Citation: *R. v. Schab*, 2016 YKTC 69

Date: 20161212
Docket: 16-00374
Registry: Whitehorse

IN THE TERRITORIAL COURT OF YUKON
Before His Honour Judge Lilles

REGINA

v.

ISAIAH DESMOND SCHAB

Appearances:
Susan E. Bogle — Counsel for the Crown
Jennifer A. Cunningham — Counsel for the Defence

RULING ON APPLICATION

[1] LILLES J.: This is a matter involving an application by Ms. Cunningham on behalf of her client, Isaiah Schab, to vary an undertaking.

[2] Some of the issues raised in this relatively minor case are very significant, in particular, in relation to their potential impact on our justice system. As a result, I have taken the time to write a decision with the intention of dealing with the facts of this particular case, but also to provide guidance to counsel in other bail situations. The decision was given orally in court on December 12, 2016.

[3] As stated, this is an application by Isaiah Schab to vary the terms of an undertaking given to a peace officer in charge. Mr. Schab has been charged with an assault contrary to s. 266 of the *Criminal Code* and unlawful confinement contrary to

s. 279(2) of the *Criminal Code*. Both charges relate to an incident that occurred in the early morning of August 14, 2016.

[4] It is alleged that Mr. Schab had been drinking and woke up around 4 a.m. and accused the complainant, his girlfriend, of cheating on him. This led to assaultive behaviour over a short period of time that included shoving, slapping, and punching. At one point, he grabbed her and threw her to the ground. He held her and covered her mouth to keep her from shouting. Eventually, he yelled at her to get out and she left running, afraid that he might pursue her.

[5] These actions led to Mr. Schab being charged with an offence contrary to s. 279(2) of the *Criminal Code,* namely that he did without lawful authority confine S.A. and also that he committed an assault against her contrary to s. 266 of the *Criminal Code*.

[6] A number of injuries were observed at the hospital, where she was taken by the police: swelling on the forehead; bruises to the face, back, and ribs.

[7] I was advised that S.A. no longer lives in the Territory.

[8] Mr. Schab was arrested and eventually released on an undertaking given by a police officer. The terms of that undertaking are as follows:

1. Report to a Bail Supervisor at the Adult Probation Office within two working days and thereafter when and in the manner directed by the Bail Supervisor;

2. Notify the Bail Supervisor of any change of your address, employment, and occupation;

3. Have no contact directly or indirectly or communication in any way with S.A., except with the prior written permission of the Bail Supervisor after consultation with Victim Services, the Spousal Abuse Program, Family and Children's Services, and the Royal Canadian Mounted Police;

4. Do not attend at the residence of S.A. or place of employment of S.A., except with the prior written permission of the Bail Supervisor after consultation with Victim Services, the Spousal Abuse Program, Family and Children's Services, and the Royal Canadian Mounted Police;

5. Abstain absolutely from the possession or consumption of alcohol and controlled drugs and substances, except in accordance with a prescription given you by a qualified medical practitioner;

6. Do not attend any bar, tavern, off sales, or other commercial premises whose primary purpose is the sale of alcohol;

7. Remain within the Yukon Territory unless you have the prior written permission of the Bail Supervisor or the court;

8. Do not possess a firearm and surrender to the Royal Canadian Mounted Police any firearm in your possession and any authorization, licence, registration certificate, or other document enabling you to acquire or possess a firearm.

[9] Mr. Schab is of First Nations ancestry. He is 19 years old and has no criminal record. He currently lives at home with his mother. I understand that he has finished high school.

[10] Counsel advised that he had lost his job, possibly due to the reporting requirements of this undertaking. Ms. Cunningham, on behalf of her client, submits that at the current time, in all of the circumstances, the conditions imposed in Mr. Schab's undertaking are unnecessarily restrictive and unreasonable, and therefore inconsistent with the objectives of the *Criminal Code* and s. 11(e) of the Canadian *Charter of Rights and Freedoms*.

Principles

[11] Section 11(e) of the *Charter* provides that:

> 11. Any persons charged with an offence has the right...(e) not to be denied reasonable bail without just cause;...

[12] In *R. v. Pearson*, [1992] 3 S.C.R. 665, the Supreme Court held that:

> 45 … In my opinion, s. 11(e) contains two distinct elements, namely the right to "reasonable bail" and the right not to be denied bail without "just cause". …

[13] Later in the same judgment, Lamer C.J. stated:

> 46 "Reasonable bail" refers to the terms of bail. Thus the quantum of bail and the restrictions imposed on the accused's liberty while on bail must be "reasonable". …

[14] *Pearson*, *supra*, also held that s. 11(e) of the *Charter* is animated by both s. 11(d), which asserts the right to be presumed innocent until proven guilty, and s. 7 which guarantees life, liberty, and security of the person.

