Citation: R v Osborne, 2022 MBCA 96
Date: 20221206
Docket: AR21-30-09635

IN THE COURT OF APPEAL OF MANITOBA

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

B E T W E E N :

	)	***M. G. Enright***
HIS MAJESTY THE KING	)	*for the Appellant*
	)	
Respondent	)	***B. M. P. Moen*** *and*
	)	***J. W. Avey***
- and -	)	*for the Respondent*
	)	
SARAH LOUELLA CHRISTINE OSBORNE	)	*Appeal heard:*
	)	***June 13, 2022***
(Accused) Appellant	)	
	)	*Judgment delivered:*
	)	***December 6, 2022***

SPIVAK JA

[1] This is a sentence appeal by the accused who was charged, along with three other co-accused, with the second degree murder of Jason James (the victim). The appeal was heard at the same time as the companion case involving the sentence appeal of one of the co-accused, Diamond Caribou (Caribou) (see *R v Caribou*, 2022 MBCA 95). The victim died following a brutal group beating and stabbing. A jury convicted the accused of manslaughter and the trial judge imposed a sentence of 17 years' imprisonment less credit for pre-sentence custody.

[2] The accused seeks leave to appeal and, if granted, appeals her sentence on the grounds that the trial judge erred by relying on aggravating facts not proven beyond a reasonable doubt and inconsistent with the jury's verdict; erred in his assessment and application of relevant *Gladue* factors (see *R v Gladue*, [1999] 1 SCR 688); and imposed a sentence that was harsh and excessive.

[3] For the reasons that follow, I would grant leave to appeal the sentence and allow the appeal. The trial judge erred in principle by erroneously considering an aggravating factor in sentencing the accused. As this error had an impact on the sentence imposed, I would set aside the 17-year sentence and substitute a sentence of 13 years less credit for pre-sentence custody.

Background

The Trial

[4] On September 22, 2018, following a 911 call, police officers attended at a home in Winnipeg (the home). The home was a flop house (a place where people attended to do drugs) where the accused, Caribou and others lived. When the police officers arrived at the home, they found the accused cleaning it. Following a blood trail, the victim's body was located in the basement. He was naked and bound around the ankles, knees, wrist and mouth. Various bicycle parts spattered with blood were observed.

[5] The accused was arrested, along with Caribou and another co-accused, Gabriel Mecas (Mecas), who were also present in the home. Caribou was observed to have blood on his hands, pants and sock, as well as bruised

knuckles (DNA testing determined that the victim's blood was on his hands and pants). Another co-accused, Faron Spence (Spence), was arrested at a later date. The accused, Caribou, Mecas and Spence were charged with second degree murder and tried together before a judge and jury.

[6] The crucial witness at trial was Season Lavallee (Lavallee) who was residing in the home and was present at the time of the murder. Lavallee's evidence was that, during the evening of September 21, 2018, the accused mentioned that she was waiting for the victim to come over to the home. After having her memory refreshed from a transcript of her police statement, Lavallee testified that the accused told her that, when the victim came over, they were "all going to play for awhile." Lavallee also testified that the accused advised her that the victim had called her "a bitch."

[7] Lavallee's evidence was that the victim attended the home that evening and went to the second floor. Two males, who she identified as Spence and his nephew, attacked the victim, who was struck with a chain which caused him to fall. The accused then started hitting the victim with her fists. Three other males came up to the second floor and began participating in the beating. Four men then carried the victim downstairs to the basement and the accused followed them downstairs where the group beating continued. According to Lavallee, at one point, she stood at the top of the basement stairs and saw the accused holding the victim down on the floor with her hands. There were multiple other people in the basement with the accused who she could not identify. After again being referred to her police statement, Lavallee confirmed that she had told the police that she saw the accused whipping and stabbing the victim in the basement, but she had no memory of seeing this when she testified at trial.

[8] The accused testified and denied any involvement in the killing. She stated that she was in her bedroom in the attic of the home when the victim arrived. She was consuming methamphetamine. She said the victim came up to the second floor and was attacked by three or four males. The accused indicated that she pushed the group towards the stairs down to the first floor and told them to leave. She acknowledged that, in doing this, she may have pushed the victim. She testified that she then returned to her bedroom and continued getting high and never went into the basement. She denied beating, whipping or stabbing the victim or arranging to have him assaulted.

