In the Court of Appeal of Alberta

Citation: R v Vader, 2019 ABCA 488

Date: 20191212
Docket: 1703-0027-A
Registry: Edmonton

Between:

Her Majesty the Queen

Respondent

- and -

Travis Edward Vader

Appellant

The Court:

The Honourable Mr. Justice Peter Costigan
The Honourable Madam Justice Dawn Pentelechuk
The Honourable Mr. Justice Kevin Feehan

Memorandum of Judgment

Appeal from the Sentence by
The Honourable Mr. Justice D.R.G. Thomas
Filed on the 25th day of January, 2017
(Docket: 130781800Q1)

Memorandum of Judgment

The Court:

[1] The appellant appeals a global sentence of life imprisonment imposed for two counts of manslaughter arising from the killing of an elderly couple, Lyle and Marie McCann. He argues that the sentencing judge erred in determining that the appellant's moral blameworthiness was to be assessed on the basis that discharging a firearm is likely to result in death, despite the absence of proof that the McCanns were killed by a firearm. He also argues that the facts and circumstances of this case are not so exceptional and severe as to warrant the imposition of the maximum sentence permitted by law for the offence of manslaughter.

Facts

[2] On July 3, 2010 the McCanns, who were in their late 70s, were on their way to a vacation in British Columbia driving a large motorhome towing an SUV. The appellant initiated contact with the McCanns in a remote location on Highway 16 near Edson, Alberta, for the purpose of robbing them. The appellant did not know the McCanns; the encounter was random. The appellant did know the motorhome was likely to be occupied and anticipated the possibility of resistance and violence. The appellant had with him one or more loaded firearms in order to control and dominate the occupants of the motorhome. The McCanns were unarmed.

[3] Violence ensued, resulting in blood being shed by both McCanns, and their ultimate deaths. The appellant's firearm was discharged during the encounter. Lyle McCann's cap was found in the SUV with a bullet hole in the brim and stained with blood. Marie McCann's blood was sprayed onto food cans also found in the SUV. The appellant used the SUV after he committed the offences.

[4] The appellant disposed of the bodies, which have never been found, and burned the motorhome. The sentencing judge was unable to determine the precise manner of the deaths. He was unable to determine that the McCanns were shot and he was unable to determine who discharged the appellant's firearm. The appellant did not testify at trial although he did testify at his sentencing hearing in relation to certain alleged *Charter* breaches which are not at issue on this appeal. Some of the appellant's acquaintances also testified at the sentencing hearing.

The Sentencing Decision

[5] The appellant was 38 years old at the time of the offences and 44 years old at the time of sentencing. He had a criminal record which included assaulting a peace officer, dangerous operation of a motor vehicle, possession of a controlled substance, careless use of a firearm, break and enter, property offences and failures to attend court and to comply with recognizances. He

pleaded not guilty in the deaths of the McCanns and showed no remorse. The appellant declined to participate in the preparation of pre-sentencing reports.

[6] The major points of contention at the sentencing hearing concerned where the offences fell within the three categories of moral culpability outlined in ***R v Laberge***, 1995 ABCA 196, 165 AR 375 and the selection of a fit sentence within the appropriate category.

R v Laberge

[7] The sentencing judge's reasons are lengthy and detailed: 2017 ABQB 48. He examined the appellant's unlawful conduct and the degree to which it put the victims at risk in the context of the ***Laberge*** framework. He noted that the appellant intentionally initiated a confrontation with persons while carrying a loaded firearm with the intention of stealing property. He did not plan to kill the McCanns but his illegal objective was robbery and he was willing to use force to assist in the process.

[8] The sentencing judge found that viewed objectively, the scenario put the McCanns at risk of life-threatening injuries. The appellant was at close quarters with the McCanns who he threatened with a loaded firearm. The McCanns might choose to resist and, if so, discharge of the firearm and life-threatening injuries were objectively foreseeable. He also found that the appellant was subjectively aware of the risk to the McCanns. The appellant would have known the implications of bringing a loaded firearm into a robbery scenario. The sentencing judge found the appellant knew what damage discharging a firearm could do and his awareness of the physical risks to the McCanns increased the appellant's culpability.

