

CANADA / JUDGMENT

R. v. Khudhair

2021 BCSC 2587

COURT

Supreme Court of British Columbia

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2021 BCSC 2587 R. v. Khudhair

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

R. v. Khudhair,

2021 BCSC 2587

Date: 20211214

Docket: X083651

Registry: New Westminster

Regina

v.

Ali Rafid Khudh Khudhair

Restriction on publication: Pursuant to s. 517 of the Criminal Code of Canada

Before: The Honourable Mr. Justice Blok

Oral Reasons for Judgment on Judicial Interim Release

In Chambers

Counsel for the Crown:

M. Fortino

M. Bussanich

Counsel for the Accused:

J. Oppal

T. Uygun, A/S

Place and Date of Hearing:

New Westminster, B.C.

December 1, 2021

Place and Date of Judgment:

New Westminster, B.C.

December 14, 2021

- [1] THE COURT: I am about to give oral reasons in this matter. As with all reasons given in this fashion, should a transcript be ordered I reserve the right to edit the transcript to correct any minor errors and to also add such things as headings and full citations and whatnot. In the course of that editing I will not of course change any of the underlying reasoning or the ultimate result.
- [2] The other preliminary comment I make is just to remind those present that there is a ban on publication in place pursuant to s. 517 of the Criminal Code.

I. Introduction

- [3] Ali Khudhair is charged with the second degree murder of Keryane Arsenault on May 4, 2021. Mr. Khudhair has been in custody since that date. He now applies for judicial interim release pursuant to s. 522 of the Criminal Code.
- [4] The defence acknowledges the seriousness of the charge and the fact that Mr. Khudhair is in a reverse onus situation but argues that the release plan he now presents meets that onus on all three grounds set out in s. 515(10) of the Criminal Code.
- [5] The Crown opposes release on all three of the grounds, but emphasizes in particular that the accused's proposed release plan is insufficient to meet the secondary and tertiary concerns in this case.
- [6] Ms. Arsenault was killed by a single gunshot that passed through her torso. This case is unusual insofar as there is a video recording retrieved from Ms. Arsenault's cell phone taken at the time of the shooting that seemingly depicts the events immediately prior to the shooting, as well as some limited aspects of the shooting itself.

II. The Crown's Case

- [7] The Crown outlined its case against Mr. Khudhair in considerable detail. I will summarize its essential features.

- [8] In the evening of May 4, 2021, Surrey RCMP received several calls relating to this event. The first was a call made at 8:51 p.m. from the phone of Ms. Arsenault, the deceased, who reported that there was a man with a gun in her house. Two other calls were received by police from citizens who saw two males depart the subject location, one of whom was calling for others to call the police. The police arrived in short order and both of those males were arrested nearby. Descriptions given by the callers later helped identify which of the males was seen with a gun. That male was Mr. Khudhair. The other man was Morteza Javidi, who resided with Ms. Arsenault.
- [9] Other officers attended at the residence where the shooting was said to have occurred. There they found Ms. Arsenault lying in a pool of blood, with obvious gunshot wounds. She was transported to hospital but despite the medical treatment she received there, she succumbed to her injuries.
- [10] A handgun was located some distance from the residence. The handgun was a Norinco 9mm pistol, a restricted weapon. It had a 10-round magazine with nine rounds in the magazine. A spent shell casing was found in the barrel of the handgun. The serial number for the handgun was obliterated.
- [11] In statements given to police, Mr. Javidi said he and Ms. Arsenault lived at the townhouse residence and Ms. Arsenault plied her trade as an escort there. He said the accused had made an appointment with Ms. Arsenault for 8:00 p.m. that evening. A few minutes after the arrival of the accused, Mr. Javidi, who was in a nearby room, heard strange sounds from the adjacent bedroom and he went to check on Ms. Arsenault's well-being. He saw Ms. Arsenault lying partially on the bed with the accused positioned over her and brandishing a handgun. Mr. Javidi moved Ms. Arsenault behind him, told her to call police and then confronted the accused.
- [12] Ms. Arsenault began video-recording the event on her cell phone. The video, which was played in court during this bail hearing, bears a timestamp of 8:52 p.m. and depicts a bedroom with a person resembling Mr. Khudhair holding a handgun while standing at the far side of the bed. There is aggressive shouting between the two men and also some physical interactions between the two, and then Mr. Khudhair appears to move through the doorway to an area just outside the bedroom. The video is jostled at that point and there is the sound of what seems to be a gunshot. A woman's voice then says words to the effect that she has been shot and then she screams.
- [13] Mr. Javidi has given a statement that accords with that general description of events. He added that after the shooting he kicked the accused down the stairs. When the accused regained his feet he pointed the gun at Mr. Javidi and threatened to shoot him. The accused continued with these threats as Mr. Javidi chased him outside and through the townhouse complex.

