

CANADA / JUDGMENT

R. v. Fabas

2017 BCSC 1693

COURT

Supreme Court of British Columbia

DECIDED

28 August 2017

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2017 BCSC 1693 R. v. Fabas IN THE SUPREME COURT OF BRITISH COLUMBIA Citation: R. v. Fabas, 2017 BCSC 1693 Date: 20170828 Docket: 64994-3 Registry: Chilliwack Regina v. Daniel Joseph Fabas Before: The Honourable Madam Justice H. Holmes Oral Reasons for Sentence Counsel for the Crown: H.B. Waldock A.M. Tosso Counsel for the Accused: D.H. Silverman Place and Date of Trial/Hearing: Chilliwack, B.C. August 21, 2017 Place and Date of Judgment: Chilliwack, B.C. August 28, 2017

INTRODUCTION

- [1] On April 18, 2016, Daniel Fabas killed David Williams by shooting him with a .22 rifle.
- [2] Mr. Fabas has pleaded guilty to manslaughter using a firearm (contrary to s. 236(a) of the Criminal Code) and to possessing a firearm while prohibited from doing so, contrary to s. 117.01(1) of the Criminal Code.
- [3] The task now is to determine the appropriate sentence. THE OFFENCES
- [4] Mr. Fabas committed the offences while he was a visitor in a basement suite on Princess Avenue in Chilliwack, B.C. Another man rented the suite and sold illegal drugs from it. Mr. Fabas had been in the suite for the evening and overnight while he worked fixing electric motor-cycle scooters in the suite. He consumed heroin in the suite shortly before the shooting.
- [5] There was a background of conflict, which I will outline shortly, between Mr. Williams and the people in the suite, including, sometimes, Mr. Fabas. On April 18, the date of the offences, that conflict erupted again after Mr. Williams' girlfriend sent texts to the drug dealer asking for heroin and crystal meth and, at about 5 a.m., arrived at the suite and made purchases. The girlfriend then consumed the drugs she had purchased, and told Mr. Williams that she had done so.
- [6] Shortly after 7 a.m., Mr. Williams arrived at the suite and smashed glass in the living room window, demanding entry. Another person in the suite, who was not Mr. Fabas, refused Mr. Williams entry.

- [7] Mr. Fabas picked up the rifle from within the suite and fired toward the window where Mr. Williams stood. That shot did not hit Mr. Williams. Mr. Williams then moved to the window closer to Mr. Fabas, and broke more glass. Mr. Fabas fired a second shot that did not hit Mr. Williams, followed by a third shot that hit Mr. Williams in the face, between the eyes, killing him. Mr. Fabas stowed the rifle in the utility room of the apartment building, and left the area by bicycle. He says that he did not realize that his shot had hit Mr. Williams, and that he was appalled, sick to his stomach, when he later saw police and tents in the area, and was told that someone had died.
- [8] I mentioned a history of conflict.
- [9] For reasons unstated in the evidence, and said to be unknown to Mr. Fabas, Mr. Williams believed that Mr. Fabas had assaulted Mr. Williams' cousin, who was also his close friend; Mr. Williams also believed that Mr. Fabas had been responsible for the cousin's death by suicide. Seemingly because of these beliefs, Mr. Williams attacked Mr. Fabas with a machete, causing a gash to his head, a broken elbow, and a slash to his arm. This was on July 12, 2015, about nine months before the present offences. Whether or not Mr. Fabas suffered from PTSD from the machete attack, as those around him think he did, the attack clearly had a serious effect on him, leaving him more than usually fearful of Mr. Williams.
- [10] In the week before the present offences, which were on April 18, 2016, Mr. Williams was in conflict with occupants of the basement suite. He went to the suite three times, but was refused entry each time. On one of those occasions, on April 11, he told the person who refused him entry, "you're on the shit list". On April 13 or 14, he smashed some windows with a collapsible metal baton, accused the drug dealer who rented the suite of selling drugs to his girlfriend, and threatened everyone in the suite, saying that he would return and shoot them. He left only when the drug dealer told him that the police were on the way -- in actual fact, they had not been called.
- [11] Mr. Fabas was not present for most or all of these confrontations at the suite. However, he was told about them when he visited on April 16. He was also told that Mr. Williams had access to firearms, and he was urged -- as were the other people in the suite -- to take steps to protect himself. Mr. Fabas said at that time that he would not hesitate to shoot Mr. Williams.
- [12] At the time of the events on April 18, Mr. Williams was on bail for a firearms charge. He was not carrying a firearm. His body contained a moderately intoxicating level of alcohol, and, for the purposes of recreational use, a moderate to high quantity of methamphetamine.
- [13] Mr. Fabas was arrested on April 29, 2016, and has been in custody since then. THE EFFECTS OF THE OFFENCE
- [14] A death caused by crime has deep and long-lasting effects on the family and friends of the victim and the community. The grief and loss that the family and friends experience are heightened by the knowledge that the death should not have happened, that it was caused by human action that violates our social norms.

