Citation: R v Letkeman, 2021 MBCA 68 Date: 20210715
Docket: AR20-30-09416

IN THE COURT OF APPEAL OF MANITOBA

Coram: Mr. Justice William J. Burnett
Madam Justice Karen I. Simonsen
Madam Justice Lori T. Spivak

B E T W E E N :

	)	***C. A. Vanderhooft*** *and*
	)	***A. C. Smith***
HER MAJESTY THE QUEEN	)	*for the Appellant*
	)	*(via videoconference)*
Appellant	)	
	)	***J. A. Weinstein*** *and*
	)	***L. D. LaBossière***
- and -	)	*for the Respondent*
	)	*(via videoconference)*
ABRAM LETKEMAN	)	
	)	*Appeal heard:*
	)	***January 15, 2021***
(Accused) Respondent	)	
	)	*Judgment delivered:*
	)	***July 15, 2021***

COVID-19 NOTICE: As a result of the COVID-19 pandemic and pursuant to r 37.2 of the MB, *Court of Appeal Rules*, MR 555/88R, this appeal was heard remotely by videoconference.

On appeal from 2020 MBQB 12

SIMONSEN JA

[1] This is a Crown appeal from a non-custodial sentence imposed on an RCMP officer for criminal negligence causing bodily harm committed while on duty and operating his cruiser car. More specifically, the accused was sentenced to a three-year probation order with the compulsory conditions in sections 732.1(2)(a), (b) and (c) of the *Criminal Code* (the *Code*) and a

condition that he perform 240 hours of community service within 18 months; a fine of $10,000, to be paid within three years; and a 12-month driving prohibition (see 2020 MBQB 12 (*Letkeman 2020*)).

[2] The offence occurred after the accused decided to follow a Jeep (the Jeep) which he suspected was being operated by an impaired driver due to the manner of driving. In the course of the approximately four-minute, slow-speed pursuit, during which the driver did not comply with a traffic stop, the accused twice intentionally struck the Jeep. On the first occasion, in a vain attempt to stop it, he deliberately collided into it, using a "precision immobilization technique" or PIT maneuver, which he was not trained to perform. On the second occasion, he intentionally T-boned the side of the Jeep while it was stationary, in a further attempt to disable it and stop its driver. The second impact caused serious injury to Lori Flett (Ms Flett), who was a passenger in the Jeep.

[3] Following a trial, the trial judge (the judge) found the accused guilty not only of criminal negligence causing bodily harm in the second collision, but also of dangerous driving causing bodily harm in that collision and dangerous driving in the first collision (see 2019 MBQB 124 (*Letkeman 2019*)). The latter two counts were conditionally stayed on the basis of the principles in *Kienapple v The Queen*, [1975] 1 SCR 729. The facts of the first collision were nonetheless relevant, as part of the factual matrix, to the sentencing for criminal negligence causing bodily harm.

[4] The Crown appeals the sentence on the grounds that the judge erred by mischaracterising the accused's moral blameworthiness; overemphasising his personal circumstances notwithstanding the focus on deterrence and

denunciation required in sentencing for this offence; and imposing a sentence that was unfit.

[5] Despite the Crown's position that a three-year jail sentence should be imposed, Crown counsel, at the appeal hearing, acknowledged that this Court may consider a lesser sentence to be appropriate, but emphasised that it should involve incarceration.

Circumstances of the Offence

[6] On the evening of November 20, 2015, Ms Flett, her two brothers and another female were drinking and partying, celebrating Ms Flett's birthday. Some cocaine use was also involved. Steven Campbell (Mr. Campbell) joined them at one of the local bars in Thompson, Manitoba. Near 2:00 a.m. (on November 21), they all left in the Jeep, which was being operated by Mr. Campbell.

[7] At the time, the accused was on duty in his capacity as an RCMP officer, operating a marked cruiser car equipped with lights and sirens. Although there were seven other officers also on duty, he was working alone.

[8] At approximately 2:00 a.m., the accused was attracted to the Jeep after hearing engine-revving and tire-spinning and observing the manner in which it was being operated. He decided to follow it, suspecting that the driver was impaired. The accused initiated his emergency lights and conducted a traffic stop. The driver of the Jeep initially complied with the traffic stop but, before the accused could exit his vehicle, the driver took off and continued driving, despite the pleas of his passengers. A slow-speed pursuit was initiated by the accused. During that pursuit, the accused advised

the Operational Communications Centre that the driver of the Jeep was fishtailing around corners.

[9] The Jeep slowed at an intersection and the accused, aware that it was full of passengers, decided to use the force of his cruiser car to immobilise it. This technique is known as the PIT maneuver. The accused's actions caused the Jeep to spin around and thereby collide with, and cause significant damage to, the police vehicle. The Jeep continued on. The accused had not sought his supervisor's input or guidance regarding his causing that collision and then failed to report same when he spoke with his supervisor after the incident. Without all of the information, the supervisor confirmed that the pursuit could continue.

[10] Given the number of officers on duty that evening, backup support was not far from the accused's position. As the pursuit continued, the Jeep went off a main residential road onto a hydro right-of-way that was used as an ATV trail. The accused followed, and two other officers were approximately a minute behind him. Due to the uneven roadway, the Jeep came to a stop perpendicular to the trail. Again knowing that the stationary Jeep was full of occupants, but in a further attempt to disable it and stop the chase, the accused drove into its passenger side, striking it with great force. The collision caused the Jeep to spin, coming to rest on the opposite side of the trail. Ms Flett, who was situated by the rear passenger side door directly at the point of impact, sustained a fractured pelvis and serious neck injuries as a result.

[11] To complete the narrative, the incident ended with the accused approaching the Jeep with his firearm drawn, and the Jeep coming toward him, striking his foot. He shot at the Jeep multiple times, thereby killing the

driver, Mr. Campbell, and very seriously injuring Ms Flett. The accused was acquitted of all charges in connection with the shooting, with the judge concluding that "[t]he result was a tragic but proportionate response to a real and immediate threat to the [accused's] life" (*Letkeman 2019* at para 91). The shooting formed no part of the sentencing, nor is it relevant to this appeal.

[12] The judge described Ms Flett's injuries as "severe and lifelong" (*Letkeman 2020* at para 47), while also noting that "sadly . . . much of her ongoing disability is related to the shooting" (at para 34).

Circumstances of the Accused

[13] The accused is married and has four pre-teenaged children. Not surprisingly, as a police officer, he has no criminal record. He is a devout Christian and attends church regularly. At the time of the offence, he was 33 years of age, and a five-year veteran of the RCMP.

[14] While growing up, the accused's father often physically abused him and his eight siblings. When the accused was a teenager, both his brother and sister were killed in separate car accidents. Eventually, in 2018, his father, too, died in a car accident.

[15] When the accused began service with the RCMP, he was first posted to Sundre, Alberta until he transferred to Thompson a year before this event. Annual performance reviews were positive. However, an incident had occurred in Sundre in 2011, for which the accused was informally reprimanded. He had continued a chase of a suspected drunk driver against the direct order of his superior and ultimately, that vehicle, with its driver and

two passengers, left the highway at a high speed and rolled, resulting in injuries.

[16] Over 120 letters of support from the accused's friends, neighbours, members of his church and work colleagues were tendered on his behalf at the sentencing. As noted by the judge, "It is an understatement to say he is held in high esteem and has led an exemplary life that many describe as selfless" (*Letkeman 2020* at para 28). Those letters also describe the genuine remorse the accused has expressed. At the sentencing hearing, the accused spoke of Ms Flett's suffering and his profound remorse for his actions.

[17] A number of expert reports, also tendered at the sentencing, indicate that the accused has been diagnosed with post-traumatic stress disorder (PTSD) due to this incident, and that he continues to suffer from symptoms related to that condition, including depression and anxiety. He is in ongoing therapy from a psychologist, Dr. I. Mogilevsky. He has been discharged from the RCMP as a result of his medical condition, although the judge observed that he would likely have been dismissed in any event as a result of his actions in this matter.

[18] Dr. D. Kolton, a psychologist who assessed the accused, stated in his report that, when discussing work stress with the accused, he became impassioned about the deaths he had experienced as a result of drinking and driving. This urge to stop or catch impaired drivers was also a theme many fellow officers and some friends mentioned about him in their letters of support.

The Judge's Decisions on Conviction and Sentence

[19] In his reasons for decision on conviction, the judge found that the accused was justified in his initial pursuit of the Jeep.

