COURT OF APPEAL FOR THE YUKON TERRITORY

Citation: ***R. v. Rodrigue***,
2008 YKCA 5

Date: 20080222
Docket: YU0593

Between:

Regina

Respondent

And

Karen Rodrigue

Applicant

Before: The Honourable Madam Justice Rowles
The Honourable Mr. Justice Hall
The Honourable Mr. Justice Chiasson

Oral Reasons for Judgment

R.S. Fowler — Counsel for the Appellant

J. Phelps — Counsel for the (Crown) Respondent

Place and Date: Vancouver, British Columbia
22 February 2008

[1] **HALL, J.A.**: This is a review directed by the Chief Justice of British Columbia pursuant to s. 680 of the ***Criminal Code*** (the "***Code***") of the order of Mr. Justice O'Connor, made September 20, 2007, denying Ms. Rodrigue bail pending her re-trial on one count of second degree murder. This will be a second trial for Ms. Rodrigue who was convicted of second degree murder by a court composed of judge and jury in October 2005. The Court of Appeal for the Yukon Territory overturned the conviction on July 11, 2007, and ordered a new trial which is set to commence in early June of this year. (See 2007 YKCA 9.)

[2] Ms. Rodrigue has been in custody on this charge since her arrest in late June 2004. Thus, if she is detained pending trial, she will have been in custody with respect to this charge for almost four years.

GROUNDS FOR REVIEW

[3] It is argued by Mr. Fowler that O'Connor J. erred in his analysis of the tertiary ground under s. 515(10)(c) of the ***Code*** in concluding that Ms. Rodrigue's detention was necessary to maintain confidence in the administration of justice. He submitted the chambers judge erred in failing to recognize the narrow ambit to be given to this ground for denial of bail. Section 515(10) of the ***Criminal Code*** provides as follows:

> (10) For the purposes of this section, the detention of an accused in custody is justified only on one or more of the following grounds:
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> > (a) where the detention is necessary to ensure his or her attendance in court in order to be dealt with according to law;
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> > (b) where the detention is necessary for the protection or safety of the public… having regard to all the circumstances including any substantial likelihood that

> the accused will, if released from custody, commit a criminal offence or interfere with the administration of justice; and
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> (c) on any other just cause being shown and, without limiting the generality of the foregoing, where the detention is necessary in order to maintain confidence in the administration of justice, having regard to all the circumstances, including the apparent strength of the prosecution's case, the gravity of the nature of the offence, the circumstances surrounding its commission and the potential for a lengthy term of imprisonment.

[4] Counsel for Ms. Rodrigue elaborates on the nature of the alleged errors made by O'Connor J. at para. 3 of his written submission as follows:

> 3. The Applicant submits that the learned Hearing Judge erred in his analysis of the tertiary ground. Specifically he erred in his analysis of the circumstances of the offence and in particular in his assessment of how the "community at large" would view the Applicant's conduct by assuming that her account of being sexually assaulted and provoked by the deceased were false. In addition the learned hearing judge erred when he concluded that it was likely that the Applicant would receive a sentence for manslaughter that was longer than any credited amount of pre-trial custody. Finally, the Applicant submits that the learned hearing judge erred when he concluded that releasing Ms. Rodrigue "may reasonably erode the public's confidence in the administration of justice" as "Whitehorse is a relatively small community" and "the public is well aware of this case, including the disturbing circumstances surrounding the offence and earlier proceedings in which Ms. Rodrigue wished to plead guilty to manslaughter" because this conclusion is based on nothing but speculation and is premised upon the legally impermissible finding that the 'community' has already concluded that Ms. Rodrigue's conduct was disturbing.

BACKGROUND

[5] Ms. Rodrigue is accused of killing a friend, Gerald Dawson, on June 17, 2004, in Whitehorse in the Yukon Territory. The victim died as a result of stab wounds to

his back. The circumstances surrounding the killing are briefly described by O'Connor J. at paras. 3-5 of his reasons refusing bail:

> [3] The facts giving rise to the charge are very disturbing. Ms. Rodrigue had known the victim for some time. Late one evening she called him to borrow some money to purchase cocaine. She ended up in his apartment. She testified that the victim sexually assaulted her. She says an argument ensued and she stabbed the victim twice in the back.
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> [4] After the stabbing, Ms. Rodrigue made no effort to obtain help. She got dressed, covered the body, cleaned the blood with a sheet and wrote a note stating the victim had gone to British Columbia for two weeks. She padlocked the door and left the house taking the victim's car. On her way home, she threw out a bag which contained the knife and her socks. She did this to conceal what she had done. There is evidence that the next day she attempted to use the victim's bank card to obtain cash.
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> [5] During the following days, she continued drinking and using cocaine. She did not tell anyone about the killing. She went to the victim's residence and took a couple of chainsaws which she pawned. Eventually, the body was found and Ms. Rodrigue was charged. Only after her arrest did she mention the alleged sexual assault.

