

SUPREME COURT OF NOVA SCOTIA

Citation: R. v. Johnston, 2009 NSSC 218

Date: 20090709

Docket: CRH294589

Registry: Halifax

Between:

Her Majesty the Queen

v.

Jerrell Corlando Johnston

Judge:

The Honourable Justice Felix A. Cacchione

Heard:

July 9, 2009, in Halifax, Nova Scotia

Written Decision:

July 30, 2009

Counsel:

Arthur G. Theuerkauf and Gregory E. Lenehan, for the Crown
Kevin A. Burke, Q.C., for Mr. Johnston

By the Court:

[1] The accused, Jerrell Johnston and Nathaniel Sparks were jointly charged with two counts of murder and one count of attempted murder in relation to shootings which occurred on December 10th, 2006.

[2] The charges were laid on June 4th, 2007 and warrants were issued that day for both accused. On June 8th, 2007 the warrants were recalled and both accused appeared that day and consented to being remanded into custody.

[3] Following a lengthy preliminary inquiry both accused were committed to stand trial on April 4th, 2008 and both remained in custody until October 29th, 2008 when they were, by consent, released on judicial interim release under the Adult Bail Supervision Program. In this decision I will address only the conditions relevant to Jerrell Johnston.

[4] Mr. Johnston was subject to a curfew from 8:00 p.m. to 6:30 a.m. daily, a residency requirement and a condition that he not attend certain areas in the Halifax Regional Municipality. He was also fitted with an electronic bracelet to monitor his activities while he was on bail.

[5] No breaches of any bail conditions were reported.

[6] In total Mr. Johnston spent approximately 17 months in pre-trial custody on remand. At the conclusion of the trial the Crown consented to a continuation of his bail conditions until the sentencing date.

[7] Both Mr. Johnston and Mr. Sparks were acquitted by the jury of the murders of Brandon Beals and Martez Provo. The jury was instructed that they could accept all, some or none of a witness' evidence. Their finding of guilt in relation to Mr. Johnston on the charge of attempting to murder Vantino Beals signifies that they accepted from the evidence of Vantino Beals and Lisa Dudka that the Crown had established beyond a reasonable doubt that Jerrell Johnston was the man Lisa Dudka said she saw firing a gun at a person whom she saw running from the driveway at 443 Upper Partridge River Road and who Vantino Beals said was the man who fired a gun at him.

[8] The jury accepted that Vantino Beals knew Jerrell Johnston before the evening in question. His evidence at trial was that he had known Mr. Johnston from his teenage years. It can be taken from the jury's verdict on the count of attempted murder that Vantino Beals was truthful when he identified Mr. Johnston as having a gun and firing it into the air moments before he, Vantino Beals, was shot; and Jerrell Johnston as the man in the middle of the Upper Partridge River Road firing a gun at him. The jury must also have accepted Vantino Beals' evidence that he was running away from the gunfire when he was struck by a bullet.

[9] It was open for the jury to find and in all likelihood they did find from the ballistics evidence presented that more than one 40 calibre firearm was fired at the scene that evening and that a 25 calibre firearm was also discharged.

[10] What preceded the outburst of gunfire, if the jury accepted Vantino Beals' evidence on this point, was a verbal encounter between Vantino Beals and Nathaniel Sparks followed by a push of Mr. Sparks by Martez Provo. There is no indication from the evidence of any animosity or hostility between Mr. Johnston and Vantino Beals. The only evidence about what occurred before the outburst of gunshots was that of Vantino Beals. His evidence on this point was lacking details in many respects.

[11] The presence of a second vehicle carrying four or five black males arriving at the same time as the vehicle carrying Vantino Beals and the deceased Brandon Beals and Martez Provo must also have been a factor in the jury's deliberations about what actually precipitated the fatal shootings and who committed them.

[12] The jury, however, was unanimous in finding that Jerrell Johnston was the person who shot Vantino Beals and that at the time he shot him Jerrell Johnston intended to kill Vantino Beals. What lead up to the fatal shootings and the shooting of Vantino Beals was not revealed in any meaningful detail by the evidence presented. Vantino Beals' evidence was the only evidence on this point and as I stated previously, it lacked any meaningful details. It is obvious from the jury's verdict on two of the three counts on the indictment that they did not accept his description of the events which led to the deaths of Brandon Beals and Martez Provo, but they did accept his evidence in relation to Jerrell Johnston firing a gun at him. What Vantino Beals did before being shot and why Jerrell Johnston fired a gun at him was not disclosed by the evidence.

[13] It would appear from the jury's verdict of guilt that Ms. Dudka's evidence must have played a significant role in the jury's conclusion. Her evidence provided a crucial piece of circumstantial evidence confirming the evidence of Vantino Beals as to who shot him. Although Lisa Dudka did not identify Jerrell Johnston as the shooter, her evidence was supportive of Vantino Beals' evidence in a material respect. Ms. Dudka's evidence no doubt provided the jury with some assurance that Vantino Beals was telling the truth on this point.

