

CANADA / JUDGMENT

R. v. Yaroslowsky

2020 BCSC 1239

COURT

Supreme Court of British Columbia

DECIDED

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2020 BCSC R. v. Yaroslowsky

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

R. v. Yaroslowsky,

2020 BCSC 1239

Date: 20200708

Docket: 30660-1-W

Registry: Vancouver

Regina

v.

David Joseph Lee Yaroslowsky

Before: The Honourable Mr. Justice Ball

On judicial review from: Provincial Court of British Columbia, April 2, 2020

(R. v. Yaroslowsky, Surrey Docket Nos. 234571-3-A, 237777-1 and 237777-2-C)

Oral Reasons for Judgment at Detention Review Hearing

Counsel for the Crown appearing by teleconference:

D.T.R. Loucks

Counsel for the Accused appearing by teleconference:

C. St. Germain

Place and Date of Hearing:

New Westminster, B.C.

June 29 and July 2, 2020

Place and Date of Judgment:

New Westminster, B.C.

July 8, 2020

- [1] THE COURT: These are oral reasons on an application pursuant to s. 525 of the Criminal Code, and as with all oral reasons, I reserve the right to edit them for clarity and grammar should the need arise. The result will not change.

Introduction

- [2] This is an application by the accused, David Yaroslowsky, pursuant to s. 525 of the Criminal Code, for review of a detention order made in the Provincial Court of British Columbia on April 2, 2020. Mr. Yaroslowsky is charged by Indictment 234571-1 with two counts of robbery, contrary to s. 344(1)(b) of the Criminal Code, both alleged robberies being of bank employees, which were alleged to have occurred on June 5, 2019, and June 10, 2019, in Surrey, British Columbia.
- [3] Following his arrest on those robbery charges, on June 12, 2019, the accused was released on bail with a \$2,000 cash deposit and a strict 24-hour house arrest condition. On July 19, 2019, police conducting a curfew check at his residence between 4:00 a.m. and 4:30 a.m., found that the accused did not answer the door. As a result, a warrant was issued for his arrest and he came back into custody on October 4, 2019. He was again released on bail by the Provincial Court with an additional cash deposit of \$200, so the total cash deposit was \$2,200 with the same strict house arrest conditions as before.

Circumstances of Information 234571

- [4] The facts of the first robbery alleged on Indictment 234571, Count 1, are that the accused entered a branch of the Toronto Dominion Bank in Surrey sporting a grey and black beard, wearing sunglasses, a hoodie worn with the hood up, and gloves. The alleged robber handed the teller a note stating that, "This [was] a robbery", demanding \$8,000 in cash. The teller gave the robber \$400 and he left the bank, fleeing in a black GMC Canyon Denali pickup truck with B.C. licence plate ML0762 ("the Truck").
- [5] Closed-circuit television showed that as the robber approached the driver's door of that Truck outside the bank, the driver's door opened from the inside, suggesting that another person was in the Truck waiting for the robber.

- [6] The Truck had details which included after-market spoked tire rims, chrome trim around the taillights, a black bumper, running boards, distinct chrome door handles, a tinted rear window, and the bed of the Truck was without a canopy.
- [7] Police conducted computer searches for persons with similar vehicles and learned that the accused had such a vehicle and a criminal record for bank robbery. Police attended the residence of the accused, a basement suite, where the identical Truck with the details noted on the closed-circuit television was parked outside. One notable difference was that the Truck had B.C. licence plate LC1901, different from the plates on the vehicle at the bank, but the plates, on inspection, were loosely attached with fastening screws protruding.
- [8] The accused was registered as the owner of the Truck and it was not reported stolen at that time. Computer searches also revealed a physical description of the accused with similar details to those of the suspect robber seen in the video; that is, a white male, five feet eight inches tall, approximately 164 pounds in weight with an athletic build.
- [9] Police spoke to the landlords of the basement suite and showed them photographs taken from the bank surveillance video. One of the landlords immediately identified the person in the video as Dave and stated he was 80 percent sure it was Dave. He also recognized the beard and its shape. The male landlord confirmed he saw Dave once a month when he pays rent, and that he has been a tenant for about three years. The male landlord also identified the Truck which he said Dave had owned for one or two years. The landlord said Dave paid his rent on time, except for the month of May when he was late, and he had yet to pay his rent for the month of June.
- [10] The other landlord was less sure of the identification of the person in the bank surveillance video because of the dark glasses he was wearing. She confirmed the tenant drove a GMC truck and, from hearing the voice on the video, she identified the party in the video as Dave.
- [11] Toronto Dominion Bank confirmed that David Yaroslowsky was a client of the Bank and the Bank provided a photograph taken in May 2019 at an ATM machine. That photo showed the accused with a beard with a notable black spot of hair near the centre of his chin which appeared to match the shading of the bank surveillance video. The bank also advised police that Mr. Yaroslowsky's account had been frozen on May 20, 2019.
- [12] Police were also able to obtain surveillance video from locations in the neighbourhood on June 6, 2019, and from the time sequence on that video were able to create a map and layout referring to the time and location of the Truck as it drove to and from the TD Bank. Police determined that the Truck drove away from the residence at 10:55 a.m., that it parked in front of the bank at 11:59 a.m., as the accused backed in and exited the Truck from the driver's door. The video also showed the accused re-entering the Truck at 12:05 p.m.

