
CANADA / JUDGMENT

R. v. Elmi

2016 BCSC 376

COURT

Supreme Court of British Columbia

DECIDED

25 January 2016

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2016 BCSC 376 R. v. Elmi

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

R. v. Elmi,

2016 BCSC 376

Date: 20160125

Docket: 26966

Registry: Vancouver

Regina

v.

Kathiye Abdulla Elmi

Before: The Honourable Associate Chief Justice Cullen

Oral Reasons for Judgment

Counsel for the Crown:

D. Boblin

Counsel for the Accused:

D. Hopkins

Place and Date of Hearing:

Vancouver, B.C.

January 25, 2016

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Vancouver, B.C.

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[1] THE COURT: This is a bail review which has been brought pursuant to s. 525 of the Criminal Code. That section reads in part as follows:

Issue of warrant for arrest of accused

525(1) Where an accused who has been charged with an offence other than an offence listed in section 469 and who is not required to be detained in custody in respect of any other matter is being detained in custody pending his trial for that offence and the trial has not commenced

(a) in the case of an indictable offence, within ninety days from

(i) the day on which the accused was taken before a justice under section 503, or

(ii) where an order that the accused be detained in custody has been made under section 521 or 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, or

(b) in the case of an offence for which the accused is being prosecuted in proceedings by way of summary conviction, within thirty days from

(i) the day on which the accused was taken before a justice under subsection 503(1), or

(ii) where an order that the accused be detained in custody has been made under section 521 or 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 having the custody of the accused shall, forthwith on the expiration of those ninety or thirty days, as the case may be, 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.

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.

Matters to be considered on hearing

- (3) On the hearing described in subsection (1), the judge may, in deciding whether or not the accused should be released from custody, take into consideration whether the prosecutor or the accused has been responsible for any unreasonable delay in the trial of the charge.

Order

- (4) If, following the hearing described in subsection (1), the judge is not satisfied that the continued detention of the accused in custody is justified within the meaning of subsection 515(10), the judge shall order that the accused be released from custody pending the trial of the charge on his giving an undertaking or entering into a recognizance described in any of paragraphs 515(2)(a) to (e) with such conditions described in subsection 515(4) as the judge considers desirable.

Provisions applicable to proceedings

- (8) The provisions of sections 517, 518 and 519 apply with such modifications as the circumstances require in respect of any proceedings under this section.

Directions for expediting trial

- (9) Where an accused is before a judge under any of the provisions of this section, the judge may give directions for expediting the trial of the accused.
- [2] The circumstances of this case and the history of the file are set out in paragraph 1 to 15 of Crown counsel's written argument as follows:
1. Kathiye Abdulla Elmi is charged on Information #240594 with the aggravated assault of Deno Lloyd Bundy on September 29, 2015. A copy of Information #240594 is at Tab A.
 2. On September 29, at approximately 5:50 pm, the accused and Bundy became involved in a physical altercation in the basketball court area of Oppenheimer Park, located in the 400 block of Powell Street, Vancouver, BC.
 3. During the altercation, the accused picked up a glass bottle and attempted to strike Bundy with it, but did not. The accused then pulled a screwdriver out from his man-purse and stabbed Bundy once in the neck.
 4. The accused ran from the scene, south-west from the Park. Bundy rode his bicycle to the north-east corner of Powell Street and Jackson Avenue before collapsing on the sidewalk.
 5. Police attended the scene to assist Bundy, search for the accused and obtain statements from witnesses in the Park.

