

CANADA / JUDGMENT

R. v. Cluett

2020 BCSC 831

COURT

Supreme Court of British Columbia

DECIDED

1 April 2020

Source: bccourts.ca · Research copy typeset by Esheria. Not court-issued or certified.

2020 BCSC 831 R. v. Cluett IN THE SUPREME COURT OF BRITISH COLUMBIA Citation: R. v. Cluett, 2020 BCSC 831 Date: 20200401 Docket: 67622 Registry: Chilliwack Regina v. Daniel Jacob Cluett Before: The Honourable Mr. Justice Riley On judicial review from: Provincial Court of British Columbia, February 6, 2020 (R. v. Cluett, Chilliwack Docket No. 67622-1) Oral Reasons for Judgment at Bail Review Counsel for the Crown appearing by teleconference: D. Novakovic Counsel for the Accused appearing by teleconference: H.M. Patey Place and Date of Trial/ Hearing: New Westminster, B.C. March 10, 2020 Place and Date of Judgment: New Westminster, B.C. April 1, 2020

[1] THE COURT: This is an application by Mr. Cluett under s. 520 of the Criminal Code, R.S.C., 1985, c. C-46 for review of his detention. He is presently in custody on substantive allegations of possession of controlled substances for the purpose of trafficking and unlawful possession of firearms on 3 April 2019. That is the date of the charges. He was originally released on bail on those charges, but then arrested for breaches of bail and new offences. It was in those circumstances that Mr. Cluett appeared in the Provincial Court of British Columbia at Chilliwack on 6 February 2020 before the Honourable Judge Ormiston, who revoked Mr. Cluett's bail and ordered him detained. Basically, the learned Provincial Court judge concluded that Mr. Cluett was unwilling or unable to abide by the terms of his release and therefore detained him under what is often referred to as the secondary ground, as set out in s. 515(10)(b) of the Criminal Code.

Analysis

[2] This is a very unusual case. Mr. Cluett's underlying problem, what in effect has driven his involvement in criminal activity for some years as reflected in his criminal record, is one of substance abuse. He has been battling with drug addiction for many years. That, unfortunately, is not particularly unusual. What is unusual is the following. Mr. Cluett had originally been released on the substantive charges, drug and firearms possession, on a recognizance with a substantial cash deposit and subject to bail terms requiring him to reside at a residential drug recovery house. By the time of his bail hearing before the learned Provincial Court Judge, Mr. Cluett had admittedly breached the terms of his release on four occasions. However, despite those breaches, there was no evidence placed before

the Provincial Court Judge that Mr. Cluett had returned to drug use or that he had fallen off the road to recovery from his problems with drug abuse.

- [3] Mr. Cluett ended up serving the equivalent of 40 days in custody for the various breaches which he was found to have committed: 12 days in August of 2019 and a further 28 days in January and February of 2020. Further, the cash which was deposited to secure his release is also now potentially subject to estreatment due to his failure to comply with bail terms. All of these consequences have been visited upon Mr. Cluett as a result of his non-compliance with his bail terms.
- [4] There are triable issue on the outstanding substantive charges against Mr. Cluett arising from an incident on 3 April 2019. In particular, there are triable issues with respect to the validity of the search and admissibility of the resulting evidence under the Charter. Those substantive drug and firearms charges are very serious, and indeed the potential consequences are significant to Mr. Cluett and of interest to the public. Mr. Cluett is presumed innocent of those charges and is entitled to have a trial on them.
- [5] There are also triable issues on the only other outstanding charge against Mr. Cluett, a charge of breach of firearms prohibition by being in possession of some ammunition found on the floor of a car which Mr. Cluett was operating upon his most recent arrest.
- [6] Despite Mr. Cluett's admitted breaches of bail for which he has paid a penalty and for which there may yet be further consequences to come in terms of estreatment, there is evidence of a period of abstinence from drug use which is, by all accounts, the major underlying concern or risk factor for Mr. Cluett's involvement in criminal activity. In these circumstances, I am in agreement with the submission of Mr. Cluett's counsel that the learned Provincial Court Judge erred in principle in concluding that Mr. Cluett's conduct indicated "the genesis of a crime cycle".
- [7] It appears that the only substantive offences which Mr. Cluett has admitted to since his release on 26 April 2019 are driving while disqualified and attempt to obstruct a police officer, for which Mr. Cluett was sentenced to a \$1,500 fine and seven days in jail respectively. In considering the impact of those offences on the continuing risk that Mr. Cluett posed to the safety of the public, the learned Provincial Court Judge failed to give proper account for the fact that there was no dangerous driving conduct and the attempted obstruct was a futile effort by Mr. Cluett to switch seats with the passenger when the police pulled him over. The Provincial Court Judge thus failed to properly consider the extent to which this conduct had any continuing impact on Mr. Cluett's ability to address the "root causes" of his alleged criminal behaviour through a residential drug recovery program, as discussed in *R. v. Myers*, 2019 SCC 18 at para. 67.
- [8] I will go on to say that there have been three further developments since the original bail decision in this case.

