

CANADA / JUDGMENT

R. v. Walcot

2001 BCCA 342

COURT

British Columbia Court of Appeal

DECIDED

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Citation:

R. v. Walcot

Date: 20010509

2001 BCCA 342

Docket:

CA026662

Registry: Vancouver

COURT OF APPEAL FOR BRITISH COLUMBIA

BETWEEN:

HER MAJESTY THE QUEEN

APPELLANT

AND:

MARK FREDERICK WALCOT

RESPONDENT

Before:

The Honourable Chief Justice McEachern

The Honourable Mr. Justice Lambert

The Honourable Mr. Justice Finch

P. Ewert, Q.C. and G. Gaul

Counsel for the Appellant

B. Coleman

Counsel for the Respondent

Place and Date of Hearing:

Vancouver, British Columbia

March 6, 2001

Place and Date of Judgment:

Vancouver, British Columbia

May 9, 2001

Written Reasons by:

The Honourable Mr. Justice Lambert

Concurred in by:

The Honourable Mr. Justice Finch

Dissenting Reasons by:

The Honourable Chief Justice McEachern (para.26, p.15) Reasons for Judgment of the Honourable Mr. Justice Lambert:

I

- [1] This is a Crown appeal from a sentence of two years less a day imposed following a guilty plea to two counts of manslaughter involving the use of a firearm in the commission of the offences. The guilty plea rested on Walcot being a party to the two offences. Parliament through s.236(a) of the Criminal Code, has provided for a minimum sentence of four years for the offence of manslaughter where a firearm was used in the commission of the offence. The sentencing judge granted a constitutional exemption to that provision in the circumstances of this case. The Crown, as appellant, argues that he should not have done so. That is the principal point in this appeal.

II

- [2] Walcot pleaded guilty. So we do not know the full facts. But I will summarize the facts we know.
- [3] Walcot owned an unregistered 7.62 calibre Norinco Model SKS Rifle. It had a magazine which held more than five cartridges and, for that reason, was a prohibited firearm. On the afternoon of 17 August, 1997, Walcot asked Michael Gamblin if he wanted to go shooting. Walcot picked up Michael Gamblin in Walcot's car. They purchased beer and cartridges in

Salmon Arm and drove to an uninhabited area for target practice. When they ran out of cartridges or beer they drove back to town for more. They picked up Richard Gamblin, Michael's brother. The three resumed target practice and consumed beer and, between them, one gram of cocaine.

- [4] Walcot and Michael Gamblin dropped Richard Gamblin off in Salmon Arm and then drove south to Vernon. They drank more beer. Later in the evening Michael Gamblin asked Walcot, who was driving his own car, with Michael Gamblin as a passenger, to drive out to Silver Star Road and to park in the school yard opposite the home of Dennis Knapp and Patricia Knapp. On the way there, Michael Gamblin said that the reason he wanted to go to the Knapps' home was "to settle the score". The rifle was still in the trunk of the car. When the car stopped in the school yard Michael Gamblin asked Walcot for the key to the trunk. Walcot gave it to him and must have known, when he did so, that Michael Gamblin was going to get the rifle. Gamblin opened the trunk, took out the rifle, loaded it, and after kicking in the door of the house, shot Dennis Knapp and Patricia Knapp with one shot each in the head, as they sat up in bed. They both died immediately. When the shots were fired Walcot was standing in the door of the house and Michael Gamblin was a few steps inside, at the bedroom door.
- [5] Both men fled. They went first to Enderby and then to Armstrong, on their way back to Salmon Arm. At Armstrong they went into the bush and threw away the disassembled rifle. A few hours later Walcot turned himself in at the Royal Canadian Mounted Police detachment in Salmon Arm.
- [6] Walcot showed the police where the rifle had been thrown and the parts of the rifle were recovered. The police also discovered that the bulb had been removed from the dome light inside Walcot's car. The bulb was left in the car. When the bulb was restored to the dome fixture both the light and the bulb were found to be in working order.

III

- [7] Walcot pleaded guilty to two counts of manslaughter. Michael Gamblin pleaded guilty to two counts of second degree murder. In relation to Walcot, the Crown said that he was guilty under s-s.21(2) of the Code as well as under s-s.21(1)(b) but the sentencing judge decided that the plea of guilty should only be attached to guilt under s-s.21(1)(b):
21. (1) Every one is a party to an offence who . . .
- (b) does or omits to do anything for the purpose of aiding any person to commit it;...
- [8] Mr. Justice Davies relied on the decision of the Supreme Court of Canada in *R. v. Davy* (1993), 86 C.C.C. (3d) 385, where Madam Justice McLachlin, in giving judgment for a unanimous nine judge court, said this with respect to s-s.21(1)(b), at p.391:

Since the date of the Court of Appeal's decision, this court has held that unlawful act manslaughter -that is, the killing of a person while engaged in an unlawful act - does not require a subjective appreciation of the consequences of the act. The test is objective - what a reasonable person would have appreciated in all the circumstances. Nor is it necessary that the risk of death be foreseeable. As long as the unlawful act is inherently dangerous and harm to another which is neither trivial nor transitory is its foreseeable consequence, the resultant death amounts to manslaughter: *R. v. Creighton* (1993), 83 C.C.C. (3d) 346, 105 D.L.R. (4th) 632, [1993] 3 S.C.R. 3 (S.C.C.); see also *R. v. DeSousa* (1992), 76 C.C.C. (3d) 124, 95 D.L.R. (4th) 595, [1992] 2 S.C.R. 944 (S.C.C.). I conclude that a person may be convicted of manslaughter who aids and abets another person in the offence of murder, where a reasonable person in all the circumstances would have appreciated that bodily harm was the foreseeable consequence of the dangerous act which was being undertaken. I further conclude that Davy might fall within this rule on the evidence presented at trial. (my emphasis)

- [9] Walcot knew that Gamblin intended "to settle the score". Walcot drove the car to the house in order to enable Gamblin to carry out that purpose. And Walcot gave the keys to Gamblin to unlock the trunk in order that Gamblin could obtain the rifle to carry out his purpose.
- [10] I have no doubt that the trial judge was correct in accepting Walcot's guilty plea to manslaughter on the authority of the Davy case and based on the facts described to him. And we cannot tell what other facts might have come out if there had been a trial.

IV

- [11] We are concerned here with s.236(a) of the Criminal Code:

MANSLAUGHTER 236. Every person who commits manslaughter is guilty of an indictable offence and liable

- (a) where a firearm is used in the commission of the offence, to imprisonment for life and to a minimum punishment of imprisonment for a term of four years; and (b) in any other case, to imprisonment for life.

That section came into force on 1 January, 1996 and at the same time the previous firearm provision was repealed. Under that previous provision a person who committed the offence of manslaughter in which a firearm was used would have been convicted of both the offence of using a firearm in the commission of an indictable offence and the offence of manslaughter. The minimum sentence for the firearm offence was one year of imprisonment consecutive to the indictable offence sentence.

- [12] I consider that if the additional time attributed to the use of a firearm were disregarded, a term of imprisonment of two years or two years less a day would have been within the "appropriate range" and, as such, would have been a fit sentence. I think that the "appropriate range" would have been between eighteen months and three years. Under the provision repealed on 1 January, 1996 I would have expected the additional consecutive sentence to be one year. The effect would have been to move the total range for this offence

committed by this offender up to thirty months to four years.

- [13] So, in my opinion, a sentence of four years imprisonment, having regard to the direction of Parliament with respect to the minimum sentence for this offence, is not a sentence which is outside "the appropriate range". It is at the bottom of the new range for manslaughter involving the use of a firearm, and that is where the sentence should fall having regard to the gravity of the offence, to the mental element in its commission, and to the circumstances of the offender.
- [14] It follows that, in my opinion, a sentence of four years imprisonment on conviction for manslaughter and as a party to the offence, for Walcot's involvement in the cold blooded execution of two people sitting in bed in their own home is not a sentence which "is so excessive as to outrage the standards of decency", nor is it a sentence which is "grossly disproportionate" to the gravity of the offence and the circumstances of the offender. In short, it would not have offended s.12 of the Charter if it had been imposed on Walcot by the sentencing judge since it would not have constituted "cruel and unusual punishment".

V

- [15] I would grant leave to appeal and I would allow the Crown appeal. I would substitute the mandatory minimum sentence prescribed in s.236(a) of the Code in place of the sentence of two years less a day imposed by the sentencing judge. I would make an allowance of one month for the two weeks spent in pre-trial custody, (see R. V. Wust, [2000] 1 S.C.R. 455), leaving a sentence of three years and eleven months as the substituted sentence.

VI

- [16] That brings me to the treatment to be given to the seventeen months that have elapsed since Walcot was sentenced on 30 November, 1999. During that period, Walcot was serving his sentence. But he was serving it as a custodial sentence in the community under the terms of a conditional sentence order. In my opinion, the usual practice that applies when there is a variation of sentence by the Court of Appeal must apply in this case. The seventeen months already served constitute part of the sentence of three years and eleven months that I would substitute. In other words, the substituted sentence takes effect from the day the original sentence was imposed.
- [17] In reaching that conclusion I have referred to s-s.687(2) of the Code:
687. (2) A judgment of a court of appeal that varies the sentence of an accused who was convicted has the same force and effect as if it were a sentence passed by the trial court. (my emphasis)
- [18] I have also referred to s-s. 719(1):

719. (1) A sentence commences when it is imposed, except where a relevant enactment otherwise provides. (my emphasis)

And I have referred to s.742.1, which authorizes the imposition of a conditional sentence:

742.1 Where a person is convicted of an offence, except an offence that is punishable by a minimum term of imprisonment, and the court

(a) imposes a sentence of imprisonment of less than two years, and (b) is satisfied that serving the sentence in the community would not endanger the safety of the community and would be consistent with the fundamental purpose and principles of sentencing set out in sections 718 to 718.2,

the court may, for the purpose of supervising the offender's behaviour in the community, order that the offender serve the sentence in the community, subject to the offender's complying with the conditions of a conditional sentence order made under section 742.3.

