Citation: R v Caribou, 2022 MBCA 95
Date: 20221206
Docket: AR21-30-09636

IN THE COURT OF APPEAL OF MANITOBA

Coram: Madam Justice Jennifer A. Pfuetzner
Madam Justice Karen I. Simonsen
Madam Justice Lori T. Spivak

B E T W E E N:

	)	***T. L. Mariash***
HIS MAJESTY THE KING	)	*for the Appellant*
	)	
Respondent	)	***D. L. Carlson*** *and*
	)	***J. W. Avey***
- and -	)	*for the Respondent*
	)	
DIAMOND SKY CARIBOU	)	*Appeal heard:*
	)	***June 13, 2022***
(Accused) Appellant	)	
	)	*Judgment delivered:*
	)	***December 6, 2022***

SPIVAK JA

[1] This is a sentence appeal by the accused who was charged, along with three co-accused, with the second degree murder of Jason James (the victim). The appeal was heard at the same time as the companion case involving a sentence appeal of one of the co-accused, Sarah Osborne (Osborne) (see *R v Osborne*, 2022 MBCA 96). The victim died following a severe group beating and stabbing. A jury convicted the accused of manslaughter and the trial judge imposed a sentence of 13 years' imprisonment, less credit for pre-sentence custody at a rate of 1.5:1.

[2] At the sentencing hearing, the accused challenged the constitutionality of sections 719(3) and 719(3.1) of the *Criminal Code* (the *Code*), asserting that the limit on credit for pre-sentence custody of 1.5:1 infringed section 7 of the *Canadian Charter of Rights and Freedoms* (the *Charter*) and that he should receive additional credit (the *Charter* motion). The trial judge dismissed the *Charter* motion. He found it unnecessary to resort to a *Charter* remedy as the issues raised by the accused could be addressed as part of the sentencing process. In the alternative, he concluded that the limitation in those sections does not violate section 7 of the *Charter*.

[3] The accused seeks leave to appeal and, if granted, appeals his sentence, contending that the trial judge erred in failing to decide the constitutional challenge and in alternatively finding that the sections of the *Code* do not infringe section 7 of the *Charter*. He asserts as well that the trial judge erred by giving insufficient weight to *Gladue* factors (see *R v Gladue*, [1999] 1 SCR 688) and imposed a sentence that was harsh and excessive.

[4] For the following reasons, I would grant leave to appeal sentence, but dismiss the appeal.

Background

The Trial

[5] On September 22, 2018, following a 911 call, police officers attended a home in the City of Winnipeg. The home was a “flop house”, a place where people went to do drugs. The accused, the co-accused Osborne and others lived in the home. The victim was found deceased in the basement.

He was naked and bound around the ankles, knees, wrist and mouth. Various bicycle parts, splattered with blood, were observed nearby.

[6] The accused was in the home when the police arrived. He was arrested, along with Osborne and another co-accused, Gabriel Mecas (Mecas), who were also present. The accused was observed to have blood on his hands, pants and sock, as well as battered and bruised knuckles. Another co-accused, Faron Spence (Spence), was arrested at a later date. The accused, Osborne, Mecas and Spence were charged with second degree murder and tried together before a judge and jury.

[7] The key witness at trial was Season Lavallee (Lavallee), who lived in the home and was a witness to the events surrounding the victim's death. Lavallee testified that the victim attended the home the evening of September 21, 2018, and went to the second floor. Two males, who she identified as Spence and his nephew, attacked the victim, who was struck with a chain. The victim fell to the floor. Three other males came up the stairs and joined in the beating, as did Osborne, who came down from the third floor. Four of the males forcibly carried the victim down to the basement, where he was continually beaten. Lavallee's evidence was that, at one point, she stood at the top of the basement stairs and saw the victim lying on his back surrounded by blood. There were multiple people in the basement with the victim at that time. After being referred to her police statement, Lavallee indicated that she told the police that she saw Osborne whipping and stabbing the victim, but had no memory of seeing this when she testified at trial.

[8] Lavallee left the home for a brief time that evening. When she returned, she saw the accused on the main floor with his brother, Michael

Caribou (Caribou). Caribou told her that the victim was dead. Lavallee saw the victim lying in a large pool of blood near the bottom of the basement stairs.

[9] The pathologist testified that the victim suffered 108 separate blunt force injuries spread over his entire body and a stab wound to his chest, which ultimately caused his death. Substantial force was used in inflicting these injuries, which contributed to his demise. Patterned injuries, consistent with the bicycle chain found in the basement, were also present, as was a burn to the victim's buttocks. The victim was alive when the vast majority of these injuries were inflicted.