- [15] In this case, four members of Mr. Williams' family read victim impact statements to the Court that explained some of the specific effects of his death. Two other members of the family, Mr. Williams' older sister and his cousin and close friend, could not bring themselves to write, but sent their comments through Crown counsel.
- [16] In a profoundly moving victim impact statement, Mr. Williams' young son spoke about how the death changed his personality. He went silent for months, and as a result lost friendships and had serious problems at school. He explained how certain people and activities remind him of his father, and he can't face them because of the hurt the reminder causes.
- [17] Mr. Williams' daughter, who was eight years old at the time of the offence, also spoke movingly about her loss, her time with her father cut unnaturally short.
- [18] Both children were immensely proud of their father, for reasons including some I will come to. The loss clearly destroys a part of their own identities that gives them pride in their family and the comfort of a recognized place in their community.
- [19] I say to these children that they showed great courage in expressing their feelings and making their victim impact statements in court. The strength they have shown will serve them well. The daughter says that she will paddle her canoe in her father's honour. I am sure that in this way and in others the children will use the strength they have from their father, and rejoin or lead their community.
- [20] V.W., who has had the role of Mr. Williams' mother since he was 13, spoke of her own pain and the pain of other family members. Her comments made clear that the way in which Mr. Williams died made the loss all the harder to bear.
- [21] A.W. (who is the "Ms. W." I will refer to in my next comments) gave the most extensive victim impact statement that described Mr. Williams as so much more than a "case number", as she put it, and so different from the man embroiled in the events that led to his death. Ms. W. is Mr. Williams' former spouse and the mother of his three children, but was also his friend from the age of about 10 and his partner since the age of about 18. She separated from him to protect the children when he "lost his battle with his demons", using her phrase, but she and he maintained their mutual love and respect and were in touch every day to check on each other and the children, and to offer each other encouragement. She is left with a deep sense of guilt for leaving Mr. Williams to his demons, and she doubts that she can trust herself ever to love someone else.
- [22] Ms. W. and Mr. Williams supported each other through university education, and achieved career and financial success. Mr. Williams was a member on tribal council. Ms. W. ran a canoe club for people from the Coast Salish territory with Mr. Williams' help and support for 15 years. She explains that the canoe club, which involved up to 150 people in a season, was the means by which she and Mr. Williams helped rebuild their nation. Mr. Williams was a top athlete who would place among the leaders in international paddling events, inspiring great pride in his family as well as in the community. He led the community by training and

encouraging others, especially youth. They are lost without him.