(my emphasis)

[19] From the wording of s.742.1(a) it is clear that a conditional sentence is a sentence of imprisonment. Like all other sentences, it begins to run when it is imposed. If it is varied by this Court, the variation takes effect from the date of the original sentence in accordance with the provisions of the Code to which I have referred and to the invariable practice of the Court. In accordance with s-s.719(1) there would have to be an enactment permitting a different starting date before such a date could be imposed.

[20] So what must happen is that Walcot must surrender himself into custody and begin serving the remainder of his sentence in the appropriate prison facilities. But when he does so, he will receive credit for the time served on his conditional custodial sentence in the community from the date when that sentence started until he surrenders himself into custody.

[21] The conclusion I have reached is consistent with the principles governing conditional sentences, including s.742.6(9)(d) which explicitly provides that where the court terminates a conditional sentence order, because of a breach of that order, the time already served on the conditional sentence continues to count as part of the sentence. Section 742.6(9)(d) reads in this way:

(9) Where the court is satisfied, on a balance of probabilities, that the offender has without reasonable excuse, the proof which lies on the offender, breached a condition of the conditional sentence order, the court may . . .

(d) terminate the conditional sentence order and direct that the offender be committed to custody until the expiration of the sentence. (my emphasis)

[22] The conclusion I have reached is also consistent with the observations of Madam Justice Arbour, for the Supreme Court of Canada, in R. V. Wust, where, at para. 22, she said:

... it is important to interpret legislation which deals, directly and indirectly, with mandatory minimum sentences, in a manner that is consistent with general principles of sentencing, and that does not offend the integrity of the criminal justice system. (my emphasis)

[23] The time served under the conditional community custodial sentence, prior to the sentence being varied by this Court, is the precise amount of time that may be deducted from the balance of the sentence to be served in prison. There is no statutory authority for allowing additional time to be deducted. The conditional custodial sentence being served in the community is part of the sentence, and time runs in its remorseless way at its constant speed for conditional and non-conditional sentences alike.

[24] In the result, if Walcot's sentence were to be varied so that it changed from two years less a day of imprisonment in the community under a conditional sentence to three years and eleven months, the balance of which is to be served in prison, then Walcot will have served more than one-third of his sentence and would, I suppose, be eligible for full parole, on conditions which could be not dissimilar from those imposed on him under his conditional sentence order.

VII

[25] In summary, I would grant the Crown's application for leave to appeal, I would allow the Crown appeal, and I would substitute a sentence of three years and eleven months for the sentence of two years less a day imposed by Mr. Justice Davies.

"The Honourable Mr. Justice Lambert"

I AGREE:

"The Honourable Mr. Justice Finch"

Reasons for Judgment of the Honourable Chief Justice McEachern:

[26] This is a Crown sentence appeal against a two-year conditional sentence and probation following a plea of guilty to two charges of manslaughter. In these Reasons I shall refer to the respondent as "the accused".

The Facts

[27] I have taken the following statements of facts from the carefully prepared Reasons for Sentencing of the learned trial judge Mr. Justice Barry Davies, and from the appellant's Statement on Appeal.

[28] The accused, now 22 years with no previous criminal record, was a heavy drinker and a user of drugs including cocaine. Nevertheless, he was regularly employed and leading a reasonably useful life. On the day in question he and a friend decided to go into the bush to do some target shooting with a rifle he owned. This was a prohibited weapon because of the size of its magazine and rapid-fire capacity. The accused had no acquisition certificate or

permit for its ownership or use. He had bought this rifle privately about a month previously and he was intending to sell it privately.

