IN THE SUPREME COURT OF THE NORTHWEST TERRITORIES

IN THE MATTER OF:

HER MAJESTY THE QUEEN

- v -

SELENA LOMEN

Transcript of the Decision on Bail Hearing of The Honourable Justice L.A. Charbonneau, sitting in Yellowknife, in the Northwest Territories, on the 1st day of March, 2019.

APPEARANCES:

Mr. A. Godfrey:	Counsel for the Crown
Mr. P. Harte:	Counsel for the Accused

(Charges under s. 235(1) of the *Criminal Code*)

There is a ban on the publication, broadcast or transmission of the evidence taken, the information given or the representations made and the reasons for decision until such time as the trial has concluded pursuant to sections 517 & 522 (5) of the Criminal Code.

THE COURT: Just as a reminder, this is a bail application in a case where there is a judge and jury election; and as such, there is a publication ban in effect that covers the evidence presented at the hearing, the submissions made, any information provided during the hearing, as well as these reasons for a decision. And that ban will be in effect until the end of the trial pursuant to Sections 517 and 522(5) of the *Criminal Code*.

The accused faces a charge of second-degree murder following the death of Danny Klondike in Fort Liard on October 28th, 2018. She now seeks to be released on a recognizance with a number of conditions.

Under the release plan, she would go live with her mother and sister at her sister's house in Fort Nelson, British Columbia. She proposes to be bound by several conditions including house arrest, a limited ability to leave the house when in the presence of her sureties, a complete abstention from consuming alcohol, and various other conditions.

The Crown acknowledges that the plan is as strong as it could be. The Crown having heard, as I did, the two proposed sureties testify at the hearing, acknowledges fairly and reasonably,

in my view, that they both appear to be suitable sureties. They appear to understand their responsibilities, and there is no reason to think they would not faithfully discharge their obligations as sureties.

Both of them testified that they do not use alcohol. The house where it is proposed the accused would live would be a non-alcohol home. And these, of course, are things that the Crown acknowledges the sureties would continue to enforce, or at least there is no reason to think they would not. Despite this, the Crown opposes release, and that opposition is based solely on the third ground of detention.

I will say at the outset that I share the Crown's view that any concerns about releasing the accused that might arise under the first or second ground are addressed through the proposed release plan.

The first ground is concerned with whether detention is necessary to ensure that an accused will attend court to face the charge. Although Fort Nelson is outside the Northwest Territories, it is a few hours' drive from Fort Liard. It is clear from the evidence that there are regular comings and goings between Fort Liard and Fort Nelson. The accused would be living with two

family members, and her ties are with this jurisdiction.

Although she faces a very serious charge and the potential consequences of being convicted may give rise to a temptation to try to avoid facing these proceedings, I am satisfied that, realistically speaking, she does not present a true flight risk and that her detention is not necessary on this ground.

The second grounds of detention are concerned with the protection of the public including the existence of a substantial likelihood that the accused will commit a criminal offence or interfere with the administration of justice if released.

In this case, the seriousness of the allegations and charge obviously raise some public safety concerns as any serious alleged crime of violence would; however, the accused does not have a criminal record. There is no evidence of a history of violence on her part nor anything to suggest that she would present a risk to the safety of others if she were on release under the proposed conditions.

As for the risk of potential interference with witnesses, there is always the potential for that; but again, there is no history here of

breaches of court orders, and with no-contact conditions and the proposed closed supervision from the sureties, I am satisfied also that detention is not necessary to address those concerns.

This leaves the third ground of detention. The *Criminal Code* says that the pretrial detention of a person is justified if the detention is necessary to maintain the public's confidence in the administration of justice having regard to all the circumstances including:

> (i) the apparent strength of the prosecution's case,
> (ii) the gravity of the offence,
> (iii) the circumstances surrounding the commission of the offence, including whether a firearm was used, and
> (iv) the fact that the accused is liable, on conviction, for a potentially lengthy term of imprisonment.

This fourth factor also includes specific terms regarding firearm offences, but they are not engaged here.

