

CANADA / JUDGMENT

R. v. Abdullahi

2020 BCSC 2170

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Supreme Court of British Columbia

DECIDED

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2020 BCSC 2170 R. v. Abdullahi

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

R. v. Abdullahi,

2020 BCSC 2170

Date: 20201222

Docket: 31295W

Registry: Vancouver

Regina

v.

Hussein Mohamed Abdullahi

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

Before: The Honourable Mr. Justice Schultes

On judicial review from: Provincial Court of British Columbia, August 12, 2020

(R. v. Abdullahi, Surrey Docket Nos. 239292-1, 239341-1, 239342-1,

239568-1, 239752-1, & 239770-1]

Oral Reasons for Judgment at Detention Review Hearing

Counsel for the Crown, appearing by teleconference:

N.M.D. Reithmeier

Counsel for the Accused, appearing by teleconference:

M.J. Swartz

Place and Date of Hearing:

New Westminster, B.C.

December 15, 2020

Place and Date of Judgment:

New Westminster, B.C.

December 22, 2020

Introduction

- [1] This is an application by Mr. Abdullahi for a review, pursuant to s. 525 of the Criminal Code, of the detention order that was imposed on him in Provincial Court on August 12 of this year.
- [2] The charges he is currently facing are contained in five informations, alleging offences committed in March, April, and May of this year. A charge of sexual assault against another inmate at the remand centre in December 2019 was also before the judge who detained him, but he was acquitted of that charge in a trial last month. The remaining informations are set for trial on separate dates in 2021 - in January, March, and May.
- [3] Based on his time in custody so far, Mr. Abdullahi would be eligible for somewhere between 11 and 12 months' credit for pretrial custody.
- [4] There is no issue about the test to be applied on this review. According to the decision of the Supreme Court of Canada in *R. v. Myers*, [2019] 2 S.C.R. 105, the question is whether the accused's detention is still justified on one or more of the grounds in s. 515(10) of the Code. Determining this involves considering the rationale for the original decision, any additional credible and trustworthy information that was not before the hearing judge, the impact of the passage of time on the appropriateness of the detention, and the effect of any unreasonable delay that has occurred.
- [5] A frequent example of additional information relied on to support release on a review, which arises in this case, is a more robust or comprehensive plan for the release of the accused than was available at the original hearing.

The Release Hearing

- [6] The submissions of counsel at the hearing are not available. To supplement the summary of the allegations in the hearing judge's reasons for detention, Crown counsel on this review has reconstituted the Crown's submissions by reference to the police reports that the prosecutor would have relied on, a sensible approach that was not objected to by the defence.

[7] Reduced to their essentials, the allegations against Mr. Abdullahi are of:

- Refusing to leave a SkyTrain station after being directed to by a police officer for causing a disturbance, followed by uttering threats to the officer who had arrested him for obstruction. That was alleged to have occurred on March 23;
- Possessing a recently stolen vehicle and driving it in an extremely dangerous manner, including high speeds, multiple U-turns, driving over curbs, driving on a flat tire and then on the rim after the tire had disintegrated, and driving through a construction site in a manner that endangered some of the workers there and damaged some of the equipment. Mr. Abdullahi claimed, upon being stopped, that it was his girlfriend's vehicle, but inquiries with the actual owner indicated that she had never heard of him. This was all alleged to have occurred on April 2;
- While subject to a condition not to be in a vehicle without the registered owner, pursuant to his release after the previous incident (and while subject to driving prohibitions under the Code and the Motor Vehicle Act), nevertheless being observed driving a vehicle that had been stolen about a week before. He was not charged with the theft of that vehicle, nor in connection with a large knife that was found inside it, but those matters were provided to the hearing judge as part of the overall relevant circumstances. He is alleged to have committed that driving offence on April 12;
- In the company of another male, committing robbery of a vehicle at 3:30 in the morning, while its owner was filling it up at a gas station, by punching its owner and taking his keys. That was on April 17;
- Later that morning, for no apparent reason, punching a random stranger multiple times, breaking his nose in the process, until he fell to the ground;
- Robbing a Tim Hortons employee of his vehicle in the early morning, as the employee arrived at work to open up the business and then, after taking the keys and entering the vehicle, pulling a knife and threatening to kill the owner when he asked for his keys back. The robber then drove away, through a red light. That is said to have happened on April 19; and
- Assaulting a young woman in a park during the daytime, by punching her, then obtaining a wine bottle from his companion and smashing it over her head. The catalyst for this assault was alleged to have been her request that he and his companion, who were behaving in a disruptive manner, move farther away from her because she is pregnant. This young woman suffered a concussion, bruises, and blood loss. He is also alleged to have uttered threats to her, and punched her female companion. That is all alleged to have happened on May 8.

