REGINA v. PODLOOK

(1972), previously unreported

Northwest Territories Territorial Court, Morrow J., 6 June 1972

MORROW J.: The present application has come on before me pursuant to the authority of s.457.5(1) of the *Criminal Code*, R.S.C. 1970, c.C-34. This sections as well as the related sections forms part of the *Bail Reform Act*, S.C. 1970-71, c.37 proclaimed to come into force on January 3, 1972.

Section 457.5(1) permits an accused to "apply to a judge for a review of the order made by the justice".

Argument took place before me at Yellowknife at the earliest date possible following the appearances before His Worship, Chief Magistrate Peter Parker at Spence Bay on the 1st day of June 1972.

The applicant stands charged with four offences. The first two, which appear to be related, are rape and pointing a firearm. These offences are alleged to have taken place in November 1971. With respect to these charges the applicant had been released on bail, $500.00 without deposit. The next two charges are of rape and pointing a firearm. These offences, alleged to have taken place in May 1972, while the applicant was free on bail, involve a different woman.

It should be observed that Spence Bay is a relatively remote community situate at the lower part of the Boothia Peninsula and some 840 miles northeast of Yellowknife. The great majority of the inhabitants of some few hundred souls, are Eskimo. Court records show that cases involving the retention of Eskimo culture and some involving witchcraft have come from this general area. This should perhaps be considered as forming part of the background in assessing the present application.

At the preliminary hearings in respect to the four charges the learned Chief Magistrate committed the applicant to trial.

Defence counsel applied for bail. Oral testimony was heard as part of this application and the notes of the proceedings were read over to me at the time of the application before me. In refusing bail the learned Chief Magistrate gave as his reasons:

Looking at the section, there are two grounds, apparently, upon which a person can be detained -- detention is necessary in the public interest is one, and I think maybe an argument could be made on that -- and "for the protection of the public having regard to all the circumstances" and so on. There is an alternative necessary in the public interest -- that is a very broad category. And then, of course, as has been mentioned, where there has been a recognizance and then the person is at large and there is reason to believe he may have committed another indictable offence, the initial recognizance can be canceled.

I am satisfied in the public interest that this young man should be taken out of this community at this time due to the fact that it is a small place and the quarters at the R.C.M.P. are certainly not suitable for a person to stay longer than overnight, as far as I'm concerned, in fact I understand in most of the Detachments they are updating the facilities which is one of the matters which was commented on at the Justice of the Peace conference recently that the detention facilities at the R.C.M.P. Detachments are not suitable, certainly for any protracted length of stay. I am reluctant to take this man away but I feel in this case where you have the two committals for these serious offences, in fact, there are actually four charges altogether involving threats and possibility of the use of firearms and so on, I feel this man has unfortunately given indications that it be desirable in the public interest for him to be taken out of the community, until this matter is disposed of.

The local Justice of the Peace who had granted bail, as above, at the time the first charges had been laid had already refused bail with respect to the later charges.

Corporal John F. Neave, the R.C.M.P. officer in charge of the two-man detachment at Spence Bay since September 1970, explained that the accused has been in custody since May 24, 1972. The applicant has not been allowed freedom to move around the detachment buildings but has

been kept in the lock-up, a metal cell some 6'7" by 5'6" with a door made up of steel bars and only a cot as furnishing.

In the normal course where bail is refused an accused person is usually sent out to Yellowknife to be retained at the Correctional Centre there until his appearance is required. In the present case the applicant was kept at Spence Bay because it was known the Magistrate's Court was coming to the settlement. He will now of course be sent out to Yellowknife as soon as the police plane is available.

When questioned the Corporal stated that it was his belief that the applicant would appear for his trial if bail was permitted. He did say, however, that in his belief the accused might cause serious harm if released. He agreed that except for the present charges there had only been one instance before when this man had done any harm. It appeared that the big trouble seemed to be that the man was not employed and made a habit of going around the hamlet at night. Normally the man's problem seemed to come from the use of intoxicants, his father having a licence to brew under the existing legislation.

Crown counsel argued strenuously that this was a small community and the people were afraid of the accused. Defence counsel pressed for bail both before the learned Chief Magistrate and again in the present application pointing out that in the normal course of events it would be several months before trial.

Under the new provisions governing the granting of bail or as it now appears to be called "Judicial interim release" the burden is on the Crown (s.457(2)). Subsection (7) of s.457 sets forth the grounds which are to be considered as justifying custody. These grounds are:

> (7) For the purposes of this section, the detention of an accused in custody is justified only on either of the following grounds, namely:
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> (a) on the primary ground that his detention is necessary to ensure his attendance in court in order to be dealt with according to law; and
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> (b) on the secondary ground (the applicability of which shall be determined only in the event that and after it is determined that his detention is not justified on the primary ground referred to in paragraph (a)) that his detention is necessary in the public interest or for the protection or safety of the public, having regard to all the circumstances including any substantial likelihood that the accused will, if he is released from custody, commit a criminal offence involving serious harm or an interference with the administration of justice.

A careful examination of this section leads me to the conclusion that the words " justified only", "primary ground", "secondary ground" and "determined only in the event" are perhaps the key words to be considered by the justice on the application before him.