- [14] The Crown's theory is that the event was the result of a robbery by Mr. Khudhair that did not come off as planned. The defence says the evidence is consistent with an accidental firing of the handgun in the course of a scuffle.

III. The Release Plan

- [15] Mr. Khudhair proposes that he be released on cash bail of \$25,000, with strict conditions requiring that he reside at the home of his fiancée, Ms. Jahedsaravani, on house arrest conditions and with electronic monitoring by a private monitoring firm, at his cost. The home is a rented condominium in Coquitlam.
- [16] Other conditions proposed by the accused are that he will surrender any travel documents and not maintain a cell phone.
- [17] The fiancée is said by the defence to be a suitable supervisor as she is self-employed as an eyelash technician and sees her clients in the home, and thus she will largely be present and available for that supervision.
- [18] Defence counsel noted that Ms. Jahedsaravani is not being proffered as a surety as such, but he said the cash bail will come from her and she will report any breaches to the authorities.

IV. The Accused

- [19] The accused is 24 years old. He immigrated to Canada as a refugee from Iraq, and he has permanent resident status, although the Crown says that status is under review due to his criminal activity in Canada and his possible ties to a Syrian militia group prior to his arrival in Canada.
- [20] Mr. Khudhair has two criminal convictions and one driving offence conviction, all for offences that occurred in 2018. The first conviction was for driving while prohibited. The other two convictions are for assault and for possessing a weapon for a dangerous purpose.
- [21] The Crown submits that the circumstances of both the driving offence and the two criminal offences offer insights into the accused's character and lifestyle.
- [22] The Crown notes that Mr. Khudhair was subject to an indefinite driving prohibition starting in October 2018 after being arrested following a police pursuit of a stolen vehicle belonging to a known member of a Lower Mainland gang. The registered owner of the vehicle confirmed that Mr. Khudhair did not have permission to use the vehicle but the owner was otherwise uncooperative with police and simply wanted his vehicle returned. No charges resulted from this incident, though it resulted in the driving suspension referred to earlier.
- [23] In December 2018, Mr. Khudhair was stopped at a roadblock while driving a vehicle with two other persons in it. He provided a false name and birthdate to the police and said his wallet had been stolen, presumably by way of explaining why he could not produce identification. After multiple attempts to confirm his identity, Mr. Khudhair was detained and told he would be taken to the police station so the police could take further steps to

identify him. At that point, he provided his name and produced his wallet and the police then learned he was under an indefinite driving suspension. On conviction, he was fined \$500 and given a one-year driving prohibition.

[24] The criminal convictions involved the following circumstances (from para. 62 of the Crown's submissions):

On June 27, 2018, the victim was involved in an altercation with Mr. Khudhair's brother at a Surrey SkyTrain station about the victim's sister. The following day, the victim, and his mother (Ms. Ekhlas) met with Mr. Khudhair and two other men in a Guildford area parking lot to address the disagreement. The disagreement stemmed from a belief that Mr. Khudhair was trying to arrange the marriage of the victim's sister to another man. Ms. Ekhlas knew Mr. Khudhair as Ali Mayahi and feared him as he had previously threatened her. When the parties met, an argument occurred that became heated, and Mr. Khudhair went to his car, retrieved a metal pipe and assaulted Ms. Ekhlas, knocking her to the ground. When the victim jumped in to defend his mother, the other two men who were with Mr. Khudhair turned on him, attacked him and stabbed him in the abdomen. While the victim was being stabbed, Mr. Khudhair proceeded to repeatedly hit Ms. Ekhlas with a metal pipe until two Samaritans intervened. The three men fled before police arrived.

[25] The Crown also notes further criminal matters that are before the Provincial Court and for which Mr. Khudhair has not sought his release. These are:

a) driving while prohibited on September 2, 2020, for which the Crown provided the following particulars (para. 64 of the Crown's submissions): written submission:

