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COURT OF APPEAL FOR ONTARIO

CITATION: R. v. Silva-Stone, 2022 ONCA 222
DATE: 20220316
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Strathy C.J.O. (Motion Judge)

BETWEEN

Her Majesty the Queen

Respondent

and

Erick Silva-Stone

Applicant

Michael Johnston and James Coulter, for the applicant

Gavin MacDonald, for the respondent

Heard: March 11, 2022 by video conference

ENDORSEMENT

[1] This is an application under s. 680 of the *Criminal Code*, R.S.C. 1985, c. C-46, for an order directing a review of the order of Parfett J. of the Superior Court of Justice (the "bail judge"), made pursuant to s. 522 of the *Code*, dismissing an application for bail pending the applicant's trial for second degree murder.

Pursuant to s. 680(2), the parties have agreed that if I determine a review is warranted, I may exercise the powers of the court to determine the full application.

[2] In considering whether to direct a review, I am required to determine whether it is "arguable" that the bail judge committed material errors of fact or law in arriving at the bail decision or whether the decision was "clearly unwarranted" in the circumstances: *R. v. Oland*, 2017 SCC 17, [2017] 1 S.C.R. 250, at para. 64. As Doherty J.A. observed in *R. v. Jaser*, 2020 ONCA 606, 152 O.R. (3d) 673, at para. 41, the first stage of the s. 680 process "is intended to weed out cases with no realistic possibility of success."

[3] I am satisfied that this case passes this relatively low threshold.

[4] If a review is directed, the panel of the court may confirm, vary or substitute the bail decision. The scope of this review was described by Moldaver J. in *Oland*, at para. 61, as follows:

> Ultimately, in my view, a panel reviewing a decision of a single judge under s. 680(1) should be guided by the following three principles. First, absent palpable and overriding error, the review panel must show deference to the judge's findings of fact. Second, the review panel may intervene and substitute its decision for that of the judge where it is satisfied that the judge erred in law or in principle, and the error was material to the outcome. Third, in the absence of legal error, the review panel may intervene and substitute its decision for that of the judge where it concludes that the decision was clearly unwarranted.

[5] For the reasons that follow, I have directed a review of the detention order. Having conducted that review, I have concluded that the bail judge's order was materially affected by errors in principle and should be set aside. The applicant will therefore be released on terms to be approved by me.

Background

[6] The applicant, who was 19 years old at the time of the offence, and his friend Nicholas Cox are charged on separate informations with second degree murder in relation the death of Christopher Houghton. The factual allegations are as follows.

[7] Mr. Houghton was a drug dealer who sold marijuana to friends and associates out of his basement apartment. In the early morning of July 22, 2021, the applicant drove Mr. Cox and two friends to Mr. Houghton's apartment. Mr. Cox had a gun. The applicant was unarmed.

[8] The applicant and Mr. Cox got out of the applicant's car, left their companions behind, and entered Mr. Houghton's apartment. A short while later, they returned to the car, covered in blood and carrying a large bag of marijuana. The applicant, Mr. Cox and their companions drove hurriedly from the scene.

[9] In the meantime, a neighbour who had heard a commotion in Mr. Houghton's apartment discovered him lying at the bottom of his stairs and called "911". Unfortunately, Mr. Houghton was pronounced dead at the scene. The cause of death was a massive stab wound to the abdomen, one of several stab wounds.

His skull was fractured, caused by blunt force trauma. There was evidence that one or possibly two knives were used in the stabbing. The magazine of a gun was found lying on the floor.

[10] About two weeks later, the applicant was arrested and charged. At that time, he was observed to have a few minor cuts on his right hand.

The applicant's proposed release plan

[11] As the suitability of the applicant's release plan played a significant role in the bail judge's decision to deny release, I will begin with some background concerning the sureties, their relationship with the applicant and the release plan.

[12] The applicant proposed that he be released on a recognizance with three sureties: his father, Mr. Leandro Silva-Stone ("Mr. Silva-Stone"); Mr. Silva-Stone's long-term partner, Mr. Jonathan Roy; and the applicant's other father, Mr. Joseph Stone.

[13] Mr. Silva-Stone is a social worker, employed by the Children's Aid Society of Ottawa. He also works part-time as an Outreach Worker with the City of Ottawa. He has a salary of between $130-150,000 per annum and has equity of about $170,000 in the family home. He was born in Brazil but attended university in the United States. He met Mr. Stone while he was in the United States, and they developed a relationship and moved together to Brazil in 2004.

