

CANADA / JUDGMENT

R. v. Stuiver

2020 BCSC 334

COURT

Supreme Court of British Columbia

DECIDED

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2020 BCSC 334 R. v. Stuiver

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

R. v. Stuiver,

2020 BCSC 334

Date: 20200228

Docket: 27721

Registry: Vancouver

Regina

v.

Gage Edward McPake and Cody David Stuiver

Restriction on Publication: A publication ban has been imposed under s. 486.5(1) of the Criminal Code, restricting the publication, broadcasting or transmission in any way of evidence that could identify a witness, referred to in this judgment as Witness X. This publication ban applies indefinitely unless otherwise ordered.

Before: The Honourable Madam Justice DeWitt-Van Oosten

Oral Reasons for Sentence re Cody D. Stuiver

Counsel for The Crown:

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Michael Barrenger

Counsel for the Accused C.D. Stuiver:

Glen Orris, Q.C.

Faisal Al-Alamy

Place and Date of Hearing:

Vancouver, B.C.

February 25, 2020

Place and Date of Judgment:

Vancouver, B.C.

February 28, 2020

INTRODUCTION

- [1] Cody David Stuiver has pleaded guilty to one count of manslaughter under s. 236(b) of the Criminal Code, R.S.C. 1985, c. C-46. He is before the Court for sentencing.
- [2] Mr. Stuiver was originally charged with second degree murder. However, with the consent of the Crown, he has entered a guilty plea to the included offence of manslaughter. The plea was entered on December 9, 2019. At that time, I conducted a plea enquiry in accordance with s. 606(1.1) of the Code, satisfying myself that Mr. Stuiver understood he was admitting to the essential elements of the offence of manslaughter, as well as the nature and consequences of a guilty plea.
- [3] The offence occurred on January 30, 2016. Mr. Stuiver went to a referral-based drug shop (the "Shop") on Granville Street in Vancouver with his co-accused, Gage Edward McPake. The Shop sold illicit substances. The two men, jointly engaged in drug trafficking, intended to rob the Shop. Mr. McPake was carrying a .44 Magnum revolver. Mr. Stuiver was carrying a can of mace. Mr. McPake was the first to enter the Shop and he shot Christopher Denis Kwik, a Shop employee. Tragically, Mr. Kwik lost his life from a single bullet wound to his chest.
- [4] Mr. McPake pleaded guilty to manslaughter for his part in the offence, and on August 6, 2019, he was sentenced to 10 years' imprisonment following a joint submission from counsel. By that time, Mr. McPake had served the equivalent of 696 days in pre-sentence custody. As a result, the time left to serve for the manslaughter was just over eight years.
- [5] There is no joint submission on sentence for Mr. Stuiver. The Crown seeks a sentence of seven years' imprisonment (less credit for time spent in pre-sentence custody). Counsel for Mr. Stuiver submits that a six-year prison term would constitute a fit sentence.
- [6] Mr. Stuiver's guilty plea has been entered as a party to the offence. More specifically, counsel agree that his legal culpability for manslaughter is best captured by s. 21(2) of the Code. Mr. Stuiver and Mr. McPake formed a common intention to carry out an unlawful purpose, namely, a robbery. Mr. McPake took a loaded firearm with him in furtherance of the robbery. Mr. Stuiver was aware of that fact and accompanied Mr. McPake into the Shop,

consistent with the joint plan. In the circumstances, it is agreed that a reasonable person would have foreseen a risk of harm to another, which in fact resulted in Mr. Kwik's death: R. v. Jackson, [1993] 4 S.C.R. 573 at 586-87.

