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CANADA / JUDGMENT

## R. v. Smith

2017 BCSC 2513

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COURT

Supreme Court of British Columbia

DECIDED

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2017 BCSC 2513 R. v. Smith

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

R. v. Smith,

2017 BCSC 2513

Date: 20171221

Docket: 100897-4; 100897-5

Registry: Kamloops

Regina

v.

Colton Reigh Smith

Before: The Honourable Madam Justice Donegan

Oral Reasons for Sentence

Counsel for the Crown:

C.M. Balison

Counsel for the Accused:

R. Kaiser

Place and Date of Trial/Hearing:

Kamloops, B.C.

December 19-20, 2017

Place and Date of Judgment:

Kamloops, B.C.

December 21, 2017

## INTRODUCTION

- [1] THE COURT: The Smith family of the Lytton First Nation community has been strongly and negatively impacted as a result of the abuses that occurred at St. George's Indian residential school. Although the school itself burned down decades ago, the Smith family continues to suffer the profound and well-recognized intergenerational effects caused by the Canadian government's prior policy of forced assimilation, policies that saw the destruction of their culture, their families, and their self-esteem.
- [2] Members of the Smith family for generations now have lived lives permeated with the aftermath, lives filled with violence, addiction, abandonment, suicide, homicide, neglect. What I have learned in this hearing is that through it all, somehow, they continued to maintain their strength, resilience and hope that they will one day be able to heal themselves and heal their community.
- [3] One of the many tragic chapters in the Smith family story involves Colton Smith, the young man who is the offender before this court, and his much-loved uncle, Jerimiah Johnson Smith, who is the deceased.
- [4] On January 26, 2016, in the midst of an alcohol-fuelled physical altercation between them, a common occurrence in the Smith family, Colton grabbed a steak knife and stabbed his uncle once in the abdomen. Nineteen years old at the time with no criminal convictions, Colton's life, and his family's life, changed forever in that moment.
- [5] Colton has accepted responsibility for what he has done. He loved his uncle, he loves his family, and knows that he will carry the guilt and grief of killing his grandmother's son, his mother's brother, his uncle, every day for the rest of his life.
- [6] It is within this context that I am tasked with crafting a just, fit, and proportionate sentence for Colton's crime of manslaughter.
- [7] The Crown takes the position the appropriate sentence is four to six years' imprisonment, less the time that Mr. Smith has spent in pre-trial custody, the equivalent of two years and two months. Therefore, Ms. Cook, on behalf of the Crown, seeks roughly slightly less than two to four years' new time.
- [8] Mr. Kaiser, on behalf of his client, takes the position that the appropriate sentence is a period of imprisonment in the range of six to 12 months' new time, followed by probation for a period of three years. He emphasizes that Mr. Smith needs rehabilitation and close supervision in the community through the imposition of the maximum period of probation.

## CIRCUMSTANCES OF THE OFFENCE

- [9] Counsel has filed an extensive agreed statement of facts, marked as Exhibit 1. I do not need to recite all of those facts, but can summarize them.
- [10] Mr. Smith was 19 when he committed this offence. It was in the afternoon of January 22, 2016, when a group of people gathered at a home in Lytton. Later that same day, Colton, his uncle J.J. (the deceased), and another man joined that party. Everyone at the party was drinking heavily in the early evening, but the homeowner asked Colton and his uncle to leave his home as he felt uncomfortable having them around when they were heavily intoxicated.
- [11] Colton and his uncle left the home. They started to argue and became engaged in a physical fight with one another on the front lawn. The next door neighbours heard a loud banging coming from outside their home. The next thing they knew, Colton came charging into their home. He grabbed a steak knife from the kitchen table and ran back outside. They described him as being "in a rage".
- [12] One of those neighbours, James Brown Senior, went outside on the porch to see what was happening. By this point, Colton had stabbed his uncle once in the abdomen. Colton was quickly back on the porch, where he punched another partygoer in the face, punched another man and then stumbled back down the porch steps.
- [13] James Brown Senior drove the man who had been punched, Colton and Colton's uncle to St. Bartholomew's Health Centre in Lytton. The group arrived at 7:22 p.m. Unfortunately, Colton's uncle died at 9:47 p.m. that night as a result of blood loss from the single knife wound, a wound measured to be about four to six inches deep into the victim's abdomen.
- [14] Police arrested Colton that evening, before his uncle had passed away, for assault with a weapon and two counts of assault. He was later arrested for murder.
- [15] Colton was highly intoxicated at the time of these events. He suffered a bump on his head, a black eye, and swelling around his nose as a result of the physical altercation with his uncle. His uncle suffered no injuries, other than the fatal stab wound.