[8] Because the strength of the Crown's case is always an issue, it is worth noting the basis of identification for those cases in which Mr. Abdullahi was not arrested at the scene of the incident in question.

[9] The driving while prohibited charge was based on video footage from nearby homes that showed him driving the vehicle, as well as throwing the keys on the lawn of that residence where it was parked, with those keys later being found in the same location.

- [10] The robbery at the gas station was captured on video and a station employee who had dealt with the assailant a few moments before it identified Mr. Abdullahi from a photo pack. The video shows him wearing a fairly distinctive hoodie, track pants, and runners, which correspond to those worn by the random assailant who broke his victim's nose elsewhere in Surrey a few hours later. That incident was also captured on video. His companion was also wearing what appears to be the same clothing in both of those incidents, including a Toronto Raptors Number 2 shirt that figures in the identification in the wine bottle assault.
- [11] His fingerprints were identified on the outside of the stolen vehicle in the Tim Hortons incident. That vehicle was found about a seven-minute walk from Mr. Abdullahi's home. The person captured on video when committing that robbery was wearing sweatpants and runners similar to those worn by the suspect in the gas station robbery and the random assault.
- [12] The vehicle stolen in the gas station incident was found abandoned in Richmond with a tire blown out, a short distance from where the vehicle stolen in the Tim Hortons robbery was photographed by a red light camera, driving through a red light shortly after it had been stolen.
- [13] During the wine bottle assault, he was recorded on video by the main complainant's friend and is shown in that video wearing similar pants and runners to the previous incidents, as well as a camouflage-pattern shirt. That witness and the main complainant both selected his picture from a photo pack. The main complainant had encountered him before and knew him by a first name that is listed on his criminal record as one of his aliases.
- [14] This assault was captured on video from a distance and the assailant's clothing can be seen in a general way, although the quality of that video is not sufficient to identify the clothing precisely, or him as the assailant.
- [15] Six minutes later he was recorded on video at a nearby SkyTrain station, wearing the same distinctive pants and runners, but now with a Number 2 Raptors shirt, apparently identical to the one worn by the companion in the gas station robbery and the random assault, but with no sleeves underneath it. The theory of the Crown is that he changed his shirt to avoid detection during his escape from the wine bottle assault.
- [16] When he was checked on the street by the police four days earlier, he was wearing what appeared to be the same pants, runners and camouflage shirt, but with another shirt over top of it. He was also wearing these items when he was arrested after the assault on May 8, after having been stabbed in New Westminster.
- [17] On the negative side, in addition to the circumstantial nature of these linkages, it appears that the investigators may have tainted the identification of the complainant in the Tim Hortons robbery by showing him a still photo from the gas station video, from which he purported to identify his assailant. The complainant also appears to be incorrect, based on the video of the incident, about the colour of the jacket worn by his robber.

- [18] According to his criminal record Mr. Abdullahi is 28 years old, although the presentence report from the previous sentencing lists him as being 24, which is also the age that his counsel provides for him. He has an extensive criminal record that includes 11 convictions for breaching a recognizance or probation order, two for obstructing a peace officer, two for robbery (not counting a youth conviction for that offence), and one each of assault, assault with a weapon, possession of a weapon, uttering threats, and possession of stolen property.
- [19] As Crown counsel pointed out in his submissions on this review, most of the recent gaps in Mr. Abdullahi's offending reflect periods during which he was in custody. In the fall of 2019, he breached his release on house arrest to a recovery facility. His probation officer wrote in the presentence report that was prepared for his most recent sentencing that Mr. Abdullahi had breached every one of his eight community release orders and that "he reports to his supervisors with a good attitude and talks of change, but he has shown that he rarely if ever follows through with action." He had been out of custody for about six weeks when the first of the offences being alleged here was committed.
- [20] Mr. Abdullahi was in a reverse-onus situation at the hearing, because he had been released on the driving while prohibited charge with a condition that he breached when he drove away with the vehicle after the gas station robbery.
- [21] Considering the secondary ground for detention, the hearing judge reached the following conclusions:
- [32] I must be satisfied that the bail risk is manageable or acceptable in view of the potential public harm that could ensue. Looking at this objectively, I do not have confidence that Mr. Abdullahi will abide by the terms of his release given his abysmal history of performance on similar forms of release in the past, taken together with all the other information and the record.
- [33] There is, in my view, a continuing substantial likelihood that Mr. Abdullahi will commit further offences if released, and in view of the allegations against him and his criminal record, the attendant risk to the safety of the community is unacceptable. The risk is too great considering the outstanding charges and Mr. Abdullahi's related criminal record. I therefore order that he be detained on the secondary grounds.

Positions on the Review

Defence

- [22] Mr. Abdullahi's counsel provided his personal background. Some of this information was also contained in the presentence report.
- [23] He arrived in Canada in 2008 as a refugee, having grown up in a refugee camp in Kenya. His family originated from Somalia. He witnessed a significant amount of violence during his upbringing, including murders and beatings of other residents of the refugee camp.

