R v Desjarlais, 2022 NWTSC 22

Date: 2022 09 29
Docket: S-1-CR-2022 000 078

IN THE SUPREME COURT OF THE NORTHWEST TERRITORIES

BETWEEN:

HIS MAJESTY THE KING

-and-

JOSHUA BRANDON DESJARLAIS

MEMORANDUM OF JUDGMENT

Publication Ban 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 **s. 517** of the *Criminal Code*, R.S.C. 1985, Chap C-46

[1] This is a review of a detention order made by a Justice of the Peace. The matter came before the court initially as a review of the accused person's continuing detention under s.525 of the *Criminal Code.* Subsequently the accused filed an application pursuant to s.520(1) of the *Code* for a review and an order vacating the detention order.

[2] For the reasons that follow, the application is dismissed.

BACKGROUND

[3] The accused, Joshua Brandon Desjarlais, was charged with two criminal offences on April 30, 2022: (1) using a weapon, specifically a hatchet, in the commission of an assault, contrary to s.267(a) of the *Criminal Code*; and (2) carrying a weapon, the hatchet, for the purpose of committing an offence, contrary to s.88(2) of the *Code*.

[4] The alleged circumstances can be briefly set forth. On April 30, at approximately 1 p.m., at a local convenience store, the accused allegedly assaulted J.M. with a hatchet. J.M. sustained a two-inch laceration under his left arm. There were witnesses to this incident including one who reported that he saw the accused pull out something that looked like a black axe and start hitting J.M. with it until J.M. fell to the ground. The accused allegedly continued to hit J.M. A hatchet was recovered from the scene. There may also have been a report that J.M. had a knife during this incident. Defence counsel, in his submissions on this application, characterized this altercation as a possible case of self-defence.

[5] The accused was subsequently released on May 3, 2022. The release order specified a number of conditions, including that the accused reside at the Salvation Army residence in Yellowknife, abide by a curfew from 10 P.M. to 6 A.M., and not possess any prohibited weapon and other devices.

[6] The accused was arrested again on June 18, 2022. The police received a complaint at 10 P.M. that the accused was at a particular bar in Yellowknife. The victim of an earlier sex assault for which the accused was convicted and sentenced worked at that bar. The police attended thinking that the accused might be under some post-sentence order of no contact with that victim. He was not but the police did ascertain that he was subject to the curfew condition in the May 3 release order. He was arrested at 10:09 P.M. During a subsequent search of the accused the police discovered a can of bear spray in his pocket. The trigger guard on the bear spray had been removed.

[7] The accused was then charged with three more offences: (1) carrying a weapon, the bear spray, for a purpose dangerous to the public peace, contrary to s. 88(2) of the *Criminal Code*; (2) carrying a concealed weapon, contrary to s. 90(2) of the *Code*; and (3) failing to comply with the curfew condition of his release order, contrary to s.145(5)(a) of the *Code*.

[8] The accused appeared before a Justice of the Peace on June 19, 2022, for a show cause hearing. Pursuant to s.515(6) of the *Code*, the onus was on the accused to show cause why he should not be detained. The accused represented himself. He expressly rejected the need for a lawyer saying at one point: "I'm good…I'm pretty confident that I can handle this because I've done it before."

[9] The accused put forth a plan for his release, modelled on the May 3 release order, and presented a person as a proposed surety. This person, a 40-year old woman with a 16 year old daughter, testified but became reluctant to act as a surety after learning, during her testimony, that the accused had been convicted of sexual

assault involving three minors. In the end, however, she still agreed to act as a surety.

[10] At one point during the proceedings the accused started to argue with the Justice of the Peace over details of his sexual assault convictions. The Justice digressed into a discussion with the accused about the concept of wilful blindness.

[11] The Justice of the Peace was also provided with a copy of the accused's criminal record. That record revealed that, from 2004 to 2019, the accused was convicted of 57 offences in 4 different communities in the Northwest Territories and Alberta. Twenty of those convictions occurred between 2004 and 2009 when the accused was a young offender as that term is known in law. Of the 57 convictions, there are 15 convictions for violence either used or threatened; 5 convictions for drug offences, including trafficking; and, by my count, 16 convictions specifically for failing to comply with court orders, including 3 convictions for failing to attend court. The most serious entries on the accused's record are three convictions in 2019 for sex assault respecting three persons under 16 years of age. He was sentenced to a total of 5years imprisonment (less credit of 29 months for pre-sentencing custody). The accused was released on February 11, 2022.

[12] The Justice of the Peace described the accused's record as being "resplendent with a historical pattern of violent behaviour and disregard for authority and conditions of release."

