SUPREME COURT OF YUKON

Citation: *R. v. Keobke*, 2018 YKSC 53

Date: 20181210
S.C. No. 18-00190B
Registry: Whitehorse

Between:

HER MAJESTY THE QUEEN

Respondent

And

SHELDON KEOBKE

Applicant

Before Madam Justice G.M. Miller

Appearances
Noel Sinclair — Counsel for the Respondent
Vincent Larochelle — Counsel for the Applicant

REASONS FOR JUDGMENT

INTRODUCTION

[1] Sheldon Keobke brings an application pursuant to s. 525 of the *Criminal Code* and submits that his detention is no longer justified within the meaning of s. 515(10).

[2] In the hearing in front of me, the applicant and the respondent took diametrically different positions as to the proper scope of a s. 525 hearing.

[3] Counsel for the applicant submitted that the simple detention of Mr. Keobke for the 90-day period of time specified in s. 525(1)(a) entitles Mr. Keobke to a *de novo* hearing at which the decision to detain Mr. Keobke is not relevant.

[4] Counsel for the respondent submitted that once the Court has determined there has been no unreasonable delay, as contemplated in s. 525, that ends the enquiry and Mr. Keobke's detention should continue.

[5] Neither counsel attended with any authority for their respective positions.

[6] Counsel agreed that I should hear the application and evidence tendered on the application, without determining the proper scope of such a hearing, until I had received their written submissions and any additional case law they wished to rely on. I reserved my decision on the application to December 7, 2018.

[7] Both counsel provided written submissions and case law on December 5, 2018.

The Scope of a s. 525 Hearing

[8] Counsel for Mr. Keobke submits that the Court need not look further than the Yukon case of *R. v. Sawrenko*, 2008 YKSC 27, to reach a proper understanding of s. 525 applications. He submits that, under the principle of comity, the Court cannot depart from the reasoning in *Sawrenko*.

[9] Counsel for Mr. Keobke submits that neither the wording of s. 525, which is substantially different from that of ss. 520-521, nor *Sawrenko* support the Crown's sweeping statements about the standard applicable to s. 525 applications. While there is conflict in the jurisprudence on the procedure and scope of s. 525 review, the law is settled in the Yukon. He submits that Crown counsel points this Court to one line of jurisprudence, known as the "two-step" approach while omitting to outline the second line of jurisprudence, known as the "one-step" approach, and more importantly, to the Yukon case law which is firmly entrenched in this second line of jurisprudence.

[10] Counsel for Mr. Keobke reiterates his position articulated in oral submissions, and adds the following observations based on *Sawrenko*:

1) A s.525 application is not made by the defence, and cannot be waived by the defence (Para. 26).

2) It is appropriate for a justice to consider a transcript of the initial bail hearing (para. 35).

3) It is appropriate for a justice to consider new evidence in a s.525 application (para. 34).

4) In a s.525 application, the justice must consider whether detention is required as per s. 515(10) of the *Criminal Code*, in addition to delay in the underlying proceedings (paras. 29-30).

[11] Other Yukon cases which seem to take the "one-step" approach, without making any specific findings as to the proper scope of a s. 525 hearing are: *R. v. Do*, [2000] Y.J. No.143; *R. v. Silverfox*, 2007 YKSC 52; *R. v. Anderson*, 2009 YKSC 77; *R. v. Mantla*, 2012 YKSC 73 and *R. v. Munch*, 2013 YKSC 41.

[12] Counsel for the Crown submitted the cases of *Neill v. Calgary Remand Centre*, 1990 ABCA 257; *R. v. La*, 2000 ABQB 856 and *R. v. Caza*, [1999] N.W.T.J. No. 73, and from these derives the following principles:

- On a s. 525 bail review, the threshold issue is whether or not the prosecutor (which can include the prosecutorial system) has been responsible for any unreasonable delay in getting the case to trial.
- If so, directions to expedite the matter may be made pursuant to s. 526.
- Additionally, the court may also go on to consider the original reasons for detention and any change in the circumstances of the detainee which may be relevant and may re-examine the question of bail with reference to the test described in s. 515(10).