[20] In determining that the Crown had proven the guilt of the accused in the actions that he took thereafter, the judge concluded that his conduct involved excessive force and was not justified by section 25(1) of the *Code*, which defines the scope of authority that may be exercised by police officers in the enforcement of the law, and thereby the ambit of protection afforded to them.

[21] The judge summarised his findings and conclusions with respect to the conduct of the accused in connection with the first crash (*Letkeman 2019* at paras 55-56):

> [The accused's] act of causing this first collision was dangerous under all the circumstances and a marked departure from the standard expected. It was indiscriminate; taken at serious risk of injury to himself and to passengers in the Jeep. Nothing warranted it. Alternately, if he truly thought it was warranted, he should have discontinued the pursuit and taken other action, all as required by [the RCMP] pursuit policy, which mandates a pursuit to end when risk to life becomes too great, the pursuit becomes futile or other means of apprehension are possible. If he had been trained in PIT procedure, he would have known not to try it here.
>
> Ultimately, I do not accept [the accused's] explanation that his risk assessment, such as it was, could possibly bring his act of causing this crash within a range of proportionate force under these circumstances. I note that nothing in [the accused's] communication to OCC, either the content or tone, suggests that he found this suspected impaired driving situation to be out of the ordinary. There was no hint of any significant concern. While I have doubts about the genuineness of [the accused's] subjective perception as he explained it, I have no doubt that objectively it

> was misplaced. It was a rash, undisciplined move to attempt this flawed procedure. It amounted to unjustified and excessive force that I find was objectively disproportionate to the risk Mr. Campbell then posed.

[22] In finding that the second collision also involved the use of excessive force, the judge stated (at paras 69, 75):

> . . . The intentional striking of the Jeep on the trail was significant in that he broadsided the entirety of the passenger side of the Jeep with the entire front of the police car. The Jeep was stopped and the officer was travelling over 20 km/h. The force of the strike was enough to: rotate the Jeep almost 90 degrees; pop-open the rear-access door to the Jeep; then causing items in the Jeep to be ejected; buckle the rear-passenger door such that it could not be opened; and, alter the Jeep's subsequent path of travel. According to exhibits, the cruiser went almost another two car lengths before it stopped. Further, the officer was aware that the Jeep was fully occupied, with three people in the back seat.
>
> Further, as should be obvious from my comments under the dangerous driving section, I do not agree that objectively there was any good reason to use the serious nature of the force used here, causing a crash, to stop the Jeep. It was a short, relatively low-speed pursuit, late at night, with minimal other traffic or pedestrians. It moved to the outskirts of town and then to a rough ATV trail with only one way out and where other officers were closing in to assist. Without minimizing the menace of impaired driving, based on his broadcast to the OCC, even [the accused] considered it to be a routine suspected impaired driving situation, as did the other officers who were trying to assist.

[23] In his reasons for decision on sentence, the judge, while stating that "[t]here [were] few mitigating circumstances of the chase and crashes" (*Letkeman 2020* at para 35), made clear that the accused was duty-bound in his initial pursuit of the Jeep and that he had not intended to hurt anyone (see para 46). Moreover, reading the judge's reasons as a whole, he found that the

accused did not foresee the consequences of his actions. He stated that "[a]ll of this was senseless, but he genuinely could not foresee it" (at para 45) and that he was "blind to what should have been obvious to him" (at para 35).

[24] The judge also found that the accused's actions were taken in the pursuit of public safety when he commented, "In the end, the terrible irony is plain: in trying to protect the public by stopping Mr. Campbell from driving, [the accused] caused the very harm he was trying to stop -- he seriously hurt Ms. Flett and risked injury to everyone else in the Jeep" (at para 45).

[25] The judge explained that the Crown sought a three-year jail sentence, taking the position that precedents indicate that the appropriate range of sentence is up to 24 months' imprisonment—and that an increased sentence is appropriate to reflect the additional culpability where the offender is a police officer acting in the course of duty (see para 51).

[26] The accused suggested a suspended sentence, particularly taking into account all of the mitigating factors relating to his personal circumstances. He emphasised the adverse collateral consequences of his conviction and the impact that jail time would have on him, especially given his ongoing psychological difficulties.

[27] The judge recognised that denunciation and general deterrence are "the guiding fundamental purposes from s. 718 [of the *Code*] that apply to sentencing police offenders" (at para 18), but indicated that "[t]he law is not at that state where the blunt harshness of a jail sentence is the only proportionate disposition for a criminal negligence causing bodily harm or death case" (at para 52). He concluded that neither three years in jail nor a simple suspended sentence was fit, but acknowledged that he was "torn" (at

para 53). He stated, "On the one hand a short period of incarceration is in the range of a fit sentence, but so too is a non-jail sanction" (*ibid*).

[28] In the result, a non-custodial sentence, the particulars of which I have outlined, was imposed.

Standard of Review

[29] The standard of review applicable to a sentencing decision was recently summarised by the Supreme Court of Canada in *R v Friesen*, 2020 SCC 9 (at para 26):

> As this Court confirmed in *Lacasse* [*R v Lacasse*, 2015 SCC 64], an appellate court can only intervene to vary a sentence if (1) the sentence is demonstrably unfit (para. 41), or (2) the sentencing judge made an error in principle that had an impact on the sentence (para. 44). Errors in principle include an error of law, a failure to consider a relevant factor, or erroneous consideration of an aggravating or mitigating factor. The weighing or balancing of factors can form an error in principle "[o]nly if by emphasizing one factor or by not giving enough weight to another, the trial judge exercises his or her discretion unreasonably" (*R. v. McKnight* (1999), 135 C.C.C. (3d) 41 (Ont. C.A.), at para. 35, cited in *Lacasse*, at para. 49). Not every error in principle is material: an appellate court can only intervene if it is apparent from the trial judge's reasons that the error had an impact on the sentence (*Lacasse*, at para. 44). If an error in principle had no impact on the sentence, that is the end of the error in principle analysis and appellate intervention is justified only if the sentence is demonstrably unfit.

[30] If a sentence is demonstrably unfit, or if a sentencing judge made an error in principle that had an impact on the sentence, an appellate court must perform its own analysis to determine a fit sentence. When performing this analysis, the appellate court will defer to the sentencing judge's findings of

fact or identification of aggravating and mitigating factors to the extent that they are not affected by an error in principle (see *Friesen* at paras 27-28).

Analysis

Sentencing of Police Officers/the Authorities

[31] In *R v Schertzer*, 2015 ONCA 259, the Ontario Court of Appeal confirmed that sentences for police offenders should be more severe than those for civilians who commit the same crime, because of the public trust that police officers hold at the time of their offence and their knowledge of the consequences of committing the offence (see paras 132-33).

[32] Again, in *R v Forcillo*, 2018 ONCA 402, the Ontario Court of Appeal commented on the guiding approach to sentencing police officers (at paras 198-99):

> Police officers are charged with enormous responsibilities to maintain order and to protect members of the public from harm. At the same time, they are granted special privileges and protections to enable them to discharge these duties. Police officers are provided with firearms. They are meant to be used to protect themselves and others, all within the bounds of reasonableness and necessity, and in accordance with police training. To this end, s. 25 of the *Criminal Code* furnishes police officers with special powers that are not available to ordinary citizens. Where this and related provisions (s. 34 of the *Criminal Code*) are found not to apply, a police officer will have abused his or her authority and breached the trust of the public in general, and that of anyone harmed along the way.
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> This factor was critical to the Supreme Court's decision in *Ferguson* [*R v Ferguson*, 2008 SCC 6]. As McLachlin C.J. observed at para. 28, police officers are trained to respond properly to volatile encounters; they are held to a higher standard than would be expected of ordinary citizens. In these circumstances,

> the principles of denunciation and general deterrence become magnified in the sentencing process.

[33] In terms of authorities that provide assistance with respect to the range of sentence, the judge considered a number of cases and specifically referred to three decisions involving police officers who were sentenced for driving offences committed while on duty:

- *R v Porto*, 2017 ONSC 733 (*Porto 2017*), aff'd 2018 ONCA 291—a police officer, while responding to an emergency, was travelling at 178 km/h where the posted speed limit was 50 km/h. He crashed into a vehicle travelling in the same direction that made a left turn across his lane of travel. The injuries to the other driver, although not serious, amounted to bodily harm. A sentence of a $2,500 fine and a one-year driving prohibition for dangerous driving causing bodily harm was upheld on appeal.

