**CITATION:** *R. v. N.Y.*, 2021 ONSC 1398
**COURT FILE NO.:** CR-21-6000061-00BR
**DATE:** 20210223

# ONTARIO

# SUPERIOR COURT OF JUSTICE

**BETWEEN:**

**HER MAJESTY THE QUEEN**

*Respondent*

**– and –**

**N.Y.**

*Applicant*

*A. Spiegel,* for the Respondent

*D. Robinson,* for N.Y.

**HEARD:** February 17, 2021.

**Restriction on Publication**
An order has been made pursuant to s. 517(1) of the *Criminal Code*. Publication and quotation of general principles in these reasons is permitted, but publication of any facts that might identify the accused or about the/his personal circumstances or the evidence is prohibited. This judgment complies with that order and may be published.

## REASONS FOR DECISION

**SCHRECK J.:**

[1] N.Y., who is 20 years old and has no criminal record, is charged with a number of offences arising out of his alleged possession of a loaded firearm and an allegation that he used it to threaten someone. He has been custody on those charges for over 90 days and is therefore entitled to have his detention reviewed by this court pursuant to s. 525 of the *Criminal Code*. He proposes that he be released on strict conditions amounting to house arrest with his mother and sister as sureties and that he be subject to electronic monitoring. The Crown opposes his release on the secondary and tertiary grounds.

[2] At the conclusion of the hearing of the application, I ordered that N.Y. be released with reasons to follow.

[3] While there are clear secondary ground concerns in this case, in my view they are addressed by the very strict conditions being proposed. The sureties, whose credibility was not challenged, take their responsibilities seriously and will ensure that N.Y. is constantly under supervision. N.Y. will have virtually no opportunity to commit further offences.

[4] With respect to the tertiary ground, the four factors enumerated in s. 515(10)(*c*) of the *Criminal Code* all weigh in favour of detention: the Crown case is strong, the offences are serious, the circumstances in which they were committed involve firearms, and N.Y. is subject to a lengthy term of imprisonment if convicted. However, there are other circumstances that favour release: (1) N.Y. is a youthful first offender; (2) he is an African-Canadian and therefore a member of a disadvantaged group that is overrepresented in the criminal justice system, a relevant factor by virtue of s. 493.2(*b*) of the *Criminal Code;* (3) the proposed release plan is very strict; and (4) the ongoing COVID-19 pandemic. Having balanced all of the circumstances, I am of the view that the public would not lose confidence in the administration of justice if N.Y. is released on strict conditions.

[5] Following are the reasons for these conclusions.

## I. FACTS

### A. The Allegations

[6] Because there is a publication ban, I will not set out the allegations in great detail. They are extremely serious and, if proven, would make N.Y. liable to a very long term of imprisonment.

[7] It is alleged that N.Y. and two unidentified males hired the complainant to drive them to Thunder Bay and back. When they returned on the afternoon of October 23, 2020, the men refused to pay the complainant and an argument ensued. It is alleged that during the argument, N.Y. stood next to the vehicle, lifted his clothing to reveal a black handgun in his waistband, and said, "Use your head, if I give it to him, he will finish you." N.Y. then walked away, while the other two men attempted to open the car doors, prompting the complainant to drive away at a high rate of speed.

[8] The complainant called the police, who began an investigation. Using security video from a nearby building, they were able to identify N.Y. and determine that he lived in an apartment close to where the altercation occurred.

[9] The police obtained a search warrant, which they executed on October 26, 2020 at the apartment where N.Y. lived with his father. A loaded black Glock handgun was found in a satchel in N.Y.'s bedroom. It had 10 rounds of ammunition in the chamber and had been converted for use as an automatic weapon. A trace of the serial number revealed that the gun had not been purchased in or legally imported to Canada. The police also seized a laptop computer from N.Y.'s bedroom which appears to have a bullet hole in it.

## B. N.Y.'s Background

[10] N.Y. is 20 years old and has no criminal record. At the time of his arrest, he was living with his father in an apartment in Toronto. He had for a time been employed in a sporting good store. He had been studying at York University but had left the program to pursue other interests.

