
CANADA / JUDGMENT

R. v. Liang

2019 BCSC 1196

COURT

Supreme Court of British Columbia

DECIDED

21 June 2019

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IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

R. v. Liang,

2019 BCSC 1196

Date: 20190621

Docket: 27632

Registry: Vancouver

Regina

v.

De Kai Liang

Before: The Honourable Madam Justice Humphries

Oral Reasons for Sentence

Counsel for the Crown:

Daniel Porte and

Jennifer Dyck

Counsel for the Accused:

Brian Coleman, Q.C. and

Edward C.H. Chu

Place and Date of Hearing:

Vancouver, B.C.

June 20, 2019

Place and Date of Judgment:

Vancouver, B.C.

June 21, 2019

- [1] THE COURT: These are my reasons on the issue of parole eligibility.
- [2] Mr. Liang was charged with the first degree murder of Martin Shen on January 16, 2017, in Richmond, B.C., but was convicted by a jury on June 12, 2019, of the lesser included offence of second degree murder. Mr. Liang must consequently be sentenced to a term of imprisonment for life.
- [3] The Crown submits that Mr. Liang should serve 15 to 16 years before he is eligible to apply for parole. The defence say 10 years is appropriate. Three jury members recommended a period of ineligibility of 10 years; the remaining nine declined to make a recommendation.
- [4] I have decided that 10 years is the appropriate period for the following reasons.

Facts

- [5] First, I have to determine the facts upon which to proceed pursuant to s. 724(2) of the Criminal Code:
 - (2) Where the court is composed of a judge and jury, the court
 - (a) shall accept as proven all facts, express or implied, that are essential to the jury's verdict of guilty; and
 - (b) may find any other relevant fact that was disclosed by evidence at the trial to be proven, or hear evidence presented by either party with respect to that fact.
- [6] Where the factual implication of the jury's verdict is clear, I am bound to rely on it. If it is ambiguous, I may come to my own independent determination of the relevant facts: *R. v. Gauthier* (1996), 108 C.C.C. (3d) 231; and *R. v. Neumann*, 2005 BCSC 1820.
- [7] For the most part, the facts are undisputed. However, the Crown says I can proceed on the basis that the jury must have concluded that the killing was planned, even if they did not find it to be deliberate. Thus, the killing was done with foresight and this would be an aggravating factor.

- [8] Mr. Shen owned a long-haul trucking business named Sosida Enterprises Ltd. Mr. Liang had worked for Sosida, and had a longstanding dispute with Mr. Shen over damages that had resulted from an accident in Ontario. Mr. Liang also felt he had been underpaid and had pursued a labour dispute against Sosida. Mr. Shen took the position that Mr. Liang owed him money and launched a civil action on behalf of Sosida against Mr. Liang in May 2016, to which Mr. Liang filed a response.
- [9] According to Mr. Liang's friend Mr. Mann, who was called at trial by the Crown, Mr. Liang was in poor financial straits. Mr. Liang and his wife had divorced and Mr. Liang was trying to keep his son in university. He was also sending money to his mother in China. Mr. Liang had been injured in the accident in Ontario and was soon unable to work. He began to drink heavily.
- [10] Mr. Mann was concerned that Mr. Liang had no money to live on, but Mr. Liang assured him he was all right. However, Mr. Liang became withdrawn and depressed and stopped responding to Mr. Mann's invitations, even to come to dinner for Chinese New Year.
- [11] Mr. Liang testified at trial, through an interpreter. He said he had thoughts of suicide. He took a firearms course, obtained his possession and acquisition licence, and bought a gun on January 13, 2017, which was a Friday, intending to shoot himself.
- [12] The Crown says that although Mr. Liang testified that he bought a gun to kill himself, it is equally plausible that he bought it with more than one purpose in mind because, early on the Monday morning, January 16, 2017, Mr. Liang drove to a parking lot near Sosida and sat there waiting for Mr. Shen to arrive.
- [13] Mr. Liang testified that he was indeed waiting for Mr. Shen. He said he wanted to confront him, demand an apology, and would use the gun to scare him. However, as he sat there, he realized he was tired and wondered if he really should follow this course of action. He decided to go home, but as he drove by Sosida, he saw the lights on. He took the gun covered in a towel and walked into the business.
- [14] Bags of empty beer cans and liquor bottles were found where his car had been parked.
- [15] Mr. Liang said he confronted Mr. Shen. He was not familiar with firearms, his hands were shaking, and the gun went off. Mr. Shen began to come around his desk and Mr. Liang reloaded the gun and shot Mr. Shen again, according to his evidence, aiming to the side. Mr. Shen had a wound to his right shoulder which was not fatal. The second shot grazed the side of his head, penetrating to the brain and was almost instantly fatal.

