SUPREME COURT OF YUKON

Citation: *R. v. Keobke*, 2021 YKSC 4

Date: 20210126
S.C. No. 18-00190
Registry: Whitehorse

BETWEEN:

HER MAJESTY THE QUEEN

APPLICANT

AND

SHELDON LAWRENCE KEOBKE

RESPONDENT

AND

GERALD KEOBKE

SURETY

Before The Honourable Justice J.Z. Vertes

Appearances:

Paul Battin	Counsel for the Applicant
Sheldon Lawrence Keobke	Appearing on his own behalf
Jennifer Budgell	Counsel for the Surety

RULING
(Estreatment Application)

[1] On December 7, 2018, the Respondent, Sheldon Lawrence Keobke, was released from custody, pending trial on a number of charges, upon entering into a recognizance with several conditions. One of the conditions of that recognizance was that his father, Gerald Keobke, serve as surety in the amount of $100,000 (without deposit). On November 4, 2019, the Respondent was convicted of two charges of failing to comply with two of the conditions of his recognizance, plus a further charge of

possession of crack cocaine for the purpose of trafficking that arose while he was bound by the recognizance. The Crown now seeks to forfeit the amount pledged by the surety.

[2] The specific conditions of the recognizance that were breached were as follows:

(1) The Respondent was to reside with his surety and abide by the rules of conduct set by the surety; he was not to leave his residence except in the company of his surety with an exception to attend his place of employment and Narcotics Anonymous meetings or other counselling; and, he must travel to and from work and his Narcotics Anonymous meetings or other counselling in the company of his surety or another person designated in writing by his surety.

(2) The Respondent was not to have in his possession any cell phone except while at his place of employment, and it must be used only for employment purposes, or to arrange transport to and from his place of employment.

[3] It was admitted by the Respondent that on March 13, 2019, he was neither at his residence nor in the company of his surety when he was found by the police in a vehicle in a drug-induced state of medical distress. At the scene the police also recovered, in addition to drugs, drug paraphernalia and cash, three cell phones.

[4] The recognizance was issued by a judge of this Court after a hearing pursuant to s. 525 of the *Criminal Code*. That section mandates that the detention of an accused person be reviewed every 90 days to assess whether there has been unreasonable delay in bringing the accused person to trial. One of the considerations on such a review is whether the initial basis for the accused person’s detention has changed or

has been sufficiently ameliorated by the passage of time to warrant a reconsideration of bail. At the time, the Respondent was facing some twenty charges. He had been detained in custody on those charges for five months prior to that hearing.

[5] At the s. 525 hearing, evidence was presented respecting the Respondent's drug addiction, the steps he had taken to overcome that addiction while in custody, and employment opportunities available to the Respondent if released. The surety testified at the hearing and spoke about his ability and willingness to supervise his son and the "dramatic change" in his son's demeanour and attitude that he witnessed during the time that the Respondent was in custody. The hearing judge was satisfied that the risk of the Respondent committing an offence or interfering with the administration of justice, if released on bail, could be managed by appropriate and strict conditions.

[6] In this case, the Crown has obtained a Certificate of Default for the breaches and now seeks forfeiture of the amount pledged in the recognizance. Initially, the Crown's application sought full forfeiture of the $100,000 pledged but, at the hearing before me, Crown counsel conceded that, under the circumstances, full forfeiture would not be appropriate. However, Crown counsel maintained that there should still be a substantial amount forfeited.

[7] On this type of application, s. 771(1)(b) of the *Criminal Code* requires that sureties attend and "show cause why the amount set out in the undertaking, release order or recognizance should not be forfeited." Accordingly, a surety bears the onus of showing why a forfeiture order should not be made in the full amount pledged or some lesser amount. Section 771(2) states that the judge hearing the application may, after giving the parties an opportunity to be heard, "grant or refuse the application and make

any order with respect to the forfeiture of the amount that the judge considers proper." Whether to grant relief from forfeiture is within the discretion of the presiding judge.

