

Case Name:
R. v. E.T.

Between
Her Majesty the Queen, respondent, and
E.T. (a young person) [Hereafter referred to as
E.T.(1)], applicant

[2006] O.J. No. 1446

2006 ONCJ 115

69 W.C.B. (2d) 641

Ontario Court of Justice

Youth Justice Court - Brampton, Ontario
I.A. MacDonnell J.

April 11, 2006.

(50 paras.)

Criminal law -- Compelling appearance, detention and release -- Judicial interim release or bail -- Application by accused young person for judicial interim release pending trial for aggravated assault and manslaughter allowed -- The applicant established that his detention pending trial was not justified -- Criminal Code, s. 515(10).

Application by the accused young person, ET, for an order of judicial interim release pending his trial for aggravated assault and manslaughter -- A standoff over ownership of a community bicycle occurred between two groups of youth -- Following the incident, the applicant's group drove to a friend's house where two individuals armed themselves with guns and set out in search of their adversaries -- The applicant assisted in the planning of the subsequent ambush and shooting of the two victims -- There was evidence that the applicant assisted in the disposal of the spent shell casings -- The applicant was 15 at the time of the offence and had no prior criminal record -- At the time of the incident, the applicant was at large on a promise to appear on a charge of possession of a weapon for a dangerous purpose, and was subsequently acquitted -- Three family members were willing to act as sureties -- HELD: Application allowed -- The allegations did not demonstrate that the applicant was involved in ongoing criminal activity, nor did they give rise to an inference that he would continue in such activity if released -- The lack of a criminal record, a positive report during incarceration, and the applicant's enrolment in school were indicative that his detention was not necessary for protection and safety of the public -- There was no substantial likelihood that the applicant would commit a criminal offence or interfere with the administration of justice -- Detention was not justified on the tertiary ground given the limited role played by the applicant in the planning and execution of the offence.

Statutes, Regulations and Rules Cited:

Criminal Code, s. 236(a), s. 268(2), s. 515, s. 515(6)(a)(i), s. 515(10), s. 515(10)(b), s. 515(10)(c)

Youth Criminal Justice Act, s. 2(1)(a), s. 28, s. 33(1)

Counsel:

Kathryn Wells for the applicant

Brian McGuire for the Crown

[Editor's note: The note "[Text deleted by LexisNexis Canada]" indicates the removal of information which may identify individuals protected under LexisNexis Canada's Guidelines for the Protection of Identities.]

***Reasons for Ruling on an Application Under
s. 33(1) of the Youth Criminal Justice Act***

1 I.A. MacDONNELL J.:-- This is a ruling on an application by a young person for an order of judicial interim release. The applicant is charged with one count of manslaughter with a firearm, contrary to s. 236(a) of the *Criminal Code*, and one count of aggravated assault, contrary to s. 268(2) of the *Criminal Code*.

2 The incident giving rise to the charges occurred on May 28, 2005. The applicant was initially arrested on January 17, 2006, but he was released the same day without charge. He was re-arrested three weeks later, on February 8, and charged with the offences before the court. A hearing to determine whether he should be granted bail commenced before a justice of the peace on February 13 and continued on an intermittent basis until March 13, at which point the applicant was ordered detained in custody. The application before this court is brought pursuant to s. 33(1) of the *Youth Criminal Justice Act (YCJA)*, which provides, in part, that where an order of detention is made in respect of a young person by a justice who is not a youth court judge, an application for release from custody may be made to a youth court judge "... [who] shall hear the matter as an original application."

A. The Circumstances of the Alleged Offences

3 On consent, the Crown called Constable David Colton, an officer with the Homicide Bureau of the Peel Regional Police, to outline what the police investigation has revealed in relation to the material incident and the role played in it by the applicant.

4 On the evening of May 28, 2005 a three-on-three basketball tournament was in progress at a Brampton school. About 300 persons were in attendance, a large number of them teenagers. At approximately 9:00 p.m., a dispute arose between two groups of individuals in relation to the ownership of a "community bicycle". A young man named Wayne Lloyd, who was 17 years of age, and Javan Douglas, who was 22 years old, were among those in one group; the applicant, his brother G. and a man named Carrington were in the other. G. and Carrington are both 29 years of age; the applicant was 15 at the time.

