

Ontario Superior Court of Justice

R.J. Nightingale J.

Heard: May 10, 15 and 27, 2013.

Judgment: May 27, 2013.

Court File No.: CR 13-4039

[2013] O.J. No. 6683 | 2013 ONSC 3141

Between Her Majesty the Queen, Respondent, and Steven Corbett, Applicant

(95 paras.)

Counsel

V. Reid, for the Respondent.

J.H. Goldlist, for the Applicant.

RULING

R.J. NIGHTINGALE J.

1 This is an application pursuant to section 522 of the *Criminal Code* by Steven Corbett for an order granting judicial interim release to him. He is charged with second-degree murder of Shaun McCann.

Nature of the Allegations

2 Steven Corbett, 25, and Shaun McCann had known each other since their teen years until the date of this incident. He was the listed tenant at 51 Blake Street apartment 102, Hamilton, since October 2012. In November, 2012 Shaun McCann moved into that apartment as his roommate.

3 That relationship soon deteriorated and during the last week of November, 2012 Steven Corbett contacted Daniel Hill, his landlord, to advise that he was kicking McCann out of the apartment because he was not pulling his weight.

4 In addition, a statement from Brianna Timmons confirmed that she understood that Mr. McCann had misled Steven Corbett as to their relationship and that Mr. Corbett got upset six days prior to Mr. McCann's death on December 6, 2012. On that night of December 2, 2012 McCann came to stay with her and brought some of his things leaving others at the Blake Street apartment including his television and other personal items.

5 Her statement also confirmed that McCann was angry at Corbett's attempt to get his keys back from McCann.

6 The statement of Trisha Geroux confirmed that she received a text message from Corbett in the early morning of December 3 requesting that she tell McCann to retrieve his items when she saw him, that things between himself

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and him were not working out because Corbett was not going to be the only person paying rent. Corbett told her that McCann's TV was not going until McCann paid what he owed him.

7 Geroux told McCann on December 6 that Corbett wanted his keys back but that he was not going to give McCann back his television. She then overheard a telephone conversation between McCann to Corbett and when he hung up the phone he left the apartment saying "you are not getting my TV back. I will be there soon". Geroux then received a telephone call from Corbett who she says said "my daughter is sleeping here. If he comes here, I swear to God I will kill him." She states that when McCann left her residence he had nothing with him but described him as an angry person with a lot of hatred.

8 The evidence of the investigating police officer was that it would take approximately 16 minutes for someone to walk the distance from there to the Corbett residence.

9 Dan Hill, the property manager at 51 Blake St., statement is that Corbett came to his apartment between 2:30 and 3:00 p.m. on December 6 and told him that his ex-roommate McCann was coming over to get a TV. Corbett then told him not to let him in because McCann owed him a couple of hundred dollars. Approximately 15 minutes after Corbett had left his apartment he observed an ambulance and police pull up and saw a male person on the roadway.

10 At approximately 3:00 p.m. McCann attended at 51 Blake Street apartment 102. While there, several independent witnesses walking by on the street in front of 51 Blake and observed McCann involved in an altercation with the male person on the balcony of apartment 102. Several witnesses reported that a blonde female was also present holding a young child in her arms.

11 Georgann Simmons noticed yelling and screaming going on between the two men. She saw one come out with a big screen TV, walk down the stairs of the apartment and turn around. She saw the other male at the top of the stairs hit the first man in the back of the head who responded "what did you f'ing do that for?" The guy with the TV put it down and went back up and there was a further argument and scuffle in the corner. She saw that both men had been right at the door to the apartment then came down the steps to the walkway. The man without the TV stated "you cannot live here for free". Ms. Simmons' statement was that a third man was present of medium height, 250 to 300 pounds wearing dark clothing about 40 years of age but she did not suggest that this other person was actively involved in the altercation other than being physically present.

12 At this point she did not believe that the man at the bottom of the stairs was injured and she left as she didn't want to get involved.

13 Another eyewitness Sherry Patriquin walking down the street heard two men arguing very loudly. She saw a male trying to walk into the house who wasn't being aggressive and the other taller man telling him no. She saw the taller man give the other a push whereupon the other man came up and did the same thing back to him at which point the taller man shoved him who then shoved the other back. She said the taller man then either hit the other or shoved him back down and that's when he went down. This last contact was described as a hit or shove in the area of the neck or face and she saw blood thinking that he had received a punch to the nose. This man started to stagger away and fell into the road bleeding from his nose, mouth and neck. She saw an injury to the neck of this man. She had a clear view of the altercation at the top of the balcony. The police believe she saw the first half of the altercation.

14 Louise Brouillard was with Ms. Patriquin and she also saw the altercation. She heard two men yelling and arguing on the staircase. She believes that the man who was later injured tried to punch the other man at the top of the stairs and was trying to get into the house. The other man then pushed the first man down the stairs who then fell, got up, walked up the stairs and came back down and collapsed on the street. The man who did the pushing yelled "get the fuck out of my house". The female who was present holding a baby was heard to say "get in the house". The police believe she saw the second half of the altercation.

