
CANADA / JUDGMENT

R. v. Richer

2005 BCCA 3

COURT

British Columbia Court of Appeal

DECIDED

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COURT OF APPEAL FOR BRITISH COLUMBIA

Citation:

R. v. Richer,

2005 BCCA 3

Date: 20050106

Docket: CA032133; CA032257

Docket: CA032133

Between:

Regina

Respondent

And

Jason Donald Richer

Appellant

- and -

Docket: CA032257

Between:

Regina

Respondent

And

Eric Henderson

Appellant

BAN ON PUBLICATION

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Before:

The Honourable Chief Justice Finch

The Honourable Mr. Justice Mackenzie

The Honourable Madam Justice Levine

D.H. Silverman

Counsel for the Appellant, Jason Donald Richer

G. Orris, Q.C.

Counsel for the Appellant, Eric Henderson

K. Ker

Counsel for the Respondent

Place and Date of Hearing:

Vancouver, British Columbia

December 1, 2004

Place and Date of Judgment:

Vancouver, British Columbia

January 6, 2005

Written Reasons by:

The Honourable Madam Justice Levine

Concurred in by:

The Honourable Chief Justice Finch

The Honourable Mr. Justice Mackenzie

Reasons for Judgment of the Honourable Madam Justice Levine:

Introduction

- [1] The appellants were convicted of manslaughter by a Supreme Court judge and jury on April 18, 2004 and sentenced on July 2, 2004 to four-and-a-half years in prison, taking into account credit of three-and-a-half years for time served. They appeal the sentences, claiming an effective sentence of eight years in prison is excessive.
- [2] I would not interfere with the sentence in the case of Mr. Henderson and would dismiss his appeal. In the case of Mr. Richer, I would allow the appeal and reduce his sentence to seven years, less three-and-a-half years for pre-trial custody.

Circumstances of the Offence

- [3] The trial judge summarized the circumstances of the offence in his reasons for sentencing (2004 BCSC 965 at paras. 2-7):

Henderson and Richer were employed at a crack cocaine house in Sechelt. They became enraged with Baptiste over the course of January the 14 and 15, 2002, because Baptiste was causing trouble at the crack house, demanding more and free drugs and attacking the door of the crack house with a hammer, large stone and machete. At one point, during the afternoon of January the 14, there was a standoff between Henderson and Baptiste outside the back door of the crack house, Baptiste, holding a hammer, and Henderson, a metal pipe. However, neither man assaulted the other at that time.

Shortly after midnight of January the 15, Baptiste returned to the crack house and was again demanding drugs and beating on the door. He was given some crack cocaine by John Varady, the employer dealer in the house, and was leaving the property. Henderson, with Richer following, accosted Baptiste in the parking lot of the crack house. Baptiste was walking away and had no weapons on his person. Henderson kicked Baptiste in the chest and then punched and kicked him in the head while he was down on the paved surface. Richer then stomped on Baptiste's head.

After the assault, Baptiste was left lying unconscious in the parking lot. Henderson and Richer returned to the crack house. Baptiste continued to lie unconscious in the parking lot. Some other customers came to the crack house and asked about Baptiste, whom they knew. Varady told them, through a closed door, that an ambulance had been called.

At one point, Richer was sent out by either Varady or Henderson, out to the parking lot with a bowl of water to throw on Baptiste to wake him up. Baptiste appeared to be snoring and was not revived by the water poured on his head.

Subsequent autopsy results revealed that Baptiste was in a coma with fatal injuries to his brain from the blows inflicted by Henderson and Richer.

Baptiste was finally found about two hours after the assault by a security guard who was doing his rounds. That security guard knew Baptiste and called Emergency Services, 911. The Royal Canadian Mounted Police and ambulance arrived a few minutes later. Baptiste was taken to the local hospital in Sechelt, then airlifted to the Vancouver General Hospital a few hours later, and from there to the intensive care unit at Victoria General Hospital where he died from his head injuries a week later, on January 22, 2002.

- [4] The trial judge found (at paras. 13-15) that Mr. Henderson had instigated the fight with the victim, and "succeeded in putting him to the ground". Mr. Richer, a "follower", "decided to participate by stomping on [the victim's] head." He found both accused "are equally culpable in causing [the victim's] death."