CIRCUMSTANCES SURROUNDING THE OFFENCE

[7] An Agreed Statement of Facts has been filed as an exhibit at sentencing, laying out the circumstances surrounding Mr. Stuiver's participation in the offence. For the purpose of these reasons, a synopsis of the more salient parts will suffice:

- In the fall of 2015, Cody Stuiver jointly operated a drug trafficking enterprise with Gage McPake.
- The two men purchased a firearm in the weeks or months prior to the day on which Christopher Kwik was killed (January 30, 2016). The firearm was a .44 Magnum revolver and purchased with \$2,000 in cash and illicit drugs.
- At the time of Mr. Kwik's death, both Mr. Stuiver and Mr. McPake were subject to a court order prohibiting them from being in possession of a firearm.
- As part of their drug business, Mr. Stuiver and Mr. McPake occasionally sold drugs to Witness X. They were interested in finding a regular source from which to purchase large quantities of illicit pills for resale, and were told by Witness X that he knew of a place in Vancouver that sold the goods they were looking for. This was the Shop, located in an apartment building on Granville Street.
- In January 2016, Mr. Stuiver and Mr. McPake went to the Shop with Witness X and attempted to purchase a large amount of pills. However, a woman who was staffing the Shop at the time refused to sell them the quantity they requested.
- Witness X was then used as a conduit to purchase drugs from the Shop on behalf of the two men. He was an "approved customer". Mr. Stuiver attended the location of the Shop several times with Witness X in January 2016, but did not enter on those occasions.
- On or about January 25, 2016, the two men asked Witness X to make a purchase for their trafficking business. Mr. Stuiver went with Witness X to the Shop. He did not enter the Shop. However, later that same evening, he exchanged text messages with Mr. McPake about the purchase, expressing frustration at having been "ripped off". Excerpts from the text messages include the following:

Stuiver: Buddy, I'm so choked

McPake: Omg what now

Stuiver: [Witness X] owes us twenty dollars he's gonna grab it from a. Atm we have two bars and ten 5mg valiums

Stuiver: I'm choked he just got ripped off again too its supposed to be four four bars and ten valiums

McPake: That doors getting kicked

McPake : Im taking everything

Stuiver: YA it is he says he's scarred [sic] to go back up there's a guy or two up there "strapped"

McPake: Good thing we have a fucking fort [sic] five

Stuiver: 44

McPake: Lol oops

- On the morning of January 30, 2016, Mr. Stuiver and Mr. McPake spoke to Witness X about returning to the Shop. They wanted Witness X to drive them there, so that they could rob the Shop. They agreed to meet later that evening. The plan was for Witness X to enter the Shop to buy drugs and then leave. Immediately after that, Mr. Stuiver and Mr. McPake would enter the Shop and commit the robbery.
- Mr. Stuiver, Mr. McPake and Witness X met up on the evening of January 30 as planned. Witness X drove the two men to the apartment building on Granville Street. Mr. McPake brought the .44 Magnum revolver with him. Mr. Stuiver also brought a weapon with him. His counsel states (and the Crown accepts) that Mr. Stuiver's weapon was a can of mace. Both items were taken to the Shop as part of the plan to commit the robbery.
- Witness X parked close to the apartment building. Mr. Stuiver, Mr. McPake and Witness X walked to the building, arriving at approximately 22:14 p.m. Witness X entered the building, followed by Mr. McPake and then Mr. Stuiver. Witness X entered the Shop to briefly purchase drugs, while Mr. McPake and Mr. Stuiver remained in the building stairwell out of view of the person who was staffing the Shop (Christopher Kwik).
- As soon as Witness X exited the Shop, Mr. McPake and Mr. Stuiver entered through the open door. When they entered, Mr. McPake had the .44 Magnum revolver in his hand. Mr. Stuiver had his weapon in his pocket.
- Mr. McPake fired the gun once. The bullet hit Christopher Kwik in the chest and he fell to the floor. Mr. Stuiver and Mr. McPake then fled the Shop. They did not take anything. This was at approximately 22:18 p.m., a maximum of four minutes from when they first approached the apartment building.
- Mr. Stuiver and Mr. McPake got into the vehicle of Witness X and were driven to New Westminster, where they shared an apartment.

· Christopher Kwik died from the bullet fired by the .44 Magnum. His body was subsequently found by two men, one of whom called 911. This was at 22:53 p.m., about 35 minutes after the two offenders left the Shop. Mr. Kwik had already passed by the time police and emergency health services arrived at the Shop.

