IN THE SUPREME COURT OF YUKON

Citation: *R.* v. *Sawrenko,* 2008 YKSC 27 Date: 20080428
Docket No.: S.C. No. 06-00075F
Registry: Whitehorse

Between:

HER MAJESTY THE QUEEN

And

IVAN THEODORE SAWRENKO

Before: Mr. Justice R. S. Veale

Appearances:

Ludovic Gouailler — Counsel for the Crown
Lynn MacDiarmid — Counsel for the Applicant

REASONS FOR JUDGMENT
(Bail Review)

INTRODUCTION

[1] This is a bail review application under s. 525 of the *Criminal Code*. Under that section, the person having custody of an accused being prosecuted for an offence by way of summary conviction is obligated to apply for a hearing after 30 days to determine whether the accused should be released from custody.

[2] In this case, Mr. Sawrenko has been held in custody for 74 days since his remand into custody on February 3, 2008. He was denied bail by a justice of the peace on February 6, 2008 on the secondary ground that his detention is necessary for the safety

of the public. The Whitehorse Correctional Centre did not apply for a s. 525 review until April 10, 2008.

[3] The Crown opposes his release.

[4] On April 16, 2008, I released Mr. Sawrenko on strict conditions and for the reasons that follow.

The Charges

[5] On February 3, 2008, Mr. Sawrenko was charged with two counts of breaching a Probation Order by being under the influence of drugs or alcohol and for failing to keep the peace and be of good behaviour. On February 13, 2008, he was charged with a third count of resisting a peace offer in the execution of her duty, by screaming, kicking, and blocking the police car door, contrary to s. 129(a) of the *Criminal Code*. The three counts relate to the same incident on February 3, 2008.

[6] The Crown will lead evidence from several police officers who were investigating a possible assault complaint at the time of the incident.

[7] The police officers arrived at the scene and attempted to negotiate with the male occupant of an apartment, who would not open his door. The male occupant warned the police to move away from the door and gave them “a three second warning”. The two police officers called for the support of additional officers, one of whom recognized Mr. Sawrenko’s voice.

[8] Mr. Sawrenko appeared to be extremely paranoid and confused. After 20 minutes of negotiating, Mr. Sawrenko tried to open the door but told the police it was frozen and suggested that they kick it in. The R.C.M.P. kicked the door open and found Mr.

Sawrenko holding a two by six piece of lumber, while appearing alternatively agitated, calm, and then aggressive.

[9] The police demanded that he put the board down. He refused and told the police to take their guns off and when the officers drew their tasers, he told them to put those weapons down. He remained combative and tried to shut the door. One of the officers deployed a taser.

[10] Mr. Sawrenko was handcuffed and arrested, but continued screaming and kicking. He began banging his head when placed in the police cruiser and used his foot to prevent the police from closing the cruiser door. He was warned that pepper spray would be used and he attempted to lunge out from the back seat. An officer pepper sprayed him.

[11] The taser and pepper spray did not have a great impact on Mr. Sawrenko. He appeared to be highly intoxicated and was lodged in cells and eventually taken to the hospital.

[12] At the show cause application on February 6, 2008, which was delayed because of his hospital attendance, Mr. Sawrenko was only charged with two counts, being the breaches of probation. He had a completely different version of the events and said that he was at a friend's house and that police were using excessive force based upon his past behaviour.

[13] Mr. Sawrenko acknowledges that he has a long history of alcohol abuse. He has some 48 convictions dating back to 1976, including theft, robbery with violence, possession of narcotics, impaired driving, and 12 convictions for failing to comply with court orders. He was also convicted of failing to attend court in 2007.

[14] The justice of the peace ordered that his detention was justified based on the secondary ground, presumably for the protection of the public and the substantial likelihood that he would commit an offence if released.

[15] Although it was mentioned at the show cause hearing that Mr. Sawrenko had a brother residing at Lake Laberge who would welcome him, he preferred to be returned to Carcross on conditions. A formal release plan was not presented and no bail assessment report was prepared for the February 6, 2008 hearing.

