

Court of Queen's Bench of Alberta

Citation: R v KDS, 2021 ABQB 934

Date: 20211122
Docket: 170472880Q1
Registry: Edmonton

Between:

Her Majesty the Queen

Crown

- and -

KDS

Accused

NOTE: This judgment uses initials to protect the identity of victims and witnesses.

Reasons for Judgment of the Honourable Mr. Justice J.J. Gill

Introduction

[1] The Accused was convicted after trial of the second-degree murder of his father. The *Criminal Code* provides that the sentence for second degree murder is imprisonment for life with no eligibility to apply for parole for a minimum of 10 years and a maximum of 25 years. The issue to decide is what length of parole ineligibility is appropriate.

Background

[2] The background is set out in detail in the trial decision: *R v KDS*, 2020 ABQB 187. The following is a summary of the events.

[3] KDS was born in 1981. The Deceased was 71 years old at the time of his death. KDS is the biological son of the Deceased. NS is the biological brother of KDS. SS was the wife of KDS. TB was the sister-in-law of KDS. LS is the son of KDS.

[4] At the time of the event, KDS and the Deceased resided in separate residences on the same rural property in Alberta. KDS lived in the main residence on the property with his wife and five children. The Deceased lived alone in a small cabin.

[5] On April 28, 2017, KDS's family hosted a lunchtime family gathering at their home. In attendance were KDS, SS, KDS's children, TB and her children. The plan was to stay outside, enjoy a campfire and cook hotdogs.

[6] KDS went into the house to get a knife to open the packaging on the hotdogs. He emerged from the house, approached SS and grabbed her by the shoulder. He told SS to pack up the kids and go to Whitecourt (the town where her mother resides).

[7] KDS turned and walked away from SS towards the Deceased's cabin which was approximately 100 yards away from the main house. KDS entered the Deceased's cabin. KDS's son, LS (age 7 at the time), was in the cabin with the Deceased.

[8] KDS became angry and began to yell and curse at the Deceased. KDS punched the Deceased multiple times in the head with a closed fist. The force of the punches caused the Deceased to fall out of the chair and onto the floor. He continued to punch the Deceased in the face while he was laying on the ground causing the Deceased to bleed from the face and head.

[9] SS observed LS riding his bike from the Deceased's cabin. LS told SS, "Dad's punching Grandpa." SS ran to the Deceased's cabin and went inside. KDS was standing near the Deceased who was lying on the floor bleeding. SS screamed at KDS to leave. KDS did not leave. SS called 911.

[10] While SS was on the line with 911, KDS made a telephone call to his brother, NS. The Accused left a voicemail message for NS stating, "I just confronted our family demon that fucking ruined everybody's fucking lives. I need your backup in court for what the fuck he did and how he fucked everybody's lives. I had to save my family and I don't give a fuck about anything else. Call me back when you get this as soon as fuckin possible".

[11] KDS continued to yell obscenities at the Deceased. KDS told SS to get out of the Deceased's cabin or she would get hurt. SS remained in the Deceased's cabin while the attack continued. KDS then took a folding knife from his pocket and opened the blade. KDS began stabbing the Deceased in the upper chest and neck with the knife. SS ran out of the cabin and down to her family.

[12] KDS stabbed the Deceased eighty-six (86) times. Fifty (50) of the stab wounds were sustained to the torso of the Deceased. Additional stab wounds to the extremities of the Deceased suggests defensive injuries. The Deceased's head was partially severed from the neck. Blunt force injuries to the head were also noted.

The Crown

[13] The Crown submits that the appropriate period of parole ineligibility is between the range of 15 to 17 years.

[14] The Crown submits that the relevant circumstances of the offense include that KDS possibly killed his elderly father for revenge or retaliation. KDS armed himself with a knife prior to going to the cabin, called his brother asking for his backup in court, and told his wife to leave the cabin as he did not need her to see what was about to happen.

[15] Aggravating factors include: the use of gratuitous violence on an unarmed and defenceless victim, murder committed in the presence of an innocent bystander, the abuse of power and trust, circumstances of domination or control, circumstances of retaliation (or revenge), and violation of the deceased's right to feel safe in their own home.

[16] In terms of character, the Crown notes that prior to this offense KDS was a contributing member of society, a father and a husband who had some mental health issues.

