Court of Queen's Bench of Alberta

Citation: R v Khazayev, 2021 ABQB 903

Date: 20211112
Docket: 200897486B1
Registry: Calgary

Between:

Her Majesty the Queen

Crown

- and -

Elcha Hamzat Khazayev

Accused

Reasons for Decision
of the
Honourable Mr. Justice W.P. Sullivan

Introduction

[1] This is a decision relating to bail forfeiture under sections 770 and 771 of the *Criminal Code*, RSC 1985, c C-46 ("*Criminal Code*"). The estreatment and forfeiture provisions of the *Criminal Code* are engaged when an accused person breaches bail by failing to appear in court or breaching one of his or her bail conditions.

[2] In August 2021, I adjourned several bail forfeiture decisions because I have concerns about the amount sought by the Crown and whether this amount is justified. The Crown was invited to make submissions but did not respond. My decision thus focuses on one of the cases that had been before me, since it exemplifies my concerns.

[3] This decision was intended to encompass several applications brought against various accused, including Mr. Khazayev. However, I do not have sufficient information on the others so I direct that their cases be returned to the estreatment list for consideration at a later date.

[4] The accused, Elcha Hamzat Khazayev, was before me on August 11, 2021 for a breach of recognizance in the amount of $3000 (no deposit). The Crown submitted that Mr. Khazayev entered into recognizance in the amount of $3000 in relation to possession of stolen property and breach of recognizance. This recognizance is a pledge by an accused (or the surety of an accused) which reflects the promise to attend in court (and obey any other conditions imposed). If the accused breaches his or her bail conditions, then either all or part of the amount pledged becomes indebted to the government.

[5] In the case of Mr. Khazayev, the Crown sought to have his entire recognizance forfeited due to his failure to appear before the Court on December 23, 2020.

Issues

[6] The issues presented by the Crown's application against Mr. Khazayev present three issues:

1. What principles apply to estreatment applications?
2. What are the factors to be considered in determining the amount of forfeiture?
3. Should the recognizance in this case to be forfeited in the entire amount of $3000, or a portion thereof?

The Legislation

[7] The scheme for bail orders, or for judicial interim release, enforcement of undertakings, release orders, and recognizances, is governed by Part XXV of the *Criminal Code*, but its application and practice varies such that different provinces have distinct rules and conventions. For discussion of the process used by Manitoba courts, see ***R v Laquette***, 2021 MBQB 103 at para 4 ("***Laquette***").

[8] Part XXV of the *Criminal Code* sets out the relevant statutory provisions dealing with the effect and enforcement of bail orders:

> 770 (1) If, in proceedings to which this Act applies, a person who is subject to an undertaking, release order or recognizance does not comply with any of its conditions, a court, provincial court judge or justice having knowledge of the facts shall endorse or cause to be endorsed on the undertaking, release order or recognizance a certificate in Form 33 setting out
>
> a) the nature of the default;
>
> b) the reason for the default, if it is known;
>
> c) whether the ends of justice have been defeated or delayed by reason of the default; and
>
> d) the names and addresses of the principal and sureties.

> (2) ...
>
> (3) A certificate that has been endorsed on the undertaking, release order or recognizance is evidence of the default to which it relates.
>
> (4) ...

[9] Section 771 is engaged after default is noted:

> 771(1) Proceedings in case of default — Where a recognizance has been endorsed with a certificate pursuant to section 770 and has been received by the clerk of the court pursuant to that section,
>
> (a) a judge of the court shall, on the request of the clerk of the court or the Attorney General or counsel acting on his behalf, fix a time and place for the hearing of an application for the forfeiture of the recognizance; and
>
> (b) the clerk of the court shall, not less than ten days before the time fixed under paragraph (a) for the hearing, send by registered mail, or have served in the manner directed by the court or prescribed by the rules of court, to each principal and surety named in the recognizance, directed to the principal or surety at the address set out in the certificate, a notice requiring the person to appear at the time and place fixed by the judge to show cause why the recognizance should not be forfeited.
>
> (2) Order of judge — Where subsection (1) has been complied with, the judge may, after giving the parties an opportunity to be heard, in his discretion grant or refuse the application and make any order with respect to the forfeiture of the recognizance that he considers proper.
>
> (3) Judgment debtors of the crown — Where, pursuant to subsection (2), a judge orders forfeiture of a recognizance, the principal and his sureties become judgment debtors of the Crown, each in the amount that the judge orders him to pay.

