*R v Lomen,* 2019 NWTSC 11 **S-1-CR-2019-000012**

# 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 .**

1. THE COURT: Just as a reminder, this is a
2. bail application in a case where there is a judge
3. and jury election; and as such, there is a
4. publication ban in effect that covers the
5. evidence presented at the hearing, the
6. submissions made, any information provided during
7. the hearing, as well as these reasons for a
8. decision. And that ban will be in effect until
9. the end of the trial pursuant to Sections 517 and
10. 522(5) of the *Criminal Code*.
11. The accused faces a charge of second-degree
12. murder following the death of Danny Klondike in
13. Fort Liard on October 28th, 2018. She now seeks
14. to be released on a recognizance with a number of
15. conditions.
16. Under the release plan, she would go live
17. with her mother and sister at her sister's house
18. in Fort Nelson, British Columbia. She proposes
19. to be bound by several conditions including house
20. arrest, a limited ability to leave the house when
21. in the presence of her sureties, a complete
22. abstention from consuming alcohol, and various
23. other conditions.
24. The Crown acknowledges that the plan is as
25. strong as it could be. The Crown having heard,
26. as I did, the two proposed sureties testify at
27. the hearing, acknowledges fairly and reasonably,
28. in my view, that they both appear to be suitable
29. sureties. They appear to understand their
30. responsibilities, and there is no reason to think
31. they would not faithfully discharge their
32. obligations as sureties.
33. Both of them testified that they do not use
34. alcohol. The house where it is proposed the
35. accused would live would be a non-alcohol home.
36. And these, of course, are things that the Crown
37. acknowledges the sureties would continue to
38. enforce, or at least there is no reason to think
39. they would not. Despite this, the Crown opposes
40. release, and that opposition is based solely on
41. the third ground of detention.
42. I will say at the outset that I share the
43. Crown's view that any concerns about releasing
44. the accused that might arise under the first or
45. second ground are addressed through the proposed
46. release plan.
47. The first ground is concerned with whether
48. detention is necessary to ensure that an accused
49. will attend court to face the charge. Although
50. Fort Nelson is outside the Northwest Territories,
51. it is a few hours' drive from Fort Liard. It is
52. clear from the evidence that there are regular
53. comings and goings between Fort Liard and Fort
54. Nelson. The accused would be living with two
55. family members, and her ties are with this
56. jurisdiction.
57. Although she faces a very serious charge and
58. the potential consequences of being convicted may
59. give rise to a temptation to try to avoid facing
60. these proceedings, I am satisfied that,
61. realistically speaking, she does not present a
62. true flight risk and that her detention is not
63. necessary on this ground.
64. The second grounds of detention are
65. concerned with the protection of the public
66. including the existence of a substantial
67. likelihood that the accused will commit a
68. criminal offence or interfere with the
69. administration of justice if released.
70. In this case, the seriousness of the
71. allegations and charge obviously raise some
72. public safety concerns as any serious alleged
73. crime of violence would; however, the accused
74. does not have a criminal record. There is no
75. evidence of a history of violence on her part nor
76. anything to suggest that she would present a risk
77. to the safety of others if she were on release
78. under the proposed conditions.
79. As for the risk of potential interference
80. with witnesses, there is always the potential for
81. that; but again, there is no history here of
82. breaches of court orders, and with no-contact
83. conditions and the proposed closed supervision
84. from the sureties, I am satisfied also that
85. detention is not necessary to address those
86. concerns.
87. This leaves the third ground of detention.
88. The *Criminal Code* says that the pretrial
89. detention of a person is justified if the
90. detention is necessary to maintain the public's
91. confidence in the administration of justice
92. having regard to all the circumstances including:
93. (i) the apparent strength of the prosecution’s case,
94. (ii) the gravity of the offence,