On September 2, 2020, Mr. Khudhair was observed by a member of the Burnaby RCMP driving a motor vehicle associated to a known drug dealer. The investigating officer was patrolling a Burnaby neighbourhood where there had been recent drug trafficking activity when he observed the vehicle driven by Mr. Khudhair travelling at a speed in excess of the 30km/h limit. After observing the speeding infraction, the officer followed the vehicle, and observed it park on the side of the road. Two men got out, Mr. Khudhair being the driver. The officer approached Mr. Khudhair and asked him for his drivers licence. Mr. Khudhair refused to provide his drivers licence or any identifying information on multiple occasions, even after being cautioned for obstructing a police officer. He was then advised he was detained for obstructing a police officer. The police officer again asked him to identify himself and provide his drivers licence. He again refused. After being detained, Mr. Khudhair's passenger told him to tell the police officer who he was, to which Mr. Khudhair said no and asked his passenger to film the interaction. Further attempts were made to identify Mr. Khudhair, and each attempt was met with his refusal. Mr. Khudhair was then told he was under arrest for obstructing a police officer. Again, he refused to identify himself. At this point, additional police officers were requested to assist to affect the arrest. The investigating officer attempted to secure Mr. Khudhair and he pulled away. Two additional officers then attended the scene to effect the arrest on Mr. Khudhair. Following his arrest, he was identified through his BC Services Card and it was confirmed that he was a

prohibited driver.

- b) Two counts breach of probation for failing to report as directed and failing to complete his required community work service; and
- c) robbery, unlawful confinement and using an imitation firearm, arising from an event that took place on March 3, 2021 (from page 21 of Crown's submissions):

On March 3, 2021, members of the Burnaby RCMP responded to a call from the Burnaby General Hospital where the Accused was found to be suffering two large lacerations to the side of his face and neck. He was bleeding profusely, and one of the stab wounds was near his carotid artery. As the police investigation progressed, the Accused gave a version of events about his whereabouts leading up to his attendance at hospital that was later directly contradicted by other evidence. Police attempted to collect evidence supporting his version, however, the Accused refused to participate with the police investigation and sign a medical release for his injuries.

On March 6, 2021, Douglas Sheh called Burnaby RCMP to report that he was robbed on March 3, 2021 while playing poker at his residence with five other friends. He told police that two males (Mr. Khudhair and Mr. Hatot) came over and robbed everyone of their cell phones and wallets at gunpoint. Mr. Sheh was also robbed of money he had in his safe and was physically assaulted and threatened. He told police that during the robbery, he managed to secure a nearby knife and slashed the Accused in the face with it, acting in self defence.

[26] The Crown also notes two further matters:

In addition to these outstanding charges, it is relevant to note that Mr. Khudhair was also the victim of a failed execution attempt on his own life. At 8:50 pm on October 10, 2020, Calgary Police responded to an Esso gas station to find Mr. Khudhair suffering from a gunshot wound. He was transported to hospital to receive treatment for non-life-threatening injuries and was uncooperative with police. The offence remains unsolved.

Since his arrival into custody on the murder charges, Mr. Khudhair's institutional performance has demonstrated a lack of respect for institutional rules. Most notably, on September 19, 2021 his cell was searched, and heroin was discovered. He was institutionally charged and disciplined. Despite this he was undeterred and reoffended. Again, on October 6, 2021, his cell was again searched and this time multiple small packages of drugs were located in coffee and peanut butter jars. The drugs were scanned and determined to be THC and heroin. He was again institutionally charged and disciplined for this.

[27] Finally, the Crown notes some additional matters revealed from searches of Mr. Khudhair's person and his cell phone:

- a) the search of his person turned up a fake driver's licence with his picture on it but showing another name; and

- b) his cell phone contained a number of matters that Crown detailed in several paragraphs in its written submissions:
42. The iPhone contained a group chat using an encrypted messaging app called Signal. Communications between the Accused and others on the app included individuals police believed to be involved in the lower mainland gang conflict. Conversations on the phone involved the Accused discussing kidnappings, robberies, transfer of firearms, transfer of silencers, stolen vehicles, and kicking down doors with the other participants.
43. The iPhone search history involved web searches for "Tracking the World", a GPS data tracking website. In one conversation, a person named "blitzkrieg" provided the Accused with a Tracking the World link in a conversation. The following day, a conversation occurred between Khudhair and "blitzkrieg" where Khudhair told blitzkrieg that he had a silencer.
44. The history on the iPhone also included searches and web browsing on topics related to shootings connected to the lower mainland gang conflict, vehicles associated to the shootings, rental vehicles, escorts, "what does it mean when you help someone escape from jail"; "How long do you go to jail for helping criminals to escape from the police?" stealing licence plates, using rental vehicles for a job and silencers. He also searched terms such as: "bacon brothers jamie bacon"; "Ali mayahi"; "Ali khudhair"; "bc Ali khudhair"; "bc gangsters Ali khudhair"; "bc gangsters photos Ali khudhair"; "bc gangsters photos"; "bacon brothers jarrod bacon"; "jamie bacon" "bk surrey"; "cop gang in bk"; "cops shot in bk"; "cops bk."
46. Additionally, a group chat was identified which included Khudhair and three others. Communications from the night of the murder revealed the three other participants discussing the following: the whereabouts of Khudhair and a City News video relating to the shooting and the subsequent arrest of Khudhair and identifying him as the person on the footage. Furthermore, there was a discussion about a firearm that one of the three had provided to Khudhair and concern whether the person's fingerprints might still be on it.
- 73 ... two days prior to the April 29, 2021 rental [of the vehicle used by the accused to travel to the location of the subject incident] Mr. Khudhair engaged in a conversation with a person identified on his phone as "brazybloodclot" where the two discussed committing some kind of crime and that Khudhair was attempting to get a rental vehicle "tomorrow" (April 28) or "after" (April 29). According to Khudhair, the plan would be to use a "stoli" (stolen vehicle) for the job and the rental for the get away vehicle.

