COURT OF APPEAL FOR THE YUKON TERRITORY

Citation: ***R. v. Rodrigue***,
2007 YKCA 9

Date: 20070711
Docket: 05-YU549

Between:

Regina

Respondent

And

Karen Rodrigue

Appellant

Before: The Honourable Chief Justice Finch
The Honourable Madam Justice Huddart
The Honourable Mr. Justice Low

R. S. Fowler and L. Smith	Counsel for the Appellant
M. W. Cozens	Counsel for the Respondent (Crown)
Place and Date of Hearing:	Whitehorse, Yukon Territory May 28, 2007
Place and Date of Judgment:	Vancouver, British Columbia July 11, 2007

Written Reasons by:
The Honourable Chief Justice Finch

Concurred in by:
The Honourable Madam Justice Huddart
The Honourable Mr. Justice Low

Reasons for Judgment of the Honourable Chief Justice Finch:

I. INTRODUCTION

[1] The appellant appeals her conviction entered on 25 October 2005 on a charge of second degree murder in the stabbing death of Gerald Glen Dawson on 17 June 2004, following a trial by judge and jury in Whitehorse. In her testimony at trial, the appellant admitted inflicting the fatal wounds, but said she was intoxicated and was provoked by the deceased's sexual assault on her and by his belittling slur that she was a "crack whore" whom no one would believe. The critical issue for the jury was whether the appellant had the necessary intent for murder.

[2] There was a substantial body of evidence led as to the appellant's conduct after the stabbing, concerning her apparent indifference to the deceased's condition, destruction of evidence, and use of the deceased's property. This, and other evidence, reflected poorly on the appellant's character. There was also evidence as to the deceased's good character, including the absence of any history of prior sexual misconduct, and his assistance to the appellant and other women with similar substance abuse issues.

[3] On this appeal, counsel for the appellant contends that the learned trial judge failed to give any, or adequate, instructions as to the use the jury could make of the appellant's post-event conduct, and the evidence of the deceased's good character and the appellant's bad character. Counsel also contends that the charge on intent for murder was inadequate and misleading in the circumstances of this case. The appellant seeks a new trial.

[4] Counsel for the Crown says that the judge's charge was adequate in respect of all issues raised. In the alternative, with respect to the charge on the evidentiary issues, the Crown says the verdict would have been the same in any event, and asks the Court to apply the provisions of s. 686(1)(b)(iii) of the ***Criminal Code***, and says the appeal should be dismissed.

[5] For the reasons that follow, I consider there to be merit in all of the grounds raised by the appellant, and I would order a new trial.

II. FACTS

A. The Relationship of the Appellant and the Deceased

[6] At the time of his death, Gerald Dawson was 64 years old, and the father of a daughter who also lived in Whitehorse. Mr. Dawson had lived in Whitehorse and worked in construction for a number of years. He had befriended and helped a number of women in the community when they needed help, and one of those persons was the appellant. There was evidence that three other women, Nadia Lennie, Sheila Scheper and Carolyne Chambers, also had problems with substance abuse and that they all received assistance from Mr. Dawson from time to time, including rides, the loan of money, or sometimes help with their children.

[7] Karen Rodrigue was born and raised in Inuvik, in the Northwest Territories. She moved to Whitehorse when she was 15. She has a grade 10 level education and is separated from her husband, Jimmy Rodrigue. Ms. Rodrigue has four children, aged from 9 to 19 at the time of trial. She lived in a common-law

relationship with Dan McGinnis for about seven months prior to the events of June 2004. She was 36 years old in June 2004.

[8] Ms. Rodrigue has a criminal record, including convictions for forgery, fraud and theft. In her evidence, she admitted that she had a substance abuse problem and used alcohol, marihuana and cocaine. She has been using drugs since she was 14 and drinking since the age of 15. She has attended some treatment programs over the years.

[9] The friendship between the appellant and the deceased was well known to the community of Whitehorse, and the two were often seen together. The deceased's daughter thought that the appellant and her father were friends, in a non-sexual relationship. Her father had told her the appellant was a friend whom he would help out if in difficulty, and she believes that this was the extent of their relationship.

[10] There was other evidence as to the friendly, but non-intimate, relationship of the two.

[11] Ms. Rodrigue testified that she borrowed money from Mr. Dawson occasionally, usually small amounts, which she said she almost always paid back. They had been friends for three or four years before June 2004. She denied any prior sexual relationship with Mr. Dawson.

[12] In the spring of 2004, she used one of Mr. Dawson's credit cards without his permission. He did not report it to the R.C.M.P. and the two remained friends.

