

CANADA / JUDGMENT

R. v. Zakuti

2020 BCSC 904

COURT

Supreme Court of British Columbia

DECIDED

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2020 BCSC 904 R. v. Zakuti

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

R. v. Zakuti,

2020 BCSC 904

Date: 20200616

Docket: 29939W

Registry: Vancouver

Regina

v.

Sevim Zakuti

Restriction on publication: Pursuant to s. 525(8) of the Criminal Code, R.S.C., 1985, c. C-46

Before: The Honourable Mr. Justice Marchand

Oral Reasons for Judgment

Counsel for the Crown:

A. Duncan

Counsel for the Accused:

K. McCullough

Place and Date of Hearing:

Kamloops, B.C.

June 3, 2020

Place and Date of Judgment:

Vancouver, B.C.

June 16, 2020

Introduction

[1] Sevim Zakuti is facing a 21-count indictment. He is charged as follows:

1. Seven counts of sexual assault;
2. One count of sexual assault with a weapon;
3. One count of choking to commit sexual assault;
4. Two counts of unlawful confinement;
5. One count of using an imitation firearm to commit an unlawful confinement;
6. Two counts of pointing a firearm;
7. Two counts of possessing a firearm for a dangerous purpose;
8. One count of possessing a firearm while prohibited from doing so;
9. One count of assault; and
10. Three counts of uttering threats.

[2] The charges against Mr. Zakuti arise from events that are alleged to have occurred between August 1 and 10, 2019 in Merritt, British Columbia.

[3] Following a bail hearing held over two days, the bail hearing judge ordered that Mr. Zakuti be detained on the so-called primary and secondary grounds. Based on Mr. Zakuti's criminal history, the seriousness of the charges and concerns about Mr. Zakuti's trustworthiness, the bail hearing judge determined it was necessary to detain Mr. Zakuti to ensure his attendance in court and to protect public safety.

[4] Mr. Zakuti has been in custody since September 4, 2019. He is before the court for a detention review under s. 525 of the Criminal Code, R.S.C. 1985, c. C-46 [Code]. He submits that his continued detention is no longer justified in view of a combination of factors, including: his progress while in custody; his updated bail plan; the cancellation of his preliminary inquiry due to COVID-19; concerns about bringing his case to trial in a timely fashion due to COVID-19 and the court's "culture of complacency"; and new information concerning the credibility and reliability of the complainants.

- [5] The Crown remains opposed to Mr. Zakuti's release on the primary, secondary and tertiary grounds. The Crown submits that it has a very strong case against Mr. Zakuti involving very serious allegations. The Crown notes that Mr. Zakuti has a history of failing to attend court. The Crown raises concerns about Mr. Zakuti's credibility and reliability. The Crown submits that there are serious shortcomings in Mr. Zakuti's bail plan.

Circumstances

- [6] Broadly, the Crown alleges that Mr. Zakuti arrived in Merritt in early August 2019. While there, he interacted with the four complainants over about a ten-day period. All of the complainants are young Indigenous women with addiction issues. Mr. Zakuti is alleged to have seriously sexually assaulted the four complainants with the sexual assaults ranging from inappropriate touching to forced oral intercourse to forced vaginal intercourse.
- [7] The Crown alleges that Mr. Zakuti controlled the complainants in a variety of ways including by: holding himself out as being a member of the drug mob; purporting to hold sway over the police; using threats, including threats to family members and pets of the complainants; assaulting the complainants; showing and/or pointing a gun at the complainants; taking the personal belongings of one of the complainants; and verbally abusing the complainants.