6. There were dozens of people in the Park, but many of them had already left by the time police arrived or declined to become involved. Ten witnesses who saw the stabbing, as well as the victim Bundy, cooperated with police and described the incident and identified the accused, with whom many were familiar, as a black Somali male known as "Kat". Certain police members knew who the witnesses were talking about and PRIME information about the accused matched the description given by those witnesses.
7. The screwdriver believed to have been used in the stabbing was also found by a witness and turned over to the police.
8. EHS transported Bundy to VGH for treatment. Hospital staff at VGH advised the police that Bundy was in critical condition and had lost 50% of his caratoid [sic] artery.
9. The accused was arrested the same day at approximately 10:00 pm when he returned to his residence at 1335 Howe Street, Vancouver, BC and he was transported to jail.
10. The accused was interviewed by the police at approximately 11:30 pm. According to the police narrative, the accused admitted to being in Oppenheimer Park and getting into an altercation with Bundy. He stated that the altercation began when Bundy called him some racial slurs and told him to leave the Park. The altercation escalated and the accused used a screwdriver. The accused appeared to be remorseful for his actions and asked how the victim was doing.
11. According to the Record of Proceedings associated to Information #240594, the accused made his first appearance in court on September 30, 2015. He was remanded in custody with his consent and his application for judicial interim release was adjourned by his counsel to October 1, 2015. A copy of the Record of Proceedings is at Tab B.
12. On October 1, 2015, the accused was again remanded in custody with his consent and his application for release was adjourned by his counsel to October 5, 2015.
13. On October 5, 2015, the accused was again remanded in custody with his consent and his application for release was adjourned by his counsel to October 7, 2015.
14. On October 7, 2015, the accused's bail hearing was held and he was ordered to be detained in custody by His Honour Judge Gove on the secondary and tertiary grounds and on the basis of his previous convictions.
15. The accused was arraigned on October 21, 2015, at which time he entered a plea of not guilty and elected to be tried by a Provincial Court Judge. Trial dates of February 22 to 25, 2016, were fixed on October 21 and confirmed on October 22, 2015. A copy of the Trial Scheduling Notice is at Tab C.

- [3] Counsel for the Crown and the counsel for the applicant differ on what the proper approach is to an application for judicial interim release which is brought under s. 525. The difference is based on two separate lines of authority which have developed in this court and which have not yet been resolved by any appellate decision.
- [4] The two approaches can be summarized as follows. The first is one in which the court conducts a two-step inquiry first determining whether there has been an unreasonable delay in bringing the matter to trial and only in the event that the court finds that such an unreasonable delay has occurred does the court go on to consider the merits of the applicant's detention pursuant to s. 515(10). The second approach considers delay as a factor in considering the provisions of s. 515(10) all as part of the same step.
- [5] The quantitative weight of authority in this court favours the two-step approach. In *R. v. Ley*, unreported, 24 March of 2014, I summarized the circumstances as they then were at paras. 4 and 5:
- [4] Although in a 2010 decision, *R. v. Sarkozi*, 2010 BCSC 1410, Mr. Justice Gaul followed a different approach based on a different line of reasoning involving a consideration of the factors in s. 515(10) along with the factor of delay, subsequent decisions of this court, including but not limited to *Widalko* have all adopted the two-step-inquiry approach outlined by Grauer J. above. [The reference to Grauer J. was the case of *R. v. Widalko*, 2013 BCSC 2077, at para. 10]
- [5] Counsel for the applicant does not urge any other approach on this application. In all the circumstances, I am satisfied that the two-step inquiry is an appropriate approach for this application.
- [6] Since the decision in *Ley*, there have been four other decisions favouring the integrated approach, that is, the approach set out in *R. v. Sarkozi*. Those decisions are *R. v. V.*, October 24th; *R. v. Quinn*, December 2014; *R. v. Haleta*, May 2015; and *R. v. Goudreau*, June of 2015. There have at the same time since the decision in *Ley* been seven other decisions favouring the two-step approach and, in particular, those are *R. v. Waniandy*, February 2015; *R. v. Wheeler*, April 2015; *R. v. Hogan*, July 2015; *R. v. Ghuman*, October 2015; *R. v. Neri*, December 2015; *R. v. Middleton*, March 2015; and *R. v. Whiteside*, January 2016.
- [7] In my view, the preferable approach is the two-step approach. The provisions of s. 520, which deal with a bail review, engage the discretion of the court to deal with a detention order imposed in the first instance.
- [8] Section 520 reads in part as follows:
- 520 (1) If a justice, or a judge of the Nunavut Court of Justice, makes an order under subsection 515(2), (5), (6), (7), (8) or (12) or makes or vacates any order under paragraph 523(2)(b), the accused may, at any time before the trial of the charge, apply to a judge for a review of the order.

