

[3] Mr. Roberts bears the onus pursuant to s. 522(2) of the *Criminal Code*, to show cause why his detention in custody is not justified within the meaning of s. 515(10) of the *Criminal Code*.

Overview of the allegations

[4] It is alleged by the Crown that the residents of 15 Fergus Street, in the City of Kingston were living an anti-social lifestyle and entrenched in the local criminal and drug subculture.

[5] Mr. Wagar had a lengthy criminal record, dating back to 1993.

[6] It is alleged that on the morning of August 12, 2021, at approximately 9:29 a.m., Mr. Wagar and Mr. Roberts entered apartment no. 3 at 15 Fergus Street. An argument ensued as between the two of them, and several gunshots were fired. Mr. Wagar was shot four times. There were no witnesses to the shooting.

[7] At the time of the shooting, Mr. Muchmore was in the bathroom of the apartment. He exited the bathroom and was confronted by Mr. Roberts who allegedly said words to the effect of: "Do you want to die too" and fired two rounds in Mr. Muchmore's direction. Mr. Muchmore was not hit by the bullets. Mr. Roberts fled the apartment on foot.

[8] Shortly after the shooting, someone called 911, and provided a description of Mr. Roberts. The police attended the area of the shooting and observed Mr. Roberts jogging down the street, approximately two blocks from 15 Fergus Street. Mr. Roberts was arrested with a backpack on his back, that contained \$7,225.00 in cash and 76 tablets of Percocet.

[9] A fanny pack style bag was located by the police a few moments later, in the area from where the accused had fled from. The fanny pack contained a 9mm Glock handgun with ammunition.

[10] The police executed a search warrant at 15 Fergus Street, where they found an Ontario identification card and a visa card, both in Mr. Roberts' name.

Legal Principles

[11] Mr. Roberts must show that his detention is not necessary on three grounds. They are known as the primary ground (to ensure his attendance at Court), the secondary ground (for the protection or safety of the public), and the tertiary ground (to maintain confidence in the administration of justice).

[12] Counsels have provided me with several decisions in support of their respective positions, some of which will be referred to in my decision.

[13] In the seminal case of *R. v. St. Cloud*, [2015] S.C.C. 27, the Supreme Court of Canada reminds us that in “Canadian law, the release of the accused person is the cardinal rule and detention, is the exception”. There is no class of offence for which bail cannot be granted.

Primary Ground

[14] Detention under the primary ground is only warranted where it is necessary to ensure attendance in Court. Relevant considerations include a connection to the jurisdiction, Canadian citizenship, contemplation of flight, a criminal record or character suggesting routine disregard for court orders, and the length of sentence that could be imposed.

[15] It is argued by the Crown that there is considerable evidence that Mr. Roberts was attempting to escape the consequences of his actions. Witness evidence sees Mr. Roberts flee 15 Fergus Street, jogging and attempting to get into a cab. It is further alleged that Mr. Roberts ditched the fanny pack containing the loaded handgun.

[16] At this stage of the proceedings, I do not have the benefit of having all the evidence. What is known however, is that Mr. Roberts appeared to be the target of a crime, possibly a hate crime. There are text messages that were sent back and forth between Mr. Wagar and another occupant of the residence indicating that they were planning on robbing Mr. Roberts while he was sleeping. These individuals were using inappropriate and racial slurs to describe Mr. Roberts. In these types of circumstances, I can accept that this was not a safe environment for Mr. Roberts and that

he may have experienced a traumatic event, which explains Mr. Roberts' need to leave the residence in a hurried manner.

[17] The Crown argues that there is an absence of good evidence that Mr. Roberts has any personal connection to the jurisdiction of Kingston. However, one of Mr. Roberts' sureties, Ms. Ann-Marie Brown, testified that Mr. Roberts had a good friend that lived in Kingston. While this evidence was not confirmed by the other sureties, I have no reason to question Ms. Brown's evidence in this regard.

[18] It is argued that if Mr. Roberts is convicted of any of the offences that he is charged with, he could be subject to a lengthy term of imprisonment, which is a motivation to abscond.

[19] There is no doubt that the term of imprisonment could be lengthy if Mr. Roberts is found guilty of the charges, but there must be some evidence before the Court that Mr. Roberts would be a flight risk.

[20] In this case, Mr. Roberts does not have a criminal record, including any convictions for failing to attend at Court.

[21] He is a Canadian citizen and he has ties to the community in the city of Ajax. Having heard the evidence of his mother, Ms. Marcia Lennox and his stepfather, Mr. Ahmed Lennox, I believe that he has a positive relationship with both, one of love, trust, and mutual respect. At the time of his arrest, he was living at home in Ajax, with his mother, stepfather and two of his siblings.

