*R v Cayen*, 2020 NWTSC 24 S-1-CR-2018-000137

**AMENDED ORIGINAL**

**IN THE SUPREME COURT OF THE NORTHWEST TERRITORIES**

**IN THE MATTER OF:**

**HER MAJESTY THE QUEEN**

**-v-**

**LEVI CAYEN**

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**Transcript of the Reasons for Decision delivered by the Honourable Justice S.H. Smallwood, sitting in Yellowknife, in the Northwest Territories, on the 26th day of May, 2020.**

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**APPEARANCES:**

A. Piche: Counsel for the Crown

 appearing via teleconference

S. Delli Fraine Counsel for the Crown

 appearing via teleconference

A. Regel: Counsel for the Defence

 appearing via teleconference

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Charges under s. 235(1) and s. 344 of the *Criminal Code*

Original amended for Clarity as of July 06th, 2022: transcript certification amended

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**(REASONS FOR DECISION)**

THE COURT: So, the accused Levi Cayen faces charges of first-degree murder and robbery in relation to the death of Alexander Norwegian on December 27th, 2017, at the K’atl’Odeeche First Nation Reserve near Hay River, Northwest Territories. Following his arrest on January 3rd, 2018, the accused was remanded into custody. He now seeks his release on a recognizance with a number of conditions.

 The plan proposed by the accused would have him live with his parents in West Channel, just outside the Town of Hay River. He proposes to enter into a recognizance with his sister and his mother as sureties.

 The release plan includes a number of conditions, including that he reside with his parents, obey any house rules, obey a daily curfew, work at the West Point First Nation, abstain from the possession or consumption of alcohol or drugs and have no contact with a number of witnesses that are anticipated to be called by the Crown.

 The proposed sureties, Wendy Ross and Leah Ross, testified at the bail hearing. In addition, John Nahanni, and Clayton Bell, Warden and Deputy Warden at the North Slave Correctional Centre, also testified, as did the accused.

 The Crown is opposed to the accused’s release on the secondary and tertiary grounds. The Crown has no concerns on the primary grounds.

 The primary ground is concerned with whether detention is necessary to ensure that the accused will attend court. I agree with the Crown that this is not a concern, based on the plan that has been proposed.

 The accused plans to live with his parents and comply with the rules of their house. At the time of the arrest, he was living with his parents and has lived in the community for his entire life. He has strong ties to the community and no significant ties outside of the community.

 His mother understands the charges that he faces and is prepared to be a surety and ensure that he attends court. While the charges that Mr. Cayen faces are very serious charges, and there are serious consequences if he is convicted, I am satisfied that the plan and Mr. Cayen’s criminal record, which does not have any convictions for failing to attend court, mean that the accused is not a significant flight risk, and his detention is not necessary on the primary ground.

 Before I turn to the secondary and tertiary grounds of detention, I will address the admissibility of the documents submitted by the Crown entitled “COVID-19 and Judicial Notice.” The defence has objected to the admissibility of this document on the basis that it is not accurate. There is nothing specific that the defence objects to in the document, and there is nothing that the defence points to as being specifically inaccurate in the document. Rather, the defence objection is that the document does not fully encapsulate the totality of the information known about COVID-19, and that the information presented is incomplete and leaves the impression that the COVID-19 threat is not serious.

 The Crown has filed a book of authorities, which includes of number of cases addressing the impact of the coronavirus on bail hearings and bail reviews. It has been very helpful.

 Courts across the country have dealt with the issue of COVID-19 and its impact upon bail reviews or bail hearings. No clear consensus has emerged about how the information about the virus should be presented to courts or what evidence should be admissible.

 In the *R. v. Find*,2001 SCC 32, the Supreme Court of Canada set out the test for judicial notice at paragraph 48:

 Judicial notice dispenses with the need for proof of facts that are clearly uncontroversial or beyond reasonable dispute.  Facts judicially noticed are not proved by evidence under oath, nor are they tested by cross-examination.  Therefore, the  threshold for judicial notice is strict: a court may properly take judicial notice of facts that are either: (1) so notorious or generally accepted as not to be the subject of debate amongst reasonable persons, or (2) capable of immediate and accurate demonstration by resort to readily accessible sources of indisputable accuracy.