- (7) On the hearing of an application under this section, the judge may consider

- (a) the transcript, if any, of the proceedings heard by the justice and by any judge who previously reviewed the order made by the justice,
 - (b) the exhibits, if any, filed in the proceedings before the justice, and
 - (c) such additional evidence or exhibits as may be tendered by the accused or the prosecutor, and shall either
 - (d) dismiss the application, or
 - (e) if the accused shows cause, allow the application, vacate the order previously made by the justice and make any other order provided for in section 515 that he considers is warranted.
- (8) Where an application under this section or section 521 has been heard, a further or other application under this section or section 521 shall not be made with respect to that same accused, except with leave of a judge, prior to the expiration of thirty days from the date of the decision of the judge who heard the previous application.
- [9] In *R. v. St-Cloud*, the court notes, however, that a review under s. 520 is not a de novo hearing and it outlines the breadth of the discretion of a reviewing judge under s. 520 as follows in paras. 120 and 121:
- [120] On the basis of the wording of ss. 520 and 521 Cr. C., a comparison with other review provisions and with sentence appeals, and the nature of the decision being reviewed, I conclude that these sections do not confer on the reviewing judge an open-ended power to review the initial order respecting the detention or release of the accused. The reviewing judge must therefore determine whether it is appropriate to exercise this power of review.
- [121] It will be appropriate to intervene if the justice has erred in law. It will also be appropriate for the reviewing judge to exercise this power if the impugned decision was clearly inappropriate, that is, if the justice who rendered it gave excessive weight to one relevant factor or insufficient weight to another. The reviewing judge therefore does not have the power to interfere with the initial decision simply because he or she would have weighed the relevant factors differently. I reiterate that the relevant factors are not limited to the ones expressly specified in s. 515(10)(c) Cr. C. Finally, where new evidence is submitted by the accused or the prosecutor as permitted by ss. 520 and 521 Cr. C., the reviewing judge may vary the initial decision if that evidence shows a material and relevant change in the circumstances of the case.
- [10] In s. 525, the focus of the section is on unreasonable delay and by whom it was caused. Reading ss. 525 and 520 and 521 harmoniously in keeping the principles governing statutory interpretation, it seems to me that it would be incongruous to interpret s. 525 as giving rise to a de novo review simply because of the expiration of 90 days from the date that the accused was taken before a justice under ss. 503, or on the happening of one of the other events referred to in s. 525(1)(a) (ii).

- [11] What the 90-day provision in s. 525(1)(a) triggers, is a review of the trial date which has been set, to determine whether it will constitute an unreasonable delay in bringing the accused applicant to trial in all the circumstances of the case. Only if it does represent such a delay, is the accused entitled to a de novo hearing under s. 515(10).
- [12] In this case, the applicant concedes that there is no unreasonable delay given that the effective delay is some four months and one week from the operative date which is the date of arrest plus approximately three weeks following representing intake time. In those circumstances, there is, in my opinion, no rationale for conducting a review under s. 525.
- [13] The applicant is not prejudiced because it is always open to him to seek a review under s. 520 to address the issues set out in para. 121 of St-Cloud quoted above, that is, to challenge the correctness or appropriateness of the original decision or to address any material change in circumstances, and he may do so under the provisions of s. 520 every 30 days. In those circumstances, to treat s. 525 as conferring the right to a de novo hearing simply on the basis that 90 days has expired is not to read it in context or harmoniously with s. 520 and 521.
- [14] Accordingly, the application for judicial interim release is dismissed. I will note that, in the alternative, had I approached this on the basis of the unified approach as set out in Sarkozi, I would have come to the same conclusion.

"A.F. Cullen ACJ."

Associate Chief Justice Cullen

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