5 The standoff over the bicycle involved the exchange of words, "hard stares" and a bit of pushing, but it came to an end without serious violence. As far as G. and Carrington were concerned, however, the matter was not over. The two of them, together with the applicant and as many as seven others, piled into a van and headed to the residence of G. and the applicant on [text deleted by LexisNexis Canada] in Brampton. On the way, G. told the others that "we'll show you how to take care of this". Upon arrival at [text deleted by LexisNexis Canada], G., Carrington and the applicant went into the residence. It would be a reasonable inference that while they were inside the residence, G. and Carrington armed themselves with, respectively, a semi-automatic pistol and a revolver. There is no evidence that the applicant was armed. The three then returned to the van, and made a return trip to the school. It would also be a reasonable inference that everyone in the van knew that the purpose of G. and Carrington in returning to the school was to shoot and kill members of the group on the other side of the dispute over the bicycle.

6 After arriving in the area of the school, G. and Carrington secreted themselves behind a tree along a public walkway, anticipating that Wayne Lloyd and/or others would pass that way. G. dispatched the applicant and another young person, A.M., to ride their bicycles to the school to locate the intended victims. In the course of carrying out this instruction, the applicant told some individuals whom he met that G. had a gun and was going to shoot Wayne Lloyd. A.M. had a walkie-talkie, and was in communication with G. and Carrington. Constable Colton indicated that "maybe" the applicant too had a walkie-talkie. In any event, A.M. used his walkie-talkie to inform G. and Carrington when Lloyd left the school. The applicant and A.M. returned to the area where G. and Carrington were waiting. When Wayne Lloyd and

Javan Douglas came along on their bicycles, G. and Carrington stepped out and ambushed them. On the basis of the shell casings found at the scene, it is reasonable to infer that G. fired at least seven shots at the victims. One of the bullets struck Wayne Lloyd in the heart and he died at the scene. Javan Douglas was struck in the leg and wounded.

7 Apart from carrying out G.'s direction to look for the victims, there is no evidence that the applicant did anything to assist in the ambush and shooting of Mr. Lloyd and Mr. Douglas.

8 After the shooting, G., Carrington, the applicant and the others returned to [text deleted by LexisNexis Canada], where they ordered pizza and played video games. There was some conversation, which may have been threatening, about the need for everyone to keep silent about what had happened. There is some evidence that the applicant assisted in disposing of spent shell casings, presumably from Carrington's revolver.

B. The Circumstances of the Applicant

9 The applicant is currently 16 years of age, but as indicated above he was 15 at the time of the incident. He has a number of siblings besides his brother G. The address on [text deleted by LexisNexis Canada] referred to above is the residence of the applicant's mother. The applicant was attending school prior to his arrest, and he has no criminal record. At the time of the incident, he was at liberty on a promise to appear and an undertaking in relation to a charge of possession of a weapon for a purpose dangerous to the public peace. He has since been acquitted of that charge. In September 2005, three months after the shooting of Wayne Lloyd, the applicant entered into a peace bond in relation to an allegation of theft.

10 The police interviewed the applicant's mother after his arrest. Constable Colton testified one of the officers told him that the applicant's mother stated that the applicant "does his own thing", that "he doesn't listen to nobody" and that he is a "shit disturber". Colton was not able to provide any context for those remarks and he was not in possession of the entire interview.

11 Constable Colton also testified that another officer told him that perhaps six months before the applicant's arrest, the applicant was asked by the police what colour he rocks', and the applicant responded "I rock red." The police took that to be an indication that the applicant was associated with the "Bloods" street gang. Colton conceded, however, that there is no other evidence connecting the applicant with any gang. Further, as I understand Colton's evidence, there is nothing to suggest that gang affiliation had anything to do with the shooting of Mr. Lloyd and Mr. Douglas.

12 The applicant called three witnesses on this application - his sister C.B., his father E.T. [Editor's note: hereafter referred to as E.T.(2)], and his father's fiancée A.M.M. All three witnesses testified that they are prepared to act as sureties for the applicant should he be released pending trial.

