SUPREME COURT OF NOVA SCOTIA
Citation: *R. v. D.M.*, 2020 NSSC 195

Date: 20200624
Docket: 493163
Registry: Halifax

Between:

Her Majesty The Queen

v.

D.M.

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Restriction on Publication – Sections 517 & 520(9) of the *Criminal Code*

Judge:	The Honourable Justice Peter P. Rosinski
Heard:	June 16, 2020, in Halifax, Nova Scotia
Written Decision:	June 24, 2020
Subject:	Bail review pursuant to s. 520 Criminal Code – *R. v. St. Cloud*, 2015 SCC 27; R. v. Zora, 2020 SCC 14
Summary:	D.M. was denied bail in Provincial Court on the grounds in section 515(10)(c). At that hearing, he had proposed two sureties pledging $100,000 in total, and that he would be under strict house arrest. He argued that there were two "material changes in circumstance" because: his trial had been delayed by five months as a result of Covid 19; and the addition before this court of a proposed GPS/electronic monitoring in addition to strict house arrest.
Issues:	1. Are either of the argued changes a "material change in circumstances" sufficient to trigger a bail review by this Court?

2. If so, as the initial decision-maker, should this Court release D.M?

Result:

1. The five months delay in getting to trial is not a material change in circumstance. The delay is not an unduly disproportionate period of time, nor does that passage of time call into question the validity of the reasons of the earlier detention.

2. The new bail plan and the old bail plan are virtually identical, except for the proposed addition of GPS/electronic monitoring. Presuming that such evidence is in fact “new evidence”, it is not reasonable to think, if it had been proposed in Provincial Court, that it could have affected the balancing exercise engaged by the Provincial Court, Judge under section 515 (10)(c).

3. While these factors do not trigger the courts engaging in a bail review, the court alternatively went on to consider the new bail proposal as if it were the initial decision-maker. It concluded that while the release plan is stringent, the presumption of innocence is significantly undermined by the compelling evidence against D.M., and the nature and circumstances of the crimes are such that D.M. has not satisfied the court that he should be released.

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Restriction on Publication – Sections 517 & 520(9) of the *Criminal Code*

Decision on Bail

Judge:	The Honourable Justice Peter P. Rosinski
Heard:	June 16, 2020, in Halifax, Nova Scotia
Counsel:	Rick Woodburn, Senior Crown Attorney Ian Hutchison, Defence Attorney

By the Court:

Introduction

[1] On August 19, 2019 D.M. was denied bail, by the Honourable Michael Sherar of our Provincial Court.

[2] D.M. has made application to this Court for a review of that decision pursuant to section 520 of the *Criminal Code* ["*CC*"].

[3] A review by this Court is only permitted in three circumstances, namely if:[1]

1. Judge Sherar erred in law, in his citation, interpretation or application of the relevant law – this was not argued as a ground for the review in this case, and for my part I see no error by the judge;

2. Judge Sherar gave excessive weight to one relevant factor or insufficient weight to another such that the decision is "clearly inappropriate"– this was not argued as a ground for the review in this case, and for my part I see no error by the judge;

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[1] *R v St. Cloud*, 2015 SCC 27 at para. 6.

3. where there is admissible new evidence – and that evidence "shows a material and relevant change in the circumstances of the case" (para. 121 *St. Cloud*). This is the basis of D.M.'s argument.

[4] In summary, D.M. argues that there are two significant changes since the August 2019 bail hearing:

1. that as a result of Covid 19, D.M.'s trial dates of May 11 and 13, 2020 have had to be rescheduled to October 27 and 28, 2020 – this delay means any negative effects on D.M. of his pre-trial remand detention, while he is presumed innocent of any crime, will persist for five further months, and if Judge Sherar had been aware that such delay would occur, it may have materially affected his decision to detain D.M.;
2. D.M.'s release plan now includes being electronically monitored (GPS) by private arrangement with Recovery Services Corporation.

