
CANADA / JUDGMENT

R. v. Khafizov

2019 BCSC 1088

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2019 BCSC 1088 R. v. Khafizov

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

R. v. Khafizov,

2019 BCSC 1088

Date: 20190703

Docket: 28049W

Registry: Vancouver

Regina

v.

Daniel Khafizov

Before: The Honourable Madam Justice Devlin

Reasons for Judgment on Detention Review Hearing

Counsel for Crown:

John Swanson

Counsel for Accused:

S. Paul Varga

Place and Dates of Hearing:

Penticton, B.C.

June 20, 21, 2019

Place and Date of Ruling given to Parties with Reasons to follow:

Penticton, B.C.

July 3, 2019

Place and Date of Judgment:

Penticton, B.C.

July 3, 2019

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Introduction

- [1] The accused, Daniel Khafizov, is before the Court for a detention review hearing pursuant to s. 525 of the Criminal Code, R.S.C. 1985, c. C-46 [Code]. He has been in custody since his arrest on January 7, 2019, in excess of 90 days. On January 8, 2019, Mr. Khafizov was granted judicial interim release in the form of a recognizance bail with \$25,000 surety and conditions. Mr. Khafizov has been unable to perfect his bail and seeks to vary the surety term. A two-day trial is set for August 15 and 16, 2019, in Penticton Provincial Court.
- [2] Mr. Khafizov is charged on Information 46367-1 with three counts involving a firearm arising out of an incident which occurred on January 7, 2019, at his residence in Oliver, BC. Specifically, Mr. Khafizov is charged with (1) without lawful excuse, used, carried, handled, shipped, transported or stored a prohibited weapon in a careless manner without reasonable precautions for the safety of other persons contrary to s. 86(1) of the Code; (2) possession of a weapon, a firearm for a purpose dangerous to the public peace, or for the purpose of committing an offence, contrary to s. 88(1) of the Code; and (3) intentional discharge of a firearm into a place knowing or being reckless as to whether another person was present or being reckless as to the life or safety of another person contrary to s. 244.2(3)(b) of the Code.

- [3] The charges arise as a result of an incident that took place in the afternoon of January 7, 2019, at the accused's apartment in Oliver, BC. Police were called to the residence to investigate a report of shots fired. According to the residents of the second and third floors of the house, shots were fired from the bottom level apartment which Mr. Khafizov occupied. The shots travelled through the floor and a cushion of the couch in the apartment above on the second floor. The shots continued upwards, eventually lodging in the third floor apartment. While the residents were inside their apartment, no one was injured. The police located the accused inside his apartment and he advised police his rifle was beneath the futon. In addition to locating a .22 calibre rifle, the police also located a number of spent shell casings and more ammunition. Police also observed bullet holes in the ceiling.
- [4] In determining that Mr. Khafizov had met the onus to justify his release from custody the Honourable Judge Cartwright considered that Mr. Khafizov did not have a criminal record and his release plan contemplated him residing with his father who, it was anticipated, could post a surety bail in the amount of \$25,000. A term of the recognizance was that he reside with his father in Osoyoos and adhere to strict bail conditions, which included a curfew.
- [5] At the commencement of the detention review hearing, the Crown raised a preliminary issue of jurisdiction. It is the Crown's position that this Court lacks jurisdiction to conduct a s. 525 detention review hearing because Mr. Khafizov is not subject to a detention order. Counsel for Mr. Khafizov takes the position that because Mr. Khafizov cannot perfect his bail he is subject to detention and as contemplated in *R. v. Myers*, 2019 SCC 18 [Myers], is entitled to a review of his detention pursuant to s. 525.
- [6] At the hearing I advised counsel I would hear their submissions on both the jurisdictional issue and the substantive application. On July 3, 2019, I advised counsel of my decision finding jurisdiction but denying Mr. Khafizov's variation application, with reasons to follow. These are those reasons.

