SUPREME COURT OF NOVA SCOTIA
Citation: R. v. K.C., 2020 NSSC 186

Date: 20200615
Docket: 498103
Registry: Halifax

Between:

Her Majesty The Queen

v.

K.C.

Restriction on Publication – sections 517 of the *Criminal Code*

Decision on Bail

Judge:	The Honourable Justice Peter P. Rosinski
Heard:	May 26, 2020, in Halifax, Nova Scotia
Counsel:	Rick Woodburn and Scott Morrison, Crown Attorney Kyle Williams, Defence Attorney

By the Court:

Introduction

[1] On December 2, 2019, SFA was transported to the Central Nova Scotia Correctional Facility (a.k.a. Burnside) to join the inmate population as a remanded prisoner. Inside the institution he was admitted to the North 3 Wing (general population) and assigned to Cell 8.

[2] All of the following can be seen on videotaped recordings from four perspectives inside North 3 Wing. At 7:24 PM he entered that wing. As he entered his cell at 7:49 PM, 6 inmates rushed in immediately behind him. K.C. followed in behind them. At 7:49 PM K.C. is shown on video running down the stairs from the top of the N3 Range cells area directly to the door of cell 8-at the door of cell 8 he is seen repeatedly striking and kicking someone in the cell. He entered the cell. Shortly thereafter the cell door was closed by two inmates outside the cell.

[3] Immediately an attack began upon SFA. It left SFA unconscious while still being beaten. The attack lasted three minutes. When correctional officers were able to finally enter the cell, they found SFA, with approximately 4 to 5 stab

wounds to his front chest, 7 stab wounds to his right middle to upper back and 2 in his left middle to upper back area; lacerations to face including his eye, lip, and forehead. He had a partially collapsed right lung, could not breathe, and a minimally displaced rib fracture.

[4] No assistance could be provided to SFA because approximately 10 to 15 other inmates congregated right in front of cell 8 and purposefully obstructed numerous correctional officers who flooded into the area from getting to cell 8 to prevent any further harm to SFA.

[5] After the three-minute attack, inmates on the outside opened the door and the inmates inside slowly dispersed. K.C. remained inside the cell throughout the time of the assault.

[6] Cell 8 was covered in blood. “High velocity blood splatter” suggests a frenzied attack. Preliminary DNA testing concluded that SFA’s DNA is on one of K.C.’s sneakers.

[7] K.C. is detained in custody pending trial. He is jointly charged that he, on December 2, 2019 with 14 other inmates:

1. s. 465 *CC* - conspired to murder SFA (who had just arrived as an inmate that day, and was placed on the same range as each of the accused just 25 minutes before the attack upon him happened)
2. s. 239 *CC* - attempted to murder SFA
3. s. 279 *CC* - unlawfully confine SFA
4. s. 268 *CC* - commit an aggravated assault on SFA by unlawfully wounding, maiming, disfiguring, or endangering the life of SFA
5. s. 267(a) *CC* - in committing an assault use a weapon or threaten to use a weapon or imitation thereof
6. s. 129 *CC* - wilfully and unlawfully obstruct correctional officers while engaged in the lawful execution of their duty (in attempting to get to the cell of SFA, in order to *inter alia*, protect him from the other inmates).

[8] He seeks bail pending the trial of his charges. This is a reverse onus situation pursuant to s. 515(6) *CC* (regarding the non-section 469 *CC* offences because he is "not ordinarily resident in Canada") – and 522(2) *CC* (regarding the s. 469 *CC* offence).

K.C.'s proposed release plan[1]

[9] The plan is for K.C. to be under house arrest, and that he be subject to electronic monitoring by way of an ankle bracelet with GPS capability if approved by the Nova Scotia Department of Correctional Services as suitable, given the circumstances of the proposed location of his residence and those related to any permitted other activities requiring him to leave the residence, including the sufficiency of Internet service at any of those locations.

K.C.'s position

[10] K.C. testified.