V. Positions of the Crown and Defence

A. The Crown

- [28] The Crown reviewed some fundamental bail principles and referred to authorities that have addressed the reverse onus provision in s. 522 of the Criminal Code, as well as authorities addressing each of the primary, secondary, and tertiary grounds for detention.

- [29] The Crown dealt with each of the detention grounds in turn.
- [30] On the primary ground, Crown said the motive to flee could not be higher than in a case involving a charge of murder. Crown noted other attempts by Mr. Khudhair to evade capture - the false identification and the use of encrypted communications on his cell phone, among other things - and submits that no form of release can alleviate the primary ground concern to an acceptable level.
- [31] On the secondary ground, the Crown submits that Mr. Khudhair presents a substantial risk to reoffend. That risk is one of a "substantial likelihood", the risk is one of danger to public safety in general and to the Crown's principal witness in particular, and the identified danger cannot be reduced to an acceptable level by bail conditions.
- [32] The Crown referred to or emphasized various matters in relation to the secondary ground including:
- (a) the nature of the present offence - murder;
 - (b) the fact that Mr. Khudhair was bound by both a bail order and a probation order at the time of this event;
 - (c) Mr. Khudhair is alleged to have committed a violent robbery in Burnaby two months prior to the alleged offence;
 - (d) he met up with a vulnerable victim, a sex trade worker, and according to the Crown's theory, with the intention of robbing her;
 - (e) he brought with him a restricted weapon with its serial number obliterated;
 - (f) the Burnaby robbery, as well as the information derived from the accused's cell phone, lead to the conclusion that Mr. Khudhair is well entrenched in a dangerous criminal lifestyle, and that he has criminal gang affiliations;
 - (g) while the accused may have an argument to make about specific intent, nonetheless the Crown's case on the murder charge is still strong, and the likelihood of conviction on, at minimum, manslaughter, is very strong; and
 - (h) Mr. Khudhair has a history of breaching probation, driving while prohibited and misleading the police about his identity in order to evade legal consequences, all of which demonstrate he is not willing to comply with conditions and that, instead, he has a contempt for the law.
- [33] The Crown also commented on Mr. Khudhair's proposed release plan noting that Ms. Jahedsaravani is not a suitable supervisor for a number of reasons, including:
- a) Police information suggests she is connected to individuals involved in the Lower Mainland gang conflict, and in particular, by having a vehicle registered in her name used by a known gang associate;

- b) By making a vehicle available to Mr. Khudhair on the night in question by renting it in her name;
 - c) Ms. Jahedsaravani does not articulate how she intends to supervise Mr. Khudhair as she has indicated that in addition to her eyelash business she works two other jobs, both of which are in the restaurant industry, and attends a post-secondary institution. I digress for a moment to note that on that latter point the court was told her educational program is finishing this month; and
 - d) In the Crown's submission Ms. Jahedsaravani is either involved with, willfully blind or oblivious to the other criminal activity Mr. Khudhair was involved in.
- [34] The Crown also notes that electronic monitoring will not reduce the risk. Electronic monitoring may help to locate an accused in a particular place, but it does not identify what they are doing or stop any criminal behaviour that might be carried on at that location. There is also the inherent weakness associated with delays in the reporting and response to any breach allegations.
- [35] On the tertiary ground, the Crown argues that the continued detention of the accused is necessary to maintain public confidence in the administration of justice. The Crown says its case is strong, noting the forethought by Mr. Khudhair that went into the offence, including the use of a rental car and bringing a loaded firearm with him to the appointment. Even if doubt is raised on the specific intent required for murder, the case against Mr. Khudhair for manslaughter using a firearm is overwhelming.
- [36] Murder, of course, is the most serious offence in the Criminal Code. Manslaughter with a firearm carries with it a minimum sentence of four years in prison. The Crown says the circumstances of this offence mean it is likely a manslaughter sentence would be well in excess of that.
- [37] The Crown relies, as well, on the "serious and concerning level of gun violence presently being experienced in the Lower Mainland", and the Crown provided statistics bearing out that concerning trend.
- [38] The Crown emphasized the circumstances of the alleged offence noting that Mr. Khudhair unlawfully possessed an illegal firearm, used that firearm to attempt a robbery of a vulnerable person, then he used that firearm to secure his escape from the scene, ultimately killing Ms. Arsenault with it. After shooting and killing her, he ran with the firearm, pointed it at Mr. Javidi, and threatened to shoot him with it.
- [39] The Crown submits that the proposed release plan does nothing to address tertiary ground concerns.
- [40] All of these considerations, the Crown says, mean that the release of the accused would undermine public confidence in the administration of justice.

