

CANADA / JUDGMENT

R. v. Dias

2023 BCSC 1407

COURT

Supreme Court of British Columbia

DECIDED

9 August 2023

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2023 BCSC 1407 R. v. Dias

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

R. v. Dias,

2023 BCSC 1407

Date: 20230809

Docket: 32027

Registry: Vancouver

Rex

v.

Garcia Ribeiro Dias

Before: The Honourable Justice MacNaughton

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Oral Reasons for Judgment

Counsel for the Crown:

M. Myhre

Counsel for the Accused:

M. Ritzker

Place and Date of Trial/Hearing:

Vancouver, B.C.

August 9, 2023

Place and Date of Judgment:

Vancouver, B.C.

August 9, 2023

- [1] On August 8, 2023, I found that Mr. Dias had breached his most recent conditions of release and ordered him detained, subject to him satisfying this Court that his detention is no longer justified under s. 515(10) of the Criminal Code, R.S.C. 1985, c. C-46 [Code].
- [2] Mr. Dias's counsel immediately applied for judicial interim release, and I heard arguments this morning.
- [3] Bail or judicial interim release is governed by Part XVI of the Code.
- [4] Counsel for Mr. Dias and for the Crown both agree that Mr. Dias is in a reverse onus situation and that the applicable subsection of s. 515(10) for considering his application is the tertiary ground in (c).
- [5] There is no dispute that the two leading Supreme Court of Canada cases on bail, and the tertiary ground for detention, respectively, are *R. v. Antic*, 2017 SCC 27 and *R. v. St Cloud*, 2015 SCC 27.
- [6] The applicable principles and guidelines that should be followed when considering whether to grant judicial interim release or on what terms are set out in para. 67 of *Antic*.
- [7] As modified because Mr. Dias is no longer presumed innocent (he has been convicted of the offence of sexual interference), and to account for Mr. Dias's reverse onus, those principles are as follows:
 - (b) Section 11(e) guarantees both the right not to be denied bail without just cause and the right to bail on reasonable terms.
 - (c) Save for exceptions, an unconditional release on an undertaking is the default position when granting release: s. 515(1).
 - (d) The ladder principle articulates the manner in which alternative forms of release are to be imposed. According to it, "release is favoured at the earliest reasonable opportunity and, having regard to the [statutory criteria for detention], on the least onerous grounds": ... This principle must be adhered to strictly.

- (f) Each rung of the ladder must be considered individually and must be rejected before moving to a more restrictive form of release. Where the parties disagree on the form of release, it is an error of law for a justice or a judge to order a more restrictive form of release without justifying the decision to reject the less onerous forms.
 - (g) A recognizance with sureties is one of the most onerous forms of release. A surety should not be imposed unless all the less onerous forms of release have been considered and rejected as inappropriate.
 - (h) It is not necessary to impose cash bail on accused persons if they or their sureties have reasonably recoverable assets and are able to pledge those assets to the satisfaction of the court to justify their release. A recognizance is functionally equivalent to cash bail and has the same coercive effect. Thus, under s. 515(2)(d) or s. 515(2)(e), cash bail should be relied on only in exceptional circumstances in which release on a recognizance with sureties is unavailable.
 - (i) When such exceptional circumstances exist and cash bail is ordered, the amount must not be set so high that it effectively amounts to a detention order, which means that the amount should not be beyond the readily available means of the accused and his or her sureties. As a corollary to this, the justice or judge is under a positive obligation, when setting the amount, to inquire into the ability of the accused to pay. The amount of cash bail must be no higher than necessary to satisfy the concern that would otherwise warrant detention and proportionate to the means of the accused and the circumstances of the case.
 - (j) Terms of release imposed under s. 515(4) may "only be imposed to the extent that they are necessary" to address concerns related to the statutory criteria for detention and to ensure that the accused can be released. They must not be imposed to change an accused person's behaviour or to punish an accused person.
- [8] Mr. Dias's most recent breach of the terms of his release is his sixth. In accordance with the ladder principle, he has been subject to release terms that are increasingly strict. As counsel so aptly put it, Mr. Dias is running out of rungs on the ladder. As a result, less onerous release terms are not appropriate in this case. Briefly, the history of Mr. Dias's judicial interim release is as follows.
- [9] His first breach occurred soon after he was charged and released on his undertaking that he would have no contact with I.L.'s family members. He called and left a voice mail message on P.L.'s phone. P.L. is the complaint's mother. On that occasion, a strict warning that he was not to contact her again was considered sufficient to ensure his compliance.
- [10] His second breach occurred approximately two weeks before the preliminary inquiry in the summer of 2021. During the Crown's interview of P.L., the Crown learned that Mr. Dias had tried to call her. That breach resulted in a tightening of his conditions in terms of the area restrictions, and he was given a stern warning from the bench.

