

SUPREME COURT OF NOVA SCOTIA

Citation: R. v. Landry, 2015 NSSC 78

Date: 20150129

Dket: SPH 423072

Registry: Port Hawkesbury

Between:

Her Majesty the Queen

v.

Joseph James Landry

SENTENCING DECISION

Judge: The Honourable Chief Justice Joseph Kennedy

Heard: Nov. 10th - 29th, 2014, in Port Hawkesbury, Nova Scotia

Sentencing: January 29, 2015

Counsel: Shane Russell, Provincial Crown
Steve Drake, Provincial Crown
Luke Craggs, for Defence

By the Court:

[1] We are present here today for the sentencing of Joseph James Landry. There was a jury trial, it commenced on the 10th day of November 2014 and ended on the 29th day of November 2014.

[2] Joseph James Landry was charged with second degree murder in the death of Philip Boudreau.

[3] The jury's verdict was not guilty of second degree murder but guilty of the included offence of manslaughter. So it is manslaughter that is the charge that I sentence on today.

[4] Let's talk about manslaughter for a minute, s.234 **Criminal Code** reads:

Culpable homicide [which means blameworthy homicide] that is not murder or infanticide is manslaughter

[5] The criminal fault in manslaughter is the causing of death by the commission of an unlawful act which is objectively dangerous in the sense

that a reasonable person in the same circumstances as Joseph James Landry would have recognized that is act or series of acts would subject Philip Boudreau to the risk of bodily harm. Bodily harm that was not either trivial or transitory serious bodily harm.

[6] We have no idea what when on in that jury room - how that jury determined the verdict. We were not present when the jury assessed the credibility of witnesses, when that jury found fact sufficient to justify its finding of guilty of manslaughter beyond a reasonable doubt. Because we don't know what that jury did or concluded or how it functioned in the process of determining that verdict, I rely on s.724 of the **Criminal Code** when I determine sentence.

[7] Section 724(2) **Criminal Code** reads:

Where the court is composed of a judge and jury, the court

- (a) shall accept as proven all facts, express or implied, that are essential to the jury's verdict of guilty;

- (b) may find any other relevant fact that was disclosed by evidence at the trial to be proven ...

[8] Essential to this jury's verdict of manslaughter is that they were satisfied that Joseph James Landry caused the death of Philip Boudreau or significantly contributed to the cause of his death, and that he did so by committing an unlawful act or a series of unlawful acts and that when he performed those unlawful acts it was objectively foreseeable that he risked causing serious bodily harm.

[9] I am mindful of the case law and I will make reference to *R.v. Ferguson* [2008] 1 S.C.R. The Supreme Court of Canada in that case found that the trial judge should turn his or her mind to the basis on which he had instructed the jury and should not find facts that are inconsistent with the jury's verdict. Where any ambiguity exists on the factual findings of the jury, the trial judge should consider the evidence and make his or her own findings of fact consistent with the evidence and the jury's findings.

[10] Therefore for purposes of the sentencing of Joseph James Landry, I find fact as follows:

- I find that Joseph James Landry caused the death of Philip Boudreau on the early morning of June 1st, 2013 on the waters off of Petit de Grat, Nova Scotia;
- I find that Joseph James Landry was at all times relevant a crewman on the lobster fishing vessel the Twin Maggies. That vessel was being skippered at the time by his son-in-law Dwayne Samson and there was a third member Craig Landry, and Craig Landry was a significant Crown witness in this matter;
- On that early morning from the Twin Maggies Philip Boudreau was spotted at about 5:55am. Philip Boudreau was operating his 14ft outboard and Joseph James Landry believed at that time that Philip Boudreau was interfering with lobster traps that were the property of the Twin Maggies;

- As the Twin Maggies approached Philip Boudreau's craft, Joseph James Landry fired four shots in the direction of the Boudreau boat and I find that one of those shots hit Mr. Boudreau in the area of the leg, that is testified to in the statement of James Landry, he believed that he hit him in the leg and also there was testimony that Mr. Boudreau shouted that he had been hit in the leg. I am satisfied that he was.
- Philip Boudreau tried to get away but his boat became disabled and this allowed Joseph James Landry, from the Twin Maggies, to grab the bowline on the Boudreau boat and to tie the bowline and to tie the bowline to the spar of the Twin Maggies at which point the Twin Maggies headed out to sea pulling Philip Boudreau's boat behind them.
- Philip Boudreau was somehow able to cut the bowline thus freeing his boat from the Twin Maggies but again leaving it idle in the water.

