
CANADA / JUDGMENT

R. v. Montemurro

2011 BCSC 1929

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Supreme Court of British Columbia

DECIDED

31 January 2011

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2011 BCSC 1929 R. v. Montemurro

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

R. v. Montemurro,

2011 BCSC 1929

Date: 20110131

Docket: 21242

Registry: Salmon Arm

Regina

v.

Carl Ryan Ennis

Joseph Bruce Skreptak

Cory Joseph Montemurro

Dennis John Miner

Ban on Publication 517 CCC

Before: The Honourable Mr. Justice Dley

in Chambers

Oral Ruling on Bail Application

(Re the Accused Montemurro)

Counsel for the Crown

by teleconference:

G.W. Koturbash

Counsel for the Accused Montemurro

by teleconference:

K.S. Westlake, Q.C.

Place of Hearing:

Kamloops, B.C.

Place and Date of Judgment:

Kamloops, B.C.

January 31, 2011

- [1] THE COURT: Mr. Montemurro is charged with nine counts of weapons-related charges under ss. 86(2), 88(1), 90(1), 94(1), and 95(1) of the Criminal Code (the "Code"). He was arrested on November 25, 2010, and has been in custody since.
- [2] Mr. Montemurro applied for bail on December 2, 2010. The Crown opposed his release on the primary, secondary, and tertiary grounds. His Honour Judge Takahashi denied bail on the tertiary ground. Judge Takahashi considered authorities from Ontario to be persuasive in considering detention under the tertiary grounds where there was a prevalence of firearms. Mr. Montemurro argues that the learned Provincial Court judge erred in following the Ontario authorities which differ from pronouncements in this province. British Columbia cases have said that the tertiary ground should only be used to justify detention in exceptional circumstances.
- [3] Mr. Montemurro applies for a review of the detention order pursuant to s. 520 of the Code.
- [4] The facts before Judge Takahashi can be summarized as follows.
- [5] A Jeep Grand Cherokee rented and driven by Mr. Montemurro was stopped for a routine traffic violation near Salmon Arm. The investigating officer detected a mild odour of marihuana bud coming from inside the Jeep. He received information that Mr. Montemurro was associated with a marihuana grow operation. Since he was alone and there were four occupants in the Jeep, the officer decided not to take any further steps at that time. The officer followed the Jeep into Salmon Arm and, with the assistance of a backup unit, stopped the Jeep again. All of the occupants were arrested for possessing marihuana.
- [6] During the arresting process, two of the occupants were briefly out of view of the police car video camera. Near that location, the police later found two loaded handguns in the snow.

- [7] From searching Mr. Montemurro, the police found a boot knife hidden in his sock. The arresting officer opened the hatch of the Jeep and saw a sawed-off shotgun in a bag. The handle had duct tape wrapped around it. Similar duct tape was found within the glove compartment.
- [8] One of the passengers, Mr. Skreptak, is a full patch member of the Hells Angels. A search of his person at the detachment revealed a bag of marihuana weighing 6.7 grams in his pocket. In his long johns, the police found a rolled up sock within which there was a latex glove containing nine rounds of .38 special ammunition.
- [9] At the detachment, the police conducted a more thorough search of the Jeep. Under the driver's seat which had been occupied by Mr. Montemurro there was found a 9 mm pistol loaded with 10 rounds of ammunition. The gun was positioned such that the butt was toward the front of the vehicle providing for easy access. That gun was registered to Mr. Montemurro. He was only authorized to transport the gun directly to and from the gun club. There was body armour located in the back of the Jeep. Also located there were two walkie-talkies, three axe or sledgehammer-type handles, a baseball bat, two knives, bear spray, and other shotgun shells. There were two balaclavas, one in the cargo area and the other on the floor of the driver's seat. There was documentation of Mr. Montemurro's in the cargo area. In the console were boxer shorts ripped in such a fashion that they could be used to mask a person's face. Near the shotgun in another duffle bag were six 9 mm magazines, all with 10 rounds of ammunition. There was a bear banger and two shotgun shells located in another bag in the rear of the Jeep. A cell phone jammer was located on the floor behind the driver's seat.
- [10] The Crown argued that the existence of the weapons, the balaclavas, and body armour could only lead to the logical inference that the occupants of the Jeep were intending to use deadly force. There were two detailed addresses found within the Jeep, but the occupants of those locations claimed not to know any of the persons named in this indictment.
- [11] The Crown argued that because of the mandatory minimum sentence of three years that would be imposed upon conviction, there was a concern on the primary ground. Likewise, there was a concern on the secondary ground because of the nature of the weapons found and the two detailed and descriptive addresses. Lastly, the Crown argued that the existence of the weapons invoked the tertiary ground justifying detention.
- [12] The arguments on the primary and secondary grounds were rejected. With respect to the secondary ground, Judge Takahashi concluded that because Mr. Montemurro did not have a criminal record, any concerns could be dealt with by way of conditions and security.