The Delay

[16] The third count of resisting a police officer was filed on February 13, 2008.

[17] Mr. Sawrenko retained counsel to represent him. As the Crown was proceeding by summary conviction, counsel requested an early trial date. A February or March date could not be obtained because one or more of the officers was on holidays. April 3, 2008 was set for trial.

[18] On April 2, 2008, the Crown provided disclosure that had been requested by defence counsel on March 17, 2008. Defence counsel requested an adjournment to April 7, 2008. The trial did not proceed on April 7, 2008 because defence counsel's father passed away and she will not be available for trial until after May 17, 2008. Mr. Sawrenko wishes to have the same counsel despite the unavoidable delay.

[19] At the time of hearing this s. 525 bail review, Mr. Sawrenko had spent 74 days in pre-trial custody, which would result in a credit of 111 days applying the standard 1.5 multiplier for pre-trial custody. The Crown advised that they would seek a four month sentence on a conviction after trial. A guilty plea could result in an even shorter sentence.

The Release Plan

[20] Mr. Sawrenko is 47 years old. He proposes that he be released to reside with his brother, Serge Sawrenko, at his property at Lake Laberge, just north of Whitehorse. Serge Sawrenko attended the hearing and indicated his willingness to act as a surety without cash deposit to ensure that the accused abides by the conditions that the accused has proposed. He initially advised the probation officer that he did not want to be a babysitter but in court he indicated his willingness to be a surety.

[21] Serge Sawrenko does not drink and does not permit drugs or alcohol on his property. He has carpentry work that his brother can do.

[22] A probation officer prepared a bail assessment report which is used in this jurisdiction to assess release plans. The report confirms the willingness of Serge Sawrenko to employ the accused and have him stay at his house and ensure that he attends for trial.

[23] While the bail assessment report does not recommend release, it does not raise any concerns about the plan while confirming that the accused has acknowledged “a long standing issue with alcohol” interspersed with periods of sobriety. It also confirms the past convictions for violence but notes that his last conviction for a violent offence was assault causing bodily harm in 1994.

[24] The bail assessment report also recommended a number of conditions, somewhat stricter than those proposed by the accused.

The Law

[25] Section 525 is entitled “Review of Detention Where Trial Delayed”. The custodial institution “shall, forthwith” apply for a hearing to determine whether the accused should be released from custody. Where proceedings are by way of summary conviction, the application must be made “forthwith on the expiration” of 30 days from February 6, 2008, the day Mr. Sawrenko was taken before the justice of the peace. On receiving an application, the judge “shall” fix a date for hearing.

[26] In my view, s. 525 was passed by Parliament to ensure that there will be judicial oversight of delays in the trial process even where the defence does not desire a bail review hearing. A s. 525 hearing cannot be waived.

[27] Section 525 sets out the following directions for the judge conducting the hearing:

> (3) On the hearing described in subsection (1), the judge may, in deciding whether or not the accused should be released from custody, take into consideration whether the prosecutor or the accused has been responsible for any unreasonable delay in the trial of the charge.
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> (4) If, following the hearing described in subsection (1), the judge is not satisfied that the continue detention of the accused in custody is justified within the meaning of subsection 515(10), the judge shall order that the accused be released from custody pending the trial of the charge on his giving an undertaking or entering into a recognizance described in any of paragraphs 515(2)(a) to (e) with such conditions described in subsection 515(4) as the judge considers desirable.
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> …
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> (8) The provisions of sections 517, 518 and 519 apply with such modifications as the circumstances require in respect of any proceedings under this section.

> (9) Where an accused is before a judge under any of the provisions of this section, the judge may give directions for expediting the trial of the accused.

