

Ontario Superior Court of Justice

P.A. Schreck J.

Heard: May 21, 2020.

Judgment: June 1, 2020.

Court File No. CR-20-60000170-00BR

[2020] O.J. No. 2434 | 2020 ONSC 3389

Between Her Majesty the Queen, Respondent, and G.F., Applicant

(34 paras.)

## **Case Summary**

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**Criminal Law — Compelling appearance, detention and release, For protection against arbitrary detention or imprisonment — Judicial interim release or bail — Grounds for denial — Detention necessary for protection of public — Review of — Application by Accused for review of his detention order dismissed — Accused charged with number of serious offences, including kidnapping, possession of firearm, and robbery — Accused had been detained for over 90 days — Accused sought for review of his detention under s. 525 of Criminal Code — Based on Accused's history and circumstances of offences, his detention was deemed necessary on secondary ground — There was no onus on Accused or Crown to justify his release from detention — There was clear indication that if Accused was released from detention, there was substantial likelihood that he would commit additional crimes.**

Application by Accused for review of his detention order. The Accused was charged with a number of serious offences, including kidnapping, possession of a firearm, and robbery. The Accused had been detained for over 90 days in relation to the alleged offences. The Accused sought for a review of his detention under s. 525 of the Criminal Code. The Crown opposed the release of the Accused on secondary and tertiary grounds, claiming that he bore the burden of justifying his release on those grounds, which he had failed to do. The Accused contended that he was subjected to an interim release order from detention and that neither party endured the burden of proof in an s. 525 hearing. The Accused had a youth record and an adult record including convictions for assault, obstructing police officer, assaulting police officer, failing to comply with a probation order, failing to attend court and four counts of failing to comply with a recognizance.

HELD: Application dismissed.

Based on the Accused's criminal history and the circumstances of the alleged offences, his detention was deemed necessary on the secondary ground. Pursuant to s. 525 of the Criminal

Code, there was no onus on the Accused or the Crown to justify his release from detention. There was a clear indication that if the Accused was released from detention, there was a substantial likelihood that he would commit additional crimes. Therefore, the Accused's detention was necessary on the secondary ground. Public trust in the administration of justice would always necessitate the detention of those who were significantly likely to commit further offences.

### **Statutes, Regulations and Rules Cited:**

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The Criminal Code, s. 515(10), s. 520, s. 521, s. 525

### **Counsel**

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*M. Coristine*, for the Respondent.

*A. Nathan*, for the Applicant.

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### **REASONS FOR DECISION**

#### **P.A. SCHRECK J.**

1 G.F. is charged with a number of serious offences, including kidnapping, possession of a firearm, and robbery. Because he has been in custody for more than 90 days, s. 525 of the *Criminal Code* requires that his detention be reviewed.

2 The Crown opposes G.F.'s release on the secondary and the tertiary grounds and submits that G.F. bears the onus of justifying his release on those grounds and has failed to do so. G.F. disagrees that he bears the onus of justifying his release. He submits that neither party bears an onus on a s. 525 review and that his detention is not justified having regard to this proposed release plan.

3 This hearing was conducted by teleconference because of the COVID-19 pandemic. At the conclusion of the hearing, I determined that G.F.'s detention should continue and indicated that I would provide reasons at a later date. Following are those reasons. In my view, G.F. is correct that neither party bears an onus on a s. 525 hearing. However, given G.F.'s history and the circumstances of the alleged offences, his detention continues to be necessary on the secondary ground.

#### **I. CHRONOLOGY OF ALLEGATIONS**

##### **A. October 13, 2019 - Theft of a Motor Vehicle, Dangerous Operation, Fail to Stop**

4 On October 13, 2019, police officers noticed a car that had been reported stolen. When they tried to stop the car by activating their police cruiser's emergency lights, the car accelerated suddenly and drove through a red light. The police chased the car briefly, but then abandoned the chase out of concerns for pedestrian safety. A few minutes later, the police received

information that the car in question had been involved in a minor collision and that the driver had fled the scene. Surveillance video in the area showed the male who had fled the car and it is alleged that his appearance is consistent with G.F.'s. Forensic examination later revealed G.F.'s fingerprints on the steering wheel and on the interior driver's door handle of the car. G.F. was not arrested at the time.