[14] Why gunfire erupted in the first place will never be known. What is clear, however, is that there was so much more that occurred in the early morning hours of December 10, 2006 which Vantino Beals did not or was not able to relate.

[15] This case demonstrates once again the presence in our community of illegal handguns and the presence of those who are prepared to use the handguns they carry regardless of the consequences to others.

[16] If Mr. Johnston was at Vegas that evening just to have a good time, why would he be packing a firearm?

[17] The case also demonstrates the fear that has been instilled in our community by the wanton use of handguns. Despite the fact that numerous persons were present both inside and outside the after hours bar known as Vegas at the time of the shootings, little useful information was provided by those persons to the authorities.

[18] The media accounts following this incident were replete with reports of the difficulty that the police were having in obtaining information from the community that would assist their investigation. The media reports also referred to subsequent shootings which appeared to be in retaliation for what occurred on December 10, 2006.

[19] Apparent from those reports was that the citizens of the community where these shootings occurred were being held hostage and lived in fear because of the intimidation produced by the presence in their community of hoodlums armed with handguns.

[20] The principles of sentencing are set out in ss.718 to 718.2 of the *Criminal Code*. The fundamental purpose of sentencing is to contribute to respect for the law and the maintenance of a just, peaceful and safe society.

[21] The principles contained in these sections provide that the objectives of denunciation of the unlawful conduct; deterrence to the offender and others who are similarly inclined; protection of society; rehabilitation of the offender; reparation to the victim or the community and the promotion of a sense of responsibility in the offender must be considered by the court when imposing a sentence.

[22] In short, the court must consider the nature and circumstances of the offence and the character of the accused in order to arrive at a fit and proper sentence.

[23] Mr. Johnston is being sentenced on one count of attempted murder involving the use of a firearm. Section 239(1)(a) of the *Criminal Code* provides for a maximum penalty of life imprisonment with a minimum punishment of four years where a firearm is used in the commission of an attempted murder.

[24] The Crown submits that a sentence in the range of 8 to 10 years would be appropriate.

[25] The defence argues that a sentence of 4½ years less a credit of 33 months for remand time and a further credit of 6 months for time spent on pre-trial release, leaving a global sentence of 15 months would be appropriate.

[26] I accept that the accused should be given credit for time spent on remand on the basis of 2 for 1 which would amount in this to 33 months credit. I do not however accept that he should be given credit for time spent on pre-trial release.

[27] The defence refers to the Ontario Court of Appeal decision in *R. v. Downes* (2006), 205 CCC (3d) 488 in support of its position that pre-trial release time should be credited. The facts in *Downes* show that the pre-trial release conditions amounted to a complete house arrest without exceptions for employment, medical emergencies or religious services. Mr. Downes was entirely dependent on his surety if he wanted to leave his residence since the release conditions required him to be in the company of his surety whenever he was not in the residence. Mr. Johnston did not have the same restrictive conditions. While he did have to obey a

curfew and wear a monitoring bracelet, he was not confined to house arrest. He could go about his daily activities and his employment.

[28] I am not satisfied that credit should be given in this case for his time on pre-trial release.

[29] Attempted murder is clearly considered to be an inherently serious crime. Saunders JA in *R. v. Bryan* (2008), 272 N.S.R. (2d) 246 at paragraph 40 stated as follows:

What is inherently serious in all cases of attempted murder is the requirement of a *mens rea* of a specific intent to kill *R. v. Ancio*, [1984] 1 S.C.R. 225). Discussing the importance of the *mens rea* component, Chief Justice Lamer observed in *R. v. Logan*, [1990] 2 S.C.R. 731 at para. 20:

The stigma associated with a conviction for attempted murder is the same as it is for murder. Such a conviction reveals that although no death ensued from the actions of the accused, the intent to kill was still present in his or her mind. The attempted murderer is no less a killer than a murderer: he may be lucky - the ambulance arrived early, or some other fortuitous circumstance - but he still has the same killer instinct. Secondly, while a conviction for attempted murder does not automatically result in a life sentence, the offence is punishable by life and the usual penalty is very severe.

[30] In the present case the jury, by its verdict, was satisfied beyond a reasonable doubt not only that Mr. Johnston shot Vantino Beals, but also that at the time of the shooting he intended to cause the death of Vantino Beals.

[31] The presentence report discloses that Mr. Johnston has a prior criminal record for non-violent offences such as fraud, possession of a controlled substance and careless storage of a weapon. He was not on probation at the time of this offence and his last conviction prior to this incident was some 3 years before.

[32] Mr. Johnston is 27 years of age. He is relatively youthful, but he is not a youthful offender. It appears from the pre-sentence report that he had an uneventful upbringing and that his parents remain supportive of him. His mother did note that Mr. Johnston might require some assistance in processing his anger.