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

[10] The Crown's position at trial was that the accused, motivated by a personal slight by the victim towards her, formed a plan with others to attack him. The Crown argued that the other co-accused participated and assisted in the prolonged group beating and the accused inflicted the fatal stab wound during the attack. The accused denied any involvement in the assault. In contrast to the jury instruction related to Caribou, there was no discrete instruction regarding intoxication and its effect on the intent for murder in relation to the accused.

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

The Sentencing Hearing

[12] There was a joint sentencing hearing in respect of Caribou and the accused. The factual basis for the accused's manslaughter verdict was the subject of sentencing submissions. There was no dispute that this was a group beating that involved extreme violence and torture. The issue was the accused's level of involvement.

[13] The Crown submitted that the jury considered the accused's use of drugs in deciding that she lacked the state of mind for murder. It asked the trial judge to find that the accused, as a result of the victim's insult, formed a plan to harm him and enlisted others to aid her in this purpose. It asserted that the accused actively participated in the attack until the end and stabbed the victim. The Crown stressed that the accused's moral culpability was high given the degree of deliberation involved in her acts, her forethought of action provoked by an insult with revenge as her motive and she incited a group of people to commit violence. The Crown sought a sentence of 18 years for the accused less credit for pre-sentence custody.

[14] The accused submitted that she should be sentenced to six years less credit for pre-sentence custody. She argued that Lavallee's evidence concerning the accused's actions in the basement was incompatible with a verdict of manslaughter. She urged the trial judge to find that her involvement was limited to being a relatively minor participant in the group beating on the second floor.

[15] A private *Gladue* report was filed on behalf of the accused. The accused was 32 years old at the time of the offence and had no criminal record. She has treaty status through the Kinosao Sipi (Norway House) Cree Nation. She was exposed to violence and substance abuse and experienced child abuse. She spent time in the care of Child and Family Services and different foster placements in Norway House. She began using drugs and alcohol at an early age and has struggled with addiction issues. Every preceding generation of her family lived through the residential school and Federal Indian Day School systems.

[16] The author of the *Gladue* report summarized the accused's life as follows:

> . . .
> [The accused]'s narrative tells of her moving back and forth beginning with her relatives; due to addictions, domestic abuse, and family violence and, child abandonment and, Child and Family Services displacement throughout her formative years.
>
> [T]he cumulative traumas of colonization also created an inner struggle of vulnerability to combat oppression, abandonment, consequences of poverty, and her alcoholism and drug addictions which led to her involvement with the justice system.
> . . .

[17] The accused has four children. She has the support of her mother and the father of three of her children. She graduated from high school and CDI College. She had employment in Norway House and Thompson. She has taken some cultural programming while at the Women's Correctional Centre. She has been involved in several institutional incidents for which she has been disciplined.

The Sentencing Decision

[18] Referencing the principles set out in *R v Ferguson*, 2008 SCC 6, the trial judge acknowledged that he was bound by the express and implied factual implications of the jury's verdict and must not accept as fact any evidence consistent only with the verdict rejected by the jury. He further recognized that, "when the facts or implications of the jury's verdict are ambiguous, the sentencing judge [must] come to his or her own independent determination of the relevant facts." After noting these principles, the trial judge stated:

> . . .
> We all recall that the Crown's position at trial in this case was that, motivated by an alleged personal slight by the [victim] towards [the accused], [the accused] formed a plan with others to attack the [victim].
>
> As part of this plan, they waited for the [victim] to arrive, then two men initiated the attack by striking the [victim] in the head with a chain. [The accused] and others joined in immediately, punching and kicking the [victim] as he fell to the floor. Members of the group, followed by [the accused], then forcibly carried the [victim] from the second floor to the basement as he was screaming for them to stop.
>
> Several people, including Gabriel Mecas and Diamond Caribou, participated and assisted in the prolonged group beating which continued in the basement.
>
> The assailants inflicted extensive injuries over the [victim]'s entire body including patterned injuries consistent with a bicycle chain that was found near the body. There were some 10[8] blunt force injuries observed by the pathologist.
>
> During the attack and at the end of it, it would seem a fatal stab wound was delivered to the chest of the [victim].
>
> I accept these as proven facts.
> . . .