[9] The sentencing judge also found that the appellant's moral culpability was elevated by the fact that the robbery was planned and calculated. In his view, the striking feature of the crime was its banality. The appellant had needs and he selected the McCanns on the basis of those needs. In the sentencing judge's view, the randomness of the homicides is terrifying for all Canadians. Although the appellant did not commence the interaction with the intention of killing the McCanns, he had a loaded firearm which he was willing to use to further the crime. He knew the potential implications and was willing to take the risk. The sentencing judge summarized as follows (paras 124-26):

> Again, what then happened is not known, though the violence that followed left traces: blood from the McCanns and evidence a firearm was discharged at least once, as shown by the powder residue on [Mr McCann's] hat. What is critical is that there was at this point a gross imbalance of power. Mr. Vader took actions that led to the McCanns' deaths, and those actions were to further his objective: theft of their property. He undertook that knowing the realistic likelihood his victims would experience life-threatening harm in the process.

> This sort of killing of two elderly people on the open road, a major Canadian highway, with thousands of innocent travelers using it every day, cries out for denunciation and deterrence. The need for deterrence here is not limited to simply Travis Vader. It is very clear that some of his peer group of drug addicts and criminals share his disregard for the safety and rights of others who travel the same path followed by the unfortunate and innocent McCanns.
>
> All these factors favour a lengthy sentence. Mr. Vader clearly falls into the upper class as identified in ***R v Laberge***.

[10] The sentencing judge considered and rejected the defence argument that the deaths could have resulted from punches or fisticuffs which were not objectively likely to result in death.

Sentence

[11] In the context of determining a fit and proportionate sentence, the sentencing judge conducted a lengthy review of the appellant's background including his criminal record; his addiction to drugs; that he was viewed by some of his peers as an angry man and a dangerous man and that he exhibited little concern for others. After this review, the sentencing judge concluded (para 176):

> What is important for the purposes of sentencing is that the information available to me indicates that Mr. Vader is a criminal whose misconduct is driven by his drug abuse. Though he is an intelligent person, and very well aware of the effects and consequences of his methamphetamine use, he has to date been unwilling or unable to restrain the drug addiction which then drives his illegal activities. He is perceived as a dangerous man by those who know him. He is centered on himself. These facts are relevant when assessing his potential for re-offending, and successful and safe re-entry into Canadian society.

[12] He found that the very serious offences warranted a lengthy term of incarceration. The appellant's drug use drove his other criminal conduct. The pattern will continue unless controlled (para 187):

> *Criminal Code*, ss 718(c) and 718(d) align in this case. These factors combine to require a lengthy sentence. Mr. Vader is addicted to methamphetamine. The implications of that are notorious. Mr. Vader is not in control of his addictions. They, instead, control him. Those addictions are what leads to his illegal conduct. Mr. Vader has proven himself to be a threat to anyone who might cross his path, or challenge or confront him. Up to this point, detention has had no effect. Time and treatment will be required to break this pattern. Until then the public is not safe.

[13] Rather than impose separate sentences to be served consecutively or concurrently, the sentencing judge followed the approach confirmed on appeal in ***R v Hennesssey***, 2010 ABCA 274, 490 AR 35, and chose to impose a single global sentence. He noted that the offence was further aggravated by the fact that there were two elderly victims, and imposed a single global sentence of life imprisonment. He found that no reduction in sentence was necessary to avoid a cumulative sentence that might crush the offender's prospects. In his view, the appellant's release into the Canadian public is best assessed on an ongoing basis by the Parole Board. The sentencing judge subsequently declined to direct a minimum period of imprisonment before eligibility for parole.

Standard of Review

[14] We approach our review of the sentencing judge's decision with deference. We cannot vary the sentence unless the sentencing judge made an error in principle, failed to consider a relevant factor or overemphasized appropriate factors, and the error has an impact on the sentence, or if the sentence is demonstrably unfit: ***R v Lacasse***, 2015 SCC 64 at paras 39-41, [2015] 3 SCR 1089.

