

Citation: *R. v. James*, 2025 YKTC 27

Date: 20250512

Docket: 24-00185

24-00185A

24-00185B

Registry: Whitehorse

IN THE TERRITORIAL COURT OF YUKON
Before Her Honour Judge Cairns

REX

v.

KASHIES CHARLES ANDREW JAMES

Publication, broadcast or transmission of any information that could identify the complainant or a witness is prohibited pursuant to s. 486.4 of the *Criminal Code*.

Publication of evidence, information, representations or reasons given at the show cause hearing is prohibited by court order pursuant to s. 517 of the *Criminal Code*.

Appearances:

William McDiarmid

Kevin Drollet

Counsel for the Crown

Counsel for the Defence

**This decision was delivered from the Bench in the form of Oral Reasons.
The Reasons have since been edited without changing the substance.**

REASONS FOR JUDGMENT

[1] CAIRNS T.C.J. (Oral): Mr. James is before the Court seeking his judicial interim release. This is a reverse onus bail application. I am advised that the Crown is in support of the release plan being advanced on Mr. James' behalf by his counsel. The

plan was, in fact, described as a joint recommendation. However, on a reverse onus bail application, it is Mr. James who has the onus of satisfying the Court on a balance of probabilities that his detention is not required on the primary, secondary, or tertiary grounds. The Court must determine whether Mr. James has met the onus and satisfied the Court that the plan for release addresses these grounds.

[2] On the bail hearing, the Crown alleges the following facts.

[3] Mr. James is facing charges contrary to s. 271 and s. 151 of the *Criminal Code*. These are indictable charges that are alleged to have occurred on June 25, 2023, in the City of Whitehorse.

[4] Mr. James was not arrested until March 19, 2024, when DNA evidence connected him to the allegations.

[5] On June 25, 2023, between approximately noon and 2:00 p.m., police were called to the hospital in Whitehorse where a 14-year-old girl, the named complainant, was alleging a violent sexual assault. She alleged she was walking by a trail along the Yukon River when an unknown male approached her and dragged her under a dock by the train station. Allegedly, she told him she was 14 years old. He sexually assaulted her, penetrating her vagina with his penis. When he was finished, she gathered her things and left.

[6] Afterwards she waved someone down and was taken to the hospital. There, she proceeded with a sexual assault kit. The clothing she was wearing was seized and swabs from her body, including vaginal swabs, were taken. From this, DNA evidence

linked the assault to Mr. James, his DNA matching the swabs taken from her vagina and the crotch of her shorts.

[7] The named complainant, being 14 years old, was not in law of an age to consent.

[8] To summarize, the allegations are of a violent sexual assault on a stranger, a vulnerable person, during daylight hours near downtown Whitehorse.

[9] As noted, Mr. James was not arrested until March 19, 2024, when the DNA evidence I mentioned connected him to the allegations.

[10] Following his arrest, he did not apply for his release until August 23, 2024, when a contested bail hearing was held before Deputy Judge Gill. He was then released on September 5, 2024, as he was in custody on another matter, when the August bail hearing took place. This custodial status is noted on the release order from that date.

[11] The release conditions at that time were strict, and I will read them out. They include a \$2,500 promise to pay. This is fairly standard, no contact with the named complainant; not to attend within 100 metres of her residence, employment, education, or place of worship; reside as directed; abide by a curfew (10:00 p.m. and 6:00 a.m.); he must report, at that time, to a bail supervisor at least once per week; daily reporting to the Carcross RCMP in person or as otherwise directed; and some treatment conditions as well. There was also a not attend within the City of Whitehorse unless at all times in the line-of-sight supervision of persons approved in advance by the bail supervisor, and a “no go” to various locations where a person under 16 years of age might reasonably be present.

[12] So, as I say, those conditions were strict.

[13] A breach of those conditions was alleged less than two months later on approximately November 2, 2024, and that was a breach of the curfew condition.

[14] The facts of that allegation as alleged by the Crown indicate that Mr. James had recently been reminded by the police of the curfew condition. He was apparently absent when a curfew check had occurred on a prior day.

