R. v. Downey, [2018] O.J. No. 6133

Ontario Judgments

Ontario Superior Court of Justice

Brampton, Ontario

S.B. Durno J.

Heard: November 6, 2018.

Oral judgment: November 6, 2018.

Indictment No. CR-18-00001217-0000

[2018] O.J. No. 6133

Between Her Majesty the Queen, and Marlon Downey

(54 paras.)

Counsel

M. Occhiogrosso, Counsel for the Crown.

C. Angelini, Counsel for Marlon Downey.

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OF JUSTICE R. L. THOMAS, SUPERIOR COURT

OF JUSTICE, DATED AUGUST 23, 2010

RULING AT BAIL

S.B. DURNO J. (orally)

1 Marlon Downey is awaiting trial on an indictment charging assault, uttering threats, human trafficking, procuring, advertising sexual services, receiving a material benefit from trafficking, and from sexual services, withholding documents for the purpose of human trafficking and exercising control. From reading the bail hearing transcript and conducting a judicial pre-trial in this case, the charges and the allegations are very serious. If convicted, the sentence would be a very significant penitentiary term.

2 After spending roughly two months in custody, a contested Crown onus bail hearing was held with the prosecutor seeking detention. The justice of the peace released the applicant on a recognizance in the amount of $30,000 with

his uncle as surety. The applicant seeks to vary the bail by deleting a house-arrest clause contending he has been in compliance with the bail without breaching for 14 months. When the bail was set, he was facing an assault charge in Toronto that has been withdrawn and that the Crown's case is substantially weaker after the preliminary inquiry, because the main witness testified that she continued to work as an escort at times when the applicant was not around, and after they stopped having contact. The Crown opposes the application, contending there has been no material change in circumstances, and accordingly, the application must be dismissed.

3 The application requires examination of five issues, the first two I will deal with in a few moments. The others are:

i) whether the term sough to be deleted reflects the order made by the justice of the peace

ii) whether there's been a material change in circumstances, and

iii) if so, should the bail be changed.

4 Before addressing those issues, two other issues arose in the course of the hearing. The use of occurrence reports and *R. v. Antic*, *[2017] 1 S.C.R. 509*. First, the use of occurrence reports. The evidentiary record at the bail hearing involved numerous occurrence reports that did not result in charges, let alone findings of guilt or convictions. Section 518(c) provides:

(c) the prosecutor may, in addition to any other relevant evidence, lead evidence;

(i) to prove the accused has previously been convicted of a criminal offence;

(ii) to prove that the accused has been charged with and is awaiting trial for another criminal offence;

(iii) to prove that the accused has previously committed an offence under Section 145, or

(iv) to show the circumstances of the alleged offence, particularly as they relate to the probability of conviction of the accused;...

(e) the justice may receive and base his decision on evidence considered credible or trustworthy by him in the circumstances of each case.

5 After reviewing the allegations against the applicant, his record and the outstanding charge, the Crown embarked on a recitation of numerous occurrence reports, telling the justice of the peace that in 2017 he was arrested in a car in relation to possession of 11 grams of marijuana. No charges were laid.

6 In 2016, police were called regarding a domestic disturbance between the applicant and his female companion. No charges were laid. After defence counsel objected submitted the incidents where there were no charges laid were irrelevant, His Worship ruled that they were inadmissible absent a showing that they showed "some pattern or it makes some connection, there's some nexus." Counsel has advised this morning that he was aware of the occurrence reports before the bail hearing.

7 After the ruling, the Crown said, "Occurrences dealing with allegations of violence and violence against people, or violence in terms of weapons, okay." The Crown continued, November 2016, domestic disturbance with his companion which is an allegation of violence with no charges laid. September 2013, he was present, or allegedly present, during an aggravated assault involving a shooting at the Crow Café afterhours bar.

8 2011, he was involved with the police in relation to an obstruct and utter threats. 2010, theft under for which he received a caution. 2010, interaction in relation to assaults. 2009, several interactions in relation to assaults.