- *R c Laurin*, 2017 QCCQ 14392—a police officer was travelling at 182 km/h in a 90 km/h zone, going to the hospital to assist another officer in a non-emergency situation. As he went to pass a vehicle that was in front of him, the driver of that vehicle made a left turn, resulting in a collision. The driver was killed and his passenger was injured. A total sentence of 12 months' incarceration plus two years of probation was imposed for dangerous driving causing death and dangerous driving causing bodily harm.

- *R v Romano*, 2018 ONSC 5172—a police officer, driving an unmarked vehicle, was travelling at a high rate of speed trying to catch up with his surveillance team, which was investigating property crimes. He struck and killed an 18-year-old female, who was jaywalking. He suffered from PTSD as a result of the incident. A sentence of eight months' imprisonment was imposed for dangerous driving causing death.

[34] At the appeal hearing, counsel referred to more recent cases which reflect sentences imposed on police officers, albeit for different offences:

- *R v Doering*, 2020 ONSC 5618—while in police custody, a person died of a heart attack brought on by the ingestion of methamphetamine. She had been arrested by the offender and, while in his custody, her condition had deteriorated. The offender did not seek medical assistance and, when he transferred her to the custody of the provincial police, he told the officers that she had been seen by a paramedic and that her condition had not changed during his interactions with her. These statements were false, and reduced the likelihood that the victim would get the medical assistance she needed. The offender had a distinguished career and suffered from mental health issues, which worsened as a result of the events of the case. He was diagnosed with PTSD and panic disorder. A 12-month jail sentence was imposed for criminal negligence causing death and failing to provide the necessaries of life.

- *R v Theriault*, 2020 ONSC 6768—an off-duty police officer saw the victim and his friends stealing from cars. He chased the victim and struck him with a metal pipe causing a number of injuries, including a significant eye injury. He did not identify himself as a police officer until the end of the incident. He was white, and the victim was a young Black man. The Court considered the issue of sentence (for assault) in the context of the history of violent interaction between members of the Black community and the police, and "years of overt and systemic racism" (at para 6). The offender received a sentence of nine months' imprisonment followed by 12 months of probation.

Moral Culpability

[35] The Crown alleges that the judge erred by mischaracterising the accused's moral blameworthiness. Essentially, two arguments are advanced. First, the Crown says that the judge created a false distinction between various types of crimes committed by police officers in order to justify treating this offence as less morally blameworthy. Second, the judge is said to have erred by finding that the accused's "blind spot" in judgment when it came to impaired drivers or "moral flaw" (*Letkeman 2020* at para 43) attenuated his moral blameworthiness, and that this "blind spot" reasoning overtook his duty to impose a fit sentence.

[36] With respect to the first argument, the judge identified cases of dishonesty (e.g., false affidavit, perjury), as well as cases involving excessive force or violence toward a suspect or prisoner (e.g., assault, unlawful

confinement, attempted murder), and then found that driving offences committed by police officers "may not be as heinous or immoral as the other types" of conduct (at para 22) (emphasis added). He further stated that the conduct in this case "is not in the same league as those officers who have perjured themselves, stolen exhibits such as drugs or other items, or used excessive force out of anger or retribution toward a suspect or prisoner" (at para 46).

[37] In *R v KNDW*, 2020 MBCA 52, Chartier CJM well summarised the concept of moral blameworthiness (at para 40):

> Assessing the degree of responsibility of offenders involves an examination of their moral blameworthiness in a particular case (see *R v Anderson*, 2014 SCC 41 at para 21). In making this assessment, due regard must be given to "the intentional risk-taking of the offender, the consequential harm caused by the offender, and the normative character of the offender's conduct" (*M (CA)* [*R v M (CA)*, [1996] 1 SCR 500], at para 80; see also *Friesen* at paras 76, 88). This will ensure that the sentence imposed aligns with the accused's moral blameworthiness, is just and appropriate and nothing more (see *M (CA)* at para 80; and *Friesen* at para 91).

[38] It is trite law that the moral culpability of an offender cannot be assessed based on discrete, fixed categories. It will always depend on the particular facts of the case.

[39] The case law, however, does recognise that conduct by police officers involving deliberate criminality will often be considered more morally blameworthy than crimes committed in the pursuit of public safety. As stated by Pomerance J in *Doering* (at para 30):

> As with all groups of individuals, the crimes committed by police cover a broad range of conduct, with varying degrees of moral blameworthiness. Moral culpability is high when the crime involves a deliberate leap into criminality, such as when an officer decides to sell drugs, or steal money, or share confidential information. Moral culpability is lower when the crime committed by an officer is incidental to the discharge of a duty related to public safety. . . .
>
> [emphasis added]

(See also *Porto 2017* at para 23; and *R v Baxter*, 2018 ONCJ 608 at para 1.)

[40] In my view, the judge, while considering various types of police misconduct as a tool for assistance, did not rigidly use those categories and try to pigeonhole this case in order to assess the accused's moral blameworthiness. He did not use the other cases as a straightjacket and draw false distinctions between crimes in order to determine the accused's moral blameworthiness. Instead, he reasonably distinguished this case from those that involve a deliberate leap into criminality.

[41] The Crown's second argument is that the judge erred by misusing the accused's "blind spot" in determining an appropriate sentence. In his reasons for decision, the judge stated, "[The accused's] privileged role as a police officer gave him the right to start the pursuit, but he abused that by using the excessive force he did. His moral blameworthiness is moderately-high; it is tempered by his ingrained blind spot in judgment" (*Letkeman 2020* at para 47). Despite the earlier incident in Sundre, it was, in my view, open to the judge to find that the accused continued to have a blind spot in judgment with respect to impaired drivers, which involved a lack of understanding of the necessary risk assessment and proper use of force to be used in an attempt

to get such drivers off the road, and a lack of foresight of the consequences of his actions. That finding is entitled to deference.

[42] Furthermore, the judge did not use the finding about the accused having a "blind spot" as justification for his conduct. Nor, reading the judge's reasons as a whole, did he treat it as mitigating. Rather, as he was entitled to do, he used the finding that the accused had a "blind spot" or "moral flaw" (at para 43) to dispel the aggravating feature of the accused being a rogue officer who "[took] the law into his own hands" (at para 38), was acting out of "maliciousness or righteousness" (at para 43), or that he intended or foresaw the consequences of his actions—all of which would make his conduct more morally blameworthy.

[43] This conclusion is supported by a review of the judge's comments during sentencing submissions:

> . . .
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> . . . So I'm just left with this whole thing, you know, are we dealing with a rogue officer or is there some fundamental deeper blind spot in judgment when it comes to -- to impaired drivers . . .
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> . . .
>
> This is -- this is where I'm looking at all these things, because one might be quite aggravating and the other -- if I determine it's a rogue situation, the other if there's a more nuanced and acceptable explanation for it it's a -- it's a different deal.

[44] In addition, at the outset of the judge's analysis as to whether the accused had a "blind spot", he asked himself this question: "Was he simply a

rogue officer taking the law into his own hands, or is there some deeper issue leading to a blind spot in judgment?" (at para 38).

[45] Later, he stated (at para 43):

> What strikes me is that his single-mindedness, his resolve to take impaired drivers off the road, because of the carnage they can and do cause, created a blind spot in his otherwise good judgment. He believed the need to stop an impaired driver was near paramount over other risk considerations. It is as though some gut compulsion took over. I do not find it was maliciousness or righteousness, but rather a moral flaw. It was truly lost on him that his judgment is wrong, and that there is good reason for the rules and risk assessment officers must follow.

[46] Therefore, I do not accept the Crown's submission that the judge erred by using his finding of a "blind spot" for an improper purpose.

[47] However, I do accept that the judge placed undue weight on the accused's "blind spot", namely the absence of an aggravating factor, and allowed that to overtake his analysis. The judge referred to the "blind spot", or similar, on multiple occasions. He stated, "I do not find [the accused] intentionally meant to hurt anyone, he was simply blind to what should have been obvious to him" (at para 35). He added that "[a]ll of this [the accused causing harm to Ms Flett while trying to protect the public from Mr. Campbell's driving] was senseless, but [the accused] genuinely could not foresee it" (at para 45). He went on to state, "[The accused] acted intentionally, but his acts were acts of negligence. I do not accept he meant to hurt anyone, but he was heedless to that obvious potential" (at para 46). He also mentioned the accused having taken responsibility "albeit limited by the blind spot I spoke of" (*ibid*).

[48] As well, it was in the midst of analysing the accused's state of mind at the time of the offence that the judge concluded that "balancing all the factors I must, general deterrence and denunciation are important but not so paramount such that a jail sentence must be imposed" (at para 46).