[14] In 2007, Mr. Silva-Stone and Mr. Stone adopted the applicant and his brother from an orphanage in Brazil. The children came from an environment in which they had been exposed to domestic abuse, addiction issues, and mental health problems. The applicant was four years old at the time of adoption and was described as being a person with cognitive and physical challenges at the time.

[15] Mr. Silva-Stone and Mr. Stone subsequently moved to Canada and married. Both regard themselves as fathers to the applicant. Both are Canadian citizens. Neither has a criminal record. Both have had regular and productive employment. Mr. Silva-Stone and Mr. Stone separated in 2009 after a 13-year relationship and they divorced amicably in 2012. After their separation, they initially shared custody and parenting time of the applicant. However, they eventually decided the applicant was best placed in Mr. Silva-Stone's home because it would be further away from Mr. Cox, whom they observed had become a negative influence in his life. Mr. Silva-Stone placed the applicant in a private school, in the hope of further separating him from Mr. Cox. Mr. Silva-Stone and Mr. Stone continue to communicate regularly to parent both their sons, in spite of the fact that the boys are now adults.

[16] The proposed release plan is that the applicant will live at home with Mr. Silva-Stone and Mr. Roy, with occasional visits with Mr. Stone. The applicant will be under effective house arrest, confined to the family home except when in the custody of one of his sureties and will be required to observe the rules and

regulations of the house. He will be required to wear an electronic monitoring device at all times, monitored by Recovery Science, a well-known specialist in bail monitoring. He will be required to comply with other usual terms, including a non-communication order relating to confederates and witnesses. The sureties have committed to work together diligently to ensure compliance with the proposed plan. They have informed themselves of the procedures surrounding the electronic monitoring system and have undertaken to comply with them.

[17] Mr. Silva-Stone works from home and thus would be able to supervise the applicant during most of the day. His job requires him to leave home occasionally for a few hours during the day, while other work commitments require him to be out of the home some evenings. Mr. Roy, however, works nearby, is home most evenings, and has no regular commitments that would prevent him from monitoring the applicant after work. Mr. Stone should also be available if for some reason both Mr. Silva-Stone and Mr. Roy are unavailable or in the event of an emergency.

[18] Mr. Silva-Stone undertakes to pay for monitoring by Recovery Science. This will be supplemented by a home security system already in place: he will be notified when anyone enters or leaves the home and be able to view entrances and exits by way of security cameras, which surround the house on all sides.

[19] The proposed sureties have sworn to contact police should they observe the applicant breaching his bail conditions or become aware of any breaches. In

addition, all three proposed sureties have promised financial security to signify their commitment to ensuring the applicant complies with any imposed bail conditions: Mr. Silva-Stone and Mr. Stone for $25,000 each, and Mr. Roy for $15,000. In his oral evidence, Mr. Silva-Stone committed to security of up to $75,000 if necessary.

[20] The three sureties state they have a strong relationship with the applicant. While they acknowledge he has not been completely open with them or trustworthy at times, especially regarding his relationship with Mr. Cox, they strongly believe the applicant would comply with his conditions and respect their instructions if he were granted bail.

[21] Mr. Silva-Stone's work involves assessing the immediate safety of children, work he has been involved in for several years. From his evidence, his work experience has made him comfortable with making difficult, emotional decisions when it comes to children, particularly if he determines that it is in a child's best interests to be removed from their parents' home. His career and volunteer work involve supporting vulnerable people and his community, and he views his proposed role as a surety for his son as falling within the umbrella of that same responsibility. It is noteworthy that his experiences with his own sons was a factor in his choice of a career path in the support of vulnerable children.

[22] Mr. Roy has lived with Mr. Silva-Stone and the applicant in the same house since 2016. Mr. Roy has spent many occasions alone with the applicant, supervising him, and has had to impose disciplinary measures in the past, including limiting the applicant's internet access. In his affidavit, Mr. Roy notes that he has spoken directly with the applicant about the proposed plan and believes that the applicant will respect his directions. He considers the applicant to be a part of his family. His evidence indicates that he understands his role as a surety to ensure that the applicant respects the conditions of his bail "100 percent of the time." Mr. Roy acknowledges that while it may be difficult to do, he will not hesitate to call the authorities if the applicant breaches his bail conditions.