- [13] On the tertiary ground, the Crown referred the judge to some Ontario cases which suggested that weapons-related offences would tend to favour detention. The Crown also relied upon the following authorities: *R. v. Taylor and Sanghera*, May 16, 2009, B.C. Provincial Court; *R. v. Isse*, April 3, 2009, British Columbia Provincial Court; and *R. v. Ahmadzai*, March 13, 2009, a decision of the Supreme Court.
- [14] The defence referred to *R. v. Charter*, July 2008, Nova Scotia Supreme Court; *R. v. Fleming*, [2007] B.C.J. No. 925, a decision of the B.C. Court of Appeal; and *R. v. Wilcox*, 2005 BCSC 1785. The Fleming case was referred to in the argument that there must be more than mere possession of a firearm to attract the tertiary ground.
- [15] In his decision and analysis, Judge Takahashi referred only to the Charter case and the Ontario authorities. He concluded that the Ontario cases were persuasive to attract the tertiary ground where mere possession of a loaded firearm was at issue. He concluded that the Crown case was of sufficient strength that detention was justified under s. 510(c) of the Code.
- [16] In this review, Mr. Montemurro has the burden of showing cause why the order of the Provincial Court judge should be vacated or varied. As the reviewing judge, I am required to give consideration to the existing order, but am also to exercise an independent discretion. I am entitled to consider any new evidence and to consider that in deciding whether the initial order was based on an error in law or in principle or whether it would be unjust not to order Mr. Montemurro released; *R. v. Adiwal*, 2003 BCSC 740, [2003] B.C.J. No. 3233, at paras. 29-32.
- [17] At this review, it has been argued that B.C. authorities would require the release of the accused because it is only in exceptional circumstances that the tertiary ground can be used to deny bail; *R. v. Brotherston*, 2009 BCCA 431; *R. v. Bhullar*, 2005 BCCA 409; and *R. v. Desmond*, December 9, 2009 (Pearlman,J.).
- [18] In these circumstances, it was argued that the mere possession of a weapon properly licensed to Mr. Montemurro was not enough to fall within the exceptional circumstances. It was submitted that the other weapons or paraphernalia can either be explained or were not linked to Mr. Montemurro. It was also emphasized that Mr. Montemurro had no record and, in fact, had "an impeccable record."
- [19] I accept that there is a divergence of views between Ontario and this province with respect to the treatment afforded to the tertiary ground. In Ontario, there is a trend to deny bail on the tertiary grounds in weapons cases where there are no exceptional circumstances. Those matters have been analysed by Mr. Justice Pearlman in *Desmond* at paras. 22-28, and I am bound to follow his decision and the authorities relied upon by him. Accordingly, I conclude that each case must be examined on its own merits rather than defaulting to the position that weapons-related charges create exceptional circumstances as contemplated by s. 510(c) of the Code.

