

CANADA / JUDGMENT

R. v. Rosch

2024 BCSC 1347

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Supreme Court of British Columbia

DECIDED

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2024 BCSC 1347 R. v. Rosch

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

R. v. Rosch,

2024 BCSC 1347

Date: 20240619

Docket: 35816-1-W

Registry: Vancouver

Rex

v.

Briaden Rosch

Before: The Honourable Madam Justice L. Lyster

Oral Reasons for Judgment

(Detention Review Hearing)

Counsel for the Crown

appearing via videoconference:

J.W. Burke

Counsel for the Defence

appearing via videoconference:

M.A. Patterson

H. Sahil, A/S

Place and Date of Hearing:

Nelson, B.C.

May 14, 2024

Place and Date of Judgment:

Nelson, B.C.

June 19, 2024

Introduction

- [1] THE COURT: These are my oral reasons for decision with respect to Mr. Briaden Rosch's application for a review of his detention, pursuant to s. 525 of the Criminal Code., R.S.C. 1985, c. C-46 [Code]. The Crown is opposed to Mr. Rosch's release and seeks his continued detention on all three grounds.
- [2] Mr. Rosch is detained in relation to several informations and one indictment. He is charged with ten counts on Indictment 23132-2, which relate to offences he is alleged to have committed on April 21, 2022 in Grand Forks and April 30, 2022 in Creston.
- [3] Crown counsel went through the details of the alleged offences. It will suffice for me to say that it is alleged, in Count 1, that Mr. Rosch robbed the CIBC in Grand Forks; and, on Count 2, that he then stole a truck. Those things are both alleged to have occurred on April 21, 2022. The following eight counts all relate to items which were found in Mr. Rosch's possession when he was taken into custody on April 30, 2022 in Creston, in particular, a loaded shotgun, a stolen Ford F-150 truck, and a stolen licence plate. At the time, Mr. Rosch was prohibited from possessing a firearm.
- [4] Mr. Rosch remained in custody after his arrest on April 30, 2022 until he was released on September 7, 2022 pursuant to a comprehensive consent release order that had been made on August 25, 2022. Mr. Rosch was released on \$2,000 bail, without deposit or surety.
- [5] The terms of the consent release order included that Mr. Rosch reside at the New Vision Supportive Housing ("New Vision") facility. He was not permitted to leave New Vision unless in the immediate presence of a staff member or representative or with the written permission of his bail supervisor. Mr. Rosch was subject to electronic monitoring and he was required to comply with an electronic supervision agreement.

- [6] On November 29, 2022, Mr. Rosch left New Vision and cut off the electronic monitoring bracelet. There is some dispute about the circumstances leading to that occurring. The Crown says that he evicted himself when he left without permission and that he tampered with the bracelet, which led to the authorities contacting New Vision, who checked and determined he was not at the facility. There were footprints seen in the snow, apparently leading to the location where a car picked Mr. Rosch up.
- [7] According to a November 30, 2022 letter from New Vision that was referred to by Crown counsel in submissions, the background to these events was that, on October 31, 2022, Mr. Rosch tested positive for THC and admitted to using cannabis while he was at a welfare office and, on November 28, 2022, he tested positive for opioids.
- [8] A warrant was issued for Mr. Rosch's arrest due to his breach of his release order. He was arrested on December 11, 2022. He was charged for the breach of the release order. That matter was resolved by a guilty plea to one count of breach of a release order on May 25, 2023.
- [9] For unknown reasons, no application was made by the Crown to revoke his bail, and Mr. Rosch was released on May 26, 2023. Crown counsel advises that the log note of the correctional officer who released Mr. Rosch on that date indicates that he reviewed the consent release order that I have already described and determined that it did not appear to apply to the current situation. The officer told Mr. Rosch that the conditions were still in place. He encouraged Mr. Rosch to call his lawyer, which he said he would do.
- [10] Crown counsel advises that Mr. Rosch called his bail supervisor once, but, after that, took no further action to deal with the situation. This situation gave rise to Information 23132-3, which contains a single count that Mr. Rosch failed to comply with a condition of his release order, on or about May 29, 2023, by failing to report. A warrant for Mr. Rosch's arrest on that information was issued on July 6, 2023. The warrant was ultimately executed on September 26, 2023. Mr. Rosch has been in custody since that date.
- [11] In the period between Mr. Rosch's release on May 26 and his arrest on September 26, 2023, a number of things occurred.
- [12] Mr. Rosch stands charged, on Information 96826-1, with four counts relating to his alleged actions in or near Abbotsford on June 11, 2023. He is charged with possession of stolen property, namely a stolen vehicle; resisting or obstructing a peace officer; failing to stop a motor vehicle while being pursued by a peace officer; and driving while prohibited.
- [13] Mr. Rosch stands charged, on Information 96731-K, with one count of assault on his former intimate partner on June 24, 2023, also in Abbotsford. Crown counsel says that she, his former intimate partner, was allowing Mr. Rosch to stay at her home, because he had no other place to live, and that he attacked her; the attack being stopped when her dog intervened and her daughter ran into the room.