15 The witness Laura Freckleton walking down the street said she heard a ruckus at the end of the street. When she got closer she saw a man stagger out of the house in question, a woman standing in the doorway and a man pacing back and forth outside the house holding his head in his hands and saying "what the fuck did you do? What the fuck did you do?" This man was distraught and the woman told him to get back in the house or bring him back in the house. The injured man staggered down the street and fell in the middle of the road and she then realized how serious his injury was. The police suggested that Corbett was talking to himself when he said this because of what he had just done although no witness specifically said that.

16 The witness Ruth Case is a neighbour of 51 Blake Street. She heard loud noises and went outside to her front porch and saw a man staggering across the lawn, sidewalk and in the roadway. She saw a flat screen TV in the yard and another man walked out on the grass pacing back and forth saying "what have you done? What have you done?" The man who had been staggering was covered in blood and she saw a woman in the doorway of 51 Blake with the baby saying "get him the fuck off the street and get him back in the house". Nothing in her statement suggests that Corbett was injured in the altercation.

17 Wayne Luey's statement was that at 3:10 p.m. on December 6, 2012 he saw a young man go into the building at 51 Blake and within a matter of seconds there was a lot of yelling including sounds of furniture being thrown around. He saw a man come out of the building bleeding profusely and fall into the middle of the road but he can't say if it was the same man he saw go in at 3:10 p.m. The whole incident lasted approximately 2 minutes. He saw the male and female who he knew lived at 51 Blake leave and go north along Blake Street. He saw an older guy come out of the house and go back in but it was only the younger couple who left the house before the police arrived.

18 No witnesses suggest that this older male or the female was involved in any physical contact with Shaun McCann. The police investigator confirmed that no witness actually saw McCann get stabbed or anyone with the knife in his hand or that a knife was ever seen by them.

19 Mr. Hill is approximately 50 years of age and is 5'9" tall and heavysset. He denies being there on the balcony area but admits he was in the building at the time.

20 Shaun McCann was attended by a passing nurse. A 911 call was made at 3:12 p.m. about a male bleeding in the street. EMS arrived to transport McCann to hospital for medical care but en route he was pronounced dead at 3:29 p.m.. It was determined by a pathologist that he died as a result of a single stab wound to the right neck area when it severed the jugular vein and carotid artery

21 The evidence of the investigating officer was that blood droplets were found on the sidewalk northeast of where McCann was found on the street and there was a large area of bloodied grass and further blood droplets leading towards the stairs and on the stairs of 51 Blake, apartment 102. The landing at the top of the stairs also had blood on it and blood droplets were observed inside the apartment and on the doorway of the apartment that leads to the interior hallway of 51 Blake. There was no blood elsewhere in 51 Blake.

22 Ashley Schmidt, the mother of Stephen Corbett's child and Samantha Alderson the mother of Ashley Schmidt both confirmed that the child had been with Corbett during the day of December 6, 2012. Both Schmidt and Alderson initially gave false statements to the police that Ashley had received a telephone call from Corbett to pick up their child at a Tim Hortons store at Main and Prospect streets, that they drove there to do so seeing Corbett by himself and that Ashley then took the bus home.

23 Both Alderson and Schmidt gave statements later recanting their first statements. Subsequent statements provided by them on December 10 confirmed that Corbett showed up at the door of Alderson and just walked in asking where Ashley Schmidt was. When Ashley came to the residence they noticed that the child had her coat on but no shoes. Corbett stated that he "screwed up" and that Ashley kept asking what was going on but got no answer. She left to go next-door. Corbett stayed saying "I fucked up" and started crying but wouldn't say what

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happened staying for approximately 10 to 15 minutes. Alderson then left to go pick up the child's belongings at 51 Blake when she saw the police there.

24 On December 6, 2012 at 11:53 p.m. Corbett turned himself into police and was arrested for second-degree murder, given his rights to counsel and declined to make any statements. He declined to give the police the name of his roommate as the deceased had yet to be identified.

25 At the time of his arrest Corbett was wearing black running shoes with blood spattered on them. The forensic analysis confirmed that McCann could not be excluded as a contributor of the blood on that shoe.

26 After obtaining a search warrant, the police attended the apartment at 102-51 Blake Street and found documents addressed to Shaun McCann and Steve Corbett. They also found a large knife covered in blood in a cabinet under the sink in the bathroom. Forensic analysis confirmed that McCann could not be excluded as a contributor of the blood on the knife blade but that there was DNA from three sources on the handle with one source being a male.

27 The police also found a sheath for that knife located on a kitchen counter and a second diving knife and a sheath attached to the wall beside the front door of the apartment.

28 They also found crack cocaine and scales on the top of the refrigerator and a grinder with marijuana residue. They gathered information that Corbett's girlfriend Kathleen McKenna was involved in the drug trade fairly regularly and that the deceased McCann may have been enlisted to deliver those drugs by accused Corbett. They also found a drug debt list in the house with no evidence as to whom it belonged.

