

CANADA / JUDGMENT

R. v. Kong

2020 BCSC 139

COURT

Supreme Court of British Columbia

DECIDED

20 January 2020

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2020 BCSC 139 R. v. Kong

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

R. v. Kong,

2020 BCSC 139

Date: 20200120

Docket: 29854W

Registry: Vancouver

Between:

Regina

v.

Robert Stanley Kong

Before: The Honourable Mr. Justice Ehrcke

On appeal from: An order of the Provincial Court of British Columbia, dated October 25, 2019 (R. v. Kong, Vancouver File No. 257000-1)

Oral Ruling on Detention Review Hearing

Counsel for Crown:

Violet Allard

Counsel for Accused:

John Turner

Place and Date of Hearing:

Vancouver, B.C.

January 14, 2020

Place and Date of Judgment:

Vancouver, B.C.

January 20, 2020

- [1] The accused, Robert Stanley Kong ("Mr. Kong"), is charged, on information 257000, with two counts of assault, contrary to s. 266 of the Criminal Code. On these hybrid offences, the Crown has elected to proceed summarily.
- [2] Because Mr. Kong has now been in custody in excess of 30 days and his trial has not yet begun, he is now before the Court for a detention review hearing pursuant to s. 525 of the Criminal Code.
- [3] The circumstances alleged by the Crown are that on October 24, 2019, the complainant in Count 2, Mr. Alshiblawi, was at a Tim Horton's restaurant on Victoria Drive near 41st Avenue in Vancouver, having a coffee with his wife. Mr. Alshiblawi is 65 years old. He is disabled. He is a recent immigrant to Canada and speaks no English. At around 2:30 p.m., he was confronted by Mr. Kong, who was demanding that he give something back, but Mr. Alshiblawi could not understand what was being said due to his inability to speak English. Mr. Kong struck him in the face two times.
- [4] The complainant in Count 1, Mr. Al-Dulaime, intervened and took out his cell phone to call the police. Mr. Kong then punched Mr. Al-Dulaime in the face and attempted to take his phone to prevent him from completing the call. The two men wound up wrestling on the ground, and some identification as well as a cell phone fell out of Mr. Kong's pocket. Mr. Kong ran away but was arrested shortly afterwards.
- [5] The Crown submits that there is little doubt that the man arrested by the police is the man who was fighting at Tim Horton's, because the cell phone he dropped rang, and when police answered it, the caller was Mr. Kong's father. In addition, there is the identification that fell out of his pocket. Finally, he is recognizable in a surveillance video that captured much of the incident.
- [6] At the time of his arrest on this incident, Mr. Kong was awaiting trial on information 255282 which alleges an indecent act committed on September 19, 2019. A term of his bail order on that charge was that he reside at the Changing Addictive Attitudes Recovery House on Slocan Street in Vancouver. The trial of the indecent act charge is set for April 6-8, 2020.

- [7] On November 1, 2019, Mr. Kong appeared before Vancouver Provincial Court Judge Rideout for a bail hearing on both informations. His Honour Judge Rideout released him again on information 255282, but ordered him detained on the two assault charges on information 257000.
- [8] No trial date has yet been set for the assault charges, but Crown counsel tells me that it has been ready to fix a date since November 2019 and that a trial date in March 2020 can be obtained.
- [9] The Crown is opposed to Mr. Kong's release on the assault charges and says that he should be detained on the secondary ground mentioned in s. 515(10) of the Criminal Code. That section reads:

515 (10) For the purposes of this section, the detention of an accused in custody is justified only on one or more of the following grounds:

- (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 witness to the offence, or any person under the age of 18 years, 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
 - (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, 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.
- [10] The Crown submits that there is a substantial likelihood that Mr. Kong will commit further offences, particularly further assaults, if he is released. The Crown is concerned that Mr. Kong appears to have mental health issues that he does not properly address when out of custody. He has a poor record of keeping appointments with Forensic Psychiatric Services, and a poor record of maintaining use of his prescribed medication. His mental health issues are exacerbated by his use of prohibited drugs, particularly cocaine and perhaps Fentanyl.

- [11] The Crown also refers to Mr. Kong's criminal record. Over the last four years, he has been convicted three times for uttering threats, once for possession of a weapon for a dangerous purpose, once for theft, once for assault, once for break and enter, and once for breach of probation.
- [12] Mr. Kong is 32 years old. He was born and raised in Vancouver. He left school in grade 11 and started working. His father continues to be very supportive of him.
- [13] The principles and guidelines that should be applied when considering a contested bail application were summarized in *R. v. Antic*, 2017 SCC 27, at paragraph 67.
- [14] The nature of a review hearing under s. 525 of the Criminal Code was clarified in *R. v. Myers*, 2019 SCC 18, where the Supreme Court of Canada said at paragraph 63:

At the hearing, unreasonable delay is not a threshold that must be met before reviewing the detention of the accused. The overarching question is only whether the continued detention of the accused in custody is justified within the meaning of s. 515(10). 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. If there was no initial bail hearing, the s. 525 judge is responsible for conducting one, taking into account the time the accused has already spent in pre-trial custody. Ultimately, s. 525 requires a reviewing judge to provide accused persons with reasons why their continued detention is -- or is not -- justified. Finally, the judge should make use of his or her discretion under ss. 525(9) and 526 to give directions for expediting the trial and related proceedings where it is appropriate to do so. Directions should be given with a view to mitigating the risk of unconstitutional delay and expediting the trials of accused persons who are subject to lengthy pre-trial detention.

- [15] The question before me is whether the continued detention of Mr. Kong is justified within the meaning of s. 515(10). The Crown submits that his detention continues to be justified on the secondary ground, while counsel for Mr. Kong submits that he should be released on conditions. Mr. Kong states that he could live with relatives and that he has been clean from drugs for the last several months while he has been in custody.
- [16] Neither the Crown nor the defence submits that there has been any significant change in circumstances.
- [17] An important consideration on this s. 525 review is the amount of delay before trial. Since his arrest on the assault information, Mr. Kong has been in custody for almost three months. Applying a multiplier of 1.5 to one, that would be equivalent to 4-1/2 months if he were sentenced today.

- [18] I am satisfied that there has not been any unreasonable delay, but I must still consider the proportionality of the time in pretrial custody when compared with any sentence that Mr. Kong might receive if convicted.
- [19] Pursuant to Bill C-75, the maximum penalty for a conviction under s. 266 of the Criminal Code was changed effective September 19, 2019. Whereas the maximum penalty for a hybrid offence had been six months imprisonment where the Crown proceeded by summary conviction, pursuant to the current s. 787, the maximum on summary conviction is now two years less one day.
- [20] The Crown submits that it will likely seek a sentence in excess of six months imprisonment if Mr. Kong is convicted. Given Mr. Kong's background and the circumstances of the offence, it appears that a sentence of six to nine months is not outside the range of possible sentences.
- [21] In all of the circumstances, I find that Mr. Kong's continued detention pending trial on information 257000 is justified on the secondary ground under s. 515(10) of the Criminal Code. I am satisfied that there is a substantial likelihood of his committing further offences if he is released.
- [22] I do not consider that Mr. Kong's continued detention until the end of his trial in March would be disproportionate. It appears that the Crown has a relatively strong case. For these reasons, the detention order is upheld.

"Ehrcke J"

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