

# Bail Exercise

## FACT PATTERN

Yesterday at 3:01 pm, 911 received a call from a Karen JOHNSON about a robbery that had just taken place at her convenience store (“Speed-E-Mart”) on the corner of Salter and Aberdeen. Members of Winnipeg Police Service arrived on the scene at 3:13 pm. JOHNSON was visibly shaken and it took the attending WPS members, Cst. SMITH and Cst. GREGORY, several minutes to calm her down and get details of the robbery.

JOHNSON stated that around 2:50 pm, the store was empty when a man entered. He was walking unsteadily and appeared to be intoxicated. He slowly wandered around for several minutes, and appeared to be distracted and “out of it”. JOHNSON asked if she could help him find anything, but he did not appear to hear her and continued to wander.

Eventually, the man approached the counter and asked for a pack of cigarettes. JOHNSON retrieved the cigarettes and placed them on the counter. The man thanked her, and started to walk away with the cigarettes without paying. JOHNSON called out that he needed to pay, but the man kept walking. Still calling after him, JOHNSON came out from behind the counter and grabbed him by the shoulder. The man spun around, shoved Johnson to the ground with one hand, raised his other fist in a threatening manner, and said “get your hands off me”. He left the store, and JOHNSON called 911 immediately.

JOHNSON described the man as white and in his late 20s or early 30s. He had long blonde hair, and was wearing a black baseball cap, black jeans, and a white T-shirt with some sort of construction company logo in blue.

JOHNSON declined medical attention, though she did note she was sore from the fall and appeared to have a slight limp.

At 3:45, SMITH radioed in the description of the suspect. Very soon after, a nearby officer, Cst. FRANKLIN, responded that a man matching this description was walking westbound on Aberdeen near McGregor, smoking a cigarette. FRANKLIN approached the man and asked if she could speak with him. He was wearing a black hat and a white shirt reading “Callahan Roofing.” The man appeared to be very intoxicated, and stared blankly at her for several seconds before trying to keep walking. FRANKLIN placed herself in his path, saying she needed to ask him a few questions, and the man again tried to move past her, this time shoving her. At 3:52, FRANKLIN placed the man under arrest for assaulting a peace officer (CC 270(1)(b)) and cautioned him for robbery (CC 344(1)(b)). He was notified of his right to counsel and transported to HQ for processing.

The suspect was identified as Herman ABRAHAM. ABRAHAM spoke to Legal Aid lawyer Peter Chapman from 4:02 - 4:13 pm, and indicated he was satisfied with the legal

advice he received. He refused to answer any questions, but repeatedly said he was innocent.

SMITH reviewed security footage and determined there was enough evidence to charge ABRAHAM with robbery. He was told about the new charge at 4:45 pm, and declined to speak with a lawyer.

ABRAHAM has a prior record, including one robbery conviction. He was remanded into custody at 4:56 pm.

## CRIMINAL RECORD

**ABRAHAM, Herman**

**DOB: 20/06/1989**

27-12-2016

Open consumption of liquor (LGCA 57(1))

\$200 fine

05-02-2011

Failure to comply with probation order (CC 733.1)

2 days

31-07-2010

Failure to comply with conditions of a recognizance (CC 145(2)(a))

1 day, consecutive to the 90-day sentence for robbery

31-07-2010

Robbery (CC 344(1)(b))

90 days, 1-year probation to follow

06-05-2009

Theft under \$5000 (CC 334(b))

1 day

02-09-2007

Mischief under \$5000 (CC 430(4))

Conditional discharge

\*\*\*END OF RECORD\*\*\*

*Notes:*

- *CC refers to Criminal Code*
- *LGCA refers to The Liquor and Gaming Control Act (now replaced by The Liquor, Gaming and Cannabis Control Act)*
- *All dates are the date of conviction, not the date of the offence*

## RELEVANT LAW

### *Criminal Code of Canada*

#### **Assaulting a Peace Officer**

**270 (1)** Every one commits an offence who

- (a) assaults a public officer or peace officer engaged in the execution of his duty or a person acting in aid of such an officer;
- (b) assaults a person with intent to resist or prevent the lawful arrest or detention of himself or another person; or
- (c) assaults a person
  - (i) who is engaged in the lawful execution of a process against lands or goods or in making a lawful distress or seizure, or
  - (ii) with intent to rescue anything taken under lawful process, distress or seizure.