[28] I conclude that s. 525 creates a mandatory bail review in the context of the *Charter of Rights and Freedoms* guarantees that an accused has the right to be presumed innocent until proven guilty at trial (s. 11(d)), the right not to be denied bail without just cause (s. 11(e)), and the right to be tried within a reasonable time (s. 11(b)).

The Burden of Proof

[29] There has been considerable judicial consternation and criticism of s. 525 for failing to explicitly specify the burden of proof and the appropriate record for s. 525 bail review hearings (see *R.* v. *Gill*, [2005] O.J. No. 2648, at paragraph 13, *R.* v. *Dass*, (1978), 39 C.C.C. (2d) 365 (Man. C.A.) at 367. I prefer the analysis of Beard J. in *R.* v. *Thorsteinson*, 2006 M.B.Q.B. 184, which I will summarize as follows:

> 1. Section 525(4) makes it clear that the judge must be satisfied that the continued detention of the accused is justified under s. 515(10) which includes, in general terms:
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> (i) whether his detention is necessary to ensure his attendance in court;
> (ii) whether the detention is necessary for the protection or safety of the public; and
> (iii) whether the detention is necessary to maintain confidence in the administration of justice.
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> 2. The burden of proof under s. 525 should be the same as provided for in s. 515(1) (on the Crown) or s. 515(6) (on the defence, i.e. the reverse onus). In other words, the appropriate burden of proof applies to the factors set out in s. 515(10).
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> 3. Section 525 adds an additional factor to s. 515(10) and that is the reasonableness of the delay and the responsibility for the delay, which can be dealt with in the final weighing and balancing of all the factors.

[30] The trigger for a s. 525 hearing is the delay of trial which creates an automatic hearing to determine whether the accused should continue to remain in custody. The fairest procedure would be to have the burden of proof on the same party that had the burden that resulted in the original or reviewed custodial order.

The Record

[31] The other issue that s. 525 is silent on is the question of the record to be considered in the hearing. There is no mention of the previous decision by a justice or the transcript from that proceeding being part of the record for a s. 525 bail review hearing. However, s. 525(8) states that ss. 517, 518, and 519 apply with necessary modifications.

[32] In particular, s. 518 gives a wide discretion to a judge to make such inquiries as he considers desirable and he “may receive and base his decision on evidence considered credible or trustworthy”.

[33] Section 518 also permits the prosecutor to show the circumstances of the alleged offence. Because s. 525 requires the judge to consider the factors under s. 515(10), it is reasonable to have all the information available at the hearing, and this would include a transcript of the hearing before the justice of the peace and the reasons for the initial refusal of bail.

[34] Further, I see no reason why new evidence should not be heard in a s. 525 bail review hearing. Although s. 525 makes specific reference to delay, the judge is required in s. 525(4) to determine whether or not the accused should be released from custody under the factors set out in s. 515(10). That necessitates consideration of any new evidence or terms of release that the accused may wish to present as well as new

evidence from the Crown. In this case, both Crown and defence have presented new evidence.

[35] Thus, I have considered the transcript of the original bail hearing, the reasons for denial of bail, the alleged facts underlying the accused's recent process convictions, the new release plan, and the bail review report assessing that plan.

Decision

[36] At the outset, I wish to comment on the timing of this s. 525 bail review hearing.

[37] The Whitehorse Correctional Centre, under the *Criminal Code,* "shall" apply to a judge "forthwith" on the expiration of 30 days of pre-trial custody in summary conviction proceedings and 90 days in indictable proceedings, for a hearing to determine whether or not the accused should be released from custody.

[38] In this case, the application was not made until April 10, 2008, rather than March 7 when the 30 day period expired from his show cause hearing on February 6, 2008. Failure to make the application in a timely manner is unlawful and will result in unnecessary *habeas corpus* applications.

The Delay of Trial

[39] In this case, it appears that the delay in holding a trial within 30 days is not for lack of court or counsel availability, but rather the availability of the police witnesses because of holidays. It is perhaps inevitable when three to four police officers are required to attend for trial, that scheduling difficulties will arise through no fault of the Crown.