## THE EFFECTS OF THE OFFENCE

- [16] With the assistance of Leesa Van Peteghen, who is with the Lytton Restorative Justice, Prevention and Education Program, Colton's grandmother and mother, who are the victim's mom and sister, provided a victim impact statement. While they are so clearly anguished by the loss of their son and brother, there is forgiveness and support for Colton. In their written statement read out by Ms. Van Peteghen, they eloquently described what they see as the cause of this family tragedy. Rooted in their residential school experiences, they describe the substance misuse and violence that has since plagued their family and led Colton to live an alcohol, drug, and violence-filled life himself.

- [17] Colton's grandmother, mother and father, who are present in court, continue to have hope for Colton's healing and rehabilitation. They do not see jail as necessary for their grandson and son. They seek for him to receive rehabilitation, for him to get help before he becomes institutionalized. They recognize that nothing will bring their brother or son back to them and that Colton will unfortunately face the pain of this loss, what he has done, for the rest of his life. In short, they wish for healing, reconciliation, and forgiveness between Colton and the rest of his family.
- [18] Ms. Van Peteghen provided her own statement, as well, which I view as something akin to a community impact statement. She is in the unique position of having a deep, working knowledge of the dynamics, tragedies, and pain the Smith family has lived through all these years. She had been working with the deceased at the time of his death as a probation client. She described how the deceased had struggles throughout his life, as well, with violence and addiction. He was, at the time he died, making amazing strides in his healing, including making plans to attend a treatment centre.
- [19] Ms. Van Peteghen fears Colton will be institutionalized and will struggle with its effects. Fortunately, she and her program will provide support to Colton and his family upon Colton's eventual release in the community to assist him with not only getting into treatment facilities, but with long-term housing and other supports. Ms. Van Peteghen ends her letter by writing:

Nothing can bring JJ back, but Colton definitely can learn from this tragedy and change his life, and become what the community and the youth so desperately need, a role model who has come through pain, poverty, abuse and addictions and be a wounded-healer as he truly has many spiritual gifts, but he needs to be mentored by a suitable spiritual healer.

## CIRCUMSTANCES OF THE OFFENDER

- [20] I am fortunate in that I have a pre-sentence report, a Gladue report, which is extensive, and a psychiatric assessment prepared by Dr. Lessing that together fully and completely outline Colton's personal circumstances. I do not need to spend a great deal of time in this area, but I will say a few things.
- [21] Colton is a member of the Lytton First Nation, born to Fred Raphael Junior and Ramona Smith. Both parents, while never together as a couple, attended court for this hearing and wish to provide support for their son. They were teenagers when he was born and did not have the maturity or skills to parent him. They were also mired in their own grief, trauma and addiction issues.
- [22] As detailed in the reports, many of Colton's family members, including his grandparents, attended St. George's Residential school, as well as St. Mary's Residential school in Mission. Karen Lara is the author of the Gladue report. She outlined the Smith family's experience as a result of the abuse suffered at these schools. Ms. Van Peteghen participated in the preparation of that report and she described it to Ms. Lehrer well. She said that the

residential school legacy has been a huge factor in current issues for Lytton families generally that attended there. She described St. George's as one of the worst cases of abuse within the residential school system in Canada. The residual effects in the community of Lytton include a fear of authority figures as well as the impacts of trauma resulting in prolific alcohol and drug use, violence, sexual assault, and incest.

