Case Name:
R. v. Anderson

Between
Her Majesty the Queen, and
Shakiem Anderson, Respondent

[2018] O.J. No. 5246

2018 ONSC 5720

Court File No.: CR-18-70000127

Ontario Superior Court of Justice

M.A. Penny J.

Heard: July 23, 2018.
Oral judgment: July 23, 2018.

(90 paras.)

Counsel:

J. Healy for the Crown.

P. Aubin and *J. Miglin* for the Respondent.

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1 **M.A. PENNY J.** (orally):-- This is an application by the Crown under section 521 of the *Criminal Code* for a review of the release order of Bovard J. of the Ontario Court of Justice made on June 20, 2018. The Crown submits bail should be revoked. Bovard J. granted bail on conditions which include 24/7 supervision by a surety, the defendant's brother, under strict terms of house arrest, no exceptions.

2 The Crown's application was heard by me on July 13th, 2018 with judgment on the application reserved to today. I am giving my reasons orally. I ask the reporter to prepare a transcript

expeditiously. I reserve the right to correct typographical and grammatical errors, but otherwise these are my final reasons.

3 By way of background, Mr. Anderson is charged with 22 counts. He is charged both with direct liability and as a party, along with three other co-accused. The charges against Mr. Anderson include pointing a firearm; intentionally discharging a firearm or imitation thereof; having his face masked; occupying a motor vehicle in which there was a handgun; transporting a firearm in a careless manner; transporting ammunition in a careless manner; possessing a loaded, restricted firearm; possessing a handgun whose serial number had been defaced; dangerous driving; fail to remain at the scene of an accident; assaulting a police officer in the execution of his duty and wounding and maiming, disfiguring or endangering his life thereby; failing to stop when ordered to do so by a police officer; carrying a concealed firearm; possession of a firearm that is a restricted weapon while being prohibited from doing so by an order under section 109 of the *Criminal Code*; and finally, breach of probation.

4 Mr. Anderson was 21 at the time of the offence. He did not work or go to school. In 2016 he was convicted of possession of a loaded prohibited or restricted weapon for which he was sentenced to two years less a day and placed on probation for two years, and made subject to a section 109 weapons prohibition.

5 Justice Bovard relied on the synopsis of the offence provided by the Crown. He summarized the core factual allegations accurately as follows:

> "The Crown alleges that there is currently an ongoing turf war between gangs in certain areas of the Toronto downtown core. This conflict has led to much violence. On the day in question Mr. Anderson and his 3 co-accused were in a Volkswagen SUV. They were wearing hoods pulled up tight around their faces and sunglasses. Police officers who were conducting a patrol in the area saw them and decided to follow them. The car stopped and one of the accused stepped out of the car, and with his hood up, pulled out a loaded revolver, and stepped onto the sidewalk on Parliament Street. He pointed the revolver up the street toward traffic and pedestrians, and pulled the trigger. The officers and numerous independent witnesses observed this. Statements have been taken from many witnesses who describe a long barrelled revolver. In addition, video surveillance captured these actions. The shooter got back into the car with the other accused. The Crown alleges that Mr. Anderson was the driver. The officers called for backup and attempted to take down the vehicle. One officer tried to block the vehicle from going forward by placing his cruiser in front of it, and another officer tried similarly to block the vehicle from behind. As the officers moved in to secure the vehicle, Mr. Anderson reversed and smashed into the police vehicle that was behind him. An officer got out of his car; walked towards the SUV, ordering Mr. Anderson to stop. Instead Mr. Anderson accelerated at the

officer and hit him with the vehicle. Then he drove into oncoming traffic at high speeds. Numerous police vehicles pursued them. An in-car camera video in one of the officer's cars captured Mr. Anderson evading the officer. Next Mr. Anderson drove down several streets in downtown Toronto trying to flee from the officers. On the way he hit two taxi cabs; drove up on a sidewalk, causing pedestrians to have to jump out of the way in order to not be hit; smashed into a pole and several municipal garbage cans, finally damaging the car to the point that it was no longer operable. All four accused got out of the car and ran away. The officers chased them on foot. The officers searched the vehicle and found a loaded revolver with a long barrel. It had five live rounds and one spent shell casing, indicating that it had been fired. The revolver's serial number was scratched off. The officers found a black hoodie that appears to match the hoodie worn by the shooter.

