
CANADA / JUDGMENT

R. v. Razavi Zadeh

2015 BCSC 1022

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DECIDED

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IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

R. v. Razavi Zadeh,

2015 BCSC 1022

Date: 20150202

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Regina

v.

Sayed Nima Razavi Zadeh

Restriction on Publication: Pursuant to s. 486.4(2) C.C.C.

Before: The Honourable Madam Justice Duncan

On appeal from: Provincial Court of British Columbia, December 8, 2014

(R. v. Razavi Zadeh, Vancouver Docket No. 232534-4-C)

Oral Reasons for Judgment

Counsel for the Crown:

S.A. Cunningham, Q.C.

Counsel for the Accused:

H.M. Patey

Place and Date of Trial/Hearing:

Vancouver, B.C.

January 29, 2015

Place and Date of Judgment:

Vancouver, B.C.

February 2, 2015

- [1] THE COURT: The accused, Seyed Nima Razavi Zadeh, is charged on a 7-count Information with a variety of sexual offences and bail breaches. He appeals the detention order of Her Honour Judge Bagnall dated December 8, 2014.
- [2] The appeal is brought pursuant to s. 520 of the Criminal Code, which provides:

Review of order

520. (1) If a justice, or a judge of the Nunavut Court of Justice, makes an order under subsection 515(2), (5), (6), (7), (8) or (12) or makes or vacates any order under paragraph 523(2)(b), the accused may, at any time before the trial of the charge, apply to a judge for a review of the order.

Notice to prosecutor

- (2) An application under this section shall not, unless the prosecutor otherwise consents, be heard by a judge unless the accused has given to the prosecutor at least two clear days notice in writing of the application.

Accused to be present

- (3) If the judge so orders or the prosecutor or the accused or his counsel so requests, the accused shall be present at the hearing of an application under this section and, where the accused is in custody, the judge may order, in writing, the person having the custody of the accused to bring him before the court.

Evidence and powers of judge on review

- (7) On the hearing of an application under this section, the judge may consider
- (a) the transcript, if any, of the proceedings heard by the justice and by any judge who previously reviewed the order made by the justice,
 - (b) the exhibits, if any, filed in the proceedings before the justice, and
 - (c) such additional evidence or exhibits as may be tendered by the accused or the prosecutor,

and shall either

- (d) dismiss the application, or
- (e) if the accused shows cause, allow the application, vacate the order previously made by the justice and make any other order provided for in section 515 that he considers is warranted.

[3] Judge Bagnall detained the accused on what are commonly referred to as the secondary and tertiary grounds in s. 515(10)(b) and (c) of the Criminal Code respectively:

515. (10) For the purposes of this section, the detention of an accused in custody is justified only on one or more of the following grounds:

- (b) where the detention is necessary for the protection or safety of the public, including any victim of or witness to the offence, or any person under the age of 18 years, having regard to all the circumstances including any substantial likelihood that the accused will, if released from custody, commit a criminal offence or interfere with the administration of justice; and
- (c) if the detention is necessary to maintain confidence in the administration of justice, having regard to all the circumstances, including
 - (i) the apparent strength of the prosecution's case,
 - (ii) the gravity of the offence,
 - (iii) the circumstances surrounding the commission of the offence, including whether a firearm was used, and
 - (iv) the fact that the accused is liable, on conviction, for a potentially lengthy term of imprisonment or, in the case of an offence that involves, or whose subject-matter is, a firearm, a minimum punishment of imprisonment for a term of three years or more.

Procedural Background

- [4] The accused first appeared in Provincial Court on January 31, 2014, on an Information charging him with sexual assault of C.E., contrary to s. 271 of the Criminal Code, and with administering a stupefying or overpowering drug to C.E. with intent to assist himself in committing a sexual assault, contrary to s. 246(b). The charges relate to an incident which occurred on September 13, 2013. I will review the allegations later in my reasons.
- [5] The accused was represented by counsel and appeared before His Honour Judge Harris to address the terms of bail. Defence counsel opposed some of the terms sought by the Crown.