[49] All of this, together with the non-custodial sentence ultimately imposed, leads me to conclude that the judge placed undue emphasis on the accused's "blind spot" and thereby understated his moral blameworthiness.

Overemphasis on the Circumstances of the Accused

[50] The Crown also alleges that the judge erred by unreasonably overemphasising the circumstances of the accused.

[51] It is well established that when the principles of denunciation and general deterrence are paramount, the focus of the sentencing judge is to be more on the offence committed, rather than on the offender, so as to better reflect the gravity of the conduct; although factors personal to the offender are always relevant, they necessarily take on a lesser role (see *KNDW* at para 21; and *Friesen* at para 104).

[52] The judge stated that general deterrence and denunciation were the primary objectives on this sentencing.

[53] Near the end of his reasons, he focussed on the circumstances of the accused and the collateral consequences of his actions, such as the loss of his career. Then, just before imposing the sentence, he stated (*Letkeman 2020* at para 53):

> Three years in jail is not fit. But neither is a simple suspended sentence, given [the accused's] active police role. Like the judge in ***Porto***, I am torn. On the one hand a short period of incarceration is in the range of a fit sentence, but so too is a non-jail sanction. General deterrence and denunciation must be balanced with parity and restraint, especially with the potential additional psychological harm that a jail sentence would inflict on this man. In the end I can see no real benefit in a jail sentence on these unique facts; it would only serve to unduly punish and <u>have no real utility</u>.
>
> [emphasis added]

[54] The Crown argues that the judge erred by finding that the principles of parity and restraint "must be balanced" (at para 53) with the principles of denunciation and deterrence, thereby giving them equal weight, rather than giving effect to the paramountcy of denunciation and deterrence. I am not persuaded that the judge gave equal weight to those sets of principles; rather, he appropriately recognised that parity and restraint remained relevant principles that had to be considered.

[55] Nonetheless, for the following reasons, I would allow this ground of appeal.

[56] Despite the judge's comments about denunciation and deterrence being paramount, he crafted what was, in my view, a largely rehabilitative sentence that focussed on the circumstances of the accused. A jail sentence may have had little benefit or utility to the accused, in terms of his rehabilitation or specific deterrence from committing other crimes. But it would have had an important purpose in deterring other police officers from overreaching the bounds of their authority, and venturing into criminal conduct—and in loudly denouncing such conduct.

[57] Moreover, after imposing the sentence, the judge commented that "[t]he community work, fine and driving prohibition [were] meant to provide a measure of punishment that probation alone could not accomplish, to further address general deterrence and denunciation beyond the criminal conviction and loss of career" (at para 55). However, a probation order cannot be imposed for purely or primarily punitive reasons; rather, probation conditions are meant to primarily address rehabilitation and reintegration (see *R v Proulx*, 2000 SCC 5 at paras 32-33; and *R v Shoker*, 2006 SCC 44 at paras 10-13) which are not really at play. It follows that the sentence did not in fact reflect the principles of denunciation and deterrence to the extent that the judge considered appropriate.

Conclusion

[58] The judge's errors in principle had a material impact and led to the imposition of an unfit sentence, which was not consistent with the fundamental principles and purposes of sentencing. As a consequence, I must determine a fit sentence.

A Fit Sentence

[59] In determining an appropriate sentence, I recognise the unique position of trust held by police officers in our society. As stated in *Doering* (at para 27):

> . . . [B]reach of trust can arise even where there is no deliberate exploitation of authority. Police criminality is, on its face, a violation of the general trust reposed in police to uphold and enforce the law. It is an implicit condition of that trust that police will obey the laws that they are enforcing. Viewed in this light, it

> is difficult to imagine an offence by a police officer that does not, in some way, breach the public's trust.

[60] Applicable statutory aggravating factors in this case are that the accused, in committing the offence, abused a position of trust or authority in relation to the victim (see section 718.2(a)(iii) of the *Code*) and that the offence had a significant impact on the victim (see section 718.2(iii.1)).

[61] Specific deterrence is of less import here, but general deterrence and denunciation are paramount. As I have said, a sentence must convey to the police that overzealous conduct of this kind will be seriously sanctioned, and thereby act as a deterrent for other officers.

[62] Denunciation is intended to instill and uphold the values of the community. These values can change over time and, as a consequence, sentencing practises will do the same. While the pursuit and arrest of impaired drivers are undoubtedly very important, society's clear expectations are that police officers will not abuse their role by acting in a criminal manner and causing harm.

[63] Although the accused's "blind spot" meant that he did not intend or foresee the consequences of his actions, it is important to remember that subjective perception is not required to ground liability for the offence of criminal negligence. Rather, the criminal law provides for culpability for acts committed with a blind eye to the risks that would have been apparent to a reasonable person.

[64] Police officers have received jail sentences for serious misconduct, even where the criminality is grounded in recklessness.

[65] That said, while not factually similar, at least some guidance can be gleaned from a canvass of sentencing authorities for police officers' use of excessive force resulting in convictions for assault or assault causing bodily harm. Those authorities reveal a pattern of relatively low sentences that recognise the typically favourable personal circumstances of police officers and the fluid and difficult situations in which they find themselves (see *R v Walker*, 2006 CarswellOnt 4132 (Sup Ct J), conditional discharge; *R v Peters*, 2008 BCSC 1839, six-month conditional sentence; *R v Eegeesiak*, 2010 NUCJ 10, concurrent suspended sentences with one year of probation; *R v Rice*, 2015 ONCA 478, conditional discharge; *R v Lavallee*, 2016 ABCA 44, 60-day intermittent sentence followed by two years of probation; and *R v Hearnden*, 2019 ONSC 4306, conditional discharge with 12 months of probation). As well, in *R c Charette*, 2006 NBBR 242, a police officer received a total sentence of 12 months' imprisonment for assault causing bodily harm of a detainee, attempted obstruction of justice for deleting the video of that incident, as well as assault of another detainee one month later.

[66] Each of the authorities submitted by counsel (see paras 33-34 herein), where jail sentences were imposed on police officers, presented its own unique facts, as does this case. Although the offender's actions in *Laurin* (12-month jail sentence) and in *Romano* (eight-month jail sentence) involved only speeding on the part of the officers and not a deliberate striking of a vehicle, their actions resulted in death. The present situation is also very different from *Porto* ($2,500 fine), given the culpability of the accused's conduct, as well as the serious injuries sustained by Ms Flett.

[67] *Doering* is noteworthy as a recent decision where the Court reviewed the applicable principles and case law, and found a 12-month jail sentence to be appropriate for a police officer who not only failed to care for a suspect whose condition was deteriorating while in his custody, but was criminally negligent in making a false statement about her status. That statement reduced the likelihood that the suspect would get the medical assistance she needed, causing her to die in police custody.

[68] In terms of general sentencing ranges (not limited to police officers) to be kept in mind, this Court, in *R v Ali*, 2015 MBCA 64, referenced the Ontario decision in *R v Rawn*, 2012 ONCA 487, which noted a range, set in 2007, of a conditional sentence to two years less a day for dangerous driving causing bodily harm—while also noting that the *Code* has since been amended to exclude the availability of conditional sentences for serious personal injury offences. There is no sentencing range for criminal negligence causing bodily harm, given the wide range of circumstances in which the offence can be committed. I appreciate, however, that the moral blameworthiness involved in criminal negligence is higher, as it requires conduct that shows a "wanton or reckless" (the *Code* at section 219(1)) disregard for the safety of others and a marked and substantial departure from that of a reasonable person in similar circumstances (see *R v JF*, 2008 SCC 60 at para 9; and *R v Tayfel (M)*, 2009 MBCA 124), whereas dangerous driving requires only a marked departure from the expected standard (see *R v Roy*, 2012 SCC 26).

