

Case Name:
R. v. Ishmael

Between
Her Majesty the Queen, and
Collis Ishmael

[2019] O.J. No. 474

2019 ONSC 596

Court File No.: 19-10000001-00BR

Ontario Superior Court of Justice

R.F. Goldstein J.

Heard: January 10, 2019.
Judgment: January 23, 2019.

(64 paras.)

Counsel:

Yeshe Laine, for the Crown.

Peter Zaduk, for Mr. Ishmael.

REASONS FOR JUDGMENT ON BAIL REVIEW APPLICATION

R.F. GOLDSTEIN J.:--

OVERVIEW

1 Mr. Ishmael faces three sets of charges. One set of charges relates to a shooting on March 8,

2018. A second set of charges relates to a shooting on May 9, 2018. A third set of charges relates to the possession of a handgun and cocaine for the purposes of trafficking on May 10, 2018. The police seized the handgun and cocaine from a safe in an apartment residence where Mr. Ishmael had strong connections. The safe also contained almost 60 grams of crack cocaine. The police seized keys from Mr. Ishmael. The keys unlocked the safe, the room the safe was in, and the apartment. A ballistics report linked the handgun in the safe to both the March 8 and May 9 shootings. Eyewitnesses said that the shooter on March 8 entered an SUV after the shooting. Ms. Izzard, Mr. Ishmael's common law spouse, owns an SUV. Mr. Ishmael was arrested while in Ms. Izzard's SUV. The police recovered shell casings from the March 8, 2018 shooting. Mr. Ishmael's DNA was on one of those shell casings. At the time of all the offences Mr. Ismael was subject to three weapons prohibition orders. He also had a criminal record that included convictions for firearms possession and drug trafficking. Mr. Ishmael was released on all three sets of charges.

2 The Crown has applied for a review of those decisions. These decisions were made by Justice Wolski of the Ontario Court of Justice on June 8, 2018 and Justice of the Peace Walker on December 18, 2018.

3 In my respectful view, the justice of the peace's decision was clearly inappropriate. She also made errors of law. I also find that there has been a material change in circumstances since Wolski J. made his release order. On January 10, 2019 I allowed the Crown's application. I vacated Mr. Ishmael's bail orders. I issued detention orders on all charges. I indicated that my reasons would follow. These are my reasons.

BACKGROUND

4 On March 8, 2018 someone fired two shots at 157 First Avenue in Toronto. 157 First Avenue is a residential address. Fortunately, no one was injured. There were, however, people home next door at 159 First Avenue. Eyewitnesses described the shooter as wearing a mask. They reported that he apparently drove away in a tan SUV. The police found two bullet holes in the house at 157 First Avenue. The police also recovered two 9mm shell casings at the scene. The shell casings were swabbed. The swabs were sent to the Centre for Forensic Sciences ("CFS"). CFS had a "hit" on one of the swabs. The National DNA Database contained Mr. Ishmael's DNA profile. The "hit" indicated that the DNA on the shell casing matched Mr. Ishmael's DNA profile in the database. CFS issued a report dated April 21, 2018 indicating the match. This finding meant that Mr. Ishmael's DNA was on one of the shell casings.

5 On May 9, 2018 at about 1:00 am someone fired gunshots at the house located at 114 Empringham Drive in Toronto. Empringham Drive is also a residential street. The police could not process the scene at the time. The next morning, however, the police located bullet holes in the garage and throughout the house. They also recovered bullets in the house. Fortunately, no one was injured. The police also located two 9mm shell casings on the driveway although there were clearly more than two shots fired.