### C. The Initial Bail Hearing

[11] N.Y. had a bail hearing on December 1, 2020 before a Justice of the Peace. He proposed his brother and his sister as sureties and also proposed that he be subject to electronic monitoring provided by the Ontario Government. On December 3, 2020, N.Y. was detained on the secondary and tertiary grounds.

### D. The Proposed Plan of Release

[12] N.Y. proposes that he be released on a recognizance in the amount of $8000 with his mother, R.A., and his older sister, E.B., (not the sister proposed at the initial bail hearing) as his sureties. Both women live in the same apartment building in Gatineau, Québec. It is proposed that N.Y. will live with his sister and her husband. He would not be permitted to leave the apartment except in very limited circumstances. His sister, who works at home, would be with him most of the time. If she has to leave, his mother, who lives one floor below, would stay with him. N.Y. would not be allowed to have keys to the apartment or the building and would not be permitted to use any electronic devices without the supervision of the sureties. They intend to search his belongings on a regular basis.

[13] In addition to the sureties, it is proposed that N.Y. be subject to electronic GPS monitoring through Recovery Science Corporation ("RSC").

## II. ANALYSIS

### A. Overview

[14] This is a review conducted pursuant to s. 525 of the *Criminal Code*. Unlike a review conducted pursuant to s. 520 or s. 521, this is not a review of any prior judicial order but, rather, a review of the detention itself. The question which the court must answer is whether the continued detention of N.Y. is justified within the meaning of s. 515(10) of the *Code*, that is, whether detention is necessary on the primary, secondary or tertiary grounds set out in that section: *R. v. Myers*, 2019 SCC 18, [2019] 2 S.C.R. 105, at paras. 45-47.

[15] Where, as in this case, there has been a prior bail hearing, the reviewing court must show respect for any findings of fact made by the first-level decision maker if there is no cause to interfere with them, but must also be careful not to simply "rubber stamp" the prior decision: *Myers*, at para. 47, 55. In this case, the findings at the initial bail hearing related to different sureties than are being proposed here. The Crown concedes that the new sureties constitute a material change in circumstances warranting a *de novo* consideration of whether bail should be granted.

[16] The Crown accepts that N.Y. will attend court if released, so his detention is not justified on the primary ground in s. 515(10)(*a*). However, the Crown opposes his release on the secondary and tertiary grounds.

### B. The Secondary Ground

#### *(i) The Nature of the Inquiry*

[17] Section 515(10)(*b*) of the *Code* states that detention is justified on the secondary ground where it is necessary for the protection or safety of the public "having regard to all the circumstances including any substantial likelihood that the accused will, if released from custody, commit a criminal offence or interfere with the administration of justice." In this context, a "substantial likelihood" means "a probability of certain conduct, not a mere possibility. And the probability must be substantial, in other words, significantly likely": *R. v. Manasseri*, 2017 ONCA 226, at para. 87.

#### *(ii) The Secondary Ground Concerns in This Case*

[18] As Crown counsel points out, the allegation in this case is that N.Y. brazenly brandished a handgun in broad daylight in order to threaten another person and that he was in possession of an extremely dangerous weapon which could have easily been used to kill or seriously injure somebody. While N.Y. is obviously presumed innocent of these charges, the nature of the allegations is nonetheless relevant for the reasons outlined by Trotter J. (as he then was) in *R. v. R.H.*, 2006 ONCJ 116, 38 C.R. (6th) 291, at para. 29:

> While still unproven, it is an important fact that should be considered in the determination of whether the public is at risk. Indeed, it would be artificial to gauge the potential risk to the public without looking at the features of the index offence. The fact that, at present, it is a mere allegation is offset by the strength of the Crown's case.

In this case, the Crown's case, particularly with respect to the firearm possession charges, is formidable. Absent a successful challenge to the search warrant or some plausible denial of knowledge of the firearm in his bedroom, N.Y. is likely to be convicted.

