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CANADA / JUDGMENT

## R. v. Kandola

2010 BCSC 841

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Supreme Court of British Columbia

DECIDED

30 April 2010

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2010 BCSC 841 R. v. Kandola

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

R. v. Kandola,

2010 BCSC 841

Date: 20100430

Docket: 25123

Registry: Vancouver

Regina

v.

Michael Kandola

Before: The Honourable Mr. Justice Groves

Oral Reasons for Sentence

In Chambers

Counsel for the Crown:

D.G. Nearing

Counsel for the Accused:

D. Markovitz

Place and Date of Hearing:

Vancouver, B.C.

April 30, 2010

Place and Date of Judgment:

Vancouver, B.C.

### April 30, 2010

- [1] THE COURT: The accused, Michael Kandola, was charged with two offences resulting from an incident that occurred in the early morning hours of September 27, 2008.
- [2] In regards to the court's consideration of these charges, the accused pled guilty to the lesser included offence of assault causing bodily harm as it relates to Count 1 of the indictment. He has agreed in so doing, in pleading guilty, that he has committed the offence of assault causing bodily harm in regards to his actions against Jordan Smith.
- [3] The issues in this case appear to be threefold. First off, does s. 718.2(a)(i) of the Criminal Code apply to this offence? Essentially, has the Crown met its obligation to prove beyond a reasonable doubt that the offence was motivated by hatred related to the victim's sexual orientation. A second issue relates to what time is the court required to credit the accused considering his time spent in pretrial custody. The third issue, building from the answers to the first two questions, is what is the appropriate sentence?
- [4] Turning to the facts of this unfortunate circumstance, many of the facts do not appear to be in dispute. The significance of them as they relate to s. 718.2 is in considerable dispute. Jordan Smith and his boyfriend, Charles McKay, were walking west on the south side of Davie Street on the early morning of September 27, 2008. As they crossed Hornby Street, they were holding hands. When they had finished crossing Hornby Street, they were met by a group of five males on the corner. From this point, much but not all that transpired was recorded on a 7-Eleven Store security video. The evidence of the 7-Eleven Store security video which has no volume is consistent with the various witnesses' verbal recollection of what happened that night.
- [5] To continue in the chronology, as they crossed the street and arrived at the 7-Eleven on the corner of Hornby and Davie, Mr. McKay and Mr. Smith released hands. At this point, Mr. Smith is noted on the video to go out of view of the 7-Eleven video camera for a period, I am advised, of approximately four seconds. The evidence of what happened in this four seconds was not seriously challenged and it is the evidence of Mr. Smith. He said that he had received, at arriving on the corner, derogatory comments from the males standing around the corner outside of the camera view and, as a result of this derogatory language, he approached the group of males to question them.
- [6] The words exchanged with the group of males, which included Mr. Kandola is evidenced by Mr. Smith and his boyfriend, Mr. McKay. They provided evidence that terms such as "faggots," comments like, "What's this? Why are you faggots holding hands?", were directed at them as they approached this group. Mr. Smith, in going out of camera range, challenged

the group on these comments in an inquiring way, I am satisfied, saying words to the effect of, "Excuse me, what are you saying?". After this four-second absence from camera view, Mr. Smith is seen returning into camera view and it is apparent that this group of men are having nothing of Mr. Smith's attempts to inquire as to what they say. The evidence shows that Mr. Smith is being backed up by this group. They are approaching him and he is responding defensively by backing away and, in doing so, backing towards the camera. As this occurs, while the victim, Mr. Smith, is acting in a defensive way, the video clearly shows the accused, Michael Kandola, moving out from the back of the pack, circling around to the victim's left, dramatically winding up and hitting the accused from his blind side.

- [7] David Petrovic is an independent witness not known to either party, it appears, who provided a statement to the police which is in evidence before me. He describes the events as I have just noted, the striking of Mr. Smith and the reaction to it. I will paraphrase his statement as follows:

All of a sudden, the accused Kandola hauled off and sucker-punched the victim right in the face. The victim instantly fell and was knocked right out on the pavement. The victim appeared to be unconscious lying there on the sidewalk. Kandola, the accused, proceeded to stand over the victim shouting obscenities, threatening to do him in, calling him a faggot, and gesturing to kick him in the face or head.