The Crown takes the position that under the circumstances of this case, no release plan, no matter how strong, can address the concerns under this ground. The defence disagrees and argues that given that the plan contemplates very close supervision by the sureties, the public's confidence in the administration of justice does

not necessitate detention.

Before turning to the analysis of the third ground of detention and the circumstances of this case, I do want to outline the allegations that were put forward by the Crown counsel at the bail hearing.

The deceased, Danny Klondike, was at the time of his death in a common-law relationship with the accused. They have a child who I am told was two years old at the time of his death.

On the night of these events, the accused and Mr. Klondike were going to a Halloween party. The accused asked Rita Duntra to babysit and Ms. Duntra agreed. She went to their house at around 8:40 p.m. The accused and Mr. Klondike left a short time after that to go to the party. Ms. Duntra says that the accused came back a few hours later, got a mickey from the house, and left again. She says Mr. Klondike returned to the residence at about 1:30 a.m., alone. He told Ms. Duntra that the accused was mad at him.

According to Ms. Duntra, Mr. Klondike was drunk. She helped him take off his jacket and his hat. She says the accused returned home at 4:00 a.m. At that point, Mr. Klondike and the baby were sleeping on the floor. The accused walked in and asked Ms. Duntra to come outside

because she wanted to talk to her. Ms. Duntra came outside.

The accused talked to her about the fact that Mr. Klondike had had a baby with another woman. This was apparently a lot of years earlier, and the woman in question has been deceased for some time. Ms. Duntra told the accused that this was a long time ago, and she should not worry about it.

The accused eventually said she could now go home. Ms. Duntra told her to just let Mr. Klondike sleep. The accused said she would just go to sleep, and she went inside. Ms. Duntra heard the door lock. About a half hour later, there was a knock on the door at Ms. Duntra's residence. She heard the accused talking to Ms. Duntra's spouse. There was nothing specific alleged at the hearing about the evidence or the anticipated evidence of Ms. Duntra's spouse.

Francine Kotchea and Douglas Bertrand lived next door to the accused and Mr. Klondike at the time of these events. Ms. Kotchea says she had been sleeping on the couch and woke at 4:00 a.m. to someone banging on a door, not hers. She got up but did not see anyone and went to bed.

Then, after 5 to 15 minutes of silence, she

heard banging on her door. The accused was at her door. She said, "Francine, I stabbed Danny. Call the health centre." The accused was covered in blood. She appeared to be under the influence of alcohol.

Ms. Kotchea says her spouse, Mr. Bertrand, went next door to check on Mr. Klondike. He returned shortly thereafter carrying the accused's child.

Mr. Bertrand is expected to say he heard banging at the neighbour's door that night. He saw shadows and heard a woman's voice. There was then a knock at his door. This is when the accused told he and his wife what had happened.

Mr. Bertrand went over to the accused's house. He found Mr. Klondike on the couch. There was blood everywhere on him, on the floor, and on the child. Mr. Bertrand believed that Mr. Klondike was unconscious. Mr. Bertrand could see a wound but did not want to touch anything, so he took the child back to his house and asked his wife to call the police.

He then returned to Mr. Klondike's house. Mr. Klondike was now on the floor. It appeared to Mr. Bertrand that Mr. Klondike had slid on the floor. Mr. Bertrand could hear Mr. Klondike breathing. He placed a jacket under his head in

the hopes it would help him breathe. He left again to see if his wife had called the police and ran into another neighbour outside. They went back in to check on Mr. Klondike and saw that he appeared to have died. They put a jacket on him.

Another witness, Margaret Klondike, is the deceased's sister. She is expected to testify that that night she had seen Mr. Klondike at the Halloween party, and he had told her that the accused was mad at him, and she had taken off from the party. Ms. Klondike told her brother just to have some fun.

Later on that night, she was sleeping and heard banging on her door. She got up and saw the accused sitting on her front steps. The accused was covered in blood. The accused told her, "I think I killed your brother." She told the accused not to lie to her. There was an exchange that followed between them.