Procedural History

- [7] On January 8, 2019, Mr. Khafizov appeared before the Honourable Judge Cartwright and was granted judicial interim release in the form of a recognizance with a \$25,000 surety and strict conditions. On February 7, 2019, Mr. Khafizov filed an Application to a Judge seeking to change the terms of his bail by reducing the amount of the surety to \$10,000 with a new surety. The Crown refused to consent to the application being heard in Provincial Court (s. 523(2)(c)). There were no further applications filed. On March 28, 2019, the Supreme Court of Canada released the *Myers* decision. In response to the procedure set out in *Myers*, this matter was set in Supreme Court on May 17, 2019, to schedule a hearing for a s. 525 review. On June 3, 2019, the s. 525 hearing was scheduled to be heard in Penticton Supreme Court on June 10, 2019, during the assize. At the request of counsel, the hearing proceeded on June 20, 2019.

ISSUES:

[8] In this hearing I must consider the following issues:

- a) Does this Court have jurisdiction to conduct s. 525 detention review hearing when bail has been granted?
- b) If so, should Mr. Khafizov's bail be varied to reduce the surety from \$25,000 to \$10,000 and name Ms. Cameron as the surety?

[9] I must resolve the issue of jurisdiction before I can dispose of the variation issue. To do so, I must consider whether the failure of Mr. Khafizov to perfect bail is tantamount to being subject to a detention order or to "being detained in custody pending his trial" within the meaning of s. 525(1) to trigger a s. 525 hearing. For the reasons that follow, I find that it is.

Issue 1: Jurisdiction

[10] In *Myers*, the Supreme Court of Canada acknowledged the inconsistency in the application of s. 525 in the jurisprudence and clarified the approach to s. 525. The Court determined that a detention review under s. 525 of the Code was intended to operate as a safeguard, which among other things, "imposes an independent responsibility on the reviewing judge to consider whether the continued detention of the accused is justified" (at para. 4). The Court recognized that the overarching purpose of s. 525 is to "prevent an accused person from languishing in pre-trial custody and to ensure a prompt trial by subjecting lengthy detentions to judicial oversight" (at para. 41).

[11] As was explained in *Myers* at para. 47:

The question in the s. 525 review - whether the continued detention of the accused is justified - is somewhat different in nature than the question at the initial bail hearing or in a review under s. 520 or 521. While ss. 520 and 521 exist for the purpose of reviewing a prior order, a review under s. 525 is more properly characterized as a review of the detention itself.

[Emphasis added.]

[12] The Supreme Court of Canada's recent decisions of *R. v. St-Cloud*, 2015 SCC 27 [St-Cloud] and *R. v. Antic*, 2017 SCC 27 [Antic], provide context for the broader bail system from which I draw guidance in determining when a s. 525 detention review hearing is triggered. In *St-Cloud*, Wagner J. (as he then was) explained why detention is not the usual or preferred course. At para. 70, he wrote:

it is important not to overlook the fact that, in Canadian law, the release of accused persons is the cardinal rule and detention, the exception. This entitlement rests in turn on the cornerstone of Canadian criminal law, namely the presumption of innocence that is guaranteed by s. 11(d) of the Charter. These fundamental rights require the justice to ensure that interim detention is truly justified having regard to all the relevant circumstances of the case.

[Citations omitted.]