[8] In *R. v. Murphy*, 2017 YKSC 34 ("*Murphy*"), at para. 28, Gower J. of this Court adopted a non-exhaustive list of factors to consider on a forfeiture application set out by the Ontario Court of Appeal in *Canada (Minister of Justice) v. Mirza*, 2009 ONCA 732 ("*Mirza*"):

> (a) the relationship between the accused and the surety;
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> (b) the amount of the recognizance;
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> (c) the surety's means;
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> (d) the circumstances under which the surety entered into the recognizance with particular emphasis on whether there was any duress or coercion;
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> (e) the surety's diligence;
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> (f) any significant change in the surety's financial situation since entering into the recognizance, and especially after the breach; and,
>
> (g) the surety's post-breach conduct.

[9] In *Mirza*, as in *Murphy* and many other cases, the court emphasized the preeminent importance of preserving the moral pressure of the recognizance in ensuring that the accused complies with the terms of release and appears in court when required to do so. The threat of forfeiture therefore provides a compelling incentive for the accused and any sureties to fulfil their obligations under the recognizance. This does not mean, however, that the only way to ensure the effectiveness of the bail system is by a rigid rule of total forfeiture. No case stands for that proposition. But, as stated in *R. v. Flanders*, 2015 BCCA 33, at para. 22, quoting Charbonneau J. in *Canada*

(Attorney General) v. Nayally, 2012 NWTSC 56: “It must be made clear to anyone offering a cash deposit in support of an application for release that there will be consequences in the event that the conditions are not complied with, beyond the possibility of facing a breach charge.”

[10] In all forfeiture cases the challenge is to strike the appropriate balance between vindicating the bail system on the one hand and not being so punitive that people are discouraged from coming forward to offer themselves as sureties. In *Mirza*, the Court held that the moral pressure of a recognizance (or “pull of bail” as it is often called) can be vindicated by something less than total forfeiture. Where the amount pledged is large and forfeiture would wipe out a surety’s equity then something less would be sufficient. Where the amount pledged is a relatively small amount then in most cases the full amount should be forfeited to respect the “pull of bail” (paras. 44-45).

[11] During the hearing before me, counsel made two submissions that I wish to address before I review the specific circumstances of this case.

[12] First, counsel for the surety questioned whether a pledge amount of $100,000 would even be considered reasonable in light of the Supreme Court of Canada decision in *R. v. Zora*, 2020 SCC 14. That case dealt specifically with the *mens rea* requirement in breach offences. But the Court also discussed the principles underlying the setting of bail conditions. Conditions must be reasonable and no more onerous than necessary to meet the statutory requirements. The bail court must act with restraint since bail conditions limit the liberty of a person who is still presumed innocent and who is made liable for potential additional criminal penalties should there be a breach.

[13] There is no argument with the principles enunciated in *Zora*. This application, however, does not permit me to re-examine the bail conditions and substitute my opinion for what I think would have been reasonable. I point out only that the suggestion of a $100,000 pledge came from the surety when he testified at the bail review hearing. When asked if he was willing to act as surety for his son and whether he was willing to put some money down, he answered: “Well, I have offered – I have a – my house is mortgage-free. And I have offered $100,000 from my house to ensure that I can work with Sheldon.” So it is not now open to question the reasonableness of the pledged amount when it was offered by the surety in the first place.

[14] Second, Crown counsel submitted that it was “frustrating” for the Crown to hear promises made at a bail hearing eventually be retracted when one gets to the estreatment stage. But that submission ignores the statutory discretion given by the *Criminal Code* to a judge hearing a forfeiture application. There would be no need for discretion if the rule was full forfeiture. There is nothing in the evidence to suggest that the surety in this case did not realize the risk he was undertaking. He simply wants to be relieved of forfeiture because of the circumstances of this case. It is not a matter of reneging on a commitment; it is a question of what is fair in the circumstances. Also, on a more general note, the reality is that sureties seldom receive independent legal advice before committing to a cash bail (and the surety in this case received no such advice) and sureties are subject not just to civil enforcement of any forfeiture order but, by s. 773 of the *Criminal Code*, may also be committed to jail if the amount forfeited cannot be satisfied. Hence the need for judicial discretion.

[15] The surety testified during the hearing before me. He is 63 years old. He works full-time and earns $60,000 per year. He owns his home in Whitehorse and there is no mortgage on it. His younger son currently lives with him. He estimated that his house was worth approximately $300,000. He has a truck and camper worth something in the range of $15,000 to $18,000. He has debts of $42,000 consisting of a line of credit and a credit card debt. He has minimal savings. Were he required to pay the full amount or any substantial part of the sum pledged he would have to sell his house and delay his retirement.

