SUPREME COURT OF NOVA SCOTIA

Citation: *R. v. Sek*, 2022 NSSC 11

Date: 20220114
Docket: **Halifax,** CRH No. 508992
Registry: Halifax

Between:

Her Majesty the Queen

v.

Sephon Sek

DECISION

Judge:	The Honourable Justice Kevin Coady
Heard:	November 1, 2021, in Halifax, Nova Scotia
Written Decision:	January 14, 2022
Counsel:	Rick Woodburn and Scott Morrison, for the Crown Mark Bailey, for the Defendant

By the Court:

[1] Sephon Sek is on remand at the Central Nova Scotia Correctional Facility. He is charged along with 14 other inmates in relation to a December 2, 2019, melee at that facility. One inmate was seriously injured. Prior to that event, Mr. Sek was being held on an immigration hold pending removal to Cambodia. The evidence indicates that Mr. Sek was part of a human shield that prevented correctional officers from intervening. All 14 co-accused face charges of attempted murder and conspiracy to commit murder, as well as other offences.

[2] The prosecution of this group has presented challenges to the administration of justice, given issues associated with the COVID-19 pandemic. In order to manage any potential risks associated with having such a large number of accused present for trial, the accused were split into two separate groups and all parties agreed that the two groups would be tried separately at different times. The first group's trial occurred from September 22 to October 1, 2021. The second group was scheduled to start their trial on November 10, 2021 and that trial is now complete.

[3] Mr. Sek was to be part of the first group. However, due to a serious cancer diagnosis, and mandatory treatments, he was unable to participate in the first trial. On September 15, 2021, Mr. Sek was severed from his original group. He is to return to court on February 28, 2022, for a status hearing.

[4] Mr. Sek is 42 years old and has amassed a very serious criminal past related to violence and gang affiliation in British Columbia. He plead guilty to offences related to the "Surrey Six" murders, a well publicized criminal gang hit. He received a six-year Federal sentence. As a result of an attack in a British Columbia facility, Mr. Sek was transferred to Springhill Institution. In November 2019 Mr. Sek was given his release from Springhill.

[5] Based on those convictions, the Minister of Immigration, Refugee and Citizenship revoked Mr. Sek's status as a permanent resident of Canada. As a result of that revocation, he was placed on an immigration hold and transferred to the provincial facility in Burnside. He was awaiting his removal to Cambodia at the time of the alleged offences he now faces. He has not sought bail given his extreme criminal history.

[6] Mr. Sek now seeks his release on the present charges. This application is being brought as a result of Mr. Sek's diagnosis of "metastatic rectal cancer to the liver". He is presently undergoing radiation therapy and chemotherapy. His prognosis is terminal, and his life expectancy is anticipated to be approximately one year. It is unlikely he will ever face his trial. Essentially, Mr. Sek's plan is to return to British Columbia to live out his final days with his three children and extended family.

[7] Mr. Sek's application is different than most in that he is not able to advance a plan for his release. The Crown raises the following concerns:

- What is his actual release plan?
- Does he have sureties?
- Where will he live and who will be looking after his medical appointments?
- Who will pay for his medical treatments? (He is an undocumented person with no status in Canada.)
- What, if any, arrangements have been made regarding his ongoing treatment?
- What is his current medical diagnosis? There is no update of actual medical opinion regarding his future prognosis?
- What, if any, assurances do we have he will abide by any conditions while on release?

It must be recognized that should I release Mr. Sek pursuant to Section 515(10) of the *Criminal Code*, such an order would not release him into the general community. It would only act as a conduit to the processes available to him in the immigration system. That process is not available to him as long as he is on remand on the present charges. The questions raised by the Crown cannot be resolved within this application. Should immigration authorities consider releasing Mr. Sek into the community, they will determine the conditions to be attached to his release, including the management of his cancer treatment. They may not agree to his

release, or they may remove him to Cambodia. Mr. Sek pleads for the chance to make a case for his release.

[8] The Crown, in is closing submissions, questioned whether Mr. Sek's condition is as dire as shown by his medical records. It was not prepared to acknowledge that he would never go to trial. It argued that the "evidence is that he is getting better". In opening submissions, the Crown stated, "We don't disagree with the defence insofar as Mr. Sek is very ill and it appears at least he has terminal cancer." The records clearly state Mr. Sek has stage 4 cancer and that it is "not curable". I am satisfied he is terminal and that there is no hope for a cure. The records indicate he is being referred to palliative therapy.

[9] It must be noted that Mr. Sek is in a reverse onus situation and he must establish, on a balance of probabilities, that his further detention is not justified. He also enjoys the presumption of innocence on the present charges.

