

SUPREME COURT OF NOVA SCOTIA

Citation: *R. v. Downey*, 2017 NSSC 302

Date: 2017-12-01

Docket: CRH No. 447536

Registry: Halifax

Between:

Her Majesty the Queen

v.

Devon Marteeke Downey

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Judge: The Honourable Justice Peter P. Rosinski

Heard: October 13, 2017, in Halifax, Nova Scotia

Written Decision: December 1, 2017

Subject: Sentencing for Manslaughter – Section 235 – Criminal Code

Summary: Mr. Downey pled guilty to striking the victim with one punch which rendered him unconscious and caused him to fatally hit his head upon falling. A contested sentencing hearing was held. The court found itself not satisfied beyond a reasonable doubt that Mr. Downey “sucker punched” the victim, however was satisfied that he did with one severe blow render the victim immediately unconscious. Positive presentence report, and no criminal record. Young African Nova Scotian male. Consideration of a Cultural Impact Assessment regarding the circumstances of Mr. Downey as an African Nova Scotian male.

Issues: (1) What is the appropriate sentence?

Result: Deterrence and denunciation are paramount – four years in custody.

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Counsel: Rick Woodburn and Brian Cox for the Crown
Brad Sarson and Brandon Rolle for the Defence

By the Court:

Introduction

[1] This is the sentencing of Devon Downey, a 25-year-old African-Nova Scotian male, who, with no criminal record at the age of 20, and with a single punch, unlawfully caused the death of another young African Nova Scotian male, Kaylin Diggs.

[2] Given these circumstances of the offence, and the circumstances of Mr. Downey, what sentence should this Court impose?

The circumstances of the offence

[3] In general, I find the facts of this case, more likely than not, as follows:

In the early morning hours of August 11, 2012, Kaylin Diggs and his friend Cody Good were having a good time in the area of Argyle Street, in downtown Halifax. Within a short time of exiting the so-called Liquor Dome, Mr. Good was involved in a fight with up to 2 to 3 African-Nova Scotian males. Mr. Good seem to be holding his own against whoever he was fighting. Mr. Diggs must have seen this, but did not intervene. Within 15 to 20 seconds, the fight had shifted up street to the intersection of Sackville and Argyle Streets. At this location, Mr. Good was fighting one African-Nova Scotian male in particular, Mike Chisholm, although Mr. Chisholm's friends created a circle-like ring around the two of them. Mr. Downey, then 20 years old with no criminal record, was one of those "friends". Mr. Diggs saw this and in a fast walk or jog made his way there in a matter of seconds. I accept that his purpose was to intervene to ensure Cody Good did not get hurt or unfairly overwhelmed by the numbers of the Chisholm crowd. Within another matter of seconds, Mr. Downey punched Mr. Diggs which knocked him out before he hit the ground heavily. He died as a result of Mr. Downey's punch.

[4] As a result of the conflicting evidence I heard, I am not satisfied beyond a reasonable doubt or "sure" that Mr. Downey "sucker punched" Mr. Diggs. However, I am satisfied that its more likely than not, that he did sucker punch Mr. Diggs. I say this because the evidence is consistent and reliable that: Mr. Diggs was at no time earlier, or then, himself involved in a fight with anyone from that group; he was knocked out by one punch so suddenly, within seconds of his arrival at the area of the fight; Mr. Downey admitted responsibility for knocking him out

in his text messages at around 10:40 a.m. on August 11, 2012, seven hours later. I cannot use the probability of a “sucker punch” as an aggravating factor on this sentencing.

[5] However, I found it an aggravating factor that Mr. Downey had actively and expressly insisted that his family and friends not speak to police, or if so, to lie about his involvement that night, and whereabouts thereafter.

The circumstances of Mr. Downey

[6] The Presentence Report, and Cultural Impact Assessment Report of Lana M. MacLean, MSW, RSW, dated August 25, 2017, provides some background information about Mr. Downey.

[7] Briefly stated, on August 11, 2012, he was 20 years old, had no criminal record, and was living a pro-social life. He had completed Grade 11. Mr. Malik Adams, who taught him at Citadel High School, noted that he did not come prepared with the skills he needed to do the academic work in high school and that the culture of the school was not welcoming to African Nova Scotian learners. It appears Mr. Downey did have Constable Seebold, a Caucasian police officer with HRP, as a Big Brother, and had known him for the past 14 years. Maurece James, Coordinator for the Phoenix Youth and Community Centre, also advised he had known Mr. Downey since he was nine years of age and had worked with him as a youth. This was confirmed by Derico Symonds, Program Manager with HRM, Community Outreach Worker for Phoenix Youth and Community Centre, who had worked with him for five years, and knew him for 10 years. Mr. Downey reported that there was no family history of substance abuse or conflict with the criminal justice system. Both parents were active in his life. For the last eight years, he has been in a relationship with Chekara Beals and they have two children aged three years and three months. Mr. Downey has worked in the past sporadically since turning 18, and relied on social assistance in between such jobs.