- [13] The licence plate which was loosely fastened to the Truck was determined to be a stolen licence plate. The auto parts vendor who sold the Truck to the accused confirmed that the tire rims were after-market rims, not stock rims, creating a unique feature concerning the Truck.
- [14] With respect to Count 2 of Information 234571, on June 10, 2019, it is alleged that the accused attended a different TD Bank at 7:39 p.m. The robber depicted in the bank surveillance video on that date was wearing a black hooded sweatshirt with an Eagle trademark on the left breast. The robber was wearing dark sunglasses and gloves, together with black shorts and the sweatshirt noted above. His beard appeared the same as the beard worn by the robber in the surveillance video on June 5, 2019. The robber demanded money from the bank manager and said, "This is an F-ing robbery." The robber was given bills and a dye pack by a teller. The robber discarded the dye pack and fled the bank.
- [15] The bank surveillance video revealed the robber left in the same black Truck with the stolen licence plate ML0762, which had the same spoked rims, running boards, chrome door handles, chrome trim on taillights, black bumper, no canopy, and tinted rear window. Again, neighbourhood security videos and video surveillance from the City of Surrey cameras collected by the police after the second robbery showed the Truck leaving the bank and heading to the residence rented by the accused shortly after the second robbery, and consistent with the time of that robbery.
- [16] Based on the evidence collected by police, police applied for and obtained a search warrant for the accused's residence. When the warrant was executed on June 11, 2019, a female answered police knocking at the door and requested a short time to get prepared as she said she was just getting out of the shower. In the search that followed, the accused was found to be in the home in a bedroom. In that basement suite, police located three stolen licence plates, all reported stolen between June 3 and June 6, 2019, one plate stolen within 50 metres of the accused's residence.
- [17] Police also found and seized a black sweatshirt hoodie with an Eagle emblem on the left breast. This hoodie appeared identical to the hoodie worn by the person displayed in the second TD Bank robbery. While the search was being executed pursuant to the warrant, Mr. Yaroslowsky was found to have the keys of the Truck in his pocket.
- [18] Based on these scenarios, Mr. Yaroslowsky was released on bail initially in the amount of a 2,000 cash deposit with a house arrest condition. He was arrested again when he did not answer the door as required by the house arrest condition on a curfew check. He was released again on bail with an increase of \$200 in cash, for a total deposit of \$2,200 with the same strict 24-hour house arrest condition on his bail.

New Information, Detention Order, and Revocation of Existing Bail

- [19] He is now before the court on Information 237777-2-C, which in 16 counts alleges robberies of three convenience stores, involving the use of face masks, weapons, or imitation weapons, as well as a count of breach of bail taking place between December 21 and December 27, 2019.
- [20] The proceedings on this new information came before the Provincial Court on April 2, 2020, before Weatherly P.C.J. Upon hearing the circumstances of the offences alleged in this new information in the circumstances of the existing bail, the court ordered that the accused be detained, and revoked the existing bail order.
- [21] The accused has filed this application pursuant to s. 525 of the Criminal Code for a review of the order made April 2, 2020.

