CITATION: R. v MCDONELL, 2012 ONSC 2567
COURT FILE NO.: 10-124897
DATE: 2012-02-10

ONTARIO

SUPERIOR COURT OF JUSTICE

B E T W E E N:	)	
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HER MAJESTY THE QUEEN	)	A. Stevenson for the Crown
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- and -	)	
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CLAY ROY MCDONELL	)	V. Loh, counsel for the Applicant
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Applicant	)	
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	)	**HEARD:** February 3, 2012

Subject to any further Order by a court of competent jurisdiction, an Order has been made in this proceeding directing that the identity of the complainants or a witness and any information that could disclose such identity, shall not be published in any document or broadcast or transmitted in any way.

REASONS FOR JUDGMENT

[1] Clay McDonell applies for a review of the order detaining him in custody pending trial on six counts of sexual assault and one count of uttering a threat to cause bodily harm.

The Allegations

[2] The following factual assertions made by the Crown are unproven allegations only and Mr. McDonell is presumptively innocent.

[3] Between April 1 and April 30, 2010, Mr. McDonell is accused of sexual assault on E.B.. Specifically, he is accused of grabbing and squeezing E.B.'s breasts.

[4] Between April 1, 2010 and April 30, 2010, he is accused of sexual assault on S.H.. He is accused of removing his penis from his shorts and forcibly grabbing the back of Ms. H.'s head and pushing her head down towards his penis.

[5] Between April 1, 2010 and April 30, 2010, Mr. McDonell is accused of sexual assault on J.B.1 by groping her buttocks and legs.

[6] On May 8, 2010, Mr. McDonell is alleged to have committed a sexual assault on J.B.1. Specifically, he is accused of forcibly engaging in sexual intercourse with his penis in her vagina.

[7] Between August 13 and August 15, 2010, Mr. McDonell is accused of sexual assault on J.B.1. He is accused of grabbing J.B.1 and forcing himself on her. Mr. McDonell is further accused that later that evening he dragged J.B.1 to the ground and tried to pull her pants off. Further, later in the evening, he is accused that he breached the lock to a bathroom and physically attempting to force sex upon J.B.1 and also shaved his genitals in front of her.

[8] Between August 13, 2010 and August 15, 2010, Mr. McDonell is accused of committing a sexual assault on P.D.. He is accused of entering Ms. P.D.'s bedroom and rubbing her neck and later stopping her and attempting to kiss her by placing his lips inches from her mouth.

[9] Between April 1, 2010 and April 30, 2010, Mr. McDonell is accused of uttering a threat to E.B. to cause bodily harm to her. He is alleged to have told Ms. E.B. that he was going to drag her to a basement and rape her.

[10] On consent, Mr. McDonell was released on a recognizance of bail on September 1, 2010 by Justice of the Peace Lee. That recognizance provided, among other things, a form of house arrest for Mr. McDonell whereby he would reside with his parents in their home in Fort St. John, British Columbia. He was required to remain in his residence at all times except when he was in the company of his surety (his stepfather) or his mother.

[11] On April 11, 2011, on consent, the recognizance of bail was varied so that Mr. McDonell could work for Richter Contracting.

The Detention Order

[12] On November 7, 8 and 9, 2011, a preliminary hearing was held before Justice Baldwin. At the conclusion of the preliminary hearing, before Her Honour committed the accused to trial, there was the following exchange with counsel:

> THE COURT: Now, I will be committing for trial but before I do that I would like to hear submissions from counsel please, on whether Mr. McDonell's bail should be revoked. I have the authority to do that pursuant to section 537(1)(c), but of course, an opportunity to make full submissions is in order.
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> THE COURT: I, I want to know what—I want to hear submissions on whether his bail should be cancelled by me.
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> MR. FRASER: Well, I, I, I haven't been advised that the Crown was seeking that and Mr. McDonell has been living in Fort St. John with his parents and as Your Honour heard, under virtual or under house arrest for a period of time and then with employment and there's absolutely no indication from anyone that he has breached any of his terms of his bail. He has abided by that. He has come back here for the preliminary hearing. I don't think there's any issue of, of him absconding. So, the primary grounds, I don't think, are grounds there and there's no indication, I don't believe, from the Crown or anybody else that he's in any way breaching the conditions that would affect either the complainants in this issue or breaching them in general, or having any contact with them or involved with them in any way. In fact, he's at the other end of the country and well away from them and, and certainly under their control and I don't think that it's necessary to do that. I think he should be allowed to stay out and....
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> THE COURT: Yes, I see that. It's all here. It was on consent, but this was prior to evidence being heard by this court that will very shortly result in the formal committal on seven counts, six of which are sexual assaults. I'm going to give you some time to consider further submissions because I'm concerned on the secondary grounds. So, I'll step out. When you're ready for me I'll come back in.

[13] Thus, on her own motion, Justice Baldwin raised the issue of whether the accused's bail should be revoked. There is no issue between the parties that she had the authority to revoke bail pursuant to section 523(2)(b) of the *Criminal Code*.

[14] Once counsel had an opportunity to consider the issue, there was an exchange with the court regarding whether there had been a material change in circumstances of the accused:

> MS. TASSON: Your Honour, I certainly understand the court's concerns on the secondary grounds and I share those concerns. I've looked at the—I've reviewed the history of the bail here and it appears to me that back on September 1, 2010 the Crown consented to the accused's release and certainly we didn't at any point bring a bail review, not that we would if there was an initial consent release in the first place. Other than committal which is understandably something that the court takes into account there is no new evidence that has come out other than what's, was already contained within the disclosure and what the Crown had anticipated would be the evidence here. I don't have any information to offer in terms of evidence or information, credible trustworthy information about potential breaches. The allegations are extremely serious, extremely concerning. I understand the courts concern about...
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> THE COURT: They're no longer just allegations.
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> MS. TASSON: Yes, I understand...
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> THE COURT: They were before we started this hearing.
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> MS. TASSON: ...understand the court's concern as well, especially in light of the committal, the accused's employment and the fact that he's in people's homes. What I would suggest is to revoke that variation that was done and revert the bail back to a strict house arrest bail and hopefully that would provide the court with some—would ease the court's concern to some degree with respect to the secondary grounds and that would be the Crown's submission on that point.
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> MR. FRASER: Actually, I could join the Crown in that submission, Your Honour, if that is a concern. I would, I would take a bit of issue with the point that these are not just mere allegations now. I said they are still allegations and they've only been proven to the point of *US v. Sheppard*. What Your Honour hasn't heard, as this is a preliminary hearing, is the testimony of other witnesses and a full canvassing of the evidence. The essential purpose of the preliminary hearing was for discovery of the complainants as Your Honour's aware that is all, who was called for that purpose and there is some considerable further airing of the evidence required, obviously for trial, and the matters will be going to trial. There is no suggestion of, of any breach. Mr., Mr. McDonell is living, as I indicated, in another province. He's a young man with no criminal record and although the allegations of breach are serious the conditions on the initial release at the very least are very strict and certainly curtail his—any activity with the public or his ability to do anything and there's no indication anywhere that he was breached that and I would suggest that perhaps the Crown's suggestion is at this time proper, if that's the step is to reign him in again and revoke the variation rather than the, the very bail itself.
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> THE COURT: Well, could I ask you all to go to Section 515(1)(c) or (b) and (c). I'll read it into the record for those present, as they don't have a *Criminal Code* in front of them.
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> Now, it's just the protection or safety of the public part of that that I'm concerned about as I indicated at the outset.
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> And I'll just pause here to say I have now heard evidence from four witnesses in a preliminary hearing. I am not—I am in a far different position than a Justice of the Peace who released him on consent or the Justice of the Peace who varied a condition of that house arrest on consent. Further,
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> ...The fact that they consented to a revocation of house arrest and allowed him to be in persons houses, again, that's the Crown's position to make. They've held themselves a little bit vulnerable in my respectful view, but I've heard witnesses under oath in this courtroom give evidence. I am in a different position than either of those Justices of the Peace or either of those Crowns who took those positions. I have duty to protect the public.