[8] The Cultural Impact Assessment Report references a history of discrimination, a cultural code of resolving such social injustice by not leaving, backing down or being punked out, being unconsciously hyper-vigilant to potential conflicts, and the cultural community code of not being a rat and placing others at additional risk. She suggests:

Mr. Downey's actions can be understood from the worldview and experience of young black males who have a history of being discriminated against by various establishments in the entertainment district of Halifax. It is well known in the African-Nova Scotian community that altercations often result between bar staff, police, and youth from the African-Nova Scotian community....

[9] She concludes, in short, the race and cultural impacts which present in Mr. Downey's life include:

1. The impact of historical and contemporary systemic racism;
2. Impacts of community dislocation and fragmentation [poverty; low income outcomes];
3. The clinical/mental health implications to black male psychological and global function;
4. Poor educational outcomes;
5. The overrepresentation of African-Nova Scotians in the criminal justice system where there remains little to no culturally relevant programming.

[10] In the circumstances of this case, there was no social injustice trigger; no racial or discriminatory [black versus white] trigger evident; no realistic need to be hyper-vigilant, given that I have concluded that Mr. Downey was in the company Michael Chisholm who was fighting Cody Good, surrounded by 8 to 10 of their friends, when Mr. Diggs, an African-Nova Scotian male of similar age, arrived at the fight to assess his friend Cody Good's situation. None of the foregoing factors could realistically be said to play any role in Mr. Downey's striking Mr. Diggs. Moreover, I reiterate Justice Campbell's comments in *R. v. Gabriel*, 2017 NSSC 90, at para. 90:

Those questions are why a cultural assessment with respect to an African-Nova Scotian offender serves such an important purpose. It does not provide a justification for a lighter sentence. Like a *Gladue* Report, it might prompt the consideration of restorative justice options where those are appropriate. It doesn't position the offender as a helpless victim of historical circumstances.

Victim impact statements

[11] Kaylin's mother, stepfather, girlfriend, and brother read out their statements in Court. They were powerful and raw expressions of the anguish of their family and themselves. The impact of Kaylin's death on them, and Cody Good and his brother and mother, Deleta Terry; his sister, Seleta Grant James; his cousin, Anissa

Bundy; Matthew Thomas, his childhood friend, Quintina Grant, his cousin; and Christina Gale, was to similar effect. They indicated a profound lifelong loss for all of them and their extended family.

The range of sentence

[12] The maximum penalty is life imprisonment. The range of circumstances for manslaughter has generally been described as running from “near accident” to “near murder”. This is a case of a single powerful punch being thrown which knocked out Kaylin Diggs. It was more likely than not a punch thrown without warning to Kaylin Diggs. Though no accident, it is closer to the “near accident” type of circumstance.

Position of the Crown

[13] The Crown argues for a seven (7) year sentence. It argues that this case is more serious than the *Henry* case [2002 NSCA 33] where a four (4) year sentence was imposed on appeal. There, Mr. Henry in a vigilante-like fashion wanted to impress a young woman he felt had been slighted and sucker punched a smaller intoxicated defenceless man. There was guarded remorse, and he was found guilty after trial. He had no record.

[14] The other cases cited by the Crown involve joint recommendations – *King and Graham*; or involved lesser sentences in not entirely unlike circumstances – *Whitehead* [2014 NSSC 439] – three (3) years. The Ontario Court of Appeal decision *Hanifan*, where a one punch manslaughter after trial resulted in six (6) years custody, involved an offender who, although he surrendered the next day to police, had a significant criminal record. However, *Hanifan* merely establishes that in Ontario six (6) years is within the range of sentence, for offenders who have significant criminal records, did not plead guilty, and delivered a severe blow.

Position of the defence

[15] Mr. Downey argues for a sentence of 2 to 3 years, and preferably two (2) years custody to be followed by three (3) years probation.

[16] He argues that though he was “drunk” around that time, there was no evidence that he was looking for a fight, nor is it clear on the evidence under exactly what circumstances, and why, he struck Mr. Diggs. In these circumstances, he suggests given his positive character evidence before and after the offence

[including his being released on conditions without incident for 2 ½ years] suggest that he is a good candidate for rehabilitation, and that the court should impose a lesser period of custody so as not to destroy any chances for his ultimate rehabilitation.

[17] He argues that the cases establish for similar offenders in similar circumstances to his, a range of 2 to 3 years as an acceptable sentence in the proper circumstances – *Hickey, Eisner, Henry, King, Whitehead* as well as the Ontario cases he cited.

The application of the principles of sentencing to the circumstances of this case

[18] I am keeping in mind the principles of sentencing in Sections 718 – 718.2 of the Criminal Code.

[19] In sentencing, courts are trying to fundamentally protect society and to contribute along with crime prevention initiatives, to respect for the law and the maintenance of a just peaceful and safe society by imposing just sanctions that have one or more of the following objectives:

- a. To denounce unlawful conduct and the harm done to victims or to the community that is caused by unlawful conduct;
- b. To deter the offender and others from committing offences;
- c. To separate offenders from society, where necessary;
- d. To assist in rehabilitating offenders;
- e. To provide reparations for harm done to victims or to the community;
and
- f. To promote a sense of responsibility in offenders and acknowledgement of the harm done to victims or to the community.