[13] Crown counsel submits further that, like the limited scope of review powers under ss. 520 and 521 described in *R. v. St-Cloud*, 2015 SCC 27, at para. 6, the review powers under s. 525 ought to be similarly narrowly construed, i.e., as stated by Justice Wagner (as he then was):

> … the power of a judge hearing an application under s. 520 or 521 *Cr. C*. to review such a decision is not open-ended. I conclude that exercising this power will be appropriate in only three situations: (1) where there is admissible new evidence; (2) where the impugned decision contains an error of law; or (3) where the decision is clearly inappropriate. In the last of these situations, a reviewing judge cannot simply substitute his or her assessment of the evidence for that of the justice who rendered the impugned decision. It is only if the justice gave excessive weight to one relevant factor or insufficient weight to another that the reviewing judge can intervene.

[14] Crown counsel also submits that, at least in future, applicants for s. 525 bail reviews ought to be required to file a transcript of the initial bail hearing in support of the application. Crown counsel submits this is consistent with the Supreme Court of Yukon's practice of requiring transcripts for ss. 520 and 521 applications. It is submitted that without the transcript of the proceedings, it may be difficult for the Court on a s.525 review to determine the existence of new evidence, errors of law or clearly inappropriate decision-making.

[15] In addition to the cases provided by counsel I have referred to a paper presented at The National Judicial Institute Criminal Law Program Vancouver, B.C. March 2015, by The Honourable Fred Ferguson, Court of Queen's Bench of New Brunswick, entitled *The Nature Of Bail Review Under The Criminal Code Sections 520, 521 and 525: Towards Consistency of Interpretation*. In this paper, Ferguson J., a pgs 5 – 8, reviewed the law, to that date, in respect of the proper scope of s. 525 hearings as follows:

This provision provides a separate route for review of an accused person's detention in those circumstances in which the commencement of the trial has been delayed beyond 30/90 days of the initial appearance in court. Unlike *Sections 520(7)(a)* and *521(8)(a)* of the *Criminal Code*, that specifically allow the reviewing judge to use the transcript of evidence at the initial bail hearing, *Section 525* does not mention it.

There are two distinct lines of authority interpreting the nature of a review brought under *Section 525* because of that kind of delay. One approach involves a full "reconsideration" of bail utilizing the criteria set out in *Section 515 (10)*, with the trial delay being but an added factor by specific reference in *Section 525(3)* of the *Code*. See, for example, *R. v. Sarkozi* 2010 BCSC 1410 B.C.S.C.), that interpreted the hearing as a bail hearing *de novo* as well as *R v. Saulnier* [202] N.S.J. No. 133 (N.S.S.C.) and, more recently *R. v. McCormack* [2014] O.J. No. 6046 (O.S.C.J.).

In the recent decision of *R. v. Vandewater* 2014 BCSC 2502 (B.C.S.C.), Groves J. adopted the reasoning in *Sarkozi*. At paragraphs. 16- 20, Groves J. wrote:

> … Frankly and respectfully, I say if it had been the intention of the Legislature to restrict bail hearings upon 90 days elapsing for indictable offences to a threshold consideration of only if there had been unreasonable delay, that such would not have been difficult for Parliament to clearly state. I think it is best to follow the clear language as set by Parliament; that is what judges are obliged to do.

