Case Name:

R. v. B.S.

Between
Her Majesty the Queen, Respondent, and
B.S., Applicant/Accused

[2007] O.J. No. 3046

2007 ONCA 560

255 C.C.C. (3d) 571

88 W.C.B. (2d) 550

49 C.R. (6th) 397

2007 CarswellOnt 5288

Docket: M35276

Ontario Court of Appeal
Toronto, Ontario

W.K. Winkler C.J.O.

Heard: July 31, 2007.
Judgment: August 9, 2007.

(17 paras.)

Criminal law -- Compelling appearance, detention and release -- Judicial interim release or bail -- Grounds for denial -- Detention necessary for protection of public -- Detention necessary to maintain confidence in the administration of justice -- Review of -- Application by the accused for an order directing that a panel of the court review a detention order denying the interim release of the applicant pending his trial on a charge of first degree murder -- Application dismissed -- No reasonable likelihood that a panel of the court would find that the judge erred in her assessment of the evidence and law as related to the tertiary ground.

Application by the accused for an order directing that a panel of the court review a detention order denying the interim release of the applicant pending his trial on a charge of first degree murder. On September 17, 2002, JL was killed. The applicant and three others were arrested in or about July 14, 2006 and charged with first degree murder. The applicant's bail hearing commenced in November 6, 2006 and continued over four days, concluding on December 6, 2006. The applicant had a prior youth record including four incidents of assault, as well as one each of break and enter, trespass, breach of probation and theft. As an adult he had only one conviction for failure to give a breath sample but admitted to regular use of cocaine and to driving while under suspension.

HELD: Application dismissed. The provisions of s. 515(10) applied to all circumstances in which an accused sought judicial release. The tertiary ground continued to apply to all persons seeking judicial interim release, whether charged with relatively minor, non-violent offences or whether charged with murder. In this case, on the basis of the evidence proffered at the bail hearing, the court was satisfied that the judge accurately characterized the evidence implicating the applicant in the murder of the victim as "reasonably strong". There was no reasonable likelihood that a panel of the court would find that the judge erred in her assessment of the evidence and law as related to the tertiary ground.

Statutes, Regulations and Rules Cited:

Criminal Code, s. 515(10)

Counsel:

Howard C. Cohen, C. Avery and D. Lessard for the applicant/accused.

John Pearson for the respondent.

[Editor's note: A corrigendum was released by the Court August 23, 2007; the correction has been made to the text and the corrigendum is appended to this document.]

ENDORSEMENT

1 W.K. WINKLER C.J.O.:-- This is an application brought under s. 680 of the *Criminal Code of Canada* seeking an order directing that a panel of this court review the detention order made by Justice Milanetti on December 6, 2006, denying the interim release of the applicant pending his trial on a charge of first-degree murder.

2 On September 17, 2002 J.L. was killed. The applicant and three others were arrested on or about July 14, 2006 and charged with first degree murder. The applicant's bail hearing commenced on November 6, 2006 continued over four days, concluding on December 6, 2006.

3 This being a murder charge, the onus was on the applicant to show, on a balance of probabilities, why his detention was not justified in light of the criteria set out in s. 515(10) of the *Criminal Code*. The learned judge found that he had failed to satisfy her that his detention was not justified, on both the secondary and tertiary grounds set out in that provision of the *Code*. Although much of the emphasis and argument before the court below and before me focused on the tertiary ground, given the judge's findings I must first consider her ruling on the secondary ground.

Secondary Ground

4 The secondary ground is set out in s. 515(10)(b) of the *Code*. It provides that detention is justified where 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".

5 The applicant had an unenviable record as a youthful offender including four incidents of assault, as well as one of each of break and enter, trespass, breach of probation and theft. As an adult he has only a conviction for failure to give a breath sample but admitted to regular use of cocaine and to driving while under suspension. Finally, an escalating series of violent confrontations, between the applicant and several of his associates on the one hand and the victim and his associates on the other, occurred in bars and on the streets of two small cities. Notwithstanding the fact that the participants, including the applicant, sustained injuries sometimes requiring medical treatment, they were not prepared to cooperate with police investigators but were, in effect, committed to "settling scores" in their own way. The circumstances of the offence itself support the finding by the judge that the applicant's involvement with violent behaviour had not abated as an adult. This was further supported by evidence of a further violent confrontation between applicant and some of the same adversaries some three years after the murder. Additionally, there was credible evidence that two of the potential witnesses were concerned for their safety if he were released.

6 Several substantial sureties, in the form of family members and the employer of the applicant, were proffered as part of a release plan. While the judge found that they were honest and law abiding citizens, she also concluded that they had been unable or unwilling to exercise any realistic level of control over the applicant for many years. Hence she was not satisfied that their involvement in the release plan would properly address the secondary ground. The justice carefully considered all of the evidence touching on the secondary ground. Her reasons disclose no arguable error in applying the law to the facts. I am satisfied that there is no realistic likelihood that a panel of this court would find that she erred in her assessment of the evidence and law in relation to the secondary ground.