[19] The trial judge further referred to the accused as the "ringleader" and organizer and noted she continued to be involved in inflicting injuries as part of the group until the end. Remarking on the vicious nature of the attack, which involved acts of torture, he described the crime as involving high moral culpability and conduct that comes close to murder.

[20] As for the presence of *Gladue* factors, the trial judge quoted directly from the *Gladue* report (see para 16 herein). He acknowledged that "[t]here [was] no question that *Gladue* factors [were] evident in this case and [had] played some role in bringing both accused before the Court." He went on to say:

> . . .
> . . . Much of what brings them to court and many of the factors that led them to offend, namely their drug and alcohol use, choice of companions, as we see from the present circumstances, problems with compliance, and underachievement generally, are the predictable legacy of colonialism in residential schools. . . .
> . . .

[21] At the same time, the trial judge stressed the paramountcy of deterrence and denunciation and concluded that, given the brutality of the group assault and high moral culpability, a sentence in the higher range was appropriate.

[22] The trial judge imposed a sentence of 13 years with respect to Caribou, noting that he was directly involved in the protracted beating of the victim, had a violent record and was a high risk to reoffend, but was intoxicated at the time of the offence and relatively young.

[23] In sentencing the accused to 17 years' imprisonment, less pre-sentence custody, the trial judge said:

> . . .
> The acts committed were to forward what I suppose was a revenge crime and the callous attitude displayed in particular by [the accused] and the fact that she had [a] significant amount of time to reflect on her actions and those of others yet proceed with them, are all factors along with others mentioned already, that justify an unusually lengthy sentence.
> . . .

Standard of Review

[24] The standard of review for a sentence appeal is deferential. An appellate court can only intervene to vary a sentence if the sentence is demonstrably unfit or the sentencing judge made an error in principle that had an impact on the sentence. An error in principle includes an error of law, a failure to consider a relevant factor, or an erroneous consideration of an aggravating or mitigating factor (see *R v Lacasse*, 2015 SCC 64 at paras 44, 51; and *R v Friesen*, 2020 SCC 9 at paras 25-26). As this Court held in *R v Ramos*, 2007 MBCA 87, coming to a conclusion that is unsupported by the evidence on a contested factual issue regarding an aggravating factor in sentencing amounts to an error in principle (see para 15).

[25] Where a sentence is demonstrably unfit or where a sentencing judge has made an error in principle that impacts the sentence, an appellate court must undertake its own sentencing analysis in order to determine a fit sentence. In doing so, it will apply the principles of sentencing afresh to the facts without deference to the existing sentence. However, 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 and Decision

Did the Trial Judge Err in Principle in Making Factual Findings for Sentencing

Fact Finding Following a Jury Trial—The Law

[26] Since this was a jury trial, and juries do not give reasons for the verdicts they reach, it was the trial judge's obligation to determine the material facts for sentencing as required by sections 724(2) and 724(3) of the *Criminal Code* (the *Code*):

> **Jury**
> **724(2)** Where the court is composed of a judge and jury, the court
>
> **(a)** shall accept as proven all facts, express or implied, that are essential to the jury's verdict of guilty; and
>
> **(b)** may find any other relevant fact that was disclosed by evidence at the trial to be proven, or hear evidence presented by either party with respect to that fact.
>
> **Disputed facts**
> **724(3)** Where there is a dispute with respect to any fact that is relevant to the determination of a sentence,
>
> . . .
> **(b)** the party wishing to rely on a relevant fact, including a fact contained in a presentence report, has the burden of proving it;
>
> . . .

> **(d)** subject to paragraph (e), the court must be satisfied on a balance of probabilities of the existence of the disputed fact before relying on it in determining the sentence; and
>
> **(e)** the prosecutor must establish, by proof beyond a reasonable doubt, the existence of any aggravating fact or any previous conviction by the offender.

