

Court of Queen's Bench of Alberta

Citation: R v Schau, 2021 ABQB 554

Date: 20210721
Docket: 190065656Q1
Registry: Edmonton

Between:

Her Majesty the Queen

- and -

Maurice Lawrence Joseph Schau

Accused

**Reasons for Sentence
of the
Honourable Mr. Justice J.J. Gill**

Introduction

[1] The Accused pled guilty to the following charge:

On or about the 10th day of April, 2016, at or near Edmonton, Alberta, did unlawfully cause the death of Brad MacDonald thereby committing Manslaughter contrary to Section 236 (b) of the *Criminal Code of Canada*.

Background

[2] An Agreed Statement of Facts and supplemental Agreed Statement of Facts was entered. The following summary is taken from those documents.

[3] On April 6, 2016, the victim Mr. MacDonald (MacDonald) travelled from Kelowna, British Columbia, where he was working, to Edmonton, Alberta for the weekend to party, do drugs and hook up with prostitutes. He checked into a room in the Lodge Motor Inn. On April 8, 2016, Marie Baker (Baker) checked into a room at the Lodge Motor Inn. She used this room to provide her escort/sexual services.

[4] On Friday, April 8, 2016, MacDonald randomly bumped into Baker when she was having a cigarette outside. He recognized her from her advertisement in a publication which advertises escort services. MacDonald propositioned Baker and a fee for services was arranged. Baker and McDonald hung out off and on for the rest of Friday, April 8, 2016, in McDonald's room at the Lodge Motor Inn consuming drugs together.

[5] On Saturday, April 9, Baker checked out of her room and moved into MacDonald's room where they continue to consume drugs. Baker was using cocaine; MacDonald was using crack cocaine. MacDonald wanted to engage in sexual relations with Baker; however, Baker would not provide services until she was paid. MacDonald attempted to email transfer money to Baker for sexual services but the payment attempt failed. He persisted in his desire to have sexual relations with Baker and Baker refused to provide services until she was paid.

[6] MacDonald became agitated and told Baker that she was not leaving until she did what she came to his room to do.

[7] Baker became frustrated that she had spent several hours with MacDonald with the promise to pay her a number of times throughout the day; however, payment was not forthcoming.

[8] Baker had been in contact with Matthew Kitsco (Kitsco) via text messaging throughout the day. She advised Kitsco that she needed his help getting her money and getting out of the situation that she was in with MacDonald. She exaggerated the situation with MacDonald as being much worse than it was.

[9] During the late evening hours of Saturday, April 9, the Accused and his co-Accused Austin Southworth (Southworth), were drinking alcohol at a bar in Stony Plain, Alberta. At around 2 am, Southworth and the Accused returned to the Accused's residence when they were joined by two other friends Jacob Heeks (Heeks) and Jeremiah Burletoff (Burletoff). All four men were consuming large quantities of beer and crystal methamphetamine.

[10] After speaking with Baker, Kitsco phoned Southworth to see if Southworth could help him and Baker out with their problem. Southworth agreed to help Kitsco out. After the phone call between Southworth and Kitsco was completed, Southworth advised the Accused, Heeks and Burletoff that one of his friends' friend was in trouble and needed his help. He told the group that they were going to go and get his friends' friend, a girl, out of a situation at a party or something - that this girl was having some trouble with some people.

[11] Southworth had stated that he needed a couple guys because he might get into a fight trying to get this girl out of the situation that she was in. The Accused, Heeks and Burletoff had

agreed to back up Southworth and together they drove to Edmonton where they met Kitsco in a parking lot near the Lodge Motor Inn.

[12] Kitsco explained to the Accused, Heeks and Burletoff that he was going to tell MacDonald that there was a party and ask if he would he like to go to the party. This was a ruse created by Kitsco to get MacDonald out of the hotel room and to join them in the truck. There was no party.

[13] Kitsco went to MacDonald's room and asked them if they wanted to go to the party. MacDonald and Baker agreed to go and left the room together. Everyone climbed into Southworth's pickup truck. Baker knew that this was a ruse to get MacDonald out of the hotel room and into Southworth's truck. She had discussed the plan with Kitsco prior to Kitsco's arrival.

[14] Southworth began to drive around while beer was consumed by some of the group in the pickup truck. At some point, Southworth stopped the vehicle on the side of the road. Everyone but Baker got out of the truck to go to the washroom at the side of the road. At that point, while standing outside of the pickup truck, MacDonald pulled out his cell phone and made a telephone call. The group began to get angry and riled up.

