
CANADA / JUDGMENT

R. v. Evans

2022 BCSC 1015

COURT

Supreme Court of British Columbia

DECIDED

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2022 BCSC 1015 R. v. Evans

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

R. v. Evans,

2022 BCSC 1015

Date: 20220517

Docket: 27697

Registry: Quesnel

Regina

v.

Roger Wayne Evans

Before: The Honourable Justice Tammen

Oral Reasons for Sentence

Counsel for the Crown:

M. Ainslie, Q.C.

T. Bauman

Counsel for the Accused:

J. LeBlond

Place and Date of Hearing:

Prince George, B.C.

May 16, 2022

Place and Date of Judgment:

Quesnel, B.C.

May 17, 2022

- [1] THE COURT: On May 11, 2021, following a trial, I convicted the accused, Roger Wayne Evans, of unlawful act manslaughter. The essential findings of fact are set out in the reasons for conviction. The unlawful act was careless use or handling of a firearm. Counsel are agreed that the four-year mandatory minimum sentence set out in s. 236(a) of the Criminal Code, R.S.C., 1985, c. C-46 does not apply. That concession by the Crown is based on the decision of Justice Schultes in *R. v. Penner*, 2022 BCSC 175 where he declared the mandatory minimum penalty of no force and effect. Crown counsel concedes that I should follow that decision in sentencing Mr. Evans.
- [2] Mr. Evans has also filed an additional constitutional challenge seeking a declaration of invalidity in respect of ss. 742.1(c) and (e) which preclude imposition of a conditional sentence in this case. The accused submits that a fit sentence is a term of imprisonment of two years less a day followed by a period of probation. Such a sentence, says defence counsel, should be served in the community pursuant to a conditional sentence order. Crown counsel submits that a fit sentence is four years and thus the first prerequisite for imposition of a conditional sentence, a sentence of less than two years, is not met.
- [3] In *Penner*, Schultes J. heard a similar constitutional challenge to that advanced here and has the matter on reserve. Rather than await the outcome of that decision, counsel have agreed that I should determine a fit sentence for Mr. Evans and, only if I decide that the sentence should be less than two years, adjourn for the decision in *Penner*. I thus intend to determine now what is a fit sentence for this accused and this offence. In *Penner*, Schultes J. determined that a fit sentence for that accused, absent any mandatory minimum penalty, would be 18 months to two years less a day. At para. 151, Schultes J. made the following comments, with which I agree:

Self-evidently, cases in which a firearm discharges unintentionally and causes a death still involve moral blameworthiness, which can be significant. That blameworthiness will usually arise from the manner in which the risk of that unintentional discharge occurring was created by conduct of the offender, including the number and duration of their acts of carelessness leading up to it, and the overall context in which it occurred.

- [4] Justice Schultes then addressed the degree of moral blameworthiness of that accused, taking into account the totality of negligent conduct in the circumstances of that case. I will do likewise in this case, but will first address the overarching principles of sentencing and the background of Mr. Evans.

- [5] The fundamental principles of sentencing are now largely codified in ss. 718, 718.1, and 718.2 of the Criminal Code. Section 718 sets out the fundamental objectives of sentencing. Section 718.1 codifies the important principle of proportionality, which requires a sentencing judge to assess the gravity of the offence and moral blameworthiness of the offender. Section 718.2(a) requires a consideration of aggravating and mitigating circumstances. Subsection (b) codifies the principle of parity. Subsections (d) and (e) codify the principle of restraint. Section 718.2(e) applies in this case, and it requires the court to consider all available sanctions other than imprisonment that are reasonable in the circumstances, paying particular attention to the circumstances of Indigenous offenders. Mr. Evans is Métis.
- [6] I have the benefit of a very helpful presentence report (PSR), a separate psychiatric report, and a thorough Gladue report. All those reports contain detailed summaries of the personal background and circumstances of Mr. Evans.
- [7] Mr. Evans is 65 years old. He was born in Edmonton, Alberta to a Caucasian mother and a Métis father. He has one older brother. His mother left the family when Mr. Evans was approximately two years old. His father was unable to raise the two boys so he left them with a maternal aunt and uncle. The accused grew up with his brother and six cousins on a farm near Dawson Creek, BC. Mr. Evans was subjected to physical, emotional, and verbal abuse over a prolonged period of time by his maternal aunt, his primary caregiver. Mr. Evans left the farm at age 15 and lived with his father for a number of years. The relationship was good, but his father was an alcoholic who exposed Mr. Evans to heavy alcohol consumption.
- [8] The accused obtained his Class 1 driver's licence and has worked as a truckdriver for more than 45 years. He is currently employed by Janik Services and is a valued employee.
- [9] His father is now deceased. Mr. Evans remains estranged from his mother, with whom he has had little contact over the years. He does not have a close relationship with any family members apart from one cousin, Dorothy Smith. The accused was married for eight years to a woman with whom he had one child, the victim, Dale Evans. Apart from that, the accused has had only one serious, romantic relationship which ended when his partner died in 2007 from a blood clot. Mr. Evans currently lives alone in a hotel rented by the month in Fort Fraser, BC. Mr. Evans appears to live a comparatively solitary life and, according to what he told the author of the psychiatric report, he prefers things that way. Mr. Evans believes his father was descended from the Cree Nation in Frog Lake, Alberta. He has had little to no connection to his Indigenous heritage until very recently when he obtained his Métis status card.
- [10] There are multiple challenges in identifying an appropriate range of sentence for a negligence-based manslaughter offence involving use of a firearm. First of all, because manslaughter is a residual catchall homicide offence which can be committed in myriad circumstances, the overall range is extremely broad. With respect to manslaughter involving use of a firearm, two related factors further complicate the task. Post-1995, all sentences for