13 C.B. is 31 years of age. She and her husband live on [text deleted by Lexisnexis Canada] in Toronto with their three children. She is taking upgrading courses at Humber College during the week. On weekends she works at a Wendy's restaurant. She described herself as a strict parent. She testified that she has been like a second mother to the applicant since she was 15 years of age, and that they have a close relationship. In the early 1990s, the applicant and a younger brother lived with her for almost a year during a period when their mother was working and could not supervise the children. She believes that the applicant respects her. He has contacted her every day since his arrest almost two months ago. She has been making efforts to have him admitted into an alternative educational institution if he is released on bail.

14 C.B. testified that she, the applicant's father E.T.(2), and A.M.M. have agreed on a plan to supervise the applicant "twenty-four/seven". Under that plan, the applicant would live with her and be under her supervision from Monday to Friday. On the weekends, when she is at work, he would reside with and be under the supervision of the applicant's father and A.M.M. She testified that she and her husband have assets worth about \$15,000. She is willing to risk all of those assets by signing as a surety for the applicant. She also testified that if this court were to find the applicant's father to be an unsuitable surety, she is prepared to quit her job so that she can supervise the applicant on weekends as well. She also testified that she would turn the applicant in if he failed to comply with his bail terms.

15 In cross-examination, she agreed that unless the applicant has supervision "he does his own thing". She also agreed that at the earlier bail hearing before the justice of the peace she had agreed with the suggestion of Crown counsel that the applicant's father would not be a good person to supervise the applicant. She explained that she was only agreeing with suggestions put to her in cross-examination, suggestions that she did not believe afforded her an opportunity to disagree.

16 The applicant's father E.T.(2) confirmed that he was prepared to be a surety and to supervise the applicant on weekends. He is 46 years of age, he is gainfully employed, and he does not have a criminal record. He conceded that on two occasions, between 7 and 10 years ago, he entered into peace bonds in relation to his dealings with his ex-wife (the applicant's mother). He agreed that his ex-wife had made allegations of child abuse against him, but he denied that there was any truth to those allegations. He pointed out that they were made at the time of a bitter divorce and custody battle, and that they had been investigated by the police and the Children's Aid Society, both of whom had decided to take no action.

17 E.T.(2) described himself as a strict father. The applicant lived with him for about three years prior to 2003, and the applicant was "very disciplined" during that period. Since the applicant's arrest, E.T.(2) has visited him every Sunday, and he speaks to him on the telephone four or five times a week. He stated that if the applicant failed to comply with the terms of his bail, he would report him to the police.

18 A.M.M., E.T.(2)'s fiancée, has been employed as an accountant at the Royal Bank of Canada's head office in Toronto for twenty years. She testified that during the three-year period when the applicant lived with her and E.T.(2), she was like a mother to him. She testified that E.T.(2) is a strict parent, but that he never abused the children. She testified that she is prepared to participate in the applicant's supervision. She has about \$70,000 equity in her home, and she is prepared to sign a substantial recognizance of bail. She testified that she would take steps to revoke the applicant's bail should he fail to comply with its terms.

19 Counsel for the applicant filed a report, dated March 30, 2006, from S. Champagne, the applicant's worker at the Hamilton Wentworth Detention Centre. The report states as follows:

[The applicant] has been in custody [here] since February 8, 2006. I have been assigned as his prime worker and I have been monitoring his progress since his admission. He has now been here about 6 weeks and seems to have settle [*sic*] in. He has attained level 3 status of our incentive program by attending school all day, following daily routine and house rules. He attends church on weekends and has family visiting regularly. He is a high energy youth and burns it off by going to the gym daily and doing extra chores in dayroom and is willing to assist or clean other areas. He has positive social skills, approachable, friendly and mainly good humoured. He is an outspoken youth, which is positive, but he is currently working on better choosing his battles and having better handle on his reaction and feelings in a situation. He has a good response from other staff members in the area. His name hasn't, in my knowledge, been spoken of recently in a negative matter. Youth appears motivated and has a plan [illegible word] when these matters get dealt with. These are my personal opinions based on observations and internal communications.

