
CANADA / JUDGMENT

R. v. Varette

2020 BCSC 810

COURT

Supreme Court of British Columbia

DECIDED

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2020 BCSC 810 R. v. Varette

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

R. v. Varette,

2020 BCSC 810

Date: 20200430

Docket: 178902-1, 179587-1

Registry: Victoria

Regina

v.

Daniel Roger Varette

Before: The Honourable Madam Justice J. A. Power

Oral Reasons for Judgment for Judicial Interim Release

Counsel for the Crown:

L. Nowlan-Card

via telephone

Counsel for the Accused:

J. Dosanjh

via telephone

Place and Date of Trial/Hearing:

Victoria, B.C.

April 30, 2020

Place and Date of Judgment:

Victoria, B.C.

April 30, 2020

INTRODUCTION

- [1] THE COURT: Daniel Roger Varette is before the court for a s. 520 bail review. The decision under review is the decision of Judge Lowe of the Provincial Court dated March 18, 2020.
- [2] There are two informations before the court. Information 178902 alleges two offences on February 3, 2020, at Victoria, British Columbia. The first of which, Count 1, is possession of a knife for a purpose dangerous to the public peace, contrary to s. 88(1) of the Criminal Code. Count 2 alleges possession of stolen property, a driver's licence. That second count occurred at the time that the police arrested Mr. Varette and found the driver's licence on his person.

- [3] The second information, 179587, alleges 11 counts:

Count 1 is a break and enter a dwelling house at 2300 Arbutus Road on March 12, 2020, and commit an indictable offence therein, theft;

Count 2, possession of property, a guitar, the value not in excess of \$5,000 knowing that it was obtained by the commission in Canada of an offence punishable by indictment;

Count 3, possession of property, Iraqi dinars, again an offence that took place on March 12, 2020, allegedly;

Count 4, March 12, 2020, possession of property, a 3D printer, not in excess of \$5,000;

Count 5, possession of property, a bicycle, not in excess of \$5,000, all of these, of course, contrary to s. 355(b) of the Criminal Code;

Count 6, possession of property, a speaker, not in excess of \$5,000;

Count 7, possession of property, a garden lamp and fireplace, not in excess of \$5,000;

Count 8, possession of an identity document, contrary to s. 56.1(1) of the Criminal Code;

All of these occurred, allegedly, on the 12th of March.

Count 9 is being at large on a release order, fail to comply with conditions;

Count 10, prowl at night upon the property of Steven Wilson, and that is alleged to have occurred on February 21, 2020; and

Count 11, prowl at night upon the property of Darren Leith, located at Scolton Road and that is alleged to have occurred on March 5, 2020.

- [4] Judge Lowe detained Mr. Varette on the secondary ground.
- [5] It is common ground between the Crown and the defence that the onus on this hearing is on the defence to establish on the balance of probabilities that Mr. Varette's detention is not necessary on the secondary ground. Throughout the hearing the decision of Mr. Justice Halfyard in *R. v. Abdel-Rahman*, 2010 BCSC 189, was referenced.
- [6] The parties agree that this court can only intervene if the hearing judge made an error of law, or if there is a material change of circumstances before me. Defence counsel before me points out that although Judge Lowe did not specifically outline the four-part test at para. 23 in *Abdel-Rahman*, defence is focussing on the material change of circumstances argument.
- [7] The defence argues that this court is being presented with a much stronger release plan than that which was before Judge Lowe. At the original hearing, it was submitted that Mr. Varette could reside at the Salvation Army shelter. On the applications before me defence is proposing cash bail in the amount of \$500, which, defence argues, is significant given that Mr. Varette is on social assistance and is a person of limited means, so that there is a cash incentive to the proposed plan. The defence is proposing that the residence be at the It's Up to You Recovery House Society in Surrey, British Columbia, which is a registered abstinence-based recovery home where the clients participate in daily group sessions and counselling.
- [8] I have received information about the It's Up to You Recovery House Society, both initially prior to the hearing today and, in the course of the hearing. Confirmation emails were referenced, the most recent of which I received after I heard argument this morning from defence counsel, which confirms that the facility operate a first-stage program which lasts for 60 days, that the facility also operates a second-stage facility where the clients are transferred after the first stage, and that the clients can stay at the second-stage facility indefinitely. The restrictions are lessened at the second-stage facility, however clients can still be on court-imposed conditions.
- [9] The plan suggested by defence before me includes strict bail terms which are akin to house arrest. The initial letter from the recovery program indicated that the program cannot monitor house arrest conditions, but some clarification in an email of April the 28th indicated that they can accept clients on house arrest as long as they can be out in the company of a representative of It's Up to You, and be out with the written permission of the treatment centre, which would allow residents to attend Narcotics Anonymous, Alcoholics Anonymous meetings and doctors appointments, and other necessary medical attendances.
- [10] There is also confirmation provided by defence that the Vancouver Island Reginal Correctional Centre where Mr. Varette is currently being held will ensure transport to --