[69] As for a consideration of the sentence that would be imposed for a similar offence committed by a civilian offender in similar circumstances, it is very difficult to make that comparison, given the very different circumstances under which the offending of police officers and civilians

typically occurs. Often, as in this case, a police officer's actions are taken in the pursuit of public safety and start out as justified, but escalate into criminality—whereas civilians may act out of other more morally blameworthy motivation. However, I note, as examples only, two driving cases where civilians were sentenced for criminal negligence causing bodily harm in circumstances where the offenders claimed that they were initially acting in pursuit of a worthy goal:

- *R v Dawydiuk*, 2008 BCPC 495, aff'd 2010 BCCA 411—the offender had been involved in confrontations in a bar and was then the subject of an unprovoked assault outside the bar. He then drove his pickup truck onto the sidewalk that was occupied by those watching or involved in the fight or who had been in the bar and complained of his earlier behaviour. He accelerated into the busy sidewalk; several people had to jump out of the way and he struck the victim, knocking her to the ground and causing lasting shoulder pain and disability. Although he claimed that he was acting in fear for his own safety, believing that he was boxed in and had no alternative but to drive as he did, he was found to be acting in a vengeful manner, intending to use his vehicle as a weapon to frighten people on the sidewalk. He had no significant criminal record and was sentenced to 12 months' imprisonment concurrent on charges of criminal negligence causing bodily harm and assault with a weapon, followed by two years of probation (he also received a six-month consecutive sentence for failing to stop at the scene of an accident).

- *R v Lights*, 2017 ONSC 5153, aff'd 2020 ONCA 102—the offender was driving, en route to the hospital to get medical care for his friend who had been shot and was a passenger in his vehicle. He ran a red light at a high speed and caused a serious accident with two other cars, resulting in harm to two victims. One sustained broken ribs, a broken pelvis and a concussion, and the other sustained a back injury and emotional consequences. The offender had a serious, lengthy criminal record. A sentence of 12 months' imprisonment concurrent on two charges of criminal negligence causing bodily harm, as well as a 12-month driving prohibition, was upheld on appeal.

[70] Taking into account all of the circumstances of this offence and the accused, the applicable principles and the authorities, I turn to the specific sentence to be imposed.

[71] There is, in my view, no pressing need for rehabilitation, given the accused's history, the letters of support, his continued psychological therapy, and Dr. Kolton's assessment that he is a low risk to reoffend. I would set aside the probation order, including the requirement for community service.

[72] However, a jail sentence is called for. A custodial sentence is required in order to address the accused's misconduct, which seriously undermines the bond that should exist between the public and the police. As stated in *Baxter*, "Any behaviour that undermines that bond is injurious to the public good" (at para 1). Moreover, regardless of the breach of trust, the accused's conduct involved a significant degree of moral blameworthiness, and caused serious injury to Ms Flett. That said, the sentence must also defer

to the judge's factual findings, including that, when the accused committed the offence, he was trying, albeit misguidedly, to protect the public (see *Friesen* at para 28). As well, the sentence must consider the accused's significant mitigating personal circumstances and the collateral consequences he has already suffered. In all of the circumstances of this offence and this offender, and having regard to the case law, I conclude that a fit sentence would be ten months' imprisonment.

[73] However, as I will explain, the sentence in this case will be shorter.

[74] Following the sentencing, the Crown did not move, under section 683(5) of the *Code*, for a stay pending appeal of the sentence imposed by the judge (see *R v Kuzyk (C)*, 2015 MBCA 85 at para 17). The accused has now paid the fine in full and completed 290 hours of community service (more than the 240 hours ordered).

[75] Because the accused has already borne the punishment of payment of the fine, I would retain that as part of the sentence.

[76] I pause here to say that I have had the benefit of reading my colleague's reasons for decision. With respect to his comments about the suitability of a fine in this kind of case, it should be noted that amendments made to the *Code* since this offence was committed connect the dangerous operation of a motor vehicle causing bodily harm to a fine; they prescribe a mandatory minimum sentence of a $1,000 fine for an offender who commits the indictable offence of dangerous operation of a conveyance causing bodily harm (first offence) (see the *Code* at sections 320.13(2), 320.2(a)(i)).

[77] The accused's payment of the $10,000 fine, although inadequate, goes some distance in addressing the sentencing principles of denunciation and general deterrence, and should be taken into account in determining a fit custodial sentence.

[78] Furthermore, the jurisprudence provides that community service performed under a probation order that is set aside on appeal can operate to reduce the appropriate sentence imposed on appeal (see *R v Sass; R v Zammit*, 2018 MBCA 46 at para 44; *R v Johnson*, 2020 MBCA 10 at paras 26-28; and *R v Kodimyala*, 2020 BCCA 275 at para 45).

[79] Taking into account the fine in my determination of a proportionate sentence, and granting credit for the community service already performed, the sentence, in the end, is one of three months' imprisonment.

[80] In my respectful view, my colleague's conclusion that the appropriate sentence is 36 months' incarceration (reduced by six months for the community service performed) is driven, in large part, by a fundamentally different perspective regarding the factual findings made by the judge. Those findings were not appealed by the Crown and are to be shown great deference by an appeal court.

[81] While my colleague finds that this was not a crime committed in the pursuit of public safety and that the accused intended to cause injury, the judge, as I have already outlined, found otherwise.

[82] I disagree with my colleague that the judge made no determination that the accused was acting in the pursuit of public safety at the time of the collisions. The judge found that the first collision involved "a vain effort to

stop [the Jeep]" (*Letkeman 2020* at para 7) and that the second collision was "a further attempt to disable the Jeep and stop Mr. Campbell" (at para 9). More generally, he found that the accused was "trying to protect the public by stopping Mr. Campbell from driving" (at para 45). Having heard the trial evidence, the judge was best positioned to make these findings, and they are owed deference.

[83] I also disagree with my colleague's conclusion that the judge made a palpable and overriding error in finding, as outlined in his reasons on sentence, that the accused did not intend to hurt anyone (see para 137 herein).

[84] First, I do not agree with my colleague that the judge's finding that the accused did not intend to cause injury is inconsistent with the facts he found on conviction, and was, therefore, not available to him. The two sets of reasons can and should be read together, recognising that they address different issues, with the reasons on conviction focussed on whether the essential elements of the crime had been proven. While the judge found, on conviction, that the accused had committed deliberate acts and was heedless to the consequences, he did not conclude that the accused intended to cause harm. The judge's comment in his reasons on conviction, referred to by my colleague, that the accused "must have been, or clearly should have been, aware of the risks" of his actions (*Letkeman 2019* at para 71) was made in the context of the judge determining, for the purpose of conviction, that the accused had "a wanton and reckless disregard for the safety of the passengers of the Jeep" (*ibid*)—and does not mean that the accused intended to cause them harm. The judge stated very clearly in his reasons on sentence that the accused did not intend to hurt anyone (see para 47 herein).

[85] Moreover, in addition to there being no appeal of, or argument regarding, the finding that the accused did not intend to cause injury, it was, again, one the judge was entitled to make on the trial evidence that he heard, including the testimony of the accused. There is no basis for appellate intervention.

[86] Finally, with respect to my colleague's comment that "[the accused's] actions set in motion the use of excessive force, by the driver and by the accused" (at para 154 herein), it must be remembered that the judge stated that "Disastrously, Mr. Campbell put the Jeep in forward gear and drove toward [the accused]. No one knows why Mr. Campbell did this, or why he kept fleeing" (*Letkeman 2020* at para 12). It must also be remembered that the accused was acquitted of all charges in connection with the shooting.

Stay of Execution

[87] The question that then arises is whether this Court should grant a stay of execution of the custodial portion of the sentence.

[88] The accused seeks a stay, arguing that such an order is in the interests of justice. At the appeal hearing, Crown counsel stated that he would make no submission on the issue other than to indicate that, as in *R v Siwicki*, 2019 MBCA 104, there is no reason or justification to grant a stay and that "the Court will make [its] own decision on that".

[89] In several recent cases, this Court has discussed the relevant principles to be considered on stay of execution of an increased sentence imposed on appeal, in the context of reincarceration (see *R v McMillan (BW)*, 2016 MBCA 12 at para 36; *R v Norton*, 2016 MBCA 79 at paras 58-64;

R v Anderson, 2017 MBCA 31 at paras 31-33; *R v JMO*, 2017 MBCA 59 at paras 141-42; *R v Burnett*, 2017 MBCA 122 at paras 38-41; *R v JED*, 2018 MBCA 123 at paras 119-29, 145-53; and *Siwicki* at paras 69-71).

[90] An appellate court may stay the execution of a fit sentence if it is in the interests of justice to do so. The persuasive burden is on the offender to demonstrate why an otherwise fit sentence should not be enforced (see *JED* at para 143). Whether to do so is an exercise of discretion. Several factors are to be taken into account in determining whether or not a stay of execution serves the ends of justice.