Overview of Legal Principles Concerning Bail

- [8] In recent years, the Supreme Court of Canada has released a number of important decisions concerning bail, including *R. v. St-Cloud*, 2015 SCC 27, *R. v. Oland*, 2017 SCC 17, *R. v. Antic*, 2017 SCC 27 and *R. v. Myers*, 2019 SCC 18. Together with earlier authorities such as *R. v. Pearson*, [1992] 3 S.C.R. 665; *R. v. Morales*, [1992] 3 S.C.R. 711 and *R. v. Hall*, 2002 SCC 64, these cases reinforce a number of important legal principles at the bail stage.
- [9] The starting point is that, under s. 11(d) of the Charter, accused persons are constitutionally presumed to be innocent. The corollary to the presumption of innocence is the s. 11(e) right of accused persons not to be denied reasonable bail without just cause, which includes the right to bail on reasonable terms: *Hall* at para. 13; *Pearson* at p. 689; *Antic* at paras. 1 and 67.
- [10] Canada is said to have an "enlightened" bail process that recognizes that the pre-trial detention of presumptively innocent persons runs the risk of undermining public confidence in the administration of justice: *Antic* at para. 1; *Myers* at para. 22; *St-Cloud* at para. 86. That is so because remand conditions are often "dire", and pre-trial detention:
1. Hinders the ability of an accused person to raise a defence;
 2. Results in a loss of liberty and, in some cases, the livelihood of an accused person;
 3. Can have a profoundly negative impact on the physical and emotional well-being of an accused person and, in some cases, that person's family; and

4. Can induce unwarranted guilty pleas that result in the wrongful conviction of innocent people.

(See Myers at paras. 26-27.)

- [11] I agree with Mr. Zakuti that these concerns are heightened by the COVID-19 pandemic. The risk of unforeseen delays in detained accused getting to trial and fears regarding contracting the virus while in custody can be expected to detrimentally affect the emotional well-being of at least some detained accused. Furthermore, if COVID-19-related delays arise, detained accused may experience a greater loss of liberty than would otherwise be the case.
- [12] Under Canada's enlightened bail process, the detention of an accused person is the exception and release the rule: Morales at p. 728; St-Cloud at para. 70; Myers at para. 1.
- [13] Bail must only be denied in a narrow set of circumstances, must be necessary to promote the proper functioning of the bail system and must not be undertaken for any purpose extraneous to the bail system: Pearson at p. 693; Antic at para. 40.
- [14] Section 515(10) of the Code sets out the only available grounds to justify the detention of an accused person. Under s. 515(10), an accused may only be detained where it is necessary:
 - a) To ensure the attendance of the accused in court (the so-called primary ground);
 - b) For the protection or safety of the public (the so-called secondary ground); or
 - c) To maintain confidence in the administration of justice (the so-called tertiary ground).
- [15] Normally, the onus is on the Crown to demonstrate that it is necessary to detain an accused. In this case, however, Mr. Zakuti is alleged to have committed various offences involving a firearm while subject to a weapons prohibition. As a result, under s. 515(6)(a)(viii) of the Code, the onus is on Mr. Zakuti to demonstrate that it is not necessary to detain him.
- [16] Recent amendments to the Code codify the principle of restraint at the bail stage such that the court must give primary consideration to the release of accused persons at the earliest possible time and on the least onerous conditions that are appropriate in the circumstances, including conditions that are "reasonably practicable" for the accused to comply with: s. 493.1.
- [17] As bail hearings are summary proceedings, the rules of evidence are "relaxed": St-Cloud at paras. 57 and 129. This principle is expressed in s. 518(1)(e) of the Code, which states that the judge on a bail hearing "may receive and base his decision on evidence considered credible or trustworthy by him in the circumstances of each case." This may include hearsay or evidence that might otherwise be inadmissible at trial: Toronto Star Newspapers Ltd. v. Canada, 2010 SCC 21 at para. 28. In British Columbia, the submissions of counsel normally form the evidentiary basis of the hearing: R. v. Cheung, 2016 BCCA 221.
- [18] Turning to detention reviews under s. 525 of the Code, Myers is the leading case.

[19] Myers establishes that the purpose of a s. 525 detention review hearing is "to prevent accused persons from languishing in pretrial custody and to ensure a prompt trial": para. 24. The overarching question is whether the continued detention of the accused in custody is justified within the meaning of s. 515(10): para. 46. While the exercise involves a review of the detention itself, the detention review hearing judge should show respect for any findings of fact made by the bail hearing judge if there is no cause to interfere with them. Further, the balancing exercise conducted by the bail hearing judge is to be reviewed in light of the time that has elapsed and any other relevant considerations: para. 47.