[13] The accused gave a lengthy account to the Justice of the Peace of his admittedly disadvantaged upbringing and his determination to "go down a different path", as he put it. The accused, now 30 years old, has two children, ages 4 and 10, and although he is separated from them he still stays in touch with them and apparently has a good relationship with them.

[14] At the conclusion of the show cause hearing, the Justice of the Peace ordered the detention of the accused. She said:

> I cannot be satisfied that the accused will think to run situations by his surety before negligently doing them, nor can I be satisfied that those actions will not result in a risk of harm to the public, let alone to the surety's teenage daughter. I appreciate the surety being cautiously willing to give the accused a second chance, in point of fact, this would be his third recent chance to prove himself.
>
> And I am not satisfied that the accused will be able to comply with his conditions of release. The accused has not met his onus to convince me that his detention is not justified because I am satisfied that there is a substantial likelihood that the accused will reoffend if released, putting public safety at risk.

[15] The accused now brings this application for review arguing that the Justice of the Peace erred in law and that there are changed circumstances warranting his release.

GROUNDS FOR REVIEW

[16] There is no need to review the principles relating to pre-trial detention or the right to reasonable bail as enshrined in s.11(e) of the *Canadian Charter of Rights and Freedoms.* It is accepted that, in Canadian law, the release of accused persons awaiting trial is the rule and detention is the exception: see *R v Myers,* 2019 SCC 18 (at para. 25).

[17] The Supreme Court of Canada, in *R v St. Cloud,* 2015 SCC 27, comprehensively explained the review process set out in section 520 of the *Criminal Code* (where an accused seeks a review of a detention order) and section 521 (where the prosecution seeks a review of a bail order). These sections of the *Code* do not grant a reviewing judge an open-ended power to review the initial order. A reviewing judge may intervene only where (1) the original decision contains an error of law; (2) there is admissible new evidence that demonstrates a material and relevant change in circumstances; or, (3) where the decision is clearly inappropriate. As stated by Wagner J. (as he then was), in *St. Cloud* (at para. 6):

> In the last of these situations, a reviewing judge cannot simply substitute his or her assessment of the evidence for that of the justice who rendered the impugned decision. It is only if the justice gave excessive weight to one relevant factor or insufficient weight to another that the reviewing judge can intervene.

[18] In *St. Cloud,* Wagner J. was concerned specifically with the “tertiary ground” for detention. His comments regarding intervention by the reviewing judge are equally apt in this case.

[19] In this case the defence argues that the Justice of the Peace made an error in law by mistakenly classifying bear spray as a prohibited weapon and, proceeding on that error, held that the accused was a higher risk to the public because he did not comply with a weapons prohibition condition. The defence also put forth a material change in circumstances by the disposition of the June 18 charges relating to the bear spray. Finally, defence argued that the Justice of the Peace placed undue emphasis on the accused’s criminal record in coming to her decision to detain the accused.

DISCUSSION

[20] With respect to the s.525 review of the accused’s detention, both the defence and the Crown acknowledge that there has been no unreasonable or extraordinary

delay. The accused's trial on the charges dating from April 30, those arising from the alleged assault with a weapon, is set to proceed on November 30, 2022, in Territorial Court.

[21] With respect to the s.520(1) review of the detention order, it is obvious that the Justice of the Peace ordered the accused's detention on the "secondary ground" found in s.515(10)(b) of the *Code*:

> 515. (10) For the purposes of this section, the detention of an accused in custody is justified only on one or more of the following grounds:
>
> (a) where the detention is necessary to ensure his or her attendance in court in order to be dealt with according to law;
>
> (b) where the detention is necessary for the protection or safety of the public, including any victim of or witness to the offence, or any person under the age of 18 years, having regard to all the circumstances including any substantial likelihood that the accused will, if released from custody, commit a criminal offence or interfere with the administration of justice; and
>
> (c) if the detention is necessary to maintain confidence in the administration of justice, having regard to all circumstances, including
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>> (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 or, in the case of an offence that involves, or whose subject-matter is, a firearm, a minimum punishment of imprisonment for a term of three years or more.

[22] The "secondary ground" requires that there be a *substantial* likelihood that the accused, if released, will commit a criminal offence and that detention is *necessary* for the safety of the public. In many cases, the nexus of a criminal record of violence and current charges of violence create that substantial likelihood and the necessity of protecting the public.

[23] The Crown, both at the show cause hearing and on the application before me, did not argue for detention on any other ground. It is therefore necessary for me to review what I understood to be the three main points of the defence submissions.

A. Change of Circumstances

[24] The Crown concedes that there has been a material change in circumstances. The June 18 charges have been resolved. The accused pleaded guilty to breach of the curfew condition and was sentenced to one day in jail. The Crown dropped the two weapons charges related to the bear spray. Therefore, as of now, the accused is only facing the two charges for which he will stand trial on November 30.

