Case Name:

R. v. M.D.

PROCEEDING UNDER the provisions of the Youth Criminal Justice Act. S.C. 2002. c. 1
Between
Her Majesty the Queen, and
M.D., a young person

[2006] O.J. No. 1467

2006 ONCJ 129

69 W.C.B. (2d) 583

Ontario Court of Justice
Toronto, Ontario

H.L. Katarynych J.

March 31, 2006.

(118 paras.)

Criminal law -- Compelling appearance, detention and release -- Detention, grounds -- Judicial interim release or bail -- Grounds for denial -- Detention necessary for protection of public -- Application by the Crown for a detention order in respect of the accused young person allowed -- Detention of the accused was necessary for the protection and safety of the public -- Criminal Code, s. 515(10).

Application by the Crown for a detention order to replace a release order made with respect to the accused young person, MD -- The accused faced 14 charges related to possession of narcotics for the purpose of trafficking, possession of an unregistered firearm, and resistance to his arrest by undercover police officers -- The accused complied with a release order that provided conditions that amounted to house arrest in his father's care -- The accused had no prior youth court record -- The accused lived with his mother for the previous two years after his father gave him an ultimatum to cease drug use or move out -- The mother was addicted to crack cocaine and used drugs with the accused on occasion -- The accused had a sporadic attendance record at school -- His mother expressed concern about the character of his peers -- The proposed release plan provided for the

accused to reside with his father -- HELD: Application allowed -- Detention of the accused was necessary for the protection and safety of the public -- Despite the lack of a prior record, the accused had sufficient contact with persons involved in crime to acquire illegal drugs, a handgun and ammunition -- The proposed release plan was neither practical for the accused, nor his father -- The father had insufficient knowledge of the accused and his lifestyle -- There was no foundation for a reasonable belief that the accused was equipped to abide by the release plan, or had the ability and motivation to defer to his father's supervision.

Statutes, Regulations and Rules Cited:

Canadian Charter of Rights and Freedoms, 1982, s. 9, s. 10(b), s. 11(e), s. 24(2)

Criminal Code, s. 515(10)

Youth Criminal Justice Act. S.C. 2002. c. 1, s. 3, s. 3(2), s. 29(1), s. 29(2), s. 38(1), s. 38(2), s. 39(1), s. 39(1)(a), s. 39(1)(b), s. 39(1)(c), s. 39(1)(d)

Counsel:

Karen Simone for the Crown

Lance Carey Talbot for M.D.

DECISION ON BAIL DE NOVO

1 H.L. KATARYNYCH J.:-- This is the decision on a bail de novo application brought by the Crown for a detention order to replace a release order made by Justice of the Peace D. Hunt on March 16, 2006, in relation to this youth.

The Substance of the Charges

2 This youth faces fourteen charges under the Criminal Code, all arising from a single incident alleged to have occurred in the early hours of March 16, 2006, in the area of 375 Bleecker Street in Toronto.

3 From the Crown's synopsis, set in the context of the testimony heard in the bail de novo, the allegations arising from the police investigation of this youth are essentially these:

> Toronto Police undercover officers were patrolling the Bleecker Street area of Toronto as part of the new Toronto Police Services initiative to step up surveillance in high crime neighbourhoods in the city. It was their task to attempt to detect and prevent crime in that area. Guns and drug violence in the neighbourhood had been the subject of many complaints to police and only a week earlier, a person had been killed at a neighbouring building on Bleecker Street.
>
> The officers caught sight of a group of five individuals in the lobby of the apartment complex municipally known as 375 Bleecker Street in Toronto. The

hour was late, and this group appeared to be adjusting their clothing in a manner that, from the perspective of the officers, was consistent with what people do when they are attempting to conceal weapons.

The officers quickly approached and identified themselves as police, both verbally and by showing their badges. As this was unfolding, the group bolted from the lobby, scattering in various direction and, but for this youth, eluding police before any of them could be questioned about their business in that lobby and their conduct with their clothing.

This youth, after shoving an officer in the chest to try to make his getaway, was captured after a short foot chase and struggle. Police Constable Racette got control of him by taking him to the ground and handcuffing him.

All this was unfolding in circumstances where the youth, but not the police officers, knew that he had a 38 snub nose revolver, with a capacity for five bullets concealed in his waistband, and that the gun was loaded with four bullets. He also knew, but the police did not, that he was also concealing a quantity of crack cocaine (.95 grams) divided into ten pieces stored in small ziplock bags and a quantity of marijuana (.85 grams) also packaged, cash in the amount of $115 and a cell phone.

According to the Crown's summary of its evidence, this youth was quite aggrieved by his capture, verbalized the sentiment that his life was now ruined, and provided a number of statements to the officers that reinforced their initial concern that he was just the sort of individual feared in the community and targeted by the police initiative: a gun-toting drug trafficker. Once he was in the officer's control on the ground, he reportedly told them that he had a gun on him. The officer seized the gun from the area of his waistband. He reportedly told the officer that he had bought the gun for $900, that he had it for protection and that he was selling drugs in the area.

