COURT OF APPEAL FOR ONTARIO

CITATION: R. v. Warner, 2019 ONCA 1014
DATE: 20191223
DOCKET: C67288

Pardu, Roberts and Thorburn JJ.A.

BETWEEN

Her Majesty the Queen

Respondent

and

Joshua Warner

Appellant

Delmar Doucette, for the appellant

Deborah Krick, for the respondent

Heard: December 5, 2019

On appeal from the sentence imposed on February 23, 2018 by Justice Antonio Skarica of the Superior Court of Justice, with reasons reported at 2018 ONSC 1799.

REASONS FOR DECISION

[1] Joshua Warner appeals from an 18-year sentence imposed for manslaughter, before nine years credit for pre-sentence custody.

[2] The offence was committed at a house party in Hamilton. The appellant attended the party with his co-accused, Tyrone Chambers. Chambers had

recruited the appellant to attend with him to protect him from another individual. The appellant brought a gun, and knew Chambers was also armed.

[3] A dispute arose at the party over a trivial issue, the kind of music that was played. Chambers fired three shots, killing Brandon Musgrave and wounding Kauner Chinambu. The appellant also brandished a gun and fired a shot that wounded Ted Tsibu-Darkoh. The appellant admitted guilt to the aggravated assault of Tsibu-Darkoh and was sentenced to six years for that offence.

[4] Following a joint trial, Chambers was convicted of second-degree murder of Musgrave and aggravated assault of Chinambu and Tsibu-Darkoh. The appellant was convicted of manslaughter in relation to the killing of Musgrave, and as a party to the aggravated assault of Chinambu. By brandishing a gun and backing up Chambers' actions, the appellant aided Chambers to commit offences but did not have the intent required to support a murder conviction.

[5] The sentencing judge imposed an 18-year sentence for the manslaughter of Musgrave and a six-year sentence for the aggravated assault of Chinambu. Both sentences were to be served concurrent to the six-year sentence imposed for the aggravated assault of Tsibu-Darkoh.

[6] The sentencing judge carefully reviewed the mitigating and aggravating factors. The mitigating factors included:

- Although the he grew up in a home with a loving mother, the appellant had no contact with his father (but for one isolated phone call) after he was nine years old. The appellant fell in with “the wrong crowd”.
- The appellant was relatively young. He was 21 years old at the time of the offence and 29 years old at the time of sentencing.
- The appellant continued to have “significant family support” from his mother, three siblings and maternal grandmother, and from his girlfriend.
- The appellant had completed his high school education.
- The appellant did not appear to suffer from any drug or alcohol addiction, although he used marijuana both in the community and while in custody.
- The pre-sentence report reflected the appellant’s remorse for his actions. Additionally, when asked if he had anything to say before he was sentenced, the appellant told His Honour: “I know my words can’t change anything you guys feel about what [I did] but I’m truly sorry…I wish that day never happened.”

[7] The aggravating factors included:

- Firearms were used in acts of reckless and senseless violence.
- The victims were unarmed and targeted.
- Two of the victims suffered serious injury and one of them death.
- The appellant had been prohibited from carrying a weapon.
- The appellant attended the party with a loaded firearm.

- The appellant was a knowing party to Chambers' aggressive behaviour and backed him up in the series of aggressive acts that led to the shooting.
- The appellant's gun was never found.
- The appellant fled from the scene and then to South America.

[8] Additionally, the appellant had a criminal record. As a youth, he received dispositions in four proceedings in 2004 to 2006 for failing to comply with a recognizance, failing to comply with a disposition (x3), possession of a scheduled drug for the purpose of trafficking (x2), robbery, possession of stolen property, possession of a prohibited weapon, tampering with a firearm serial number, flight from the police, and obstructing a police officer. His longest disposition as a youth was time served of 147 days, in 2006. As an adult in early 2009, he had been sentenced to 31 days in jail in addition to 147 days pre-sentence custody. This was for failure to attend court, failure to comply with a youth disposition, and possession of a scheduled drug. Later in 2009, the appellant was sentenced to 35 days in addition to 148 days pre-sentence custody for theft under.

[9] In arriving at an 18-year sentence for the manslaughter, the sentencing judge indicated that "Warner was going to back up Chambers regardless of how bullying, dangerous, or homicidal Chambers chose to be." This is inconsistent with the jury verdict acquitting the appellant of second-degree murder and convicting him as a party to manslaughter. The appellant did not shoot Musgrave, nor did he

intend that Musgrave be killed or suffer from bodily harm likely to cause death, factors highly relevant to the appellant's moral culpability.

[10] The sentencing judge compounded this error by referring to the offence as "aggravated manslaughter". In *R. v. Devaney*, 213 C.C.C. (3d) 264, at para. 33, this court indicated that using subcategories of manslaughter is not appropriate:

> The first question is whether it is appropriate to label a subcategory of manslaughter as "aggravated manslaughter" for the purpose of sentencing. In my view, it is not useful to attach a label to a subcategory of the offence, then to try to pigeonhole the facts of any case into the label. Adding a descriptive label to a set of facts within the defined offence adds a level of complexity to the sentencing exercise that is both unnecessary and potentially diverting for the court and could lead to errors.

[11] These are errors in principle that had an impact on the sentence. It falls to this court to determine the appropriate sentence. We turn therefore to this court's jurisprudence about sentencing parties to manslaughter.

[12] In *R. v. Almarales*, 2008 ONCA 692, 237 C.C.C. (3d) 148, the offender arguably played a similar aider role to the shooter, who was a long-time friend he met in prison. The offender drove the shooter to and from the offence site, knowing the shooter had a gun. He assisted the shooter in intimidating the victims (e.g. putting a knife to a victim's throat) and generally complied with the shooter's directions (e.g. to switch lights on/off, turn up the volume on a stereo).

[13] On appeal, amongst other things, this court reduced the 20-year manslaughter sentence to 12 years. Watt J.A. found the sentencing judge erred in

considering the offender a principal in the manslaughter and failing to consider the offender had been in pre-sentence custody for about 21 months. He wrote at para. 144 that 20 years was "beyond the range of sentence imposed on secondary participants in manslaughter cases. Indeed, few persons convicted of manslaughter as a principal, who have been in custody prior to sentence for 21 months, receive a sentence of imprisonment for 20 years."

[14] The jurisprudence suggests that 12 or 13 years is generally appropriate for aiders or abettors to manslaughter, where those offenders have a high degree of moral culpability.[1]

[15] We would therefore grant leave to appeal from the manslaughter sentence, allow the appeal, and substitute a sentence of 15 years, concurrent to the six-year sentence for the aggravated assault of Chinambu, and concurrent to the six-year sentence for the aggravated assault of Tsibu-Darkoh. After deducting nine years of pre-sentence custody, the net sentence is six years. A 15-year sentence is very substantial and adequately reflects the aggravating circumstances surrounding the appellant's conviction as a party to the manslaughter.

"G. Pardu J.A."
"L.B. Roberts J.A."
"J.A. Thorburn J.A."

---

[1] *R. v. Thompson*, [2005] O.J. No. 3351, aff'd 2008 ONCA 693; *R. v. Jones-Solomon*, 2015 ONCA 654, 329 C.C.C. (3d) 191; *R. v. Chretien*, [2009] O.J. No. 2578; *R. v. Dirie*, 2018 ONSC 5536; *R. v. Monk*, 2003 BCSC 449, aff'd 2005 BCCA 394, 198 C.C.C. (3d) 495.