

CANADA / JUDGMENT

R. v. Buchanan

2020 BCSC 852

COURT

Supreme Court of British Columbia

DECIDED

6 May 2020

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2020 BCSC 852 R. v. Buchanan

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

R. v. Buchanan,

2020 BCSC 852

Date: 20200506

Docket: 83677-2

Registry: Nanaimo

Regina

v.

John Albert Buchanan

The trial of this matter has concluded and the publication ban made pursuant to s. 517(1) of the Criminal Code has expired.

Corrected Judgment: The text of the judgment was corrected at paragraphs 18 and 24 on April 28, 2021.

Before: The Honourable Mr. Justice Thompson

Oral Reasons for Judgment on Judicial Interim Release

Counsel for the Crown

appearing by teleconference:

L. Mascolo

Counsel for the Accused

appearing by teleconference:

M. Munro

Place and Dates of Hearing:

Nanaimo, B.C.

April 6, 8 & 15, 2020

May 6, 2020

Place and Date of Judgment:

Nanaimo, B.C.

May 6, 2020

- [1] THE COURT: This is an application for judicial interim release. Mr. Buchanan is charged with the second-degree murder of Richard Sitar, who died in his apartment on 11 September 2017. Mr. Sitar suffered ten injuries to his head, including deep scalp lacerations and skull fractures. The pathologist concluded that he died from multiple blows to his head from a blunt object. Following a preliminary inquiry that concluded on 19 January 2019, Mr. Buchanan was committed to stand trial.
- [2] With the consent of the Crown, Mr. Buchanan will be tried by judge alone. The case was set to proceed to trial on the 25 November 2019 assize, but in the days beforehand the Crown provided disclosure in relation to a statement recently given to the police by a cellmate of Mr. Buchanan. The cellmate alleges that in late October 2019 Mr. Buchanan spoke to him of killing Mr. Sitar with a bat. The trial was adjourned and reset for the 19 October 2020 assize. Mr. Buchanan plans to make a Jordan stay application at the outset of the trial, which is now scheduled to occur approximately 37 months after his arrest.
- [3] This is Mr. Buchanan's first application for bail. His release plan is centred on living at his sister's up-Island residence, at least on a temporary basis. The Crown's position is that Mr. Buchanan has failed to show cause on the secondary and tertiary grounds. However, for the reasons that follow, I am persuaded that Mr. Buchanan has established his entitlement to bail.

Circumstances

- [4] Mr. Buchanan and Mr. Sitar were acquainted with one another. The case against Mr. Buchanan has two main components. The first of these is a closed circuit video from the hallways of Mr. Sitar's apartment building that is alleged to show Mr. Buchanan entering and leaving Mr. Sitar's apartment shortly before and after the time when Mr. Sitar was allegedly killed. The Crown submits that the video evidence, together with the testimony of Amanda Karaim (Mr. Sitar's spouse) will establish that Mr. Buchanan was the last person alone with Mr. Sitar before he was killed and the only person to leave the apartment before Mr. Sitar

was discovered dead.

- [5] The second main body of evidence comprising the Crown's case is statements made by Mr. Buchanan to his cellmate and to the police. In his statements to police in the day following his arrest, Mr. Buchanan acknowledged that he was at Mr. Sitar's apartment on the day in question. And, Mr. Buchanan's cellmate is expected to testify that Mr. Buchanan provided details of the killing that are consistent with other evidence, including the opinion evidence of the pathologist and the blood spatter expert. More recently, on 5 March 2020, the accused provided a further detailed statement to police which the Crown characterizes as "another version of what happened." I have not seen the statement, but I was told that it implicates two other persons, both since deceased.
- [6] The accused is 48 years old. He has struggled with drug addiction and homelessness. He has a criminal record. He has a string of convictions between 2004 and 2008 for uttering threats, weapon possession, assault, breach of recognizance, mischief, obstructing a police officer and theft under. However, his next conviction was in November 2016 for theft under. He has convictions in 2017 related to living on railway property, evidently stemming from homelessness.
- [7] While on remand, Mr. Buchanan has completed six courses related to living without violence, substance abuse management, respectful relationships, and peer education. His counsel advises that Mr. Buchanan has detoxed and drug dependency is not presently an issue.