Unknown to the officers at the time was that this youth had moved to this mother's apartment in the 375 Bleecker Street building some two and a half years ago.

4 These are the circumstances in which the Crown seeks to detain this youth pending his trial, even though he had been released by Justice of the Peace Hunt on March 16, 2006, on conditions of release that essentially amounted to a "house arrest" in his father's care.

Legal Principles governing the Bail Hearing and Analysis

5 In order to understand this court's decision in this bail de novo, it is important to keep in mind the following principles and perspective of the Youth Criminal Justice Act in an adjudication of this nature, notwithstanding the absence of argument on these points:

1. A court is prohibited from detaining a young person in custody as a substitute for appropriate child protection, mental health or other social measures.

See YCJA s. 29(1).

2. In considering whether the detention of a young person is necessary for the protection or safety of the public under the secondary ground for detention orders permitted by the Criminal Code (discussed later in these reasons), a youth justice court or justice shall presume that detention is not necessary if the young person could not, on being found guilty, be given a custodial sentence under one of the first three conditions for a custodial sentence set out in the Youth Criminal Justice Act.

See YCJA s. 29(2).

3. Those first three conditions for a custodial sentence are these:

(a) the youth has committed a violent offence; or
(b) the youth has failed to comply with non-custodial sentences; or
(c) the youth has committed an indictable offence for which an adult would be liable to imprisonment for a terms exceeding two years and has a history that indicates a pattern of findings of guilt under the Youth Criminal Justice Act or its predecessor.

See YCJA s. 39(1).

4. There is a fourth set of circumstances identified in s. 39(1) as a basis for a custody sentence, one not caught by the presumption set out s. 29(2) of the Youth Criminal Justice Act:

> ... exceptional cases where the young person has committed an indictable offence, [and] the aggravating circumstances of the offence are such that the imposition of a non-custodial sentence would be inconsistent with the purpose and principles of sentencing set out in s. 38 of the Act.

See YCJA s. 39(1)(d).

5. The long term protection of the public falls within purpose of sentencing under the Youth Criminal Justice Act, but with a defined perspective on how that is to be achieved: - "to hold a young person accountable for an offence through the imposition of just sanctions that have meaningful consequences for the youth person and that promote his or her rehabilitation and reintegration into society."

See YCJA s. 38(1).

6. The five sentencing principles set out in s. 38 of the Act to guide the court's sentencing discretion must be read in the context of the overarching principles set out in s. 3 of the Youth Criminal Justice Act.

See YCJA s. 38(2).

7. The principles setting out Canada's policy with respect to young persons also address the long term protection of the public as a goal for any decision made under the legislation, and again with a defined perspective on how that is to be achieved.

   See YCJA s. 3.

8. There is also direction to construe the Act liberally in order to ensure that young persons are dealt with in accordance with the principles that make up Canada's policy.

See YCJA s. 3(2)

6 I cite these particular principles as the backdrop for my consideration of the permissible grounds for detention provided by s. 515(10) of the Criminal Code.

7 Now to certain principles governing all bail applications that I considered essential bedrock for my consideration of the permissible grounds provided by the Criminal Code for a detention order:

1. These charges are allegations, accusations against this youth, as yet unproved.
2. This youth, as a member of our free and democratic society, is clothed with the same presumption of innocence that clothes all of us when we are accused of crime. That presumption can only be displaced by a judicial finding of guilt.
3. Unknown at this time is whether this youth will be found guilty of any of these charges. An array of considerations are at work in a criminal prosecution, including attention to the rights of this youth guaranteed him by the Canadian Charter of Rights and Freedoms and the Youth Criminal Justice Act, whether there has been an infringement of any of those rights in the police investigation, and it so, the impact on the Crown's case against this youth. At the time of this bail de novo, this prosecution is in its early stages.
4. It is not the task of a bail be novo judge to determine this youth's guilt on any of these charges. That is the task of the trial judge.
5. It is not part of our criminal justice system to use a pretrial detention order to "punish" an accused person before there has been a judicial finding of his guilt for the crimes alleged against him, even when the charges are serious. In our free and democratic society we consider it fundamental to our freedom and the rule of law that governs all of us that there be trial and an establishment of guilt before the infliction of any punishment.

   So it is that people who may later be found guilty of even serious crime will be released during the time between arrest and trial.

6. Just as charges may be serious, so are the consequences of pretrial detention. It is, after all, the detention of a person presumed to be innocent of the crimes alleged against him. That detention can last for many months. It disrupts

employment and schooling opportunities. It interferes with important relationships. It can significantly compromise an accused person's ability to assist his counsel in the preparation of his defence.