[15] The next day, when attending to his required daily check-in with the RCMP in Carcross, he was given a warning that the RCMP had checked the night before and not found him. He was warned on that occasion but not charged.

[16] However, later, as I understand it, the same day at around 8:30 p.m., he was in the presence of the police. He noted that it was only 8:30 and not 10 o'clock, meaning he did not need to be in his residence but that he was aware of his curfew.

[17] Subsequently, later that evening, at 10:27 p.m., the police attended his residence, and he was absent. He was arrested the following day.

[18] Shortly thereafter, on November 5, 2024, a bail hearing was run, and he was detained. His trial was then set for March 10 and 11, 2025. When it was discovered that these dates coincided with the complainant's birthday, there was an adjournment and Mr. James then applied again for bail before me.

[19] He was released on January 31, 2025, on the following conditions. Some similar — there was again a \$2,500 promise to pay; the no contact/"no go"; reside as

directed; a curfew — the curfew in this case was to abide by a curfew by being inside his residence or on his property at all times except with prior written permission of the bail supervisor or in the direct line of sight of the person who was named in the particular case or another responsible adult approved by the bail supervisor; reporting; participating in programming; again, a not attend the City of Whitehorse unless at all times in the line of sight of Ms. Hager, who was the person he was to be residing with, or another person approved in advance; a “no go” in any various areas where persons under the age of 16 could reasonably be likely to be present.

[20] Mr. James was released, as I say, on those conditions on January 31, 2025.

[21] Shortly thereafter, on February 11, 2025, the police attended the residence where he was to be staying, and he was not present.

[22] Sometime later, on February 21, 2025, the Crown advises, the police were called to a disturbance at another residence and while there, located Mr. James.

[23] Those are the background facts of both the substantive offence and the s. 145 *Criminal Code* allegations.

[24] Mr. James has a criminal record which starts in 2009 and runs through to 2023. By my count, there are 26 entries. His record includes numerous convictions for failing to comply with numerous kinds of court orders, including a fail to comply with undertaking, with his disposition, with suspended sentence, with probation order, and two fail to appears. There are property crimes, driving offence, and a resist arrest.

There are also offences of violence. I count four assaults, an assault causing bodily harm, and, most recently, a 2023 conviction for sexual assault.

[25] I am advised by his counsel that Mr. James has ongoing struggles with alcohol abuse but has more recently connected with Chad Nichol and has begun to develop a therapeutic relationship. Mr. Nichol, I am told, cooperates with the Forensic Complex Care Team to provide counselling, and Mr. James indicates through his counsel that, with the support of Mr. Nichol, he is confident he will be able to comply with the proposed structured release plan.

[26] I am further advised that Mr. James tragically learned of the death of his father when he was in Mayo on his previous release and that it was this news that triggered a relapse and perhaps provides some explanation for the most recent allegations of failure to comply with the release conditions.

[27] Counsel for Mr. James has put forward a plan for Mr. James to reside at Connective under fairly strict terms; again, a no contact; a “no go” in relation to the named complainant; reside at Connective and abide by the rules; a curfew, which is strict, to be inside his residence or in the presence of a responsible adult and only to be out for purposes of assessment, treatment, counselling, or legal appointments; reporting conditions; abstain; “no go” bars; not to have weapons; attend for programming; and remain within the Yukon Territory. And with that one, a \$1,000 promise to pay.

[28] I am mindful that all accused have the right to reasonable bail. It is a right enshrined in the *Charter*. I am mindful that even when the reverse onus applies, the presumption of innocence remains and therefore the denial of bail should be the

exception rather than the norm. As I have indicated, this is a reverse onus situation and, as such, the onus is on Mr. James to establish on a balance of probabilities that his detention is not justified under any of the criteria listed under s. 515(10)(c) of the *Criminal Code*.

[29] I note that this is different from a Crown onus show cause, where the Crown need only show that detention is required under any of the three grounds. Mr. James must satisfy me on a balance of probabilities that, in all of the circumstances, his detention is not required.