[8] Prior to the guilty plea, I conducted a pre-trial voir dire that involved a non-warranted safety search of the apartment Mr. Stuiver shared with Mr. McPake. The search arose from an incident unrelated to the robbery of the Shop and occurred on February 21, 2016. The evidence on the voir dire revealed that during the search, police saw a box of ammunition on the floor of the washroom in the apartment. I understand that the ammunition was compatible with a revolver of the type used by Mr. McPake in the robbery of the Shop. A subsequent search of that same apartment, executed pursuant to a search warrant, located the .44 Magnum revolver used in the plan to rob the Shop, as well as a considerable amount of illicit drugs.

[9] In March 2018, Mr. Stuiver was arrested and charged in the killing of Christopher Kwik.

VICTIM IMPACT

[10] At the sentencing of Mr. McPake in August 2019, Christopher Kwik's mother and sister presented victim impact statements in person, under the authority of s. 722(5) of the Code. I addressed those statements at paras. 38-39 of my previous Oral Reasons for Sentence, indexed as R. v. McPake, 2019 BCSC 1361.

[11] For Mr. Stuiver's sentencing, I again received in-person victim impact statements from Mr. Kwik's mother (delivered through a friend), and his sister. Mr. Kwik's sister also presented a statement on behalf of her son.

[12] As a family, they remain profoundly sad at not having Mr. Kwik with them. As is to be expected, each of them have been affected in different and far-reaching ways by his death, based on their individual relationships with Mr. Kwik, as well as the manner in which he died. Collectively, they struggle to manage the pain, fear and intense sense of loss they now encounter in so many aspects of their lives. Their impact statements emphasize Mr. Kwik's positive attributes, the joy he brought to them, and the compassion, kindness and empathy they personally witnessed in his interactions with others.

[13] Mr. Kwik's family members recognize that he had struggles of his own and, at the time of his death, was working in an illicit drug shop. In his sister's words, Mr. Kwik "was not perfect". However, appropriately, they do not wish for him to be defined by those imperfections, because it fails to account for the many good things he did for his family, his friends and the others with whom he interacted over the course of his 40 years. With courage and grace, Mr. Kwik's sister spoke of forgiveness and expressed a genuine hope for Mr. Stuiver and Mr. McPake that they both find and commit to a rehabilitative path, ultimately making reparations for the harm they have caused by becoming law-abiding and productive members of society. She believes, consistent with his nature, that her brother would have

felt the same way.

- [14] As noted in *R. v. Berner*, 2013 BCCA 188 at para. 14, the presentation of victim impact statements allows for the consequences of the offender's actions to be "brought home palpably" to him. It also enables the sentencing judge to understand the damage that the commission of the offence has caused to the victims and, indirectly, the community at large. In my view, both objectives have been achieved in this case. At the same time, it is important to keep in mind, and I so instruct myself, that the impact of an offence must not overwhelm all other considerations at sentencing. It is my obligation to impartially craft a fit sentence for Mr. Stuiver by taking into consideration all legal principles and the circumstances of the offence and the offender: *Berner* at para. 25. The impact on the victims is but one factor in the analysis.

OFFENDER'S ANTECEDENTS

- [15] At the time of the manslaughter, Mr. Stuiver was 21 years old.
- [16] He was raised by his parents in the Lower Mainland. He completed grade nine of high school, but then left school, finding it difficult to cope with the learning dynamics. I am told that Mr. Stuiver would struggle with meeting learning expectations and, rather than persevering, he "would give up". His counsel attributes this response to a lack of confidence and, possibly, low self-worth. It was not long after leaving high school that Mr. Stuiver started to engage in criminal activity.
- [17] Ultimately, that activity resulted in a criminal record, as both a young person and an adult. Mr. Stuiver's record consists of convictions for: common assault (June 2011); robbery (February 2012); trafficking in a controlled substance and possession of stolen property under \$5,000 (December 2013); and four counts of drug trafficking. He was sentenced for the latter offences in September 2017 and received a global 29 months' imprisonment, followed by one year of probation.
- [18] Through his counsel, Mr. Stuiver has advised the Court that he is not proud of his background. He acknowledges that prior to this offence, he did not work at improving himself as a person; to the contrary, Mr. Stuiver pursued a destructive and anti-social path. His parents have expressed tremendous frustration to his counsel at what they see as their son's unwillingness to work through his issues in his teenage years and early adulthood and build on his strengths.
- [19] Mr. Stuiver says he realizes that his participation in the robbery of the Shop has caused devastating harm and that he is committed to changing his life and making lawful, productive choices. In turn, his parents are committed to supporting him in his rehabilitation. A letter from his mother was placed before me, expressing her belief that Mr. Stuiver has the capacity to be generous, kind-hearted and constructive. While in custody awaiting trial, Mr. Stuiver has availed himself of various programming opportunities, completing sessions in substance abuse, building and maintaining healthy relationships,