All of these events were captured by surveillance video in the areas where they took place. There is no evidence that anyone was injured as a result of the shot that was fired.

One of the co-accused gave KGB video statement and he admitted being a passenger of the vehicle. At some point while the accused were in custody they either talked about urinating on their hands or actually urinated on their hands. The Crown states that this was an attempt to eliminate the gun residue.

The Crown played the video mentioned above in court. It is approximately 4 minutes long. The Crown made it an exhibit, along with still photos taken from the video. In addition, on consent" -- and I'm still quoting here -- "I qualified Officer Peglar Artinian (ph) as an expert in gang related matters. He may give evidence relating to general gang indicia - gang membership, tattoos, turf, characteristics, graffiti, coded language and hand signs". The CD is an exhibit. This report was made an exhibit on consent. It discusses the history of gang violence in the areas to which I referred. Officer Artinian concluded that there is insufficient evidence to determine at this time that Shakiem Anderson is or is not a member of the Projects Originals/Menace gang."

6 To that summary I would add only that after the four occupants of the VW SUV got out and ran away, they were chased by police in cars and on foot in hot pursuit and all four were run to ground and apprehended during the chase. A good deal of the available CCTV footage documents this chase, pursuit and apprehension.

7 This is a reverse onus case by virtue of section 515 (6)(a), (7) and (8) - that is on two grounds - first, the discharge of the firearm, and second, involvement with firearm and ammunition while under a prohibition order.

8 Justice Bovard granted bail on June 20, 2018. He imposed the following conditions:

1) Mr. Anderson will live with Mr. Ramone Anderson. He will be under house arrest. He is to remain in that residence 24 hours a day, 7 days a week, unless he is in the direct company of Mr. Ramone Anderson or Mr. Dean or counsel.

2) Mr. Anderson is not to operate any electronic communication devices. Mr. Anderson is not to have any contact with his co-accused except through counsel. He is not to be in the direct presence of his co-accused except as required for court appearances.

3) Mr. Anderson is not to possess any weapons, including firearms;

4) Mr. Anderson is not to be in a motor vehicle unless he is in the direct presence of Mr. Ramone Anderson or Mr. Dean.

5) Mr. Anderson in not to be in the care or control of a motor vehicle unless he is in the direct presence of Mr. Ramone Anderson or Mr. Dean or counsel.

9 There are three grounds for review of a bail order:

1) a material change in circumstance, typically arising from new admissible evidence;

2) an error of law on the part of the bail judge;

3) where the bail judge's disposition was clearly inappropriate.

10 In this case the Crown relies on all three grounds of review.

11 Dealing first then with material change. The Crown seeks to introduce new evidence on the review. The new evidence falls into two categories:

1) Additional evidence relating to the circumstances of the principle surety, Ramone

> Anderson, who is the defendant's brother. This evidence relates to additional arrests made of Ramone which were not disclosed by him at the first hearing. This includes arrests for shoplifting and purse snatching in 2013 and two detentions under Mental Health Act warrants in 2017 when Ramone was taken to Sunnybrook Hospital.

2) The notes of the defendant's probation officer, Genelle Gordon, following the defendant's release from imprisonment for his prior conviction. The relevant notes span July 2017 to May 2018, just prior to the events in question.

12 The test for new evidence on a bail review is similar to but less strict than the well known test for introducing new evidence under *Palmer v. The Queen*, [1980] 1 SCR 759, at page 775.

13 In summary, the due diligence requirement is met if there is a reasonable explanation for why the evidence was not provided at the original hearing. The evidence must be relevant but need not be decisive, or even potentially decisive. The evidence must be credible in the sense that it is reasonably capable of belief given the relaxed evidentiary rules at the bail stage, and it must be reasonable to think that the new evidence could have affected the balancing exercise engaged in by the judge who granted or refused bail at the first instance.

14 The Supreme Court of Canada reviewed the *Palmer* criteria in the context of bail review in *R. v. St-Cloud*, 2015 SCC 27. *St-Cloud* is the governing case on bail review and, as will be discussed in more detail below, in particular on the tertiary ground under section 515(10)(c) of the *Criminal Code*.

