Citation: R v Guiboche, 2025 MBCA 8
Date: 20250129
Docket: AR24-30-10085

IN THE COURT OF APPEAL OF MANITOBA

Coram: Chief Justice Marianne Rivoalen
Madam Justice Holly C. Beard
Madam Justice Diana M. Cameron

B E T W E E N:

	)	***A. C. Smith***
	)	*for the Appellant*
HIS MAJESTY THE KING	)	
	)	***S. Zaman***
Appellant	)	*for the Respondent*
	)	
- and -	)	*Appeal heard and*
	)	*Decision pronounced:*
CHRISTOPHER WAYNE DAN GUIBOCHE	)	***January 15, 2025***
	)	
(Accused) Respondent	)	*Written reasons:*
	)	***January 29, 2025***

RIVOALEN CJM (for the Court):

Introduction

[1] This is a Crown sentence appeal.

[2] On August 14, 2023, the accused pled guilty in the Provincial Court to discharging a restricted firearm with the intent to endanger life under section 244(1) of the *Criminal Code*, RSC 1985, c C-46 [the *Code*]. On May 3, 2024, the accused was sentenced under section 244(2)(a)(i) to an effective sentence of five years' incarceration. With an enhanced credit of three years and twelve days for pre-sentence custody, the sentencing judge

imposed a sentence of incarceration of two years less one day, to be followed by three years of supervised probation and ancillary orders.

[3] The Crown sought leave to appeal and, if granted, appealed the sentence.

[4] The Crown (not the same Crown as at the sentencing) advances one ground of appeal, being that the sentencing judge erred in his assessment of aggravating and mitigating factors, resulting in the imposition of an unfit sentence. In particular, the Crown alleges that the sentencing judge committed a number of errors in principle, including that (i) he failed to give effect to the "inflationary floor" created by the minimum sentence under section 244(2)(a)(i) of the *Code*, (ii) he overemphasized the accused's personal circumstances and failed to give effect to the primary sentencing principles of denunciation and deterrence, (iii) he relied too heavily on the "jump" principle, and (iv) he failed to acknowledge important aggravating factors of the offence.

[5] After hearing the appeal, we granted leave to appeal the sentence, but dismissed the appeal with reasons to follow. These are those reasons.

Background

[6] During the evening of March 11, 2022, the accused, a gang member, was in the lounge of a downtown bar, playing pool and drinking with a fellow gang member (his associate). According to the police arrest report, the accused and his associate became embroiled in a verbal dispute with the victim, who was also in the bar. When the victim left the bar, the accused and his associate followed him out to the parking lot. The accused produced a nine-millimetre handgun and fired at the victim three times, striking him in

the hip/buttocks area. The accused and his associate fled on foot, but were later identified through a combination of surveillance videos (video evidence) and police notes.

[7] The accused was arrested approximately ten days later and gave a statement to the police, indicating he had used drugs on the day of the incident and did not recall the events.

[8] The injury to the victim was not life-threatening and did not result in any permanent injuries.

[9] The handgun was never recovered.

[10] At the sentencing hearing, the Crown (the sentencing Crown) sought a sentence of seven years' incarceration, arguing that an offence involving the discharge of an illegal firearm resulting in injury to the victim attracts a sentence in the range of seven to eleven years. The accused sought a sentence of five years, which is the mandatory minimum sentence imposed under section 244(2)(a)(i) of the *Code.*

[11] At the time of sentencing, the accused was forty years old. He had a lengthy criminal record, relating primarily to property offences. He is a non-status Indigenous person; however, he was not exposed to his Indigenous culture and spirituality when growing up. He had a difficult upbringing during which he experienced neglect and trauma from a young age. He and his siblings were raised by their mother, who had been taken away from her family during the Sixties Scoop. She had alcohol issues throughout her life and the family struggled to meet their basic needs. As the sentencing judge noted, there were significant *Gladue* factors (see *R v Gladue*, 1999 CanLII 679 (SCC) [*Gladue*]) at play.