- [14] Mr. Rosch stands charged with three counts, on Information 36947-1, all relating to his alleged conduct in or near Creston on July 16, 2023. Specifically, he is charged with failing to stop a motor vehicle while being pursued by a peace officer; driving a motor vehicle in a dangerous manner; and driving while prohibited. These charges all stem from a traffic stop and Mr. Rosch allegedly taking off from that stop at high speed, allegedly with a child in the vehicle.
- [15] Mr. Rosch stands charged with three counts, on Information 27574-1, arising from his alleged conduct in the Salmo area on August 5, 2023. Once again, he is charged with failing to stop a motor vehicle while being pursued by a peace officer; driving while prohibited; and resisting or obstructing a peace officer. The circumstances, save for a child being in the vehicle, are somewhat similar to the Creston charges.
- [16] Lastly, Mr. Rosch has two counts charged against him on Information 36047-A. These relate to his alleged conduct on September 6, 2023 in the Creston area. Those charges relate to Mr. Rosch failing to comply with his original release order, by not residing at New Vision, and failing to comply with the electronic supervision agreement.
- [17] Trial dates have all been set on all of Mr. Rosch's outstanding charges. They are scheduled on various dates in Provincial Court between now and September 2024; and one Supreme Court trial relating to the alleged robbery and related charges, to be held in Rossland, starting August 19, 2024.

Background

- [18] As related by his counsel, Mr. Rosch is now 37 years of age. He has Cree heritage on his mother's side. He has four sisters, and he enjoys a close relationship with all of his sisters and his parents. Mr. Rosch had an unfortunate childhood growing up. His maternal grandmother was a residential school survivor. His father assaulted his mother. He reports that he was sexually assaulted by a cousin and that he has received no treatment for the traumatic effects of that assault. Mr. Rosch presently has a grade 11 education and he hopes to complete his grade 12. He has some employment history in construction and in buying and selling items online.
- [19] Mr. Rosch has epilepsy. He also has a history of substance misuse; starting to use drugs when he was only 13 years of age. When he is using, his drug of choice is cocaine. Reportedly, he uses cocaine to self-medicate for the trauma related to being sexually abused. He has had many relapses on his path to sobriety and he has poor impulse control and decision-making.
- [20] Mr. Rosch has what is often described as an unenviable criminal record. I will not attempt to recount all of the offences of which Mr. Rosch has been convicted. His record extends back to youth convictions in 1999, 2001, 2003 and 2005. His adult convictions begin in 2005. There are numerous breaches of recognizance and two convictions for failure to appear. Of particular concern, given the charges which now bring Mr. Rosch before the courts, is a

2008 conviction for robbery, for which he was sentenced to three years; and eight robbery convictions in 2017, for which he was sentenced to three years, and a year consecutive for the use of an imitation firearm. There are numerous convictions for breaking and entering. In 2020 and 2022, he was convicted of escaping from lawful custody.