- [6] The accused's mother, Zarrindokht Sadeghi, appeared at the bail hearing and offered to act as surety. Judge Harris reviewed with her on the record the obligations of a surety to render an accused and report any breaches to the authorities. He advised Ms. Sadeghi that she could lose \$20,000 if her son breached his bail terms. Ms. Sadeghi was prepared to be a surety, notwithstanding these obligations, telling Judge Harris she trusted her son and he told her "this is false".
- [7] Judge Harris reviewed the conditions of release on the record with the accused and released him with his mother as a surety. Three of the conditions of release are of note to the proceedings before me: first, the accused was directed to have no contact with any adult female person in a private place, unless an immediate family member was present, or unless he obtained advance permission from his bail supervisor; second, the accused was prohibited from having contact with any female who, to his knowledge, had consumed alcohol; and third, the accused was prohibited from possessing any drugs as defined by the Controlled Drugs and Substances Act, save and except for drugs prescribed to him.
- [8] The Information was on the Provincial Court list six times between January 13 and July 2014. When the accused appeared on July 12, 2014, he was in custody, charged with breaching his recognizance on July 11, 2014, and with further substantive sexual offences. On August 11, the two Informations were combined into one with a total of seven counts.
- [9] The accused remained in custody by consent until December 3, 2014, when his counsel made a bail application. I will return to the reasons of Judge Bagnall refusing the accused's application later in my judgment.
- [10] I turn next to a review of the Crown's allegations against the accused.

The First Set of Allegations

- [11] C.E. arrived in Canada on August 30, 2013, from Switzerland on a work visa. She met the accused while waiting outside his apartment building, where her friend also lived. The two chatted and exchanged contact information. They talked and texted over the next two weeks, and saw each other once at a bar, apparently by chance. The accused kept asking C.E. to meet him and she finally agreed.
- [12] The two met on September 13 after work for drinks. C.E. told the accused she was not looking for a boyfriend. The accused wanted to show her pictures of Australia he had on his computer at home. He also wanted to change his clothes, as he had come directly from work.

- [13] C.E. went with the accused to his apartment. He offered her juice, but she declined. He then urged her to drink some special tequila he had from Mexico. She declined, but he persisted, and she finally accepted a small shot of tequila. He also gave her a glass of juice. C.E. only drank a small amount of the juice, because she thought it had a strange colour. The accused brought out his computer and started to show C.E. pictures of Australia. C.E. felt strange, weak, and dizzy.
- [14] The next thing C.E. remembered was lying on a bed with the accused naked and on top of her. She could feel his penis on her vagina. She pushed him off and got up with some difficulty. C.E. searched for her clothes and the accused started yelling at her, asking her why she was acting so weird.
- [15] C.E. tried to phone the friend who lived in the same building, but the accused attempted to stop her and told her to calm down. He continued to berate her for acting weird. C.E. finally reached her friend and met him in the lobby of the building. The accused followed her downstairs, still berating her. C.E. felt very weak and upset. She threw up in her friend's apartment. A few hours later they took a taxi to her own apartment, and from there called police. She told police there was no kissing and only incidental contact over the course of the evening she spent with the accused. C.E. said she no longer felt safe in Vancouver.
- [16] A member of the sexual assault team at Vancouver General Hospital examined C.E. A doctor noted four lacerations to her perineum and vaginal opening which were consistent with recent forced vaginal assault.
- [17] Police obtained a search warrant for the accused's apartment and executed it on September 14, 2013. They found juice containers matching the description provided by C.E. and an open tequila bottle. In the kitchen garbage, they located a used plastic cup, tissue, used condoms and wrappers, and an empty juice container. A glass containing a cloudy, juice-like liquid and an empty vodka bottle containing liquid that did not appear to be vodka were also seized. Forensic testing established that C.E.'s urine sample contained a forensically-significant amount of gamma-hydroxybutyric acid or GHB. I will return to the properties of GHB shortly.
- [18] The juice bottle and tequila bottle from the accused's kitchen counter also contained GHB. A bottle of Gatorade and a clear drinking glass seized from the fridge contained GHB. The accused's fingerprint was found on the plastic cup in his kitchen garbage. His DNA profile was identified from a sample of spermatozoa taken from the victim's underwear. Two used condoms containing his sperm were in the garbage can in the kitchen. C.E.'s DNA profile was identified on both of them.
- [19] GHB is a central nervous system depressant that has legitimate medical applications. It is also used recreationally for its intoxicating effects such as euphoria, reduced inhibitions, and sedation. GHB can cause increased sociability and increased sex drive. It also causes confusion, dizziness, drowsiness, sedation, and unconsciousness. Nausea and vomiting are common side effects, as is memory loss. It can have serious consequences if administered in

high doses. GHB is rapidly eliminated from the body. It can be detected in the blood for up to nine hours after ingestion and in the urine for up to 18 hours after ingestion.