- [23] Ms. W. has found herself unable to continue the club without Mr. Williams. She suffers physical consequences of many kinds, and has resorted to forms of assistance or relief that she evidently regrets. I hope that with time Ms. W. will heal enough to take up her leadership role once again. Our communities value and depend on people with the unusual degrees of initiative, strength and commitment to others that she has shown.
- [24] Mr. Williams was the main breadwinner for the family while it was intact, and, it seems, afterwards to an extent. With his death Ms. W. provides the sole income and is responsible for his debt in the USA. She has trouble working the hours she should be capable of. As a result, the family has lost their house and most of their vehicles, and Ms. W. is considering bankruptcy. MR. FABAS' BACKGROUND AND CIRCUMSTANCES
- [25] A pre-sentence report details Mr. Fabas's background and present circumstances, and I will only outline some of the main features.
- [26] Mr. Fabas was almost 34 years old at the time of the offences, and is now 35. He has been in custody since he was arrested about 11 days after the offences.
- [27] Mr. Fabas and his fiancé have a four-year old son together. Mr. Fabas values those relationships. He does his best while in custody to stay in contact with his son by, for example, sending him recorded bedtime stories.
- [28] Mr. Fabas has a problem with substance abuse that began when he was about 21. He has tried more than once to get free of his addiction, but never with complete success. It is important to Mr. Fabas's fiancé that he be free of drugs, and I am confident that her support in that way will assist Mr. Fabas. His son needs him to be healthy and strong.
- [29] Mr. Fabas has a criminal record for offences between 1997, when he was a youth, and September 2009, when he was 27. Crown counsel advises that the details are somewhat different from those that appear in the pre-sentence report, so, for accuracy, I will attach (as appendix A to these reasons) a copy of the record as confirmed by the Crown. The offences are mainly property offences and breaches, with one offence of obstructing a peace officer, and one of escaping lawful custody.
- [30] Mr. Fabas would like to work toward and achieve a GED qualification while he is in custody. He was unable to reach that goal during a previous period in custody, but I am confident that he has the necessary motivation now.
- [31] Mr. Fabas feels profound remorse for having caused Mr. Williams' death. He broke down during the interview with the probation officer. In his personal statement to the Court, he told the family and friends of Mr. Williams how deeply he regrets his conduct. He was evidently moved by the victim impact statements that were read aloud in court.

- [32] I have no doubt that Mr. Fabas understands the enormity of his actions, takes full responsibility for them, and would make recompense if that were possible. He cannot bring back Mr. Williams or heal the pain that he has caused in others, but he can make some indirect recompense by gathering his own strength and using it to contribute to society in a meaningful way. THE APPLICABLE PRINCIPLES General Principles
- [33] The fundamental purpose of sentencing is to protect society and to contribute to respect for the law and the maintenance of a just, peaceful, and safe society. There are six main objectives in sentencing: (1) denouncing the offending conduct; (2) deterring the offender and other people from criminal conduct; (3) separating the offender from society when necessary; (4) rehabilitating the offender; (5) making reparation to victims or the community; and (6) fostering the offender's acknowledgement of responsibility and of the harm done to victims and the community.
- [34] Sentencing involves the exercise of a broad discretion in balancing all of the relevant factors to meet the applicable objectives. The relative emphasis given to the various objectives will vary according to the particular offence and the particular offender.
- [35] The Crown and the defence agree that for a case involving a death, especially in a context of self-help violence in the drug sub-culture, the case authorities require emphasis on the objectives of denunciation and deterrence: R. v. Dhanda, 2005 BCCA 533.
- [36] Other sentencing principles help a sentencing judge tailor the sentence to the offence and the offender. In particular, the sentencing judge will take into account the aggravating and mitigating circumstances relating to the offence and the offender, when considering where, within the applicable range of sentence, the particular sentence should fall. Available Range of Sentence
- [37] The manslaughter offence carries a mandatory minimum sentence of four years' imprisonment, because Mr. Fabas used a firearm in the commission of the offence. The maximum sentence is life imprisonment. However, case authorities indicate that generally sentences for manslaughter fall between four years and fifteen years' imprisonment, except in unusual circumstances or special circumstances: R. v. Engebretsen, 2016 BCCA 182, at para. 13. I note that the discussion in that case was manslaughter offences in general, and not, specifically, manslaughter with a firearm.
- [38] The offence of possessing a firearm while prohibited carries a maximum sentence of ten years' imprisonment. THE CROWN'S POSITION
- [39] The Crown submits that the appropriate sentence is seven years' imprisonment for the manslaughter using a firearm, with an additional one-year, to be served consecutively, for the offence of possessing a firearm while prohibited.