This witness is expected to testify that the accused made a number of utterances to her during their exchange, words to the effect, "He's at the house"; "I killed him"; "I may have killed him"; "I think I killed him." This witness says the accused eventually left her place and walked in the direction of the RCMP detachment.

The RCMP received the phone call from Ms. Kotchea, the complainant, at 4:55 a.m. My understanding from what I was told is that the local members were off duty and had to be contacted and made aware of this through the RCMP's dispatch system. Officers got ready to respond to the call. Two of them attended the accused's house at 5:30 a.m. By then, there were several people there. A local nurse also attended. Mr. Klondike was pronounced dead.

In the meantime, another officer was at the detachment getting ready to go and assist his colleagues. He was aware of the nature of the complaint they were responding to. While he was getting ready, there was a knock at the detachment door. He answered. It was the accused at the front door. She was covered in blood. She said, "I killed him." He placed her under arrest.

Members of the Major Crimes Unit attended Fort Liard later that day to assist with this investigation. One of their members took a warned statement from the accused. In that statement, she indicates that she remembers that Mr. Klondike made her mad that night; she remembers walking around being mad; she said she got home to a locked door; she said she

remembered sitting on the floor and being mad; she does not remember why or how she stabbed Mr. Klondike but thinks she stabbed him once.

The preliminary results from the autopsy conducted on Mr. Klondike's body is that the cause of death was a stab wound to the heart.

Those were the allegations conveyed to me by the Crown. Defence counsel mentioned, as an additional fact which was not disputed by the Crown, that the deceased has a conviction from January 2018 for assault on the accused back in October 2017. He received a discharge as a sentence for that.

The accused is charged with second-degree murder. Her election is judge and jury. The matter is currently set for preliminary hearing in June. Three days have been set aside in Fort Liard, and I am told there may be an additional sitting day in Hay River depending on the results of blood spatter analysis that is underway.

There is no dispute about the legal framework that applies when release is opposed on the third ground of detention. That framework can be taken directly out of the relatively recent decision of the Supreme Court of Canada in *R v St-Cloud*, 2015 SCC 27.

Prior to that decision being rendered,

jurisprudence interpreting the third ground of detention had developed, but the Supreme Court said in *St-Cloud* that some of the directions that the jurisprudence had taken were in error.

The Supreme Court set out a comprehensive legal framework that applies when this ground of detention is invoked. I am not going to repeat here everything the Supreme Court said on that topic. There is a very helpful summary of the principles at paragraph 87 of the decision.

I would simply note the following for today's purposes: The third ground of detention is a standalone ground. It is not a residual ground. It is also not a ground that can only be relied on in exceptional circumstances or when crimes appear unexplainable. Those types of thresholds had been used in earlier jurisprudence, but the Supreme Court set them aside.

The four factors that are listed in the section of the *Code* are not exhaustive. These factors must all be weighed as well as other factors the Court may find relevant. No single factor or circumstance is determinative. And even when all four listed factors point towards detention, that does not necessarily mean that detention should be ordered. There is nothing

automatic about how this ground for detention is to be applied.

The Court must consider not only whether release would cause the public to lose confidence in the administration of justice, but also whether detention would result in that type of loss of confidence.

And when the judge considers the public whose confidence in the administration of justice must be considered, it must consider the perspective of a reasonable person properly informed about the philosophy of bail provisions and fundamental *Charter* values such as the presumption of innocence and the constitutionally protected right to reasonable bail. But the Court must not consider the matter from the perspective of a legal expert.

At paragraph 88 of *St-Cloud*, the Supreme Court said:

> In conclusion, if the crime is serious or very violent, if there is overwhelming evidence against the accused and if the victim or victims were vulnerable, pre-trial detention will usually be ordered.

I now turn to the application of those principles to this case. Dealing first with the apparent strength of the prosecution's case, I note, as I must, that the accused benefits from

the presumption of innocence. Courts must never lose sight of this when dealing with pretrial bail.

At the same time, one of the factors that I am required to consider is the strength of the prosecution's case; and based on the allegations before me at this stage, the Crown appears to have an overwhelmingly strong case on at least a charge of manslaughter.

