

- Breach of weapons prohibition contrary to s. 117.01(1) of the *Criminal Code*.

[4] Mr. Ofori-Mensah was arrested on September 9, 2020. His application for bail was denied. He now brings a bail review application. The onus is on Mr. Ofori-Mensah due to the nature of the charges. Mr. Ofori-Mensah is alleged to have committed the offence while using a firearm. He was also on a weapons prohibition. The onus would rest on him on either basis.

[5] Mr. Ofori-Mensah has a criminal record. On October 25, 2017 he was convicted of failure to comply with a recognizance. He was then required to be in his place of residence except for the purpose of going to or from Lakeshore Community College, where he was taking classes. He was found to be outside his residence on a day when he did not have class. He was given a conditional discharge and put on probation for 12 months.

[6] On March 20, 2018, Mr. Ofori-Mensah was convicted of possession of a loaded prohibited firearm contrary to s. 95(1) of the *Criminal Code*. He was a passenger in a car when it was stopped by the police. The police searched him and found a gun in the waistband of his pants.

[7] There appears to be agreement that Mr. Ofori-Mensah can meet his onus on the primary ground. There also appears to be agreement that the key issues on the tertiary ground are the strength of the Crown's case and the impact of the recent Covid-19 outbreak at the TDSC. Thus, there are five issues to be determined on this bail review:

First, has there been a material change of circumstances or an error by the justice of the peace?

Second, has Mr. Ofori-Mensah met his onus on the secondary grounds?

Third, what is the strength of the Crown's case?

Fourth, what is the impact of the recent Covid-19 outbreak?

Fifth, has Mr. Ofori-Mensah met his onus on the tertiary ground?

[8] For the reasons that follow, I find that there has been a material change of circumstances. I also find that Mr. Ofori-Mensah has met his onus on the secondary and tertiary grounds. The application is granted.

(a) Has there been a material change of circumstances or an error by the justice of the peace?

[9] Mr. Ofori-Mensah's counsel, Mr. Ghebrai, argues that I should review the detention as there has been a material change in circumstances: there has been a significant outbreak of Covid-19 at the Toronto South Detention Centre (which I will refer to as the "TDSC") where Mr. Ofori-Mensah is currently being held. Mr. Ghebrai also argues that the justice of the peace made an error of law when he detained Mr. Ofori-Mensah. I can therefore deal with the application as a hearing *de novo*: *R. v. St. Cloud*, 2015 SCC 27.

[10] Crown counsel, Mr. Poon, agrees that the recent Covid-19 outbreak at the TDSC constitutes a material change of circumstances. Mr. Poon disputes that the justice of the peace made an error of law. He does agree that I can review Mr. Ofori-Mensah's bail *de novo* but argues

that the result is the same: the plan is insufficient for Mr. Ofori-Mensah to meet his onus on the secondary and tertiary grounds.

[11] I agree with counsel that there should be a hearing *de novo* based on the material change of circumstances because of the outbreak at the TDSC. The pandemic will not constitute a material change of circumstances in every situation: *R. v. J.A.*, 2020 ONCA 660 at para. 85. In that case, Thorburn J.A. dealt with the review of a single judge who granted bail pending appeal. Thorburn J.A. stated at para. 66:

The relevance and materiality of the COVID-19 pandemic requires a review of:

- (a) The respondent's age and health;
- (b) The conditions at the institution in which the respondent would be detained;
- (c) The effect of COVID-19, if any, on whether the respondent will attend court as required; and
- (d) The effect of COVID-19, if any, on the threat posed to public safety by the respondent's release.

[12] I am satisfied that the recent outbreak meets the criteria.

[13] I do not agree that the Justice of the Peace made an error at the initial bail hearing. Mr. Ofori-Mensah is not entitled to a hearing *de novo* on that basis. Although Mr. Ghebrai set out several alleged errors in the notice of application, in oral argument he pressed the point that the Justice of the Peace erred in law by misapprehending the nature of his discharge for breach of recognizance. The Justice of the Peace noted it as a reason for Mr. Ofori-Mensah failing to meet his onus on the secondary grounds. Mr. Ghebrai argued that it was merely a technical breach; and that the Justice of the Peace misapprehended the evidence by failing to note that there was a period of sustained compliance after that.