B. Defence

- [41] Defence counsel notes, at the outset, that detention is a measure of last resort. Counsel says the proposed release plan is a strong one that addresses all grounds of concern.
- [42] Counsel spent some time describing the release plan, noting the substantial cash bail proposed, the significant restrictions being put forward, the diligent supervision promised by Ms. Jahedsaravani and the additional security assurance that electronic monitoring will provide.
- [43] Counsel noted Mr. Khudhair's difficult personal history, with his family put in a difficult situation as a result of the 2003 Iraq invasion, their subsequent flight to Syria, and the further violence and instability that incurred in that country. As noted earlier, they were relocated to Canada in 2015 as refugees.
- [44] The defence emphasized some of the fundamental principles relating to bail, including the presumption of innocence, the Charter right to reasonable bail, the presumption in favour of release, and the principle that detention is a measure of last resort. Even in cases where an accused is in a reverse onus situation, the defence says, detention orders are the exception, not the rule.
- [45] Counsel reviewed a number of cases involving reverse onus situations, mostly involving murder charges. In each case the accused was released.
- [46] Defence counsel then dealt with each of the three grounds under s. 515(10) of the Criminal Code.
- [47] On the primary ground, counsel said there is no evidence showing Mr. Khudhair as a flight risk. He has substantial roots in Canada, his family resides here, and he has a fiancée who is a resident here. Any concerns on the primary ground, counsel says, are addressed by the proposed conditions and in particular, by the electronic monitoring.
- [48] On the secondary ground, counsel noted the Crown's case on the murder charge is not nearly as strong as Crown suggests, as there is a good case to be made that the firearm was discharged without the requisite intent.
- [49] Counsel also emphasized that Mr. Khudhair's criminal record is very limited and it should not cause the Court to conclude he presents a substantial likelihood to reoffend or fail to comply with conditions. Although he has had some past breaches and he faces proceedings for further alleged breaches, these events took place in a very different context. The stakes are far higher now, and thus there is much greater incentive for him to comply. Again, the proposed electronic monitoring, to be done at his expense, reduces any secondary ground concerns to an acceptable level.
- [50] On the tertiary ground, counsel again noted the weakness of the Crown's case on the matter of intent. Counsel said the defence will be one of "accidental discharge" that occurred as a result of Mr. Khudhair and Mr. Javidi struggling with one another at the time the pistol was

discharged. Prior to that point Mr. Khudhair was trying to leave but the way out was blocked by Mr. Javidi, who was being actively confrontational. Had Mr. Khudhair's intent been to inflict deadly force, he had ample opportunity to do so prior to the discharge of the weapon. Mr. Khudhair's purpose was to leave the scene, not to inflict deadly force. Counsel noted the video recording is supportive of the defence case in this regard.

- [51] Counsel added that there is no evidence of any planning or premeditation of doing anything but obtaining sexual services, and the Crown's suggesting of an intent to commit a robbery is devoid of any evidentiary foundation.
- [52] The defence noted that if the facts are interpreted as an accidental discharge, this paints quite a different picture of the case in terms of the tertiary ground.
- [53] Counsel also noted that there is likely to be a lengthy period of time before the matter gets to trial. There may be "multiple pretrial applications" and the trial itself may be a lengthy one. If Mr. Khudhair were to be detained in custody, he would be "significantly hampered" in preparing for trial with his counsel. Counsel argues that this too weighs in favour of release on the tertiary ground.

VI. Analysis

A. Judicial Interim Release - General Principles

- [54] I begin by reviewing some of the fundamental principles applicable here:
- a) Mr. Khudhair is presumed to be innocent of the charge he faces;
 - b) he has the right not to be denied reasonable bail without just cause;
 - c) judicial interim release at the earliest opportunity and in the least onerous manner is the default presumption in Canadian criminal law;
 - d) pretrial detention is the exception and not the rule: *R. v. Myers*, 2019 SCC 18; and
 - e) there are no offences for which pretrial release is not available, although in some instances, including the present, the accused is placed in a reverse onus situation.
- [55] On that last point, s. 522 of the Criminal Code, which governs this bail hearing, provides that where an accused is charged with certain offences of which murder is one, the court "shall order that the accused be detained in custody unless the accused, having been given a reasonable opportunity to do so, shows cause why his detention in custody is not justified" within the meaning of s. 515(10) of the Criminal Code. That latter provision describes the three bases for detention which are known as the primary, secondary and tertiary grounds for detention.
- [56] With those principles in mind, I turn to each of those grounds, beginning with the primary ground.

