

*Case Name:*  
**R. v. Sakhiyar**

**Between**  
**Her Majesty the Queen, and**  
**Hasibullah Sakhiyar**

[2018] O.J. No. 4999

2018 ONSC 5767

Court File No. 14784/18

Ontario Superior Court of Justice

**S.T. Bale J.**

Heard: September 19, 2018.  
Judgment: September 28, 2018.

(16 paras.)

**Counsel:**

David Slessor, for the Crown.

Tina Kaye, for the accused.

---

**S.T. BALE J.:--**

**Overview**

**1** Hasibullah Sakhiyar is charged with a variety of firearm offences. Following a **bail** hearing in May of this year, he was detained in custody pursuant to an order of Justice of the Peace Allison. He now applies to this court for a review of the decision of the **bail** justice, and for an order that he be released on an undertaking with conditions, including house arrest, with two sureties.

**2** The offences with which the accused is charged include an offence under s. 117.01 of the *Criminal Code* of possessing a firearm, while prohibited from doing so. As a result, pursuant to s.

515(6)(a)(viii) of the *Code*, the onus was on him to show cause why his detention in custody was not justified.

### Scope of review

3 Sections 520 and 521 of the *Code* which provide for **bail** review applications do not confer an open-ended discretion on the reviewing judge to vary the initial decision concerning the release or detention of the accused. In order for the reviewing judge to intervene, it must be shown that the **bail** justice erred in law, that the impugned decision was clearly inappropriate, or that new evidence shows a material and relevant change in the circumstances of the case. The reviewing judge does not have the power to interfere with the initial decision simply because he or she would have weighed the relevant factors differently: *R. v. St-Cloud*, 2015 SCC 27, at para. 121.

### Position of the defence

4 Defence counsel argues that the **bail** justice erred in law by failing to apply the "ladder principle" endorsed by the Supreme Court of Canada in *R. v. Antic*, 2017 SCC 27.

5 She argues that the decision of the justice was clearly inappropriate, in that she gave excessive weight to the tertiary ground, and insufficient weight to the others.

6 And finally, she argues that the release plan proposed by the accused represents a material and relevant change in circumstances.

### Analysis

#### *Whether the **bail** justice erred in law*

7 I do not accept defence counsel's argument that the **bail** justice erred in law by failing to apply the "**ladder** principle". This was a **reverse onus bail** hearing to which the "**ladder** principle" does not apply." In this regard, I accept the following statement of law contained in **Trotter**, *The Law of **Bail** in Canada*, at page 6-9 (2017 -- Rel.2):

The **ladder** principle is inapplicable to situations in which a **reverse onus** provision in s. 515(6) is triggered. When this subsection was enacted in 1976, Parliament made no attempt to reconcile the **reverse onus** provisions with s. 515(3). It follows that when the onus is on the accused, he or she ought to be required to justify why the most onerous form of release should not be imposed. This may well be the reality in practice.

#### *Whether the decision of the **bail** justice was clearly wrong*

8 I do not accept defence counsel's argument that the **bail** justice gave excessive weight to the tertiary ground, and insufficient weight to the others. The weight to be given to the grounds for detention will vary in accordance with the circumstances of the case. In the present case, Crown counsel argued that the accused should be detained on the secondary and tertiary grounds, and it was on those grounds that the **bail** justice focused her decision. In doing so, she gave appropriate weight to all of the relevant factors.

9 On the secondary ground, she noted that there was evidence that the accused carried a loaded handgun in a Gucci bag into a Keg restaurant, that the accused's criminal record includes three robberies, and two breaches of recognizance, and concluded that detention was necessary for the protection and safety of the public. It was open to her to do so.

**10** On the tertiary ground, the **bail** justice considered all of the circumstances of the case. She considered the apparent strength of the prosecution's case, and found it to be "not particularly weak". She considered the gravity of the offence, and found that it could not be overstated. She considered the circumstances surrounding the commission of the offence, including the fact that a firearm was used. And finally, she correctly found that in the circumstances of the case, including the accused's criminal record, he would be liable, on conviction, for a potentially lengthy term of imprisonment. Having taken these considerations into account, she found that detention was necessary to maintain confidence in the administration of justice. It was open to her to do so.

*Whether there is a material and relevant change in circumstances*

**11** I do not accept defence counsel's argument that there is a material and relevant change of circumstances. At the time of the alleged offences, the accused lived at home with his mother, sister, and two uncles. At the original **bail** hearing, his release plan was house arrest in that home, with his sister and one of his uncles as sureties. The release plan proposed on this **bail** review is house arrest in that home, with his sister and the other uncle as sureties.

**12** The accused's sister testified that since the **bail** hearing, she has installed a security system in the home. However, the system consists solely of a video camera at the front and back doors, which she can monitor on her cell phone while at work. In my view, these cameras add little, if anything, to the release plan. She could not possibly do her job and monitor the doors with her phone. She says that the system records the video, but it is unrealistic to think that after arriving home from work, she would sit down and watch hours of video to see whether the accused had left the home.

**13** It is also of note that the strength of the Crown's case has, if anything, increased since the **bail** hearing, as a result of photographs and videos of guns and stacks of money found on the accused's cell phone

**14** The new release plan does not represent a material and relevant change of circumstances.

### **Disposition**

**15** In the end result, it has not been shown that the **bail** justice erred in law, that the impugned decision was clearly inappropriate, or that there has been a material and relevant change of circumstances. The **bail** justice weighed all of the relevant factors, and her decision is entitled to deference.

**16** The application is therefore dismissed.

S.T. BALE J.

---- End of Request ----

Download Request: Current Document: 4

Time Of Request: Friday, October 26, 2018 10:19:05