15 After listing the four *Palmer* criteria, Wagner J., as he then was, wrote:

> In my opinion the four criteria from *Palmer* are relevant with any necessary modifications to the determination of what constitutes new evidence for the purposes of the review provided for it in sections 520 and 521 of the *Criminal Code*. Given the generally expeditious nature of the interim release process and the risks of violating the rights of the accused, and since the released hearing takes place at the very start of the criminal proceedings, and not at the end like the sentence appeal, a reviewing judge must be flexible in applying these four criteria. I reiterate at the outset that the rules of evidence are relaxed in the context of the release hearing.

16 So, dealing first with the due diligence requirement:

17 The first criteria, due diligence, exists to ensure finality and order. However, despite the importance of these values, it is well accepted that the due diligence criteria should not be applied as strictly in criminal matters as it is in civil matters.

18 Wagner J. wrote in *St-Cloud* at paragraph 131:

> ...that a generous and liberal interpretation of the meaning of new evidence in the context of section 520 and 521 of the *Criminal Code* is thus quite consistent with the principles developed by this court.

19 He went on to say the due diligence requirement in *Palmer* "...must be adapted to the context of bail review. A reviewing judge may consider evidence that existed at the time of the first hearing but was not tendered as long as the reason is legitimate and reasonable".

20 Justice Wagner specifically contemplated that given the expedited and compressed time frames in which bail applications are heard, material, although technically available, may not have been located, processed or understood in sufficient time or with sufficient clarity to introduce it at the hearing.

21 Mr. Anderson was arrested on May 28th, 2018. The evidentiary portion of the bail hearing took place on June 14th, some 17 days following arrest. The Crown was given no prior notice of who the proposed surety was going to be or what the terms of a plan of supervision might be. It was of course the defendant's right not to provide advance notice of that information, but given the language of the Supreme Court of Canada on this criterion, it should hardly be surprising if, once that information is known, the Crown may engage in further investigation and seek to rely on new evidence in subsequent proceedings.

22 I am satisfied that although the new evidence clearly existed at the time of the bail hearing, the expeditious nature of the proceedings combined with the fact that the importance of the information now sought to be introduced would not necessarily have been entirely appreciated or known before the hearing began, is sufficient legitimate and reasonable explanation for why the information was not produced at the first hearing.

23 Dealing then with the second criteria of relevance, unlike the *Palmer* criteria under the second requirement in the context of bail review, the new evidence need not bear upon a decisive or potentially decisive issue. It is sufficient if the new evidence is relevant to an issue before the court. Since under the tertiary ground the justice must consider all of the circumstances, the range of relevance is necessarily quite broad. In this case the proposed evidence about Ramone's experience with the police is relevant to his suitability to act as surety. The parole officer's notes are relevant to both the secondary and tertiary ground; the secondary because the evidence is relevant to the likely success of a plan of supervision; and the tertiary for much the same reason - if the defendant has, for example, struggled with probation supervision, a reasonable person might wonder why the defendant would respect the direction of a sibling. Being relevant, therefore, the new evidence passes the second hurdle to its admission.

24 Credibility, the third criteria:

25 The third criteria requires that the new evidence be credible in the sense that it is reasonably capable of belief. In the context of the relaxed rules associated with bail review, there can be no question that the proposed new evidence, being a form of business record essentially, prepared more or less contemporaneously with the relevant events by employees of the government whose job it is to accurately record their interactions with those they deal with in their professional capacity, are reasonably capable of belief.

26 Finally, the Supreme Court modified the fourth *Palmer* criteria in the context of a bail review as follows:

> The new evidence must be such that it is reasonable to think, having regard to all the relevant circumstances, that it could have affected the balancing exercise that the hearing judge must engage in in deciding whether to grant bail. It is sufficient if the evidence therefore is significant in the sense that it could have affected the striking of the court's balance.

27 In this case the Crown argues that the evidence about Ramone's prior arrests could have affected the judge's assessment in two ways:

28 One, if the evidence had been used during cross-examination to contradict Ramone's testimony that he had only been arrested twice, it could have led to the submission that Ramone was not being forthright with the court. This, Mr. Healy submits, could have affected the judge's assessment of Ramone's suitability as surety.