[22] Mr. Roberts is also involved in a romantic relationship. According to the evidence of Ms. Moses, her daughter is dating Mr. Roberts.

[23] Mr. Roberts was gainfully employed prior to his arrest. He had been working with his stepfather at his construction company, almost on a full-time basis since the age of 16 years old. His stepfather continues to be committed to providing him with gainful employment.

[24] Ms. Lennox testified that Mr. Roberts has family in Jamaica but the last time they had been there was approximately 5 years ago. Mr. Roberts has an expired passport and if necessary,

he is prepared to deposit the passport with the police or comply with an order that he is not to renew his passport.

[25] Mr. Roberts' sureties are his mother, stepfather, Ms. Moses, and Ms. Brown. They have agreed to pledge collectively \$335,000.00. Between the four of them, they have agreed to provide 24 hour supervision of Mr. Roberts and ensure that he abides by all the bail conditions. Based on the testimony of these four sureties, I am satisfied that they are ready, willing, and able to ensure that Mr. Roberts attends trial.

[26] In my view, Mr. Roberts has satisfied his onus that his detention is not necessary to ensure his attendance in Court.

Secondary Ground

[27] Detention under the secondary ground is necessary for those that pose a substantial likelihood of committing an offence or interfering with the administration of justice, where this substantial likelihood endangers the protection or safety of the public. The term "substantial likelihood" has been defined by the Ontario Court of Appeal in the case *R v. Manasseri*, 2017 ONCA 226, at para. 87, as follows: "a probability of certain conduct, not a mere possibility. And the probability must be substantial, in other words, significantly likely".

[28] In assessing the secondary ground, the Court must consider the seriousness of the offences and the strength of the Crown's case. It is undisputed that a second-degree murder charge and attempt to commit murder are very serious. However, in my review of the evidence, I find that there are some weaknesses in the Crown's case against Mr. Roberts.

[29] There is evidence that Mr. Roberts may have been at the residence in or around the time of the incident, but there are no witnesses to the alleged murder of Mr. Wagar. There is no direct evidence that Mr. Roberts caused Mr. Wagar's death by gunshot or any evidence as to the *mens rea*. In terms of the gun that was allegedly used to commit this murder, although it was located in or around the location from where Mr. Roberts had fled, the results of the CFS analysis are still pending.

[30] More importantly, there is a very strong self-defence argument. The evidence before me demonstrates that Mr. Roberts was the victim of a racist conspiracy and attack immediately preceding the incident in question. It appears to me that there was an orchestrated plan by Mr. Wagar to rob Mr. Roberts. It must be noted that the items seized at the scene were a firearm, a bat, and a machete. The police's belief is that these weapons belonged to Mr. Wagar. Also, it is noteworthy that Mr. Wagar had an extensive criminal record and there is evidence that he was known to be violent.

[31] In respect to the attempted murder charge, Mr. Roberts argued at the bail hearing that Mr. Muchmore's role still needed to be determined. The Crown submitted that Mr. Muchmore had not been charged and there was no evidence that he was involved in any discussion of a robbery of Mr. Roberts.

[32] After the bail hearing, further evidence was filed by Mr. Roberts, with the Crown's consent. The additional evidence was a third statement made by Ms. Erica Vance to the police on September 9, 2021. The relevance of this statement is that it implicates Mr. Muchmore in the plan to rob Mr. Roberts, including that Mr. Muchmore used Ms. Vance's cellular phone to communicate and conspire with Mr. Wagar. Mr. Muchmore was interviewed the following day and denied his involvement in planning the robbery.

[33] The Crown argues that this additional evidence filed by Mr. Roberts remains tenuous because it was omitted in the first two statements given by Ms. Vance. I disagree.

[34] In my opinion, this additional evidence is not tenuous because it connects Mr. Muchmore to the planning and execution of the robbery of Mr. Roberts, which is directly relevant to my determination of the weakness and/or strength of the Crown's case in relation to the attempted murder charge. Given that there is some evidence that Mr. Muchmore may have played a part in the conspiracy to rob Mr. Roberts, I am of the view that this weakens the Crown's case on the attempted murder charge.

[35] Turning to other factors that I need to consider, at the time of Mr. Roberts' arrest, he had over \$7000 cash and 76 tablets of Percocet with him. Therefore, the Crown suggests that there is some evidence that Mr. Roberts was involved in a criminal lifestyle that included drugs, as well

as firearms. It is alleged that Mr. Roberts was associating with individuals that were entrenched in the drug subculture.