financial management, communication, and criminal addictive thinking (among others). The latter module aims to teach participants that it is possible to change their thinking patterns and adopt a new, more productive approach. Mr. Stuiver successfully completed 25 sessions of that module. He also took academic courses while in custody, achieving an 87% average in a Grade 12 Family Studies course. He clearly has the capability to do well, when he sets his mind to it.

[20] The offence in this case was committed before the four counts of trafficking for which Mr. Stuiver was sentenced in September 2017. Counsel for the Crown advises that Mr. Stuiver has been in pre-sentence custody for the manslaughter offence since March 6, 2018. As such, as at today, he has already served the equivalent of 1,086 days toward the sentence I will impose (or, 2 years and 356 days).

AGGRAVATING and MITIGATING CIRCUMSTANCES

[21] At paras. 40-41 of my reasons for sentence on Mr. McPake, I identified a number of aggravating circumstances surrounding the commission of the manslaughter that are equally applicable to Mr. Stuiver, although I have modified them where necessary:

- a firearm was used in the offence;
- Mr. McPake and Mr. Stuiver jointly purchased and possessed the .44 Magnum (as well as its ammunition), for no purpose other than their drug enterprise, itself a criminal enterprise;
- the intended robbery of the Shop was incidental to plans by the two men to grow their drug trafficking business;
- the plan to commit the robbery and take a gun along was jointly developed and made days in advance;
- Mr. Stuiver knew that Mr. McPake had the firearm when they headed into the Shop;
- Mr. Stuiver also carried a weapon with him, albeit not a lethal one;
- he was subject to a firearms prohibition at the time of the manslaughter;
- Mr. Stuiver has a record substantiating a criminal lifestyle since 2011; and,
- as noted, he was sentenced for four counts of drug trafficking in September 2017. After the death of Mr. Kwik, he continued committing crimes, unwilling to stop notwithstanding the fact that he was involved in an offence that caused a death. This factor is relevant to Mr. Stuiver's risk to the public.

[22] There are also mitigating circumstances, similar to those laid out for Mr. McPake at paras. 42, 44, and 45 of my previous reasons for sentence:

- Mr. Stuver has pleaded guilty to the offence, accepting responsibility, providing certainty in resolution and avoiding the necessity of further pre-trial motions and a jury trial, which was scheduled for about eight weeks;
- although the robbery of the Shop was planned, it was not a sophisticated plan and the death of Mr. Kwik was not intended. The shooting was sudden and unexpected. This is not a situation involving a prolonged attack or gratuitous violence that was inflicted in addition to the delict of the offence. The men were inside of the Shop for less than two minutes, they did not take anything, and the evidence of their conduct after-the-fact is consistent with having been taken aback by the fact of a shooting;
- Mr. Stuver is only 25 years old. Notwithstanding the criminality displayed in his early adult years, he has time to rehabilitate and become a productive member of society; and,
- he has expressed remorse for his participation in the offence, both in person and through his counsel, which I accept as genuine.

[23] Unique to Mr. Stuver:

- he was not the person who shot Mr. Kwik, nor did he handle the firearm in approaching or entering the Shop. Although carrying mace, he did not use that weapon against Mr. Kwik or personally inflict violence on anyone; and,
- he has expressed a desire to change his behaviour and rehabilitate. I accept the expression as genuine. Indeed, the Crown does not suggest that Mr. Stuver's commitment is inauthentic. While in pre-sentence custody, Mr. Stuver has made considerable effort to engage in betterment programming. These efforts are consistent with, and lend credence to, a personal desire for rehabilitation.