- [24] He now lives with his mother and four siblings in Surrey. His father, who was able to gain refugee status in the United States, is attempting to immigrate to Canada.
- [25] He has completed Grade 10 and is attempting to achieve his high school graduation in custody. His employment history consists of various short-term positions, such as in warehouse work through placements with a personnel agency. He has struggled with substance use, specifically alcohol and cocaine, and would like to receive assistance with this problem.
- [26] His counsel advises that his release plan at the original bail hearing was to live at his mother's home on electronic monitoring, but without any cash deposit. A further limitation was that one of his brothers also had an outstanding charge at that time. His release plan on the bail from last fall was not successful, counsel explains, because the facilities were located in close proximity to the negative peer group from which he needs to disengage.
- [27] He now proposes to be released to Joshua House, a faith-based recovery facility located in a very isolated area of Chilliwack. It would apparently take eight hours to reach the town of Chilliwack on foot from that facility. I have been provided with a copy of its house rules and it is clear they represent a very structured set of requirements for the residents' behaviour and their participation in rehabilitative programming. It is staffed 24 hours a day and the staff will report any breaches of the rules to authorities. It is also a suitable location to be combined with electronic monitoring, which Mr. Abdullahi's counsel says he is more than willing to have added to his conditions.
- [28] In addition, Mr. Abdullahi is in a position to provide a cash deposit of \$1,000, which is a very significant amount for his family in their financial situation.
- [29] His counsel suggests that despite the number of breach convictions, I should keep in mind that these kinds of offences, as the Supreme Court of Canada has recently affirmed, can often be system-generated, and that they are frequently seen in cases of offenders in disadvantaged or marginalized circumstances.
- [30] As to the alleged offences here, counsel asks me to keep in mind that some are more serious than others, and that by no means does the circumstantial evidence leave the Crown with airtight cases on all of them. For example, there is no indication about what happened to the camouflage shirt worn by the wine bottle assailant, which is nowhere to be seen at the point that Mr. Abdullahi was video-recorded wearing only a basketball shirt shortly afterwards, or where that basketball shirt came from.
- [31] Another concern is that the threats to the police officer occurred after an arrest for failing to follow the officer's direction to leave the area. There is a triable issue about whether an officer has authority to give such a direction and, as a result, about the lawfulness of the resulting arrest.

- [32] The intermittent earlier observations of the stolen vehicle on April 2 leave open the possibility that the main driver and possessor of it left before Mr. Abdullahi was stopped driving it, and the fact that a second assailant was present at the scene of the wine bottle assault and was charged in relation to his participation raises a question of which one of them actually carried out the assault, particularly in view of the confusion about clothing in the SkyTrain video, and the fact that both suspects captured in it are young black males. (I took counsel to be adverting to the demonstrated frailties of cross-racial identification in these circumstances.)
- [33] As an example of the appropriate application of the consideration in Myers, as well as of the influence of the current COVID-19 pandemic on release decisions, including s. 525 reviews, counsel cited R. v. Duncan, 2020 BCSC 590. Relevant to our case, that decision makes the following points:
- Myers explicitly directs judges to pay careful attention to release plans, which have the potential to address the root causes of offending, and to remember that pretrial detention is a measure of last resort;
 - The combination of an extended period on remand to interrupt a pattern of substance use, release to an isolated rehabilitation facility, and the incentive towards good behaviour provided by imminent trial dates can form the pillars of an effective release plan, as they did for Mr. Duncan; and
 - Where there is a satisfactory release plan to address public safety, the risk of COVID-19 infection within the remand facility can tip the balance in favour of release.
- [34] Mr. Abdullahi's counsel also referred me to the decision of R. v. Morris, 2018 ONSC 5186, in which the sentencing judge accepted into evidence a report analyzing and outlining research "on the existence and impact of anti-Black racism in Canadian society in general and the Toronto region in particular". Of particular relevance were the parts of the report that addressed the experiences of young Black men with the criminal justice system in Canada. It found that they are more frequently the subject of police stops, serve longer periods of pretrial detention, and receive longer sentences than other members of the community. In general, they were found to be grossly overrepresented in the provincial and federal correctional systems. These circumstances were found to stem from the heritage of colonialism, slavery, and segregation that has been inflicted on Black people in Canada, which gave rise to stereotypical assumptions about them and discriminatory treatment of them by various institutions in society. While the specific relevance of the report was to the treatment of young Black men in the Toronto area, which has become a notorious situation, the report was framed to be applicable Canada-wide.
- [35] The sentencing judge drew an analogy between the impact of these systemic factors on the young Black offender before him with the Gladue factors that must be taken into account when sentencing Indigenous offenders. Mr. Abdullahi's counsel submits that this kind of analysis aligns with the direction in the recently enacted s. 493.2 of the Code, which requires

judges "[to] give particular attention to the circumstances of . . . accused who belong to a vulnerable population that is overrepresented in the criminal justice system and that is disadvantaged in obtaining release under this Part" when making bail decisions.