[23] According to his evidence, Mr. Stone maintains a significant relationship with his son. He notes that the applicant listens to him and usually follows his directions. Before the alleged offence, they communicated frequently and had regular visits. Mr. Stone's partner has also expressed support for the proposed plan. Mr. Stone may be relocating to Montreal, but he intends to remain part of the proposed plan, particularly when the other two sureties need assistance.

[24] All three proposed sureties have mentioned that they understand the difference between the applicant disobeying their orders as a teenager prior to the alleged offence, and the consequences of such disobedience now, if he is granted bail.

[25] Mr. Silva-Stone has explicitly acknowledged that while it has been a challenge to discipline the applicant in the past, his commitment as a surety is of a different nature: he is expected to report the applicant to the authorities if the applicant breaches a condition.

[26] While Mr. Roy noted in his evidence that the applicant has not always considered consequences in the past, he strongly believes that the applicant has changed the way he views the consequences of his actions in the current situation.

[27] Mr. Stone noted in his evidence that while the applicant had not followed his instructions in the past, for example, Mr. Stone telling him not to see Mr. Cox, he believes that the applicant understands that the repercussions of disobeying an instruction while on bail are much more severe.

The bail judge's reasons

[28] After setting out the background and the proposed release plan, the bail judge identified the applicant's s. 11(e) right under the *Canadian Charter of Rights and Freedoms* not to be denied reasonable bail without just cause and noted the interplay between the presumption of innocence and the provisions of s. 515(10) of the *Code*. She noted the important role played by sureties in determining whether the accused's release plan adequately addresses the relevant ground for detention, observing that "[a] surety is expected to be able to supervise an accused and prevent that person from committing further crimes or evading justice by

fleeing the jurisdiction." She pointed out that the proposed surety must not only be willing to supervise the accused, but must also be able to do so. She quoted The Honourable Justice Gary T. Trotter, *The Law of Bail in Canada*, 3rd ed. (Toronto: Carswell, 2010) (eLoose-leaf updated 2021), at §7:10:

> Just as important as the surety's character is the nature of the relationship between the proposed surety and the accused. On a view of the surety relationship that contemplates any degree of supervision of the accused, it is crucial to know whether the relationship is one which will realistically permit the infusion of these obligations and their potential enforcement. … Thus, it is important to inquire beyond the mere formalities of the surety's relationship with the accused and determine its nature. [Emphasis in original.]

[29] The bail judge was satisfied that although there was some flight risk in relation to the primary ground, it was alleviated by Mr. Silva-Stone's evidence that he had possession of the applicant's Brazilian and Canadian passports and that he would deliver them to the Ottawa police.

[30] The bail judge found, however, that the proposed release plan was not sufficient to address her concerns under the secondary ground. Although the applicant had no criminal record, either as a minor or as an adult, his behaviour during the preceding year demonstrated that he had been "increasingly out of control" and that his parents had been unable to control him.

[31] She referred, in particular, to graphic videotape surveillance evidence tendered by the Crown in relation to uncharged conduct that occurred about a

week before the homicide. The video showed Mr. Cox and the applicant apparently ambushing a black male victim in the parking lot of an Ottawa mall and beating him with a pipe and a bat before he was able to escape. She noted that the applicant had told his father, Mr. Silva-Stone, about an attack in a mall, but had claimed that he and his girlfriend had been the victims. His father believed him and did not report the incident to police. In addition, she noted that Mr. Silva-Stone was also aware that the applicant had claimed to have been threatened by others on an earlier occasion and had been accused, along with Mr. Cox, of assaulting another young man in August 2020. No charges were laid in connection with that allegation. There were also "a couple of incidents of poor driving" by the applicant, including one where he had rear-ended someone and "totaled" his own car.

[32] Having heard the evidence of the three sureties, the bail judge concluded that although they were well-meaning and good people who had put considerable financial resources on the line for the applicant, their own evidence demonstrated that they had lost control of the applicant. Although they claimed he was an adult, and they had been unable to do anything about his association with Mr. Cox or his conduct, he was "only just an adult" when the homicide occurred, and he was no longer living full-time at home – he was spending time with his girlfriend at her grandmother's residence. The sureties were aware that Mr. Cox was in the applicant's life, but they chose not to do anything about it.