[6] At her first trial, Ms. Rodrigue attempted to enter a guilty plea to the lesser included offence of manslaughter. However, the Crown would not accept the plea and she was convicted of second degree murder after a trial at which she testified. A new trial was ordered on the basis of errors made by the trial judge in his charge to the jury, including his charge on post offence conduct.

THE DECISION UNDER REVIEW

[7] After setting out the relevant background, Mr. Justice O'Connor summarized Ms. Rodrigue's personal circumstances at paras. 8-10 of his reasons:

> [8] Ms. Rodrigue's background is described in a Bail Assessment Report prepared by Clara Northcott, a probation officer in Whitehorse. Ms. Rodrigue is now 38 years of age. She has a criminal record dating

> back to 1988. Her record includes a number of convictions for breaching court release orders and convictions for assault with a weapon and two forgery related offences.
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> [9] Ms. Rodrigue is currently single. She has four children, three of whom have been in the care of Family & Children's Services. At the time of her arrest for this charge, she was living with a common-law partner and was employed as a chambermaid in a local hotel.
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> [10] Ms. Rodrigue has a long history of abusing alcohol, cocaine and marihuana. Her substance abuse addictions lie at the core of her problems with the law and her difficulties in raising her children. On previous occasions she has been unable to comply with conditions in court orders requiring her to refrain from drinking and using drugs.

[8] O'Connor J. went on to note that Ms. Rodrigue had taken a number of programs while in custody to address her alcohol and drug problems, and that, while in the Whitehorse Correctional Centre, she had contacted both an addiction and spiritual counsellor. He accepted that Ms. Rodrigue's efforts to address her problems were genuine, but stated (at para. 15) that the most he could say as a result of her efforts is "that her chances this time of remaining free of substance abuse are better than they were in the past".

[9] After stating that he was satisfied that Ms. Rodrigue did not present a flight risk, O'Connor J. stated that, "I may have released Ms. Rodrigue on very strict conditions such as those proposed by Ms. Northcott", who prepared the Bail Assessment Report. I take it from those comments that he had concerns based on the secondary ground but chose to primarily consider the tertiary ground as the basis for denial of bail. Mr. Phelps submitted that this application for review ought to be dismissed having regard to concerns relating to both the secondary and tertiary grounds for denial of bail. O'Connor J. went on to consider the relevant factors under s. 515(10)(c) of the ***Code***, including "the apparent strength of the

prosecution's case, the gravity of the nature of the offence, the circumstances surrounding its commission and the potential for a lengthy term of imprisonment."

[10] In applying s. 515(10)(c), O'Connor J. found that the offence was very serious; that the circumstances surrounding the offence were also serious; that the Crown's case was overwhelming with respect to manslaughter and that there was a very strong case for murder; that there was potential for a lengthy prison term. In his view, it was doubtful that the amount of time she would spend in custody, if detained, would be greater than any sentence imposed even if she were convicted only of manslaughter. He noted that Ms. Rodrigue had tried and failed in the past to come to grips with her addictions. He also noted that Whitehorse was a relatively small community which was well aware of the circumstances of the case and that releasing Ms. Rodrigue in all of the circumstances "may reasonably erode the public's confidence in the administration of justice".

DISCUSSION

[11] The standard of review on a review application under s. 680 of the ***Code*** has been stated in a number of authorities. I would like to make reference to comments of this Court in ***R. v. Bhuller***, [2005] B.C.J. No. 1762 (QL) (C.A.), where Madam Justice Rowles, speaking for the Court, stated (at para. 8):

> [8] The nature of a review under s. 680 of the ***Code*** was described by Cumming J.A. for the Court in ***R. v. Wu*** (1998), 117 B.C.A.C. 305 at 307:
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> > [6] A review under s. 680(1) of the *Criminal Code* is in the nature of an appeal on the record and not a hearing *de novo*. While the reviewing court exercises an independent discretion and may substitute its own

> opinion for that of a single judge under review, it must base its review on the facts found by the single judge's evaluation of the evidence. It is not necessary that a reviewing court, before intervening, come to a conclusion that the decision of the single judge under review was unreasonable or that an error in principle was committed. See *R. v. D.S.H.* (1991), 2 B.C.A.C. 309.