6 On May 10, 2018 the police obtained a search warrant for 295 Sackville Street, Apartment 213, Toronto for reasons unrelated to the two shootings. Mr. Ishmael was named as the warrant's target. The police observed Mr. Ishmael walking a dog in the vicinity. He walked the dog into the building at 295 Sackville Street. He then left the building and was arrested as he entered an SUV. He was found carrying two sets of keys. The police seized the keys. They used one of the keys to enter apartment 213. The door to the bedroom was locked. The police used another of the keys to open the bedroom door. There was a locked safe in the bedroom. The police used a third seized key to open the safe. The police found a 9mm Sig Sauer handgun in the safe. They also found a magazine with six rounds of 9mm ammunition and 13 loose rounds of 9mm ammunition in the safe. The police also found just under 60 grams of crack cocaine in the safe.

7 The police arrested Mr. Ishmael for possession of the firearm, the ammunition, and the crack cocaine.

8 Mr. Ishmael has a criminal record. In 2014 he was convicted of possession of a loaded restricted firearm. In 2013 he was convicted of possession of cocaine for the purpose of trafficking, and possession of marijuana for the purpose of trafficking. At the time of the May 10, 2018 bail hearing Mr. Ishmael was subject to three weapons prohibitions.

9 The justice of the peace released Mr. Ishmael on a recognizance. That recognizance only related to the May 10 gun and drug possession charges. Akaysha Izzard and Sean Ishmael acted as his sureties. Ms. Izzard is Mr. Ishmael's common law spouse. Sean Ishmael is Mr. Ishmael's brother.

10 On June 6, 2018 the police charged Mr. Ishmael with the March 8 shooting at 157 First Avenue. They arrested him on a *Feeney* warrant. The police found a cell phone in his possession. That was a breach of his recognizance, although the breach did not come to light until a later bail hearing. The main piece of evidence against him was the DNA hit on the discarded shell casing. The 9mm shell casing was, of course, also consistent with the 9mm handgun found in the safe. Wolski J. of the Ontario Court of Justice released him on another recognizance. His sureties were Ms. Izzard, again, and Charmel Cleverdon, a family friend. In doing so, His Honour said:

What has happened is that there has been a shooting at a certain location in the City of Toronto where two casings were found and two bullets were extracted from the exterior of a house. The casings have some DNA from which the Centre of Forensic Science, I gather, cannot exclude this particular defendant as a possible depositor of that DNA.

... the evidence may or may not show that it is the accused's DNA that is on the casing. It is a possibility, but so far it remains only a possibility.

... it would be difficult to draw an inference, merely because he cannot be

excluded from a DNA deposit on a casing, that he was the actual shooter, particularly when he has weapons stored in a safe to which he had keys... As I said, the Crown's case is not solid in any way, shape, or form.

11 As I will outline later in these reasons, I disagree with the bail hearing judge's finding that the case was not "solid". It was very solid. As I will also explain, however, I am vacating the release order based on a material change in circumstances.

12 While he was on bail, Mr. Ishmael successfully completed an apprenticeship program to be a hazardous material worker. He obtained employment in October 2018 with an environmental management company and was, apparently, working at a job site in Toronto.

13 On October 30, 2018 the Center of Forensic Sciences issued a Firearms Linkage Report. The Report indicated that the 9mm shell casings that the police seized from the March 8 First Avenue and May 9 Empringham crime scenes had been fired from a 9mm SigSauer handgun. That was the handgun seized from the safe at 295 Sackville on May 10. It will be recalled that the police seized the keys to that safe (as well as the apartment and the bedroom) from Mr. Ishmael.

14 The police then contacted Mr. Ishmael and told him to turn himself in. On November 26, 2018 Mr. Ishmael did so. The police charged him in relation to the May 9 Empringham shooting. The police also charged him with the breach of recognizance related to the cell phone found in his possession on June 6, 2018. He had a bail hearing on December 7 and 18, 2018. The justice of the peace released him on a recognizance. For procedural reasons, a new bail hearing was also held regarding the drug and gun possession charges.