[25] The only other new evidence presented by the defence is a letter from a prospective employer who manages a tattoo parlour in Yellowknife. The accused stated to the Justice of the Peace that he took up tattoo and drawing while in the penitentiary. The letter confirms that the accused has been offered an apprenticeship to eventually be trained as a tattoo artist.

[26] The one thing that is not new is the release plan proposed by the defence. It is the same one as detailed in the conditions that were set out in the release order of May 3, 2022 (with a few minor changes). The current release plan is in fact less than what the accused proposed at his show cause hearing before the Justice of the Peace. There he put forward a surety. Now, there is no surety proposed. The proposal to continue the curfew condition is particularly problematic in light of the fact that the alleged assault with the hatchet occurred at 1 P.M. during the day. Of course a strong release plan may mitigate the "secondary ground" concerns sufficiently to conclude that detention is not necessary. The current proposal, in my opinion, is not such a plan.

B. Error in Law

[27] The Crown concedes that the Justice of the Peace erred in law by describing bear spray as a prohibited weapon. Defence counsel submitted that the Justice compounded the effect of this error by citing two existing court orders which prohibited the accused from being in possession of prohibited weapons. In doing so, it is argued, the Justice detained the accused essentially on the mistaken basis that he posed a higher risk to the public as he could not comply with that condition. This is reflected in comments made by the Justice of the Peace: "He knew he was prohibited from possession (of) weapons, yet he did not make the necessary inquiries to avoid breaching those conditions."

[28] The question is how material this error was to the Justice's reasoning and decision. I note that it was the Justice herself who first raised the point about bear spray being a prohibited weapon during an exchange with the accused. The Crown did not correct her.

[29] In my opinion, there was ample evidence before the Justice of the Peace to justify her concern about the accused's ability to comply with conditions of release. As noted above, his record contains at least 16 convictions for failing to comply with court orders.

[30] Defence counsel pointed out, however, that there were no breaches on the accused's record since 2015. That is true but that does not mean the accused led a blameless existence since 2015. In 2017, he was convicted of seven offences including assault, assaulting a peace officer and resisting arrest. In 2018, he was convicted of uttering threats. And, in 2019 came the three convictions for sexual assault.

[31] In my opinion, the error of law did not materially affect the outcome.

C. Over-emphasis of Criminal Record

[32] Defence counsel argued that the Justice of the Peace placed too much emphasis on the accused's record. He likened it to be punished twice for the same offence. More significantly defence counsel submitted that there are strong *Gladue* factors that should be taken into account in the accused's favour.

[33] Defence counsel was, of course, referring to s.718.2(e) of the *Criminal Code,* as interpreted by the Supreme Court of Canada in *R v Gladue,* [1999] 1 S.C.R. 688, which requires a sentencing court to consider the unique systemic and background factors that may play a part in bringing an Indigenous offender before the court, as well as sentencing procedures and alternative sanctions which may be appropriate in the circumstances because of the offender's background. This is a mandated methodology designed to focus the sentencing court on the unique circumstances of an Indigenous offender to determine a fit sentence.

[34] The *Gladue* principles have been extended to bail decisions, most notably in this jurisdiction by the decision of Shaner J. in *R v Chocolate,* 2015 NWTSC 28. In doing so, she relied on a number of decisions from courts throughout Canada, including the Courts of Appeal of Ontario (*R v Robinson,* 2009 ONCA 205) and Alberta (*R v Oakes,* 2015 ABCA 178).

[35] I note, as well, that Part XVI of the *Criminal Code,* titled "Compelling Appearance of Accused Before a Justice and Interim Release", which contains the previously cited s.515(10), also contains sections 493.1 and 493.2 which codify the principle of restraint in bail and its application to Indigenous offenders:

> 493.1 In making a decision under this Part, a peace officer, justice or judge shall give primary consideration to the release of the accused at the earliest reasonable

> opportunity and on the least onerous conditions that are appropriate in the circumstances, including conditions that are reasonably practicable for the accused to comply with, while taking into account the grounds referred to in subsection 498(1.1) or 515(10), as the case may be.
>
> 493.2 In making a decision under this Part, a peace officer, justice or judge shall give particular attention to the circumstances of
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> (a) Aboriginal accused; and
>
> (b) accused who belong to a vulnerable population that is overrepresented in the criminal justice system and that is disadvantaged in obtaining release under this Part.

[36] In my opinion, despite the reversal of onus, the overarching principle of restraint still applies to the ultimate issue of release or detention. And, the inclusion of s.493.2(a) clearly signifies Parliament's intention to adapt the principles of s.718.2(e) from the sentencing context to bail situations.