7. The Canadian Charter of Rights and Freedoms guarantees the right of any person charged with a crime to a reasonable bail, unless "just cause" for pretrial detention is shown. See Charter, s. 11(e).
8. That Charter guarantee makes pretrial detention an extraordinary measure in our system of criminal justice; extraordinary because our freedom to move about in the community without interference from the police or other authorities of the State is at the heart of what makes up our free and democratic society.
9. Pretrial detention is reserved essentially for circumstances in which the right of an accused person to a reasonable bail must be overridden to preserve some demonstrably pressing social interest.
10. What makes up a "just cause" and the sort of "demonstrably pressing social interest" that overrides an accused person's right to reasonable bail is stipulated by s. 515(10) of the Criminal Code.
11. "Necessity" is the operative consideration to be brought to the adjudication of a request for a pretrial detention order. Accused persons are not detained because it is convenient, advantageous or even advisable, nor is pretrial detention to be used as a tool for making a point to the community at large about the risk of getting involved in crime.

8 Let me move now to whether the Crown showed just cause for detention of this youth under any of the grounds permitted by s. 515(10) of the Criminal Code.

On the Operation of the Presumption in s. 29(2) of the YCJA

9 This youth is not encompassed by any of the three criteria for a custodial sentence, if he is found guilty of these offences.

10 A push on an officer an attempt to get away from police is not the sort of violence that in this court's understanding of the law, attracts the operation of the s.39(1)(a)). In the circumstances of this bail de novo, this youth's gun and drug toting behaviour was violence waiting to happen, - a potential risk to safety that the police were trying to head off before the violence came to fruition.

11 This youth has not failed to comply with non-custodial sentences, nor has he laid down a history that indicates a pattern of guilt under the youth justice legislation that would bring him within either the s. 39(1)(b) or (c) grounds for a custody sentence.

12 This youth has no youth court record.

13 If the evidence in this bail de novo in relation to the gun and drug charges is sustained at trial and he is found guilty of those offences, the operation of s. 39(1)(d) may well be set in motion. That will depend on whether a trial judge finds him and his crimes to be an "exceptional case", in the sense that there are aggravating circumstances of the offences such that the imposition of a non-custodial sentence would be inconsistent with the Act's sentencing principles.

14 On the evidence in this bail de novo and in the context of the considerations that must be brought to bear in adjudicating the necessity of a pretrial detention order, this court finds the sort of

substantial risk to the safety of the public that is likely contemplated by s. 39(1)(d) of the Act, if Parliament's concern about public safety is to be made visible.

15 That risk, as a matter of common sense, is created by the mix of a loaded gun and illegal drugs packaged for trafficking, being toted by this seventeen year old in the early hours of March 16, 2006, in a neighbourhood trying to shield itself from drug and gun violence, - all of that set in the context of this youth's spurning of parental guidance and supervision for more than two years and the risk to public safety if it depends on a blind faith in his seventeen year old's ability and motivation to suddenly shift his lifestyle and hand over control of his movements to his father and the terms of a surety bail.

16 I thus approached the bail de novo adjudication unimpeded by the presumption under s. 29(2) of the Youth Criminal Justice Act.

On the Primary Ground

17 This ground was not advanced by the Crown as a basis for detaining this youth.

18 It is thus not necessary to detain this youth to ensure his attendance at court to answer these charges. There is no allegation that he poses a flight risk that cannot be overcome by conditions placed on his release.

On the Secondary Ground

19 The secondary ground under s. 515(10) of the Code requires the Crown to show that detention of this youth is necessary for the protection and safety of the public, having regard to all the circumstances, including any substantial likelihood that this youth will, if released, commit a criminal offence or interfere with the administration of justice.

20 I kept in mind the following:

- "all the circumstances" means that no one single circumstance dictates the court's decisionmaking, although as a matter of common sense, some circumstances may loom larger than others;
- the requirement that there be a "likelihood" under a release that the youth will commit a criminal offence of interfere with the administration of justice means that a mere "possibility" of that outcome is not a sufficient base to establish necessity; and
- the requirement that this likelihood be "substantial" means that there must be something real and appreciable in which to root the likelihood of that outcome. A spectre falls short.

21 Although this is a bail de novo and not a bail review, I also had handy the interim release order of Justice of the Peace Hunt throughout my deliberations, and considered the extent to which it obviated the necessity for the detention order sought by the Crown.

22 I took into account in that regard that for the last fifteen days, this youth has been in the community on those surety bail conditions imposed on March 16, 2006. No allegation was made that this youth had breached any of those conditions.

23 I was acutely aware of the impact on this youth of a detention order at this time. This is not a case of continuing an existing detention. A detention order made today requires him to step into custody.

24 Notwithstanding that, on all the circumstances in this bail de novo, I found a detention order necessary at this time on this ground of s. 515(10) of the Criminal Code for essentially the following reasons:

> At the heart of the terms of this release, as any other release, is an effective supervision of this youth in the community pending his trial on these charges.
>
> There is no meaningful ability to do that within this proposed plan. The proposed release plan looks good on paper. Lifted from the paper, it is neither credible nor practical for either the youth or his father proposed as his surety.