[20] At a detention review hearing, both parties may make submissions on the basis of any additional credible or trustworthy information which is relevant or material. Any new evidence must meet the following four criteria:

1. The evidence must truly be new or if it existed at the time of the initial bail hearing, it can be admitted only if it was not tendered for a reason that is legitimate and reasonable;
2. The evidence must be relevant;
3. The evidence must be credible in the sense of being reasonably capable of belief; and
4. The evidence must be significant in the sense that it is reasonable to think that it could have affected the balancing exercise engaged in by the initial bail hearing judge.

(See Myers at para. 49 and St-Cloud at paras. 132-135.)

[21] In determining whether the detention remains justified, the detention review hearing judge should consider the impact that the time that has already elapsed or the anticipated passage of time will have on the appropriateness of the detention. The detention review hearing judge must be "sensitive to whether the continued detention of the accused person could erode public confidence in the administration of justice." This is a question of proportionality and reviewing judges must be "particularly alert to the possibility that the amount of time spent by an accused in detention has approximated or even exceeded the sentence he or she would realistically serve if convicted": Myers at paras. 50-51.

[22] In Myers, Wagner J. (as he then was) specifically addressed cases where substance abuse and mental health issues may be at the root of the accused's alleged criminal behaviour. At para. 67, Wagner J. held in part:

judges and justices presiding over bail hearings should always give very careful consideration to release plans that involve supervised treatment for individuals with substance abuse and mental health issues. Release into treatment with appropriate conditions will often adequately address any risk raised under s. 515(10), and such a strategy is a less onerous alternative than provincial remand. It may also substantially address the root causes of the accused person's alleged criminal behaviour and reduce the likelihood of future criminal conduct. In accordance with the principles articulated in Antic, we must not lose sight of the fact that pre-trial detention is a measure of last resort.

[23] Finally, s. 525(9) empowers the detention review hearing judge to give directions for expediting the trial of a detained accused, if appropriate to do so: Myers at paras. 57 and 63.

[24] The parties made relatively brief submissions on the impact of the COVID-19 pandemic on detention review hearings under s. 525. Over the last couple of months, I have reviewed a number of authorities on the topic. What I take from the decisions I have reviewed is that COVID-19-related concerns must be considered but are not determinative.

[25] The early authorities establish that a detention review hearing judge should take the impact of COVID-19 into account in their assessment of whether the continued detention of an accused is justified and/or whether detaining the accused is necessary to maintain public confidence in the administration of justice in the particular circumstances of the case. This exercise will involve weighing factors such as:

- Limits on social distancing in correctional settings;
- The risks to individuals and the community associated with a COVID-19 outbreak in the prison context;
- The strength of any evidence concerning the special vulnerability of the accused to the effects of COVID-19;
- Whether COVID-19 has been detected at the relevant correctional facility and the steps being taken by that facility to minimize the risks associated with COVID-19; and
- The COVID-19-related risks the accused will face if released.

(See, for example, R. v. J. S., 2020 ONSC 1710 at paras. 18-20, R. v. Berlinguette, 2020 BCSC 477 at paras. 35-37, R. v. G.T.B., 2020 ABQB 228 at paras. 28-54, and R. v. Kazman, 2020 ONCA 251 at paras. 17-21.)

Reasons of the Bail Hearing Judge

[26] The bail hearing judge gave relatively brief but considered reasons for judgment.

[27] Like me, the bail hearing judge considered it unnecessary to detail the allegations against Mr. Zakuti. Rather, the bail hearing judge briefly summarized the circumstances. After doing so, the bail hearing judge characterized the complainants as "vulnerable in that they were drug users living on the edge of poverty."

[28] The bail hearing judge then summarized Mr. Zakuti's background and the evolution of Mr. Zakuti's bail plan from a cash deposit, residence at a recovery house and electronically monitored house arrest to a cash deposit plus a named surety and house arrest at the surety's residence. The bail hearing judge noted "concerning entries" in Mr. Zakuti's criminal record, including three fail to attend court and two fail to comply with a recognizance convictions as well as convictions for assault and use of a firearm. The bail hearing judge noted that Mr. Zakuti is alleged to have committed the present offences while on probation. The bail hearing judge also noted that Mr. Zakuti is facing charges of breach of probation

and obstruction in Ontario.