### **B. October 19, 2019 - Robbery, Possession of Controlled Substances**

5 It is alleged that on October 18, 2019, G.F. and two other males approached a woman outside a restaurant and demanded that she drive them home. When she refused, they pushed her, threatened her and stole her car keys. When her companion attempted to come to her aid, the three men assaulted him and stole his gold chain. The men then fled, although the complainant was able to point G.F. out to the police when they arrived and he was arrested. He was allegedly in possession of the complainant's keys at the time of his arrest, as well as some controlled substances in amounts consistent with personal use.

6 While in custody on the robbery charges, G.F. was arrested for the offences allegedly committed in October.

7 On October 29, 2019, G.F. was released on a recognizance with his mother as his surety. One of the conditions of his recognizance was that he abide by a curfew between 11:00 p.m. and 6:00 a.m.

### **C. January 18, 2020 - Kidnapping, Possession of a Firearm, etc.**

8 It is alleged that at around 4:00 a.m. on January 18, 2020, G.F. and two other men forcibly removed a man from a car he was sitting in and assaulted him. They brought him into a nearby hotel, where they repeatedly assaulted him, causing significant injuries. They then contacted a relative of his and threatened to kill the complainant unless a ransom was paid. The relative contacted the police, who were able to locate the complainant through his mobile phone. When the police arrived at the hotel, G.F. was in the complainant's car, where he was arrested. He had a key to the hotel room in his possession. When the police entered the hotel room, they found the complainant on the floor with his hands bound. A loaded handgun was located on a table in the room, as were various controlled substances.

9 The hotel video security system captured the complainant being brought to the room by the three men. The faces of the alleged assailants, including G.F., can be clearly seen.

## **II. PERSONAL CIRCUMSTANCES**

10 G.F. is 27 years old and until his arrest was living with his mother and his four siblings. He has a youth record and an adult record dating back to 2014. The adult record includes convictions for assault, obstruct police officer, assault police officer, failing to comply with a probation order, failing to attend court and four counts of failing to comply with a recognizance.

11 The applicant's sister and cousin are proposed as sureties. He proposes that he be required to live with his sister and the rest of his family and that he be subject to house arrest enforced by

electronic monitoring through the Ministry of the Solicitor General. His cousin, who would not live with him, would maintain contact with him by telephone.

### III. ANALYSIS

#### A. The Nature of the Review

**12** This is a review conducted pursuant to s. 525 of the *Criminal Code*. Unlike a review conducted pursuant to ss. 520 or 521, this is not a review of any prior judicial order but, rather, a review of the detention itself. The question which the court must answer is whether G.F.'s continued detention is justified within the meaning of s. 515(10) of the *Code*, that is, whether detention is necessary on the primary, secondary or tertiary grounds set out in that section: *R. v. Myers*, [2019 SCC 18](#), at paras. 45-47. Where, as in this case, there has been no prior bail hearing, the court must conduct the full bail hearing "from the ground up": *Myers*, at para. 56.

**13** The Crown takes the position that G.F.'s detention is necessary on the secondary and tertiary grounds set out in ss. 515(10)(b) and (c) of the *Criminal Code*.

#### B. The Onus

**14** G.F. was subject to a judicial interim release order at the time of the most recent alleged offences. Because of this and the nature of the offences, if he had had a bail hearing, he would have borne the onus of demonstrating why his detention was not justified. However, he submits that because this is a hearing pursuant to s. 525 of the *Code*, there is no onus on him or the Crown. The Crown takes a different view and submits that the onus on a s. 525 hearing is the same as it would have been at any initial hearing.

**15** There is conflicting caselaw on this issue, which was not directly addressed in *Myers*. Several cases decided prior to *Myers* conclude that the onus on a s. 525 hearing is the same as it would be at an initial bail hearing: *R. v. Thorsteinson*, [2006 MBQB 184](#), [206 Man. R. \(2d\) 188](#), at paras. 16-21; *R. v. Sawrenko*, [2008 YKSC 27](#), at para. 29; *R. v. Russell*, [2016 NLTD\(G\) 208](#), [136 W.C.B. \(2d\) 73](#), [34 C.R. \(7th\) 262](#), at paras. 23-29.

**16** Since *Myers*, in *R. v. Denesevich*, [2019 ONSC 3823](#), at paras. 46-51, Grace J. held that where there has been no initial bail hearing, the onus is the same as it would have been at an initial hearing. However, where there has been an initial hearing, the onus is on the accused to demonstrate that his or her detention "is no longer justified based on new evidence, a material change of circumstances, the elapsed and anticipated passage of time and/or unreasonable delay for which the Crown bears responsibility" (at para. 51). This approach appears to have been followed in *R. v. Spurrell*, [\[2020\] O.J. No. 62](#) (S.C.J.), at para. 27 and *R. v. Ricourt-Casseus*, [2019 ONSC 7471](#), at para. 15. In *R. v. Momulu*, [\[2019\] O.J. No. 5069](#) (S.C.J.), at para. 40, it was suggested that the onus on a s. 525 hearing is on the accused, but "is not as stringent as the onus on a s. 520 application."