25 These are the reasons, on the whole of the bail de novo evidence.

In relation to the Youth Himself

26 The proposed release plan depends for its effectiveness on the motivation and ability of this youth to abide it, not for a few days or weeks, but until his trial.

27 There is no foundation for a reasonable belief that he is equipped to do that.

28 The absence of a youth court record or any outstanding criminal charges does not in his case vouch for his attention to law-abiding behaviour as part of his lifestyle. At the age of seventeen and for an unknown time before he reached that age and stage in life, he has managed to consort with individuals who supplied him with a gun and ammunition and a quantity of illegal drugs. He was engaged in criminal activity. He simply had not been caught until the early hours of March 16, 2006.

29 He has had little, if any, parental supervision over the past two years. Officially, he has been living with his mother. On his own evidence and on her own admission, he is seldom home. Over the course of that two and a half years, this youth has basically been doing as he pleased.

30 She has little acquaintance with his friends and even less with his comings and goings.

31 In response to the mother's testimony, this youth testified that he had not smoked marijuana with his mother during the past year. If he speaks the truth on that point, I can infer that the marijuana and crack cocaine found on him were not for his personal use.

32 This youth showed no respect for his mother's attempts to parent him. She frankly acknowledged that she did not know what he does because he does not tell her. She knew that he was missing school because the school kept phoning her. She got him up for school. Whether he actually arrived at school was obviously left to him. He told her that he had a part-time job at the ACC, something about "promotion" and she saw someone pick him up to take him to work. She knew nothing further about the job, had never established that it was a legal enterprise, never ascertained the identity of the person transporting him. She was concerned about the company he was keeping in the neighbourhood, told him that the crowd "hanging around him" that he "kinda knew" were "bad people, doing drugs and carrying guns." He paid no heed to her.

33 This youth showed no respect for the attempts of mother's common law spouse to parent him. In relation to this youth's drug use, the mother testified that her partner did not like M.D. smoking marijuana either - but "what could he do?"

34 This youth has laid down no solid school life. I took into account in this regard that his evidence that he is registered in Grade 12. That is the level one would expect for a youth of his age. Being registered in school in one step. More significant is what one does with that opportunity for learning and preparing oneself for a responsible life.

35 He has shown himself to be enough of a behaviour problem in the school setting during his adolescence to attract the suspension powers under the Education Act on a number of occasions, both in his father's care and in the care of his mother. His mother testified that he is difficult to motivate to get to school on time, although she does her best to get him up in the mornings. On his own evidence, his achievement is at the low end of passing grades. It was not at all clear from his evidence that he has been maintaining a full course load. That he needed prompting to remember his course load suggested that he has not rooted himself much in his academic work.

36 This youth has far too much time on his hands under this release proposal. Essentially he is required to be in his father's home unless he is accompanied by his father. That leaves him in the inertia of sleeping, eating, playing about the house and doing the bit of homework that his girlfriend brings to him from his "old" school. That is a mindless and dissolute lifestyle for a youth who has had no solid parenting guidance for more than two years.

37 The plan makes no meaningful provision for his schooling while he is awaiting trial. Having his girlfriend ferry homework to and from the school is hardly enough, even if I can presume her dedication to him from her presence in the bail hearing. She was not called as a witness.

38 The plan makes no meaningful provision for employment of this youth, if he is not participating actively in his schooling. His father spoke of his own desire to have this son working, and was hopeful that he could pave the way for a job through a friend of a friend sort of outreach. That tells me that the father is beginning to recognize how dysfunctional this sort of bail release is for this youth.

39 The evidence does not invite the inference that this youth is even equipped for lawful work or motivated to dedicate his energy to that. If he is unable to get himself off to school in the morning, and arrive on time, without having the school telephone his mother to ask about his whereabouts, it is unlikely that he is equipped to rouse himself for the rigours of a fulltime employment.

40 I did not consider his occasional "promotion" activities at the Air Canada Centre on event nights, however that employment emerged, much of an employment. On the evidence in the bail de novo, I could not ascertain whether this is even lawful employment. Certainly the youth himself know little about it. He had only the first name of his boss. According to his mother's evidence, he was driven to the job on occasion by someone. She did not know the identity of that person. The youth made no mention of it in his evidence.

41 Neither parent considers it really possible to dictate to this son what he is not prepared himself to abide. In that regard, they are not unlike many parents of teens.

42 The difference here is that this youth has not acquired much of a positive role modelling from his mother to inform his decisions about his conduct, and he has not heeded the role modelling offered by his father over their years together.

43 Let me move to that now.

In relation to His Mother, not proposed as a Surety, but as an Assist to Her Son

44 I address the mother first because her evidence provided a picture of what this youth's lifestyle has been over the course of the last two years.

