

CITATION: R. v. James Antwan and Mohamed Hassan, 2024 ONSC 2213
COURT FILE NO.: CR-23-50000328 and CR-25-50000122
DATE: 20240417

ONTARIO

SUPERIOR COURT OF JUSTICE

BETWEEN:)
)
HIS MAJESTY THE KING) *Scott Arnold and Kelly Simpson, for the*
) *Crown*
– and –)
)
ANTWAN JAMES and MOHAMED) *Justin Yuen and Karen Lau-Po-Hung, for*
HASSAN) *Antwan James*
Defendants) *Rachel Lichtman and Michael Coristine, for*
) *Mohamed Hassan*
)
) **HEARD: April 15, 2024**

SENTENCING REASONS

BOUCHER J.

1. Habil Hassan was shot dead on Scarlett Road in Toronto on April 3, 2021, as he rode in the passenger seat of a vehicle. Antwan James and Mohamed Hassan proceeded to trial before a judge and jury on an indictment charging them with first degree murder. At trial, Antwan James acknowledged that he shot Habil Hassan from the passenger seat of a vehicle driven by Mohamed Hassan. He fired at least seven bullets at Habil Hassan’s vehicle. Both Mr. James and the police believed that Habil Hassan had shot Mr. James in 2019, a shooting that gravely injured Mr. James. The Crown relied on the prior shooting as evidence of motive for the shooting, while Mr. James relied on it in support of his claim of self-defence. The driver, Mohamed Hassan, claimed lack of awareness that Mr. James would shoot Habil Hassan.

2. On February 13, 2024, the jury acquitted both accused of first-degree murder, instead finding them both guilty of second-degree murder.

3. The sentencing hearing proceeded April 15, 2024. These are the reasons for sentence.

Minimum sentence

4. The offence of second-degree murder carries a minimum penalty of life imprisonment: s.235(1) and (2). The sentence includes a period of parole ineligibility of 10 years, or such other number of years not greater than 25 years, as the sentencing judge deems fit in the circumstances: s.745.4.

Principles of sentencing

5. All sentences must conform to the principles of sentencing in the *Criminal Code*. Sentences must conform to the fundamental principle of contributing to respect for the law and the maintenance of a just, peaceful, and safe society by imposing just sanctions. A sentencing judge must consider all the principles of sentencing to arrive at a sentence proportionate to the gravity of the offence and the degree of responsibility of the offender.

6. In determining the period of parole ineligibility in a case of second-degree murder, the sentencing judge must consider the character of the offender, the nature of the offence and the circumstances surrounding its commission, and the recommendation of the jury, if any: s.745.4

1) Nature and Circumstances of the offence, and aggravating factors

7. As the judge passing sentence in a matter tried by judge and jury, I must accept all the express and implied facts that were essential to the jury's verdict of guilty. See *R. v. Brown* 1991 2 SCR 518. If the factual implications are ambiguous, I may find any relevant facts proven on a balance of probabilities, or, if the additional facts are aggravating or mitigating, I must only consider them if they are proven beyond a reasonable doubt. See *R. v. Gardiner* 1982, 2 SCR 368.

8. In this case, the jury's verdict necessarily means that the claim of self-defence was rejected, that there was not proof beyond a reasonable doubt of the element of planning and deliberation, and that the intent for murder was proven beyond a reasonable doubt.

9. Necessarily, then, the facts of this offence are that on April 3, 2021, the two offenders were in a vehicle, with Mr. Mohamed Hassan driving and Mr. James in the front passenger seat. Mr. James saw Mr. Habil Hassan seated in another vehicle, parked at Scarlettwood Court. Habil Hassan's vehicle began to follow theirs. Minutes later, Mr. James purposely shot at Habil Hassan's vehicle, knowing that Habil Hassan was in the passenger compartment, intending to kill him or wilfully blind to the fact that Habil Hassan could be killed through his actions. Mr. James shot at the vehicle at least 7 times, while traveling in a live lane of traffic in the middle of the afternoon, with other vehicles driving near them at the same time.