The other approach is potentially narrower - the "2 step line of inquiry" as articulated in *R. v. Gill* [2005] O.J. No. 2648 (O.S.C.J.), by Hill J. in *R v. Kissoon*, [2006] O.J. No. 4800 (O.S.C.J.), and by Justice Bernard in *R. v. Jerace,* 2012 BCSC 2007 (B.C.S.C.). This interpretive approach to a *Section 525* review was very recently explained and adopted in *Widalko*. As noted at paragraph 25 in part, the approach requires:

> ... focus on whether there has been an unreasonable delay in bringing the matter to trial and, if so, the cause of the delay. If there has been an unreasonable delay, then the question becomes whether its consequences can be ameliorated. If they cannot, only then will the

> focus change to whether the continued detention of the accused can be justified within the meaning of s. 515 (10).

To a similar effect is the recent decision of Associate Chief Justice Rooke in *R v. Bowden,* 2013 ABQB 178 (A.Q.B). In the absence of a *Section 520* review, he concluded at paragraphs 16-18:

> On a s. 525 Detention Review application ... it should be presumed that [the accused] is validly detained. In other words, a s. 525 application, in my view, is not, in the normal course, to be an appeal or reconsideration of an initial bail application under s. 515 or a review of bail under s. 520. Rather, in my view, the focus of the s. 525 Detention Review is to determine whether there has been undue delay in getting to trial...
>
> ... the application should be dismissed if the delay is not unreasonable. If the threshold of unreasonable delay is reached ..., that delay should be pursued and be ameliorated (under s. 525 (9) to a reasonable time by getting an earlier preliminary or trial date), or the Court should consider the conditions which, if at all, the accused should be released pending trial.
>
> Accordingly, the focus of s. 525, again in my view, is specifically neither for an initial application for bail under s. 515, nor a reconsideration under s. 520. If it is the former, then an accused should exercise their right in the Provincial Court, and if it is the latter then an accused should exercise their right in our Court's Bail Review court ... The bottom line is that, in my view, it is only if there is a finding of undue delay under s. 525, that one gets into consideration of the circumstances of the accused relevant to release.

The rationale of Bernard J. in *Jerace* for preferring this two-step approach later adopted by Grauer J. *Widalko* seems compelling to many:

> In *Sarkozi*, [2010 BCSC 1410], the learned judge found that s. 525 "mandates that the issue of the accused's continuing detention be reconsidered" whether or not unreasonable delay has been shown and whether or not directions by the court might serve to address any delay concerns.

> Very reluctantly, I must disagree with this interpretation of *s. 525*. In my view, in the absence of unreasonable delay which cannot be adequately addressed through direction, there is no reconsideration of bail. I find support for this view in the reasoning of Hill J. in [*Kissoon*, 2006 O.J. No. 4800] and in [*The Law of Bail in Canada*, 2010, Gary T. Trotter].
>
> > If it had been the intention of the Legislature to entitle an accused to a fresh bail hearing merely upon 90 days lapsing for indictable offences, then such would not have been difficult to clearly state; moreover, it would have made little sense to characterize it as a review and to require that a supervising court decide the matter.
> >
> > …
>
> It would be, in my view, an odd result if s.525 were read so as to afford an accused an avenue of review which requires neither proof of any of the aforementioned grounds [error of law or principle, material change, or material misapprehension of the evidence] nor the finding of an unreasonable delay.

[16] In a thoughtful review of the conflicting case law in British Columbia, as well as *Kissoon* and *Sawrenko*, Riley J. of the British Columbia Supreme Court in *R. v. C.L.J.M.*, 2017 BCSC 1717, came down in favour of the “two-step” approach as set out at para. 23:

> (a) First, whenever an accused has been detained in custody for longer than the statutorily prescribed period of time without a trial, the jailer has a mandatory obligation to apply for a "hearing" (under s. 525(1)), and the judge has a mandatory obligation to schedule and conduct the "hearing" (under s. 525(2)). In other words, once the accused has been detained for more than the statutorily prescribed period of time without a trial, a s. 525 hearing is mandated. However, in my view, the crux of the matter is the proper analytical framework for the s. 525 hearing itself.
>
> (b) Second, the "hearing" contemplated in s. 525 is not meant to be a fresh bail application or a completely open-ended review of the initial detention order. Hence, the s. 525

