

 [R. v. Youkhana](#)

Ontario Judgments

Ontario Court of Justice

Toronto, Ontario

S. Nestico J.P.

Heard: January 9, 2020.

Oral judgment: January 17, 2020.

[2020] O.J. No. 165

Between Her Majesty the Queen, and Youkhana, Sargon

(39 paras.)

Case Summary

Criminal Law — Compelling appearance, detention and release — Judicial interim release or bail — Grounds for denial — Detention necessary to maintain confidence in the administration of justice — Application by accused for judicial interim release dismissed — 18-year-old accused fled from police and was apprehended — Accused was found in possession of loaded firearm, cocaine and drug paraphernalia — Accused was charged with drug and weapons offences — Evidence against accused was strong and suggestive of ongoing criminal behaviour — Properly informed, reasonable member of community would lose confidence in administration of justice if accused was released on bail — Criminal Code, s. 515(10).

Application by the accused for judicial interim release. The accused and an unknown male were stopped by police officers while walking. The accused fled. The officers gave chase and the accused was apprehended. He was found in possession of a loaded firearm, cocaine and drug paraphernalia. He was charged with possession of crack cocaine, possession of cocaine for the purpose of trafficking, possession of the proceeds of crime, and various weapons charges related to the firearm. The accused was 18 years old and lived with his parents and siblings. He had no criminal record.

HELD: Application dismissed.

Based on the totality of the available evidence and the physical seizure of illicit drugs and a firearm, the case against the accused was cogent, grounded in a very strong evidentiary foundation and objectively consistent with drug trafficking at a low level with a loaded firearm. The evidence was strong and suggestive of ongoing criminal behaviour. A dispassionate, properly informed, reasonable member of the community with knowledge and understanding of bail philosophy, legislative provisions and Charter values would lose confidence in the administration of justice if the accused was released on bail.

Statutes, Regulations and Rules Cited:

Canadian Charter of Rights and Freedoms, 1982,

Controlled Drugs and Substances Act, S.C. 1996, c. 19, s. 4(1), s. 5(2)

Criminal Code, [R.S.C. 1985, c. C-46, s. 86](#)(1), s. 88(1), s. 90(1), s. 92(1), s. 92(2), s. 95(1), s. 354(1), s. 515(10)

Counsel

Michael Coristine, for the Crown.

Antony Bugo, for the Accused.

JUDICIAL INTERIM RELEASE HEARING

REASONS FOR JUDGMENT

S. NESTICO J.P. (orally)

A. INTRODUCTION

1 These are my reasons for judgment in the special bail hearing for Mr. Sargon YOUKHANA which was heard on January 9th 2020.

2 At the outset, I'd like to compliment both Defense Counsel Bugo and Crown Counsel Corstine for the impressive manner in which they presented their respective positions. There were a number of thought provoking arguments raised by both parties and the pathway to my decision was not an easy one.

3 Mr. Sargon Youkhana is 18 years of age (born July 1 2001). He is a Canadian citizen, employed as a labor at a marble company and then as an apprentice plumber Sargon resides at 40 Panaroma Crt Suite 603 with his parents and siblings in North York.

There is no criminal record to speak of as none was afforded to the court

B. A SUMMARY OF THE CROWN'S CASE

4 On January 2nd 2020 at 9:38 PM Mr. S argon YOUKHANA was walking with an unknown male at 2533 Kipling Ave AKA St Andrew Catholic Elementary School. Members of the Toronto Police Service (Major Crime Unit 23Division) approached Mr. Sargon Youkhana and they identified themselves as Police Officers. You and the unkown male allegedly ran in opposite

directions. The police gave chase and after a brief chase you were apprehended and the following was found in your personal possession:

5 A Taurus Firearm with a loaded magazine of fifteen bullets/1.35g of coke/\$110/small baggies/infinity weigh scale/ 1 iPhone and 1 Blackberry phone

C. THE CURRENT CHARGES AGAINST THE ACCUSED

Information sworn on January 9, 2020 (City of Toronto):

Count #1 C.D.S.A. s 4(1) Possession of a schedule I substance -- Crack Cocaine

Count #2, C.D.S.A. s.5(2) Possession of a schedule I substance -Cocaine for the purpose of trafficking.

Count#3, C.C. s.354(1) Possession of property namely \$110 Canadian Currency derived directly from an offence punishable by indictment

Information sworn on January 9, 2020 (City of Toronto):

C.C. s.95(1) Possession of a loaded restricted firearm without being the holder of a license permitting such possession

C.C. s.92(2) Possession of a prohibited device which was not a replica firearm namely an over capacity magazine knowing its possession is not authorized.

