WARNING

The President of the panel hearing this appeal directs that the following should be attached to the file:

An order restricting publication in this proceeding under ss. 486.5(1), (2), (2.1), (3), (4), (5), (6), (7), (8) or (9) or 486.6(1) or (2) of the *Criminal Code* shall continue. These sections of the *Criminal Code* provide:

> 486.5 (1) Unless an order is made under section 486.4, on application of the prosecutor in respect of a victim or a witness, or on application of a victim or a witness, a judge or justice may make an order directing that any information that could identify the victim or witness shall not be published in any document or broadcast or transmitted in any way if the judge or justice is of the opinion that the order is in the interest of the proper administration of justice.
>
> (2) On application of the prosecutor in respect of a justice system participant who is involved in proceedings in respect of an offence referred to in subsection (2.1), or on application of such a justice system participant, a judge or justice may make an order directing that any information that could identify the justice system participant shall not be published in any document or broadcast or transmitted in any way if the judge or justice is satisfied that the order is in the interest of the proper administration of justice.
>
> (2.1) The offences for the purposes of subsection (2) are
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> > (a) an offence under section 423.1, 467.11, 467.111, 467.12, or 467.13, or a serious offence committed for the benefit of, at the direction of, or in association with, a criminal organization;
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> > (b) a terrorism offence;
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> > (c) an offence under subsection 16(1) or (2), 17(1), 19(1), 20(1) or 22(1) of the *Security of Information Act*; or
> >
> > (d) an offence under subsection 21(1) or section 23 of the *Security of Information Act* that is committed in relation to an offence referred to in paragraph (c).
>
> (3) An order made under this section does not apply in respect of the disclosure of information in the course of the administration of

justice if it is not the purpose of the disclosure to make the information known in the community.

(4) An applicant for an order shall

(a) apply in writing to the presiding judge or justice or, if the judge or justice has not been determined, to a judge of a superior court of criminal jurisdiction in the judicial district where the proceedings will take place; and

(b) provide notice of the application to the prosecutor, the accused and any other person affected by the order that the judge or justice specifies.

(5) An applicant for an order shall set out the grounds on which the applicant relies to establish that the order is necessary for the proper administration of justice.

(6) The judge or justice may hold a hearing to determine whether an order should be made, and the hearing may be in private.

(7) In determining whether to make an order, the judge or justice shall consider

(a) the right to a fair and public hearing;

(b) whether there is a real and substantial risk that the victim, witness or justice system participant would suffer harm if their identity were disclosed;

(c) whether the victim, witness or justice system participant needs the order for their security or to protect them from intimidation or retaliation;

(d) society's interest in encouraging the reporting of offences and the participation of victims, witnesses and justice system participants in the criminal justice process;

(e) whether effective alternatives are available to protect the identity of the victim, witness or justice system participant;

(f) the salutary and deleterious effects of the proposed order;

(g) the impact of the proposed order on the freedom of expression of those affected by it; and

(h) any other factor that the judge or justice considers relevant.

(8) An order may be subject to any conditions that the judge or justice thinks fit.

(9) Unless the judge or justice refuses to make an order, no person shall publish in any document or broadcast or transmit in any way

(a) the contents of an application;

(b) any evidence taken, information given or submissions made at a hearing under subsection (6); or

(c) any other information that could identify the person to whom the application relates as a victim, witness or justice system participant in the proceedings. 2005, c. 32, s. 15; 2015, c. 13, s. 19

486.6 (1) Every person who fails to comply with an order made under subsection 486.4(1), (2) or (3) or 486.5(1) or (2) is guilty of an offence punishable on summary conviction.

(2) For greater certainty, an order referred to in subsection (1) applies to prohibit, in relation to proceedings taken against any person who fails to comply with the order, the publication in any document or the broadcasting or transmission in any way of information that could identify a victim, witness or justice system participant whose identity is protected by the order. 2005, c. 32, s. 15.

Publication Notice: The order restricting publication in this proceeding made under s. 517 of the *Criminal Code* is no longer in effect. This judgment was published on April 19, 2023.

COURT OF APPEAL FOR ONTARIO

CITATION: R. v. Fasoranti, 2020 ONCA 576
DATE: 20200911
DOCKET: M51710

Strathy C.J.O. (Motion Judge)

BETWEEN

Her Majesty the Queen

Respondent

and

Babatunji Lloyd Fasoranti

Applicant/Appellant

Christopher K. Assié, for the applicant/appellant

Lisa Joyal, for the respondent

Heard: August 21, 2020 by teleconference

[1] The applicant requests an order pursuant to s. 680 of the *Criminal Code*, R.S.C. 1985, c. C-46, directing a panel of this court to review the decision of Edwards J. of the Superior Court of Justice denying his application for bail pending trial on a charge of second-degree murder.

