R. v. T.L., [2020] O.J. No. 1371

Ontario Judgments

Ontario Superior Court of Justice

Milton, Ontario

A.M. Molloy J.

Heard: March 13 (in court) and March 23 (by conference call),

2020.

Judgment: March 30, 2020.

Court File No. CR-20-30000061-BR

[2020] O.J. No. 1371 | 2020 ONSC 1885

Between Her Majesty the Queen, Respondent, and T.L., Defendant/Applicant

(39 paras.)

Counsel

Alan Spiegel, for the Crown.

Ehsan Ghebrai, for the Defendant/Applicant.

REASONS FOR JUDGMENT

(Bail Review)

PUBLICATION BAN pursuant to ss. 517(1) and 520(9) of the *Criminal Code*. [FOR CLARITY - COUNSEL ARE PERMITTED TO CIRCULATE ENDORSEMENT TO OTHER COUNSEL OR USE IN COURT. PUBLICATION AND QUOTATION OF GENERAL PRINCIPLES FROM THE CASE IS PERMITTED. PUBLICATION IS PROHIBITED OF ANY FACTS ABOUT PARTICULAR DEFENDANT'S CHARGES, AND IDENTIFYING INFORMATION ABOUT THE DEFENDANT OR HIS PERSONAL CIRCUMSTANCES]

A.M. MOLLOY J.

Background

1 On September 30, 2019, there was a shooting in a plaza in Toronto. Several shots were fired at Stevie Muling, injuring him, but not killing him. Mr. Muling's cousin, D.M., was subsequently charged with attempted murder. Also charged along with D.M, was T.L. (Mr. L.). Mr. L. is alleged to have passed the firearm to D.M. immediately before

D.M. shot his cousin, and then used his own car to pick up the shooter and flee the scene. Mr. L. was arrested October 27, 2019. He was charged with various offences including: transferring a handgun to D.M.; discharging a firearm with intent to wound (s. 244); various counts of possession of the firearm; and, accessory after the fact by assisting D.M. to escape.

2 A bail hearing proceeded before Justice of the Peace Ng on November 13, 2019. There were three proposed sureties: the accused's mother; his common law spouse; and his employer. For oral reasons given that same day, the Justice of the Peace ordered Mr. L. detained on the secondary and tertiary grounds.

3 Mr. L. brought a bail review application in this Court, which proceeded before me in open court on March 13, 2020. On that day, I heard evidence from the proposed sureties: the accused's mother (T.S.) and the accused's grandmother (H.H.). The plan for supervision contemplated a full house arrest in the accused's grandmother's home, along with strict ankle bracelet monitoring. This was a reverse onus application. Defence counsel proceeded first. During the course of those submissions, I expressed concerns about releasing Mr. L. with a requirement that he reside in his grandmother's house without hearing from her husband, who also lived there. Further, Mrs. H. and her husband jointly owned their home. Without his consent, she could not pledge their joint assets. She was proposing to post bail in an amount that was only a small portion of their assets and which would not run any risk of losing their house. She said she was prepared to pledge more, but this would have been without her husband's knowledge and consent. Accordingly, I advised counsel that the absence of Mr. H. was a significant impediment. Without his active agreement, I would not be prepared to issue an order that effectively placed his grandson in his house under house arrest for a considerable period of time. Some of the participants were not available the next week, which was the school March Break. The hearing was therefore adjourned to March 23, a date convenient to all parties.

4 Meanwhile, the COVID-19 health crisis worsened, resulting in an Order by Chief Justice Morawetz adjourning all matters scheduled in the Superior Court of Justice between March 17 and June 1, 2020. As a result of this Order, subject to the court ordering otherwise, this matter would have been adjourned to June 2, 2020. A protocol was developed for dealing with various matters in the interim, including matters which would affect the liberty of the person, such as this bail review before me. In accordance with that protocol, I agreed that the balance of the bail review application would proceed by conference call if all parties consented.