[37] In *Chocolate,* Shaner J. granted bail notwithstanding the fact that the accused there, who was 21 years old at the time and charged with sexual assault, had a significant criminal record dating back to when he was a young offender. Included on the record were 10 convictions for failing to comply with court orders. Like the accused in the case before me, the accused person in *Chocolate* had a difficult childhood, often left to his own devices without supervision or guidance. Shaner J. placed significant emphasis on that accused's personal circumstances and the pertinence of the socio-economic factors identified in *Gladue* in ordering release on strict conditions. She wrote (at para.49):

> In my view, honouring the constitutional right to reasonable bail requires consideration of the socio-economic factors present in the life of *any* accused, regardless of whether they are Aboriginal. For many Aboriginal people who come before the courts, however, the factors identified in *Gladue* will form a large part of their overall socio-economic context. It would be unreasonable and unfair to conclude detention is justified based solely on an accused's criminal record and/or the circumstances of the alleged offence without considering the role *Gladue* factors may have played in leading to that person committing criminal acts in the past, being charged again and, consequently, seeking bail. There simply must be more than a superficial review of an accused's past criminal conduct and/or the circumstances leading to the current charge.

[38] While I agree with these comments, it is important to note several distinguishing features between the *Chocolate* case and the case before me.

[39] First, there was no trial date set in the *Chocolate* case. Shaner J. commented that there would likely be a significant delay before trial (at para. 72). In the case before me, the trial will be held in two months' time.

[40] This point also goes to a submission by defence counsel that I should have regard to the passage of time on the appropriateness or proportionality of the detention. In other words, reviewing judges must be alert to the possibility that the amount of time in pre-trial detention will equal or exceed any likely sentence if the accused is convicted. Here, the accused has been in custody for a little over 3 months and there are 2 months until his trial. I do not presume to guess what his sentence might be were he convicted of assault with a weapon. But I venture to say that it would likely be more than the time he will have spent in pre-trial custody (even if one accounts for pre-sentence credit).

[41] In *Chocolate*, there was a significantly detailed release plan with Mr. Chocolate's parents, who were described as now being supportive and stable, serving as sureties with a cash deposit.

[42] Also in *Chocolate*, Shaner J. received testimony from the accused's father about the family history, including his and his wife's difficulties that they struggled to overcome. In the case before me, there was no evidence presented to me, other than the transcript of the show cause hearing, about the accused's personal history. The accused spoke at length to the Justice of the Peace about his difficult childhood, being born while his mother was in custody, and being shunted to different foster homes. He spoke about becoming involved in gang life in Vancouver as a teen-ager and then becoming involved in drug trafficking. I take all this into account.

[43] The evidence of the accused as to his personal history certainly informs the *Gladue* analysis. And while I can take judicial notice of broad systemic factors affecting Indigenous offenders generally, and while I recognize many of the pervasive problems caused by poverty, substance abuse and family disruption, there should still be some evidence of the unique systemic or background factors that may have played a part in bringing this particular offender before the court. The Ontario Court of Appeal in *Robinson,* while recognizing the application of *Gladue* principles to a bail decision, still mandated evidence on the issue (at para. 13):

> [T]he application judge cannot apply such principles in a vacuum. Application of the Gladue principles would involve consideration of the unique systemic or background factors which may have played a part in bringing the particular aboriginal offender before the courts. The exercise would involve consideration of the types of release plans, enforcement or control procedures and sanctions that would, because of his or her particular aboriginal heritage or connections, be

> appropriate in the circumstances of the offender and would satisfy the primary, secondary and tertiary grounds of release.

[44] I am not suggesting that a bail hearing must have the same type of evidence, or the same extensive background information, as one would have on a sentencing hearing. But there must be more than simply a recitation of an accused's personal history and a statement that *Gladue* principles must be applied. In the absence of such evidence, and without a detailed and realistic release plan, the criminal record inevitably becomes the major focus of the inquiry as to bail.

[45] Upon examining the record of the show cause proceedings, I fail to see where the Justice of the Peace gave excessive weight to one factor or insufficient weight to another. Even in light of the error of law identified by counsel it is not for me to intervene.

CONCLUSION

[46] The accused has not met the onus of establishing why the detention order should be vacated. The application is dismissed.

J.Z. Vertes
J.S.C.

Heard at Yellowknife, NT on
September 26th, 2022

Dated in Yellowknife, NT this
29th day of September, 2022

Counsel for the Crown: C. Brackley
Counsel for the Accused (Applicant): T. Pham

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THE HONOURABLE JUSTICE J. Z.VERTES