- The Twin Maggies, the much larger vessel, then rammed the Boudreau craft three times swamping it and causing Philip Boudreau to end up in the water hanging on to a floating gas can.

[11] I do find for sentencing purposes, and I want to make clear, I find that Mr. Joseph James Landry then gaffed Philip Boudreau hooking him with a gaff as he lay in the water and the Twin Maggies again headed out to sea this time dragging the person, dragging the body of Philip Boudreau in the water along side. I am satisfied that the jury could and did accept the gaffing for purposes of determining manslaughter in this matter.

[12] Philip Boudreau is gaffed by Joseph James Landry, he is being pulled out to sea along side the Twin Maggies, he slips off of that gaff but the Twin Maggies comes around and Mr. Joseph James Landry gaffs him again, a second time, and they continue to proceed out to sea, continue to drag Mr. Boudreau along side. At this point Mr. Boudreau comes out of his sweater that he had been wearing and again escapes the gaff. Evidence from Craig Landry that he is still able to tread water at this point. Joseph James Landry gaffs him a third time and the outward journey

continues. The Twin Maggies finally comes to a stop and Craig Landry testified that when he looked over the starboard side he sees Philip Boudreau, at this point he is naked from the waist down, he is not struggling, a white foam is coming from his mouth and he rolls over face down in the water.

[13] I do not consider the evidence of the tying to the anchor for purposes of determining sentencing in this matter because I do not know how the jury treated that evidence. It is possible, as Mr. Craggs says, that they disregarded it or I suppose it is possible that the jury believed that Philip Boudreau was dead at that point and that the tying of the anchor to the body was not what caused his death. I want to make it clear that I stop at the point that he is gaffed for the third time and he is lying face down in the water for purposes of sentencing.

[14] As to that sentence, I am mindful of the principles of sentencing as set out in s.718 of the **Criminal Code**:

718.1 “A sentence must be proportionate to the gravity of the offence and the degree of responsibility of the offender.”

In this province the sentencing Bible, the oft quoted cases ***R. v. Grady*** (1973), 5 NSR (2d) 265 (N.S.S.C.A.D.) has long established the approach taken in criminal sentencing in the Province of Nova Scotia was Chief Justice MacKinnon who stated:

It has been the practice of this court to give primary consideration to the protection of the public and then to consider whether this primary objective can best be attained by a) deterrence or b) reformation and rehabilitation of the offender or c) both deterrence and rehabilitation.

[15] I am satisfied that the public in this province is best protected when citizens respect the “rule of law”.

[16] As to manslaughter sentencing, again I make reference to ***R. v. Creighton*** (1993), 83 C.C.C. (3d) 346:

(S.C.C.) ... Murder entails a mandatory life sentence. Manslaughter carries with it no minimum sentence. This is appropriate. Because manslaughter can occur in a wide variety of circumstances, the penalties must be flexible. An unintentional killing, while committing a minor offence, for example, properly attracts a much lighter sentence than an unintentional killing where the circumstances indicate an awareness of risk of death just short of what would be required to infer the intent required for murder. The point is, the sentence can be and is tailored to suit the degrees of moral fault of the offender. The flexible sentencing scheme under a conviction for manslaughter is in accord with the principle that punishment be meted out with regard to the level of moral blameworthiness of the offender.

[17] So “manslaughter” sentencing must address fact situations that range from “almost accident” at the low end to “almost murder” at the high end. Moral blameworthiness is the key.