45 It is right that she not be considered as a surety. She does not in this court's mind qualify as a responsible person within the meaning of the YCJA in whom to entrust this youth at this time in any event.

46 The mother herself has not laid a firm foundation in a law-abiding life.

47 She has been immersed in the drug culture through the time that this son was expected to reside with her. Although she testified that she has been trying to overcome a longstanding addiction, it was also apparent from her testimony that she has a long way to go. She told the court that that she had not had any drugs in her system since the arrest of this youth on March 16, 2006, and that it had been over two weeks since she'd done any crack. That does not suggest much of a distance from drugs and those who are her suppliers.

48 She admitted that she and this son have smoked drugs together while he has been living with her.

49 Although his mother tried to put rules in place for him, including a curfew, and tried to encourage him to involve himself in a drug rehabilitation counselling that she herself attended and go to school regularly, her efforts were largely ignored. On his own evidence, he was seldom at her home, preferring to be elsewhere and with others. Apart from identifying one Kevin Morris as a friend, she could shed no light on how he spent his time and with whom when he was not with her, nor could she shed any light on his activities. She did know about a job that he had at the Air Canada Centre in "promotion", and that someone picked him up to go to work, but she had no idea who that was.

50 I kept in mind that his mother is not being proposed as a surety. She does, however, see a role for herself in helping him in whatever way that she can, including giving him money.

51 Her assistance, including the provision of money to this youth, is not the quality of assistance likely to provide a meaningful influence on her son's compliance with a bail release.

In relation to His Father, proposed as a Surety

52 Notwithstanding the decade of parenting this youth that preceded his departure to live with his mother, this father has had little influence on this youth over the course of these last two years, and appeared to be losing ground with him in the time leading up to this youth's departure from his home.

53 He was already vesting far too much decisionmaking in this boy at that time. This youth was living with his mother because his father, weary of his attempts to get this son to stop smoking marijuana in his house, gave him a choice: either give up the marijuana or move out and live with your mother in downtown Toronto. This youth chose to live with his mother.

54 He kept far too little track of the "benefits" of that choice for his son. It may have solved his problem of the smoking of marijuana in his home. It did nothing to solve problems for his son. It

made no dint in the son's smoking of marijuana, and the choice to live with the mother plunged this youth, at fifteen years of age, into the heart of drug culture.

55 On his own evidence, this father knew little about his son's comings and goings, except for a brief acquaintance with his son's friend, Kevin Morris, at one point. Father understood that person to be a youth worker. He never verified his understanding through any inquiries of this Kevin Morris.

56 This is not a case that depends for the effectiveness of a release on substantial sureties have come forward to guarantee compliance with the proposed plan of supervision. It depends on the motivation and ability of the youth himself.

57 On close scrutiny of the evidence relating to the proposed surety, this father has far too little knowledge of his son and his lifestyle, far too little appreciation of the circumstances in which this boy landed at age 15 in his mother's care, and what a poor choice that was for him, far too little knowledge of the extent to which this mother's attempt to supervise and guide this son since that time have failed.

58 He also rests far too much trust in the ability and motivation of his son to do what is required. He expects his son to obey. That is an expectation too blind to the realities of this son to make him a responsible surety or a responsible person in whom to entrust this seventeen year old within the meaning of the Youth Criminal Justice Act.

59 This father's need to expect his son to act responsibly is understandable. He is a man of very modest means. He is a hard working man at the lower end of the hierarchy of responsibility in a grocery chain. He is not his own boss. He must defer to his employer's needs or risk loss of his livelihood.

60 Although he has altered his shift hours to try to be more available for supervision of his son, the father's reality is that he needs the assistance of his girlfriend and his younger daughter to keep tabs on this youth when he is not himself supervising this son. I know nothing about the girlfriend's willingness or ability to supervise this 17 year old. Although the younger sister was in court for the bail hearing, as a matter of common sense, I cannot expect her to hold sway over her older brother, even if she were inclined to do that.

61 The effectiveness of this release depends not so much on the willingness of this proposed surety to hold this youth to the terms of this release, but on this youth's ability and motivation to defer to his father's supervision.

62 This youth has not laid down any sort of a foundation for obedience to his father.

63 It was his disobedience to his father's rules about drug use in his home that generated this youth's decision to go to live with his mother.

64 It is naïve in the extreme to believe that a father who has not parented this son for so long, who was having difficulty with this son's obedience before that time, and who has been only minimally involved in this son's life over the last two and a half years, can provide the level of influence that is needed to make this release effective.

65 The father actually knows very little about this son's ability to conduct his life. His testimony was that he trusts him to abide his supervision. On all the circumstances in this bail de novo, that trust is misplaced.

66 This plan makes no sense for the father. He does not appear to recognize that. This is a working man. He cannot supervise this son 24/7, although he is expected by this proposed release to do exactly that. At least one judge has pointed out in that regard that it is not the intention of a release that the parent as a surety be transformed to a parent as a jailer.