B. The Primary Ground

- [57] The primary ground is where detention is necessary to ensure the accused's attendance in court.
- [58] There is not a lot of evidence relating to this ground. The defence points to Mr. Khudhair's connection to the community, as his parents and siblings live here and he is engaged to a woman who lives locally.
- [59] The Crown notes Mr. Khudhair's efforts to evade capture and cover his criminal offending, and his failure to abide by conditions. The Crown also notes that primary ground concerns are inherent in the context of murder because the penalty on conviction is the most severe that the law provides.
- [60] I am not persuaded that Mr. Khudhair's actual or alleged attempts to avoid detection nor to breach conditions necessarily translate into a risk that he will abscond or otherwise make himself unavailable at court. Certainly, that risk has not materialized thus far despite the fact that he has faced some serious charges prior to this murder charge.
- [61] Although his roots in the community are not of long-standing, his family is here and his ready residency alternatives of Iraq or possibly Syria have many problems that would limit their viability as absconding destinations.
- [62] In brief, I conclude that Mr. Khudhair has discharged his onus on the primary ground, as I am satisfied that his detention is not necessary to ensure his attendance in court.

C. Secondary Ground

- [63] The secondary ground deals with situations where detention is necessary for the protection or safety of the public, including any witnesses:

having regard to all the circumstances including any substantial likelihood that the accused will if released from custody commit a criminal offence or interfere with the administration of justice.

- [64] There are a number of matters that raise concerns under this ground. These include:
- a) Mr. Khudhair's criminal record: While the actual convictions are not for the most serious of offences, the circumstances of those offences are most concerning. In a June 2018 incident, Mr. Khudhair beat a woman with a metal pipe while his associates attacked and stabbed her would-be rescuer. In a December 2018 incident that gave rise to a conviction under the Motor Vehicle Act, R.S.B.C. 1996, c. 318, of driving while prohibited, Mr. Khudhair gave a false name to police and persisted with that lie until he was about to be taken to a police station. Moreover, his original prohibition had been imposed because he had been found at the wheel of a stolen vehicle belonging to a known associate of a Lower Mainland criminal gang;

- b) Other criminal charges: Mr. Khudhair is again facing charges of driving while prohibited, this time while driving a vehicle associated to a known drug dealer. This event is said to have occurred in September 2020. Again, he gave the police the runaround about his identity. He is also charged with robbery and other offences in connection with a March 2021 robbery at gunpoint of a private gambling event said to have been committed by Mr. Khudhair and another individual. The event was evidentially captured by high-quality CCTV that Crown says is clear enough to prove identity on its own, meaning that the case for the Crown appears to be very strong.

Another concern arising from that event is that there is evidence of a bounty having been put on the life of the complainant in that case, as he resisted during the robbery and slashed Mr. Khudhair's face with a knife. This raises concerns about the safety of the Crown's main witness in this case, Mr. Javidi.

Mr. Khudhair also faces charges of breaching his probation in that he failed to report and failed to complete his community work service requirement.

- c) There are a number of circumstances that are strongly suggestive of criminal gang affiliation by Mr. Khudhair including:
- i. a recent attempt on his life that took place at a gas station in Calgary, where despite having been shot Mr. Khudhair refused to cooperate with police;
 - ii. the results of an examination of a cell phone which revealed a group chat, using an encrypted messaging app, with individuals that police believe are involved in the Lower Mainland gang conflict. The conversations involving the accused are said to be about acts of robbery and other violence, stolen vehicles and transfer of firearms and silencers;
 - iii. a history of searches made on his cell phone showing searches on topics related to violent offending, criminal gangs, and the Lower Mainland gang conflict;
 - iv. messages in a group chat with three other individuals that were posted after the killing of Ms. Arsenault, indicating that one of those persons had supplied the handgun Mr. Khudhair allegedly used during the subject incident; and
 - v. another conversation on his cell phone between Mr. Khudhair and another person about committing some kind of crime and that he was planning to use a rental vehicle. This conversation took place just two days prior to the rental of vehicle by Ms. Jahedsaravani that ultimately became the vehicle Mr. Khudhair drove to Ms. Arsenault's residence.
- [65] I agree with the Crown that these circumstances indicate Mr. Khudhair is entrenched in a serious and dangerous criminal lifestyle that involves participation in or involvement with a criminal gang or gangs.