- [29] After spending the afternoon in these pursuits they were joined by his friend's brother, Gamblin, who may have been one of the suppliers of drugs to the accused. These three men were drinking beer and using drugs during their target shooting.
- [30] Later in the day the accused and Gamblin were driving around Vernon. The accused told the police that he was "pretty drunk and in a daze sort of thing." He later told the police Gamblin said "...something like he had to, you know, settle the score, or something like he had to, you know, settle the score, or something like that, you know, like he's - I don't know what he's saying." It is not clear how much time elapsed after the above statements that Gamblin asked the accused to take him to a particular location. When they arrived there, Gamblin opened the trunk and took the rifle out and loaded it. Then he told the accused to follow him. Gamblin went into the basement of a residence but quickly returned, as he could not gain access to the house through the basement. Gamblin then went to the front door, which he kicked in. He then confronted a man and his wife, who were both in bed, and he shot and killed them, allegedly or possibly, in connection with a drug deal. The accused said he heard the shots from outside, and it is uncertain whether he was ever inside the home. He may have been briefly inside because he said he saw the deceased, but he took no part in the killing nor can it be said that he abetted the killer in any way.
- [31] The accused and Gamblin then drove to an isolated location where the gun was dismantled and thrown in some bush. They then separated.
- [32] Later that night, the accused told a friend what had happened. The accused then went directly to the R.C.M.P. and made a full disclosure, implicating Gamblin. He also helped the police recover the weapon.
- [33] There are a number of Informations and Indictments in the file. Gamblin was first charged with one count alleging the first degree murder of both victims in an Information dated 18 June 1997. In a second Information, dated the next day, Gamblin was charged with two counts of first degree murder. The next Information, dated 17 November 1997, charges both the accused and Gamblin with two counts of first degree murder. After a Preliminary Inquiry, the accused was committed for trial on two counts of first degree murder. Next, there is an Indictment, 17 dated June 1998 alleging two counts of first degree murder against both the accused and Gamblin. On March 23, 1999, there were two separate Indictments. One alleged two counts of second degree murder against Gamblin. The other alleges two counts of manslaughter against the accused. On March 29, 1998, the accused pleaded guilty to two counts of manslaughter.
- [34] Gamblin pleaded guilty to both counts of second degree murder and he was sentenced to life imprisonment without eligibility for parole for 17 years.

- [35] The sentencing judge referred to two theories upon which the accused could have been convicted of manslaughter. The first was under Code s. 21(1)(a) as an aider or abettor with objective foresight of bodily harm. The second theory was under Code s. 21(2) as a joint venturer with Gamblin, again with objective foresight of physical harm: *R. v. Davy* (1993), 86 C.C.C. (3d) 385 (SCC).
- [36] The trial judge sentenced the accused on the basis that the facts most closely fell within the "aiding" theory.
- [37] I cannot understand any theory that could have led the Crown to allege first degree murder against the accused. On the facts we have here, there was no evidence coming even close to establishing beyond a reasonable doubt, or at all, that the accused had any of the intentions required for the offence of murder. The Crown seemed to rely on: *R. v. Davy* (supra); but in that case the Crown alleged that the accused participated fully with the co-accused in the attack upon the deceased. I agree with the learned sentencing judge that "... he [the accused] intended no harm or violence to anyone but was overtaken by events and caught up in Gamblin's plans, the true nature of which were unknown to him." (Emphasis added.)
- [38] In fact, I cannot understand how the Crown expected to establish aiding. What was said in *Davy* about the liability of an aider in a manslaughter case must be read in the context of that case. Before it is necessary to consider the mental state required for an aider to be convicted of manslaughter it must first be determined whether he is in fact an aider. Here, there was insufficient evidence to establish the accused knew Gamblin intended to commit any offence or that the accused intended to assist Gamblin in any way. Knowing Gamblin wished to settle a score does not indicate an intention to commit an offence. It is not clear who opened the trunk, but even if the accused did, that does not indicate an intention to assist in the settlement of whatever score was to be settled and the rifle may have been required, for all the accused knew, as a threat or for self defence. The accused here was more in the role of a passive bystander than an aider.
- [39] In *R. v. Dunlop*, [1979] 2 S.C.R. 881, Dickson J. for the majority of the Supreme Court of Canada stated:

Mere presence at the scene of a crime is not sufficient to ground culpability. Something more is needed: encouragement of the principal offender; an act which facilitates the commission of the offence, such as keeping watch or enticing the victim away, or an act which tends to prevent or hinder interference with accomplishment of the criminal act, such as preventing the intended victim from escaping or being ready to assist the prime culprit. Thus, in an early work, *Foster's Crown Law*, p. 350, we read:

... in order to render a person an accomplice and a principal in felony, he must be aiding and abetting at the fact, or ready to afford assistance if necessary, and therefore if A. happeneth to be present at a murder, for instance, and taketh no part in it, nor endeavoureth to prevent it, nor apprehendeth the murderer, nor levyeth hue and cry after him, this strange behaviour of his, though highly criminal, will not of itself render him either principal or accessory. The leading

case of *R. v. Coney* [(1882), 8 Q.B. 534] decided that non-accidental presence at the scene of the crime was not conclusive of aiding and abetting... Cave J. [stated]...: Now it is a general rule in the case of principals in the second degree that there must be participation in the act, and that, although a man is present whilst a felony is being committed, if he takes no part in it, and does not act in concert with those who commit it, he will not be principal in the second degree merely because he does not endeavour to prevent the felony, or apprehend the felon.

[40] Dickson J. also considered the jurisprudence on the presence of an accused when the accused has prior knowledge of the principal offender's intention to commit the offence. He notes that:

...[i]n *Preston v. R.* [[1949] S.C.R. 156]. The appellant and another were accused of having set fire to a school. Mr. Justice Estey delivered the majority judgment in this Court, in the course of which he stated (p. 159) that in order to find the appellant guilty of aiding, abetting, counselling or procuring, it was not only necessary to show that he understood what was taking place and by some act on his part encouraged or assisted in the attainment thereof. Later he said (p. 160) that mere presence does not constitute aiding and abetting, but presence under certain circumstances may itself be evidence thereof.