The Release Plan

- [8] Mr. Buchanan's release plan is based on his elder sister's agreement to act as surety, and have him live with her family in Campbell River until such time as he is able to arrange suitable housing in that city. She lives in a two-bedroom apartment with her husband and two adult children, and a friend of the family. Mr. Munro advises that the role and obligations of a surety have been explained to her, and she "accepts the role of whistleblower in the event that the accused does not abide by conditions."
- [9] The surety proposed that Mr. Buchanan live with her until trial. The matter was adjourned to allow the Crown to make inquiries in relation to the bail plan. Members of the Campbell River RCMP detachment attended on the surety and were satisfied as to the arrangement. However, following that satisfactory report a member of the Nanaimo detachment called the building manager to see what he thought, and he indicated that "there is no way that the building would allow that" -- which I understand to mean having six people living in the apartment.

[10] The application was further adjourned to allow the accused to try to find alternative accommodation. This has proved challenging during the COVID-19 epidemic. The matter has come forward today on the basis that the accused will be a temporary visitor in his sister's apartment until another Campbell River residence can be organized.

Has the Accused Shown Cause?

[11] This is an application under s. 522, and the accused must show cause why his detention in custody is not justified within the meaning of s. 515(10). The Crown does not contest -- and I find -- that the accused has shown that his detention is not necessary on the primary ground.

[12] With respect to the secondary ground, the issue is whether the accused has shown that his detention is not necessary for the protection or safety of the public having regard to all of the circumstances, including a substantial likelihood that the accused will, if released, commit a criminal offence or interfere with the administration of justice.

[13] This passage from Mr. Justice Halfyard's often quoted reasons in *R. v. Abdel-Rahman*, 2010 BCSC 189, at paras. 21-23, summarizes the proper approach to the secondary ground:

[21] The limits within which detention on the secondary ground may be justified were described by Chief Justice Lamer in *R. v. Morales*, [1992] 3 S.C.R. 711 (at para. 39) in the following words:

. . . Bail is not denied for all individuals who pose a risk of committing an offence or interfering with the administration of justice while on bail. 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. . . .

[22] In *R. v. Wilcox* 2005 B.C.S.C. 1785, Mr. Justice Barrow (at para. 22) further clarified the limits of the secondary ground by stating that bail should not be denied unless "that risk cannot be adequately addressed by the imposition of appropriate terms of release." I take this statement to refer to the "necessity" of detention, and to mean that even significant risks can be addressed by strict bail conditions, provided the risk to public safety does not amount to a "substantial likelihood."

[23] In my opinion, the decisions that a judge must necessarily make in order to reach the conclusion that detention is justified on the secondary ground, are the following:

- a) First, that there is a risk that the accused will either commit an offence, or will interfere with the administration of justice, if he is released;
- b) Second, that this risk is of such magnitude that it amounts to a "substantial likelihood;"

- c) Third, that the said risk would constitute a danger to public safety (in general, or to a specific victim or witness) if the accused is released; and
 - d) Fourth, that the detention of the accused is "necessary," because the identified danger to public safety cannot be prevented or reduced to an acceptable level by bail conditions (such as reporting to authorities, curfew, no-contact, mobility restrictions, sureties or cash bail).
- [14] Of course, what Justice Halfyard said in this passage must be read with the realization that in the matter at hand the accused has the onus to show cause. I conclude that the accused's release plan will mitigate the risks of the commission of an offence or the interference with the administration of justice to an extent significantly below the "substantial likelihood" threshold. The absence of concerning criminal convictions since 2008 provides grounds to believe that the public will be protected with appropriate bail conditions. I do not overlook that Mr. Buchanan was on probation at the time of this alleged offence, and has two breach of probation convictions in the months leading up to his arrest in this matter as well as the very dated breach of recognizance conviction. However, I think it likely, based on what I was told during the hearing, that the two recent breaches were for returning to sleep on property owned by a railway company. If Mr. Buchanan is living with his sister or another suitable accommodation in the Campbell River area, the risk of this type of trespass offence -- which is in any event unlikely to constitute a danger to public safety -- will be removed.