- [29] Though he did not go into the details, the bail hearing judge acknowledged that Mr. Zakuti had raised arguments regarding the credibility and reliability of the Crown's witnesses. The bail hearing judge then concluded "I am sure there are triable issues with respect to the 21 counts that he is charged with."
- [30] The bail hearing judge considered information provided by Mr. Zakuti concerning his education and work history not to be trustworthy or credible.
- [31] In view of Mr. Zakuti's lack of trustworthiness concerning his ability to comply with any terms of bail, the seriousness of the charges and the fact that Mr. Zakuti was on probation at the time the alleged offences were committed, the bail hearing judge concluded that Mr. Zakuti's bail plan did not adequately address primary and secondary ground concerns. In the result, the bail hearing judge found it necessary to detain Mr. Zakuti to ensure his attendance in court and for the protection or safety of the public. The bail hearing judge did not address the tertiary ground.

New Evidence

- [32] I am satisfied that there is new admissible evidence for the purposes of this review, as follows:

- Two of the complainants are alleged to have committed criminal offences within the four months preceding the alleged criminal conduct by Mr. Zakuti;
- Two of the complainants have criminal convictions pre-dating the alleged criminal conduct by Mr. Zakuti;
- One of the complainants is alleged to have committed a criminal offence in January 2020; and
- Mr. Zakuti is also facing a fail to attend court charge in Ontario such that there are three warrants outstanding in Ontario for Mr. Zakuti.

- [33] I am unable to conclude, however, that information provided by the Crown regarding a somewhat similar complaint made against Mr. Zakuti in Vancouver shortly after the present allegations qualifies as new evidence for the purposes of this s. 525 review. It appears that this information was available to the Crown at the time of the original bail hearing and the Crown has not explained why the information was not tendered at that time. Accordingly, I am unable to determine if the information "was not tendered for a reason that is legitimate and reasonable".

Bail Plan

- [34] In assessing whether Mr. Zakuti has demonstrated that it is not necessary to detain him, I must consider his bail plan.

[35] Mr. Zakuti proposes to be under house arrest at one of the Trilogy Houses operated by The Realistic Success Recovery Society in Surrey. He proposes to abide by all of their house rules and attend all of their programming. Mr. Zakuti's mother is prepared to make a \$5,000 cash deposit in support of Mr. Zakuti's release. Finally, Mr. Zakuti promises to abide by various protective terms.

Analysis

The Primary Ground

[36] In addressing the primary ground, I will begin by setting out s. 515(10)(a) in full:

(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

[37] I find myself in complete agreement with the bail hearing judge that Mr. Zakuti presents serious primary ground concerns.

[38] Mr. Zakuti has three prior convictions for failing to attend court. One of these convictions relates back to 2010 when Mr. Zakuti was facing charges of sexual assault and sexual assault causing bodily harm, and left Canada for five years to live in Kosovo: see agreed statement of facts in *R. v. Zakuti*, 2017 ONSC 5685 at para. 4. Mr. Zakuti also has two convictions for failing to abide by terms of a recognizance. Further, he was less than candid with the bail hearing judge regarding his personal background. He has three outstanding warrants in Ontario for obstruction, breach of probation and failing to attend court. The obstruction charge involves an allegation that Mr. Zakuti provided a police officer with false identification and was found in possession of a very substantial amount of cash. Finally, Mr. Zakuti does not have significant ties to British Columbia.

[39] The question is whether the combination of factors identified by Mr. Zakuti is strong enough to overcome the primary ground concerns. In my respectful opinion, it is not.

[40] I have to acknowledge that Mr. Zakuti has made good use of his time while in custody. I commend his efforts to improve himself through completing so many Substance Abuse Management and Essential Skills to Success modules. I also commend Mr. Zakuti for his efforts in identifying a highly reputable recovery facility that is willing to admit him in spite of the nature and seriousness of the charges he is facing.