C. Analysis

20 By virtue of s. 28 of the *YCJA*, the provisions of Part XVI of the *Criminal Code*, including the provisions dealing with judicial interim release, "apply to the detention and release of young persons under this *Act*." The central provision of the *Criminal Code* dealing with judicial interim release is s. 515. Pursuant to s. 515(6)(a)(i), where an accused is charged with an indictable offence "that is alleged to have been committed while at large after being released in respect of another indictable offence ... the justice shall order that the accused be detained in custody ... unless the accused ... shows cause why his detention in custody is not justified ..." In the case at bar, the offences for which the applicant seeks bail are alleged to have been committed while he was at large on a promise to appear and an undertaking in relation to a charge of possession of a weapon for a purpose dangerous to the public peace. Accordingly, on this application he bears the burden of establishing that his detention in custody is not justified.

21 Section 515(10) of the *Code* sets forth three bases upon which the detention of an accused pending trial can be justified. The first is to ensure the attendance of the accused in court. It is common ground that the applicant has met the onus of showing that his detention is not justified on this basis. The substantial issue before the court is whether the applicant has established that his detention is not justified on either the second or third grounds. I will consider each in turn.

(i) The secondary basis for detention: s. 515(10)(b) of the Criminal Code

22 Pursuant to s. 515(10)(b), detention of an accused pending trial is justified where it "is necessary for the protection and safety of the public ... having regard to all of 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." When consid-

ering whether detention is justified on this basis, a court is entitled to take into account not only the accused's antecedent behaviour but also the inferences that may reasonably be drawn from the conduct alleged against him in relation to the offences in issue. I will address the latter subject first.

(a) *the circumstances of the offences*

23 The manner in which the allegations in themselves may give rise to an inference that an accused is likely to commit further offences can be illustrated with reference to *R. v. Whervin*, [2006] O.J. No. 443 (Ont. S.C.J.). In that case, the accused was charged with, *inter alia*, possession of crack cocaine for the purpose of trafficking and a number of weapons offences. The allegations arose out of a traffic stop of the accused's motor vehicle at three o'clock in the morning. In the vehicle the police found 6.7 grams of crack cocaine, a small amount of marihuana, cell phones, cash and a loaded 9-millimetre revolver. After a bail hearing, the accused was ordered detained pending trial. That order was reviewed and affirmed by Justice Hill. With respect to the secondary ground set forth in s. 515(10)(b), Justice Hill stated at paragraphs 10 and 13:

The allegations - and I underline 'allegations' - raise cogently the inference of an established young drug dealer in possession of cocaine for the purpose of trafficking as well as money and communication devices to ply his trade and a piece of weaponry to protect himself, his drugs and his profits.

I am satisfied on the totality of the evidence that the profile of the applicant as involved in ongoing drug dealing which emerges from the evidence at this time justifies the conclusion that he was involved in the possession of cocaine for the purposes of trafficking and that the weapon was related to that ongoing illegal activity. I am satisfied that the Crown has established that there is a substantial likelihood that if he were to be released from custody he would commit a further criminal offence. [emphasis added]

24 In the case at bar, in contrast, no inference can reasonably be drawn from the allegations against the applicant that he was involved in ongoing criminal activity, whether of the kind that led to his arrest or any other kind. The facts alleged by Constable Colton disclose that the decision to seek revenge against Wayne Lloyd and his friends was made by G. and Carrington. Those two men were the ringleaders of this tragedy and its main actors. There is nothing in the allegations suggesting that the applicant made a single decision in relation to the implementation of the plan to seek revenge. On the contrary, the relatively minor contribution that the applicant made to the plot was made at the direction of G. Nor can any inference be drawn from the facts alleged against the applicant that he had been involved in conduct of this kind before May 28, 2005 or that he was likely to engage in it in the future. That is, the allegations do not show the applicant to have been involved in ongoing criminal activity, and thus they do not in themselves give rise to an inference that he would be likely to continue in such activity if released.

(b) *the applicant's antecedents*

25 The most significant hurdle which the applicant must overcome in order to establish that his detention is not justified on the secondary ground arises from the fact that at the time of the offences he was at liberty on a promise to appear and undertaking on a charge of possession of a weapon for a purpose dangerous to the public peace. As a matter of law, that fact reverses the onus on this application, and as a matter of common sense it raises concerns with respect to whether the applicant is likely to commit further offences if released. In that respect, however, there are a number of considerations to be borne in mind.