ANALYSIS:

15 Mr. Ishmael, like all accused persons, has a constitutional right not to be denied reasonable bail without just cause: *R. v. Pearson*, [1992] 3 S.C.R. 665, at p. 691; *R. v. Antic*, 2017 SCC 27, [2017] 1 S.C.R. 509, at para. 31. The default position, except in the case of reverse onus offences (such as these) is that a person should be released. The release should be on the least onerous terms consistent with risk.

16 A justice may, however, detain an accused person on either the primary ground (necessary to ensure attendance in court), secondary ground (necessary to prevent the commission of further offences or interference with the administration of justice), or the tertiary ground (necessary to maintain confidence in the administration of justice): *Criminal Code*, s. 515(10).

17 In *R. v. St. Cloud*, 2015 SCC 27, [2015] 2 S.C.R. 328, the Supreme Court of Canada clarified the basis on which a court may review a bail decision. A reviewing court may intervene in a bail decision where the lower court has erred in law or made a decision that was clearly inappropriate. However, the reviewing judge does not have the power to interfere simply because he or she would have weighed the relevant factors differently (at para. 121). A reviewing court may also overturn a

bail decision where there is new evidence to show a material and relevant change in circumstances (at para. 121). All three bases of review apply to all three criteria for detention: *R. v. Dang*, 2015 ONSC 4254, 21 C.R. (7th) 85, at para. 31.

18 Given the background, these are the issues to be determined on this bail review:

- (a) Has there been a material change in circumstances since Wolski J. released Mr. Ishmael?
- (b) Did Justice of the Peace Walker make an error in releasing Mr. Ishmael?

19 Since I am satisfied that there was a material change in circumstances, and that the justice of the peace erred in releasing Mr. Ishmael, I will go on to answer these questions:

- (c) Should Mr. Ishmael be detained on the secondary ground?
- (d) Should Mr. Ishmael be detained on the tertiary ground?

(a) Has there been a material change in circumstances since Wolski J. released Mr. Ishmael?

20 Mr. Zaduk argued, on behalf of Mr. Ishmael, that the ballistics report did not constitute enough of a change to justify vacating bail granted by Wolski J. That was the bail in relation to the the March 8, 2018 shooting. He argued that the report did little to advance the Crown's case because the person who possessed the gun on May 10 was not necessarily the same person who fired the gun on March 8. The Crown's case is no stronger as a result of the ballistics report than it was when Wolski J. granted bail.

21 I respectfully disagree. I find that the Firearms Linkage Report's availability created a material and relevant change in circumstances. That Report indicated that the shell casings that the police found at both locations were fired from the SigSauer seized by the police from the safe at Sackville. That, of course, was the safe to which Mr. Ishmael had the key. The Report is clearly new information that was not available to the bail hearing judge. There is no doubt I can take it into account. When viewed in conjunction with Mr. Ishmael's DNA on the shell casing, it is difficult to describe the Crown's case as anything but strong.

22 Frankly, I would not have released Mr. Ishmael in relation to the March 8, 2018 shooting. I do not agree with the bail hearing judge on that point. I think the "hit" did more than simply "not exclude" Mr. Ishmael as the donor of the DNA. The odds against the donor of the DNA being someone else are measured in the trillions. I do not agree that it was not a strong Crown case. It was an extremely strong Crown case even without the Firearms Linkage Report. That said, I do not have an open-ended jurisdiction to substitute my views for the views of the bail hearing judge: *R. v. Dang*

, at para. 48.

23 Crown counsel also notes that the bail hearing Crown did not have the full biology report. This meant that Crown counsel did not have all of the available factual background.

24 I disagree that possessing the biology report was a material change. The report was available. There was no legitimate or reasonable reason why it was not placed before the bail hearing judge. In my view, the criteria in *R. v. Palmer*, [1980] 1 S.C.R. 759, should apply, as noted in *St. Cloud* at paras. 132 and 135. In any event, the Crown still had the information. Wolski J., an experienced judge, would have known the importance of a DNA "hit" from a shell casing. Moreover, the information from the DNA hit was surely the important thing. That information was before Wolski J. The report itself added little.