Analysis

Moral Blameworthiness

[15] It is common ground that the sentencing judge was correct to assess the appellant's moral blameworthiness within the framework set out in ***R v Laberge***. However, the appellant contends the sentencing judge erred in finding the appellant's moral blameworthiness fell within the highest category, acts which are likely to put the victim at risk of, or cause, life-threatening injuries. He argues that his moral culpability falls within the second category, acts which are likely to put the victim at risk of, or cause, serious bodily injury. He emphasizes the sentencing judge was unable to determine the precise cause of death. The sentencing judge did not find that the appellant discharged a firearm or that the McCanns were shot. The appellant argues that given those findings, the sentencing judge erred because his analysis of moral blameworthiness was premised on the conclusion that the appellant would have foreseen the risk of death to the McCanns because he understood that death could result from shooting someone with a firearm. In support of this argument, the appellant points to the following passages from the sentencing reasons (paras 113-14):

> Here, Mr. Vader was in close quarters with the vehicle occupants whom he threatened with a loaded firearm. The vehicle occupants may choose to resist and if so then discharge of the firearm and life-threatening injuries are objectively foreseeable. This brings Mr. Vader into the third and most serious of the ***R v Laberge*** categories.
>
> I also find Mr. Vader was subjectively aware of this risk to the vehicle occupants. As I have concluded earlier he is an intelligent criminal and would have known the

> implications of bringing a loaded firearm into a robbery scenario of this kind. He knew what damage discharging a firearm could do. He was a hunter of big game. His awareness of the physical risks to the victims increases Mr. Vader's culpability.

[16] In assessing moral blameworthiness, a sentencing judge must consider all of the circumstances that bear on an offender's moral culpability. 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.

[17] The appellant's contention is based on parsing out small passages from the sentencing judge's lengthy reasons. A fair reading of the reasons as a whole does not support this argument. The sentencing judge did not proceed on the basis that the appellant discharged a firearm, that the McCanns were shot and that the appellant foresaw that risk. To the contrary, he specifically declined to make those findings. The impugned passages were part of the sentencing judge's review of the circumstances, including the appellant's personal characteristics, to determine, objectively and subjectively, the extent of the risk posed by the appellant in bringing a loaded firearm to a planned and deliberate robbery of two unarmed, elderly victims. The sentencing judge concluded that given the appellant's background as a hunter he would have known the implications of bringing a loaded firearm to a robbery. There is no doubt that the firearm was discharged during the course of the robbery. Regardless of whether the appellant discharged the firearm or shot the McCanns, the sentencing judge was entitled to conclude, on the facts as he found them, that the act of bringing the firearm to the robbery elevated the risk to the highest level and the appellant was aware of the risk. Although the precise manner of the McCanns' deaths could not be determined because the motorhome was destroyed and their bodies hidden, it is clear from the state of the cap and the blood spatter on the food cans that their deaths were violently inflicted. On this record, the sentencing judge was entitled to conclude that the appellant foresaw the possibility of using life-threatening force to effect the robbery. The fact that the appellant brought a loaded firearm to the robbery is evidence that the appellant knew his acts were likely to put the McCanns at risk of or to cause life-threatening injuries.

[18] The appellant also argues that the sentencing judge erred in placing a burden on him to prove that his conduct fell within a lower category of moral culpability as a mitigating factor. In support of that argument, the appellant relies on para 65 of the sentencing reasons:

> I reject the argument that I should sentence Mr. Vader on the basis that the McCanns' deaths resulted from a 'fisticuffs' event. This amounts to the Defence asserting a mitigating circumstance. Analogous to ***R v Holt***, it is up to Mr. Vader to prove that beyond a balance of probabilities, and he has not done so. Instead, the evidence speaks for itself. There was blood shed from the two elderly victims. A firearm was discharged. While it is possible the firearm's discharge was completely unrelated to the spattered blood of either of the two dead senior citizens, that is

> simply unlikely without additional supporting evidence. I asked Mr. Whitling in the course of his closing submissions how one kills two senior citizens by accident. He offered no hypothetical scenario in response, let alone one supported by any evidence.

To the extent that the sentencing judge may have misused the term mitigating circumstance in the context of his ***Laberge*** analysis, the misuse was harmless. The thrust of the sentencing judge's statement was that there was no evidence to support a fisticuffs event. That conclusion was available on the record. The statement that it was unlikely, without further evidence, that the firearm's discharge was completely unrelated to the blood spatter was also made in the context of rejecting the fisticuffs argument and was not a finding of fact. It had no effect on the sentence. The sentence was based on the findings that it was unknown who discharged the firearm and precisely how the deaths occurred.