[18] I will very quickly cite three cases in relation to specific sentencing in manslaughter cases. The first being ***R. v. Reed***, 2013 ONSC 4247:

The accused pleaded guilty to manslaughter in the brutal beating and stabbing of her mother. The prolonged attack began with a choke hold. The accused then threw her mother to the floor, struck her in the head and body numerous times with a candle holder ... At that point ... the victim was not moving and looked to be unconscious. The accused then went to the kitchen, came back with a steak knife and stabbed her mother multiple times in the head, neck and body. The accused was intoxicated on amphetamines and cocaine at the time of the offence. ... The Court imposed a sentence of 12 years ...

[19] I make reference to ***R.v. Best & Dawson***, [2005] N.S.J. No. 293; 2005 NSSC 199:

Two co-accused were charged in the death of a homeowner during a violent home invasion. Billy Best stabbed the homeowner three times upon entry into the house. He was convicted of second degree murder. Joey Dawson did not kill the homeowner but he fully participated in the home invasion and carried a baseball bat into the home. Joey Dawson was found guilty of manslaughter by a jury. He was 18 at the time of the home invasion. He had a prior criminal record including crimes of violence. ... This Court imposed a sentence of 15 years federal incarceration for manslaughter.

[20] In ***R. v MacPhee***, [2007] N.S.J. No. 601; 2007 NSSC 114 the sentence of this Court again, sentencing judge was me:

The accused pleaded guilty to manslaughter and aggravated assault. He shot and killed one man and shot and severely wounded the brother of the victim. The Court reviewed the case law related to sentencing for manslaughter and then accepted a joint recommendation of seventeen -and-one-half years (17.5) imprisonment for the manslaughter charge.

[21] This case has uncommon aspects that are relevant to what I do here today. I am satisfied that Philip Boudreau's death has affected families involved. It has certainly affected the families, we heard today that victim impact statement, sounded to me like the victim's family has been affected. It is fair surmise that Mr. Landry's family has been affected, their lives will never be the same. So the families have been affected but the manner of this death, Phillip Boudreau's demise, has further impacted on that community the area surrounding Isle Madam to an extent and in a manner that I think will endure. The repercussions will endure for years, perhaps decades, it has as the crown suggested, torn at the fabric of a close knit traditional area of this province causing dissention, divide and disharmony

amongst good, hard working, honest people. Many of whom depend on the lobster fishery for their livelihood and security.

[22] The death of Philip Boudreau has impacted on a larger society as well because the actions of Joseph James Landry on the early morning of one June 2013 were in violation of the “rule of law”, pretty basic stuff here but very important. In violation of the “rule of law” the basic constant that allows this democratic country to function and exist is the “rule of law”.

Without the “rule of law”, without the stability of the “rule of law” this would not be the country that it is, this would not be Canada. This would be some other country, countries that we read about and see depicted in the world news on a daily basis. Countries where the “rule of law” does not exist, compliance through the “rule of law” is, certainly I can attest, compliance for the “rule of law” can be frustrating and people can wonder by times about why things happen the way they do, sometimes lose faith. With that said it is absolutely basically necessary to our society, if each of us were able to exercise revenge and retribution as we alone determine our lives would be chaos, characterized by fear and brutality. This would be animal kingdom.

[23] There are six hundred ways that Joseph James Landry could have addressed his perceived injustice of the loss of his lobsters. Six hundred ways short of causing the death of Philip Boudreau, this did not have to happen.

[24] He says in his pre-sentence report that he wanted to scare Boudreau, scare is the word that he used. When Philip Boudreau was in that water begging for his life as I find that he was, “please James don’t shoot me, I didn’t steal your lobsters”. When he was begging for his life, when he was in that water hanging onto that gas can for floatation, as I find that he was, I suggest that most objective people would conclude that Joseph James Landry had succeeded in scaring Philip Boudreau. There was much more than scaring going on that morning. This wasn’t about scaring, scaring was long past. I consider the sustained attack that resulted in the death of Philip Boudreau to be at the “almost murder” extreme of the sentencing range in manslaughter.