**17** A different view was expressed by Corozza J. (as he then was) in *R. v. Pescon* (unreported, March 16, 2020), at p. 5:

Turning to the question of onus, in my view, it is clear that on a s. 525 review there is no onus on either party during this hearing. There is nothing in the language of *Myers* or in the wording of s. 525 that would suggest that a party appearing at the hearing carries an onus. Indeed, Chief Justice Wagner in *Myers* stressed that the section imposes an independent responsibility on the reviewing judge to consider whether the continued detention of the accused is justified, and establishes a discretionary mechanism designed to prevent unreasonable delay and to expedite the trials of individuals in remand.

Coroza J. disagreed with the approach taken in *Denesevich*, which he viewed as inconsistent with the distinction made in *Myers* between s. 525 reviews and initial bail hearings on reviews conducted pursuant to s. 520.

**18** In my view, the approach taken in *Pescon* is correct. As pointed out in that decision, *Myers* makes it clear that a s. 525 review is intended to be a safeguard. It is different than an initial bail hearing or a s. 520 review and is intended to be a review of the detention itself. As noted in *Myers*, at para. 4, s. 525 "imposes an independent responsibility on the reviewing judge to consider whether the continued detention of the accused is justified." In my view, this means that the reviewing judge's responsibility to review whether the detention is justified does not depend on whether one or the other party discharges any onus.

**19** It is important to note that a s. 525 review is not instigated by either the Crown or the accused but, rather, by the person having custody of the accused: *Myers*, at para. 34. Absent informed waiver, the court has a duty to conduct the review. As stated in *Myers*, at para. 44, "[f]orm letters which place the burden on the accused to pursue a s. 525 hearing are inconsistent with the law." While the Court refers to there being no burden on the accused to "pursue a s. 525 hearing", in my view this language suggests that the hearing, including the determination of whether the continued detention is justified, does not depend on the accused taking any steps. Rather, it should occur automatically.

**20** Like Coroza J., I must respectfully disagree with the suggestion in *Denesevich*, at para. 51, that where an accused has been detained at an initial hearing, he or she bears the onus of demonstrating that the detention is no longer justified "based on new evidence, a material change of circumstances, the elapsed and anticipated passage of time and/or unreasonable delay for which the Crown bears responsibility." On this approach, there is no meaningful difference between a s. 525 review and a review conducted pursuant to s. 520.

**21** More importantly, the s. 525 review would no longer be a safeguard. As noted in *Myers*, at para. 44, one of the purposes of s. 525 is to provide judicial oversight of the presumptively innocent individuals who are in custody awaiting trial. This safeguard is of particular importance for unrepresented accused, who are most in danger of "falling through the cracks." As stated in *Myers*, at para. 55:

As noted above, s. 525 creates an independent safeguard function that is particularly important for unrepresented individuals, who may not have had the means, the capacity or the awareness to apply for a s. 520 review but are now appearing before a judge at a s. 525 hearing.

An individual without the means, capacity or awareness to apply for a s. 520 review is likely to be ill-equipped to discharge any onus to show why he or she should be released. Requiring him or her to do so is inconsistent with s. 525's safeguard function.

**22** Counsel for the respondent suggested that "accused persons in a reverse onus situation may choose to decline their right to a bail hearing in favour of a 90-day review." A similar argument was made and rejected in *Myers*, at para. 56:

I wish to mention here that it has been suggested that allowing a full bail hearing to proceed before a superior court judge at the s. 525 stage would encourage "judge shopping" or would afford the accused some kind of procedural advantage that would for him or her justify spending three months in custody. In my view, this argument strains credulity. To quote O'Neill J. in *McCormack*, [2014 ONSC 7123], "I am not at all sure that many jailed accused would ever resort to paying the 90 day price for that strategy": para. 26.

**23** All of that said, the practical reality is that where there has been a prior reverse onus bail hearing at which an accused was unable to meet his or her onus, unless the prior findings are tainted by error, they will be given weight on a s. 525 review and the lack of onus will often have no effect on the outcome absent a material change in circumstances.