29 And two, the circumstances of the *Mental Health Act* detentions led to the revelation that Ramone suffers from bipolar disorder, and was on at least one of those prior occasions experiencing a psychotic episode and was delusional.

30 I am not satisfied that this evidence is significant enough to warrant admission on the basis that it would have affected the balancing of Justice Bovard. I cannot conclude on this record that Ramone was being less than forthright with the court. The other arrests were in 2013 (5 years before the events in issue). As I said earlier, there were no convictions. Ramone was a young offender. It is equally if not more plausible that Ramone did not remember these experiences during the stress of giving testimony.

31 Regarding the *Mental Health Act* warrants, these are different from criminal arrests. While they are more recent, they are not in respect of any offence. A young man of limited education could be forgiven for not regarding a *Mental Health Act* detention as an arrest when asked about prior arrests in the context of a serious criminal prosecution.

32 The Crown fairly did not rely on the fact of the 2017 *Mental Health Act* issues or mental health issues per se as disqualifying Ramone from acting as a surety. There were both procedural and substantive reasons for that concession in the circumstances.

33 At the end of the day, I do not think the evidence about Ramone's prior arrests meets the fourth threshold - that it could have affected the balancing that was required in deciding whether to grant bail, and if so on what conditions.

34 I take a different view, however, of the probation officer's notes. An important, if not the most important issue facing the judge at the bail hearing on the secondary and perhaps even tertiary ground, was whether, given the familial relationship and the closeness of their ages, put together with the defendant's prior incarceration and alleged breach of parole and prohibition order, the surety, in this case his brother, would be able to exert the necessary influence over the defendant.

35 The judge said at page 22 of his decision:

> Mr. Ramone Anderson cannot pledge a lot of money as a surety, which perhaps would have the effect of making him more vigilant. He's not that much older than the accused. It would be difficult to criticize one for wondering how much influence he could have on the accused who must have hardened beyond his years when in prison.

36 He then balanced that consideration against his assessment of Ramone as a determined kind of person who, the judge felt, would call the police should the defendant not obey his bail conditions.

37 The notes from the parole officer display on the defendant's part an almost pathological inability to comply with his commitments to the parole officer. Of 26 visits in 2017 and 2018, the defendant was significantly late for - that is hours and hours late - not just minutes - or entirely missed 17 of the appointments. In most cases there was no call in advance to warn the P.O. The excuses eventually offered were, to put it mildly, somewhat lame. Perhaps even more significantly, the probation officer caught the defendant out in a lie. The defendant claimed to be enrolled in school at a time when he was not. The schooling he did enrol in was done using an alias. Thus there is reasonably credible evidence that the defendant was not forthright with his parole officer in accounting for what he was doing with a significant amount of his time following his release from prison.

38 In my view this is information which, given the ambivalence the judge had with Ramone - he said at one point "I grant that Mr. Ramone Anderson is not as strong a surety as would be ideal, particularly with his ability to exercise effective control or influence over his brother" could easily have tipped the balance the other way.

39 For these reasons I find that the parole officer's notes do meet the fourth test of significance. They could have affected the balance struck by the hearing judge during his assessment of the secondary ground and possibly the tertiary ground.

40 That being the case, as the Supreme Court of Canada said in *St-Cloud*, at paragraph 138:

> If the new evidence meets the four criteria for admissibility, the reviewing judge is authorized to repeat the analysis under section 515(10)(c) of the *Criminal Code* as if he or she were the initial decision maker [in this case whether the release of the defendant is justified].

41 So turning to analysis of the Crown's review application:

42 The Crown relies on the secondary and tertiary ground. Section 515(10) (b) provides, with respect to the secondary ground, where the detention is necessary for the protection or safety of public, including a victim of or witness to the offence, or any person under the age of 18, 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.

43 And with respect to the tertiary ground, the *Criminal Code* provides in section 515 (10)(c), if the detention is necessary to maintain confidence in the administration of justice, having regard to all the circumstances, including:

1) the apparent strength of the prosecution's case;

2) the gravity of the offence;

3) the circumstances surrounding the commission of the offence, including whether a firearm was used; and

4) the fact that the accused is liable upon 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 3 years or more.

