IN THE SUPREME COURT OF THE YUKON TERRITORY

Citation: *R.* v. *Barclay*, 2006 YKSC 19

Date: 20060228
Docket: S.C. No. 05-01516
Registry: Whitehorse

BETWEEN:

HER MAJESTY THE QUEEN

AND:

RYAN EDWARD BARCLAY

Before: Mr. Justice L.F. Gower

Appearances:
David McWhinnie — For the Crown
Ryan Barclay — Appearing on his own behalf

MEMORANDUM OF SENTENCE
DELIVERED FROM THE BENCH

[1] GOWER J. (Oral): This is an application for bail estreatment. The respondent accused was charged with assault with a weapon, possession of a weapon for a dangerous purpose and two breach of probation charges. He was released on his own recognizance on January 24, 2006, with a cash deposit of $2,000. That recognizance required the accused to attend court on those charges on February 1, 2006, which is approximately a week later. The conditions of that recognizance were that the accused remain in the Yukon Territory, unless he had the prior written permission of his bail supervisor or permission of the Court; that he abide by a curfew by remaining within his place of residence between 9:00 p.m. and 6:00 a.m daily, unless

he had prior written permission of his bail supervisor; to reside at 13 Koidern Street and not to change that residence without the prior permission of his bail supervisor; and also, of course, to attend court on February 1, 2006.

[2] The accused testified that the day before he was to attend in court, at about 11:00 p.m., he was in his apartment at 13 Koidern Street with his girlfriend, Jennifer McGowan. The two were watching television when all of a sudden an unknown male broke down the interior apartment door by kicking it in, entered the main room, where the television was, wearing a ski mask, carrying a hammer and said words to the effect, "You'd better leave town or you're fucking dead." As I understood the evidence of the accused, this threat was directed towards him. He did not recognize the voice of the unknown male and could not tell whether the male was white-skinned or not from under the ski mask. The male was approximately a 10 foot distance away from the accused and his girlfriend. He then says that the unknown male smashed the television they were watching in his presence and in the presence of his girlfriend and left.

[3] All of that apparently occurred over only a few moments. He said that he and his girlfriend then spoke about what had happened. They thought briefly about the prospect of going to the police, but he said he was really scared and that they packed up the next day and took some of their personal belongings and headed towards Toronto, Ontario, where the accused said he had another apartment.

[4] The accused said that the incident happened so fast that he was scared, that he was shocked and that, after admitting he had a criminal record, he said that he had been on the other side of the law before and did not think the police could help him,

unless he was able to provide a description or some identification of his attacker. He said that he figured he was pretty well by himself. He acknowledged that his girlfriend, Ms. McGowan, had family in Whitehorse, but did not consider staying with them or even calling them.

[5] After the two fled Whitehorse in Ms. McGowan's vehicle, they were on the road for about two or three days before he was arrested near Lethbridge, Alberta and brought back to the Yukon, where he remains in custody today.

[6] He said that he was intending to call his probation officer upon arrival in Toronto, but made no other phone call to anyone in authority, or even the courthouse, to let them know he had left town.

[7] He acknowledged having a criminal record dating back, as I heard it, to 1998 for assault on a police officer; 1999, possession of a controlled substance; 2002, again, possession of a controlled substance and one other offence for which he received five days in jails intermittent; 2003, assault with a weapon for which he received 90 days in jail, and again, in 2005, assault with a weapon.

[8] He said that, despite those offences on his record, he had never been in a situation where he had had a weapon brandished on him before and never had to defend himself in similar circumstances.

[9] He generally admitted that he was aware that if he left Whitehorse he was putting his $2,000 bail deposit at risk, as well as risking further criminal charges for breaching

his recognizance and for failing to appear in court, but he explains that at the time he felt that his life and the life of his girlfriend was worth more than the $2,000.

[10] Jennifer McGowan testified as well and corroborated the story of the accused that the two of them were watching TV when an unknown male unlawfully entered their apartment, came in yelling, "Get out of town or I'm going to kill you" to the accused and smashed their television with a hammer. She also did not know the male and did not see his face. She said that afterwards she and the accused talked and decided they better leave Whitehorse.

[11] She said that the interior apartment door had been kicked in. She thought that her landlord, who lived upstairs, would have been present at the time that this person entered the apartment but she did not tell the landlord what was going on. She admitted she had a cell phone with her in the apartment at that time, but did not call anyone.

[12] She had not been in trouble recently with the police in Whitehorse and was not afraid of the police, but when asked why she did not call them, she said that she thought that that could make things worse; that the person who threatened them might get more angry at them, I guess, if she told the police. She did not call her mother until the next day when they were on the road and she did so to let her know that she was okay. She also said that she called her landlord about one and a half to two days later to have her make sure that she would look after the couple's remaining belongings which were left in the apartment.

[13] She also said that this happened about 11 or 11:30 at night and that the two of them talked about what they would do for about an hour to 45 minutes. She said they did not sleep afterwards. They began packing up her car, which took a few hours. At one point, the accused left the apartment to get some gas for the vehicle, during which time she was left alone in the apartment by herself. Ultimately, they left Whitehorse at about 9:00 a.m.