25 In my view, therefore, I am in a position to review the decision made by the bail hearing judge and intervene due to a material change in circumstances.

(b) Did the justice of the peace make an error in releasing Mr. Ishmael?

26 Mr. Zaduk argues that the reasons of the justice of the peace disclose no error. Mr. Ishmael had been on bail for several months at the time of the December 2018 bail hearing. He had completed an apprenticeship program. He had a job. The bail conditions were working.

27 I disagree. Regrettably, the justice of the peace erred in releasing Mr. Ishmael on both the primary and secondary grounds. She incorrectly applied the ladder principle in a reverse onus situation. Furthermore, the release decision was clearly inappropriate on both the secondary and tertiary grounds. I would respectfully formulate the errors this way:

- (i) Did the justice of the peace err by applying the ladder principle in a reverse onus situation?
- (ii) Did the justice of the peace err on the primary or secondary grounds?
- (iii) Did the justice of the peace err on the tertiary ground?

i. Did the justice of the peace err by applying the ladder principle in a reverse onus situation?

28 The justice of the peace clearly applied the ladder principle. She stated the following in her reasons:

Because there was an alleged breach, I agree that we must move up the ladder of release to a stricter form and that would be a house arrest.

He was not on a house arrest before.

So, this form of release is at the top of the ladder.

29 The onus was on Mr. Ishmael to show cause why he should have been released. Mr. Zaduk argues that the Supreme Court's decision in *Antic* makes it clear that the ladder principle now applies even in the case of reverse onus provisions. He notes that *Antic* was a drug case, which means that it was reverse onus by nature of the charges. Accordingly it was no error for the justice of the peace to apply the ladder principle in these circumstances.

30 I disagree. The justice of the peace erred by applying the ladder principle in a reverse onus situation. I agree with the following statement of Bale J. of this Court in *R. v. Sakhiyar*, 2018 ONSC 5767, at para. 7, which in turn relies on Justice Trotter's work on bail:

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.

31 The ladder principle was described in *Antic*, at para. 29, in this way:

The *Bail Reform Act* also codified what is now known as the "ladder principle". This *Act* set out possible forms of release, which were ordered from the least to the most onerous. The ladder principle generally requires that a justice not order a more onerous form of release unless the Crown shows why a less onerous form is inappropriate. In other words, the ladder principle means "that release is favoured at the earliest reasonable opportunity and . . . on the least onerous grounds": *R. v. Anoussis* (2008), 242 C.C.C. (3d) 113, at para. 23, per Healy J.C.Q. (as he then was).

32 When properly read *Antic* does not overturn the notion that the ladder principle does not apply in a reverse onus situation. Wagner J. noted that by the time of the bail review at issue, Mr. Antic had pleaded guilty to the drug charges. Accordingly, only the firearms charges remained

outstanding. It was not a reverse onus situation at the bail review. The bail review judge should have applied the ladder principle. Wagner J. stated at para. 50 of *Antic*:

With these interpretive principles in mind, I will now turn to the bail review decision at issue in this appeal. Mr. Antic's show cause hearing and bail reviews were contested. Mr. Antic bore the onus of establishing why the detention order should be vacated. However, once Mr. Antic had satisfied the bail review judge that new circumstances justified his vacating the order, the ladder principle ought to have guided the judge in fashioning a release order. Although Mr. Antic had been charged with drug trafficking, which had reversed the onus at the initial bail hearing, he had pleaded guilty to these charges by the time of his second bail review hearing. He was therefore not in a reverse onus position at that time.

33 In my respectful view, it makes sense that the ladder principle does not apply in a reverse onus situation. In a reverse onus situation, of course, the accused must show cause. A justice at a reverse onus bail hearing does not simply make a "yes" or "no" detention decision. A justice must consider whether an accused can be released depending on the conditions. Those conditions may include the availability of a surety or a good residential plan. A justice would be justified in finding that the accused has failed to meet his onus because the plan of supervision is inadequate. Ordinarily the onus is on the Crown to show cause why more restrictive bail conditions are required.