26 First, the applicant has since been acquitted of the weapons dangerous charge. I acknowledge that this does not affect the incidence of the burden of persuasion on this application. I also recognize that it does not negate the concern that he is alleged to have involved himself in the serious criminal activity before the court at a time when he was already facing a criminal charge. However, the fact of the acquittal does preclude the court from reasoning, as it might otherwise have done, that the applicant has shown a pattern of continuing to commit offences while on bail and thus that he likely to commit offences if released now. The latter chain of reasoning, if it were available, would stand strongly against a further release order.

27 Second, the prior form of release consisted of a promise to appear and an undertaking: there is no suggestion that the applicant was in breach of the kind of stringent conditions that might be imposed upon him now should he be released.

28 Third, the prior form of release did not provide for a surety. In relation to his proposed release at this point, three people have come forward and have indicated their willingness to participate in a plan to keep the applicant supervised "24/7", and to pledge what assets they have to guarantee his compliance with the terms of a bail order. I was particularly impressed with A.M.M.'s willingness to stand as a surety: she has been employed at a major bank for 20 years and holds a position of responsibility at head office.

29 Fourth, this court is in a position to impose conditions on the applicant's release significantly limiting his ability to be at large unsupervised in the community. Such conditions can go a long way to removing any likelihood that the applicant would have the opportunity to commit offences while on bail.

30 In considering the likelihood of the applicant committing further offences, it is relevant that he has never been found guilty of any criminal offence. At the time of his arrest, he was attending school. Further, the report from his worker at the Hamilton Wentworth Detention Centre as to his behaviour and attitude while in custody for the last two months can only be described as positive.

31 Taking all of the foregoing considerations into account, it is my view that the applicant has shown cause why his detention is not necessary for the protection and safety of the public. He has established that there is no substantial likelihood "that ... if released from custody, [he will] commit a criminal offence or interfere with the administration of justice".

32 In coming to that conclusion, I have not overlooked the letter from the principal of the applicant's school in relation to his attendance there on January 18, 2006. He had been arrested in class by two Peel Regional Police Officers the day before, but had later been released without being charged with any offence. In the circumstances, it appears that he was entitled to be at school on January 18, as he had not yet been suspended. The principal's main concern, as I read the letter, was that she did not think that the applicant should be at school because relatives of the victim were students at the school. She also expressed concern that the applicant kept putting his hand inside his coat "as if he was holding a gun". However, there is no evidence at all that the applicant had a gun, and there is nothing to indicate that the applicant did or said anything else that might be construed as threatening.

33 Nor have I overlooked the allegation that when the group returned to [text deleted by LexisNexis Canada] after the shooting of Wayne Lloyd and Javan Douglas, the applicant stated that nobody should say anything about what had happened. In my view, that allegation falls considerably short of raising a reasonable concern that the applicant might attempt to interfere with the administration of justice if released.

34 I have also considered the evidence that the applicant's mother told a police officer that the applicant does not listen to anybody. It is difficult to place much weight on this remark in the absence of a context, but in any event it is an opinion that is not shared by the three sureties who are prepared to pledge their assets to guarantee the applicant's compliance with terms of bail. Neither does it appear to be consistent with the assessment of the applicant provided by his worker at the Hamilton Wentworth Detention Centre.

(ii) The tertiary basis for detention: s. 515(10)(c) of the Criminal Code

35 Pursuant to s. 515(10)(c), detention pending trial is justified where it "is necessary in order to maintain confidence in the administration of justice, having regard to all of the circumstances, including the apparent strength of the prosecution's case, the gravity and nature of the offence, the circumstances surrounding its commission and the potential for a lengthy term of imprisonment."