- [13] In *Antic*, Wagner J. begins the decision by reminding us "[t]he right not to be denied reasonable bail without just cause is an essential element of an enlightened criminal justice system" (at para. 1). When considering the application of the bail provisions *Antic* reminds us of the key principles "[a]ccused persons are constitutionally presumed innocent, and the corollary to the presumption of innocence is the constitutional right to bail" (at para. 67).
- [14] It is with these fundamental principles in mind that I turn to consider the jurisdiction issue.
- (i) Is a detention order pursuant to s. 515(10) a pre-requisite to a s. 525 review?
- [15] The Crown argues that a detention order pursuant to s. 515(10) of the Code is required in order for a court to conduct a detention review hearing pursuant to s. 525. In support of their position the Crown relies on *R. v. Burgar*, 2003 BCCA 426 [Burgar] and *Ex Parte Srebot* (1975), 28 C.C.C. (2d) 160 (B.C.C.A.) [Srebot]. In both cases, the Court of Appeal held "a review is not required when the accused has been ordered released but cannot perfect bail" (*Burgar* at para. 15). In brief, in *Burgar*, the appellant argued he ought to have been released unconditionally, and appealed from the dismissal of his habeas corpus application. After a show cause hearing, the appellant was ordered released on a recognizance with one or more sureties and other conditions. He was unable to perfect his bail. He remained in custody after the justice of the peace refused his proposed surety's certified cheque as a deposit. His bail review was dismissed. At his habeas corpus hearing, Madam Justice Loo dismissed his argument and agreed with the Crown that s. 525 applied only in circumstances where an accused had been ordered detained, and was unnecessary where an accused could not perfect bail. Justice Loo converted the hearing to a s. 520 bail review. She released the appellant with conditions in place and reduced his surety. The Court of Appeal dismissed his appeal.
- [16] In *Srebot*, the appellant similarly could not perfect bail, and remained in custody. He appealed arguing that he was entitled to a s. 525 hearing (then s. 459) as he was still in custody after the 90 day period lapsed. *Farris C.J.B.C.*, held that the then equivalent provision to s. 525, applied only where the continued detention of an accused had been ordered pursuant to a detention order. The appellant's failure to perfect bail was not deemed to be equivalent to a detention order. His appeal was dismissed. As I explain below, I disagree with the Crown's submission and reliance on these cases that did not have the benefit of *Myers*.
- [17] In *Myers*, the Court recognized that there could be instances where a detention order has not been issued but an accused person remains subject to detention such as where an accused person consents to remain in custody on a reverse onus matter or "in other narrow circumstances" (at para. 42). With reference to *Burgar* and *R. v. Saulnier*, 2012 NSSC 45 [Saulnier], which I revisit below, the Court recognized there was some disagreement as to whether such individuals are entitled to a s. 525 hearing, concluding at para. 43:

In my view, there is no principled basis for holding that individuals in this situation are not entitled to a hearing under s.525. In theory, every accused person in custody will have been "taken before a justice under section 503" within the meaning of s. 525(1) and is therefore entitled to a hearing under s.525. More to the point, the fundamental purpose of s.525 is to afford an opportunity to have a judge scrutinize the detention itself, and individuals who find themselves in these exceptional circumstances should not be denied that safeguard.

- [18] The context for these comments at para. 43 pertain to the application of s. 525 in situations where there is no initial detention hearing. It is evident that Wagner J.'s emphasis of the principled core behind the provision responds to and clarifies the inconsistency in the case law on the application of s. 525, as apparent in a line of cases in which Srebot and Bugar are a part.
- [19] I adopt Wagner J.'s principled approach to the application of the s. 525 review. Other instantiations of this principled approach appear in the recent Supreme Court of Canada jurisprudence on bail. For example, Antic cautions that it is impermissible to "fix the amount of surety or cash deposit so high as to effectively constitute a detention order" (at para. 56, citing *United States v. Robertson*, 2013 BCCA 284 at para. 22). From Antic it is apparent that the fixing of a cash deposit that is beyond an accused's means to pay can amount to a de facto detention order. If an individual fails to perfect bail, then that accused is consequently still in custody. In a similar way, the failure to perfect bail amounts to a de facto detention. In any case, I find Srebot is distinguishable in its result. The principled importance of a system favouring release as a "cardinal rule" and "detention, the exception" in light of s. 11(e) of the Charter (St-Cloud at para. 70; Myers at para. 25), did not infuse the judicial interim release system at the time of Srebot, as it does, now.
- [20] In any event, there is no effective difference between an accused who is not eligible for release because he cannot fulfil the conditions of his recognizance, and the accused who is not eligible for release because he has been ordered detained. The former scenario differs only from the latter in that the accused is for some reason or other unable to meet the preconditions for release, which are the recognizance conditions. In the latter scenario, there is no precondition to release, the accused is simply ordered ineligible for release. An accused's failure to perfect bail does not suddenly suspend the initial authority by which he was detained, in this case, as per s. 519 of the Code; he remains under the strictures of the law and thus is equally entitled to renewed judicial supervision of his detention. In this case, the authority by which Mr. Khafizov was detained continues uninterrupted notwithstanding his failure to perfect bail; his surety conditions remain. Even more saliently, in Myers, Wagner C.J.C. notes that those accused who consent to remain detained in custody are not by virtue of their consenting, disentitled to a s. 525 hearing (Myers at para. 43). Likewise, there is no functional difference between an accused who consents to detention, and an accused who cannot perfect bail or meet the preconditions for their release and remains in detention. If s. 525 applies to safeguard an accused who consents to detention, a fortiori, s. 525 applies to safeguard an accused who does not consent to detention but cannot for some

reason perfect bail to get release.