[15] MacDonald began to run; he was immediately chased by the Accused. Just before giving chase, the Accused grabbed a wooden baseball bat from underneath the backseat of Southworth's pickup truck. The Accused chased MacDonald into a ditch beside the overpass near Winterburn Road. The other three followed after the Accused and all caught up to MacDonald in the ditch.

[16] The Accused, Heeks, Burletoff and Southworth were involved in the assault on MacDonald. The Accused hit MacDonald with a baseball bat three times on the body. Heeks and Southworth were also repeatedly hitting, striking, punching and kicking MacDonald as well.

[17] Southworth grabbed the bat and struck MacDonald several times with the bat to his body and Southworth hit MacDonald at least two times in the back of the head.

[18] After Southworth hit MacDonald with the bat, the group returned to the pickup truck. No one turned to check and see how MacDonald was doing. MacDonald was left lying in the ditch.

[19] The group left the scene in the pickup truck. Baker inquired if anyone had grabbed MacDonald's wallet. She advised the group that her money was in MacDonald's account. Kitsco turned the pickup truck around and they made the way back to where MacDonald was lying in the ditch. The Accused got out of the pickup truck, made his way down into the ditch, out of sight of those parties in the pickup truck to where MacDonald was lying in the ditch and took MacDonald's wallet from him.

[20] No efforts were made by any members of the group to contact and notify the Edmonton Police Service or the Edmonton Emergency Medical Services of the whereabouts or status of MacDonald.

[21] While driving, someone wiped the bat clean and then tossed it out the back window of the pickup truck. The contents of MacDonald's wallet was also discarded out the window with the exception of the bankcard which was handed to Baker which Baker attempted to use, unsuccessfully, at a bank machine. Later everyone went their separate ways.

[22] MacDonald's body was discovered by a passerby on April 10, 2016, at 8:10 in the morning.

[23] An autopsy was performed on MacDonald on April 11, 2016. The Medical Examiner found that MacDonald died as a result of head trauma.

[24] It was determined that he had suffered a number of injuries including: three distinct injuries predominantly to the back of the head caused by a heavy weapon with a sharp edge; associated significant comminuted fracturing of the occipital skull and of the entirety of the base of the skull; bruising and abrasion the left side of the head, bruising, laceration and fracture of the tip of the index finger of the left hand; focal bruising and abrasion to the back of the right hand representing defence type words.

The Accused

[25] The Defence advises that the Accused is 36 years old, born in Edmonton and raised in Alberta. He resides in Edmonton with his mother. He did not know his biological father. He has two younger sisters and a stepbrother. The Accused was born prematurely and had complications at birth. He suffered from a number of health concerns as a child. He suffered physical and sexual abuse from his mother's common-law partners throughout his childhood.

[26] Although he struggled with school, he obtained his grade 12 diploma. He has had various forms of employment since finishing school, including working as a sous chef and working for a concrete company doing seasonal work.

[27] He began drinking at the age of 16 and 17, started smoking marijuana and started using cocaine at the age of 25 and later switched to methamphetamine. His methamphetamine use continued up until the date of his arrest. A psychological assessment report prepared by Dr. Liam Ennis was filed. Dr. Ennis's report describes that in the months and years prior to the events the Accused was living the life of a chronic drug and alcohol abuser.

[28] The Accused has been suffering from mental health issues since his involvement in the offence. He suffers from agoraphobia, posttraumatic stress disorder, anxiety and major depression. He believed he was acting to protect Ms. Baker who he believed to have been raped and held against her will. He is remorseful for his actions.

[29] Since his arrest, the Accused risk factors have subsided. He stopped consuming alcohol and drugs. He now lives again with his mother. As noted, his mental health has deteriorated. Dr. Ennis ultimately assessed the Accused as a medium risk offender compared to offenders being supervised in the community and is a relatively low risk compared to offenders serving in correctional facilities.

[30] The Accused has been on release for this offense for approximately three years as a result of delays mainly caused by COVID 19. He has abided by a curfew and a prohibition from consuming drugs and alcohol among other stringent bail conditions.

[31] The Accused has no criminal record.

Impact on the Victims

[32] Victim Impact Statements from the victim's mother, father, brother and a friend were presented on WebEx. They describe the disruptive and devastating impacts that the crime has had on each of them and their families. It has ruined many lives. The victim was a good brother, son and father. He was a great friend to many and a very loved person. Over 900 people attended

his funeral. Much pain has been caused which his friends and families will have to endure. The victim leaves a 17-year-old daughter and many other family members and friends.