B. Events Before the Stabbing

[13] On 16 June 2004, the appellant was drinking with Danny McGinnis in their apartment in the afternoon. They decided to get some cocaine, which they did, used it, and drank some more beer. Later they decided to go downtown to get more cocaine with their remaining money, but were unsuccessful.

[14] The appellant decided to try to borrow $30.00 from Mr. Dawson so she could purchase more cocaine. Mr. McGinnis, in the meantime, had gone home while the appellant stayed downtown at a local bar. She continued to drink beer. She phoned Mr. Dawson at about midnight and he came down and picked her up. She said they drove around for some time and eventually went back to Mr. Dawson's house to drink some beer and "smoke a joint".

[15] When the appellant asked for a ride home, Mr. Dawson told her it was too late and she would have to walk. He agreed they would sleep and he would drive her home in the morning. She lay on a cot with a blanket over her.

[16] She testified that she awoke to Mr. Dawson tugging on her arm and asking her to come lay with him. She declined and asked him to leave her alone. She says he then grabbed her, threw her onto his bed, held her down and sexually assaulted her.

[17] The two then argued about what had just occurred. The appellant said Dawson taunted her, saying that she could tell the R.C.M.P. her story, but they wouldn't believe her because he would tell them that she was a "crack whore". The

appellant said she was very upset. They were standing in the kitchen, and when Mr. Dawson turned around, she grabbed a knife and struck him.

[18] She said Mr. Dawson acted as though the matter was a big joke and that nobody would believe her anyway. She said she was very angry that he thought he could get away with what he had done. She didn't think about what she was doing before she stabbed him and only realized what she had done after the event. She said her level of intoxication was high and that she was half-drunk.

[19] It was admitted at trial that the cause of death was internal bleeding caused by a stab wound on the upper left shoulder region of Mr. Dawson's back. The stab wound was consistent with a single-edge knife blade penetrating the deceased's body for five or six inches. The cutting edge of the knife was facing upwards. Internal bleeding would probably have taken ten or fifteen minutes before it was ultimately fatal. It could not be determined whether the injuries sustained would have been survivable even if appropriate and timely medical treatment had been given.

C. Post-event Conduct, and the Appellant's Character

[20] After the stabbing, Mr. Dawson fell to the floor and lay with his eyes closed, unresponsive. Ms. Rodrigue said she panicked and did not know what to do next. She pulled his body into the bedroom and covered him with a blanket. There was a pool of blood in the kitchen, so she grabbed a sheet, put it over the blood and poured water over it. She wiped it up and threw the sheet back into the bedroom. She took off her bloody socks, put her shoes on, grabbed the car keys from the table

and Mr. Dawson's gun from a dresser. She also took some beer and left in Mr. Dawson's car.

[21] She said she left the residence and padlocked the door on her way out. She left a note on the door that she wrote in the deceased's name, saying he was out of town for two weeks. She said she did this to throw anybody off the track that might be looking for him. She admitted taking the knife and the socks from the scene to conceal what she had done.

[22] On her way home, she stopped at a recycling depot and threw out a bag which contained the knife and her socks. From there she drove home.

[23] There was evidence that, between about 4:30 and 5:30 on the morning of 17 June, there were four unsuccessful attempts, using different Royal Bank convenience cards, to withdraw money from the deceased's account. Ms. Rodrigue admitted that she may have used the cards, although she could not remember doing so.

[24] When she got home, she did not tell Mr. McGinnis what had happened. She said things got worse so she just continued drinking and using a large amount of cocaine, for days, while she tried to think about how to sort things out.

[25] The following day, she got a paycheque which she cashed to buy more alcohol and cocaine. She went with Mr. McGinnis to the Dawson residence and took a couple of chainsaws from his shed, which they pawned at a pawn shop. With that money, they bought more beer. Later they sold another saw and used that money to

buy more beer and some cocaine. They did this for ten days following the stabbing, namely, drink, use cocaine, and drive around in Mr. Dawson's car. About ten days after the stabbing, they were pulled over while driving Dawson's car.

[26] Ms. Rodrigue testified that during the ten-day period, she did not tell anyone she had been sexually assaulted and she did not tell anyone about Mr. Dawson's death, including her boyfriend, Mr. McGinnis. After her arrest, she did not tell the police constable initially because she was very frightened. She eventually did tell the truth to the police because she knew that they knew about Mr. Dawson's death.

[27] She made a statement to Constable Wirachowsky, including an apology letter admitting that what she had done was wrong and asking for forgiveness.

