

CANADA / JUDGMENT

R. v. Cooper

2020 BCCA 387

COURT

British Columbia Court of Appeal

DECIDED

30 September 2020

Source: bccourts.ca · Research copy typeset by Esheria. Not court-issued or certified.

2020 BCCA 387 R. v. Cooper COURT OF APPEAL FOR BRITISH COLUMBIA Citation: R. v. Cooper, 2020 BCCA 387 Date: 20200930 Docket: CA46080 Between: Regina Respondent And Malcolm Lyle Cooper Appellant Before: The Honourable Mr. Justice Goepel The Honourable Mr. Justice Hunter The Honourable Mr. Justice Voith On appeal from: An order of the Supreme Court of British Columbia, dated May 1, 2019 (R. v. Cardoso, 2019 BCSC 781, New Westminster Docket X080507). Oral Reasons for Judgment Counsel for the Appellant (via videoconference): E. Purtzki Counsel for the Respondent (via videoconference): C. Tomusiak Place and Date of Hearing: Vancouver, British Columbia September 30, 2020 Place and Date of Judgment: Vancouver, British Columbia September 30, 2020 Summary: The appellant was convicted of six offences stemming from a home invasion. The sentencing judge imposed a seven-year global sentence. The appellant challenged only his convictions for the three firearms offences. On appeal, the court quashed those convictions and ordered a new trial for the firearms offences. The appellant now challenges the sentence as unfit since the three firearms offences have been set aside. Held: Appeal allowed. The appellant conceded at trial and maintained on appeal that he was guilty of the lesser included offence of robbery simpliciter, and the Crown agreed to stay the firearms offences if the sentence was adjusted appropriately. A reduced sentence was appropriate to reflect the reduced moral culpability of the appellant given that the firearms offences had been set aside. A five-year global sentence was appropriate in light of the Gladue report.

- [1] GOEPEL J.A.: This is a sentence appeal. The appellant was convicted of several offences arising out of a November 26, 2016 home invasion of a residence in Maple Ridge, British Columbia. The appellant was found to have participated in the home invasion with three other men. The trial judge's reasons are found at 2018 BCSC 1786.
- [2] The trial judge convicted the appellant of the following offences: Count 1: breaking and entering into dwelling house; Count 2: using a restricted or prohibited firearm while committing a robbery; Count 3: unlawful confinement; Count 4: using a firearm while committing the offence of breaking and entering; Count 5: having a face mask while committing an indictable offence; and Count 8: intentionally discharging a firearm.
- [3] The trial judge acquitted the appellant of being in actual possession of a firearm during the home invasion.

- [4] The sentencing reasons are found at 2019 BCSC 781, where the trial judge described the circumstance of the offence as follows:
- [4] The circumstances giving rise to the convictions are that on November 29, 2016, these two offenders, while in the company of two others, Mr. Wight and Mr. McInnis, broke into the home of Robert Morrison in what is euphemistically known as a home invasion. At least two of the intruders, Mr. Cardoso and Mr. McInnis, were armed. Ultimately, three handguns were recovered from the scene.
- [5] The intention underlying the entry into the Morrison home was to rob its occupants of money, jewellery and possibly drugs.
- [6] Upon entry, the four men encountered the owner's brother, John Morrison, and three of them proceeded to assault him in the recreation room on the second floor of the residence. Seemingly unbeknownst to the intruders, Robert Morrison had escaped the home and made his way to a neighbour's where he contacted police. Additionally, Robert's son, Robert Jr., and his girlfriend were downstairs in a bedroom. They heard the commotion and also notified police.
- [7] Aroused by the noise from the recreation room, Robert Morrison's common law spouse, Ms. Moayed, whom I will refer to as Misha, entered the recreation room from the bedroom where she and her daughter were sleeping. She tried to deescalate the situation noting John Morrison's condition. One of the intruders, Mr. Wight, took charge of Misha and returned her to the bedroom where she and her daughter, Allie, were detained while the other three searched the home.
- [8] Ultimately, all of the assailants gathered in the bedroom containing Misha and her daughter and John Morrison was returned to the bedroom at that time.
- [9] Mr. Cardoso, who was armed, exchanged words with Ms. Moayed and when she confronted him saying that they were "punks and probably the guns were not real" he discharged the firearm he was holding into the wall of the bedroom.
- [10] Discussions took place about taking John Morrison with them to what was referred to as a "trap house" and then demanding money for his return.
- [11] Following the encounter with the four men in the recreation room, John Morrison was bleeding badly.
- [12] Large sums of money were mentioned. One of the intruders noted they wanted \$10 million.
- [13] Both Mr. Cardoso and Mr. Cooper wore balaclavas or similar face-coverings over their face during the robbery.
- [14] In addition to shooting into the wall, Mr. Cardoso also struck Ms. Moayed about her face during the exchange between them.