[5] In the circumstances of this case, I conclude neither of these are a material and relevant change rising to the level of "admissible new evidence", and therefore I am not permitted to proceed as if I were the initial decision-maker in evaluating his present release plan.

[6] Alternatively, presuming at least one of these to be a material and relevant change in circumstances, I conclude that he has not satisfied me that he should be released pursuant to section 515(10)(c) *CC*.

Background

[7] D.M. was born on July 20, 1993. He has not been a youth since 2011. He will shortly turn 27 years old.

[8] He has lived with his mother in Halifax for his entire life, except for: when he was younger he spent some summer school breaks with his father in Ontario (p. 54(5) Transcript); the times he lived with his father and stepmother in Ajax, Ontario while attending school there to complete Grade 10 and 11; and after his return to Nova Scotia where he was unsuccessful in completing Grade 12, he did so upon returning to Ontario by attending night school (likely in 2012). Otherwise he has visited the Ontario residence of his father every second Christmas in his younger years, and only rarely for short visits in more recent years.

[9] His father and stepmother (B.M. and T.M.) testified that they have tried to maintain a long-distance relationship with him. There was very little detail provided in this regard. I conclude that, based on their answers to questions

regarding what they knew about D.M.'s activities, both pro-social and not so, that the relationship was not very active in the last seven years.

[10] D.M. has a criminal record (he turned 18 years old on July 20, 2011):

- on December 4, 2009, he was sentenced to a reprimand under the *Youth Criminal Justice Act* for a s. 264.1(1)(a) *CC* offence, occurring July 10, 2009;
- on September 16, 2011, he was sentenced under the *Youth Criminal Justice Act*, to a nine-month conditional discharge, and ordered to serve 20 hours community service, after which he was subject to nine months probation including conditions that he keep the peace and be of good behaviour, that he not use or possess alcohol or any controlled substances and attend for such assessment counselling as directed by his youth worker, and not have in his possession any firearm, crossbow, prohibited weapon, restricted weapon, prohibited device, ammunition or explosive substance or any weapon is defined by the *Criminal Code* (and not to attempt to have or have contact with another individual K M-H). The underlying offences were:
    1. May 3, 2011 s. 5(2) *CDSA* possession for the purpose of trafficking;
    2. May 3, 2011 s. 4(1) *CDSA* simple possession;
    3. July 5, 2011 s. 266(b) *CC* assault.
- on January 21, 2016, he was sentenced to a $900 fine (and the remarks note that "fine to be paid from monies seized at time of arrest") for s. 4(1) *CDSA* offence which was committed on May 12, 2015;

- on December 12, 2017, he was sentenced to a $1000 fine and a one-year motor vehicle driving prohibition order for a s. 253(1)(b) *CC* (“over 80” impaired driving) offence.

[11] The evidence suggests that D.M. likely has not had any ongoing significant periods of employment for at least several years.

The current offences charged

[12] Stemming from him allegedly firing 7 to 8 .45 calibre bullets in the direction of the victim R.C. in the area of Spring Garden Road and Dresden Row, Halifax, on August 9, 2019 (shortly after midnight), he stands charged of the following offences (maximum sentences in brackets):

1. attempted murder of R.C. - s. 239 *CC* [life imprisonment]
2. use and carry a restricted firearm in a careless manner or without reasonable precaution for the safety of other persons - s. 86(1) *CC* [two years]
3. point a firearm at R.C. - s. 87(1) *CC* [five years]
4. intentionally discharge a firearm while being reckless as to the life or safety of another person - s. 244.2 *CC* [14 years]

5. possess a restricted firearm (.45 calibre Ruger semi-automatic handgun) without being a holder of a license or registration certificate - s. 91(1) *CC* [five years]

6. possess a loaded restricted firearm without, being a holder of an authorization or license under which he may possess the firearm in that place, and having a registration certificate for the firearm - s. 95(1) *CC* [10 years]

7. possession of a weapon, to wit, a handgun for a purpose dangerous to the public peace or for the purpose of committing an offence - s. 88 *CC* [10 years]