[27] In *Ferguson*, McLachlin CJC articulated two principles governing the task of a sentencing judge following a jury trial as contemplated by sections 724(2) and 724(3) (at paras 17-18):

> . . . First, the sentencing judge "is bound by the express and implied factual implications of the jury's verdict": *R. v. Brown*, [1991] 2 S.C.R. 518, p. 523. The sentencing judge "shall accept as proven all facts, express or implied, that are essential to the jury's verdict of guilty" (*Criminal Code*, s. 724(2)(*a*)), and must not accept as fact any evidence consistent only with a verdict rejected by the jury: *Brown; R. v. Braun* (1995), 95 C.C.C. (3d) 443 (Man. C.A.).
>
> Second, when the factual implications of the jury's verdict are ambiguous, the sentencing judge should not attempt to follow the logical process of the jury, but should come to his or her own independent determination of the relevant facts: *Brown*; *R. v. Fiqia* (1994), 162 A.R. 117 (C.A.). In so doing, the sentencing judge "may find any other relevant fact that was disclosed by evidence at the trial to be proven" (s. 724(2)(*b*)). To rely upon an aggravating fact or previous conviction, the sentencing judge must be convinced of the existence of that fact or conviction beyond a reasonable doubt; to rely upon any other relevant fact, the sentencing judge must be persuaded on a balance of probabilities: ss. 724(3)(*d*) and 724(3)(*e*); see also *R. v. Gardiner*, [1982] 2 S.C.R. 368; *R. v. Lawrence* (1987), 58 C.R. (3d) 71 (Ont. H.C.).
> . . .

[28] In *R v Aragon*, 2022 ONCA 244, the Court, referring to *Ferguson*, helpfully summarized the process for settling the factual record of sentencing

in a jury trial as involving two steps. First, the sentencing judge is required to identify any relevant factual determinations the jury made by examining the facts essential to the jury's verdict and then applying those facts when sentencing the offender. Second, where it is necessary in order to sentence an offender to determine facts that were not expressed or necessarily implicit in the jury verdict, the sentencing judge should engage in their own independent fact-finding exercise with the limitation that any disputed aggravating fact must be proved beyond a reasonable doubt (see paras 105-7; see also *R v Daigle*, 2017 BCCA 86 at para 19).

[29] In *Aragon*, the Court also referred to its earlier decision in *R v Moreira*, 2021 ONCA 507, which provided that a failure to resolve an ambiguity in a jury verdict—by not making an independent determination of the relevant facts—is an error in principle (see para 48).

[30] With those principles in mind, I turn to an examination of the ground of appeal related to this issue.

The Parties' Positions

[31] The accused argues that the trial judge sentenced her on the basis of the complete acceptance of Lavallee's testimony and the Crown's theory as to the accused's involvement. In particular, the accused submits that the trial judge found that she planned and organized the beating, that she participated in the assault throughout and that she was the stabber. The accused contends that, not only were the aggravating facts relied on by the trial judge not proven beyond a reasonable doubt, but the trial judge's findings were also inconsistent with the verdict of manslaughter.

[32] The Crown submits that the trial judge found that the accused planned the attack because the victim had insulted her, that she enlisted others to assist her and that she was involved in the attack throughout. The Crown asserts that the trial judge did not find that the accused stabbed the victim. The Crown further says that the trial judge's findings were available from the evidence, were not inconsistent with the jury's verdict, and that "[i]t was open to him to accept that the [accused] formed and carried out a plan to beat the victim without intending to kill him or considering whether the beating would kill him."

The Trial Judge's Findings

[33] Let me say at the outset that this case posed a challenging fact-finding exercise for the trial judge. Here, the Crown's theory was that the accused planned and organized the assault, that she stabbed the victim and that she was therefore guilty of second degree murder. The accused denied any involvement in the assault and sought an acquittal. Intoxication was not raised as a defence by the accused, nor was the jury specifically instructed on intoxication in relation to the accused. Manslaughter, while presented as an option to the jury in the charge, was not front and centre—neither party argued for this result.