[10] DNA testing determined that the victim's blood was on the accused's hands and jeans. There was evidence that the accused was heavily intoxicated that night.

[11] The Crown's position at trial was that the accused was an active participant in the deadly assault and that Osborne was the stabber and organizer.

[12] The jury convicted the accused and Osborne of manslaughter and Mecas of assault causing bodily harm. It acquitted Spence.

The Sentencing Hearing

[13] The accused was 24 years old at the time of the offence. A pre-sentence report with a *Gladue* component (the PSR) was filed at the sentencing hearing. The accused's mother is from Pukatawagan First Nation. He lived primarily in Thompson, Manitoba and had an unstable childhood. His parents separated when he was young and he had no relationship with his

father. His mother suffered from alcohol addiction and was involved in violent relationships. He was placed in the care of Child and Family Services a number of times and was often left to fend for himself. Most of his maternal family members are residential school survivors.

[14] The accused became involved in the justice system as a youth and has continued to engage in a cycle of offending. He has four previous assault convictions, including one for aggravated assault as a youth. He began drinking at a young age and acknowledged that alcohol became a problem for him in the months preceding this offence. Since incarceration, he has been involved in institutional incidents of misconduct. He has a mature student diploma and has completed level one of carpentry at the Manitoba Institute of Trades and Technology. He was assessed as a high risk to reoffend.

[15] At the sentencing hearing, the accused filed a motion asserting that the cap on the credit for pre-sentence custody at 1.5:1 set out in sections 719(3) and 719(3.1) of the *Code* be struck down on the basis of a violation of his rights under section 7 of the *Charter*. The accused has remained in custody since his arrest and has never applied for judicial interim release. He argued that those sections of the *Code* limit the availability of pre-sentence custody credit without allowing for any discretion for the harsh consequences he suffered due to the restrictions imposed during the COVID-19 pandemic and for contracting COVID-19 himself. He also submitted that the limit on pre-sentence credit would result in him spending more time incarcerated than someone who is sentenced to the same penitentiary term while out of custody.

[16] The Crown submitted that there was no need to resort to a constitutional challenge to respond to the issues raised by the accused as they could be addressed as part of the sentencing process, so the *Charter* motion was moot. In any event, the Crown contended that the impugned sections do not infringe the *Charter*.

[17] The trial judge dismissed the accused's *Charter* motion. Relying on *R v Nasogaluak*, 2010 SCC 6; and *R v Lloyd*, 2016 SCC 13, he noted the principle of judicial restraint and concluded that it was unnecessary to decide the constitutional challenge as the issues raised by the accused could be addressed as part of the sentencing process. He agreed with *R v Morgan*, 2020 ONCA 279, where it was held that the impact of the COVID-19 pandemic on an accused could be treated as a collateral consequence for sentencing purposes. Having so concluded, he added that there was "no basis whatsoever on what's been put before [him] to conclude that the limitation in question infringes upon the principles of arbitrariness, overbreadth, or gross disproportionality."

[18] At the sentencing hearing, the Crown sought a sentence of 15 years' incarceration. The accused argued that a global sentence in the range of seven to 12 years should be imposed.

[19] The trial judge accepted that the accused was intoxicated at the time of the offence, but found that the evidence supported that he had direct involvement in the brutal and protracted beating of the victim. Stressing the vicious nature of the attack, which involved acts of torture, the trial judge described the crime as involving high moral culpability and the conduct as being close to murder.

[20] The trial judge reviewed the accused's tumultuous background and the impact of colonization and the residential school system, as described by the author of the PSR. He acknowledged that *Gladue* factors played some role in bringing the accused before the Court. He nonetheless considered that the principles of denunciation and general and specific deterrence were paramount and justified a higher range of sentence. Referring to *Morgan*, he indicated he was tempering the sentence with an acknowledgement that the time served thus far and in the future would be more difficult as a result of the pandemic. He considered *R v Ahnert*, 2014 BCCA 212, which discussed a sentencing guideline of less than 14 years' imprisonment for most manslaughter convictions, but noted that some egregious cases call for longer sentences. He imposed a sentence of 13 years less credit for pre-sentence custody of 976 days at 1.5:1 (about four years).

Issues

[21] The accused appeals on the grounds that the trial judge erred in dismissing his *Charter* motion and not allotting him additional credit for pre-sentence custody. More particularly, he argues that the trial judge erred in finding that the issues raised by him could be dealt with through the sentencing process and in declining to decide the constitutional challenge on that basis. He further submits that the trial judge incorrectly determined, in the alternative, that the limitation on pre-sentence custody does not infringe section 7 of the *Charter*. Finally, he contends that the trial judge erred in his consideration of the accused's *Gladue* factors and imposed a sentence that was harsh and unfit.