The Second Set of Allegations

- [20] On July 5 or 6, 2014, the accused struck up a conversation with J.C., a bartender in a restaurant. He gave her his phone number. J.C. gave him her phone number after conferring with a co-worker, who said he seemed like a good guy. The accused asked J.C. out on a date, and they agreed to meet on the evening of July 10. She thought they were going for a drink, but he took her to his apartment, saying he needed to change his clothes.
- [21] The accused made J.C. a gin and tonic, then started pouring her shots of tequila. He prepared all of the alcoholic beverages out of her sight. J.C. thought the tequila tasted salty, but did not at the time suspect it contained GHB. J.C. had tasted GHB before and noted its saltiness.
- [22] J.C. started feeling very drunk and went out onto the patio. The accused followed her and started touching her, then led her into his bedroom. She felt heavy and relaxed. He took off her pants and performed oral sex on her. She asked him to stop, but he ignored her. J.C. got up and said, "I don't want to do this," but the next thing she remembered, the accused was on top of her, penetrating her. While she wanted him to stop, she felt she could not say anything or think clearly. J.C.'s next memory was hearing the shower running. She tried to get up but felt sick and too heavy to move. She fell asleep and woke up around five o'clock the next morning on the bed. The accused was on the couch.
- [23] J.C. went home. She did not contact police right away, but upon telling a girlfriend what had happened, she changed her mind. She contacted police and identified the accused in a photo lineup on July 11. She provided a statement on July 12.
- [24] Mr. Patey drew my attention to portions of J.C.'s statement which appear to refer to some consensual sexual contact with the accused, albeit after she ingested drinks provided by him. He points those out, as they indicate the Crown's case on the sexual assault of J.C. may not be particularly strong.
- [25] A sexual assault examination did not reveal any signs of forced sexual assault of J.C. A urine sample taken from her more than 20 hours after her interaction with the accused did not reveal GHB.
- [26] Police arrested the accused on July 11 at nine o'clock in the evening and searched his residence, pursuant to a search warrant. GHB was found in a sample taken from a Body Energy Club bottle in the fridge, and from a bottle of tequila on the counter.

- [27] Approximately two weeks after the accused's arrest, a woman J.C. believed to be the accused's mother came to the restaurant she was working at. They had a conversation in which the accused's mother said words to the effect that she thought her son had done what he did because he was not raised with sisters. Apparently the woman told J.C. to punch in whatever tip percentage she wanted. J.C. typed in 15 percent, which is the usual tip amount.
- [28] J.C. told police the woman came back to the restaurant about 10 days later in early August. J.C. saw her in the washroom. At the end of August, J.C.'s manager asked if she would be willing to drop the charges for \$25,000. The manager checked back several times, at one point even discussing with J.C. the amount of \$60,000, but he dropped the subject once J.C. told him she had received a subpoena.
- [29] Mr. Patey points out that this allegation of a bribe was raised before Judge Bagnall. Judge Bagnall made nothing of it and Mr. Patey says neither should I. There is no discernible connection between the restaurant manager and the accused.

The Background of the Accused

- [30] Mr. Razavi Zadeh is 32 years of age. He was born in Iran. His family moved to Dubai when he was six and to Canada when he was 14. His father left the family in 2005 and is not particularly involved in his life. The accused told Dr. Lohrasbe, a forensic psychiatrist, that he was the victim of physical abuse at the hands of his father and sexual abuse at school in Dubai.
- [31] The accused graduated from high school in West Vancouver. He obtained a degree in engineering from UBC, a construction management certification from BCIT, and has been gainfully employed in the construction industry. He has no criminal record.
- [32] Significant difficulties with alcohol have plagued Mr. Razavi Zadeh. In 2011, his doctor warned him to stop drinking or risk permanent damage to his liver. The accused turned to using GHB as an alternative to alcohol. He has taken antidepressant drugs but has issues metabolizing them due to liver damage. He currently takes melatonin in jail to sleep at a very high dosage.
- [33] In preparation for the bail hearing before Judge Bagnall, defence counsel retained Dr. Lohrasbe, noted above, to prepare a risk assessment. Dr. Lohrasbe is a prominent forensic psychiatrist. He examined the accused and concluded he is at low risk to reoffend if he abstains from substance abuse and if he seeks counselling for his mood disorders.
- [34] The accused's mother has equity in an apartment in West Vancouver. She can provide a surety of up to \$200,000 and is prepared to have her son come and live with her pending preliminary hearing and trial. She was the accused's surety at first instance, but the Crown is seeking to have the original \$20,000 surety forfeited because of the accused's breaches.