9 I appreciate that as a result of the need for expeditious determinations of bail issues, that the rules of evidence are relaxed. However, they are not abdicated. In cell phone cases, we hear and read of tower dumps. Bail hearings should not become police file dumps of everything in a police file or computer with the accused's name anywhere in it. Just because a police officer has recorded something someone has told him or her in an occurrence report, does

not mean it is admissible at a bail hearing or anywhere else. It is impossible to determine if any of the uncharged incidents were "credible" or "trustworthy". There is no way to test it. No sources are given, no reasons are given why no charges were laid. The references to police being involved with him, without more, are irrelevant.

10 In his text, The Law of Bail in Canada, Justice Trotter notes that the meaning of credible or trustworthy has proven somewhat elusive. It has been suggested that credible applies to direct evidence, while trustworthy refers to hearsay evidence. The author notes the phrase might best be considered as a measure by which the court can determine the weight to be assigned to proffered evidence. This issue is traditionally evaluated by the availability of effective means of testing dependable evidence. There were no means of testing these comments.

11 Many years ago, in the well-known bail case of *R. v. Powers* *(1972), 9 C.C.C. (2d) 533* (Ont.H.C.). Justice Lerner addressed the issue as follows:

> ...the stricter application of the rules of evidence in the trial process are not necessarily applicable as long as each party has a fair opportunity of correcting or contradicting any statement or evidence he considers prejudicial to his position on such application.

12 Bearing in mind here, it was the defence position that none of these uncharged events were relevant. Further, Justice Trotter says that in the absence of an opportunity to cross-examine, it is not a barrier to admissibility, but in considering what weight to assign to hearsay evidence, a court may evaluate the circumstances in which the evidence was obtained, as well as the reliability of the ultimate source.

13 For these occurrence reports, he could do neither. Since it is impossible to evaluate the circumstances in which this evidence was obtained, or the credibility or reliability of the person who provided the information, they simply cannot be assessed.

14 To say that it is a matter of weight is problematic on these occurrence reports. It is readily apparent that they were introduced to sow the seeds that the applicant had committed numerous other assaults. Otherwise, why introduce them? What is the relevance that someone said he did something else? What is the relevance of "present at the scene of a shooting" or in a car, or that he was investigated with respect to assaults without knowing anything more. It provides no link to the allegations before the court and the issues the justice of the peace had to determine. If a piece of evidence has no weight, other than to simply pile it on to the accused, it is inadmissible.

15 Even after the ruling, the Crown continued with some incidents that were inadmissible even on the Crown's interpretation of the ruling. At the end of reciting what must have been virtually every reference to him in the police computer, the Crown said the justice had information about his criminal record and "his past antecedents".

16 In his reasons, the justice of the peace referenced 2012, 2013, 2014, and 2015 occurrence reports. With respect to any of those reports, there was simply no basis upon which they were admissible. Those conducting bail hearings should be cautious about admitting occurrence reports with no indication regarding the source of the information and nothing to indicate why no charges were laid. The effect here was to add more fuel to the Crown's fire that these occurrence reports did not merit.

17 During submissions, I mentioned that I thought there had been some recent appellate authority on occurrence reports. On further review, it was in relation to police synopses where the offender had been convicted at trials and there was no transcript. I regard a synopsis as considerably more reliable than an occurrence report. Although, synopses are not particularly reliable.