Standard of Review

[22] The standard of review for a sentence appeal is deferential. Absent an error in principle that materially impacted the sentence, an appellate court may only intervene when the sentence is demonstrably unfit. An error in principle includes an error of law, a failure to consider a relevant factor, or an erroneous consideration of an aggravating or mitigating factor (see *R v Lacasse*, 2015 SCC 64 at paras 44, 51; and *R v Friesen*, 2020 SCC 9 at paras 25-26).

[23] While the failure to consider a relevant factor, such as the impact of collateral consequences, is an error in principle, where collateral consequences are considered by a trial judge who applies the proper sentencing principles, deference is owed to that decision (see *R v Pham*, 2013 SCC 15 at paras 23-24; *R v Suter*, 2018 SCC 34 at para 28; and *R v CCC*, 2019 MBCA 76 at para 17).

[24] A trial judge's decision to decline to address a constitutional challenge based on the principle of judicial restraint is an exercise of judicial discretion and is entitled to deference (see *R v JED*, 2018 MBCA 123 at para 87; and *R v Alexander*, 2019 BCCA 100 at paras 50, 56). An appellate court is justified in intervening in a trial judge's exercise of discretion only if a trial judge misdirects themselves or if the decision is so clearly wrong as to amount to an injustice (see *R v Kuzyk (C)*, 2016 MBCA 97 at para 5; and *R v Loonfoot*, 2018 MBCA 140 at para 12).

Analysis and Decision

Did the Trial Judge Err in Declining to Address the Accused's Charter Motion?

[25] Sections 719(3) and 719(3.1) of the *Code*, which restrict credit for pre-sentence custody to a rate of 1.5:1, provide as follows:

> **Determination of sentence**
> **719(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.
>
> **Exception**
> **719(3.1)** Despite subsection (3), if the circumstances justify it, the maximum is one and one-half days for each day spent in custody.

[26] In *R v Summers*, 2014 SCC 26, the Supreme Court of Canada interpreted the above sections and explained the rationale for enhanced credit as being both quantitative and qualitative. From a quantitative perspective, pre-sentence custody is not taken into account by the correctional authorities in determining an offender's eligibility for parole or conditional release after sentence is imposed. Under the *Corrections and Conditional Release Act*, SC 1992, c 20 (the *CCRA*), parole is available to a federal inmate after one-third of the sentence has been served (see section 120) and statutory release is available once two-thirds of the sentence has been served (see section 127(3)). Accordingly, loss of eligibility for parole is a "circumstance" or basis to award credit for pre-sentence custody at a rate of 1.5:1 (*Summers* at para 6). Further, a ratio of 1.5:1 ensures that an offender who is released

after serving two-thirds of their sentence serves the same amount of time in jail, whether or not they are subject to pre-sentence detention (see paras 27, 68). The qualitative reason for granting enhanced credit relates to conditions in jail. Time in pre-trial detention is often more onerous and remand centres tend not to provide educational or rehabilitative programs generally available when serving sentences in correctional facilities (see para 28).

[27] At the sentencing hearing, the accused put forward specific evidence about the restrictions and hardships he experienced while incarcerated due to the COVID-19 pandemic. He lost access to cultural and spiritual services and was not allowed outside except for very brief times. He contracted COVID-19 and suffered from weight loss and loss of taste and smell, which continued until his sentencing. The accused also filed statistical evidence, which he asserted indicated that, from 2018-2019, a first-time male Indigenous federal offender serves, on average, 38% of his sentence before receiving day parole and 45.3% of his sentence before receiving full parole (see Public Safety Canada, *Corrections and Conditional Release: Statistical Overview*, 2019 Annual Report, Catalogue No PSI-3E-PDF (Ottawa: PSC, 2020) at p 98 (the PSC report)).

[28] As earlier mentioned, the accused's argument in respect of his *Charter* motion was two-fold, consisting of a qualitative and a quantitative component. First, he submitted that the limit on pre-sentence custody was unconstitutional as it prevented a sentencing judge from granting enhanced credit to account for the harsh conditions he suffered as a result of the COVID-19 pandemic. Second, he argued that, based on the above statistical evidence, assuming he received parole and a credit of 1.5:1, he would spend more time

in custody than an offender with a similar sentence who was granted judicial interim release.

