

CANADA / JUDGMENT

## R. v. Brown

2020 BCSC 1384

COURT

Supreme Court of British Columbia

DECIDED

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2020 BCSC 1384 R. v. Brown

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

R. v. Brown,

2020 BCSC 1384

Date: 20200622

Docket: 30404

Registry: Vancouver

Regina

v.

Fabian Yul Brown

Before: The Honourable Mr. Justice P. Edelmann

Oral Reasons for Judgment on Bail Review

Counsel for the Crown, appearing by teleconference:

C. Risley

Counsel for the Accused, appearing by teleconference:

J.J.F Waddington

A. Cadoret, Articled Student

Place and Date of Hearing:

Vancouver, B.C.

May 26, June 16, 2020

Place and Date of Judgment:

Vancouver, B.C.

June 22, 2020

- [1] THE COURT: This is a detention review hearing being conducted pursuant to s. 525 of the Criminal Code, R.S.C. 1985, c. C-46 [Code].
- [2] On October 23, 2019, Mr. Brown was charged with possessing a restricted firearm with ammunition contrary to s. 95(1) of the Code and possessing a firearm contrary to a firearms prohibition order contrary to s. 117.01(1) of the Code.
- [3] Mr. Brown was arrested on October 22, 2019, the date of the allegations, and appeared before a justice on October 23, 2019, pursuant to s. 503(1)(a) of the Code. Mr. Brown consented to remain in custody and did not have a bail hearing at that time.
- [4] On January 21, 2020, the jailor at North Fraser Pretrial Centre applied to the court under s. 525 to fix a date for a review of the detention of Mr. Brown as he had been detained for 90 days. On March 25, 2020, Mr. Brown sought his release in Provincial Court under s. 515 of the Code. He was ordered detained under s. 515(10).
- [5] Although it has been less than 90 days since the decision of the Provincial Court detaining Mr. Brown, both Crown and defence take the position that he is eligible for a review of his detention under s. 525 before this Court. I agree.
- [6] The timing of a review is set out in s. 525(1)(a):

525(1) The person having the custody of an accused -- who has been charged with an offence other than an offence listed in section 469, who is being detained in custody pending their trial for that offence and who is not required to be detained in custody in respect of any other matter -- shall apply to a judge having jurisdiction in the place in which the accused is in custody to fix a date for a hearing to determine whether or not the accused should be released from custody, if the trial has not commenced within 90 days from

- (a) the day on which the accused was taken before a justice under section 503; or
- (b) in the case where an order that the accused be detained in custody has been made under section 521, paragraph 523.1(3)(b)(ii) or section 524, or a decision has been made with respect to a review under section 520, the later of the day on which the accused was taken into custody under that order and the day of the decision.

The person shall make the application immediately after the expiry of those 90 days.

- [7] The section refers to 90 days from the day on which the accused was taken before a justice under s. 503 or where an order that the accused be detained in custody is made under s. 521 and various sections have come into play. There have been no intervening detention orders under s. 521 or 524 of the Code or reviews of the detention order under s. 520.
- [8] Section 503 requires that an accused arrested by a peace officer be delivered before a justice within a 24-hour period. In Mr. Brown's case, the date he was taken before a justice under s. 503(1)(a) was October 23, 2019. Section 525(1) lists the events triggering a requirement that the application should be commenced by the jailor and specifically the section references s. 503, 520, 521, and 524.
- [9] Although Mr. Brown did not seek to have a bail hearing in Provincial Court until well after 90 days had elapsed from his original appearance under s. 503, there is no reference in s.525(1) to a hearing or an order made under s. 515. The detention order under s. 515(10) therefore does not affect Mr. Brown's ability to seek a review of his detention under s. 525. In my view, he is eligible for a review under s.525.

### Nature of 525 Review

- [10] The nature of a review hearing under s. 525 of the Code was clarified by the Supreme Court of Canada in *R. v. Myers*, 2019 SCC 18 at paragraph 63:

In determining whether the detention of the accused is still justified, the reviewing judge may consider any new evidence or change in the circumstances of the accused, the impact of the passage of time and any unreasonable delay on the proportionality of the detention, and the rationale offered for the original detention order, if one was made. [ ] Ultimately, s. 525 requires a reviewing judge to provide accused persons with reasons why their continued detention is, or is not justified. [ ]