- [11] His third breach was in early 2022. Y.L. was walking outside her home, where she lived with I.L., the child complainant; and P.L., was living about a block away. Y.L. observed P.L. and Mr. Dias removing groceries from his car. The Crown learned that Mr. Dias was paying for P.L.'s expenses. He remained under a no-contact condition. This was considered a very serious breach due to the potential of P.L.'s influence over her daughter. The area restriction was set to include Fraser St. on the east, Granville St. on the west, False Creek on the north and 57 Ave. on the south. The restrictions were designed to keep him away from the L. family, and he required permission from his bail supervisor to go outside his area restrictions. In addition, he was required to post \$5,000 in cash.
- [12] His fourth breach occurred when Mr. Dias was observed eating lunch at the Café Algarve which was outside his area restriction. His cash bail was put up for escheatment. He was rereleased on the same conditions.
- [13] His fifth breach occurred in April 2023 when he was at his doctor's office on Commercial Drive at the same time as Y.L. and P.L. who attended the same clinic. He advised A.C.J. Holmes that he had fallen in the street and injured his arm. He was bleeding. He took a taxi to his doctor who sent him to Emergency. I was advised that Mr. Dias was treated and he wore a cast for several weeks. His conditions were tightened, and he was restricted to his home except for three set days a week and for two hours at a time.
- [14] The circumstances of his sixth breach are set out in my reasons delivered on August 8, 2023, indexed at 2023 BCSC 1384, and involve Mr. Dias walking on Commercial Drive, outside his geographic restrictions.

Applicable Law

- [15] In general terms, pursuant to s. 515(10), the continued detention of an accused is only justified if one or more of the following circumstances is established:
- a) detention is necessary to ensure the accused's attendance in court;
 - b) detention is necessary for the protection or safety of the public; or
 - c) detention is necessary to maintain confidence in the administration of justice.
- [16] As I have said, it is the tertiary ground that applies here. The issue I must address is whether Mr. Dias's continued detention is necessary to maintain confidence in the administration of justice. Sections 515(10)(c) provides that I must consider all of 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.

- [17] In this case, due to Mr. Dias's conviction, the strength of the prosecution's case is no longer a consideration.
- [18] As to the gravity of the offence, sexual interference is a serious offence that carries a maximum sentence of 14 years. In addition, in *R. v. Friesen*, 2020 SCC 9, the Court held that sentences for crimes of sexual violence against children must increase. There were several considerations that led to the Court's conclusion. One was an emerging, deeper understanding of the vulnerability of child victims, and the profound harm that such criminal conduct causes to victims, families, and communities. Another was that, through amendments to the Criminal Code over about the past 15 years, Parliament has mandated that sentences for sexual offences against children must increase.
- [19] There can be no doubt that Mr. Dias's offence is a serious one.
- [20] The circumstances surrounding the offence are set out in my reasons for convicting Mr. Dias, indexed at 2023 BCSC 1373.. Briefly, they include a significant breach of trust, the offence occurred when that the complainant was eight years old and had been left in Mr. Dias's care by her grandmother while all three were in Peru. It has impacted I.L. and Y.L.
- [21] As to the potential for a lengthy term of imprisonment, sentencing submissions in this case are currently scheduled for September 8, 2023. I understand from the Crown's submissions today that they will be seeking a penitentiary custodial sentence.
- [22] In addition to the aggravating factors that have been suggested by the Crown, there are mitigating circumstances that I will be required to consider. These include Mr. Dias's advanced age and the fact that he has no criminal record. The defence also submits that I did not find that Mr. Dias had inappropriately touched I.L. under her clothes which goes to the length of the imprisonment.
- [23] There is also some evidence before me about Mr. Dias's failing physical and mental health. That evidence is not medical but came from Mr. Belmiloud who testified at the breach hearing before me.
- [24] The Crown therefore submits that Mr. Dias could not meet his onus to show that his continued detention was not necessary.
- [25] The defence suggests that there remain at least one or two rungs on the Antic ladder that I should consider. Counsel for Mr. Dias proposed two sureties and, in the alternative, ankle monitoring. In the further alternative, he proposes that a combination of sureties and monitoring would be possible.

[26] In *St-Cloud* at para. 87, Wagner J. summarized the "essential principles that must guide" judges in applying s. 515(10)(c):