[33] The bail judge concluded that the release plan was inadequate because the sureties were unable to “control” the applicant:

> In my view, the evidence of [the applicant’s] recent activities suggests that he is engaged in a criminal lifestyle that was increasingly violent and consequently, the secondary grounds are engaged in this matter. There is a substantial likelihood that he would continue his activities unless the plan of release could reduce the risk.
>
> Unfortunately, I am not confident that any of the proposed sureties could exercise the necessary degree of control over [the applicant]. There are no accurate predictors of future behaviour, but past behaviour can provide some assistance. In the present case, the proposed sureties have had no control over [the applicant] for at least the past year and therefore, it is doubtful they would have any more influence if he was released into their care.
>
> In the circumstances, I do not find that the proposed plan of release is sufficient to alleviate the concerns raised by the secondary grounds. Moreover, I note that the monitoring device, while it is a useful supplement to an adequate plan of release, cannot turn an inadequate plan into an adequate one. [Footnote omitted.]

[34] The bail judge found that the applicant would be detained pursuant to the secondary ground, but also held that he did not meet his onus on the tertiary ground. She noted that the charge of second degree murder is one of the most serious in the *Code*. While the Crown’s case had “some challenges” because it was “not clear who did what in that basement”, the Crown had a strong case that he would be liable as either a principal or a party to the homicide and he faced a lengthy term of imprisonment if convicted. The bail judge found the balance of the enumerated factors in s. 515(10)(c) favoured detention.

[35] The bail judge accordingly found that "[g]iven the seriousness of the charge and the weakness in the proposed plan of release", the applicant had not discharged his onus to show that he should be released pending trial.

Submissions

[36] The applicant challenges the bail judge's decision on three bases.

[37] First, the bail judge erred in concluding that the proposed sureties were unsuitable and that the plan of release did not satisfy the court's concerns for public safety under the secondary ground for detention pursuant to s. 515(10)(b). It was an error in principle for the bail judge to focus on the sureties' past conduct and their alleged lack of control over the applicant leading up to the alleged offence because the circumstances would be entirely different under the proposed plan of release, which amounts to surveilled house arrest, backed by GPS ankle monitoring.

[38] Second, the bail judge erred in concluding that the applicant had failed to show his detention was not necessary to maintain confidence in the administration of justice, the tertiary ground for detention pursuant to s. 515(10)(c). In assessing the apparent strength of the prosecution's case, the bail judge failed to consider the applicant's potential claim of self-defence, and overlooked the possibility that he might be convicted of manslaughter having regard to the uncertainty concerning the nature of the homicide and his role in it.

[39] Finally, the applicant submits the bail decision was “clearly unwarranted” given the strength of the proposed plan of release. Counsel emphasizes that the applicant is 19 years old, has no criminal record, proposes three substantial and committed sureties, and would be subject to GPS ankle monitoring and home security video surveillance. This plan ought to have been sufficient to show that detention was not necessary on the secondary or tertiary grounds and should have resolved any remaining concerns as to the applicant’s trustworthiness.

[40] In support of the bail judge’s decision, the respondent submits that the bail judge did not err in finding that the applicant had not met his onus on the secondary and tertiary grounds of s. 515(10), nor was her decision clearly unwarranted. Her findings were based on substantial evidence that the applicant would not submit to the supervision of his sureties and that his release would be contrary to the public interest in all the circumstances.

[41] On the secondary ground, there was abundant evidence that the applicant withheld information from his proposed sureties and lied to his father about an uncharged assault in which he was an active participant, barely a week before the homicide. The bail judge was correct to look to past behaviour for assistance in assessing predictors of future behaviour. The proposed sureties’ lack of connection to the applicant’s life, and their apparent wilful blindness to his activities, raised substantial concerns regarding their ability to adequately supervise the applicant.

[42] On the tertiary ground, the respondent submits that this case satisfies the non-exhaustive factors enumerated in s. 515(10)(c): there is substantial evidence placing the applicant at the scene of the offence and confirming his involvement; the prospects of success of self-defence are slim in light of the evidence; the applicant has been charged with one of the most serious offences in Canadian law; the circumstances surrounding the commission of the offence were extremely violent and involved a firearm; and finally, the applicant faces a lengthy term of imprisonment for being at least a party to this very violent killing. These factors strongly support the applicant's detention.

Analysis

[43] For the reasons that follow, I find that the bail decision was materially affected by errors in principle. I grant the application and order the applicant be released on terms.