[14] Respectfully, I cannot agree. Mr. Ofori-Mensah's bail was varied so that he could leave his residence and travel to school. He was stopped in a car on a day when he did not have class. I cannot agree that it was a trivial or technical breach. On the other hand, Mr. Ofori-Mensah did plead guilty and receive a discharge.

[15] Based on the material change, I will consider the question of bail *de novo*.

(b) Has Mr. Ofori-Mensah met his onus on the secondary ground?

[16] Mr. Ghebrai argues that Mr. Ofori-Mensah can meet his onus on the secondary grounds. He argues that the risk that Mr. Ofori-Mensah will commit further offences can be managed. A good plan combined with GPS monitoring is sufficient.

[17] Section 515(10)(b) describes the secondary grounds:

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:

(b) where the detention is necessary for the protection or safety of the public, including any victim of or witness to the offence, or any person under the age of 18 years, 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...

[18] At the initial bail hearing, Mr. Ofori-Mensah's then counsel proposed three sureties: Martha Aguilera, Christiana Ofori, and Lydia Adjei. Ms. Aguilera is the mother of Mr. Ofori-Mensah's girlfriend; Ms. Ofori is Mr. Ofori-Mensah's mother; and Ms. Adjei is Mr. Ofori-Mensah's aunt. The plan was that Mr. Ofori-Mensah continue to reside with his mother. Ms. Aguilera and Ms. Ofori were Mr. Ofori-Mensah's sureties when he breached his bail conditions in 2017 although he was living with his mother. The Justice of the Peace in this case was not satisfied that the plan was adequate for Mr. Ofori-Mensah to meet his onus. He noted that Ms. Aguilera and Ms. Ofori were sureties on the initial breach. Mr. Ofori-Mensah was residing with his mother when he breached. After hearing their evidence, he was not satisfied that they were prepared to do anything different, other than simply talk to Mr. Ofori-Mensah. With respect, I do not see any error in the Justice of the Peace's analysis.

[19] Mr. Poon, for the Crown, described the proposed plan as a "failed plan". Crown counsel is right to be concerned about the two proposed sureties. I see no error by the Justice of the Peace in rejecting the proposed plan at the initial bail hearing. I am satisfied, however, that the new plan meets the onus on the secondary ground.

[20] The plan presented at the bail review featured the same sureties but a different arrangement. Mr. Ofori-Mensah would live with Ms. Aguilera. I share the concerns of the Justice of the Peace and the Crown about Ms. Aguilera and Ms. Ofori. To be fair, however, after the 2017 breach Mr. Ofori-Mensah was released back to them as sureties. The justice who re-released him in 2017 believed that they were still suitable, and Mr. Ofori-Mensah did not breach his bail again.

[21] I find it significant that Mr. Ofori-Mensah will be subject to GPS monitoring as provided by SafeTracks, an Ontario government program. The option of GPS monitoring was not presented to the Justice of the Peace at the original bail hearing.

[22] In my view, the plan of release is an improvement in the sense that Mr. Ofori-Mensah would no longer be living in the Driftwood housing complex. It is also an improvement in the sense that the plan features GPS monitoring and a different residential surety. In my view, the risk on the secondary ground can be managed. That, of course, is not the end of the matter. I must also consider the tertiary ground.

(c) What is the strength of the Crown's case?

[23] Section 515(10)(c) sets out the circumstances that a justice or judge must take into account when determining 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 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.

[24] There is no question that the gravity of the offence, the circumstances of the offence, and the use of a firearm militate do not favour release. There is also no question that Mr. Ofori-Mensah is liable to a significant term of imprisonment given that, if convicted, this would be his second s. 95(1) offence. He would almost certainly face a significant penitentiary sentence.

[25] Mr. Ghebrai argues that the real issue on the tertiary ground is the strength of the Crown's case. He argues that the case is not strong. There is no forensic evidence tying Mr. Ofori-Mensah to the shooting. The weapons were never recovered. The intended victims have not come forward. The video is inconclusive. There are no eyewitnesses who can identify Mr. Ofori-Mensah. There is a real chance of an acquittal.