- [23] Colton witnessed significant alcohol and drug misuse and inter-familial violence throughout his childhood and youth. He was cared for primarily by his grandmother and mother. He saw his mother struggle with her own trauma and grief. He saw her struggle through suicide attempts and through drugs and alcohol misuse. She was victimized many times by intimate partners.
- [24] Colton's uncles, with whom he spent a great deal of time, were involved in heavy drinking, drug use, criminality and violence. Colton had few rules or supervision and was encouraged by his uncles to "man up" like them and engage in alcohol, drugs, and violence as a way of life. His uncles discussed with him a past relative who had been murdered in a family feud fuelled by alcohol.
- [25] Understandably, within this environment, Colton began to use alcohol and drugs at the tender age of 10. He had difficulty in school. He had confrontations with authority figures. He would fight. He left school in Grade 9.
- [26] Colton used alcohol and drugs daily. A multitude of resources were offered to him, including alternative school methods, counselling, drug and alcohol intervention, other things. These were largely unsuccessful largely, it seems, because Colton was continually enabled by family members who were understandably struggling with their own issues. He had no supports or tools to be able to implement any of the positive things that he had tried to learn.
- [27] By age 16, Colton was getting drunk every day to the point of blacking out. He attempted suicide on more than one occasion. Violence, suicidal ideation, and dependency on alcohol and other drugs were the legacy that Colton inherited. Colton has recently disclosed that he was also sexually abused as a child.
- [28] On a positive note, Colton did complete a three-month introduction to trades course through the Nicola Valley Institute of Technology when he was 18 and did get involved in some pro-social activities over the years like motocross, hunting and fishing with his dad. He has held no employment.
- [29] When Colton committed this crime, he had no record of criminal convictions. He was released on bail after a few months in custody in order to attend North Wind Healing Centre. He attended that program from May 2 to June 10, 2016. He told Dr. Lessing that his time there was the "best time of his life". Unfortunately when Colton left the program, he had minimal supports in place. He did have one support, but it turned out to be a place that offered him drugs daily. He ended up breaching his bail by breaking curfew and drinking,

resulting in his arrest at his bail supervisor's office while under the influence of alcohol and continued incarceration since then.

- [30] While in custody, Colton has been forced to abstain from alcohol. Colton told me that he has been taking courses while in custody, plans to obtain his grade 12 and hopes to enter a trades program. Primarily from his remarks to me, I understand that he wants to get well. He wants to heal. He wants to help his family heal, and he wants to take whatever steps he can towards reconciliation.
- [31] Colton did make attempts while on bail to make good choices, and he has insight into why he committed this offence. Dr. Lessing's report supports that. While she was not asked to provide a risk assessment, she did diagnose Colton, understandably, with alcohol use disorder (in forced remission while incarcerated). She also offered that Colton's developmental and educational history may suggest a possible diagnosis of fetal alcohol spectrum disorder, or one of the lesser neurodevelopmental variants. She suggests that assessments in this regard should be conducted; they have not been to date.
- [32] Notably, Dr. Lessing opined that Colton does not suffer from any major mental disorder. His past emotional instability, the suicidal ideation and rage that he has exhibited, seem to have occurred in the context of either addiction, or frustration when his requests were denied.
- [33] Ultimately, Dr. Lessing recommends that Colton receive individualized mentorship in his pursuit of a different lifestyle. She suggests that he would do well in the community being assertively case managed to help him get on track to pursue his life and employment goals.
- [34] It is very fortunate that Ms. Van Peteghen and her organization recognize Colton's need for help and the Smith family's similar need and are willing to provide support to Colton and his family to help them try to address the myriad of issues that they face.
- [35] In short, Colton is a young man with a lot of work ahead of him, but he does have family and community support in order to make his rehabilitation goals attainable.

