CITATION: R. v. Dang, 2015 ONSC 4254
DATE: 20150703

ONTARIO

SUPERIOR COURT OF JUSTICE

BETWEEN:	)	
	)	
HER MAJESTY THE QUEEN	)	*Michael Passeri*, for the Crown
Applicant	)	
– and –	)	
	)	
JAMIE DANG	)	*John S. Struthers and Deniz Sarikaya*, for
	)	Mr. Dang
Respondent	)	
	)	
	)	**HEARD:** June 17, 2015
	)	

TROTTER J.

REASONS FOR JUDGMENT

1. Introduction

[1] Mr. Dang is charged with attempted murder, contrary to s. 239 of the *Criminal Code*, R.S.C. 1985, c. C-47 [*Criminal Code*], and with a criminal organization offence (s. 467.13). He was released on bail. The Crown applies under s. 521 to review the decision of the learned justice of the peace on the attempted murder charge.

2. The Facts

(a) The Offences

[2] On December 25, 2012, at about 10:45 p.m., the victim in this case, Duy Ly Nguyen, was at his parents' home in Scarborough. He was loading Christmas gifts into his car when another car approached. Three men got out of the car and started shooting. Mr. Nguyen was shot 14 times. He suffered serious injuries to his arms, legs, shoulders, spleen and kidney. He has had multiple surgeries. A bullet remains lodged in his skull.

[3] The Crown alleges that Mr. Dang was one of the shooters. He is the only person who has been charged. During the incident, the victim's brother came out of the house and saw three men running back to the black car, which was driven away. No one is able identify the men because they all wore dark clothes and ski masks

[4] At 12:20 a.m. the next morning, Mr. Dang arrived at Humber Finch Hospital. He had a bullet wound that went through his left arm and came to rest just under his heart, where it remains today. Apparently, a Good Samaritan drove Mr. Dang to the hospital, where he identified himself using someone else's driver's license. A police officer arrived at the hospital and Mr. Dang told him that he was walking down on street, on his way to get something to eat, when a car pulled up and someone fired two shots at him. This story is unlikely because Mr. Dang did not have a credit card or money at the time. The police investigated the place where Mr. Dang said he was shot and could find no shell casings, nor were there any reports of gunfire.

[5] The police believe Mr. Dang was shot during the attempted murder. There is evidence that connects him to the car that the shooters used that night. At about 2:14 a.m., the police were called to the scene of a vehicle fire a few kilometers from the victim's home. The Crown alleges that it was the same car used in the shooting. The fire appears to have been deliberately set. Investigation revealed two bullet holes – one in the driver's side door, and the other in the trunk. The Crown submits that the hole in the door is consistent with Mr. Dang's injuries, although no expert evidence was called to support this proposition. It is the Crown's theory that the car was set on fire to prevent recovery of Mr. Dang's blood for DNA testing.

[6] There is other evidence that is said to link Mr. Dang to this car, which was a rental car. The police believe that Diana Thai, Mr. Dang's girlfriend, rented the car. The police showed a photo array to the owner of the rental company, five months after the shooting. The owner identified a photo of Ms. Thai said he was "35 to 40% sure" she was the person who rented the car. He was not shown a line-up containing a photo of the woman whose identification was used to rent the vehicle.

[7] In terms the bullet holes in the car, counsel proceed on the theory that they were caused by return fire from someone at the scene. However, neither the victim nor his brother mentioned returning fire. This is a hurdle the Crown will face as the case moves forward.

[8] Returning to the scene, there were shell casings all over the place. At least two firearms were used, including an assault rifle similar to an AK-47. Bullet holes were found in the victim's car and in a van that was parked across the street. A bullet also went through a neighbour's window.

[9] There is serious backdrop to this story. It is alleged that Mr. Dang is a member of a street gang called the "Asian Assassinz" and that Mr. Nguyen is associated with a rival gang known as "Chin Pac". Both gangs were the focus of a Toronto Police Service investigation known as "Project Battery." This project resulted in Mr. Dang being charged under s. 467.13 of the *Criminal Code*. It is alleged that, following the attempted murder of Mr. Nguyen, and while Mr. Dang was in custody on unrelated charges, he arranged through his associates to have $4,000 brought to Ms. Thai. It is alleged that this money is the proceeds of crime. During a search of Ms. Thai's apartment, the police found $3,896 Cdn, quantities of MDMA and heroin, false identification for Mr. Dang, memorials for murdered gang members and a speed ammunition loader.