Positions of the Crown and Defence

The Crown

[33] The Crown seeks a prison term of 8 to 9 years, a DNA order and the mandatory section 109 weapons prohibition.

[34] It notes that the co-Accused (Southworth) pleaded guilty after the preliminary inquiry and received a prison term of 10 years. Southworth organized the group attack and caused the victim's death by striking twice on the head with the baseball.

[35] The Crown submits that this case falls within the third category of *R v LaBerge*, 1995 ABCA 196 (*LaBerge*) as the force used by the Accused put the victim at risk of, or caused serious bodily injury and those which are likely to put the victim at risk of or cause life-threatening injuries.

[36] In considering or assessing moral blameworthiness (the subjective intent) the relevant facts here are that they lured the victim to the attack and then subjected him to a group beating. The subjective intent involved was closer to murder. This puts the Accused's involvement at the high-end of moral blameworthiness but a bit lower than the co-Accused (Southworth).

[37] The Crown refers to the following as aggravating factors:

- a) This was a group attack with four people participating, making the victim more vulnerable. It was not a fair fight.
- b) A weapon was used.
- c) The Accused brought the baseball bat.
- d) This was a prolonged assault with multiple blows inflicted.
- e) The attack was not a spontaneous reaction to a provocation. There was no provocation. This was gratuitous violence on an innocent victim. There were elements of planning involved and the victim was chased.
- f) The victim was left seriously injured in a ditch and no call was made for emergency assistance.

[38] A mitigating factor is the guilty plea before trial which shows remorse and an acceptance of responsibility. In addition, the Accused does not have a criminal record.

[39] The Crown referred to a number of cases with sentences in the range of 7 to 14 years imposed.

The Defence

[40] The Defence submits that considering the aggravating and mitigating factors, the personal circumstances of the Accused and the *LaBerge* analysis, an appropriate sentence is three years and six months.

[41] The defence submits that this case fits into the middle category of *LaBerge*. The force used by the Accused put the victim at risk of causing serious bodily injury not life-threatening

injury. The level of subjective intent concerning foreseeability of serious bodily harm put it into the *LaBerge* middle category.

[42] The defence refers to the case of *R v Belcourt*, 2010 ABCA 319 and submits that the Accused's mental health is a mitigating or sentence reducing factor. It notes that there is evidence of mental health issues before the event that contributed to the offenses and also mental health issues that arose after the offense.

[43] Another strong mitigating factor is his recovery from addiction: *R v Howse*, 2006 ABCA 163 and *R v Roberts*, 2020 ABCA 434. Also, relevant to a sentence reduction is the fact that he was on strict release conditions for two years and eight months.

[44] The defence referred to a number of cases with sentences in the range of 4 to 5 years. The defence submits that the Crown's cases are not helpful because they all relate to circumstances in the third category of *LaBerge*. The defence notes that the co-Accused (Southworth) is in a very different position from the Accused as Southworth organised the attack and administered the fatal blows.

Principles of Sentencing

Purpose and Principles of Sentencing

[45] Section 718 of the *Criminal Code* outlines the purpose and principles of sentencing:

Purpose

[718] The fundamental purpose of sentencing is to contribute, along with crime prevention initiatives, to respect for the law and the maintenance of a just, peaceful and safe society by imposing just sanctions that have one or more of the following objectives:

- (a) to denounce unlawful conduct;
- (b) to deter the offender and other persons from committing offences;
- (c) to separate offenders from society, where necessary;
- (d) to assist in rehabilitating offenders;
- (e) to provide reparations for harm done to victims or to the community; and
- (f) to promote a sense of responsibility in offenders, and acknowledgment of the harm done to victims and to the community.

R.S., 1985, c. C-46, s. 718; R.S., 1985, c. 27 (1st Supp.), s. 155; 1995, c. 22, s. 6.

[46] The primary sentencing principles relevant to this case are denunciation, deterrence and protection of the public.

Aggravating and Mitigating Circumstances

[47] Section 718.2 requires a Court that imposes a sentence to take into consideration the following principles:

- (a) a sentence should be increased or reduced to account for any relevant aggravating or mitigating circumstances relating to the offence or the offender....

[48] In this case the I find relevant aggravating and mitigating circumstances are as follows.