## LEGAL FRAMEWORK

- [36] I recently had occasion to set out the legal framework for this offence in a somewhat similar case, *R. v. Johnson*, 2017 BCSC 1240 at paras. 41-57. I do not intend to read all of what I said in that case into the record, we would be here all day, but I will highlight a few things for you, Colton, so you can understand a bit of the legal framework.
- [37] The seriousness with which Parliament views the offence of manslaughter is reflected by the maximum penalty of life imprisonment set out in the Criminal Code, R.S.C. 1985, c. C-46 [Code]. This offence, however, carries no minimum sentence. Therefore, the range of sentence is anywhere from a suspended sentence to life imprisonment.

- [38] Many courts have recognized that manslaughter is an offence that can encompass very different factual matrixes from -- I am sure you heard your lawyer talk about this -- from near accident to near murder. These differences explain why there is such a wide variation in the range of sentences that are imposed. As I indicated at the beginning, my challenge in your case is to locate you somewhere on that broad range.
- [39] The determination of a just and appropriate sentence is a highly individualized exercise that goes beyond a mathematical calculation. Many courts have recognized that imposing a fit sentence in a serious case like this is among the most challenging responsibilities a judge can undertake. It involves a careful balancing of a variety of factors in the context of a particular set of circumstances in respect of a very particular offender.
- [40] The balancing that I have to do in imposing a sentence for you has to occur within a framework, and that framework is set out in s. 718 of the Code:
- 718 The fundamental purpose of sentencing is to protect society and to contribute, along with crime prevention initiatives, to respect for the law and the maintenance of a just, peaceful and safe society by imposing just sanctions that have one or more of the following objectives:
- (a) to denounce unlawful conduct and the harm done to victims or to the community that is caused by unlawful conduct;
  - (b) to deter the offender and other persons from committing offences;
  - (c) to separate offenders from society, where necessary;
  - (d) to assist in rehabilitating offenders;
  - (e) to provide reparations for harm done to victims or to the community; and
  - (f) to promote a sense of responsibility in offenders, and acknowledgment of the harm done to victims or to the community.
- [41] Section 718.1 of the Code also outlines the fundamental principle of proportionality which provides that a sentence must be proportionate to the gravity of the offence and the degree of responsibility of the offender. I am also to take into account other principles of sentencing that are set out in s. 718.2 of the Code. They include -- there are a number of them, but they include what is called often the principle of parity, which means that a sentence should be similar to sentences imposed on similar offenders committed in similar circumstances. That is why the lawyers gave me a variety of cases showing me what other courts have done for offenders that are in somewhat similar circumstances with similar offences.
- [42] Also among the relevant factors in s. 718.2, I must consider all available sanctions other than imprisonment that are reasonable in the circumstances and consistent with the harm done to victims or to the community should be considered for all offenders, with particularly attention paid to the circumstances of aboriginal offenders.

- [43] The Supreme Court of Canada has explained all of these principles in several recent decisions. I have set them out, the various cases, in Johnson at paras. 48-57. I will not read those in, but I do take all of that into account.
- [44] Counsel have referred me to several authorities that confirm our Court of Appeal's instruction in R. v. Pop, 2013 BCCA 160, that the range of sentence for young aboriginal offenders without prior records who commit manslaughter in aggravated circumstances is between three and eight years' imprisonment, with the outer ends in special circumstances of that range being between one and 10 years.
- [45] No two cases are precisely alike and, of course, it may be appropriate in some cases to deviate from a particular range. I am not going to summarize the cases here. I summarized a few of them in Johnson and I refer to those summaries. I have reviewed all of the authorities. I do find them helpful for general principles and when I look at the principle of parity, but they all have features that are different than the circumstances that I am facing and that you are facing here today.