[26] I respectfully disagree. The Crown's case is not unassailable, but it is strong.

[27] At 2:53 pm on the day of the shooting surveillance cameras in the parking garage at 16 Driftwood Avenue captured an image of a person driving a car registered to Mr. Ofori-Mensah. A person alleged to be Mr. Ofori-Mensah was walking from the car. I am unable to say if the person resembles the RICCI and MTO photos of Mr. Ofori-Mensah as the image is too blurred. I can say that the person was wearing a two-tone long-sleeve hoodie. The arms of the hoodie were dark, and the body was light. The person also appeared to be wearing two-toned bottoms and a cap. A surveillance camera captured the same person entering the front door of 149-16 Driftwood Avenue. That was Mr. Ofori-Mensah's address. I think it is a reasonable inference that the person in the underground garage and entering 149-16 Driftwood Avenue was Mr. Ofori-Mensah. It is certainly an inference that a jury would be able to draw.

[28] At 5:54 pm a surveillance camera captured a person wearing the same two-toned hoodie, cap, and bottoms. That person appeared to be Mr. Ofori-Mensah from the RICCI and MTO photos, but it is not certain. The person wore the same clothing as the person who got out of Mr. Ofori-Mensah's car and entered Mr. Ofori-Mensah's residence. One distinctive item was a shoulder satchel that the person wore over his left shoulder. At 5:56 pm surveillance cameras captured three images of this person, as well as two other people who are suspects in the shooting. In each photo the person wears the distinctive shoulder satchel and his hoodie is over his head. Again, I think it

is a reasonable inference that the person was Mr. Ofori-Mensah. Again, it is certainly an inference that a jury would be able to draw.

[29] At 6:00 pm surveillance cameras captured the shooting. The images are not perfect. The clothing worn by one of the alleged shooters was very much like the clothing worn by the person alleged to be Mr. Ofori-Mensah. He appeared to be crouched, with his hands pointing forward, looking very much like a person shooting a weapon. Images captured afterwards appear to show Mr. Ofori-Mensah at the housing complex.

[30] A video clip at 6:01 pm captured three men running. The three men appeared to be the two shooters and Mr. Ofori-Mensah. Again, the satchel strap over the left shoulder was captured.

[31] After detailed examination of the video and the images, I agree with the justice of the peace that the prosecution's case against Mr. Ofori-Mensah is strong. I disagree that the case is built on flimsy circumstantial evidence. I also disagree that the surveillance camera evidence is inconclusive. It seems to me that the evidence places Mr. Ofori-Mensah with two other people who appear to be shooters; it places Mr. Ofori-Mensah at the place of the shooting crouched in a position that seems like he is firing a weapon; and has him running away with the same two people who also appear to be shooters.

(d) What is the impact of the recent Covid-19 outbreak?

[32] Prior to December 2020, the number of infected inmates at the TDSC had been much lower than feared at the beginning of the pandemic. The authorities, faced with an unprecedented health crisis that threatened the health of inmates in Ontario's correctional institutions, took significant measures. There were many bail decisions in the early months of the pandemic. Although different judges took different approaches, there was near-unanimity that containing the pandemic among inmates and staff would be a great challenge. The challenge has been mostly – although not completely – met throughout 2020. All agree that the institutional authorities have been relatively successful in containing the pandemic among the inmate populations. Unfortunately, in December 2020 the TDSC suffered a major outbreak of Covid-19. As of December 18, 2020, 54 inmates were infected with the virus. According to the evidence of Deputy Superintendent John Marchand, the number of infected inmates rose to a high of 61. By December 31, 2020, the date of this bail review, the numbers had subsided considerably: there were ten positive cases among the inmates.

[33] Mr. Ghebrai accepted that the correctional authorities were experienced and doing their best to craft and implement policies to prevent the spread of the virus. As he correctly pointed out, and Deputy Superintendent Marchand agreed, the policies were only as good as the implementation. Mr. Ghbrai has a point. It is clear that a staff member was the vector for this latest outbreak. This is unfortunate indeed – there are dozens of staff members working at the TDSC, and it only took one person's carelessness to create an outbreak. For the reasons I will set out, I ultimately find that the recent outbreak is a neutral circumstance in the bail analysis.