29 They found no evidence of Mr. McCann having a weapon.

30 After Corbett's arrest, on December 9 police obtained evidence from the Hamilton Wentworth Detention Centre that his sister Tricia Corbett signed in to visit him suggesting she was his wife. His girlfriend McKenna was also there but did not sign in to see Corbett. Ms. McKenna is now also charged with assisting Corbett for the purpose of enabling him to escape after his committing the murder. The officer indicated that after a brief meeting between Tricia Corbett and Kathleen McKenna, McKenna then spoke to Corbett. The suggestion is that this meeting by McKenna was planned by way of deception with Tricia Corbett and perhaps Stephen Corbett but there is no evidence before me to confirm that.

31 The police then obtained a letter from Margaret Thompson supposedly written by Ms. McKenna to Corbett although the names are not mentioned wherein she suggests that he not say anything about this to anyone.

32 Naeem Qureshi's statement was that he was a cab driver dispatched to pick up a fair at Dunsmuir and Fairholt the night of Dec 6, 2012. He met a male and female with a female child with them and he was familiar with them as he had picked them up before. He was told by the female to drive to Tim Hortons in one particular area and then told to go to another area. He was then redirected to Tim Hortons at Main and Wentworth and then to go to Jax bar as there was no bathroom at that Tim Hortons. At Jax bar he said the female told the male to go wash his hands and face. He came back at which point Mr. Qureshi said the man pulled his sleeves down and that there was blood on the man's left hand but was unsure if there was blood on his right hand. The female continued to receive calls on her cell phone. The female was angry and told the man he had to go to the police. The man responded that he loved her and told her that if he went to the police that he wouldn't see her or the daughter again. They then went to the Dunsmere Road address of Ashley Smith and Samantha Alderson.

Location of Stab Wounds

33 The evidence confirms that there was one stab wound to the right side of Mr. McCann's neck in the middle. Police investigation suggests that Mr. Corbett is right-handed. Photographs of the scene confirm significant blood on the right side of the porch and railing (if one was walking out the door and down the stairs) although there was

some minimal red marks on the left side. Apparently the evidence of a blood spatter expert suggests there is no void of blood spray and it was the officer's opinion that the knife wound was inflicted from behind by Mr. Corbett. A crescent shaped mark in the area of the stab wound is believed to be caused from the hilt of the knife. However, the forensic analysis of the origin of the knife thrust is still in question and not conclusive as to whether it was made from behind or in front of Mr. McCann.

34 The examination of Mr. McCann's body suggested abrasions in the area of his left eyebrow and nose but no marks on his right hand to suggest that he had used his hand in a fight. He had some blood in his fingernails of his left hand but no marks to suggest the use of that hand either in a fight.

35 Photographs of Mr. Corbett by the police confirm scratches and a small gouge on the left side of his eye, scrapings on his nose and some abrasions on his abdomen and red marks in his upper chest. There was an obvious C-shaped cut or abrasion on the side of his right thumb and a clear abrasion and skin missing and a small red mark on his ring finger of his left hand.

Additional Background and Circumstances of the Accused

36 Mr. Corbett has convictions for two counts of mischief under \$5000 and possession of break-in instruments in May 2008 when he was 20 resulting in a period of probation for one year.

37 The Crown points to his young offender's record as being significant on this application. In October 2001 when he was 14 years old, he was convicted of break, enter and theft, failing to comply with a disposition (2 counts), failing to comply with an undertaking (4 counts), and assault resulting in what appears to be a total of 120 days open custody and a period of probation.

38 In June 2004, when he was 16 he was convicted of flight while pursued by a peace officer, possession of property obtained by crime under \$5000 and failing to comply with a disposition resulting in a custodial period of a total of 40 days plus 18 months probation.

39 The Crown had the investigating officer provide the details of two alleged prior incidents involving the accused in 2006 and 2007. The first involved an allegation at a local high school and a complainant who alleged that after an incident when he admitted to picking a fight with Corbett, Corbett returned to try and intimidate him into fighting and while walking by him in the school showed him a 15 cm knife that he displayed but he didn't make any gestures with it or say anything to the complainant about using it.

40 The police interviewed Corbett who confirmed the complainant indeed attempted to fight him by shoving him and swearing at him but he denied that he either carried a knife on him or had shown the complainant a knife. At no time was a knife or any other weapon ever recovered, and Corbett agreed to cease contact with the complaint. The complainant was fine with that and did not wish to pursue charges and none were.

41 The 2007 incident involving the mother of a boy calling the police after she heard some details from her daughter's boyfriend that her son had told him of Corbett allegedly pulling out a handgun after dragging him into his apartment, pointing it at his head telling him he would shoot him if he told anybody about a break and enter allegation against Corbett. The son would not tell the mother any details and did not want her or the police to do anything about the incident and the mother could not provide many details regarding it. The son would not divulge any details regarding the incident. It appears that no charges were laid with respect to that incident.