## ANALYSIS

- [46] Of primary importance in this case are the sentencing objectives of denunciation, deterrence, and your rehabilitation. What I told another young man, Mr. Johnson, at para. 79 of my decision applies precisely to you.
- [47] Mr. Smith, you and other like-minded individuals must understand that your use of drugs and alcohol carry risks of inducing behaviour that you might not otherwise undertake and you need to be held accountable for the harm that you do while in such a state. The court's message through sentencing must be strong. Mr. Smith, you must specifically understand that your priority in life is to remain abstinent from alcohol and other drugs, absolute priority. While your abstinence while in custody and the good efforts that you made while on bail are a good start, from what I see, your addictions are profound and your risk to harm others while intoxicated can be high. You have to undertake extensive and intensive treatment to continue on the path of healing.
- [48] The mitigating factors that I see in this case are numerous.
- [49] First, Colton was 19 at the time of the offence. He is a youthful offender for which rehabilitation must play a very important role.
- [50] Second, Colton has entered a guilty plea. This is as an indication of remorse. I accept this remorse. He has expressed it not only through his guilty plea, but he has, based on what has been presented to me, accepted responsibility for what he has done. Even if his memories are clouded or even obliterated by alcohol, he has demonstrated accountability and remorse, including riding along to the hospital with his uncle at the time of the events. I accept when he says that he is truly remorseful for what happened.

- [51] Third, Colton's family is supportive. This is a mitigating factor. Also mitigating is his support system through the community, evidenced by Ms. Van Peteghen's letters, her remarks, and ongoing support for Colton and the family.
- [52] Fourth, Colton is motivated to change. He took positive steps toward rehabilitation while on bail and, although he faltered, he has worked on programming while in custody and, importantly, has demonstrated insight into his offending.
- [53] Fifth, if Colton is able to abstain from alcohol and drugs completely, he is likely to be a low risk to reoffend violently. I agree with what Colton's grandmother wrote in her victim impact statement. Although brief, it is very insightful. She wrote, "Alcohol. That is the real cause." I do think your risk to reoffend would be low if you could stay away from alcohol.
- [54] Sixth, Colton's lack of criminal history. Seventh, and I have explained this factor in detail, is Colton's background circumstances as an aboriginal offender.
- [55] The final mitigating factor that I see in this case is the presence of a degree of provocation. Colton was on the losing end, it appears, of a physical altercation with his uncle. I see his act as being rather impulsive, motivated by rage and alcohol.
- [56] There are aggravating factors, of course. Colton used a weapon. He had to take steps to obtain that weapon, to retrieve it and use it. Also aggravating is that if he does not abstain from the use of alcohol and drugs, his risk to reoffend violently would increase.
- [57] This is a case, I think, that falls somewhere near the middle of the manslaughter "scale". It is, as I see it, not a near murder like I found in Johnson and like other courts have found. Nor is it a case of near accident, like in R. v. Huth, [2014] B.C.J. No. 579, and similar cases where, for example, an offender punches someone and that person unexpectedly dies. Somewhere in the middle of the scale is where I see this case falling.
- [58] Colton, I am going to ask you to stand. In all of the circumstances of this case, when I weigh all of these factors and give primary emphasis to the goals of sentencing I have outlined, paying particular attention to your aboriginal background, which clearly played a substantial role in limiting your level of moral blameworthiness, I have decided the overall objectives of sentencing will best be served by a further period of imprisonment of one year followed by three years' probation.
- [59] In combination with your two years and two months of pre-trial incarceration, this means your total custodial penalty for this offence will be three years and two months. That is at the very low end of the range.