[19] I agree with the Crown that possession of a firearm is not an opportunistic offence or one resulting from a momentary lapse in judgment. As observed by my colleague, Harris J., in *R. v. Kawal,* 2018 ONSC 7531, at para. 16, "[a] person does not stumble upon an illegal handgun. There is a process of purchasing from a trafficker and secreting the handgun to avoid detection and prosecution. There is a high degree of deliberation and contemplation involved." The allegations in this case, if true, demonstrate that N.Y. deliberately took the steps involved to arm himself with a deadly weapon and was prepared to use it, at least for the purpose of threatening someone. This gives rise to obvious secondary ground concerns.

[20] However, as was noted in *R. v. Tully,* 2020 ONSC 2762, at para. 23:

> … the relevant question is not whether secondary ground concerns exist, but whether they can be adequately addressed by the proposed release plan, having regard to all of the relevant factors. [The applicant] does not have to show that he is unlikely to ever reoffend under any circumstances or for all time, but only to establish that the risk of his reoffending in a way that would jeopardize public safety can be reduced to tolerable levels during the time he will be on bail by the restrictions and supervision he will be under as provided in the bail order.

Thus, the issue is whether the proposed plan in this case will reduce the risk of reoffence to a tolerable level.

*(iii) The Proposed Plan*

[21] In this case, the proposed plan is very strict and would require N.Y. to remain in his residence and under the direct supervision of a surety at all times with few exceptions. Both proposed sureties testified on this application and were extensively cross-examined. I found both to be impressive. They clearly understand their obligations as sureties and have turned their minds to the creation of a comprehensive release plan. The Crown does not suggest that the sureties are not credible and did not submit that they would be unable or unwilling to implement the plan they proposed.

[22] The supervision by the sureties would be supplemented by electronic monitoring through RSC. While no evidence was led about the electronic monitoring, RSC is familiar to the courts and I can take judicial notice of how the monitoring works. RSC would be able to track N.Y.'s movements by GPS. When N.Y. is permitted to leave the residence, one of his sureties would have to contact RSC by telephone to notify them and the surety's identity would be confirmed by voice recognition software. The police would have access to the tracking data on request and would be notified by RSC if N.Y. left his residence without authorization or if he removed the electronic monitoring bracelet.

[23] I recognize that electronic monitoring has its limitations. While it can reveal where an individual is, it cannot reveal what he is doing. More importantly, it cannot directly prevent a person from breaching his bail. It can only afford evidence that he has done so after the fact: *R. v. Jesso*, 2020 ONCA 280, at paras. 24-27. However, what it can do is make it virtually certain that any breach will be quickly detected, which can have a deterrent effect. As was observed by Nordheimer J. (as he then was) in *R. v. Doucette*, [2016] O.J. No. 852 (S.C.J.), at para. 5, "electronic monitoring does significantly reduce the likelihood that an accused person will commit an offence … because the accused has to know that in addition to the watchful eyes of his sureties, there is an electronic eye on him that will automatically alert the authorities if he strays out of the designated area." See also *R. v. B.M.D.*, 2020 ONSC 2671, at paras. 56-58; *R. v. Rajan*, 2020 ONSC 2118, at paras. 32-33; *R. v. T.L.*, 2020 ONSC 1885, at para. 22.

*(iv) Opportunity to Commit Further Offences*

[24] Secondary ground concerns cannot be assessed in the abstract. Rather, the court must consider the nature of the risk to public safety based on the nature of the allegations and the accused's antecedents as well as the details of the proposed release plan. Based on this, the court must consider what the risk is and whether the proposed plan sufficiently addresses it.

[25] In this case, N.Y. has no criminal record or history of disobeying court orders, so the risk assessment must be based only on the nature of the allegations. There are two obvious concerns. The first is that N.Y. will once again procure a deadly weapon. The second is that whether or not he obtains a weapon, that he will threaten or harm the complainant or some other person with whom he has some sort of dispute.