42 Counsel for Mr. Corbett objected to the admissibility of this evidence on the basis that it was neither relevant nor credible or trustworthy evidence. The Crown took the position that it was both admissible and relevant with respect to the secondary ground for considering the judicial interim release of Mr. Corbett as it is character evidence indicating a propensity for violence and accordingly, he should not be allowed to return to the community pending trial.

43 Hearsay evidence at a bail hearing is admissible under s. 518 (1) (e) which provides that a justice may receive and base his decision on evidence considered credible or trustworthy by him in the circumstances of each case. The court may consider how much weight should be given to this evidence by evaluating the circumstances in which it was obtained and the reliability of the sources.

44 Mme. Justice Himel in *R. v. Krasniqi* [2008] O.J. No. 5815 held that the circumstances involving the accused entering into a recognizance where the recognizance had expired prior to the charge before the court could not be considered at his bail hearing as they constituted mere allegations of charges never proven. Charges were withdrawn and Krasniqi made no admission of guilt and there had been no finding of wrongdoing. He was entitled to the presumption of innocence regarding those criminal charges

45 Aston J. in *R. v. Boroumand* [2011] O.J. No. 6431, following *Krasniqi*, confirmed that evidence of a large quantity of drugs seized in the accused's car incidental to his arrest was not admissible on his bail hearing as he was not even charged with an offence involving those drugs. The accused was entitled to the presumption of innocence and the prejudicial effect admitting that evidence was significant. In any event, Aston J. found that no significant weight should be afforded that evidence.

46 Although evidence of the accused's propensity for violence may be relevant to the issue of the court's requirement to make a prediction about the accused's future conduct, and hearsay evidence may be admissible under section 518 (1)(e) if it is credible or trustworthy, I agree with Aston J. and Himel J. that in the circumstances of this case, given the presumption of innocence of the accused, that no finding of wrongdoing was ever made, no admission of guilt was made by the accused and in fact was denied by him with respect to the 2006 incident and that the 2007 incident does not include any evidence from the actual alleged complainant, this evidence should not be allowed. However, even if the evidence was admissible, given all the circumstances of that evidence as indicated above, I would have attached no significant weight to it.

The Law

47 In a case involving second-degree murder, an accused must be detained in custody unless he establishes on a balance of probabilities that his detention is not justified within the meaning of s. 515 (10). That section confirms that the detention is justified only on one or more of the primary, secondary and tertiary grounds.

48 The primary ground for detention requires that the detention is necessary to ensure his or her attendance in court in order to be dealt with according to law.

49 The secondary ground for detention requires that it is necessary for the protection or safety of the public, including any victim of or witness to the offence, 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.

50 The tertiary ground states that the detention is justified if the detention is necessary to maintain confidence in the administration of justice, having regard to all of the circumstances, including (i) the apparent strength of the prosecution's case, (ii) the gravity of the offence, (iii) the circumstances surrounding the commission of the offence, including whether a firearm was used, and (iv) the fact that the accused is liable on conviction for a potentially lengthy term of imprisonment.

Positions of the Parties

51 The Crown concedes that Mr. Corbett's detention is not required on the primary ground as the issue of the accused's release on that ground can be addressed by the appropriate imposition of bail conditions. The Crown states that Corbett's continued detention is required under the secondary and tertiary grounds.

52 Defence counsel submits that the evidence establishes that Mr. Corbett should be released on bail as he has met the onus required of him under the secondary and tertiary grounds and upon release he would be bound by strict terms of bail.

Secondary Ground

53 Defence counsel referred to the accused as having no conviction as an adult for a crime of violence, a young offender's assault conviction when he was 16 but the balance of his young offender record being for property related offences and failures to comply with his undertaking and disposition.

54 In his affidavit, Corbett initially stated that he did not have an adult criminal record and disclosed the general nature of his youth record stating in his cross-examination that he did have an adult record but had forgotten to add it in his affidavit and he didn't recall it when he swore the affidavit.

55 He readily admitted his young offender's record suggesting those offences occurred when he was wild and a troubled child growing up without parents because the death of his mother and the criminal background of his father. He stated that he has been working full time as a roofer since he was 14 years old most recently working for one roofing supply business from 2009 until November 2012 just shortly before this incident. His evidence was that his life has changed significantly in that he now has three-year-old daughter who is "my life.". Although that daughter was present during the incident, a letter from the Children's Aid Society of Hamilton which conducted an investigation confirmed the evidence of Ashley Schmidt that when he brought the child home that night, the mother did not notice any change in her behaviour that would suggest she had been exposed to something that impacted her emotional well-being. The mother reported that the daughter asked to visit the accused regularly and had not displayed any fear. The mother never had any child protection concerns and reported that the accused and his daughter were very close. The CAS file was closed as there was no evidence to suggest the child was at risk of harm.

56 Defence counsel refers to the leading decision of *R. v. Morales* [1992] S.C.J. No. 98 wherein the court confirmed that 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." Lamer C.J at page 17.