[91] A non-exhaustive list of those factors was set out by Chartier CJM in *McMillan (BW)*, adopting the summary listed in *R v Veysey*, 2006 NBCA 55 at para 32 (at para 36):

> . . . Suffice it to say that a non-exhaustive list of factors to consider on the issue of whether to stay the remaining custodial portion of the sentence on a successful Crown appeal against sentence were conveniently set out by the New Brunswick Court of Appeal in *R v Veysey (JM)*, 2006 NBCA 55, 303 NBR (2d) 290 (at para 32):
>
> > (1) the seriousness of the offences for which the offender was convicted; (2) the elapsed time since the offender gained his or her freedom and the date the appellate court hears and decides the sentence appeal; (3) whether any delay is attributable to one of the parties; and (4) the impact of reincarceration on the rehabilitation of the offender.
>
> As can be seen by these factors, the analysis as to whether the accused should not be reincarcerated is fact-sensitive in nature.

[92] These principles also apply in a situation where the offender has not previously been incarcerated (see *R v Dunn*, 2011 NBCA 19; *R v Smickle*,

2014 ONCA 49; *Schertzer*; *R v GGS*, 2016 MBCA 109 at paras 63-72; and *Sass/Zammit*).

[93] In the present case, the following facts are relevant for consideration. The offence, while serious, is not in the category of the most serious offences; one year passed between the sentencing and the hearing before this Court, and no argument is made that either party is responsible for delay; there has been no post-sentencing misconduct; and incarceration would have a significant negative impact on the accused's mental health and may compromise his prospects for rehabilitation.

[94] Notably, with respect to the accused's mental health, he continues to suffer from PTSD and is still in therapy more than five years after the offence and one year post-sentencing. Dr. Kolton has stated in his report that "any period of incarceration would delay treatment for his mental health condition and would only serve to exacerbate his symptoms."

[95] Other relevant factors that I have considered include systemic issues; the length of time since the offence occurred; the length of sentence to be served; and the potential for injustice if the new sentence is served (see *JED* at paras 112, 115, 125). There has been considerable overall delay in this case, in that the offence was committed more than five years ago. The jail sentence to be served is not lengthy; indeed, had the appropriate sentence been imposed initially, I expect that the accused would have been released from custody many months ago in early remission (that would be the case, even with a ten-month sentence, per para 72 herein).

[96] In conclusion, I am satisfied that the sentencing objectives of denunciation and general deterrence can be met without now incarcerating the

accused. Permanently staying the incarceratory portion of his sentence would not be contrary to the interests of justice.

Disposition

[97] For the above reasons, leave to appeal is granted, and the appeal is allowed in part. The probation order, including the requirement for community service, is set aside; the fine of $10,000 is retained; and a period of incarceration of three months is imposed. I would stay the execution of the custodial part of the sentence. As neither party raised any issue regarding the one-year driving prohibition, it remains.

Simonsen JA

I agree: Spivak JA

BURNETT JA (dissenting):

Introduction

[98] This appeal raises the difficult issue of a fit sentence for a police officer who uses excessive force in the course of his duties. It is an important decision, particularly in the present social context, as it directly impacts public confidence in the administration of justice.

[99] Parliament has given police officers special protections in section 25 of the *Criminal Code* (the *Code*) to use as much force as is necessary to reasonably execute their lawful duties. In this case, the accused abused that authority, and his use of force was criminal. He was convicted of criminal negligence causing bodily harm.

[100] Public confidence requires that the community know that police officers who commit crimes using excessive force will be dealt with harshly by the courts.

[101] The accused drove his police cruiser directly into the side of another vehicle (the Jeep), on two separate occasions, knowing that it was fully occupied. There was no reason to ram the Jeep.

[102] On both occasions, the police cruiser struck the Jeep with lethal force. On the second occasion, the Jeep was stationary. An innocent passenger (Ms Flett) in the rear seat of the Jeep suffered serious and life-altering injuries, including a fractured pelvis and serious neck injuries.

[103] The accused escalated the use of force knowing that he had the ability to get guidance and assistance from other officers, that any action he

would take to apprehend the driver of the Jeep would place innocent civilians at risk (i.e., the passengers), and that he had adequate time to weigh the options before escalating the use of force. Significantly, the second use of force was not directed at the driver side of the Jeep, but at the passenger side of the vehicle.

[104] The trial judge found that the accused's actions were intentional, dangerous, and a marked and substantial departure from the standard expected, that he used unjustified and excessive force, that he acted recklessly and with a complete disregard for the safety of the passengers in the Jeep, and that he must have been aware of the risks he was taking. Notwithstanding those findings, the trial judge decided (when sentencing the accused) that the accused never "meant to hurt anyone" (2020 MBQB 12 at para 35 (*Letkeman 2020*)), and he imposed a fine, community service and probation.

[105] It is inconceivable that a civilian offender in similar circumstances would receive such a lenient sentence. A fine was never a fit sentence—or a component of a fit sentence—for this offence and this offender. Leaving aside the fact that most offenders could not afford to pay a $10,000 fine, a significant period of incarceration was—and is—required.

The Trial Judge's Findings

[106] I begin with a brief review of the important facts, with appropriate deference to the trial judge's findings that are reasonable and not tainted by error (see *R v Friesen*, 2020 SCC 9 at paras 26-28).

[107] The incident which led to the injuries sustained by Ms Flett was described by the trial judge as "one continuous, fluid event punctuated by two

intentional crashes" (2019 MBQB 124 at para 77 (*Letkeman 2019*)) (emphasis added). About four minutes elapsed from the start of the pursuit and the first crash until the second crash. Other police officers arrived at the scene in less than two minutes.

[108] The accused knew the Jeep was fully occupied, with the driver and a male passenger in the front seat, and Ms Flett and two passengers in the rear seat. Visibility at the time of these incidents was fine, and there was minimal other traffic or pedestrians.

[109] While the accused suspected that the driver was impaired, he did not know that at the time of either crash.

[110] In the first crash, the accused rammed the Jeep using an unauthorized and extremely dangerous, high-risk immobilization technique. The police cruiser was severely damaged.

[111] The trial judge concluded (at paras 55-56):

> [The accused's] act of causing this first collision was dangerous under all the circumstances and a marked departure from the standard expected. It was indiscriminate; taken at serious risk of injury to himself and to passengers in the Jeep. Nothing warranted it. Alternately, if he truly thought it was warranted, he should have discontinued the pursuit and taken other action, all as required by s. 9.1 of the pursuit policy, which mandates a pursuit to end when risk to life becomes too great, the pursuit becomes futile or other means of apprehension are possible. If he had been trained in PIT [precision immobilization technique] procedure, he would have known not to try it here.
>
> Ultimately, I do not accept [the accused's] explanation that his risk assessment, such as it was, could possibly bring his act of causing this crash within a range of proportionate force under these circumstances. I note that nothing in [the accused's]

> communication to [the communications centre], either the content or tone, suggests that he found this suspected impaired driving situation to be out of the ordinary. There was no hint of any significant concern. While I have doubts about the genuineness of [the accused's] subjective perception as he explained it, I have no doubt that objectively it was misplaced. It was a rash, undisciplined move to attempt this flawed procedure. It amounted to unjustified and excessive force that I find was objectively disproportionate to the risk [the driver] then posed.
>
> [emphasis added]

[112] The accused used the same technique in the second crash. He intentionally broadsided the entire passenger side of the Jeep with the entire front end of his cruiser in a "T-bone" (at para 32) collision.

[113] The trial judge did not accept the accused's evidence that the Jeep was moving at the time of the second crash and described that evidence as an embellishment. The Jeep was stationary when he struck it. According to the trial judge (at para 69):

> . . . The Jeep was stopped and the officer was travelling over 20 km/h. The force of the strike was enough to: rotate the Jeep almost 90 degrees; pop-open the rear-access door to the Jeep; then causing items in the Jeep to be ejected; buckle the rear-passenger door such that it could not be opened; and, alter the Jeep's subsequent path of travel. According to exhibits, the cruiser went almost another two car lengths before it stopped. Further, the officer was aware that the Jeep was fully occupied, with three people in the back seat.

[114] Ms Flett was sitting directly at the point of impact by the passenger side rear door. She took the worst of the strike, suffering a broken neck and a fractured pelvis.

[115] The trial judge concluded (at para 71):

> All in, this is a marked and substantial departure from the conduct of a reasonable person in similar circumstances. Further, this marked and substantial departure showed heedless concern for any consequences to the occupants, a wanton and reckless disregard for the safety of the passengers of the Jeep. [The accused] must have been, or clearly should have been, aware of the risks he posed to them by driving into the Jeep the way he did. . . .
>
> [emphasis added]

[116] The trial judge accepted the expert's opinion that the accused used potentially lethal force disproportionate to the circumstances because there was no plain or immediate threat to anyone's life, and he concluded that there was no good reason to use the serious force used here.