The transcript of the proceedings before the learned Chief Magistrate shows clearly that "detention" to ensure attendance was not necessary. I think it can be observed that in general native communities such as we have here are sufficiently isolated that attendance at trial is not likely to present a problem.

The scope and manner of inquiries which the justice may make on such an application are set forth in s.457.3. Included here is s-s. (1)(c) which includes:

> (i) ...the accused has previously been convicted of a criminal offence,
> (ii) ...the accused has been charged with and is waiting trial on another criminal offence,
> (iii) ...the accused has previously committed an offence under section 133.

In the present case of course the applicant, accused, stands charged "with and is waiting trial on another criminal offence" and could be charged with an offence under s.133 but cannot in the strict sense be taken to have "previously committed an offence. . ." under that section.

It is now necessary to examine the secondary grounds. Counsel were unable to produce any reported decision in respect to the new provisions. I have before me, however, two unreported judgments of the Court of Appeal of British Columbia which, although discussing the appeal sections which entail different provisions than s.457, do provide some guidance in the view taken by the learned members of that Court in referring to "public interest".

Taggart J.A. in an oral judgment concerning a man convicted of a charge of possessing a weapon for the purposes dangerous to the public peace where Crown counsel had agreed that the appeal was not frivolous and where the accused appellant had an alcohol problem, and where he had five previous convictions since 1963 of the nature of impaired driving, decided it was an appropriate case for an order releasing the appellant on bail. In reaching his conclusion the learned Justice said:

I would prefer to deal with it on a broad public interest basis and, having regard to the fact that prior to this offence the only offences of which this appellant had been convicted were offences involving liquor and driving, it seems to me that this is a case when an Order should be made. . . (*R. v. James Brent*, B.C.C.A., 10 May 1972).

In the unreported judgment (*R. v. Edward Proulx and Conrad William Green*), 13 March 1972, Bull J.A. of the same Appeal Court reached the conclusion, on the facts recited in the judgment which indicated no convictions since 1960, and that the man had not apparently been leading a criminal life in the main, that "it is not in the public interest to keep him in gaol".

When making the "review of the order made by the justice" a judge in my present position is by s-s.(7) required to by (d) "dismiss the application" or "if the accused shows cause" allow the application and vacate the previous order and make a new order. Sections 457.2, 457.3 and 457.4 apply *mutatis mutandis*.

In my opinion "Public Interest" as used in the new legislation under consideration is broad enough in meaning to include "protection or safety of the public" but could also embrace the safety and protection of the accused himself. If, as the Crown counsel has intimated here, the community is "scared" of the accused, then to release him at this time may even be an invitation to members of the public to take some form of redress against him.

I must weigh all these circumstances and probabilities in the fact of the declared intention of the Parliament of Canada that an accused should be released upon giving the assurances which a justice may request. (s.457(1)and (2)).

In my experience in the small communities that are so common in the Northwest Territories, it would not be hard to adduce some evidence of fear by some members of the public nor would it be too difficult to contemplate the accused becoming embroiled with relatives of the injured party. But surely some risks must be taken if the new legislation is to have meaning. The Territorial Court over the years has followed an almost universal rule of granting bail to an accused person where he is a resident in a settlement and so not likely to leave the jurisdiction and where there is no evidence indicating any mental disturbance apparent in the accused. On several occasions in the past bail has been refused for a short time to allow a cooling off period but almost invariably the accused has been released on bail before trial.

In 1969 bail in this jurisdiction was discussed in *R. v. Moses* (1969), 68 W.W.R. 509 [6 C.N.L.C. 492]. What does not show in the report is that upon the Crown requesting an adjournment of the trial date, the accused Moses was released on bail during daytime hours only, being required to return to the Frobisher Bay detachment each night. The charge in the Moses case was more serious as well as was the man's mental condition.

In interpreting new legislation the Court should take a forward look and resist looking back. I cannot believe that the present legislation, placing the burden for refusal of bail on the Crown as it does, can be taken to have intended to make bail more difficult to obtain.

The present case presents what might be termed a borderline case. I have canvassed the possibility of a trial at an early date but this cannot be arranged. Accordingly I feel that taking all the circumstances into consideration, that while it may have been in the public interest or for the protection or safety of the public to detain the accused for a short period of time to allow a "cooling off" of feeling, that at this time the order of the learned Chief Magistrate should be vacated and that the application should be allowed with an order permitting his release from custody upon signing a recognizance to include the terms and conditions as hereinafter set out.

(a) The accused shall report to the R.C.M.P. at Spence Bay each Saturday at the time indicated by the 0fficer Commanding;
(b) The accused shall not communicate with any witness or complainant;
(c) The accused shall refrain from the excessive use of alcohol;
(d) The accused shall keep the peace and be of good order;

(e) The release of the accused shall not take effect until he has been placed aboard such plane as is to take him from Yellowknife to Cambridge Bay en route to Spence Bay;

(f) In the event he defaults in the observance of any of the above conditions he will, upon request, deliver himself up to the R.C.M.P. to be taken into custody pending any action to be taken on breach of his recognizance.