The Scope of Review

- [35] In *R. v. Adiwal*, 2003 BCSC 740, Mr. Justice Romilly analyzed the then divergence of opinion in the jurisprudence about whether a s. 520 review hearing in the superior court is a de novo hearing or an appeal. He considered *R. v. Marsman* (1995), 140 N.S.R. (2d) 383, in which Saunders J., as she then was, concluded a s. 520 hearing is a hybrid or blend of an appeal and a de novo hearing. Romilly J. said at paras. 29 and 30 of the judgment:
- [29] The onus is on the Applicant to show that the Justice or Provincial Court Judge who fixed the original bail made an error in law or in principle, that the circumstances have changed or that it would be unjust not to Order the release: *R. v. Hill* [citation omitted]; *R. v. DiMatteo* [citation omitted].
- [30] An application under s. 520 of the Criminal Code is not strictly an ordinary appeal. While due consideration must be given to the initial Order of the Justice, the Judge is entitled to exercise an independent discretion: *R. v. Carrier* [citation omitted].
- [36] Counsel agree the approach set out by Romilly J. is the one to be followed and framed their submissions accordingly.

The Position of the Defence

- [37] Mr. Patey acknowledged the allegations before this court are very serious and the second sexual assault occurred while the accused was on bail for the first. He points out, however, that sexual offences have no special bail scheme. They are subject to the same considerations in s. 515 as all other offences, and it is important to set aside the revulsion associated with sexual offences and examine them dispassionately against the prevailing legal standards.
- [38] Mr. Patey argues detention was not justified on either the secondary or tertiary ground in this case, and in any event there was a change in circumstances with a substantial surety and conditions to address factors identified in the risk assessment.
- [39] I will deal with Mr. Patey's submissions on the tertiary ground first. His position is that Judge Bagnall approached s. 515(1)(c) as a sort of checklist and, in a conclusory paragraph at the end of her reasons, determined the criteria were satisfied. Counsel submits this error is analogous to the one identified by Mr. Justice Pearlman in *R. v. Desmond*, 2009 BCSC 1954. In that case, the accused had been detained for gun offences, in part on the tertiary ground. Pearlman J. found the case lacked the constellation of exceptional circumstances which would warrant detention on the tertiary ground, and in light of the proposed release plan, ordered the accused released.

- [40] Counsel also relies on *R. v. Bhullar*, 2005 BCCA 409. The accused was charged with the second degree murder of his adopted son and detained on the tertiary ground at first instance. He applied for a review by the Court of Appeal. Madam Justice Rowles for the court reviewed jurisprudence from the Supreme Court of Canada concerning the tertiary ground and said:
- [62] Assuming the primary and secondary grounds are met, the denial of bail on the tertiary ground will be exceptional. As Hall J.A. noted at para. 24 in *R. v. MacDougal*, *supra*, quoted with approval by McLachlin C.J. in Hall at para. 27: "Courts must be careful not to pander to public opinion or to take account of only the overly excitable, but I believe that to fail to have regard to the provisions of s. 515(10)(c) in the relatively rare cases where it can properly be invoked would tend to work against maintaining broad public confidence in the way justice is administered in this country."
- [41] Rowles J.A. went on to say:
- [64] In the case before us, the hearing judge emphasized the strength of the Crown's case and distinguished cases to which she had been referred by defence counsel on the ground that the Crown's case against the accused in those cases did not appear to be "all that strong". However, the strength of the Crown's case is only one of the factors to be considered and is not determinative of the question of whether a detention order is warranted. To say otherwise undermines a fundamental principle - the presumption of innocence.
- [42] The decision in *Bhullar* confirms that a strong Crown case is not the driving force under s. 515(10)(c). The hearing judge had not set out in that case why a reasonable and well-informed member of the public would lose confidence in the administration of justice if the applicant were granted bail on strict terms or provide an assessment as to how the case had particular significant public safety concerns or other concerns in the community and release was granted.
- [43] Mr. Patey's argument on the secondary ground is that Judge Bagnall did not articulate how a substantial likelihood to reoffend remained, in light of the release plan proposed, the substantially increased surety, and Dr. Lohrasbe's risk assessment. He puts particular emphasis on Dr. Lohrasbe's assessment as it places the accused at low risk to reoffend if he abstains absolutely from substance abuse and if he seeks treatment for his mood instability. Dr. Lohrasbe recommends a lengthy residence at a drug and alcohol program to continue the detoxification that has occurred during incarceration.
- [44] Counsel points to the comments of Lamer C.J.C. in *R. v. Morales*, [1992] 3 S.C.R. 711, concerning the secondary ground for detention, where he said at page 737:

Bail is denied only for those who pose a "substantial likelihood" of committing an offence or interfering with the administration of justice, and only where this "substantial likelihood" endangers "the protection or safety of the public". Moreover, detention is justified only when it is "necessary" for public safety. It is not justified where detention would merely be convenient or advantageous.

[45] Counsel also submitted there has been a change in circumstances in this case which merit the accused's release. Mr. Patey submitted that when the accused was first released on bail, he was new to the criminal justice system, perhaps did not truly appreciate the peril he or his mother would be in if he breached his bail. Counsel maintains the accused now understands the seriousness of his circumstances and the fact that his mother would be pursued for a substantial amount of money if he breached his bail. Counsel proposes a \$200,000 surety, residence with his mother, which was not proposed in the court below, as well as conditions concerning abstention from substance abuse, requiring counselling as directed, curfews, and other appropriate conditions. Mr. Patey submits that his client is prepared to go to counselling while on bail and that such a condition would alleviate one of the risk factors identified by Dr. Lohrasbe.

Position of the Crown

[46] The Crown first addressed the condition proposed by the defence that, if released, the accused would take such counselling or treatment as directed, as I questioned counsel as to whether such a condition would be enforceable or even supervised on a bail order.

[47] Ms. Cunningham spoke with the duty officer at the Cordova Street office. She was advised that a bail order to go to treatment is only put in place if the accused is already in treatment and residency in a treatment centre can be verified. While there are some facilities to which a bail supervisor can refer clients, they are generally residential treatment programs undertaken as part of the social assistance regime. Bail supervisors do not refer clients to programs that cost them money or to counselling programs, as it is not within their mandate of supervision.

[48] Ms. Cunningham cautioned against over-reliance on Dr. Lohrasbe's report as the assessment of risk at the bail stage is squarely the responsibility of the presiding judge. She submits Judge Bagnall's reasons on the tertiary ground are sound. Her conclusion at the end of the reasons, which Mr. Patey points to as solely conclusory, must be read in the context of her reasons as a whole. Ms. Cunningham also points out that the accused was in a reverse-onus situation, having breached his bail while on release for an indictable offence, and in addition committing a new substantive offence of the very same nature as the original ones.

The Reasons for Judgment at the Judicial Interim Release Application

- [49] Judge Bagnall set out the circumstances of the two sets of charges before her. She noted the accused was 32 years of age with no criminal record and gainfully employed until his arrest. She acknowledged the defence submission that his time in jail from July to December would ensure good conduct in the future. Judge Bagnall was advised of the surety of up to \$200,000 through his mother. She adverted to the risk assessment by Dr. Lohrasbe as being helpful, but not determinative.
- [50] Judge Bagnall rejected the submission that the accused's mother act again as surety, as he had already breached his bail while she was his surety. Judge Bagnall did not find he would be deterred a second time if his mother were surety again. She did not rely on any of the allegations about the mother's alleged conduct with the second complainant in reaching that conclusion, and nor do I.
- [51] At paras. 24 and 25 of Judge Bagnall's reasons, she said:
- [24] The presumption of innocence applies here. What is commonly referred to as the reverse onus also applies here. I am satisfied that the accused must be detained, because there is a substantial likelihood that he will commit a criminal offence if released from custody.
- [25] I am also satisfied that his detention is necessary to maintain confidence in the administration of justice, and I have taken into account the following: the case against the accused is very strong on all counts; the offences alleged are all very serious; the circumstances alleged here are all very serious; a lengthy jail sentence is likely if the accused is convicted.