- [It] does not create a residual ground for detention that applies only where the first two grounds for detention ((a) and (b)) are not satisfied. It is a distinct ground that itself provides a basis for ordering the pre-trial detention of an accused.
- [It] must not be interpreted narrowly (or applied sparingly) and should not be applied only in rare cases or exceptional circumstances or only to certain types of crimes.
- The four circumstances listed in s. 515(10)(c) are not exhaustive.
- A court must not order detention automatically even where the four listed circumstances support such a result.
- The court must instead consider all the circumstances of each case, paying particular attention to the four listed circumstances.
- The question whether a crime is "unexplainable" or "unexplained" is not a criterion that should guide the analysis.
- No single circumstance is determinative. The justice must consider the combined effect of all the circumstances of each case to determine whether detention is justified.
- This involves balancing all the relevant circumstances. At the end of this balancing exercise, the ultimate question to be asked by the court is whether detention is necessary to maintain confidence in the administration of justice. This is the test to be met under s. 515(10)(c).
- To answer this question, the court must adopt the perspective of the "public", that is, the perspective of a reasonable person who is properly informed about the philosophy of the legislative provisions, Charter values and the actual circumstances of the case. However, this person is not a legal expert and is not able to appreciate the subtleties of the various defences that are available to the accused.
- This reasonable person's confidence in the administration of justice may be undermined not only if a court declines to order detention where detention is justified having regard to the circumstances of the case, but also if it orders detention where detention is not justified.

[27] Having heard the submissions, I have concluded that, from the perspective of a reasonable person, properly informed as set out in *St-Cloud*, that person would not lack confidence in the administration of justice if Mr. Dias were released on the basis of providing two sureties, and electronic monitoring, in addition to the following terms governing his release:

Condition 1: You are to continue reporting to a Bail Supervisor, by telephone at 604-660-3700 and after that you must report as directed by your Bail Supervisor.

Condition 2: You must not leave British Columbia.

Condition 3: You must notify your Bail Supervisor of any change of your address, occupation or employment.

Condition 4: You must have no contact or communication, directly or indirectly, with [I.L.], [P.L.] or [Y.L.].

Condition 5: You must not be within 100 meters of any place where [I.L.], [P.L.], or [Y.L.] live, work, attend school or worship, or happen to be, including [Addresses redacted]. If you see them, you must leave their presence immediately without any words or gestures.

Condition 6: You must remain inside your residence located at 306-375 West 10th Avenue, Vancouver, BC at all times. The exceptions are: a) Mondays, Wednesdays, and Fridays between 11:00 am and 1:00pm; HOWEVER, you must stay in the area bounded by Broadway to the North, 12th Avenue to the South, Ash Street to the West, Columbia Street to the East; b) You may leave your residence if you are going directly to or returning directly from a health care facility because of a medical emergency or scheduled doctor's appointments with the prior permission of your Bail Supervisor; c) you may leave your residence if you are going directly to or returning directly from a scheduled court appearance; d) You may leave your residence with prior permission of your Bail Supervisor; that permission may be given only for compelling reasons.

Condition 7: You must present yourself immediately at the door of your residence or answer the phone when any peace officer or Bail Supervisor attends or calls to check on you.

[28] Mr. Belmiloud and Alfreda Batista have both told the court that they are prepared to act as sureties, without deposit, for Mr. Dias. Although Mr. Belmiloud has only limited availability due to his imminent return to work in Northern Alberta, he has been actively involved in assisting Mr. Dias and will continue to do so for the next two weeks. Mr. Batista testified at the hearing. He resides with Mr. Dias in Mr. Dias's apartment when he is in Canada. He generally leaves Canada for a number of months around Christmas to visit his family in Europe. He testified that he will be leaving again this Christmas. I expect that Mr. Dias will be sentenced before then, and Mr. Batista will no longer be required as a surety.

[29] I was satisfied that Mr. Batista understood the role of a surety and his obligation to report any breaches by Mr. Dias. While I had some concern that reporting a breach would put Mr. Batista's housing at risk and put him in a difficult position, I was satisfied with the answers that he gave that he was willing to take on that risk. I accept that he is an honourable man. He made a commitment to the court that he would report Mr. Dias despite the potential impact on his personal living circumstances, and I accept that commitment. He understood that he could resign at any time.

[30] The obligations of a surety are set out in *R. v. Patko*, 2005 BCCA 183 at para. 22. Sureties must ensure the good behaviour of Mr. Dias while on bail, ensure that he appears in court, and render the accused into custody if he does not seem to be keeping the peace or behaving well. As a result, pursuant to s. 515(2.1), Johnny Belmiloud and Alfredo Batista are named as sureties for Mr. Dias. Any further vetting of the two sureties is not required.

[31] I am waiving the requirement of a surety declaration for Mr. Batista because:

- a) I have received sufficient information of the kind that would be set out in a declaration to evaluate whether Mr. Batista is suitable to act as a surety for Mr. Dias; and
- b) Mr. Batista has acknowledged that he has received sufficient information with respect to the matters referred to in s. 515.1(1)(e)-(g) of the Code to accept the role and responsibilities of a surety.

[32] A surety declaration is required from Mr. Belmiloud.

[33] I also order that a technical suitability report for the purpose of electronic monitoring be prepared with respect to Mr. Dias's residence located at 306-375 West 10th Avenue, Vancouver, BC. Mr. Dias is to remain in custody until the report is prepared.

"MacNaughton J."

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