8. unlawfully carrying a concealed weapon, to wit, a handgun, not being authorized under the *Firearms Act* to carry it concealed - s. 90(1) *CC* [five years]

9. possess a firearm, to wit, a handgun knowing he was not the holder of a license under which he may possess it, and without being the holder of a registration certificate for the firearm - s. 92(1) *CC* [10 years]

10. without lawful excuse was in possession of the firearm, to wit, a handgun, knowing that the serial number on it had been altered, defaced or removed - s. 108(1)(b) *CC* [five years]

The bail release plan before PCJ M. Sherar on August 19, 2019

[13] The onus was on D.M. to satisfy the court that he should be released pursuant to s. 515 *CC*.

[14] He presented B.M. as his witness, and in response to his counsel's question whether it would be necessary to call T.M., the Crown agreed some brief representations could be made by the Defence, in addition to the similar evidence she could have given to that of B.M. (p. 71 Transcript).

[15] In summary, the release plan was that D.M.'s father and stepmother would be sureties and pledge monies in the amount of $100,000, with a requirement for him to be under house arrest with other conditions.

[16] B.M. testified in Provincial Court that *at that time* "both my wife and I have the opportunity to work from home… We would make it work depending on whatever the conditions are. Question: Should your wife or yourself, not be available -any alternatives? Answer: Yes, my mother-in-law, she's retired, and she would come to the home." (p. 61 Transcript).

[17] B.M. was asked in direct examination whether D.M. was then employed in Nova Scotia – he answered "No, not that I know of, no." (p.63 Transcript)- in

cross-examination he confirmed that “to my knowledge he’s not working.” (p. 66). When asked about his previous “record of employment”, B.M. answered: “he has worked in a magazine warehouse, he’s done some roofing”. B.M. clarified that, “that’s a few years ago now”. When asked about D.M.’s employment in the last five years- Question: So what about the last five years in terms of employment…? Answer: “I’m not aware”. Question: You have no idea where your son’s been working for the last five years, if at all?”. Answer: “No.”

[18] As Mr. Hutchison said, “should the court be minded to grant [D.M.] bail, the plan would be, is, that he would leave the court this afternoon and be taken to the airport and the family will, would return on a flight back to Ontario later this evening.” (p. 74 Transcript).

[19] The Crown argued that its cogent concerns arose under s. 515(10)(c) *CC*.

[20] It had presented as evidence the testimony of Detective Constables Adam Whynot and Eddy El-Diri, to set out the background facts regarding the investigation and arrest of D.M. and D.B., and to make reference to the various exhibits including: a map of the area including the run path allegedly taken by D.M. and his two companions J.D. and D.B., as well as a Google Maps printout; a package of photographs; and a compilation of video surveillance cameras in the

relevant areas of Spring Garden Road in Halifax. The Crown also referenced the criminal convictions of D.M. as part of its case. (p. 49 Transcript)

[21] In his decision Judge Sherar stated:

> "… I'm not determining his guilt or innocence, but there seems to be a significant amount of evidence pointing towards the possible culpability of the defendant as charged. Despite all that, the defendant, through his counsel, has offered an opportunity for the court to consider whether he ought to be released pending his opportunity to make a full answer and defence. I am mindful that may take a period of time and an innocent person could be detained until they are possibly ultimately exonerated by the courts… The Crown is not seeking the detention of the accused under the primary or secondary ground. What they purport to apply is the third ground…[s. 515(10)(c) *CC*] I'll read that at length … [He reads the entire section into the record–I recognize that there have been amendments to section 515 *CC*, effective December 18, 2019, however they are not relevant and material to this bail review, unless I conclude that there was a material change of circumstances and assess the matter as the initial decision-maker.]