[34] There is no dispute that the jury rejected that the accused had the intent to cause death or serious bodily harm, which she knew was likely to cause death, and was reckless as to whether death ensued or not. As the specific factual foundation for the jury's conviction could not be identified, it was for the trial judge to make his own factual conclusions. The issues raised

by the accused essentially relate to the trial judge's findings of fact arising from the ambiguity in the verdict.

[35] What then were the trial judge's findings of fact for sentencing and did he err in principle as the accused suggests?

The Stabbing

[36] First, to convict on the charge of manslaughter, it was not essential for the jury to find that the accused stabbed the victim. In the context of this case, having a reasonable doubt about whether the accused was the stabber, but accepting her involvement in the group beating, logically flows from the acquittal on the charge of second degree murder.

[37] Reading the trial judge's sentencing decision in its entirety, I agree with the Crown that he did not find that the accused stabbed the victim and did not sentence her on that basis. It is true that the trial judge did not explicitly identify this fact as not being essential to the jury's verdict or address whether or not the stabbing was inconsistent with a manslaughter conviction. Nor did he directly state that he was rejecting this aspect of Lavallee's evidence. He could have been clearer in this regard.

[38] Indeed, part of the trial judge's reasons in this respect are potentially ambiguous. At one point, he refers to Lavallee's testimony as implicating the accused as the stabber and, at another point, he indicates that he is satisfied the accused was involved "right up to the end of the assaults". That said, the trial judge's reference to the accused as the stabber was in the context of reciting the Crown's position and summarizing Lavallee's evidence. As well, the finding that the accused was involved until the end has to be considered in

light of her submission at sentencing that the basis for the verdict was only her assault on the second floor and not any assault in the basement.

[39] Furthermore, as I have already stated, the jury's verdict reveals that it found that the accused caused the victim's death unlawfully but did not have the state of mind required for murder. Significantly, the trial judge was not of the view, as the Crown argued at sentencing, that the jury accepted all of Lavallee's testimony regarding the accused's actions, including the stabbing, but convicted her of manslaughter because of her intoxication. He specifically rejected this position when he stated that, unlike Caribou, "there was no evidence of [the accused's] intoxication such that it warranted being put before the jury for their consideration when deliberating on the issue of intent." Additionally, the trial judge noted the frailty of the stabbing evidence, mentioning that Lavallee made this allegation in her police statement, but had difficulty recalling that the accused was the stabber at trial. This is consistent with his summary of Lavallee's evidence in the jury instructions wherein he indicated that "she was having a hard time remembering [the accused] 'whipping and stabbing' [the victim]."

[40] Moreover, in recounting what he accepted as proven facts, the trial judge specifically omitted naming the accused as the stabber. Rather, as the above quote illustrates, he only stated that "[d]uring the attack and at the end of it, it would seem a fatal stab wound was delivered to the chest of the [victim]." Later on in his reasons, when he listed the aggravating facts, he made no mention of her as the stabber.

[41] It is apparent from a review of the whole of the trial judge's reasons that the higher sentence attributable to the accused, as compared to Caribou,

relates to his finding that she planned and organized the assault. This leads to whether the trial judge erred in principle in making this finding.

Did the Trial Judge Err in Relying on an Aggravating Factor: That the Accused Planned and Organized the Beating?

[42] As already mentioned, the trial judge found that the accused planned the attack on the victim because he had insulted her and that she enlisted others to assist. He referred to the accused as the "ringleader" or organizer and the killing as "a revenge crime". He stressed that the accused had time to reflect on her actions and those of others, yet proceeded.

[43] The finding that the accused planned and organized the group assault was not essential to the jury's manslaughter verdict; it is an aggravating fact. As I will elaborate upon shortly, the trial judge never recognized this as such. It was open to the jury to reject the Crown's position regarding the motive for the assault and the leadership role of the accused, yet still convict her of manslaughter based on her participation in the group beating. After all, the jury was instructed that they could accept all, none or part of a witness's evidence. In order to attribute this elevated role to the accused when sentencing her, the trial judge would have had to come to his own determination that this was proved beyond a reasonable doubt (see *R v Gardiner*, [1982] 2 SCR 368 at 415; and section 724(3)(e) of the *Code*). He never engaged in this analysis. Nor, as I will also explain, does the evidence support such a finding beyond a reasonable doubt. Therefore, in my view, the trial judge erred in principle in both failing to address whether this aggravating fact was proven beyond a reasonable doubt and relying on an aggravating fact unsupported by the evidence (see *Ramos* at para 15).