- [40] The Crown says that, although no case is exactly the same as another, the proposed sentences have strong support in case authorities based on generally similar offences committed by generally similar offenders. Concerning the manslaughter with a firearm, these include the following: · R. v. Henderson & Richer, 2005 BCCA 3; · R. v. M.C.K., 2015 MBQB 82; · R. v. Mulligan-Brum, 2013 BCCA 231; · R. v. Wall, 2010 BCSC 972; · R. v. Ispanovic, 2008 BCCA 270; · R. v. Holden, 2012 BCCA 317; and, · R. v. Dhanda, 2005 BCCA 533.
- [41] In detailed and helpful written submissions (exhibit 2), Mr. Waldock outlines similarities and differences between those cases and this one. THE DEFENCE POSITION
- [42] The defence submits that there is no reason to depart from the range of between four and six years' imprisonment described as the usual range for manslaughter offences: see the comments of Chief Justice McEachern in R. v. Gillies (1998), 107 BCAC 157, 38 WCB (2d) 306, as cited many times since. In support, the defence relies on the following, they final four for their discussions of the applicable law: · R. v. Dhak, 2003 BCSC 595; · R. v. Uppal, 2004 BCSC 414; · R. v. Quinlan, 2009 BCSC 1327; · R. v. Mulligan-Brum, 2013 BCCA 231 (on which the Crown also relies); · R. v. Martinez, 2015 BCSC 653; · R. v. McMath, 2015 BCSC 440; · R. v. Feng, 2015 BCSC 1447; and, · R. v. Scotchman, 2016 BCSC 652.
- [43] As to Mr. Fabas's possession of a firearm while prohibited, the defence submits that if it is to function as an aggravating factor for the manslaughter offence, then it cannot properly give rise to a consecutive sentence for a separate offence as well. APPLYING THE PRINCIPLES Aggravating and Mitigating Circumstances
- [44] There are several aggravating circumstances.
- [45] The most significant is that the offences led to a death. This was a tragic loss of a valued and valuable member of the community.
- [46] The offences took place because Mr. Fabas associated himself with the drug sub-culture. They took place because he defended the dealer's premises against a man angry that the dealer was selling drugs to his girlfriend, and, no doubt, bringing "demons" into her life as well.
- [47] Mr. Fabas did not plan or intend to shoot Mr. Williams. However, the conflict which led to Mr. Williams' death did not come as a surprise to Mr. Fabas. He was forewarned, and he neither left the scene nor called for help from the authorities. Instead, he stayed and he made the rifle accessible in the suite.
- [48] Mr. Fabas handled the gun earlier in the day at least once, when he hid it under a couch in the suite, and likely twice, because the gun was later moved to on top of the drug dealer's bed. He discussed using it if necessary. When he grabbed the gun and shot at the window Mr. Williams had smashed, Mr. Fabas's act was not an impulsive one.
- [49] Mr. Fabas fired three shots at reasonably close range.

- [50] He increased the risk of the situation by putting himself under the influence of heroin, which he had taken shortly before.
- [51] I do not treat Mr. Fabas's breach of the firearms prohibition as an aggravating circumstance in relation to the offence of manslaughter with a firearm. Because, as I will explain later, I have concluded that Mr. Fabas must serve a consecutive sentence for the breach, it would count that conduct twice against Mr. Fabas if the breach also functioned to make the manslaughter with a firearm more serious.
- [52] There are also important mitigating circumstances.
- [53] Mr. Fabas took responsibility for his conduct at an early stage. Although he denied involvement at first, this changed as events unfolded. For the preliminary inquiry which based on a more serious offence, he admitted much of the Crown's case, and only the key civilian witnesses were necessary for the Crown to call on the points then in issue. After the preliminary inquiry, Mr. Fabas entered the present guilty pleas, which the Crown then accepted.
- [54] Mr. Fabas has a criminal record but, as I noted, he has been free of convictions for 8 years.
- [55] As I have noted, there can be no doubt that Mr. Fabas feels profound remorse for his actions.
- [56] I accept that Mr. Fabas has a sincere wish to rehabilitate his life and, finally, to overcome his addiction. Other Case Authorities
- [57] No case is exactly like another. However, other case authorities help a sentencing judge identify the applicable range of available sentences and to gauge where, in that range, the particular sentence should fall.
- [58] I agree with the Crown that Mr. Fabas's moral culpability was high because he resorted to self-help violence within the illegal drug sub-culture.
- [59] The sentence should also denounce the resort to self-help violence, which departs radically from our communal values, in this case with tragic consequences.
- [60] However, there are circumstances in this case that, I agree, support a slightly shorter sentence than the one the Crown proposes.
- [61] Most similar to this case, in my view, are Henderson & Richer (specifically, Mr. Henderson's case - 8 years), Mulligan-Brum (7 years), and Quinlan (6 years), but they too have differences from this case.
- [62] Mr. Henderson, whose sentence was eight years, lacked the important mitigating factor of a guilty plea. Mr. Henderson used his fists and feet, and not a firearm, as Mr. Fabas did; however, he was trained in martial arts and it was unsurprising that his actions were lethal. Also, Mr. Henderson was on probation at the time of the offence.