- [15] The hole in the wall was later identified as having come from a Ruger .45-calibre handgun found on the stairs adjacent to the point of entry after the departure of both Mr. Cardoso and Mr. Cooper through that door by which they had entered.
- [16] During the home invasion, a number of items were taken, mostly jewellery and cash. Most of it was retrieved when police captured all four assailants.
- [5] The trial judge described the appellant's personal circumstances as follows:
- [28] Mr. Cooper's circumstances are more fully described in a Gladue report (R. v. Gladue, [1999] 1 S.C.R. 688) which was provided to me and then filed in this sentencing proceeding.
- [29] Mr. Cooper is a non-status Indigenous man who self-describes himself as Métis. He grew up in what can only be described as the most unfortunate of circumstances. He was abandoned by his father at an early age and lived primarily with his mother, a prostitute. He was debased and abused as a child physically, emotionally and ultimately, sexually.
- [30] His father came back into his life for a period of time and he lived with his father in the United States. That arrangement, however, did not thrive such that ultimately he went into foster care, again with negative results.
- [31] It is clear from the report that Mr. Cooper has been greatly impacted by his status not only as an Indigenous person, but has also been a victim of racial discrimination as a result of being a person of colour.
- [32] The Gladue report describes Mr. Cooper's upbringing as: tumultuous, characterized by poverty, instability, crime and physical and sexual abuse. His mother and father used alcohol and cocaine on a regular basis. He was raised by his mother, but "passed around" between his mother, father and paternal grandmother. He stated that he did not have loving parents, and in reference to his mother he said, "I knew she hated me, she tortured me".
- [33] Mr. Cooper's maternal grandmother was part of the 60s scoop.
- [34] Mr. Cooper returned from the United States when he was 15 years old and spent the remaining of his years of his life, he is presently 43, in and out of detention centres and various provincial institutions.
- [35] He has an extensive criminal record which begins in 1995 and culminates with events a little different from those for which he is being sentenced now in 2004.
- [36] His criminal history includes multiple offences of robbery, careless use and storage of a firearm, carrying a prohibited weapon, carrying a loaded and restricted weapon, break and enter, committing an indictable offence and unlawful confinement.
- [37] In addition, there have been various breaches of either recognizances or failures to appear in court.
- [6] The trial judge imposed a seven-year global sentence on the appellant.