[10] The Crown alleges that the attempted murder of Mr. Nguyen was part of the ongoing dispute between the Asian Assassinz and Chin Pac. Violence between the rival gangs seems to have escalated since 2010, resulting in a series of back-and-forth, retaliatory murders and attempted murders. See the reasons of my colleague Quigley J. in *R. v. Tran*, [2014] O.J. No. 3525 (S.C.J.) for a description of this disturbing situation.

(b) Mr. Dang's Background

[11] Mr. Dang is almost 26 years old. At the bail hearing, there was no indication that he had any type of legitimate employment. He attended George Brown College for a while, but did not complete his program.

[12] Mr. Dang has no adult criminal record. He has findings of guilt under the *Youth Criminal Justice Act*, S.C. 2002, c. 1 [*YCJA*], dating back to 2007, involving a serious incident in which Mr. Dang and others, while armed with knives, attacked three young men at a mall. Mr. Dang's associates in this incident are now said to have ties to the Asian Assassinz.

[13] When Mr. Dang appeared at the hospital on the night of the shooting, it was soon discovered that there was an outstanding warrant for his arrest. He was immediately arrested and remained in custody on these charges until he was acquitted on February 24, 2015. He was charged with attempted murder that same day, over two years after the shooting.

(c) The Release Plan before the Justice of the Peace

[14] At the initial bail hearing, it was proposed that Mr. Dang be released on a $33,000 recognizance with three sureties and electronic monitoring. The justice of the peace ultimately agreed with this plan.

[15] One of the sureties is Jenny Nguyen, a 26-year-old friend of Mr. Dang. She signed for $25,000. Ms. Nguyen is a financial analyst. She has been a surety for others on 3 occasions, all of which were without incident. Mr. Dang now lives with Mrs. Nguyen. She supervises Mr. Dang by accompanying him to a job that had recently been found for him.

[16] In her testimony before the justice of the peace, Ms. Nguyen said she had known Mr. Dang for 15 years. They lost touch for a while and then re-connected. However, it is clear from her testimony that Ms. Nguyen did not appear to know Mr. Dang that well, even though she claimed to speak with him almost every day.

[17] Jennifer Dang, Mr. Dang's older sister, is also a surety for $5,000. She testified that she is not close to her brother. Before his arrest, Ms. Dang saw her brother regularly, but she was unaware of the previous outstanding warrant, the details of the current charges, his friends and where he lived.

[18] The third surety is Nghia Nguyen, the former husband of Ms. Dang. Mr. Nguyen owns his own business installing countertops. He gave Mr. Dang a job. Like the other sureties, Mr. Nguyen knew little of Mr. Dang, including the details of the present charges and his youth court

history. After hearing the about the current allegations and Mr. Dang's past, Mr. Nguyen said: "I feel he is a dangerous person, but he is part of my family." Still, he pledged $3,000 as a surety.

[19] Lastly, the justice of the peace heard evidence from Stephen Tan of Recovery Science Corporation (RSC), a company that provides electronic monitoring services. He explained GPS monitoring technology. RSC keeps compliance records and shares them with the police upon request. I was provided with a favourable compliance report regarding Mr. Dang's short time on bail. Mr. Tan testified that two other people charged as a result of Project Battery were released with electronic monitoring.

(d) The Decision of the Justice of the Peace

[20] The Crown contested release on all three grounds in s. 515(10) of the *Criminal Code*. In coming to the conclusion that Mr. Dang should be released, the justice of the peace made some important findings. First, she found Mr. Dang's story about how he was shot to be "incredulous." She also found that Mr. Dang is either a member of a close associate of the Asian Assassinz. Moreover, the learned justice expressed concern with the evidence of Ms. Nguyen and Ms. Dang. As she said: "I suspect neither one of them wants to tell me that he is a member of the Asian Assassinz, or that he is involved in criminal activity. It doesn't mean that they can't be sureties, but it does rather taint their evidence, in my view."

[21] Turning to s. 515(10), the justice had no concerns on the primary ground given that all of Mr. Dang's life connections are in the Toronto area. She was not swayed by Mr. Dang's use of false identification when he appeared at the hospital, and in the past.

