

CANADA / JUDGMENT

R. v. Hasan

2024 BCSC 1913

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DECIDED

2 July 2024

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2024 BCSC 1913 R. v. Hasan

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

R. v. Hasan,

2024 BCSC 1913

Date: 20240702

Docket: 36198W

Registry: Vancouver

Rex

v.

Janiar Hasan

Before: The Honourable Justice Girn

On judicial review from: Provincial Court of British Columbia, February 16, 2024

(R. v. Hasan, Surrey Docket No. 255340-2C)

Oral Reasons for Judgment

at s. 525 detention review hearing

Counsel for the Crown:

N.M.D. Reithmeier

Counsel for the Accused:

S.A.L. Williams

Place and Date of Hearing:

New Westminster, B.C.

June 19, 2024

Place and Date of Judgment:

New Westminster, B.C.

July 2, 2024

- [1] THE COURT (by videoconference): These are my oral reasons for judgment. I reserve the right to edit them for grammar, errors, citation, and context as necessary, provided such changes do not affect the final disposition.
- [2] Mr. Hasan is before the court for a detention review hearing pursuant to s. 525 of the Criminal Code of Canada. He was detained pursuant to the order of the Honourable Judge Lopes of the Provincial Court of British Columbia at Surrey on February 16, 2024. Despite Mr. Hasan having been in custody for over five months, no date has been set for trial. This is partly due to issues arising from delay of disclosure which I will address later in these reasons.
- [3] Mr. Hassan was in a reverse-onus situation at the initial judicial interim release. He does not dispute this and, for the purposes of this review hearing, I am satisfied that he continues to be in a reverse-onus situation.
- [4] At the bail hearing before Judge Lopes, the parties agreed that the hearing only concerned the tertiary ground pursuant to s. 515(10)(c) of the Criminal Code. Accordingly, he was detained only on this ground. Primary and secondary ground concerns were not advanced.
- [5] Mr. Hasan says that his continued detention is no longer necessary, primarily on the basis of a robust proposed release plan.
- [6] The Crown submits that Mr. Hasan's continued detention is justified on the tertiary ground. The Crown says the proposed release plan is substantially the same as the one that was before Judge Lopes at the initial hearing.

The Alleged Offences

- [7] Mr. Hasan was detained on very serious offences involving allegations of carjacking, robbery with a weapon, and a police pursuit. As well, he is charged with possession of various weapons, including two rifles and a handgun. The robbery-using-a-weapon charge attracts a minimum mandatory sentence of five years.
- [8] On January 7, 2024, Mr. Hasan, along with his two co-accused, are alleged to have robbed an individual at gunpoint and stealing his vehicle.

[DISCUSSIONS WITH COUNSEL ON DATES]

- [9] The accused then led a police pursuit throughout Surrey, including into residential areas. A police car and the stolen vehicle eventually collided, resulting in both vehicles ending up in a ditch. The accused, including Mr. Hasan, attempted to flee the scene, but were eventually taken into custody. Mr. Hasan was observed exiting the rear passenger door.
- [10] Inside the stolen vehicle the police located, in plain view, around the front passenger footwell area an AK-47 rifle loaded with an oversized magazine that contained 24 rounds of ammunition, plus one extra round of ammunition in the breach. This made the firearm immediately ready to fire. Also located in plain view on the rear passenger seat was a fully loaded TNW-ASR rifle, as well as a fully-loaded Glock.22 handgun which had an extra round of ammunition in the breach.
- [11] It was alleged by the Crown at the initial bail hearing that the AK-47 rifle had been used in a gang-related shooting three days earlier and the Glock handgun had been used in another gang-related shooting two days earlier which resulted in a fatality.
- [12] Mr. Hasan had earlier been observed driving another vehicle, a Hyundai Sonata, prior to the carjacking. That vehicle had been reported stolen in December 2023. CCTV footage gathered by the police prior to the incident revealed Mr. Hasan driving that vehicle. When the Hyundai was searched, police located three jerrycans full of gasoline in the trunk which the Crown noted at the initial bail hearing is used by gangs as a means of burning and destroying vehicles when they are no longer needed.
- [13] As well, police located, under the driver's seat of the Hyundai, a KelTec 2000 G17 rifle with ammunition, a face mask, and two cellphones. Drink containers were found in this vehicle which contained a partial fingerprint of Mr. Hasan.
- [14] GPS data from the Hyundai and CCTV footage from days leading up to the January 7th incident revealed Mr. Hasan and his co-accused at various locations, including a restaurant in the Queensborough area of New Westminster. They were positively identified through this footage.
- [15] It goes without saying that Mr. Hasan is presumed innocent of all of the offences for which he is charged. One co-accused has already pleaded guilty. He received a four-year sentence of imprisonment, which included a mandatory three-year weapons sentence.