C.C. s 90 (1) Carry Concealed Weapon not authorized under the Firearms Act

C.C. s.86(1) Carry Firearm in a careless manner without reasonable precautions

C.C. s.92(1) Possession of a prohibited firearm knowing its possession is not authorized

C.C. s.88(1) Carry a firearm for a purpose dangerous to the public

C.0 s. 88 (1) Carry a prohibited device namely a loaded overcapacity magazine for a purpose dangerous to the public.

D. REVERSE ONUS

[The Board did not assign paragraph number 6.]

7 Given the nature of the charges before the court, specifically the possession of Schedule I substance for the purpose of trafficking in conjunction with the firearm charges, the onus for bail is reversed on 2 elements against the accused.

8 To secure an order for judicial interim release you are required to show cause and satisfy the court on a balance of probabilities that your detention is not necessary. The Crown submits that the Court should order the detention of Mr. Sargon Youkhana on the secondary or public safety ground and tertiary or risk of loss in public confidence ground.

E. ASSESSMENT OF THE STRENGTH OF THE CROWN'S CASE

9 I am mindful that the bail hearing stage of a criminal prosecution represents a high water

mark for the Crown. A case may appear to be artificially strong and overwhelming as the evidence tendered has not been tried, tested and proven in court to withstand the rigors of a trial to be accepted as proof beyond a reasonable doubt. That said, an assessment of the Crown's case while not determinative of bail is required of a court of first instance including the weighting or persuasiveness of the evidence, the reasonable inferences which can be drawn and a reasonable forecast for how the case will unfold. The appraisal of the strength of the Crown's case is relevant to all three grounds for detention.

10 It is truly unfortunate that the findings of the forensic examination of the mobile communication devices as well as DNA and fingerprint analysis from the recovered firearms will not be available at this time. This evidence would permit me to make a more definitive pronouncement concerning the anticipated strengthening or weakening of the Crown's case. To be clear, it is the accused who determines the timing of a judicial interim release application and the accused has the right to schedule the hearing promptly to ensure that his/her right to liberty can be swiftly decided. While the defence suggests there is some question regarding the degree to which the knowledge and control over the specified prohibited items still has to be proven, I believe it is important to highlight the following legal concept pertaining to *possession* which is prejudicial to the defence at this stage of the proceedings in view of the totality of the circumstances:

s.4(3) of the Criminal Code of Canada establishes that for the purposes of this Act,

- (b) where one of two or more persons, with the knowledge and consent of the rest, has anything in his custody or possession, it shall be deemed to be in the custody and possession of each and all of them.

11 I would be remiss in my analysis of the strength of the Crown's case if I omitted to consider the facts which may detract from the accused's involvement in this case but there are none to speak of. The money was found on Mr. Sargon YOUKHANA and the drugs were located on Mr. Sargon YOUKHANA, the gun was found on the waist band of Mr. Sargon Youkhana. That aside however, the narcotics were found on Mr Youkhana personal possession and as a result, the legal doctrine of *wilful blindness* is a live issue in this case. It would be an illogical proposition for the court to accept that the nefarious activity which was being undertaken in the school yard of 2533 Kipling Ave aka St Andrews was unintended or unknown to Mr. Sargon YOUKHANA. I would reject the inference that it was a mere coincidence that Mr YOUKHANA found himself in the wrong place, at the wrong time in the direct company of an unknown male party.

F. EXAMINATION OF SURETIES AND THE PLAN OF SUPERVISION FOR Mr YOUKHANA

12 APTSAM HEIDOO is the mother of Mr. Sargon Youkhana. She resides at 40 Panaroma Court Suite 603 with her husband William Youkhana and children. She has been employed at Devine Sleep as a machine operator for 6 years and earns approx. \$26,000 per annum and is working Monday to Friday from 1am to 4pm. She is willing to pledge \$20,000 to secure her sons release. She is shocked and angered by the allegations because she believes that her son is a good person, and is becoming a more responsible and mature person. She stated that her son listens to her at home and has completed Gr 12 but is shy one credit from graduation. He spends his time working most recently as an apprentice plumber. She maintains that they have

a good relationship and is willing to pledge \$20,000 towards his release. She is willing to reside in their Winsor residential home and supervise her son 24/7

13 Mr William Youkhana the father of Mr Sargon Youkhana, was proposed as a second surety and is prepared to help supervise the accused. He is presently employed at a Real Estate Office as a Real Estate agent His hours are flexible and earns approximately \$50,000 and will be providing 24 hour supervision. He is willing to pledge \$20,000 with his wife. he advises that they have a close -- respectful relationship.