Analysis

- [52] Upon consideration of the submissions of counsel and the materials placed before me, I would not overturn the finding of Judge Bagnall that there is a substantial likelihood the accused would commit a criminal offence if released from custody.
- [53] The accused was on restrictive bail terms, yet he proceeded to offend again in almost the same manner, breaching his bail as well as committing other serious, substantive offences. He is an educated man. The terms of bail were explained to him by Judge Harris. They were comprehensive, but not complex. His mother guaranteed his compliance by pledging \$20,000.
- [54] Subsequent to the first police search of his apartment, during which all alcohol and GHB were apparently removed, the accused took the time and trouble to restock his kitchen with alcohol and GHB. He befriended another young woman and is alleged to have subjected her to the same ruse of persuading her to come to his apartment so he could change his clothes. He then plied her with alcohol, which was likely laced with GHB, given the results of the forensic analysis of the liquids in the accused's apartment.

- [55] In all the circumstances, I am not satisfied, on a balance of probabilities, that the release terms proposed would address the substantial risk of reoffence in this case. The risk would endanger unsuspecting young women, the apparent preferred target of these allegations, even though the proposed terms of release are strict.
- [56] As to the tertiary ground, when the reasons for detention are read as a whole, the requirements for the detention on the tertiary ground, in my view, are not satisfied. I agree with counsel for the accused that the four factors in 515(10)(c) are stated in a conclusory fashion. That, however, is not the end of the matter.
- [57] My analysis of the tertiary ground factors is as follows, bearing in mind that restraint must be applied when detention on the tertiary ground is sought or ordered:
- [58] First, the Crown has a strong case against the accused on the first set of allegations and on the bail breaches. The case on the second sexual assault may be less strong, but the case as a whole appears substantial, bearing in mind, pursuant to Bhullar, that this is not the governing factor and should not overwhelm consideration of the other factors.
- [59] Second, the gravity of these offences is high. The accused is alleged to have used a stupefying substance to overcome the resistance of two women he befriended. The substance in question, GHB, was found in his apartment after the first set of allegations and again after the second, notwithstanding he was prohibited from possessing it under his bail order. The drug can have serious detrimental effects on people who take it and he is alleged to have administered it to the victims without their knowledge or consent and without knowing what effect it might have on them beyond temporary sedation.
- [60] Third, the circumstances of the offences are troubling. The allegations bear the hallmark of a serial sex offender at work. I appreciate Mr. Patey's observations that the complainants knew the accused and his actions in that context are perhaps less sinister; however, his modus operandi is the administration of a drug to young women he befriends, ostensibly for the purposes of engaging in sexual relations with them while they are disabled by the drug, or at least unable to put up much resistance.
- [61] Fourth, on conviction the accused is liable to a lengthy term of imprisonment measured in years, not months.
- [62] Taking all of those circumstances into account, does this case then involve exceptional circumstances? To put it another way, would an informed and reasonable person, having regard to the proposed terms of release, including the surety, the residency condition, and other conditions, along with the lack of a criminal record and the circumstances of the offences, find detention necessary to maintain confidence in the administration of justice?

- [63] In my view, an informed and reasonable person would find detention necessary to maintain confidence in the administration of justice. I appreciate Dr. Lohrasbe's assessment of the risk is low if the accused abstains from alcohol and if he takes counselling for his mood disorders, but the risk to potential victims if he wavers while on release, as he has done in the past, would impair public confidence in the administration of justice in the very particular circumstances before me.
- [64] Finally, I am not satisfied the conditions proposed by the defence represent a true change in circumstances from those presented to Judge Bagnall.
- [65] Notwithstanding Mr. Patey's able, focused, and detailed submissions on behalf of his client, I dismiss the defence application for release and affirm the detention order.
- [66] I remand the accused in custody directly to his preliminary hearing date on April 7, 2015, unless counsel seek an interim appearance.

"Duncan J."

The Honourable Madam Justice Duncan

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