[28] In her testimony, Ms. Rodrigue acknowledged that she did not check to see whether Mr. Dawson was breathing in the ten to fifteen minutes after his death. She did not call the police after she stabbed him. She could not explain why she did not call 911. She guessed that she moved the body so it couldn't be seen through a window.

D. Gerald Dawson's Good Character

[29] James Wood was a close friend and co-worker of Mr. Dawson. Wood testified that he had never seen Mr. Dawson do anything sexual to any of the deceased's female friends, nor had he ever made a sexual advance towards any of them. He knew that Mr. Dawson and the appellant spent time together, but he

thought that they were just friends. He never saw any behaviour to make him think they were a couple.

[30] Maria Schafer testified that her relationship with the deceased was not an intimate one, and that he had never done or said anything to her that made her uncomfortable or fearful. Sheila Scheper testified that she and the deceased were not having a sexual relationship, and that the deceased had never shown any romantic interest in her, or behaved inappropriately towards her.

[31] David Bunbury, a distant relative of Mr. Dawson, testified that he saw or talked to Mr. Dawson probably every day within the preceding few years. He often saw the appellant riding around town in Mr. Dawson's car, and he believed that the nature of Mr. Dawson's relationship with the appellant was little more than a friendship.

III. OVERVIEW OF THE PARTIES' POSITIONS

A. The Appellant's Position

[32] Counsel for the appellant submitted that the trial judge failed to give the jury adequate instructions as to the use the jury could make of the evidence concerning the appellant's conduct after the stabbing. He stressed that in this case, the appellant had essentially admitted the *actus reus* of the offence alleged, namely, the stabbing of the deceased, and that the only real issue was whether the appellant had the requisite intent for murder. He said the judge's charge was completely

deficient in explaining to the jury that the post-offence conduct had no probative value on the central issue of the appellant's state of mind at the time of the stabbing.

[33] Counsel for the appellant made a similar, and somewhat overlapping, submission concerning the evidence of the appellant's bad character. He contended that the judge gave no directions as to the proper use the jury might make of this evidence, and, more importantly, did not tell the jury about the ways in which the evidence of bad character could not be used. He says that although much of the evidence concerning the appellant's disreputable character was relevant to the issue of motive, the evidence was left to the jury to infer, improperly, that the appellant had a propensity to commit unlawful acts.

[34] On the issue of the judge's charge on the necessary intent for murder, counsel for the appellant says the charge is defective because it failed to instruct the jury that an accused's intent to murder must be contemporaneous with the *actus reus*, that the charge failed to clarify that s. 229(a)(ii) of the ***Criminal Code*** required subjective foresight of death, and failed to explain the concept of "recklessness" in relation to foresight of death, having regard for all the evidence about the appellant's post-event conduct.

B. The Respondent Crown's Position

[35] Crown counsel says the judge's charge concerning post-event conduct was adequate. He says the evidence was a significant part of the appellant's defence, presented to show that she either lacked the requisite intent, or was consistent with the defence of provocation. He says the judge told the jury that the post-event

conduct was equally consistent with manslaughter or murder, and that the jury was not told the post-event conduct was more consistent with murder than with manslaughter. He says any further instruction was unnecessary and relies on s. 686(1)(b)(iii), the curative proviso.

[36] As to the evidence of the appellant's bad character, Crown counsel says much of this evidence was advanced by the defence, particularly through the report and testimony of Dr. Lohrasbe, a psychiatrist who was called on her behalf. The Crown says the evidence of the appellant's character was relevant to the issue of motive, and that Crown counsel at trial did not encourage the jury to engage in impermissible reasoning. The Crown says no further instruction by the judge was required with respect to the use of this evidence.

[37] As to the evidence of the deceased's good character, the Crown says this evidence was relevant to the defence of provocation because it was probative on the appellant's assertion that the deceased had sexually assaulted her immediately before the stabbing. He contends that the evidence was only utilized to that extent, and that the jury was not invited to consider the appellant's guilt on the basis of character comparison.

[38] Crown counsel again relies on the curative proviso.

[39] With respect to the judge's charge on the intent for murder, counsel maintains that the charge was adequate and not misleading. He points out that neither counsel at trial objected to the sufficiency of the charge on intent for murder, and again relies on the curative proviso.