> judge cannot simply substitute his or her view for that of the justice or judge who made the original decision to detain the accused. This is because s. 525 does not connote a *de novo* consideration of the statutory criteria in s. 515(10), but rather a determination as to whether, in light of the fact that the accused has been in custody beyond the prescribed time without a trial, the initial basis for the accused's detention has somehow fallen away or been sufficiently ameliorated by the passage of time to warrant a reconsideration of bail. In other words, the question is whether the effluxion of time with the accused in custody has caused the basis on which the accused was ordered detained to fall away or dissipate to such an extent that further detention is not justified.
>
> (c) Third, in keeping with the nature of s. 525 as a review provision, and the deference owed to the justice or judge who made the initial detention order, the reviewing judge's analysis should proceed in two stages. At the first stage, the accused must identify some basis on which the passage of time with the accused in custody has had a material impact on the initial grounds for the accused's detention. The reviewing judge may also consider any "unreasonable delay" caused by either the Crown or the accused. If the accused is able to show either that detention beyond the prescribed time has had a material impact on the initial decision to detain, or unreasonable delay on the part of the Crown, then the analysis will move to the second stage. At the second stage, the reviewing judge must consider whether "further detention of the accused in custody" is justified having regard to the criteria under s. 515(10).

[17] Riley J. indicates very clearly at para.27:

> … with regard to the record on a s. 525 review, I would expect it to include the transcript of the initial judicial interim release hearing, and the reasons for detention (either under s. 515, s. 520, or s. 521 as the case may be). And since the review is initiated on the basis of a passage of time, the parties would be at liberty to present additional "credible or trustworthy" material that has come to their attention since the initial judicial interim release proceeding, to the extent that such information is relevant or material to the issues before the s. 525 judge. As for material that was in existence but not placed before the court in the initial judicial interim release proceeding, admissibility of such material at the s. 525 review hearing would be governed by the rules laid down in *St-Cloud* at para. 125-138.

[18] Leave to appeal this decision to the Supreme Court of Canada was granted. *R. v. Myers*, [2017] S.C.C.A. No. 460. Intervener status was granted to the Canadian Civil Liberties Association and to the Attorney General of Ontario. The appeal was heard and reserved on October 18, 2018.

[19] Having considered the submissions of counsel and the case law noted above, I find that I am persuaded that the "two-step" approach to a s. 525 hearing, as articulated by Riley J. in *C.L.J.M*. is the correct one.

[20] As I indicated to counsel in my interaction with them in this case, I am also strongly of the view that in order to properly consider whether the time the accused has spent in custody has caused the basis on which the accused was ordered detained to fall away or dissipate, to such an extent that further detention is not justified, it is necessary for the reviewing justice to have regard to the initial reasons for detention.

Whether Sheldon Keobke has shown cause why his Detention is no Longer Justified

[21] In this case, Sheldon Keobke was arrested June 22, 2018, detained on July 6, 2018, and had a preliminary hearing – in which the issue of committal is confined to charges related to the shooting incident – January 4, 2019. No submissions were made that the delay to date is in any way unreasonable.

[22] In this case, no transcript was provided, but I took it upon myself to listen to the reasons given for Mr. Keobke's detention. To this extent, I was able to understand the basis on which Mr. Keobke was detained, and thereby to be able to assess whether the passage of time spent in custody has had a material impact on the initial grounds for Mr. Keobke's detention.

[23] In this case, Mr. Keobke was detained on both the secondary and tertiary grounds. I note that in his reasons for the detention order the justice suggested that if Sheldon Keobke was to address the Court's concern in respect of evidence of a fairly recent drug addiction, the result might be different on review.