[29] In accepting that it was unnecessary to resort to a *Charter* remedy as the matter could be dealt with through the sentencing process, the trial judge said:

> . . .
> . . . I am satisfied on the authority of [*Summers*], [*Nasogaluak*], and [*Suter*], and other cases such as [*Morgan*], a decision of the Ontario Court of Appeal, that the preponderance of authority supports the position of the Crown respondent that in appropriate circumstances the import of the COVID-19 restrictions or hardships may be considered as collateral consequences for sentencing purposes.
>
> . . . I agree with that, and therefore it is neither necessary nor desirable to go the *Charter* route suggested by the [accused].
> . . .

[30] The trial judge then relied on the following quote from *Lloyd*, which speaks to the principle of judicial restraint and the flexible application of the doctrine of mootness (at para 18):

> To be sure, it does not follow that a provincial court judge is obligated to consider the constitutionality of a mandatory minimum provision where it can have no impact on the sentence in the case at issue. Judicial economy dictates that judges should not squander time and resources on matters they need not decide. But a formalistic approach should be avoided. Thus, once the judge in this case determined that the mandatory minimum did not materially exceed the bottom of the sentencing range applicable to Mr. Lloyd, he could have declined to consider its constitutionality. To put it in legal terms, the doctrine of mootness should be flexibly applied. . . .

[31] To determine whether the trial judge erred in the exercise of his discretion to decline to decide the constitutional issue requires an examination of the jurisprudence and principles he relied upon.

Judicial Restraint

[32] Judicial restraint or judicial economy is one of the animating rationales behind the mootness doctrine. The public interests in both the conservation of scarce judicial resources and judicial restraint militate against the courts unnecessarily deciding legal questions (see *Geophysical Service Incorporated v National Energy Board*, 2011 FCA 360 at para 9). Further, Peter W Hogg & Wade K Wright, *Constitutional Law of Canada*, 5th ed Supp (Toronto: Carswell, 2022) (loose-leaf updated 2022, release 1) pt IV, ch 59, explain (at section 59:11):

> A case that is properly before a court may be capable of decision on a non-constitutional ground or a constitutional ground or both. The course of judicial restraint is to decide the case on the non-constitutional ground. . . .
>
> [footnote omitted]

[33] As the majority of the Supreme Court affirmed in *Phillips v Nova Scotia (Commission of Inquiry into the Westray Mine Tragedy)*, [1995] 2 SCR 97, "This Court has said on numerous occasions that it should not decide issues of law that are not necessary to a resolution of an appeal. This is particularly true with respect to constitutional issues" (at para 6). Another example of the expression of this principle is found in *JED*, where Steel JA noted that, "[n]ormally, the course of judicial restraint would be to decide the case on the narrowest possible of grounds" (at para 87).

[34] In *Lloyd*, judicial restraint, as an aspect of mootness, was addressed in the context of a constitutional challenge to a mandatory minimum sentence which had no impact on the sentence of the accused in that case. Remarking on the importance of judicial economy, *Lloyd* instructs that the fact that a party has standing to make a constitutional argument does not compel a court to rule on the issue. A sentencing judge has discretion as to whether to address the constitutional question where it can have no impact on the sentence of the offender (see para 18; see also *Alexander* at para 50).

[35] I now turn to the basis upon which the trial judge determined that it was unnecessary to address the constitutionality of the provisions limiting pre-sentence custody.

Collateral Consequences and the COVID-19 Pandemic

[36] There are many sentencing decisions in which courts have taken into account the impact of the COVID-19 pandemic on inmates in determining a fit sentence. These decisions involve a variety of circumstances and reflect differing legal justifications for doing so (see *Morgan*; *R v Rajmoolie*, 2020 ONCA 791; *R v Marshall*, 2021 ONCA 344; and *R v AB*, 2021 SKCA 119).

[37] In finding that it was "neither necessary nor desirable to go the *Charter* route", the trial judge concluded that, in appropriate circumstances, the impact of the COVID-19 pandemic could be considered as a collateral consequence for sentencing purposes within the sentencing regime in accordance with *Morgan*.

[38] *Morgan* is the seminal decision wherein the Ontario Court of Appeal accepted that difficult conditions of incarceration resulting from the

COVID-19 pandemic can qualify as a collateral consequence warranting consideration during sentencing (see para 9). In that case, the appellant sought a reduction of his sentence, submitting that the intervening event of the COVID-19 pandemic rendered the sentence unfit because of the risk of contracting COVID-19 while incarcerated and the restrictions on rehabilitative programs. The Court viewed the appellant's submission as falling into the category of collateral consequences for sentencing purposes, as explained by the Supreme Court in *Suter*. Nonetheless, it declined to reduce the sentence because it was already at the very low end of the range and "collateral consequences cannot be used to reduce a sentence to a point where [it is] disproportionate to the gravity of the offence" (at para 10).