- [8] Defence counsel and Mr. Kandola admit that Mr. Kandola did the acts as alleged and as recorded in the 7-Eleven video surveillance. Further, he admits to the derogatory language prior to what I have called the sucker punch. He admits to the sucker punch. He admits to derogatory language, threatening language, post the assault. In addition to the further berating of the victim after he is struck and after he is unconscious on the ground, there then appears on the video to be an exchange of words directed by Mr. Kandola at Mr. Charles McKay. Again, Mr. Kandola acts in what appears to be a bullying and threatening fashion towards Mr. McKay. Around this time, it appears that a taxi driver approaches and indicates that he is filming the event, which he is not, and that he has called the police. Faced with this, Mr. Kandola and his friends depart the scene.

- [9] The physical injuries to Mr. Smith were significant. He was admitted to St. Paul's Hospital on an emergency basis, determined to have a broken jaw, and required almost immediate surgery. Additionally, he had a concussion from the head trauma, being knocked out by the punch, and/or the combination of hitting the ground. He indicates in his victim impact statement he suffered from headaches and dizziness. His jaw had to be wired shut for six weeks. He lost 15 pounds as a result of a lack of caloric intake. He indicates in his victim impact statement that his bite no longer aligns post-surgery and there was ensuing dental work as a result. Additionally, Mr. Smith's victim impact statement speaks volumes of the emotional trauma he suffered after the assault as he struggled to deal with the senselessness of the act of violence inflicted upon him by the actions of Mr. Kandola.

[10] Turning to s. 718.2, the Crown submits and I agree that the case law gives the court guidance on factors to consider in determining whether s. 718.2 is applicable in any given case. Section 718.2(a)(i) reads as follows:

A court that imposes a sentence shall also take into consideration the following principles:

- (a) a sentence should be increased or reduced to account for any relevant aggravating or mitigating circumstances relating to the offence or the offender, and, without limiting the generality of the foregoing,
- (i) evidence that the offence was motivated by bias, prejudice or hate based on race, national or ethnic origin, language, colour, religion, sex, age, mental or physical disability, sexual orientation, or any other similar factor

shall be deemed to be aggravating circumstances

- [11] In the past, through case law, courts have taken into consideration in determining whether an offence is motivated by hatred related to sexual orientation the following circumstances: whether there was anti-homosexual language uttered before, during, or after the offence was committed; whether the offence was committed in a high-visibility, for lack of a better term, location where homosexuals are known to frequent; the lack of provocation; any lack of prior interaction between accused and victim; extreme or disproportionate violence; and finally, absence of any possible alternative explanation or motivation given the presence of some or all of the above-noted factors. The Crown submits essentially that all the factors noted in the case law are present here and that they have proven beyond a reasonable doubt that there is a hate motivation at play in this situation.
- [12] On behalf of Mr. Kandola, his counsel, Mr. Markovitz, raises two challenges, as I will put it, to the Crown's position in regards to s. 718.2. The first I will call provocation. The second challenge is that while agreeing that hateful language was used by Mr. Kandola before the incident, while in the group, and after the incident as evidenced by the video and the witness Petrovic, there is no evidence that at the actual time of the assault, the time the punch was thrown, that Mr. Kandola was acting with a hateful motive.
- [13] In terms of what I have referred to as provocation, the circumstances are that Mr. Smith arrived at a corner and was insulted. He was bullied. His reaction was to challenge those insulting and bullying him by asking them what they said and why they said it. This is not provocation. Provocation at law generally is an insult directed at a person, which insult is then used to explain that person's violent reaction. There is no suggestion and no evidence here that anything Mr. Smith did or said constituted an insult. It would be, in my view, a sad day if a victim of bullying such as Mr. Smith could not challenge the person bullying him without being accused of provoking behaviour, and thus lessening responsibility for subsequent assaults.