LEGAL FRAMEWORK FOR SENTENCING

- [24] The fundamental purpose of sentencing is to protect society and to contribute to respect for the law and maintenance of a just, peaceful and safe society: s. 718, Code. There are additional objectives delineated in the Code, including denunciation, deterrence, rehabilitation and reparations for harm done to victims or the community. The weight given to each objective when imposing sentence is a matter of discretion.
- [25] Sections 718.1 and 718.2 of the Code set out a number of sentencing principles that guide judges in achieving a just sanction. The most fundamental of these is the principle of "proportionality". According to s. 718.1 of the Code, "[a] sentence must be proportionate to the gravity of the offence and the degree of responsibility of the offender".

- [26] What does this mean? A proportionate sentence is one that promotes justice for victims and ensures public confidence in the justice system by giving meaningful effect to the seriousness of the offence. At the same time, it is a sentence that ensures justice for the offender by not exceeding what is appropriate in light of that offender's level of moral blameworthiness: *R. v. Ipeelee*, 2012 SCC 13 at para. 37.
- [27] Achieving a proportionate sentence is done case-by-case, applying a multi-factorial analysis that takes into account the individual circumstances of the offence, as well as the offender: *R. v. Nur*, 2015 SCC 15 at para. 43.

SENTENCING RANGE FOR MANSLAUGHTER

- [28] The maximum sentence available for manslaughter is life imprisonment.
- [29] Unlike his co-offender, Mr. Stuver entered a guilty plea to manslaughter simpliciter, with specific reference to s. 236(b) of the Code, rather than manslaughter with a firearm as described in s. 236(a). The Indictment under which the plea was accepted does not particularize the use of a firearm in the offence.
- [30] At the start of the sentencing hearing, both counsel took the position that a four-year mandatory minimum term of imprisonment applies to Mr. Stuver. However, on reflection, the Crown fairly noted the possibility that for the purpose of this case, the minimum term specified in s. 236(b) of the Code may not be formally engaged because the guilty plea was entered without reference to s. 236(a). The defence questioned the correctness of that proposition in light of the fact that a firearm was indisputably used in the manslaughter, the precise delict that Parliament sought to address through the enactment of a mandatory minimum sentence. In other words, any manslaughter in which death was caused by the use of a firearm likely falls subject to the mandatory minimum penalty, irrespective of whether s. 236(a) or (b) is relied upon when entering the plea. See, for example, the analyses offered in cases such as *R. v. Moore*, 2012 ONCA 770 at para. 7; *R. v. Watson*, 2008 ONCA 614 at paras. 69-72; and *R. v. A.D.*, 2003 BCCA 106 at paras. 27-30.
- [31] I do not consider it necessary to resolve that issue in this case because, functionally, it makes no difference. Even if the four-year mandatory minimum sentence is not engaged, the fact that a firearm was involved in Mr. Stuver's offence is a highly relevant consideration at sentencing, and, importantly, both the Crown and the defence accept that in the circumstances before me, a prison term under four years' would not have been a fit sentence. Based on the jurisprudence I have reviewed in determining Mr. Stuver's sentence, that position reasonably reflects the state of the law in this area. A sentence less than four years would have been unrealistic.
- [32] In *R. v. Engebretsen*, 2016 BCCA 182 at para. 13, the general range of sentences for manslaughter was described as four to 15 years. See also *R. v. Ahnert*, 2014 BCCA 212 at paras. 31-39, and *R. v. Aburto*, 2009 BCCA 446 at paras. 17-19.