[41] Dickson J. also considered another case that held that to be an aider the accused must have knowledge of the offence that is going to be committed.

In *R. v. Hoggan* [(1965), 47 C.R. 256 (Alta. S.C., A.D.)], the charge was that the accused aided and abetted in wilfully attempting to defeat the course of justice by attempting to dissuade a witness from giving evidence. Johnson J.A. concluded at p. 260:

There are two things that must be proved before an accused can be convinced of being a party by aiding and abetting. It must be proved that he had knowledge that the principal intended to commit the offence and that the accused aided and abetted him. Where there is no knowledge that an offence is to be committed, the presence of an accused at the scene of the crime cannot be a circumstance which could be evidence of aiding and abetting.

[Emphasis added.]

[42] The Ontario Court of Appeal in *R. v. Morgan* (1993), 80 C.C.C. (3d) 16 (Ont. C.A.); leave to appeal to S.C.C. refused (1994), 87 C.C.C. (3d) vi (S.C.C.), addressed the requirement that an aider must intend to aid. It is not sufficient if his or her actions in fact aid the principal offender if that was not the intention of the accused. The Court stated:

In our view, the trial judge's instructions suggested that the appellant's liability as an aider rested entirely on whether his conduct had the effect of aiding the seller in the sale of the cocaine. The trial judge should have made it clear that the appellant was only liable if he intended to assist the seller. The directions with respect to the requisite culpable mental state were inadequate and necessitate the quashing of the conviction on count 9.

[43] The Ontario Court of Appeal in *R. v. McDaid* (1974), 19 C.C.C. (2d) 572 (Ont. C.A.) addressed the issue of whether an accused could be found to be an aider without actual knowledge of the offence, but because the accused was wilfully blind. Martin J.A. for the Court stated:

In order to sustain the conviction it is necessary for the prosecution to prove that the appellant aided or abetted the keeping of the liquor for sale as he himself was in no way an actual participant in the sale of liquor on the premises. Having regard to the fact that the appellant was in control of the premises his failure to prevent the sale of liquor if he was aware that liquor was being sold would, in our view, have been sufficient to constitute aiding or abetting. However, there is no evidence that the appellant was aware that liquor was being sold and in our view the evidence falls far short of establishing wilful blindness on the part of the appellant with respect to the sale of liquor. There is no evidence that the appellant's suspicions were aroused with respect to liquor being sold and that he wilfully shut his eyes to that fact. In the result, we are all of the view that there was no evidence upon which it could be found that the appellant was a party to the offence of keeping liquor for sale by reason of having aided or abetted the commission of such offence.

[44] The necessary intention of the accused as an aider to murder or manslaughter was explained by Arbour J.A., as she then was, for the Ontario Court of Appeal in *R. v. Cribbin* (1994), 17 O.R. (3d) 548 (C.A.). Arbour J.A. stated that:

The jury should have been instructed that the appellant could only be found guilty of murder as Reid's accomplice if he knew of Reid's intention to kill Ginell or to cause him bodily harm that he knew was likely to cause death, and if he, Cribbin, intended to aid or abet Reid. Alternatively, under s. 21(2), Cribbin could be found guilty of murder if the jury were satisfied beyond a reasonable doubt that he formed an intention in common with Reid, or with Reid and others, to rob Ginell, and that Cribbin knew that the commission of murder would be a probable consequence of carrying out that intention. More specifically, under subsection (2), the jury would have to be instructed that Cribbin's liability for the murder committed by Reid would only arise if Cribbin knew that Reid would probably kill Ginell, in circumstances amounting to murder. The jury should then have been instructed about the possibility of Cribbin being guilty only of manslaughter, although as an aider and abetter to the murder committed by Reid: *R. v. Davy*, S.C.C., December 16, 1993 [now reported [1993] 4 S.C.R. 573, 86 C.C.C. (3d) 385]. If the jury were left in doubt about Cribbin's knowledge of Reid's intention to kill Ginell, or to cause him bodily harm that he knew was likely to cause death, Cribbin could be convicted of manslaughter if he intended to aid or abet Reid in assaulting Ginell, and if a reasonable person in the circumstances would have appreciated that bodily harm was the foreseeable consequence of the dangerous act which was being undertaken: *R. v. Davy*, supra, per McLachlin J. at p. 9.