- [14] As to the second point that there is no evidence of a hateful motive at the time the punch was thrown, despite the able submissions of Mr. Markovitz on this point, I cannot accept the accused's position in this regard. The incident from start to finish, from the time of the encounter at the corner to the time that Mr. Smith is flat on his back unconscious on the ground, is a matter of seconds. Additionally, it is a continuous flowing event. The fact is that the words were spoken at the beginning of the event, an assault occurred, and then the words were spoken again immediately after the assault. This is one event. I repeat what I said during submissions. It is, in my view, not possible to separate out intent that existed both before and after a momentary and sudden act from the intent that existed when the sudden act occurred.
- [15] So the question is, has the Crown proven beyond a reasonable doubt that s. 718.2 is applicable? I am satisfied, having considered all the evidence and the position of the accused in regards to that evidence that the Crown has proven that hatred of the victim's sexual orientation was at play in this offence and was the motivation for the accused's actions and, as such, this hatred is an aggravating circumstance that I must consider in sentencing.
- [16] Turning to what the case law has told judges to consider, was there anti-homosexual language uttered during, before, or after the offence? Here, clearly it was both before and after the offence. Was the offence location in a highly visible area for homosexual persons, and that answer is also clearly yes. There was no provocation, there was no prior interaction between the accused and victim, and there is really no alternate explanation for what happened on that date in light of those other factors pointing towards this matter being motivated by hatred.
- [17] The second issue is an issue of credit for time served. The law has changed now in that Parliament has directed since the 22nd of February 2010, that persons in custody, absent special circumstances, are entitled only for credit for time served on a one-to-one basis. The law applicable, however, to Mr. Kandola and applicable at the time of the offence, I am satisfied, as directed by the British Columbia Court of Appeal, at least, is that trial judges have no discretion in crediting a person with two-to-one time for pretrial custody.
- [18] The question in this case is how long a period of time is that two-to-one credit applicable for. At the time of the offence, the 27th of September 2008, the accused was released on a form of judicial interim release. The accused was arrested on the 18th of December 2009, some 15 months after the offence, for a robbery charge arising out of Surrey, the circumstances of which occurred on the 5th of June 2009, some months previous. He was held on that charge until he successfully obtained through a Provincial Court judge judicial interim release on the 15th of February 2010. Coincidentally with his arrest in December, he was also charged related to the breach of his recognizance of bail in this matter. After being released on the charges on the 15th of February 2010, he appeared in Supreme Court on the 16th of February 2010, before Justice Bowden of this court. Justice Bowden revoked Mr. Kandola's bail and detained him from that date on this matter. The accused realistically has been in custody on

this matter, in my view, only since he was granted bail on the robbery charge on the 15th of February 2010. To today's date, that is 74 days which, when the doubling factor is applied, works out to slightly less than five months. I am satisfied that this accused is entitled to credit for five months of pre-sentence custodial time. Any pretrial custody prior to the 15th of February 2010, rationally relates to his robbery charge.

[19] Turning to sentencing principles generally, while s. 718.2(1)(a) of the Criminal Code is a factor which should influence the court in determining a fit sentence in the present case, the court must not exclude from consideration all other relevant factors which ought to influence the sentence imposed. In *R. v. Evanson*, 2009 BCCA 425, 278 B.C.A.C. 16, Madam Justice Bennett of that court noted that it is an error in principle to ascribe specific effect or credit for the various sentencing principles and factors which are triggered in a particular case. Thus, a sentencing judge needs to consider all factors in arriving at a fit sentence as opposed to taking a piecemeal approach.

[20] In section 718.1 of the Criminal Code, Parliament has directed that the fundamental principle of sentencing is that:

A sentence must be proportionate to the gravity of the offence and the degree of responsibility of the offender.

Section 718.2(b) of the Criminal Code provides that any sentence imposed:

should be similar to sentences imposed on similar offenders for similar offences committed in similar circumstances

[21] Accordingly, it is appropriate to look at previously decided cases for objective guidance in assessing a just sentence in each case keeping in mind that each offender and each offence are uniquely individual and must be dealt with on that basis.

[22] There are a wide range of sentences in assault causing bodily harm cases because each sentence must reflect the particular circumstances of the individual offence in issue. However, some guidance on a broad range within which sentences for particular offences typically fall can be found in the authorities.

[23] In *R. v. Desjarlais*, 2006 BCSC 888, Madam Justice Daphne Smith of this court, as she then was, stated at paragraph 69:

...The range of sentence for assault causing bodily harm falls between a suspended sentence and a sentence of two-to-three years.