IV. DISCUSSION

A. The Charge on Post-Event Conduct

[40] The judge's charge on the appellant's post-event conduct was as follows:

> [84] You have heard evidence about Ms. Rodrigue's conduct occurring after the stabbing. I will review that evidence with you shortly.
>
> [85] What Ms. Rodrigue did or said might help you decide whether she is guilty or not guilty of the offence of murder.
>
> [86] However, you may also decide that this evidence is equally consistent with Ms. Rodrigue having committed manslaughter and not murder.
>
> [87] The first thing to decide is whether Ms. Rodrigue actually did or said these things. If you find that she did not do or say any of these things, you must not consider that evidence in reaching your verdict.
>
> [88] If you find that Ms. Rodrigue did in fact do or say these things, you should consider next whether this was because she committed the offence charged. If so, you should consider this evidence, together with all the other evidence, in reaching your verdict.
>
> [89] If, however, you find that Ms. Rodrigue did or said these things for some other reason, such as having committed manslaughter, you should not consider that as evidence of guilt.

[41] The judge summarized the Crown's submission concerning the appellant's post-event conduct, as follows:

> [185] Her subsequent actions were intended to mislead and conceal her tracks:
>
> - She moved the body into the back room where it would not be seen through the window.
> - She wiped up the blood.
> - She took the knife and her bloody socks from the scene and disposed of them.
> - She wrote a false note saying that Mr. Dawson was in British Columbia for two weeks.

- She took his vehicle.
- She told Jimmy Rodrigue not to steal anything from Mr. Dawson's residence because she was afraid he might discover the body.
- She told other people stories to throw them off the track.

[42] It is settled law that evidence of flight, concealment or disposal of evidence is circumstantial evidence from which the jury may draw an inference of guilt. In this case, it is only one of the inferences that might be drawn. For this reason, the law requires the trial judge to give careful instructions to a jury not to misuse this type of evidence. An instruction on the proper use of after-the-fact conduct is necessary "to counter the jury's natural tendency to leap from evidence of flight or concealment to a conclusion of guilt, and to ensure that alternative explanations for the accused's conduct are given full consideration": ***R. v. White***, [1998] 2 S.C.R. 72, 125 C.C.C. (3d) 385 at para. 36. The Supreme Court of Canada has held that when evidence of post-offence conduct is put to the jury, the jury should be properly instructed on how to use such evidence: see ***White*** at paras. 22, 23, 36; and ***R. v. Diu*** (2000), 144 C.C.C. (3d) 481, 49 O.R. (3d) 40 (C.A.) at para. 120.

[43] The Crown says the after-the-fact conduct of the appellant was an important part of her defence and was used to support the defence theory that her state of mind at the time of the unlawful killing was such that she either lacked the requisite intent to commit murder, or was consistent with her being provoked and then killing the deceased on a sudden impulse.

[44] Crown counsel submitted that the appellant's actions throughout, including the after-the-fact conduct, were calculated to mislead others as to discovery of the

death. Crown counsel at trial submitted that at least some of the appellant's actions after the stabbing were to conceal what she did and give insight into her motive.

[45] The Crown points out that there were no submissions by either Crown or defence counsel in conferences before the charge was given to the jury with respect to the use to be made of the post-event conduct and, after the charge, defence counsel did not object to the charge on this aspect of the evidence.

[46] The appellant does not dispute that the after-the-fact conduct in this case was part of the circumstantial evidence of motive, relevant to rebut the evidence of intoxication, and relevant to rebut the defence of provocation.

[47] A limiting instruction was especially necessary in this case because the appellant admitted stabbing the deceased. The issue for the jury was the appellant's intent at the time of the stabbing. As explained by the Court in ***White***, *supra*, the danger in such a case is that "the jury might determine that the conduct of the accused arose from a feeling of guilt, but might fail to consider whether that guilt relates specifically to the crime at issue, rather than to some other culpable act." (at para. 22)

[48] The jury was told that the appellant's post-event conduct might be considered equally consistent with murder or manslaughter (para. 86), but the jury was not told that the post-event conduct had no probative value with respect to any particular offence, and was not told that they could not use the post-event conduct in deciding whether the appellant had the necessary intent for murder.

[49] The deficiency in the charge is that, given the accused's admission of guilt in respect of the unlawful act, none of the post-event conduct could be relied upon as direct proof of an intent to kill through the reasoning of consciousness of guilt. Although the jury was told that they might find the evidence to be equally consistent with the accused having committed manslaughter and not murder, the import of this statement was compromised by the direction (at para. 88) that "If you find that [the accused] did in fact do or say any of these things, you should consider next whether this was because she committed the offence charged." Rather, the jury should have been told that, because the after-the-fact conduct was as consistent with consciousness of guilt for manslaughter as it was for murder, it therefore had no probative value directly on the question of the mental state of the accused at the time the unlawful act was committed.