[15] The accused's mother was then called to testify. After hearing argument from counsel, Justice Baldwin made her ruling as follows:

> THE COURT: Thank you. Well, as I indicated at the outset of this hearing on the issue of judicial interim release of Mr. McDonell, I am not concerned on the primary grounds, but despite hearing the evidence from Ms. Burkholder, the mother, a well intentioned woman I'm sure, I am still not satisfied the public would be protected by the current form of release that the accused is on or any variation or tinkering of it.
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> I am concerned that the mother does not know the last name of the accused's current girlfriend. Not even sure of her first name. Not aware of where they met. Not even positive when they met. I am also concerned that he is being permitted to drive alone to and from a workplace. The mother's submission to me, and as one mother to another, I believe it to be since ma'am, "I'll have to tie him to my wrist. I will if I have to." I am sure you would, but the time for that has come and gone.
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> These charges as we have discussed, are extremely serious. We have now finished or about to finish a preliminary hearing process where there will be committal on seven counts. In my view, in order to maintain confidence in the administration of justice and that is the pubic in this province and in this country, I must detain the accused and I do so pursuant to Section 537(1)(c) of the *Criminal Code.*

Analysis

[16] A bail review proceeds according to a hybrid model, incorporating elements of a review on the record and a fresh hearing (see *R. v. Rayzak*,[2002] O.J. No. 4138 (Sup. Ct.)). As Justice Hill stated in *R. v. Reid*, [2000] O.J. No. 3603 (Sup. Ct.) at para. 7:

> A detention review pursuant to s. 520 of the Code is not a *de novo* hearing. The applicant for review must establish an error in principle in the reasoning of the show cause justice and/or a material change in circumstances since the original proceedings.

[17] There is a difference of opinion regarding the nature of the review to be conducted by a preliminary hearing judge pursuant to section 523(2)(b) of the *Criminal Code*. As Justice Trotter notes in his seminal text *The Law of Bail in Canada,* the issue is whether the court may conduct a *de novo* hearing or whether the court should only interfere with the previous order where there has been a material change in circumstances (see pages 349 to 351). Justice Trotter's view, with which I concur, is that the preliminary hearing judge should only interfere with the previous order where there has been a material change in circumstances.

[18] It would appear from the transcript of the preliminary hearing that in the instant case Justice Baldwin concluded that there had been a material change in circumstances and this is what led Her Honour to raise with counsel the possibility of revoking bail. However, as the Crown conceded, there was nothing in the evidence heard at the preliminary hearing which was in any way inconsistent with the disclosure already provided by the Crown. There was also no evidence of any breaches of any terms of the existing recognizance by the accused.

[19] Instead, as is clear from the transcript, Justice Baldwin's conclusion that there had been a material change in circumstances was founded on the fact that Mr. McDonell was going to be committed to trial. In reaching this conclusion, Justice Baldwin made an error in law. Committal for trial itself does not justify vacating a previous release order (see *R. v. Braithwaite* (1980), 57 C.C.C. (2d) 351 (N.S.C.A.)).

[20] The policy rationale for this rule is obvious. As counsel for the accused pointed out to Justice Baldwin, the purpose of the preliminary hearing from the defence's point of view in this case was strictly for discovery purposes. Defence counsel made the tactical decision, as he was entitled to do, that there would not be a full canvassing of the evidence. To rely upon the committal to trial as the basis for interference with a previous release order would be to fundamentally alter the preliminary hearing process. Moreover, revocation of bail on this basis fails to recognize the low threshold which the Crown has to meet for committal.