5 The conference call proceeded before me on March 23, with a Registrar who ensured that an audio recording of the hearing was maintained. Both Crown counsel and I dialed in remotely. Defence counsel called in from his office, in the presence of the two sureties (the accused's mother and grandmother) and Mr. H. (the accused's grandfather). All parties consented to proceeding in this fashion. Mr. Ghebrai confirmed that he had discussed this with his client and he had waived his right to be present for the hearing.

6 Mr. H. was cross-examined by the Crown, after having made a solemn affirmation to tell the truth. There was also a brief cross-examination of Mrs. H. to clear up a small issue of possible contradiction. I then heard submissions from both counsel.

7 At the conclusion of argument, I advised that I would be ordering Mr. L.'s release. I then heard further submissions as to some of the terms of release upon which counsel were not in agreement. The final form of the order was then transmitted through various email exchanges. Mr. Ghebrai confirmed that he had reviewed the terms with his client and that he understood them.

8 I gave brief oral reasons on the record as to why I was ordering Mr. L.'s release and stated that I would be issuing a written endorsement providing full reasons. In the event of any conflict, it is these reasons that will govern.

Change in Circumstances and Fundamental Error

9 The Crown initially took the position that there was no reviewable error by the Justice of the Peace and that the

proposed plan did not involve a material change in circumstances. However, the Crown abandoned that position in argument on March 13, 2020. The new plan is markedly different from the previous plan, with additional sureties and the added feature of electronic monitoring. Further, in relation to the suitability of the accused's mother being a surety, the Justice of the Peace stated that he had concerns because when she had previously been a surety there were 14 to 27 occasions when there was nobody at home when there should have been. In fact, there was no evidence whatsoever as to that being the case. This was a fundamental misapprehension of the evidence that affected the result.

10 The Justice of the Peace had credibility concerns with respect to the accused's employer, who is no longer a proposed surety. The Justice of the Peace also found that the accused's common-law spouse would not be effective at supervising him. She also is no longer proposed as a surety. The accused's mother is still one of the proposed sureties, but the Justice of the Peace's difficulty with her was based on a misapprehension of the evidence.

11 Accordingly, the bail review proceeded before me as a hearing *de novo.*

Reverse Onus

12 Because of the nature of the charges, by virtue of statute this is a reverse onus situation. The burden is on the accused to demonstrate that his detention is not justified under s. 515(6) of the *Criminal Code.* The Crown raised no concerns under the primary grounds (to ensure the accused's attendance in court). I also, have no such concerns. Thus, the onus is on the accused to show that: (a) if released he would not be a risk to the public, including by reoffending or interfering with the administration of justice (the secondary grounds); and (b) his detention is not necessary to maintain confidence in the administration of justice (the tertiary grounds).

The Secondary Grounds

13 Mr. L. has a criminal record. He is now 28 years old and will turn 29 this May. In 2011, when he was 20, he was convicted of unauthorized possession of a firearm, for which he was sentenced to 1 day in custody on top of 4 months of pre-sentence custody. He also has a number of convictions from Youth Court, with three sets of convictions as follows:

> March 2007 (age 15) --- possession of a restricted or prohibited firearm; obstruct police x 2; fail to comply recognizance; unlawfully at large
>
> June 2008 (age 17) --- assault; theft under $5000; fail to comply recognizance; robbery
>
> June 2008 (age 17) --- theft under $5000 and obstruct police

14 The Crown also sought to introduce evidence of a set of charges against the accused from October 2016, which included possession of a prohibited handgun. Mr. L. went to trial on all of those charges and was acquitted on everything. That is the end of the matter. I refused to take this into account in any manner on the bail application, and also would not permit the Crown to cross-examine the proposed sureties as to their knowledge of the circumstances of the charges. For these purposes, the acquittal is equivalent to a finding of innocence.[1] Information

about the conditions of Mr. L.'s bail conditions with respect to those charges and any problems that arose would be relevant, but not the subject matter of the charges themselves.