As to the identity of the person who inflicted the injury to Mr. Klondike, there is strong circumstantial evidence that it was the accused. Among other things, this comes from the timeline. Ms. Duntra has her returning to the house at 4:00 a.m. After their conversation, she left, heard the door being locked, leaving the accused alone in the house with Mr. Klondike and their child.

Mr. Bertrand said he heard banging on a door at 4:30 a.m., and it was about 15 minutes later that the accused came to his door. The call made by Ms. Kotchea was received at 4:55 a.m., as I've already mentioned. So there is a relatively short time span between the time when the accused returned home, at which point Mr. Klondike was fine, and when the accused went to ask Ms. Kotchea to call the health centre.

It is roughly 45 minutes not counting the time she and Ms. Duntra talked outside the house. Acknowledging that these timelines are probably not very precise because people are not constantly looking at their watches, that is still a relatively short timeframe.

Aside from the timeline, which suggests exclusive opportunity, there is obviously the fact that the accused was covered in blood when she knocked on the door at the Kotchea-Bertrand home and that she was seen covered in blood by other witnesses after that.

Next, of course, there is evidence that she made admissions to various people about what she did: She told her neighbour; she told the deceased's sister; she told a police officer who opened the door to her at the detachment before he had a chance to even ask her anything. So even if there end up being issues with the admissibility of the warned statement she later gave to the police, there are, at this point, three different witnesses (and no indication any of them were intoxicated) who are expected to say that the accused basically admitted to them that she stabbed Mr. Klondike.

On the issue of intent, on the allegations before me, it is true there is no direct evidence

as to what happened between the time the accused went into that house and when Mr. Klondike was stabbed. Even if the accused's warned statement is admissible, it does not include much details as to what happened as she told police she did not remember how or why she stabbed him. The absence of evidence can give rise to a reasonable doubt on any element of a charge including intent. Intoxication is another factor that may be a live issue in this case and have a bearing on the proof of intent.

At the same time, other aspects of the evidence, circumstantial in nature, will also have to be considered by the trier of facts and may assist the Crown in proving intent. For example: evidence suggesting that the accused was angry at the deceased; her conversation with Ms. Duntra outside the house which suggests that she may have been brooding about Ms. Klondike's involvement with another woman in the past very shortly before Mr. Klondike was stabbed; the location of the stab wound; that the accused was aware enough of what was happening to tell a number of people what she did, including the neighbours who she asked to call the health centre; and that after her stop at the deceased's sister's house, she effectively turned herself

into the custody of the police.

I want to say a word about self-defence because it was discussed briefly during submissions last week. The reason I raised it then is that it was mentioned in the written submissions filed by counsel, at paragraph 20. On the record before me, there is nothing at this point that gives an air of reality to that defence. This could change at trial, obviously; but at this point, I have to assess the case as it presents at this stage.

In conclusion on the strength of the Crown's case, it appears to me that this is an overwhelming case on manslaughter at least and certainly not a particularly weak case on the charge of murder. I bear in mind that not all the evidence is available at this stage and also that it has not been tested in any way. That is the nature of a bail hearing. I heard that there is a blood spatter expert report pending, and there may be other things, many other things, that could change the fact pattern that will be presented at trial. But at this stage, to the extent that the *Criminal Code* requires me to consider the strength of the Crown's case, it must be acknowledged that that case is strong.

The next factor is the gravity of the

offence. Murder is obviously a very serious offence. I do not think more needs to be said about that. And even if the Crown's case were to fall short on the issue of intent, and the accused were to be found guilty of manslaughter only; that, too, is a serious offence; and on the allegations before me, there would be a number of aggravating features.

The next factor is the circumstances of the commission of the offence. Section 515(10)(c) makes specific reference to the use of firearms and the description of that factor. Here, no firearm was used. But there are other aspects of the circumstances that are aggravating: the fact that a knife was used, the fact that this occurred in the context of a domestic relationship, the fact that it happened in the presence of a young child.