- [45] In order for the accused to be convicted as an aider in the murders committed by Gamblin, he must have assisted Gamblin or acted in a way to facilitate the commission of the offence. Additionally, the accused must have intended to assist Gamblin in the offence; it is not sufficient if the accused inadvertently gave assistance. Also, the accused must have understood what was taking place when Gamblin went to commit the murders. He must have had knowledge that Gamblin intended to murder the victims.
- [46] Over-charging for the purpose of obtaining a plea to a lesser offence is a very serious abuse of prosecutorial discretion. I am hesitant to conclude that that happened here, but the history I have recited probably explains why the accused would plead guilty to manslaughter, even though he faced a possible minimum sentence of four years. He had to avoid the risk of a life sentence without parole for 25 years on a trial with a jury in a very ugly case. I shall return to this question when I come to discuss the considerations to be taken into account in determining the constitutionality of a mandated minimum sentence as it appears to me there may have been a serious miscarriage of justice in this case.
- [47] Section 236(a) of the Criminal Code provides for a minimum sentence of four years when a weapon is used in the commission of the offence of manslaughter. The learned trial judge concluded that, but for this provision, the proper sentence for this offender for this offence would be a custodial sentence of two years less one day, and that a sentence of four years would be grossly disproportionate and therefore cruel and unusual punishment in breach of s. 12 of the Canadian Charter of Rights and Freedoms.
- [48] The trial judge then concluded that it would be inappropriate to declare the mandatory punishment provision for manslaughter with a firearm unconstitutional, so he elected instead to provide the accused with a constitutional exemption. On this basis, the accused was sentenced to a custodial sentence of two years less one day, to be served in the community on conditions that he remain under "house arrest" in the home or on the property where he resides between 8:00 p.m. to 6:00 a.m. daily except for the purpose of employment and the performance of 240 hours of community service and other exceptions approved by a bail supervisor. He was also directed to undertake alcohol and drug counselling and other standard provisions. He has now served 17 months of his conditional sentence.
- [49] The principle reasons considered by the trial judge in imposing the above sentence included the age of the accused and the lack of previous convictions, the fact that his participation in this awful event was unintended, and the fact that he would have to serve his sentence in protective custody because of his assistance to the police, without which this double murder might never have been solved.
- [50] This sentence was imposed before the recent judgment of the Supreme Court of Canada in *R. v. Morrisey*, [2000] S.C.J. No. 39, where some of the questions arising on this appeal are fully considered. In that case, the accused pleaded guilty to criminal negligence causing death and unlawfully pointing a firearm. The accused's culpability as the person causing the

death in question seems to have been far more serious than that of the accused in this case. The trial judge in *Morrissey* held that the correct sentence would have been two years plus the further mandatory one-year sentence, and that the mandatory four-year sentence was cruel and unusual punishment. In the result, he imposed a sentence of three years.

[51] Both the judges of the Court of Appeal of Nova Scotia and Gonthier J., who wrote the majority judgment of the Supreme Court of Canada, were of the view that a sentence of four years in the circumstances of that case was not grossly disproportionate. In his Reasons for Judgment, Gonthier J. embarked upon an elaborate analysis that required him to consider all relevant contextual factors, including the gravity of the offence, the personal characteristics of the offender, and the particular circumstances of the case for the purpose of determining "what range of sentences would have been appropriate to punish, rehabilitate or deter this particular offender or to protect the public from this particular offender": *R. v. Smith*, [1987] 1 S.C.R. 1045 at 1073. Gonthier J also referred to his earlier decision in *R. v. Goltz*, [1991] 3 S.C.R. 485 at 500, where he further defined these factors as "...the actual effect of the punishment on the individual, the penological goals and sentencing principles upon which the sentencing principles are fashioned, the existence of valid alternatives to the punishment imposed and a comparison of punishments imposed for other crimes in the same jurisdiction."

[52] He then commented that the contextual factors must be evaluated in light of the particular circumstances of the offender before the court. He said, at 10-11:

If the sentence is grossly disproportionate for the individual offender, the court then proceeds to analyse whether the infringement can be justified under s. 1 of the Charter. If it is not disproportionate for the individual offender then the court still has to consider the constitutionality of the sentence with reasonable hypotheticals. If the sentence would be grossly disproportionate in a reasonable hypothetical case, then the only refuge for the sentencing provision can be found under s. 1.

[53] In most cases, I would not consider a sentence of four years for the offence of manslaughter to be grossly disproportionate. I say this because for as long as I can remember, the usual range of sentences for manslaughter in this province has been from eighteen months to six years. There have been exceptions where suspended sentences have been allowed in some cases, and longer sentences up to life in more serious cases, but the great majority of cases fall within the range I have mentioned.

[54] The unusual circumstances of this case, however, persuade me that, like the trial judge, I should follow the example of Gonthier J. in *Morrissey*, and undertake a contextual analysis. I say this principally because the imposition of a minimum sentence for manslaughter on a person first charged with first degree murder, but who did not cause a death, but pleads guilty to manslaughter, and is being held responsible only as an aider, requires careful consideration of the degree of moral culpability that should be assigned to this offender. I shall follow the approach used by Gonthier J.