- [33] Where a particular case falls in that range will be informed by the circumstances surrounding the commission of the offence, the offender's personal antecedents, the aggravating and mitigating factors, and an individualized application of the principles of sentencing: *Aburto* at para. 19; *R. v. Peynado*, 2011 BCCA 524 at para. 30; *R. v. Bidesi*, 2017 BCSC 198 at para. 31. Furthermore, it is well established that a range functions as a guideline only: *Aburto* at para. 19. It does not displace the individualized nature of the proportionality analysis: *R. v. Sesay*, 2020 BCCA 41 at para. 32.
- [34] Crown counsel put a number of authorities before me specific to the issue of quantum within the context of a manslaughter using a firearm. The defence did not tender any cases for comparative purposes, not taking issue with the range of sentences as stated by the Crown.
- [35] I have reviewed the Crown's authorities; however, I will not refer to all of them in these reasons. I have found the ones involving party liability to be the most instructive. In particular, those cases in which a death resulted from the use of a firearm, but the sentenced offender was not the person who committed the shooting, nor did they possess, brandish or in any way personally use a firearm during the events. In my view, that context most closely aligns with the circumstances surrounding Mr. Stuver's involvement in the case at bar:
- *R. v. Jongbloets*, 2018 BCSC 403 - 10 years' imprisonment for two firearms-related deaths during a home invasion-type robbery. The offender was 28 years old with an extensive criminal record (43 prior convictions), including convictions for violence. He was on a bail recognizance at the time of the offence and involved in planning the robbery. He did not carry a weapon with him, but knocked on the door to facilitate entry into the home.
 - *R. v. Araya*, 2015 ONCA 854 - six years' imprisonment for a shooting that occurred during a non-premeditated robbery and caused the death of a 17 year old boy. The offender was 18 at the time, with no criminal record. He was not the shooter and did not carry a gun. He agreed to participate in the robbery and knew his confederates were armed. At sentencing, he was able to demonstrate "strong support within the community" and had a favourable pre-sentence report.
 - *R. v. Kwakye*, 2015 ONCA 108 - seven years' imprisonment for a manslaughter committed by firearm during a home invasion. The offender was 18 years old, with no criminal record. He had a supportive family, a "positive background", and "significant rehabilitative potential".

APPLICATION OF PRINCIPLES

- [36] Manslaughter is culpable homicide. It carries the potential for life imprisonment, signifying its objective gravity in comparison to other Code offences. When a firearm is involved in the offence, it necessarily attracts a heightened level of seriousness. As noted in *R. v. Kachoul*, 2017 BCCA 292 at para. 25, "Canadian courts have become increasingly concerned by the proliferation of handguns, gun violence and the dire consequences for our society". As result, denunciation and deterrence are "prioritized" in sentencing proceedings involving

firearms: at para. 25; ss. 718(a) and (b), Code. Doing so is necessary to ensure public safety and to express society's condemnation for both the offence and the harmful impact it has engendered: at paras. 25-26.

- [37] In the circumstances of this case, the manslaughter occurred during the course of a planned robbery that was incidental to already-subsisting unlawful activity, namely, a drug trafficking enterprise operated by Mr. Stuiver and Mr. McPake. The .44 Magnum revolver used to shoot Mr. Kwik was purchased in support of that enterprise and it was brought to the robbery for the specific purpose of intimidation. The fact that it was present and loaded made the risk of bodily harm palpable. Particularly given the fact that, according to text messages exchanged between Mr. Stuiver and Mr. McPake five days before the event, they understood there may be one or more persons in the Shop who were "strapped". I understand this to mean there was the potential for persons in the Shop to be armed, which only served to heighten the risk of danger. There is no suggestion that Mr. Kwik was armed; however, Mr. Stuiver's understanding that the Shop carried that potential is a relevant factor for consideration. It elevates the level of risk that ought to have been foreseen by him and which he voluntarily undertook by virtue of his active participation in execution of the plan to commit a robbery.
- [38] The two men fled the Shop after Mr. Kwik was shot. The Crown asks that I also treat that fact as an aggravating feature of the case, saying it reflects a degree of callousness or indifference by the offenders toward the harm caused by their conduct. I am not inclined to draw that inference. The Crown accepts that the shooting was unexpected. Mr. Stuiver and Mr. McPake fled the shop immediately thereafter. They took nothing with them. There is evidence that they were taken aback by what had occurred and, in the car afterward, there was conversation consistent with confusion and panic. In light of that evidence, and although a troubling feature of this case, callousness or indifference are not the only reasonable conclusions to draw from the failure to attend to Mr. Kwik's wound or call for assistance.
- [39] Mr. Stuiver did not hold or fire the gun that killed Christopher Kwik. He did not intend for Mr. Kwik to be shot. Nor did he intend that bodily harm be inflicted on him. Moreover, Mr. Stuiver has been convicted of manslaughter as a party, rather than as the principal offender. This is a significant feature of the case and it is what distinguishes him from Mr. McPake. Any sentence I impose must account for that distinction in a meaningful way.
- [40] Nonetheless, I find that Mr. Stuiver's moral blameworthiness is substantial. In assessing moral culpability, the Court must examine the nature and extent of conscious choices made by the offender. The offender's mens rea at the time of the offence is relevant to the analysis. However, contrary to the nature of the submission made by the defence, it is not the only factor for consideration. The blameworthiness analysis is broader in scope. The personal characteristics of the offender and the circumstances surrounding the offence are also informative: *R. v. Stone*, [1999] 2 S.C.R. 290 at para. 234; *R. v. LaBerge*, 1995 ABCA 196 at paras. 7-11 (cited with approval in *Stone* at para. 247).