[22] Judge Sherar inserted his own observations after each of the four factors in s. 515(10)(c):

(i) the apparent strength of the prosecution's case - "it does appear to be a strong case";
(ii) the gravity of the offence- "attempted murder is of the almost highest gravity";
(iii) the circumstances surrounding the commission of the offence including whether a firearm was used- "it's alleged a firearm was used and the firearm was discharged in a high density urban area where there were members of the public present at the time of the discharge of the weapon";
(iv) the fact that the accused is liable, on conviction, for a potentially lengthy term of imprisonment or, in the case of an offence that involves, or whose subject matter is, a firearm, a minimum punishment of imprisonment for a term of three years or more- "This alleged offence, the evidence which is before the court at this point, clearly come within the purview of subsection 515(10)(c)(iv)."

[23] He concluded:

> "… The Defendant has not shown cause why he ought to be released and he will be detained until further dealt with by the court." (p. 83 Transcript)

Has there been a material change in circumstances, which would allow me to act as the "initial decision-maker" regarding the release plan presented in this court?

[24] D.M.'s counsel says that the five-month delay of his trial, and the addition of GPS/electronic monitoring of D.M. each constitute a material change in circumstances.

i) When can delay of trial constitute a material change in circumstances?

[25] Regarding what is a "material change in circumstances", particularly insofar as an argument is made that delay as a result of adjournments may constitute such material change in circumstances, I stated in *R v BTD*, 2020 NSSC 165 regarding the reasons in *R v Ledesma* 2020 ABCA 194:

> 37 Although there is a distinction between the section 679 considerations for post-conviction bail pending appeal and the section 515 *CC* pre-conviction considerations in relation to alleged offenders, the assessment of what is a "material change in circumstances" is common to both.
>
> Justice Rowbotham stated:
>
> > Has There Been A Material Change in Circumstances Since November 26, 2019?
> >
> > 14 A material change is one capable of leading to a different assessment of one or more of the factors in section 679(3): *R v Baltovich*, [2000] OJ No 987 at para 6, 47 OR (3d) 761 (CA). *The assessment of whether a change is sufficiently material involves an examination of whether the new circumstances call into question the*

> *validity of the reasons for the earlier detention: R v Ledesma*, 2019 ABCA 60 at para 44. ...
>
> 15 Mr Ledesma submits that there have been two material changes in circumstance: the adjournment of his appeal and the risks posed by the COVID-19 pandemic.
>
> *Delay as a result of the adjourned appeal*
>
> 16 Mr Ledesma's appeal was scheduled to be heard April 8, 2020. It was adjourned in February and will be heard on November 12, 2020. ...
>
> 17 Mr Ledesma maintains that the delay in the appeal hearing constitutes a material change in circumstances since my earlier decision.
>
> 18 *A significant period of delay can constitute a material change in circumstances*. In *Baltovich*, the first application judge who denied release, was influenced by the fact that the appeal was expected to be heard within six months. Due to an application for fresh evidence, the appeal was delayed for several years and when the second application for release was heard, the appeal was still approximately a year away. The second application justice determined that the delay amounted to a material change in circumstances.
>
> 19 In *Oland*, the Supreme Court cited *Baltovich* with approval and explained that when balancing the tension between enforceability and reviewability, appellate judges should be mindful of the anticipated delay in deciding an appeal, relative to the length of sentence: *Oland* at para 48.
>
> [My italicization added]

[26] The most recent word about the imposition and enforcement of bail conditions, and consequently bail reviews, is found in the reasons of the court in *R v Zora*, 2020 SCC 14, as authored by Justice Martin. She stated:

> 63 In my view, despite high rates of criminal charges for failure to comply, Parliament did not intend for criminal sanctions to be the primary means of managing any risks or concerns associated with individuals released with bail conditions. The scheme of the *Code* illustrates that such concerns are to be managed through the setting of conditions that are

minimal, reasonable, necessary, least onerous, and sufficiently linked to the accused's risk; variations to those conditions when necessary through bail reviews and vacating bail orders; and bail revocation when bail conditions are breached, which may result in release on the same conditions with altered behaviour expected of the accused, changed conditions, or detention. Charges under s. 145(3) are not, and should not be, the principal means of mitigating risk.