- [21] Furthermore, I'm strengthened in my reading of s. 525. This provision does not, in letter or principle, exclude those individuals who, apart from the scenarios enumerated in s. 525, consented to stay in remand or for some other reason as in a situation of failing to perfect bail, are still in custody, from a s. 525 review hearing. As stated in Myers, the "fundamental purpose of s. 525 is to afford an opportunity to have a judge scrutinize the detention itself" (at para. 43). While Mr. Khafizov did appear before a justice under s. 503, and was not subject to a detention order within the meaning of s. 525(1)(a)(ii), his failure to perfect bail did not change the fact of his continued detention. Requiring a s. 525 review on the making of a detention order made under subsection (ii) serves to reiterate that another review of whether a continued detention is justified is imperative. Simply because Mr. Khafizov does not neatly fit into the scenarios contemplated within the disjunctive subsections (i) or (ii), by virtue of his being ordered released on recognizance with sureties, but unable to perfect bail, does not disentitle him from the opportunity to have a judge scrutinize his continued detention. It is not an answer to the issue to say that an accused who fails to perfect bail may still avail themselves of s. 520; the purpose, onus and leave threshold required under that provision differs from the principled basis for a s. 525 hearing.
- [22] In the wake of Myers, the overarching purpose animating s. 525 is whether the continued detention of the accused in custody is justified. I find it would be absurd if an accused who remains in detention because he is unable to perfect bail, should be excluded from a s. 525 hearing because strictly speaking, the failure of the accused to perfect bail is not technically a detention order, whereas an individual who is subject to a detention order benefits from the safeguard of a s. 525 hearing. That would not change the risk of his languishing in custody against which the s. 525 hearing safeguards. Even before Myers, the importance of renewed judicial supervision of the continued detention of individuals beyond their initial appearances for judicial interim release, or the scenarios set out in s. 525(1)(a)(i)(ii), was already expressed in the jurisprudence. For example, in *Re Ferreira and the Queen* (1981), 58 C.C.C. (2d) 147 (B.C.C.A.) [Ferreira], the accused was charged with various offences in connection with possession of stolen property and breaking and entering. He was released on recognizance with conditions on the first charges. He was later charged with breaking and entering. He was ordered detained. Subsequently, a warrant of committal was issued pursuant to now s. 524 for his breach of recognizance of the initial charges. He did not receive a review under what is now s. 525. The Court of Appeal held the chambers judge erred in ruling that since the accused was not "being detained in custody pending his trial" within the meaning of s. 525 the accused's continued detention was not unlawful and therefore he was not eligible for a s. 525 hearing. That was too narrow an interpretation of the provision.
- [23] Although Ferreira dealt primarily with the application for habeas corpus, the principles that come from it are relevant in informing the question of whether this Court has jurisdiction to hold a s. 525 hearing. Ferreira emphasizes the point that it is the continuity in an accused's

pre-trial detention that attracts the need for judicial supervision guaranteed by a s. 525 hearing. Put another way, the obligation of the person having custody of the accused to apply for a s. 525 hearing is not obviated or alleviated by a s. 503, or s. 520, or other enumerated hearing ordering detention having already taken place, regardless of the number of charges against the accused (see also *Burton v. Surrey Pre-trial Centre* (1993), 84 C.C.C. (3d) 311 (B.C.C.A.); see also *Saulnier*). Additionally, *Saulnier*, cited in *Myers*, already acknowledged that it was the effect of detention, whether by consent as in that case, or some other mode, which should trigger a s. 525 review hearing (*Saulnier* at para. 10). The protection afforded by s. 525 to an accused, is further magnified after *St-Cloud*; *Antic*; and *Myers*.