- [11] THE CLERK: I'm sorry, My Lady, I've just received a notice from Supreme Court Scheduling that Mr. Dosanjh has lost contact with us, so I would like to call him again right now, if that's possible.
- [12] THE COURT: All right, certainly.
- [13] THE CLERK: Thank you.
- [14] THE COURT: So I am just going to confirm, Mr. Dosanjh, I understand that it was you that lost contact. I was summarizing the defence proposal just prior to the fact that I learned that you had lost contact. Did you hear that?
- [15] MR. DOSANJH: Yes, My Lady. The audio cut out when you stated the original plan submitted was Mr. Varette could reside at the Salvation Army, and then it cut out.
- [16] THE COURT: All right. So I had detailed the fact that you were proposing cash bail, you were just proposing the residence. I will not restate what I said entirely, Mr. Varette has heard it, but for your purpose, I summarize the cash bail, the residence at It's Up to You Recovery House, with some information about that, and I confirmed that I had received further information from you just after 1 o'clock this afternoon, and strict bail terms.
- [17] MR. DOSANJH: Okay.
- [18] THE COURT: There is also confirmation before me that the Vancouver Island Reginal Correctional Centre where Mr. Varette is currently being held will ensure transport to a correctional facility on the Lower Mainland so that there is no break in the chain of custody so to speak.
- [19] MR. DOSANJH: Thank you.
- [20] THE COURT: Finally, It's Up to You Recovery House Society does have a bed available and advises that the beds are given up on a first-come, first-serve basis, but that should a bed not be available, they would not arrange a pickup at that transfer institution until a bed is available.
- [21] It is conceded by the Crown before me that this new release plan does present a material change of circumstances. Therefore the question that I must decide on this hearing is whether Mr. Varette's continued detention is necessary on the secondary ground, and whether he has met the burden which is on him, because it is a reverse onus situation, as well to establish that it is not.

ANALYSIS

- [22] In *R. v. Abdel-Rahman*, at paras. 22 and 23, Mr. Justice Halfyard summarized these principles:

- [22] In *R. v. Wilcox*, 2005 BCSC 1785, Mr. Justice Barrow (at para. 22) further clarified the limits of the secondary ground by stating that bail should not be denied unless "that risk cannot be adequately addressed by the imposition of appropriate terms of release." I take this statement to refer to the "necessity" of detention, and to mean that even significant risks can be addressed by strict bail conditions, provided the risk to public safety does not amount to a "substantial likelihood."
- [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).
- [23] In the initial hearing before Judge Lowe, she summarized the circumstances of the first information at paras. 3, 4 and 5, and noted that that was a fairly strong case:
- [3] With respect to that matter, Mr. Varette is alleged to have pulled a knife on a man outside of the Kentucky Fried Chicken in Victoria, after it appears the two had a conversation while in line. As I understand it Mr. Varette was apparently complaining about the service or something of that nature. The other gentleman said something to him. They both proceeded to get their meals, eat their meals, but upon proceeding outside the gentleman left and then was confronted by Mr. Varette, whom he alleges pulled a knife and essentially handled it in a threatening manner towards him. That gentleman then contacted the police.
- [4] Mr. Varette was located and made a spontaneous utterance saying, "I didn't pull a knife," and suggested to police that his rings were shiny like a blade, and therefore the complainant would have presumed that those shiny rings were a blade. In fact, a folding knife was found in his backpack.
- [5] That is a fairly strong case. Nonetheless he was released on terms which included obviously some no-go, no-contact conditions, et cetera, but of course a condition that he keep the peace and be of good behaviour. He was released on February 4th.
- [24] She went further in discussing the second information relating to the offences, mostly on the 12th of March of 2020, at paras. 6, 7, 8, 9 and 10.