[22] The justice identified the secondary ground as the "most troubling." As she explained:

> It seems to me that the plan proposed prevents the substantial likelihood of re-offence in a **violent way**. The problem I have on the secondary grounds is that it would seem to me, from the intercepts, that Mr. Dang can still conduct criminal activity even while he is in custody in a detention centre.
>
> I don't know that any plan can prevent him from doing that, if he is determined, and if his sureties are less than vigilant. [emphasis added]

Referring to the intercepted communications of Mr. Dang during the time when he was in custody, and when he arranged for his girlfriend to receive $4,000, the justice said:

> There is a certain amount of resourcefulness and inventiveness there that the sureties will have to be very vigilant to stop that from happening. I don't know that the sureties can do that. I don't know that detention can do that either. Despite his deceit and apparent resourcefulness, I am not sure that the court is in a position to prevent it entirely. He has to be motivated himself, and the sureties have to be very vigilant.

> Nonetheless, the plan does its best to address the secondary grounds, with virtually around the clock supervision, a house arrest, augmented by GPS monitoring.

[23] On the tertiary ground, the justice adverted to the factors in s. 515(10)(*c*) of the *Criminal Code*. She characterized the Crown's case as "not at its maximum, but it is very compelling." The justice recognized the gaps in the case, such as the absence of eyewitness identification evidence, no recovered weapons or DNA. The justice accepted the Crown's submission that the car was burned out in order to prevent DNA from being extracted. The justice also accepted that the shooting was a part of the retaliation-type killings between the two criminal gangs, involving the use of multiple firearms in public places, exposing innocent passers-by to great danger.

[24] After addressing the four factors in s. 515(10)(*c*), the justice concluded her analysis of this ground in the following way:

> I am not convinced, however, despite the seriousness of each of these points, that they are at their maximum, such that an informed member of the public, understanding the rights of the accused, and knowing what the plan of release was, and further knowing that others arrested in these project raids were released on substantial bails, I am not satisfied that those members of the public would lose confidence in the administration of justice.
>
> I have come to the conclusion that despite Mr. Dang's apparent involvement in criminal activity, he has nonetheless shown cause why his detention is not required pending the determination of his guilt or innocence at trial.

3. Analysis

(a) Introduction

[25] The Crown does not seek to review the decision releasing Mr. Dang on the criminal organization charge under s. 467.13 of the *Criminal Code*; it challenges only the decision on the attempted murder charge under s. 239. This complicates the analysis somewhat because the learned justice heard a good deal of evidence relating to the criminal organization charge. It is important to isolate the parts of her reasons that focus on the application of s. 515(10) to the attempted murder charge.

[26] At the bail hearing, the onus was on Mr. Dang to justify why he should be released. The reverse onus is created by s. 515(6)(*a*)(vii), which applies to a person who is charged with "an offence under … subsection 279(1) … that is alleged to have been committed with a firearm."

[27] The Crown contends that Mr. Dang's detention is required on the secondary ground (s. 515(10)(*b*)) and the tertiary ground (s. 515(10)(*c*)), arguing that the justice made a number of legal errors and came to a decision that was "clearly inappropriate." On Mr. Dang's behalf, counsel argue that the decision of the justice is free from error and allege that the Crown's review is a "thinly veiled attempt to have a *de novo* hearing."

(b) The Standard of Review

[28] This application engages the scope of review under ss. 520 and 521 of the *Criminal Code*. Since the passage of the *Bail Reform Act*, S.C. 1970-71-72, c. 37, there has been a lack of consensus about the nature of the review under these provisions. This is complicated by the existence of other bail review provisions in the *Criminal Code*, the *YCJA* and the *Extradition Act*, S.C. 1999, c. 19, some of which employ different terminology.

[29] As far as ss. 520 and 521 are concerned, the Supreme Court of Canada has clarified the proper approach in *R. v. St-Cloud*, 2015 SCC 27 [*St-Cloud*]. There is no point in re-tracing the jurisprudential debate that led to the need for the Supreme Court's intervention on this issue. The Court held that ss. 520 and 521 do not grant a reviewing judge an open-ended discretion to substitute his or her decision for that of the bail judge. Writing for the Court, Wagner J. identified three circumstances in which a reviewing court may intervene (at para. 121):