15 The Crown also sought to rely on the fact that the accused attended at a Service Ontario location one day after the shooting, turned in the existing licence plates on the car he used as the getaway vehicle, and purchased new plates for it. The Crown argues that this supports a concern under the "interference with the administration of justice" aspect of the secondary grounds provision.[2] I do not agree. This conduct may or may not be evidence of post-offence conduct at Mr. L.'s trial. I make no comment, one way or the other. However, the action he took was open and lawful. I see no interference with the administration of justice and it does not give me any additional cause for concern under the secondary ground.

16 The existence of the criminal record, particularly where guns and violence are involved, is a relevant factor to consider under this heading. As pointed out by the Crown, it is also troubling that the accused is alleged to have driven the shooter away from the scene in his car immediately after the shooting and that the gun has never been found.

17 However, the criminal record, even though related, does not automatically mean that the accused must be detained to protect the public. Where there is a strong enough plan for supervision during bail, the threat to the safety of the public can be greatly reduced, or even eliminated. I am satisfied that there are adequate safeguards in the current plan to satisfy the concerns on the secondary grounds.

18 The proposed plan is for the accused to be under house arrest in his grandparents' home. The two sureties would be his grandmother and his mother, with primary responsibility being on the grandmother as he will be living in her home. I was initially concerned about the grandmother proposing to be liable for only $20,000 in the event her grandson breached his bail, even though she had substantial equity in her home, which together with her savings totalled over $600,000. To me this signified a lack of confidence in her grandson abiding by the terms of his bail. I was also concerned that Mr. L. would not be deterred by his grandparents losing an amount of money they could afford to lose. However, this concern was rectified on the second hearing where both grandparents agreed they were prepared to put up everything they had to ensure the accused's release from custody. Both grandparents are now retired, after having had stable employment over a period of many years. They are law abiding citizens who impressed me with their commitment to supervise their grandson. I also found Mr. L.'s mother to be a solid citizen who has a proven track record in supervising her son while on bail. Most recently, she was his surety for two years without any incident. Earlier, when the accused was 16, she pulled his bail and turned him into custody when he failed to follow her rules.

19 Both grandparents are at home during the day, so the accused would never be without supervision. His mother would be a backup in case one or both grandparents need to be away from the home. Also, the grandmother does not drive, but the accused's mother and/or his grandfather would be available to drive him to court or anywhere else he was required to be. It is proposed that the only exception to the house arrest would be while in the company of a surety or as required for medical emergency for himself or close family.

20 The supervision plan is backed up by electronic ankle bracelet monitoring at the highest level of supervision, with the cost being borne by the accused.

21 This is as tight a plan of supervision as can reasonably be expected in any situation. It would be a rare situation in which an accused would not be releasable on conditions such as these.

22 It is, of course, obvious that an ankle bracelet cannot prevent an accused from breaching his bail conditions and committing an offence. The function of the bracelet is to alert the authorities immediately if there is a breach. The accused could simply leave the home even though wearing the bracelet, which would make him easier to track. Or, theoretically, he could cut off the bracelet (although not an easy task), in which case the alarms will go off and the breach will be immediately known. In either event, Mr. L. could reoffend. However, just because it would be possible

to commit a crime while on bail, notwithstanding an ankle bracelet, does not mean that an ankle bracelet is not a useful supervision tool in many bail situations. It has, at the very least, a psychological deterrent effect. Mr. L. will know that any breach, no matter how minor, will be detected and reported. He will have no illusions about his sureties not betraying him. The electronic bracelet will not be swayed by emotion. I believe the ankle bracelet also reinforces for the sureties and other people in the home the importance of strict compliance with the terms of the bail.