Crown

- [36] Crown counsel submits that there is an ample basis on which to uphold the detention order on the secondary ground as expressed by the hearing judge or, if necessary, on the tertiary ground. In his submission, the circumstances show Mr. Abdullahi to be an extremely dangerous person who has no regard for anyone else. The video recording of the random assault offers particularly disturbing evidence in support of that proposition. Even with a more isolated release location, as is proposed here, Crown counsel says that the issue is still the risk that Mr. Abdullahi poses to commit more violent offences if he were to leave that facility. His past behaviour, including his inability to comply with previous orders, must be given some weight in the analysis.
- [37] This is also not a situation, the Crown says, in which Mr. Abdullahi's accumulated time in custody and the credit he will receive for it have become disproportionate to even the lowest range of sentence, if he is convicted of any of the more serious offences he is charged with.

Discussion

- [38] Although Mr. Abdullahi has been acquitted of a very serious charge that he was facing at the time of the release hearing, and that must necessarily have figured in the hearing judge's analysis, the remaining charges present quite a compelling picture of ongoing reckless and dangerous behaviour by him, including egregious driving and serious unprovoked violence. His counsel has certainly identified issues worthy of argument in the various trials that are forthcoming. Nevertheless, I would say that overall these cases are reasonably strong and that where they rely on circumstantial evidence, it seems convincing enough to make a strong contribution to the burden of proof.
- [39] Even accepting the risk of system-generated breaches for those living in marginalized circumstances, his record of non-compliance is quite notable and seems inevitably to speak of disregard for court supervision, rather than of a tumultuous lifestyle.
- [40] Overall, he presents a high risk of committing further offences, which I am satisfied are likely to be violent, including against physically vulnerable victims, as has occurred so far; or to create a danger to the public in the manner that they are carried out, such as by driving recklessly.

- [41] I commend his counsel for developing a focused release plan that addresses what went wrong with previous releases, and I accept in a general way that geographic distance, in itself, may be helpful in providing the isolation from the negative peer group that has apparently influenced his behaviour. I also accept that the cash deposit proposed, a significant amount in itself, would be even more significant for his family to risk, given their financial circumstances.
- [42] But the rules of the rehabilitation facility, the presence of electronic monitoring, the distance from town, and the risk to his family's finances will not, in my estimation, form a sufficient barrier when inevitably Mr. Abdullahi has an impulse to pursue short-term gratification of some kind instead, as he has so regularly done in the past. Stealing a car from or near the rehabilitation facility is the possibility that springs most obviously to mind.
- [43] Duncan is an example of a case in which, on its particular facts, the time that elapsed since the offence dates, the positive effects of incarceration, the Gladue considerations now represented in s. 493.2, and a viable release plan, all came together to indicate that detention was no longer required. However, while the break and enters that the accused was alleged to have committed are serious, and one of the allegations involved him entering an occupied home while masked and brandishing pepper spray, there were not the repeated instances of the infliction of violence, or the threat of violence, or the danger to the public at large that are present in our circumstances. Further, while Mr. Duncan had some difficulties with reporting and he had prior breach convictions within a lengthy related record, his past disregard for court orders was not on the scale that Mr. Abdullahi has demonstrated.
- [44] The decision in Morris has not yet been adopted in this province and the report it cited, while certainly purporting to address the situation it describes at a national level, is nevertheless very Ontario-centric in its focus and in many of its statistical references.
- [45] As a purely technical matter, it is not open to me to directly adopt factual findings made in a separate hearing. There needs to be an evidentiary foundation specific to each case unless, as in the case of Gladue, the Supreme Court of Canada directs that judicial notice be taken of systemic factors applicable to an accused from a particular background.
- [46] I also think that evidence of the specific challenges that arise in the British Columbia context, including reference to whatever statistical measures showing over-representation of Black Canadians in the criminal justice system are available, is necessary before proper consideration can be given to accused persons with that background in the context of bail in this province.
- [47] It may be of some comfort to Mr. Abdullahi to know that even if I had been able to apply the full weight of the findings in Morris to his bail prospects, and had concluded that I could give particular attention to him as a member of an over-represented group that had difficulty obtaining a release, it would still not have overcome my concerns about the likelihood of repetition of violent offences.

[48] Therefore, despite the usual able submissions of his counsel, I conclude that Mr. Abdullahi's detention remains justified on the secondary ground and his application must be dismissed.

[49] Thank you very much.

"Schultes J."

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