[24] In *R. v. Matonovich*, 2007 BCCA 472, 246 B.C.A.C. 254, that court recently noted that a custodial sentence of two years imprisonment for assault causing bodily harm is at the high end of the appropriate range and is usually imposed only in particularly egregious circumstances. Quoting from that case at paragraph 15:

The maximum term of imprisonment for assault causing bodily harm is ten years. At sentencing, the Crown submitted that, "at minimum" a custodial sentence of two years was appropriate. The defence made no submissions on the range of sentence. Counsel on appeal have placed before us numerous cases which suggest a range from nine months to two years.

[25] Based on the cases to which I have been referred by counsel, it appears that a sentence of two years imprisonment for assault causing bodily harm is at the high end of the range. Such sentence typically involves aggravating factors involving the use of a weapon or assaults committed in the spousal context or committed by offenders with serious records of violent assault. The Crown submits that this case involves significant aggravating factors, and that the provisions of the Criminal Code in s. 718.2(a) are an expression of the public's revulsion and condemnation of offences which are motivated by prejudice and hate against identifiable groups. Such offences strike at the heart of the collective values of tolerance and acceptance upon which a just society is premised.

[26] In *R. v. D.S.K.*, 2005 SKCA 18, 257 Sask.R. 161, the attack on the victim was racially motivated. The court noted that offences motivated by this type of prejudice or hate are particularly abhorrent and require an increase in sentence from that which would be imposed in their absence. Though that case dealt with racial hatred, the language there is appropriate here. From paragraph 42 of that decision:

Such attitudes are utterly abhorrent and highly destructive, no matter by whom they are held, and against whom they are directed. So are such associations. And when they manifest themselves in the commission of an offence, it falls to the courts to take them into account and act upon them in keeping with the principles of sentencing found in section 718.2(a) of the Code. In other words, the offender's sentence should be increased in consequence.

[27] In my view, s. 718.2(a) is an expression of Canadian social values which include a respect for diversity and is a direction from Parliament that sentencing judges ought to give substantial weight to this aggravating factor. In fact, before Parliament even enacted this section in 1995, the courts had determined that offences which were motivated by prejudice or hate are particularly heinous and the sentence imposed in such circumstances must be one which expresses the public's abhorrence for such conduct and their refusal to countenance it.

[28] In *R. v. Ingram*, (1977), 35 C.C.C. (2d) 376 (Ont. C.A.), a decision relied on by Crown in this case, the accused were both convicted of assault causing bodily harm. At the time of the offences, the accused were 21 and 18 years of age, had minor criminal records, and their offences were committed while they were on probation. The victim of the crime was from Tanzania and had recently immigrated to Canada. The accused in that case shouted racial slurs towards the victim, chased him down a subway platform, assaulted him, and pushed him onto the platform of the subway tracks. The victim was severely injured and hospitalised for four-and-a-half months. On appeal, the Court of Appeal imposed higher sentences of two-and-a-half and two years for the offenders. In doing so, the court held at

paragraph 8:

It is a fundamental principle of our society that every member must respect the dignity, privacy and person of the other. Crimes of violence increase when respect for the rights of others decreases, and, in that manner, assaults such as occurred in this case attack the very fabric of our society. ...An assault which is racially motivated renders the offence more heinous. Such assaults, unfortunately, invite imitation and repetition by others and incite retaliation. The danger is even greater in a multicultural, pluralistic urban society. The sentence imposed must be one which expresses the public abhorrence for such conduct and their refusal to countenance it.

[29] Turning to mitigating factors, Mr. Markovitz on behalf of Mr. Kandola points to a number of mitigating circumstances in his submissions. First, there is the plea of guilty which is acknowledged; secondly, the fact is that Mr. Kandola is a young man with no criminal record who has the support of his family and a hope for rehabilitation; thirdly, it is argued that the publicity associated with the public condemnation of Mr. Kandola which has surrounded these proceedings has had some rehabilitory effect on Mr. Kandola already; and finally, Mr. Markovitz relies on Mr. Kandola's general remorse for his action and his apology.