[26] Does the proposed plan address these risks? In my view, it does. The proposed plan, which involves N.Y. being subject to constant supervision while confined to his home in a city where he does not know anybody, would make it very difficult for N.Y. to commit further offences. While neither his sureties or the electronic monitoring could prevent N.Y. from breaching his conditions if he were inclined to do so, he would know that any such breach would with certainty result in his imprisonment and his sureties' forfeiture of the funds they pledged. Given the evidence of the sureties, which I accept, that they have a close relationship with N.Y., I do not believe it is likely that he will do so.

[27] In my view, there is not a substantial likelihood that N.Y. will commit further offences and pose a danger to the public. As a result, his detention is not necessary for the protection of the public. However, that does not end the inquiry. The court must still consider whether his detention is necessary on the tertiary ground.

**C. The Tertiary Ground**

*(i) The Nature of the Inquiry*

[28] Section 515(10)(*c*) provides as follows:

> 515. (10) For the purposes of this section, the detention of an accused in custody is justified only on one or more of the following grounds:
>
> . . . .
>
> (*c*) if the detention is necessary to maintain confidence in the administration of justice, having regard to all the circumstances, including
>
> > (*i*) the apparent strength of the prosecution's case,
> >
> > (*ii*) the gravity of the offence,
> >
> > (*iii*) the circumstances surrounding the commission of the offence, including whether a firearm was used, and

> (*iv*) the fact that the accused 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.

[29] Public confidence refers to the perception of reasonable members of the community who are informed about the philosophy behind the bail provisions in the *Code, Charter* values and the actual circumstances of the case. It does not take into account the perceptions of those prone to emotional reactions, those who do not have knowledge of the circumstances of the case or who disagree with society's fundamental values: *R. v. St-Cloud,* 2015 SCC 27, [2015] 2 S.C.R. 328, at paras. 75-80.

[30] The tertiary ground is a distinct ground that can justify detention: *St-Cloud,* at para. 87. The tertiary ground is also conceptually distinct from the other grounds. The primary and secondary grounds relate to an assessment of the probability that the accused will behave in a certain way, that is, fail to attend court or commit further offences. The tertiary ground is not concerned with predictions about the accused's behaviour but, rather, with public perception. Having proper regard for the views of reasonable members of the public while disregarding views that may be based on purely emotional reactions or misunderstandings is not an easy task: *St-Cloud,* at para. 81.

*(ii) The Statutory Factors*

[31] Subsections (*i*) to (*iv*) of s. 515(10)(*c*) provide a non-exhaustive list of circumstances which the court should consider in relation to the tertiary ground: (*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. All four factors clearly favour detention in this case.

[32] As noted earlier, the Crown's case, particularly with respect to the firearm possession charges, is strong.

[33] The offences are very grave. The proliferation of illegal firearms in Toronto is an increasingly dire problem. According to statistics compiled by the Toronto Police Service, there were 462 shooting and firearm discharge incidents in Toronto in 2020, resulting in death or injury to 217 people.[1]

[34] The circumstances surrounding the commission of the alleged offences are also serious. N.Y. allegedly possessed a loaded firearm that had been modified for use as an automatic weapon. Moreover, while there is no allegation that N.Y. discharged a firearm, the act of showing it to the complainant while threatening him clearly constitutes a "use" of the firearm: *R. v. Steele,* 2007 SCC 36, [2007] 3 S.C.R. 3, at para. 32.

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[1] https://data.torontopolice.on.ca/pages/shootings

[35] Finally, if convicted N.Y. is liable to a penitentiary sentence of at least three or four years, despite his being a youthful first offender.

[36] While the enumerated factors set out in subsections (*i*) to (*iv*), all favour detention in this case, those factors are not exhaustive: *St-Cloud,* at paras. 66-71. Section 515(10)(*c*) requires the court to have regard to "all the circumstances." The non-enumerated circumstances that may be relevant will depend on the facts of each case.