[50] Having regard for the volume and significance of the after-the-fact conduct, the failure to address this issue adequately in the charge is an error of law within the meaning of s. 686(1)(a)(ii) of the ***Criminal Code*** and had the potential to lead to a miscarriage of justice.

[51] In my opinion, the only appropriate remedy is to quash the conviction and order a new trial pursuant to s. 686(2)(b) of the ***Code***.

B. The Charge on Character Evidence

1. Evidence of the Appellant's Bad Character

[52] The appellant concedes that the learned trial judge gave an adequate charge concerning the appellant's criminal record. However, counsel contends that, beyond

that, the trial judge gave no instruction whatsoever as to the limits within which the jury could use the evidence reflecting on the appellant's disreputable conduct, or bad character, much of which evidence related to her conduct after the stabbing.

[53] Counsel contends that although the Crown did not encourage the jury to use "propensity" reasoning in reaching its verdict, it did rely on evidence of the appellant's character as relevant to the issue of motive.

[54] The closing submissions of counsel for the Crown included this:

> There is a jarring dichotomy between [w]hat she wants you to believe on the one hand, that he was her friend and he shouldn't have done this, and the idea that he even did it at all. That's just not Gerald Dawson. And so, in some way, she's trying to have it both ways. He did this thing, but it hurt me particularly because that's not him. I would suggest that you're being asked to go around in circles and chase your own tail, as it were, in trying to figure out what happened on this particular issue.
>
> Now, when you stack that kind of an "is it plausible issue" up against what Dr. Lohrasbe told you about the behaviour of drug addicts when they're in that drug, I'll use the word "craze", but I don't think that's quite the word he used, that passion for their addictions, where they'll do almost anything, where, when they're frustrated, they'll do other things to get what they need, what they want, does that make more sense? I suggest to you that it does, and that's what, when you listen to Karen Rodrigue's descriptions of what happened between she and Mr. Dawson, not just on the night in question, but during the course of their relationship, seems to have been her pattern in her dealings with him. She was using him to get what she wanted.
>
> * * *
>
> Now, again, I want to be very clear. We're not suggesting that she is a bad person and that she killed Mr. Dawson because she's a bad person. We're suggesting that she is addicted to drugs, she cannot, in effect, do anything other than feed her habit. Cocaine is a harsh mistress. And so even though she's got a good job opportunity coming at her, even though she's going to go out of town and make some money and solve some of her financial problems, get off of the having DIA having to pay her rent and having that arrangement to pay

> it back, she grabs the card, she uses it, she gets money and she gets cocaine. And that, ladies and gentlemen, is what we say this case is all about.
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> * * *
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> She spends what little money she has on alcohol and, it appears, is able to get other people to buy alcohol for her, and then, and this did have the ring of truth about it, when she said, about quarter to 12:00 when she sort of gets back into time, realizes there's no more money, she hasn't got the drugs, she hasn't got the alcohol, she hasn't got the tobacco, and her immediate response is to call Gerald, the guy who helps her.
>
> That, ladies and gentlemen of the jury, we suggest is insightful. That tells you what's going on in her life. It shows that she's spiralling down. She's going out of control. She has a need.

[55] The Crown argues on appeal that the appellant's callous and indifferent behaviour toward the deceased after the stabbing, the evidence of flight, her destruction of evidence, theft of the deceased's property after he was killed, and her lying and misleading the police, were not evidence of bad character in and of itself. The Crown says this was after-the-fact evidence in relation to the events occurring immediately after the stabbing and did not go to the appellant's general reputation in the community or to the kind of person she was. The Crown says the evidence of Dr. Lohrasbe explained this conduct as consistent with the version of events testified to by the appellant.

[56] As to the evidence of the appellant's history of illicit drug use and substance abuse, the Crown says that although it is somewhat in the nature of character evidence, it was minimal in nature and part of the general background or narrative.

[57] The appellant's argument is that although the Crown did not suggest the jury use the evidence of the appellant's bad character for an improper purpose, the

learned trial judge gave no instruction to the jury warning them against impermissible propensity reasoning. Counsel for the appellant concedes that the evidence as to Ms. Rodrigue's lifestyle was relevant and admissible on the issue of motive, and also in assessing her credibility. It was relevant to the issue of whether, as the appellant testified, she was sexually assaulted and provoked before the stabbing.