14 I find that both proposed witnesses satisfy the base sufficiency of surety requirements in so far as they are Canadian citizens, they do not have a criminal record and they are not currently acting as a surety for anyone else. In the aggregate they are willing to pledge upwards of \$20,000 to procure Mr Youkhana Sargon release on a strict house arrest basis with 24/7 supervision. They promise to enforce all court imposed conditions and will search his belongings, check his phone, and restrict access to the residence. They promise to call the police if Mr Sargon Youkhana is not compliant with the bail and will work in concert to ensure that he attends court. Furthermore, they are aware of the surety relief process and would discontinue their involvement as a surety if Mr. Sargon Youkhana fails to abide by the terms of the release order or refuses to follow the rules of the home. I accept that there are no real gaps in supervision with the proposed plan. They are also proposing to move to Windsor to further ensure the plan of supervision is compliant

15 If this was the conclusion of my analysis of the plan of supervision for Mr Sargon Youkhana the court could comfortably rule that the suggested bail strategy and integrated features attenuates any concern that there is a substantial likelihood that he would commit additional indictable offences or interfere with the administration of Justice. Regrettably however, there are other important factors that must be closely examined. Mrs. APTSAM HEIDOO stated that she's "not really aware of all of his friends" and nor is his father. She did provide some names but there was no in depth information She does not know who he hangs out with and has never taken it upon herself to get to know any of these individuals intimately because "there have been no issues" Mrs. APTSAM HEIDOO advised the court that she and her husband have spoken with SARGON before about getting his life in order and get the additional credit to graduate but she nor her husband did not know of his involvement with any criminal activity which involved guns, drugs, weigh scales, and money In essence, Mr Sargon Youkhana hasn't been very forthright and honest with his mother or father.

16 The assessment of surety suitability includes whether the proposed sureties can realistically discharge the obligations and willingly exercise their powers as the civilian jailer of the accused in the community. Common sense and logical reasoning on the basis of what rings true and what rings false provides the bail jurist with a measure of dexterity to objectively assess the credibility and reliability of a surety's testimony. None of the proposed sureties could provide the court with any real insights into the accused's lifestyle, activities, and circle of friends. I find that the testimony of his mother and father (APTSAM HEIDOO AND WILLIAM YOUKHANA) on this specific issue to be highly problematic; it is evasive, misleading and does not fit coherently within the context of a typical relationship between family members. Moreover, Ms. Aptam Heidoo testified that "I only know him at home" similarly his father stated 'outside I don't know all

of his friends". I am not persuaded that the parents stand in any real position of authority over their child despite their assertion to the contrary.

G.

17 In Justice Trotter's seminal text on judicial interim release, "The Law of Bail in Canada" (3rd Edition), the learned author and now Ontario Court of Appeal jurist states at page 7-19:

"On a view of the surety relationship which contemplates any degree of supervision of the accused, it is crucial to know whether the relationship is one which will realistically permit the infusion of these obligations and their potential enforcement. A parent who has no effective control over a grown child who still lives in the family home will not be a good candidate"

18 With regard to the parents, I believe they are credibly well meaning and well-intentioned to pledge \$20,000 of their equity in their home in Windsor to secure their sons release. They both have their hands full with 3 children and the father working FT as a Real Estate Agent 7 days a week and his wife, Monday to Friday from 1am to 4pm. The parents advised the court that they will be strict and therefore, "not interested in helping someone who does not want to help themselves." I am not persuaded that they stand in any position of authority over the accused in light of the fact that they do not discuss "that part of his life" which pertains to his involvement of the criminal activity. They don't know his friends intimately and do not think he is part of a gang. And yet the court has been furnished an allegation of their son walking in an elementary school yard in the evening brandishing a gun in his waist band which is loaded, has drugs, money, weigh scales and two cell phones.

H. THE RIGHTS OF THE ACCUSED AND ANALYSIS OF THE LAW

19 I often state when presiding in bail court that my role is not to make any findings of guilt or innocence; I am not the trier of fact in this case. Rather, I see my role as a trier of risk. The function of the bail court is not to punish an accused for crimes which he is alleged to have committed but rather to assess the risk to public safety and the risk of loss of public confidence in the administration of justice posed by the accused's release on bail and also determine whether conditions can be crafted to ensure that the accused not re-offend or interfere with the administration of justice and attend court as and when required.