- [21] The Crown opposes Mr. Rosch's release on all three grounds listed in s. 515(10), with particular reliance on the secondary ground. While the Crown is concerned that Mr. Rosch might fail to attend court when required, it is more concerned that, if released, he will commit more crimes.
- [22] Crown counsel submits that Mr. Rosch is a professional criminal; that he has engaged in robberies that were planned in advance, as well as numerous breaches and flights from police. Crown counsel submits that Mr. Rosch is a person who will do what he wants, when and where he wants, regardless of any conditions the court might impose. Crown counsel submits that there is a substantial likelihood that Mr. Rosch will commit further offences if released.
- [23] In relation to the tertiary ground, Crown submits that Mr. Rosch will, in light of his record, face a substantial sentence if he is convicted on some or all of the informations now before the courts. Crown submits that, if Mr. Rosch were to be released, it would bring the administration of justice into disrepute.
- [24] Mr. Rosch's counsel submits that there are significant identity issues with respect to the alleged robbery. He submits that there are triable issues with respect to the charges relating to the alleged flights from police. He has not yet filed any Charter notices, but he intends to do so both with respect to the robbery and the flights.
- [25] Mr. Rosch's counsel submits that the biggest issue has to do with the circumstances surrounding Mr. Rosch leaving New Vision in November 2022. He provides an alternative explanation for those events, saying that Mr. Rosch did not feel that he fit in. He wanted to go home to his family and to receive day treatment, but New Vision was not receptive to those desires and told him he could not leave for 18 months. He says that Mr. Rosch was very upset as a result and smoked a joint. According to Mr. Rosch, New Vision told him, in response to having smoked the joint, that he could either leave or be sent to another house, which houses people charged with sex offences. That triggered him, due to his background of being the victim of sexual abuse. He also says that he was asked to leave by New Vision.
- [26] Mr. Rosch does not dispute cutting off the electronic bracelet and leaving New Vision. However, he has a new bail plan, which he says should relieve the court's concerns under all grounds. In this regard, he submits that the former release conditions were deficient, in that they did not specify that Mr. Rosch was under house arrest, and the new bail plan would address that deficiency.

- [27] Mr. Rosch's counsel submits that, when he was released in May 2023, there is no evidence that his release conditions were actually explained to him. He had nowhere to go. Reportedly, he called a facility, I believe VisionQuest, but there was no bed for him. He says that he did report once to his bail supervisor and he left a phone number, but he never received a call back. He acknowledges that he, for his part, never called back either.
- [28] In reply, Crown counsel disputed Mr. Rosch's version of events surrounding him leaving New Vision. According to a letter of eviction referred to by Crown counsel, he was transferred to the Top of the Hill house for a last and final chance, following the positive opioid test. Later that night, there was a tamper alert on the electronic monitoring system, and it was discovered that Mr. Rosch was not in his bedroom or in the facility. The Crown denies that Mr. Rosch was directed to leave and, according to Crown counsel, the Top of the Hill house is not for sex offenders.
- [29] Crown counsel says that this is the first time that he has heard that Mr. Rosch is Indigenous or that he has suffered sexual abuse. He does not dispute those facts, but he notes the absence of any Gladue report in respect of Mr. Rosch's previous sentencings.

Decision

- [30] An accused person, such as Mr. Rosch, is presumed innocent until proven guilty. I am mindful that s. 11(e) of the Charter states that, "Any person charged with an offence has the right not to be denied reasonable bail without just cause".
- [31] As stated by the Supreme Court of Canada in *R. v. Myers*, 2019 SCC 18, at para. 1:
- [1] The right to liberty and the presumption of innocence are fundamental tenets of our criminal justice system. In the pre-trial context, release -- at the earliest opportunity and in the least onerous manner -- is the default presumption in Canadian criminal law. Pre-trial detention is the exception, not the rule.
- [32] In *Myers*, the Court further stated at para. 67:
- [67] Third, Mr. Myers was detained exclusively on the basis of the second ground under s. 515(10), despite the fact that he had a release plan involving a closely supervised treatment facility to address his substance abuse problems and multiple proposals to address the concern that he posed a risk to the public. It was within the bail judge's discretion to determine whether the release strategies presented by counsel addressed the risk that if released from custody, Mr. Myers would commit a criminal offence or interfere with the administration of justice within the meaning of s. 515(10)(b). That being said, judges and justices presiding over bail hearings should always give very careful consideration to release plans that involve supervised treatment for individuals with substance abuse and mental health issues. Release into treatment with appropriate conditions will often adequately address any risk raised under s. 515(10), and such a strategy is a less onerous alternative than provincial remand. It may also substantially address the root causes of the accused

person's alleged criminal behaviour and reduce the likelihood of future criminal conduct. In accordance with the principles articulated in *Antic*, we must not lose sight of the fact that pre-trial detention is a measure of last resort.