57 Defence counsel conceded that it appeared that the Crown had a strong case for second-degree murder from the circumstantial evidence provided but subject to the issues of identity and the intent of the accused and the issue of self-defence. Indeed, the case for manslaughter is certainly strong.

58 The accused's proposal is that his release from custody to reside with and be under the supervision of his uncle Calvin Corbett and his grandmother Patricia Corbett with the potential of his being able to work as a roofer in the daytime with other conditions of bail would provide the reasonable management of any risks involved under the secondary ground.

Calvin Corbett-Proposed Surety

59 Calvin Corbett is 42 years old, a Canadian citizen living in his house that he owns at 1250 Dunsmere Road Hamilton with his mother Patricia Corbett since 2004. He has been gainfully employed since graduating from college as an auto mechanic and currently works in Burlington Monday to Friday leaving the house at 7:30 a.m. and returning it approximately 5:30 p.m.

60 He admits having a criminal record for assault against his spouse at a wedding when alcohol consumption was involved in 2005 but has no outstanding charges. He proposed that if Steven was released from custody, he would

reside with him and his mother would supervise him during the day when he was at work and with Calvin to supervise him in the evenings and that together they could watch Steven Corbett on weekends. He would be able to check in during the day if his mother needed to go out when he was at work. He had approximately \$22,000 of equity in his house and savings/investments of \$7000 which was the extent of his net worth which had taken him his entire life to accumulate. He was prepared to pledge \$25,000 as surety for Steven Corbett's release knowing that if he were to lose it because of his breach of his bail conditions, the impact on Calvin would be substantial and he would not allow that to happen. He had been a surety for Steven in the past when he was an adult and confirmed that Steven always followed the conditions set by the court. He stated that he knew Steven would follow the conditions of the court release as well as the rules of his house and if he didn't abide by either, he would immediately report him to the police and there would be no second chances for him.

61 He was aware that Steven had a job opportunity as a roofer available to him with Frank Mitchell. He proposed to call the employer during the day on his cell phone so that he could then ensure that Steven Corbett was compliant with his bail conditions. Unfortunately, he has not spoken to the employer to Mitchell and doesn't know him.

62 Calvin Corbett knows Ashley Schmidt and heard the evidence in court on the initial conversation between Ashley and Steven Corbett the evening of the incident before he turned himself into the police. In order to ensure compliance with a court order having no association or contact directly with any of the witnesses in this case including Ashley Schmidt, he said he would ensure that no witnesses would be allowed call his house and he would screen the calls and he would check any cell phone records of Steven regularly. He said that if provided with a list of the witnesses to whom no contact was to be made, he would try to ensure Steven had no contact with them to the best of his ability.

63 I am satisfied that Calvin Corbett is sincere in what he states he will do to properly supervise Steven Corbett if released and that given his experience as a surety for him in the past and the serious financial consequences to him personally if he doesn't fulfill his surety obligations to the court, he will be able to do so.

Patricia Corbett-Proposed Surety

64 In addition, defence counsel submitted that Patricia Corbett, the 73-year-old grandmother of the Steven would also be his surety. She has no criminal record or outstanding charges and had acted as a surety in the past for Steven when he was a youth. She presently lives with Calvin Corbett in his house and her only source of income is her old-age pension of approximately \$1200 per month with no savings or investments. She was willing to pledge \$1000 for Steven's release which she admitted did not seem like a lot of money but it was more than she could afford to lose. In addition, she understood that her son Calvin was willing to pledge \$25,000 for Steven's release which was almost his entire life savings and she would not allow Steven to do anything to jeopardize her son Calvin.

65 She pointed out that in the past when she was surety for Steven, he was a young teenager and he did breach his bail and she did call the police "without hesitation" and was prepared to do it again if he failed to abide by the conditions of the court of the rules of the house. She confirmed that she believed he would follow his conditions this time as he was no longer a youth and is more responsible today than he was back then.

66 She is able to supervise Steven during the day when her son Calvin was at work. She was adamant that she knew she must and will call the police if he is released to reside in their home and he did not abide by the court conditions imposed. That included calling the police if he left the home without her knowing and that he would not be given a second chance because of the risk of Calvin losing his home. She was prepared as Calvin was to be the surety even though this case would not proceed to trial until 2014.

67 On cross-examination by the Crown Attorney regarding an incident of March 29, 2001 when he was 14, she admitted that Steven did not return home for his 9:30 p.m. curfew then imposed by the court and that she didn't call the police until approximately 4 hours later as he had told her earlier that he was on his way home. In another incident of June 10, 2001 when he violated his curfew, she found him at his friend's house but didn't immediately

call the police but did so when she found out he had left again. I find that her actions, although not perfect then, were not unreasonable and am satisfied that she is fully aware of her obligation, given the gravity of this offence, to immediately contact the police if Steven violates any proposed conditions of bail. I accept her evidence that although it would be emotionally difficult for her to turn him in, if she had to she would do it. Her doing so in the past when she was a surety and her desire to avoid any risk of Calvin Corbett losing his life savings and house where they reside confirms that.