[The video connection with the accused was lost, and a portion of the reasons were re-read.]

- [15] It would of course be preferable if Mr. Buchanan's bail plan provided for a more permanent residence, because stable housing often mitigates risk that an accused may commit an offence while on bail. However, after considering the matter, I conclude that the temporary arrangement combined with surety bail and an intention to continue to try to secure more lasting accommodation is sufficient to keep the risk below the substantial likelihood threshold.
- [16] On the tertiary ground, the leading case is *R. v. St-Cloud*, 2015 SCC 27. The analysis of whether the accused has demonstrated that his detention is not necessary to maintain confidence in the administration of justice requires consideration of all of the circumstances, including but not restricted to the factors specified in s. 515(10)(c) .

Apparent Strength of the Crown's Case

- [17] The Crown submits that its case is very strong. Mr. Munro submits that the case is "arguable," and depends in large measure on the alleged jailhouse confession -- which I sense will be the subject of a vigorous challenge. There is also the Jordan issue which has the potential to result in a stay of proceedings, although based on what I heard (which naturally was limited) I think it less than probable that the Jordan application will succeed.

- [18] I am not to take on the role of the jury at this bail hearing or, in this case, the judge that will be hearing this case, and delve deeply into issues of credibility and reliability of the evidence. It is difficult to take the measure of a case like this without hearing the cellmate. Although the Crown's case appears to have elements of strength, based on the limited information available to me I think it would be going too far to characterize it as "very strong."

Gravity of the Alleged Offence

- [19] Murder and the included offence of manslaughter are both most grave offences, amongst the most serious in the Criminal Code.

Circumstances Surrounding the Commission of the Alleged Offence

- [20] A bat is alleged to have been used by the accused in the commission of the offence, and many blows were landed. The alleged offence was gruesome, but does not fall into the category of heinous or hateful, as I understand Justice Wagner's use of these adjectives in St-Cloud, at para. 61. It was not committed in a domestic violence context and there is no indication of criminal gang or terrorist organization involvement, and it is not suggested that the deceased was a member of a vulnerable class of persons.

Liability on Conviction for a Potentially Lengthy Term of Imprisonment.

- [21] If convicted of murder, the accused will be sentenced to imprisonment for life. The range of sentences following manslaughter convictions is broad, but I find that the accused is facing a lengthy term of imprisonment if he is convicted of manslaughter.

Other Circumstances

- [22] Mr. Buchanan was on probation at the time he was alleged to have committed this offence. In a case that was decided before St-Cloud, our Court of Appeal held that a bail judge erred by focussing on non-compliance with court requirements in determining whether the tertiary ground applied, R. v. Brotherston, 2009 BCCA 431, at paras. 31-32, but I read St-Cloud, at paras. 66-71, as providing scope for consideration of all of the circumstances of the case. So his status as a probationer is a relevant circumstance, in my opinion. On the other hand, Mr. Buchanan's cognate criminal record is very dated and contains few and minor offences of violence.
- [23] I consider all of the s. 515(10)(c) factors together. On balance, I am satisfied that the accused's detention is not required to maintain confidence in the administration of justice. The confidence of the reasonable and thoughtful representative of the public -- one who understands the presumption of innocence and the entitlement to reasonable bail -- would not be undermined by the accused's release from custody on surety bail with strict conditions.

[24] By way of postscript, I should mention that I was asked to consider the risk of the accused's exposure to COVID-19 while on remand as a relevant circumstance on the tertiary ground, on the basis that Mr. Buchanan would be at less risk under house arrest conditions living in his sister's residence, because it is easier to self-isolate in a home setting than in a prison. Further, I was told that in his 20's, Mr. Buchanan suffered a collapsed lung and has respiratory issues. It is unnecessary to my decision to consider this submission, because I am prepared to release Mr. Buchanan without adding the epidemic to the equation.