18 A synopsis is prepared when someone has reasonable and probable grounds to believe an offence has been committed and provides the source of the information upon which the probable grounds were formed. With respect to the Court of Appeal case, albeit in the context of a dangerous offender application, part of sentencing where the rules of evidence are also relaxed, the Court of Appeal held in *R. v. Williams,* *2018 ONCA 437*:

> [42] In instances such as the present case, the Crown will seek to admit and rely upon police synopsis to establish the factual basis of prior convictions in support of a dangerous offender application...police synopsis are often prepared at the time of arrest, or in the early stages of a criminal prosecution. A fuller appreciation of the facts often emerges later, such that the facts set out in the synopsis will often diverge from the facts proven at trial, or admitted on a guilty plea...
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> [44] In *J.K.L.*, this court expressed the view that it is difficult to conclude that a Crown synopsis, standing alone, is an accurate reflection of events. The court noted that the sources of information contained in the synopsis may not be specified, and an assessment of the reliability and trustworthiness of the information contained within may be difficult or impossible. [emphasis added]

19 The Court of Appeal continued:

> [45] I agree that there are issues respecting the reliability of information contained in synopses, be they labelled as police or Crown synopses. However, I do not agree with Mr. Williams' submission that synopses are wholly inadmissible at a sentencing hearing. As further explained below, the court may take a generous approach to admissibility in a dangerous offender proceeding. However, once the evidence has been admitted, the court must then grapple with the appropriate weight to be accorded to the information contained within the synopses. In the present case, the sentencing judge properly admitted the police synopses, but erred in finding that their contents had been proven beyond a reasonable doubt. However, I conclude there is no reasonable possibility this error had any impact on the outcome. I would there dismiss the appeal.

20 As indicated, a synopsis is a considerable way along the road from an occurrence report. I appreciate that s. 518 also refers to other relevant information, but many of these occurrence reports were irrelevant. To ask the justice of the peace to consider the applicant's pattern of abuse of women, is to elevate occurrence reports to convictions when there were no charges.

21 Accused persons facing a bail hearing should be prepared to address the admissible evidence, his or her criminal record, and outstanding charges. In some cases, where there is some indication of an admission or the basis of the report, it may be that uncharged incidents will be linked to the offence or complainant as occurs in some domestic assault cases and that they may be admitted, provided there is an opportunity to assess what weight can be given to them as opposed to bald statements. But they should not be routinely admitted simply because they are occurrence reports and nothing more.

22 They would never be admissible for the truth of their contents at a trial. Their reliability is suspect and cannot be tested. Indiscriminate use of occurrence reports provides a real risk that the bail hearing gets skewed by allegations that cannot be tested at the hearing.

23 It appeared, and counsel have confirmed this morning, that this was a special bail hearing, with probably a day set aside or half a day set aside for it. It may be that it would be appropriate for special bails, for Crowns to provide a typed synopsis outlining what they intend to introduce for the assistance of defence and for the justice of the peace. It would assist in terms of focusing the hearing, reducing the time, provided the accused has seen it, and with writing the reasons, but also permit both counsel to assess areas where there are going to be disputes on admissibility.

24 The second preliminary area is the submission and reply that was made that the justice of the peace did not address the latter principal as described in *Antic.* He did not. However, I am not persuaded it is an error in principle to omit any reference to *Antic* and the ladder principle in each and every bail judgment, although it may be the prudent course to follow. Mr. Angelini did not submit it was an error in principle, but he raised the issue.

25 There are cases where it is readily apparent from both counsel's submissions that the only realistic options are

a surety bail with strict terms or detention. Regardless of counsel's positions, two principles must be kept in mind:

i) the justice of the peace or judge conducting the bail hearing is not a rubber stamp, and must make an independent judicial adjudication that the positions of counsel are appropriate: *Antic*, at para. 68; *R. v. Singh*, *2018 ONSC 5336*, at paras. 24-6; and

ii) regardless of who has the onus or the positions of counsel, the justice of the peace or judge must be guided by the ladder principle in fashioning a release order: *Antic*, at para. 50.