The Initial Bail Hearing

- [16] Crown at the initial bail hearing took the position that no release plan could satisfy the reverse onus and justify the accused being released as it would undermine public confidence in the administration of justice. Mr. Hasan proposed a very strict release plan: that he reside with his parents with a \$50,000 surety bail, along with conditions that he be under house arrest, with the only exception that he would be permitted to leave the home in the company of his parents or for medical reasons.
- [17] Between the two of them, it had been proposed that his parents would always be home with Mr. Hasan, given their flexible work schedules. He would not be left alone at home.

Mr. Hasan's Background

- [18] Mr. Hasan has no criminal record. He is 25 years old and has support from his family. Mr. Hasan has siblings who live at home with his parents. Mr. Hasan came to Canada with his parents from Iraq at a very young age. He graduated from high school and since then has been working in construction as a labourer prior to the detention order.
- [19] He is artistic and plans to attend college to pursue his artistic interests. There does not appear to be any mental health or substance abuse or alcohol issues.

Legal Framework

- [20] In a s. 525 detention review hearing, the key question for the reviewing judge to consider is whether the continued detention of the accused is justified under any of the three grounds for detention, as set out in s. 515(10) of the Criminal Code. In Mr. Hasan's case, as I have noted, I must consider whether his detention continues to be justified under the tertiary ground.
- [21] In the landmark case of *R. v. Myers*, 2019 SCC 18 the Supreme Court of Canada set out the key principles governing a s. 525 review. These principles were succinctly summarized by Justice Riley in *R. v. Leppington*, 2020 BCSC 546 at paras. 18 to 23, which I adopt:
- [18] The purpose of the 90 day bail review provision in s. 525 of the Criminal Code is to prevent accused persons from languishing in custody pending trial and to ensure matters are tried promptly: *Myers* at para. 24.
- [19] The reviewing judge is expected to show deference to any findings of fact made by the first instance decision maker unless there is some demonstrated basis for reconsidering them: *Myers* at para. 47.

- [20] The overarching question for the reviewing judge under s. 525 of the Criminal Code is whether the continued detention of the accused is justified having regard to the grounds set out in s. 515(10): Myers at para. 46. Section 515(10) sets out three different grounds for detention, which I would briefly summarize as: (1) to ensure attendance at trial per s. 515(10)(a), (2) to protect safety of the public as contemplated in s. 515(10)(b), and (3) to maintain confidence in the justice system per s. 515(10)(c).
- [21] In considering the question of judicial interim release, the court must bear in mind that throughout the process the accused is presumed innocent unless and until there has been a trial leading to a finding of guilt based on proof beyond a reasonable doubt, or a guilty plea: Antic at para. 1, 66, 67(a); Myers at para. 1, 59.
- [22] The default position is that the accused should be released at the earliest opportunity and on the least onerous terms available in the circumstances: Myers at para. 1; Antic at para. 29, 67(d). Detention in custody is the exception and should be regarded as the option of last resort: Myers at para. 67.
- [23] In deciding the overarching question of whether continued detention is justified under the grounds set out in s. 515(10), the reviewing judge should consider (a) any new evidence or change in circumstance, (b) impact of the passage of time and any unreasonable delay on the proportionality of detention, and (c) the rationale offered for the initial detention: Myers at para. 63.
- [22] With respect to the tertiary ground, s. 515(10)(c) provides that detention is justified if necessary to maintain public confidence in the administration of justice, having regard to all the circumstances, including:
- (i) the apparent strength of the [Crown's] case,
 - (ii) the gravity of the offence,
 - (iii) the circumstances surrounding the commission of the offence[s], 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] In *R. v. St-Cloud*, 2015 SCC 27 the Supreme Court emphasized that these factors are not exhaustive and involves a balancing of all relevant circumstances. At the end of the balancing exercise, the ultimate decision is whether detention is necessary to maintain confidence in the administration of justice. In order to answer this question, the court must look from the perspective of the public. That perspective is 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.

[24] The court in St-Cloud also noted at para. 88 that:

... if the crime is serious or very violent, if there is overwhelming evidence against the accused and if the victim or victims were vulnerable, pre-trial detention will usually be ordered.