[17] The lack of a criminal record and KDS's mental illness are mitigating factors. Even though mental illness does not provide a full defense it may mitigate a sentence when determining parole ineligibility, in part because it may explain an apparently out of character behaviour of the Accused and thereby reduces moral blameworthiness: *R v Tremblay*, 2006 ABCA 252.

[18] The Crown referred to a number of cases which imposed parole ineligibility periods of between 15 and 17 years. It noted that striving for parity is one of the relevant principles of sentencing.

The Defence

[19] The defence submits that the minimum parole ineligibility period of 10 years is appropriate.

[20] The defence notes KDS voluntarily surrendered to the police shortly after the event and admitted from the outset that he had caused the death of his father. He was originally charged with the offence of first-degree murder but after a preliminary inquiry he was committed to stand trial on the offence of second-degree murder as there was insufficient evidence of planning or deliberation. The circumstances of the offence were presented by way of an Agreed Statement of Facts. The only issue to be determined at trial was KDS's ability to appreciate the nature and quality of his actions at the time of the index offence.

[21] The defence notes that the Court found that KDS reacted in response to suppressed memories. While retaliation is not an excuse for the acts, KDS's history of abuse and trauma provide insight into his distorted thinking leading to the commission of the offence. Although there was a motive and the act was not random, there was no premeditation or planning. These findings significantly reduce KDS's degree of moral culpability.

[22] KDS's mental illness significantly contributed to the commission of the offence and his moral culpability is accordingly reduced. This argues for a reduction in the period of parole ineligibility to 10 years.

[23] While KDS did not enter a guilty plea, KDS admitted the facts of the offence and immediately took responsibility for causing the death of his father. He has demonstrated significant remorse since the offence and continues to suffer from major depression though he has been successful with treatment in this regard.

[24] KDS has been in custody since the date of the index offence, April 28, 2017. He has been cooperative and compliant since his arrest and there have been no concerns about his conduct while he has been in custody. KDS has been medication compliant since his diagnosis and has demonstrated significant progress towards his ultimate rehabilitation. No institutional problems have been reported and he has been moved to a medium security facility.

[25] Though this was a violent offence, KDS demonstrates is of otherwise good character. He has no criminal record and is at very low risk of reoffending. Neither KDS's circumstances nor the circumstances of the offence require an increase from the minimum parole ineligibility period of 10 years.

Victim Impact

[26] Victim impact statements were filed by several family members. They described the devastating emotional and financial impacts that this crime has had and continues to have on all the family. It has caused depression, feelings of anxiety and fear for the future.

Legal Framework

[27] Section 745.4 of the *Criminal Code* provides that:

745.4 Subject to section 745.5, at the time of the sentencing under section 745 of an offender who is convicted of second degree murder, the judge who presided at the trial of the offender or, if that judge is unable to do so, any judge of the same court may, having regard to the character of the offender, the nature of the offence and the circumstances surrounding its commission, and to the recommendation, if any, made pursuant to section 745.2, by order, substitute for ten years a number of years of imprisonment (being more than ten but not more than twenty-five) without eligibility for parole, as the judge deems fit in the circumstances.

[28] In *R v Shropshire*, 1995 CanLII 47 (SCC), Justice Iacobucci noted that the 10-year parole ineligibility period for second degree murder is a minimum reserved for offenders whose cases are the least egregious. Exceptional circumstances are not required to achieve a longer period of parole ineligibility. He stated at paragraph XXIX at page 8:

Section 742(b) of the *Code* provides that a person sentenced to life imprisonment for second degree murder shall not be eligible for parole "until he has served at least ten years of his sentence or such greater number of years, not being more than twenty-five years, as has been substituted therefor pursuant to section 744." In permitting a sliding scale of parole ineligibility, Parliament intended to recognize that, within the category of second degree murder, there will be a broad range of seriousness reflecting varying degrees of moral culpability. As a result, the period or parole ineligibility for second degree murder will run anywhere between a minimum of 10 years and a maximum of 25, the latter being equal to first degree murder. The mere fact that the median period gravitates toward the 10 year minimum does not, ipso facto, mean that any other period of time is "unusual."

[29] At paragraph XXXI he continued:

If the objective of s. 744 is to give the trial judge an element of discretion in sentencing to reflect the fact that within second degree murder there is both a range of seriousness and varying degrees of moral culpability, then it is incorrect to start from the proposition that the sentence must be the statutory minimum unless there are unusual circumstances.