44 Dealing with the secondary ground, the hearing judge was cognizant of the need to protect the public and of the issue of any potential to commit another criminal offence. This is why he imposed strict house arrest and other terms and assessed the question of whether Ramone would be able to influence the defendant.

45 Looking at the matter afresh, with the benefit of the parole officer notes, I am unable to reach the same conclusion as the judge below.

46 The defendant served a sentence of 2 years less a day. He appears to have been released around April 2017. He was released on 3 years probation and was under a prohibition order against possession of any firearm. Barely a year later he is alleged to have been the driver of an SUV with

three other passengers, two of whom had illegal loaded firearms. The front seat passenger got out of the car on a week day in the afternoon on Parliament Street and took a shot at someone. There was a police takedown. The driver of the SUV reversed and smashed into a police car behind and then hit a uniformed officer as it sped forward. It ran red lights, smashing into other cars as it went through busy intersections. It drove up the wrong side of the street into oncoming traffic. It pulled over onto the sidewalk and careened up the sidewalk, smashing garbage containers and causing pedestrians to flee for their lives. All of this is caught on police and CCTV camera footage. The video shows and police officers also saw the vehicle hit a pole and stall, whereupon all four passengers ran away on foot. All four fleeing occupants were apprehended shortly after as they were running away. One loaded firearm was left in the car. The other loaded firearm was found on one of the other fleeing accused. This defendant was observed jumping over a fence into a construction site to avoid capture where he was eventually cornered and taken into custody by the police.

47 These are obviously unproved allegations but, as I will discuss later, the evidence, at this stage at least, presents an overwhelmingly strong Crown case due to the proximity of multiple police officers who observed the events, the video footage and the circumstances of the chase and eventual apprehension and arrest of the men involved.

48 It is clear that under the proposed plan of supervision, the bulwark against further threat to the protection and safety of the public is, in effect, Ramone Anderson. There are two other sureties but in my view they cannot be regarded as serious constraints on the defendant's behaviour given that they live at some distance from the defendant, and in the case of the person described as his "girlfriend", an entirely different city. They are therefore in little or no position to supervise and influence the defendant's behaviour.

49 I will note, however, that the defendant deceived his girlfriend by renting the SUV used in the commission of these offences by surreptitiously using her rental account and taking the SUV that was rented in her name without her authority or permission.

50 I share the hearing judge's ambivalence about Ramone's ability to exert influence over his brother, but come to a different conclusion. Mr. Anderson has been convicted of an illegal weapons offence. He was on probation at the time of the present offences. He was under a weapons prohibition. On the available evidence for the purposes of bail, he appears to have breached both his probation order and weapons prohibition. Following his release from prison on his prior conviction, he repeatedly breached commitments made to his parole officer and was seriously late for or failed to attend well over half of his scheduled meetings with her. Further, he lied to his parole officer, claiming to be attending school when he was not; thus failing to account to his parole officer properly for what he was doing with his time. He remained unemployed and despite claims to want to pursue becoming a personal trainer, he appears to have done next to nothing to actually make that happen. Ramone is 22; a year older than the defendant. He too is unemployed and has no money. They are apparently living with their mother but she played no part whatsoever in the bail proceedings below.

51 Having regard to all the circumstances, I have no faith in Ramone's ability to influence Mr. Anderson's behaviour. This is not a criticism of Ramone. It is simply an assessment based on the defendant's past conduct. He has in my opinion shown himself to be unmanageable. It must be remembered as well that this is a reverse onus case; the ladder approach does not apply. In my view the defendant has failed to discharge his onus of showing that his plan of supervision, given his antecedent behaviour, will sufficiently protect the public or keep the public safe. I would therefore revoke bail on this basis.

52 Turning to the tertiary ground, the hearing judge said the Crown rightly pointed out that, with regard to the apparent strength of the prosecution's case, it appears they have a strong case. I would agree with that. The Crown does not allege that Mr. Anderson was in direct possession of a firearm; however, strong arguments can be made that he had constructive possession, pursuant to section 4(3) of the *Criminal Code* and, under section 21 of the *Criminal Code*, that Mr. Anderson aided or abetted the persons that had direct possession of the firearms.