Circumstances of the Offenders

Mr. Henderson

- [5] At the date of the offence, Mr. Henderson was 30 years old. He was raised primarily by his mother, who continued to support him through the criminal proceedings. Mr. Henderson has a son from a common-law relationship from whom he is involuntarily estranged. His criminal record, until his conviction for robbery in 2001, involved minor matters. He has a grade 10 education and has held a series of jobs, none for more than two years. He has a black belt in tae-kwon do. He had some anger management counselling while on probation for the robbery, but did not avail himself of any programs or courses while in custody awaiting trial for this offence. Mr. Henderson has used alcohol to excess; both he and Mr. Richer had been drinking the day of this offence.
- [6] Mr. Henderson was on probation following his conviction for robbery when this offence was committed. His co-accused in the robbery was convicted of manslaughter. The robbery involved an attempt to break-in and steal from a marijuana grow operation. He and his co-accused did not expect the house to be occupied. They left when they became aware that there was someone in the house. The co-accused fired shots from outside which the trial judge found resulted in the death of the victim. The trial judge concluded that: "The defendants came armed, in a planned endeavour, fully willing to participate with deadly force." Mr. Henderson was sentenced to four years in prison, reduced to five months after allowing credit for 43 months spent in custody before sentencing, and one year probation "to promote efforts towards rehabilitation".

- [7] After his release from prison following the robbery, Mr. Henderson took a job with the drug house in Sechelt as an enforcer, to make some money and buy a car. In the pre-sentence report, the probation officer points out that in both the robbery and in taking the job with the drug house, Mr. Henderson made a conscious decision to participate in matters centering on the drug trade, knowing of the potential for violence in these enterprises.
- [8] The sentencing judge noted that Mr. Henderson has been described by corrections officers as respectful and courteous, and that he has plans to complete his education, restore access to his son and stabilize his life.

Mr. Richer

- [9] Mr. Richer was 24 years old at the date of this offence. He lived with his mother from the age of 12 until 2000. He maintains supportive relationships with his father, his siblings and a woman with whom he lived for three years before this offence and who is a positive influence on him. Mr. Richer has limited cognitive ability. He finished grade seven after repeating some grades several times. Despite his limited education, he has maintained steady employment. He had no criminal record before this offence. He has an alcohol abuse problem, for which he sought counselling and completed courses while in prison awaiting trial. He applied to a treatment centre, hoping to attend on his release from custody.
- [10] Mr. Richer's relationship with Mr. Henderson involved training in tae-kwon do and drinking beer together. The trial judge commented (at para. 12) that: "He looked to Henderson as an older brother and mentor." Although the trial judge said (in para. 2) that both Mr. Henderson and Mr. Richer were employed at the drug house, he noted that both Mr. Henderson and Mr. Richer had stated that Mr. Richer only went there to keep Mr. Henderson company.

Counsel's Positions at Sentencing

- [11] Crown counsel sought an effective sentence of 16 years in custody for Mr. Henderson and 13 years for Mr. Richer.
- [12] Both defence counsel argued that the appropriate range of sentence was four to six years before credit for pre-sentence custody. Counsel for Mr. Henderson suggested a sentence of less than two years and probation (taking into account pre-sentence custody). Counsel for Mr. Richer suggested that an appropriate sentence would be time served or a conditional sentence if further time in prison was necessary.

Grounds of Appeal

Description of Offence as "Near Murder"

- [13] Both appellants claimed that the trial judge erred in principle by describing the offence as equivalent to murder as defined in s. 229(a)(ii) of the Criminal Code:

229. Culpable homicide is murder

(a) where the person who causes the death of a human being

...

(ii) means to cause him bodily harm that he knows is likely to cause his death, and is reckless whether death ensues or not;

[14] The appellants object to the following passages of the trial judge's reasons for sentencing (at paras. 18 and 32):

[18] ...

1. The beating was brutal. While it is unclear which of the two offenders directly caused the victim's death, both ought to have known that the force of their attacks may well cause death. In other words, there was reckless indifference as to the consequences.

...

[32] [after referring to manslaughter cases "approaching the very serious offence category of near murder"] This case comes close to the "very serious" category.

[15] The appellants suggest that by describing this offence in terms of murder, the trial judge gave excessive weight to the aggravating factors.

[16] I agree with Crown counsel that it cannot be said, considering the trial judge's reasons as a whole in the context of his experience as a trial judge and having heard the evidence in this particular case, that the trial judge did not understand the nature of the offence of which the appellants had been convicted.

[17] As pointed out by Crown counsel, the trial judge was articulating the objective standard for "unlawful act manslaughter".

[18] In *R. v. Creighton*, [1993] 3 S.C.R. 3 at 42, McLachlin J. (as she then was) stated that manslaughter consists of (1) conduct causing the death of another person, and (2) fault short of intention to kill. The fault may consist of committing another unlawful act, in this case the assault of the victim. She continued at 42-43:

The cases establish that in addition to the *actus reus* and *mens rea* associated with the underlying act, all that is required to support a manslaughter conviction is reasonable foreseeability of the risk of bodily harm. While s. 222(5)(a) [the definition of culpable homicide by means of an unlawful act] does not expressly require foreseeable bodily harm, it has been so interpreted: see *R. v. DeSousa*, [[1992] 2 S.C.R. 944]. The unlawful act must be objectively dangerous, that is, likely to injure another person. The law of unlawful act manslaughter has not, however, gone so far as to require foreseeability of death.