Tertiary Ground

7 In my view, the justice correctly applied the law in respect of the tertiary ground. In accordance

with the decision of the Supreme Court of Canada in *R. v. Hall*, [2002] 3 S.C.R 309 as explained by this court in *R. v. E.W.M.*, [2006] O.J. No. 3654 (now *R. v. Mordue*, the trial having been completed), she considered the combined effect of the four factors set out in s. 515(10)(c) in order to determine whether it was necessary to deny bail in order to maintain public confidence in the administration of justice.

8 Counsel submitted that the tertiary ground comes into play only in exceptional circumstances where all of the four factors set out in s. 515(10)(c) were at the highest levels. This would, effectively, limit recourse to the tertiary ground only to cases of the most grievous of murders with overwhelming evidence against the accused person. In my view, the tertiary ground is not so limited.

9 The provisions of s. 515(10) apply to all circumstances in which an accused person seeks judicial interim release. While the decision of the Supreme Court of Canada in *Hall* was made against the background of a heinous murder, that fact played no role in the legal analysis leading to the conclusion that the tertiary ground set out in s. 515(10)(c) was constitutionally valid. Nowhere in that decision did the court purport to limit application of the tertiary ground, as a matter of principle, to only murder charges generally and, further, to only the most heinous of murder charges in particular.

10 The tertiary ground continues to apply to all persons seeking judicial interim release, whether charged with relatively minor, non violent offences or whether charged with murder. In a practical sense, it will not often be a factor in most cases, but as the nature of the offence and surrounding circumstances become more serious, the consideration of the tertiary ground will become more relevant. That is not to say that the tertiary ground operates to effectively dictate the detention of all persons charged with murder. Rather, the judge must analyze the combined effect of the four factors set out in the subsection, as explained in *E.W.M.*, in coming to a determination on the tertiary ground.

11 The charge being murder, counsel did not challenge, in the court below or before me, the obvious conclusion that two of the four factors are necessarily assessed at the highest level.

12 However, counsel challenged the strength of the case against the applicant. While the case may not be straightforward or overwhelming, neither is it weak or suspect. On the basis of the evidence proffered at the bail hearing, I am satisfied that the judge accurately characterized the evidence implicating the applicant in the murder of the victim as "reasonably strong". Future developments may strengthen or weaken the crown's case and if the latter, form the basis of a further hearing, as suggested by McMurtry C.J.O. in *R. v. Boyle*, [2006] O.J. No. 5094, 2006 ONCA M34280 (released December 20, 2006). At this point, however, the learned judge's assessment was accurate.

13 Counsel for the applicant also took the position that before the court may rely on the tertiary ground for detention, there must be "something more" in the circumstances surrounding the

commission of the offence. They pointed out that in this case there was no evidence of torture or dismemberment and no evidence that there was a prevailing sense of community fear or concern arising out of the commission of the offence. Certainly, in *Hall* the facts of the murder were gruesome and there was a level of community fear that a murderer was at large. However, as stated by O'Connor A.C.J.O. in *R. v. Stevenson*, [2007] O.J. No. 1955, 2007 ONCA 378 at paragraph 7:

> In my view, the decision of the Supreme Court of Canada in *R. v. Hall*, [2002] 3 S.C.R. 309 does not stand for the proposition that, in the case of a murder charge, the surrounding circumstances must necessarily include a level of extreme viciousness or elements of torture or mutilation before the tertiary ground comes into play. Rather, the justice must consider the circumstances of each case to determine whether the applicant has shown that his or her detention is not necessary to maintain confidence in the administration of justice.

14 In my view, the elements of horror and community fear that were present in the *Hall* case are merely two examples of factors that may be considered in assessing the circumstances surrounding the commission of the offence. They are not the only two factors. For example, Chief Justice McLachlin pointed out, at p. 328 of the *Hall* decision itself, that "an accused's implication in a terrorist ring or organized drug trafficking might be relevant to whether he is likely to appear at trial, whether he is likely to commit further offences or interfere with the administration of justice, and whether his detention is necessary to maintain confidence in the justice system".

15 In addition to the factors identified in *Hall*, other cases have identified factors such as elements of stalking, ambushing or setting a trap for the victim, the domestic nature of the homicide and the motive to dispose of a potential witness to a crime as circumstances to be weighed when considering the tertiary ground. Other factors could include gang-related crimes or, as exhibited here, circumstances involving an ongoing pattern of openly violent behaviour. This list is not exhaustive and the presence or absence of any of these factors is not necessarily conclusive in the analysis.

16 The role of the judge hearing an application for judicial interim release on a murder charge must, of course, recognize the constitutional presumption of innocence, consider the fact that it is a reverse onus situation and evaluate the combined effect of the four factors enumerated in s. 515(10)(c) in coming to a decision on the tertiary ground. The justice did so in this case. She considered the combined effect of the four factors, including the strength of the prosecution's case and the circumstances surrounding the commission of the offence in assessing whether it was necessary to detain the applicant in order to maintain confidence in the administration of justice. I am satisfied that there is no reasonable likelihood that a panel of this court would find that she erred in her assessment of the evidence and law as relate to the tertiary ground.

17 Accordingly this application is dismissed.

W.K. WINKLER C.J.O.

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Corrigendum
Released: August 23, 2007

Please note that the correction is reflected in para. 13 in the spelling of the cite *R. v. Stevenson*.