[30] Turning to the issue of Mr. Kandola's youth, he is 22 years of age. While the court ought to carefully assess all other available options before imposing a custodial sentence on a youthful first offender which Mr. Kandola is, it is not possible to treat all offenders, in my view, in the same way. Some crimes are more serious than others and some offences, such as this offence, are more grave than others. In the case of youthful first offenders, ordinarily, the primary objective in sentencing is rehabilitation and individual deterrence. While rehabilitation must be considered when young first offenders are sentenced, that is not to say that the court is unable to impose relatively harsh sentences on first-time offenders when it is justified in the circumstances.

[31] Again, turning to the case law and the case of R. v. Trask, [1974] O.J. No. 849, the Ontario Court of Appeal, in that case, stated at paragraph 4:

It is a principle of sentencing often acted upon by this Court that in ordinary circumstances a custodial sentence should be avoided when practicable in the case of a first offender. In the case of a serious offence involving violence to the person, however, that principle must yield to the necessity of a sentence which gives emphasis to the factor of general deterrence to like minded persons. In this case we do not think the learned trial Judge gave undue weight to that factor and we see no error in principle in the sentence imposed, nor do we think the sentence is disproportionate to the gravity of the offence.

[32] In the case of R. v. Atkinson (1978), 43 C.C.C. (2d) 342 (Ont. C.A.), the court held that it is appropriate for the principle of rehabilitation to yield in cases where senseless assaults have been committed against an innocent victim because of his or her sexual orientation. Again, the Ontario Court of Appeal, Justice Dubin, stated as a general principle and considering what an appropriate sentence should be for a youthful offender, the paramount consideration should be their immediate rehabilitation and the length of sentence should be

determined by considerations of individual rather than general deterrence. However, in assaults of this nature, that principle should not be a paramount consideration.

- [33] Turning to the alleged mitigating factor of publicity, in his submissions, Mr. Markovitz referenced the extensive media coverage which Mr. Kandola has been subject to and his public vilification as a gay-basher. Mr. Markovitz is suggesting that this ought to be treated as a fact which mitigates the accused's sentence to some degree. In my view, there is an insufficient evidentiary basis on which a finding could be made that the publicity surrounding Mr. Kandola and his offence has had an inordinate impact beyond the stigma which attaches to anyone who is found guilty of criminal conduct. Accordingly, while the pre-sentence publicity to which Mr. Kandola has been subjected may satisfy in part the objective of denunciation and deterrence, it does not satisfy these objectives in their entirety and, in large part, the publicity surrounding these proceedings is a result of the fact that the accused committed the type of crime for which he is being sentenced, a further reflection, likely, of the revulsion with which the community at large views this conduct.
- [34] Turning to remorse as a mitigating factor, I do note the submission today of Mr. Kandola and his letter read by his counsel directed to the victim. With respect, however, the evidence of remorse in this case is limited and late in the day. Mr. Markovitz advised the court that his client is sorry for what he has done. Mr. Kandola has done the same both in court on April 26 and today through his letter. In my view, however, for a court to consider remorse and regret as a significant mitigating factor, there must be more evidence, not just a statement or letter prepared and read as sentence is looming. This would have had a greater impact, no doubt on both Mr. Smith and the court, if Mr. Kandola had done this prior to the moment before sentencing is passed.
- [35] I turn to an analysis of the mitigating and aggravating factors in this sentencing. Mitigating factors which I accept: the accused has pled guilty. He has saved the victims the necessity of a potentially protracted trial. This is Mr. Kandola's first offence. His record is clean. Mr. Kandola is only 22 years old. Age is a mitigating factor because we as a society believe that youth sometimes explains rash behaviour and that young people have a greater propensity and greater time to mend their criminal behaviour and mend their ways.
- [36] Turning to aggravating factors, there were significant injuries in this case to the victim, Jordan Smith, as I have noted. As I have found, this act was motivated by hatred directed at the victim because of his sexual orientation. Additionally, I am struck by the senselessness of this attack and the extent to which the victim has suffered and the extent to which upon a simple analysis this whole circumstance could have been avoided. The first aspect of this unfortunate event was the name-calling. Now, that is not necessarily criminal. It is bad behaviour, but not necessarily criminal. At this point, Mr. Smith challenged Mr. Kandola and the others and they chose not to back down. The second aspect of this offence is what I call the gang pushing back of Mr. Smith and surrounding him. This in and of itself likely constitutes an assault. It is threatening behaviour. This did not inspire Mr. Kandola or the others to back down. The third aspect of this offence is the punch. It is vicious and it is

unprovoked. It is a cowardly-like approach, sneaking up on someone from behind. The effect of this third aspect of the offence is to knock Mr. Smith out so that he is flat on the ground and unconscious. Does this give Mr. Kandola pause for thought? Does this cause him to back down? No, it does not.