[19] After reviewing the history of the development of the test of objective foreseeability, McLachlin J. summarized the test at 44-45:

So the test for the mens rea of unlawful act manslaughter in Canada, as in the United Kingdom, is (in addition to the mens rea of the underlying offence) objective foreseeability of the risk of bodily harm which is neither trivial nor transitory, in the context of a dangerous act.

[20] The appellants were charged with second degree murder. Provocation and intoxication were factors for the jury to consider in determining their intent. The jury found the appellants did not have the specific intent for murder, but the trial judge's description of the offence as being "very close to the "very serious" category" of "near murder" does not indicate any confusion on his part. Rather, it reflects the well-established spectrum of culpability in manslaughter cases ranging from "near accident" to "near murder": see *R. v. Billings*, 2004 BCSC 653 at para. 50, where Romilly J. cites *R. v. Pettigrew* (1990), 56 C.C.C. (3d) 390 (B.C.C.A.) and *R. v. Vaudreuil* (1995), 98 C.C.C. (3d) 316 (B.C.C.A.). The location of this offence on the spectrum is a factual matter. This Court will not interfere with the trial judge's findings of fact unless it is shown that he misapprehended the evidence. That has not been shown in this case.

[21] I would dismiss this ground of appeal.

Mr. Henderson's Grounds of Appeal

[22] Mr. Henderson raises three additional grounds of appeal.

[23] Mr. Henderson claims that the trial judge erred in considering as aggravating factors Mr. Henderson's participation in the drug trade as an employee of the drug house and his involvement in the robbery of the marijuana grow operation in which a man died.

[24] In my opinion, these were important matters relating to Mr. Henderson's background that the trial judge had to take into account as aggravating factors. They reflect on Mr. Henderson's character and his willingness to be involved in illegal and potentially serious, violent activities. The circumstances of the robbery conviction attain greater relevance because Mr. Henderson was on probation from that offence when this offence was committed.

[25] I would not accede to these two grounds of appeal.

[26] Mr. Henderson claims that the trial judge erred in finding that the victim was impaired by drugs or drug withdrawal and likely unable to defend himself and characterizing that as an aggravating factor. He does not challenge, however, the trial judge's description of the victim's activities and condition during the day preceding the beating. He was a drug addict who kept returning to the house, acting erratically and violently until he was given more drugs. There is no error in drawing the inference from those facts that at the time of the beating the victim was impaired by drugs or drug withdrawal.

[27] I would not accede to this ground of appeal.

Mr. Richer's Grounds of Appeal

- [28] Mr. Richer argues that the trial judge failed to give sufficient weight to the mitigating factors in his case and therefore placed insufficient emphasis on the principle of rehabilitation. He also claims that the trial judge failed to consider a conditional sentence.
- [29] I will deal with the first ground after the discussion of the range of sentence, below.
- [30] The trial judge did not discuss a conditional sentence in his reasons for sentence, but during submissions of counsel, he made it clear that he did not consider this case appropriate for a sentence of imprisonment of less than two years, stating: "In my view, this case calls for an additional term of imprisonment amounting to federal penitentiary time."
- [31] I would not accede to this ground of appeal.

Range of Sentence

- [32] Both appellants say that the effective sentence of eight years is outside the range of sentences for this type of manslaughter. They cite *R. v. Gillies*, [1998] B.C.J. No. 1153 (C.A.) (QL) as establishing a range of four to six years.
- [33] This Court dealt with the applicability of a "range" of sentences in *R. v. Bernier* (2003), 177 C.C.C. (3d) 137 (B.C.C.A.). All of the justices who decided that case agreed that when this Court refers to a "range" of sentences for a particular offence, it reflects the sentences the Court has approved or determined in previous appeals involving similar offenders and similar offences. A "range" is meant to serve as a guideline for trial judges, not a rule that imposes a minimum or maximum for a particular offence. As Prowse J.A. pointed out at para. 75:

I agree with my colleagues that references to ranges of sentence should not distract the court from giving appropriate weight to the other principles of sentencing set forth in the Code, or from adjusting each sentence to the specific circumstances of the offence and the offender. The goal of the Court in each case will be the same -- to determine whether the sentence is fit for this offender committing this crime.

- [34] Thus, the four to six year range suggested in *R. v. Gillies* is just that, a suggestion. The question is whether, in determining the sentences imposed on these offenders for this offence, the trial judge considered the relevant principles of sentencing, gave appropriate emphasis to the aggravating and mitigating factors, and took into account the particular circumstances of each of Mr. Henderson and Mr. Richer and of the offence.