- [7] The trial judge structured the seven-year sentence as follows: Count 1: breaking and entering into a dwelling house--two years, four and a half months; Count 2: using a restricted or prohibited firearm while committing a robbery--two years, four and a half months (running concurrently with Count 1); Count 3: unlawful confinement--time served plus one day (concurrently to Counts 1 and 2); Count 4: using a firearm while committing the offence of breaking and entering--one year consecutive to sentences imposed on Counts 1 and 2); Count 5: having a face mask while committing an indictable offence--time served plus one day; and Count 8: intentionally discharging a firearm--time served plus one day.
- [8] It was common ground that the appellant was entitled to enhanced credit of three years, seven and a half months for time spent in pre-sentence custody. The trial judge applied that credit equally between Counts 3, 5 and 8.
- [9] The appellant appealed his conviction for the three firearm offences to this Court, arguing that the trial judge erred in law in applying the principles of party liability. This Court allowed the appeal, quashed the convictions, and ordered a new trial on the three firearm offences (Counts 2, 4, and 8). The non-firearm offences (Counts 1, 3, and 5) were not subject to appeal. This Court's reasons are found at 2020 BCCA 206.
- [10] On the conviction appeal, this Court, while setting aside the appellant's conviction on Count 2 (using a restricted firearm during a robbery), did not substitute a conviction for the lesser included offence of robbery. The appellant, however, conceded at trial that he was guilty on Count 2 of the lesser included offence of robbery simpliciter. The appellant maintains that concession on this appeal. The global sentence the appellant seeks on this appeal reflects the concession that he was involved in a robbery without knowledge of the use or discharge of any firearm. Both the appellant and the Crown agree that the facts of the robbery should be taken into account on this sentence appeal, and, in that case, the Crown has agreed that it will stay the remitted charges that are now before the trial court.
- [11] On this appeal, the appellant submits that now that this Court has set aside the three firearm offences, the global sentence should be reduced to reflect the material change in the factual underpinnings of the sentence and the consequent reduction in the appellant's moral culpability: *R. v. S.C.L.*, 2014 BCCA 336; *R. v. Nicolaou*, 2008 BCCA 459.
- [12] As the result of this Court allowing the appellant's conviction appeal, the appellant's actual sentence is automatically reduced by one year because Count 4 was quashed. The sentence imposed on that count was one year consecutive. A consecutive sentence was required on this count under s. 85(4) of the Criminal Code, which provides the sentence imposed for using a firearm during the commission of an offence "shall be served consecutively to any other punishment imposed on the person for an offence arising out of the same event or series of events".

- [13] In the result, the appellant's actual sentence is, therefore, two years, four and a half months. The global effective sentence (before the application of pre-sentence credit) is six years' imprisonment.
- [14] The remaining question is whether the sentence should be reduced further. The appellant submits a fit global sentence for the remaining offences being Count 1 (breaking and entering), Count 3 (unlawful confinement), and Count 5 (using a face mask) is five years' imprisonment. This sentence takes into account the seriousness of the offences and the lack of a firearm. It also takes into account the appellant's tragic background and circumstances as an Aboriginal offender as vividly detailed in the Gladue report.
- [15] Given the removal of the seriously aggravating circumstance of the finding that the appellant was liable for the firearms-related component of the offences, case law cited by the appellant, and the facts of this case--including the substantial Gladue factors considered by the trial judge--the Crown agrees that the sentence should be adjusted in the matter proposed by the appellant.
- [16] I agree with the circumstances of this case and that the application for leave to appeal sentence should be granted, the appeal should be allowed, and to reduce the sentence in the manner set out above. In the result, I would substitute an effective global sentence of five years. After giving credit for three years, seven and a half months, I would structure the three remaining counts as follows: Count 1: one year, four and a half months; Count 3: time served plus one day; and Count 5: time served plus one day.
- [17] HUNTER J.A.: I agree.
- [18] VOITH J.A.: I agree.
- [19] GOEPEL J.A.: The appeal is allowed and the sentence is reduced in the manner set out above. "The Honourable Mr. Justice Goepel"

Source & reproduction note

Judgment wording, source notices and original paragraph numbers are retained. Esheria supplies the layout and this PDF's page numbers; these are not the source pagination. This is a research copy, not an official or certified court document. Check quotations, citations and publication restrictions against the original source before relying on it.

ORIGINAL SOURCE <https://www.bccourts.ca/jdb-txt/ca/20/03/2020BCCA0387.htm>

CASE PAGE <https://chat.esheria.ai/case-law/canada/r-v-cooper-2020>

Prepared on 25 October 2026 · Esheria