- [16] Mr. Liang left, sat in his car for a minute or two, and drove to the police station where he spoke to the E-Comm operator on the courtesy phone, telling her he had shot someone a moment ago at Sosida, on Viking Road. He repeated this information to the members of the RCMP who arrested him shortly thereafter. The officers who dealt with him found him to be quite intoxicated and exhibiting signs of impairment - red watery eyes, slurring his words, and smelling strongly of alcohol.
- [17] The Crown says that although the jury did not find Mr. Liang guilty of first degree murder, I can find that the verdict is most consistent with the killing being planned for some time, but that his level of intoxication affected his ability to deliberate. The Crown says I could also find that the confrontation was planned for some time, but the decision to kill did not coalesce in Mr. Liang's mind until the morning of January 16, 2017.
- [18] In either case, the Crown says Mr. Liang chose to take a loaded firearm to a confrontation he planned and intended to initiate with an unarmed and defenceless man. His moral culpability is high and foresight is an aggravating factor.
- [19] The defence does not dispute that Mr. Liang's moral culpability is high. He has been found guilty of murder. However, counsel says there is no ambiguity and the Crown should not suggest that I should proceed on the basis that the jury could have accepted half of the first-degree requirement. Mr. Liang bought the gun thinking of suicide. He went to Sosida to confront Mr. Shen. The jury found intent to kill, but rejected planning and deliberation. The defence says it is plausible that the jury found the second path to intent, that is, (meant to cause bodily harm that was likely to cause death and was reckless whether death ensued) as the wound to the head, which was the cause of death, was tangential.
- [20] If the concept of planning to kill is to be used as an aggravating fact, I would have to be satisfied of it beyond a reasonable doubt under s. 724(3)(e) of the Code. As well, I cannot undermine the jury's verdict. I am not satisfied beyond a reasonable doubt that Mr. Liang had a plan to kill Mr. Shen, whether or not he was intoxicated enough to raise a reasonable doubt as to his ability to deliberate. He was drinking heavily at this time, was depressed, in financial difficulties, and could well have brought the gun as he said thinking suicide was an option. It is also not unreasonable that he was waiting for Mr. Shen hoping to threaten him and extract an apology given his intoxication.
- [21] It is important that the jury rejected planning and deliberation, and I will proceed on the basis that, although Mr. Liang's visit to Sosida, taking the gun, was obviously thought out beforehand, he did not go there with a plan to kill Mr. Shen. On the other hand, the killing was not almost accidental, as might be gleaned from Mr. Liang's evidence; the jury found it was intentional.

- [22] I was given some basic facts about Mr. Liang. He was born in 1961 in China and came to Canada in 2006, becoming a citizen in 2009. He worked hard at various low paying jobs, including at Sosida. He has high school and two years of university. He is divorced and has one son with whom he has little contact. He has no criminal record and no family support.
- [23] Mr. Liang spoke at some length to the court, saying how sorry he is for what he has done and how he hopes to atone for it by helping others in prison, particularly those with alcohol problems.
- [24] Mr. Shen's wife has filed a victim impact statement explaining how she has chosen to deal with the loss of her husband and the father of her son who is obviously also the son of his own father for whom she also spoke. She says she does not want to talk about her private misery and will live optimistically.