(iii) the circumstances surrounding

1. the commission of the offence, including whether a firearm was used,
2. and

(iv) the fact that the accused is

1. liable, on conviction, for a potentially lengthy term of
2. imprisonment.
3. This fourth factor also includes specific terms
4. regarding firearm offences, but they are not
5. engaged here.
6. The Crown takes the position that under the
7. circumstances of this case, no release plan, no
8. matter how strong, can address the concerns under
9. this ground. The defence disagrees and argues
10. that given that the plan contemplates very close
11. supervision by the sureties, the public's
12. confidence in the administration of justice does
13. not necessitate detention.
14. Before turning to the analysis of the third
15. ground of detention and the circumstances of this
16. case, I do want to outline the allegations that
17. were put forward by the Crown counsel at the bail
18. hearing.
19. The deceased, Danny Klondike, was at the
20. time of his death in a common-law relationship
21. with the accused. They have a child who I am
22. told was two years old at the time of his death.
23. On the night of these events, the accused
24. and Mr. Klondike were going to a Halloween party.
25. The accused asked Rita Duntra to babysit and
26. Ms. Duntra agreed. She went to their house at
27. around 8:40 p.m. The accused and Mr. Klondike
28. left a short time after that to go to the party.
29. Ms. Duntra says that the accused came back a few
30. hours later, got a mickey from the house, and
31. left again. She says Mr. Klondike returned to
32. the residence at about 1:30 a.m., alone. He told
33. Ms. Duntra that the accused was mad at him.
34. According to Ms. Duntra, Mr. Klondike was
35. drunk. She helped him take off his jacket and
36. his hat. She says the accused returned home at
37. 4:00 a.m. At that point, Mr. Klondike and the
38. baby were sleeping on the floor. The accused
39. walked in and asked Ms. Duntra to come outside
40. because she wanted to talk to her. Ms. Duntra
41. came outside.
42. The accused talked to her about the fact
43. that Mr. Klondike had had a baby with another
44. woman. This was apparently a lot of years
45. earlier, and the woman in question has been
46. deceased for some time. Ms. Duntra told the
47. accused that this was a long time ago, and she
48. should not worry about it.
49. The accused eventually said she could now go
50. home. Ms. Duntra told her to just let
51. Mr. Klondike sleep. The accused said she would
52. just go to sleep, and she went inside.
53. Ms. Duntra heard the door lock. About a half
54. hour later, there was a knock on the door at
55. Ms. Duntra's residence. She heard the accused
56. talking to Ms. Duntra's spouse. There was
57. nothing specific alleged at the hearing about the
58. evidence or the anticipated evidence of
59. Ms. Duntra's spouse.
60. Francine Kotchea and Douglas Bertrand lived
61. next door to the accused and Mr. Klondike at the
62. time of these events. Ms. Kotchea says she had
63. been sleeping on the couch and woke at 4:00 a.m.
64. to someone banging on a door, not hers. She got
65. up but did not see anyone and went to bed.
66. Then, after 5 to 15 minutes of silence, she
    1. heard banging on her door. The accused was at
    2. her door. She said, "Francine, I stabbed Danny.
    3. Call the health centre." The accused was covered
    4. in blood. She appeared to be under the influence
    5. of alcohol.
    6. Ms. Kotchea says her spouse, Mr. Bertrand,
    7. went next door to check on Mr. Klondike. He
    8. returned shortly thereafter carrying the
    9. accused's child.
    10. Mr. Bertrand is expected to say he heard
    11. banging at the neighbour's door that night. He
    12. saw shadows and heard a woman's voice. There was
    13. then a knock at his door. This is when the