[15] There is a strong case that the phenomenon of risk aversion permeates the criminal justice system in Canada and has resulted in an increase in the number of cases where bail is denied or where an inordinate number of conditions of release are imposed. Risk aversion applies to all decision-makers in the system, starting with the police and includes Crown attorneys and judges. It can take the form of delaying decision-making, passing the decision on to someone else, or by imposing numerous conditions in order to avoid subsequent criticism in the event that the offender reoffends or does not show up for court.

[16] The imposition of numerous conditions in bail orders makes it difficult to distinguish a bail order from a probation order. In principle though, the presumption of innocence and the requirement that the bail conditions be reasonable should result in probation and bail orders being quite different.

[17] The imposition of numerous conditions in bail orders has resulted in a dramatic increase in the number of breach charges and revocations, as well as making it more difficult for an accused person to obtain bail in the future.

[18] These points are considered in an article by C.M. Webster, A.N. Doob, and N.M. Myers, “The Parable of Ms Baker: Understanding Pre-Trial Detention in Canada” (2009) 21 *Current Issues Crim. Just.* 79, at page 99:

> ...it could even be argued that the criminal justice system is creating — to a certain extent — conditions for 'crime' to be committed. Specifically, the rising number of charges being brought to court in Ontario is driven, to a large extent, by 'administration of justice' charges. With an increasing number of people being on pre-trial release — almost always with conditions — coupled with an apparently strong belief that a greater number of conditions will lead to less crime, the criminal justice system 'creates' the likely possibility of additional crime (that might not have existed before) in the form of a failure to comply with these conditions....

[19] Similar concerns are expressed in *The Law of Bail in Canada*, (The Honourable Mr. Justice Gary T. Trotter, 3rd ed., (looseleaf)). For example, it has been observed that bail conditions can be coercive and overused. Conditions are imposed when a promise to appear would suffice. Conditions are imposed for purposes unrelated to the bail system. Sometimes the conditions imposed are not practically enforceable.

[20] At page 6-24, Justice Trotter states (as read):

> The imposition of bail conditions must be approached with care. There may be a temptation on a bail hearing to write all the wrongs by intervening in a substantial way in the accused person's life. In these circumstances, a bail order begins to resemble a probation order or a conditional sentence. This is improper at the bail stage.

[21] As Lamer J.A., as he then was, held in *Keenan c. Stalker* (1979), 57 C.C.C. (2d) 267 (C.A. Québec) (translation as reproduced in Trotter):

> ...Society did not intend to give itself the right to invade the private life of the accused to the same extent that it recognizes it has in the case of someone whose marginality (marginalité) has been proved beyond a reasonable doubt.
> ...

[22] Thus on a determination of what conditions are appropriate, the proper role of bail conditions and the relationship to the criteria for release must be kept in mind as a check against overly intrusive conditions.

[23] The concerns expressed in the Webster, Doob, and Myers article mentioned above are reflected in the Juristsat document: *Trends in offences against the administration of justice*, (Statistics Canada, October 15, 2015), although that report does not single out bail conditions from the broader category of court-ordered conditions.

[24] The Canadian Civil Liberties Association (“CCLA”) published a report in July 2014 entitled *Set Up to Fail: Bail and the Revolving Door of Pre-trial Detention*. In addition to concluding that the bail system is risk-averse,the CCLA found that it also disproportionately penalizes poverty, addiction, and mental illness, including those suffering from Fetal Alcohol Spectrum Disorder, by imposing release conditions that are difficult if not impossible for individuals with these issues to meet. Invariably and predictably, criminal charges for breach of bail follow and, as a result of the breach, diminished prospects for release not only for the current charge but also for any future charge. Too often the activity that resulted in the breach would not have been illegal or a crime but for the fact that it was a condition of the offender's bail.

[25] The CCLA report included statistics showing that the Yukon has the third-highest remand rate in the country, after the Northwest Territories and Nunavut, with 166 remand inmates per 100,000 population. This is notably higher than the national average of 39.

[26] Other statistics in the CCLA report show that sixty percent of the inmates in the Whitehorse Correctional Centre are there on remand. (emphasis added) I am aware, of course, that some of those inmates are there because they have not applied for bail.

[27] The Yukon as well has the highest national average rate breach of bail charges: 1,099 charges per 100,000 residents. This compares to a national average of fewer than 300 charges per 100,000 residents. Again, this is strongly suggestive of overuse or inappropriate use of bail conditions.

[28] The criteria for considering bail are guided by the provisions of s. 515(10) of the *Criminal Code*. They can be briefly summarized as follows:

1. To ensure the presence of the accused before the court.

2. To ensure the protection of the public. For example, is there a substantial likelihood that the accused will commit a criminal offence or interfere with the administration of justice if released? The safety of any victim or witnesses fall in this category.