- [33] Section 493.2 of the Code instructs the court that, in making a decision about release, I must give particular attention to the circumstances of Aboriginal accused persons. As stated by Justice Edelman in *R. v. Telechea*, 2022 BCSC 831, the situation of Indigenous accused must be considered at all stages of the criminal process.
- [34] All three grounds for detention are relied upon by the Crown in this case. I propose to deal with the secondary ground first, as I do think it is the most important consideration in this case.
- [35] The decision of Mr. Justice Halfyard, in *R. v. Abdel-Rahman*, 2010 BCSC 189, sets out the factors a court must consider in determining whether an accused person should be detained on the secondary ground. In that case, the court referred to the decision of Chief Justice Lamer in *R. v. Morales*, [1992] 3 S.C.R. 711, at para. 39, for the limits within which detention on the secondary ground may be justified:
- [39] I am satisfied that the scope of the public safety component of s. 515(10)(b) is sufficiently narrow to satisfy the first requirement under s. 11(e). Bail is not denied for all individuals who pose a risk of committing an offence or interfering with the administration of justice while on bail. Bail is denied only for those who pose a "substantial likelihood" of committing an offence or interfering with the administration of justice, and only where this "substantial likelihood" endangers "the protection or safety of the public". Moreover, detention is justified only when it is "necessary" for public safety. It is not justified where detention would merely be convenient or advantageous. Such grounds are sufficiently narrow to fulfil the first requirement of just cause under s. 11(e).
- [36] Justice Halfyard went on to list, at para. 23, the factors a judge must be satisfied of in order to reach the conclusion that detention is justified on the secondary ground. He wrote:
- [23] In my opinion, the decisions that a judge must necessarily make in order to reach the conclusion that detention is justified on the secondary ground, are the following:
- a) First, that there is a risk that the accused will either commit an offence, or will interfere with the administration of justice, if he is released;
 - b) Second, that this risk is of such magnitude that it amounts to a "substantial likelihood;"
 - c) Third, that the said risk would constitute a danger to public safety (in general, or to a specific victim or witness) if the accused is released; and
 - d) Fourth, that the detention of the accused is "necessary," because the identified danger to public safety cannot be prevented or reduced to an acceptable level by bail conditions (such as reporting to authorities, curfew, no-contact, mobility restrictions, sureties or cash bail).

- [37] In light of Mr. Rosch's criminal record, I do not think that there can be any doubt that there is a risk he will commit an offence if he is released. Given Mr. Rosch's criminal record, I accept the Crown's submission that the risk of him committing a criminal offence amounts to a substantial likelihood. I further accept that the risk of Mr. Rosch committing an offence would constitute a danger to public safety in general, given the nature of the offences he has been convicted of in the past and those he is now charged with.
- [38] I turn to the real question in this case, which is whether Mr. Rosch's continued detention is necessary because the identified danger to public safety cannot be prevented or reduced to an acceptable level by bail conditions.
- [39] Mr. Rosch's proposed release plan mirrors his former plan, except in two respects.
- [40] First, he would be released to the Hope For Freedom Society, which as set out in a letter dated May 10, 2024 from Jacobus Jansen, an intake worker, they have agreed to have him join their drug and alcohol rehabilitation program pending bed availability.
- [41] In submissions, Mr. Rosch's counsel advised that Hope For Freedom Society offers trauma counsellors and a visiting psychologist, which would be of particular assistance to Mr. Rosch, given his unaddressed trauma. There was nothing in the materials from the Hope For Freedom Society to indicate that they offer such services, so I granted counsel leave to file additional materials about Hope For Freedom's programming and delayed my judgment to give him time to do so.
- [42] I was provided with a second letter from Mr. Jansen, dated June 6, 2024, in which it states that Hope For Freedom does not offer trauma counselling, but they can and do refer clients to resources in the community where they can access such services.
- [43] Second, Mr. Rosch would be subject to 24-hour house arrest. His counsel submitted that if these conditions could not sufficiently ameliorate the risk of Mr. Rosch committing further offences, there was nowhere else to go on the Antic ladder.
- [44] I have concluded that the release plan proposed does not adequately address the risk of Mr. Rosch committing a criminal offence.
- [45] On the information before me, the programming available at Hope For Freedom is not materially different from New Vision. I am confident that either facility could refer clients to community-based resources for trauma counselling where appropriate.
- [46] I do not agree with counsel that a term that Mr. Rosch be subject to 24-hour house arrest would be materially different from the terms he was under when he cut the electronic bracelet off and left New Vision. That release order provided:

You must not leave the New Vision Supportive Housing facility unless you are in the immediate presence of a staff member or representative of the New Vision Supportive Housing Society or you have the written permission of your bail supervisor. Such permission is to be given only for compelling reasons.