[117] In finding the accused guilty of criminal negligence causing bodily harm, he said (at para 92):

> . . . Intentionally striking the Jeep with the police car amounted to a marked and substantial departure from the standard of a reasonable person in all the circumstances, including his role as a police officer, which showed a wanton and reckless disregard for the safety of others. Such a use of force was not justified by s. 25(1); it was not proportional, necessary or reasonable. . . .

[118] The trial judge found that the second crash caused the injuries sustained by Ms Flett, and that the accused's actions were the significant contributing cause of her bodily harm.

[119] The impact on Ms Flett and her family was devastating.

Analysis

[120] I agree with my colleague's introductory remarks, her description of the circumstances of the offence and the accused, and the standard of review.

[121] I also agree with her conclusions that:

1) the sentence imposed by the trial judge did not reflect the principles of denunciation and deterrence;

2) the trial judge understated the accused's moral blameworthiness;

3) the trial judge's errors in principle had a material impact and led to the imposition of an unfit sentence, which was not consistent with the fundamental principles and purposes of sentencing; and

4) there is no pressing need for rehabilitation, and a jail sentence is called for.

[122] However, and with respect, I disagree with several key components of my colleague's analysis and with her ultimate determination of a fit sentence.

[123] In my view, the trial judge made at least three fundamental errors, namely:

1) he failed to give adequate weight to general denunciation and deterrence;

2) he improperly assessed the accused's moral culpability; and

3) he exercised his discretion unreasonably and imposed a demonstrably unfit sentence.

[124] The following analysis is based upon the factual findings of the trial judge to the extent that they are not affected by an error in principle.

General Denunciation and Deterrence

[125] General denunciation and deterrence are the paramount sentencing principles when sentencing a police officer, particularly when excessive force is used.

[126] Where denunciation and deterrence are the paramount sentencing principles, the accused's conduct is more important than his personal circumstances. As Chartier CJM stated in *R v McMillan (BW)*, 2016 MBCA 12 (at para 12):

> . . . When denunciation and general deterrence are the paramount sentencing objectives, the focus is more on an offender's conduct than any circumstances particular to that offender. Put another way, while factors personal to the accused remain relevant, they necessarily take on a lesser role (see *R v Nur (H)*, 2013 ONCA 677 at para 107, 311 OAC 244).

[127] The trial judge crafted a largely rehabilitative sentence that focused on the accused's circumstances. He said that there was no need for the sentence to impress upon the accused responsibility for what he had done, that general deterrence and denunciation must be balanced with parity and

restraint, and that a jail sentence would have no real utility (see *Letkeman 2020* at para 53).

[128] In my view, the trial judge's approach completely misses the point. In *R v Anderson*, 2018 MBCA 42, Mainella JA explained the purpose of a denunciatory sentence (at para 81):

> . . . The starting point for the principle of denunciation is the symbiotic relationship between law and shared community values, such as the prohibition against homicide or the protection of sexual integrity. The aim of denunciation is to maintain respect for the law by society as a whole for such norms. A denunciatory sentence communicates society's disapproval of the wrongdoing while also affirming the importance of the values that the criminal law enforces for the benefit of everyone (see *M (CA)* [*R v M (CA)*, [1996] 1 SCR 500] at para 81).

[129] The trial judge in this case made the same error as the sentencing judge in *R v Siwicki*, 2019 MBCA 104 (at paras 63, 68):

> Ultimately, in my opinion, the sentencing judge erred by focussing on the personal circumstances of the accused when deterrence and denunciation were the primary sentencing principles and by imposing a sentence that is not proportionate to the gravity of the offence and the degree of responsibility of the accused, particularly when considered comparatively. These errors affected the sentence in more than an incidental way and, in my view, resulted in a sentence that is demonstrably unfit.
>
> . . . While the personal circumstances of the accused mitigate the sentence in a meaningful way, general deterrence and denunciation are the primary sentencing principles and, therefore, the gravity of the offence must be reflected in the sentence imposed. . . .

[130] The conduct to be denounced in this case is much more than simply the dangerous driving of a police officer—it is his use of unnecessary, excessive force. Such conduct must be denounced in the clearest terms "to communicat[e] society's disapproval of the wrongdoing" (*Anderson* at para 81), to impress on other police officers that they will be held to a higher standard, and to confirm that, if they commit an offence, the sentence will be more severe.

Moral Culpability

[131] The trial judge's assessment of the accused's moral culpability was seriously flawed.

[132] First, the trial judge felt that "[p]olice officer offender cases can be divided into various distinct groups" (*Letkeman 2020* at para 22) (emphasis added), such as cases which "undermine the administration of justice", "crimes of dishonesty", "cases where the officer uses excessive force" and "cases where the officer commits a driving offence, and someone is hurt or killed" (*ibid*). The trial judge viewed some of these cases as more "heinous or immoral" than others (*ibid*) and, in his sentencing reasons, he decided "[t]his situation is unique" and "not in the same league as those officers who have perjured themselves, stolen exhibits" or "used excessive force out of anger or retribution toward a suspect" (at para 46).

[133] The artificial categories or groups created by the trial judge were clearly designed to minimize the accused's moral culpability and were of no assistance. In my view, the accused could arguably fall into each category.

[134] Second, in his reasons for sentence, the trial judge refers to the trial decision in *R v Porto*, 2018 ONCA 291, for the proposition that because the police officer's motive was public safety, it substantially mitigates moral culpability. In this regard, the trial judge says that "at least initially, [the accused] was duty bound to try to stop the Jeep as he suspected the driver was impaired and was thus a potential risk to others" (at para 35) (emphasis added). It is noteworthy that the trial judge limits any public safety concern to the accused's initial pursuit of the Jeep. Significantly, in his reasons for conviction, he specifically rejected "the argument that effectively any impaired driver is such a hazard on the road that stopping them is a subjectively and objectively reasonable necessity" (*Letkeman 2019* at para 54).

[135] This was not a crime committed in the pursuit of public safety. The trial judge found that nothing warranted the first crash; there was no good reason for the second crash; and neither of the crashes was justified.

[136] The public safety concerns in the present case were minimal or non-existent. At 2:00 a.m. on November 21, 2015, the streets of Thompson, Manitoba were virtually deserted, many other police officers were available to assist, and police officers were on the scene within two minutes of the second crash. Prior to that crash, there was no reason that the accused could not have stopped a few meters away and called for assistance (as was the situation in *R v Dawydiuk*, 2010 BCCA 411 at para 21, albeit in a different factual scenario). In these circumstances, it cannot be said that public safety concerns had any impact on the accused's moral culpability.

[137] Third, the Crown's first ground of appeal (and main argument) was that the trial judge mischaracterized the accused's moral culpability (i.e., his degree of responsibility). Given his findings regarding the second crash, the trial judge's conclusion (in his reasons for sentence) that the accused did not intentionally mean to hurt anyone is clearly a palpable and overriding error. At no time did the Crown accept that conclusion. More importantly, it is impossible to reconcile that conclusion with the trial judge's repeated findings (in his reasons for conviction) that the accused made a "deliberate considered choice" (*Letkeman 2019* at para 67) to continue the pursuit, that he meant to strike the Jeep, that he intentionally struck the Jeep and that he must have been, or should have been, aware of the risks that he posed to the occupants of the Jeep by driving in the dangerous way he did. "This was not a case of a few seconds of careless or negligent conduct" (*Dawydiuk* at para 20).

[138] To be clear, the facts, as found by the trial judge in his reasons for conviction, are not in dispute. The issue is the legal effect of those facts. Section 718.1 of the *Code* requires an assessment of the "degree of responsibility of the offender" for the purposes of proportionality. To that end, this Court must accept the trial judge's findings except where, as is the case here, he makes irrational, inconsistent or illogical departures from his own previous findings on conviction.

[139] In convicting the accused, the trial judge found that the "marked and substantial departure from the conduct of a reasonable person in similar circumstances" (*Letkeman 2019* at para 71) was the intentional use of excessive, potentially lethal force. The risk to the lives of the driver and innocent victims was obvious. Having made that finding, the trial judge could

not reasonably say—for the purposes of sentencing—that the accused did not intend to cause the injuries to Ms Flett.

[140] I have carefully considered my colleague's comments regarding these inconsistent findings and do not find them persuasive.