- [66] In terms of the analytical framework for the secondary ground as set out in *R. v. Abdel-Rahman*, 2010 BSCS 189, I am satisfied that there is a risk, to a magnitude of a substantial likelihood, that Mr. Khudhair will commit an offence or interfere with the administration of justice if he is released. I am satisfied that this risk constitutes a danger to public safety in general, and to the Crown's principal witness in particular.
- [67] The final step in the analysis, that is whether detention is necessary, requires the Court to consider whether the identified danger to public safety, or to the administration of justice, can be prevented or reduced to an acceptable level by bail conditions. This requires an examination of the proposed release plan.
- [68] The release plan, I am compelled to say, is not particularly strong. The proposal is for Mr. Khudhair to be released to live with his fiancée at her residence, under house arrest conditions, with a deposit of \$25,000 and electronic monitoring.
- [69] Defence counsel made it clear that Ms. Jahedsaravani is not to be a surety here, but that she will nonetheless supervise and monitor Mr. Khudhair. The sum of \$25,000 will be posted from a source or sources that were not very well identified. In submissions, defence counsel said Ms. Jahedsaravani will post the money, but she does not say that in her affidavit. In these circumstances, I am left in doubt as to the source of the money. Given the Crown's allegations of involvement by Mr. Khudhair in gang activity, this is an important item of information.
- [70] There are two difficulties with Ms. Jahedsaravani acting as Mr. Khudhair's bail monitor, if I can use that term to describe her non-surety role. First, she has been linked to gang activity by lending her name for the registration or rental of motor vehicles, including the very vehicle Mr. Khudhair used to drive to the subject location. Second, if it is not actually her money that is used to post the \$25,000 cash deposit, then she has nothing "on the line" in terms of financial or other incentives for her to carry out diligent supervision.
- [71] The Crown argued that Ms. Jahedsaravani's busy life outside her home should cause the Court to be concerned that she will not even be home much, given that she is attending the local college, working as a server at two different restaurant establishments and engaging in her home-based eyelash business. I accept that her college program has ended now, but it does appear that her other activities would leave Mr. Khudhair unsupervised for periods of time. The Crown's related point - that Ms. Jahedsaravani was either involved, willfully blind or oblivious to Mr. Khudhair's apparent criminal activity - is a much stronger point for the Crown. I agree that this does not reflect well on Ms. Jahedsaravani in terms of her being an appropriate supervisor or monitor.
- [72] The final aspect of Mr. Khudhair's release plan is electronic monitoring. I agree with the comments that have been made about the limited utility of electronic monitoring in such cases as *R. v. Osman*, 2020 ONSC 965, and *R. v. Moazami*, 2019 BCCA 226. Electronic monitoring has its place but it will not prevent reoffending, which can occur within the monitored location, and delays in breach reports and in the responses to breach reports

means that offences can be committed before any effective action can be taken. Of course, the electronic bracelet can also simply be cut off, as was evidently done by Mr. Khudhair's co-accused in the gambling den robbery. That person is now at large.

- [73] I hasten to add that I am not concluding that because the co-accused cut off his bracelet Mr. Khudhair would do the same, but it does show the limitations of electronic monitoring as a preventative measure.
- [74] Finally, I refer to Mr. Khudhair's history of non-compliance, his repeated efforts to conceal his identity, his lack of cooperation with police, even when he was shot, and the fact that this current matter took place while he was subject to conditions set by a probation order and a bail order. He has demonstrated no respect for court orders and conditions and it appears he has no regard for either the police or the law generally.
- [75] In summary, I find that the release plan proposed by Mr. Khudhair to be wholly insufficient in addressing public safety and administration of justice concerns. He has failed to discharge his burden of showing his detention is not necessary on the secondary ground.

D. Tertiary Ground

- [76] The tertiary ground addresses situations where detention is necessary to maintain confidence in the administration of justice, having regard to all the circumstances, and four circumstances in particular, those being:
- the apparent strength of the prosecution's case;
 - the gravity of the offence;
 - the circumstances surrounding the commission of the offence, including whether a firearm was used; and
 - 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 of punishment of imprisonment for a term of three years or more.
- [77] I begin with the strength of the Crown's case. In addressing this aspect, I bear in mind that often the Crown's case appears strong at the early stages of a prosecution. Much can happen between now and the trial, or at the trial itself.
- [78] The case against Mr. Khudhair for manslaughter using a firearm is very strong. I accept that there is a case to be made as to the requisite intent for murder. I do not consider it appropriate for me to analyze this in detail on this bail hearing, other than to say defence counsel outlined a viable argument for manslaughter in the course of his submissions.
- [79] Nonetheless, I also agree that a sentence for manslaughter involving a firearm, given the circumstances here, would be substantial, perhaps in the upper single digit or lower double digit penitentiary range.