10. The Crown has not proven the element of planning and deliberation beyond a reasonable doubt, as is clear from the jury's verdict. Further, there is insufficient evidence of planning to constitute proof beyond a reasonable doubt of planning as an aggravating factor on sentence. The evidence highlighted by the Crown about the offenders' driving behaviour shows intentionality and purpose, but not planning in a legally aggravating sense. The fact that they turned off Scarlett Road, away from Habil Hassan, creates a reasonable doubt about planning, rather than providing evidence proving planning. There is no evidence that they hunted down Habil Hassan, in a planned execution: that would have been a first-degree murder. The fact that they ended up driving next to Habil Hassan's car minutes later proves that there was enough communication between the two offenders to create legal culpability for Mohamed Hassan about Mr. James' intentions to kill Habil Hassan, without rising to the level of a "plan". Because Mr. James was pre-armed from his business of dealing drugs, this enabled him to, quickly and intentionally, murder Habil Hassan. There was no legally applicable justification for this murder.

11. There is insufficient evidence to prove anything more beyond a reasonable doubt, which is the required standard before the court could conclude “planning” beyond a reasonable doubt and use it as an aggravating factor on sentence.

12. In terms of other facts related to the victim’s conduct, the jury rejected self-defence. I do not accept that Mr. James saw that the victim had a gun, which would have been a mitigating factor. It is not likely that Mr. James could have made that observation in the circumstances described, despite his evidence, and no gun was ever found related to Habil Hassan. Mr. James may have felt personally threatened when he saw Habil Hassan. I accept that Mr. James was anxious about Habil Hassan, because of Mr. James’ belief that Habil Hassan had shot him in the past, and because of the extreme medical situation and life altering consequences from that shooting. The circumstances in 2021 were not, however, an actual threat to him. There were no reasonable grounds that would have justified permitting Mr. James to shoot at Habil Hassan to protect himself. Mr. James’ actions, shooting at Habil Hassan at least 7 times in a live lane of traffic, were not proportional to any perceived threat. I accept that Mr. James’ actions were impulsive, not calculated or planned.

13. Mohamed Hassan was the driver of the car for Mr. James. As I noted, the jury’s verdict necessarily implies that Mohamed Hassan was aware that Mr. James had a gun and that Mr. James intended to shoot Habil Hassan, and that Mohamed Hassan aided Mr. James to shoot Habil Hassan by driving him where he needed to go to kill him. As I just explained, his actions in assisting Mr. James by putting the vehicle near Habil Hassan’s car did not rise to the level of a plan, but his actions were intentional, with knowledge of Mr. James’ purpose.

Aggravating Factors

14. Most of the facts of the offence are aggravating of the seriousness of the conduct, most notably that multiple shots were fired with a modified automatic handgun on a public street in Toronto. Denunciation and deterrence are the primary sentencing principles, requiring a sentence that adequately demonstrates society’s disapproval of gun violence in this city and the tragic consequences that follow: see *R. v. Danvers* [2005] O.J. 3532 (CA). Mr. James himself knows the consequences of gun violence from his personal experience of being shot and suffering the debilitating impacts of such unnecessary, dangerous conduct.

15. The fact that both offenders went to the area armed with unregistered, restricted firearms as part of their drug business is an aggravating feature of this offence. Neither offender had a licence for firearm possession. They had armed themselves because they were drug dealers and had the guns as they described “for their protection”. I highlight, however, that there was no evidence of gang affiliation or gang activity, no evidence that this was a turf war, or that this was in any way gang related.

16. The Crown also relied on the aggravating factor that the offenders had drugs with them at the time of the incident. The drug possession and drug dealing facts were admitted at trial. This factor is aggravating because it is the companion fact to them having been armed in their vehicles. The drugs in question, including fentanyl, were dangerous for the safety of the public. Because the offenders were in their vehicle, armed, as part of their drug dealing businesses, it made it possible for Habil Hassan to be killed this way, on the street.

17. The significant impact on the victim's family is an aggravating factor: see s.718.2(a)(iii.1). The Crown filed numerous victim impact statements that I accept in accordance with s.722(9), from Habil Hassan's mother and sisters, from his cousins, from neighbours, from friends. All describe a significant feeling of loss and heartache from the unlawful taking of Habil Hassan from their lives. Habil Hassan made a positive contribution to the lives of many, helping them, feeding them, participating in the community, lifting the spirits of so many with his companionship and support. I treat the impact on the victim's family and friends as a seriously aggravating circumstance.