3. To maintain confidence in the administration of justice.

[29] One aspect of reasonable bail conditions is that they must comply with the "ladder" approach, that is, release should be considered first without any conditions and that the conditions of increasing severity should only be imposed after considering whether a lesser condition, one which interferes as little as possible with the liberty of innocent persons would suffice. (see *R. v. Prychitko*, 2010 ABQB 563)

[30] With this background, I will now review the conditions of the undertaking that apply to Mr. Schab.

Issues and findings

[31] Ms. Cunningham raised a number of concerns with respect to most of the conditions in Mr. Schab's bail order. I will deal with each condition separately and give my decision on each.

Clause 1

[32] Ms. Cunningham takes the position that a formal reporting requirement is not necessary but if one is to be imposed, it should be to the police rather than to the bail supervisor. She points out that in Whitehorse, the bail supervisor is also a probation officer and Mr. Schab, who is presumed innocent, should not be required to "associate" with convicted individuals who may be attending the same office for purposes of probation supervision.

[33] As mentioned previously, Mr. Schab is a 19-year-old man with no criminal record. He has been on the current conditions for four months without incident. He resides at

his mother's house. There is no information before me that suggests he might be a flight risk.

[34] In my view, there is no need for a reporting requirement at this time. Clause 1 will be deleted.

[35] In light of this ruling, it is unnecessary for me to decide whether reporting to a bail supervisor who is also a probation officer is inappropriate. I will say this in *obiter*: based on the information presented, I would probably not have acceded to a request on the facts of this case that her client report to the police instead of to a probation officer.

Clause 2

[36] As Mr. Schab no longer reports to a bail supervisor, Clause 2 needs to be modified. It will now read as follows:

> 2. Mr. Schab will reside at the residence of his mother and notify the court of any change of address.

Clause 3 and Clause 4

[37] Although the complainant no longer lives in the Yukon, a no contact and no communication restriction may still be appropriate. Counsel for Mr. Schab objects to the added verbiage involving a number of other organizations or services for the purposes of providing exceptions on the facts of this case.

[38] As I said, the complainant no longer lives in the jurisdiction. There is no suggestion that she or Mr. Schab want any contact. There is no need for the further

involvement of the agencies mentioned to provide exceptions to the no contact order or to permit attendance at the complainant's residence.

[39] Clause 3 will now read as follows:

> 3. Have no contact directly or indirectly or communicate in any way with S.A.

[40] Clause 4 will now read as follows:

> 4. Do not attend at the residence of S.A. or place of employment of S.A.

[41] I am cognizant of the fact that the complainant no longer lives in the Yukon but communication could still theoretically take place by telephone, email, or through third parties.

Clause 5 and Clause 6

[42] Clause 5 is a standard "abstain from the possession of alcohol" term and Clause 6 is a standard "not attend licensed premises" term. The circumstances as alleged indicate that alcohol was a contributing factor in this offence.

[43] Counsel points out that Mr. Schab has no previous criminal record and no history of alcohol contributing to offending behaviour. There is no suggestion he consumes alcohol on a regular basis. Ms. Cunningham referred to *The Law of Bail in Canada*, previously mentioned in this decision, at page 6–37 (as read):

> When the accused's alleged contact is accompanied by the ingestion of drugs or the consumption of alcohol, a judge may be justified in attempting to curb this activity...

— and this is the important part —

> ...if there is an apprehension that continued indulgence may foster the commission of further offences. The existence of some type of addiction or a record for previous offences committed while under the influence of alcohol or drugs will further underline the need for this prohibition.

[44] As mentioned earlier, Mr. Schab has no criminal record and there has been no suggestion that he has been abusing alcohol, other than in this one instance. Ms. Cunningham submits that abstaining and prohibiting possession of alcohol are not justified in the circumstances of this case.

[45] I agree. Clause 5, the abstain condition, will be deleted.

[46] And for the reasons given above in relation to consumption and possession of alcohol, Ms. Cunningham submits that the clause prohibiting attendance at licensed premises is not justified or reasonable.

[47] I agree. That clause will also be deleted.

Clause 7

[48] Clause 7 requires Mr. Schab to remain within the Yukon Territory unless he has the prior permission of the bail supervisor or the court.

[49] Mr. Schab is a resident of the Yukon. There is nothing before me suggesting that he may be a flight risk.

[50] Clause 7 will be deleted.

Clause 9

[51] This clause prohibits Mr. Schab from possessing a firearm and requires him to surrender any firearm along with any licence or registration to the RCMP.

[52] Mr. Schab does not own a firearm. I have no information suggesting that anyone living in his house owns or has access to a firearm.

[53] The argument that since he does not have a firearm therefore there is no harm in leaving this condition in place as it will not inconvenience him is not a valid one. Making such an order in the absence of some evidence that he has access to a firearm and that there is a concern based on reasonable facts that he might use it, in my opinion, would be unlawful. Clause 9 is eliminated.

[54] I am aware of the work of the local subcommittee on bail. I have read its interim consultation document with respect to the work of that committee, and this decision is consistent with the direction that that committee appears to be moving.

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LILLES T.C.J.