Discussion

Is the continued detention of Mr. Hasan justified?

[25] I am guided by Myers, in which the court reiterated that the purpose of s. 525 is to prevent accused persons from languishing in custody pending trial and to assure a prompt trial. In this review hearing, I am required to consider three important factors. They are:

- 1) any new evidence or change in circumstances since the original hearing;
- 2) the impact of the passage of time and any unreasonable delay on the proportionality of detention; and
- 3) the rationale offered for the initial detention.

[26] I will now discuss each of these factors.

The impact of the passage of time and any unreasonable delay on the proportionality of detention

[27] Mr. Hasan says there has been unreasonable delay relating to disclosure. Mr. Hasan's counsel of record, Mr. Jessop, provided an affidavit wherein he states that there has been considerable delay in obtaining disclosure from the Crown. The disclosure is voluminous. Disclosure was to be provided electronically and the Crown demanded that Mr. Jessop provide them with a USB drive because the disclosure contained some 82 gigabytes of data. Mr. Jessop objected to this and cited this practice was not the normal course.

[28] Crown at this hearing, Mr. Reithmeier, acknowledged that this is not the procedure that the B.C. Prosecution Service utilizes and could not explain why this occurred. In any event, disclosure was eventually provided to Mr. Jessop some three months later. Hopefully, this should get the matter moving along and back on track.

[29] While it is unacceptable that there were delays in providing disclosure, I am inclined to agree with Crown that the delay is well removed from being unreasonable.

[30] In terms of proportionality, Mr. Hasan does not dispute that, if convicted, he will face a lengthy term of imprisonment. The offences for which Mr. Hasan is charged are very serious and carry lengthy terms of imprisonment if convicted. Crown points to R. v. Brogan, 1999 BCCA 278 in which the Court of Appeal set out that robbery involving violence carries a sentence range from two to nine years. As well, because Mr. Hasan is charged with robbery with a firearm, there is a mandatory minimum sentence of five years. While there is also no trial date set as of yet, the Crown argues that Mr. Hasan's pre-trial custodial time is nowhere near the sentence he is likely to receive if convicted. I agree with the Crown in this respect.

[31] Overall, I am satisfied that the three-month delay in providing disclosure, along with the sentence that Mr. Hasan is likely to receive, is not disproportionate to his continued detention.

[32] I will now move to the rationale offered for the initial detention.

The rationale offered for the initial detention

[33] As I have noted, Judge Lopes detained Mr. Hasan on the tertiary ground. She went on to state that foremost in her consideration at all times are the statements by the Supreme Court of Canada in *R. v. Antic*, 2017 SCC 27 on the presumption of innocence and an accused's right that bail should not be denied without just cause and the right to bail on reasonable terms and the use of the ladder principle.

[34] Judge Lopes went on to consider the principles set out in *St-Cloud* regarding the tertiary ground. She provided detailed analysis on the relevant factors to analyze on the tertiary ground. She noted that the strength of the Crown's case was overwhelming against Mr. Hasan, even at that stage of the hearing, which did not have the benefit of forensic analysis. As well, the gravity of the offence was serious and grave. She specifically noted that the maximum sentence for robbery is life imprisonment, that also attracts a minimum sentence of five years because of the use of a firearm. As well, Judge Lopes noted Mr. Hasan's liability for a lengthy term of imprisonment if convicted. Finally, she considered the circumstances of the offences. Judge Lopes noted they were extremely concerning given that, even though the accused had their own vehicles, they engaged in a carjacking, engaged in a dangerous police pursuit, and the presence of firearms in the vehicle. Judge Lopes considered the prevalence of gun violence that continues to be a major concern for the citizens of our community.

[35] Finally, Judge Lopes took into consideration the very significant bail plan presented by Mr. Hasan which included the \$50,000 surety. Judge Lopes acknowledged that the plan represented the highest rung on the ladder and that it was a strong plan. Judge Lopes went on to conclude at para. 22. She writes:

[22] However, when I consider all of the factors present, I find that a reasonable member of the public informed about the presumption of innocence and an accused's right not to be denied reasonable bail would conclude that to release Mr. Hasan, even on strict terms of surety bail and house arrest, would bring the administration of justice into disrepute.

[36] Mr. Hasan concedes that the tertiary ground exists. He says for the most part Judge Lopes' decision is owed deference. However, he takes issue with the comments by Judge Lopes in characterizing that his alleged conduct was part of a greater gang activity in the Lower Mainland. In particular, Mr. Hasan says that the comments of the Crown at the bail hearing appear to have influenced Judge Lopes at para. 18(3) and para. 23.