[58] However, counsel for the appellant says the trial judge was nevertheless obliged to charge the jury that they could not use evidence of the appellant's lifestyle or character to infer guilt for murder, where the only issue was whether the appellant had the requisite intent.

[59] I respectfully agree with the appellant's submissions on this issue.

[60] Much of the evidence of disreputable conduct was relevant to the issue of motive, but it did not bear directly on that issue or relate directly to Mr. Dawson. Rather, it was evidence of a pre-existing disreputable lifestyle. Moreover, a lot of the evidence related to disreputable behaviour of the appellant after the stabbing occurred.

[61] The Crown relied on this evidence to a substantial degree, as well as on the good character of the deceased, and in the absence of some clear limiting instruction, there is a real likelihood that the jury might have engaged in an impermissible line of reasoning.

[62] I would give effect to this ground of appeal as well.

2. Evidence of the Deceased's Good Character

[63] In his closing submissions, Crown counsel relied on the evidence of Gerald Dawson's good character as an answer to the appellant's allegations that she was sexually assaulted, and thereby provoked into attacking him. The Crown's submissions included this:

> The young women who were comparable to Ms. Rodrigue, to a person said he was never inappropriate with them. And so when you're going through your analysis and considering whether the story that Ms. Rodrigue has told you, that she was raped by Gerald Dawson quite unexpectedly, is plausible, there's two parts to that you need to think about. The first one is the part where she says it's unexpected. I would suggest to you that it is unexpected, not just because she didn't think about it or think it was going to happen, but it's unexpected because we all know, and the evidence is incontrovertible, that that's not the kind of man Gerald Dawson was. He's not the kind of man that would lure young women into his web, if you will, and then take advantage of them. They're very, very consistent that that didn't happen.
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> * * *
>
> There is a jarring dichotomy between [w]hat she wants you to believe on the one hand, that he was her friend and he shouldn't have done this, and the idea that he even did it at all. That's just not Gerald Dawson.
>
> * * *
>
> The story that she tells about being raped is just that. In the Crown's submission, it's a story. It's implausible, at the outset, in the Crown's submission, that he would rape her. That's just not Gerald Dawson.
>
> * * *
>
> At least one of the witnesses referred to him as being something of a father figure. It seems that he took his role in the community as an older person somewhat seriously, and that's something that, when you're assessing, did he rape Karen Rodrigue, you've got to ask yourself: Does this make any sense? It just isn't Gerald Dawson. It didn't happen that way.

[64] Generally speaking, the character of a victim of crime is not relevant. There are some cases, however, where evidence of character or disposition of a victim has been held to be admissible: see ***R. v. Scopelliti*** (1981), 63 C.C.C. (2d) 481, 34 O.R. (2d) 524 (C.A.) and ***R. v. Soares*** (1987), 34 C.C.C. (3d) 403, 19 O.A.C. 97.

[65] The important issue is whether the probative effect of the evidence outweighs its prejudicial value: see ***R. v. Dejong*** (1998), 125 C.C.C. (3d) 302, 16 C.R. (5th) 372 (B.C.C.A.) and ***R. v. Edelenbos*** (2004), 187 C.C.C. (3d) 465, 71 O.R. (3d) 698 (C.A.).

[66] Crown counsel on appeal says the evidence of Mr. Dawson's good character was relevant to the appellant's allegation of sexual assault, and hence her defence of provocation. He contends that that was the extent to which the evidence was used.

[67] In my view, the evidence of Mr. Dawson's reputation concerning his personal conduct towards other women was of limited value. Sexual conduct is inherently private in nature, and sexual misconduct even more so. The absence of a reputation for conduct of a certain kind is hardly an assurance that the reputation does not hide the truth, or that a person previously well behaved may not act in an aberrant way.

[68] The danger with this evidence in this case is that there would be a natural inclination on the part of the jury to juxtapose the evidence of Mr. Dawson's good character with the evidence of the appellant's bad character.

[69] It does not appear that counsel for the appellant at trial expressed any objection to the admissibility of the evidence concerning Mr. Dawson's character. In submissions, before the judge gave his charge, defence counsel did express concern over Crown counsel's submissions that the deceased was not the type of man who would commit rape.

[70] Given the limited probative value of this evidence and the danger that the jury might use it in an improper way, it is my opinion that the judge should have cautioned the jury about its use. A proper instruction would have been that the evidence had some, but limited, probative value on the allegation of sexual assault, because most sexual conduct and misconduct occurs in private; and that the evidence should not be used as a basis for "character comparison" – i.e. the deceased was a good man, the appellant is a bad woman, and therefore she must be guilty.