20 The Charter of Rights and Freedoms and abundant case law on the subject supports the conclusions that:

- * The accused is presumed innocent of these offences and that a reasonable bail shall not be denied without just cause;
- * Pre-trial custody is truly a last resort. Liberty deprived can never be regained and is lost forever;
- * There is no category of offence for which bail is not a possibility;
- * Bail will be denied only in a narrow set of circumstances.
- * Detention must be necessary not merely advisable;

- * The accused has the right to a fair trial before punishment (*R. v. Andrade*, 2015, Para.73).

21 There is an inherent tension in the bail court. The rights of an accused are not absolute and must be balanced against the community's right to public safety and security and the expectation of trust and confidence in the administration of justice. In addition to the foregoing, a reverse onus creates a presumption in favour of detention and there must be a sound discharge of that burden.

I. THE PRIMARY GROUND

22 Although the Crown does not seek detention on the Primary Ground, I wish to highlight that I do not see Mr. Sargon Youkhana as a real flight risk although it is acknowledged that in view of the potential for a lengthy period of incarceration upon conviction, there is always the possibility they may flee the jurisdiction. Mr. Sargon Youkhana does not have any conviction but that aside, I view the risk of non-attendance as extremely low because Mr. Sargon Youkhana is a Canadian citizens and has ties to the community, Further the bail plan strengthened with conditions that he remain in the province, surrender his passport and any travel documents and not to apply for any replacement documents would reasonably ensure their attendance at court.

J. THE SECONDARY GROUND

23 "While exact predictions of future dangerousness is not constitutionally mandated" (a statement attributed to Chief Justice Lamer speaking for the S.C.C. in *R. v. Morales* [1992] 3 S.C.R. 711 from 1992), the best predictor of future behaviour is past behavior. I find that the fact that there is no criminal record for Mr Sargon Youkhana to be highly relevant and related.

24 Mr. Sargon Youkhana may be new to the criminal justice system but Mr. Sargon Youkhana has been unlucky individual, finding himself in the wrong place at the wrong time and associating with the wrong individuals or perhaps even more sinister, he has been part of a criminal lifestyle. The preponderance of the evidence available at this time certainly suggests that he is the authors of his own misfortune.

25 No plan of supervision even one with the most compelling sureties will prove effective and ultimately successful if the accused is either unwilling or unable to comply. While I appreciate the willingness to supervise certainly exists, I find that there is a real chance, a significant possibility and substantial likelihood that the authority of the proposed sureties would be undermined by Mr. Sargon Youkhana. Fundamentally, for reasons previously outlined in Section "F" and "G" of my judgment, I do not have the requisite degree of confidence on a balance of probabilities in the proposed sureties' authority and ability to supervise him successfully and attenuate the courts concern on the secondary ground to a manageable level. .

K. THE TERTIARY GROUND

26 The use of case law at bail hearings has some inherent limitations when comparing the circumstances of the accused, the particulars of the offence and plan of release but I accept that

they are an important consideration with regard to the examination of the principles of release or detention and most certainly when the case originates from an appellate court.

27 The S.C.C. decision *R. v. Antic* [\[2017\] 1 S.C.R. 509](#) released in 2017 is without question an important reminder of the presumption of innocence and the ladder principle of release but in my respectful opinion, *Antic* has diminished relevance and applicability in a reverse onus bail hearing with creates a presumption in favour of detention as was clearly intended by Parliament and specifically with regard to the case at bar which attracts strong tertiary ground concerns where all four factors enunciated in *Hall* [\[2002\] 3 S.C.R. 309](#) can reasonably be assessed as having maximum force and effect. Justice Trotter in his addendum or update to Chapter 6 of "*The Law of Bail in Canada*" (3rd Edition) which was released on June 6, 2018 (post *Antic*) draws the clear distinction that:

"The ladder principle is inapplicable in situations in which a reverse onus provision in s.515(6) is triggered."

28 The S.C.C. landmark decision on judicial interim release *R. v. St. Cloud*, [\[2015\] 2 S.C.R. 328](#) provides new practice direction for the bail jurist while also re-affirming the test for detention established in *R. v. Hall*.

First pillar to be analyzed is the strength of the Crown's case:

29 In *St. Cloud*, the court signaled the importance of an authentic appraisal of the strength of the crown's case at the bail stage which deserves some prominence in the mix. This was further underscored in an important decision shortly following the release of *St. Cloud* in a bail review before Justice Trotter in the case *R. v. Dang*, [2015 ONSC 4254](#) at Para. 55:

"No matter how serious the allegations, and notwithstanding the potential penalty that the accused may face, detention based on a weak case tends to undermine confidence in the administration of justice, not maintain it."