### Principles of Bail

- [11] The Supreme Court of Canada has made a number of decisions in recent years setting out the principles of bail. Notably, in *R. v. Antic*, 2017 SCC 27, [2017] 1 S.C.R. 509, the court noted that the right not to be denied reasonable bail without just cause is an essential element of an enlightened criminal justice system. It entrenches the effect of the presumption of innocence at the pretrial stage of the criminal trial process and safeguards the liberty of accused persons. The principle of restraint has, since the decision in *Antic*, been set out in the Criminal Code itself at s. 493.1:

## Principle of restraint

493.1 In making a decision under this Part, a peace officer, justice or judge shall give primary consideration to the release of the accused at the earliest reasonable opportunity and on the least onerous conditions that are appropriate in the circumstances, including conditions that are reasonably practicable for the accused to comply with, while taking into account the grounds referred to in subsection 498(1.1) or 515(10), as the case may be.

2019, c. 25, s. 210

[12] Mr. Brown was detained by the bail judge in Provincial Court on secondary and tertiary grounds. He was in a reverse onus position as a result of s. 515(6)(h) of the Criminal Code given that the alleged offence involved a firearm. I will not repeat in detail the circumstances surrounding the investigation of the alleged offence which is set out in the reasons of the bail judge. Briefly, the Crown alleges that Mr. Brown was seen on video entering premises carrying a distinctive knapsack. The knapsack was later searched by police and found to contain a loaded restricted firearm with a suppressor and the serial number removed. Mr. Brown denied ownership or knowledge of the contents of the knapsack at the time and his counsel argues there are a number of triable issues including in relation to the search. The Crown points to a number of circumstantial factors including other items found in the knapsack that the Crown alleges can be tied to Mr. Brown.

## Tertiary Grounds

[13] The bail judge ordered detention on both secondary and tertiary grounds. I will begin with a discussion of the tertiary grounds, although there was limited analysis provided on the engagement of the tertiary grounds in by the bail judge.

[14] In *R. v. St-Cloud*, 2015 SCC 27 the Supreme Court of Canada discussed the purpose of the tertiary grounds. Parliament was of the view that there are circumstances in which allowing a person charged with a serious crime to be released into the community pending trial in the face of overwhelming evidence might suggest to the public that justice had not been done. The basis for tertiary ground detention is set out in s. 515(10)(c) of the Code.

(c) If the detention is necessary to maintain confidence in the administration of justice, having regard to all the circumstances, including:

(i) the apparent strength of the prosecution's case,

(ii) the gravity of the offence,

(iii) the circumstances surrounding the commission of the offence, 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.

[15] I will go through each of the factors in the context of the Supreme Court's comments in *St-Cloud*.

#### The Apparent Strengths of the Prosecution's Case

[16] The court in *St-Cloud* discussed this criteria in paragraphs 57 to 59, noting in paragraph 58:

[58] Despite these difficulties inherent in the release process, the justice must determine the apparent strength of the prosecution's case. On the one hand, the prosecutor is not required to prove beyond a reasonable doubt that the accused committed the offence, and the justice must be careful not to play the role of trial judge or jury: matters such as the credibility of witnesses and the reliability of scientific evidence must be analyzed at trial, not at the release hearing. However, the justice who presides at that hearing must consider the quality of the evidence tendered by the prosecutor in order to determine the weight to be given to this factor in his or her balancing exercise. For example, physical evidence may be more reliable than a mere statement made by a witness, and circumstantial evidence may be less reliable than direct evidence. The existence of ample evidence may also reinforce the apparent strength of the case.

[17] Based on the allegations set out in its submissions, the Crown would appear to have a reasonably strong case. The Crown concedes that the case is circumstantial, as Mr. Brown was not found in possession of the firearm or bag at the time of his detention and arrest. The defence has raised the prospect of Charter issues in relation to the detention, arrest, and search that were not fully articulated before me. Even setting aside the Charter issues, while I accept the case described by the Crown appears strong, I would not describe it as an overwhelming case of the nature that was before the court in *St-Cloud*.

#### Gravity of the Offence

[18] According to the court in *St-Cloud* at paragraph 60, the gravity of the offence is to be:

assessed on the basis of the maximum sentence -- and the minimum sentence, if any -- provided for in the Criminal Code for the offence.

[19] In this case, the maximum penalty for an offence under s. 95(1) or 117.01(1) is 10 years. This would indicate serious offences, but not amongst the gravest offences in the Code, such as those attracting penalties of 14 years or life imprisonment. The mandatory minimum penalty set out in s. 95(1) was struck down in *R. v. Nur*, 2015 SCC 15 and is therefore not relevant to my analysis.