34 In my respectful view, the justice of the peace made an error of law by applying the ladder principle in a reverse onus situation.

ii. Did the justice of the peace err on the primary or secondary grounds?

35 I am not concerned about the primary ground. Mr. Ishmael has never been convicted of breaching a court order or failing to appear. He has turned himself in twice in this case. The primary ground is simply not an issue here.

36 The secondary ground, however, is a different matter. In my view, the justice of the peace made two legal errors: she erred when considering the grounds to arrest Mr. Ishmael; and she erred in failing to conduct a risk analysis. Her decision was also, unfortunately, clearly inappropriate.

37 The justice of the peace first erred when considering the grounds to arrest Mr. Ishmael. She indicated that she was aware that there was a search warrant in existence when Mr. Ishmael was arrested, and that he was the target. She stated that she did not know why he was arrested because the warrant had not yet been executed. With respect, if the police had a search warrant with Mr. Ishmael as the named target, then they clearly had reasonable grounds to arrest him. If the police have reasonable grounds to search a place, then they have reasonable grounds to believe that a crime has occurred and there is evidence in the place to be searched. The police need not name a target in a search warrant, of course. But if they do, as they did here, that means that a judicial officer agreed that they had reasonable grounds to believe Mr. Ishmael committed the crime.

Although the dynamics of arresting a person and executing a search warrant are different, it is obvious that if there are reasonable grounds to execute a warrant then there are reasonable grounds to arrest the person who has allegedly committed the crime. It may well be that the dynamics at play in an arrest situation mean that the considerations are different from those before a justice of the peace: *R. v. Golub* (1997), 34 O.R. (3d) 743, 117 C.C.C. (3d) 193 (C.A.), at p. 750. Here, however, the police clearly had grounds to arrest based on the issued warrant. They had discretion as to whether to arrest before or after executing that warrant.

38 In fairness, that error was not particularly consequential. The more fundamental error was that the justice of the peace did not conduct a risk analysis. A risk analysis is required by s. 515(10)(b): *R. v. Young*, 2010 ONSC 4194, at paras. 18-19. The justice of the peace simply examined the plan of release. The justice of the peace was required to weigh the gravity of the harm against the possibility that the accused might commit another offence. The need for a risk assessment was particularly acute in this case. The Crown alleges that Mr. Ishmael committed two drive-by shootings. He allegedly fired shots randomly at two residences. The evidence strongly suggested he was in possession of the weapon that fired those shots. He was already on three weapons prohibitions. He clearly posed a risk of re-offending. It is difficult to imagine a more dangerous form of crime. This city has experienced several unfortunate cases where random shots killed or injured innocent bystanders, including young children. The justice of the peace should have weighed that risk.

39 Frankly, and with great respect to the justice of the peace, the decision to release was also clearly inappropriate considering the nature and strength of the Crown's case, Mr. Ishmael's criminal record, and risk of harm to the public. I also point out that the analysis of the charge relating to Mr. Ishmael's cell phone possession showed that the justice of the peace failed to properly weigh the evidence.

40 When the police arrested Mr. Ishmael on the *Feeney* warrant in June 2018 he was in possession of a cell phone. There was a condition in the May 2018 recognizance that Mr. Ishmael was not to possess a cell phone. The police did not immediately charge him. From what counsel tell me, it seems that the police may not have been aware of the condition. It is also possible that the cell phone was not operable. In any event, no breach of recognizance charge was laid until the December 2018 bail hearing, when the condition came to light. Clearly, as Mr. Zaduk points out, the police did not see the cell phone as a particularly serious matter. Mr. Zaduk also takes the position that the cell phone did not operate and that Mr. Ishmael's children used it to play games. Of course, if that is the case then the breach of recognizance charge is triable.