[12] While in pre-sentence custody, the accused successfully completed the Winding River treatment program, which is a lengthy and intensive program, and extricated himself from gang affiliation. He now serves as a mentor to inmates starting that program. In addition, he completed the required studies and received his Mature Grade 12 diploma, as well as a long list of approximately thirty other programs and workshops that are described in the pre-sentence report (the PSR).

[13] The PSR also sets out the positive reports from third parties, confirming the significant change in attitude that the accused stressed he has achieved since his arrest. These include his case manager and his teacher at the Headingley Correctional Centre, as well as his sister.

The Sentencing Judge's Decision

[14] In his decision, the sentencing judge explained the sentence that he imposed by saying that, while he accepted the sentencing Crown's submissions that there is a range of sentence of seven to eleven years' incarceration in circumstances such as the ones before him, departing from that range with the imposition of a lower sentence would not be inappropriate.

[15] The sentencing judge recognized the paramountcy of general deterrence and denunciation and stated that the circumstances particular to an accused "[were] secondary considerations and [he recognized] that in arriving at the sentence that [he did]." Further, he acknowledged that significant *Gladue* factors were present, but that when dealing with serious offences of violence such as this, the need to protect the public may result in similar sentences for Indigenous and non-Indigenous offenders.

[16] In response to the sentencing Crown's submissions that the offence was aggravated because it was unprovoked and planned, the sentencing judge said he was not satisfied beyond a reasonable doubt that it had proven either of those factors. He repeated that, "[i]n sentencings related to serious violent offences the principles of general deterrence and denunciation are paramount."

[17] The sentencing judge cited the Ontario Court of Appeal in *R v Hamilton*, 2004 CanLII 5549 (ONCA): "Sentencing is a very human process. . . . [T]he fixing of a fit sentence is the product of the combined effects of the circumstances of the specific offence with the unique attributes of the specific offender" (at para 87).

[18] The sentencing judge then referred to proportionality as a fundamental principle of sentencing, citing *R v Ipeelee*, 2012 SCC 13 at para 37:

> The fundamental principle of sentencing (i.e., proportionality) is intimately tied to the fundamental purpose of sentencing [for two reasons]. . . . First, the principle ensures that a sentence reflects the gravity of the offence. This is closely tied to the objective of denunciation. It promotes justice for victims and ensures public confidence in the justice system. . . . Second, the principle of proportionality ensures that a sentence does not exceed what is appropriate, given the moral blameworthiness of the offender. In this sense, the principle serves a limiting or restraining function and ensures justice for the offender. In the Canadian criminal justice system, a just sanction is one that reflects both perspectives on proportionality and does not elevate one at the expense of the other.

[19] The sentencing judge stated that the protection of the public principle did not result in the need to increase the sentence from what would

otherwise be appropriate having regard to the other sentencing principles. He considered the weight that should be given to the accused's efforts to reform himself while in custody. He found that the accused had grown significantly while in custody, adopting a new and positive attitude, which change had been confirmed by the people who knew him best.

[20] The sentencing judge noted that, by imposing a sentence of two years less a day, he could also order a lengthy period of probation that would provide the accused with community supports for a lengthy period following his release to allow access to programming after he returned to the community.

Standard of Review

[21] The standard of review on a sentence appeal is well-established. As this Court stated in *R v Johnson*, 2020 MBCA 10 at para 9:

> Appellate courts must show great deference when reviewing sentencing decisions. Succinctly put, appellate intervention is only justified in cases where a material error has an impact on the sentence or when the sentence is demonstrably unfit. A material error includes an error in principle, a failure to consider a relevant factor or an erroneous consideration of an aggravating or mitigating factor. It also includes an overemphasis of the appropriate factors (see *R v Lacasse*, 2015 SCC 64 at paras 41, 43-44, 51).

[22] In *R v Lacasse*, 2015 SCC 64, the Supreme Court of Canada made it clear that the test for appellate intervention after reviewing the fitness of a sentence is a very high threshold. The standard has also been described as '"clearly or manifestly excessive', 'clearly excessive or inadequate', or representing a 'substantial and marked departure'" (*ibid* at para 52) or "an

unreasonable departure" (*ibid* at para 53) from the principle of proportionality. As such, the test is not whether the sentence imposed is that which the appellate court would have imposed. Nor can an appellate court intervene simply because it would have weighed relevant factors differently (see *ibid* at paras 11, 52).