[20] The application of the tertiary ground is succinctly referred to in the Brotherston case at para. 30, and I quote from that case:

[47] The proposition that denial of bail on the basis of the tertiary ground will be exceptional finds support in the decision of Esson J.A. granting interim release to the accused in *R. v. Patko*, 2003 BCCA 262, [2003] B.C.J. No. 1012. In that case, the accused was charged with second degree murder in a case in which the victim had died as a result of head injuries inflicted by baseball bats. In elucidating the exceptional nature of the circumstances required to justify detention on the tertiary ground, Esson J.A. stated, at para. 14:

It is of some significance that the Chief Justice of Canada, in giving judgment for the majority [in *Hall*], agreed with the statements of Mr. Justice Hall of this Court in *R. v. MacDougal* (1999), 138 C.C.C. (3d) 38 to the effect that the application of the tertiary ground will be relatively uncommon. The facts in *MacDougal* and those in *R. v. Hall* were both considerably more serious than those in this case in terms of being capable of affecting public confidence in the administration of justice should the accused person be released pending trial. It is particularly relevant that, because *R. v. Hall* was a murder case, there is a direct basis for comparison.

...

[60] In my respectful view, the hearing judge's brief analysis of the tertiary ground does not accord with the constitutional constraints discussed by the Chief Justice in *Hall*. In relation to the tertiary ground, McLachlin C.J. made clear that s. 11(e) of the Charter does not permit Parliament to confer a broad discretion on judges to deny bail; rather, s. 515(10)(c) must be considered having regard in particular to the four enumerated factors set out in that subparagraph. Moreover, the court must be satisfied that detention is not only advisable but necessary and necessary not just to any goal, but to maintain confidence in the administration of justice.

[61] Further, the analysis must be made from the perspective of a reasonable and informed member of the public. As noted by McEachern C.J.B.C. in *R. v. Nguyen*, [1997] B.C.J. No. 2121, *supra*, at para. 18, and referred to with approval in *Hall*, the reasonable person making this assessment must be one properly informed about "the philosophy of the legislative provisions, Charter values and the actual circumstances of the case." The Charter values include the presumption of innocence and the recognition of the importance of bail to the proper administration of justice.

[62] Assuming the primary and secondary grounds are met, the denial of bail on the tertiary ground will be exceptional ...

[21] The mere fact that Judge Takahashi did not specifically refer to case law arising from our Court of Appeal dealing with the tertiary ground does not necessarily mean that it was not considered. He was referred to some B.C. authorities such as *Taylor*, *Isse*, and *Ahmadzai*. However, the reasons were restricted to the positions taken by the courts in Nova Scotia and Ontario without including any analysis of the directions given in cases such as *Brotherston*,

Bhullar, or Desmond. Had the learned judge considered the requirement for exceptional circumstances to exist, he may have reached a different conclusion.

- [22] If there were no new factors to consider, this review would be confined to the issue as to whether there were exceptional circumstances and whether this is the relatively rare case where the tertiary ground justified the detention order. However, the Crown has now uncovered and presented facts that were not before the Provincial Court judge.
- [23] First, the Crown refers to a criminal record. On September 30, 1993, Mr. Montemurro was convicted of possession of a narcotic for the purpose of trafficking and for possessing a weapon contrary to s. 87 of the Code. In 1993, that provision of the Code read as follows:

Everyone who carries or has in his possession a weapon or imitation thereof for a purpose dangerous to the public peace or for the purpose of committing an offence is guilty of an indictable offence and liable to imprisonment for a term not exceeding 10 years.

- [24] Mr. Montemurro received sentences of three years and six months respectively. Mr. Montemurro was granted a pardon with respect to those offences on July 27, 2009. The pardoned record has now been disclosed pursuant to the provisions of ss. 6(2) and (3) of the Criminal Records Act R.S. 1985, c. C-47.
- [25] Second, the Crown refers to a stayed proceeding on May 4, 1998, arising out of charges on June 10, 1997. The stay of proceedings was entered with respect to two counts of possession of a scheduled substance for the purpose of trafficking, possession of proceeds of crime, and possession of a weapon. With respect to those charges, Mr. Montemurro was found in possession of cocaine, close to \$20,000, bear spray, dog repellent, a cell phone jamming device, and a knife. He admitted that he had been trafficking in cocaine. Those charges were stayed as a result of concerns relating to the compromise of an informant.
- [26] The initial question to be resolved is whether the court can take this new information into account.
- [27] The defence argues that a pardon would lose its impact if a pardoned conviction was now to be considered. The defence also argues that the stay of proceedings should be treated as if Mr. Montemurro had never been charged. Section 5 of the Criminal Records Act reads as follows:

The pardon

- (a) is evidence of the fact that
 - (i) the Board, after making inquiries, was satisfied that the applicant for the pardon was of good conduct, and
 - (ii) the conviction in respect of which the pardon is granted should no longer reflect adversely on the applicant's character; and

- (b) unless the pardon is subsequently revoked or ceases to have effect, requires the judicial record of the conviction to be kept separate and apart from other criminal records and removes any disqualification or obligation to which the person so convicted is, by reason of the conviction, subject by virtue of the provisions of any Act of Parliament, other than section 109, 110, 161, 259, 490.012 or 490.019 of the Criminal Code or subsection 147.1(1) or section 227.01 or 227.06 of the National Defence Act, or of a regulation made under an Act of Parliament.
- [28] Since the pardon has not been revoked or ceased to have effect, the defence maintains that in light of s. 5, the pardon prevents Mr. Montemurro from being disqualified as a person who seeks the benefits of the bail provisions set out in s. 515 of the Code. It is further argued that s. 5 prevents the evidence of the prior conviction from being adduced as admissible evidence in a bail hearing. Finally, it is argued that reference to the pardoned conviction would be an abuse of process.
- [29] In *R. v. Paterson*, 102 B.C.A.C. 200 at paras. 100-103, the Court of Appeal confirmed that a pardoned record could not be the subject of cross-examination. The court read the provisions of s. 748(3) of the Code together with s. 5 of the Criminal Records Act, and concluded that those provisions would be rendered meaningless if the pardon was not respected.
- [30] The Crown argues that the pardoned record is a factor that can be considered. It says that the pardon was administrative and not pursuant to s. 748 of the Code. The latter pardon results in a grant that deems the offence to never have been committed. The Crown further argues that the pardoned conviction does not disqualify Mr. Montemurro from being released. Rather, it becomes one of the considerations to be accounted for.
- [31] It is not open to this court to question the granting of the pardon. That would be a collateral attack on the integrity of the process and is beyond the purview of this hearing; *R. v. Bruha*, 2006 NWTCA 1 at paras. 13-15.
- [32] In *R. v. Gyles*, 2003 CarswellOnt 6610, the Ontario Superior Court of Justice dealt with the issue of a witness being confronted with an administrative pardon granted under the Criminal Records Act. The analysis in that case is persuasive. The court differentiated between the various types of pardons. It concluded that the s. 748 Code pardon, in effect, resulted in treating a conviction as if it had been made in error. The Ontario court declined to follow *Paterson* because *Paterson* had been decided before the amendments to s. 5 of the Criminal Records Act and prior to *Re Therrien*, 2001 SCC 35.

[33] The history of s. 5 was discussed by the Supreme Court of Canada in *Therrien* commencing at para. 117. When first enacted in 1970, s. 5(b) used language to state that the granting of a pardon vacated the conviction. That wording no longer appears in s. 5. Instead, s-s. (b) requires the pardoned conviction to merely be kept separate from other criminal records and removes any disqualification that the person might be subjected to. The court said the following about the amended s. 5 at para. 119:

I note in passing that the interpretation holding that the Act does not allow a person to deny that he or she was convicted is also consistent with the most recent amendments to the Act in 2000, although those amendments cannot be set up against the appellant in this case. The Act to amend the Criminal Records Act and to amend another Act in consequence (proclaimed in force August 1, 2000 by Order SI/2000-73, vol. 134, p. 2033), amends the French and English versions. In my view, these changes embody the meaning that Parliament has always intended the Act to have. Apart from the various disqualifications that a conviction may lead to under federal statutes or regulations, as referred to in s. 5, the other "conséquences" associated with the existence of a criminal record that the pardon sought to eliminate for the future are all covered by keeping the information associated with the existence of a criminal record separate and apart. That information then becomes private to the individual and cannot be disclosed without the prior approval of the Minister. Professor Dumont shares this view:

This legal construction of the stigmatization or legal recognition of the fiction of dishonour, is so evident that the pardon process in the Criminal Records Act consists, first and foremost, of terminating the use and distribution of the information recorded in the criminal record, restoring the confidential status of information relating to an individual's criminal history and returning that information to the private sphere. From that point of view, the Act creates not so much a procedure for obtaining a pardon as a mechanism consisting of withdrawing information relating to an individual's criminal history from circulating.

[34] Mr. Justice Gonthier then went on to differentiate between the Code pardon and the administrative pardon at para. 122:

Accordingly, I find, as did the Court of Appeal, that an objective analysis of the Act does not support the appellant's argument that the pardon retroactively wipes out his conviction. Professor Dumont accurately summarizes the essence of what I have said:

It seems clear that the Criminal Records Act grants a pardon which is designed only to put an end to the negative effects of a conviction. An administrative pardon, which adopts the features of a partial and conditional pardon, is not equivalent to a retroactive acquittal, as a free pardon may be, by virtue of the Royal prerogative or the Criminal Code; accordingly, an administrative pardon does not logically result in retroactive annulment or neutralization of the conviction.

[35] The court summarized the impact of an administrative pardon at para. 127:

I therefore find that while a pardon does not make the past go away, it expunges consequences for the future. The integrity of the pardoned person is restored, and he or she need not suffer the effects associated with the conviction in an arbitrary or discriminatory manner, a situation which the Canadian and Quebec charters tend to protect against.

[36] Therrien has clarified the manner in which an administrative pardon is to be considered. No longer is the notion that the existence of a pardon regardless of its nature, a bar to any reference to it in subsequent proceedings. Providing the Minister approves, the pardon can be lifted out of its private domain and used as one factor in further criminal proceedings.

[37] At para. 116 of Therrien, the following summary sets out the considerations in accessing a pardoned record:

Sections 5 and 6(2) C.R.A. set out the effects of granting a pardon: (1) it is evidence that the National Parole Board, after making the inquiries specified in the Act, was satisfied that the applicant was of good conduct and that the conviction in respect of which it is granted should no longer reflect adversely on his character; (2) it vacates the conviction and removes any disqualification to which the person is subject by virtue of any federal Act or regulation made thereunder; and (3) it results in any record of the conviction being kept separate and apart: in other words, the criminal record is expunged. In and of themselves, these provisions do not persuade me that the pardon can operate to retroactively wipe out the conviction. Rather, they are an expression of the fact that it still exists, combined with a desire to minimize its future consequences. Section 5(a)(ii) C.R.A. provides that the pardon is evidence that "the conviction in respect of which the pardon is granted or issued should no longer reflect adversely on the applicant's character" (emphasis added), implying that it still exists and could so reflect. Second, the effects of the pardon are limited to the legal disqualifications created by federal statutes or the regulations thereunder and therefore exclude all the post-sentence consequences provided in provincial legislation, which also suggests that the pardon has only limited effect. Third, the information contained in the criminal record is not destroyed but is kept separate and apart, whence it may re-emerge should the pardoned person subsequently be no longer of good conduct.

[My emphasis]

[38] The consideration of the pardon in this hearing is not carried out in an arbitrary or discriminatory manner. The pardoned conviction is merely one factor to be considered. It does not by or in itself disqualify Mr. Montemurro from the benefits of the bail provisions or detract from the presumption of innocence.

[39] The Minister has provided his approval so that the private nature of the pardoned conviction can be disclosed to the court in the interests of the administration of justice. The charges suggest that Mr. Montemurro is no longer of good conduct and the criminal record can now re-emerge. Accordingly, notwithstanding the existence of the pardon, I have concluded that this court can consider the prior criminal activity which was the subject of the 1993 convictions.