Analysis

1. What principles apply to estreatment applications?

[10] The Ontario Court of Appeal decision, ***Canada (Minister of Justice) v Mirza***, 2009 ONCA 732 ("***Mirza***"), is the leading decision on estreatment applications. The decision of Rosenberg JA reviewed section 771, the case law underlying estreatment applications, and relevant principles to be applied in the context of surety forfeiture. The case is also helpful for recognizance decisions involving an accused alone.

[11] The wording of section 771(1)(b) makes clear that the onus is on the surety or the accused to "show cause" as to why the recognizance should not be forfeited in its entirety: ***Mirza*** at para 27. This reverse onus stems, in part, from the "pull of bail", a long-held "central animating principle" in bail forfeiture applications: ***R v Tymchyshyn***, 2015 MBQB 23 at para 12 ("***Tymchyshyn***").

[12] The “pull of bail” has long been used to justify the use of forfeiture proceedings against accused who do not attend their scheduled court date, or breach a bail condition. It refers to the threat of financial penalty – primarily against a surety of the accused, but remains applicable to an accused alone – should an accused fail to attend court or breach a condition of his or her bail. This threat is necessary to ensure adherence to bail conditions, attendance in court, and the overall effectiveness of the bail system: ***Mirza*** at para 41. Justice Gary T. Trotter notes that the procedure’s value “would be seriously diluted by widespread knowledge that the procedure is only invoked sporadically”: *The Law of Bail in Canada*, 3rd ed (Toronto: Thomson Reuters, 2020) at 460 (“The Law of Bail”).

[13] However, section 771 also gives the Court a broad discretion to grant relief from forfeiture. Under s. 771(2), "the judge may, after giving the parties an opportunity to be heard, in his discretion grant or refuse the application and make any order with respect to the forfeiture of the recognizance that he considers proper.": ***Tymchyshyn*** at para 7; see ***Mirza*** at paras 42-44. This discretion demonstrates that total forfeiture is not the only means of maintaining the pull of bail – it can “sometimes be vindicated by something less”: ***Mirza*** at para 44.

[14] Moreover, the default provisions for bail orders are a component of the broader bail system, and as such should be inherently harmonious with that system to every extent possible: ***Laquette*** at para 12. This suggests that a court must integrate the principles found in recent Supreme Court decisions relating to bail with the principles to be considered at the forfeiture stage. These decisions include ***R v Zora***, 2020 SCC 14 (“***Zora***”) and ***R v Antic***, 2017 SCC 27 (***“Antic***”). I discuss these principles below.

[15] Lastly, Justice Trotter states in The Law of Bail at 461:

> ... it is important to recognize that, while the law technically characterizes forfeiture proceedings as "criminal" in nature, there are distinct non-criminal threads running through this area of the law. The forfeiture hearing itself is essentially an inquiry into whether the accused or the surety should be relieved from forfeiture. Indeed, when forfeiture is ordered it results in the creation of a civil debt. ...

[16] It must be remembered that a person who is accused of a crime is presumed to be innocent of that crime, which informs a judge’s decision when setting bail conditions: ***R v Prychitko***, 2010 ABQB 563 at para 5. The practice of subjecting an accused to harsh financial penalties which may be at a preliminary stage – a stage where the accused is presumed innocent – further calls into question the legitimacy of such practices.

