

CANADA / JUDGMENT

R. v. Ayukawa

2023 BCSC 693

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Supreme Court of British Columbia

DECIDED

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2023 BCSC 693 R. v. Ayukawa

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

R. v. Ayukawa,

2023 BCSC 693

Date: 20230209

Docket: 33843-1-W

Registry: Vancouver

Rex

v.

Chad James Ayukawa

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Before: The Honourable Madam Justice Ker

On judicial review from: Provincial Court of British Columbia, October 24, 2022

(R. v. Ayukawa, Vancouver Docket No. 264819-2-C; 264819-3-C)

Oral Reasons for Judgment

at s. 525 Detention Review Hearing

Counsel for the Crown:

S. Bains

Counsel for the Accused::

G. Garih

Place and Date of Trial/Hearing:

Vancouver, B.C.

February 9, 2023

Place and Date of Judgment:

Vancouver, B.C.

February 9, 2023

- [1] These Reasons for Judgment were delivered as oral reasons. They have since been edited for distribution.
- [2] The accused, Chad James Ayukawa, is before the Court for a detention review hearing pursuant to s. 525 of the Criminal Code [Code] because he has been detained in custody in excess of 90 days and the trial of the indictable offences with which he is charged has not yet commenced. Indeed, no trial date has been set, nor will one be set. It is the accused's intention to plead guilty to the offences he is charged with. The Court was advised at this detention review hearing this morning that sentencing is to occur on or about February 23, 2023, in the Provincial Court of British Columbia in Vancouver.
- [3] Mr. Ayukawa is charged on Information Number 264819 with four offences: three substantive offences from February 27, 2022, and one breach offence from August 10, 2022. More specifically, he is charged with:
- 1) assault of Oliver Bashonga, contrary to s. 266 of the Code;
 - 2) robbery of Connie Yam, contrary to s. 344(1)(b) of the Code;
 - 3) dangerous operation of a conveyance causing bodily harm, formerly known as dangerous driving causing bodily harm, contrary to s. 320.13(2) of the Code; and
 - 4) failure to comply with a release order by failing to remain at or on the lot of his residence, contrary to s. 145(5)(a) of the Code.
- [4] Obviously the robbery and dangerous operation of a conveyance are the serious offences in this matter. The maximum sentence for robbery is life. There is no mandatory minimum sentence in this case.
- [5] The maximum sentence for dangerous operation of a conveyance causing bodily harm is 14 years' imprisonment and a minimum punishment of \$1,000 fine as provided by s. 320.2(a) of the Code.

- [6] The circumstances of the offences were outlined very briefly at the initial bail hearing before Judge Solomon of the Provincial Court of British Columbia on or about April 22, 2022. Judge Solomon's reasons for releasing the accused are not before the Court.
- [7] I take my summary of the circumstances from the Crown's written submissions filed on this hearing:
5. On February 27, 2022, at approximately 8:40 am, complainant Ms. Yam was driving her Toyota Yaris northbound on Cambie Street and stopped at a red light at W. Broadway avenue in the number 3 lane where she planned on making a right hand turn. An unknown male, later identified as Mr. Chad Ayukawa approached her Yaris from the south east corner of the intersection and entered her vehicle via the unlocked passenger door. Mr. Ayukawa struggled with Ms. Yam and attempted to force her out the drivers door of the vehicle. Ms. Yam described it as "he was pushing me out, as if he wanted to drive the vehicle". Ms. Yam's seatbelt was fastened; therefore, she was unable to escape. She opened the door and began yelling for help. Several witnesses overhead the cries for help and went over to assist. Mr. Ayukawa continued to push Ms. Yam out of the vehicle, while her door was open which caused her to be halfway out of her vehicle. A civilian member, Mr. Bashonga, observed the interaction and placed his vehicle in park and stepped to assist Ms. Yam. However, Mr. Bashonga was struck in the face by Mr. Ayukawa and the vehicle accelerated hard northbound. Ms. Yam felt the vehicle move forward and she was dragged for approximately one city block. Ms. Yam recalls witnesses attempting to pull her out of the vehicle while she was being dragged. She was eventually pulled out of her vehicle where she recalled laying on the ground.
 6. Another civilian witness who observed the incident, photographed the incident and took multiple videos of Ms. Yam on the ground.
 7. By the time officers arrived on scene, the ambulance was already at the location and treating Ms. Yam. Cst. Schellinck observed that Ms. Yam's pants had been severely rashed from being dragged and fresh bruising to her leg.
 8. At 9:48 am, Cst. Wong observed the stolen Yaris driving westbound onto the 500 blk of Keefer St. Officers then conducted a pin of the vehicle midblock and took Mr. Ayukawa into custody. He was the only occupant in the vehicle.
 9. Mr. Ayukawa was arrested and chartered for robbery and assault. He was asked if he would like to speak to a lawyer, he stated "nope". He was then read the official warning. Mr. Ayukawa was then placed in the back of the police vehicle. Cst. Schellinck asked Mr. Ayukawa "what happened" to which Mr. Ayukawa responded with "I tried to get the seatbelt off, I'm sorry, I dragged her".
 10. As for injuries, Mr. Bashonga had some redness to his face but was relatively uninjured. Ms. Yam, on the other hand, was transported to VGH with the following injuries:

- Right leg: numbness, bruises, and pulled ligament;
 - Left arm: bruises and abrasions;
 - Left leg: bruises and abrasions;
 - Right arm: abrasions.
11. Mr. Ayukawa appeared in custody on February 27, 2022. He had a bail hearing on April 22, 2022 and was released on comprehensive conditions that included residing at Luke 15 House, reporting, electronic supervision and house arrest.
12. In addition, Mr. Ayukawa is also charged with breaching his release order on August 11, 2022. One of the conditions of his release order was electronic monitoring. On August 10th, 2022, the National Monitoring Unit advised that Mr. Ayukawa was absent without leave. In other words, he was breaching his ankle monitoring. He was then arrested on August 11th near Nanaimo and East 24th Avenue, Vancouver. At that time, community corrections also noted that Mr. Ayukawa was struggling with complying with house arrest, as well as Luke 15's rule of abstaining from illicit substances.
- [8] The accused was at large for nearly 24 hours before being arrested on August 11, 2022. The accused consented to remain in custody until he had a bail hearing before Judge Gordon of the Provincial Court on October 24, 2022. At his bail hearing before Judge Gordon, the accused sought release on the same onerous terms that Judge Solomon had imposed in April 2022, but proposed that the recovery house he be released to be changed to Hope For Freedom in Maple Ridge, B.C., instead of Luke 15, which he had walked away from on August 10, 2022.
- [9] A technical suitability report for electronic monitoring was before Judge Gordon, and again before this Court on this detention review hearing. Notable in that report is the following:
- a) Has the client been compliant with prior electronic supervision?
 - a. Yes []
 - b. No [X]
 - c. Not applicable []

Comments: Mr. Ayukawa was placed on electronic supervision from April 28, 2022 to August 11, 2022. Below are the instances of non-compliance with electronic supervision during this period.

- May 20, 2022: 42 minutes late for curfew.
- May 26, 2022: Evicted from his residence at Luke 15 for testing positive for opiates. Was accepted back into the program on May 27, 2022.
- July 6, 2022: 1 hour and 28 minutes late for curfew.

- July 13, 2022: Mr. Ayukawa was given permission from his bail supervisor to attend a dentist office but did not go to the approved location. Mr. Ayukawa went to locations not approved by his bail supervisor and returned 50 minutes late for curfew.
- August 10, 2022: Refused to provide a urine sample for Luke 15 staff and chose to leave Luke 15. Mr. Ayukawa was arrested by Vancouver Police Department and Police File #22-122505 was created.

Mr. Ayukawa was previously [in] the Electronic Monitoring Program with BC Parole between September 13, 2000, and January 10, 2001. Mr. Ayukawa's BC Parole was revoked on January 9, 2001, and he turned himself in on January 10, 2001. Mr. Ayukawa did not have any Electronic Monitoring compliance issues during this period of supervision and the reason for his BC Parole being revoked was not related to his Electronic Supervision.

[10] Judge Gordon detained the accused, providing succinct reasons for doing so:

- [1] THE COURT: Chad Ayukawa seeks judicial interim release. The onus is on him. He was released by my brother Judge Solomon in April to a treatment facility and to be bound by electronic monitoring. During the course of that release, he breached the order on five occasions. He now proposes the exact same release order, but a different facility.
- [2] I am satisfied, if released, there is a substantial likelihood of his inability to comply, and bail is denied.
- [11] At the conclusion of the bail hearing, the accused was adjourned over to November 18, 2022, ostensibly for a sentencing hearing. The accused became eligible for a s. 525 detention review hearing on November 9, 2022, when he reached the 90-day mark in his custodial status.
- [12] Mr. Ayukawa is 49 years old. He has a criminal record that is not disputed. It consists of 23 prior convictions, largely for property offences pertaining to break and enter, theft under, fraud, one conviction for possession of a controlled substance, and one prior failure to comply with a probation order. His criminal record started in 1998 and his last conviction was March 1, 2021, for the breach of probation offence.
- [13] Mr. Ayukawa's main problem is a crippling addiction to heroin. He has worked in the past, with his last full-time employment in 2012 in his family's commercial fishing supply business where he worked as a salesman and warehouse manager.
- [14] Since detained on these charges, Mr. Ayukawa has engaged in some one-to-one counselling in the detention centre. For the past two months, he has been taking suboxone to help him with his heroin addiction. He was previously on methadone but finds the suboxone a much better maintenance program.
- [15] Mr. Ayukawa proposes that he be released on the same terms as he was released on in April 2022, but this time that he be released to the Hope For Freedom Recovery House.