68 She admitted she didn't know who Steven Corbett's proposed employer was and said that she would get his phone number. She was concerned that the employer was not prepared to be responsible for Steven but that she trusted him if he was allowed to work during the daylight hours.

Proposed Employer-Frank Mitchell

69 Defence counsel filed a confirming letter from Frank Mitchell of Mitchell Contracting who stated that he had known and worked with Steven Corbett in the past described them as a reliable hard worker. He was prepared to hire Steven as a roofer on his crew working under him when he is released. He understood he may have "conditions" (i.e. of bail) and he was willing to have him work within them.

70 The investigating police officer spoke to Mr. Mitchell by telephone shortly before this hearing on May 7. Mr. Mitchell apparently said he was prepared to employ Steven but not act as a surety and that he would not be responsible for him while at work. He stated to the officer that if he knew that Steven breached his bail conditions that he should call police. He again stated that he would give him a job but would not look after him.

71 The Crown suggests that Corbett's history of breaching court orders as a young offender and there being some evidence of at least his assisting his girlfriend McKenna in her drug dealing means he will commit further offences upon release pending trial.

72 The issue is in the circumstances of this case, can the sureties adequately supervise him such that there would be no basis to conclude that there is a substantial likelihood he would reoffend if released or that his detention was necessary for the protection and safety of the public given the proposed plan of supervision? If the sureties are unable to provide the measure of supervision over the accused's daily activities, that would be different.

73 I am satisfied that the proposed sureties are honest people who are prepared to and can provide the required constant supervision over Steven Corbett if released and that if he violates his strict terms of release, including his requirement to be of good behaviour and not have any contact or communication with McKenna, they will immediately notify the police so as not to risk Calvin Corbett's life savings and home.

74 Although the charge is very serious, there is no significant evidence of planning the commission of the act on the part of Corbett. His alleged crime is not unexplainable in the circumstances that would be more worrisome for society if he was released.

75 Although there is always the possibility of Corbett committing further offences upon release, in my view he has demonstrated a lack of any substantial likelihood of reoffending if released and strict terms and conditions of bail are imposed.

Interference with Administration of Justice

76 The Crown also suggests that Corbett's interfering with the evidence of witnesses Ashley Schmidt and Samantha Alderson immediately after the crime by getting them to say they picked up the child from him at a Tim Hortons store was an attempt to fabricate an alibi defence and he should be denied bail for that reason citing Durno J. in *R. v. Kaiser* [\[2003\] O.J. No. 3668](#). The Crown concedes that there is no evidence of any attempt by the accused to interfere with the evidence of the approximately 30 other Crown witnesses listed in the material.

77 On closer examination of the actual evidence before me, Samantha Alderson's second statement of December 10 states only that Mr. Corbett attended that Thursday, December 6 afternoon with Lily, indicated that he screwed up and started crying but wouldn't say what happened. Her evidence was that regarding the Tim Hortons information, it was his idea but that he said that if anyone goes to the house to tell them "I am at the Tim Hortons".

78 Ashley Schmidt confirmed that Steven Corbett showed up at her house that afternoon at approximately 4 p.m. indicated that something happened but wouldn't tell her what. Nothing else was mentioned from that statement to this Court.

79 That evidence could be construed simply to the effect that the Corbett was going to be at a Tim Hortons if anyone asked. These statements are both vague and lacking in detail and in particular, Alderson's statement does not state that he was asking them to change their potential evidence about his past whereabouts unlike the clear and planned conversation the accused in *R. v. Qaiser*, supra set up in a wiretapped telephone conversation with an unknown male. The evidence here suggests Corbett was distraught when he first arrived there within an hour of the crime. In my view, similar to the evidence in *R. v. Heyden* [2009 ONCA 494](#), this evidence is not strong enough to warrant a conclusion that there is a substantial likelihood that Steven Corbett would interfere with the administration of justice if released from custody especially if strict terms of bail are imposed preventing any communication with Crown witnesses.

80 Accordingly I am satisfied that the Corbett has met the onus on him proving that his continued detention pending trial based on a secondary ground is not justified.

Tertiary Ground

81 The Supreme Court of Canada in *R. v. Hall* [\[2002\] 3 S.C.R. 309](#) held that this ground will only apply in relatively rare cases and is to be used sparingly. The court further found that the judge hearing the bail application must be satisfied that Mr. Corbett's detention is not only advisable but necessary to maintain confidence in the administration of justice.

82 The gravity of the charge of second-degree murder in itself and the potential for a lengthy penitentiary sentence including on a manslaughter conviction in this case are a given and accordingly should be assessed, which I do, at a high level of significance.

83 The Crown asserts that it has a strong case for second-degree murder and at least manslaughter and the defence does not dispute that based on the circumstantial evidence. However, the defence raises issues of identity of the accused, and his intent and potential self-defence.