[1] Gravity of the Offence

- [55] There can be no doubt about the seriousness of the offence, particularly when two persons have been executed in a most cruel and callous way. But the accused did not kill these people, and his participation must be examined in view of what he actually did, and what he knew. Crown counsel placed considerable emphasis on the fact that the accused owned a prohibited weapon, and he was addicted to alcohol and drugs. In my view, these may be aggravating factors, but they did not form part of the *actus reus*.
- [56] What the accused did, contributing to his culpability, was to be present when he knew Gamblin said he had a score to settle and he may have opened the trunk as requested. Whether the accused could have stopped the killer from getting at the gun is not known. Moreover, nothing more was disclosed to the trial judge about what the accused knew about the nature of the score to be settled, or whether the gun was to be used aggressively, or merely as a threat, or for self-defence. I am not able to ascribe any measure of culpability to the accused for following the killer to the house because, as just mentioned, he did not know what was likely to happen. He was a person "caught up" in something to which he contributed only to the extent just mentioned.
- [57] Being the source of a weapon that was used without any participation by him in the death of two persons is certainly a serious matter but on careful analysis it does not amount to aiding. Manslaughter, even as a party, is also a very serious matter. I have the view, however, that the culpability of the accused in this case is not nearly as serious as that of the accused in *Morrissey* who, while heavily intoxicated, carelessly permitted a loaded sawed-off rifle to discharge, killing a person. Similarly, I would not put the culpability of the accused in this case as high as a drunken driver who causes death by wanton and reckless driving.
- [58] What is particularly troubling is the circumstances of the plea as already described. Although we cannot go behind the plea, the circumstances in which it was made and the likelihood of a not guilty plea and possible conviction of a much more serious charge are relevant to the assessment of the culpability of the accused. It cannot be disputed that manslaughter is a very serious offence, but manslaughter by a person who does not cause death, as in the circumstances of this case, is of a different and lesser order of seriousness. In this connection, I have examined all the material filed by counsel regarding the circumstances under which the mandatory four-year sentences for offences committed with a firearm were enacted and I note no mention or recognition of the fact that persons convicted as aiders, regardless of the circumstances, would be subject to the minimum sentence. The culpability of the accused must be tempered in this case by the circumstances I have described.

(2) Particular Circumstances of the Offender and the Case

- [59] In *Morrissey*, the accused was heavily intoxicated by both liquor and drugs, and he was guilty of wanton and reckless management of a loaded rifle causing a death. He was the actor who caused the death. He also took steps to hide the body. There were some mitigating factors,

such as the absence of a previous record, he was genuinely remorseful, he cooperated with the police, he pleaded guilty, he served five months pre-conviction imprisonment and he was able to support himself. On balance, however, it was found by the Supreme Court of Canada, which took a much sterner view than the trial judge in that case, that the mitigating factors did not offset the aggravating factors. This seems to be based largely on the fact that the offence was based on negligence, where mitigating factors are not unexpected.

[60] The accused in this case has most of the same mitigating factors to his credit, and some obvious aggravating factors, including his addictions, his possession of a prohibited weapon, and his participation, if it was such, in the commission of the offence. In his favour are the fact that he was much younger than Morrissey, the limited knowledge he had about Gamblin's intentions, and the fact that he did not actually kill anyone, all of which are, in my view, substantial mitigating factors on a charge of manslaughter. It may be useful to mention the views of the learned trial judge, who said this about the accused:

[73] I also accept Walcot's assertion that he is genuinely remorseful for his involvement in the deaths of Mr. and Mrs. Knapp. Both his actions in assisting the police and his words to the probation officer, Mr. Amy, and to Dr. Ley as well as to the court at the conclusion of the sentencing hearing convince me that Mark Walcot feels true guilt and remorse for his actions. [74] I am additionally satisfied that Walcot has made significant efforts at rehabilitation since his pre-trial release from custody. I am told that he has fully complied with all terms of his interim release pending this disposition, including abstinence from the alcohol and drug use which led to his association with Michael Gamblin and the drug scene in which he had been embroiled in the months before these events. He has a history of gainful employment which was only interrupted by these events and has good prospects for future employment.

[61] In my judgment, the mitigating factors on this issue offset the aggravating factors by a wide margin.

(3) The Actual Effect of the Punishment on the Offender

[62] As Gonthier J. said in Morrissey at 13, "...this factor requires the reviewing court to fully understand the impact of the sentence as it will actually be served." As I read what Gonthier J. has said, however, it appears this is largely a factor that militates against a finding of disproportionality because it refers to the various parole opportunities, and the reduction in the sentence for time served, as stated in *R. v. Wust*, [2000] 1 S.C.R. 455.

