
CANADA / JUDGMENT

R. v. Kim

2013 BCSC 2143

COURT

Supreme Court of British Columbia

DECIDED

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2013 BCSC 2143 R. v. Kim

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

R. v. Kim,

2013 BCSC 2143

Date: 20131010

Docket: X075915-3

Registry: New Westminster

Regina

v.

Jason Hyun Kim

Before: The Honourable Madam Justice Ker

Oral Reasons for Sentence

Counsel for the Crown:

W.M. Stephen, Q.C.

Counsel for the Accused:

B. Coleman, Q.C.

Place and Dates of Hearing:

New Westminster, B.C.

October 7 and 10, 2013

Place and Date of Sentence:

New Westminster, B.C.

October 10, 2013

I. Introduction

[1] THE COURT: On September 3, 2013, Jason Kim entered a guilty plea to one count of manslaughter in relation to the death of Charlie Lee. The offence occurred in the early morning hours of June 1, 2003, in Coquitlam, B.C. at the Boss Sushi Restaurant. Mr. Kim is now before the Court for sentencing.

II. Ancillary Orders

[2] I will first make certain ancillary orders that were not contested by Mr. Kim.

[3] Manslaughter is a primary designated offence within the meaning of s. 487.04 of the Criminal Code, R.S.C. 1985, c. C-46 [the Code]. Pursuant to s. 487.051 of the Code, I order that samples of bodily substances reasonably required for DNA analysis be taken from Mr. Kim.

[4] In addition, manslaughter being an offence involving the use of violence for which he is liable to imprisonment for more than ten years, pursuant to s. 109(2)(a) of the Code, I prohibit Mr. Kim from possessing any firearms other than a prohibited or restricted firearm, and any crossbow, restricted weapon, ammunition and explosive substance for a period of ten years. Pursuant to s. 109(2)(b) of the Code Mr. Kim is prohibited from possessing any prohibited firearms, restricted firearms, prohibited weapons, prohibited devices and prohibited ammunition for life.

III. Circumstances of the Offence

[5] On May 31, 2003, and into the early morning hours of June 1, 2003, the deceased, Charlie Lee, was at Boss Sushi Restaurant in Coquitlam celebrating a friend's birthday with 14 others (the "Lee group").

[6] Jason Kim and three friends ("the "Kim group") were also at the restaurant. At some point after midnight on June 1, Mr. Lee became involved in an argument with Mr. Kim outside the restaurant. Mr. Lee uttered some threatening comments to the Kim group which loosely translated to "do you want to die" or "you're going to be dead".

[7] Both groups went back into the restaurant. At some point, someone from the Kim group threw a glass or a beer bottle at the Lee group. Both groups (who I note had been drinking) went back outside, resulting in a general mêlée and fight in the restaurant's parking lot.

- [8] At some point, one member of the Kim group retrieved a loaded handgun from Mr. Kim's Honda Civic. The Honda Civic actually belonged to his mother, but Mr. Kim had driven it to the restaurant. Two shots were fired by someone from the Kim group. One shot hit Mr. Lee in the back as he was running back into the restaurant. He died from the gunshot wound to his back. Mr. Kim fled the scene in his Honda Civic. His friends fled the scene in their vehicles.
- [9] Mr. Kim was arrested on June 26, 2003, and released on bail on August 1, 2003. A 524 warrant was issued on February 16, 2004, for Mr. Kim and remained outstanding until Mr. Kim's arrest on July 26, 2011, on other charges. The other charges were possession for the purposes of trafficking heroin and obstruct justice, for which Mr. Kim received a one day sentence and a two month sentence, respectively.
- [10] Calculations by learned Crown counsel arrive at two years and six weeks pre-sentence custody, which should be doubled to four years and three months to be deducted from the global sentence imposed in this case.