*(iii) Other Circumstances*

*(a) Age and Criminal Record*

[37] The age of the accused and the extent, if any, of his criminal record are also relevant circumstances: *St-Cloud,* at para. 71. In this case, N.Y. is young and has no prior criminal record. It is a well-established sentencing principle that youthful first offenders should only be imprisoned if absolutely necessary and then for as short a term as possible: *R. v. Brown,* 2015 ONCA 361, 126 O.R. (3d) 797. In my view, a reasonable and informed member of the public would expect the same approach to be taken with respect to bail. I will explain why.

[38] Accused persons who are denied bail and later convicted are given credit for the time they spend in presentence custody. In the vast majority of cases, that credit will be at a rate of one and half days of credit for every day spent in presentence custody: *Criminal Code,* s. 719(3.1); *R. v. Summers,* 2014 SCC 26, [2014] 1 S.C.R. 575. Recently, many individuals who were in presentence custody at the Toronto South Detention Centre ("TSDC"), where N.Y. is incarcerated, have been granted significant additional credit because of the harshness of the conditions there: *R. v. Fronczak,* 2021 ONSC 219, at paras. 56-57; *R. v. Stevens,* 2020 ONCJ 616, at para. 46; *R. v. Gordon,* 2020 ONSC 7395, at paras. 44-45; *R. v. McLaughlin,* 2020 ONCJ 566, at para. 39; *R. v. Edusei,* 2020 ONSC 4856, at para. 60; *R. v. Niyongabo,* 2020 ONSC 4752, at para. 74; *R. v. Kandhai,* 2020 ONSC 3580, at para. 94; *R. v. Studd,* 2020 ONSC 2810, at paras. 34-35.

[39] Depending on the extent of credit given, the time it takes to get to trial and the ultimate sentence imposed, an accused who is denied bail and later convicted could end up serving a significant portion of his sentence in presentence custody and correspondingly less time serving the sentence. However, presentence custody and time spent serving a sentence are significantly different, as was noted in *Summers,* at para. 28:

> Remand detention centres tend not to provide the educational, retraining or rehabilitation programs that are generally available when serving a sentence in corrections facilities. Consequently, time in pre-trial detention is often more onerous than post-sentence incarceration.

[40] It follows from the foregoing that denying bail to a youthful first offender who is later convicted has the effect of reducing his access to rehabilitative programs which are intended to facilitate his transition to becoming a law-abiding member of society. In my view, a reasonable member of the public who is aware of the importance of rehabilitation in the sentencing of youthful first offenders would consider this to be a relevant circumstance. In some cases, absent secondary ground concerns, allowing the youthful first offender to spend the time before trial under the

supervision of a supportive family may be preferable to detention. Public confidence in the administration of justice is not enhanced when sentences for youthful first offenders are served before instead of after conviction, with no access to rehabilitative programs.

*(b) Section 493.2(b) of the Criminal Code*

[41] Section 493.2 was recently added to the *Criminal Code* together with a number of other amendments.[2] The full text of the section is as follows:

> 493.2 In making a decision under this Part, a peace officer, justice or judge shall give particular attention to the circumstances of
>
> (*a*) Aboriginal accused; and
>
> (*b*) accused who belong to a vulnerable population that is overrepresented in the criminal justice system and that is disadvantaged in obtaining release under this Part.

N.Y. is an African-Canadian. There can be no doubt that he is part of a vulnerable group that is overrepresented in the criminal justice system: *R. v. Le,* 2019 SCC 34, 54 C.R. (7th) 325, at paras. 90-97; *R. v. Golden,* 2001 SCC 83, [2001] 3 S.C.R. 679, at para. 83; *R. v. Reid,* 2016 ONSC 8210, at paras. 23-26; *R. v. Williams,* 2018 ONSC 5409, at paras. 45-46; *R. v. Elvira,* 2018 ONSC 7008, at para. 22; *R. v. Kandhai,* 2020 ONSC 3580, at para. 40.

[42] Section 515(10)(*c*) refers to confidence in the administration of justice "having regard to all the circumstances". In my view, "all of the circumstances" clearly includes the circumstances that a court considering bail is statutorily required to consider, including the accused's membership in a vulnerable and overrepresented group. This is clearly part of the "circumstances of a case" that a reasonable member of the public would consider: *St-Cloud,* at para. 80; *R. v. E.B.,* 2020 ONSC 4383, at para. 67.