    14. accused told he and his wife what had happened.
    15. Mr. Bertrand went over to the accused's
    16. house. He found Mr. Klondike on the couch.
    17. There was blood everywhere on him, on the floor,
    18. and on the child. Mr. Bertrand believed that
    19. Mr. Klondike was unconscious. Mr. Bertrand could
    20. see a wound but did not want to touch anything,
    21. so he took the child back to his house and asked
    22. his wife to call the police.
    23. He then returned to Mr. Klondike's house.
    24. Mr. Klondike was now on the floor. It appeared
    25. to Mr. Bertrand that Mr. Klondike had slid on the
    26. floor. Mr. Bertrand could hear Mr. Klondike
    27. breathing. He placed a jacket under his head in
67. the hopes it would help him breathe. He left
68. again to see if his wife had called the police
69. and ran into another neighbour outside. They
70. went back in to check on Mr. Klondike and saw
71. that he appeared to have died. They put a jacket
72. on him.
73. Another witness, Margaret Klondike, is the
74. deceased's sister. She is expected to testify
75. that that night she had seen Mr. Klondike at the
76. Halloween party, and he had told her that the
77. accused was mad at him, and she had taken off
78. from the party. Ms. Klondike told her brother
79. just to have some fun.
80. Later on that night, she was sleeping and
81. heard banging on her door. She got up and saw
82. the accused sitting on her front steps. The
83. accused was covered in blood. The accused told
84. her, "I think I killed your brother." She told
85. the accused not to lie to her. There was an
86. exchange that followed between them.
87. This witness is expected to testify that the
88. accused made a number of utterances to her during
89. their exchange, words to the effect, "He's at the
90. house"; "I killed him"; "I may have killed him";
91. "I think I killed him." This witness says the
92. accused eventually left her place and walked in
93. the direction of the RCMP detachment.
    1. The RCMP received the phone call from
    2. Ms. Kotchea, the complainant, at 4:55 a.m. My
    3. understanding from what I was told is that the
    4. local members were off duty and had to be
    5. contacted and made aware of this through the
    6. RCMP's dispatch system. Officers got ready to
    7. respond to the call. Two of them attended the
    8. accused's house at 5:30 a.m. By then, there were
    9. several people there. A local nurse also
    10. attended. Mr. Klondike was pronounced dead.
    11. In the meantime, another officer was at the
    12. detachment getting ready to go and assist his
    13. colleagues. He was aware of the nature of the
    14. complaint they were responding to. While he was
    15. getting ready, there was a knock at the
    16. detachment door. He answered. It was the
    17. accused at the front door. She was covered in
    18. blood. She said, "I killed him." He placed her
    19. under arrest.
    20. Members of the Major Crimes Unit attended
    21. Fort Liard later that day to assist with this
    22. investigation. One of their members took a
    23. warned statement from the accused. In that
    24. statement, she indicates that she remembers that
    25. Mr. Klondike made her mad that night; she
    26. remembers walking around being mad; she said she
    27. got home to a locked door; she said she
94. remembered sitting on the floor and being mad;
95. she does not remember why or how she stabbed
96. Mr. Klondike but thinks she stabbed him once.
97. The preliminary results from the autopsy
98. conducted on Mr. Klondike's body is that the
99. cause of death was a stab wound to the heart.
100. Those were the allegations conveyed to me by
101. the Crown. Defence counsel mentioned, as an
102. additional fact which was not disputed by the
103. Crown, that the deceased has a conviction from