23 The Crown referred to a number of cases in which judges refused to release an accused on bail, even with ankle bracelet electronic monitoring. All of those decision turned on their particular facts, which is often the case for bail applications. I find all of them to be distinguishable from the case before me.

24 In *R. v. Ma*,[3] Goldstein J. held that the addition of electronic monitoring would not solve the problems involved, particularly on the tertiary grounds. However, that case involved two home invasions where the victim sex workers were raped and robbed. The accused's parents were proposed as sureties but were found to be evasive and the Justice of the Peace had concluded the accused would not take direction from them. Goldstein J. noted that a reasonable person "would be flabbergasted to find a person in Mr. Ma's position was not detained."[4] That is not the situation here. The crimes with which Mr. L. is charged do not involve him actually inflicting harm by his own acts, which is not to excuse such conduct, but merely to point out the difference. Also, the proposed two sureties in this case are reliable, and there is a track record of Mr. L. successfully completing a prior bail under his mother's supervision. Further, Goldstein J. himself noted that "[t]here are undoubtedly many cases where ankle monitoring is the correct way to manage an accused person."[5]

25 The Crown also relied upon *R. v. Stojanovski*,[6] in which Penny J. dismissed an application for bail review even though ankle bracelet monitoring was being added as an additional component of the supervision plan. However, this case actually turned on whether the applicant had satisfied the requirement of showing that the new evidence of monitoring being provided would have changed the result before the Justice of the Peace. At the initial bail hearing, the accused's mother was the proposed surety and she was able to supervise her son all of the time because she worked fulltime out of her own home. The Justice of the Peace found this was not a strong enough plan, in all of the circumstances, to prevent the accused from reoffending. By the time of the bail review application, the accused's mother was still working fulltime, but no longer at home. There would be nobody at home to ensure he did not leave the residence. An additional surety was added, but she lived an hour's drive away, worked fulltime, and had two small children at home. Penny J. held that the addition of electronic monitoring was not material on the grounds that if the accused could not be trusted to abide by the terms when supervised all of the time, then he could not be trusted to abide by the terms just because he was wearing an ankle bracelet. The application was dismissed on this basis. It was not a hearing *de novo*, and is therefore distinguishable on that basis.

26 Finally, the Crown relied on *R. v. Osman,*[7] which is also distinguishable on its facts. The accused in that case had a history of breaching court orders, including a prior breach of recognizance. Also, the subject offences had been committed while the accused was on bail on other serious offences and there was strong evidence that he was out of his residence at the time. The plan of supervision was weak. There was no supervision by anyone who would be present in the home during the day to supervise compliance. One of the key sureties, the accused's father, had supervised the accused on a prior bail that the accused had breached. The father claimed not to know about that, even though the accused was tried and convicted of the breach. In these circumstances, Akhtar J. held that the addition of electronic monitoring could not be expected to control the behavior of the accused, stating (at para. 35) that "electronic monitoring is only useful if it supplements what is already a strong supervisory surety plan." In the case before me, the circumstances are quite different; there is a strong supervisory plan, which is buttressed by the electronic monitoring.

27 I find that the accused has satisfied his onus on the secondary grounds. No plan of supervision comes with an iron-clad guarantee, nor is it required to. However, this plan comes as close as can reasonably be expected. This plan is a tight one, involving full house arrest in the accused's grandparents' home. Both grandparents are retired and available to supervise him fulltime. The accused's mother is also a surety and will assist with supervision and

transportation when needed. I found both sureties to be dependable and honest. There was an issue with respect to the grandmother's prior affidavit in which she said she and her husband lived alone in their house, which was not entirely true as their son (the accused's father) was living with them at the time under the terms of his bail (completely unrelated to this case). However, I found the explanation given by the grandmother to be satisfactory. The fact that the grandfather, although not a surety, will also be on hand to supervise is an additional level of comfort. I am satisfied that the mother and grandparents of the accused understand the importance of adherence to the terms of the bail and they will be able to control the accused. The electronic ankle bracelet provides additional backup to ensure everyone maintains rigorous compliance. This is an exceptionally solid plan. With this plan in place, it is unlikely that Mr. L. will reoffend and I see no threat to public safety.