- [35] Mr. Henderson's counsel cited *R. v. Gillies* (seven years; youthful offender "fueled by alcohol and drugs" stabbed the victim during a fight) and *R. v. R.E.A.*, 2003 BCSC 925 (five years 10 months; offender stabbed victim during a fight; both using cocaine) in support of his submissions that Mr. Henderson should receive an effective sentence of six years. Taking into account credit for pre-sentence custody, the sentence would be 24 to 30 months in prison.
- [36] Mr. Richer's counsel's position is that Mr. Richer's sentence should be lower than that of Mr. Henderson. He suggests a sentence of time served plus a year of probation, or a conditional sentence of up to 18 months. The effective sentence would be four to five years. He cites in support of his submissions *R. v. Gillies*, *R. v. Hancock*, 2001 BCSC 871 (18 months prison plus two years probation for manslaughter involving torture of a masochist); *R. v. Chao*, 2003 BCSC 879 (conditional sentence of two years less a day; youthful first offenders part of a group assault at a Karaoke club); *R. v. Aldridge* (11 December 2002), North Vancouver 13503-C2 (B.C.P.C.) (five years; young first offender kicked victim at a New Year's party).
- [37] Crown counsel provided cases where offenders were sentenced to seven to ten years. Of particular note are: *R. v. Henderson and Kieler* (22 June 2001), New Westminster CWC X040473 (B.C.S.C.) (44 months (effective eight years) following guilty plea to manslaughter; this was Mr. Henderson's co-accused in the robbery); *R. v. Glover*, 2002 BCCA 271 (seven (effective 10) years; youthful offender struck victim from behind with a hammer; co-accused stabbed the victim); *R. v. Nowacki*, [1998] B.C.J. No 481 (C.A.)(QL) (ten years; 32-year-old offender put victim in a sleeper hold; co-accused beat victim); *R. v. Dasilva*, [1988] B.C.J. No. 1744 (C.A.)(QL) (eight years; 22-year-old offender beat victim). (The trial judge cited *Gillies*, *Glover* and *Nowacki* in his reasons for sentence.)
- [38] Each of these cases may be distinguished from each other and from this case. Every case cited involves unthinking, horrific violence with the worst ultimate consequences. It is not the role of this Court to examine the facts of each authority to precisely calibrate the degrees of violence of each incident. The role of this Court is to determine whether the trial judge imposed a sentence that is demonstrably unfit in the circumstances of the particular case he had to decide, considering the principles of sentencing, the aggravating and mitigating factors, and the relevant authorities.
- [39] In the case of Mr. Henderson, I find no basis to conclude that a sentence of eight years is, in all of the circumstances, demonstrably unfit.
- [40] In the case of Mr. Richer, however, in my opinion the trial judge placed too much emphasis on denunciation and too little on his greater prospects of rehabilitation.

- [41] The trial judge considered as an aggravating factor in Mr. Richer's case that his role in the beating was particularly brutal, but found both appellants equally culpable in the beating death of the victim. Given that finding, the trial judge failed to give sufficient emphasis to the mitigating differences, from Mr. Richer's point of view, between his background and that of Mr. Henderson.
- [42] Mr. Richer has no criminal record; no proclivity to violence; has been regularly employed despite learning difficulties that have resulted in bare literacy and a grade seven education; and made efforts at rehabilitation while in prison awaiting trial. Mr. Henderson has a criminal record, including a conviction in 2001 for robbery in which his co-accused was convicted of manslaughter. Mr. Henderson committed this offence while he was on probation relating to the robbery conviction. Both of the convictions involved the drug trade.
- [43] The trial judge correctly considered that denunciation and general deterrence were the main principles of sentencing applicable in this case. He found that specific deterrence was not a concern because neither appellant is likely to commit another homicide. He should have considered, in addition, the likelihood of each of the appellants being involved in further criminal activity and the relative effect of rehabilitative measures. Had he done so, in my opinion he would have concluded that Mr. Richer is less likely than Mr. Henderson to be involved in criminal activity following his release from prison and more likely to benefit from rehabilitation programs while he is there.
- [44] For these reasons, I would reduce the sentence imposed on Mr. Richer to an effective seven years. Allowing credit for pre-sentence custody, his sentence would be three-and-a-half years in prison.

Conclusion

- [45] I would grant Mr. Henderson an extension of time in which to bring his sentence appeal, grant leave to appeal, and dismiss his appeal.
- [46] I would grant Mr. Richer leave to appeal, allow the appeal, and vary his sentence by reducing it by one year to three-and-a-half years in prison.

"The Honourable Madam Justice Levine"

I Agree:

"The Honourable Chief Justice Finch"

I Agree:

"The Honourable Mr. Justice Mackenzie"

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