- [47] While the term "house arrest" was not used, it was the clear meaning of that condition that Mr. Rosch was not to leave New Vision, except in the limited circumstances outlined.
- [48] Counsel for Mr. Rosch relies on the *R. v. Rajan*, [2020] O.J. No. 1437, for the utility of electronic monitoring of persons released on bail. At para. 32, Justice Harris stated that it "can be a valuable tool", which "can function as a specific deterrent on an individual released on bail".
- [49] He went on to state, at paras. 32-33:
- [32] In some instances, electronic monitoring can be a valuable tool on bail. Monitoring can function as a specific deterrent on an individual released on bail. In the context of sentencing, the criminal law places reliance on the efficacy of specific deterrence. There is no reason not to extend the philosophy underlying specific deterrence to bail, albeit with some modifications. An accused person subject to electronic monitoring will know that not only will they be apprehended if they violate their house arrest but that the GPS device will produce cogent evidence to assist with their prosecution. To most, this will act as a real deterrent.
- [33] The one thing that electronic monitoring cannot do is protect against an out of control, irrational accused who does not care about apprehension or prosecution. That is an important limitation particularly in the offences against the person and domestic violence context. But it does not lead to the conclusion that electronic monitoring is wholly ineffective. If the surety supervision is reasonably good, electronic monitoring remains a tool and a useful one. Nothing is a complete guarantee: *R. v. T.L.*, 2020 ONSC 1885 at paras. 22-27.
- [50] Counsel submits that Mr. Rosch is not irrational or out of control and that electronic monitoring is an important part of his carefully crafted bail plan.
- [51] I agree that electronic monitoring can be a valuable tool and that nothing is a complete guarantee. The difficulty Mr. Rosch faces is that he cut off one electronic bracelet, and there is no basis on the information before me to think that he would not do so again. He is not one of the "most" for whom electronic monitoring acts as a real deterrent. Mr. Rosch may not be irrational or out of control, but he has given ample evidence, by his own conduct, that he does not care about apprehension or prosecution.
- [52] In this regard, I refer not only to him having cut off the electronic bracelet the last time he was released, but his many convictions for being unlawfully at large and breaches of release orders, not to mention the charges he currently faces for flights from the police.

- [53] There is some dispute between the parties about the specific circumstances under which Mr. Rosch left New Vision. I need not resolve those disputes. There is no question that Mr. Rosch left New Vision, in breach of the term requiring him to remain there, and that, in the course of doing so, he cut off the electronic monitoring bracelet, also in breach of his release conditions. There is nothing in the new proposed plan that would serve to adequately address the risk that he would do so again, particularly if he was upset or angry with some decision or restriction imposed upon him by the Hope For Freedom Society.
- [54] I am mindful that Mr. Rosch reports that he is Indigenous and of the obligation imposed on this court by s. 493.2 of the Code. While I do not have a Gladue report, the facts put forward by Mr. Rosch's counsel regarding his maternal grandmother being a residential school survivor, his father assaulting his mother, his mother being addicted to alcohol and cocaine, and him being sexually abused by a cousin, are all too tragically typical of the consequences of Canada's assimilationist and racist policies towards Indigenous people. I accept that they will have played a role in Mr. Rosch's previous offending and his behaviour related to the charges now alleged against him.
- [55] Section 493.2 demands that the court take that into account in considering Mr. Rosch's release. Unfortunately, taking those factors into account does not affect my assessment of the risk of Mr. Rosch committing an offence if released from custody. There is a substantial likelihood that he will do so, and thereby endanger public safety, and the proposed plan does not reduce that risk to an acceptable level.
- [56] For essentially the same reasons, I find that Mr. Rosch's continued detention is also justified on the primary and tertiary grounds. Given Mr. Rosch's history of breaching undertakings, failing to appear, and leaving New Vision in breach of his release orders, his continued detention is necessary to ensure his attendance at the many pending court dates.
- [57] With respect to the tertiary ground, Mr. Rosch is charged with serious offences, which I have already summarized. His counsel properly acknowledges that there is a likelihood that he will face some custodial time, albeit, he says, that it would pale in significance to the amount of custodial time he has already served.
- [58] On Indictment 23132-2, Mr. Rosch is charged with a number of offences related to the Churchill Model 610 12-gauge pump action shotgun which was found in his possession. He is also charged with robbery, an extremely serious offence, of which he has already been convicted on a number of occasions. The trials on all of these offences are scheduled within the next three to four months, so all charges will be resolved promptly.
- [59] In all of these circumstances, I find that a reasonably informed member of the community would find that Mr. Rosch's continued detention is necessary to maintain public confidence in the administration of justice. For these reasons, I order that Mr. Rosch continue to be detained.

"L.M. Lyster J."

LYSTER J.

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