- [60] I agree with Mr. Kaiser that the addition of the maximum period of probation to your one-year sentence will ensure the community supervision, that assertive case management that was recommended by Dr. Lessing, will be in place to assist you with your trauma recovery and rehabilitation. I agree with everyone who has said that you need help, not only for addictions, for your own violence, but you have endured so much trauma in your young life that you need trauma counselling, as well.
- [61] You can have a seat here, Colton. I am going to outline the terms of your probation, but I will hear -- I know Mr. Balison, you might be at a bit of a disadvantage, but I will hear submissions if there is any other terms that might be sought. Terms were not specifically addressed in submissions. Ms. Hammett, the probation officer who prepared the probation order, recommends a number of conditions. They seem appropriate to me.
- [62] In addition to the mandatory statutory conditions that are set out in the Code, Colton will be required to report to a probation officer at 102 - 455 Columbia Street, Kamloops, British Columbia, and thereafter report as and when directed by your probation officer.
- [63] Next, you shall reside in a residence approved by your probation officer and you shall not change your address without the prior written permission of your probation officer.
- [64] Next, you shall abstain absolutely from the possession or consumption of alcohol or illicit drugs, except for those prescribed for you by a medical practitioner or dentist.
- [65] Next, you must not be found in any liquor store, bar, nightclub, tavern, or other place whose principal business is the sale of alcohol.
- [66] Next, you shall attend, participate in, and successfully complete any such assessment, counselling, or program as directed by the probation officer. Without limiting the general nature of this condition, such assessment, counselling, or program may relate to psychiatric assessment, psychiatric or psychological counselling, substance abuse, or life skills support, including a full-time residential attendance program.
- [67] Next, you will not possess any weapons as defined in the Code.
- [68] Next, you shall attend, participate in, and successfully complete healing programs, including full-time attendance programs sensitive to your Aboriginal heritage.
- [69] Finally, you must not possess any knife, except for the immediate preparation of or eating of food, or for purposes directly and immediately related to your employment.
- [70] All right. Ms. Van Peteghen, I know you are going to be involved quite a bit with Colton when he is released from custody and hopefully this will give you the time that you need to get some resources in place. Is there any -- I know this is unusual for me to ask, but I think it is important that I do -- is there anything else that you can think of in terms of probation conditions that might assist Colton with his rehabilitation or assist you in getting him into programs? I just do not want to overlook anything.

- [71] LEESA VAN PETEGHEN: I think with putting in about the -- the full-time attendance programs, that would be sufficient, on the probation term.
- [72] THE COURT: Okay. Well, if there is any difficulties, the matter can be brought before me and we can tweak the wording of it.
- [73] MR. KAISER: Absolutely, yes. Yes, My Lady.
- [74] THE COURT: All right. Turning now to the Ancillary orders.
- [75] Pursuant to s. 109 of the Criminal Code, you are prohibited from possessing the items that are listed there, firearms and the like, it will be identified in the order, for a period of 10 years.
- [76] This is a primary designated offence for the purposes of DNA, so pursuant to s. 487.051 of the Code, you are ordered to provide a sample of your DNA. That will be taken in custody for inclusion in the DNA data bank.
- [77] The victim fine surcharge to be paid within a year following the expiration of your probation order.
- [DISCUSSION ABOUT EXHIBITS]
- [78] MR. KAISER: Thank you, My Lady.
- [79] THE COURT: Okay. That concludes things?
- [80] MR. BALISON: Yes, I will ask if the dash 4 Indictment is still outstanding?
- [81] THE COURT: Was that the Indictment charging second degree murder?
- [82] MR. BALISON: Yes.
- [83] THE CLERK: I just have the dash 5 scheduled for today.
- [84] MR. BALISON: Okay, well I, just out of an abundance of caution, will enter a stay of proceedings on any other indictments in this information or indictment number, sequence, just so that everything is cleaned up.
- [85] THE COURT: Okay, thank you, and thank you to both counsel. You can communicate that to Ms. Cook, I am sure.
- [86] MR. BALISON: Yes, thank you.
- [87] THE COURT: And Colton, I just wish you the best. You have a great support, so please use it. Okay, good luck to you.

"S.A. Donegan J."

DONEGAN J.

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