[11] He was born in Jamaica on January 15, 1990. He is a Jamaican national, and has worked in Canada, for a number of months each year since 2015 on a seasonal

[1] His preliminary inquiry on these serious charges is set for January 4-8, 2021; his plan included living with an elderly individual S.L. until then, but she was not prepared to be a *surety* – then – after the hearing, by letter dated May 28, 2020, K.C.'s counsel confirmed (that S.L. informed him) "that she is no longer able to provide K.C. with living accommodations… I do not foresee any viable options being put in place prior to Tuesday's appearance" [the matter was set for decision June 2 at 2 PM]. In a further letter June 1, 2020 his counsel requested that while "S.L.'s withdrawal does not preclude the court from rendering a decision [on June 2],… It is respectfully submitted that the fundamental principle of fairness calls for an adjournment of K.C.'s matter" [in order to allow him to attempt to arrange for a substitute landlord]. On June 2 the matter was therefore adjourned to June 15, 2020. By letter dated June 11, 2020, K.C.'s counsel advised that he was unable to fill the gap in his release plan resulting from S.L.'s unexpected withdrawal of living accommodations. I will make my decision today based on the proposed original release plan which has K.C. living with "someone" suitable who is also not a surety akin to S.L. I attach as an Appendix to this decision, a copy of the proposed order for release from custody on bail application presented as part of the May 11, 2020 brief submitted by Mr. Williams on behalf of K.C..

worker visa. From April 1 2018 he was working in Nova Scotia for the ensuing six to eight months. During this time he met JM, who had a number of children at that time. They began an intimate relationship. On October 8, 2018 he was arrested for an assault upon her, and her young son, as well as for uttering threats to kill her- ss. 266 and 264.1(1)(a) *CC*. He was released on a recognizance.

[12] In order to allow him to depart from Canada to Jamaica on December 27, 2018 (i.e. I infer that his work visa had expired) he had been authorized to do so by an emergency certificate issued by Jamaican authorities, since he had to render his passport to Canadian authorities. I infer he did depart Canada for Jamaica as scheduled.

[13] On January 2, 2019, his counsel appeared on his behalf and scheduled K.C.'s return to court for April 1, 2019. In the interim K.C. remained in Jamaica. He returned to Canada as expected on March 28, 2019. While in Jamaica, he had impregnated a woman who was a friend of his sister. Their son was born September 9, 2019.

[14] On August 22, 2019, he was found guilty of the assault and threats against JM – the assault charge against her young son was dismissed for lack of proof beyond reasonable doubt that it was an intentional physical movement by K.C. that

caused the young son to fall and sustain an injury. K.C. testified. The trial judge found that K.C. confronted JM about the purported infidelity by JM. She asked him to leave her home. He refused and attacked her pushing her to the ground and punching her at least nine times as well as threatening to kill her. Photos before me capture the consequent visible injuries. At the time of the assault four of her children were present in the home and two of them could see the assault taking place. When he left the premises he took both the home phone and JM's cell phone. He did not go very far, and then realizing an ambulance was in attendance at the home, he made his way back to an area close to the home when police officers arrived and noticed him. He was arrested for the assault and threats against JM and an assault against her young son.

[15] On November 12, 2019, he was sentenced to 60 days in custody on both charges concurrently (typically two thirds of such sentences are served – i.e. 40 days, which would have expired on approximately December 22, 2019).

[16] Having committed those offences, he also came to the attention of the Canadian Border Services Agency (CBSA). His most recent work permit was due to expire on December 15, 2019. CBSA issued a report and other documents on November 19, 2019. Pursuant to those, K.C.'s status was, and remains, as

considered “inadmissible for re-entry to Canada” and subject to a deportation order pursuant to section 228 of the Immigration and Refugee Protection Regulations.

[17] Presently, K.C. believes that, even if he is released by this Court, he may very well be detained by separate processes of the CBSA. He cannot leave Canada and return as a result of the processes involving CBSA. He cannot legally work in Canada.

[18] K.C. says because he left Canada while facing the earlier criminal charges and returned, the court should be similarly inclined to see him released pending the outcome of his more recent charges.

[19] He indicated that he has no one who could act as his surety, however there is S.L., a lady born in 1939, who he says has offered him a room in her house as a place to stay as these matters are processed. He met her and her daughter through church in the area where the original incident happened. He says his sister in Jamaica has been keeping in contact with S.L. and is trying to do whatever else she can for him in the circumstances.

[20] He conceded in cross-examination that he had never been to her house, he does not know her last name, and the last time he spoke with her has been not since “months”. No discussions have been held between he and S.L. regarding the

amount of rent. He did concede that she had mental health issues and her daughter is usually required to drive her to church.

[21] He was adamant that the only reasonable alternative he has to make a decent living is to continue the seasonal work program in Canada.

[22] He says he is committed to trying to get a pardon for his October 2018 charges (realizing it takes five years) and to hopefully move himself and his son and family to Canada one day.

[23] His counsel points out that he is prepared to be bound by electronic monitoring, and CBSA considered him a flight risk and danger to the public *merely because* he is a foreign national charged with very serious crimes, and he had previously been convicted of assault and threats.

[24] His counsel notes he did not breach his release conditions in any fashion on the earlier charges, and he has no passport - moreover, transportation out of Canada for someone in his position is not readily accessible, if even available.