[24] The charges Sheldon Keobke faces are: three counts of Discharging a Firearm with Intent; Careless Use of a Firearm; Having a Restricted Firearm in a Motor Vehicle; Storing a loaded handgun contrary to the Regulations; Possession of a Firearm for a Purpose Dangerous to the Public Peace; Possession of a Firearm with the Serial Number Removed; Possessing a Loaded Restricted Firearm without a registration certificate; Possession of a Knife for a Purpose Dangerous to the Public Peace; Possession of a Stolen Vehicle; Possession of a Short-barrelled Shotgun for Purpose dangerous to the Public Peace; Possession of a Loaded Prohibited Weapon without authorisation; Storing a loaded Prohibited Firearm contrary to the Regulations; Careless Storage of Ammunition; Possession of Cannabis for the Purpose of Trafficking; Possession of Cocaine; Possession of Fentanyl; Possession of Fentanyl for the Purpose of Trafficking; and Possession of Cocaine for the Purpose of Trafficking.

[25] The allegations are that on June 20, 2018, Sheldon Keobke fired a handgun from a Dodge Durango at occupants of another vehicle on the Alaska Highway just outside of Whitehorse. The persons fired at were not injured but there was a bullet hole in their vehicle. They reported the matter to police together with a description of the driver, the vehicle he was driving and the licence plate number. Police were able to ascertain that the Dodge Durango was registered to Sheldon Keobke and that the description of the shooter matched the driver's licence photo on file for Sheldon Keobke.

[26] Police began surveillance of Sheldon Keobke at his residence owned by him at 156/157 Dalton Trail in Whitehorse. They observed Sheldon Keobke driving a Honda Civic bearing the same licence plate as was registered to the Dodge Durango. On June 21, 2018, Sheldon Keobke was arrested driving this vehicle. On Sheldon Keobke's person police found over $5,000 in cash, thee cellphones and a score sheet (drug debt list).

[27] Police obtained a search warrant and found in the vehicle keys to the duplex at 156/157 Dalton Trail: identification in the name of Sheldon Keobke; 3.21g of cocaine; pre-loaded syringes containing cannabis resin; 484.56g of dried cannabis; a scale; three notebooks of score sheets and a Smith and Wesson 9mm handgun, fully loaded; assorted ammunition for rifles and shotguns; a homemade silencer; and a large folding knife over 30cm in length in the driver's door. Police received information from the registered owner of the Honda that it had been taken without his permission months before. The Crown acknowledges that police are sceptical as to the veracity of this information form the Honda owner.

[28] Police obtained and executed a warrant at 157 Dalton Trail which is shared with Sheldon Keobke by his wife and children. Police located in the residence: 9mm ammunition and a short-barrelled shotgun in a bedside table; as well as over $4,000 in cash in Canadian and U.S. currency. Police also located the keys to the Dodge Durango which had been reported missing to Mr. Keobke's insurance company but not to police. In addition, police located 393.3g of marijuana in several bags – two of which had fingerprints matching Sheldon Keobke's. There were as well more scoresheets and cellphones. In the garage of the residence they found 2581g of marijuana in vacuum sealed bags.

[29] A search warrant executed at 156 Dalton Trail revealed a bedroom containing: personal papers in the name of Sheldon Keobke; more cannabis; gun parts and a lock safe; an empty 9mm magazine; registration papers for both the Honda and the Dodge Durango; 14 cellphones; and a container of benzodiazepam. In the kitchen of the residence police located: 8.03 g of cocaine; 191.28 g of Fentanyl in bags located under the kitchen counter; a scale with white residue; a handgun box and two 9mm bullets; a filter mask which tested positive for the presence of illicit drugs, and a 5.7g bag of cocaine.

[30] It is noted that the residence at 156 Dalton Trail was rented to tenants but there is evidence that Sheldon Keobke stayed there.

[31] Mr. Keobke presented his father, Gerald Keobke, as a potential surety willing to post $100,000 bail. Gerald Keobke testified as to his ability to supervise Mr. Keobke in the community. Gerald Keobke testified he now recognizes that his son was addicted to drugs at the time of his arrest. He was able to describe steps taken by Sheldon Keobke while in custody to address his addiction to drugs, and the dramatic change in demeanour and attitude he has seen in Sheldon Keobke during the six months he has been in custody.