#### **Robbery**

**344 (1)** Every person who commits robbery is guilty of an indictable offence and liable

- (a) if a restricted firearm or prohibited firearm is used in the commission of the offence or if any firearm is used in the commission of the offence and the offence is committed for the benefit of, at the direction of, or in association with, a criminal organization, to imprisonment for life and to a minimum punishment of imprisonment for a term of
  - (i) in the case of a first offence, five years, and
  - (ii) in the case of a second or subsequent offence, seven years;
- (a.1) in any other case where a firearm is used in the commission of the offence, to imprisonment for life and to a minimum punishment of imprisonment for a term of four years; and
- (b) in any other case, to imprisonment for life.

#### **Release Order without Conditions**

**515 (1)** Subject to this section, when an accused who is charged with an offence other than an offence listed in section 469 is taken before a justice, the justice shall, unless a plea of guilty by the accused is accepted, make a release order in respect of that offence, without conditions, unless the prosecutor, having been given a reasonable opportunity to do so, shows cause, in respect of that offence, why the detention of the accused in custody is justified or why an order under any other provision of this section should be made.

#### **Justification for Detention in Custody**

**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:

- (a) where the detention is necessary to ensure his or her attendance in court in order to be dealt with according to law;
- (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

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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.

## ADDITIONAL INFO FOR DEFENCE ONLY

Herman Abraham wants you to make a bail application for him. You have spoken with him and learned the following:

- Herman was born in Swan Lake, Manitoba. He grew up without his father, and his mother died of liver failure when he was 10. She had problems with alcohol all of Herman's life. Herman has five older siblings, but is only in contact with two of them, who still live in Swan Lake. He does not know where the other three are.
- After his mother died, he moved to Winnipeg to live with his grandmother, Dorothy. She was a stable force in his life, and he remained very close with her. Dorothy died last month, and Herman is very upset about losing her. His only other family in Winnipeg is his aunt Betty, who was also active in raising him.
- He works as a roofer from May to September each year. He likes his boss and enjoys working outdoors. This year business has been slower than usual and he is not working much. He has applied for income assistance but has not heard back yet. In the winter, he picks up odd jobs, like clearing snow for neighbours.
- He lives alone in an apartment on Aberdeen Avenue, but because money is tight, he is not sure he can afford to stay much longer. He thinks he can stay with his aunt Betty, who lives at 765 Hector Avenue, just off Pembina.
- Herman has struggled with alcohol in the past, and blames his criminal record on his drinking. He says his robbery sentence was a wakeup call, and he attended AA regularly for a year and a half. Before this incident, he was completely sober for three years. He is willing to attend alcohol abuse programming again.
- His robbery conviction involved Herman and two others stealing money and cigarettes from a convenience store. Herman says he was tricked into it by his friends and didn't know a robbery was going to take place until it was happening.
- Herman remembers almost nothing about this incident. The last thing he remembers is feeling sad about his grandmother's death and starting to drink.

You have also spoken to Herman's aunt Betty and learned:

- Herman had difficulties with school. He was diagnosed with ADHD when he was 12 and prescribed medication. When he was 17, he went through a rebellious period and stopped taking his medication. He graduated high school, "but just barely". He fell in with a bad crowd and began to drink a lot.
- Betty has a spare bedroom and would be happy to let Herman stay with her.

Herman's boss, Bill Callahan, says he is a hard worker, but is sometimes late to jobs. He knows about Herman's record and says the person who committed those crimes is "a totally different person" than the Herman he knows. He says as long as there is work, he is happy to keep Herman employed.