[25] His counsel points out that the assault on JM was a “crime of passion” sparked by serious concerns of infidelity. I take him to mean that it was impulsive, and arguably out of character for K.C. who has no other criminal record in Canada, or in Jamaica he said.

[26] His counsel suggests the case against him here is not overwhelming, and it appears his criminal role, if any, is more modest than that of many others charged.

[27] It was suggested that he has some difficulty breathing at times, and arguably he might be seen to be someone similar to an inmate in the position of having asthma. This has more relevance presently as a result of Covid 19. K.C. described the cleaning regime in the Burnside correctional facility as substandard. I note here that there was however no reliable evidence in either of those regards.

[28] He conceded that he got a disciplinary infraction notification in relation to an incident on January 25, 2020. He suggested that the claimed "refusal to lockdown" was not an order he disobeyed – he said at the time the order was given, he was laying on his bed and he considered it "their duty to close my door".

[29] He also agreed that he had been on the phone outside of his cell when other inmates started destroying facility property and as a result an order to lockdown [or return to their cells immediately] was given to all inmates including K.C.. Correctional officers' reports suggest that all inmates refused to lockdown initially and that K.C. specifically was still on the phone thereafter, he says, speaking to family in Jamaica. Then he walked to the cell and lay down on his bed. Correctional officers returned (he said "suited up" with shields) and told him to

close his cell door. Regarding the correctional officers being "suited up" he stated: "I gave them no excuse to do anything to me".

[30] In cross-examination it was suggested to him that official reports indicate he did not immediately lockdown or go back to his cell and he did not go back to his cell until reinforcements of correctional officers showed up and then he went into his cell. He agreed he had been found guilty after an adjudication for failure to obey the order and received at least 15 days punishment in segregation thereafter.

[31] His counsel argues that *in jail*, inmates have to be aware of the expectations of other inmates regarding how they behave in relation to each other, and that if some were non-compliant with an order on January 25, it is generally understood that the other inmates should not be seen to break ranks with those most implicated in the disobedient behaviour.

The Crown position

[32] The Crown says K.C. should be refused release on the basis of ss. 515(10)(a) and (c).

[33] As to flight risk, the Crown points out K.C. has nothing to lose by fleeing. Both counsel suggested, and I have not examined this myself, that Canada does not

have an extradition treaty with Jamaica. Even if it did, the existence of the process is no guarantee of a resultant extradition.

[34] The Crown says that K.C.'s previous trip to Jamaica and return to Canada was in completely different circumstances. Comparing the assault and threats in 2018 to the present charges, is truly comparing "apples and oranges".

[35] The Crown says that K.C.'s release plan is very weak. There is no surety who will supervise K.C.'s continued presence in Nova Scotia, and who could alert authorities if he has fled or intends to flee. We have no evidence from the proposed landlord S.L., or anyone in her place to confirm that the home is even really available for K.C.. Notably S.L. would appear to have some dementia related illness.

[36] They say the notion of electronic monitoring is very questionable given that no one testified or sent a written letter outlining the circumstances of electronic monitoring in Nova Scotia, specifically regarding whether it is even feasible in and around the home and area of S.L. as a result of Internet connectivity issues, and that frankly, K.C. would be so strongly motivated to get out of Canada that this would not prevent him from making serious efforts to do so.

[37] While CBSA may also detain K.C. if this court releases him, the Crown notes that even if they do not, he cannot work here in any event.

[38] The Crown also points out that the case against K.C. is strong as it relies primarily on videotaped recordings, supplemented by observations of correctional officers who were present at the time of these events, and recorded those observations such as what people said, and who said what, very shortly after the events in question. Moreover, even if K.C. is not as easily assigned criminal responsibility for attempted murder and conspiracy to commit murder as some of the other accused are, they say the evidence very strongly suggests he may be convicted of aggravated assault.

[39] They say a telling incident is his sustained disobeying of the lockdown order on January 25, 2020. In their view, this is a continuation of his criminal behaviour which started in October 2018, and significantly escalated on December 2, 2019.

Summary of findings and conclusions

[40] I have recently canvassed some of these first instance bail issues in *R v BTD* 2020 NSSC 165.

Primary ground

[41] K.C. repeated “I live by my word” or “all I have is my word” when presenting his evidence about why the court should trust him in these circumstances and release him.

[42] Generally speaking, I found K.C.’s testimony not reliable. His testimony suggested at first that he was somehow familiar with his proposed landlord SL, and her home. He was not. He was insistent that he had not punched JM in some of the areas where recent bruising is very visible on the photos tendered in evidence. On balance, I conclude that the trial judge found he was responsible.