[32] Additional affidavit evidence was presented with respect to the character of Sheldon Keobke and employment opportunities available to Sheldon Keobke on his release. Gerald Keobke in his testimony was able to articulate how he would ensure Sheldon Keobke's supervision in conjunction with his employers.

[33] Mr. Keobke, due to the nature of the charges, continues to face a reverse onus to show cause why his detention is not justified.

[34] I am persuaded that the passage of time here has had a material impact on the decision to detain. I am persuaded that the steps Sheldon Keobke has taken to address his addiction, together with his stated intention to pursue such measures if permitted to out of custody, has had a material impact on the risk he presents if released from custody, on strict terms, and under the supervision of the proposed surety Gerald Keobke. I am satisfied, as articulated by the Supreme Court of Canada in *R. v*. *Morales*, [1992] S.C.J. No. 98, at para. 39, that the risk that Sheldon Keobke, if released on bail, poses a substantial likelihood of committing an offence or interfering with the administration of justice in a way that will endanger the protection and safety of the public, can be managed by appropriate terms.

[35] I have heard and considered the position of the Crown that the nature of the offences alleged are such that Mr. Keobke has not yet met his onus on the tertiary grounds.

[36] I take no issue with the initial decision to detain Mr. Keobke on the tertiary grounds. On the guiding principles for detention on the tertiary ground as set out in *St. Cloud* at para. 87, I take note that the decision “involves balancing all the relevant circumstances. At the end of this balancing exercise, the ultimate question to be asked by the court is whether detention is necessary to maintain confidence in the administration of justice. To answer this question, the Court must adopt the perspective of the "public", that is, the perspective of a reasonable person who is properly informed about the philosophy of the legislative provisions, *Charter* values and the actual circumstances of the case. However, this person is not a legal expert and is not able to appreciate the subtleties of the various defences that are available to the accused.”

[37] In this case I find that were the public to be aware of the steps taken by Mr. Keobke during the time he has spent in custody, and all of the other circumstances as well as the strict terms of bail to be imposed, Sheldon Keobke's detention is not required to maintain confidence in the administration of justice.

[38] Sheldon Keobke may be released pending trial on his outstanding charges on the following terms:

1. Before Sheldon Keobke's release, Gerald Keobke must remove from his property any firearms and ammunition. Gerald Keobke may transfer these items to another person who is authorised to possess them or he may turn over those items to the police for safe-keeping while he is surety for Sheldon Keobke;
2. Sheldon Keobke is to enter into a recognizance with Gerald Keobke as his surety in the amount of $100,000 without deposit;
3. Report immediately to a Bail Supervisor and thereafter when and in the manner directed by the Bail Supervisor;
4. Attend and actively participate in all assessment and counselling programs as directed by the Bail Supervisor and complete them to the satisfaction of the Bail Supervisor for substance abuse; relapse prevention and any other issues identified by the Bail Supervisor;
5. He must reside with his surety and abide by any rules of conduct set by the surety;
6. He is not to leave his residence except in the company of his surety except to attend his place of employment and Narcotics Anonymous meetings or other counselling. Sheldon Keobke 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; any other exceptions must be approved in writing by the Bail Supervisor;

7. He is not to have in possession any cellphone 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;
8. He is not to communicate directly or indirectly or be in the company of Sophie Tren, Megan Birmingham, Darryl Reid, Kimberly Wollis, Mark Leslie, Rebecca Allen, MacLean Palmer, and April Anderson;
9. He must not possess any drug unless it is prescribed for him by a medical doctor; and
10. He is not to possess any weapon as defined by the Criminal Code;

[39] Mr. Keobke is remanded to his preliminary hearing January 4, 2019.

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MILLER J.