[36] During the testimony of the sureties, there was evidence given that Mr. Roberts was paid in cash for his work with Mr. Lennox' company and because he did not have a bank account, he always had cash on him. This may partially explain the cash on his person but it does not appear to be an explanation for his possession of the Percocet.

[37] In any event, I believe that any concerns that may exist under the secondary ground can be adequately addressed by Mr. Roberts' proposed plan.

[38] First, Mr. Roberts proposes to reside with his mother and stepfather in Ajax and they both are prepared to pledge significant equity in their homes. It is proposed that Mr. Roberts would work with his stepfather, something that he has done since the age of 16 years old. I am satisfied that both the mother and stepfather would supervise Mr. Roberts closely and neither of them would hesitate to contact the authorities in the event of a breach.

[39] Second, there are two additional sureties, namely Ms. Moses and Ms. Brown, who are prepared to pledge \$50,000 and \$5,000, respectively. It is noted that Ms. Moses has previously acted as a surety and there have been no breaches. All four sureties recognize the seriousness of the allegations and charges against Mr. Roberts.

[40] Third, under the proposed plan, Mr. Roberts would be subject to house arrest and remain in his residence at all times, unless he is working with his stepfather, attending court, medical emergencies, or meeting with his lawyer. When outside of his residence, Mr. Roberts would be accompanied by one of his sureties for one of the purposes identified.

[41] Fourth, Mr. Roberts would be subject to 24/7 electronic monitoring with a GPS ankle bracelet, which would be paid by the mother and stepfather.

[42] Finally, it must be reminded that Mr. Roberts does not have a criminal record. Counsel for Mr. Roberts referred me to the decision of *R v. Ellis*, 2014 ONSC 4190 where Justice Nordheimer commented on the significance of the absence of any prior criminal record. Applying

his reasoning to this case, I would say that it is difficult to see how one could conclude that there is a substantial likelihood that Mr. Roberts would commit another offence or interfere with the administration of justice when there is no established record of him having previously done so.

[43] For these reasons, I am satisfied that Mr. Roberts has demonstrated, under the secondary ground, that his detention is not necessary for the protection or safety of the public.

Tertiary Ground

[44] The last ground is known as the tertiary ground. It provides that an accused may be detained where the detention is necessary to maintain the confidence in the administration of justice, having regards to all the circumstances including:

- i. The apparent strength of the Crown's case;
- ii. The gravity of the nature of the offence;
- iii. The circumstances surrounding the commission, including whether a firearm was used; and
- iv. The potential for a lengthy term of imprisonment, or if the case involves a firearm, minimum punishment of three years or more.

[45] The Court must determine whether detention is necessary to maintain confidence in the administration of justice, having regards to the four factors that I have just listed. It is important to note that no single factor is determinative.

[46] Two of the four factors are met because of the murder charge. The gravity of the offence and the potential for a lengthy term of imprisonment would have to be assessed at the highest level. These two factors militate towards detention but the analysis does not end there. The combined effect of all the factors must be assessed.

[47] The third factor is the strength of the Crown's case. I have already commented on some of the weaknesses in the Crown's case under the secondary ground and it applies to the tertiary ground. It is worth noting that the Supreme Court of Canada in *R. v. St. Cloud* stated the pre-trial detention will usually be ordered "if the crime is serious or very violent, if there is overwhelming

evidence against the accused and if the victim was vulnerable.” There is no doubt that the crime in this case is serious but I would not say that the evidence against Mr. Roberts is overwhelming at present. The self-defence claim exists. The allegation that Mr. Roberts was in unlawful possession of a loaded gun is not compelling at this time. Regarding the vulnerability of Mr. Wagar, it is questionable that he was vulnerable given his extensive criminal record and his detailed plan to rob Mr. Roberts, presumably using weapons that were found in his apartment.

[48] This leads me to the fourth factor to be considered, namely the circumstances surrounding the commission of the event. Mr. Wagar was shot to death with a firearm and there is evidence that the firearm found by the police is the same caliber as spent casings found at the apartment at 15 Fergus Street. This description of the crime falls under the definition of a violent crime. However, the circumstances leading up to the incident in question are very relevant and must be considered. The evidence strongly suggests that Mr. Roberts was the target of a racially motivated attack and as outlined by the Court of Appeal in the case of *R. v. Theriault*, 2021 ONCA 517, “racial context” is a relevant consideration. Mr. Wagar’s criminal history of violence combined with the use of racial epithets towards Mr. Roberts provides significant context to the incident in question. Given the unique circumstances of this case, it is my view that racial context must be considered when assessing the circumstances surrounding the commission of the event.