36 In *R. v. Hall*, [2002] 3 S.C.R. 309, Chief Justice McLachlin explained the application of s. 515(10)(c) in the following terms:¹

The judge must be satisfied that detention is not only advisable but necessary. The judge must, moreover, be satisfied that detention is necessary not just to any goal, but to maintain confidence in the administration of justice. Most importantly, the judge makes this appraisal objectively through the lens of the four factors Parliament has specified. The judge cannot conjure up his own reasons for denying bail; while the judge must look at all the circumstances, he must focus particularly on the factors Parliament has specified. *At the end of the day, the judge can only deny*

bail if satisfied that in view of these factors and related circumstances, a reasonable member of the community would be satisfied that denial is necessary to maintain confidence in the administration of justice. [italics added; underlining in the original text.]

(a) "the apparent strength of the Crown's case"

37 The question in relation to this factor is not whether the Crown has a strong case that a crime was committed, but whether there is a strong case connecting the accused to that crime. The distinction is important because in the case at bar there is a very strong case that the death of Wayne Lloyd was a planned and deliberate murder carried out by two gunmen who ambushed him as he was riding his bicycle home from a basketball tournament. What must be assessed, however, is the strength of the evidence linking the applicant to that crime.

38 No arrests were made for approximately eight months after the shootings. The applicant was initially arrested on January 17, along with G. and Carrington. The latter two men were charged with first degree murder; the applicant was released without charge, only to be re-arrested three weeks later on the lesser charges of manslaughter and aggravated assault. On the basis of the summary provided by Constable Colton, it appears that the bulk of the evidence against the applicant comes from persons who were not initially co-operative with the authorities. The credibility and reliability of those witnesses is apt to be a live issue at trial. On the basis of what is before this court, it is not possible to come to any view as to the likelihood of those issues being determined one way or the other. To put it another way, it is not possible at this stage to determine whether the case connecting the applicant to the offences is weak, strong or somewhere in between. I therefore regard "the apparent strength of the Crown's case" as a neutral consideration on this application.

(b) "the gravity and nature of the offence"

39 The offences of manslaughter and aggravated assault are inherently serious offences, particularly when both are alleged to have involved the use of firearms.

(c) "the circumstances surrounding Its commission"

40 The circumstances surrounding the killing of Wayne Lloyd are quite disturbing. It is horrifying to think that within the space of less than an hour a dispute over the ownership of a bicycle could have escalated from an exchange of angry words to the planned and deliberate murder of a 17-year-old boy and the attempted murder of his companion. The senseless nature of the crimes and the cold-blooded manner in which they were carried out reasonably raise issues in relation to whether bail should be granted to those charged with their commission.

41 It is important, however, not to lose sight of the fact that the question before me is not whether public confidence in the administration of justice would be undermined if G. or Carrington - the two adults who devised the plan to ambush and kill Wayne Lloyd and who actually carried it out - were to be released on bail, but whether the release of the applicant would have the same effect. There are obvious distinctions to be drawn between their situation and his. First of all, they were both 29 years of age; the applicant was 15. From the outset, they (G. and Carrington) were the ones directing the plan to exact vengeance. They were the ones who armed themselves with loaded handguns, who lay in wait to ambush the victims, and who fired the multiple gunshots that took Wayne Lloyd's life. The Crown's case against the applicant is that he knew what the plan was, that he accompanied the perpetrators when they went to get their handguns, that he assisted them in carrying out the plan by scouting out where the victims were, that he waited to watch as the murder was committed, and that he assisted in disposing of evidence after the fact. As I indicated earlier, however, the allegations provide no basis for an inference that the applicant made a single decision that advanced G.'s and Carrington's murderous intentions. That is not to say that the allegations against the applicant are not serious, but it cannot reasonably be suggested that the circumstances of his involvement are on a par with those pertaining to G. and Carrington.

(d) "the potential for a lengthy term of imprisonment"

42 Manslaughter is a "presumptive offence" within the meaning of that term as set out in s. 2(1)(a) of the *YCJA*. If found guilty, the applicant may be subject to either an "adult sentence" or a "youth sentence". For an adult, the maximum sentence that might be imposed is life imprisonment. The maximum length of a youth sentence for the offence of manslaughter is three years.

43 If the applicant were found guilty of manslaughter, the interaction of a number of provisions of the *YCJA* would, on their face, require that he receive an adult sentence unless he discharged the onus of establishing that a youth sentence would be sufficient to hold him accountable. In *R. v. D.B.*, [2006] O.J. No. 1112, the Ontario Court of Appeal held

those provisions to be unconstitutional insofar as they placed the onus on the young person. Accordingly, if the applicant is found guilty, he will receive a youth sentence unless the Crown establishes that an adult sentence is required.