30 Using the application of logic, common sense and my experience as a judicial officer presiding in the Toronto bail courts for over 13 years, I am persuaded based upon the totality of the available evidence at this time and the physical seizure of illicit drugs and 1 firearm that the case against Mr Sargon Youkhana is cogent, grounded in a very strong evidentiary foundation and objectively consistent with drug trafficking at a low based on the amount of drugs seized. I envision that they will have their hands full trying to mount a defence to many of the charges and I also expect that the case against Mr Sargon Youkhana will strengthen if the anticipated forensic examination of the mobile communication devices and the loaded firearm in particular is able to be completed.

The second pillar in *Hall* requires that I consider the objective gravity of the offence:

31 As Justice Dumo noted in *R. v. Budge* at para. 70, "The combination of drugs and guns is a deadly combination and one that upon conviction merits a significant jail term." While there has been a shift in the application of mandatory minimum sentences once required in a variety of gun and drug crimes, many obligatory sentences have been set aside by higher courts deemed "cruel and unusual punishment" and therefore unconstitutional, the combination of possession of

a Schedule I substance for the purpose of trafficking with loaded firearms present is an aggravating factor on sentence.

The third pillar addresses the circumstances surrounding the commission of the offence including whether a firearm was used:

32 The offences for which Mr. Sargon Youkhana is charged are suggestive of cocaine trafficking. ONE loaded firearm was seized which was essentially located in his waist band The gun and ammunition recovered are intended to inflict the maximum amount of damage upon the intended target or victim.

The fourth pillar requires that I make a cursory assessment of the length of sentence that Mr Sargon Youkhana may receive if he is found guilty of one or more of the charges before the Court:

[The Board did not assign paragraph number 33.]

34 Deterrence both specific and general is a core principle of sentencing. In circumstances where the facts establish a causal connection between a drug addiction and trafficking in narcotics, courts have recognized the addiction as a significant mitigating circumstance. There does not appear be any such link at this time and Mr Sargon Youkhana is seemingly motivated by the lure of profiting from the drug trade. Mr Sargon Youkhana could face upwards of 5 years in a penitentiary. Personal circumstances aside and the yet to be determined the prospect for Mr Sargon Youkhana rehabilitation and reintegration in the community is likely to occur , I believe that his sentencing range would conservatively meet or exceed 3 years in a penitentiary.

35 The four pillars listed in s.515(10)(c) are not exhaustive and the court must also consider all the circumstances of each case. No single circumstance is determinative and the justice must consider their combined effect. The S.C.C. in *St. Cloud* went on to state:

"This is a balancing exercise that will enable the justice to decide whether detention is justified"

36 I am mindful that despite the absence of any loss of employment or interruption of education commitments, pre-trial detention can significantly hinder the ability of an accused to prepare a defence to the charge and have an adverse impact on the life of the accused person and their family. Mr. Sargon Youkhana would be deprived of the opportunity to spend precious quality time together with his siblings (present in court today) if he is detained in pre-trial custody. Sadly however, and despite no criminal record, for reasons only Mr Sargon Youkhana knows, he was arrested with a loaded firearm in his waist band and with narcotics located in his personal possession , two cell phones and a small quantity of cash and weigh scales. .

L. DISPOSITION

37 Despite the fact that no firearm was discharged and there are no direct victims per se, I

would be remiss when evaluating "*the totality of the circumstances*" if I overlooked the epidemic of gun violence which continues to plague the City of Toronto. People are gunned down on a far too frequent basis. Some are totally innocent bystanders going about their daily lives with the expectation that we all enjoy should enjoy a safe and secure community. They are wounded or killed, families are torn apart -- robbed of their loved ones and the community at large is terrified by these senseless acts involving illegal firearms which serve no other purpose but to intimidate, maim or kill human beings and facilitate criminal enterprise.

38 In these instances, I believe the courts are obliged to consider with great care and caution the right of the community at large to safety and security and to have confidence in the administration of justice when contemplating the accused's right to the presumption of innocence and the right to be granted a reasonable bail. Where evidence against an accused is strong and suggestive of an ongoing criminal behavior of an individual with a criminal lifestyle which revolves around the trafficking of illicit narcotics at a low level with loaded firearms present, I find that dispassionate, properly informed, reasonable member of the community with knowledge and understanding of our bail philosophy, legislative provisions and Charter values would lose confidence in the administration of justice if Mr Sargon Youkhana hee were released on bail.

39 Mr Sargon Youkhana has not met his onus on the secondary and tertiary ground. I order his detention in pre-trial custody until he has been dealt with according to law pursuant to s.515(10) (b) and (c) of the *Criminal Code*.

S. NESTICO J.P.