Citation: *R.* v. *J.D.*, 2011 YKYC 1

Date: 20110330
Docket: Y.C. 09-03547
Registry: Whitehorse

IN THE YOUTH JUSTICE COURT OF YUKON
Before: His Honour Judge Faulkner

REGINA

v.

J.D.

Publication of identifying information is prohibited by s. 110(1) and 111(1) of the *Youth Criminal Justice Act*.

Appearances:
David McWhinnie — Counsel for the Crown
K. C. Komosky
Gordon Coffin — Counsel for the Defence
Fia Jampolsky

REASONS FOR JUDGMENT

[1] J.D. is to all appearances a normal, average seventeen year old girl. Normal and average except for one thing: on August 9, 2009 she attacked a man with a knife and killed him.

[2] In August of 2009, J. D. was living with her mother M.F. and her brother P.D. in a mobile home in Whitehorse. M.F. was steadily employed but was an alcoholic. Usually she would stop at the bar after work. Once at home, she would continue to drink and, typically, ended up passed out on the living room couch.

[3] The deceased, P.S., had also resided in the home for several years. P.S. had once been M.F.'s boyfriend, but they were no longer in a relationship. P.S. was, from all accounts, somewhat depressed and in poor health. He did not work and very seldom left the trailer, preferring to sit in his chair in the living room smoking and drinking beer. He contributed little or nothing to the family finances.

[4] J.D. came to hate him. She resented the fact that some of her mother's limited funds were spent on keeping P.S. supplied with beer and cigarettes. She resented P.S.'s presence in the house because it limited her own use of it: she felt she had no privacy or freedom in her own home. By August 2009, J.D's latest complaint was that P.S. seemed to have developed the habit of coming into the kitchen when she was there, thus invading her "bubble" or personal space.

[5] In the early hours of August 9, 2009, J.D. was in the kitchen getting a drink of juice from the refrigerator. P.S. got up from his chair and came into the kitchen. J.D. went to a drawer, got out a butcher knife and attacked P.S. Ultimately, she inflicted twelve stab wounds on Mr. S., one of which proved fatal. J.D.'s mother, who was passed out on the couch, slept through the entire incident.

[6] After the attack, J.D. made no attempt to assist Mr. S. but fled the premises in her mother's car. J.D. made cell phone calls to her brother P.D. and her mother. She also went to her best friend's house and then to the home of her some-time boyfriend. She provided each with some description of her attack on Mr. S. She also disposed of the knife. Eventually, after some hours, she turned herself in to the police.

[7] After J.D. had fled the scene, her mother, M.F., woke up. P.S. was still alive and calling for help. M.F. tried to use the telephone in the residence to call 911 but the phone wouldn't work because the battery was dead. M.F. ran to a neighbor and called 911 from there. While she was gone, the accused's brother, P.D., having received the call from J.D. telling him what she had done, arrived on the scene. Both M.F. and P.D. attempted to assist Mr. S. until the ambulance and paramedics arrived and took over. Unfortunately, the efforts to save Mr. S. were in vain.

[8] J.D. is charged with second degree murder. She elected trial before a youth justice court judge. At the outset of the trial, she entered a plea of guilty to manslaughter, but this plea was not accepted by the Crown and the trial proceeded.

[9] J.D. admits to causing the death of Mr. S. The sole issue at trial was her state of mind at the time of the attack on Mr. S. She acknowledged that she had wanted to hurt Mr. S. but denied intending to kill him. Dr. Riar, a forensic psychiatrist called by the defence, offered the opinion that, after taking up the knife, J.D. had entered a dissociative state.[1] While in this state, she inflicted the wounds on the deceased without much awareness of what she was doing and without the specific intent to kill him or to cause bodily harm she knew was likely to cause death while being reckless whether or not death ensued. It is only if the court is satisfied beyond reasonable doubt that the accused had this intent that she can be convicted of murder. As Lamer, C.J.C. stated in *R. v. Martineau*, [1990] 2 S.C.R. 633, "it is a principle of fundamental justice

[1] Unhelpfully, Dr. Riar offered the additional opinion that virtually all murderers are in a dissociative state to some degree when they kill.

that a conviction for murder cannot rest on anything less than proof beyond a reasonable doubt of subjective foresight of death" (para. 12).

[10] The Crown called no psychiatric evidence, contenting itself with challenging the evidence of Dr. Riar and relying on the common sense inference that when one attacks someone with a rather formidable knife and stabs them twelve times, they may be at least reckless about whether or not death will result.