> It will be appropriate to intervene if the justice had erred in law. **It will be appropriate for the reviewing judge to exercise this power if the impugned decision was clearly inappropriate, that is, if the justice who rendered it gave excessive weight to one relevant factor or insufficient weight to another. The reviewing judge therefore does not have the power to interfere with the initial decision simply because he or she would have weighed the relevant factors differently.** I reiterate that the relevant factors are not limited to the ones expressly specified in s. 515(10)(*c*) *Cr.C.* Finally, where new evidence is submitted by the accused or the prosecutor as permitted by ss. 520 and 521 *Cr.C.*, the reviewing judge may vary the initial decision if that evidence shows a material and relevant change in the circumstances of the case. [emphasis added]

[30] The Crown alleges both legal errors and that the decision of the justice was "clearly inappropriate." In terms of the former, especially as it relates to the tertiary ground, the justice of the peace applied the Supreme Court's earlier decision in *R. v. Hall* (2002), 167 C.C.C. (3d) 449 (S.C.C.) [*Hall*]. *St-Cloud*, which was released shortly after the justice decided this case, also addressed the tertiary ground. As discussed below, the justice faithfully applied *Hall*, without making the main error identified in *St-Cloud*.

[31] The focus of this case in on whether the decision of the justice of the peace was "clearly inappropriate." The Crown argues that the framework for review established in *St-Cloud*, particularly the "clearly inappropriate" standard, applies only to the review of tertiary ground decisions in s. 515(10)(*c*). I read the Court's decision more broadly. While *St-Cloud* involved a review of a decision under s. 515(10)(*c*), the Court purported to clarify the nature and scope of reviews under ss. 520 and 521 in general. Consequently, all three bases for review apply to all three criteria for detention in s. 515(10).

[32] The "clearly inappropriate" standard has not been identified in previous bail review cases. As noted above, the Court in *St-Cloud* defined the standard by providing that a decision will be "clearly inappropriate" where "excessive" or "insufficient" weight is given to various factors. As the passage reproduced in paragraph 29 above provides, this standard of review does

not permit a mere re-weighing of relevant factors. This would amount to the exercise of an open-ended discretion, something that the Court clearly rejected.

[33] In *St-Cloud*, the appellant urged the Court to approach bail reviews in the same manner as appellate courts consider sentencing decisions. After comparing the two procedures, Wagner J. held at para. 112:

> Thus, although a comparison between the interim release decision and the sentencing decision is interesting, it cannot in itself be determinative, given the differences between these two types of decisions.

[34] However, the Court's reference to a bail judge giving "excessive weight to one relevant factor or insufficient weight to another" is resonant of the sentence appeal case law. In *R. v. Shropshire* (1995), 102 C.C.C. (3d) 193 (S.C.C.) [*Shropshire*], Iacobucci J. held that an appellate judge is not permitted to substitute his or her views for those of the sentencing judge. As he explained at p. 210: "A variation in the sentence should only be made if the Court of Appeal is convinced that it is not unfit. That is to say, that it has found the sentence to be clearly unreasonable."

[35] In *R. v. Rezaie* (1996), 112 C.C.C. (3d) 97 (Ont. C.A.), Laskin J.A. reviewed *Shropshire* and *R. v. C.A.M.* (1996), 105 C.C.C. (3d) 327 (S.C.C.) and elaborated on what "clearly unreasonable" means in the sentencing sphere (at p. 103):

> These two decisions demonstrate that an appellate court may interfere with a trial judge's sentencing discretion in only two kinds of cases. First, an appellate court may interfere if the sentencing judge commits an "error in principle." Error in principle is a familiar basis for reviewing the exercise of judicial discretion. It connotes, at least, **failing to take into account a relevant factor, taking into account an irrelevant factor, failing to give sufficient weight to relevant factors, overemphasizing relevant factors and**, more generally, it includes an error of law. [emphasis added]

See also *R. v. McKnight* (1999), 135 C.C.C. (3d) 41 (Ont. C.A.), per Laskin J.A., at pp. 53-54. There is similar language found in the Supreme Court's more recent decision in *R. v. Nasogaluak* (2010), 251 C.C.C. (3d) 293 (S.C.C.), at p. 315.

