R. v. Rootenberg

Ontario Judgments

Ontario Superior Court of Justice

Toronto, Ontario

M.F. Brown J.

Heard: September 1, 2017.

Oral judgment: September 1, 2017.

[2017] O.J. No. 5324

Between Shaun Rootenberg, and Her Majesty the Queen

(16 paras.)

Counsel

Mr. M. Coristine: for the Crown.

Mr. S. Rootenberg: on his own behalf.

REASONS FOR JUDGMENT

M.F. BROWN J. (orally)

1 These are my oral Reasons for Judgment on the application by the applicant Shaun Rootenberg under s. 520 of the *Criminal Code* for a review of the order of Justice Robert Clark of July 10, 2017.

2 In his Reasons of July 10, 2017, reviewing the detention order of Justice of the Peace Deacon of June 8, 2017, Justice Clark found that Justice of the Peace Deacon had erred in law and proceeded thereafter, as he was entitled to do, to consider the matter *de novo*. Justice Clark then proceeded to detain the applicant on the secondary ground. It is that order of Justice Clark that the applicant now seeks to review. See *R. v. Brahaney* *2015 ONSC 5877* at para. 10.

3 One issue I wish to address at the very beginning of this review is that this matter proceeded on consent of the parties without an official transcript of the ruling of Justice Clark. I expressed some reservation about proceeding in this manner and offered to adjourn the matter until next week to obtain a transcript of the Reasons of Justice Clark who has been away on summer holidays and quite understandably has not been able to approve the transcription of his Reasons, which I understand have now been completed. However, the applicant, who is self-

represented, declined this invitation and indicated he would like to proceed today on the basis of the audio DVD of Justice Clark's ruling, which he has heard. The Crown also agreed to proceed in this fashion and so I agreed to do so. A copy of the audio DVD of Justice Clark's ruling has been made an exhibit on this review along with the Application Record, which, among other things, includes a transcript of the proceedings before Justice Clark on July 10, 2017 without his ruling and Justice of the Peace Deacon on June 8, 2017.

4 As was made clear by Justice Wagner in *R. v. St. Cloud* [2015] 2 S.C.R. 328 at paras. 92, 120, and 121, a review under s. 520 does not confer an open ended discretion on the reviewing judge to vary the decision being reviewed concerning the detention or release of the accused. A reviewing judge can only intervene where relevant new evidence is tendered showing a material and relevant change in the circumstances of the case, where an error of law has been made, or finally, where the decision was clearly inappropriate.

5 In this case, I am satisfied that Justice Clark made no errors in law in his decision of July 10, 2017. Nor can it be said that his decision was clearly inappropriate. The real issue before me on this review is, has the applicant submitted relevant new evidence that shows a material and relevant change in the circumstances of this case to permit me to exercise my power of review?

6 The proposed super vision plan before Justice Clark was that the applicant's mother, acting as surety, would post $15,000 by way of a bond and supervise the applicant in a house arrest situation involving GPS monitoring. The proposed bond of $15,000 was twice what the applicant's mother had originally considered posting at the original bail hearing on June 8, 2017.

7 Justice Clark was of the view that even if the dollar amount posted were adequate, which in his view it was not, he was not persuaded that the applicant's elderly mother was a suitable person to oversee the applicant's behaviour. Justice Clark noted regarding the amount of recognizance that given the fact that the applicant previously absconded when his brother had pledged something in the order of $150,000, the amount pledged of $15,000 was not, in Justice Clark's assessment of the applicant's background, sufficient. As well, as noted by Justice Clark, the proposed GPS monitoring scheme merely tells the monitoring agency where the person is at any given time, but it tells the agency nothing about what the person is doing at any given point in time. The nature of these charges is such that they can be committed from virtually anywhere.

8 It was Justice Clark's view that, as the proposed bail was insufficient and the proposed surety unsuitable for the reasons he expressed, there would be a substantial risk that the applicant, if admitted to bail, would commit further and other offences.

9 The proposed supervision plan now before me has the applicant's 87-year-old father in place of his mother as surety. The amount of proposed recognizance for his father remains at $15,000. On behalf of the applicant's sister who is also proposing to come forward now as a surety for the applicant, she is prepared to pledge as recognizance $45,000 of her RRSPs for a total amount of $60,000 between the two sureties. If released, the supervision plan is for the applicant to reside with either one of his sureties, his father or his sister at their homes each and every night, again with essentially house arrest conditions and GPS monitoring. The applicant argues there has been a material change in circumstances with the added surety of his sister

who is prepared to pledge an additional $45,000 and supervise him, as well as the addition of his father who is prepared to supervise him.

10 In my view, these new sureties with the proposed supervision plan do not amount to a material change in circumstances that could materially call into question the continued validity of the reasons for detention of the applicant.

11 I agree with the position of the Crown that what may be described as the new proposed plan for supervision amounts to little more than a reshuffling of the deck. The comments of Hill J. in *R. v. Ferguson*, *[2002] O.J. No. 1969* at para. 17, are appropriate when he states, and I quote :

> As to the first point, the advancement of fresh prospective sureties in a bail review, I would think that this approach to support an argument of unjustified detention is generally destined to fail. Simply re-shuffling the deck of prospective sureties to draw out new ones, or a greater number, does not in itself amount to a material change in circumstances. Only where it can be said that the commitment and nature of the newly proffered suretyship materially calls into question the continued validity of the reasons for detention can it reasonably be said that the submitted material change in circumstances is relevant to the existing cause of detention.

12 In saying that there is no material change in circumstances I mean no disrespect to the applicant's father or his sister who are good, well-meaning people who are coming forward to assist their brother and son. They undoubtedly have the best interests of the applicant at heart. What is proposed, however, in the new plan of release is really little different from what was proposed before Justice Clark. Even with an additional $45,000 pledged and new sureties, I am of the view that the applicant will remain a substantial risk to the public if released on the proposed plan.

13 As noted by Justice Clark, in the past the applicant has failed to appear for a preliminary inquiry, betrayed the trust of his brother, who was surety for him at that time and put his brother's pledged funds at risk. As well, as noted by Justice Clark, the applicant has committed offences similar to those with which he is presently charged. He not only breached his bail on earlier occasions, but on one of those occasions he committed a further offence while on bail. Indeed, having breached his bail by failing to appear and leaving his brother to potentially suffer the consequences, including the potential of losing a very significant sum of money, he went on to impersonate his brother in the course of committing yet another fraud.

14 The applicant's father is 89 years old and his sister, although prepared to supervise her brother, has a job as an occupational therapist. While her hours vary and she can set her own schedule, she cannot supervise her brother 24/7. I am not satisfied the sureties could adequately supervise the applicant, even with the best of intentions. Given the past antecedents of the applicant, I am not satisfied that this new plan would diminish the substantial risk that this applicant, if admitted to bail, would commit offences.

15 The commitment and nature of the newly proffered suretyship does not materially call into question the continued validity of the reasons for the detention of the applicant as expressed by

Justice Clark. Therefore, it cannot reasonably be said that the submitted material change in circumstances is relevant to the existing cause of detention.

16 Accordingly, because there has been no material change in circumstances on the record before me, the application for review must be dismissed.

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