manslaughter where a firearm was used were punishable by a mandatory minimum sentence of four years' imprisonment. Thus, there is a dearth of case authority considering appropriate sentences for such offences. The extent to which the MMP has created an inflationary floor is difficult to assess. At the same time, courts, in particular appellate courts, have recognized that the 1995 amendments are a signal that Parliament views all gun crimes and their impact on society very seriously and courts should as well. Thus, courts, like Parliament, have taken a firmer response to firearms offences than in the past. That means that pre-1995 cases are of limited assistance and sentences in those cases likely need to be adjusted upward. All this was recognized by Schultes J. and eloquently summarized in his thoughtful analysis at paras. 139 -142 of Penner.

- [11] A further complicating factor in fixing sentence for cases involving negligence-based manslaughter firearms cases is that such offences may be committed by at least two different means, with slightly different fault components. Criminal negligence manslaughter, s. 220, requires the Crown to prove wanton and reckless disregard for the lives or safety of other persons. Unlawful act manslaughter where, as here, the predicate offence is careless use or handling of a firearm, requires the Crown to prove a marked departure from the standard of care of a reasonably prudent person in all the circumstances. That is the same fault element as the offence of dangerous driving, and is the lowest level of negligence that attracts criminal liability in Canadian law. Thus, it becomes extremely important in such cases to assess all aggravating and mitigating factors and then to assess the overall moral blameworthiness of the particular accused, placing his conduct on the continuum of negligence.
- [12] The main aggravating factors in this case are these:
- a) The accused was not licenced to possess the firearm. He was subject to a ten-year prohibition commencing in 2007 which had expired, but he had not taken steps to legally possess firearms since that time.
 - b) The criminal record of the accused, Exhibit 6 in these proceedings. Although it is dated, his record includes a 2007 conviction for aggravated assault for which the accused was sentenced to 15 months' imprisonment.
 - c) The accused was in an advanced state of intoxication at the time he handled the firearm.
- [13] The main mitigating factors are these:
- a) The accused is somewhat elderly, currently 65, and there is a significant gap in his record and he has a good work history. Mr. Evans is presently employed and is described by his employer as an exemplary employee.
 - b) Mr. Evans expressed remorse immediately after the shooting when questioned by police and again when asked if he wished to say anything prior to sentencing.

- [14] His expression of regret during his right of allocution was moving and no doubt sincere. Nonetheless, the presence of true remorse is not as powerful a mitigating factor in this case as in many others. I say that for several reasons. The accused remains in denial about his longstanding misuse of alcohol, likely addiction to it, and the specific role alcohol played in this offence. He was in an advanced state of intoxication at the time he fatally shot his son. He recognized at the time that he was too drunk to drive to summon help and, as I found earlier, should have known that he was too drunk to handle a firearm. In his statement to police, the accused acknowledged that he was drunk and that he passed out on the couch afterward. The fact that he was passed out from drink is supported by the fact that he did not wake up when the landlord entered the house some hours later. It was only when police came into the living area that the accused roused himself. Despite that evidence, Mr. Evans told the various report writers he was not intoxicated at the time. He does not acknowledge that alcohol was a factor in the shooting, simply referring to the shooting as an accident.
- [15] In addition, Mr. Evans cleaves to the position that his son, the victim, was responsible for leaving the loaded firearm on the table. That may or may not be the case. There is no evidence on that score. I do not view these statements by the accused as what is sometimes called victim-blaming, but rather as an inability on his part to fully accept responsibility for his own role in the tragic death of his son. I will address that role when I consider Mr. Evans' moral culpability.
- [16] At this juncture, I observe that, in my view, Mr. Evans is incapable of truly acknowledging his own responsibility. That likely stems from his state of denial concerning his underlying disease, alcoholism. The psychiatric report makes a tentative diagnosis of that condition. The family members who spoke with report writers, in particular, the cousin with whom Mr. Evans enjoys a close relationship, support the diagnosis. The situation is summed up well in the Gladue report at pp. 14-15 as follows. Under the heading "Understanding of the Index Offence" is written this:

Roger believes that the index offence was an accident caused by his son's careless storage of his rifle. At the same time, he states that not a day goes by without thoughts of his son's tragic death. Roger's acceptance of responsibility for the incident of August 1, 2018, is limited and he does not appear to have fully appreciated the role he played in it.

- [17] Immediately thereafter, under the heading "Summary", is the following:

Roger's life is coloured by a difficult early childhood which included abandonment by his parents and serious levels of violence at the hand of his maternal aunt. He grew up almost totally isolated from his Métis culture and when, at the age of 13, he returned from Dawson Creek to Edmonton to live with his biological father, he was exposed to high levels of alcohol consumption, according to his cousin, Dorothy Smith.

- [18] As noted in that extremely thorough report, there are powerful Gladue factors present. Although Mr. Evans grew up disconnected from his Métis culture, his personal history, in particular the time he spent living with his father, a Métis man, reflects the

intergenerational effects of colonization. The presence of such factors is not viewed as a discrete mitigating circumstance. Rather, it informs a consideration of moral blameworthiness. In a very real way, the presence of Gladue factors attenuates the moral blameworthiness of the offender.

- [19] In this case, apart from the Gladue considerations, the moral blameworthiness of Mr. Evans is very high indeed. The actual discharge of the firearm was accidental, that is, unintentional. However, the accused, by his negligent conduct, was responsible for creating circumstances which permitted the accident to occur. The accused, as noted, owned the firearm, for which he did not possess a licence. He habitually stored it in an unsafe manner in a bedroom closet. The timeframe over which his negligent conduct manifested itself was not transient, but rather prolonged. At the time, the accused was in the process of moving from the home and was loading his belongings into a truck and trailer for transport. He should have taken steps to secure the rifle and render it safe for transport long before he commenced drinking with his son. Once he was in an advanced state of intoxication, he should not have handled the firearm. It matters not who last used the rifle nor who placed it on the table. It was Mr. Evans' rifle and his responsibility. Prior to picking up the rifle, Mr. Evans did not remove the magazine, nor take any steps to check if the gun was loaded. Then, having picked up the rifle, he did not point it at the floor or the ceiling, but rather in the direction of his son, the only other occupant of the home.
- [20] Precisely how the gun discharged is a matter about which there is no evidence. The only logical inference is that the accused accidentally applied pressure to the trigger. I infer that he was in such a state of intoxication that he does not recall how that occurred. The moral blameworthiness of the accused is akin to a grossly impaired individual who decides to drive an automobile while in that condition. Moreover, Mr. Evans, by his conduct over a considerable period of time, created the overall circumstances which crystalized with the tragic events here.
- [21] For those reasons, I am satisfied that this case bears little similarity to *R. v. Owens*, [1985] B.C.J. No. 431 (S.C.); *aff'd* [1986] B.C.J. No. 401 (C.A.), a case in which a suspended sentence was imposed. Likewise, the case of *R. v. Pettigrew*, [1990] B.C.J. No. 996 is very different to this one. In *Pettigrew*, the accused, a Métis woman who had suffered prolonged abuse at the hands of her spouse, was acting out of a concern for her children when she attempted to unload the firearm which discharged, killing the spouse. Similarly, I fix the degree of moral blameworthiness of Mr. Evans significantly further toward the serious end of the continuum than the accused in *Penner*.