[30] In *R v Ryan*, 2015 ABCA 286 (CanLII), Justice Picard stated that s. 745.4CC should be considered with the policies and considerations of s. 718CC. *Ryan*, supra, at paragraph 57, lists a non-exhaustive list of potentially aggravating factors. This list includes: gratuitous violence, murder committed in the presence of an innocent bystander/non-party, abuse of power, abuse of trust, circumstances of domination or control, circumstances of retaliation, or revenge.

[31] *R v Parranto*, 2021 SCC 46, the Supreme Court affirmed at paragraph 10 that the goal in sentencing is a fair, fit and principled sanction. Proportionality is the organizing principle in reaching this goal, and parity and individualization are secondary principles. Individualization is central to the proportionality assessment. Each offence is committed in unique circumstances by an offender with a unique profile. The question is always whether the sentence reflects the gravity of the offence, the offender's degree of responsibility and the unique circumstances of each case.

[32] In *R v Lugela*, 2019 ABQB 412, at paragraph 15, the Court stated that denunciation and deterrence are of primary importance in cases involving second degree murder.

Case Law

[33] Both the Crown and defence refer to a number of cases. Many are distinguishable.

[34] The Crown cases lack the significant mitigating factors present in this case or contain aggravating factors not present in this case. In *R v Bobocel*, 2014 ABQB 570 (CanLII), (15 years), there was aggravating post-offence conduct including an attempt to destroy the victim's body and conceal the crime. The murder appeared to be in response to an altercation earlier in the day and motivated by knowledge that the victim was planning on leaving the relationship.

[35] In *R v Boukhalfa*, 2017 ONCA 660, (15 years), the offender had a criminal record for convictions for violent offences and was bound by a conditional sentence order and a weapons prohibition at the time of the offence. In *R v Roy*, 2016 NBQB 7, (16 years), there were significant aggravating factors including that the offender subsequently set the family home on fire in an attempt to conceal the crime. In *R v Sollows*, 2017 ONSC 2359, the Court accepted a joint submission of 17 years of parole ineligibility. There was evidence that the offender contemplated harming his father in the past and there were elements of planning and deliberation to his conduct. In *R v Tucker*, 2017 NBQB 017 (14 years), aggravating factors included that the offender attempted to hide the victim's body and any evidence of the killing. He also discouraged the victim's fiancé from reporting her missing and was of no assistance in the search for the victim.

[36] The defence cases of *R v McKnight*, 1999 CanLII 3717 (ONCA), (14 years), and *R v Freeman*, 2021 ABQB 854, (13 years) cases are the most relevant. The guilty plea was a significant factor in the *Freeman* case. The other defence cases are clearly distinguishable primarily on the basis of the presence of significant mitigating factors, e.g.: *R v Pyne*, 1997

CanLII 1472 (ONCA), (10 years) involved an altercation, *R v Aristor*, 2020 ONSC 6070, (10 years) involved an altercation and a jury recommendation, *R v Desroches*, 2015 BCSC 1287, (10 years) was a joint submission.

Analysis

[37] After trial, this court found KDS guilty of second-degree murder. The *Criminal Code* provides that the sentence for 2nd degree murder is imprisonment for life with no eligibility to apply for parole for minimum 10 years and a maximum of 25 years. Under section 745.4 of the *Criminal Code*, the Court's task is to determine the term of parole ineligibility that is appropriate, having regard to the character of the offender, the nature of the offence and the circumstances surrounding its commission. Section 745.4 CC has to be considered with the policies and considerations of s. 718 CC.

The Nature of the Offense

[38] This was a brutal, unprovoked attack by KDS on his father. The Deceased suffered eighty-six (86) separate stab wounds. Fifty (50) of the stab wounds were sustained to the torso of the Deceased. The Deceased's head was partially severed from the neck. Blunt force injuries to the head were also noted.

[39] KDS told the police that his father needed to die and stated that he stopped stabbing when his father could no longer hurt anyone.

[40] The murder took place in the victim's cabin. The Deceased was elderly (71), and completely defenseless. The event started in the presence of the Accused's seven-year-old son and the murder took place in the presence of the Accused's wife. At the time of the attack, KDS made a call to his brother and left a message advising him that he would need his help in court.

The Circumstances Surrounding the Offense

[41] While this court concluded that KDS had the requisite intent for murder at the time of the offence, it accepted that KDS was suffering from alcohol withdrawal and major depressive disorder. *R v KDS supra* at para 258.