 The test for judicial notice is a strict test. Balanced against this is section 518(1)(e) of the *Criminal Code* which permits a justice at a bail hearing to consider evidence that is considered credible or trustworthy in the circumstances of each case.

 It was acknowledged in *R. v. St-Cloud*, 2015 SCC 27, “that the rules of evidence are relaxed at a bail hearing,” and in the context of bail reviews, what is considered credible must be “reasonably capable of belief” (paras. 129, 136).

 Different courts have come to different conclusions about what can be taken judicial notice of with respect to the coronavirus and when expert evidence is required. Information about the coronavirus is available from public health authorities. It is also available from different government departments.

 There are things that are known about the coronavirus, and there are things that are more speculative. Some information is based upon the best information available at the time, but, for example, health models predicting the spread of the coronavirus, health authorities are making predictions based upon education and experience.

 In a situation like this, what the Court has to do is take judicial notice of the authoritative information, the best and most reliable information that is available to it at the time, acknowledging that this is a unique situation and what might have seemed accurate in March 2020 may now, as the situation evolves and our information and experience with this virus grows, may not be considered as accurate now. In two or three months, we will have learned even more about the virus, and some of the information viewed as accurate today may not be viewed as such then.

 The most credible, reliable sources of information, in my view, are the public health authorities who are responsible for managing the Northwest Territories’ and Canada’s response to this pandemic, and the World Health Organization. Other specialized institutions or organizations, for example, the Johns Hopkins Coronavirus Resource Centre, which has experts in global public health and infectious disease who are devoted to helping understand and explain the virus, may also be of assistance to courts.

 On that basis, I am prepared to admit the document presented by the Crown. It is information obtained from the World Health Organization, Public Health Agency of Canada, and the GNWT Health and Social Services websites, so that document will be marked Exhibit 6.

EXHIBIT 6: CROWN DOCUMENTATION RE COVID-19.

THE COURT: I acknowledge defence counsel’s comments that the information is incomplete. I do not think that the document was intended to be a compendium of information regarding the coronavirus. It provides some basic information about the disease and the situation in the Northwest Territories.

 I will have more to say about the coronavirus when I address the secondary and the tertiary grounds.

 The procedural history of what has occurred is also important. As I mentioned, the accused was arrested on January 3, 2018, and he has been in custody since that date. He was charged with murder and robbery on January 4, 2018.

 A preliminary inquiry was held, and on November 20, 2018, the accused was ordered to stand trial on charges of first-degree murder and robbery. And Indictment was filed on November 23, 2018. A trial was scheduled in this court to commence January 13, 2020 and was expected to last for six weeks.

 Pre-trial applications were also scheduled for October 2019. Those applications were heard, and the matter was adjourned to November 18, 2019. On that date, the accused dismissed his counsel, Mr. McIntyre. The following week, the trial was cancelled. Mr. Regel was subsequently retained.

 A pre-trial conference was held on May 4, 2020. Some pre-trial applications were scheduled for this week, and others will be scheduled once these applications have been addressed.

 A trial date has not been set yet. As it currently stands, because of COVID-19 the court is not conducting jury trials, and there is no indication of when they will resume. It is very likely that judge-alone trials will resume before we are able to conduct jury trials.

 In terms of the issue of delay, the delay that can be attributed to the coronavirus really commences as of this month, May 2020. While the accused has been in custody since his arrest, had he not dismissed his lawyer in the fall of 2019, his trial was scheduled to have been completed prior to any of the restrictions associated with the coronavirus being imposed.

 One of the factors cited by the accused in seeking his release is the risk of transmission of the coronavirus while in custody. The impact of the coronavirus on the grounds for detention has been considered in varying manners by courts across the country.