26 Turning next to the areas noted at the outset. First, what the justice of the peace said and what the recognizance said, were different things. In granting the release, the justice of the peace held:

> As such, the court finds that the Crown did not meet its onus and Mr. Downey will be released on a recognizance in the amount of $30,000 no deposit, and Stanley Stewart will be named as surety with the following conditions. That he will reside with the surety and abide by the surety's rules. He is to have no contact or communication, directly or indirectly, with J.L., or any member of her family, save and except through legal counsel. He is not to attend any hotels, motels, except in the direct presence of his surety. He is to be in the presence of his surety at all times except for personal medical emergencies by ambulance or with written, dated permission from the surety to be with an adult family member over the age of 25.

27 And there are other terms that do not relate to who he can with and where he can be. Counsel asked further down, "...if the circumstances where Mr. Downey is at home, but Mr. Stewart is out of the home...for whatever reason, would that require written permission?" And the justice said:

> Well as part of the court's consideration when making a release is on the premise the surety's going to get the job done... If the surety for any reason cannot be available for an hour or two, five hours, then this court requires that he designates somebody to do that job. It can't be left up willy-nilly... So there are adults in the home over 25.

28 There is no direct reference to house arrest or to remaining in the residence unless with the surety or a family member over the age of 25 in the recognizance. The justice of the peace's order was for him to live with his surety, his uncle, and be in the presence of his uncle at all times, except for medical emergencies by ambulance or if he was a family member who was at least 25, provided his uncle gave him written, dated permission.

29 The release order terms read: remain in your residence at all times except for personal medical emergencies by ambulance, unless you are in the presence of your surety or with a written, dated permission of your surety, to be with a family member over the age of 25. The recognizance added being in the residence at all times but leaves open that he could be alone in the residence, which is the normal house arrest term, from my experience. The term His Worship actually imposed was he had to be with his uncle or another an adult over 25, every hour of every day.

30 In the time available, I was unable to find any authorities on this issue. Neither were counsel. I agree with the approach of counsel today and find the applicant was bound by the terms of the release that he signed and will apply that finding as the basis for the balance of the reasons. Crown counsel has fairly indicated that she does not seek to edit the actual terms His Worship directed to apply.

31 Has there been a material change in circumstances? In *R. v. St. Cloud*, the Supreme Court of Canada examined the material change in circumstances criteria, finding the appellate fresh-evidence criteria should be applied with appropriate modifications. Two of the criteria are not at issue here, the information was not available at the initial bail hearing and there is no issue that the bases were credible, reasonably capable of belief. The remaining criteria are at play. They were described by Justice Wagner, as follows:

> [135] ...the evidence obviously does have to bea[r] upon a decisive or potentially decisive issue at trial...it will suffice if the evidence is relevant for the purposes of s. 515(10)... where, more specifically, the third

> ground of detention under s. 515(10)(c), the one at issue here is concerned, I note that the justice must consider "all the circumstances". The second *Palmer* criterion will therefore rarely be decisive in the context of an application for review under ss. 520 and 521...since the range of 'relevant evidence' will generally be quite broad.
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> [137] ...the new evidence must be such that it is reasonable to think, having regard to all the relevant circumstances, that it could have affected the balancing exercise engaged in by the justice under s. 515(10)(c)... The new evidence must therefore be significant.

32 As worded in the notice of application, the three bases are:

1. The applicant has been perfectly compliant with the bail for 14 months, showing he is amenable to supervision and reduces the need for a house-arrest term,
2. When the bail was set, he was facing an assault charge in Toronto, which was withdrawn on July 4, 2018, and
3. The Crown's case got substantially weaker at the preliminary inquiry when the complainant admitted she continued to work as an escort after she left the applicant, and while they were still together, but he was not around.

33 The applicant's affidavit states that he has been confined to his home for days and weeks at a time. His uncle works full time and does not always have work for the applicant. While there are other adults in the house, on this application, the uncontested position is that the only other person with whom he can be out of the house is his 80-year-old grandmother. This has been hard on him as he cannot exercise, socialize, or pick up his daughter from daycare. He cannot work full time or further his education.