- [6] The new information before me alleges a number of counts of essentially possession of stolen property and trespassing by night. It appears that in and around February and March of 2020 a number of homes in the Gordon Head area of Saanich were broken into or had a shed broken into, and the like, and property stolen.
- [7] As well, there are allegations of trespassing by night, and Mr. Varette, it is suggested by police, is actually seen on video in the area of I believe it is two of the homes in question, trespassing in the early morning hours. Of course ultimately that is a matter for a trial, but as a result of seeing Mr. Varette the police became suspicious that indeed he was a person who had been seen on these videos. They decided to follow him or watch him.
- [8] They attended at his residence in order to do some surveillance and at that location they observed outside of his residence, one he apparently shares with his girlfriend, although it may be that there is another party or parties there, certainly according to Crown counsel the landlord has indicated that Mr. Varette's girlfriend resides at the residence, and that he comes and goes and resides there also. There was no mention of any other parties. However, during this surveillance, as I say, the police observed outside of the residence a tall garden lamp, which was one that was stolen from one of the homes in the Gordon Head area of Saanich.
- [9] Police obtained a search warrant and executed that on March 12th on the home, where they located a number of items, including a 3D printer, a Bluetooth speaker, there was the garden lamp of course, a portable fireplace, a guitar, two amps, all of which came from residential break and enters in about that area over some period of time.
- [10] When Mr. Varette was arrested on his person was located 1.5 million Iraqi dinars, which I am told by Crown counsel do not essentially have a monetary value, although I take it that these are currency, but nonetheless the owner of those indicated that he had paid some thousand dollars in order to obtain those and was holding those. Those were located on Mr. Varette's person. As well, he had a grey bicycle with him, which also was taken from one of the homes in Saanich. Obviously the investigation with respect to these various break and enters are ongoing, however, at this time I am of the view that, in all of the circumstances as outlined by the Crown counsel, that there is quite a strong case with respect to Mr. Varette's involvement, at least to some degree, whether in fact he broke into these houses or is involved as a party. I am certainly mindful of the fact that one of the videos which shows someone breaking into a residence shows a female, who as I take it is yet undetermined. Nonetheless, Mr. Varette was living in a home with all of this stolen property and importantly found on his person was property stolen from at least one of the break and enters, as well as the bicycle which I have mentioned.

- [25] I, on the hearing before me, learned additional factors that were not referenced by Judge Lowe, that included that an independent witness from the Kentucky Fried Chicken observed a knife in Mr. Varette's hand, and that the lead count on Information 179587, the break and enter and theft, occurred when the perpetrator entered the residence and students that were resident there were sleeping.
- [26] In many cases on the video, the police indicate in the background that Mr. Varette matches descriptors of individuals on the video, although it is recognized that there are some differences. Including, on one occasion, that a person of colour might be involved, and on another occasion, a female might be involved.
- [27] Mr. Varette has a lengthy criminal record which dates back to 1992. That again is set out in the materials that were provided to me on the hearing, so I am not going to read it out here.
- [28] As noted by defence, there are gaps in this record that indicate that Mr. Varette can live in a pro-social way, and that he has had periods of success in the community.
- [29] In terms of his personal circumstances, he is 46 years of age, he has a Grade 12 education, he has a history of some employment skills in the area of carpentry, roofing and he can apparently fulfill a number of different positions. He is currently on social assistance.
- [30] As outlined both before Judge Lowe and before myself, he has a son in Victoria who is 22 years old, with mental health issues, and that he has been a caretaker for his son in the past. Mr. Varette has had addictions in his life, and much of his criminal record has related to his addictions. He can have a stable lifestyle when he is addiction-free.
- [31] Now as I turn to the arguments before me, I have to keep in mind as noted in the decision of *R. v. Anderson*, a decision of Judge Brown of the Provincial Court of April 17, 2020, which is 2020 BCPC 70, Mr. Varette is entitled to reasonable bail and not to be detained without just cause. In the pretrial context, release should be granted at the earliest opportunity and in the least onerous manner and that is the default presumption in Canadian criminal law, *R. v. Myers*, 2019 SCC 18.
- [32] There was argument before me with respect to the global pandemic and the risk presented to Mr. Varette by being incarcerated, and that I should consider that if I consider this case a close call, and it should tip the scales on the review before me. I do accept that there is some risk to Mr. Varette in a custodial setting, but I note, as Judge Brown did in *Anderson*, that, at para. 30:

We are in the middle of a COVID-19 pandemic. We are in unprecedented times. Everyone in the country has been affected by the virus, whether it be by social distancing, by social isolation or even by loss of employment.

He noted further, at para. 32:

Inmates are housed in closed quarters, making them a vulnerable, state-mandated group of people. But the vulnerability of prisoners must be placed in context. Many other segments of society are seriously vulnerable at this time. The elderly in care homes and healthcare workers in hospitals are especially vulnerable to the virus. ...

He stated further, at para. 35:

To be clear, the coronavirus is not a "get out of jail free card". It is a serious factor to consider and may tip the scales in some cases. But if an accused's risk is truly unmanageable, it remains unmanageable notwithstanding the greater risks posed by the coronavirus inside an institution.

- [33] Here the release plan includes release to a group setting in the It's Up to You Recovery Program, which as I have indicated is a two-stage program.
- [34] On the issue, however of the COVID-19 factor, and keeping in mind that the It's Up to You Program is following the provincial protocols, I am not satisfied that that the COVID-19 factor should be anything other than a neutral factor. It is unclear to me how the risk to Mr. Varette is reduced if he leaves an institution to live in a group setting where there are individuals coming and going from the institutional setting. It seems to me that both the custodial setting and the group setting of the recovery program presents certain risks and I am not satisfied that the risk to Mr. Varette in custody is reduced by going to It's Up to You Recovery House.
- [35] That leaves me with the consideration of whether this is new release plan satisfies the onus which is on Mr. Varette that his continued detention is not justified on the secondary ground, and I am not satisfied that it does.
- [36] The secondary ground concerns here are significant and obvious. These are serious offences and there are a large number of them. The Kentucky Fried Chicken incident has an independent witness that belies Mr. Varette's spontaneous denial at the scene. The property offences on the second information are numerous, and while the individual counts may be of varying strength, many of the counts, particularly the lead break and enter count which involved entering the dwelling house while the students were sleeping, appear to be strong. Further, the distinguishing characteristics, including the descriptors of facial features, height and clothing, which appear to match Mr. Varette are compelling. The circumstances, as I have said at the lead B & E are strong.
- [37] Overall, the case against Mr. Varette on 179587, the 11-count information, in my opinion, is a strong one. Also of concern is that these offences occurred in short succession to the original indictment.
- [38] Mr. Varette's trial on the lead information is in September, and he has an arraignment on the second information in late June. It is too soon to speculate what will happen with the trial dates, but I am considering that it may be some months before Mr. Varette has a trial.

[39] Overall, having considered all of the factors that I must consider, I am satisfied that the detention of Mr. Varette is necessary because the risk to the public cannot be reduced to an acceptable level by the new release plan. Accordingly, Mr. Varette's application under s. 520 is dismissed.

[40] THE ACCUSED: House arrest isn't good enough, Your Honour? I won't -- I'm not a threat to the public, I can promise you this. I'm a good man. I am a good man.

[41] THE COURT: All right. Thank you very much, counsel.

[42] MS. NOWLAN-CARD: Thank you.

[43] MR. DOSANJH: Thank you. May I be excused?

[44] THE COURT: Yes, you may.

"J. A. Power, J."

The Honourable Madam Justice J. A. Power

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