[34] Mr. Ofori-Mensah testified about how the Covid-19 outbreak affected him. On December 8, 2020 an inmate left the unit and later (as he learned from the staff) tested positive for the virus.

On December 10 his unit was locked down. On December 11 all inmates on his unit were tested. On December 13 the results came back. Six or 7 inmates tested positive, although they were not moved immediately. By December 14 most of the results came back. Mr. Ofori-Mensah's results were inconclusive. He was tested again. On December 16 he received the results: he tested positive for the virus. He continued to reside with his cellmate although his cellmate had tested negative. On December 23 he was moved to a segregation unit. He remained there for one week. From December 11 to December 23 he was able to shower only four times. Once in segregation, he was subject to the same rules as if he were sent there for punishment, although he has never had an institutional misconduct.

[35] Mr. Ofori-Mensah suffered from sneezing and coughing when he had the virus, not unlike the regular flu. His symptoms were not terrible (if I may summarize his testimony) but there was certainly nothing pleasant about it. Once he was medically cleared, he returned to his unit. He testified that he now feels his health is good.

[36] I accept Mr. Ofori-Mensah's evidence. He described some actions of staff that could also be described as careless. Given the outbreak that occurred, I accept his evidence on that point as well.

[37] Deputy Superintendent Marchand leads the TDSC institutional response to the pandemic. He has a large amount of experience dealing with public health issues. He testified that an outbreak was declared on December 9, 2020. Three inmates tested positive for the virus. The authorities determined that a staff member had not worn PPE properly. The authorities reviewed hundreds of hours of video and determined that this staff member had close contact with several inmates. Deputy Superintendent Marchand testified about the measures that the TDSC took to reduce the outbreak. The authorities locked down all units where there had been an infected inmate. They halted transfers into the institution and held all new arrivals for 14 days. They contact traced and screened all inmates for temperature control. The authorities also tested 300 members of the staff and purchased two large thermal scanners for the entrance to TDSC. The TDSC has a capacity of 1600 inmates; there are currently about 900 inmates. The institutional authorities are putting inmates in cells by themselves insofar as is possible.

[38] Deputy Superintendent Marchand was able to shed some light on Mr. Ofori-Mensah's case. On December 23, the inmates who initially tested positive were deemed medically resolved by Public Health. Those inmates were moved to a clean unit. Mr. Ofori-Mensah was not cleared by Public Health because his positive test came back later. Deputy Superintendent Marchand testified that the isolation and clearance decisions are not made by the correctional staff, but by Public Health staff. Mr. Ofori-Mensah was moved to the segregation unit because the medical unit was full. The segregation was used for overflow. He could not be left on his regular unit because it would have prolonged the clearance date for everyone else.

[39] It is unfortunate that Mr. Ofori was placed in segregation; on the other hand, I accept that the authorities had difficult decisions to make while the numbers of infected inmates spiked.

[40] Several judges of this Court have concluded that the pandemic is best assessed when dealing with the tertiary ground. See, for example: *R. v. S.A.*, 2020 ONSC 2946 at para. 47; *R. v.*

J.S., 2020 ONSC 1710 at para. 18; *R. v. T.L.*, 2020 ONSC 1885 at para. 34; *R. v. Williams*, 2020 ONSC 2237 at paras. 136-138.

[41] In *R. v. Jeyakanthan*, 2020 ONSC 1984 McWatt J. (now A.C.J.) rejected the assumption that proper pandemic amelioration measures could not be taken in Ontario's correctional institutions. She examined the evidence of measures taken by the authorities. She found at paras. 33-34 that each case must be approached individually. A judge or justice must examine the institutional response. The judge or justice must also examine the medical evidence concerning the particular inmate. There should be no automatic response based on speculation about conditions in the institutions. I respectfully agree with her approach.