[49] Regarding Mr. Roberts’ submission that the evidence suggests that racism has tainted the investigation by the Kingston Police officer, I would not attribute much weight to this argument. Having quickly reviewed a small portion of the video interview of Ms. Vance during the bail hearing, it appears at first glance, that the officer was simply quoting Ms. Vance’s racial slurs that she had written in a text. On this video alone, I am not persuaded that Mr. Robert’s allegations that the investigation was tainted by racism is grounded in the evidence.

[50] In addition to the four factors to be considered in assessing the tertiary ground, it is now widely accepted that the pandemic may also be taken into consideration. At the bail hearing, the Covid-19 pandemic was raised by Mr. Roberts as a factor that I should consider because he is not vaccinated. Mr. Roberts had filed a document from the Solicitor General’s website, indicating that there had been five resolved cases at the Quinte Detention Centre. In recent days, I have received information from both counsel that an outbreak has now been declared at the Quinte

Detention Centre, where at present, there are seven cases that tested positive for Covid-19. It is undisputed that the Covid-19 virus represents a serious health risk, especially to those that are not vaccinated. Mr. Roberts may be more vulnerable than others and as such, it is a factor that I have considered in my analysis.

[51] Considering the totality of the evidence presented, including the racial context, the qualities of the sureties, the terms of the proposed plan of supervision, the lack of a criminal record, and the most recent outbreak at the Quinte Detention Centre, I am of the opinion that detention is not necessary in order to maintain confidence in the administration of justice. I am satisfied that Mr. Roberts has met the onus on the tertiary grounds.

[52] Therefore, I am prepared to grant Mr. Roberts bail based on his proposed plan, with minor amendments and subject to the Crown's submissions on other conditions the Crown may seek to impose.

Conditions

[53] Further to hearing the submissions of the parties, one amendment is made to Mr. Roberts' proposed plan, namely adding that Mr. Roberts may execute his employment duties between the hours of 6:00 a.m. and not to exceed 8:00 p.m.

[54] Mr. Roberts is to comply with the bail conditions set out in Form 10A Conditions of Release and Schedule A to Form 10A Conditions of Release, which includes the following:

- i. Reside with your sureties, Marcia Lennox and Anthony Lennon, at 3 Distleman Way, Ajax, Ontario.
- ii. Remain in your residence.

EXCEPT

- For medical emergencies involving you or a member of your immediate family (spouse, child, parent, sibling).

- For purposes of travelling directly to, from and while at court appearances, or meeting with your lawyer, or for purposes of complying with this or any other court Order.
 - When you are in the presence of your surety.
 - Or for the purpose of executing employment duties with Ahmed Lennox (AKA: Anthony Lennox), and coming to and from that employment between the hours of 6:00 AM and not to exceed 8:00 PM.
- iii. Remain in Ontario.
- iv. Deposit all your passports with Kingston Police Force with Det. Sgt. Chad Parslow, within 72 hours of being released.
- v. Not to be within the City of Kingston, Ontario, unless for the purpose of Court, or reporting to the Kingston Police Force.
- vi. Do not contact or communicate in any way either directly or indirectly, by any physical, electronic, or by other means, with the following: Sam W. Cluett, Myles Lessard, Michael Muchmore, Erica Vance, Denise Merpaw, Harry Merpaw and Kody Whitmarsh
- EXCEPT
- In the presence of or through legal counsel for the purpose of preparing a defence.
- vii. Do not possess any weapon(s) as defined by the *Criminal Code* (for example, but not to be restricted to, a pellet gun, firearm, imitation firearm, cross-bow, prohibited or restricted weapon or device, ammunition or explosive substance or anything designed to be used or intended for use to cause death or to threaten or intimidate any person).
- viii. Cooperate with bail Compliance Checks at the residence.

- ix. Be monitored with a GPS ankle bracelets and associated service from Recovery Science Corporation (RSC).

A handwritten signature in black ink, appearing to read "M. Smith J". The signature is written in a cursive, somewhat stylized font. It is positioned above a horizontal line.

M. Smith J

Released: December 17, 2021

CITATION: R. v. Roberts, 2021 ONSC 8401
COURT FILE NO.: 21-5658A
DATE: 2021-12-17

ONTARIO

SUPERIOR COURT OF JUSTICE

B E T W E E N:

HER MAJESTY THE QUEEN

Respondent

– and –

VAUGHAN OSCAR ROBERTS

Applicant

REASONS FOR DECISION

M. Smith J

Released: December 17, 2021