[39] In *Suter*, the Supreme Court clarified the scope of the doctrine of collateral consequences previously outlined in *Pham*. The collateral consequence at issue in *Suter* was the vigilante violence against the accused that occurred after the offence, but before the sentencing. The Court held that the sentencing judge properly took this into account in determining the appropriate sentence. Moldaver J, writing for the majority, stated that, "[t]ailoring sentences to the circumstances of the offence and the offender may require the sentencing judge to look at collateral consequences" (at para 46). He defined collateral consequences as "includ[ing] any consequence arising from the commission of an offence, the conviction for an offence, or the sentence imposed for an offence, that impacts the offender" (at para 47). He explained that "collateral consequences are not necessarily 'aggravating' or 'mitigating' factors under section 718.2(a) of the . . . *Code*—as they do not relate to the gravity of the offence or the level of responsibility of the offender" (at para 48). They nevertheless speak to the personal

circumstances of the offender (*ibid*). He cautioned, however, that collateral consequences cannot be used to reduce a sentence to a point where it becomes disproportionate to the gravity of the offence or the moral blameworthiness of the offender (see para 56). Further, there is no requirement that collateral consequences emanate from state misconduct in order to be considered (*ibid*).

[40] As this Court articulated in *R v Gardiner*, 2019 MBCA 63, a case involving the immigration consequence of a sentence, the consideration of collateral consequences in the sentencing process is to "ensure that the accused does not receive a sentence disproportionate to those of others given his personal circumstances" (at para 20).

[41] The treatment of the impact of the COVID-19 pandemic as a collateral consequence within the sentencing context has been adopted in a number of cases. Furthermore, this characterization has been recognized as sufficiently flexible to consider the impact of the COVID-19 pandemic on a go-forward sentence and on the conditions of pre-sentence custody. This is consistent with *Suter*, which considered a collateral consequence that took place before sentencing. It makes sense that fashioning a sentence to the particular circumstances of the offender would involve an assessment of the collateral consequences already experienced by that offender.

[42] For example, in *R v Johnston*, 2021 ONCA 331, the Ontario Court of Appeal upheld the trial judge's decision to take into account the collateral consequence of the impact of the COVID-19 pandemic on an accused for the time already served in a remand centre, in addition to the risks to his health in the remaining sentence to be served. The Court noted that a trial judge's exercise of discretion in weighing relevant factors attracts deference on appeal

and the trial judge did not exercise his discretion unreasonably (see para 20; see also *R v Nuziato*, 2021 ONCA 300 at para 3).

[43] As for other appellate courts that have accepted this approach, in *R v St Constantine*, 2022 BCCA 6, the Court acknowledged that the impact of the COVID-19 pandemic could be taken into account as a collateral consequence that relates to the personal circumstances of the offender (see paras 41, 43). So too, in *R v Kolola*, 2021 NUCA 11, the Court stated that the COVID-19 pandemic may be considered as a collateral consequence which might have a more significant impact on an offender because of his unique and individual circumstances (see para 18).

[44] I pause to comment on *R v Duncan*, 2016 ONCA 754, which has been repeatedly applied in Ontario courts to justify the awarding of an enhanced credit, commonly referred to as the "*Duncan* credit", for pre-sentence custody to compensate an offender for the impact of harsh custodial conditions, including COVID-19 restrictions. Often, a specific number of days or months are given as a *Duncan* credit in addition to the 1.5:1 credit for pre-sentence custody pursuant to section 719(3.1) of the *Code*. Recently in *Marshall*, the Court clarified that a *Duncan* credit is given on account of particularly difficult and punitive pre-sentence custody conditions. It is not a deduction from an otherwise appropriate sentence, like credit pursuant to section 719(3), but is one of the mitigating factors that can be taken into account in determining a fit sentence (see paras 50-51).

[45] In my view, the preferable method to allow for the impact of the COVID-19 pandemic in determining a fit sentence, one that is doctrinally sound and consistent with sections 719(3) and 719(3.1) of the *Code*, is to treat

this as a collateral consequence, rather than an enhanced credit. I would, therefore, endorse the approach taken in *Morgan*. As highlighted in *Suter* and *Morgan*, the question is whether the collateral consequences are such that a particular sentence would have a more significant impact on an offender because of their circumstances. It is analytically fitting to assess the potential impact of the COVID-19 pandemic on an offender in this context. In saying this, I reiterate what has been emphasized in the jurisprudence—that collateral consequences cannot be used to reduce a sentence to the point where it is no longer proportionate (see *Kolola* at para 18; and *St Constantine* at para 43).