- [9] The first development is that at the original bail hearing, there was a suggestion that the drug recovery house where Mr. Cluett would be residing, Night and Day, was not suitable because someone involved in running it was himself facing drug charges. That was raised by the Crown and cited as a concern by the Provincial Court Judge. At the original bail hearing, Mr. Cluett's counsel chose to respond to that concern in submissions rather than adjourning the bail hearing to obtain additional information. As it turns out, based on information obtained by counsel for Mr. Cluett subsequent to the original bail hearing, the person who was charged with drug offences is no longer having any involvement whatsoever in the actual operation of this drug recovery facility, Night and Day. Thus, that issue, which was clearly a concern to the Provincial Court Judge although not perhaps dispositive, has now been addressed.
- [10] The second development is that Mr. Cluett's counsel has now obtained a technical suitability report and is proposing release to a Night and Day residential recovery facility with electronic monitoring. In many instances, the addition of electronic monitoring might only be a mere nuance or detail rather than a material change in circumstance. However, in this particular case, it would be highly material. I say that because the principal problem with Mr. Cluett's performance on bail since his release has been his ability to ensure that he is at his residential address, obeying the curfew, in compliance with the terms of his bail order. As noted above, this is not a case where there is any evidence of actual relapse or return to drug use, and there is little evidence of any new criminality. Certainly the offences for which Mr. Cluett has now been sentenced do not have any direct link to the root causes of Mr. Cluett's involvement in criminal activity, which is fundamentally drug abuse. So in these circumstances, the added assurance that electronic monitoring could provide would directly address the issues that have led to prior breaches of Mr. Cluett's bail.
- [11] An unfortunate wrinkle is that due to the emergent COVID-19 pandemic, corrections officials have adopted a position where they will not place clients on electronic monitoring because of the health concerns that may pose to individuals who are required to affix the electronic monitoring equipment. So the actual form of release in this case would be that Mr. Cluett is to be placed on electronic monitoring as soon as is practicable. This is a very unfortunate development, in that it does not allow for electronic monitoring to take place immediately, and consequently does not immediately address or reduce Mr. Cluett's bail risk, at least until such time as the monitoring equipment can be installed.
- [12] This leads me to the final development, that being the emergence of the COVID-19 pandemic. Counsel for Mr. Cluett does not seek to characterize this as a freestanding material change in circumstance warranting a reconsideration of bail under s. 520 of the Criminal Code. Still, it is important to acknowledge, as I did in *R. v. Berlinguette*, 2020 BCSC 477, at paras 34 to 37, that one of the main strategies advocated by public health officials to combat the spread of COVID-19 is social distancing and self-isolation, which can be problematic in institutions where inmates do not normally have single cells.

- [13] I am aware from specific information furnished to me in other cases argued before me in the past week that those responsible for the administration of pretrial detention facilities in this province have specific measures in place to monitor and address COVID-19 risks. This is obviously a very fluid situation and the circumstances are changing on an almost daily basis, which highlights the importance of making case-by-case decisions based on the particular circumstances of each accused before the Court.
- [14] Suffice to say that there are heightened risks to those who are held in custody, a factor which is relevant to the health and safety interests of the accused, as discussed in Myers at para. 27. That factor was not present when the Provincial Court Judge initially ordered Mr. Cluett's detention on 6 February 2020. Although I am not specifically ruling that this is an independent basis for revisiting Mr. Cluett's detention, I will simply note that this is a consideration favouring release in the case at bar. I am only prepared to reach that conclusion in view of my previous conclusion, having found that the Provincial Court Judge erred in principle in assessing the nature of the risk that Mr. Cluett posed. When that risk is properly assessed, in my view it can be managed and, as I say, another consideration is the situation with regard to COVID-19.
- [15] So my conclusion is that the Provincial Court Judge erred in principle in ordering Mr. Cluett's detention on the secondary ground, and that there is at least one material change in circumstance in relation to Mr. Cluett's release plan, that being the clarification that no one associated presently with the Night and Day recovery house is facing drug charges that would impact upon the operation of that recovery facility.
- [16] In the net result, I am satisfied that all three grounds in s. 515(10) of the Criminal Code can be met by an order releasing Mr. Cluett on a recognizance with a cash deposit in the amount of \$22,500, and to be clear, that is a further cash deposit, not the cash marked for estreatment, on various terms, including a requirement that he reside at a particular drug recovery house operated by Night and Day, a curfew, a requirement that he is not to change his residence without prior approval of his bail supervisor, and a requirement that he be subject to electronic monitoring as soon as practicable.
- [17] So that is my ruling and that leads then to a discussion about the bail terms. I am looking for the most recent bail document. [DISCUSSION RE TERMS OF ORDER] "Riley J."

Source & reproduction note

Judgment wording, source notices and original paragraph numbers are retained. Esheria supplies the layout and this PDF's page numbers; these are not the source pagination. This is a research copy, not an official or certified court document. Check quotations, citations and publication restrictions against the original source before relying on it.

ORIGINAL SOURCE <https://www.bccourts.ca/jdb-txt/sc/20/08/2020BCSC0831.htm>

CASE PAGE <https://chat.esheria.ai/case-law/canada/r-v-cluett-2020>

Prepared on 26 October 2026 · Esheria