[20] Fundamentally, a sentence must be proportionate to the gravity of the offence and the degree of responsibility of the offender. Moral responsibility or blameworthiness is the barometer of punishment in such cases. More blameworthy conduct generally sees a more severe sentence imposed.

[21] In *CAM*, [1996] 1 S.C.R. 500, Chief Justice Lamer speaking for the Supreme Court of Canada confirmed that the notion of retribution is appropriate in sentencings because it incorporates a principle of reasoned restraint – retribution requires the imposition of a just and appropriate punishment and nothing more. It

is based on the intentional risk-taking of the offender and the consequential harm caused by the offender as well as the normative character of the offender's conduct. It is distinguishable, therefore, from vengeance.

[22] The court must also consider factors that aggravate/tend to increase or mitigate/tend to reduce the severity of a sentence.

[23] In this case, I found an aggravating factor was that Mr. Downey actively and expressly encouraged friends and family not to cooperate with the police investigation, which I find did have a material effect on preventing the police from ascertaining the truth of what happened to Kaylin Diggs earlier. I will assign this factor only modest weight, however, because it is difficult to be confident what precise effect his urgings had upon his friends and family.

[24] Mitigating factors in this case include: the youth of Mr. Downey, 20 years old at the time, and the fact that he is now 25; the fact that he has had a pro-social life before and after August 2012; that he has good rehabilitation prospects; and has a supportive family.

[25] Mr. Downey also pled guilty in February 2017. This was within days of damaging text message evidence being ruled admissible against him at trial. It was two years after he was charged, and one year after the Preliminary Inquiry hearing concluded. While this guilty plea was somewhat late, and the earlier a guilty plea the more likely the impact on the victims here would have been reduced, ultimately the court must, and does, give some weight to that guilty plea.

[26] Regarding remorse, as a mitigating factor, I find an objective view of Mr. Downey's conduct and expressions of remorse, only allow me to give a neutral amount of weight to that factor, apart from as noted the guilty plea, which I assigned modest weight.

[27] While I may not have articulated all the relevant factors in this decision, I have carefully considered the submissions made by both Crown and defence counsel here and have taken them into account.

Conclusion

[28] I conclude that the primary objectives to emphasize in this sentencing are deterrence and denunciation, but I must seriously consider rehabilitation as well given Mr. Downey's age at the time and now, and his good potential for rehabilitation.

[29] I keep in mind that I was not satisfied beyond a reasonable doubt that Mr. Downey sucker punched Mr. Diggs, so that cannot be an aggravating factor on the sentence.

[30] Nevertheless, there is no question that Mr. Downey punched Mr. Diggs, in such a way that Mr. Diggs was immediately rendered unconscious. I am satisfied beyond a reasonable doubt that that would have been an intentionally powerful punch. Given my findings regarding the circumstances of Mr. Diggs being struck by Mr. Downey almost immediately upon his arrival at the scene of the Chisholm/Cody Good fight, I am satisfied beyond a reasonable doubt he was not involved in a fight with Mr. Downey or anyone else at the time he was struck.

[31] Therefore, ultimately, Mr. Downey knowingly struck Mr. Diggs with a powerful blow, with which, I am satisfied he intended to stun Mr. Diggs. Mr. Diggs had encountered a group of 8 to 10 individuals, who had surrounded his friend Cody Good. I find it more likely than not that he approached them with a good measure of caution considering the numbers. Certainly, Mr. Diggs did not represent a threat to the collected group, or any individual member thereof.

[32] Why Mr. Downey struck Mr. Diggs is not clear. Only Mr. Downey perhaps knows the answer to that question. He is entitled by our Constitution to remain silent about the answer.

[33] However, he has admitted his powerful blow rendered Mr. Diggs immediately unconscious and killed him. As Justice Pugsley remarked in *R. v. McDow* [1996] NSJ 52, at para. 93:

The sentence imposed by this court should reflect society's recognition of the unique gift of life and the seriousness with which we view the actions of those who trivialize that gift by taking it from another.

[34] I will endorse the warrant of committal, as requested by Mr. Downey's counsel that Correctional Services Canada consider him for psychotherapy and psycho-educational programming; as well as programming regarding Mr.

Downey's mental health, particularly by assessors who are sensitive to his cultural and racial background as an African-Nova Scotian. I am also going to sign the mandatory DNA Order, so called, and Firearms, so called Prohibition Order under Sections 487.051 and 109 of the Criminal Code. I impose a Victim Fine Surcharge as required (as it is mandatory), of \$200, which I direct should be paid by December 31, 2021.

[35] In all the circumstances here, I am satisfied that a fit and proper sentence of custody for the offence of manslaughter is four (4) years in a federal penitentiary.

Rosinski, J.