[2] The test on a s. 680 application is whether "it is arguable that the [bail] judge committed material errors of fact or law in arriving at the impugned decision, or that the impugned decision was clearly unwarranted in the circumstances": *R. v. Oland*, 2017 SCC 17, [2017] 1 S.C.R. 250, at para. 64. The test is informed by the standard of review to be applied by the panel reviewing the impugned decision, which accords deference to the findings of fact made by the bail judge.

[3] In this case, the only issue for the bail judge under the primary ground was the proposed plan of release, which envisaged house arrest under the supervision of the applicant's parents, who were also proposed as sureties. The bail judge was not satisfied that the proposed plan of release was appropriate. The applicant now proposes a new release plan: house arrest in the home of his aunt and uncle, supplemented with electronic monitoring. The applicant's aunt and uncle would stand as his sureties with a joint bail in the amount of almost $1 million. If the release plan were the only factor for consideration, then the applicant could simply re-apply in the Superior Court based on a material change in circumstances.

[4] However, the bail judge found that the real issue was the strength of the Crown's case under the tertiary ground. He found that the Crown's case was strong and that "the applicant's continued detention is more than justified on the tertiary ground alone". He observed that the video evidence of the killing and the evidence of an eye-witness "link[ed] the applicant directly to the events as they unfolded with [the victim], in such a way that the applicant was an active participant in the events

that ultimately led to the death of [the victim].” He observed that the strength of the Crown’s case flowed, at least in part, from the fact that the killing was caught on videotape.

[5] The applicant submits that the bail judge committed a material error of law in mis-stating the test for party liability and in concluding that the Crown’s case was strong. In particular, he submits the bail judge failed to make findings of fact or to articulate a theory of liability to support his conclusion that the Crown’s case was strong. Being an “active participant” in the events is not a basis of liability. This, he says, was a material error of law and rendered the decision clearly unwarranted.

[6] The applicant also submits that the bail judge made a material factual error in concluding that the video evidence supported the Crown’s case. The applicant says that the video evidence was ambiguous at best.

[7] The respondent points out that the bail judge is presumed to know the law about party liability and that his decision should not be overturned simply because he could have said more. I appreciate as well that the bail judge may have been reluctant to make conclusive findings of fact at the bail stage.

[8] However, in my view, it is arguable that the bail judge’s conclusion that the Crown’s case was strong reflects either a material error in the assessment of the evidence or an error of law. The absence of specific findings of fact and the failure

to identify a specific basis of liability reduce the deference that would be otherwise given to the bail judge's decision.

[9] The strength of the Crown's case will ultimately be a reflection of all the evidence presented at trial. However, for the purposes of the bail hearing, the main pieces of evidence identified by the Crown were the video evidence and the evidence of an eyewitness.

[10] There were numerous concerns raised with respect to the video evidence. The video was taken at a long range, its clarity is poor, and it does not provide a clear view of the occupants of the vehicle at the critical time. It does not show what the applicant was doing in relation to the victim, either before the shooter intervened or after he did so. It is far from conclusive about what actually happened inside the vehicle in the crucial 30 seconds leading up to the shooting. While it is conceded that the applicant was one of the two parties shown standing by the door of the vehicle, the identity of the shooter is still at issue.

[11] The eyewitness was in the driver's seat of the vehicle beside the victim. He witnessed the shooting and drove the victim from the scene. The evidence of the eyewitness will be considered together with all the evidence at trial, but because the eyewitness could not identify the actual shooter, his evidence could be subject to more than one reasonable interpretation.

[12] There is other evidence that links the applicant and his co-accused both before and after the shooting. There is also some evidence that could establish that the applicant aided or abetted the shooter (s. 21(1)(a) or (b)), or that they were engaged in a common unlawful purpose (s. 21(2)). It remains open to debate, however, whether this evidence establishes that the Crown's case is strong, rather than demonstrating the existence of "triable issues" as conceded by the applicant's counsel at the bail hearing.

[13] In my view, the issues raised by the applicant should be reviewed by a panel of this court and it is so ordered.

"G.R. Strathy C.J.O."