[40] The defence argues that under s. 579(2) of the Code, a stayed charge effectively results in that charge having never occurred. The section reads as follows:

Proceedings stayed in accordance with subsection (1) may be recommenced, without laying a new information or preferring a new indictment, as the case may be, by the Attorney General or counsel instructed by him for that purpose giving notice of the recommencement to the clerk of the court in which the stay of the proceedings was entered, but where no such notice is given within one year after the entry of the stay of proceedings, or before the expiration of the time within which the proceedings could have been commenced, whichever is the earlier, the proceedings shall be deemed never to have been commenced.

[41] Since the stay of proceedings occurred in 1998, it is argued that Mr. Montemurro must now be treated as if he had never been charged.

[42] The Crown argues that s. 579 is restricted to the recommencement of proceedings after a stay has been entered. It argues that the section does not prevent reference to the circumstances giving rise to the stayed charges.

[43] I conclude that the charges which have been stayed are "untried charges". Those are factors to be considered at a bail hearing. That is the direction provided by the Supreme Court of Canada in *Toronto Star Newspapers Ltd. v. Canada*, 2010 SCC 21, at para. 28:

To avoid any delay prejudicial to an accused who ought to be released, while at the same time ensuring that those who do not meet the criteria for release are kept in custody, compromises had to be made regarding the nature of the evidence to be adduced at the bail hearing. There are practically no prohibitions as regards the evidence the prosecution can lead to show cause why the detention of the accused in custody is justified. According to s. 518(1)(e) [of the] Cr. C., the prosecutor may lead any evidence that is "credible or trustworthy", which might include evidence of a confession that has not been tested for voluntariness or consistency with the Charter, bad character, information obtained by wiretap, hearsay statements, ambiguous post-offence conduct, untested similar facts, prior convictions, untried charges, or personal information on living and social habits. The justice has a broad discretion to "make such inquiries, on oath or otherwise, of and concerning the accused as he considers desirable" (s. 518(1)(a)). The process is informal; the bail hearing can even take place over the phone

[44] Accordingly, this court will consider as a factor the circumstances relating to the 1997 charges.

- [45] The Crown argues that the stayed proceedings are similar to the facts being alleged against the accused now. The Crown further argues that Mr. Montemurro has attempted to mislead this court in his review of his activities in 1993. It points to paras. 11 and 12 of Mr. Montemurro's affidavit that was sworn December 20, 2010:
11. In September 1993 at age 23 I started writing computer software programs for medical offices in Edmonton and did so for one year.
 12. In 1993, I returned to the construction trade as a self-employed builder. I continued to work constructing homes in Edmonton until 1997.
- [46] The Crown says that Mr. Montemurro was in jail in 1993 and not doing the kinds of activities that he described. On behalf of Mr. Montemurro, it was argued that he must have made a mistake since he was recounting his history from memory alone.
- [47] In light of the new information, being the pardoned conviction, the circumstances of the stayed charges in 1997, and the deceiving affidavit, the Crown says that the secondary ground must now be taken into account. Mr. Westlake argues that even if the 1993 and 1997 events are taken into account, they are so dated as to be inconsequential now.
- [48] *Regina v. Morales*, [1992] S.C.J. No. 98 confirms that an accused person must be granted bail unless the Crown can justify detention. The principles are set out in paras. 37-39:
- [37] The public safety component of s. 515(10)(b) provides that pre-trial detention is justified where it is necessary "for the protection or safety of the public, having regard to all the circumstances including any substantial likelihood that the accused will, if he is released from custody, commit a criminal offence or interfere with the administration of justice". The appellant concedes, quite properly in my opinion, that danger or likelihood that an individual will commit a criminal offence does not in itself provide just cause for detention. In general, our society does not countenance preventive detention of individuals simply because they have a proclivity to commit crime. The appellant accepts this proposition but submits that there is just cause for preventive detention where an individual who presents a danger of committing an offence is already awaiting trial for a criminal offence.
- [38] In *Pearson*, I identified two factors which in my view are vital to a determination that there is just cause under s. 11(e). First, the denial of bail must occur only in a narrow set of circumstances. Second, the denial of bail must be necessary to promote the proper functioning of the bail system and must not be undertaken for any purpose extraneous to the bail system. In my opinion, the public safety component of s. 515(10)(b) provides just cause to deny bail within these criteria.
- [39] I am satisfied that the scope of the public safety component of s. 515(10)(b) is sufficiently narrow to satisfy the first requirement under s. 11(e). Bail is not denied for all individuals who pose a risk of committing an offence or interfering with the administration of justice while on bail. Bail is denied only for those who pose a "substantial likelihood" of committing an offence or interfering with the administration of justice, and only where this "substantial