- [22] The other important consideration here is the criminal record of the accused. Although it is dated, it places Mr. Evans in a different position than the accused in those cases. All were comparatively youthful first offenders. Mr. Evans committed a very serious criminal offence in 2006 while in a state of blackout intoxication. For that offence, he was sentenced in 2007 to 15 months' imprisonment. He says he stopped drinking for a period of time thereafter, but was clearly drinking to excess at the time of this offence.
- [23] Were it not for the Gladue considerations, I would consider a fit range of sentence here to be three to four years. Three years was the sentence the trial judge in *R. v. Morrissey*, 2000 SCC 39 would have imposed were it open to him to do so. That case involved an accidental shooting by an intoxicated accused. The accused had no record and there were other mitigating factors not present in this case. However, there were no Gladue considerations in *Morrissey*.
- [24] Although the Gladue considerations significantly attenuate the moral blameworthiness of Mr. Evans, in my view, a sentence of more than two years is required. Thus, the first prerequisite for the imposition of a conditional sentence is not met. There must be a traditional sentence of imprisonment to be served in a penitentiary. The sentence must be proportionate to the degree of responsibility of the offender and must adequately express society's condemnation of the unlawful conduct. In this case, I am also satisfied that deterrence, both general and specific, are important considerations. Given the presence of powerful Gladue factors, I intend to depart from what might be considered a fit range of sentence of three to four years. I will fix the sentence at 30 months.
- [25] Mr. Evans, please stand, sir.
- [26] For the offence of manslaughter, I sentence you to a term of imprisonment of 30 months. You may be seated.
- [27] There are ancillary orders that I must impose now.
- [28] Mr. Bauman, those are set out in your submission on range of sentence, there is the mandatory firearms prohibition which I believe in this case is life; is that correct?
- [29] CNSL T. BAUMAN: That is correct, Justice.
- [30] THE COURT: All right. There will be a mandatory lifetime firearm ban pursuant to s. 109 of the Criminal Code.
- [31] I also make an order pursuant to s. 487.051(1) of the Criminal Code that Mr. Evans provide a sample of his DNA suitable for analysis.
- [32] And then, Mr. Bauman, you referred to the prospect of a forfeiture order yesterday?
- [33] CNSL T. BAUMAN: Yes, Justice, that would be pursuant to s. 491 and I would suggest that all firearms and ammunition seized by the police be forfeited.

- [34] THE COURT: Okay. Any position on that, Mr. LeBlond?
- [35] CNSL J. LEBLOND: No, Justice, I agree the order is appropriate.
- [36] THE COURT: All right. I will make the forfeiture order in the terms just set out by the Crown. Is it only the one firearm or were there two firearms at issue here, Mr. Bauman?
- [37] CNSL T. BAUMAN: There were two.
- [38] THE COURT: All right. Both firearms and all ammunition seized by the RCMP are --
- [39] CNSL T. BAUMAN: Justice, I am sorry to interrupt. I said I will draft that order with reference to the property report --
- [40] THE COURT: Am I correct that those are to be subject to forfeiture for destruction
- [41] CNSL T. BAUMAN: Yes, Justice.
- [42] THE COURT: All right, that will be the order, then.
- [43] In addition, pursuant to s. 743.2 of the Criminal Code, I am making a direction that these reasons for sentence be transcribed and transmitted to the Corrections Service of Canada (CSC) as is required under that subsection.
- [44] Mr. LeBlond, that section also requires that the Court takes steps to have the various reports and any other exhibits that may be required transmitted to the CSC. That should clearly include Exhibits 1, 2, and 3. I would be guided by your position, Mr. LeBlond, as to some of the ancillary exhibits including those that you filed, whether you wish those to be transmitted to the CSC authority or not. I will hear you about the Alberta PSR. My view is that it need not be transmitted.
- [45] CNSL J. LEBLOND: I agree with regard to the Alberta PSR. It is dated and, in my submission, subsumed by the more recent reports. I would submit, Justice, that the references letters of Exhibit 7 ought to be included in the material submitted to the CSC for consideration on parole.
- [46] THE COURT: Yes. The exhibits that will be transmitted to the CSC are Exhibit 1, the PSR; Exhibit 2, the psychiatric report; Exhibit 3, the Gladue report; and Exhibit 7, the defence letters in relation to Mr. Evans' employment.
- [47] That only leaves the bail supervisor's letter which was Exhibit 5, what is your position on that, Mr. LeBlond?
- [48] CNSL J. LEBLOND: I believe that would be helpful, Justice, for the CSC to see it. It updates Mr. Evans' behaviour in the community between two fairly distant points in time.
- [49] THE COURT: All right. Then I will order that Exhibit 5, the bail supervisor's letter, be transmitted.

- [50] Mr. Bauman, I am not inclined to order that the dated Alberta PSR be transmitted to the CSC authorities unless you can persuade me that it must be.
- [51] CNSL T. BAUMAN: I am not going to make any submissions on that, Justice. I just would add that I think you probably should direct that both your reasons for conviction and reasons for sentence be transmitted to the CSC so that they have the benefit of the precise facts underlying the conviction.
- [52] THE COURT: Yes, that is a fair point, Mr. Bauman. All right, so both sets of reasons, then. Once these reasons are transcribed, the additional reasons have already been transcribed, and both sets of reasons should be transmitted to the CSC so that they can consider them in administering Mr. Evans' sentence.

"Tammen J."

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