- [16] As I noted earlier, the accused has no trial date for these charges and no effort has been made to secure a trial date. That is because this matter has always been intended to be resolved by means of a guilty plea and sentencing.
- [17] Had a guilty plea been entered, Mr. Ayukawa would be ineligible to have a s. 525 detention review hearing. Once a guilty plea is entered, an accused has waived his right to a trial and to a s. 525 review: see *R. v. Bhullar*, 2016 BCSC 2506.
- [18] It is only because no guilty plea has been entered that the accused remains ostensibly eligible for a s. 525 detention review hearing.
- [19] The onus is on Mr. Ayukawa to establish that he should be released; that is, his detention is not justified on any of the enumerated grounds outlined in s. 515(10) of the Code. The Crown opposes Mr. Ayukawa's release on the secondary and tertiary grounds.
- [20] 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 SCC 18 at para. 63, 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.
- [21] A frequent example of additional information relied upon to support release on a detention review is a more robust or comprehensive plan for release of the accused than was available at the original bail hearing.
- [22] The question before me remains this: whether Mr. Ayukawa's continued detention is justified within the meaning of s. 515(10) of the Code, which provides as follows:
- 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 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.

[23] Although Myers states in stark terms at para. 63 that the question is whether continued detention is justified under s. 515(10), the decision must be taken in context. Of course, the jurisprudence admonishes that pretrial detention is the exception, not the rule: Myers at para. 1.

[24] However, Myers also states:

[4] In the case at bar, the Court is asked to determine the correct approach to a detention review under s. 525 Cr. C., and to explain the place of such a review within the larger context of pre-trial custody in Canada. For the reasons that follow, I find that Parliament intended s. 525 to operate as a safeguard. This section imposes an independent responsibility on the reviewing judge to consider whether the continued detention of the accused is justified, and establishes a discretionary mechanism designed to prevent unreasonable delay and to expedite the trials of individuals in remand .

[Emphasis added.]

[25] Section 525 of the Code provides:

Time for application to judge

525 (1) The person having the custody of an accused -- who has been charged with an offence other than an offence listed in section 469, who is being detained in custody pending their trial for that offence and who is not required to be detained in custody in respect of any other matter -- shall apply to a judge having jurisdiction in the place in which the accused is in custody to fix a date for a hearing to determine whether or not the accused should be released from custody, if the trial has not commenced within 90 days from

- (a) the day on which the accused was taken before a justice under section 503; or
- (b) in the case where an order that the accused be detained in custody has been made under section 521, paragraph 523.1(3)(b)(ii) or section 524, or a decision has been made with respect to a review under section 520, the later of the day on which the accused was taken into custody under that order and the day of the decision.

The person shall make the application immediately after the expiry of those 90 days.

Waiver of right to hearing

(1.1) However, the person having the custody of the accused is not required to make the application if the accused has waived in writing their right to a hearing and the judge has received the waiver before the expiry of the 90-day period referred to in subsection (1).

Notice of hearing

- (2) On receiving an application under subsection (1), the judge shall
- (a) fix a date for the hearing described in subsection (1) to be held in the jurisdiction
 - (i) where the accused is in custody, or
 - (ii) where the trial is to take place; and
 - (b) direct that notice of the hearing be given to such persons, including the prosecutor and the accused, and in such manner as the judge may specify.

Cancellation of hearing

- (3) The judge may cancel the hearing if the judge receives the accused's waiver before the hearing.

Consideration of proceeding's progression

- (4) On the hearing described in subsection (1), the judge shall consider whether the prosecutor or the accused has been responsible for any delay and, if the judge is concerned that the proceedings are progressing slowly and that an unreasonable delay may result, the judge may
- (a) give directions for expediting the proceedings; or
 - (b) require a further hearing under this section within 90 days or any other period that the judge considers appropriate in the circumstances.

[26] An examination of s. 525 of the Code, informed as it is by the directions from Myers, reveals that this provision is to ensure that accused do not languish in custody pending trial, particularly where an accused is approaching spending more time detained pending trial than would be imposed if the accused were sentenced. Myers reflects this in the delay and proportionality analysis found at paras. 50 through 54 of the decision.