[43] The reasonable members of the community whose confidence s. 515(10)(*c*) is intended to maintain are properly informed about the philosophy of the legislative provisions that relate to issues of bail: *Hall,* at para. 41. Section 493.2, like all new enactments, is presumed to be remedial: *Interpretation Act,* R.S.C. 1985, c. I-21, s. 12; *Bell ExpressVu Limited Partnership v. Rex,* 2002 SCC 42, [2002] 2 S.C.R. 559, at para. 26. The problem it is designed to remedy is the overrepresentation of certain populations in the criminal justice system: *E.B.,* at para. 22. The reasonable member of the community is aware of the need to remedy this problem.

[44] Obviously, applying s. 493.2 of the *Code* does not mean that bail should be granted simply because the accused is from a disadvantaged community. What it does mean is that where an accused is from an overrepresented and disadvantaged group and there is a viable alternative to detention, public confidence will sometimes be strengthened by choosing the less restrictive option. Section 493.2 requires the court to ask the question which Nakatsuru J. asked himself in

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[2] *An Act to Amend the Criminal Code, the Youth Criminal Justice Act and Other Acts and to make consequential amendments to other Acts,* S.C. 2019, c. 25, assented to June 21, 2019.

*R. v. Sledz,* 2017 ONCJ 151, at para. 20, a bail case involving an Indigenous accused: "So when I look at your case and ask myself whether detention is the only answer, I must be mindful that I do not want to become part of the problem."

*(c) The Release Plan*

[45] The strictness of a proposed release plan is a relevant circumstance to consider in relation to the tertiary ground for the reasons explained by Trotter J. (as he then was) in *R. v. Dang,* 2015 ONSC 4254, 21 C.R. (7th) 85, at para. 58:

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

[46] Crown counsel points out that the Crown's case in *Dang* was not overwhelming and submits that the portion quoted above must be considered in that context. I do not agree. It is now well-accepted in authorities from this Court that the strictness of the release plan is a relevant circumstance to be considered on the tertiary ground, and not only where the Crown's case is not strong: *R. v. S.L.,* 2021 ONSC 721, at para. 61; *R. v. Ofori-Mensah,* 2021 ONSC 90, at para. 47; *R. v. B.M.D.,* 2020 ONSC 2671, at paras. 67-69; *R. v. S.B.S.,* 2020 ONSC 4516, at para. 61; *R. v. M.K.,* 2020 ONSC 2266, at para. 23; *R. v. J.S.,* 2020 ONSC 1710, at para. 10; *R. v. Forbes,* 2020 ONSC 1798, 459 C.R.R. (2d) 297, at para. 28; *R. v. Aden,* 2019 ONSC 2043, at paras. 29-30; *R. v. Oksem,* 2019 ONSC 958, at para. 71; *Tully,* at para. 32.

[47] In this case, the proposed plan contemplates N.Y.'s freedom being restricted as much as it can be short of actual incarceration. In my view, this circumstance would increase confidence in the administration of justice.

*(d) The COVID-19 Pandemic*

[48] The COVID-19 pandemic has been ongoing for almost a year. While the process of vaccinating the population has begun, it will be many months before the majority of Canadians are vaccinated. Recently, variants of the virus causing COVID-19 which are believed to be more

contagious have begun to spread in Ontario. The pandemic has negatively affected the lives of virtually everyone.

[49] It is now well-known that the virus is airborne and spreads easily in places where individuals are in close contact. Congregate settings, including prisons, allow it to spread more easily. The staff in Ontario's correctional facilities have done an admirable job in attempting to protect the inmates in their care. For the first several months of the pandemic, they were largely successful. Unfortunately, as was bound to happen, as the incidence of infection in the community has risen, outbreaks have begun to occur in Ontario correctional facilities, including at the TSDC. In my view, it is no longer reasonable to believe that the virus can be kept out of custodial facilities.