- [63] Mr. Mulligan-Brum, whose sentence was seven years, was 20 years old at the time of his offence, and had the mitigating factor of being a youthful offender. However, there were also aggravating factors that do not exist in Mr. Fabas's case. Mr. Mulligan-Brum's criminal record was more recent than Mr. Fabas's (albeit with less serious offences), and he was on probation at the time of the manslaughter. He also pursued the victim. His professed remorse was not sincere.
- [64] Mr. Quinlan, whose sentence was six years, was also a youthful offender (at 23) and he had no criminal record. However, unlike Mr. Fabas he initiated the dispute that led to the death, and he fired eight times at people who were fleeing from him. Concurrent or Consecutive Sentences
- [65] I agree with the Crown that the sentence for the breach of the firearms prohibition should be served consecutively to the sentence for manslaughter with a firearm. There is a discretion to allow concurrent sentences, but to do so would undermine the important deterrent objective of these prohibitions. SENTENCE
- [66] Mr. Fabas, I am going now to impose sentence.
- [67] For the offence of manslaughter with a firearm, you are sentenced to imprisonment for six years.
- [68] For the offence of using a firearm while prohibited, you are sentenced to imprisonment for one year.
- [69] Those sentences will be served consecutively, for a total of seven years.
- [70] You were arrested on April 29, 2016 and have been in custody since. Crown counsel calculated that, as of August 21, 2017, when submissions were made, you had been in custody for 479 days, and that, with the usual credit of 1.5 times, your credit should be 2 years minus 11 days. Another 7 days have passed since August 21, and you will therefore have credit of exactly 2 years. ANCILLARY ORDERS
- [71] You are prohibited from possessing any firearm or ammunition, or any cross-bow, restricted or prohibited weapon, or explosive substance. That order, which I made under s. 109, is for life.
- [72] Section 487.051 requires that I make an order that you provide a sample of bodily substance suitable for DNA analysis. You are to do so.
- [73] The seized items will be disposed of in the manner proposed by the Crown, as outlined in exhibit 3.
- [74] The victim surcharge? [SUBMISSIONS]

[75] The victim fine surcharge will be \$200 for each of the two offences, payable forthwith. In default of payment, there will be periods of imprisonment, as the Criminal Code provides, to be served concurrently each with the other and with the sentence for count 1.

[76] THE COURT: Is there anything else to be dealt with?

[77] MR. SILVERMAN: I don't believe so.

[78] MR. WALDOCK: No, I think that's everything. "The Honourable Madam Justice H. Holmes"
APPENDIX A 17 December 1997 (Youth) CCC-355 (a) - PSP Over \$5000 Offence date: 8 March 1997 Probation Order 1 year 22 January 1998 (Youth) CCC-145 (3) - Breach of Undertaking or Recognizance Offence date: 18 June 1997 Probation Order 1 year 22 January 1998 (Youth) CCC-145 (3) - Breach of Undertaking or Recognizance Offence date: 24 August 1997 Probation Order 1 year 3 December 1998 (Youth) YOA-26- Failure to Comply with Disposition Offence date: 21 August 1998 Community Work Service Order for 10 hours Probation Order - 6 months 27 July 2001 Mischief under \$5000 Susp Sentence 6 months 23 August 2006 Theft under \$5,000 \$750 11 August 2008 Robbery CSO 7 months 2 years probation 11 May 2009 Breach of undertaking or recognizance x2 10 days 18 June 2009 PSP over Time served 3 months Obstruct Peace Officer . Time served 1 month Probation 2 years 16 September 2009 B&E Escape lawful custody Time served 5 months 10 days Probation 2 years

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