[41] I also have to acknowledge that, at this stage, I have only heard the Crown's version of events. Nevertheless, despite Mr. Zakuti's comprehensive submissions and the presence of triable issues, in my view, the Crown case is cohesive and compelling. There are four complainants with similar accounts of their interactions with Mr. Zakuti and no apparent motive to identify him as a perpetrator. While no one witnessed the alleged sexual violence

perpetrated by Mr. Zakuti, the accounts of the complainants are supported by the evidence of a number of other witnesses.

[42] It will ultimately be up to the trial judge or jury to weigh all of the evidence to determine whether the allegations against Mr. Zakuti have been proven beyond a reasonable doubt. In doing so, they will undoubtedly consider Mr. Zakuti's theory that the complainants cooked up their stories to curry favour with the police. All I can say as the detention review hearing judge is that nothing raised by Mr. Zakuti during the bail hearing and detention review is inconsistent with the Crown case. In particular, I note that:

- I am unable to assess how the vulnerability or lack of vulnerability of the complainants relates to their credibility and reliability. That will be up to the trial judge or jury;
- There is nothing unusual about sexual assault complainants, particularly Indigenous sexual assault complainants, taking time to report sexual violence to the police;
- There is nothing unusual about women, such as the complainants, discussing troubling events, such as those alleged against Mr. Zakuti, prior to making complaints to the police. The fact that they did so is evidence that they had an opportunity to collude but is not evidence that they actually colluded;
- There is nothing unusual about a lack of independent evidence of what happened between Mr. Zakuti and the complainants. Sexual violence usually occurs in private so it is not surprising that there are no independent eye witnesses;
- There is nothing unusual about a lack of objective evidence. When complaints of sexual violence are delayed, often no objective evidence, such as DNA evidence, is available;
- There is nothing unusual about inconsistencies between the versions of events given by complainants and/or other witnesses. In fact, a certain level of inconsistency is expected; and
- Often, when a complainant makes a statement against interest during a police interview, such as admitting that they were engaged in criminal activity, that enhances rather than detracts from their credibility and reliability. The trial judge or jury will have to assess whether the complainants did so in this case in the hopes of securing advantageous treatment by the police in relation to their own matters.

[43] My point in commenting on the strength of the Crown case in my analysis of the primary ground is to be in a position to comment on the motivation Mr. Zakuti may have to abscond. Given that he fled Canada in 2010 for five years when he was facing two counts of sexual assault, I am gravely concerned that Mr. Zakuti will be even more motivated to flee in the face of an indictment comprised of 21 very serious counts.

- [44] While it is positive that Mr. Zakuti proposes to reside at a reputable recovery facility, no information was shared with me to link Mr. Zakuti's substance use to his flight to Kosovo and his failure to attend court on other occasions. Further, while The Realistic Success Recovery Society can be trusted to report any apparent breaches of bail, the facility is not secure and will not prevent Mr. Zakuti from simply leaving.
- [45] In addition, I am not satisfied that a \$5,000 deposit will be sufficient to assure his attendance in court. Mr. Zakuti appears to be resourceful and to have resources. In particular, I note that the bail hearing judge raised serious concerns about the veracity of information Mr. Zakuti shared regarding his personal background, including his educational and employment background. Despite this, Mr. Zakuti offered no new information to substantiate the background information he had provided. As a result, I am very concerned that Mr. Zakuti was found in possession of a very substantial amount of cash when he was arrested in Ontario for obstructing justice, despite having no apparent legitimate source of income.
- [46] Finally, while Mr. Zakuti may not be able to get back to Kosovo during the pandemic, he has other options within Canada. For instance, while facing relatively minor offences in Ontario, Mr. Zakuti found his way quite easily to British Columbia.
- [47] In all of the circumstances, Mr. Zakuti has failed to demonstrate that his continued detention is not justified on the primary ground.

The Secondary Ground

- [48] In addressing the secondary ground, I will begin by setting out s. 515(10)(b) in full:
- (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:
- (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
- [49] In his widely-cited decision in *R. v. Abdel-Rahman*, 2010 BCSC 189, Halfyard J. neatly summarized the decisions a bail hearing judge must make to reach the conclusion that an accused must be detained on the secondary ground at para. 23 as follows:
- [23] In my opinion, the decisions that a judge must necessarily make in order to reach the conclusion that detention is justified on the secondary ground, are the following:
- a) First, that there is a risk that the accused will either commit an offence, or will interfere with the administration of justice, if he is released;
- b) Second, that this risk is of such magnitude that it amounts to a "substantial likelihood;"

- c) Third, that the said risk would constitute a danger to public safety (in general, or to a specific victim or witness) if the accused is released; and
- d) Fourth, that the detention of the accused is "necessary," because the identified danger to public safety cannot be prevented or reduced to an acceptable level by bail conditions (such as reporting to authorities, curfew, no-contact, mobility restrictions, sureties or cash bail).