64 *A bail review under ss. 520 and 521 is the primary way to challenge or change bail conditions which are not, or which are no longer, minimal, reasonable, necessary, least onerous, and sufficiently linked to risks posed by the accused (except for accused charged with very serious offences under s. 469).*

65 Parliament also enacted two tools to address breaches of bail conditions: bail revocation under s. 524 and criminal charges under s. 145(3). These two provisions work together to promote compliance with conditions of bail, along with forfeiture provisions for monetary amounts set out in a recognizance (see Part XXV of the *Code*). However, these two mechanisms serve distinct and different legislative purposes. Whereas revocation under s. 524 fulfills a risk management role, criminal liability under s. 145(3) exists to punish and deter.

66 Revocation of bail occurs under s. 524…Where the judicial official finds, on a balance of probabilities, that the accused contravened or was about to contravene the relevant order or that there are reasonable grounds to believe that the accused committed another indictable offence while on bail, the judicial official must cancel the order and detain the accused (s. 524(4) and (8);… The accused then has the onus to show why their detention is not justified. *If the accused establishes that the detention is not justified, the judicial official can order release with any of the options available under s. 515, including changing the conditions of the undertaking or recognizance (s. 524(4) to (9)). This means that the judicial official has the ability to consider the appropriateness of the original release order and may remove or narrow conditions from the release order where the accused shows that they are no longer necessary, reasonable, least onerous, or sufficiently linked to the statutory criteria in s. 515(10)* (Trotter, at p. 11-1).

…

68 If detention is the proportionate result for the accused's breach of bail then revocation under s. 524 is the appropriate avenue. …

[27] D.M. cites in support of his position the reasons in: *R v St. Cloud*, 2015 SCC 27; *R v Antic*, 2017 SCC 27; *R v Myers*, 2019 SCC 18.

[28] D.M. recognizes that his trial will be held 14 months after his arrest – and that the (presumptive 18 months for trials to be conducted in Provincial Court) threshold for "unreasonable delay" as contemplated by s. 11(b) of the Charter of Rights, (per *R v Jordan*, [2016] 1 SCR 631) will not be violated. However, he forcefully argues that this is not determinative in relation to the question of whether there has been a consequent "material change in circumstances" triggered due to the mere fact of unanticipated delays in getting to trial for remanded accuseds. I agree.

[29] The Crown argues that it would not be appropriate to consider every unanticipated adjournment of trial- dates to be a material change in circumstances triggering a potential bail review. I agree.

[30] As D.M. points out, cases from the Supreme Court of Canada have repeatedly urged that for those in pre-trial detention, if appropriate, release is favoured at the earliest reasonable opportunity and on the least onerous grounds (*Antic* at para. 29), and that the court should give priority in scheduling so as to effect early trial dates for those who have been detained in custody pending trial (*R v Myers*, 2019 SCC 18 at paras. 21-24 – which I acknowledge specifically dealt with the interpretation and application of s. 525 *CC*.).

[31] He argues that the four factors referenced in subsection 515(10)(c) *CC* are not exhaustive (*St. Cloud* at paras. 71,79 and 87), and that a relevant factor, which could become material depending on the circumstances of the case in question, is the extent of pre-trial delay.

[32] To state it bluntly – innocent persons should not have to wait for *undue* periods of time to be exonerated (*Myers*, at paras. 53-54). I accept that proposition. However, the determination of whether to grant an accused person pre-trial release necessarily involves a balancing of considerations, and the predominant considerations are set out by Parliament in s. 515(10) *CC*.