[71] I would also give effect to this ground of appeal.

C. The Charge on Intent for Murder

[72] The charge on the issue of intent was as follows:

> [109] The crime of murder requires proof of a particular state of mind. For an unlawful killing to be murder, Crown counsel must prove that Karen Rodrigue meant either to kill Mr. Dawson or meant to cause him bodily harm that she knew was likely to kill Mr. Dawson, and was reckless whether he died or not. The Crown does not have to prove both. One is enough. All of you do not have to agree on the same state of mind, as long as everyone is sure that one of the required states of mind has been proven beyond a reasonable doubt.
>
> [110] If Karen Rodrigue did not mean to do either, she committed manslaughter.

> [111] To determine Karen Rodrigue's state of mind, what she meant to do, you should consider all the evidence. You should consider:
>
> - what she did or did not do;
> - how she did or did not do it; and
> - what she said or did not say.
>
> [112] You should look at Karen Rodrigue's words and conduct before, at the time and after the unlawful act that caused Mr. Dawson's death. All these things, and the circumstances in which they happened, may shed light on her state of mind at the time. They may help you decide what she meant or didn't mean to do. Along with this evidence, you should consider the opinion of the expert, Dr. Lohrasbe, who testified about Karen Rodrigue's state of mind. In considering all the evidence, use your good common sense.

[73] The ***Criminal Code*** defines murder in s. 229:

> 229. Murder – Culpable homicide is murder
>
> (*a*) where the person who causes the death of a human being
>
> (i) means to cause his death, or
>
> (ii) means to cause him bodily harm that he knows is likely to cause his death, and is reckless whether death ensues or not; ...

[74] The appellant contends that the trial judge's charge on intent fails to describe accurately the requirements of the ***Criminal Code*** because the charge failed:

1. to instruct the jury that the mental state for murder must be present at the time of the stabbing, in other words contemporaneously with the *actus reus*;

2. to establish clearly that the mental state, specifically in respect of s. 229(a)(ii), requires that at the time of the act, the accused must foresee a likelihood of death flowing from the bodily harm that is being inflicted on the victim, in other words a subjective foresight of death;

3. to provide any definition of recklessness.

[75] The appellant says the judge ought to have told the jury that at the time of the unlawful act, the accused must foresee a likelihood of death flowing from the bodily harm that is being inflicted on the victim. In other words, at the time the bodily harm is inflicted, the accused must know that death is a likely consequence.

[76] Counsel for the appellant says that not only must the *mens rea* be contemporaneous with the *actus reus*, but that all three parts of the definition of *mens rea* in s. 229(a)(ii) must be present at the same time, i.e.:

(1) an intent to cause bodily harm;

(2) knowledge of the likelihood of death; and

(3) recklessness as to whether death ensues or not.

[77] Counsel for the appellant says that a correct charge on intent for murder is set out in M. R. Dambrot and E.A. Bennett, *Canadian Criminal Jury Instructions: CRIMJI*, looseleaf, 4th ed. (Vancouver: Continuing Legal Education Society of B.C., 2005), at 6.45, para. 37:

> The third part is that _____ [THE ACCUSED] was reckless about whether or not (his/her) conduct caused the death of _____ [THE VICTIM]. If _____ [THE ACCUSED] knew at the time that (he/she) committed _____ [THE UNLAWFUL ACT] that it would likely cause the death of _____ [THE VICTIM], but _____ [THE ACCUSED] nonetheless persisted in committing that act despite (his/her) knowledge of that risk, then _____ [THE ACCUSED] has been reckless as to whether or not death ensues.

[78] The judge did tell the jury that a review of all the evidence "may shed light on her state of mind at the time" (para. 112). However, he did not clearly state what "time" referred to. In this case, where there was a great deal of evidence as to the

accused's conduct or misconduct after the stabbing, the appellant says it was essential to direct the jury to consider the appellant's state of mind at the time of the unlawful act of stabbing. This is especially so because the jury was specifically directed to consider what the appellant did or did not do after the unlawful act that caused Mr. Dawson's death.

[79] The appellant says the essential defect in the trial judge's charge is that it never focussed the jury on the issue of whether the accused foresaw death as a consequence of her actions at the time of her unlawful act. The jury was told to consider her state of mind and what she meant to do. This was an appropriate charge for s. 229(a)(i), "means to cause death". But it was inappropriate for the mental state requirement under s. 229(a)(ii) because it failed to connect "means to cause bodily harm" with the additional mental state of knowledge of the foreseeable consequences of that bodily harm.