41 The justice of the peace, however, took the view that the Crown's case on the cell phone was actually stronger than the Crown's case on the May 9 shooting and the possession of the firearm and drugs. She said this:

An inference was made that Mr. Ishmael must be the one in possession of the

drugs and the gun and the ammunition found in the safe as he had the key. Ms. Laine has indicated that having the keys is also having knowledge and control of the items. I have not heard anything that he has any knowledge of the items, but that is triable.

With regard to the shooting the day before at 114 Empringham, the Crown's case is also based on inference. Two of the casings that were shot on May 9th at 114 Empringham were from the gun that was found in the Sackville search. Mr. Ishmael, because he had the keys to the apartment, the locked room and the locked safe where the gun was found, [sic] it was inferred that he must be the shooter. There are no allegations of fingerprints; no strong eyewitnesses; no video footage of Mr. Ishmael in the shooting. These types of things are what we see when the Crown has a very strong case.

42 Although the justice of the peace referred to the lack of fingerprints on the casings, she did not mention Mr. Ishmael's DNA on the casings at the other shooting. In fact, she did not mention the March 8, 2018 shooting at all. She also did not mention that the May 9 Empringham shooting occurred at 1:00 a.m., a time where eyewitnesses were unlikely to be present. The justice of the peace also did not mention that the shooter in the March 8, 2018 shooting was seen driving away in a light coloured or tan SUV. The police arrested Mr. Ishmael as he was getting into a light coloured SUV. Ms. Izzard, his common law spouse and surety, owns that SUV.

43 It is difficult to understand how the possession of a cell phone that may not have been operating (and only came to light months later) qualifies as a strong case but the possession of a gun and drugs in a safe -- a safe to which Mr. Ishmael had the key -- was not. It is also difficult to understand how the possession of a gun linked to the two shootings (as well as DNA -- a fact not mentioned by the justice of the peace) did not constitute a strong Crown case. The justice of the peace erred in this respect. She did not properly weigh the evidence. I understand that I do not have an open-ended jurisdiction to revisit decisions of a justice at a bail hearing, but there is simply no other way to characterize the analysis.

44 Furthermore, Mr. Ishmael has a history of committing these types of offences. He seemed not to have any means of support at the time of the bail hearing (other than drug dealing). The decision to release -- at least insofar as the secondary ground is concerned -- was clearly inappropriate. Even a very good plan, recalling that the onus was on Mr. Ishmael, would not have been enough to outweigh the strength of the Crown's case and the obvious risk of harm to the public.

iii. Did the justice of the peace err on the tertiary ground?

45 Section 515(10)(c) sets out the criteria of what is commonly referred to as the tertiary ground. A justice may detain an accused person in custody where it is necessary to maintain confidence in the administration of justice, having regard to all of the circumstances. Those circumstances are set

out in s. 515(10)(c) but they are not exhaustive, as the Supreme Court commented in *St. Cloud*. A court must balance all of the relevant circumstances, including the factors in s. 515(10)(c), in order to determine whether detention is necessary to maintain confidence in the administration of justice. A bail court must adopt the perspective of a reasonable member of the public who is properly informed about the philosophy of the legislative provisions, *Charter* values, and the circumstances of the case. He or she need not be a legal expert, obviously. A justice at a bail hearing must also consider whether confidence in the administration of justice would be undermined if detention is ordered where it is not justified.

46 The factors set out in s. 515(10)(c) that a justice must weigh are:

- (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 is liable, on 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 three years or more.

47 Mr. Zaduk argues that Mr. Ishmael has been doing everything he can to turn his life around. He has surrendered himself when required. He has obtained a trade and a job. The justice of the peace made no error, he argues, in strongly weighing those facts.