[33] I believe that the Supreme Court of Canada would favour a contextual proportionality yardstick when courts are required to consider whether unanticipated delay rises to a level that it becomes a material consideration in a release from pre-trial detention scenario – for example, see the court's comments at paras. 53-4 and 71 in *Myers*:

> 53- "In other circumstances, accounting for the elapsed time or anticipated passage of time may require a more nuanced analysis of its impact on the three grounds which justify detention under section 515(10). *In St. Cloud the court indicated that a lengthy delay between the hearing and the eventual trial may be considered in determining whether detention is necessary to maintain confidence in the administration of justice, which is the tertiary ground: para. 71. In this sense, the analysis in is not only retrospective, but also forward-looking. For example, let us consider a scenario* in which an individual is detained on the basis of section 515(10)(c) CC, and at the time of the first detention order his trial is only two months away. If the trial date is then rescheduled for a date two years

> later and remains many months away at the time of the section 525 hearing, *the continued detention of the accused may no longer be proportionate, or necessary, for the purposes of this third ground: see also R v Whyte, 2014 ONCA 268…at paras. 39-43; Piazza at paras. 71-81. In an appropriate case, it may also be possible for the judge to conclude that a hypothetical risk in relation to the primary or secondary ground is simply outweighed by the certain cost of the accused persons loss of liberty or a loss of public confidence in the administration of justice.*
>
> 54- As part of this analysis, the judge may consider whether either party has been responsible for any *unreasonable* delay in the trial of the charge: s. 525(3) CC. *If an unreasonable delay in getting the case to trial can be attributed to one of the parties, that factor will be relevant in determining whether the continued detention of the accused is proportionate or appropriate.* Thus, if the accused appears to have engineered an unreasonable delay in his or her own trial, the basis for making a release order will clearly be weaker, but if the Crown is responsible for an unreasonable delay, this will weigh in favour of release… The judge must therefore rely on his or her judgement and experience in determining what impact, if any, the passage of time and an unreasonable delay should have on the continued detention of the accused."
>
> …
>
> 71- "… In some cases, [a judge in a bail or bail review scenario] might also take account of the fact that the trial of the accused will be held at a *much later date*.
>
> [My italicization added]

[34] D.M. also argues that such delay can have material consequences, such as the potential prejudice to a defendant's ability to make full answer and defence, and the unnecessary continuation of any negative effects on a defendant flowing from his pre-trial detention (*Myers* at para. 27). Let me say at this juncture that: no examples of the potential prejudice to D.M.'s ability to make full answer and defence were cited; nor is there any evidence of "negative effects" on D.M. flowing from his pre-trial detention since neither D.M. nor anyone else testified in relation to this issue. On the other hand, it is reasonable to infer that generally

speaking there will be negative effects upon individuals who are in pre-trial detention, and that these effects are likely exacerbated the longer the period of time they are in pre-trial detention.

[35] In his decision, Judge Sherar stated that: “I am mindful that [the point in time at which his trial will end] may take a period of time and an innocent person could be detained until they are possibly ultimately exonerated by the courts.” I observe that the trial is to take place in the Provincial Court, and will be in the building in which Judge Sherar has been sitting for many years. He would have been aware of the general period of delay before such matters come to trial at that courthouse, and specifically would have had a reasonably accurate yardstick in his mind to assess how long D.M.’s trial would be before it came to trial.

[36] I conclude that an additional delay of five months before D.M.’s trial commencement (which would bring his pre-trial detention in aggregate to 14 months since the date of his arrest), due to Covid 19 (which is not attributable to any of the parties or the Court), in the circumstances of this case (which *inter alia* involve three co-accused in total) is not *an unduly disproportionate period of time, nor does that period of time call into question the validity of the earlier detention*.

[37] Therefore, the additional five months of delay do not constitute "a material change in circumstances".

ii) is the addition of GPS/ electronic monitoring, a material change in circumstances?

[38] GPS monitoring as arranged through the Ontario-based Recovery Services Corporation (RSC) has been available to residents of Ontario since 2009, and has been used in Nova Scotia since 2014, according to Stephen Tan Director of Operations for RSC.

[39] Therefore, at the time of D.M.'s Provincial Court bail hearing, privately paid GPS monitoring as an option for persons seeking bail in Nova Scotia had been available for five years.