84 The Crown did not suggest its case for second-degree murder was overwhelming or formidable and I agree that it is not. However, it appears that its case for second-degree murder or at least manslaughter may be reasonably strong. The limiting issue at trial may be whether and to what extent the deceased may have initiated the physical confrontation with the accused which is at least suggested by one of the witnesses and whether there was any justification whatsoever for the use of a knife in response. This is a factor, although not the determining factor, that I consider in this case because of the presumption of innocence Mr. Corbett has under our law.

85 With respect to the circumstances surrounding the commission of the offence, the facts, in addition to the previous paragraph, confirm a single blow with the knife in the neck of the victim during a heated argument and pushing and shoving match with tragic consequences resulting in the victim's death. Although the courts have not limited the application of the tertiary ground as a matter of principle to only murder charges generally and further, to only the most heinous and vicious of murder charges with overwhelming evidence against the accused, (*R. v. B.S.* [\(2007\) 49 C.R. \(6th\) 397](#) (O.C.A.): *R. v. Stevenson* [\[2007\] O.J. No. 1955](#)), there is no evidence in this case of stalking, ambushing, homicide involving a domestic dispute between spouses, motive to dispose of a potential

witness to a crime, gang-related crimes or circumstances involving an ongoing pattern of openly violent behaviour as contemplated in *R. v. B.S.*, supra.

86 Cronk J.A. in *R. v. LaFramboise* [2005] O.J. No. 5785 confirmed that a detention order under section 515(10)(c) requires a showing of "something more" than the fact that the charge is grave, potential punishment may be lengthy and the Crown has a strong case in the context of the circumstances surrounding the commission of the offence.

87 In my view, the circumstances surrounding the commission of the offence in this case are not at the highest level compared to egregious facts in other decisions of the court involving callous murders or conspiracy to murder and other cases that were noted by Himel J. in *R. v. Mcfarlane* [2012] O.J. No. 3549, resulting in that element of "something more" to justify continued detention being missing.

88 Given these factors, the issue before me is whether the accused's presence in the community will undermine the public's confidence in the administration of justice. McLachlin, C.J.C. in *R. v. Hall* [2002] 3 S.C.R. 309 confirmed that 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 the denial of bail is necessary to maintain confidence in the administration of justice.

89 The appropriate consideration is that of a reasonable member of the community informed of the circumstances, Charter values and of the appropriate legal principles relevant to bail provisions of the *Criminal Code*: *R. v. Mordue* (2006) 223 C.C.C. (3d) 407.

90 Glithero, J. in *R. v. Stevenson* [1998] O.J. No. 4390 concluded that a reasonable fair-minded and informed individual of the public would remain confident in the administration of justice if a person were released on bail, even on a serious charge, and even in the face of what appears at the initial stages to be a strong Crown case, as long as it is likely that the accused will attend for trial, would not commit further offences, and would not otherwise interfere with the administration of justice. If those current concerns were satisfied, then the granting of bail does nothing more than delay incarceration if in fact the Crown's case is as strong as it is billed. To deny bail in circumstances of an allegedly strong case in order to maintain public confidence runs the risk of invoking the end result prior to the proper unfolding of the due process.

91 Similarly, I am not persuaded that that informed member of the public, given an understanding of the presumption of innocence and legal principles of bail would find that the detention of the accused in this case is necessary especially when taking into account that sufficiently onerous bail conditions that can be instituted to substitute for continued detention, which in my view they can.

92 Accordingly, I find that Corbett has satisfied this court on a balance of probabilities that his continued detention is not justified under the tertiary ground.

Terms of Release

93 Defence counsel has suggested initially if Mr. Corbett was released, he should be allowed to return to work as a roofer in the daytime with Frank Mitchell. Even though the sureties Calvin Corbett and Patricia Corbett would be content with that, this court is not satisfied at this stage that if Mr. Corbett was released he should be allowed participate in that kind of employment when neither of the proposed sureties had checked with the employer to determine whether they were satisfied that Mr. Corbett would be properly supervised so as not to violate any of the terms of his bail conditions and if so, that they would be notified forthwith.

94 Mr. Mitchell, understandably so, is not prepared to act as a surety but is only prepared to give Corbett employment. Unless and until this Court can be satisfied that:

- a) the actual work of Mr. Corbett keeps him within the Hamilton area,
- b) the sureties know in advance exactly where he is to be working each day

and

- c) the appropriate supervision of Corbett can be made at all times by someone who the sureties can establish to this court's satisfaction is prepared to and will in fact notify them immediately during the workday if he has reason to believe he violated his bail conditions,

the release plan must essentially amount to virtual house arrest at the residence of his uncle Calvin Colbert and that he not be permitted to leave that house except in certain restricted circumstances.

95 For all of these reasons, I order that Corbett can be released upon his entering into a recognizance with the following sureties and conditions as set forth in Schedule A, the terms of which have been revised upon hearing submissions from the Crown and defence counsel after their review of my endorsement ruling herein provided earlier to them today.