[40] The delay of the trial for four days from April 3 to April 7 because of lack of timeliness of Crown disclosure should be avoided, but it is not the kind of delay that gives

rise to a rebuke unless it was deliberate or negligent, neither of which were alleged in this case.

[41] The third factor of delay is the unfortunate death of the father of defence counsel. That too is unavoidable and not a factor to be considered in the trial delay. The fact that defence counsel will not be available until after May 17, 2008 should not be taken into consideration as the accused is aware that he could have an earlier trial date but prefers to wait for this counsel, who is knowledgeable about his case.

[42] As I have indicated, the accused has now served 111 days, assuming a credit of 1.5 for his pre-trial detention. That amount of custody is very close to the sentence that might be imposed if the accused is convicted. While some may consider it academic to proceed to trial, it is Mr. Sawrenko's right to have his day in court.

[43] In my view, one of the fundamental purposes of s. 525, in providing for review of pre-trial detention where the trial is delayed, is to ensure that accused persons do not serve an equivalent to a post-conviction sentence before their trial. In fact, that is what has occurred in Mr. Sawrenko's case. It provides a strong argument for his release despite the fact that the Crown is not responsible for the delay.

The Merits of Release

[44] Mr. Sawrenko has presented a release plan that was alluded to, but not fully explored, at the initial bail hearing. There was no affidavit from Mr. Sawrenko, his brother Serge Sawrenko was not present to support the plan, and there was no bail assessment report to provide some independent assessment of the release plan. I do not find any error in the initial bail denial based on the record at that time but undoubtedly this evidence could have resulted in a different decision at that time.

[45] As I have indicated, the excessive but unavoidable delay of trial, for which neither Crown nor defence are responsible, is certainly a major factor in support of releasing Mr. Sawrenko. But, in addition, the release plan is a reasonable one, as it places Mr. Sawrenko outside Whitehorse under the supervision of a responsible, substance-free person, who is obligated to immediately report any breach of conditions to the R.C.M.P. It also can be said that the release conditions, proposed in essence by the accused, are quite onerous for someone who has arguably served his time before his trial takes place. I am satisfied that the objectives of having Mr. Sawrenko appear for trial and not engaging in any criminal behaviour will be addressed by the conditions I have ordered.

[46] The Crown has failed to justify the continued detention of Mr. Sawrenko. I have therefore released Mr. Sawrenko on the conditions that he:

1. Keep the peace and be of good behaviour; appear before the court when required to do so.

2. Report to a bail supervisor immediately upon his release from custody, and thereafter, when and in the manner directed by the bail supervisor.

3. Abstain absolutely from the possession or consumption of alcohol and controlled drugs or substances except in accordance with a prescription given to him by a qualified medical practitioner.

4. Not attend any bar, tavern, off-sales or other commercial premises whose primary purpose is the sale of alcohol.

5. Not have in his possession any firearms, knife, or weapon of any kind.

6. Reside at the residence of Serge Sawrenko, Lot 94, Lake Laberge, Yukon Territory and remain at all times on the property, except when he is in the direct company of Serge Sawrenko.

7. Not to attend in the City of Whitehorse, Yukon, except in the direct company of Serge Sawrenko.

8. Abide by the rules of the residence of Serge Sawrenko at Lot 94, Lake Laberge, Yukon.

9. He must present himself at the door of Serge and Gwen Sawrenko's residence or answer the telephone during reasonable hours for checks that he is abiding by these conditions. Failure to do so will be a presumptive breach of the condition.

10. He is to be in the company of Serge Sawrenko at all times that he is off the property of Lot 94, Lake Laberge, Yukon.

11. If there is any breach of these conditions, Serge Sawrenko is to notify the R.C.M.P. immediately.

[47] It would be appropriate to order an expedited trial, but neither Crown nor defence counsel requested because of defence counsel's unavailability until May 17, 2008.

Veale J.