[46] Accordingly, the trial judge was correct in considering the impact of the COVID-19 pandemic on the accused as a collateral consequence that could temper his sentence. As such, he made no error in exercising his discretion and concluding that it was, therefore, unnecessary to resort to a *Charter* remedy to address that issue. This accords with the principle of judicial restraint and deciding that matter on the more narrow or non-constitutional grounds.

[47] One final point related to the trial judge's treatment of the impact of the COVID-19 pandemic as a collateral consequence. As mentioned earlier, the trial judge indicated that he was tempering the accused's sentence to acknowledge the difficulty posed by the pandemic in the time served by the accused thus far and into the future. While the accused does not directly take issue with the weight attributed by the trial judge in this regard, appellate courts have appropriately taken a deferential stance to the balancing of this factor absent an error in principle (see *Johnston* at para 20; and *St Constantine* at para 46).

The Accused's Quantitative Argument

[48] Even if the impact of the COVID-19 pandemic on the accused is considered as a collateral consequence in determining a fit sentence, this does not address his separate argument challenging sections 719(3) and 719(3.1) of the *Code* because of a disparity in sentence between offenders released before sentencing and those who remain in pre-sentence custody.

[49] The trial judge does not directly explain why he determined that he was not required to decide the constitutional question raised by this quantitative argument of the accused. Before the trial judge and before this Court, the Crown argued that this was unnecessary since *Nasogaluak* allows for *Charter* issues to be addressed in the sentencing process and there is broad discretion to craft a remedy in that context to account for any excessive custody time to be served by the accused. It is implicit from the trial judge's reliance on *Nasogaluak* and *Lloyd* that he accepted the Crown's position.

[50] In my view, the trial judge erred in principle in declining to address the accused's quantitative argument on the basis of *Nasogaluak*.

[51] *Nasogaluak* is applicable to circumstances involving state misconduct, which is something quite different from a *Charter* challenge to legislative provisions. In that case, the police used excessive force when they arrested the accused and the issue was the possible reduction in sentence to take this into consideration. The Supreme Court held that *Charter* breaches and other state misconduct may be taken into account as relevant mitigating factors under the usual sentencing framework without recourse to remedies under section 24(1) of the *Charter* (see paras 47, 55). Factors unrelated to the

offence and to the offender will remain irrelevant to the sentencing process and will have to be addressed elsewhere (see para 63).

[52] The scope of *Nasogaluak* was considered in *R v Blackplume*, 2021 ABCA 2, where the Alberta Court of Appeal held that it does not apply to cases where a penalty imposed by a statute is challenged under the *Charter*. In that case, the accused was found to be a dangerous offender, but the sentencing judge found a section 12 *Charter* breach regarding the mandatory indeterminate sentence. The Court determined that *Nasogaluak* is limited to cases involving state misconduct and did not apply to a case where it was alleged that the penalty imposed by a statute breached the *Charter* (see para 41).

[53] This is not a case of state misconduct affecting an individual, but a claim that a law of universal application is unconstitutional. The accused's *Charter* motion seeks a declaration of invalidity of sections 719(3) and 719(3.1) of the *Code* under section 52(1) of the *Constitution Act, 1982* due to a breach of section 7 of the *Charter*. This does not fall within the ambit of *Nasogaluak*.

[54] Notwithstanding the trial judge's misdirection as just described, as I will now explain, I am nonetheless of the view, for different reasons, that it is appropriate to decline to address the accused's constitutional challenge on the basis of the principle of judicial restraint.

[55] As previously mentioned, a court should not decide constitutional questions unnecessarily and is not obliged to determine a constitutional issue unless it would have an impact on the appropriate sentence.

[56] The accused's challenge is grounded on the assertion that, if he is not granted credit greater than 1.5:1, he will spend more time in custody than a similarly sentenced offender who did not serve any pre-sentence custody. He says this because, as *Summers* noted, a credit of 1.5:1 only ensures that an offender who is released after serving two-thirds of their sentence serves the same amount of time in jail, whether or not they are subject to pre-sentence custody (see para 27). (Interestingly in *Summers*, admittedly not a constitutional challenge, the Supreme Court recognized that a 1.5:1 ratio would not put offenders held in custody prior to sentencing in the same position as an offender who had received judicial interim release insofar as parole eligibility at the one-third mark (see para 62).)