44 I accept that if the applicant is found guilty of manslaughter, a custodial term is very likely to be imposed whether he is sentenced as a youth or an adult. However, on the basis of the record before me, it is not possible to gauge the probability of the Crown meeting its onus in seeking an adult sentence, and thus it is not possible to say whether it is likely or unlikely that the applicant is facing a lengthy term of imprisonment.

(e) other relevant considerations

45 The charges against the applicant are not apt to come to trial for some time. As of the date on which this application was heard, disclosure had not yet been provided to the defence. Constable Colton explained the delay as arising, at least in part, from the fact that over 130 videotaped interviews had to be copied for four separate accused. I mention that merely to indicate that it is likely that this matter will not be tried for many months, particularly if it proceeds first by way of a preliminary inquiry. The fact that the applicant's detention prior to trial may be prolonged is a relevant consideration in relation to the tertiary ground: see *e.g.* *R. v. A.B.*, [2006] O.J. No. 394 (Ont. S.C.J.), at paragraphs 19(e), (g) and (h).

(f) conclusions re tertiary ground.

46 The burden is on the applicant to establish that his detention is not necessary to maintain confidence in the administration of justice. Put another way, he is required to establish that a reasonable member of the community would not regard his detention as necessary for that purpose. In *R. v. Hall*, *supra*, Chief Justice McLachlin described a "reasonable person", for the purposes of this test, as a person "properly informed about the philosophy of the legislative provisions, *Charter* values and the actual circumstances of the case".

47 When determining whether detention is necessary to maintain confidence in the administration of justice, a reasonable person "properly informed about ... *Charter* values" would take into account the fact that the right not to be denied bail without just cause is a fundamental constitutional value. That person would also take into account that "it is a principle of fundamental justice that young offenders should be dealt with separately and not as adults ... [and that] the system of criminal justice for young persons must be premised on treating them separately, and not as adults, because they are not yet adults": *R. v. D.B.*, *supra*, per Goudge J.A. at paragraph 55. A reasonable person "properly informed about ... the actual circumstances of the case" would take into account the matters set forth earlier in these reasons, at paragraph 41, which demonstrate that, in relative terms, the applicant played a limited role in Wayne Lloyd's death, and that those directly responsible for conceiving the plan to kill Wayne Lloyd and for carrying that plan to completion were mature adults, almost twice the age of the applicant.

48 In *Hall*, the Chief Justice observed that circumstances in which bail will be denied on this ground "may not arise frequently".² A number of subsequent judgments of the Ontario Superior Court have translated that observation into a caution that the tertiary ground for detention is to be resorted to sparingly: see, *e.g.*, *R. v. A.B.*, *supra*, per Ducharme J. at paragraph 20; *R. v. Qaiser*, [2003] O.J. No. 3668, per Durno J. at paragraph 29; *R. v. Thomson* (2004) 21 C.R. (6th) 209, per Corbett J. at paragraph 35. Indeed, in the latter case Corbett J. concluded that "The majority in *Hall* bases its decision on the rare case where there is a brutal and apparently inexplicable crime, the Crown has an overwhelming case, and there is a demonstrable and understandable public response."

49 The circumstances surrounding Wayne Lloyd's death are deeply disturbing. However, it cannot be said, as sometimes happens when the tertiary ground is invoked, that there is an overwhelming case against the applicant. In the end I am satisfied that a reasonable member of the community -- properly informed as to the matters set out above in paragraphs 41 and 47 -- would not consider that this was one of those infrequent cases in which public confidence in the administration of justice demanded pre-trial detention, particularly when there is the available alternative of imposing significant restrictions on the applicant's liberty in a bail order.

D. Disposition

50 I am satisfied that the applicant has shown cause why his detention pending trial is not justified on any of the grounds set forth in s. 515(10) of the *Criminal Code*. I will hear from counsel in relation to the conditions of release.

cp/qi/e/qw/qlbxm/qlpwb/qljxl

1 At paragraph 41.

2 At paragraph 31.