

CANADA / JUDGMENT

R. v. Tschritter

2021 BCCA 16

COURT

British Columbia Court of Appeal

DECIDED

15 January 2021

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2021 BCCA 16 R. v. Tschritter

COURT OF APPEAL FOR BRITISH COLUMBIA

Citation:

R. v. Tschritter,

2021 BCCA 16

Date: 20210115

Docket: CA47162

Between:

Regina

Respondent

And

Ashleigh Danielle Tschritter

Applicant

Restriction on Publication: A publication ban has been mandatorily imposed under s. 517(1) of the Criminal Code restricting the publication, broadcasting or transmission in any way of the evidence taken, the information given, or the representations made and the reasons, if any, given or to be given by the justice presiding over the application for judicial interim release (bail).

Direction of the Chief Justice on an Application for Review

Pursuant to Section 680 of the Criminal Code of Canada.

Counsel for the Applicant:

B Movassaghi

Counsel for the Respondent:

T.A. Livingston

Written Submissions of the Applicant Filed:

December 8 and 15, 2020

Written Submissions of the

Respondent Filed:

December 18, 2020

Place and Date of Judgment:

Vancouver, British Columbia

January 15, 2021

Summary:

This is an application under s. 680 of the Criminal Code for a direction for bail review. Held: Application denied. The bail judge's conclusions on the secondary and tertiary grounds for detention in custody are supported by the circumstances of the case. Considering the deferential standard to be applied on the proposed review, it is not arguable that the judge committed material errors or that the bail decision was clearly unwarranted. The threshold for directing a review is not met.

Reasons for Judgment of the Honourable Chief Justice Bauman:

- [1] Ashleigh Tschritter seeks an order under s. 680 of the Criminal Code for the Chief Justice to direct the Court of Appeal to review a bail decision made by Madam Justice Donegan on 19 October 2020.
- [2] A publication ban applies to this case under s. 517 of the Criminal Code. The s. 517 ban prohibits the publication, broadcast or transmission in any way of the evidence, information and representations at the bail hearing and the bail judge's reasons. The ban will expire when the trial ends. Until then, reasons for judgment on this review application and any subsequent review decision should not be published.

Background

- [3] On 6 September 2020, Ms. Tschritter was charged with second-degree murder contrary to s. 235 of the Criminal Code. It is alleged that Ms. Tschritter caused the death of her husband, David Simpson.
- [4] Ms. Tschritter applied under s. 522 of the Criminal Code for judicial interim release. On 19 October 2020, Justice Donegan issued an oral judgment denying bail, indexed as 2020 BCSC 1814 but not published pursuant to the s. 517 publication ban.

Summary of Judgment on Appeal

- [5] The bail judge provided the circumstances of the alleged offence. I would summarize those circumstances as follows.
- [6] Ms. Tschritter is 31 years old. She had a traumatic upbringing and reports being sexually assaulted a number of times as a youth and following a path into addiction and criminality. Her criminal record includes convictions for theft under \$5,000 in relation to an event that occurred in October 2010, aggravated assault and robbery in relation to events that occurred in March 2010, assault with a weapon in relation to an event that occurred in 2008, obstruction of justice in relation to an event that occurred in June 2014, and two convictions for breach of probation in relation to events that occurred in 2009. Ms. Tschritter was also subject to a mandatory ten-year firearms prohibition at the time of the alleged offence.
- [7] Ms. Tschritter and Mr. Simpson met at a recovery facility in Chilliwack and had been together for about ten years at the time of his death. They have three small children, the eldest of whom is seven years old. The family lived in Clearwater, BC. In addition to raising their children, Ms. Tschritter worked at housekeeping and other jobs. She denies having any substance use issues at the time of the offence.
- [8] On 6 September 2020, the family went camping at a remote campsite near Vavenby, BC. There was no one else in the vicinity until their friend, Mr. Flowers, joined them late that evening. Mr. Flowers was also their neighbour and landlord.
- [9] According to Mr. Flowers, he and Mr. Simpson spent some time that evening target practicing with two firearms, one of which was a shotgun. Once they finished their target practice, Ms. Tschritter came out of the fifth-wheel trailer that the family was camping in and joined the two men by the campfire. Alcohol was consumed by the three adults, but Mr. Flowers said none of them were intoxicated. The children stayed in the trailer throughout this time.
- [10] Mr. Flowers reports that at one point, Mr. Simpson began talking about some of his ex-girlfriends, which upset Ms. Tschritter. Ms. Tschritter went into the trailer and retrieved the shotgun from where the men had left it on the table. She returned to the campfire and pointed it at her husband, initially at his head, then his feet, and then his torso. According to Mr. Flowers, he heard a "click", which he believes meant Ms. Tschritter had removed the safety on the gun. He then saw Ms. Tschritter shoot Mr. Simpson once in his torso. It is alleged that Mr. Simpson (before he collapsed) and Mr. Flowers unsuccessfully tried to wrestle the gun away from Ms. Tschritter; she wrestled it free and tossed it away. At this point, Mr. Flowers says that he was frightened and he ran away, but looked back once as he neared his vehicle to see Ms. Tschritter stomp on Mr. Simpson's head as he lay on the ground. Mr. Flowers says that after the incident, Ms. Tschritter sent him a text message saying, "Dave's dead."
- [11] Mr. Flowers called 9-1-1 and ultimately provided a statement to police.