[11] The evidence of Dr. Riar is troubling on a number of fronts. Essentially, what he is saying is that J.D. went into a state of rage. While in that state, she lacked control over her actions. Mr. S. died as a result. While it is undeniably true that the law requires subjective foresight of death to found a conviction for murder, it is not the law that someone who simply gives way to rage may rely on the rage to diminish their responsibility for the lethal consequences of their loss of control: *R. v. Parent*, [2001] 1 S.C.R. 761.

[12] The second potential problem with Dr. Riar's evidence is that it relies almost exclusively on what J.D. has told Dr. Riar about her memories and perception of the attack on Mr. S. She told Dr. Riar she remembered little after deciding to go the drawer and get a knife. She said "everything snapped". It "just happened", and it did not feel real to her. She could not remember having the knife but that, "I could feel what was happening. It was physical, but I could not see or comprehend it". Then, suddenly she snapped out of it and could see what she had done. When she testified at trial, her description of her thought processes was generally similar.

[13] The difficulty in relying on J.D.'s memory (or lack thereof) as the basis for the opinion is that J.D. provided arguably different descriptions when she spoke to her mother, brother, friend and boyfriend shortly after the incident. It was clear that Dr. Riar was not aware of what J.D. told these people. All these persons testified and all were, unsurprisingly, in considerable sympathy with the accused. Thus, none of them were likely to have embellished their descriptions at her expense. The boyfriend, in particular, said that J.D. told him that she had stabbed Mr. S around ten times and had chased him around the room. In the result, there may be reason to suppose that her later memory of the events is an unreliable source for an opinion regarding her mental state at the relevant time. The Crown suggested, and Dr. Riar agreed, that J.D. may be quite genuine in reporting her present memory, but that she may simply be an unreliable rapporteur.

[14] The third difficulty is that, as Dr. Riar himself noted, a dissociative state generally results from some precipitating incident – the ingestion of a mind altering substance, or a severe physical or mental blow which triggers the dissociative state. Dr. Riar could find no such incident in this case. It is true that J.D. was unhappy about the state of her home and school life and the state of her relationship with her boyfriend. However, nothing out of the ordinary ups and downs of life had occurred in the period of time preceding the attack on Mr. S. Thus, one classic indicator of a dissociative state is entirely missing.

[15] Yet, there is some reason not to discount entirely J.D's description of her mental process at the time of the stabbing. I say that primarily because of what J.D. did not

say. If she was attempting to deceive, and was not in a position to deny that she wielded the knife, she would have done one of two things: She would have claimed that the deceased said or did something so provocative that she was deprived of self control, and Mr. Coffin would be urging the Court to rely on s. 232 of the *Criminal Code*; alternatively, she would have claimed to have acted in self defence to ward off a physical or sexual attack. She did neither. In fact, she expressly disclaimed any such suggestion: she testified that she was in no sense in fear of the deceased and that the deceased said nothing and did nothing more offensive than come into the kitchen while she was there and got into her "bubble".

[16] Still, on careful analysis, the theory that the accused entered a dissociative state remains just that, a theory. There is no evidence that the accused suffers from any form of mental disorder or infirmity. There is no evidence of previous psychotic episodes. There is no evidence of a precipitating event sufficient to trigger dissociation. There is no evidence that the accused was significantly under the influence of any mind-altering substance. Finally, as noted previously, the whole concept of dissociative rage runs perilously close to providing a defence of diminished responsibility which is not only unknown to our law but clearly contrary to sound public policy.

[17] To found a defence of non-insane automatism, the dissociative state must have resulted from factors external to the accused and which go beyond "the ordinary stresses and disappointments of life" *R. v. Rabey* [1980] 2 S.C.R. 513. As already noted, there is no evidence of any external cause for J.D. to enter a dissociative state. Nor is there any evidence that J.D. suffered from a disease of the mind and is not

criminally responsible for the death of Mr. S. Still, the evidence of her mental state emanating from Dr. Riar and the other witnesses (including the accused herself) must be considered in determining whether, in fact, she formed the necessary intent. Even if the accused was not in a "dissociative state", she may, nonetheless, have had less than full awareness of what she was doing and, more particularly, of the probable consequences of her actions.

[18] That leaves for consideration the theory of the Crown. The Crown argues with some force that the proven actions of the accused, specifically, inflicting multiple stab wounds, demonstrate that, at the least, the accused intended to cause bodily harm she knew was likely to cause the death of Mr. S. and was reckless whether or not death ensued. While conceding that the age and relative lack of life experience of the accused were factors to be taken into account in determining whether or not J.D. formed the requisite intent, the Crown argued that even a very young and naïve youth would understand the potentially lethal consequences of the kind of attack perpetrated by the accused. In the theory of the Crown, the accused's disappointments in life, coupled with her growing hatred of the deceased, culminated on the night in question in a murderous rage. The Crown points to certain statements by the accused after the fact that support the idea that the accused knew what she was doing.