[14] On these facts, there is no dispute that the accused did technically violate his recognizance by failing to appear in Territorial Court on February 1st and by breaching the other conditions which I have just listed. The only real issue is whether the explanation of the accused for having committed those breaches is reasonable in the circumstances and whether that justifies returning to him part or all of the $2,000 cash deposit, as opposed to having it forfeited to the Crown.

[15] The case of *R*. v. *Huang* (1998), 127 C.C.C. (3d) 397, is a decision of the Ontario Court of Appeal which says that, in deciding whether to order forfeiture of recognizance because of a failure to appear, the extent to which the surety is at fault is relevant. It goes on to say that where a surety connived at, aided or abetted at the non-appearance, the whole sum should be forfeited. Where a surety failed to exercise due diligence to secure the appearance, forfeiture of all or a substantial part of the sum may be appropriate. Finally, where a surety did not fail to exercise due diligence and used every effort to secure the accused's attendance, the entire sum may be returned to the surety.

[16] Of course, in this case, we are dealing with more than just a fail to appear, we are dealing with a fail to appear plus other apparent breaches of the recognizance, and we are also dealing with a situation where the accused made his own deposit and was acting as his own surety in the amount of $2,000.

[17] The Crown is the applicant on this hearing and I find, on a balance of probabilities, that the Crown has satisfied me that the accused technically violated his recognizance. However, it is open to the accused to provide an explanation for why the recognizance was violated. At that point, the onus shifts to the accused, in my view, to satisfy me on a balance of probabilities that there is good reason for returning part or all of the deposit to him.

[18] In considering whether the accused has discharged that onus, I first have to look at the story about whether the intruder came in, threatened him and, implicitly, his girlfriend, damaged the television and left, as the two of them testified. While I have my doubts about that and while a sceptic might say that perhaps the accused and his girlfriend could have planned to damage the television on their own and taken a photograph of it as proof to support the story that they have now given, I am prepared to give the accused the benefit of the doubt.

[19] I find it improbable that the girlfriend, Ms. McGowan, would have gone back to the apartment after her return to Whitehorse specifically for the purpose of taking a photograph of the broken television if the television had not broken on the night of the attack or break-in by the unknown male. I say that it is improbable because that is a fact which is capable of being corroborated by the landlord, who presumably would

have had to have let Ms. McGowan back into the apartment in order for her to take the photograph. If Ms. McGowan was lying about that, then she risks a charge of perjury. I conclude that she would not have taken such a risk in all of the circumstances. So I do accept the accused's explanation that this event happened.

[20] So the next thing I have to ask myself is whether the response of the accused was reasonable in all the circumstances. Conversely, did he fail to exercise due diligence? I can understand that the accused would have been upset and panicky as a result of this incident. I can understand that probably the terms of his recognizance and his $2,000 would not have been at the top of his mind. But, they were in his mind, and they would have been in his mind for some time, because the evidence is that the couple talked about it for an hour to 45 minutes immediately after the incident happened and they did not sleep afterwards. They presumably would have continued talking to each other as they packed up their belongings and prepared to leave town by nine o'clock the next morning, some nine or ten hours later. That is a significant period of time to discuss the situation and all the potential consequences of what might happen if the accused left town without the permission of his bail supervisor. That is my first point of concern.

[21] My second point of concern is that even allowing for the fact that the accused might have understandably wanted to leave town quickly without calling the police or involving the police in any way, once he was in a position of relative safety outside of Whitehorse, it is beyond me why he did not call anyone to let them know what the situation was. This was in spite of the fact that his girlfriend was making calls; one, to her own mother to let her know that they were okay, and a second to their landlord. It is

difficult for me to understand why the accused would not similarly have used that opportunity to call either his bail supervisor or someone from the court or the police or a lawyer to let them know what had happened once he was out of immediate danger. On his own evidence, he did not plan to call anybody until he reached Toronto several days later.

[22] The third point of concern is why was it necessary for the accused to move all the way to Toronto, Ontario as a result of this incident? He says he had an apartment there, but his immediate concern, on his own evidence, was that he was in fear of his life and that of his girlfriend. Once he was out of that situation of risk and his life was no longer at risk, or that of his girlfriend, there was simply no reason for him to continue travelling al the way to Toronto, Ontario when he knew full well that he had obligations to the court in the Yukon, not the least of which was facing a four-count Information on some serious charges.

[23] Therefore, on balance, I do not find that the accused's explanation for failing to appear and for apparently breaching the terms of his recognizance is a reasonable one and I order that the entire amount of his deposit be forfeited.

[24] Is there anything further required from Crown?

[25] MR. MCWHINNIE: No, My Lord. I'll prepare the usual form of order and arrange for a filed copy to be delivered to Mr. Barclay in the usual course.

[26] THE COURT: Thank you.

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GOWER J.