[36] While recognizing the significant differences between sentencing and bail, the standard of review established in *St-Cloud* clearly has links to the sentence appeal jurisprudence. There are obvious similarities in the expressions "clearly inappropriate" (*St-Cloud*) and "clearly unreasonable" (*Shropshire*). This parallel is supported by reference to the French version of *St-*

Cloud, in which the expression "manifestement inappropriée" is used for "clearly inappropriate."[1]

[37] *St-Cloud* directs that bail review judges (at least those making decision under ss. 520 and 521) observe the same deferential approach to first instance bail decisions that appellate courts employ in sentencing cases. In the absence of some demonstrable problem with a justice's handling or balancing of relevant factors, a reviewing judge should not intervene on this basis.

(c) The Secondary Ground (s. 515(10)(*b*))

[38] Like the justice of the peace, I find this ground to be the most challenging in this case. It is a close call on this record. While I found some of the language used by the justice to be somewhat problematic, I am satisfied that she committed no legal errors, nor do I consider her decision to be "clearly inappropriate."

[39] Part of the problem in applying s. 515(10)(*b*) lies with the Crown's decision to seek detention on the attempted murder charge only. At the bail hearing, much attention was focused on what Mr. Dang is alleged to have done while he was in custody (*i.e.*, arranging for money to be delivered to his girlfriend). It was this conduct that the justice characterized as requiring "resourcefulness and inventiveness." The learned justice expressed concerns about the plan of supervision in relation to *this* conduct (and not the attempted murder charge) in the passage reproduced in paragraph 22, above.

[40] Focusing on the attempted murder charge, the justice observed that the release plan had to be considered in light of whether it "prevents the substantial likelihood of re-offence in a violent way." This is the correct approach: see *R. v. Morales* (1992), 77 C.C.C. (3d) 91 (S.C.C.). The justice was right to be concerned about preventing Mr. Dang from maintaining contact with some of his associates. Her comments in which she expressed some reservations about the efficacy of the release plan focused on this aspect of the evidence, not on whether the plan could properly address the substantial likelihood of violent re-offending.

[41] The Crown also argues that the justice of the peace erred in accepting Ms. Nguyen and Ms. Dang as sureties, given her concerns with their evidence. She found that they had essentially misled the court about Mr. Dang's association with the Asian Assassinz.

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[1] See *R. v. Proulx* (2000), 140 C.C.C. (3d) 449 (S.C.C.), a sentencing case. In the English version, at p. 500, Lamer C.J.C. said: "Again, I stress that appellate courts should not second-guess sentencing judges unless the sentence imposed is demonstrably unfit." In the French version, the expression "manifestement inappropriée" is used instead. Similarly also, for example, see *R. v. Bunn* (2000), 140 C.C.C. (3d) 505 (S.C.C.), at p. 514 and *R. v. Ouellette* (2009), 244 C.C.C. (3d) 42 (S.C.C.), at p. 46.

[42] Deception is a matter that may detract from a person's trustworthiness and suitability to undertake the important responsibilities of a surety: see *R. v. Geesic*, 2014 ONSC 7438 and *R. v. Sotomayor*, 2014 ONSC 500. However, this shortcoming in the evidence of these two sureties did not amount to automatic grounds for disqualification. It was for the justice to evaluate this aspect of the evidence in the context of the case as a whole. She did just that. She addressed the issue head on. Moreover, the justice was presented with a release plan augmented by electronic monitoring. Electronic monitoring is not an infallible prophylactic against bail violations (see *U.S.A. v. Singh*, 2014 ONCA 559, at para. 17 and *R. v. Chun*, 2015 QCCA 1021, at para. 30). However, in some circumstances, it is capable of strengthening a release plan to the satisfaction of the bail judge. Other judges or justices of the peace might have found the sureties' testimony to be fatal to their candidacy. In all of the circumstances, I cannot say that the justice erred in deciding this factual issue in the manner that she did.

[43] At the end of the day, Mr. Dang is charged with a very serious offence. He has a youth record for violence, but it is very dated. Mr. Dang has ties to the Asian Assassinz, who have a history of homicidal violence. Mr. Dang has not been linked to any previous shootings involving the two gangs. After an extensive police investigation (*i.e.*, Project Battery), all Mr. Dang was charged with was transferring proceeds of crime to his girlfriend.

[44] The level of violence in this case, and the extent to which the general public was exposed to danger, is shocking. However, as discussed in the section below, the evidence against Mr. Dang is not overwhelming. Balanced against this is a plan involving a $33,000 recognizance, with three sureties and electronic monitoring. The reasons of the learned justice on this ground do not reflect legal error. And while it might be considered to be a close call, I cannot say that the decision is "clearly inappropriate."