- [24] Additionally, to adopt the Crown's submission would be to analogically penalize the accused in the manner that *Antic* specifically rejects; which, in that case, requiring cash bail before other less onerous modes of bail are ordered on the "ladder principle" was deemed to operate unfairly to accused (*Antic* at paras. 58, 59). If an individual who cannot perfect bail is disentitled from a s. 525 review hearing, the judicial message would be discordant with the principles set out in *Myers*, and would work unfairness on individuals who cannot perfect bail. The effect of both mechanisms - recognizance with a failure to perfect bail, and a detention order - is the same: the accused continues to be detained. The paramount consideration is whether the continued detention of the accused is justified and to prevent an accused's unnecessary and forgotten lingering in custody. In addition to this, the courts must prevent unreasonable delay and expedite the trials of individuals in remand (*R. v. Jordan*, 2016 SCC 27). These goals are ensconced in a system that presumes the accused's innocence and favours release except in exceptional circumstances. I do not read *Myers*, specifically in light of *Wagner C.J.C.*'s comments at para. 43 above, that the technical mode by which an accused is detained controls the application of s. 525. The application of s. 525 is regenerative in the sense that an accused's entitlement to a s. 525 hearing is not spent merely because, as in *Mr. Khafizov's* case, he was granted release in the form of a recognizance bail with \$25,000 surety and conditions, but remains in custody because he cannot perfect bail. A functional approach to the reality of a continued detention for accused persons who fail to perfect bail militates against disentitling accused who share *Mr. Khafizov's* circumstances from a s. 525 hearing.
- [25] In sum, given the overarching purpose of a s. 525 detention review hearing is to prevent persons from languishing in pre-trial custody, I cannot accept that *Myers* contemplates for a narrow interpretation of s. 525 as advocated by the Crown. Indeed, *Myers* acknowledges that there are "exceptional circumstances" in which some individuals remain detained beyond the 90 or 30 day limit, and extends the application of s. 525 to other individuals who are not necessarily subject to a detention order. The conclusions in *Srebot* (rendered pre-*Charter*, and pre-*Myers*) and *Burgar* (a post-*Charter* decision but pre-*Myers*) has now, in my view, been overtaken by the decision in *Myers*. Accordingly, I find there is no legal basis to differentiate between those whose detention is the result of a detention order pursuant to s. 515(10) of the Code and those who are subject to detention because they are unable to

perfect their bail. The accused person subject to a detention order, or who has failed to perfect bail, still remains in pre-trial detention. The unjustified continued detention of these individuals is the core concern in s. 525, and therefore, those individuals who continue to remain in custody are equally entitled to the safeguards provided by a s. 525 hearing.

[26] Accordingly, I find that this Court does have jurisdiction to conduct a detention review hearing.

Issue 2: Should Mr. Khafizov's bail be varied to reduce the surety from \$25,000 to \$10,000 and name Ms. Cameron as the surety?

[27] As discussed earlier in these Reasons, Mr. Khafizov was granted bail in the form of a recognizance with a \$25,000 surety. Although the possibility of his father being a surety was discussed during the hearing he was not specifically named as a surety, and the amount was set at \$25,000.

[28] Mr. Khafizov has been unable to secure a surety in the amount of \$25,000, and seeks to have the amount of surety reduced so that he may perfect his bail and obtain his release from detention. Ms. Joan Cameron testified in support of his application. Ms. Cameron is prepared to post a \$10,000 surety and assume the role. She understands that her obligations are to call the police if Mr. Khafizov breaches any of his release terms, and her surrendering of the \$10,000 surety. She explained she has known Mr. Khafizov for two years as he is the boyfriend of her daughter. Ms. Cameron is prepared to have Mr. Khafizov reside at her residence together with her husband and daughter. Ms. Cameron works full-time at the Osoyoos Duty Free store and has sufficient financial resources including RRSPs to provide a \$10,000 surety. Ms. Cameron testified that her husband would not agree to have the equity in their residence posted as a surety.

[29] Ms. Cameron testified that she was aware of the nature of the charges and the terms of his release. However, she was not aware of the actual circumstances that resulted in Mr. Khafizov's arrest. When challenged in cross-examination why she did not inquire into the circumstances of the offence she said she simply did not ask but maintained that she did not feel Mr. Khafizov would be a threat. Ms. Cameron also revealed that while she was away at work her husband would be home to watch Mr. Khafizov. She explained her husband was retired and no longer drives. While she testified that her husband was agreeable to have Mr. Khafizov reside with them and monitor his activity, I did not hear from him directly.