[10] The principles set forth in Section 510(15) are well known to this Court. They are as follows:

> (10) For the purpose of this section, the detention of an accused in custody is justified only on one or more of the following grounds:
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> > (a) where the detention is necessary to ensure his or her attendance in court in order to be dealt with according to law;

> (b) where the detention is necessary for the protection or safety of the public, including any victim of or a witness to the offence, 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; and
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> (c) if the detention is necessary to maintain confidence in the administration of justice, having regard to all the circumstances, including:
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> (i) the apparent strength of the prosecution's case;
>
> (ii) the gravity of the offence;
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> (iii) the circumstances surrounding the commission of the offence, including whether a firearm was used; and
>
> (iv) the fact that the accused is liable, on conviction, for a potentially lengthy term of imprisonment or, in the case of an offence that involves, or whose subject matter is, a firearm, a minimum punishment of imprisonment for a term of three years or more.

If it were not for Mr. Sek's medical condition, it is very unlikely that he could establish that his remand is not justified on any of the three enumerated grounds.

[11] I am satisfied that Mr. Sek's continued detention is not required to ensure his attendance at court. He does not have a record for failing to attend when required. I am satisfied that his present health limits his mobility. I am also satisfied that the immigration authorities will not release Mr. Sek if they deem him a flight risk. Given his circumstances, where would he go? He is dependant on the medical professionals for any quality of life.

[12] I am further satisfied that Mr. Sek's continued detention is not required for the protection or safety of the public, and to ensure he does not commit a criminal

offence or interfere with the administration of justice. The reasons for this conclusion are the same as for the primary ground. I conclude that Mr. Sek will not be left in a position where he can re-commit. He will hopefully spend the remainder of his life receiving palliative care.

[13] I am also satisfied that Mr. Sek's continued detention is not necessary in order to maintain confidence in the administration of justice. I rely on the British Columbia Court of Appeal's decision in *R. v. Michel*, 1996 CanLII 8363 (BC CA). In that case the offender sought bail pending appeal and one of the issues raised by the Appellant was that he was diagnosed with a terminal illness. In relation to the tertiary ground, the court stated at paragraphs 12-14:

> 12 The Crown does concede that the appellant is no longer a risk for re-offending. They argue, however, that the public interest is a much wider concept and it is not in the interest of the public that this appellant be released.
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> 13 Crown counsel states it this way:
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>> The Respondent submits that it is inappropriate for the Appellant to use his condition as a person infected with HIV to gain the sympathy of the Court, when this very condition was an aggravating feature of the sexual assault he committed. Such an incongruity would have a negative impact on the public's perception of the administration of justice, and therefore be contrary to the public interest.
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> 14 I do not agree with Crown counsel. In my view, the public's confidence in the administration of justice will not be negatively affected in the circumstances which exist in this case. From the material filed it would appear that the appellant who is terminally ill, is manifesting a marked deterioration in his condition. The

> Court in my view in special circumstances can afford to show some compassion even though he has been convicted of a very serious offence.

The public's confidence in the criminal justice system is not limited to detention and punishment. It can also be affected by showing compassion to an offender when circumstances warrant.

[14] In *R. v. St-Cloud*, 2015 SCC 27, Chief Justice Wagner discussed the tertiary ground as follows:

> [4] The ground for detention in s. 515(10)(c) Cr. C. requires that an effort be made to strike an "appropriate balance between the rights of the accused and the need to maintain justice in the community": *Hall*, at para. 41. In addition, judges must adopt the perspective of the public in determining whether detention is necessary. What the word "public" means is not always easy to understand. These difficulties no doubt explain why s. 515(10)(c) Cr. C. has generated so much discussion among legal experts and led to inconsistent results across the country.
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> [5] In my opinion, the scope of s. 515(10)(c) Cr. C. has been unduly restricted by the courts in some cases. This ground for detention is not necessarily limited to exceptional circumstances, to the most heinous of crimes involving circumstances similar to those in *Hall*, or to certain classes of crimes. The interpretation of s. 515(10)(c) Cr. C. has also been truncated by a misunderstanding of the meaning of the word "*public*" used in the provision's French version (and implied in the word "*confidence*" used in the English version), which I will discuss below. For now, I will simply note that the "public" are reasonable, well-informed members of the community, but not legal experts with in-depth knowledge of our criminal justice system.

I do not feel that a consideration of the four factors in Section 515(10)(c) of in any way distracts from my conclusion. Very little evidence was before me on the strength of the Crown's case. The gravity of Mr. Sek's role in the present charges is

limited to the human shield activity. Further, it is unlikely Mr. Sek will live long enough to serve a lengthy term of imprisonment.

[15] I am prepared to release Mr. Sek on the Burnside charges. I want counsel to put their heads together and to submit your views on the vehicle and the conditions that should apply. I am asking counsel to inquire as to the most effective way to transfer custody from the correction facility to immigration services. I will then draft an order based on your submissions. Only when the order is signed, will this decision take effect.

Coady, J.