[25] Every perpetrator, every accused before this court is an individual, Joseph James Landry is sixty-seven years old. It is trite to say that time spent incarcerated impacts on a sixty-seven year old more dramatically than it would on a twenty year old.

[26] Significantly, at that advanced age, he has no prior criminal record. He has not spent his life as a criminal, he has been a lobster fisherman. Evidence would suggest that he had a good life, and then he had one very bad day.

[27] During his pre-trial incarceration, he has been of good behaviour, his behaviour could reasonably be described as exemplary he has gone back to school. I find that there is little risk of his re-offending.

[28] His actions have already had significant negative consequences, consequences to himself and to his family. Joseph James Landry says in his pre-sentence report “that he would like to fish again”, but that is not likely to ever happen.

[29] I am going to deal with two matters before we get the bottom line. As to remand, credit for remand time. Joseph James Landry was taken into custody on June 7th, 2013 and has been incarcerated since that time, as of today, January 29th, 2015 he has been in pre-disposition custody for 601 days. Section 719(3.1) of the **Criminal Code** reads:

(3) In determining the sentence to be imposed on a person convicted of an offence, a court may take into account any time spent in custody by the person as a result of the offence but the court shall limit any credit for that time to a maximum of one day for each day spent in custody.

(3.1) Despite subsection (3), if the circumstances justify it, the maximum is one and one-half days for each day spent in custody ...

[30] I am aware of the decision of Justice Beveridge, Nova Scotia Court of Appeal in **R. v. Carvery**, 2012 which he did a comprehensive analysis of that section 719 (3.1). His analysis and review, I am satisfied was approved by the Supreme Court of Canada on appeal. The legislation provides for the judicial discretion to grant credit for time on remand of up to one and half for one. On the consideration of loss of remission or parole eligibility during pre-disposition remand time, you don't get time accumulated for purposes of parole.

[31] In the specific the information provided to me is that Joseph James Landry has been a good inmate during his incarceration. It is probable, I believe, that he would have been granted remission time on parole where parole eligibility if available, for that period of custody.

[32] I therefore exercise my discretion and grant credit of 1.5 for 1 for his time spent in pre-trial custody which would mean a credit of 901 days.

[33] As to eligibility for parole, I have the ability under s.743.6 of **Criminal Code** to order the offender to be ineligible for parole until at least half of his sentence has been served.

[34] The Crown has asked that I do so in this matter because of what it refers to as the aggravating circumstances of this offence. That set of circumstances and societies interest in the denunciation of the offence, both of those factors have been a significant factor in my determining appropriate sentence. I do not intend to revisit response to those issues under s.743.6. I am also mindful of the age of the defendant, which is not definitive of anything but is not irrelevant, I repeat he is sixty-seven years of

age, a combination, I am going to leave the issue of parole in the hands of the parole of board. I make no parole finding in this matter under s.743.6.

[35] The Crown has sought two orders, a DNA Order and a mandatory Prohibition in relation to firearms, ammunition neither order is the subject of any conflict. Both of those orders will be granted.

[36] Remand credit time will be on the basis of 1.5 to 1, that I say nothing as to eligibility to parole, keeping in mind all of the factors in this case, all of what I consider to be the proper sentencing considerations. Considering the moral blameworthiness of Joseph James Landry acts of the terrible series of assaults on Philip Boudreau over a considerable time frame when he was vulnerable and defenceless, firstly in a small boat and then in water. Considering the message that I believe must be delivered to those who would take the law into their own hands, particularly when those actions result in the taking of a human life but also considering this one specific man, this individual before me, the positives as well as the dramatic negatives, considering all of those factors I sentence Joseph

James Landry on the charge of manslaughter to a period of fourteen years in a federal institution less time spent incarcerated pending, which I have calculated to be 901 day. The orders will be signed. Thank you counsel.

J.