#### Circumstances Surrounding the Commission of the Offence

[20] The court in *St-Cloud* discussed this factor at paragraph 61, and the court said that:

Without drawing up an exhaustive list of possible circumstances surrounding the commission of the offence that might be relevant under s. 515(10)(c), I will mention the following: the fact that the offence is a violent, heinous or hateful one, that it was committed in a context involving domestic violence, a criminal gang or a terrorist organization, or that the victim was a vulnerable person [et cetera]

- [21] The Crown points to various aggravating factors related to the firearm in question and the surrounding circumstances. The firearm is alleged to have had a silencer, an over-capacity magazine, and the serial number filed off. It was being transported in a populated urban area loaded with a bullet in the chamber. Mr. Brown was subject to multiple prohibitions on the possession of firearms.
- [22] Taking into consideration the factors set out in *St-Cloud* and without minimizing the gravity of the alleged conduct, I would note that this is not a situation in which a firearm was used nor is there an allegation of planned use. The allegation is one of unlawful possession in circumstances in which the safety of the public was put at risk, but not one of a deliberately violent act. The offence could not be described as "violent, heinous, or hateful", nor is there any allegation of involvement with a criminal or terrorist organization.

### Potentially Lengthy Term of Imprisonment

- [23] The Crown relies on the decisions in the Court of Appeal in *R. v. Holt*, 2015 BCCA 302 and *R. v. Kachuol*, 2017 BCCA 292 to support the position that Mr. Brown is facing a potential term of imprisonment upwards of 30 months if he were convicted of the offence under s. 95(1).
- [24] In *Myers*, the court considered the impact of the passage of time on assessing the tertiary grounds at paragraph 53, the court says that the passage of time is relevant to considering the gravity under the tertiary grounds:
- [53] In other circumstances, accounting for the elapsed time or anticipated passage of time may require a more nuanced analysis of its impact on the three grounds which justify detention under s. 515(10). In *St-Cloud*, the Court indicated that a lengthy delay between the hearing and the eventual trial may be considered in determining whether detention is necessary to maintain confidence in the administration of justice, which is the tertiary ground: para. 71. In this sense, the analysis is not only retrospective, but also forward-looking. For example, let us consider a scenario in which an individual is detained on the basis of s. 515(10)(c), and at the time of the first detention order his trial is only two months away. If the trial date is then rescheduled for a date two years later and remains many months away at the time of s. 525 hearing, the continued detention of the accused may no longer be proportionate, or necessary, for the purposes of this third ground: see also *R. v. Whyte*, 2014 ONCA 268, 119 O.R. (3d) 305, at paras. 39-43; *Piazza*, at paras. 71-81 (CanLII). In an appropriate case, it may also be possible for the judge to conclude that a hypothetical risk in relation to the primary or secondary ground is simply outweighed by the certain cost of the accused person's loss of liberty or of a loss of public confidence in the administration of justice.

[25] I would note in the present case that Mr. Brown has been in custody for some eight months which would foreseeably be credited as 12 months on sentencing. As noted by the court in Myers, the time already served should be considered in assessing the potential sentence facing the accused. Therefore, while I accept that Mr. Brown faces the potential of a sentence that is somewhat lengthy, this jeopardy has also been somewhat mitigated by the passage of time.

## Conclusion

[26] In conclusion, the court in St-Cloud emphasized that the factors set out above are not exhaustive and that the ultimate question is whether detention is necessary to maintain confidence in the administration of justice. In my view, this is not a case where detention is necessary to maintain confidence in the administration of justice. If concerns around flight risk and danger to the public can be addressed with appropriate conditions, then a reasonably informed member of the public would not lose confidence in the recognition of the presumption of innocence which is inherent in the Charter right to reasonable bail in the circumstances of this case.

[27] There is a distinct contrast in the case before me and the type of case described in St-Cloud, and the words of the court at paragraph 88:

[88] In conclusion, if the crime is serious or very violent, if there is overwhelming evidence against the accused and if the victim or victims were vulnerable, pre-trial detention will usually be ordered.

[28] In relation to firearms offences, I would note the contrast with the case before me to that before Madam Justice Murray in *R. v. Mountain*, 2018 BCSC 1264 in which she said:

[44] In my view, the offences with which Ms. Mountain is charged are the very type of offences that the tertiary ground applies to: premeditated, planned and violent crimes involving guns and other weapons.