2) The character of the offenders, and mitigating factors

Youthful "first offenders", no criminal records

18. The offenders' age is a major mitigating factor for the required severity of the sentence. Mr. James was 18 years old at the time of the offence, just at the threshold of adulthood, not even the age of majority. Mohamed Hassan was 21 years old. This factor alone supports a parole ineligibility period lower in the range than higher, particularly since they had no criminal records at the time: see *R. v. Grant* 2016 ONCA 639 at para. 173.

19. Their ages are mitigating even though the offenders had been engaging in the criminal conduct of drug trafficking and firearm possession. They did not have the prior benefit of deterrent or rehabilitative sentencing.

Family and community support

20. Mohamed Hassan filed numerous letters of support from his family. They offer condolences to Habil Hassan's family. They point out that Mohamed Hassan had significant responsibilities in their family because they did not have their father's support. They highlight that Mohamed Hassan had significant potential, completing studies and participating in competitive soccer. They are saddened to lose this important person from their day to day lives. This support is a beneficial factor for Mohamed Hassan because it is reflective of his potential to reintegrate into society through his supportive network.

21. Mr. James' family also filed letters of support, from his mother, from his siblings, his grandmother, and a family friend. They explain how much they relied on Mr. James in their network, what he meant to them, and their sense of loss. They also pleaded for mercy for Mr. James because of his personal circumstances related to the prior shooting, of the risk to his life that occurred, that changed his personality to being fearful and anxious and embarrassed, that permanently harmed his health, and prevented him from finishing school.

22. Both offenders' families attended throughout the trial, showing their support every day.

23. The family support for both offenders is a mitigating feature because it supports the potential for eventual reintegration.

Mr. James' medical situation

24. The facts that relate to Mr. James's medical situation were outlined at trial and are a mitigating factor. The sentence would be proportionally harder on him than for another offender.

25. Mr. James's injuries from the prior shooting include having been placed in an induced coma, that the bullet had gone through his back area, puncturing his lung, diaphragm, pancreas, spleen, large bowel, and left thigh. The bullet is still in his body. He continues to experience ongoing medical issues including bowel control problems, and psychological issues as detailed by his family and through his evidence at trial.

26. Both Mr. James and the police believed that Habil Hassan had shot Mr. James in 2019, causing those injuries. Mr. James' belief about Habil Hassan having shot him is not a mitigating factor. This is, however, a factor that explains this tragic shooting, in that it was not a random act. The prior shooting was in large measure the reason for the shooting, in that the offenders' actions were the result of an unreasonable belief that Mr. Habil Hassan posed a current threat based on that prior shooting, actions that were not proportional to the situation.

Whether or not they turned themselves in

27. It is commendable that Mr. James turned himself in shortly after the shooting and this fact may support his potential for rehabilitation. The Crown did not rely on Mohamed Hassan's flight as an aggravating factor. There was no evidence that Mohamed Hassan's flight delayed the overall proceedings.

Pretrial Custody

28. Both offenders spent significant time in pretrial custody. By operation of the *Criminal Code*, each day in custody counts towards the life sentence that will be imposed, and towards the parole eligibility date. No enhanced credit is available for offenders sentenced to life sentences.

29. I note as well that both offenders had significantly negative experiences in pretrial detention. For Mr. James a major portion of his time was in a triple bunking situation, meaning an overcrowded cell. Mr. Hassan had a significant number of days in lockdown, with limited access to time out of his cell for normal prison activities.

3) Recommendations by the Jurors

30. Most of the jurors made recommendations. For Mr. James, 5 jurors made no recommendations, 5 jurors recommended 10 years, 1 recommended 12 years and 1 recommended 15 years. For Mr. Hassan, 2 jurors made no recommendations, 9 jurors recommended 10 years, and 1 juror recommended 11 years.

31. The jury's recommendations must be understood as reflecting their understanding of the offenders' age and character and the nature and circumstances of the offence, because of the instructions I provided them.