- [41] In this case, those circumstances include Mr. Stuiver's participation in the purchase of the handgun that caused the death. Mr. Stuiver further participated in planning the robbery in furtherance of drug trafficking. He brought mace with him to the Shop and he was prepared to use it. He knew of Mr. McPake's intention to use the .44 Magnum as a form of intimidation. He knew that Mr. McPake had the gun with him in the car when they travelled to the Shop with Witness X. He knew it was in Mr. McPake's hand as they moved through the stairwell and into the Shop. He was an active participant in conduct involving a weapon that carried an obvious risk of serious bodily harm or lethality, while knowing that he was subject to a court order that prohibited him from possessing firearms or ammunition. The handgun and ammunition were later found in the apartment that Mr. Stuiver shared with Mr. McPake. The gun was still with them.
- [42] There is no evidence before me to suggest that Mr. Stuiver was impaired on the night of the offence, by alcohol, drugs or otherwise. There is no evidence that he was intimidated or coerced into participating in the robbery. There is no evidence that he suffers from cognitive limitations that somehow diminish his ability to foresee risk, appreciate the consequences of his behaviour, or restrain his impulses. Instead, he made a number of conscious choices that led to his active participation in a highly dangerous scenario that caused a death. He did so in support of drug trafficking, itself unlawful activity for which he had already been before the courts and sanctioned in 2013.
- [43] In this sense, Mr. Stuiver is qualitatively different than the offender in Araya, the Ontario case that the defence says supports a sentence of six years. In that case, Mr. Araya and two or three other youths participated in a group robbery at gunpoint in a Toronto park. After the robbery, the assailants fled. The victim chased them. In response, one of the assailants turned around and shot him. The victim was a 17-year old boy and died from the shooting. He was an only child and his death devastated his family (at para. 22).
- [44] Mr. Araya was not the shooter. He was not carrying a gun during the robbery (at para. 2). He agreed to participate in the robbery, he knew that his associates were armed with one or more guns, and he knew that one of the guns was loaded (at para. 15). The robbery was planned, but not very long in advance of its occurrence. The court rejected a description of the event as "premeditated" (at para. 15).
- [45] Mr. Araya was 18 years old at the time of the offence; he had spent time in foster homes due to struggles in his relationship with his mother; and he was homeless when involved in the robbery. He did not have a criminal record (at para. 32).
- [46] Mr. Stuiver was three years older than Mr. Araya when he planned the robbery of the Shop with Mr. McPake. Discussion about that robbery, including the use of the .44 Magnum first occurred on January 25, five days in advance. The gun taken for the purpose of intimidation was one that Mr. Stuiver jointly purchased with Mr. McPake. The shooting itself was spontaneous, but occurred as part of a shared objective of retaliation and gain through the acquisition of illicit substances. Unlike Mr. Araya, the offender before me has a criminal

record, including a prior conviction for robbery that was committed while Mr. Stuver was subject to a probation order. He was also prohibited from being in possession of a firearm at the time of the manslaughter. In my view, his moral blameworthiness, or degree of personal responsibility in the commission of the offence, even as a party, was more substantial than that of Mr. Araya.