[42] In *R. v. Jaser*, 2020 ONCA 606, Doherty J.A. considered an application to direct a bail hearing before a full panel of the Court of Appeal. He stated at para. 105:

The presence of COVID-19 is a factor to be balanced in the tertiary ground analysis, especially where there is a viable alternative to actual incarceration, which can go a long way to achieving *de facto* incarceration outside of the correctional institution. I must, however, reject the contention that post-COVID-19 detention on the tertiary ground will "rarely be justified". Like all other factors in the tertiary ground balancing, the significance of the pandemic depends on the individual case and the evidence provided to the court. On the evidence I have, COVID-19 concerns are relevant in the tertiary ground assessment. They are far from determinative.

[43] In recent case of *R. v. Korkis* 2020 ONSC 8017 Harris J. dealt with the current outbreak at TDSC. He stated at para 27:

Here, house arrest and quarantine are viable alternatives to incarceration. A reasonable and informed member of the public would see the outbreak of COVID in the TSDC to be a significant factor militating towards the Applicant's release and satisfaction of his onus on the tertiary ground.

[44] As of December 31, 2020 the correctional authorities had taken measures at the TSDC that reduced the numbers of infected inmates dramatically. Those measures were effective. Regrettably, Mr. Ofori-Mensah was one of the infected inmates. Mr. Ofori-Mensah is a healthy young man. He has a stomach condition but that it was unrelated to the infection. He was candid about his symptoms and did not exaggerate them. Given that he has already experienced the virus, it is possible but unlikely that he is at risk or poses a risk to others.

[45] I take into account the measures taken to stem the outbreak. I also take into account the impact of the outbreak on Mr. Ofori-Mensah. On balance, I find that recent outbreak is a neutral circumstance: it militates neither in favour of or against release.

(e) Has Mr. Ofori-Mensah met his onus on the tertiary ground?

[46] The dangers posed by gun violence in our community are well known. Statistics appended to the Crown's material show that gun violence in the City of Toronto is on the increase. There

has been a significant increase in gun violence in 2020. There is no question that a reasonable member of the public would be very concerned about releasing Mr. Ofori-Mensah. Mr. Ofori-Mensah has a record for possession of a handgun. The Crown has a strong case that Mr. Ofori-Mensah, along with two accomplices, opened fire in broad daylight in a housing complex. It is fortunate indeed that neither the intended victims (who are as yet unidentified) or bystanders were shot. Bystanders, including children, could easily have been hit by a stray bullet.

[47] Of course, the fact that the case is strong is not the end of the matter. As Trotter J. (as he then was) pointed out in *R. v. Dang*, 2015 ONSC 4354 at para. 53 a good release plan may well compensate for concerns on the tertiary ground. It is a question of managing the risk.

[48] I agree that the SafeTracks program is helpful, and certainly goes at least part of the way to dealing with the concerns on the tertiary grounds. GPS monitoring only goes so far, however. The sureties themselves must be appropriate. As I pointed out in *R. v. Ma*, 2015 ONSC 7709 at para. 55, GPS monitoring will do little if a person is simply un-releasable due to his or her violent character. GPS monitoring is also not a panacea. It depends on the situation. In this case, the conditions will include that Mr. Ofori-Mensah simply cannot leave the residence without notifying the OIC (and whoever is designated by SafeTracks). If he does so, he will undoubtedly be arrested and re-incarcerated. In this case, I adopt the comments of Molloy J. in *R. v. T.L.*, 2020 ONSC 1885 at para. 22:

It is, of course, obvious that an ankle bracelet cannot prevent an accused from breaching his bail conditions and committing an offence. The function of the bracelet is to alert the authorities immediately if there is a breach. The accused could simply leave the home even though wearing the bracelet, which would make him easier to track. Or, theoretically, he could cut off the bracelet (although not an easy task), in which case the alarms will go off and the breach will be immediately known. In either event, Mr. L. could reoffend. However, just because it would be possible to commit a crime while on bail, notwithstanding an ankle bracelet, does not mean that an ankle bracelet is not a useful supervision tool in many bail situations. It has, at the very least, a psychological deterrent effect. Mr. L. will know that any breach, no matter how minor, will be detected and reported. He will have no illusions about his sureties not betraying him. The electronic bracelet will not be swayed by emotion. I believe the ankle bracelet also reinforces for the sureties and other people in the home the importance of strict compliance with the terms of the bail.