Principles

- [25] I start with s. 745.4 which allows a trial judge, having regard to the character of the offender, the nature of the offence, and the circumstances surrounding its commission, and to the recommendation, if any, from the jury, to substitute a number greater than 10 years but less than 25 as the judge deems fit in the circumstances.
- [26] I also have regard to the statement of the Supreme Court of Canada in *R. v. Shropshire*, [1995] 4 S.C.R. 227 in which they stated:
- [29] as a general rule, the period of parole ineligibility shall be for 10 years, but this can be ousted by a determination of the trial judge that, according to the criteria enumerated in s. 744
- [now s. 745.4]
- [27] The court also noted that the general principles of sentencing which are now set out in s. 718, 718.1, and 718.2 are relevant.
- [28] Since *Shropshire*, the Court of Appeal in *R. v. Cerra*, 2004 BCCA 594 has stated that there are two broad groupings of cases where parole ineligibility is extended beyond 10 years: where there is a particularly aggravating feature which might call for a period of 12-15 years, and where the case is at the highest order of moral culpability, which might require a period of 15-20 years.
- [29] These are guidelines, not binding categories, and the wide discretion afforded to trial judges is fettered by the case law.
- [30] These principles are all conveniently summarized in *R. v. Bennight*, 2012 BCCA 461 at para. 18.

Case Law

[31] The Crown referred me to three cases which they say support their contention that 15 to 16 years is an appropriate period before parole eligibility:

R. v. Hoang, 2002 BCCA 430: a man and his son became involved in an altercation in a parking lot. The offender and his friends swarmed and attacked the son. The father tried to defend him and he and his son returned to their vehicle, trying to leave. As they started out of the parking lot, the offender shot the son in the heart. The jury recommended 10 years before parole eligibility; the trial judge imposed a period of 20 years, which was reduced on appeal to 15 years;

R. v. White, 2011 BCCA 328: the offender was seen displaying a gun outside a nightclub. The victim, who was a stranger to the offender, made a passing comment: "it's not cool shooting a gun." The offender hit him with the gun. The two separated briefly, but the offender shot the victim shortly thereafter. The period of parole eligibility of 16 years imposed by the trial judge was upheld on appeal; and

R. v. Kirkpatrick, 2014 BCCA 102: the offender, 66, was fired from his employment by two men. He went to the office Christmas party with a fully loaded shot gun and more ammunition in his pocket. He walked in, calling for the two men. Only one of the men was there and he moved into an office. The offender fired through the wall, and hit the man. He then fired two more shots into the man's back. The jury made no recommendation. The offender was epileptic, which the judge accepted as a mitigating factor. He imposed a period of parole ineligibility of 15 years.

[32] The defence also referred to a number of cases, in each of which a period of 10 years before parole eligibility was imposed:

R. v. Holt, 2012 BCSC 408: the accused stabbed his elderly neighbour 134 times, at least partially under the influence of cocaine. The accused had many health problems and, at the time of sentence was blind and wheelchair bound. The Crown sought a period of 14 years; the court ordered 10 years.

R. v. Taylor, 2007 BCSC 390: the accused killed his wife with a gun. They had both been drinking. There appeared to be no motive. He immediately reported that he had shot his wife by accident. The jury recommended 12 years but the judge imposed 10 years.

R. v. Ghiorghita, 2019 BCCA 59: the offender shot his wife upon learning of her affair. He left the house and turned himself in to the police. The Crown sought 14 years of parole ineligibility. The court ordered 10 years.

R. v. Pattison, 2011 BCSC 1603: the offender became angry with his step uncle who denied him a loan. He got a rifle and shot the victim. He immediately reported the shooting. The Crown sought a period of parole ineligibility of 12 years. The court ordered 10 years; and

R. v. Bhandar, 2010 BCSC 1812: the offender had consumed alcohol and cocaine throughout the day. He got into an argument with the victim and his girlfriend and the victim suggested by phone that they continue the confrontation. The offender took a loaded handgun with him, intending to scare the victim. The victim approached him with a sword and the offender shot at him six times, two in the back as the victim ran away. The jury recommended 10 years; Crown sought 15 years; the court ordered 10 years.

[33] The Crown says these cases can be distinguished on the basis that Mr. Liang acted with foresight, whereas these offenders did not.

Aggravating Factors

[34] The Crown says there are aggravating factors which justify a period of 15 to 16 years of parole ineligibility.

[35] There was longstanding animosity between Mr. Liang and Mr. Shen. Mr. Liang used a firearm. The firearm was preloaded with other ammunition available. Mr. Liang waited outside Sosida with a loaded gun and a towel to hide it. There was foresight and planning involved. The victim was killed in his place of business which should be a safe place. The killing was solely precipitated by the actions of the accused. Mr. Liang did not call for assistance or try to help Mr. Shen. There was risk to the community.