- [12] Ms. Tschritter also phoned the police to report that her husband had shot himself. After the incident, she and the three children went to a friend's home in Vavenby. Police arrived at the home to find Ms. Tschritter covered in blood except for her hands, which had been washed. She was arrested and has remained in custody since that time.
- [13] Given that the hearing of the interim release application took place at an early stage of the proceedings, no autopsy report or other detailed disclosure had yet been provided.
- [14] The bail judge noted that pursuant to s. 522(2) of the Criminal Code, the burden lay on Ms. Tschritter to show cause why her detention in custody is not justified.
- [15] The Crown's position was--and remains--that Ms. Tschritter's continued detention is necessary under s. 515(10)(b) and (c), that is, for the protection of the public and to maintain confidence in the administration of justice.
- [16] Ms. Tschritter's position was that she should be released on a release order with two sureties, her grandparents, who promised to pay \$40,000, and she suggested conditions that she live with her grandparents, report to a bail supervisor, obey her grandparents' house rules, not possess or consume alcohol or drugs, stay out of bars and liquor stores, and not possess firearms and weapons and live in a residence where such items are kept.
- [17] Ms. Tschritter submitted that her detention is not necessary for the protection or safety of the public. She emphasized that her criminal history is dated and should be given little weight in the bail analysis. She also submitted that the Crown's case is not strong, as it relies on the evidence of Mr. Flowers, whose credibility will be challenged at trial, as well as his reliability, particularly in light of the alcohol consumed that night. Given that there had been no disclosure at that point in the proceedings, future disclosure could undermine Mr. Flowers' version of events, which Ms. Tschritter said was contrary to her version of events. Given the weakness of the Crown's case, her proposed release plan, and her compliance with previous court orders, her release would not cause a right-minded member of the public to lose confidence in the administration of justice.
- [18] The bail judge concluded that the accused had shown that her detention is not necessary on the primary ground for detention. On the secondary and tertiary grounds, the judge found that Ms. Tschritter had not met her onus to show that her detention in custody is not justified. Accordingly, she denied Ms. Tschritter's application for interim release.

Secondary Ground

- [19] The judge was satisfied that there is a substantial likelihood that if released from custody Ms. Tschritter would commit an offence and that the risk she would do so constitutes a danger to public safety. The judge considered that although Ms. Tschritter's criminal history is somewhat dated, it is a history with serious convictions for violence and not so far in the past so as to render it insignificant. At the time of the shooting, she was subject to a ten-year firearms prohibition order. In addition to her history of violent crimes, Ms. Tschritter has

shown on two prior occasions that she cannot comply with court orders. Her most recent conviction, from 2015, is for attempting to pervert, defeat, or obstruct justice, for which she received a not-insignificant sentence of three months' imprisonment.