11 January 2018 for assault on the accused back in

12 October 2017. He received a discharge as a

1. sentence for that.
2. The accused is charged with second-degree
3. murder. Her election is judge and jury. The
4. matter is currently set for preliminary hearing
5. in June. Three days have been set aside in Fort
6. Liard, and I am told there may be an additional
7. sitting day in Hay River depending on the results
8. of blood spatter analysis that is underway.
9. There is no dispute about the legal
10. framework that applies when release is opposed on
11. the third ground of detention. That framework
12. can be taken directly out of the relatively
13. recent decision of the Supreme Court of Canada in
14. *R v St-Cloud*, 2015 SCC 27.
15. Prior to that decision being rendered,
    1. jurisprudence interpreting the third ground of
    2. detention had developed, but the Supreme Court
    3. said in *St-Cloud* that some of the directions that
    4. the jurisprudence had taken were in error.
    5. The Supreme Court set out a comprehensive
    6. legal framework that applies when this ground of
    7. detention is invoked. I am not going to repeat
    8. here everything the Supreme Court said on that
    9. topic. There is a very helpful summary of the
    10. principles at paragraph 87 of the decision.
    11. I would simply note the following for
    12. today's purposes: The third ground of detention
    13. is a standalone ground. It is not a residual
    14. ground. It is also not a ground that can only be
    15. relied on in exceptional circumstances or when
    16. crimes appear unexplainable. Those types of
    17. thresholds had been used in earlier
    18. jurisprudence, but the Supreme Court set them
    19. aside.
    20. The four factors that are listed in the
    21. section of the *Code* are not exhaustive. These
    22. factors must all be weighed as well as other
    23. factors the Court may find relevant. No single
    24. factor or circumstance is determinative. And
    25. even when all four listed factors point towards
    26. detention, that does not necessarily mean that
    27. detention should be ordered. There is nothing
16. automatic about how this ground for detention is
17. to be applied.
18. The Court must consider not only whether
19. release would cause the public to lose confidence
20. in the administration of justice, but also
21. whether detention would result in that type of
22. loss of confidence.
23. And when the judge considers the public
24. whose confidence in the administration of justice
25. must be considered, it must consider the
26. perspective of a reasonable person properly
27. informed about the philosophy of bail provisions
28. and fundamental *Charter* values such as the
29. presumption of innocence and the constitutionally
30. protected right to reasonable bail. But the
31. Court must not consider the matter from the
32. perspective of a legal expert.
33. At paragraph 88 of *St-Cloud*, the Supreme
34. Court said:
35. In conclusion, if the crime is serious or very violent, if there is
36. overwhelming evidence against the accused and if the victim or victims
37. were vulnerable, pre-trial detention will usually be ordered.

23

1. I now turn to the application of those
2. principles to this case. Dealing first with the
3. apparent strength of the prosecution's case, I
4. note, as I must, that the accused benefits from
5. the presumption of innocence. Courts must never
6. lose sight of this when dealing with pretrial
7. bail.
8. At the same time, one of the factors that I
9. am required to consider is the strength of the
10. prosecution's case; and based on the allegations
11. before me at this stage, the Crown appears to
12. have an overwhelmingly strong case on at least a
13. charge of manslaughter.
14. As to the identity of the person who
15. inflicted the injury to Mr. Klondike, there is
16. strong circumstantial evidence that it was the
17. accused. Among other things, this comes from the
18. timeline. Ms. Duntra has her returning to the
19. house at 4:00 a.m. After their conversation, she
20. left, heard the door being locked, leaving the
21. accused alone in the house with Mr. Klondike and
22. their child.
23. Mr. Bertrand said he heard banging on a door
24. at 4:30 a.m., and it was about 15 minutes later
25. that the accused came to his door. The call made
26. by Ms. Kotchea was received at 4:55 a.m., as I've
27. already mentioned. So there is a relatively
28. short time span between the time when the accused
29. returned home, at which point Mr. Klondike was
30. fine, and when the accused went to ask
31. Ms. Kotchea to call the health centre.
    1. It is roughly 45 minutes not counting the
    2. time she and Ms. Duntra talked outside the house.
    3. Acknowledging that these timelines are probably
    4. not very precise because people are not
    5. constantly looking at their watches, that is
    6. still a relatively short timeframe.
    7. Aside from the timeline, which suggests
    8. exclusive opportunity, there is obviously the
    9. fact that the accused was covered in blood when
    10. she knocked on the door at the Kotchea-Bertrand
    11. home and that she was seen covered in blood by
    12. other witnesses after that.
    13. Next, of course, there is evidence that she
    14. made admissions to various people about what she
    15. did: She told her neighbour; she told the
    16. deceased's sister; she told a police officer who
    17. opened the door to her at the detachment before
    18. he had a chance to even ask her anything. So
    19. even if there end up being issues with the
    20. admissibility of the warned statement she later
    21. gave to the police, there are, at this point,
    22. three different witnesses (and no indication any
    23. of them were intoxicated) who are expected to say
    24. that the accused basically admitted to them that
    25. she stabbed Mr. Klondike.
    26. On the issue of intent, on the allegations
    27. before me, it is true there is no direct evidence
32. as to what happened between the time the accused
33. went into that house and when Mr. Klondike was
34. stabbed. Even if the accused's warned statement
35. is admissible, it does not include much details
36. as to what happened as she told police she did
37. not remember how or why she stabbed him. The
38. absence of evidence can give rise to a reasonable
39. doubt on any element of a charge including
40. intent. Intoxication is another factor that may
41. be a live issue in this case and have a bearing
42. on the proof of intent.
43. At the same time, other aspects of the
44. evidence, circumstantial in nature, will also
45. have to be considered by the trier of facts and