[19] On analysis, this theory is also somewhat problematic. It is true that J.D. said somewhat more about the events than she now claims to recall to those she encountered shortly after the stabbing. She told her mother words to the effect of "I did it, I finally did it." This could suggest that she had previously harboured murderous

thoughts in regard to Mr. S. However, it could also be a more general reference to ruining her life – a statement she also made that night. As well, it must be noted that, later in her evidence, J.D's mother stated that she took J's comment as meaning "I finally did something" or "I finally lost it".

[20] Perhaps more significantly, J.D. is reported to have told her sometime boyfriend, S.L., that she stabbed the deceased over ten times in the chest, back and, maybe, in the lower torso. S.L. also testified that J.D. said, "She was chasing [P.S.] around the house or events were taking place in the living room and eventually I think her mom or [her brother] woke up first". This, says the Crown, suggests a much greater degree of awareness of what was going on at the time of the attack than J.D. now claims. However, some of what J.D. reported to S.L. could have been after the fact reconstruction. In other words, when J.D. snapped out of the frenzy, she could see pretty plainly what she had done and worked backward from there. It should also be noted that the evidence is clear that J.D's brother was not in the residence at the time of the attack, so the statement suffers to some extent either from faulty recollection by S.L. or faulty perception by the accused. There is no physical evidence capable of supporting the idea that J.D. pursued her victim around the house. Blood was found in many parts of the trailer, but the deceased was ambulatory for a period of time after the attack and J.D.'s mother and brother could have gotten blood on themselves and deposited it in other areas of the house as they attempted to assist Mr. S. The blood spatter expert called by the Crown was unable to offer an opinion on the sequence of events. He did note a blood spatter in the hall that was likely the product of a blow struck with the knife. However, this location is but a step or two from the kitchen where,

the accused says, the attack began and thus is incapable of supporting an inference that the accused pursued the deceased through the house.

[21] There were other statements. Of note, P.D. testified that J.D. told him that she had stabbed the deceased "like 50 times" that "she didn't stop until she seen his face" and that "she was in her room hiding." P.D. also testified that she told him she "had stabbed [P.S.] in the chair, but she – and she said that he was still in the living room". However, other evidence would seem to suggest that J.D. didn't hide out in her bedroom, but fled the scene shortly after the stabbing. As well, there is no other suggestion in the evidence that the deceased was stabbed while in his chair.

[22] J.D. also reported the stabbing to her best friend and the friend's sister, albeit in more general terms.

[23] All of these statements are, to some extent, supportive of the Crown's view of J.D.'s state of mind, but I find that they are sufficiently equivocal or at variance with the known facts that it would be unsafe to rely on them to the extent necessary to say definitively that J.D. had the requisite intent to found a conviction for murder.

[24] Of course, the inference to be drawn from the nature of the attack on Mr. S., and the statements of the accused shortly thereafter must be considered cumulatively, but also must be considered in light of the overall circumstances and in light of all the evidence. J.D. had no history whatever of acting out violently, apart from defending herself in a couple of school yard fights. Her admitted hatred of the deceased had

never been acted on in any way. She had never acted violently or even aggressively toward the deceased, indeed, there was but scant evidence that they had even had harsh words. No one had detected the least sign that J.D. might harm Mr. S. -- or anyone else. Nothing occurred on the date in question that would begin to explain what happened. The accused herself, offers no real insight into how or why she came to commit so terrible an act. In short, the events of August 9, 2009 came, seemingly, out of nowhere. It is like reading a book with the final chapter missing.

[25] Of course, it is not necessary for the Crown to provide an explanation for why the accused did what she did. The reasons may forever remain obscure. Nonetheless, the Crown does bear the burden of proving what her intent was. At the end of the day, it is clear that J.D. assaulted P.S. with a knife and that she intended to hurt him. What she intended or appreciated beyond that, I am unable to say to the requisite degree of certainty. As suggested previously, there appears to be something missing. Even though I place little weight on the opinion of Dr. Riar that J.D. was in a dissociative state, on all of the evidence I cannot say beyond reasonable doubt that she intended to cause the death of P.S. Nor can I say beyond reasonable doubt (though it is certainly much more likely) that she intended to cause bodily harm she knew was likely to cause death and was reckless whether or not death ensued.

[26] In the result, I find the accused guilty of the included offence of manslaughter.

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FAULKNER T.C.J.