48 Respectfully, I disagree. The justice of the peace, unfortunately, erred when she failed to properly weigh the strength of the Crown's case, (as I have already mentioned in my analysis of the secondary ground). I will not repeat why the Crown's case was strong.

49 Furthermore, the justice of the peace failed to consider the other factors set out in s. 515(10)(c). Of course, she was not required to specifically allude to each factor in her reasons. That said, I have no confidence, based on her ruling, that she actually considered them. Moreover, the justice of the peace failed to consider the suitability of Ms. Izzard as a surety. It is true that Mr. Ishmael has never breached a court order while Ms. Izzard supervised him. That said, it is also true that Ms. Izzard and their young child were cohabiting with Mr. Ishmael when the police seized a loaded handgun from their residence in 2013. That handgun was accessible to anyone, including the child. Moreover, while I do not suggest that Ms. Izzard was in any way involved or even knowledgeable about Mr. Ishmael's participation in the offences, there are facts suggesting that he

used her SUV to commit one of the drive-by shootings. The justice of the peace failed to weigh these facts when considering the plan of supervision. I do not say that Ms. Izzard, after appropriate consideration, may not have been a proper surety. But the justice of the peace erroneously failed to consider those facts.

50 Regrettably, the justice of the peace also erred in her application of the test on the tertiary ground. She said this:

So, looking at the totality of the circumstances outlined by the Crown based on the inferences made, I do not find the Crown's case strong enough to address the tertiary grounds and I do not believe the public would be outraged by your release.

51 Whether or not the public would be outraged is not the test. The test is whether detention is necessary to maintain confidence in the administration of justice. If outrage were required then virtually everyone charged with a serious offence would be detained on the tertiary ground. It is never difficult to find a lot of people outraged by a particular crime. In other words, the justice of the peace appears to have accepted that detention could occur on a lower standard than the one set out in s. 515(10)(c). As Iacobucci J. said in *R. v. Hall*, 2002 SCC 64, [2002] 3 S.C.R. 309, at para. 128:

Finally, I emphasize that the role of this Court, and indeed of every court in our country, to staunchly uphold constitutional standards is of particular importance when the public mood is one which encourages increased punishment of those accused of criminal acts and where mounting pressure is placed on the liberty interest of these individuals. Courts must be bulwarks against the tides of public opinion that threaten to invade these cherished values. Although this may well cost courts popularity in some quarters, that can hardly justify a failure to uphold fundamental freedoms and liberty.

52 Although Justice Iacobucci was in dissent, no right-thinking member of the community, and certainly no member of the judiciary, would disagree with those comments.

53 Given my conclusion that the justice of the peace erred on the secondary and tertiary grounds, I am in a position to review her decision and intervene. Although I am not conducting a *de novo* hearing, I must determine whether a release is appropriate. I now turn to that question.

(c) *Should Mr. Ishmael be detained on the secondary ground?*

54 My finding that Mr. Ishmael's release on the secondary ground was clearly inappropriate answers this question. For the sake of completeness I will simply reiterate why it was inappropriate.

55 Mr. Ishmael had previously been convicted of possession of a loaded restricted firearm. He

had previously been convicted of two drug trafficking offences. He was on three firearms prohibitions when he was found, allegedly, in possession of a loaded firearm and 60 grams of crack cocaine. The December bail hearing was a reverse onus situation. It was a reverse onus because of the drug charges and the weapons charges.

56 When I conduct a risk assessment, I am mindful of Mark Twain's observation that history may not repeat itself, but it rhymes. I have already mentioned Mr. Ishmael's criminal antecedents. As must be obvious, I find that the justice of the peace was simply wrong to say that the Crown's case is not strong. It is quite strong. Mr. Ishmael was arrested with the keys to the apartment, bedroom, and safe containing the firearm that shot at the two residences. His DNA was on one of the shell casings at one of the scenes. He was arrested in a light coloured SUV. The shooter on March 8 was driving a tan or light coloured SUV. The potential harm is about as high as the circumstances can get. There is nothing more dangerous to the safety of the community than someone firing random shots at a residential address. When I weigh the strength of the case against the gravity of the potential harm I have little difficulty in finding that the balance comes down on detaining Mr. Ishmael. On the secondary ground I am not satisfied that Mr. Ishmael will not continue to commit further offences. Given the nature of the offences he is alleged to have committed, the risk of harm to the public is simply too great.