53 Regarding the gravity of the offences, the offences with which Mr. Anderson is charged are extremely serious. The circumstances surrounding the commission of the offences are also extremely serious, especially because two firearms were allegedly used and it is alleged that Mr. Anderson lead the police on a very dangerous car chase in the downtown core in the middle of the afternoon when there were many persons on the roads and sidewalks. Finally, Mr. Healy argued that should Mr. Anderson be convicted of these offences, there is a strong likelihood that the court will impose a lengthy term of imprisonment, especially since loaded firearms were involved in the offences with which he is charged and he has a criminal record for a firearms offence; plus he was subject to a probationary condition that he not possess weapons including firearms.

54 The hearing judge rightly observed that a strong Crown case on the four enumerated factors under the tertiary grounds does not result in automatic detention. The essential principles which must guide the application of section 515(10(c), or the tertiary ground, are usefully summarized in paragraph 87 of *St-Cloud*. I will not repeat them all here for the purposes of my oral judgment but incorporate that paragraph by reference.

55 A similar conclusion was articulated earlier by the Court of Appeal for Ontario in *R. v. E.W.M.* That was in [2006] O.J. No. 3654 where Justice Juriansz wrote:

> Section 515(10)(c) is designed so that a consideration of all the circumstances with special regard to the four key factors will result in a determination that maintains the public's confidence in the administration of justice. For example, where each of the four factors is assessed as having maximum force, a determination that refusal of bail is necessary to maintain public confidence in the administration of justice is entirely to be expected. All of the relevant factors must be analyzed to determine whether when they are balanced as they should be, without legal error, the detention of the defendant is necessary to maintain

confidence in the administration of justice.

56 I will start with the four enumerated factors which the *Criminal Code* says I must have regard to.

Strength of prosecution case:

57 The prosecution case appears to be overwhelmingly strong. As I said earlier, there is video evidence and eyewitness testimony. As the Supreme Court said in *St-Cloud*, evidence like video evidence can be more reliable than circumstantial or even testimonial evidence. The defendant was seen running from the scene and followed by police. The defendant was captured by CCTV, cornered in a dead-end alley where he jumped a fence into a construction site. CCTV cameras also recorded his attempts to get out of the construction site to escape capture, and his eventual takedown by police who also entered the site.

58 It is of course not the role of the bail judge or my role to predict the future outcome of the trial. The defendant likewise has no obligation to disclose at this stage his defences. He has not however at this stage offered any defence, so all we have to go on is the *prima facie* Crown case which I find, as did the bail judge, is very strong.

Objective seriousness of the office:

59 The offences are very serious. The maximum penalty for some of them is 14 years. Some of the offences also have minimum sentences of 3 years.

The circumstances of the offence:

60 The circumstances of the offence are grave. The defendant was driving a vehicle on busy downtown streets, mid-afternoon on a nice spring day. Two occupants carried loaded illegal firearms. The front passenger jumped out and shot at someone on Parliament Street. There were many moving pedestrians and occupied vehicles going about their business in the vicinity. The defendant drove into a police car and hit a uniformed officer trying to escape. He drove recklessly through red lights, smashing into other vehicles. He drove up the wrong side of the road and then on the sidewalk. Pedestrians literally ran for their lives to avoid being run down. This was a violent series of events which put many innocent bystanders at serious risk. The defendant participated in these events while on probation and while under weapons prohibition, which resulted in even more charges against him.

Finally, dealing with subjective exposure to penalty:

61 As I have noted, the defendant is charged with 22 counts. They include an offence for which there is a 14 year maximum. He is also charged with an offence for which there is a 3 year minimum. If found guilty, given his criminal antecedents, there is little doubt he will be liable to a

potentially lengthy term of imprisonment.

62 Accordingly, the four enumerated criteria set out in section 515(10)(c) strongly support the detention of the defendant.