[30] I will start with the primary grounds.

[31] Primary grounds arise where it is necessary to detain the accused to ensure his attendance at court. I note that Mr. James has, by my count, nine convictions for failing to comply with court orders, two of which are failing to attend court and one of those is dated November 2023. With respect to this ground, there was little information put before me to satisfy me that his detention was not required on the primary grounds. However, I do not view Mr. James as a flight risk. I understand he has connections to Carcross and that he has family here. I can certainly glean from his criminal record that he is a longtime resident of the Yukon.

[32] Given his connections to the community, on a balance of probabilities, I am satisfied his detention is not required on the primary grounds.

[33] With respect to the secondary grounds, detention is justified on the secondary grounds where it is necessary for the protection and safety of the public, having regard

to all the circumstances including any substantial likelihood that the accused will, if released, commit a criminal offence or interfere with the administration of justice. This ground is largely concerned with the risk of further offences, both in relation to the frequency of those offences and the seriousness of them.

[34] Mr. James' counsel draws to my attention that, while there have been allegations of failures to comply with release conditions, there have been no further substantive breaches since the date of the sexual assault allegation. However, here, I note that Mr. James has been in custody on and off since that time. It appears that, at the time of his first release, he had been incarcerated from November 23, 2023, to September 5, 2024. He was then released on September 5, 2024. He was back in custody on November 4, 2024. He was then released with a release order that was initially dated January 31, 2025, but it was not perfected until February 7, 2025. There are allegations of his failure to report and comply almost immediately, and then he was back in custody as of February 22, 2025 until now.

[35] Under the secondary grounds, my role is to consider the safety and protection of the public — and I have concerns for the protection of the public on the basis of the risk of reoffending, noting, in part, the numerous breaches of court orders on Mr. James' record. He has a significant history of failure to comply with court orders.

[36] It is also important to note that, in this case, if released, this would be the accused's third release on bail on the substantive charges after allegedly breaching the terms of two prior release orders.

[37] In considering the secondary ground, I must also consider the type and seriousness of the offences alleged, as those accused of more serious offences pose a greater risk to the safety and protection of the public than those charged with less serious offences. In this case, the substantive allegation is a violent stranger sexual assault in broad daylight in a public place. The complainant is a vulnerable person, being a 14-year-old girl. As noted, Mr. James has prior convictions for assault and a prior recent conviction for sexual assault.

[38] Turning now to the strength of the prosecution case.

[39] The Crown's case appears strong. There is DNA evidence linking Mr. James to a 14-year-old complainant.

[40] I have already gone over Mr. James' criminal record and, while a criminal record is not determinative, it is a relevant consideration to whether there is a substantial likelihood that he will reoffend. A criminal record that is significant, lengthy, serious, and relatively uninterrupted, as it is here, weighs heavily in favour of detention.

[41] A record of breaches of prior court orders have a significant impact on the secondary ground as it demonstrates a likelihood that the accused will not comply with future orders.

[42] Given Mr. James' history of non-compliance, I am not satisfied that there are conditions that can be imposed that would protect the public and prevent him from reoffending.

[43] Turning, finally, to the tertiary ground.

[44] The tertiary ground justifies detention where it is necessary to maintain the public's confidence in the administration of justice.

[45] In *R. v. Manasseri*, 2017 ONCA 226, the judge addressed the tertiary ground in paras. 89 to 96, and I summarize his comments as follows.

[46] The tertiary ground holds that detention is justified if it is necessary to maintain confidence in the administration of justice. Whether detention is or is not necessary on this ground is to be determined by a consideration of all the circumstances, but, in particular, the factors Parliament has marked out for specific consideration in s. 515(10)(c) of the *Criminal Code*. Detention can only be justified on the tertiary ground if the judge, having considered the listed factors and related circumstances, is satisfied that a reasonable member of the community would be satisfied that denial of release is necessary to maintain confidence in the administration of justice.