IV. Circumstances of the Offender

- [11] Mr. Kim is 29 years old. He was born in Vancouver and has lived here his entire life. He was approximately 19 years of age at the time of this offence. He has been estranged from his father since about the age of 14. At the time of the offence, he lived with his mother and younger brother Jessie. I note that Jessie is present in Court today and remains supportive of his older brother. Tragically, Mr. Kim's mother passed away in January 2012.
- [12] Mr. Kim had no record at the time of this offence but has subsequently been convicted of the offences to which I just referred. He has a Grade 11 education from Burnaby North Secondary School and some credits for Grade 12. He tried to do some upgrading through Vancouver Community College for approximately eight months but did not complete that. His hope is that he will get himself back on track with his education once he is finished with his sentence.
- [13] Before the offence, Mr. Kim did part-time work in the restaurant industry but did not return to that type of work after the offence. During the seven years he was at large after the charges he worked odd jobs, such as landscaping and drywalling.
- [14] Despite his non-appearance on the outstanding 524 warrant, Mr. Kim did not leave the jurisdiction. He simply maintained a very low profile and was not involved in crime except for the two offences to which I referred, which for sentencing purposes are subsequent convictions. He is essentially a first offender with this offence.
- [15] I have already indicated that Mr. Kim has been in pre-sentence custody for two years and six weeks which doubles to four years and three months credit.

- [16] The Court can only accept a limited indication of remorse in his guilty plea in light of his fleeing the scene at the time of the offence and disappearing for seven years. Nevertheless, I accept that there is an element of remorse in this case. Even if his fleeing the scene and remaining at large was treated as a lack of remorse, that is not an aggravating circumstance. It is simply the absence of a mitigating circumstance.

V. Impact of the Offence on the Victim and Community

- [17] Mr. Lee's father submitted a victim impact statement which is marked Exhibit 1 on this sentencing. I have read it with care and I have heard submissions from Crown counsel as to Mr. Lee's attendance at the Crown's office and discussion about the impact of this offence.
- [18] It is obvious from the contents of this statement and from the interview as related by Ms. Stephen that the impact of this offence on the lives of Mr. Lee's family has been profoundly serious, sad and, indeed, devastating.
- [19] In *R. v. Iozzo*, [2004] O.J. No. 3641 (S.C.) at para. 98, Morin J. spoke poignantly about the difficulty any sentence imposed in that case would pose for the deceased's family. I adopt and paraphrase what was said there. Tragically, Charlie Lee was killed in a cowardly attack after a drunken *mêlée* in a parking lot. I know that in the face of their tragic loss, Mr. Lee's family may not be totally satisfied with the sentence that I am about to impose. I am reminded, however, of the words of Watt J. (as he then was) in *R. v. Costa*, [1996] O.J. No. 299 (C.J.), where he stated:

42 It is also worthy of observation that the sentence to be imposed is governed by fixed principles applied to the circumstances as I have found them to be. Too often and erroneously, it is thought to afford some measure or indication of the value which a court places upon the life of the deceased. Nothing could be further from the reality that is sentencing in criminal cases. There is no measuring of the inherent or intrinsic value of the principals, and the application of some measurement of equivalence in the sentencing process. The sentence imposed ought not to be thought reflective of the intrinsic value or worth of the deceased. It is not. That is not the function of a sentence in this or in any criminal case. No sentence will ever breathe life into the deceased person, nor restore him or her to his or her family and/or friends. Would that it were that simple.

- [20] Mr. Lee was clearly a much loved son, brother, and cherished family member. His loss, especially in such a senseless and needless way, has left those who cared about him devastated and bereft. Moreover, they have had to wait approximately ten years to have some closure in this tragic event given Mr. Kim's disappearance before the preliminary hearing scheduled for September 2004. As noted, a 524 warrant was issued for his arrest in February 2004 but he was not arrested until July 2011. The Lee family's anguish has no doubt been compounded by the long delay to conclude this matter occasioned by Mr. Kim's disappearance.

VI. Legal Parameters

- [21] The offence of manslaughter carries a maximum sentence of life imprisonment. This offence pre-dates the Code amendments which now call for a mandatory minimum sentence of four years imprisonment where a firearm is involved in the commission of the offence.