[17] Justice Martin in ***Zora*** also pointed out that “Parliament did not intend for criminal sanctions to be the primary means of managing any risks or concerns associated with individuals released with bail conditions.”: para 63. Courts should therefore be careful when considering whether to force an accused to pay what essentially amounts to a fine. This is especially the case when the Crown also charges an accused for failure to appear before a court, which may create a double jeopardy for the accused. I note this as a possible factor in my discussion below.

2. What are the factors to be considered in determining the amount of forfeiture?

[18] Section 771 does not provide clear guidance as to what factors ought to inform a judge's decision. In ***Mirza***, Justice Rosenberg discussed the matter in the context of a surety bail at para 51:

> I do not think it is helpful or even possible to develop an exhaustive list of the factors that the judge should take into account in exercising this discretion. Further, not all factors will be of equal relevancy or weight in all cases. A review of the cases does, however, show that there are categories of factors that the courts regularly take into account...

[19] The factors in ***Mirza*** are specific to sureties and a surety's relationship with the accused. However, I am of the view that courts should apply the same thorough evaluation when dealing with an accused's forfeiture as well.

[20] In ***Tymchyshyn***, the Court stated that "where the recognizance amount is significant, forfeiture of the entire amount may not be necessary to maintain the integrity of the bail system (para 14). In my view, it is a judge who must determine, on the facts of the application, what exactly 'significant' amounts to.

[21] Additionally, courts must acknowledge the bleak and challenging realities faced by many accused when they become entangled in the justice system. It is easy to take for granted simple luxuries like having a smartphone, access to transportation, or the ability to take time off work. An accused who lacks these things should not be punished for being disadvantaged. These types of concerns were raised (albeit with respect to setting bail conditions) in ***Zora***, where Justice Martin described how bail conditions "disproportionately impact vulnerable and marginalized populations": para 79.

[22] Such disadvantages may relate to an accused's financial circumstances as well. While judges and prosecutors may view certain dollar amounts as reasonable, it may be a crushing blow for some. This concern was raised in ***R v Howell***, 2008 NLTD 70 ("***Howell***"), which dealt with an application by the Crown for the forfeiture of cash bail paid by an accused.

[23] In ***Howell***, the accused raised multiple considerations for why he deserved relief from full forfeiture. These included his good behavior prior to the breach, his financial strains as a parent of two children, and his limited income (para 10). Justice Harrington acknowledged these hardships and agreed that they should bear on the accused's application: paras 19-23. He cited a previous Newfoundland decision in which the Court concluded that the "alleged adverse effects…were relevant grounds for the exercise of discretion to refuse the Crown's application": ***Howell*** at para 19. Justice Harrington therefore ordered forfeiture of one-half of the accused's cash bail.

[24] The crux of the provisions is that a deciding judge must evaluate on a case-by-case basis, weighing the reasons posed by the Crown against the circumstances and concerns posed by an accused. This aligns with an accused's right to reasonable bail under section 11(e) of the *Charter* – "reasonable bail" relates to both the conditions imposed on an accused as well as the "quantum of any monetary component": ***Antic*** at para 41, citing ***R v Hall***, 2002 SCC 64.

[25] A judge at the forfeiture stage should not disregard the individualized meaning of "reasonable" simply because the accused's bail conditions were already set. Instead, a judge must undertake the same individualized evaluation when determining if, and how much, an accused must forfeit.

[26] This aligns with the "ladder principle", codified in section 515 of the *Criminal Code*, which requires a judge or justice to impose the least onerous form of release on an accused, unless the Crown shows why that should not be the case: ***Zora*** at para 21, citing ***Antic*** at para 44. The ladder principle is premised on restraint, meaning that courts must be thoughtful when setting burdensome conditions and asking for large sums of money from an accused at the bail stage of proceedings.