[47] The term “public” in s. 515(10)(c) refers to reasonable members of the public who are properly informed about the philosophy of the legislative provisions, of *Charter* values, and the actual circumstances of the case. A “reasonable member of the public” is familiar with the basics of the rule of law in Canada and with the fundamental values of our criminal law, including those protected by the *Charter*. He or she would know of the importance of the presumption of innocence and the right to liberty, and that these are fundamental rights guaranteed by our *Charter*.

[48] A “reasonable member of the public” also expects that anyone charged with a crime is entitled to be tried within a reasonable time, and also would know that pre-trial release of those charged with offences is the cardinal rule, and detention the exception.

[49] I will turn now to review the four legislative factors set out in s. 515(10)(c).

[50] The first is the strength of the Crown's case. Here, while the presumption of innocence applies, the strength of the Crown case is a factor for consideration under the tertiary ground. This, in part, is because detention of an accused based on a weak case tends to undermine, not maintain, the public's confidence in the administration of justice.

[51] In this case, the Crown has DNA evidence linking Mr. James to a sexual encounter with a 14-year-old girl, whose evidence is that she told him of her age.

[52] I must, however, also consider the defences raised by the accused to the extent that I am aware of them and that they were put forward before me in this application. In this case, I understand the accused denies the assault, while not denying that sexual intercourse occurred, and the accused denies any knowledge of the complainant's age.

[53] However, considering the apparent strength of the Crown's case and these defences raised by the accused, I find that the strength of the Crown's case militates against release.

[54] The second factor is the gravity of the offence, and this factor is weighed objectively based on the maximum and minimum sentences for offences. For the offence contrary to s. 271, when the victim is under age 16, the maximum penalty is 14 years for the offence; for the offences contrary to s. 151, the maximum penalty is 14 years.

[55] Again, on the balance of probability, this factor also weighs against release.

[56] The third factor is the circumstances surrounding the commission of the offence, including whether a firearm was used. The more serious the offence, the higher the risk that the public confidence in the administration of justice will be undermined if the accused is released on bail.

[57] In this case, again, as I have described, the allegation is of a violent sexual assault against a stranger occurring in daytime in a public place in downtown Whitehorse, and the complainant, being a young person, is vulnerable. This is a factor that was noted by the Supreme Court of Canada in *R. v. St-Cloud*, 2015 SCC 27, as a relevant factor for consideration.

[58] The circumstances, in my view, surrounding the commission of the offence weigh against release.

[59] Finally, the fourth factor is whether the accused is liable on conviction for a lengthy term of imprisonment. The Crown has proceeded by way of indictment and, as such, Mr. James is liable for a lengthy term of imprisonment as noted above.

[60] This factor also militates against release.

[61] In conclusion, this is a reverse onus bail hearing and, in my view, the plan proposed is not sufficient. Mr. James has not met the burden of establishing, on the balance of probabilities, that the plan proposed addresses concerns around the secondary and tertiary grounds. While Connective is a structured environment, it is also a place he could walk away from, and he has twice been released on plans that included strict supervision. As I reviewed at the beginning of my reasons, the first

release had daily reporting to RCMP in Carcross, weekly reporting to a bail supervisor, not to attend Whitehorse unless he was in the line-of-sight supervision, a curfew, and so on, a significant amount of cash as a promise to pay. The second release also had a strict curfew requiring him to be inside or on his property at all times with strict exceptions and, again, a not to attend Whitehorse unless in line-of-sight supervision, and also \$2,500 as a promise to pay.

[62] At this point, Mr. James is facing allegations that he has twice not complied with the prior terms of release. The plan proposed does not satisfy me on either the secondary or tertiary grounds. Even remaining mindful of the presumption of innocence and other fundamental rights guaranteed by the Constitution, it is my view that a reasonable member of the community informed of the background and information set out above would find that the applicant's continued detention is necessary in all the circumstances. I detain Mr. James on the secondary and tertiary grounds. Pursuant to s. 515(12) of the *Criminal Code*, I include in the order detaining him that there be a no contact or no communication, directly or indirectly, with the named complainant, whose name is protected by a non-publication order.

CAIRNS T.C.J.