[49] The mitigating factors:

- a) an early guilty plea.
- b) the Accused had a difficult background which included some mental health issues and has ongoing mental health issues.
- c) the Accused's recovery from addiction.
- d) the Accused adhered to strict release conditions which included a curfew and abstinence

[50] The Accused does not have a record which is not mitigating but is relevant.

[51] The aggravating factors:

- a) This was a group attack involving four participants. It was not a fair fight. The victim was very vulnerable.
- b) A weapon was used. It was a prolonged assault with multiple blows and involved a high level of violence.
- c) The Accused brought the baseball bat to the attack.
- d) The attack was not a spontaneous reaction to a provocation. The victim was chased. This was gratuitous violence perpetrated on an innocent victim.
- e) The attack had elements of planning.
- f) The victim was left in a ditch and no call was made for emergency assistance.

Analysis

[52] The Crown has submitted that an 8-9 year prison term is appropriate. The defence submits a total sentence of three years six months (3 ½ years) is appropriate.

[53] The objective seriousness of the crime of Manslaughter was established by Parliament, which imposes a maximum sentence of life imprisonment.

[54] In *R v Roberts*, 2020 ABCA 434, the Court summarised the approach to be taken in imposing a sentence for Manslaughter:

[35] In assessing moral culpability, a sentencing judge must consider the full breadth of circumstances that bear on an offender's moral culpability. As neatly summarized in *Vader* at para 16:

...This includes not only the nature of the unlawful act, but also the degree of planning and deliberation involved in the unlawful act and any other factor that is relevant to the offender's moral blameworthiness, such as the personal characteristics of the offender that may aggravate or mitigate the offender's moral culpability.

[36] Manslaughter covers a wide range of moral culpability that in turn is reflected in sentences ranging from a suspended sentence to life imprisonment.

Laberge provides an instructive framework in assessing the different degrees of moral culpability arising in the unlawful act of Manslaughter. The most important element in assessing moral culpability is the unlawful act itself. Multiple stab wounds inflicted to the necks of a vulnerable and elderly couple in two different areas of the home, are “near murder”; Roberts’ acts fall within the highest *Laberge* category. Indeed, it was admitted in the Agreed Statement of Facts that “considered objectively, it is clear that the injuries he deliberately inflicted to each victim would be fatal to each victim.”

.....

[40] In assessing moral culpability for Manslaughter, both the objective features of Manslaughter *mens rea* and any subjective features that are present play a role. This was explained in *Ferguson* at paras 60-61:

An assessment of moral culpability [in a manslaughter case] involves a consideration of the particular circumstances of the case including: the nature, quality and gravity of the act; the method and manner by which the act was committed; the offender's awareness of the risk; and what should have been in the offender's mind, had he or she acted reasonably. One begins the analysis by classifying culpability on the basis of subjective and objective intent. The lowest level of moral blameworthiness is simply the *mens rea* the crown must prove: that a reasonable person would know the unlawful act would subject Varley [the victim] to the risk of bodily harm. A more culpable level would be that Ferguson [the accused] knew the conduct would put Varley [the victim] at risk of, or cause, bodily injury. Thus, subjectively, the more Ferguson's "intention" or "awareness" approached the point at which he knew or was wilfully blind or reckless to the fact the unlawful act would not only put Varley at risk of death, but would actually cause death, the higher the culpability. Similarly, the more Ferguson's conduct approached the point that he ought to have known (objectively) that life-threatening injuries would result, the more culpable he is.

[55] In *LaBerge, supra* the Court divided the range of unlawful acts involved in Manslaughter into 3 categories:

[9] Unlawful acts may be divided into three broad groups: those which are likely to put the victim at risk of, or cause, bodily injury; those which are likely to put the victim at risk of, or cause, serious bodily injury and those which are likely to put the victim at risk of, or cause, life-threatening injuries. Only when the offender's proven mental state at the time of commission of the offence is evaluated in the context of the crime itself, in other words in terms of its relative degree of seriousness, is it possible to classify for sentencing purposes the degree of fault inherent in the crime committed.

[56] Given the agreed-upon facts and the inferences that must necessarily be drawn from them, I find that the Accused’s unprovoked assault on MacDonald with a baseball bat was of a type to place it within the second category of objective intent - an act which was likely to cause serious bodily injury.

[57] Unlike his co- Accused Southworth, the Accused did not organize the group attack nor did he strike the fatal blows. However, his level of moral blameworthiness is still very high.