[29] Taking into consideration all the circumstances of the case, I therefore decline to order continued detention on the tertiary grounds.

## Secondary Grounds

[30] I do not propose to review Mr. Brown's record in detail, but I agree with the bail judge that his record raises valid concerns that he would be likely to offend if released unsupervised into the community. I also accept that there are primary ground concerns based on his past failures to comply with court orders. However, in my view, these concerns can be sufficiently mitigated through an appropriately crafted set of conditions. Although there are violent offences on his record, the only use of a firearm was over 20 years ago, and in circumstances where it does not appear that the firearm was discharged. While there is an allegation of possession of a firearm, there does not appear to be a substantial record with

respect to the use of firearms, and although there are some offences of violence, most of Mr. Brown's record is either drug or compliance related. Therefore, in my view, the concerns around flight risk and danger to the public can be addressed through an appropriate set of conditions.

[31] The Supreme Court in *R. v. Zora*, 2020 SCC 14 has recently addressed the imposition of conditions in the context of bail. The bail conditions, as noted earlier, should be imposed keeping the principles of restraint in front of mind. The court set out a number of principles and discussed various specific conditions and the approach to be followed by this court in assessing conditions is set out at paragraph 89:

In summary, to ensure the principles of restraint and review are firmly grounded in how people think about appropriate bail conditions, these questions may help structure the analysis:

1. if released without conditions, would the accused pose any specific statutory risks that justify imposing any bail conditions;
2. is this condition necessary;
3. is this condition reasonable;
4. is this condition sufficiently linked to the grounds of detention under s. 515(10)(c); and
5. what is the cumulative effect of all the conditions?

[32] Both defence and Crown have made submissions to me with respect to conditions. In my view, a number of conditions are appropriate in the circumstances. Mr. Brown, I therefore make the following order:

[33] You shall be released with a deposit of \$3,500 in cash. I do take into consideration the direction of the Supreme Court in both *Antic* and in *Zora* with respect to cash bail, but given the previous history of non-compliance, in my view, a cash bail is appropriate to provide an incentive for compliance with this court's orders.

[34] You will report to a bail supervisor by phone at the number set out within 24 hours of release and, after that, as directed by the bail supervisor.

[35] You must travel as directly as practicable to Phoenix House in Nanaimo, British Columbia, and in any event, to attend there within 72 hours of your release.

[36] You must live at Phoenix House and provide your bail supervisor with your phone number. You must not change your address or phone number without prior written permission from your bail supervisor.

[37] If you are evicted or expelled from the place where you are living, you must tell your bail supervisor immediately. If the office is closed, you must contact your bail supervisor immediately when the office opens on the next business day.

- [38] You must obey a curfew by being inside your residence between 9:00 p.m. and 6:00 a.m. every day.
- [39] You must present yourself immediately at the door to your residence or answer the phone when any peace officer or bail supervisor attends or calls to check on you during the curfew.
- [40] You may be away from your residence during the curfew with the prior written permission of your bail supervisor. You must carry the permission, which can be in electronic format, with you when you are outside your residence. You may also be away from your residence during the curfew hours while at or going directly to or returning directly from a healthcare facility because of a medical emergency. If asked, you must provide your bail supervisor with proof of your attendance at the facility.
- [41] You must not possess any weapon as defined by the Criminal Code, including firearms and ammunition; crossbows, prohibited or restricted weapons or devices or explosive substances; anything used, designed, or to be used or intended for use in causing death or injury to any person or to threaten or intimidate any person; or any imitation firearms or weapons including any compressed airguns or BB pellet guns.
- [42] There was some discussion with respect to a condition not to attend various parts of Vancouver. In my view, given the location of the offence and the curfew in Nanaimo, that is not a condition that is justified in the circumstances and I decline to impose that condition.
- [43] With respect to the contact with the three persons named, I do not see any indication either in Mr. Brown's record or in the evidence that is before me of any attempts at obstruction of justice in the past or with respect to these particular individuals and I therefore decline to impose that condition.
- [44] With respect to the rules and regulations of the residence, I am not aware of what those rules and regulations are and I am therefore reluctant to impose such a condition. I will note that if there is non-compliance, then Mr. Brown will find himself with some difficulty in complying with his residence condition, but I will not impose that condition, in particular given the comments of the Supreme Court in Zora.

"Edelmann J."

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