[63] In this case, however, in addition to living under an apparently unfair charge of first degree murder for over a year, the accused has already served 17 months of his conditional sentence. The imposition of the mandatory sentence now would require him to begin imprisonment for a term of not more than 31 months (48 months less 17 months) in the midst of his apparently successful rehabilitation. It is important to note what the trial judge said in this connection:

- [94] In my view, there are four ways in which Walcot will be particularly effected by a four year mandatory minimum sentence. They are:
- a) The mandatory minimum sentence would be served for a crime in which Walcot was involved only as a party and which he did not subjectively intend to commit; b) The length of a mandatory minimum sentence of four years imprisonment would be more than double that which I have determined to be otherwise appropriate; c) The mandatory minimum sentence of four years imprisonment would at least initially have to be served in a federal penitentiary amongst society's most hardened and violent criminals; and d) Walcot would almost certainly have to request that the mandatory sentence be served in protective custody rather than in general population because he directed the police to Gamblin and assisted them in obtaining Gamblin's conviction for murder. Each of these has a bearing on the question of whether such a sentence would be grossly disproportionate.
- [64] In addition, denunciation and deterrence are among the principal reasons for the enactment of this minimum sentence. Although they are valid sentencing principles, they should receive little weight in the unusual circumstances of this case.
- [65] None of these factors are conclusive, but I would think they fall very much on the accused's side of the weighing process.

Penological Goals and Sentencing Principles

- [66] The discussion of this factor in *Morrissey* and in the material I have mentioned discloses an understandable Parliamentary initiative to establish, along with other considerations, a punitive regime when firearms are used in the commission of offences. It is apparent, however, that the accused did not use a firearm and the facts of this case do not fit comfortably or possibly at all with Parliament's purpose. As I have said, the material does not include any mention of minimum sentences for aiders and abettors. No doubt, some aiders and abettors may deserve the mandatory minimum sentence, but others may not, and this accused deserves favourable consideration on this question, especially when proper weight is given to the other principles of sentencing established in sections 718 and 718.2 of the Criminal Code described in cases such as *R. v. Gladue*, [1999] 1 S.C.R. 688 (S.C.C.), particularly moral culpability and limited interference with liberty.
- [67] At the end of the weighing, I consider that this factor, "Penological Goals and Sentencing Principles", also favours the accused.
- [68] On balance, therefore, I conclude the trial judge was right in concluding, as I do, that a four-year sentence in all the circumstances of this case is grossly unfair, excessive and likely to outrage society's sense of decency. Although not mentioned by the trial judge, I think the Crown was wrong to charge the accused with first degree murder and that fact may have contributed to a miscarriage of justice. Those facts undoubtedly contributes to everyone's sense of decency and proportionality.

[69] It follows, in my view, that the sentence sought by the Crown in this appeal would be cruel and unusual although, as this was a Crown appeal, it may only be necessary for us to find that the sentence imposed by the trial judge was a fit one for all the reasons I have mentioned.

[70] If it is necessary to go further in obedience to the regime described by the majority in Morrissey, I note that Gonthier J. at para. 29, wrote:

These contextual factors must be first evaluated in light of the particular circumstances of the offender before the court. If the sentence is grossly disproportionate for the individual offender, the court then proceeds to analyze whether the infringement of s. 12 can be justified under s. 1 of the Charter.

[71] The Court in Morrissey did not have to consider the operation of s. 1 because it found no gross disproportionality either upon a consideration of the factors affecting the individual accused, or on the basis of reasonable hypotheticals.

[72] The jurisprudence makes it clear that, in order to apply section 1, there must be a rational connection between the way a provision for a mandatory sentence works and its objective. The objective of the provision is to create a fixed minimum sentence for those with a high degree of culpability who use a firearm in the commission of the offence. There would be no difficulty finding a rational connection in many cases, particularly where the sentence, but for this provision, would normally be four years or more. Where the circumstances are different, and the mandated sentence is determined to be grossly disproportionate, then the rational connection becomes increasingly tenuous. In a case that is very close to the line, the Crown, which carries the onus, may be able in some cases to establish such a connection in order to support the Parliamentary objective. In this case, however, where the circumstances are unfair and the sentence grossly disproportionate, the rational connection has not been established.

[73] Moreover, the Crown has not satisfied the modified minimal impairment test which requires proportionality between the effects of the provision offending section 12 and the objective of the provision. The effects of this provision in this case, as already described, where the accused did not use a firearm in the commission of the offence, and when the other circumstances are considered, are disproportionate to the objectives of denunciation and deterrence, and preclude the application of section 1.

[74] That being so, it is unnecessary to consider reasonable hypotheticals.

[75] The trial judge did not find it necessary to declare the minimum sentence for this offence with a firearm unconstitutional because there will undoubtedly be many cases where Parliament's intention can be served by the imposition of such a sentence without offending against Charter s. 12. Instead, the trial judge granted the accused a constitutional exemption. I am not satisfied the trial judge was wrong in doing so.

[76] I conclude that the Crown has not satisfied the onus resting on it under section 1. I remain satisfied that the sentence imposed upon the accused was a fit and lawful one. I would give leave to appeal but I would dismiss the Crown's appeal.

"The Honourable Chief Justice McEachern"

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