**24** For the foregoing reasons, I propose to conduct an independent review of G.F.'s detention without there being any onus on him or the Crown.

### **C. The Secondary Ground**

#### *(i) Overview of Legal Principles*

**25** Section 515(10)(b) of the *Code* states that detention is justified on the secondary ground where it is necessary for the protection or safety of the public "having regard to all the circumstances including any substantial likelihood that the accused will, if released from custody, commit a criminal offence or interfere with the administration of justice." In this context, a "substantial likelihood" means "a probability of certain conduct, not a mere possibility. And the probability must be substantial, in other words, significantly likely": *R. v. Manasseri*, [2017 ONCA 226](#), at para. 87.

#### *(ii) History and Nature of the Allegations*

**26** In this case, the applicant has several convictions for violating court orders, particularly recognizances. More importantly, at the time he allegedly became involved in the kidnapping, which commenced at 4:00 a.m., he was on a recognizance requiring him to be in his residence between 11:00 p.m. and 6:00 a.m. If the allegations are true, he chose to disregard that

condition in order to commit serious criminal offences notwithstanding that doing so put his mother at significant financial risk.

**27** Unfortunately, there is little reason to think that the applicant will behave any differently if both his sister and his cousin are his sureties. I accept that both proposed sureties care about the applicant and are committed to helping him. It appears that they have been trying to assist him in changing the course of his life for several years. Thus far, their efforts in this regard have been largely unsuccessful. The reality appears to be that he does not listen to them and would likely be as willing to put their assets at risk as he was his mother's.

*(iii) Electronic Monitoring*

**28** I realize that the proposed plan includes electronic monitoring, which G.F. was not subject to at the time of the alleged offences. Electronic monitoring can be a very effective part of a release plan. It makes it virtually certain that breaches of geographic restrictions will be quickly detected, which can have a powerful deterrent effect: *R. v. Doucette*, [\[2016\] O.J. No. 852](#) (S.C.J.), at para. 5. However, this presupposes that the individual is a person who is capable of being deterred. In this case, the allegation is that G.F. left his home in violation of a curfew to participate in a serious and violent crime. I accept that the members of G.F.'s family are likely honest and responsible people. G.F. must have been aware that there was a risk that they would discover the breach and report it. However, if the allegations are true, he clearly did not care and was willing to take that risk. In my view, this makes it unlikely that electronic monitoring would have a deterrent effect.

*(iv) COVID-19*

**29** There is currently a pandemic of a coronavirus disease, COVID-19, which is caused by a novel coronavirus that was first discovered in late 2019. While much about the virus is unknown, it is clear that it spreads easily. Thousands of people in Ontario have been infected and have died. Attempts to control the spread of the virus, a strategy commonly referred to as "flattening the curve", have had a profound effect on virtually everyone.

**30** On this application, counsel for G.F. filed an affidavit by Dr. Aaron Orkin, a physician and epidemiologist. Dr. Orkin's evidence, which I accept, is that preventing outbreaks in congregate living facilities such as detention centres is an important priority for the flatten-the-curve strategy. Reducing the number of individuals in such facilities is therefore an important goal, not only for the individuals who are released, but for society as a whole.

**31** However, any benefit resulting from reducing the prison population must be weighed against the need to protect the public from those who are likely to commit serious criminal offences if released. In this case, the benefit resulting from any reduction in the inmate population is outweighed by the potential harm that would result from G.F.'s likely commission of further offences.

**32** I accept that in some cases, the existence of the pandemic will be relevant to the secondary ground if the fear of contracting the disease while in custody will provide some additional motivation for an accused to abide by the conditions of his bail: *R. v. T.K.*, [2020 ONSC 1935](#), at

R. v. G.F.

para. 60; *R. v. Cahill*, [2020 ONSC 2171](#), at paras. 27-30. In my view, this is not such a case. While I accept that the applicant suffers from asthma and is therefore at an increased risk, given his history I have considerable doubt that his fear of contracting COVID-19 will have any significant effect on his behaviour.

#### **D. Conclusion**

**33** For these reasons, I have concluded that if G.F. is released, there is a substantial likelihood that he will commit further offences. As a result, his detention is necessary on the secondary ground.

**34** Given my conclusion, it is unnecessary for me to consider whether detention is warranted on the tertiary ground. In any event, there would be little utility in engaging in that analysis. While detention may be justified on the tertiary ground even where it is not justified on the secondary ground, the converse is not true. Public confidence in the administration of justice will always require that those who are substantially likely to commit further offences should be detained.

P.A. SCHRECK J.