15 may assist the Crown in proving intent. For

1. example: evidence suggesting that the accused was
2. angry at the deceased; her conversation with
3. Ms. Duntra outside the house which suggests that
4. she may have been brooding about Ms. Klondike's
5. involvement with another woman in the past very
6. shortly before Mr. Klondike was stabbed; the
7. location of the stab wound; that the accused was
8. aware enough of what was happening to tell a
9. number of people what she did, including the
10. neighbours who she asked to call the health
11. centre; and that after her stop at the deceased's
12. sister's house, she effectively turned herself
13. into the custody of the police.
14. I want to say a word about self-defence
15. because it was discussed briefly during
16. submissions last week. The reason I raised it
17. then is that it was mentioned in the written
18. submissions filed by counsel, at paragraph 20.
19. On the record before me, there is nothing at this
20. point that gives an air of reality to that
21. defence. This could change at trial, obviously;
22. but at this point, I have to assess the case as
23. it presents at this stage.
24. In conclusion on the strength of the Crown's
25. case, it appears to me that this is an
26. overwhelming case on manslaughter at least and
27. certainly not a particularly weak case on the
28. charge of murder. I bear in mind that not all
29. the evidence is available at this stage and also
30. that it has not been tested in any way. That is
31. the nature of a bail hearing. I heard that there
32. is a blood spatter expert report pending, and
33. there may be other things, many other things,
34. that could change the fact pattern that will be
35. presented at trial. But at this stage, to the
36. extent that the *Criminal Code* requires me to
37. consider the strength of the Crown's case, it
38. must be acknowledged that that case is strong.
39. The next factor is the gravity of the
    1. offence. Murder is obviously a very serious
    2. offence. I do not think more needs to be said
    3. about that. And even if the Crown's case were to
    4. fall short on the issue of intent, and the
    5. accused were to be found guilty of manslaughter
    6. only; that, too, is a serious offence; and on the
    7. allegations before me, there would be a number of
    8. aggravating features.
    9. The next factor is the circumstances of the
    10. commission of the offence. Section 515(10)(c)
    11. makes specific reference to the use of firearms
    12. and the description of that factor. Here, no
    13. firearm was used. But there are other aspects of
    14. the circumstances that are aggravating: the fact
    15. that a knife was used, the fact that this
    16. occurred in the context of a domestic
    17. relationship, the fact that it happened in the
    18. presence of a young child.
    19. Another factor is that, on the allegations
    20. before me, Mr. Klondike was in a vulnerable
    21. position at the time of the attack. This stems
    22. from elements of circumstantial evidence before
    23. me; Ms. Duntra's evidence that he was intoxicated
    24. when he came home to the point that she helped
    25. him take his coat off and his hat; her evidence
    26. that he and the baby were sleeping on the floor
    27. when the accused returned to the home; and that
40. in her conversation with the accused outside the
41. house, she told her, among other things, to just
42. let him sleep. This evidence suggests that
43. Mr. Klondike was in a vulnerable position when
44. this happened, and that is part of the
45. circumstances of the commission of the offence
46. that must, under this factor, be taken into
47. account.
48. The last factor is the potential penalty
49. that the accused is liable to on conviction. On
50. murder, the punishment is life with a minimum of
51. ten years without eligibility for parole. Even
52. if convicted of the lesser offence of
53. manslaughter, under the circumstances of this
54. case, the accused would still face a lengthy term
55. of imprisonment. The four factors listed at
56. Section 515(10)(c) all point towards detention
57. being necessary. That is not determinative, as I
58. have already mentioned. Other factors must be
59. considered as well including the absence of the