[40] The new bail plan and the old bail plan are virtually identical – same two sureties; same residence in Ontario; same amount of money pledged – $100,000; strict house arrest with other conditions.

[41] The only significant difference between the old and new bail plans is the GPS/electronic monitoring.

[42] There is no evidence before me whether GPS/electronic monitoring was considered by D.M.'s parents or counsel at the original bail hearing. Thus, I am

unable to ascertain whether this evidence was not presented at the original bail hearing for reasons that are legitimate and reasonable. In this regard Wagner J (as he then was) stated in *St Cloud*:

> 132 I am therefore of the opinion that a reviewing judge may consider evidence that is truly new or evidence that existed at the time of the initial release hearing but was not tendered for some reason that is legitimate and reasonable. This is how the "due diligence" criterion from *Palmer* must be [page 382] understood in the context of the review provided for in ss. 520 and 521 *Cr. C.* The nature of the release system and the risks associated with it demand no less.
>
> …
>
> 134 This requirement to show a reason that was legitimate and reasonable means that it will be open to the reviewing judge to refuse to admit new evidence where it is alleged to have actually been in the interest of the accused to drag out the application for release or where the accused is alleged to have tried to use the review to engage in judge shopping. In this way, the conception of new evidence in the context of ss. 520 and 521 *Cr. C.* reflects both the need to ensure the integrity of our criminal justice system and the need to protect the rights of accused persons in proceedings that are generally expeditious.

[43] While the Crown did not expressly allege that D.M. is now engaged in "judge shopping", it did suggest that, in effect, D.M. is seeking a review, or "a second kick at the can", without establishing a material change in circumstances.

[44] I bear in mind that the onus is upon D.M. to present evidence and satisfy the court on *each* of the four factors listed at paras. 128-138 in *St. Cloud*.

[45] Most significantly here is the fourth modified *Palmer* criterion, which Justice Wagner described in *St. Cloud*, as follows:

> 137 Finally, the fourth *Palmer* criterion should be modified as follows: the new evidence must be such that it is reasonable to think, having regard to all the relevant circumstances, that it could have affected the balancing exercise engaged in by the justice under s. 515(10)(*c*) *Cr. C.* The new evidence must therefore be significant.

[46] A reading of Judge Sherar's decision, regarding his conclusion that D.M. had failed to satisfy him that he should be released on the tertiary ground, satisfies me that he did not detain D.M. because his release plan was weak, but rather because the evidence in support of the four factors in s. 515(10)(c) was so compelling. Therefore, I conclude that had Judge Sherar been presented with GPS/electronic monitoring as an additional proposal, it is not reasonable to think that it could have materially affected the balancing exercise he engaged in, which led him to detain D.M.

[47] I conclude that the GPS/electronic monitoring proposal is not a material change in circumstances.

[48] Having concluded that neither the five months delay nor the addition of GPS/electronic monitoring constitute a material change in circumstances, I am precluded from going on to conduct a bail review as an initial decision-maker.

Examining bail as an initial decision-maker

[49] Nevertheless, alternatively, I will briefly consider the merits of the old bail plan as supplemented by GPS/electronic monitoring. I have canvassed the law in relation to first instance bail matters in *R v BTD*, 2020 NSSC 165.

[50] Section 515 (10)(c) reads [my comments follow in brackets]:

> c) if the detention is necessary to maintain confidence in the administration of justice, having regard to all the circumstances, including
>
> (i) the apparent strength of the prosecution's case,
>
> [I bear in mind that the Crown evidence was presented in an expeditious manner and has not been tested, nor has the opportunity been given to, or taken by, the Defence to provide any evidence it might wish to at trial- see *Toronto Star Newspapers Ltd. v Canada*, 2010 SCC 21. Nevertheless, the nearly continuous and high quality video evidence captures not only D.M.'s presence in the relevant area, at the time when at least seven gunshots were fired from a .45 calibre semi-automatic pistol, but clearly show him firing a handgun, and continuously carrying a handgun away from the scene to a nearby location, where an officer with a weapon drawn arrested D.M. and D.B., however was unsuccessful in restraining J.D. who fled (I infer with the handgun). J.D. returns to the run path they took, shortly thereafter. His brief disappearance is tracked by a K9 unit and a .45 calibre semi-automatic pistol with an empty magazine is recovered in the fenced-in (Department of National Defence) Artillery Park complex into which J.D.'s run path was tracked. Video shows him emerging from the fenced-in compound, onto Queen St. (near the intersection with Doyle Street) very near to where the gun was discovered inside the compound. Shell casings at the scene are forensically linked to the gun found. Two bullets are recovered from a parked car in the area towards where the shots were fired, and they are forensically linked to the gun found. The Crown case is very compelling that D.M. exited a restaurant, deliberately targeted another known male person, R.C., and fired seven shots from the middle of the street (Dresden Row/Spring Garden Road) at R.C., one of which penetrated his buttocks as he was fleeing –he was treated at a local hospital for such a gunshot wound a short time thereafter. Notably, he has been uncooperative regarding the police investigation into the source of his injury.]
>
> (ii) the gravity of the offence,
>
> [attempted murder and reckless discharge of the .45 calibre handgun are among the most serious category of offences]

(iii) the circumstances surrounding the commission of the offence, including whether a firearm was used,

[a firearm was discharged seven times in a high-density urban area where there were members of the public present at that time] and

(iv) the fact that the accused is liable, on conviction, for a potentially lengthy term of imprisonment or, in the case of an offence that involves, or whose subject-matter is, a firearm, a minimum punishment of imprisonment for a term of three years or more.

[The firearm's serial number was obliterated; I infer that D.M. had no official training in the handling of firearms, and did not have legal authority to possess, much less to discharge any firearm; it was wildly discharged until empty (there were seven or eight shell casings recovered by police); in these extremely serious circumstances, a court could be expected to impose a very substantially deterrent sentence in a federal penitentiary- See for example the statements in *R v Nur*, 2015 SCC 15.]

[51] As Wagner J (as he then was) stated in *St. Cloud*:

(4) Conclusion on the Application of Section 515(10)(*c*) *Cr. C.*

87 I would summarize the essential principles that must guide justices in applying s. 515(10)(*c*) *Cr. C.* as follows:

- Section 515(10)(*c*) *Cr. C.* does not create a residual ground for detention that applies only where the first two grounds for detention ((*a*) and (*b*)) are not satisfied. It is a distinct ground that itself provides a basis for ordering the pre-trial detention of an accused.

- 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.

- A court must not order detention automatically even where the four listed circumstances support such a result.

- The court must instead consider all the circumstances of each case, paying particular attention to the four listed circumstances.

- The question whether a crime is "unexplainable" or "unexplained" is not a criterion that should guide the analysis.

- No single circumstance is determinative. The justice must consider the combined effect of all the circumstances of each case to determine whether detention is justified.

- This involves balancing all the relevant circumstances. At the end of this balancing exercise, the ultimate question to be asked by the court is whether detention is necessary to maintain confidence in the administration of justice. This is the test to be met under s. 515(10)(*c*).

- To answer this question, the court must adopt the perspective of the "public", that is, the perspective of a reasonable person who is properly informed about the philosophy of the legislative provisions, *Charter* values and the actual circumstances of the case. However, this person is not a legal expert and is not able to appreciate the subtleties of the various defences that are available to the accused.

- This reasonable person's confidence in the administration of justice may be undermined not only if a court declines to order detention where detention is justified having regard to the circumstances of the case, but also if it orders detention where detention is not justified.

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.

[52] Bearing in mind all the Court’s statements in *St. Cloud*, I conclude that while the release plan is stringent, the presumption of innocence is significantly undermined by the compelling evidence against D.M., and the nature and circumstances of the crimes are such that D.M. has not satisfied me he should be released pending his trial.

Conclusion

[53] D.M. will be detained in custody under the tertiary ground pending his trial.

Rosinski, J.