[12] In my view, there is little merit to the submission that the trial judge erred in stating the obvious, which is that Whitehorse is a relatively small community where it is likely that the circumstances of this crime would become widely known and be regarded as disturbing. The Crown has filed additional material on this appeal to demonstrate the amount of press coverage which this crime attracted and to confirm that the population of Whitehorse was approximately 24,500 people as of December 2007.

[13] O'Connor J. said at para. 19:

> [19] It is relevant as well that Ms. Rodrigue sought to plead guilty to manslaughter at her first trial. While it is theoretically possible that she will be acquitted at a second trial, that seems most unlikely. She did not seek an acquittal the first time. A reasonable and well informed member of the public would no doubt view this case against that background. Thus, while Ms. Rodrigue will have been in custody for a considerable amount of time before her second trial, it is doubtful that the amount of time in pre-trial custody will be greater than the sentence that would likely be imposed even if she is only convicted of manslaughter.

[14] Counsel for Ms. Rodrigue suggests that the chambers judge should not have engaged in speculation as to the possible sentence which Ms. Rodrigue could serve if she were convicted of manslaughter. In any event, he submits that, if Ms. Rodrigue were given two-for-one credit for the time she spent in custody she would

have served the equivalent of an eight year sentence and that it is highly unlikely that she would receive an eight year sentence for manslaughter.

[15] In my view, it was open to the trial judge to consider in these circumstances whether failure to release Ms. Rodrigue on bail would likely result in her serving a period of incarceration which was ultimately unjustified. If, for example, a person were charged with theft over and as a result of delays had served a period of incarceration of two years, where it was unlikely any sentence imposed would exceed one year, a further detention might well be regarded as undermining the confidence of the public in the administration of justice.

[16] In this case, however, the difficulty is that it appears unlikely that Ms. Rodrigue would be given full two-for-one credit for time spent in custody on any subsequent sentencing for manslaughter. This is because it is evident that she took advantage of a wide range of programs while in custody and, therefore, did not suffer the type of pre-sentencing detention for the entire period of her detention, which frequently gives rise to a two-for-one credit. Thus, although I would not be inclined to give this factor significant weight, this is not a case in which the amount of time spent in pre-sentencing custody tends to support pre-trial release. The fact that there is an early trial date is also a relevant factor.

[17] In my view, in addition to the seriousness of the offence and the circumstances surrounding its commission, a very significant factor relied upon by the trial judge in refusing release is the fact that Ms. Rodrigue's addictions to alcohol and drugs in the past have proved intractable and have led, amongst other things, to

a variety of criminal activity including a failure to adhere to court orders. While it appears she has made considerable efforts to overcome those addictions through programs available to her in custody, similar efforts to overcome her addiction in the past have been unsuccessful, leading the chambers judge to conclude that "the most one can say is that her chances this time of remaining free of substance abuse are better than they were in the past."

[18] I note that the Court was provided with a further Court Report Bail Assessment dated January 16, 2008, which sets forth a proposal concerning release. Concern has been expressed by the author of that report as to whether Ms. Rodrigue would be able to maintain herself drug-and alcohol-free if she were released. In my opinion, this case presents a situation where there presently exist substantial concerns related to the secondary ground. The applicant has a substantial record for various offences, including property offences, failure to observe recognizances and the like. She had a recent conviction before the homicide of assault with a weapon. That is a particularly troubling offence in the context of the present case. O'Connor J. expressed some concerns which I share about the secondary ground for denial of bail. The proposed plan of release is such as to not much allay concerns on this ground. I view the situation with respect to concerns on the secondary ground as being less favourable than the apparent factual situation before O'Connor J. last fall. I think it could be said there are some substantial risks of re-offending having regard to the proposed release plan. Mr. Fowler submits the Court can impose conditions to ensure the applicant will avoid difficulty but I do not see as presently available a plan that would inspire confidence

that such would be the case. While as Mr. Fowler says, she is to be commended for her efforts in the institutions to address her addiction problems, those concerns in my view remain significant. In my view, this latest report lends support to Mr. Justice O'Connor's conclusion that Ms. Rodrigue is not a good candidate for release.

CONCLUSION

[19] I am in agreement with the conclusion of the learned chambers judge that it would not be appropriate to grant bail in this case based upon considerations related to both the secondary and tertiary grounds. The application for review should be dismissed.

[20] **ROWLES, J.A.**: I agree.

[21] **CHIASSON, J.A.**: I agree.

[22] **ROWLES, J.A.**: The application for review is dismissed.

"The Honourable Mr. Justice Hall"