Another factor is that, on the allegations before me, Mr. Klondike was in a vulnerable position at the time of the attack. This stems from elements of circumstantial evidence before me; Ms. Duntra's evidence that he was intoxicated when he came home to the point that she helped him take his coat off and his hat; her evidence that he and the baby were sleeping on the floor when the accused returned to the home; and that

in her conversation with the accused outside the house, she told her, among other things, to just let him sleep. This evidence suggests that Mr. Klondike was in a vulnerable position when this happened, and that is part of the circumstances of the commission of the offence that must, under this factor, be taken into account.

The last factor is the potential penalty that the accused is liable to on conviction. On murder, the punishment is life with a minimum of ten years without eligibility for parole. Even if convicted of the lesser offence of manslaughter, under the circumstances of this case, the accused would still face a lengthy term of imprisonment. The four factors listed at Section 515(10)(c) all point towards detention being necessary. That is not determinative, as I have already mentioned. Other factors must be considered as well including the absence of the criminal record and the strength of the release plan.

The Supreme Court has said that in considering the public whose confidence in the administration of justice must be maintained, as I mentioned already, the Court is to consider a well-informed, dispassionate member of the

public, not someone prone to an emotional response. The members of the deceased's family can be expected to have a very strong emotional reaction to what happened and to have a strong emotional reaction if the accused were to be released.

I heard through the Crown that they are very concerned about the prospect of the accused being released. That is not surprising, and as the Crown acknowledges, it is not at all determinative. People who are emotionally invested in the case are definitely not the target public that *St-Cloud* instructs me to think about when making an assessment pursuant to the third ground of detention; otherwise, no one would ever be released on bail on a homicide case or any case where someone has been seriously harmed. As I said, what I am required to consider are the views of the well-informed, thoughtful, and balanced objective member of the public.

I accept the sureties would be good sureties, that they are honest and well intended, and that they would carry out their duties. But in some cases, that is just not enough; and unfortunately, I have concluded in this case that it is not enough. This case meets the

description of the Supreme Court of Canada at paragraph 88 in *St-Cloud* that I quoted earlier: it is a serious and violent offence; there is overwhelming evidence against the accused; and the victim was attacked in circumstances when he was vulnerable. In addition, this occurred in a domestic context and in the presence of a young child.

On balance, I am satisfied that the accused's detention is necessary to maintain public confidence in the administration of justice. I think that well-informed and dispassionate members of the public would lose confidence in the administration of justice if a person, facing such a serious charge supported by strong evidence and potentially facing such a severe penalty if convicted, were to be released pending trial. And for those reasons, the application for release is dismissed.

There will be a new detention order in Form 8 Warrant of Committal issued by this Court. It will be endorsed with a direction that the accused is prohibited from communicating with the individuals that will be listed on the appendix.

Mr. Godfrey, we discussed this the last time we were in court. The accused must know who she is prohibited from contacting, so if you have

those names, I would ask you to read them into the record now and to later provide that list to the clerk so that it can be included as an appendix to the Warrant of Committal.

MR. GODFREY: Certainly, Your Honour. If I could just have a minute to consult with my friend.

THE COURT: Go ahead.

MR. GODFREY: Your Honour, it's quite a list: Francine Kotchea, Douglas Bertrand, Margaret Klondike, Rita Duntra, Grace Berreault, Jolan Kotchea, Chase Berrault, Dolan Klondike, Robert Duntra, Patrick Kotchea, Ross Duntra, Dustin Hope, Clint McLeod, Connie Bertrand, Hilary Deneron, Ryan Berreault, April Bertrand, Frank Deshenes, Jeanine Gaulian.

THE COURT: Thank you.

CERTIFICATE OF TRANSCRIPT

I, the undersigned, hereby certify that the foregoing transcribed pages are a complete and accurate transcript of the digitally recorded proceedings taken herein to the best of my skill and. ability.

Dated at the City of Edmonton, Province of Alberta, this 8th day of March, 2019.

Certified Pursuant to Rule 723
Of the Rules of Court

Adrianna Mazzocca, CSR(A)
Court Reporter