60. criminal record and the strength of the release
61. plan.
62. The Supreme Court has said that in
63. considering the public whose confidence in the
64. administration of justice must be maintained, as
65. I mentioned already, the Court is to consider a
66. well-informed, dispassionate member of the
67. public, not someone prone to an emotional
68. response. The members of the deceased's family
69. can be expected to have a very strong emotional
70. reaction to what happened and to have a strong
71. emotional reaction if the accused were to be
72. released.
73. I heard through the Crown that they are very
74. concerned about the prospect of the accused being
75. released. That is not surprising, and as the
76. Crown acknowledges, it is not at all
77. determinative. People who are emotionally
78. invested in the case are definitely not the
79. target public that *St-Cloud* instructs me to think
80. about when making an assessment pursuant to the
81. third ground of detention; otherwise, no one
82. would ever be released on bail on a homicide case
83. or any case where someone has been seriously
84. harmed. As I said, what I am required to
85. consider are the views of the well-informed,
86. thoughtful, and balanced objective member of the
87. public.
88. I accept the sureties would be good
89. sureties, that they are honest and well intended,
90. and that they would carry out their duties. But
91. in some cases, that is just not enough; and
92. unfortunately, I have concluded in this case that
93. it is not enough. This case meets the
94. description of the Supreme Court of Canada at
95. paragraph 88 in *St-Cloud* that I quoted earlier:
96. it is a serious and violent offence; there is
97. overwhelming evidence against the accused; and
98. the victim was attacked in circumstances when he
99. was vulnerable. In addition, this occurred in a
100. domestic context and in the presence of a young
101. child.
102. On balance, I am satisfied that the
103. accused's detention is necessary to maintain
104. public confidence in the administration of
105. justice. I think that well-informed and
106. dispassionate members of the public would lose
107. confidence in the administration of justice if a
108. person, facing such a serious charge supported by
109. strong evidence and potentially facing such a
110. severe penalty if convicted, were to be released
111. pending trial. And for those reasons, the
112. application for release is dismissed.
113. There will be a new detention order in
114. Form 8 Warrant of Committal issued by this Court.
115. It will be endorsed with a direction that the
116. accused is prohibited from communicating with the
117. individuals that will be listed on the appendix.
118. Mr. Godfrey, we discussed this the last time
119. we were in court. The accused must know who she
120. is prohibited from contacting, so if you have
121. those names, I would ask you to read them into
122. the record now and to later provide that list to
123. the clerk so that it can be included as an
124. appendix to the Warrant of Committal.
125. MR. GODFREY: Certainly, Your Honour. If I
126. could just have a minute to consult with my
127. friend.
128. THE COURT: Go ahead.
129. MR. GODFREY: Your Honour, it's quite a
130. list: Francine Kotchea, Douglas Bertrand,
131. Margaret Klondike, Rita Duntra, Grace Berreault,
132. Jolan Kotchea, Chase Berrault, Dolan Klondike,
133. Robert Duntra, Patrick Kotchea, Ross Duntra,
134. Dustin Hope, Clint McLeod, Connie Bertrand,
135. Hilary Deneron, Ryan Berreault, April Bertrand,
136. Frank Deshenes, Jeanine Gaulian.
137. THE COURT: Thank you.

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# 1 CERTIFICATE OF TRANSCRIPT

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1. I, the undersigned, hereby certify that the
2. foregoing transcribed pages are a complete and
3. accurate transcript of the digitally recorded
4. proceedings taken herein to the best of my skill and.
5. ability.
6. Dated at the City of Edmonton, Province of
7. Alberta, this 8th day of March, 2019.

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1. Certified Pursuant to Rule 723
2. Of the Rules of Court

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1. Adrianna Mazzocca, CSR(A)
2. Court Reporter

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