63 As I will discuss in the next section of these reasons, it is not easy to determine from the bail judge's reasons, specifically why he concluded in regard to the tertiary ground that detention is not required to maintain public confidence in the administration of justice. I put it this way - why detention was not required - because in the admitted circumstances of this case, there was not only a legal onus arising out of the application of sections 515(6)(a), (7) and (8) of the *Criminal Code*, but something in the nature of a tactical or evidentiary onus arising out of the *St-Cloud* injunction that if a 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, and the Court of Appeal's statement in *R. v. E.W.M.* that where each of the four factors is assessed as having maximum force, a determination that refusal of bail is necessary to maintain public confidence in the administration of justice is entirely to be expected.

64 In other words, the enumerated circumstances applicable under the tertiary grounds strongly support the refusal of bail - that is, clearly denial of bail is not automatic but in the absence of strong countervailing considerations, this is the usual result, or the result entirely to be expected.

65 The defendant argues that a reasonable fair-minded member of society informed about the philosophy of legislative provisions, Charter values - specifically the presumption of innocence and what that implies for pre-trial detention and the actual circumstances of the case, would not believe detention is necessary to maintain public confidence in the administration of justice. The hypothetical reasonable person would not adopt a visceral negative reaction to alleged crime or criminals. The presumption of innocence is a concrete reality in a free and democratic society. The reasonable person must judge without emotion the application of the presumption of innocence to the issue of pre-trial release or detention.

66 The defendant has three sureties who will supervise his conduct, influence his behaviour and report him if he does not strictly comply with his bail conditions. This - all of this, he argues, is sufficient to maintain confidence in the administration of justice.

67 I am unable to agree. In my opinion this argument conflates the secondary and tertiary grounds. It fails to account for the fact that the tertiary ground is a separate and independent basis to refuse bail. The tertiary ground is a constitutionally valid limit on the constitutional protection of the presumption of innocence.

68 In my view the defendant's argument relegates the tertiary ground to little more than a recap of the secondary ground.

69 Without doubt the tertiary ground raises all the usual difficulties of a reasonableness standard.

Reasonable people, of course, can disagree. There is always a doubt that, unadorned, the reasonableness standard could merely reflect a particular judge's own perspective. This could lead to unpredictable and inconsistent bail conditions.

70 The answer it seems to me is found in the Court of Appeal's reasoning in *E.W.M.*, at paragraphs 29 and 31. There Justice Juriansz wrote:

> Parliament, recognizing the court's inability to measure public confidence directly and the judicial discretion inherent in identifying it, has specified four factors that the court should consider: the apparent strength of the prosecutions' case; the gravity of the nature of the offence; the circumstances surrounding it's commission; and the potential for a lengthy term of imprisonment. The courts are well able to assess these factors. The importance of the legislative direction that the courts consider these four factors cannot be over stated. Their existence was integral to the Supreme Court's finding in *Hall* that section 515(10)(c) is constitutional - where McLachlin, C.J.C. explained that the provision did not authorize a standardless sweep because these four criteria delineated a basis for the exercise of judicial discretion.

71 I will eliminate the quote from paragraph 30 of that decision. Justice Juriansz goes on in paragraph 31:

> No one factor is determinative. The four factors should be analyzed together - not separately. Consideration of their combined effect in the context of all the circumstances enables the court to determine whether it is necessary to deny bail in order to maintain public confidence in the administration of justice

72 This is why both the Supreme Court of Canada and the Court of Appeal have said where the enumerated circumstances, which are objective and measureable, have strong force, the denial of release is the usual or expected result. I can find nothing in the record to counterbalance the weight of the four objective factors in the circumstance of this case. Indeed the defendant has, on the available record, by reoffending, breached prior orders of the court. He has not fulfilled the commitments to his parole officer and appears to have actively mislead her about what he was doing with his time.

73 Under the tertiary ground, I am compelled to conclude that detention is necessary to maintain public confidence in the administration of justice.

74 For these reasons on a reconsideration arising out of the admission of new evidence, bail must be denied or in this case revoked.

Error of Law

75 If I am wrong in admitting new evidence and conducting and repeating the analysis under the secondary and tertiary grounds, as if I were the original decision maker, I would nevertheless have granted the Crown's review of bail on the basis of an error of law. The analysis of whether there was an error of law lies in my reasons given under the first ground of review.