32. The jurors did not have the benefit of the victim impact statements, and of other relevant information related to sentencing, and the sentencing judge has the ultimate decision-making authority for the sentence. Thus, the jurors' recommendations do not dictate the ultimate sentence imposed but are a factor for the sentencing court to consider with the rest of the applicable factors.

33. The jury recommendations were not unanimous, although more of the jurors recommended 10 years ineligibility than any other possibility. For Mohamed Hassan, the 10-year recommendation is especially clear, with 9 of them recommending that outcome. Their recommendation is understandable because Mr. Hassan was a party to the offence and not the actual shooter. Being a party does not automatically entitle an offender to a lower sentence, but in many cases it would.

34. Here, it makes sense that the party would receive a less significant sentence than the actual shooter, since the shooter bears more proportional responsibility for the harm caused in the circumstances, whereas Mohamed Hassan was responsible for helping him to do the harm. See for example *R. v. Grant and Vivian*, 2016 ONCA 639 at para.171 where a 14-year ineligibility period was imposed for the shooter and 11-years' ineligibility was imposed for the driver.

35. The jury recommendations for Mr. James were more mixed, in that an equal number of jurors recommended 10 years as those who made no recommendation. Two other jurors made higher recommendations. It is difficult to infer a general message from the recommendations regarding Mr. James, but there was no general push for an enhanced sentence.

4) Range in the case law for parole ineligibility

36. The Crown cited several cases from the Court of Appeal where parole ineligibility periods of 14 to 16 years were upheld in cases of murders with handguns in public places in Toronto. The Crown also pointed out *R. v. Berry* 2017 ONCA, where 17 years' ineligibility was imposed in a case with evidence of planning, and a rejection of self-defence. In that case, the accused attended the victim's door before shooting him.

37. Justice Code in *R. v. Hayles Wilson* 2018 ONSC 4337 reviewed sentencing decisions in murders involving public shootings in Ontario to that date in 2018. Justice Code observed that the cases were clustered in three groups. At the lowest end were 12-year sentences, in cases involving less aggravating or unusual or mitigating circumstances, including that of non-principals. At the highest end of the range, 18-to-22-year ineligibilities were imposed for recidivists with significant records and aggravated circumstances of serious injuries to multiple victims, significant risk to others, or gang activity. Most cases were found to be at the mid-point, in the 14-to-16-year range, which included cases of multiple shots fired in a public area, elements of impulsivity, evidence of planning, histories of carrying firearms, vengeance, breach of bail and prohibition orders, gang affiliations, some criminal records, as well as cases involving more than one victim.

38. The defence also highlighted other murder cases in the 11-13 year range, where shootings did not involve planning elements, with impulsive actions, with youthful offenders. A case was highlighted from another jurisdiction where 10 years was imposed. I note that sentencing ranges are local, and the cases from Ontario are of more relevance given our experience with firearm violence.

5) Positions of Crown and Defence

39. The Crown requested a parole ineligibility period for both Mr. James and Mr. Hassan of 15 to 16 years, based on their argument about evidence of planning, and the other aggravating factors.

40. Both offenders requested periods of 10 years, based on the mitigating factors, and their argument as to the applicable aggravating factors. Both counsel argued that the range for the relevant factors would be 10-12 years' parole ineligibility, but that their individual situations merited 10-year parole ineligibility periods.

6) Parole ineligibility period imposed

41. This case is not at the high-end or mid-point of severity because of the mitigating circumstances and offender character circumstances I have outlined. There are, however, significant aggravating factors in the nature and circumstances of the offence that indicate the parole ineligibility period should be increased from 10 years. The juror recommendations fit into the court's determination as well, alongside considerations of the prior caselaw.

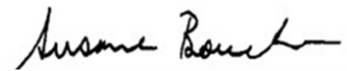
42. The court imposes the following sentences: life sentences for both Mr. James and Mr. Hassan. The parole ineligibility period for Mr. Antwan James is 12 years, and for Mr. Mohamed Hassan, 11 years.

Ancillary Orders

43. The court imposes the following ancillary orders for both offenders.

44. Section 109 prohibition order for life.

45. Section 487.051(1) DNA order, because the offence is a primary designated offence.



Boucher J.