[23] A sentence is demonstrably unfit if it represents an unreasonable departure from what is required by the fundamental sentencing principle of proportionality. In other words, if the sentence "is in substantial and marked departure from the sentences customarily imposed for similar offenders committing similar crimes" (*R v Parranto*, 2021 SCC 46 at para 118, quoting *R v M (CA)*, 1996 CanLII 230 at para 92 (SCC)).

Analysis

[24] The Crown argues that the sentencing judge erred in his assessment of aggravating and mitigating factors, resulting in the imposition of an unfit sentence.

(i) Error in Aggravating Circumstances

[25] The Crown argues, relying on the video evidence from the bar, that the sentencing judge erred by declining to find that the offence was unprovoked or unplanned, and that his finding was speculative. Its position is that this was speculative and an error in principle because it was an unsupported finding as to an aggravating factor.

[26] As pointed out by the accused at the appeal hearing, the video evidence had to be weighed together with the police arrest report that was also in evidence before the sentencing judge. In that report, the police say that,

while in the bar, the accused and his associate "become embroiled in a verbal dispute with the victim". This was referenced by defence counsel at the sentencing hearing when he pointed out: "Something happened in the bar. We're unclear exactly what happened as well. Then you have the sequence of events that are depicted on video as well."

[27] When all the evidence is considered, we are of the view that the sentencing judge did not err in finding that, "based on the evidence before [him]", he could not find either no provocation or no planning beyond a reasonable doubt.

(ii) The Jump Principle

[28] The Crown's position is that the sentencing judge erred by placing significant weight on the jump principle. It argues that the jump principle presumes offences of a similar nature, which is not the case here, and that it has recently been said that it is "one of the least significant mitigating factors in sentencing" (*R v Mbah*, 2024 ABCA 174 at para 11).

[29] The Alberta Court of Appeal also stated that the jump principle remains relevant in certain cases. We are of the view that, while the sentencing judge refers to this principle and notes that the five-year sentence he imposed is a significant jump from the accused's earlier sentences, we do not agree with the Crown's position that he placed significant weight on it. It was a principle that he was entitled to consider, and we are of the view that he did not err in doing so.

(iii) Overemphasizing Mitigating Factors

[30] The Crown's position is that the sentencing judge overemphasized the accused's mitigating factors in determining sentence. It states that, while the sentencing judge acknowledged at the outset that the paramount sentencing principles were denunciation and deterrence, he made no further mention of them and did not explain how the most lenient sentence would achieve those objectives. It argues that the sentencing judge consistently emphasized the accused's prospects for rehabilitation and provided support for his rehabilitation with a provincially based disposition.

[31] We do not agree with the Crown's characterization of the sentencing judge's reasons. The sentencing judge began his reasons by acknowledging the paramountcy of denunciation and general deterrence:

> [The sentencing Crown] has rightly pointed out in circumstances where general deterrence and denunciation are the paramount considerations that the considerations are squarely focused on those two sentencing principles. To use [the sentencing Crown's] language, that's what drives the bus.
>
> [Defence counsel] on behalf of [the accused] has focused on those factors that are particular to his client, the circumstances of the offender. They are secondary considerations and I recognize that in arriving at the sentence that I have.

[32] The sentencing judge also recognized the limitations of the significance of the accused's personal circumstances:

> I also recognize because [defence counsel] has relied heavily on the presence of *Gladue* factors that are specific to [the accused] as a First Nations person and while I recognize that those factors are present, I also recognize that when dealing with serious offences of violence such as this the need to protect the public sometimes ultimately results in a sentence which is not appreciably different

> from the sentence that would be imposed on a non-Indigenous offender where those factors aren't present for consideration, and that is also recognized and I've taken that into consideration when assessing the need to separate [the accused] from the community in order to protect the public.