R.J. NIGHTINGALE J.

* * * * *

Schedule A

1. The sureties and their respective penal sums without deposit will be as follows:
 - a. Calvin Corbett 1250 Dunsmere Road, Hamilton, Ontario --- \$25,000
 - b. Patricia Corbett 1250 Dunsmere Road, Hamilton, Ontario --- \$1,000
2. The accused will abide by the following conditions:
 - a. Keep the Peace and Be of Good Behaviour
 - b. Be under house arrest and reside at 1250 Dunsmere Road, Hamilton with Patricia Corbett and Calvin Corbett and abide by the rules, condition and discipline of that household as set forth by either of them and do not move from or change that address without the prior approval of the court;
 - c. Be in your place of residence at all times except for attending for medical or dental purposes, meeting with counsel, attending in court or the Hamilton Central Police Station as required herein and travelling directly to and from those attendances. Mr. Corbett must be in the company of a surety at any time that his is not in his residence at 1250 Dunsmere Road, Hamilton;
 - d. Observe an absolute curfew of 11pm to 7 am except for medical emergencies;
 - e. Present yourself at the door within five minutes in the event any police officers attend at the residence to inquire about his whereabouts;
 - f. Not to possess or consume any non-medically prescribed drugs;
 - g. Remain in the province of Ontario at all times and within the City of Hamilton;
 - h. Surrender any passport or travel documents immediately to the clerk of the court and do not possess or apply for any passport or travel document;
 - i. Not to possess or purchase an airline ticket or any other ticket for public conveyance for travel outside of Ontario;
 - j. Not to associate or have any communication or contact, directly or indirectly, with:
 - i. Kathleen McKenna
 - ii. David (Dave) Alderson
 - iii. Samantha Alderson
 - iv. Jason Bakhuis
 - v. Lakhwinder Brar

- vi. Louise Brouillard
- vii. Ruth Case
- viii. Tisha Corbett
- ix. Jason Fitzsimons
- x. Laura Freckleton
- xi. Trisha Geroux
- xii. Allison Higginbottom
- xiii. Daniel Hill
- xiv. Chantal Huszar
- xv. Wayne Luey
- xvi. Neil MacDonald
- xvii. Michael Mapes
- xviii. Sherri Patriquin
- xix. Marie Pierre
- xx. Naeem Qureshi
- xxi. Ashley Schmidt
- xxii. Georgann Simmons
- xxiii. Hugh Thompson
- xxiv. Margaret Thompson
- xxv. Brianne Timmons
- xxvi. Charlotte Vander Hoek
- xxvii. Jason Wedekind
- xxviii. Caylie White

xxix. Or any member of the family of Shaun McCann, including but not limited to: Lisa McCann; Jessie Lee McCann and Angel McCann

Exceptions:

- a) Except through legal counsel;
- b) In the case of Ashley Schmidt, except through a mutually agreed third party for the sole purpose of arranging access, visitation and support of your child Lily Schmidt;
- c) In the case of Ashley Schmidt, except as incidental or necessary to any family court proceedings, Children's Aid Society proceedings while in the immediate presence of counsel or a Children's Aid Society worker (or CAS designate);
- d) In the case of exceptions b) and c) above, you shall not communicate in any fashion about the matters before the criminal court.
- e) In the case of Tisha Corbett, except in the presence of one of your sureties. While in communication with Tisha Corbett, you shall not discuss the matter before this criminal court, nor shall you discuss Kathleen McKenna;
- k) not to possess any firearm, crossbow, prohibited weapon, restricted weapon, prohibited device, ammunition or explosive substance or knife except one designed for dining purposes and only during

that time and surrender to a peace officer, firearms officer, or a chief firearms officer any such items currently in your possession together with every authorized nation, license or registration certificate relating thereto held by you;

- l) Not to associate with anyone deemed by either of your sureties to be an unfit companion or with any person known to have a criminal record except immediate family members;
- m) Report forthwith upon release to the officer in charge or his designated at the Central Police Station, 155 King William Street Hamilton and thereafter on every Monday between the hours of 9 am and 4 pm;
- n) Not to possess or use a cellular telephone without the prior express consent of Calvin Corbett or Patricia Corbett. Such use shall only be permitted in the direct presence of Calvin Corbett or Patricia Corbett;
- o) Within 24 hours of your release, delist/unfriend/ delete/block any of the individuals listed in the attached document entitled "Schedule B" and any member of the McCann family from any social media page to which you have access or subscribe, including but not limited to Facebook, Linked In or any other information sharing page created/used by yourself. If you are unable to block/ delete/eliminate them from your updates/messaging then you shall immediately unsubscribe/close/delete your own access to that social media website;
- p) Do not attend within 50 meters of the workplace, place of worship, place of recreation or residence of any persons listed in condition j if known to you, or within 10 meters of their person except for the purposes of attending at any medical facility for medical treatment;
- q) Do not attend within 50 meters of 51 Blake Street, Hamilton, Ontario

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