[141] The trial judge must be faithful to the facts found on conviction. He was obliged to make rational, logical and consistent findings based on his determination that there was an intentional use of excessive force targeted at a stationary car full of people. In my view, he did not have the discretion to make two findings of fact concerning the mindset of the accused, one for the purposes of conviction and the other for the purposes of sentence. In particular, given his findings on conviction, it was not possible for the trial judge to find that the accused did not mean to hurt anyone.

[142] Fourth, I categorically reject the trial judge's finding that the accused's moral blameworthiness "is tempered by his ingrained blind spot in judgment" (*Letkeman 2020* at para 47), or, more broadly, that, as a general proposition, a "moral flaw" or "blind spot" (at para 43) mitigates an accused's moral culpability. A police officer is expected to follow the law, and his or her personal biases are not mitigating factors to excessive use of force. Presumably, every criminal has a moral flaw or blind spot. Of particular concern is the evidence that this accused had been previously involved in another incident where he was informally reprimanded for continuing a chase of a suspected drunk driver against the direct order of his superior, and where ultimately the vehicle, its driver and two passengers left the highway at high speed and rolled, resulting in injuries.

[143] Finally, and with respect, it is simply semantics to suggest, on the one hand, that the trial judge did not use the accused's blind spot to justify his conduct and to say, on the other hand, that he was entitled to use the accused's blind spot to reduce his moral blameworthiness. A moral flaw or blind spot does not attenuate what would otherwise be significant morally blameworthy conduct.

[144] In my view, the intentional risk-taking by the accused was extreme, the consequential harm caused by him was horrifying, and the normative character of his conduct was deliberate and wholly unacceptable (see *R v KNDW*, 2020 MBCA 52 at para 40).

Unfit Sentence

[145] The trial judge found that the accused intentionally struck the Jeep on two separate occasions; that there was no reason to ram the Jeep once, let alone twice; that he knew the Jeep was fully occupied, but nevertheless used potentially lethal force; that there was no reason to use such force, and that it was unjustified and excessive; and that he caused serious life-altering injuries to Ms Flett, an innocent victim (a statutorily aggravating factor).

[146] The sentence imposed by the trial judge—a fine, community service and probation—failed to recognize the high moral blameworthiness of the accused's actions and failed to adequately denounce his behaviour. The accused was a police officer, and his actions were an egregious breach of the public trust reposed in him. As noted by my colleague, police officers are held to a higher standard than would be expected of ordinary citizens (see *R v Forcillo*, 2018 ONCA 402 at para 199) and "owe a special duty to be faithful to the justice system" (*R v Schertzer*, 2015 ONCA 259 at para 136). They are

subject to a more severe sentence than a civilian committing the same crime and, in my view, they are not entitled to a lenient sentence because they have a moral blind spot to their criminal behaviour.

[147] The sentence imposed by the trial judge must be incomprehensible to Ms Flett, to members of her community and to the public generally in Manitoba.

[148] I entirely agree with my colleague that "a sentence must convey to the police that overzealous conduct of this kind will be seriously sanctioned, and thereby act as a deterrent for other officers" (see para 61 herein). However, I do not agree that payment of a fine went a considerable, or even some, distance in addressing the sentencing principles of denunciation and deterrence.

[149] The notion that payment of a substantial fine and community service would constitute a fit sentence is profoundly wrong and deeply disturbing. To be clear, in my view, a fine would never be appropriate in the circumstances of this case. $10,000 is not a substantial fine to a person of means. A fine, or a fine coupled with a few months of incarceration, does nothing to denounce the accused's behaviour and, in actuality, such a disposition sends the wrong message.

[150] I do not find my colleague's reference to prior decisions involving assault and dangerous driving causing death or harm, particularly helpful (e.g., *Porto*, etc.). Having said that, if the range in 2007 for the offence of dangerous driving causing bodily harm was a conditional sentence to two years less a day, the sentence for criminal negligence causing bodily harm

must be higher given the higher moral blameworthiness for that offence when committed by a police officer.

[151] Criminal negligence causing bodily harm is a serious crime, which is punishable by a maximum of 10 years' incarceration (see the *Code* at section 221). I acknowledge that the sentence for this offence is highly fact-specific, but a preliminary (and admittedly incomplete) review of prior decisions involving civilian offenders incarcerated for this offence reveals a sentence ranging from 12 months at the low end to six years at the high end (see, for example, *R v Tkachuk*, 2001 ABCA 243; *Dawydiuk*; *R v Middleton*, 2012 ONCA 523; *R v Shular*, 2014 ABCA 241; *R v Lights*, 2017 ONSC 5153, aff'd 2020 ONCA 102; *R v Simeunovich*, 2018 ONCJ 581, aff'd 2019 ONCA 856; and *R v Desmond*, 2020 NSCA 1).

[152] In my view, a fit sentence for this offence and this offender is not 10 months in prison, reduced to three months after taking into account the fine and community service.

[153] In re-sentencing the accused, section 718.2(a) of the *Code* requires a court to take into consideration any relevant aggravating or mitigating circumstances relating to the offence or the offender.

[154] The accused's conduct was highly culpable. His actions set in motion the use of excessive force, by the driver and by the accused.

[155] In his reasons for conviction, the trial judge found that (*Letkeman 2019* at paras 85-86, 91):

> . . . [B]y making a series of poor policing decisions, blunders really, [the accused] put himself in a position where, by his account, he had to use lethal force.
>
> . . . [V]irtually nothing was reasonable from the start, and each mistake built on the last. Overall, in this sense, I find the circumstance was officer-generated jeopardy. In other words, his actions put his life at risk.
>
> . . . [The accused] brought the jeopardy upon himself through his acts that night . . .
>
> [emphasis added]

[156] And in his reasons for sentence, the trial judge said (*Letkeman 2019* at para 12):

> While not directly relevant to this sentencing, to complete the story, after the second crash, the Jeep quickly went into reverse, arching to the opposite side of the trail. [The accused] got out of his cruiser, pistol drawn, and passed in front of the Jeep to do what he described as a "high risk takedown" of [the driver]. Disastrously, [the driver] put the Jeep in forward gear and drove toward [the accused]. No one knows why [the driver] did this, or why he kept fleeing. Fearing for his life, [the accused] shot into the Jeep as it came toward him.
>
> [emphasis added]

[157] None of this would have occurred but for the actions of the accused initiating the chain of events. Moreover, it is not difficult to understand why the driver tried to flee after being subjected to the use of excessive, potentially lethal force on two occasions.

[158] Ms Flett was an innocent victim and her injuries were extremely serious. If a civilian offender had committed this offence, a significant jail

term would have been imposed. To be more specific, if an ex-boyfriend/girlfriend or a person with a grudge or road rage had committed this offence, the sentence would not be a fine and community service. A civilian would receive a significantly greater sentence, and certainly not less than two years' incarceration, even if the offender was previously a person of good character, like the accused.

[159] After taking into account all of the applicable sentencing objectives and principles, the mitigating and aggravating circumstances described by my colleague and "the sentencing judge's inclination to show leniency" (*Siwicki* at para 68), it is my view that an appropriate sentence would be: 36 months' incarceration, reduced by six months for the community service performed by the accused; repayment of the fine to the accused; and the setting aside of the probation order.

[160] The notion of a stay is also inappropriate. The accused has never been incarcerated. While it is true that the Crown could have applied for a stay of sentence pending the outcome of this appeal, the accused could have done the same thing. The accused knew, within 30 days of sentencing, that the Crown was appealing. He did not have to pay the fine. As this Court said in *R v Burnett*, 2017 MBCA 122 at para 39, in serious cases where denunciation and deterrence are the primary considerations, reincarceration may be necessary despite significant hardship to the accused and the risk it may pose to his rehabilitation.

[161] Having considered the factors identified by my colleague, I do not believe that it would be in the interests of justice to stay the remaining custodial portion of the sentence.

Conclusion

[162] In summary, the trial judge overemphasized the accused's personal circumstances and failed to give enough weight to the accused's extremely high moral blameworthiness, with the result that he exercised his discretion unreasonably (see *Friesen* at para 26).

[163] The sentence imposed by the trial judge, and the sentence proposed by my colleague, do not respect well-established legal principles. Most importantly, they do nothing to maintain public confidence in the administration of justice or to demonstrate that police officers who commit serious criminal offences will be severely punished.

[164] For the foregoing reasons, I would allow the appeal, set aside the sentence imposed by the trial judge, and impose the sentence described at para 159 herein.

Burnett JA