Circumstances of Information 237777-2-C, the Second Information

- [22] The fourth, fifth, and sixth counts on the second information involve allegations which occurred on December 21, 2019, in Surrey, British Columbia, of a robbery and assault of the operator of West Coast Fuels while carrying or using or threatening to use a weapon or imitation weapon, contrary to s. 267(a) of the Criminal Code, and using an imitation firearm while committing, attempting to commit, or during flight after committing or attempting to commit a robbery, contrary to s. 85(2) of the Criminal Code while wearing a mask with the intention of committing an indictable offence.
- [23] The facts alleged by the Crown are that at 7:37 p.m. on December 21st, the clerk operating West Coast Fuels was robbed at gunpoint by a white male wearing a grey hoodie, black pants, a black face mask, as well as grey and blue gloves. The robber entered the store and stated, "This is a robbery." The robber then pointed a grey and black handgun at the clerk and demanded both money and cigarettes. The robber was also holding a canister of bear spray which was pointed at the clerk.
- [24] The clerk gave the robber approximately \$1,000 in cash and placed money in a green reusable shopping bag from Dollarama which was provided by the suspect. The suspect grabbed a coin tray from the drawer of the till in front of the clerk and placed that tray in the Dollarama shopping bag. The suspect then fled the store.
- [25] The suspect was observed fleeing from the store in a black Mazda 3 which was sporting licence plate number ML0762, noted to be the same licence plate affixed to the Truck used in the second June robbery referred to above.

- [26] The surveillance video from outside the store showed the black Mazda arriving at the store and the suspect exiting the vehicle from the front passenger seat. The video captures the licence plate noted above and a rectangular sticker in the top driver side windshield of the Mazda. Also noted in the video was a dent in the rear driver side quarter panel of the Mazda and that the front licence plate was slightly off centre.
- [27] The in-store security system recorded both audio and video of this robbery. Constable Maomi, a person having had previous contact with the accused in person during the bail hearing, believed the voice of that suspect was that of Mr. Yaroslowsky. The suspect was wearing black pants and a black shirt underneath his jacket. There was a letter "S" that was observed displayed in the middle of the shirt, just above the zipper.
- [28] On December 21, 2019, police performed a curfew check at 9:34 p.m. at the residence of Mr. Yaroslowsky. He answered the door and police took a photograph of him to record what he was wearing. Mr. Yaroslowsky was wearing a black T-shirt with the words "Alpine Stars" across the front of the shirt. The letter "S" from the words "Stars" on the shirt matched the letter "S" that was seen on the T-shirt of the robbery suspect.
- [29] The eighth, ninth, tenth, and eleventh counts on the second indictment, which allegedly occurred on the 24th of December, 2019, at or near Surrey in the Province of British Columbia, involved counts of robbery and assault of named individuals with a weapon or imitation weapons, and committing an indictable offence while wearing a mask. The facts alleged to support these counts are that on December 24th, a male and female entered the store of the Otter Co-op on 104th Avenue in Surrey. Both suspects were wearing masks, black pants, and jackets. They robbed two employees of the Co-op of over \$600 in cash and \$2,000 worth of cigarettes. The suspects held a firearm and a canister of bear spray. The firearm had the same colours as that used in the December 21st robbery of West Coast Fuels.
- [30] A witness observed the suspect leaving the Co-op in a dark-coloured pickup truck, black or blue, with custom taillights. The Crown's position is that the Truck has custom taillights.
- [31] The male suspect appeared to be wearing the same clothing that was worn in the West Coast Fuels robbery. The female suspect was wearing a black hoodie with flat white hoodie strings. With enhanced video, the police were able to determine that the canister of bear spray used in the West Coast Fuels robbery and the Otter Co-op robbery were identical, including wear and tear on the labelling of the can.
- [32] During the execution of the search warrant on Mr. Yaroslowsky's basement suite, police photographed a canister of bear spray which was the same brand as the bear spray captured in the video of the two robberies, but the photograph would not allow police to determine wear and tear on the canisters to create an exact match.
- [33] Also in the basement suite photograph was a green reusable Dollarama bag of the type used in the West Coast Fuels robbery used by the suspect to remove stolen items.