[27] In my view, the purpose of s. 525 of the Code as outlined in Myers is to ensure that accused do not languish in custody awaiting their trial. Indeed, para. 54 of Myers reinforces this point:

As part of this analysis, the judge may consider whether either party has been responsible for any unreasonable delay in the trial of the charge: s. 525(3) Cr. C. If an unreasonable delay in getting the case to trial can be attributed to one of the parties, that factor will be relevant in determining whether the continued detention of the accused is proportionate or appropriate. Thus, if the

accused appears to have engineered an unreasonable delay in his or her own trial, the basis for making a release order will clearly be weaker, but if the Crown is responsible for an unreasonable delay, this will weigh in favour of release. While the term "unreasonable delay" in s. 525 clearly cannot have the same meaning as it does in the context of s. 11(b) of the Charter, the two can be seen to be conceptually related. That being said, not every delay in getting a matter to trial will be unreasonable, and the accused does not have a right to be at any particular point in the process when the 90-day mark is reached. The judge must therefore rely on his or her judgment and experience in determining what impact, if any, the passage of time and an unreasonable delay should have on the continued detention of the accused.

[Emphasis in original.]

- [28] In this case, the accused has not "engineered an unreasonable delay" of his own trial as, on the basis of the information before me, he has never intended to take this matter to trial. The Crown certainly is not responsible for any delay in this case, based on the information placed before the Court on this hearing. In my view, this particular case is an example of the inappropriate use of the s. 525 process that appears to be developing since the decision in Myers.
- [29] Here the accused does not intend to take this matter to trial; he intends to plead guilty and be sentenced. The Crown seeks a sentence of two years less a day imprisonment as a custodial sentence, followed by probation. The accused intends to seek a conditional sentence order.
- [30] In light of the Crown's position on sentence, a CSO appears to be potentially available. Of course, Mr. Ayukawa is eligible to have his presentence custody deducted from any global sentence imposed by virtue of the provisions of s. 719(3.1) of the Code. This is the remedial provision for individuals who languish in custody awaiting sentence. This is the remedial component available to Mr. Ayukawa. I commend Mr. Ayukawa for his steps at getting his substance abuse issues under control, and that will be an appropriate point for the sentencing judge who hears this matter in two weeks' time to consider.
- [31] Respectfully, however, I find that the use of the s. 525 detention review hearing in this case is really nothing more than a veiled attempt to try and bind the sentencing judge that hears this matter in two weeks' time. Should the accused be released today, the sentencing judge may well feel their hands have been tied on the type of sentence to impose where a Supreme Court judge has ordered the accused's release. It is almost like a reverse summary conviction sentence appeal, where the sentencing judge may well feel constrained at sentencing by a bail decision of a superior court judge made two weeks before the sentencing.
- [32] The sentencing judge will have many factors to consider, but a pre-screening as to the type of sentence to be imposed may well be construed as having been made if release were ordered now.

[33] This is not what s. 525 is to be used for and not what Myers envisioned when that decision came down. Proportionality is not in issue in this case. If the accused is sentenced to a custodial sentence in the range sought by the Crown, there will be at least a net sentence of approximately nine months' imprisonment after presentence custody is deducted. If the defence is successful in obtaining a CSO, then the accused will start serving his sentence in the community in about two or three weeks, but that decision ought to be made by the sentencing judge and not in advance through the s. 525 detention review hearing process.

[34] To be clear, it is my view that the purpose of the s. 525 detention review hearing process and the decision in Myers interpreting those provisions is not to be used as an end run on securing a particular type of sentence at a later date. Section 525 is to ensure that the detention or custodial status of an accused is reviewed when a matter is not moving along with sufficient dispatch to get the matter to trial. The circumstances of the substantive offences in this case are grave. In addition, five instances of non-compliance with the previous release order culminated in one breach charge.

[35] Accordingly, the circumstances are very concerning. I agree with Judge Gordon's succinct analysis. The detention of Mr. Ayukawa remains justified on the secondary ground, and I would add the tertiary ground. More significantly, though, I find that the overall purpose of s. 525 is not engaged in this case, as the accused is not unnecessarily detained in custody awaiting his trial. He is detained in custody awaiting a sentencing hearing.

[36] While it is tempting to issue a direction pursuant to s. 526 of the Code, which provides:

526 Subject to subsection 525(4), a court, judge or justice before which or whom an accused appears under this Part may give directions for expediting any proceedings in respect of the accused.

-- no such direction was sought.

[37] Moreover, no information has been placed before the Court as to why the sentencing of Mr. Ayukawa has been delayed three months from November 18, 2022, to February 23, 2023. I can surmise why the delay may have accrued but that is immaterial. Significantly, it is not clear to me that the accused has not been responsible for this passage or elapse of time. I have heard nothing that would suggest that there is difficulty in obtaining a sentencing hearing date in the Provincial Court of British Columbia and so I decline to make any direction in the circumstances of this case.

[38] For the reasons given, I conclude that the detention of Mr. Ayukawa remains justified under the secondary and tertiary grounds. The detention order is upheld. That concludes my reasons.

"Ker J."

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