Order

[25] The accused has shown cause on the primary, secondary and tertiary grounds. The release order is made with a total financial obligation of \$2000, with surety, in the name of Laurie Green, date of birth [redacted]. Laurie Green will promise to pay \$1500 and Mr. Buchanan's promise to pay will be an additional \$500, if he fails to comply with a condition of this order.

[Discussion about Crown's consent to a surety declaration waiver.]

[26] Following are the conditions of the release order, and I will hear from counsel when I finish reciting the conditions. My ears are open if you think that these conditions need amendment or variation, or need to be supplemented.

[27] The first is -- and these are keyed to the picklist -- 1001: keep the peace and be of good behaviour.

[28] 1002: must not change your residence without first notifying your bail supervisor. You must have no contact or communication, directly or indirectly, with the witnesses, Aaron Craig, Amanda Karaim or Steven Johnson, provided that your lawyer may communicate with these persons for the purpose of trial preparation.

[29] 1104: report by telephone to the bail supervisor in Campbell River within two business days of your release, and thereafter as and when directed by your bail supervisor, but no less than once per week.

[30] 1204: on your release, you must be transported directly to your sister's property at [redacted], Campbell River, and you will continue to live at that property, or at such other residence as may be approved by the bail supervisor.

[31] 1209-1: you must obey a curfew by being on your residential property between 7:00 p.m. and 7:00 a.m. every day. You must present yourself immediately at the door to your residence when any peace officer or bail supervisor attends or calls to check on you during the curfew hours. You may be away from your residence during the curfew with the prior written permission of your bail supervisor, to be given only for employment or other compelling reasons. You must carry the permission with you when you are outside your residence.

[32] 1401: you must not possess or consume alcohol, drugs or any other intoxicating substance, except with a medical prescription.

- [33] 1610: you must not possess weapons as defined by the Criminal Code.
- [34] Before I address counsel, Mr. Buchanan, do you understand those conditions?
- [35] THE ACCUSED: Yes, I do, Your Honour. Yes I do.
- [36] THE COURT: Okay. Ms. Mascolo?
- [37] MS. MASCOLO: Yes, My Lord. I would ask you to also consider a no-contact with a few other witnesses. The first is Tryggve Farmer. And I would also ask Your Lordship to consider continuing the no-contact order with the individuals I named as part of a no-contact while Mr. Buchanan was in custody, Sarah Baker, Kym Arkell and William Curry. And I would ask Your Lordship to consider -- I am not sure what my friend will have to say about this, but certainly I will ask Your Lordship to consider -- no-go to the specific apartment and perhaps that Mr. Buchanan not be found in Nanaimo, except for purposes of attending court.
- [38] THE COURT: Mr. Munro, what do you say about the additional persons that your friend has made mention of in terms of the no-contact?
- [39] MR. MUNRO: I don't have any issue with that, My Lord.
- [40] THE COURT: Those names will be added to the no-contact order with the same proviso that counsel may communicate with these persons for the purpose of trial preparation.
- [41] MR. MUNRO: Thank you.
- [42] THE COURT: Now what about the no-go to Nanaimo?
- [43] MR. MUNRO: Yes, I don't have any trouble with that. There should be something that allows him, obviously, to travel through so he can get to Campbell River.
- [44] THE COURT: Yes. So with the exception of the trip to Campbell River, or for court purposes, the accused will not be present within Nanaimo city limits. Does that do it?
- [45] MS. MASCOLO: Yes, that is sufficient.
- [46] THE COURT: It is not inconceivable in these days that the accused might be called upon to appear in Nanaimo, as opposed to Campbell River. That is why I think we ought to provide for that.
- [47] MR. MUNRO: Yes, thank you, My Lord.
- [48] MS. MASCOLO: My Lord.
- [49] THE COURT: Anything else, counsel?
- [50] MS. MASCOLO: Not from the Crown, thank you.
- [51] MR. MUNRO: No, thank you.
- [52] THE COURT: Thank you both for your considerable assistance. It is much appreciated.

[53] MR. MUNRO: Thanks very much, My Lord.

"Thompson J."

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Prepared on 25 October 2026 · Esheria