[36] In response to some of these points, the defence says the rest of the ammunition was in a bag in the car; it was not taken to the scene, unlike Kirkpatrick. The defence also questions the categorization of a shooting by location, unless it is in one's home. The defence also submits there was no risk to the community, and in the circumstances of this case I agree.

Mitigating Factors

[37] The defence submits the following are mitigating factors, and support a period of 10 years: the offender has expressed remorse and acceptance of responsibility; he has no record; he has no history of violence and has led a productive life; he turned himself in and cooperated with the police; he is 57 now, has been in custody for two years, and will be in his mid-60's before he can even begin the parole process; he was intoxicated at the time of the offence; he is a low risk to reoffend. Three members of the jury recommended 10 years.

Discussion

[38] The Court in Shropshire emphasizes how fact-specific this exercise is. It is clear from the cases how disparate the approaches of various courts are in setting periods of parole ineligibility. At the end of the day, of course, it is the parole board that will decide on suitability for release. If Mr. Liang is determined not to be suitable for release, he will remain in prison. Regardless of whether he is released, he will always be under a sentence of life imprisonment and subject to revocation of his parole.

- [39] The Crown is correct that there was some degree of foresight in Mr. Liang's actions in driving to Sosida with the gun. However, the jury rejected the theory that the killing was planned and deliberate. According to Mr. Liang's evidence, he had actually decided to go home when he drove past Sosida and saw the lights on. It appears that the jury saw the act as intentional, but somewhat impulsive.
- [40] At the time of the murder, Mr. Liang was a sad, depressed, lonely man with few resources who drank heavily and had only one friend, Mr. Mann, from which he was withdrawing. He was angry at Mr. Shen. He shot at Mr. Shen and left him to die. He was at least reckless as to whether death ensued.
- [41] While his resentment and animus towards Mr. Shen were longstanding and he obviously planned to encounter Mr. Shen in his office, Mr. Liang had an explanation for that which was not in line with planning and deliberating to kill him and which the jury appears to have accepted, or at least allowed to raise a reasonable doubt: that is, that he wanted to confront Mr. Shen and demand an apology. He immediately turned himself in to the RCMP.
- [42] In this case, denunciation and deterrence are important, as they are in any case of this kind. Rehabilitation is also relevant, despite Mr. Liang's age. He is now 57 and has been in custody for over two years. He will be in his mid-60's by the time he can make his first application for parole. I accept that Mr. Liang does not seem likely to reoffend but those considerations are for the parole board.
- [43] In the cases presented by the Crown in which the period of parole ineligibility has been extended, the murders were senseless and random and inexplicable, and, in the case of Kirkpatrick, aggravated by shooting two more shots into the victim as he lay on the floor.
- [44] The killing of Mr. Shen, who was defenceless in his office, is indeed a brutal act of high moral culpability and Mr. Liang must be sentenced to life imprisonment for it. However, his action was as a result of a longstanding grievance, depression, and intoxication. I bear in mind that three members of the jury recommended 10 years; the jury as a whole rejected the theory of planning and deliberation.
- [45] I have considered the factors set in s. 745.4. I agree with the defence that there is no particularly aggravating factor or egregious circumstance that takes this case out of the ordinary category of offences of second degree murder, thus attracting a period of 10 years before parole eligibility.
- [46] Therefore, considering the principles set out in s. 745.4, s. 718, s. 718.1, and s. 718.2, as well as the jury's partial recommendation, I sentence Mr. Liang to a term of imprisonment for life without eligibility for parole until he has served a period of 10 years.
- [47] He is also subject to an order that he provide a bodily substance pursuant to s. 487.051 of the Criminal Code for the purpose of forensic DNA analysis and inclusion in the national DNA databank.

[48] He is also subject to an order under s. 109(2)(a) and 109(2)(b) of the Criminal Code that he be prohibited from possessing the weapons that are enumerated in those sections for life.

[49] There will also be an order pursuant to s. 491 of the Criminal Code that the shotgun which was entered as an exhibit in these proceeding, Exhibit 18, and the ammunition seized by the police be forfeited to Her Majesty to be disposed of as the Attorney General directs.

"Humphries J."

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