- [34] On December 27, 2019, a further robbery is alleged to have occurred which is captured in Counts 12, 13, 14, and 15 of the second indictment. As above, these counts include an allegation of robbery, use of an imitation firearm, an indictable offence committed while wearing a mask, and an assault with the use of a weapon or imitation weapon, contrary to s. 267(a) of the Criminal Code.
- [35] The facts alleged to support these counts occurred on December 27, 2019, at an Esso gas station located at 15775 Fraser Highway in Surrey, where a clerk was approached by a white male wearing all black with a black face mask. The male was brandishing a handgun and bear spray, which appeared to be the same gun and bear spray used in the robberies of December 21st and December 24th discussed above.
- [36] The suspected entered the gas station store and told the clerk, "This is a robbery", and he wanted money from the cash register. Security video from both inside and outside the store showed that at 5:23 p.m. on December 27th, the suspect entered the store with a firearm in his left hand and a blue bear spray canister in his right hand. He was wearing blue nitrile gloves. At one point, he reached over the counter to remove the coin tray from the register and the coins therein were stolen.
- [37] The act of reaching over the counter allowed a distinct tattoo on the top of the suspect's wrist to be observed, just above the hand line. The visual image captured in that video is of a skull. The video image included the eye sockets and brow area of the skull, as well as either a petal or leaf beside the brow socket in the centre of what appeared to be a flower. This tattoo is distinct and matches the same tattoo Mr. Yaroslowsky was photographed to have on his wrist on June 2019 when he was arrested for the bank robberies referred to above.
- [38] The suspect was also wearing the same clothing as was worn by this robbery suspect on the 21st and 24th of December discussed above.
- [39] Approximately 40 minutes after the robbery, police observed the Truck at a Husky gas station at the corner of 96th Avenue and 160th Street in Surrey. Police, upon seeing the Truck, tried to initiate a traffic stop but the vehicle fled from police at a high rate of speed, driving into oncoming traffic and through a stale red light. The Truck narrowly missed a head-on collision, at which point police terminated their pursuit in the interest of public safety.
- [40] At approximately 8:03 p.m. that evening, about two hours after the chase referred to above, Mr. Yaroslowsky phoned the RCMP to report his vehicle had been stolen earlier that day. He told police that the vehicle had been stolen from the Shoppers Drug Mart parking lot where he had left the vehicle running. When asked why he had not reported the vehicle stolen at the time it was stolen, he said he did not have a phone to call the police. The police asked him to remain where he was so they could interview him. He told the police he did not want to wait and would not be available for a statement.

- [41] Police had been conducting surveillance of Mr. Yaroslowsky's residence at 5:00 p.m., where they observed his Truck parked there. Upon returning to surveillance of that residence at 5:20 p.m., the police observed the Truck was no longer at the residence. The second viewing of the residence was approximately three minutes before the robbery at the Esso gas station.
- [42] That evening, police officers attended the residence of the accused and found he was not home and did not return for the entire evening.
- [43] At 11:00 p.m., police conducted a door knock which lasted for a full 10 minutes with loud knocking. The knocking was sufficient to cause the neighbouring tenant, as well as the upstairs landlord, to come and speak to police because they heard the knocking.
- [44] The Crown's position is that Mr. Yaroslowsky reported his Truck stolen after the robbery at the Esso station and shortly after the pursuit, in order to mislead police.
- [45] The Truck was located approximately one week later by police. A search warrant was obtained and executed on that vehicle, which was found to be devoid of any personal belongings, except for a piece of black stretchy fabric which might be used as a face mask. Forensic analysis is being conducted on that fabric to determine if it contains relevant evidence.
- [46] About 11:40 p.m. on the same evening, police observed a black Mazda 3 registered to Michelle Dombroski at a gas station on Fraser Highway. The police vehicle followed the Mazda, which then made an erratic lane change. At that point, police decided to effect a traffic stop and they spoke to the driver, Ms. Dombroski, who told the police she had just picked up Lisa Mann and David Yaroslowsky, and was giving them a ride home because they had been drinking. Ms. Mann was seated in the front passenger's seat and Mr. Yaroslowsky was seated in the rear of the Mazda.
- [47] Immediately Mr. Yaroslowsky was arrested for robbery and for breaching his curfew. At that time, Mr. Yaroslowsky was wearing a ball cap consistent with the one worn by the suspect who was fuelling the Truck just prior to the police pursuit.
- [48] In a search incident to arrest, police located a small bundle of cash and a large number of loose coins, as well as a roll of dimes in his pocket, and 111 25-cent pieces in a black sock in his pocket. Police suspect this large number of coins to have been taken in the robbery of the Esso gas station.
- [49] Police also found drugs in Mr. Yaroslowsky's pocket which was a violation of the terms of his existing bail.
- [50] Mr. Yaroslowsky also had a set of the keys for the Truck.