34 The applicant's surety, his uncle, swore that his nephew had been perfectly compliant with all the terms of his release. He supports removing the house-arrest term as the applicant has demonstrated maturity, a good work ethic, and positive attitude over the past year or so. He does not feel house arrest or a curfew is necessary. The surety lives with his mother, his girlfriend, grand-daughter, and his son, as well as the applicant. He operates his own maintenance and renovation business, working full time on a contract basis and varied hours. The applicant has worked with his uncle on several jobs since his release.

35 The Crown submits there is no material change, viewing the bases in isolation or collectively. In effect, the strict terms are working and will ensure future compliance by a person with a proven track record of non-compliance and violence against women. The surety can take the applicant out of the house, or others could, so he could pursue his education. No further details were provided as to what that would be, and there is considerable flexibility with three adults and the applicant's uncle permitted to accompany him out of the house.

36 The applicant's criminal record is as follows. Youth Court entries from 2010 and 2012 for robbery, theft under, two uttering threats and an assault. The only jail term was 10 days in addition to 10 days pre-trial custody. As an adult, he has two 2013 failing to comply with undertakings, two counts of assault in 2014, a fail to comply with a recognizance in 2015, and assault with a weapon in 2015. His jail terms were 22 days pre-trial custody credit in 2013, seven days pre-trial credit in 2013, 30 days in 2014, and 20 days in 2015.

37 The question is could the proposed fresh evidence have been expected to have affected the justice of the peace's balancing of the factors and imposing the terms that he did. I do not see how the withdrawal of the Toronto charge can be viewed as something that would have affected the ruling. That allegation post-dated the Brampton charges, so it was a Crown onus bail hearing here. Neither do I find that the preliminary inquiry evidence would have affected the terms of release. He still faces serious charges and while there is some modification of the allegations, given all the charges in his record, I cannot see how that would have impacted on the release terms, and it's also so particular in light of all of the massive information that was put before the justice of the peace.

38 In addition, the charges have gone from an officer having reasonable and probable grounds to a judicial determination or a concession if committal for trial was not contested, that there is evidence upon which a reasonable jury, properly instructed, could find the applicant guilty.

39 I reach a different result in regards to the 14 months of house arrest for the following reasons. In addition, the applicant has set a trial date for July 22, 2019 so on the Crown's position, he will be on this form of release for 22 or 23 months.

40 First, in *R. v. Saracino*, *(1989), 47 C.C.C. (3d) 185* (Ont. H.C.), Justice Doherty, as he then was, held:

> A right of review (subject to the requirement of leave if the earlier review was held within 30 days) is more consistent with our bail system which emphasizes flexibility and the ready availability of the means to reassess or review an accused's bail status while the charges against him are working their way through our system of criminal justice.

41 I appreciate that those comments were made 27 years before *St. Cloud* but I find they remain a consideration, one of many. The Crown fairly agreed that the comments remain a valid consideration. Second, the term at issue is the most restrictive form of release, although it is not pure house arrest, nor as restrictive as the terms in *R. v. Downes* *(2006), 79 O.R. (3d) 321*. In *Downes*, Justice Rosenberg held:

> [27] ...even the most stringent bail conditions, including house arrest, tend to allow the offender the opportunity to work, attend school, attend medical appointments, conduct religious worship, and address personal needs. The rehabilitative and treatment options that are often denied an accused in pre-trial custody are usually available, even to an accused on house arrest.

42 And further:

> [29] On the other hand, some of the same considerations that justify credit for pre-sentence custody apply to an offender who has spent a long time under house arrest. Stringent bail conditions, especially house arrest, represent an infringement on liberty and are, to that extent, inconsistent with the fundamental principle on the presumption of innocence. House arrest is a form of punishment, albeit of a different character than actual incarceration. Pre-sentence house arrest varies little in character from the house arrest that is often imposed as a term of a conditional sentence under s. 742.1 of the *Criminal Code.*

43 Too many accused persons were being released on house arrest terms, by which I mean stay in your house with exceptions, not a curfew. Counsel advised that post-*Antic*, there are fewer house arrest orders. That is a very, very good thing. The term is appropriate in some cases but with the exception of few, should not be the starting or the end-point of a bail hearing. That form of order is close to the top of the s. 515 ladder as explained in *Antic*.