[33] The offender is currently involved in a common law relationship which has produced two young children, ages 7 and 5.

[34] He has a grade 10 education and has indicated an interest in upgrading his education. His work history consists mostly of seasonal labour type employment. A current employer, Mr. Faught, describes him as a good employee who takes direction well and puts in a full days work.

[35] It would appear from the presentence report that Mr. Johnston has no substance abuse issues.

[36] Mr. Dan Ray, the Probation Officer who supervised Mr. Johnston since his release on bail in October 2008 described him as a compliant person and attentive to the requirements of his bail order.

[37] The offender, as is his prerogative, does not accept responsibility for the offence. He did, however, acknowledge to his Probation Officer that he has trouble processing his anger emotions and might benefit from assistance in this area. Having difficulty processing anger emotions and packing a loaded firearm is a lethal combination.

[38] The offence before this Court was a particularly serious one. An aggravating factor in this case is that handguns were used in an area where a number of people were close by at the after hours bar known as Vegas. Quite a few shots were fired and two persons died as a result of the gunfire. This is referenced simply to provide context for the sentence to be imposed.

[39] Mr. Johnston was acquitted of the two counts of murder and he is not being sentenced for those offences today. The fatalities are mentioned simply to highlight what the result of indiscriminate gunfire can be.

[40] Another aggravating factor is that a bullet found its way into an occupied residence across the road from the after hours bar. There was a serious threat to the safety and well being of the persons living in that residence as well as to those persons who were congregated on the outside porch of the after hours bar shortly before gun fire began. There was also a threat to the safety and security of Ms. Dudka who was sitting in a vehicle parked by the side of the road near the gunfire.

[41] The fact that Mr. Johnston obviously possessed and used a firearm is also an aggravating factor. This was not the first time Mr. Johnston possessed a firearm as evidenced by his March 20, 2001 conviction for careless storage of a weapon.

[42] From the evidence presented at trial and the presentence report the only possible mitigating factors that I can find are Mr. Johnston's relatively youthful age, the fact that he did not breach his bail conditions and that he has no record of violence.

[43] The range of sentence for an offence of attempted murder is at the high end, 10 to 15 years incarceration for the most serious cases involving a devastating injury or marked cruelty. The mid-range for this offence is 4 to 9 years and the low range is 4 to 5 years. (See *R. v. T.H.*, [2005] O.J. No.5849)

[44] In *R. v. Bryan* our Court of Appeal upheld a 15 year sentence for an attempted murder in a domestic context.

[45] In the present case it is the use of the handgun which is particularly aggravating. Handguns by their nature are deadly weapons which are easily concealed. They can easily be transported and concealed until they are used. The evidence in the present case points to the presence of at least 2, probably 3 handguns being fired in the early morning hours of December 10, 2006.

[46] In situations such as this where handguns are used to settle disputes the primary objective of sentencing must be deterrence both specific and general and denunciation of such conduct. It must be made clear to all those in our society who believe that disputes can and should be settled through the barrel of a gun, that our society will not tolerate such behaviour and that severe sanctions will be the result of the use of handguns.

[47] Recently it would seem that not a week has gone by without guns being discharged in areas frequented by members of our community. In fact the day before the date originally set for this sentencing the local newspaper carried yet another story of someone being shot. That shooting occurred on the Upper Partridge River Road as well. The same road where Brandon Beals and Martez Provo were killed and where the present offence which I am dealing with occurred. Again the community, because of the fear instilled in it by the presence and use of handguns, was loathe to assist the police in their investigation.

[48] A review of local newspaper articles relating to gun related shootings in HRM since this incident shows that gun related shootings are on the rise. In 2007 there were 27 gun related shootings. In 2008 there were 29. This year to date there have been 40 such shootings.

[49] The risk posed by such shootings to law abiding citizens who are going about their daily business is high and increasing. A clear message must be sent to those in our community who believe in living by the gun and settling their disputes through the use of a gun. The message is that there will be severe consequences for those who behave in such a fashion.

[50] The sentence imposed today should reflect society's abhorrence of those who decide to live by the gun and use the gun to settle disputes.

[51] Given the nature and circumstances of the offence and the character of this offender a proper sentence should be at the high end of the mid-range set out by Blacklock J. in *R. v. T.H.*

[52] Accordingly, a sentence of 9 ½ years should be imposed with a credit on a 2 for 1 basis for Mr. Johnston's pre-trial custody. In this case the accused served approximately 17 months of pre-trial custody while on remand and he should be credited 34 months for this dead time.

[53] Accordingly the global sentence to be imposed is one of 6 years, 8 months incarceration.

[54] There will also be an order under s.109 prohibiting Mr. Johnston from possessing any firearm, crossbow, restricted weapon, ammunition and explosives. That prohibition order will be for life, and there will be a DNA order. The Crown is to prepare those orders.

Cacchione, J.