 The consensus in the case law is that the coronavirus pandemic is not, on its own, a justification for release on any of the grounds. Courts have appeared to accept that it is a relevant factor in considering the tertiary grounds, and there is less agreement that the coronavirus is a relevant consideration in considering the secondary grounds.

 As stated in *R. v. Ledesma*, 2020 ABCA 194, at paragraph 31, the emerging trend is that an accused person seeking release “must establish that, if detained, they are at a higher risk of infection or at a higher risk of complications from infection as compared to the general inmate population.”

 COVID-19 is an infectious disease which can cause mild to severe respiratory infections. For the majority of individuals who contract this disease, they experience flu-like symptoms and recover without needing medical treatment. In some cases, individuals suffer severe symptoms which can include difficulty breathing, pneumonia, severe acute respiratory distress syndrome, and death. It is accepted that there are individuals who are at higher risk of serious complications from the coronavirus, for example, those over the age of 60, those with certain underlying conditions, and those with weakened immune systems.

 There are places like correctional institutions where the risk of transmission of the coronavirus is higher if the virus enters the facility. Senior care facilities have been disproportionately affected in Canada. That being said, we are all at risk from the coronavirus.

 While some categories of people are at higher risk of serious complications or death, people from all age groups have been affected. It is a serious disease that has caused a great deal of anxiety and fear in our society. Unprecedented public health measures have been put in place to attempt to stop the spread.

 The accused states that he is concerned that he may contract coronavirus while in custody. He says that he has a weak immune system. In her testimony, his mother, Wendy Ross, testified that the accused has always had a weak immune system. When questioned by the Crown about what this meant, the accused testified that he gets sick easily, and colds are difficult for him. His mother testified that it takes him a long time to recover when he gets sick.

 The accused has not been diagnosed with a disease or a condition which would substantiate this claim. No medical records have been provided which would give credence to this claim.

 Within the institution, I have heard evidence about the measures that NSCC staff have taken to reduce the risk of transmission of the coronavirus. I will not go through all of the steps taken, but there is a plan if an inmate or a staff member tests positive for COVID-19. Measures have been put in place to reduce the risk of transmission such as providing each inmate with their own cell, requiring inmates to eat their meals in their cells, providing masks to the inmates, and requiring inmates to social distance in common areas. Enhanced cleaning has also been undertaken. To date, there have been no positive tests for the coronavirus at NSCC amongst the staff or inmates.

 Within the Northwest Territories, a public health emergency was declared on March 18, 2020. Schools and businesses have been closed. There were a number of restrictions imposed, including limiting who can enter the Northwest Territories.

 To date, there have been five known cases of coronavirus in the Northwest Territories. All cases have recovered. All cases involve travel outside of the Northwest Territories, and there is no known evidence of community spread in the Northwest Territories. The last reported case was on April 5, 2020. There are no known active cases in the Northwest Territories as of today’s date.

 While the borders remain closed, within the Northwest Territories restrictions have begun to be eased, beginning on May 15, 2020. There are four phases in the plan to lift restrictions. We are currently in Phase 1, and Phase 2 is scheduled to commence later in June 2020, assuming that there are no further cases.

 The situation in the Northwest Territories is currently stable. And we are luckier than other provinces: we have no active cases, and there is no evidence of community spread.

 In the circumstances of this case, I am not satisfied that the current risk of Mr. Cayen contracting the coronavirus is significant. Further, Mr. Cayen is young, 22 years old, and there is no medical evidence that Mr. Cayen is any more at risk of contracting the coronavirus or of being at risk of serious complications or death than any other person incarcerated at the North Slave Correctional Centre.

 In an application for release, based in part on concerns about the coronavirus, medical evidence should be presented regarding the accused’s medical situation, including any evidence of enhanced susceptibility to the effects of the coronavirus. Evidence of the general risk to the population or the inmate population is not sufficient to establish that a particular accused should be released absent demonstrating that the accused is at an elevated risk to contract the virus or has an elevated risk of experiencing severe complications from the virus.