[16] The significant portion of the surety's evidence recounted the events of March 13 to 15, 2019. The Respondent was arrested on March 13 at 9:30 p.m.

[17] The surety testified that either he or his son's boss would take the Respondent to and from work. The surety worked a regular day shift but the Respondent worked a night shift. Early on the morning of March 13, the surety decided to go out to a lake some 100 kilometres from Whitehorse to look at a camper that he parked there. The area had no cell coverage. He assumed that his son's boss would take him to work as usual. By the end of the afternoon, the surety decided to stay overnight in his camper because he had drunk a few beers and did not want to drive back to town. The next day he returned to Whitehorse in the afternoon and learned that his son had not come home the night before. He immediately started to search for his son. He found out that his son had not gone in to work for the previous two days.

[18] On the morning of March 15, the surety telephoned 911 to report that his son had not come home. The 911 operator told him that an officer would call him back. The

surety never heard back from an officer. Instead the Respondent phoned him from jail at 6 p.m. and told him what had happened.

[19] The surety further testified that things were going well after his son was released on bail. His son's wife and two children also moved into the surety's house. He said that his son's wife helped with the supervision of the Respondent. The surety noticed nothing that would lead him to suspect that his son had any drugs. When asked why he did not call the police as soon as he found out his son was missing, the surety testified that he wanted to give his son the benefit of the doubt. He wanted to find him in case he was in some difficulty, such as a road accident. He had a close bond with his son and trusted him. The plan for his son's release was premised on his son being clean and sober and there was nothing to warn him that his son was either back on drugs or planning to do so. There were no signs that the Respondent was at risk of breaching his recognizance.

[20] The surety acknowledged that he understood his responsibilities under the recognizance. His counsel submitted that there was no requirement to supervise his son constantly. The Respondent may have been under a form of house arrest but the surety was not.

[21] Crown counsel argued that the surety "took himself out of the equation" when he went out to the lake and stayed overnight in his camper. The surety changed the circumstances of the bail. He was not only not at home to supervise his son but there was also no way to communicate with his home since his camper was located in an area without cell coverage. In Crown counsel's submission, the surety was negligent on

March 13. The public's trust in the bail system has to be maintained and there must be consequences when obligations are not fully satisfied.

[22] Examining the factors listed in *Murphy* outlined previously, here was a relationship of father to son, and the father wanting to do all he possibly could to help his son. The amount pledged is very high but it was suggested by the defence and the surety at the bail review hearing. At that point a parent may be willing to pledge any amount to help their child. But I am satisfied that the surety understood the risk he was undertaking when he offered up that amount. The surety entered into the recognizance without any duress or coercion and with full knowledge of his obligations. His financial situation has not significantly changed since the bail hearing. The surety is a man of modest means, as his counsel described him, and I have no doubt that any amount forfeited will cause hardship for him.

[23] The surety may be faulted for leaving town on March 13 and going somewhere without communication resources. There was, however, nothing in the evidence to suggest that he did not act diligently prior to that in supervising his son. After he found out his son was missing, he searched for him and made inquiries. He could, and should, have notified the police much sooner about his son's disappearance since he did not know, during March 14 and 15, that his son had already been arrested. But the fact is that he did eventually call the police. This is not a situation where he aided in any way his son's actions.

[24] It is also worth noting that this is not an absconding case. The breaches did not result in a delay or disruption to the administration of justice. These breaches only resulted in harm to the Respondent and the surety.

[25] While I recognize that the surety is a man of modest means, there must be some forfeiture to acknowledge that, as stated previously, there are consequences to a breach. I also recognize that the consequences of a breach are all too often visited upon an innocent party, and not the person responsible for the breach. But the public needs to be reassured that there are consequences; parties to a recognizance must know there are consequences; to do otherwise would make a pledge of money meaningless.

[26] Having regard to all of the circumstances, I conclude that an appropriate order would be forfeiture of $10,000. Even though the surety is a man of modest means, and the amount is therefore relatively substantial, he is employed and given time I am confident he has the means to pay.

[27] Forfeiture is ordered in the sum of $10,000. A writ of *fieri facias* shall be issued by the Clerk of the Court in that amount.

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VERTES J.