[37] At para. 18, Judge Lopes writes:

3. Circumstances of the offences. The circumstances of these offences are extremely concerning. The accused already had vehicles; yet, they engaged in an armed carjacking. There is a dangerous police pursuit when the stolen motor vehicle fails to stop. There are three loaded firearms in the vehicle. A fourth firearm is located in another vehicle associated to the accused on the day of the alleged offences. Further two of the firearms have been connected to shootings in the Lower Mainland, one which resulted in a fatality. There is no legitimate purpose for the accused to be in possession of the stolen vehicle or the firearms found within it.

[38] And at para. 23, Judge Lopes writes:

- [23] The crimes alleged against Mr. Hasan are very serious. They constitute violent and potentially lethal conduct in connection with the firearms possessed. There is overwhelming evidence of his identification and they represent conduct in our community that is seen as a serious problem requiring a strong response from the criminal justice system.
- [39] Mr. Hasan submits that the suggestion that he is linked to the use of firearms in separate shootings on another day in another area is speculative, and submits that these comments should be given little weight, especially in light of the presumption of innocence.
- [40] Mr. Hasan also points to the fact that his role is unclear. While he was driving the vehicle, he was not alleged to have pointed the firearm during the robbery. His knowledge and control over the weapons will be a triable issue.
- [41] In my view, the severity of the offences that Mr. Hasan is charged with cannot ignore the significance of gun violence in this province. The presence of weapons located in plain view in a stolen vehicle that Mr. Hasan was observed inside, as well as the jerrycans of gasoline found in one of the other vehicles that he was observed driving, are consistent with actions of those involved in gang activity. In my view, Judge Lopes's comments were not improper and she was entitled to comment on the presence of gun violence in our province.
- [42] In any event, even if I were to disregard the comments with respect to the two firearms being linked to past shootings, it does not affect the overall decision of Judge Lopes to detain Mr. Hasan on very serious offences on the tertiary ground because it was not the only reason why Mr. Hasan was detained.
- [43] I agree with the Crown that gun violence is a serious problem in Canada and Surrey is one place where that form of violence is of acute concern. I am reminded by the comments of Justice Brundrett in *R. v. Bowcock*, 2022 BCSC 523 at para. 59:

The balancing of all circumstances under s. 515(10)(c) is to be guided by the perspective of the public in light of the circumstances. Here that perspective is informed by a significant concern over gun crime throughout B.C. and particularly in Surrey where this offence occurred.

Change of circumstances

- [44] Mr. Hasan says his continued detention is not justified because there is a change in circumstances, namely a new release plan. The proposed release plan is slightly different than what was presented to Judge Lopes at his initial bail hearing in Provincial Court. Mr. Hasan now proposes a \$100,000 surety bail with his parents remaining as the sureties. As well, he says that house arrest is appropriate and he is willing to abide by any additional conditions that the court deems appropriate in the circumstances.
- [45] In regard to the amount of surety, I have been provided with evidence that supports that Mr. Hasan's parents own their home and have substantial equity in that home that permits them to pledge the amount in the proposed surety bail.
- [46] As well, Mr. Hasan says that there will be greater supervision in this proposed release plan. In her affidavit, Mr. Hasan's mother, Ms. Mahdi, says that she intends to stop working at her part-time job to ensure that Mr. Hasan is supervised at all times. Both Mr. Hasan's parents provided affidavits in support of their roles as proposed sureties.
- [47] As well, as a result of the court's concern, each of them provided further viva voce evidence. It is apparent from their evidence that they wish to support their son in any way possible. Through their evidence, the court learned that Mr. Hasan has not lived with them in their home for over two years. They did not know where he lived, nor had they ever visited his place of residence. As well, Mr. Hasan's parents did not know any of Mr. Hasan's friends or who he associated with.
- [48] In my view, it is evident that Mr. Hasan's parents knew very little of Mr. Hasan's life in the past two years. It does not appear that that information was before Judge Lopes.
- [49] Both parents testified that they would do anything to help their son. While I applaud them for supporting their son, I am not convinced that much has changed since they stepped up to be sureties for Mr. Hasan in the initial bail hearing before Judge Lopes, save and except the amount for the surety has increased from \$50,000 to \$100,000.
- [50] The level of supervision remains the same, except now Ms. Mahdi is prepared to stop working to supervise Mr. Hasan. In the proposed release plan before Judge Lopes, one of Mr. Hasan's parents were to be present at all times with Mr. Hasan if released. In my view, the only difference in this proposed release plan before me is an increase in the surety bail.
- [51] Mr. Hasan submits that confidence in the administration of justice may be undermined not only if the 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, particularly where a robust release plan is proposed. Mr. Hasan relies on *R. v. Braich*, 2019 BCSC 1918 in support of the proposition that the strength of a proposed release plan is a relevant consideration where there are tertiary ground concerns.