- [47] As such, I do not consider six years' imprisonment to be a fit sentence for Mr. Stuver. At the same time, there are mitigating circumstances here, including: youth; a guilty plea that avoided a lengthy trial and the attendant use of public resources; genuine remorse; a stated commitment to rehabilitation; and, importantly, efforts made while awaiting his trial and sentencing that show Mr. Stuver has the capacity to choose a different path for himself and the personal fortitude to follow through. He is to be commended for the efforts made to break away from his previous destructive tendencies. The steps taken since March 2018 bode well for Mr. Stuver's continued rehabilitation and are relevant to the proportionality analysis.
- [48] In the whole of the circumstances, I am satisfied that the Crown's submission of a sentence of seven years' imprisonment reasonably accounts for the aggravating and mitigating circumstances in this case, and achieves proportionality between the gravamen of the offence and Mr. Stuver's moral culpability as a party to the offence. That is a sentence three years less than the one imposed on Mr. McPake, which fully accounts for the differences between principal offender and party status.
- [49] I appreciate that for someone of Mr. Stuver's age, who has already spent considerable time in custody, a further four years in a penitentiary will seem like a long haul, particularly in an environment that is challenging and carries the risk of increased negative peer influence. However, Mr. Stuver's rehabilitation is but one of the sentencing objectives at play in this case. Denunciation and deterrence also loom large, given the nature of the offence, the manner in which it was committed, and Mr. Stuver's criminal antecedents.

DISPOSITION

- [50] Mr. Stuver, please stand.
- [51] I am satisfied that a fit sentence for your participation in the manslaughter of Christopher Kwik is seven years.
- [52] As at February 28, 2020, you have spent 724 days in pre-sentence custody specific to this offence. In accordance with s. 719(3.1) of the Code, it is appropriate that you receive 1,086 days' credit toward your sentence (2 years and 356 days). Accordingly, you have 1,469 days left to serve on the sentence for manslaughter, or, four years and nine days.
- [53] There are a number of ancillary orders I am also bound to make:

- a) Pursuant to s. 109(2) of the Code, you are prohibited from possessing any firearm, crossbow, restricted weapon, ammunition and explosive substance for life after release from your term of imprisonment.
 - b) Under this same section, you are prohibited from possessing any prohibited firearm, restricted firearm, prohibited weapon, prohibited device and prohibited ammunition for life, running from the date of this order.
 - c) Manslaughter is a primary designated offence within the meaning of s. 487.04 of the Code. As such, pursuant to s. 487.051(1), I make an order authorizing the taking of a sample of bodily substance from you, for the purpose of forensic DNA analysis and inclusion in the national DNA databank.
 - d) Under the authority of s. 743.21(1) of the Code, while serving the custodial part of your sentence, you are prohibited from communicating, directly or indirectly, with Witness X; and,
 - e) Pursuant to s. 491(1) of the Code, I order that the firearm and ammunition seized and detained by police in relation to the offence of manslaughter is forfeited to Her Majesty and shall be disposed of as the Attorney General directs.
- [54] I have declined the Crown's request for an order under s. 743.21(1) of the Code prohibiting contact with Mr. McPake during the custodial portion of Mr. Stuiver's sentence. First, an order prohibiting contact is already in place with respect to Mr. McPake and he received a longer term of imprisonment than Mr. Stuiver. As such, I do not consider an order against Mr. Stuiver to be necessary. Second, I have been told by counsel for Mr. Stuiver that an order to that effect may detrimentally impact the manner in which Mr. Stuiver is classified in the federal correctional system and limit the rehabilitative programming options made available to him. Assuming such to be the case, and finding it is to the benefit of both Mr. Stuiver and society that he achieve rehabilitation, I do not consider the s. 743.21(1) order to be in the interests of justice.
- [55] Finally, pursuant to s. 743.2 of the Code, I order that a copy of these reasons for sentence be forwarded to the Correctional Service of Canada.

"DeWitt-Van Oosten J."

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