(d) The Tertiary Ground (s. 515(10)(*c*))

[45] Prior to *St-Cloud*, appellate courts had interpreted the tertiary ground very narrowly. This approach can be traced to the some of the language in *Hall*, in which the majority held that detention on the tertiary ground should only occur in "relatively rare" cases. Some courts took this to mean that "rareness" should operate as an independent threshold under s. 515(10)(*c*). Expanding on this theme, other courts held that detention should only be ordered on this basis when the offence is "inexplicable", "unexplainable" or unusually "heinous."

[46] The *St-Cloud* Court held that this is wrong approach. As Wagner J. said at paras. 50 and 87:

> Furthermore, I agree with the appellant that detention may be justified only in rare cases, but this is simply a consequence of the application of s. 515(10)(c) and not a precondition to its application, a criterion a court must consider in its analysis or the purpose of the provision.
>
> . . .

> Section 515(10)(c) Cr. C. must not be interpreted narrowly (or applied sparingly) and should not be applied only in rare cases or exceptional circumstances or only to certain types of crimes.
>
> The four circumstances listed in s. 515(10)(c) Cr. C. are not exhaustive.

[47] Justice Wagner also addressed an issue concerning the combined effect of the four factors listed in s. 515(10)(*c*). The Crown argued that, based *R. v. Mordue* (2006), 223 C.C.C. (3d) 407 (Ont. C.A.), at pp. 415-416, when all four factors are present, a detention order *must* be made. The Supreme Court rejected this proposition at para. 69:

> The argument that detention must automatically be ordered if 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.

Wagner J. identified other factors that might be important in this context. Adverting to s. 515(10)(*c*)(iii) ("circumstances surrounding the commission of the offence"), he said at para. 71:

> I would add that the personal circumstances of the accused (age, criminal record, physical or mental condition, membership in a criminal organization, etc.) may also be relevant. The justice might also consider the status of the victim and the impact on society of a crime committed against that person. In some cases, he or she might take account of the fact that the trial of the accused will be held at a much later date.

Still, at the end of this part of the judgment, Wagner J. said at para. 88:

> In conclusion, if the crime is serious or very violent, if there is overwhelming evidence against the accused and if the victim or victims were vulnerable, pre-trial detention will **usually** be ordered. [emphasis added]

[48] Had I been tasked with conducting this bail hearing, I might have balanced the s. 515(10)(*c*) factors differently and reached a different result. However, after *St-Cloud*, I am not permitted to review the case with an open-ended discretion and substitute my own views for that of the learned justice. I must determine whether she gave excessive weight to one factor and/or insufficient weight to another. Looking at her reasons as a whole, I cannot say that she did.

[49] As I have already noted in paragraph 30 above, the justice did not make the *St-Cloud* error by erecting an artificial threshold to be overcome before applying the tertiary ground factors. She rightly proceeded on the basis that the tertiary ground was fully engaged and deserved serious consideration. I review some of her findings, leaving the strength of the prosecution's case until the end.

[50] There can be no doubt about the gravity of the offence (s. 515(10)(*c*)(ii)). After *St-Cloud*, this factor is now determined solely by the maximum (and in some cases, the minimum) sentence available for the offence with which an accused person is charged. Attempted murder carries a maximum term of life imprisonment (s. 239(1)(*b*)). It also carries a minimum term of five years'

imprisonment if committed in conjunction with a criminal organization (s. 239(1)(*a*)(i)) and a minimum of four years' if committed with a firearm (s. 239(1)(*a*)(ii)). Consequently, the offence faced by Mr. Dang is grave. This also resonates under s. 515(10)(*c*)(iv). If convicted, Mr. Dang will face a lengthy term of imprisonment.

[51] In terms of s. 515(10)(*c*)(iii), there are certain circumstances surrounding the commission of this offence that favour detention. The fact that the offence appears to be associated with a criminal organization is a serious consideration. The historical context of the shooting (retaliatory gang warfare) must also be borne in mind, in addition to the exposure of innocent bystanders to serious harm.

[52] These factors must be balanced against the fact that Mr. Dang was not charged with attempted murder for more than two years after the incident. I was not provided with a formal explanation for why things transpired in this manner. However, the answer to this question may be traced to s. 515(10)(*c*)(i) – the apparent strength of the Crown's case.