- [51] The Mazda 3 driven by Ms. Dombroski was towed by police, who obtained a search warrant to allow them to examine the inside of the vehicle. Inside the vehicle, the police found a black jacket with a fur-trimmed hood consistent with the jacket worn by an individual shown in the surveillance video fuelling the Truck, as well as the person who was seen driving the Truck when it fled police from the Husky gas station.
- [52] Black track pants were also located in the rear seat of the Mazda 3, believed to have been worn by Mr. Yaroslowsky during the three robberies. The green Dollarama reusable type of bag shown in the West Coast Fuels robbery video was also located.
- [53] The Mazda 3 also contained a vast quantity of the belongings of Mr. Yaroslowsky which police believe he had cleared out of the Truck and placed in the Mazda 3. This discovery is inconsistent with Ms. Dombroski's statement to the police that she had just been picking up her friends because they had been drinking. When the Truck was eventually located, all of Mr. Yaroslowsky's personal belongings had been removed.
- [54] Police were also able to confirm the Mazda 3 belonging to Ms. Dombroski was the same vehicle used in the West Coast Fuel robbery because of matching details observed at the robbery scene, including the same rectangular sticker in the same location on the upper driver side windshield, an offset of the front licence plate, and a notable dent in the driver side rear quarter panel.
- [55] When Lisa Mann was arrested in that vehicle, she was wearing a hooded sweatshirt with flat white hoodie strings of the same type worn as the female robber in the robbery of West Coast Fuels.
- [56] The presence of a large quantity of Mr. Yaroslowsky's possessions in the Mazda 3 and the presence of Mr. Yaroslowsky in that same vehicle with those possessions further support the proposition that the report by him of his vehicle being stolen was a device to divert police attention and not an accurate statement of fact.
- [57] Police obtained a search warrant for the Yaroslowsky residence on January 8, 2020. In the course of executing that search warrant, police seized a black Alpine Stars T-shirt that Mr. Yaroslowsky had been observed wearing the night of the curfew check on December 21st. Police also seized black track pants and a solid black baseball cap which police believe Lisa Mann wore during the Otter Co-op robbery. She was also seen wearing the same clothing on December 27 at 5:15 p.m. at the Shoppers Drug Mart.
- [58] Mr. Yaroslowsky was arrested for robbery and breach of the 24-hour house arrest provision of his bail conditions. This charge is represented in Count 16 of the information and it prohibits Mr. Yaroslowsky from being outside his residence 24 hours a day. He must be inside the residence. All contrary to s. 145(5)(a) of the Criminal Code.

Counts 1, 2, and 3

- [59] During the execution of the search warrant, the police observed a small yellow hatchet and a pair of grey Nike running shoes inside the residence. Police believe these two items link Mr. Yaroslowsky to two counts of breaking and entering, Counts 1 and 2 of the second information, to the effect that on June 4, 2019, Mr. Yaroslowsky had his face masked contrary to s. 351(2) and attempted a break and enter.
- [60] On June 4, 2019, the Surrey RCMP responded to break and enter calls at the Flying Cup Café and Sushi and Company restaurant, both of which are eating establishments located on 168 Street in Surrey. Both restaurants are located kitty-corner to the Otter Co-op. Surveillance video obtained by police at that location showed a vehicle matching Mr. Yaroslowsky's Truck arrive at that scene and park across the street. The GMC emblem on the front of that Truck is blacked out and other details distinctive to the Truck discussed above were present. Front sun visors of the Truck were pulled down, consistent with the position in which Mr. Yaroslowsky maintains the front sun visors in the Truck. This was the condition of the Truck when the police executed a search warrant on the Truck, as well as in the surveillance video from the Husky gas station when the same Truck fled that area on December 27th.
- [61] Two persons executed the Truck and walked across the street towards the restaurant. The male was wearing shorts and an American Eagle hoodie with an Eagle trademark on the left breast. The male was also wearing a pair of grey Nike running shoes. This clothing was the same as seen in photographic evidence of the June 10th robbery, and was the same clothing recovered on June 11th during the execution of the search warrant at his residence. In the security video from the area of the restaurant, the male was seen carrying a small yellow-handled hatchet and a large screwdriver, both of which were recovered from his residence in the search in January 2020.
- [62] The female suspect is wearing an all-black hoodie with white flat hoodie strings, black track pants, and black gloves with grey markings. As noted above, Ms. Mann was found wearing the matching sweatshirt on December 27, 2019.
- [63] The male suspect then attempted to smash or break the glass door at the Flying Cup Café, but it would not break. The couple then observed on video surveillance to run down the street to Sushi and Company restaurant, where they managed to break the glass panel in the door. Both suspects entered the restaurant but apparently could not find anything of value to steal. They left the restaurant without any stolen property, re-entered the Truck, and left the scene southbound on 168th Street.