57 I am aware that Mr. Ishmael has been on bail successfully since May 2018. I am also aware that he completed an apprenticeship program and found a job. It is unfortunate that he must be sent to custody. The potential for harm, however, outweighs his success on bail.

(d) *Should Mr. Ishmael be detained on the tertiary ground?*

58 When I examine the factors set out in s. 515(10)(c), it is clear that Mr. Ishmael's detention is required to maintain confidence in the administration of justice. The Crown's case is strong and the gravity of the offences is high. Firearms were used. The length of imprisonment will be significant if Mr. Ishmael is convicted. Again, Mr. Ishmael was on three firearms prohibition orders at the time the offences were committed.

59 Unlike the justice of the peace, I do not find that the possession of the cell phone is a serious violation. It was not even brought to Wolski J.'s attention at the June 2018 bail hearing. It is certainly not enough to justify detention on any ground.

60 Mr. Ishmael has allegedly engaged in the type of crimes -- drive by shootings at residential addresses -- that are absolutely the most dangerous of all to the general public. We know that wild shootings in the general direction of someone or some thing do not just occasionally take the life of rival gang members. They also take the lives of innocent bystanders. The shooters are generally untrained and unconcerned with the consequences. That describes, allegedly, Mr. Ishmael. When considering the strength of the Crown's case, the gravity of the offences, and the potential for harm if Mr. Ishmael re-offends, a reasonable, thoughtful member of the public would likely lose confidence in the administration of justice if he was released.

61 The Crown alleges that Mr. Ishmael is associated with the Sick Thugz, a street gang. Certainly the behaviour that Mr. Ishmael is accused of -- drive-by shootings, gun possession, drug trafficking -- is consistent with membership in a street gang. So is his criminal record.

62 Other than the allegation, however, there is no concrete evidence of Mr. Ishmael's membership. That said, I observe that it is unlikely that a person who has been convicted of drug trafficking and firearms possession, and allegedly possesses almost 60 grams of crack cocaine, as well as a handgun and ammunition, is freelancing when he fires shots at two residential addresses. As a criminal court judge presiding in this jurisdiction, I think I can also observe -- for the purposes of a bail hearing -- that this looks an awful lot like gang activity. Ultimately, whether or not Mr. Ishmael is a member of a gang is not that germane on this bail review. What is germane is that he has engaged in criminal activities that are consistent with membership in a gang. The public is entitled to assume that the courts will protect them from this type of behaviour. Where the courts do not, confidence in the administration of justice will be undermined. That is so even where someone like Mr. Ishmael appears to have taken steps to right himself. Those steps are simply not enough to outweigh the potential for grave harm.

63 Even acknowledging that Ms. Izzard is Mr. Ishmael's common law spouse, I am also troubled by her as a surety. It is a concern is that Ms. Izzard appears never to have discussed with Mr. Ishmael the fact that he kept a loaded handgun and drugs in her house with their infant child. I find that shocking, if true as Ms. Izzard claims. My more immediate concern is the fact that it seems that Mr. Ishmael may have used a vehicle registered to Ms. Izzard when he allegedly conducted the drive-by shooting on March 8, 2018. It seems not to have occurred to her that this could be a problem. I am not sure how she could ever be an appropriate surety. More importantly, a reasonable, thoughtful member of the public would also likely share those concerns.

DISPOSITION

64 Mr. Ishmael is detained on all charges pending trial.

R.F. GOLDSTEIN J.

---- End of Request ----

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