44 The future impact of restrictive bail terms cannot be ignored. If this case ever gets to sentencing, it would be a rare case where Crown and defence agree on *Downes* credit, that can significantly reduce a sentence.

45 Third, in *The Law of Bail*, Third Edition, the author outlined changed circumstances which involved events in the criminal trial process of which a reviewing judge may take judicial notice. Others require that some evidence be adduced. And the author also noted that many of the examples listed pre-date the *St. Cloud* decision, including number six in his list, "The passage of a significant amount of time spent in pre-trial custody (in relation to the appropriate...sentence)."

46 I appreciate that bail is not jail; *R. v. Pandu*, *2007 ONCA 598*, but find that the passage of a significant amount of time under strict house arrest with full compliance, can amount to or at least contribute to a material change in circumstances. When the terms were set, no one knew how long the case would be outstanding. Certainly, the

Crown indicated that it would be known the case could take a long time. That is right, it could. On other occasions, it does not take that long.

47 I find that the applicant's more than 14 months on house arrest is a factor that qualifies as a material change in circumstances, where he has not had any breaches. His surety and the applicant in their affidavits outline that he had followed all the terms without fail.

48 In reaching this conclusion, I also take into consideration that he will be on bail for 22 or 23 months at the end of his trial. Since house arrest is a form of punishment, I find that waiting for his trial for that period contributes to the material change in circumstances. Albeit in the context of people in jail, the time to trial has previously been a factor in support of release in some cases: *R. v. Lamb*, *[1995] O.J. No. 5120* (Gen. Div); *R. v. Nichols*, *[1990] O.J. No. 3199* (Gen. Div); *R. v. Hadani*, *[1999] B.C.J. No. 1150* (C.A.).

49 With respect to the uncertainty as to how long an individual is going to be on house arrest, there can be pleas, withdrawals, preferred direct indictments or other events. It is not the same as being in jail but there are significant restrictions on an individual's liberty.

50 The availability of detention or bail reviews cannot be ignored, and the right to review the terms previously imposed. I am not suggesting that there is a magical line in the sand for reviewing whether restrictive terms or any terms should remain. However, it certainly is not a matter of a few months. Each case will have to be assessed on its own merits, on the basis of the evidence presented.

51 In all the circumstances in this case, for this applicant, I find that there has been a material change on that basis. He has done very well on bail. It is very restrictive. In reaching that conclusion, I've also considered the justice of the peace was given evidence that was of no evidentiary value, and it was referenced, albeit without assigning it any specific weight one way or the other.

52 I am prepared to change the bail, but not to the extent the surety suggested. The new recognizance will be with the same surety, same amount and terms except the house arrest term is deleted and replaced with be inside your residence each and every day between the hours of 9:00 p.m. and 6:00 a.m., unless you are in the presence of your surety or a family member 25 years of age or older, with a signed and dated, written consent of the surety.

...PORTION OF PROCEEDING RECORDED BUT NOT TRANSCRIBED

53 Before reading the endorsement, with respect to the occurrence report issue in terms of having focussed and efficient bail hearings, to ask someone to respond to, challenge or call evidence on a raft of occurrence reports you will not be setting aside days for a bail hearings, you will be setting aside weeks.

54 For the reasons dictated, application granted, new release order to issue, same surety amount. And term, except clause 2 is deleted and replaced with the inside your residence each and every day between the hours of 9:00 p.m. and 6:00 a.m. unless you are in the presence of your surety or a family member 25 years of age or older. Or, with the written -- a signed and dated consent of the surety, or for medical emergencies for himself or for any member of his immediate family. The old bail applies until the new order is signed.

...WHEREUPON THIS MATTER WAS CONCLUDED
