

IN THE COURT OF APPEAL OF MANITOBA

Coram: Madam Justice Barbara M. Hamilton
Mr. Justice Marc M. Monnin
Madam Justice Diana M. Cameron

BETWEEN:

| | | |
|-------------------------------------|---|---------------------------------|
| <i>HER MAJESTY THE QUEEN</i> |) | <i>E. J. Roitenberg</i> |
| |) | <i>for the Appellant</i> |
| |) | |
| <i>Respondent</i> |) | |
| |) | <i>R. D. Lagimodière</i> |
| <i>- and -</i> |) | <i>for the Respondent</i> |
| |) | |
| <i>ISAAC RAY NDLOVU</i> |) | <i>Appeal heard and</i> |
| |) | <i>Decision pronounced:</i> |
| <i>(Accused) Appellant</i> |) | <i>October 26, 2018</i> |

On appeal from 2017 MBQB 157

CAMERON JA (for the Court):

[1] The accused applies for leave to appeal and, if granted, appeals a sentence of nine years’ incarceration less 1,446 days of pre-sentence custody imposed in response to his guilty plea for one count of manslaughter.

[2] Using his influence as a high-ranking member of a local street gang, the accused caused a 16-year-old, lower-ranking member of that gang (the youth) to procure a gun. He directed the youth to give the gun to an associate of the gang for the purposes of settling a “beef” (at para 1). The associate used the gun to assault another man and, during the course of the assault, the firearm went off, killing the victim, who was a bystander. The associate fired off a further five more shots at his intended victim while fleeing the scene.

The shooting occurred on the street in front of a busy local nightclub at closing time. After the shooting, the accused took steps to destroy the gun.

[3] The associate was sentenced to 18 years' incarceration for the offence of manslaughter as a result of a joint recommendation. The youth was sentenced as an adult to six years' incarceration.

[4] The accused maintains that the sentencing judge erred by not giving enough weight to his personal background, including the *Gladue* factors (see *R v Gladue*, [1999] 1 SCR 688).

[5] Absent an error in principle, failure to consider a relevant factor, or an overemphasis of the appropriate factors, the decision of the sentencing judge is entitled to deference. We can only intervene if there is an error that materially affects the sentence (see *R v Lacasse*, 2015 SCC 64 at paras 43-44).

[6] We are not persuaded that the sentencing judge erred. The record and the sentencing judge's reasons, when read together, indicate that all of the accused's personal circumstances, including his upbringing and *Gladue* factors, were before the sentencing judge and he considered them. He balanced the accused's personal circumstances, including his difficult upbringing and *Gladue* factors, with his significant prior criminal history, the use of his influence as a gang member to obtain the firearm and his involvement in, and responsibility for, the very dangerous and serious circumstances of the offence. How he balanced that is entitled to deference.

[7] While the sentence of nine years is at the higher end of the applicable range, we cannot say that it is unfit.

[8] In the result, leave to appeal was granted and the appeal was dismissed.

Cameron JA

Hamilton JA

Monnin JA