Record of the Accused

- [64] There has been no dispute in this proceeding that the accused has a significant adult criminal record commencing in the year 2000, continuing with a number of convictions for theft, both over and under \$5,000; three counts of mischief both over and under \$5,000; assault causing bodily harm in 2003; break and enter to commit an indictable offence,

carrying concealed weapon; 24 convictions for possession of stolen property; robbery for which he received a first federal sentence in the year 2007; possession of a controlled substance; three counts of failure to comply with a recognizance; possession of a prohibited or restricted weapon; unauthorized use of credit card data; possession of a scheduled substance for the purpose of trafficking; breach of probation; possession of property obtained by crime; unlawful possession of a credit card; possession of a firearm and ammunition contrary to a probation order, again a federal sentence of five years in 2013; possession of a prohibited or restricted firearm with ammunition; unlawfully procuring information to make an identity document that relates to another person; and possession of stolen property.

- [65] Mr. Yaroslowsky has prior convictions for breaching bail and probation orders, and has a lifetime firearms prohibition order, with one conviction for breach of a probation order.
- [66] These were the facts and circumstances that were presented to the Provincial Court judge by the Crown. Crown counsel below asserted the Crown's case was very strong and that, if convicted, a sentence would be substantial given that three of the present counts, if resulting in convictions, mandate one-year minimum consecutive sentences in circumstances where there are significant aggravating factors.
- [67] The existing bail of \$2,200 was thought to be significant for this accused, coupled with the house-arrest provision which clearly did not bind the accused, given his arrest outside of his home in suspicious circumstances, against a background where the accused had apparently falsely reported the theft of the Truck to police.
- [68] The Crown relied on s. 515(10)(b) to seek the detention of the accused and revocation of the existing bail.
- [69] Defence counsel made submissions that the accused should be released to the Phoenix Treatment Centre, apparently recommended by personnel at the Surrey Reintegration Team. The defence asserted this was a wholly circumstantial case, including recognition evidence. The defence argued that identification evidence was not particularly strong and that individual pieces of circumstantial evidence on their own provided a less-strong case for the Crown. It was suggested there is not clear forensic evidence for the Crown at this time.
- [70] Defence counsel reviewed the life history of the accused and his background where his mother was an addict and his father an alcoholic. At age 12, Mr. Yaroslowsky was placed in foster care and there became the victim of abuse. He became a user of alcohol and drugs at a young age. He graduated from high school and then began a life of crime.
- [71] His most recent five-year federal sentence was served principally at Mountain Prison in British Columbia where he benefited from some rehabilitation programs. He had a period of sobriety and on parole lived at the Phoenix Treatment Centre for some years during which he reached warrant expiry.

- [72] He began to work as a roofer and obtained a roofing ticket. He continued working as a roofer until he was again arrested and encountered his first bail breach and subsequent charges.
- [73] He proposed a release plan in the court below which included residence at the Phoenix Recovery Society. That program will not call authorities if there is a breach of bail or do monitoring on persons resident with the Phoenix Society.
- [74] After hearing the submissions of Crown and the accused, the court below reviewed the counts in the new indictment and the counts in Indictment 234571 where the Crown sought to revoke bail. In reviewing the facts, the court below noted the facts which have been detailed above and which are not apparently disputed, to the effect that the evidence available was suggested not to be strong and also circumstantial. Time spent by the accused at the Phoenix Society was also reviewed.
- [75] Ultimately, following the case of *R. v. Abdel-Rahman*, 2010 BCSC 189, the court below concluded there was a significant likelihood that if the accused were released, he would commit a further offence based on a history of bail breaches and a recent bail breach within a week of being released on bail for bank robberies and within a week of having committed a series of offences which would constitute a danger to public safety.
- [76] The court concluded that there was not a bail document with conditions available that would control the adverse behaviour of this accused. The suggestion that an attendance at Phoenix House would be appropriate was found in the court below not to address the concerns for public safety. Dangerous driving was noted as a serious concern and, at the time of that driving, the accused was ordered to remain in his residence.
- [77] Ultimately, the court below concluded that notwithstanding issues presented by COVID-19, the public safety concerns outweighed the public health risk to the accused. He was ordered detained and bail on Information 237777-C-2 was revoked.