67 Even with the change that he has made in his hours of work, this father is still dependent on others to keep the watch on his son. He testified that his girlfriend would do that. I had on evidence of either the ability or the motivation of the girlfriend to do that.

68 The bottom line is that this youth has not had a meaningful parental supervision and guidance for some two and a half years. None of three parent figures in this seventeen year old's life appear to know very much about his conduct of his life.

69 This is not a plan where adherence to this plan is enhanced by a substantial penal sum of the surety.

70 It depends for its efficacy on the ability and motivation of this youth to relinquish control of his movements to his father.

71 The father indicated that he would not hesitate to contact police if his son disobeyed his release conditions. I considered that. I also considered the price paid by the father for such a report.

72 The security to be posted is to be a maximum $5,000, as I understood it. That exceeds this father's liquid assets, and requires him to reach to a modest RRSP, if that proves necessary. The sum represents a huge sacrifice of his father. It would be naïve to think that the potential of losing that money might not weigh heavily in the father's decision to contact police if his son is not complying with release conditions.

73 It would also be naïve to think that this father, weary himself of the strain that these conditions impose on his own life, would not be generous in his interpretation of a "breach". That strain was already beginning to show in the bail de novo. He was already looking to get his son out of the house and working.

74 I took into account this youth's evidence that he understood the price to be paid by his father if he breached conditions of a release. I also took into account that a youth who contributes nothing to his mother's household or his father's but is quick to rely on them to give him money from time to time, and who somehow acquires some $900 to purchase that gun in his waistband is unlikely to consider in any meaningful fashion that the amount put up by his father is a substantial sum.

Specific to the Safety of the Public

75 This youth has provided all manner of reason to distrust his ability to manage his life responsibly.

76 Although this youth has no youth court record and no other outstanding charges, those factors do not, in the circumstances of this case, invite the inference that he has been steering clear of criminal activity.

77 As a matter of common sense, the unregistered gun, ammunition and packaged illegal drugs on his person at the time of this investigation says that this youth has sufficient contact with persons involved in crime to acquire these items for himself. His interest in the gun was sufficient to have him hand over $900 to someone in exchange for it. Who his suppliers have been, where they themselves acquired the illegal drugs and firearm and ammunition, whether they are currently out

and about in the community plying their trade, and where they are at this time is an unknown. It is not a stretch to be concerned about their interest in making contact with him, the extent of their influence on him, particularly in circumstances where this youth was the only one of the group caught and where he might rat on them.

78 As a matter of common sense and simple human experience, when it comes to the protection and safety of the public in this city, persons carrying a mix of drugs packaged in ziplock bags and loaded guns in an area noted for gun and drug related violence present a real danger to others, whether it be late at night, as alleged in this case, or any other time of the day. That public includes the youth himself and undercover police who are also in the area attempting to keep it safe for its citizens.

79 He has laid down no real foundation of obedience to the guidance of either parent over a very long time. He's been the master of his own life.

80 Nothing is known about his friends and acquaintances, apart from the reality that some person or person have supplied him with a gun and illegal drugs, and that on this youth's own testimony, he spends considerable time with Kevin Morris, including staying weekends at his home. Neither mother nor father have anything more than a passing acquaintance with this Kevin Morris. There is no evidence in the bail de novo that sheds any meaningful light on Kevin Morris as a responsible adult or friend; including whether this man is, indeed, the "youth worker" that the father and mother believe him to be.

81 For a number of years he has had an interest in his marijuana smoking that is greater than his interest in the structure and parenting within his father's home, greater than his ability to resist the invitation of his mother to smoke it with her, and on his mother's evidence, greater than his preparedness to heed the disapproval of her partner. Somewhere in the community are his suppliers. It would be naïve to "trust" that he has relinquished this interest.

82 I did take into account that there was no evidence that he has breached the release conditions in the days that they have been in place.

83 I also took into account that he has no youth record and hence no basis for projecting future behaviour on the basis of criminal conduct proven in the past. As I have discussed earlier in these reasons, past criminal conduct is not the only means by which to project future behaviour. How one has been governing one's life over a period of more than two years can also provide information upon which to base a prediction.

84 There is nothing innocuous about the loaded firearm and his illegal drugs found on this youth in the early hours of March 16, 2006. It is a dangerous and lethal mixture. Those four bullets in that gun were at the ready to harm any person who might come face to face with that gun. Protection and safety of the public, wherever they are in this community, is a real issue here. This was a shoot-out waiting to happen.

85 The proposed release plan lacks the components needed to provide an effective supervision of this youth in the community at this time.

86 For all the foregoing reasons, I am satisfied that it is necessary at this time to detain this youth in custody on the secondary ground provided by s. 515(10) of the Criminal Code.

On the Tertiary Ground

87 This ground advanced by the Crown under s. 515(10) of the Criminal Code is all about the maintenance of public confidence in the administration of justice.