[20] The bail judge also viewed the Crown's case as very strong, given the eyewitness to the events that led up to the victim's death, his killing, and the immediate aftermath and that Ms. Tschritter was found by police to be covered in blood. The bail judge noted that if found to be proven, the offence of second degree murder is one of the most serious and dangerous to public safety offences, the seriousness of which is only heightened by the use of a shot gun to kill the victim only a few feet from where another person stood, in circumstances where her three small children were nearby, and at a time where Ms. Tschritter was bound not to possess firearms by court order.

[21] At para. 34 of her reasons, the bail judge considered that the real question was:

... whether Ms. Tschritter has established that her detention is not necessary because the danger to public safety that she poses can be prevented or reduced to an acceptable level by restrictions that could be imposed.

[22] The judge was not satisfied that the release plan that was proposed was such that the danger Ms. Tschritter poses to public safety can be prevented or reduced to an acceptable level by any restrictions that could be imposed. In the bail judge's view, the danger Ms. Tschritter poses to public safety is very high and the release plan she offered was very general and lacking in detail. The judge specified a number of non-exclusive details about Ms. Tschritter's proposed plan that were lacking and noted that Ms. Tschritter offered no details about what she would plan to do while living with her grandparents. She also found that given her criminal history and the existence of the firearms ban, the court has no confidence that Ms. Tschritter would abide by release conditions.

Tertiary Ground

[23] With regard to the tertiary ground, the bail judge considered whether further detention was "necessary to maintain confidence in the administration of justice", per s. 515(10)(c) of the Criminal Code. She considered this provision in light of the Supreme Court of Canada's guidance in *R. v. St-Cloud*, 2015 SCC 27.

[24] The bail judge found that the Crown's case was very strong and that the gravity of the alleged offence is very high. The circumstances surrounding the alleged commission of the offence are of the most serious kind, as they involve an allegation of intimate partner violence of the highest degree. Ms. Tschritter is alleged to have used a firearm to kill her husband not in the heat of the moment, but after some consideration, all while her three young children were nearby and while bound by a court order not to possess firearms. If convicted as charged, Ms. Tschritter will be sentenced to imprisonment for life with parole ineligibility ranging between ten to 25 years.

[25] On balance, and considering all of these factors, the judge concluded that Ms. Tschritter's detention is necessary to maintain confidence in the administration of justice.

Positions of the Parties

[26] Ms. Tschritter asks that a division be directed to review the bail judge's decision on the following grounds:

- a) the judge failed to give her an opportunity to address the court's concerns regarding the suitability of her proposed sureties, their background and living situation, and her plans if released;
- b) the judge misapprehended her submissions regarding her intention to retain custody of her children;
- c) the judge over-emphasized her dated criminal history and ignored her compliance with her most recent court order;
- d) she has recently learned that the Ministry of Child and Family Development is seeking an order appointing the Public Guardian and Trustee as her children's property guardian; and
- e) the Crown has failed to provide any disclosure on her file, aside from a half-page narrative summarizing the allegations.

It is Ms. Tschritter's position that she should be given an opportunity to address the Court's concerns respecting the suitability of her proposed sureties, her plans moving forward, the undue weight the Court placed on her criminal history, and the significant change in her children's circumstances.

[27] The Crown submits that Ms. Tschritter has not established that the judge arguably materially erred in law or fact or that her decision to detain was clearly unwarranted. All of the enumerated circumstances in ss. 515(10)(b) and (c) of the Criminal Code strongly favoured Ms. Tschritter's detention.

[28] In response to Ms. Tschritter's specific arguments summarized above, the Crown submits:

- a) the judge did not have an obligation to request further evidence in addition to that offered by Ms. Tschritter, who bore the onus on the application;
- b) whether the judge misapprehended submissions with respect to Ms. Tschritter's efforts to regain custody of her children is not an essential aspect of the judge's reasoning in detaining Ms. Tschritter;
- c) the weight to be given to Ms. Tschritter's criminal record was within the judge's discretion and was properly balanced with other factors; and
- d) the lack of further disclosure and the guardianship status of Ms. Tschritter's children do not change the fact that the judge did not arguably materially err.