[57] So while parity is achieved at statutory release, this would not occur if the accused was granted parole and released before that time. The accused claims this will be the case.

[58] The accused relies on one statistical table to argue that he would be granted parole and, therefore, serve a disparate sentence compared to a hypothetical offender who was granted bail. A single table from the PSC report is relied upon which he indicates shows that an average first-time Indigenous offender will serve 38% of their sentence before receiving day parole and 45.3% of their sentence before receiving full parole (see p 98). In fact, the table is not limited to first-time or Indigenous offenders, but applies to all male offenders generally. Of course, whether or not the accused will receive parole depends on the National Parole Board. But that aside, as stressed by the Crown, there is no evidence, expert or otherwise, as to the appropriateness of using this general raw data to reach conclusions about the accused's parole prospects in the future, which is a discretionary decision

determined by correctional authorities under a different statutory mandate. Moreover, there is no indication that the accused would fall into the category of the average offender. If anything, the evidence suggests otherwise. The accused has a criminal record for violence, this offence was particularly brutal, he is assessed at a high risk to reoffend and he has been involved in six infractions while incarcerated.

[59] The accused has already received a credit of 1.5:1. Further, the trial judge stated that he was accounting for the impact of the COVID-19 pandemic in arriving at his sentence. This, together with the weak evidentiary record and the accused's specific circumstances, provide insufficient indication that the accused would spend more time in custody than an offender out on bail and require a credit of greater than 1:5:1 to avoid such a result. Since I am of the view that a determination of the constitutional issue would not impact the accused's sentence and given the paucity of the evidence, it is in the interest of judicial economy to refrain from deciding that matter.

[60] Before leaving this point, I think it is important to highlight *R v Passera*, 2019 ONCA 527, as an example of a decision involving a similar constitutional challenge with a robust evidentiary record and in-depth submissions. In that case, the accused claimed that section 719(1) of the *Code*, which provides that a sentence begins when imposed, and section 719(3.1), which limits credit for pre-sentence custody, violated sections 7 and 12 of the *Charter* as they required her to spend a longer time in custody before being eligible for parole than if she had been granted bail. Various reports containing statistical data were provided, including the complete Public Safety Canada, *Corrections and Conditional Release: Statistical Overview*, 2017 Annual Report (Ottawa: Public Works and Government Services

Canada, 2018). The Court took into account statistical data that indicated that most federal offenders are released on their statutory release date at two-thirds of their sentence (see para 54). Also included in the material before the Court was detailed information comparing sentences in respect of all facets of conditional release between offenders on bail and the accused to illustrate the differences in time spent in custody (see para 16). The information demonstrated that parity in respect of all facets of conditional release between offenders who were on bail and those who were in custody cannot be achieved through the granting of enhanced credit for pre-sentence custody (see paras 20-21). Ultimately, the Court dismissed the accused's constitutional argument as neither of these impugned sections deal with the timing and eligibility for parole and whether pre-sentence custody can be taken into account by correctional authorities, which is governed by the *CCRA*, a statute which was not challenged by the accused (see paras 10, 26, 45).

[61] Lastly, given my decision, it is not appropriate to review the trial judge's *obiter* and conclusory statement concerning the constitutionality of sections 719(3) and 719(3.1) of the *Code*. A proper analysis is best left for another day.

Did the Trial Judge Err in His Consideration of the Accused's Gladue Factors and Impose a Harsh and Unfit Sentence?

[62] The accused submits that the trial judge erred by giving insufficient weight to his *Gladue* factors which led to the imposition of an unfit sentence. He contends that the trial judge failed to undertake an analysis that incorporated the accused's reduced moral culpability because of a view that

sentences should not vary between Indigenous and non-Indigenous offenders for a serious and violent offence such as the current offence.

[63] Sentencing is a highly individualized process, calling for a delicate balancing of the various sentencing principles and objectives in accordance with the fundamental principle that a sentence must be proportionate to the gravity of the offence and to the degree of responsibility of the offender. The failure to take into account the constrained circumstances that may diminish an Indigenous offender's moral culpability would violate the fundamental principle of proportionality (see *R v Ipeelee*, 2012 SCC 13 at para 73).

[64] I am not persuaded that the trial judge erred in his treatment and application of the accused's *Gladue* factors.

[65] In arguing that the trial judge erred, the accused refers to the trial judge's reference to *R v Wells*, 2000 SCC 10, as authority for the proposition that, where the offence is a violent and serious one and the principles of denunciation and deterrence are dominant, the appropriate sentence will often not differ between Indigenous and non-Indigenous offenders.