Section 525 Application

- [78] The submissions of the accused on the application before this court were substantially the same as before the court below, except for the single difference that the accused has now arranged that in the event he is released, he seeks an order that he be permitted to reside at the VQ Lake facility operated by the VisionQuest Recovery Society.
- [79] In correspondence received from defence counsel after the 525 hearing, the court reviewed a letter from the intake coordinator of the VQ Lake facility describing the practices of the society dealing with house-arrest orders. Simply put, the society conducts six head counts per day with the shortest interval between head counts being two hours and the longest interval between head counts being 4.5 hours.

- [80] Counsel for the defence states that standalone pieces of evidence would not suffice for a conviction. For this court to treat evidence in standalone pieces to determine if those pieces each by themselves would support a conviction would constitute an error in law. Trial evidence must be treated as a whole and with all the pieces of evidence treated collectively, not individually.
- [81] While it is suggested that evidence against the accused is circumstantial, that characterization does not include, for instance, the photographic and video evidence which appears substantial in this case and is real and not circumstantial evidence.
- [82] The location of the VQ Lake facility is in Savona, British Columbia. Savona is a small community located near the Trans Canada Highway, 20 minutes' driving west of Kamloops and east of Cache Creek. This facility is a treatment facility and has no bars, no locked gates. Persons assigned there stay on the honour system. If the accused were to breach the proposed bail order and leave the VQ Lake facility, as he left his home demonstrated on December 27, 2019, with the assistance of someone driving a vehicle, he could be hundreds of kilometres away from the facility prior to his absence being detected in a head count or reported to authorities.
- [83] The Crown takes the same position as it did in the court below, which is there is a strong likelihood that if this accused is released from custody to a facility such as VisionQuest, and notwithstanding its excellent programs, the accused is likely to commit further offences. The Crown submits that the decision in the court below was correct and there is no set of conditions that will control the behaviour of this accused.
- [84] The accused served a five-year sentence and fell back into crime.
- [85] The accused was released on bail and promptly breached the bail. The accused was released again and has not denied further breaches of bail, including being arrested away from his residence on December 27, 2019.

Conclusion

- [86] The law in Canada is clear that release of persons charged with criminal offences is the default position and that pretrial detention is a measure of last resort: *R. v. Myers*, 2019 SCC 18.
- [87] The case of *R. v. Zora*, a more recent bail case that considered bail in the Supreme Court of Canada, 2020 SCC 14, also cited by defence in argument, deals with the required standard for a court to consider a breach of bail. In that case, Zora was an addict dealing with withdrawal from narcotics and asserted that he did not hear the knocking of police on a presence check. At that time, the court concluded the objective standard of mens rea was what the Crown had proved and was sufficient for a conviction. That decision was sustained by the British Columbia Court of Appeal. The Supreme Court of Canada concluded that a subjective standard of mens rea was necessary to prove the offence of failing to comply with a bail

condition.

- [88] In the case at bar, it is clear from the history of the file that Mr. Yaroslowsky was fully aware of the house arrest provisions of his bail from the first breach, the attempt to mislead police about the theft of the Truck, all at a time when he was not at his home. He was finally arrested away from his home in December 2019. Arguably he had full knowledge that he was bound by a 24-hour house arrest at that time and he was not at home.
- [89] Where an accused deliberately flaunts a bail condition such as house arrest for the purpose of committing criminal offences, revocation of bail is to be expected as a result, particularly where the accused poses a substantial likelihood of committing an offence which will endanger the public. The accused has made this case one where detention is a choice of last resort and the only reasonable choice in the circumstances of repeated disregard of bail orders and a record of criminality created by the accused. The court below made that finding and that finding is entitled to be shown respect in this court.
- [90] There has been shown no cause to interfere with the findings made below.
- [91] I have reviewed the courses completed by the accused while in custody to aid with his rehabilitation, but here the accused is facing serious charges and a significant jail sentence if convicted. The courses taken, while a positive step over a relatively brief period of time, are insufficient to instill any sense of trust of this accused by this court.
- [92] In all the circumstances, I am satisfied beyond any doubt that the accused should be detained and the existing bail order be revoked, as decided in the court below.
- [93] I therefore dismiss the application for release under s. 525 of the Criminal Code and confirm the detention of the accused and revocation of the existing bail order. Thank you

"Ball J."

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