- [37] The fourth aspect of the offence, standing over an unconscious man further berating him with derogatory terms, name-calling and threats of future violence, and yet a prone, unconscious man does not cause Mr. Kandola to back down. To anyone at any of these four junctures, there was an opportunity to stop, an opportunity to see that the matter was getting out of control, an opportunity to change your ways, an opportunity to choose a different path. This opportunity was never chosen by Mr. Kandola. It is only the threat that the police were being called that ended this event.
- [38] Sentencing, as I have said earlier, involves the balancing of numerous factors. There is a component of punishment for the individual for their conduct. There is a component of denouncing the conduct of the individual. There are components of general and specific deterrence, specific deterrence to this individual and general deterrence to those in society.
- [39] Deterrence, in my view, is particularly crucial when, as here, the Crown has proven beyond a reasonable doubt that hatred is a motivation in this crime. It is hard to fathom how in this day and age, something as non-confrontational as two men holding hands can cause such a visceral reaction in this accused. Canada is a free, tolerant, inclusive society, a society which welcomes citizens from many lands, of various racial origins, persons who speak numerous different languages, and have a variety of religious or political backgrounds. In Canada, people are free to live their lives as they choose, be they heterosexual or homosexual. In Canada, we do not tolerate crime based on prejudice or hateful motives related to sexual identity, related to race, related to religion, related to age, or related to language. Mr. Kandola individually must know his actions are not only contrary to the law, but are deplored by Canadian society as articulated by Parliament in s. 718.2 of the Criminal Code. In terms of general deterrence, those who wish to act like he did on September 27, 2008, must know that there are real consequences for their behaviour if they act in that fashion.
- [40] Having reviewed all the evidence, considered the case law and the submissions of counsel, and in applying the principles of sentencing as set out in the Criminal Code, I am persuaded that a significant period of additional incarceration is necessary for this accused. To sentence him to time served as suggested by his counsel, five months, in my view, is woefully inadequate considering what I have concluded in regards to this being a matter motivated by hatred and what the law directs in that regard.
- [41] Based on what the Crown has suggested - Mr. Kandola, I sentence you to a total period of 17 months incarceration. Recognizing credit for time served on a double-time basis, two-and-a-half months equalling five months, I sentence you, Mr. Michael Kandola, to a further period of 12 months incarceration.

- [42] Following your incarceration, you are to serve a probation period of one year. The conditions of that probation are that you are to keep the peace and be of good behaviour. You are to report on release to your probation officer and then as directed. You are to reside where directed by a probation officer and not change your address without the probation officer's consent in writing.
- [43] You are to have no contact with Jordan Smith or Charles McKay.
- [44] You are not to attend the areas of Downtown Vancouver south of Robson Street to False Creek or English Bay, east of and including Denman Street, and west of and including Howe Street.
- [45] You are to take and successfully complete any anger management program and alcohol counselling program as directed by your probation officer.
- [46] You are prohibited from possessing any weapons during the period of your probation.
- [47] You are to complete 50 hours of community work service.
- [48] Though the Crown has not requested it, I note that s. 487.051 of the Criminal Code, provides that a DNA order is mandatory for assault causing bodily harm as it is a primary designated offence and I am directing that there be a DNA sample of Mr. Kandola.
- [49] Mr. Kandola, you are young, sir. You have a time to change your ways and you have time to modify your behaviour. You have indicated to the court that you have made a start on that and I wish you luck on continuing in that, sir. It is not too late for you to turn your life around. Thank you.
- [50] MS. NEARING: Your Lordship, were you making a firearms prohibition? Madam Registrar was wondering whether that was part of the probation order or a separate 109 order.
- [51] THE COURT: No, it is part of the probation order.

"The Honourable Mr. Justice Groves"

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