[44] As the applicant is charged with second degree murder, an offence listed in s. 469 of the *Code*, s. 522(2) puts the onus on him to show that his detention is not justified within the meaning of s. 515(10). That provision states that the detention of an accused prior to trial is justified only on one or more of three grounds.

[45] The primary ground (s. 515(10)(a)) requires the applicant to establish that detention is not necessary to ensure his attendance in court.

[46] The applicant notes that the bail judge found that the risk of flight was addressed by Mr. Silva-Stone's assurance that he had control of the applicant's Brazilian and Canadian passports and that he would deliver them to the Ottawa Police Service. The primary ground is not in issue.

[47] The secondary ground (s. 515(10)(b)) requires the accused to establish that his detention is not necessary for the protection or safety of the public, "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".

[48] As I have observed, the applicant contends that the bail judge erred in principle, or alternatively arrived at a decision that was plainly unwarranted, because her assessment of the release plan focused on the inability of the sureties to control the applicant prior to the alleged offence, as opposed to considering their suitability as informed sureties who had undertaken to supervise the applicant under pain of forfeiture of bail.

[49] It was appropriate for the bail judge to consider the ability of the sureties to ensure that that the applicant observed the conditions of his release and that they would render him if he failed to observe those conditions, keep the peace and be of good behaviour. Their previous conduct was relevant to this consideration.

[50] But the applicant's proposed terms of release were also relevant.

[51] It was an error in principle for the bail judge not to consider the proposed terms of release in evaluating the sureties' ability to "control" the applicant. The bail judge's conclusion that the sureties' inability to "control" their adult son in the year prior to the homicide made it "doubtful they would have any more influence if he was released into their care," did not take into account conditions that would prevail under the release plan in contrast to the circumstances that prevailed in the prior year. The circumstances that prevailed in the preceding year were vastly different from what would exist under the release plan. In much of the previous year, the applicant had been out of the home, living with his girlfriend and associating with Mr. Cox. His parents were unaware of the extent of his anti-social behaviour because he either lied to them or kept it from them. The assault in the mall a week or so before the homicide is a case in point: he lied to them and said that he was the victim.

[52] Given his age and that he was not living under their roof full-time, it was unrealistic to think that the sureties could have controlled him or that they were "willfully blind" to his conduct – they were simply deceived. He was an adult who had made up his mind to live with his girlfriend and they could not force him to return to the family home full-time.

[53] While *Jaser* is not directly on point, I note the observations of Doherty J.A., at paras. 70-71:

> In the course of examining the secondary ground, the bail judge, at para. 52, expressed “concerns” about the ability of Jaser's parents, two of the proposed sureties, to “control and supervise” Jaser. The bail judge did so primarily because of Jaser’s proclivity in the past to manipulate and deceive others, including his parents, for his own personal gain and advantage. This was the same consideration that led him to conclude there was a substantial likelihood Jaser would commit an offence if released.
>
> I see no error in the trial judge’s concern that Jaser’s family could be manipulated and deceived by him. The concern was supported by the evidence, albeit evidence from many years earlier, and was relevant to the suitability of Jaser’s parents as sureties. I note, however, the bail judge did not consider the extent to which his concerns could be mitigated by specific stringent bail terms allowing for significant ongoing police oversight of Jaser’s compliance with his bail terms. Nor did the bail judge consider whether Jaser’s parents' susceptibility to his deceit and manipulation would continue in the very different circumstances presented in February 2020. Jaser faced serious allegations. His parents were very familiar with those allegations. They had to know Jaser, if released, would be under ongoing police scrutiny. They also knew they faced serious financial consequences if Jaser breached his bail. [Emphasis added.]

[54] Under the release plan the applicant will be living in the family home, effectively under house arrest, most of the time with one of three adult parents in the home, wearing a monitoring device, with entries and exits from the house being monitored. The sureties will have a strong financial incentive to ensure his compliance with the release terms. Based on their sworn evidence, I am satisfied that the sureties’ – particularly the two adoptive parents’ – strong connection to their son and their deep commitment to him will be sufficient to ensure both his

compliance with the terms of his release and that they will render him in the event he breaches those terms.

[55] I turn to the tertiary ground.

[56] The tertiary ground (s. 515(10)(c)) required the bail judge to consider whether detention was 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 was liable on conviction to a potentially lengthy term of imprisonment.