[43] He testified that he returned to Canada in March 2019 to face trial on the charges involving JM because “the case was strong on me – I knew I would be going behind bars”. Yet he suggested that at the same time he still had a reasonable prospect of providing his son (born in September 2019) with a better life in Canada, and that once he got a pardon he might be able to move his family to Canada. I note that coincidently this should’ve suggested to him a very great incentive to stay out of trouble.

[44] The videotaped evidence speaks for itself. On December 2, 2019, K.C. *ran towards trouble*. The Crown has a very strong case that *he wanted to be in the middle of trouble* – in the cell of SFA.

[45] I find that there is a substantial likelihood that he will be found guilty of *at least* aggravated assault (see *R v Metzler* 2008 NSCA 26; *R v Gervais*, 2020 ABCA 221).

[46] He gave evidence that he suffered from some respiratory disease, which his counsel put forward as an argument that his continued detention was problematic from the Covid 19 perspective. There is simply insufficient evidence to draw that conclusion. Covid 19 is a neutral factor in this case.

[47] His suggestion that the cleaning regime at the Burnside correctional facility is dangerously inadequate is not persuasive. This may be because he does not understand the intricacies of the infection and transmission of Covid 19. I rely on the exhibits filed including that of John Scoville, Director of Corrections.

[48] K.C.'s reference to the January 25th 2020, lockdown incident, suggests he did nothing wrong. Even on his own evidence, that he laid on the bed rather than lockdown his own cell door, I conclude his behaviour was defiant, and could

attract a notification for not obeying an order. He clearly acknowledged he was aware there was an order for lockdown. He knew what lockdown meant.

[49] Based on my assessment of the credible and trustworthy evidence and reliable representations of the circumstances that I accept, I conclude there is a real risk that he will attempt to flee the jurisdiction of Canada if he is released. He has little to lose in Canada- and could gain his freedom in Jamaica.

[50] He has not satisfied me that he should be released under the primary ground of s. 515.

Tertiary ground

[51] In relation to the tertiary ground, I find that: releasing K.C. would undermine confidence in the administration of justice by a reasonable and dispassionate member of the public who is aware of all the circumstances and the relevant law, including the Charter of Rights.

[52] I will examine briefly the four enumerated factors, and include my conclusions thereafter:

1. the apparent strength of the Crown's case – the case against him is strong, in relation to the following offences: assault with a weapon;

aggravated assault; attempted murder; conspiracy to commit murder. The case relies largely on videotaped evidence interspersed with recollections from correctional officers of what individuals were shouting or saying at the relevant times. K.C. made a concerted effort to get inside the cell of SFA, running down the stairs in haste, directly to that cell; was seen speaking to B.J.M. (who arguably orchestrated this attack- and who was denied bail by Justice Denise Boudreau in an oral decision which I have listened to only in order to ensure we are consistently interpreting the legal principles involved) very shortly before the attack on SFA in his cell; was seen kicking and punching into the cell area before the door was closed by two inmates on the outside; and all the while was one of seven people who were inside the cell for approximately three minutes during which very many injuries were inflicted on SFA.

2. the gravity of the offences – the nature of the attack and the injuries to SFA are very high on the blameworthiness scale. The maximum penalties are among the highest available in the *Criminal Code*.
3. The circumstances surrounding the commission of the offences, including whether a firearm was used – no firearms were used, but

sharp objects were used in place of knives by one or more of the seven attackers; seven individuals against one person in a confined locked space; what very much appears to have been a coordinated, and inferentially therefore discussed before-hand, plan of attack, carried out in part in a conspicuously surveilled location inside a prison – suggests a previously unseen level of audacity and threat to ongoing control of the institution by Correctional Services.

4. that the accused is liable on conviction for potentially lengthy terms of imprisonment – as examples, assault with a weapon carries a maximum of 10 years in custody, whereas aggravated assault has a maximum of 14 years in custody. If convicted, there is a substantial likelihood that the sentence will be in a federal penitentiary.

[53] After considering the circumstances of this case in the context of the tertiary ground, I conclude that K.C. has not satisfied me that he should be released. He has no proposed surety, no ties to Canada and a very weak release plan. He has not satisfied me that a dispassionate member of the public, apprised of all the circumstances and aware of the law including the Charter of Rights, would continue to have confidence in the administration of justice if he were released.

Conclusion

[54] Under both the primary and tertiary grounds in s. 515 (10) *CC*, I conclude that K.C. has not satisfied me he should be released. Therefore, he will be detained in custody pending his trial**.**

Rosinski, J.