76 The hearing judge acknowledged the strong case on each of the four enumerated conditions under the tertiary ground. He then reviewed the need for the reasonable man to understand the presumption of innocence. He reviewed the plan of supervision, and although acknowledging some ambivalence about it, concluded that it was, with strict house arrest conditions, an appropriate basis upon which to grant bail. It is impossible to distinguish between his analysis of the secondary and tertiary grounds. To the extent there is analysis, it is clearly relevant to the secondary ground. While I accept that a plan of supervision could factor into the assessment of the reasonable person as to whether detention is necessary to maintain public confidence in the administration of justice, this analysis cannot be just a repetition of the secondary ground assessment. As Quigley J. said in *R. v. Bonito* at 2015 ONSC 4928, para. 39:

> However, whether the accused was properly releasable was also the subject of assessment of the tertiary ground criteria by the justice. Therefore that requires consideration. Whether the proposed new plan of release affects that assessment as well, it also seems plain that merely because an accused person may put forward a plan of release that satisfies the secondary ground concerns, will not be determinative of whether the detention may be ended or must nevertheless continue going to the weight of tertiary ground concerns in the context of the balancing exercise that the Code requires.

77 The tertiary ground is manifestly an independent basis for the denial of bail and must be analyzed as such.

78 As discussed earlier, the Supreme Court and the Court of Appeal for Ontario have addressed the four objective enumerated conditions under the tertiary ground and concluded that where there is strong support for all four, detention is the usual or expected result.

79 With the greatest of respect to the hearing judge, I do not think, in light of these statements, that having acknowledged the strength of the Crown's case on all four enumerated circumstances, he could justify release without specifically addressing how and why the conditions he imposed were sufficient to overcome the weight or impetus of the four objective circumstances in 515(10)(c). As Quigley J. said in *Abdullahi*, 2013 ONSC 4873 at paras. 32:

> In fairness to the learned justice and consistent with the arguments made by counsel for the defence, I wish to emphasize that it may well be that the learned justice did consider all four of the factors stipulated in that provision in reaching her determination - whether or not a reasonable member of the public of the kind previously described would lose confidence in the administration of justice if Mr.

> Abdullahi were to be granted bail. The difficulty is that I cannot discern from her reasons what considerations she gave to each of those four factors. Yet it seems plain to me on the language of the Code that all four of those factors must be considered specifically in the course of a tertiary ground analysis.

80 I would also rely on paragraph 33 and 34 but I will not read them all out for the purposes of these oral reasons.

81 He concludes paragraph 34 by saying:

> Even if she did consider all four factors in reaching her determination that detention was not required on the tertiary ground, the reasons do not permit me to understand how she reached that conclusion, and thus do not permit meaningful review.

82 Those comments apply with equal force to the circumstance of this case.

83 I tend to agree with the Crown that the hearing judge appears to have conflated the test under the secondary ground with the test under the tertiary ground. This was, in my view, an error of law. Having concluded that the bail judge was in error in failing to specifically address why the four enumerated criteria had nevertheless to yield to some other circumstance, it falls to me to conduct my own review of the tertiary ground.

84 On this analysis, as I have set out above, when I take specific account of each of the four enumerated factors under 515 (10)(c) of the *Criminal Code*, considered against the other circumstances of this case, I find that the detention of Mr. Anderson is required in order to maintain public confidence in the administration of justice.

85 I will not repeat my analysis again as it is set out in full earlier where I deal with the first ground of the review.

86 I agree as well with the Crown that the analysis set out by Justice Quigley in *Abdullahi* at paragraphs 37 to 42 is essentially on all fours with the circumstances of this case.

87 For these reasons I would grant the appeal on this ground as well.

88 Finally, dealing with the clearly inappropriate ground, had I not admitted evidence or found an error of law, I would nevertheless have found because of the failure to address specifically the reasons why the four objective enumerated circumstances were insufficient to warrant detention, I would have concluded that the release order in the circumstances was clearly inappropriate.

89 It appears the hearing judge gave excessive weight to the plan of supervision and insufficient weight to the four enumerated circumstances as described by the Wagner J. in *St-Cloud* at paragraph 121.

90 For all of these reasons the Crown application is allowed and the bail is revoked.

M.A. PENNY J.