[27] The Supreme Court in ***Zora*** made clear that this principle must be followed by judicial officials, and requires "conditions that are specifically tailored to the individual circumstances of the accused": ***Zora*** at paras 24-25. As was noted in ***Antic*** at para 42:

> it is the justice or judge who ultimately decides which form of release to order in a given case, and he or she also has discretion under s. 515(4) of the Code to impose terms that are specific to the circumstances of the accused.

[28] I see no reason why this comment should not extend to all stages of the bail process, including section 771(2), which provides judges with discretion to grant or refuse estreatment applications, or make any order the judge considers proper. Additionally, the word "bail" in the *Charter* has been broadly interpreted to include all forms of judicial interim release under the *Criminal Code*: ***R v Pearson***, [1992] 3 SCR 665 at 690. Lastly, when the Crown brings a bail revocation application against an accused who breached a bail condition, the "ladder principle" is revisited, along with a consideration of the circumstances surrounding the breach: Justice Gary T. Trotter, *Understanding Bail in Canada* (Toronto: Irwin Law, 2013) at 96.

[29] In my view, the case law suggests that bail estreatment applications should be decided using the same factors, and with the same depth as any other bail-related application.

[30] Some considerations that the justice should consider on all applications for forfeiture before the Court could be as follows:

a) The nature of the charge and the number of charges;
b) The nature of the breach. For example, was it a failure to attend at the probation office at the designated time? Was it a failure to attend at court for a preliminary or initial appearance or subsequent appearance to set a date? Or was it much more serious, such as a failure to attend for trial? Were witnesses inconvenienced?
c) Personal circumstances of the accused as known to the Crown. A history of failure to appear, previous – if any – bail forfeiture orders, and amounts outstanding to the Crown as a civil debt from previous orders.
d) Has the original charge been disposed of? More specifically:

    i. Did the accused voluntarily appear and surrender or attend for example before his release supervisor?

ii. Was the accused arrested? Had there been a subsequent disposition of the charge, either by way of plea or by trial?
iii. Does there appear to be, on its face, a valid reason for the accused's failure to appear?
iv. Was the accused in custody on other charges and was the failure to appear as a result thereof?
v. The accused's ability to pay and the long-term impact of such a civil judgment against an individual.
vi. Is the accused otherwise disadvantaged by mental or physical disability?

The Crown in their application materials should answer these enquiries. These are a few of the considerations that the justice should consider in estreatment or forfeiture. In my view, these considerations should be before the justice with respect to those that appear at the estreatment hearing. Respectfully, blanket endorsements in my view forfeiting bail against persons who have failed to attend should not be encouraged.

3. Should the recognizance in this case to be forfeited in the entire amount of $3000, or a portion instead?

[31] As I have stated, a determination of how much an accused must forfeit must involve considering the individualized situation of the accused, in light of the principles applicable to our bail system generally, and thoughtful deliberation of what is justified in the circumstances.

[32] Here, Mr. Khazayev has no way of getting the $3000 requested by the Crown. Prior to entering remand, he was homeless and living in a tent. He was helping to take care of his brother, who struggles with physical and mental health issues. Mr. Khazayev himself is working through an addiction. In my view, a $3000 forfeiture payment poses a real threat to Mr. Khazayev's rehabilitation and reintegration.

[33] Mr. Khazayev submitted that he missed his December 23 court date because he was homeless and living out of a tent, along with the challenges presented by the COVID-19 pandemic. He was assigned a lawyer but there were issues between counsel and Mr. Khazayev. He has since been waiting to receive a new lawyer from Legal Aid and remains in remand.

[34] In light of Mr. Khazayev's circumstances and the principles discussed above, I do not view the $3000 forfeiture amount to be justified in Mr. Khazayev's circumstances. I therefore order forfeiture of $300 from Mr. Khazayev.

Heard on the 11th day of August, 2021.
Dated at the City of Calgary, Alberta this 12th day of November, 2021.

W.P. Sullivan
J.C.Q.B.A.

Appearances:

K. McCaffrey
for the Crown

Elcha Hamzat Khazayev
Self-represented