## **ADDITIONAL INFO FOR PROSECUTION ONLY**

You are the Crown attorney assigned to this file. You are opposed to releasing Mr. Abraham. You have the following additional information:

- The victim, Karen Johnson, is 68 years old. She owns Speed-E-Mart with her retired husband Tom. Speed-E-Mart has two part time employees, but Karen usually works the store herself, alone. She typically works full daytime shifts on weekdays and sometimes on weekends.
- The evening of the incident, Johnson's pain continued and she ended up going to the hospital. She has a hairline fracture in her left hip and has been advised to stay off her feet as much as possible.
- Mr. Abraham's first robbery conviction involved him and two other men stealing \$210 and several packs of cigarettes from a convenience store. In that situation, the victim was also an older woman. Mr. Abraham was armed with a baseball bat at the time, though it was not used violently.

## NOTES FOR INSTRUCTOR

### Points for defence:

- Bring up Herman's upbringing. According to the Criminal Code (s 718.2), Courts must consider the individual circumstances of all offenders, with particular attention to those of Indigenous offenders. This is more relevant for sentencing purposes, but is also considered at the bail stage. Herman has had a rough childhood with a lot of instability, and the judge should take this into account when making a decision about bail.
- Herman's record is dated—his last criminal offence was in 2011 (offences under provincial acts like the LGCA or Highway Traffic Act are not usually considered in bail court). Emphasize that he appears to have reformed his life, and has stayed out of trouble for a long time.
- Emphasize that he has had success in treating his alcohol issues. While it is a problem that he was drunk at the time of this incident, this could probably be explained by his grandmother's death. A relapse should not be enough of a reason to hold someone in custody.
- It is usually not a good idea to mention a client's version of events in a bail application, because it may limit the number of defences that can be made at trial. However, it would probably be safe to say that Herman remembers very little about the incident.
- Herman can live with his aunt. This is a good solution because a) it gets him out of the neighbourhood where the offence occurred, b) it helps relieve his financial situation, and c) she can help make sure he stays out of trouble.
- He has a seasonal job, and his boss spoke very highly of him—he has the opportunity to keep working and being a productive member of society.
- The offence itself is on the lower level of robberies. There was no weapon, and the violence used (shoving) was in response to Johnson grabbing him as he was leaving. It can be tricky to try and downplay things like this (“it was ONLY a shove”), but it is good to try and distinguish this incident from more serious and dangerous crimes.
- Remember, this is not a hearing to decide if Herman is guilty, it is just to decide whether he should be held in jail until his trial or a guilty plea.
- It would be best to avoid talking about any details of the past robbery conviction. Telling Herman's story that he was “tricked into it” suggests he has not taken responsibility for it (and it also contradicts information the Crown has).

### Points for prosecution:

- Karen Johnson is a senior citizen. She was injured in this attack, and her business will probably suffer now that she will not be able to work as much as she usually does. She was very upset when the police arrived on the scene, and will likely remain troubled by this offence. She is a pretty sympathetic figure.
- The case against Herman is strong. He was caught on camera, Johnson described his clothing accurately, and he was found almost immediately, only a few blocks away.
- Herman's record includes two convictions for failing to comply with court conditions. The argument the Crown usually uses is: if they couldn't comply before, why should we trust them to comply now?
- Prosecutors should not go too much into past offences that the accused has already been sentenced for, but in this case, they might briefly point out that the prior robbery conviction was similar: a convenience store, an older victim, and stolen cigarettes.

**Other notes:**

- In an actual bail court, Herman would most likely be released. There probably aren't strong enough reasons to justify keeping him in custody. However, his release conditions may vary in strictness depending on the judge. He would definitely need an address to stay at, a condition to not contact Karen Johnson or attend Speed-E-Mart, a condition to not consume alcohol or illegal drugs, and possibly a condition to attend substance abuse programs.
- It is not unusual for the Crown to have access to information the defence does not at a bail hearing (for example, that Johnson has a hip fracture, or the details of Herman's past robbery conviction).