 Associated with the accused’s concern about the coronavirus is the accused’s complaint that he has noticed blood in his stool while incarcerated and has brought this to the attention of the staff at NSCC, but nothing has been done to follow-up with this complaint. It is not clear from the evidence what happened with Mr. Cayen’s request. For some reason, it has not been followed up on. This is unfortunate, but there is no evidence that this medical situation renders Mr. Cayen more susceptible to contracting the coronavirus or more susceptible to experiencing severe complications if he were to contract the virus. I would encourage Mr. Cayen to follow-up with correctional staff if he wishes to have this issue medically assessed.

 Mr. Cayen has also raised the issue of an attack on him by another inmate which occurred a few weeks ago. According to Mr. Cayen, he was attacked by another inmate who worked in the kitchen with him, and he suffered injuries. There is no indication that the attack was related to the charges Mr. Cayen faces or is related to gang or drug activity.

 There is no known history between the accused and the other inmate. Quite simply, the attack appears to be unprovoked, and there is no known motive. This is apparently the first incident of violence against the accused since his arrest. While this was an unfortunately incident, I do not see how it can have any significance in the decision of whether to grant the accused’s release.

 Turning now to the secondary grounds of detention. The secondary grounds 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. The seriousness of the charges and the allegations raise public safety concerns. I do not intend to review the allegations in detail, but the allegations involve the accused and others planning to rob the deceased of drugs and money, and the accused and another person directly participating in the assault and robbery of the deceased using weapons and leaving the deceased injured in a vulnerable state in the winter which resulted in his death from hypothermia.

 The accused has a criminal record which has five convictions in 2017 and 2018. He has three convictions for failing to comply with an undertaking, one conviction for failing to comply with a probation order, and a conviction for an assault against his ex-girlfriend, Monique Graham.

 For the assault, he received a conditional discharge and 15 months of probation. One of the conditions of his probation required him to have no contact with Monique Graham.

 While in custody, the accused has faced disciplinary charges within the institution. These include contacting Monique Graham when he was not permitted to do so. This contact was reported by Ms. Graham’s mother and the phone number was blocked from his call list.

 Mr. Cayen then contacted Ms. Graham using a different number. He contacted Ms. Graham 285 times in approximately a six-week period in 2018. Mr. Cayen explains this by saying he contacted Ms. Graham because he was suicidal and his support plan that had been developed prior to him going into custody included her as a person to contact.

 Mr. Cayen says that he now appreciates the importance of complying with court-imposed conditions. He says that he is now detoxed from the drugs and alcohol he was using before his arrest, and he has taken some counselling while in custody. Mr. Cayen has also faced disciplinary charges for disrespecting staff and for the possession and/or use of marijuana while in custody. As recently as January 2020, Mr. Cayen tested positive for THC.

 In my view, despite the accused’s newfound appreciation for the importance of complying with conditions, the accused’s recent history suggests that there is a significant risk that he would not comply with conditions if released.

 The plan for the accused’s release involves him living in the small community of West Channel with his parents. The community is just outside of Hay River, and there are around 200 people who reside in the community, many of whom are related. His mother works at the West Point First Nation, and the accused has been promised employment with the First Nation if he were to be released.

 Two witnesses for the Crown, Sasha Cayen and Tyler Cayen, are both related to the accused. They have pled guilty to their involvement in this crime, served their sentences, and been released. They both currently live in West Channel.

 Sasha Cayen works for the West Point First Nation; although, Wendy Ross testified that Ms. Cayen works in a different building than she does. The employment that has been proposed for the accused would involve him working in the community. There is, given the size of the community, a risk, a substantial risk, that if released on the proposed plan that the accused will encounter one or both of these witnesses while on release.

 The allegations presented by the Crown claim that the accused interfered with evidence, that he initially lied to the police and later burnt his clothes and destroyed evidence. If true, this raises serious concerns that the accused will interfere with witnesses or evidence if he is released.