[57] The respondent's helpful factum points to the Supreme Court's guidance in *R. v. St-Cloud*, 2015 SCC 27, [2015] 2 S.C.R. 328, at para. 87, concerning the application of these factors:

- Section 515(10)(c) does not create a residual ground for detention that applies only where the first two grounds for detention 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) 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) 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.
- 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.

- The 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.

[58] The applicant submits that in finding that he had not met his onus on the tertiary ground, the bail judge gave unreasonable weight to the offence with which he was charged and failed to make any assessment of the strength of the Crown's case. While she noted that "[t]he Crown's case has some challenges as it is not clear who did what in that basement", she failed to consider the potential for either a claim of self-defence or the possibility of a conviction for manslaughter.

[59] I agree with the respondent that the four factors mentioned in s. 515(10)(c) are in play here: (i) while much remains unknown, the Crown's case appears strong; (ii) the offence of second degree murder is extremely serious; (iii) the circumstances of the offence are grave – the victim was eviscerated by one of several stab wounds, a handgun was taken to the scene of the crime and one or more knives were used in the offence; and (iv) the applicant is liable, on conviction, to a term of life imprisonment.

[60] That being said, as the Supreme Court noted in *St-Cloud*, detention does not automatically follow even when the four listed circumstances in s. 515(10)(c) support that result.

[61] I therefore consider whether the applicant's detention is necessary to maintain confidence in the administration of justice – bearing in mind that the question is asked from 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.

[62] The adequacy of the applicant's bail plan is a factor that may be considered in the analysis under s. 515(10)(c). As Trotter J., as he then was, observed in *R. v. Dang*, 2015 ONSC 4254, 21 C.R. (7th) 85, at para. 58:

> An accused person's plan of release may be relevant to whether public confidence in the administration of justice can be maintained when an accused person is released: see *R. v. B.(A.)* (2006), 204 C.C.C. (3d) 490 (Ont. S.C.J.), at p. 501. This is explicitly recognized in the newly enacted amendment (S.C. 2012, c. 1) to s. 29(2)(*c*) of the *YCJA*. A reasonable and knowledgeable member of the community may take a different view of a case in which an accused person charged with a violent offence is released into the community with virtually no supervision, compared to a situation where a strict plan has been put in place to monitor the accused. The plan goes to the core of s. 515(10)(*b*), but it may also impact on the application of s. 515(10)(*c*). The bail decision does not involve a stark choice between absolute freedom on one hand, and detention on the other. Realistically, it is a choice between release on conditions and detention. I see nothing wrong with this reality being reflected in s. 515(10)(*c*).

[63] The bail judge's error in principle in failing to consider the applicant's release plan in relation to the secondary ground extended to her analysis of the tertiary ground. It is important in this case to consider the proposed terms of release in

assessing the impact of the applicant's release on public confidence in the administration of justice. In my view, public confidence would not be undermined if the applicant, who is not yet 20 years old and has no prior criminal record, were to be released into the supervision of his father, his father's partner, and his other father, subject to virtual "house arrest" under strict terms, including being required to wear a monitoring device around his ankle.

[64] A reasonable and informed member of the community would recognize that, while the offence and its consequences are grave and the Crown case appears strong, the applicant is presumed innocent and the outcome of the trial depends on the evidence of his involvement in the homicide, which is very uncertain at present.

[65] A reasonable and informed member of the community would, in my view, also have regard to the fact that the three sureties have not only put financial security at risk, but they have a deep personal connection to the applicant and are committed to discharging both their parental responsibilities and their legal duties. They have sworn that they will do everything necessary to ensure the applicant will comply with the terms of his release and to inform the authorities if he fails to do so.

[66] Having regard to these circumstances, the release of the applicant on the proposed bail terms would not undermine public confidence in the administration of justice.

Disposition

[67] For these reasons, I allow the application, set aside the decision of the bail judge, and order that the applicant be released on terms to be approved by me.

[68] Subject to the submissions of counsel, it seems to me that the terms should include those proposed by the sureties, with slight modifications: that the applicant is not to leave the family home for any reason, except in the company of one of his sureties; that he is to be subject to continuous monitoring by Recovery Science; and that he is to have no communication or contact with Mr. Cox, who is apparently in custody at present.

[69] If the parties are able to agree on terms, a draft order may be submitted to me through the Registry. If they are unable to agree, they should provide a draft order, setting out their positions on any terms in dispute and arrangements can be made for further submissions, if necessary.

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