Analysis

[29] For the following reasons, I find that the bail judge did not arguably commit any material errors of fact or law. Nor is it arguable that the decision was clearly unwarranted in the circumstances. As a result, I would dismiss the application.

[30] Section 680(1) of the Criminal Code reads:

680 (1) A decision made by a judge under section 522 or subsection 524(4) or (5) or a decision made by a judge of the court of appeal under section 261 or 679 may, on the direction of the chief justice or acting chief justice of the court of appeal, be reviewed by that court and that court may, if it does not confirm the decision,

- (a) vary the decision; or
- (b) substitute such other decision as, in its opinion, should have been made.

[31] The threshold for directing a review is whether it is arguable that the bail judge committed material errors of fact or law, or whether the impugned decision was clearly unwarranted in the circumstances: *R. v. Oland*, 2017 SCC 17 at para. 64.

[32] If a review is directed, the following principles guide the reviewing court:

First, absent palpable and overriding error, the review panel must show deference to the judge's findings of fact. Second, the review panel may intervene and substitute its decision for that of the judge where it is satisfied that the judge erred in law or in principle, and the error was material to the outcome. Third, in the absence of legal error, the review panel may intervene and substitute its decision for that of the judge where it concludes that the decision was clearly unwarranted.

R. v. Oland, 2017 SCC 17 at para. 61

[33] I do not find it arguable that the bail judge committed material errors of fact or law and do not see the bail judge's decision as clearly unwarranted.

[34] The bail judge correctly identified that the onus was on Ms. Tschritter to establish that her detention in custody is not justified (s. 522(2) of the Criminal Code). Accordingly, it was her burden to offer sufficient evidence to satisfy the judge that her detention is not necessary, because she either does not pose a danger to public safety, or because the danger to public safety that she poses can be prevented or reduced to an acceptable level by restrictions that could be imposed. It is not arguable that the bail judge erred in failing to give her further opportunity to address concerns regarding the suitability of her proposed sureties, their background and living situation, and her plans if released. She had the burden of putting this information before the court--the court did not have the burden of eliciting it.

- [35] It is not clear how Ms. Tschritter's submissions on her custody plans for her children could have materially changed the bail judge's analysis. She does not identify what exactly the judge misapprehended about her submissions. However, I cannot see how such an error, if made, would be material to the bail judge's decision. It does not seem to be an essential aspect of the judge's reasons or material to the judge's decision to order detention.
- [36] With regard to the weight placed on Ms. Tschritter's criminal history, this was a matter within the judge's discretion. The judge noted the dated nature of the convictions, but also found that a more recent conviction provided the basis for a concern that if released, the applicant would interfere with the administration of justice. In my view, the reasons of the bail judge reveal that she carefully considered the weight she gave to Ms. Tschritter's criminal history and balanced it with the other relevant factors.
- [37] It is not arguable that the bail judge erred because the Ministry of Child and Family Development is now seeking an order appointing the Public Guardian and Trustee as her children's property guardian. This was not before the bail judge and is irrelevant to the question that must be answered on this application. Ms. Tschritter has not sought leave to introduce fresh evidence on this point and, even if she had, it is not clear from her memorandum of argument how this would affect her ability to show that her detention is not necessary.
- [38] Similarly, it is not arguable that the bail judge erred because the Crown had not provided Ms. Tschritter with disclosure at the time of filing the application at bar. Ms. Tschritter has not provided any arguable reason why the lack of disclosure would impact her ability to show that her detention is not necessary, nor has she sought leave to adduce fresh evidence supporting her position.
- [39] Absent an arguable material error of fact or law, Ms. Tschritter must show that the bail judge's decision was clearly unwarranted in order to justify a review.
- [40] A decision is not clearly unwarranted "simply because a different judge or judges may come to a different balancing result", unless it was a decision which no reasonable chambers judge could reach: *R. v. Poony*, 2017 BCCA 447 at paras. 29-30.
- [41] The decision of the bail judge was well within her discretion; it cannot be said that no reasonable judge could have come to the decision. Accordingly, the decision was not clearly unwarranted.

Disposition

- [42] I would dismiss Ms. Tschritter's application for a direction under s. 680.

"The Honourable Chief Justice Bauman"

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