[50] In considering the likelihood of dangerousness, in *R. v. Wu*, 1998 CanLII 4378 (B.C.C.A.) at para. 10 and *Cheung* at para. 51, our Court of Appeal has adopted the following passage from *R. v. Rondeau*, (1996) 108 C.C.C. (3d) 474 (Q.C.A.) (translation) at p. 478:

In the case at bar, the issue concerns the assessment of the likelihood of dangerousness. In my view, several factors must be taken into account in deciding this question, including (1) the nature of the offence, (2) the relevant circumstances of the offence, which may put in issue events prior to and subsequent to the offence, (3) the likelihood of a conviction, (4) the degree of participation of the accused, (5) the relationship between the accused and the victim, (6) the profile of the accused, i.e., his occupation, his lifestyle, his criminal record, his family situation, his mental state, (7) his conduct prior to the commission of the alleged offence, (8) the danger which the interim release of the accused represents for the community specifically affected by the matter.

[51] I share the secondary ground concerns of the Crown and the bail hearing judge. Though Mr. Zakuti does not have a terribly serious record, he is alleged to have committed very serious offences against vulnerable complainants when he was on probation and wanted on a number of outstanding matters in Ontario. Further, the Crown case is cohesive and compelling.

[52] The question is whether the combination of factors identified by Mr. Zakuti adequately addresses these concerns. While I consider it a close call, in my respectful opinion, it is not.

[53] Given the nature and recency of his criminal record, the nature of the present allegations, Mr. Zakuti's lack of trustworthiness, and the fact that he is alleged to have committed the current offences while on probation and while wanted on three separate matters in Ontario, there is clearly a risk that Mr. Zakuti will commit further offences if released. In fact, Mr. Zakuti's apparent inability to control himself satisfies me that the risk rises to the level of "substantial likelihood".

[54] After considering the factors in *Rondeau*, I have no hesitation in concluding that the risk posed by Mr. Zakuti constitutes a danger to public safety. Mr. Zakuti does not appear to have an established living situation or support network, has not abided by various court orders and has acknowledged a serious drug problem. In addition, there is cohesive and compelling evidence that he preyed on vulnerable young women.

[55] Finally, Mr. Zakuti's alleged offences are closely linked to his acknowledged misuse of illicit drugs. As a result, I have to acknowledge that his current bail plan goes a long way to addressing the secondary ground concerns. The problem is that I do not trust that Mr. Zakuti will actually remain within the therapeutic setting. As a result, I am not confident that the identified danger to public safety can be prevented or reduced to an acceptable level by bail conditions.

[56] For all of these reasons, Mr. Zakuti has failed to demonstrate that his continued detention is not justified on the secondary ground.

The Tertiary Ground

[57] In addressing the tertiary ground, I will begin by setting out s. 515(10)(c) in full:

(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:

(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.

[58] In *St-Cloud* at para. 87, Wagner J. (as he then was) summarized the essential principles guiding bail hearing judges in applying s. 515(10)(c) of the Code as follows:

- Section 515(10)(c) Cr. C. does not create a residual ground for detention that applies only where the first two grounds for detention ((a) and (b)) are not satisfied. It is a distinct ground that itself provides a basis for ordering the pre-trial detention of an accused.
- Section 515(10)(c) Cr. C. must not be interpreted narrowly (or applied sparingly) and should not be applied only in rare cases or exceptional circumstances or only to certain types of crimes.
- The four circumstances listed in s. 515(10)(c) Cr. C. are not exhaustive.
- A court must not order detention automatically even where the four listed circumstances support such a result.
- The court must instead consider all the circumstances of each case, paying particular attention to the four listed circumstances.