The Tertiary Grounds

28 The accused must also demonstrate that his detention is not necessary to "maintain confidence in the administration of justice" as required under the tertiary ground. The *Criminal Code* mandates this analysis as "including" four factors: (i) the strength of the Crown's case; (ii) the gravity of the offence; (iii) the gravity of the circumstances of the offence, including whether a firearm was used; and (iv) whether the accused is facing a lengthy period of imprisonment if convicted.[8] The Supreme Court of Canada confirmed in *R. v. St. Cloud*[9] that the tertiary ground is a stand-alone basis for denying bail and can justify detention even when the primary and secondary grounds are met. It is also clear that the four enumerated factors are not meant to be exhaustive and that I must take into account any issue that might cause a reasonable, informed member of the public to lose confidence in the administration of justice if Mr. L. were released on bail. In that regard, the terms of any release are relevant. A member of the public might well be shocked to learn that a person charged with this type of offence and in these circumstances would simply be released into the community. The question, however, is whether such a member of the public, understanding the constitutional principles underlying bail, and knowing the limits imposed on Mr. L. during his period on bail, would be of such a view.

29 The Crown submits that it has a strong case against Mr. L. I have watched the surveillance video of the parking lot where this shooting took place. Mr. L. can be seen crouched down by a car with another man, alleged to be D.M. It is not possible to see what they are doing. There is no audio. However, immediately after coming out from behind that car, the other man appears to have a gun in his hand and immediately heads to the other end of the parking lot, firing multiple shots at the victim. Mr. L. immediately goes to his parked car, drives to where the shooter is, picks him up, and leaves the scene.

30 I agree with Crown counsel that there is an inference that could be drawn that Mr. L. passed a handgun to the shooter, who then used it to shoot the victim. However, there are also other inferences available. It is entirely possible that a jury might not draw the inference consistent with the guilt of the accused, particularly given the fact that they will be instructed that they can only draw such an inference if there are no other rational inferences available. The Crown's case on this point is arguable, but far from overwhelming.

31 However, the Crown's case with respect to assisting the shooter to flee the scene immediately after the shooting is very strong. Indeed, I would say overwhelming. Likewise, there is a strong case that Mr. L. had to have known at that point that the shooter had a gun, and nevertheless transported him in his car.

32 Thus, there is a strong Crown case. The offence is a very serious one. The shooter is charged with attempted murder. Mr. L. is charged with having aided that. He is also charged with having provided the weapon. The surrounding circumstances were also aggravating. Although in the early morning hours, this was a plaza with many members of the public in the area. It was a violent, brazen shooting in an open public area. At this time in the City of Toronto, not just judges and others who work in the criminal justice system, but all of our citizens, are keenly aware of the alarming incidence of gun violence in our community. If convicted of even some of these charges, Mr. L. will likely be facing a significant sentence in a penitentiary. These are all factors supporting detention.

33 However, this is not a "tick-off-the-box" exercise. The fact that these factors exist does not mandate detention.

These are simply relevant factors to take into account in determining whether public confidence in the administration of justice would be undermined. A contextual approach must be taken, looking at all of the surrounding circumstances, including (as I have already mentioned) the strength of the plan of supervision.

34 In the unique circumstances in which we now find ourselves, facing a global COVID-19 pandemic, it is also relevant to take into account the realities of detention and release in our current environment. Mr. L. is currently detained at the Toronto East Detention Centre. He is presumed to be innocent of the crimes with which he is charged. At the current time, all courts are effectively closed except for emergency applications. All matters scheduled for trial in the Superior Court of Justice from mid-March through to the end of May have been adjourned to June. Even assuming the courts are open for business as usual at that point, a significant backlog will have been created. It is very difficult to predict when Mr. L.'s trial will be reached, but we can expect it will be many months from now, probably longer. The additional time that Mr. L. will be in custody pending his trial is a factor to take into account on the tertiary ground.