[53] In *St-Cloud*, the Court signaled the importance of an authentic appraisal of the strength of the Crown's case at the bail stage. As Wagner J. said at para. 58:

> ...the justice who presides at that hearing must consider the quality of the evidence tendered by the prosecutor in order to determine the weight to be given to this factor in his or her balancing exercise. **For example, physical evidence may be more reliable than a mere statement made by a witness, and circumstantial evidence may be less reliable than direct evidence.** [emphasis added]

The Court also stressed that, in addition to evidence that casts doubt on the strength of the prosecution case, potential defences must also be considered.

[54] The case against Mr. Dang is entirely circumstantial. Although there were three shooters that night, only he is charged. There are obvious problems that will arise with the Crown's case at trial. The victim and his brother describe being shot at, but they make no mention of return fire. The connection of Mr. Dang to the car is at present not particularly strong. The learned justice of the peace heard the theory of a police officer about how a bullet must have penetrated the car door, travelled through Mr. Dang's left harm and then came to rest in his chest. Proving this theory at trial will require opinion evidence from a number of qualified experts.

[55] To use the words of Wagner J. quoted in paragraph 47 above, the Crown does not have an "overwhelming" case against Mr. Dang. This is significant. It is true that the Court in *St-Cloud* did not rank the importance of the four statutory criteria in s. 515(10)(*c*). This is because none of them is singularly capable of justifying detention. They merely feed into the essence of s. 515(10)(*c*) – maintaining confidence in the administration of justice. However, it stands to reason that the strength of the case in s. 515(10)(*c*)(i) ought to enjoy some prominence in the mix. No matter how serious the allegations, and notwithstanding the potential penalty that an accused may face, detention based on a weak or doubtful case may tend to *undermine* confidence in the administration of justice, not *maintain* it.

[56] The Crown also argues that the justice erred in the passage reproduced in paragraph 24 above by adverting to the plan of release, as well as the fact that other individuals arrested as a result of Project Battery have been released. He argues that, by referring to these factors, the learned justice conflated the secondary and tertiary grounds.

[57] I see no error in the justice's reference to the release plan in this context. As Wagner J. emphasized in *St-Cloud* (at para. 87), the four factors enumerated in s. 515(10)(*c*) are not exhaustive of whether detention is necessary to maintain public confidence. Moreover, certain factual features of a case may be relevant to one or more of the grounds in s. 515(10). As Chief Justice McLachlin said for the majority in *Hall*, at p. 462:

> Bail denial to maintain confidence in the administration of justice is not a mere "catch all" for cases where the first two grounds fail. **It represents a distinct basis for bail denial not covered by the other two categories. The same facts may be relevant to all three heads.** For example, an accused's implication in a terrorist ring or organized drug trafficking might be relevant to whether he is likely to appear at trial, whether he is likely to commit further offences or interfere with the administration of justice, and whether his detention is necessary to maintain confidence in the administration of justice. **But that does not negate the distinctiveness of the three grounds.** [emphasis added]

[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 in s. 515(10)(*c*).

[59] I am more concerned about the learned justice's reference to the fact other individuals charged as a result of Project Battery were released on "substantial bails." Parity, a sentencing concept, is largely foreign to the bail context: see *R. v. R.D.* (2000), 273 A.R. 368 (Q.B.), at paras. 40 and 41 and *R. v. Tse*, 2012 SKQB 26, at para. 6. It certainly has no role to play in the application of ss. 515(10)(*a*) and (*b*), both of which are focused on the assessment of individual risk. Without deciding whether the decision of one justice or judge should ever impact on another's assessment of the tertiary ground in a companion case, I note that this factor that did not dominate the justice's decision under s. 515(10)(*c*).

[60] In all of the circumstances, the justice of the peace did not err in her application of s. 515(10)(*c*).

4. Conclusion

[61] This application under s. 521 of the *Criminal Code* is dismissed.

Trotter J.

Released: July 3, 2015

CITATION: R. v. Dang, 2015 ONSC 4254
DATE: 20150703

ONTARIO

SUPERIOR COURT OF JUSTICE

BETWEEN:

HER MAJESTY THE QUEEN

Applicant

– and –

JAMIE DANG

Respondent

REASONS FOR JUDGMENT

Trotter J.

Released: July 3, 2015