VII. Position of the Crown and Defence

- [22] Crown and defence have made a joint submission that Mr. Kim should receive an effective sentence of seven years imprisonment less credit for pre-trial custody. Counsel submit that once that is deducted, a net sentence of two years and nine months imprisonment should be imposed.
- [23] Mr. Kim, who was taken into custody June 26, 2003, served five weeks of pre-sentence custody before being released on bail, and was then taken back into custody on July 26, 2011. As noted, he is entitled to two-for-one credit for his pre-sentence custody that is applied to offences that were committed prior to the proclamation of the Truth in Sentencing Act, S.C. 2009, c. 29, in February 2010. Doubled up, the credit, then, is four years and three months.
- [24] Learned Crown counsel provided the following cases to support the joint submission on sentencing of Mr. Kim:
1. R. v. Lennard, 2010 BCSC 1918, where Mr. Justice Schultes imposed effective sentences of seven and eight years on two youthful offenders for their role in the stabbing of a man during a heated confrontation initiated by the third co-accused in a family campground at Cultus Lake.
 2. R. v. Gillies, [1998] B.C.J. No. 1153 (C.A.), where an effective ten-year sentence for stabbing in the context of a drunken mob mentality fight and siege was reduced from a net sentence of six years to three years imprisonment. The accused was youthful. The trial judge aptly described the incident as involving name calling, rumours and intoxicated bravado, none of which are conducive to critical thought. The trial judge further found that the accused was "fueled by alcohol and drugs" and that "he demonstrated bravado and cowardice." A similar descriptor can be applied to Mr. Kim in the circumstances of the offence before me. The effective sentence for Mr. Gillies after the Court of Appeal decision was seven years.
 3. R. v. Richer, 2005 BCCA 3, where the trial judge imposed effective eight year sentences for the beating and stomping death of a crack addict who was drawing too much attention to a crack shack in Sechelt, B.C. The two accused were employed as the crack house enforcers and took it upon themselves to beat the deceased. They left him lying in a parking lot. E.H.'s net sentence of four and a half years was upheld on appeal but his co-accused, Mr. Richer, had his sentence reduced to three and a half years as the Court of Appeal found the trial judge erred in placing too much emphasis on denunciation and too little on his greater prospects of rehabilitation due to his lack of criminal record. The Court of Appeal at paras.

33 to 34 of Richer set out what the applicability of a range of sentences for a particular offence meant. The range serves as a guide, but as has been more recently and repeatedly stated, ranges are guidelines, not hard and fast rules: *Nasogaluak*, 2010 SCC 6 at para. 44, *R. v. Scott*, 2013 BCCA 397 at paras. 38-39. Ranges can be no more than a broad guide due, in large part, to the individualized nature of sentencing and the reality that no two offences are ever truly alike: *R. v. Allen*, 2012 BCCA 377 at para. 35.

4. Finally, *R. v. Mulligan-Brum*, 2013 BCCA 231, where the court imposed an effective seven year sentence for manslaughter with a firearm. After credit for two and a half years of pre-sentence custody, the actual sentence imposed was four and a half years imprisonment. The offender was 20 years of age and at the time of the offence had an unrelated criminal record. The circumstances of the offence can be described as a form of vigilantism. A group of youths had vandalized the offender's vehicle, slashing its tires. Mr. Mulligan-Brum emerged from his home, pursued the group while in possession of a loaded handgun, and yelled at them. When the group started to run, he fired two shots, one of which killed the victim.

[25] The cases counsel cited support the conclusion that a sentence in the range of six to eight years is appropriate where a youthful offender either arms himself with a weapon or is involved in an offence where a weapon is used in a retaliatory or misconceived defensive manner, in circumstances where planning and foresight are limited and fueled by alcohol, and in the dynamics of a mob mentality and intoxicated bravado.

VIII. Aggravating and Mitigating Circumstances

[26] The aggravating factors include:

1. that this was a completely pointless and unnecessary attack on Mr. Lee;
2. the use of a firearm in the commission of the offence;
3. that Mr. Kim's group carried the attack far beyond any necessary or retaliatory or defensive steps and resorted to serious violence in the circumstances, likely fueled by the consumption of alcohol;
4. the failure to remain at the scene to render assistance; and
5. the lengthy delay between the offence and dealing with it.

The latter is an aggravating factor in the sense that it has certainly contributed to difficulties with respect to the Crown's case, which depends largely on eyewitness identification evidence.

[27] The mitigating factors are:

1. Mr. Kim's guilty plea;
2. his young age;
3. his lack of record at the time,

4. his expression of remorse for his involvement as demonstrated through his guilty plea;
5. his employment; and
6. that he has only one other offence in the eight year period while he was at large, and which precipitated his arrest on the outstanding warrant in this case.