likelihood" endangers "the protection or safety of the public". Moreover, detention is justified only when it is "necessary" for public safety. It is not justified where detention would merely be convenient or advantageous. Such grounds are sufficiently narrow to fulfil the first requirement of just cause under s. 11(e).

- [49] During this hearing, Mr. Montemurro was described as a 41-year-old man with no record. He was further described as a man with an "impeccable" record. That description would relate to a person who has had no convictions, pardoned or otherwise.
- [50] Mr. Montemurro does not fit within those parameters. He was arrested for these offences within 16 months of being pardoned for conduct that resulted in convictions for drug and weapons offences. He had just completed a jail sentence for those offences when he was involved with further circumstances of trafficking, weapons, and proceeds of crime offences. Those incidents in 1997 were eerily similar to the facts being alleged by the Crown in this case.
- [51] Mr. Montemurro filed an affidavit that was intended to convey to the court that he had never been in trouble with the law previously.
- [52] I have concluded that the explanation given for the 1993 activities as simply being a mistake in memory is not acceptable. The rational conclusion to be drawn is that Mr. Montemurro directed his mind to that time period and intended to deceive the court.
- [53] In this case, Mr. Montemurro was part of an enterprise that intended to inflict violence. There can be no other rational conclusion to be drawn in light of the weapons and the apparel found within his rental vehicle. The existence of two detailed addresses leads to the inference that the targets had been identified.
- [54] While no single factor is determinative, taking into account all of the following: (1) similar circumstances in 1993 and 1997; (2) the arsenal of weapons and collateral equipment and apparel; (3) the detailed addresses being targeted; and (4) the misleading affidavit concealing the past history, leads to the conclusion that detention is necessary for the protection or safety of the public. Accordingly, I have concluded that the Crown has satisfied the burden to show that there is a substantial likelihood that, without detention, the protection or safety of the public would be in danger.
- [55] There are no special bail provisions that would provide for the safety concerns, especially since Mr. Montemurro has shown a willingness to deceive the court. There would be a substantial likelihood under these circumstances that Mr. Montemurro would not abide by the terms of a release order. Accordingly, detention is justified under the secondary ground.
- [56] The remaining issue is whether this is one of those rare cases where detention would also be justified on the tertiary ground.
- [57] I conclude that it is.

- [58] The Crown case is strong, the nature of the offences is serious, and the conduct was designed to inflict violence and grievous bodily harm.
- [59] The accused is facing a lengthy jail sentence which will likely be more than the mandatory minimum of three years since the minimum sentence is generally reserved for the best accused in the best circumstances. The accused has a history which favours a longer sentence.
- [60] Mr. Montemurro has a related history, members of the public were being targeted, and the weapons and apparel lead to the conclusion that he was part of a group that were going to be violent aggressors.
- [61] In seeking his release, Mr. Montemurro took advantage of the pardon that had been granted and attempted to deceive the court as to his past relevant conduct. All of these factors fall within the exceptional circumstances necessary to justify detention on the tertiary ground. To maintain confidence in the administration of justice, these circumstances require detention on the tertiary ground.
- [62] Accordingly, Mr. Montemurro is detained on the secondary and tertiary grounds.

"S.D. Dley J."

DLEY J.

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