88 The Crown must show that detention is necessary to maintain confidence in the administration of justice, having regard to all the circumstances, including the apparent strength of the Crown's case, the gravity of the nature of the offences, the circumstances surrounding the commission of the offences, and the potential for a lengthy term of imprisonment.

89 The public perception must be viewed, not through eyes of those who agitate about the state of safety in the community, not through the eyes of the media or advocates for a more punitive justice, but through the eyes of a reasonable member of the community, living within a community that is itself properly informed about our system of criminal law, the philosophy of the legislation and Charter values, including the constitutionally guaranteed presumption of innocence and the right not to be denied bail without just cause, and the actual circumstances of the case.

90 The Supreme Court of Canada has made clear that this ground should be invoked rarely as a basis for pretrial detention. The caution to be taken from the jurisprudence is that it is rarely justifiable to detain an accused person on this particular ground.

91 Detention is justified under the tertiary ground of s. 515(10) only if the basis for denying bail is not covered by either the primary or the secondary grounds.

92 In light of this court's decision that detention of this youth is necessary under the secondary ground of s. 515(10) of the Code, it is unnecessary to deal with this particular ground.

93 On the whole, I found no basis for recourse to this particular ground for detention.

94 It is only fair, however, to address certain of the arguments that appeared to be rooted in this tertiary ground for detention.

95 Let me move to that now.

On the Apparent Strength of the Crown's Case

96 Defence counsel urged this court, quite properly, to take into account possible Charter issues that may wither the Crown's case against this youth.

97 I did that during my deliberations on the evidence and have the flowing comments.

On Issues rooted in s. 9 of the Charter

98 The circumstances of this case do attract attention to the delicate issue of balancing lawfully recognized police powers of detention and searches incidental to that detention against the right of an individual, whatever his age, race, or economic circumstances, to move freely about our community, whatever the hour of the day or night, without interference from police.

99 There is no question that fundamental to the legality of the entire encounter of police with this youth on March 16, 2006, is whether the police had articulable cause or other authority to interfere with this youth's freedom of movement in the community.

100 As Justice H. LaForme, now of our Ontario Court of Appeal, pointed out in R. v. Ferdinand [2004] O.J. No. 3209 (provided by defence counsel) at paragraph 56:

> ... Young people have a right to just "hang out", especially in their neighbourhood, and to move freely without fear of being detained and searched on a mere whim, and without being advised of their rights and without their consent. Mere hunches do not give police the grounds to surprise a group of young people or to "get right on them" for investigative purposes without something further that provides a lawful basis for doing so.

101 If this youth launches a challenge under s. 9 of the Charter to this prosecution, it will be his task to establish on a balance of probabilities that he was detained by police. That may be conceded in this case. If there was a detention, then it is the task of the Crown to satisfy the trial court on a balance of probabilities that the detention was not arbitrary.

102 It is an established legal principle that not every instance of a police officer stopping a person or even interviewing them amounts to a detention that engages Charter protections. See R. v. Mann [2004] 3 S.C.R. 59. Defence is, however, quite right to cite established legal principle that stands for the proposition that guarantees in the Charter loom large if the police interaction moves beyond a mere request for identification or brief interview and becomes an investigative detention.

103 Investigative detentions are only justifiable if they are not arbitrary. The trial court uses a two-pronged analysis for that; - first, deciding whether the conduct of police falls within the general scope of any duty imposed by statute or common law, and then if it does, whether the police conduct veered into arbitrariness; specifically, an unjustifiable use of powers associated with the duty. (see R. v. Mann confirming that the seminal authority on police powers of investigative detention is the 2 pronged test in R. v. Waterfield [1963] 3 All E.R. 659).

104 A detention is not arbitrary if police have articulable cause ("reasonable cause to suspect", according to jurisprudence predating Mann) - what Supreme Court Justice Iacobucci in the Mann case now calls "reasonable grounds to detain", assessed on an objective and subjective standard. That is a threshold that is somewhat lower than the reasonable and probable ground required for an arrest.

105 It is also established legal principle that there is no absolute power to search incidental to an investigative detention. That search must be reasonably necessary to the officer's duty. A search, even a patdown search, must be based upon an objectively viewed decision that it was reasonably necessary in light of the totality of the circumstances. It cannot be justified on the basis of a vague or non-existent concern for safety, nor can the search be premised upon hunches or mere intuition. See Mann at para. 40.

106 The whole of the evidence in this bail de novo, recognizing that it is not the whole of the evidence that would be before a trial court, yielded a constellation of objectively discernible facts that gave the officer who detained this youth reasonable cause to suspect that this youth was criminally implicated in the activity under investigation.

107 Here is what the evidence in the bail de novo yields:

> Unlike the circumstances in R. v. Ferdinand referenced by defence counsel, this is not a case where it can be readily said that police detention of this youth came before any justifiable reason for doing so.