 Taking into account the accused’s criminal record, his disciplinary record at NSCC, and the allegations that he destroyed evidence, there is a substantial risk that if released the accused will commit an offence or interfere with the administration of justice.

 Two sureties have been proposed as part of the release plan. Leah Ross is the sister of the accused and she is prepared to pledge $500 no-cash deposit. Wendy Ross is the accused ‘s mother and she is prepared to pledge her home to secure the accused’s release. I have concerns about the suitability of the sureties, particularly Wendy Ross.

 I have some hesitation about Leah Ross’ suitability as a surety, given the seriousness of the charges and the level of supervision the Court would expect. She is the younger sister of the accused. She is 20 years old and lives with her boyfriend and has a young baby. She is employed and does not live at the same residence where the accused proposes to reside if released from custody. I question whether she can adequately supervise the accused and whether she can enforce the accused’s compliance with the terms of the proposed plan.

 Wendy Ross was cross-examined about her knowledge of the accused’s criminal record. She denied knowing that the accused had a criminal record or that he had been charged in the past. She also claimed not to know that he was charged with assaulting Monique Graham or that he was charged with breaching conditions. When asked if these concerned her, she testified that if she had known, she would have kept the accused out of trouble and kept him away from Monique Graham, who she viewed as a troublemaker.

 She also claimed that she did not know the accused was not to have communication with Monique Graham. Ms. Ross’ testimony was contradicted by the text messages presented by the Crown. The Crown presented text messages between Wendy Ross and Monique Graham. Wendy Ross acknowledged sending the text messages. In those text messages, she asked Monique Graham to drop the charges, texting:

 Hello levi wants to know if you can drop the charges on him so he can call you he does not want to loose his telephone privileges as there is conditions not to contact you if he gets caught he will loose all his phone calls.

 When asked about this, she claimed that she thought that this was just about the phone calls between the accused and Monique Graham while in jail and thought he was going to lose his phone privileges. When Ms. Graham asked about how to drop the charges, Ms. Ross replied that she would check with Sasha about how she dropped charges and later advised Ms. Graham:

 need to talk to the Crown and witness coordinator at the courthouse today they are all there today let me know if you need a ride or if you want me to go with you.

 It is apparent that Wendy Ross knew that Levi Cayen was not supposed to contact Monique Graham and that she contacted Monique Graham because he was not supposed to. She contacted Ms. Graham to pressure her to drop the charges.

 Wendy Ross essentially helped the accused to breach his probation condition, and I have serious doubts about her explanation that she did so because she thought he was going to lose his phone privileges. It is clear from those text messages that Wendy Ross knew Levi Cayen had charges. Why else would she refer to court and talking to the Crown.

 As a proposed surety, Wendy Ross would have obligations to the court to enforce the accused’s compliance with conditions, to properly supervise the accused. I do not think that she has been candid and forthright with the court. I do not have confidence in her ability to properly supervise the accused and I am concerned that she might interfere with the administration of justice.

 Accordingly, detention on the secondary grounds is justified.

 The tertiary grounds of detention require me to consider pursuant to section 515(10)(c) whether the detention of the accused is necessary to maintain confidence in the administration of justice, having regard to all the circumstances, including the apparent strength of the prosecution’s case; the gravity of the offence; the circumstances surrounding the commission of the offence, including whether a firearm was used; and the fact that the accused is liable on conviction for a potentially lengthy term of imprisonment.

 Looking at the apparent strength of the prosecution’s case, the allegations that were put forward by the Crown at the bail hearing were lengthy, and I do not intend to review them in detail.

 Briefly, the victim, Alexander Norwegian, was selling crack cocaine on the evening of December 26, 2017. He was in an isolated area on K’atl’Odeeche First Nation. Alexander Norwegian sold crack cocaine to Sasha Cayen that night. Later, Sasha Cayen, Tyler Cayen, James Thomas, and Levi Cayen were socializing at James Thomas’ house. One of them suggested robbing the victim for his money and drugs. The four of them discussed the plan.