[19] Although other sentencing cases are of limited value in the context of the great variety of circumstances that can lead to a manslaughter conviction, the introduction of a loaded firearm into a situation where it could be used has resulted in a finding that the offence falls within the highest category of moral blameworthiness even where the accused was not the one who killed the victim: ***R v Deer***, 2014 ABCA 88, 572 AR 149.

[20] The sentencing judge's conclusion that these offences fell within the highest category of moral culpability is amply supported by his findings of fact. We discern no error in that conclusion and decline to interfere.

Life Sentence

[21] The appellant argues that even if the sentencing judge did not err in placing the appellant's moral culpability within the highest category, the facts are not comparable to other cases in which a life sentence has been imposed for manslaughter. He contends that committing manslaughter in the course of robbery with a firearm, for those reasons alone, should not attract a life sentence. He contends that the life sentence should be set aside and substituted by two sentences of 8-12 years to be served concurrently.

[22] As noted, sentencing decisions in other manslaughter cases are of limited precedential value. However, life sentences have been imposed for the violent sexual assault of an elderly victim resulting in death: ***R v Cheddesingh***, 2004 SCC 16, [2004] 1 SCR 433; the beating to death of an elderly victim by an offender with a related record who posed a high risk to re-offend: ***R v Piche***, 2006 ABCA 220, 391 AR 102; the robbery and beating to death of an elderly victim and infliction of life-threatening injury on another elderly victim by an offender with a related record who posed a risk to public safety: ***R v Boucher***,1991 ABCA 223, 117 AR 264; and the beating to death of one victim and the infliction of severe and permanent injuries on another victim as a result of a racially motivated attack by an offender with a lengthy record: ***R v Gray***, 2013 ABCA 237, 556 AR 107. None of these cases involved the killing of two victims. The appellant argues that the

sentencing circumstances in his case are distinguishable at least in part because of what he classifies as his limited record.

[23] Lesser sentences have also been imposed in cases involving the highest category of moral blameworthiness. Some of those cases are reviewed in ***R v Holloway***, 2014 ABCA 87 at paras 47-48, 572 AR 121. As well, a global sentence of 15 years was upheld in ***Hennessey*** for providing assistance to a person who killed four RCMP officers and a sentence of 16 years was upheld in ***Deer***.

[24] There are no mitigating factors in this case. The aggravating factors include the following:

- the killings occurred during the course of a planned robbery where a confrontation was anticipated;
- two victims were killed;
- the victims were vulnerable unarmed senior citizens who posed little risk to the appellant;
- the killings were violent resulting in significant blood splatter from both victims;
- the appellant brought a loaded firearm to the robbery to control and dominate the victims and was willing to use physical violence to achieve his objectives;
- the appellant disposed of the victim's bodies;
- the appellant burned the motorhome to destroy evidence;
- the appellant has a significant record;
- the appellant poses a significant and ongoing risk to public safety;
- the appellant showed no remorse.

[25] The maximum sentence for an offence is not to be reserved for the most serious circumstances imaginable, but for very serious circumstances. Imposing the maximum sentence is justified where the offender is dangerous, and is likely to offend again in a serious way: ***R v Nienhuis***, 1991 ABCA 238 at para 32, 117 AR 253. The sentencing judge found the appellant was dangerous and a threat to anyone who might cross his path. Until his offence pattern is broken, the public is not safe. This conclusion, when combined with the egregious circumstances of the offences perpetrated on the two victims, supports the imposition of a life sentence. The sentence imposed is not clearly unreasonable and is not demonstrably unfit.

Conclusion

[26] The appeal is dismissed.

Appeal heard on December 10, 2019

Memorandum filed at Edmonton, Alberta
this 12th day of December, 2019

Costigan J.A.

Pentelechuk J.A.

Feehan J.A.

Appearances:

J.R. Russell
for the Respondent

B.A. Beresh, Q.C.
S.M. Purser
N.J. Whitling
for the Appellant