- The question whether a crime is "unexplainable" or "unexplained" is not a criterion that should guide the analysis.
- No single circumstance is determinative. The justice must consider the combined effect of all the circumstances of each case to determine whether detention is justified.
- This involves balancing all the relevant circumstances. At the end of this balancing exercise, the ultimate question to be asked by the court is whether detention is necessary to maintain confidence in the administration of justice. This is the test to be met under s. 515(10)(c).
- To answer this question, the court must adopt the perspective of the "public", that is, the perspective of a reasonable person who is properly informed about the philosophy of the legislative provisions, Charter values and the actual circumstances of the case. However, this person is not a legal expert and is not able to appreciate the subtleties of the various defences that are available to the accused.
- This reasonable person's confidence in the administration of justice may be undermined not only if a court declines to order detention where detention is justified having regard to the circumstances of the case, but also if it orders detention where detention is not justified.

[59] At para. 88, Wagner J. added:

[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.

[60] I turn now to consider the relevant factors.

[61] As noted above, I consider the Crown case to be strong. I cannot, however, say that it is overwhelming.

[62] Next, the offences Mr. Zakuti is alleged to have committed are grave. The maximum sentences range up to life imprisonment.

[63] The circumstances surrounding the commission of the alleged offences are very concerning. In particular, Mr. Zakuti is alleged to have committed prolonged, violent and predatory acts of sexual violence against vulnerable women.

[64] As Mr. Zakuti so strongly contested the vulnerability of the complaints during the detention review, I feel compelled to add the following.

[65] As a group, Indigenous women are amongst the most vulnerable members of Canadian society. As noted by the National Inquiry into Missing and Murdered Indigenous Women and Girls and others, Canada's colonial history and destructive assimilationist policies, as well as racism and sexism, have created significant socio-economic gaps between Indigenous and non-Indigenous Canadians. These same factors have embedded and normalized violence into the everyday lives of Indigenous women, girls, and gender diverse people.

- [66] The fact that the complainants have addiction and legal issues may well negatively affect how the trier of fact assesses their trial testimony but does not, in my respectful view, lead to the conclusion that they were not vulnerable. In fact, drug addiction and involvement in criminal activity are often indicators of the heightened vulnerability of Indigenous women.
- [67] Finally, Mr. Zakuti is alleged to have committed firearms offences and, on conviction, is liable to serve a very lengthy federal sentence.
- [68] Against this backdrop, the combination of factors identified by Mr. Zakuti does not satisfy me that it is not necessary to detain him on the tertiary ground. In my respectful view, a reasonable and informed person would lose confidence in the administration of justice if Mr. Zakuti were to be released in all of the circumstances of this case.

Conclusion

- [69] In reaching my conclusion, I am fully aware of the detrimental impacts of detaining a presumptively innocent person. I am particularly concerned that Mr. Zakuti has already lost one preliminary inquiry date, with no new date set despite a previous application by Mr. Zakuti to proceed. Though no cases of COVID-19 at the Kamloops Regional Correctional Centre have been brought to my attention and Mr. Zakuti does not assert any special vulnerability to the virus, I am also concerned that the future is unpredictable in the face of the COVID-19 pandemic.
- [70] Nevertheless, I do not consider Mr. Zakuti's continued detention to be disproportionate or otherwise inappropriate. The provincial court has already given directions to expedite the preliminary inquiry and there is no local problem with complacency or inordinate delays. In fact, even without any direction from the court, very early trial dates are readily available in Supreme Court in Kamloops for detained accused like Mr. Zakuti.
- [71] Of course, if Mr. Zakuti is acquitted, he will never recover the time he has spent in custody awaiting trial. On the other hand, if convicted, Mr. Zakuti is likely to serve a sentence that greatly exceeds the time he has spent in custody awaiting trial.
- [72] At the end of the day, on the circumstances as a whole, Mr. Zakuti has failed to demonstrate that his continued detention is not justified. I order that Mr. Zakuti continue to be detained.
- [73] I thank counsel for their thorough submissions.

MARCHAND J.

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CASE PAGE <https://chat.esheria.ai/case-law/canada/r-v-zakuti-2020>

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