[42] In addition, this court found that memories of childhood abuse at the hands of his father played a role in KDS's consciousness and state of mind. *R v KDS supra* at para 207:

I also find that on a balance of probabilities, memories of childhood abuse at the hands of his father played an important role in KDS's consciousness and state of mind at the time of the offence. These memories, which likely lay suppressed for a long time, seemingly emerged after KDS suddenly stopped drinking a few weeks prior to the offence. As KDS suffered through alcohol withdrawal and concomitant major depressive disorder, he was forced to confront these traumatic memories without the aid of his longstanding coping mechanism: alcohol. The emergence of these suppressed memories further contributed to the Accused's negative perception of his father around the time of the offence, influencing his thinking and decision-making. Although I accept that these traumatic memories affected the Accused's mental state at the time of the offence, I am not convinced that the emergence of suppressed memories of childhood abuse should be legally characterized as a "disease of the mind".

The Character of the Offender

[43] Although this Court did find that KDS was suffering from alcohol withdrawal and major depressive disorder it had concerns that KDS was malingering some of his symptoms. *R v KDS supra* at para 184:

184 I conclude that KDS is more likely than not malingering the symptoms he reported experiencing on April 28, 2017. I am not convinced on a balance of probabilities that KDS was guided by the sun or that he heard his father's thoughts that day. Beyond the one comment made in the voicemail to NS about a "family demon," KDS did not describe or even imply a perception of supernatural phenomena or psychotic symptoms around the time of the offence. I do not find KDS's reports about perceiving the sun as guiding him that day, or of hearing his father's thoughts at the time of the offence, credible. I observed no indication of psychosis in the police interviews. Neither SS, TB, nor the police witnesses saw indications that KDS was observing or responding to unseen stimuli. KDS mentioned these symptoms, for the first time, months after the offence, in the context of NCR clinical interviews at Alberta Hospital.

185 Moreover, the Accused has reported inconsistent and contradictory descriptions of these symptoms to different experts, and in his testimony at trial. I find Dr. Rai's opinion and analysis regarding malingering to be persuasive.....My conclusion that the Accused was malingering is based primarily on his implausible, incredible, and inconsistent evidence concerning visions of the sun guiding him and of hearing people's thoughts.

[44] Prior to the offense KDS had no criminal record and was a contributing member of society. He was a father and a husband. He has demonstrated remorse. He continues to suffer from major depression but his condition has improved with treatment. He is at very low risk of reoffending.

Conclusion

[45] Based on the nature of the events, the level of KDS's moral blameworthiness is extremely high. This was a senseless, callous and savage attack by KDS on his unsuspecting, elderly and vulnerable father.

[46] Aggravating circumstances include the use of gratuitous violence and the fact that the murder was committed in the presence of another family member. There were circumstances of domination, abuse of power and trust and suggestions of retaliation (or revenge). This Court found that KDS was not credible in relation to some of his self reporting and more likely than not malingered some symptoms.

[47] These factors require an increase from the minimum parole ineligibility of 10 years.

[48] However, there are mitigating factors arising from the circumstances surrounding the offense and the character of the offender. In particular KDS's mental illness and his general favourable background. His criminal conduct in this case was totally inconsistent with his previous life and good character. He had no prior criminal record. He was a father, husband and a reliable provider. He has expressed genuine remorse. He continues to treat his mental illness

and has made significant progress. His conduct since his arrest and while in custody has been exemplary.

[49] These factors support a reduction of parole ineligibility to a period closer to 10 years.

[50] The comparable cases suggest a range for parole ineligibility of between 13 and 15 years.

Decision

[51] Taking into account all the circumstances and balancing the relevant factors I conclude that an appropriate period of parole ineligibility for KDS is 13 years.

Ancillary Orders

[52] I also make the following ancillary orders: a DNA order under *CC* s. 487.051 and a weapons prohibition order under s.109(2).

[53] As requested I also make a non-communication order under *CC* s743.21(1) prohibiting KDS from communicating, directly or indirectly, during the custodial period of his sentence with the following family members SS, NS, TS, LS, AS, JF and CF.

Heard on the 12th day of November, 2021.

Delivered at the City of Edmonton, Alberta the 22nd day of November, 2021.

J.J. Gill
J.C.Q.B.A.

Appearances:

Jeff Rudiak and Trevor Peeters, Alberta Justice
for the Crown

Marshall Hopkins, Hopkins Law
for the Accused