- [80] The strength of the Crown's case for an attempted robbery gone bad, which the Crown alleges, is difficult to assess. The defence argues that this is sheer speculation on part of the Crown as there is no evidence to support it, which is true to a point, but it also begs the question why Mr. Khudhair was seen by Mr. Javidi overtop Ms. Arsenault and in the words of Mr. Javidi, quote, "holding the gun against" Ms. Arsenault. Those circumstances could lead to the conclusion that Mr. Khudhair was robbing Ms. Arsenault at gunpoint.
- [81] I now turn to the other specific considerations under the tertiary ground, those being gravity of the offence, circumstance of the offence and potential for a lengthy term of imprisonment.
- [82] I address those collectively by saying that murder is the most serious of offences. On conviction, Mr. Khudhair would be subject to a mandatory life sentence with no possibility of parole for at least 10 years. The circumstances of the offence include the serious aggravating factors of the use of a firearm, the death of a vulnerable victim and the fact that the accused was subject to court-imposed conditions at the time.
- [83] In *R. v. St-Cloud*, 2015 SCC 27 [St-Cloud], the Supreme Court of Canada made it clear that the four listed circumstances in s. 515(10)(c) are merely the main factors to be balanced by the Court, and that all circumstances of the case must be considered. In this case, defence counsel raised questions about a potentially lengthy process to get to trial and the fact that trial preparation is made more difficult when an accused is in custody. I do not minimize these potential difficulties at all and I accept that they are valid considerations the Court must weigh. However, the Crown notes "the parties have moved forward at the agreed speed", disclosure is largely complete, and the matter is ready for arraignment. I also agree with the Crown submission that s. 525 provides a form of remedy to ensure that the accused's continued detention remains proportionate.
- [84] Defence counsel referred to a number of serious cases where courts have ordered release despite the fact that the four listed considerations were not met. There are, however, distinguishing factors in each of those cases. In *R. v. Pereira*, 2019 BSCS 634, the alleged offences were not crimes of violence and secondary concerns were found to be adequately addressed. In *R. v. Kang*, 2019 BCSC 2321, and *R. v. Deo*, 2019 BCSC 2063, there were comprehensive release plans involving family members as sureties and/or the pledging or posting of large amounts of security such that again secondary ground concerns were met. In *R. v. Alexander*, 2019 BSCS 145, the accused demonstrated good behaviour for the 32 months he lived in the community after his initial arrest while being under close police surveillance during that time. I will not address the other cases in the defence brief other than to say that they too had distinguishing features.

- [85] St-Cloud makes it clear that public confidence in the administration of justice is to be measured by reference to reasonable members of the community who are properly informed about the philosophy of the legislative provisions, Charter values, and the circumstances of the case. St-Cloud also makes it clear that the Court is not to pander to those who would react emotionally on the basis of inadequate knowledge.
- [86] Here, an informed, reasonable member of the public, knowing all those matters I have just reviewed, would see a strong case for the Crown of an unlawful killing and perhaps murder, of a vulnerable person by Mr. Khudhair in circumstances suggestive of an attempted robbery, where a firearm with an obliterated serial number was brandished and was the cause of death, with Mr. Khudhair having a recent history of violence and facing further allegations of having committed a violent robbery involving a firearm just two months before, who appears to have criminal gang connections and who shows no inclination to abide by court ordered conditions or to even admit his identity to police, and who proposes that he be released to live with a person who may have been assisting him in his illicit activities or was blind to those activities.
- [87] Having considered all of the circumstances of this case, I conclude that reasonable members of the public would lose confidence in the administration of justice if Mr. Khudhair were to be released pending trial.
- [88] For these reasons, I find that Mr. Khudhair has failed to satisfy the onus on him to show that his continued detention is not warranted on both the secondary and tertiary grounds. Accordingly, I order that he be detained in custody.
- [89] Those are my reasons.
- [90] CNSL M. FORTINO: Given your conclusions ordering his detention, I would ask that you make a further order under s. 515(12) of the Criminal Code prohibiting him from having any communication directly or indirectly with the Crown's principal witness, Morteza Javidi.
- [91] THE COURT: I am just noting -- making notes. Mr. Oppal, any other --
- [92] CNSL J. OPPAL: No position, Justice, on --
- [93] THE COURT: All right.
- [94] CNSL J. OPPAL: -- that application.
- [95] THE COURT: All right. I consider that the order sought by the Crown is warranted, and thus there will be an order prohibiting Mr. Khudhair from communicating directly or indirectly with Morteza Javidi.

"Blok J."

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