[52] Justice Ker released Mr. Braich after he had been detained on the tertiary ground. Justice Ker notes that Mr. Braich was not simply being turned loose on society without precautions or safeguards. Mr. Hasan says that paras. 196 and 197 are the relevant passages:

[196] To borrow from Trotter J.A.'s observations in Papasotiriou, a reasonable member of the public--properly informed about the philosophy of the legislative provisions of the Code, Charter values, the presumption of innocence, the right to make full answer and defence and meaningfully prepare for trial (something much more effectively accomplished while released on bail), the actual circumstances of the case, and the fact that Mr. Braich is not simply being "turned loose" on society without precautions or safeguards while his case works its way through the trial process--would realize that Mr. Braich's release is not contrary to the interests of justice nor is it necessary to maintain confidence in the administration of justice.

[197] Indeed, on the point of simply being "turned loose", to the contrary, Mr. Braich will be released on very stringent conditions, including house arrest, non-association and non-communication clauses, and other restrictive terms, all supported by a significant surety bail with his proposed sureties prepared to monitor his behaviour in the community.

[53] Justice Ker also addressed the issue of gun violence as it relates to the protection of the public from this dangerous behaviour. She notes at para. 193:

I take the broader social context of gun violence, shooting, and retaliatory acts into account insofar as they relate to protecting the public from this dangerous behaviour. It is a factor that militates in favour of detention, but it is not determinative of the issue.

[54] While Justice Ker released Mr. Braich on a substantial surety of \$500,000, the proposed release plan also included electronic monitoring in even more stringent conditions of release than initially proposed at the bail hearing.

[55] Another factor that Justice Ker took into account was the sheer complexity of the matter. Justice Ker referred to it as an exceptionally complicated case that would not come on for trial for many, many months, given the magnitude of the anticipated pretrial applications and the sheer length of time the trial itself may well take. There was voluminous electronic disclosure, hundreds of intercepted communications that needed to be translated and transcribed, approximately 60 prior judicial authorizations, constitutional challenges to at least two statutes, and involving multiple accused. This is not the situation facing Mr. Hasan. While the disclosure is voluminous and forensic evidence will be led, it is not a complex case and there is only one other accused remaining with Mr. Hasan. Therefore, I find that the Braich decision to be distinguishable on a number of factors, including the complexity of the case, which is something that I believe Justice Ker took into account when ordering Mr. Braich's release.

- [56] I am mindful that the balancing exercise requires me to consider what a "reasonable member of the public" means. As stated by Justice Ker in Braich, citing Trotter J. in Papasotiriou at para. 45:
- [45] Public confidence is to be measured by the standard of a reasonable member of the public. As Moldaver J. said in Oland, at para. 47: "This person is someone who is thoughtful, dispassionate, informed of the circumstances of the case and respectful of society's fundamental values." . . .
- [57] While I accept that the Crown cannot at this point say what Mr. Hasan's role was, in my view the Crown's case is an extremely strong one, even without the forensic evidence.
- [58] The offences that Mr. Hasan is charged with involve brazen robbery and carjacking in broad daylight. The presence of firearms that had been used in shootings days before this incident cannot be overlooked, even if the Crown cannot prove that Mr. Hasan was involved in these prior shootings.
- [59] Nonetheless, this factor favours continued detention.
- [60] In balancing all of the factors, I have taken into consideration that Mr. Hasan is a young man with no criminal history. While the proposed release plan which he submits is a robust and strict one, it is essentially the same one that was proposed to Judge Lopes, save and except the increased surety amount. I am also concerned that for over two years prior to his arrest, Mr. Hasan's parents knew very little about his lifestyle or even where he lived or with whom he associated.
- [61] In all of the circumstances, no reasonable and properly-informed member of the public would tolerate the accused residing in their community under the proposed release plan, given the tertiary ground factors in the accused's situation.
- [62] Accordingly, I find that the proposed release plan is simply not sufficient and the accused's continued detention is justified on the tertiary ground.

"Girn J."

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Prepared on 26 October 2026 · Esheria