[50] N.Y. has unfortunately already contracted COVID-19 at the TSDC, but has fortunately recovered. While much about the virus remains unknown, there is reason to believe that those who have contracted the disease and recovered may have some immunity against reinfection, at least for some period of time. Whether he can still spread the virus to others remains unknown.[3]

[51] The impact of COVID-19 is especially significant in cases where the accused has an underlying health condition which puts him at greater risk: *R. v. Kazman,* 2020 ONCA 251, at para. 17. As that is not the case here, the pandemic does not play as significant a role in the tertiary ground analysis as it otherwise would. However, it is nonetheless relevant in three respects.

[52] First, preventing outbreaks in custodial institutions by limiting the prison population benefits not only the inmates, but also the correctional staff and the communities in which they live. Public confidence in the administration of justice is enhanced when the courts take into account public health measures designed to protect everyone in the community: *Kazman,* at para. 18; *R. v. Hoo-Hing,* 2020 ONSC 6343, at para. 40; *R. v. S.A.,* 2020 ONSC 3622, at para. 41; *R. v. H.K.,* 2020 ONSC 3275, at para. 97; *R. v. D.M.,* 2020 ONSC 3152, at para. 35; *R. v. F.D.,* 2020 ONSC 3054, at para. 18; *Forbes,* at para. 32; *R. v. T.L.,* 2020 ONSC 1885, at para. 36; *R. v. B.J.,* 2020 ONSC 2596, at para. 82-83.

[53] Second, the measures being taken by the correctional staff to control the spread of COVID-19 have made the conditions in which inmates must live much more difficult: *R. v. Xavier,* 2021 ONSC 890, at para. 46; *R. v. Brown,* 2020 ONSC 6355, at paras. 50-53; *R. v. Prince,* 2020 ONSC 6121, at para. 74; *Rajan,* at paras. 51-52.

[54] Third, the pandemic has necessitated that courts be closed for periods of time and has slowed the rate at which cases can be heard. At the time these reasons were released, jury trials in Toronto have been suspended since October 9, 2020 and will continue to be until at least May 3, 2021.[4] Because of this, it is likely that it will take longer for N.Y.'s case to be heard than it otherwise would: *R. v. B.J.,* 2020 ONSC 2596; *R. v. G.D.,* 2020 ONSC 3164, at paras. 47-48; *T.L.,* at para. 34; *Tully,* at para. 35; *Myers,* at para. 50.

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[3] https://www.news-medical.net/news/20201028/Study-Close-to-1725-of-recovered-COVID-19-patients-could-still-carry-the-virus.aspx

[4] Notice to the Profession and Public Regarding In-Person Operations in Toronto, Brampton and Ottawa (October 9, 2020); Notice to the Profession and Public Regarding Court Proceedings – January 13, 2021.

[55] For these reasons, while the significance of the COVID-19 pandemic is limited in this case, it is nonetheless a relevant circumstance weighing in favour of release.

*(iv) Balancing*

[56] How then are the various factors to be balanced? The Crown submits that where the four enumerated factors in s. 515(10)(*c*) favour detention, then detention will ordinarily follow. In this regard, the Crown relies on *R. v. Anderson,* [2018] O.J. No. 5043 (S.C.J.), at para. 72:

> 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.

With respect, I cannot agree with this proposition.

[57] In concluding that detention is the "expected result" when the enumerated factors strongly favour detention, the Court in *Anderson* relies on *R. v. E.W.M.,* [2006] O.J. No. 3653 (C.A.) (cited as paras. 62 and 71), which it views as consistent with *St-Cloud.* However, that aspect of *R. v. E.W.M.,* (which is sometimes reported as *R. v. Mordue*) was expressly rejected in *St-Cloud*, at paras. 68-70:

> The appellant, relying on *R. v. Mordue* (2006), 223 C.C.C. (3d) 407 (Ont. C.A.), submits that a detention order must be made when the four circumstances set out in s. 515(10)(c) weigh in favour of that result, unless there are other "circumstances" that might justify a release order.
>
> In my opinion, the appellant is mistaken.
>
> Section 515(10)(*c*) could not be worded more clearly: it refers to "all the circumstances, including . . .". In my opinion, Parliament would have worded this provision differently (although I will not comment on the validity of such a wording) if it had intended a detention order to be automatic where the four listed circumstances weigh in favour of such an order. In fact, Parliament intended the opposite. As the Chief Justice stated in *Hall* [2002 SCC 64, [2002] 3 S.C.R. 309], a justice dealing with an application for detention based on s. 515(10)(*c*) must consider all the relevant circumstances, but must focus particularly on the factors Parliament has specified: para. 41.
>
> . . . .
>
> Moreover, the automatic detention argument disregards the fact that the test to be met under s. 515(10)(*c*) is whether the detention of the accused is necessary to maintain confidence in the administration of justice. The four listed circumstances are simply the main factors to

> be balanced by the justice, together with any other relevant factors, in determining whether, in the case before him or her, detention is necessary in order to achieve the purpose of maintaining confidence in the administration of justice in the country. . . . The argument that detention must automatically be ordered if the review of the four circumstances favours that result is incompatible with the balancing exercise required by s. 515(10)(*c*) and with the purpose of that exercise.
>
> Finally, it is important not to overlook the fact that, in Canadian law, the release of accused persons is the cardinal rule and detention, the exception: *Morales* [[1992] 3 S.C.R. 711], at p. 728. To automatically order detention would be contrary to the "basic entitlement to be granted reasonable bail unless there is just cause to do otherwise" that is guaranteed in s. 11(*e*) of the *Charter*: *Pearson* [[1992] 3 S.C.R. 665], at p. 691. This entitlement rests in turn on the cornerstone of Canadian criminal law, namely the presumption of innocence that is guaranteed by s. 11(*d*) of the *Charter*: *Hall*, at para. 13. These fundamental rights require the justice to ensure that interim detention is truly justified having regard to all the relevant circumstances of the case.

[58] The principle of restraint referred to in *St-Cloud* has been reaffirmed by the Supreme Court of Canada since *St-Cloud*: *R. v. Zora,* 2020 SCC 14, at para. 83; *R. v. Antic,* 2017 SCC 27, [2017] 1 S.C.R. 509, at para. 29; *Myers,* at para. 25. It has also been recently codified in s. 493.1 of the *Criminal Code,* (which was enacted at the same time as s. 493.2):

> 493.1 In making a decision under this Part, a peace officer, justice or judge shall give primary consideration to the release of the accused at the earliest reasonable opportunity and on the least onerous conditions that are appropriate in the circumstances, including conditions that are reasonably practicable for the accused to comply with, while taking into account the grounds referred to in subsection 498(1.1) or 515(10), as the case may be.

[71] Based on the foregoing, it is necessary in this case to balance the factors enumerated in s. 515(10)(*c*), which favour detention, against the other relevant factors, including N.Y.'s age, his membership in a disadvantaged and overrepresented group, the strictness of his release plan and the ongoing pandemic. That balancing must be informed by the principle of restraint codified in s. 493.1. Ultimately, the question that must be determined is whether N.Y.'s detention is *necessary* to maintain confidence in the administration of justice. In my view, it is not. A reasonable person would not lose confidence in the administration of justice if N.Y. is released on strict conditions.

## III. DISPOSITION

[59] For the foregoing reasons, N.Y. is ordered released on a recognizance with A.S. and E.B. as sureties. He is to remain in his residence, subject to limited and enumerated exceptions, he is

not to possess any weapons, he is not to have any contact with the complainant and he is to be subject to electronic monitoring through RSC.

Justice P.A. Schreck

**Released: February 23, 2021**

**CITATION:** *R. v. N.Y.*, 2021 ONSC 1398
**COURT FILE NO.:** CR-21-6000061-00BR
**DATE:** 20210223

**ONTARIO**

**SUPERIOR COURT OF JUSTICE**

**HER MAJESTY THE QUEEN**

**– and –**

**N.Y.**

## REASONS FOR DECISION

P.A. Schreck J.

**Released: February 23, 2021**