 James Thomas and Levi Cayen went to the victim’s location after Sasha Cayen texted the victim to set up a drug purchase. They took with them a small wooden bat and a steel pipe. The accused and James Thomas assaulted the victim, leaving him bleeding and disoriented. They took his sweater and coat and cell phone.

 James Thomas and Levi Cayen returned to James’ residence. And later that evening, Levi Cayen made an anonymous call to the RCMP, reporting an intoxicated driver in a damaged vehicle. The accused was not found until December 28, 2017, and he was deceased in his vehicle. The accused was arrested on January 3, 2018. In a statement to the police following his arrest, Levi Cayen confessed to his involvement in the death of the victim and admitted burning his coat and boots on instructions from James Thomas.

 The Crown’s case is apparently a strong one. In terms of manslaughter, it appears to be overwhelming. And with respect to murder, it is a fairly strong case. I say this, keeping in mind that the evidence has not all been presented in court, nor has it been tested. I do not have the benefit of any defences that might be raised. That is the nature of a bail hearing. How things come out at trial may be different. But at this stage, I am required to consider the strength of the Crown’s case, and it is strong.

 In terms of the gravity of the offences, the offences the accused are facing, first-degree murder and robbery, are two of the most serious offences in the *Criminal Code*. The allegations involve the death of a person, and there is no doubt that the gravity of the offences are serious. Even if the accused were found guilty of manslaughter, that is still a very serious offence, and the allegations presented by the Crown demonstrate that it would be manslaughter with several aggravating factors.

 Looking at the circumstances surrounding the commission of the offence, in this case there was no firearm used. However, it is alleged that the accused use weapons: a small wooden bat and a steel pipe. Those are aggravating.

 It is also aggravating that following the attack on the deceased it is alleged that the accused took his sweater and coat and cell phone, and they left him in the cold, injured and disoriented. The deceased was not in a position to call for help or keep himself warm. It is also alleged that the accused, they locked the gate on the road, putting another obstacle between the deceased and help if he had been able to get that far.

 There are a number of aggravating factors in the allegations that would impact on the circumstances surrounding the commission of the offence.

 In terms of a potentially lengthy term of imprisonment, if convicted of the offences he is charged with, the accused is liable to a lengthy period of imprisonment. First- or second-degree murder result in an automatic sentence of life, a life sentence, the only difference being the eligibility for parole.

 Even if the accused were convicted of manslaughter, in these circumstances a lengthy period of imprisonment is likely. As well, a robbery conviction would also expose the accused to a lengthy period of imprisonment, although not as lengthy as a conviction for any of the homicide offences.

 At paragraph 88 of *St-Cloud*, the Supreme Court of Canada noted that 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 on the tertiary grounds.

 In this case, the alleged offence is serious. The victim was assaulted by two individuals armed with weapons and left in a vulnerable situation to die. The case is strong. On balance, the four factors favour detention.

 Overall, I must consider whether the accused’s detention is necessary to satisfy the public’s confidence in the administration of justice. I have already commented on the suitability of the sureties and expressed some concerns with the plan, as well as the accused’s prospect for compliance with conditions. I have also considered the accused’s arguments with respect to the coronavirus.

 In my view, a reasonable member of the public, familiar with the basics of the rule of law and knowledge of the circumstances of the case, would have their confidence in the administration of justice negatively impact were I to grant Mr. Cayen’s release.

 In my view, detention is required on the tertiary grounds. Therefore, the application of the accused for bail is denied, and he is detained on the secondary and the tertiary grounds.

**(END OF EXCERPT)**

**CERTIFICATE OF TRANSCRIPT**

Neesons, the undersigned, hereby certify that the foregoing pages are a complete and accurate transcript of the proceedings transcribed from the audio recording to the best of our skill and ability.  Judicial amendments have been applied to this transcript.

Dated at the City of Toronto, in the Province of Ontario, this 6th day of July, 2022.

Veritext Canada

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