[30] Counsel for Mr. Khafizov submits that Ms. Cameron is an appropriate surety and while the amount of surety is less than the original bail there had not been an opportunity to determine whether anyone could actually provide the \$25,000 before the original bail was set. Counsel also referred to the application filed by Mr. Khafizov in February 2019 in which he attempted to vary his bail as it was apparent he could not perfect the original bail. Given these circumstances, counsel for Mr. Khafizov submits that the current surety amount is in effect a detention order and contrary to the principles set out in *Antic*. In further support of his application counsel also referred to the assessment report from the Forensic Psychiatric

Hospital which detailed Mr. Khafizov's history of mental health and substance abuse issues and his need for assistance to stabilize his mental health.

- [31] The Crown maintains the original bail is appropriate and there is no basis to vary the order. In particular, the Crown takes the position Ms. Cameron is not a suitable surety as she is unaware of the nature of events which led to the arrest and oblivious to the risk to the public posed by the actions of Mr. Khafizov. Further, the Crown argues the proposal to have Ms. Cameron as surety should be rejected as it is apparent that the person responsible for monitoring Mr. Khafizov would be Ms. Cameron's husband and there is no evidence that he would be appropriate. The only information provided regarding Mr. Cameron is that he is retired, does not drive and was not prepared to pledge the family residence for Mr. Khafizov's bail. The Crown also argues that the new information regarding Mr. Khafizov's mental health and substance abuse raises further concerns for public safety.

Analysis

- [32] I am guided in my analysis by the principles I have discussed earlier in these reasons regarding Mr. Khafizov's entitlement to have his detention reviewed to ensure that he is not languishing in pre-trial custody. I also accept that the \$25,000 surety has proven to be insurmountable for Mr. Khafizov, and I have considered the revised bail plan with Ms. Cameron as the proposed surety. While I accept that Ms. Cameron is prepared to act as a surety I am not satisfied that she is appropriate in these circumstances. The reality of the plan as proposed is that Ms. Cameron's husband, who I have not heard from, will actually be responsible for ensuring Mr. Khafizov adheres to his bail conditions as Ms. Cameron will be away from the residence for substantial periods to attend her employment. It is problematic that I was not provided with any information regarding Ms. Cameron's husband's awareness of the nature of the circumstances resulting in the charges nor his ability to fulfil the role. The extent of what I have been advised is that he is retired, does not drive, and would not agree to pledge the equity in their house on bail. I am not satisfied based on the proposed plan that the legitimate concerns regarding Mr. Khafizov's release in the community have been addressed. Moreover, the offences in this case involve a firearm and its reckless discharge, and the new information regarding his substance abuse and mental health issues generate additional concerns as to his suitability in the proposed release plan. I agree with Cartwright P.C.J.'s comments at para. 15 of her reasons, that "these are very serious matters" and that Mr. Khafizov is "liable for a lengthy term of imprisonment".
- [33] Accordingly, I deny Mr. Khafizov's application to have Ms. Cameron named as surety with a \$10,000 bail. The proposed release plan does not give me confidence to conclude he has satisfied the concerns referred to in s. 515(10) which constituted the original basis for the terms of his release. However, in the event Mr. Khafizov has an alternate plan which addresses the deficiencies I have identified, it is open for him to pursue a s. 520 review.

Conclusion

[34] I find that this Court does have jurisdiction to hear the s. 525 hearing. There is no effective difference between an accused who is subject to a detention order, and an accused like Mr. Khafizov, who is ordered released, but cannot perfect bail and is thus de facto detained under the authority of s. 519 of the Code. As expressed in Myers, judicial supervision of whether the continued detention is justified is integral to both scenarios of detention, irrespective of the mode by which the accused stays detained.

[35] Having considered Mr. Khafizov's revised release plan proposing Ms. Cameron as surety in the amount of \$10,000 I decline Mr. Khafizov's proposal. While I have no difficulty with the reduction of the surety from \$25,000 to \$10,000 I am not satisfied that the proposed release plan is sufficient to address the concerns raised regarding Mr. Khafizov's release.

"Devlin J."

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