IX. Principles of Sentencing

- [28] A fundamental principle of sentencing is that a sentence must be proportionate to the gravity of the offence and the degree of responsibility of the offender.
- [29] Parliament has enumerated a number of sentencing objectives in s. 718 of the Code including denunciation of unlawful conduct, deterrence of the offender and others from committing offences, separation of offenders from society where necessary, rehabilitation, provision of reparation for harm done to victims or the community, promotion of a sense of responsibility in offenders and acknowledgement of the harm done to victims and the community.
- [30] In arriving at my decision, I am mindful of the fundamental purpose and principles of sentencing as contained in ss. 718 to 718.2 of the Code.
- [31] Denunciation is a primary principle of sentencing, especially in cases of such serious violence. The sentence I impose must reflect society's collective disapproval of such dangerous conduct, particularly where there is a resort to firearms. Effecting one's purpose through this conduct and resort to firearms wreaks enormous havoc in the lives of innocent citizens, and family and friends of the deceased. Increased use of firearms in the commission of offences also undermines the collective security of the community.
- [32] General deterrence is of equal importance. As Schultes J. noted in Lennard at para. 54:
- [54] Those who would otherwise be inclined to engage in such acts must also receive a message of general deterrence by understanding, through the representative nature of this sentence, that the courts will view such acts of violence very seriously.
- [33] Similarly, specific deterrence must also receive some emphasis. Again, I echo the thoughtful comments of Schultes J. in Lennard at paras. 55 and 56:
- [55] In addition, these two offenders, despite their apparently sincere intentions to do better, must nonetheless receive a clear, specific message that there is nothing more important for them to do in the rest of their lives but to learn how to refrain from the infliction of violence against any other human being.
- [56] There is also a need to separate them from society until they have received whatever assistance can be provided to them in a correctional facility to assist them in controlling such inclinations to commit violence in the future.

- [34] The principle of rehabilitation must receive some emphasis in this case given Mr. Kim's age and lack of criminal record at the time of the offence.
- [35] As this is a joint submission for a sentence of seven years imprisonment, it is necessary to consider whether the sentence agreed to by the Crown and the defence should be given effect by the Court.
- [36] The Court owes considerable deference to joint submissions arrived at by negotiations between counsel who are thoroughly familiar with all the issues in the case, the implications of the guilty plea, and the impact of the sentencing. That deference is particularly important where, as here, the plea has been negotiated between senior and responsible counsel who are certain to have considered the effect of the joint submission from all perspectives, including that of its impact on the repute of the administration of justice: *R. v. Russell*, 2013 BCSC 697 at para. 4.
- [37] Mr. Kim has pleaded guilty to a very serious offence which carries a maximum sentence of life imprisonment. I have referred to the relevant principles of sentencing in this case as well as the aggravating and mitigating circumstances. I accept that Mr. Kim is remorseful.
- [38] Based on all the evidence, the submissions I have heard, and the authorities reviewed, I am satisfied that it is appropriate to accept the joint submission of counsel. The proposed sentence properly addresses the principles of denunciation and deterrence, the primary principles of sentencing in cases such as this, but it also recognizes Mr. Kim's potential for rehabilitation.
- [39] In the present case, the joint submission neither offends the interests of justice nor is contrary to the administration of justice. Furthermore, it is not unfit in the circumstances.

X. Credit for Pre-sentence Custody

- [40] Counsel agreed that Mr. Kim is to be credited on a two-for-one basis for his pre-sentence custody. He has served two years and six weeks. Doubling that, he is entitled to a credit of four years and three months pre-sentence custody.
- [41] Mr. Kim, would you please stand up.
- [42] Mr. Kim, I would have sentenced you to seven years imprisonment. You have served four years and three months in pre-sentence custody and are entitled to a reduction on your sentence for that pre-sentence custody. Accordingly, I now sentence you, taking into account credit for the time already served, to two years and nine months for this manslaughter.
- [43] Is there anything else, counsel?
- [44] MS. STEPHEN: Yes, with respect to the "dash 2" Indictment of the murder, I direct a stay of proceedings on that matter.

[45] THE COURT: Thank you. Mr. Coleman?

[46] MR. COLEMAN: No, thanks fine, thank you.

[47] THE COURT: Thank you very much. I am indebted to both counsel for their thorough and thoughtful submissions in this case.

"Ker J."

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