[21] Justice Baldwin compounded her error by engaging in an analysis which conflated the secondary and tertiary grounds. Her Honour stated at the outset that her concern was only with respect to the secondary grounds. She then went on to consider the relevant factors under the

tertiary grounds. Ultimately, the decision to detain the accused appears to have been based on a "duty to protect the public". Having reviewed her ruling carefully it is unclear to me on what basis she purported to revoke his bail. The conflation of the grounds was another error in law.

[22] I note as well that there was no evidence of any breach of any terms of the release. Justice Baldwin expressed concerns regarding the fact that the accused appeared to be in a relationship with a new woman and that his mother did not know the details regarding that relationship. There was no requirement that the accused abstain from being in the presence of all women. To the extent, therefore, that Justice Baldwin considered this a breach, this was an error in law.

[23] Pursuant to section 520(7)(e) of the *Criminal Code* I have the power to make any order under section 515 which I consider warranted. In all of the circumstances, I find that the appropriate order is to release Mr. McDonell on bail.

[24] Notwithstanding this conclusion, I am concerned about the plan of supervision being put forward by the defence. Two alternatives were proposed. The first has the accused working for his stepfather. However, this plan involved very limited direct supervision of the accused. He would be left alone for much of the day and working out of town in isolated areas. Such a plan does not provide adequate supervision of the accused.

[25] The second option proposed was that the accused work for a friend of his stepfather, a Gordon Bahm, in his vacuum truck firm. There is no affidavit evidence from Mr. Bahm regarding the nature of the work or the supervision of the accused. While strictly speaking an affidavit is not necessary (see *R v. Brooks*, 2001 CanLII 28401 (ON SC)), in this case I have only the vaguest of details regarding this employment and it is not possible on the evidence before me to evaluate the efficacy of this plan of release.

[26] In argument, counsel suggested that perhaps the accused could return to work at Richter Contracting. However, this position does not provide adequate supervision of Mr. McDonell.

[27] I conclude that the best plan of supervision is to revert to essentially the same terms as the original recognizance. To those provisions I add a term of release that Mr. McDonell is not to in the presence of any female unless under the supervision of his stepfather or his mother.

Disposition

[28] The application is granted. Release is ordered on the basis of Mr. McDonell entering into a recognizance of bail with his surety Scott Burkholder in the amount of $25,000 by he and his surety (no deposit) with the following conditions:

1. Abstain absolutely from the possession, consumption or purchase of alcohol;

2. Remain in your surety's residence at all times save and except when in the company of your surety or your mother;

3. Abstain from contacting, associating and/or communicating directly or indirectly with E.B., J.B.1, S.H., P.D., B.B., J.B.2, M.B.,, S.B. or K.B.;

4. You shall not attend within 500 metres of N[…] Street, Burlington, and you shall not attend within 500 metres of any known residence, place of employment, school, place of worship or place of recreation of the above parties and you shall not attend within 500 metres of any place where they are known to you to be;

5. Attend and actively participate in such assessments, counselling and rehabilitative programs for anger management and alcohol abuse as directed by your surety in consultation with a family doctor;

6. Sign all necessary consents and/or releases to enable your surety to monitor your compliance with and progress in all assessments, counselling and rehabilitative programs;

7. Not possess until dealt with according to law, any firearm, crossbow, prohibited weapon, restricted weapon, prohibited device, ammunition, prohibited ammunition or explosive substance or such items intended for use as a weapon as defined by the *Criminal Code of Canada*;

8. Not possess or make application for any licence or authorization pursuant to the *Firearms Act*; and

9. Not be in the presence of any female unless in the presence of your surety or your mother, except for medical emergencies.

HOURIGAN J.

Released: February 10, 2012

COURT FILE NO.: 124897/10
DATE: 2012-02-10

ONTARIO

SUPERIOR COURT OF JUSTICE

HER MAJESTY THE QUEEN

– and –

CLAY ROY MCDONELL

REASONS FOR JUDGMENT

HOURIGAN J.

Released: February 10, 2012