35 I agree with my colleague, Copeland J., who held in her recent decision in *R. v. J.S.,*[10] as follows:

> In my view, the greatly elevated risk posed to detained inmates from the coronavirus, as compared to being at home on house arrest is a factor that must be considered in assessing the tertiary ground.

36 Detention prior to trial is difficult at the best of times, which is one of the reasons that, on sentencing, extra credit is provided for pre-trial custody. In the middle of a pandemic, serving that time in an institution is even more difficult. Transmission of the virus would be so much easier within an institution than in a private home. Protective measures being undertaken by the rest of the community (such as not congregating in groups, self-isolation, social distancing, maintaining a six-foot distance between people) are not as easily achieved in an institutional prison environment. Not only that, the more people that are housed in the institutions, the harder it will become to achieve any distancing to prevent infection or to contain or treat any infections that do occur. It is in the interests of society as a whole, as well as the inmate population, to release people who can be properly supervised outside the institutions. It better protects those who must be housed in the institutions (because there are no other reasonable options), those who work in the institutions (because they perform an essential service), and our whole community (because we can ill-afford to have breakouts of infection in institutions, requiring increased correctional staffing, increased medical staffing, and increased demand on other scarce resources).

37 The Crown in this case argued that because the grandparents are seniors they would be endangered by having their grandson live with them during this pandemic and that this is a negative factor that must be balanced against the advantage to the accused. First of all, as I have just discussed, it is not simply an advantage to the accused, it is a benefit to many others as well, including the community as a whole. Secondly, and more importantly, the grandparents are each close to 70 years old, so admittedly in a higher risk group in terms of the possible ramifications of infection. However, they are capable, competent adults. They are aware of the pandemic and its risks. They understand those risks and they accept them, because they love their grandson and they think it is the right thing to do. That is a choice they are entitled to make. I applaud them. I trust that their grandson does as well.

38 In these circumstances, I find that a well-informed member of the community, knowing all of this information and understanding the constitutional rights involved, would continue to have confidence in the administration of justice if Mr. L. was released on bail under strict terms to be under house arrest in his grandparents' home. Accordingly, I find that the accused has met his onus on the tertiary ground.

Terms of release

39 I ordered the accused released on strict conditions that he live with his grandmother and be subject to house arrest and subject to rigorous electronic monitoring. His grandmother posted security in the amount of $85,000 and his mother in the amount of $15,000. He is not permitted out of the residence except in the presence of a surety or his lawyer, and even then, prior notice must be given to the electronic monitoring company. He is also required to

obey a curfew from 9:00 p.m. to 6:00 a.m. and to present himself at the front door within five minutes of law enforcement attending to ensure that he is in compliance with the bail. The only exception to this is for medical emergencies for himself or his grandparents. The precise terms are set out in the recognizance itself, which in the event of a conflict, takes priority over these reasons.

A.M. MOLLOY J.

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1 *R. v. Grdic v. The Queen* (1985), 19 C.C.C. (3d) 289 (S.C.C.); *R. v. Verney* (1993), 87 C.C.C. (3d) 363, [1993] O.J. No. 2632 (C.A.) at para. 14.

2 *Criminal Code,* s. 515(10)(b)

3 *R. v. Ma*, 2015 ONSC 7709.

4 *Ibid*, para. 55.

5 *Ibid*, para. 56.

6 *R. v. Stojanovski*, 2017 ONSC 7194.

7 *R. v. Osman*, 2020 ONSC 965.

8 Criminal Code, s. 515(10)(c)

9 R. v. St. Cloud, [2015] 2 S.C.R. 328

10 *R. v. J.S.*, 2020 ONSC 1710.

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