[66] It is true that, in *Ipeelee*, the Supreme Court warned that courts have erroneously interpreted this generalization from *Wells* as indicating that *Gladue* principles do not apply to serious offences (see para 84). To be sure, the Supreme Court has made it clear that *Gladue* principles apply to violent and serious offences. Courts should not merely pay lip service to their application. However, I do not accept that the trial judge's reference to *Wells* and emphasis on the seriousness of the offence meant that he approached the matter as though *Gladue* factors did not apply. Contrary to the accused's contention, the trial judge specifically acknowledged that *Gladue* factors

apply to violent and serious offences and recognized that the consideration of an Indigenous person's unique circumstances is a statutory duty. He said:

> . . .
> . . . [*Gladue*] stands for the proposition that despite the seriousness of a crime, I must take into account [section] 718.2(e) of the *Criminal Code* and the factors identified in *Gladue* and *Ipeelee* as relevant because of the accused['s] aboriginal heritage . . .. Much of what brings [him] to court and many of the factors that led [him] to offend, namely [his] drug and alcohol use, choice of companions, as we see from the present circumstances, problems with compliance, and underachievement generally, are the predictable legacy of colonialism [and] residential schools. . . . These are givens.
> . . .

[67] The trial judge did not view the seriousness of the offence as eliminating the obligation to apply section 718.2(e) of the *Code*. He reviewed in detail the accused's background and the probation officer's conclusion regarding the impact of colonization and the residential school system upon him and his family. He was alive to and considered the *Gladue* factors, but was of the view that, given the brutality of the assault and the accused's record, the principles of denunciation and deterrence were paramount and that the accused's commission of the offence still involved a high degree of moral culpability. Furthermore and importantly, the accused was assessed as a high risk to reoffend. The decision to weigh factors in a particular way is not an error requiring appellate intervention unless the weighing is unreasonable (see *Lacasse* at para 78). I see no reviewable error in the manner in which he weighed the *Gladue* factors.

[68] As for the fitness of the sentence, there is no doubt that the accused received a significant custodial sentence. However, this case called for a

denunciatory sentence. Indeed, the accused suggests that a fit sentence in this case is 10 years' imprisonment.

[69] Sentences for manslaughter cover a wide range of cases extending from those near accident to those near murder at the other extreme. Different degrees of moral culpability attach to each along the continuum within that spectrum (see *R v LaBerge*, 1995 ABCA 196 at para 6; and *R v McLeod*, 2016 MBCA 7 at para 17).

[70] The Crown relies on *Ahnert* and *McLeod* as justification for a lengthy sentence in a manslaughter case such as this. Both cases were referred to by the trial judge.

[71] In *Ahnert*, the British Columbia Court of Appeal upheld an 18-year sentence for an offender who brutally beat the victim to death with a co-accused over several hours. Stating that most manslaughter cases result in sentences of less than 14 years, the exceptional violence, callous attitude and prolonged attack justified an unusually lengthy sentence (see paras 39, 41). In *Ahnert*, the accused pled guilty, had a long and serious criminal record and no *Gladue* factors.

[72] In *McLeod*, an intoxicated first-time accused strangled the victim during a consensual wrestling match and then dismembered and disposed of the body. The trial judge found that a sentence of 11 to 13 years' imprisonment was appropriate for the killing and a further two to four years was fit for the accused's aggravating post-offence conduct. A 15-year sentence was upheld on appeal, with this Court noting that it was at the high end of the range.

[73] In the present case, the trial judge reasonably regarded this crime as a high-end manslaughter close to murder. He found that the accused directly participated in the brutal and protracted beating, continued to be involved as part of a large group and inflicted injuries after witnessing injuries caused by others. He understandably viewed this as a case of extreme violence involving a high degree of moral blameworthiness. He appropriately described the aggravating factors which made this offence especially egregious. These included the vicious nature of the attack which involved acts of torture (burning the victim with an open flame and striking him with bicycle parts), the vulnerability of the victim, the indignities heaped upon him, the prolonged nature of the attack and that the victim was left to die alone, naked on the floor. He took into account the accused's personal circumstances, his criminal record, his continued engagement in violence while incarcerated, his high risk to reoffend, but also his *Gladue* factors and that his time in custody had been more difficult because of the pandemic. In all of the circumstances, the sentence, while high, is not demonstrably unfit for this particular homicide. Appellate intervention is not warranted.

Conclusion

[74] For these reasons, I would dismiss the appeal.

Spivak JA

I agree: Pfuetzner JA

I agree: Simonsen JA