[80] The appellant argues that *CRIMJI* contains the appropriate charge in these circumstances at 6.45, para. 36:

> The second part is that _____ [THE ACCUSED] knew that the bodily harm would likely cause the death of _____ [THE VICTIM]. You must ask yourselves whether _____ [THE ACCUSED] intended to cause bodily harm of such a grave and serious nature that (he/she) knew that it was likely to result in the death of_____ [THE VICTIM]. As you probably know, knowledge is like intention. They are both states of mind. Therefore, you should decide what _____ [THE ACCUSED] knew the same way you decide what (he/she) intended to do–by looking at all the surrounding circumstances (including the effect that intoxication or mental disorder may have on a person's ability to foresee or know that death was a likely consequence of his/her actions).

[81] Finally, with respect to the charge on intent, the appellant contends that the trial judge failed to define "recklessness". In this case, where the jury was directed to consider acts done or not done "after the stabbing", the inclusion of the word reckless had a special significance. The appellant says it was essential for the trial judge to provide the jury with assistance as to the meaning of recklessness within the overall definition of the mental state for murder. Given the failure to alert the jury in any meaningful way to the requirement of knowledge of death as a likely and foreseeable consequence, it was even more imperative that this word be given its meaning within the legal concept.

[82] The *Oxford English Dictionary* definition of "reckless" is "Careless in respect of the consequences of one's actions; lacking in prudence or caution" or "Having no care or consideration for ... another." It can also mean showing neglect towards something or someone. However, within the meaning of s. 229(a)(ii), reckless refers to the foreseeability of a likely, as opposed to simply a possible, consequence flowing from the bodily harm that he is occasioning the victim: ***R. v. Cooper***, [1993] 1 S.C.R. 146 at 155, 78 C.C.C. (3d) 289. In other words, within the legal definition of the mental element for murder, reckless is synonymous with a substantially subjective state of mind, and not with imprudence or carelessness. As explained by Cory J. (for the majority) in ***Cooper*** (at pp. 154-155):

> The aspect of recklessness can be considered an afterthought since to secure a conviction under this section it must be established that the accused had the intent to cause such grievous bodily harm that he knew it was likely to cause death. One who causes bodily harm that he knows is likely to cause death must, in those circumstances, have a deliberate disregard for the fatal consequences which are known to be

> likely to occur. That is to say he must, of necessity, be reckless whether death ensues or not.

[83] The Crown referred us to the instruction given by the judge at the commencement of the trial on s. 229(a)(i) and (ii), and to his closing instructions on intent as quoted above (charge, paras. 109-112).

[84] The Crown says there could have been no doubt in the mind of the jury that the critical moment for determining intent was the time at which the appellant stabbed the deceased. Counsel says the instruction by the trial judge to consider the appellant's conduct, or failure to act, after the stabbing was not an invitation to the jury to look at the lack of assistance rendered by the appellant and then to reason backwards to an intent at the time of the stabbing. The Crown says nothing in the submissions of counsel or in the charge would have led the jury in that direction. The Crown says that what the appellant did or did not do after the stabbing was evidence to be considered along with all other evidence when looking at whether the offence committed was murder or manslaughter. Counsel says the judge was not required to provide the jury with any further instruction with respect to what constituted recklessness.

[85] The Crown points out that neither Crown nor defence counsel made any submissions during the pre-charge conferences as to the sufficiency of the charge on the intent for murder.

[86] In my respectful view, the Crown's submissions do not answer the deficiencies in this charge identified by counsel for the appellant.

[87] The instruction on intent given by the trial judge was, we were told, adopted from D. Watt, *Watt's Manual of Criminal Jury Instructions* (Toronto: Carswell, 2005). The charge as given has the merit of brevity. However, it was not apt to the circumstances of this case, the evidence as to post-event conduct, and the danger that the jury might not understand the necessity for intent under either s. 229(a)(i) or (ii) to coincide with the *actus reus*.

V. CONCLUSION

[88] The issue throughout this case for the jury was the appellant's mental state at the time of the stabbing. There was evidence of intoxication, provocation and post-event conduct that touched on this issue. The errors identified in the charge by the appellant were serious, and were errors of law that had a potential to cause a miscarriage of justice. They can only be remedied by a new trial.

[89] For these reasons, I would allow the appeal and direct a new trial.

_____
The Honourable Chief Justice Finch

I agree:

_____
The Honourable Madam Justice Huddart

I agree:

_____
The Honourable Mr. Justice Low