[49] These sureties are not ideal. It will rarely be the case that ideal sureties are available, particularly where the sureties are members of a marginalized group. The sureties do not have to be ideal, of course. They only need to be adequate. I am satisfied that these sureties are adequate to supervise Mr. Ofori-Mensah when combined with GPS monitoring.

[50] I also consider that Mr. Ofori-Mensah is a young man of colour, and that bail decisions can disproportionately affect young men like him. That disproportionate effect is also something that can undermine confidence in the administration of justice. The protests of 2020 have illustrated that fact not only in the United States, but in our own and other countries. It would be extremely

easy to keep Mr. Ofori-Mensah in detention. Few would blink an eye if I dismissed his application, given his record and the circumstances of the alleged offence. The events of 2020, including not only the protests but also the pandemic, have shown that we must think hard about the things that maintain confidence in the administration of justice, and the things that can undermine confidence in the administration of justice.

[51] When I consider all of the circumstances, I find that Mr. Ofori-Mensah has met his onus on the tertiary ground. I want to emphasize, particularly to Mr. Ofori-Mensah, that this is a very close call, but I am satisfied that that a strict house arrest with GPS monitoring is a viable alternative to incarceration that will maintain confidence in the administration of justice. My intention is to craft the strictest possible house arrest. In my view, that is the only way to maintain confidence in this case.

[52] Mr. Ofori-Mensah will be released to the named sureties of Martha Aguilera, Christiana Ofori, and Lydia Adjei with no deposit in the amount of \$32,000.00.

[53] Mr. Ofori-Mensah will comply with the following conditions:

- He will live with his surety Martha Aguilera at 1209-100 York Gate Blvd. and be amenable to the routine and discipline of the household. He must notify the officer in charge of the case of any change of address 24 hours prior to the change. I ask Crown counsel to supply the name and telephone number of the OIC.
- He will be under house arrest: he is not to leave the residence at 1209-100 York Gate Blvd. except in the company of a surety, for any reason except for medical appointments (involving himself, not others) or meeting with his lawyer. If he has a medical emergency, he may only leave the house unaccompanied by a surety if he has called 911 and is in an ambulance.
- He will enrol in the SafeTracks GPS monitoring program and comply with all of the conditions.
- If he schedules a medical appointment or visit to his lawyer's office, he is to notify the OIC 24 hours in advance that he will be leaving the residence with his surety; this is in addition to any other obligations to notify under the SafeTracks GPS program.
- He is to report to the officer-in-charge of the case, or the OIC's delegate, once per week by phone. Again, I ask Crown counsel to supply the name and telephone number of the OIC.
- He is not to associate with anyone known to him to have a criminal record or face criminal charges, unless the person is a close member of his family. By close member of his family I mean a parent, a sibling, an aunt or uncle, or a first cousin. By aunt or uncle I do not mean close family friend; I mean a sibling of one of his parents.

- He is not, under any circumstances, to be within the area bounded by Jane Street to the west, Finch Avenue to the north, Sentinel Road to the east, and Sheppard Avenue to the south. Anything he may need in terms of toiletries, clothing, or other personal items can be retrieved by one of his sureties and brought to 1209-100 York Gate Blvd. for him. In the event of a medical emergency or visit to his lawyer, it will not be considered a breach if he merely drives on Jane Street, Finch Avenue, Sentinel Road, or Sheppard Avenue.
- He is to deposit any passport or other travel document to the OIC within 24 hours of his release from custody.
- He will not possess any firearms or other weapons as defined by the *Criminal Code*.


R. F. Goldstein J.

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DATE: 20210105

ONTARIO

SUPERIOR COURT OF JUSTICE

BETWEEN:

HER MAJESTY THE QUEEN

– and –

BRIGHT OFORI-MENSAH

**REASONS FOR JUDGMENT ON BAIL REVIEW
APPLICATION**

R.F. Goldstein J.