[58] The actions of the Accused that result in a high level of moral blameworthiness are:

- a) This was not a spontaneous or impulsive attack. It had elements of planning. The Accused was somewhat involved in this planning. Specifically, I note the Accused was the one who took the bat from the truck and first used it in the attack;
- b) The Accused struck the victim several times with the bat;
- c) The Accused returned to the place where the victim had been left to remove his wallet. He took no steps to check on the victim's condition;
- d) The Accused did not call any emergency services (either after the assault or after going back to get the wallet).

[59] The Accused should garner some credit for his recovery from addiction. However, this is somewhat mitigated by the fact that it occurred while he was on bail conditions which prohibited consumption of drugs.

[60] The defence raises the issue of the Accused's mental disorder. In *Belcourt, supra*, the Court considered the effect of a mental disorder on sentencing. Beginning at para 8:

[8] The effect of a mental disorder on sentencing is helpfully summarized in C. C. Ruby, *Sentencing* (6th ed.) (Markham: Butterworths, 2004) at paras. 5.246 and 5.256:

It is, therefore, clear that a sentence can be reduced on psychiatric grounds in two instances: (1) when the mental illness contributed to or caused the commission of the offence; or (2) when the effect of imprisonment or any other penalty would be disproportionately severe because of the offender's mental illness.

General deterrence should be given very little, if any, weight in a case where an offender is suffering from a mental disorder because such an offender is not an appropriate medium for making an example to others.

This principle has been applied in cases like *R. v. Newby* (1991), 1991 ABCA 307 (CanLII), 84 Alta. L.R. (2d) 127, 120 A.R. 68 (C.A.) and *R. v. Fraser*, 2007 SKCA 113, 302 Sask. R. 210 at paras. 32-5.

[61] The evidence of the Accused's mental illness before the offence does not establish that this mental illness contributed to or caused the offence. Nor does the evidence establish that the effect of imprisonment would be disproportionately severe for the Accused.

[62] Counsel referred to a number of cases. Many of these cases are distinguishable and of limited value. The *R v Guitar*, 2000 ABCA 58 is instructive. In *Guitar*, the accused was convicted of Manslaughter. The case involved a group beating and a finding that the accused's involvement fell within the most serious category in *Laberge*. The Court of Appeal imposed a sentence of ten (10) years.

[63] The defence referred to a number of cases including *R v Beaver*, 2019 ABQB 235, where the accused received a four (4) year term after being found guilty of Manslaughter. That case involved an attack by the accused and another individual. The victim was punched and choked. No weapon was involved.

[64] In *R v Decoine- Zuniga*, 2014 ABQB 155, the accused was involved in a group assault which culminated in the victim being stabbed by another participant. His involvement included punching and stomping. After being convicted of Manslaughter, the accused who was a young, Indigenous offender was sentenced to five (5) years. The accused was not aware that one of the participants had a weapon.

[65] In *R v Thompson*, 2010 ONCA 463, the accused received four (4) years for a guilty plea to Manslaughter. The case involved a group assault and a group stabbing. The 19-year-old accused stabbed the victim once but did not deliver the fatal wound.

[66] In *R v Olsen*, 1994 ABCA 111, the accused was found guilty of Manslaughter after trial and received a four (4) year sentence. This was also a group assault. No weapon was involved. The accused did not strike the fatal blow.

Decision

[67] The Crown has submitted that an 8-9 year prison term is appropriate. The Defence submits a sentence of three years six months (3 ½ years) is appropriate.

[68] The sentence range suggested by the Crown overemphasizes the moral blameworthiness of the Accused and underemphasizes the mitigating circumstances. A reduction is appropriate to reflect the personal circumstances of the Accused including his mental health issues and his conduct since the offense. The sentence suggested by the defence fails to account for the Accused's relatively high level of moral blameworthiness and overemphasizes the mitigating factors.

[69] Taking into account the Accused's level of moral blameworthiness, the aggravating and mitigating circumstances and the relevant case law, I find that an appropriate sentence to be higher than 5 years but lower than the 8-9 years proposed by the Crown.

[70] I find that a fit and proper sentence is six years (6) years imprisonment. In addition I impose a DNA order and a lifetime weapons prohibition.

Heard on the 16th day of April and the 3rd day of June, 2021.

Dated at the City of Edmonton, Alberta this 21st day of July, 2021.

J.J. Gill
J.C.Q.B.A.

Appearances:

John Watson Q.C.
of the Crown Prosecutor's Office
for the Crown

Jim Edgett
of Zuk Stewart Edgett
for the Defence