Unlike Ferdinand, this is not a situation where a person sitting on a bench on a late afternoon talking to another, saw police approaching, got up and walked away, and was then detained because police interpreted that walking away as somehow indicative that he was trying to hide something. Unlike the climate in R. v. Ferdinand, there is no evidence in this case that this was a casual stop of this youth and his companions to invite him or the others to answer questions for their "208" cards or otherwise identify themselves.

There was no evidence in this case that the police were tracking the movements of this youth, or that they knew him or that he was a suspect in any particular investigation or that they knew his race, even less that they were engaged in a racial profiling, as raised by defence counsel as an issue.

There is no evidence that police were investigating a specific offence when they came on the scene.

The named officers were in this neighbourhood on March 16, 2006, to preserve the peace, to prevent crime and to protect life and property by their walkabouts in that area, - precisely what the community expects its police to do.

The bail evidence yields nothing to suggest that these officers were outside the scope of these common law duties or that their conduct involved an unjustifiable use of the powers associated with their duties.

What drew police attention to this group in the lobby of this apartment building was not simply their presence there, or a hunch that they might be up to no good at that hour of the night, but observation of them arranging their clothes in that apartment lobby in a manner that, in the mind of the officers, was consistent with what people do when they are trying to quickly conceal weapons on their person.

It was in that context that the police responded to what they had just seen by immediately approaching this group, and it was in that context that they interfered with this youth's freedom to move about as he pleased. He was chased by police because the observations of the group in the lobby gave them reason to believe that he was armed and now dispersed into the very community that the police were entrusted to protect from harm.

The search of this youth in these circumstances had everything to do with safety; his own, the officers, and anyone else in the vicinity of his capture. Reasonable people in the community, reasonably informed, would expect the police in these circumstances to remove that loaded gun, a quantity of crack cocaine and marijuana and other items consistent with a trafficking operation from this youth's person and to detain him.

108 If those facts in the Crown's case remain intact at trial, that is the constellation of factors ready for assessment of the integrity of police intervention under s. 8 and 9 of the Charter in relation to this rapidly unfolding incident, these charges and this youth.

109 Even if the trial court finds that there has been an arbitrary detention, there is still the task of determining whether the breach is such that evidence obtained as a result of it will be excluded from trial under s. 24(2) of the Charter. That entails consideration of the nature of the evidence obtained, the nature of the right violated, and thereafter, the seriousness of the breach (whether committed in good or bad faith, how interfering was the search, was there an expectation of privacy to it, were there reasonable grounds for the search).

110 If the evidence is to be excluded, the trial court must conclude that in all the circumstances, the administration of justice would be brought into disrepute if the state were permitted to advance evidence obtained by the police in this fashion against this youth in his trial. The issue is whether it is conscripted evidence, whether this youth was compelled to implicate himself in the crimes, whether it is evidence that could have been obtained "but for" the breach of a Charter right. All of that is also to be assessed through the eyes of the reasonable person in the community, himself dispassionate and fully apprised of the circumstances of the case.

111 It would be rash to assume at this time and on the evidence in the bail de novo that a Charter challenge would wither the Crown's case.

On Issues rooted in the Youth's Statements

112 Defence counsel also pointed out that there was a genuine issue about the admissibility of this youth's alleged statements to police at the time of his arrest and in the wake of it; - issues within s. 10(b) of the Charter, issues of voluntariness and issues within the provisions of the Youth Criminal Justice Act.

113 The central issue here appears to be the extent, if at all, to which this youth's various statements were spontaneous utterances to the officers.

114 The evidence in the bail de novo from an officer who had had direct interaction with this youth, as well as information from other officers in the investigation indicated that this youth responded to his capture by announcing, in considerable distress, that his life was now ruined, and that he continued to unload information, even when told to stop and wait until he could have the advice of a lawyer. Part of that information was that he had bought the gun for $900.

115 The evidence is that he was properly cautioned and given his rights to counsel. This does not appear to be a case where police disregarded his right to speak to counsel. On the evidence in the bail de novo, they in effect, forced counsel on him. This youth got contact with duty counsel essentially over his objections. He did not want to talk to a lawyer. The officer herself made contact with duty counsel, because she was mindful of police protocol for the videotaping of statements and his right to choose whether or not to participate in that. She had told him to stop talking until he talked to a lawyer. He refused to heed her. That videotaping never did take place. The youth heard the duty counsel advice to him to keep silent. The officer respected that.

116 The officer acknowledged that this youth's mother did not see him at the station. The youth did not want to see his mother. That is consistent with the mother's evidence that this youth often tries to deflect her, and tells her that she embarrasses him.

117 She wanted to see him. That is not synonymous with his right to see her. If it is found that this youth wanted his mother with him and she was not permitted by police to see him, the police will need to answer for their responsibility under the Youth Criminal Justice Act to give this youth an access to his parents.

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118 On the whole of the evidence in the bail de novo, and for all the foregoing reasons, which are to form part of the court record in this case, a detention order will issue today.

H.L. KATARYNYCH J.

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