[33] He later repeated the importance of general deterrence and denunciation in this case:

> This offence is a serious violent offence which is reflected in the fact that Parliament has imposed a minimum period of incarceration of five years, one of the longest minimums attaching to an offence other than homicide. In sentencings related to serious violent offences the principles of general deterrence and denunciation are paramount.

[34] The sentencing judge correctly summarized the principles of sentencing and then set out both aggravating and mitigating factors. He considered the protection of the public principle and reviewed the circumstances he found relevant to that principle. The sentencing judge then reviewed the jurisprudence referenced by counsel, correctly acknowledging that "the normative range of sentence is between seven and 11 years in custody." He also noted that the jurisprudence holds that "sentencing and ranges are not intended as judicial straightjackets to constrain the discretion of sentencing judges."

[35] Based on the evidence that the sentencing judge set out in detail, he concluded that "the extensive programming efforts [of the accused] in custody have resulted in significant positive changes" and that "[t]hese mitigating factors are sufficiently compelling to impact in a material way the sentence that would otherwise be imposed."

[36] Finally, the sentencing judge concluded that "[a]pplication of the sentencing principles allows proper weight to be accorded to the principles of denunciation and general deterrence as well as other sentencing principles".

[37] We are of the view that the sentencing judge's reasons, which are relatively lengthy and well reasoned, explain how and why the sentence that he imposed would meet the sentencing principles as he correctly set them out, including general deterrence and denunciation. He then weighed the aggravating and mitigating factors, which are reviewed on a deferential standard. We conclude that, in doing so, the sentencing judge did not err by overemphasizing the mitigating factors.

(iv) Mandatory Minimum Sentence

[38] Finally, the Crown argues that, in light of the aggravating circumstances as the sentencing judge found them, the sentencing judge erred by imposing the mandatory minimum sentence of five years, thereby failing to give effect to the inflationary effect of that minimum sentence (see *R v Morrisey*, 2000 SCC 39 at para 75).

[39] In its submissions, the sentencing Crown raised the issue of the mandatory minimum sentence, quoting from this Court's decision in *R v Maytwayashing*, 2018 MBCA 36 [*Maytwayashing*]: "A mandatory minimum sentence is the starting point for analysis for all offenders. It will be rare that it applies to a repeat offender. In [*Morrisey*], Arbour J explained the 'inflationary floor' . . . created by a minimum punishment" (at para 42).

[40] The sentencing Crown then argued that the applicable sentencing range had to start at seven years because "[t]here has to be a premium for shooting at and striking a human being with a deadly weapon like a firearm."

[41] As mentioned earlier, the sentencing judge referred to *Maytwayashing* and accepted that "the normative range of sentence is between seven and 11 years in custody." He reviewed the facts of that case and others, which the sentencing Crown relied upon. He noted that "sentencing and ranges are not intended as judicial straightjackets to constrain the discretion of sentencing judges." He further found as follows:

> [T]he extensive programming efforts in custody have resulted in significant positive changes. These mitigating factors are sufficiently compelling to impact in a material way the sentence that would otherwise be imposed. The sentence imposed today should recognize and reflect the work that [the accused] has done while in custody.

[42] The sentencing judge concluded by stating that the sentence he imposed applied the sentencing principles to allow proper weight to be accorded to the principles of denunciation and general deterrence, as well as other sentencing principles.

[43] We are of the view that the sentencing judge did not err as argued by the Crown. The sentencing Crown made its argument, citing *Maytwayashing* and other cases, and the sentencing judge delivered his reasons that same day, referring to those cases and the range of sentence that was set out therein. After correctly stating the legal principles and applying them to the facts before him, he concluded that this was a case in which the mandatory minimum sentence should apply to the accused, who is a repeat offender, and explained why that was the case. We are not convinced that he erred as alleged by the Crown. He weighed the aggravating and mitigating factors, applied the legal principles and made a decision regarding the

appropriate sentence. While the sentence may be low, in light of the deferential standard of review, we are not satisfied that it is unfit.

Decision

[44] For these reasons, we granted leave to appeal the sentence, but dismissed the appeal.

Rivoalen CJM

Beard JA

Cameron JA