[44] While the trial judge acknowledged that a sentencing judge is bound by the express and implied factual implications of the jury's verdict and, where ambiguous, must independently determine the facts, he made no mention that aggravating facts must be proven beyond a reasonable doubt. Nor did he identify the planning and organization of the assault as an aggravating factor that the Crown had to prove to that standard, or that he was satisfied that this burden was met. Rather, he accepted this aggravating feature, along with all the other facts, as proven.

[45] As for the insufficiency of the evidence to support this aggravating fact beyond a reasonable doubt, I say this for the following reasons.

[46] The trial judge appears to base this finding on Lavallee's testimony that the accused told her the victim called her a "bitch" and indicated "we're all going to play for awhile" which the trial judge equated with the torture the victim experienced.

[47] For any aggravating fact, the sentencing judge must be satisfied that the evidence is sufficiently cogent to enable a finding that it is proved beyond a reasonable doubt (see *R v Landry*, 2016 NSCA 53 at paras 48-49). I have concerns about the cogency of those portions of Lavallee's testimony relied upon in determining the motive for the beating and the accused's leadership role. At trial, when the Crown initially asked Lavallee if the accused said anything to her about what would happen when the victim arrived, Lavallee responded, "No." When the Crown then asked Lavallee if she was "sure about that," she indicated she was having a hard time remembering. It was only after refreshing her memory with her police statement that Lavallee testified that the accused used the words "we're all going to play for awhile." (Lavallee

also indicated that she was coming off drugs when she was interviewed by police.) Lavallee was then asked whether the accused said anything about why they were all going to "play for awhile." She answered, "Not that I remember." She was then asked whether the victim had "done anything" and then responded that the accused told her that the victim had called her "a bitch." Lavallee provided no detail or context with regard to these statements, including how they were related and whether they were made by the accused at the same time.

[48] Furthermore, the meaning of the words attributable to the accused is ambiguous. It is not apparent that this necessarily meant that the accused was referring to beating or torturing the victim. I do not agree with the Crown that this is clear evidence of a plan to do harm to the victim which she organized.

[49] Additionally, Lavallee testified that the accused did not initiate the assault on the victim but joined in after two men came up from downstairs and started beating him with a chain. Three other individuals then came up from the main floor and became involved in the beating. Lavallee was unable to identify these three individuals. Four of these men carried the victim into the basement. Lavallee also indicated that, when she later looked into the basement, there were multiple people with the accused who she could also not identify. There was no evidence of any discussions about a plan to assault the victim between the accused and any of the individuals involved in the beating. Other than being a friend of Spence, there was no evidence of any other relationship between the accused and the individuals involved in the assault or their motive for becoming involved in the group beating.

[50] Treating the accused as the planner and organizer of the assault was clearly significant to the sentence the trial judge imposed. His erroneous consideration of an aggravating factor affected his characterization of the accused's level of culpability and materially impacted her sentence. That requires this Court to sentence afresh. As no deference is owed to the sentence imposed, it is not necessary to address the other grounds of appeal advanced by the accused except to the extent that they are relevant to re-sentencing the accused.

The Fit Sentence

[51] As the trial judge erred in his reliance on an aggravating factor (that the accused planned and organized the assault), which materially impacted the sentence he imposed, the sentence of imprisonment of 17 years must be set aside and this Court must impose a fit sentence. In doing so, all facts, express or implied, in the jury's verdict must be accepted and deference must be accorded to the trial judge's factual findings unless affected by an error in principle. As this Court observed in *R v Johnson*, 2020 MBCA 10, when appellate courts sentence afresh, "it does not mean that they start their analysis without any consideration for those findings or conclusions of the sentencing judge that are untainted by error" (at para 11).

[52] The accused argues that a finding that she was involved in the attack in the basement is precluded by the jury's verdict because it did not convict her of second degree murder. I do not agree.

[53] It was not at all implicit that the jury convicted the accused of manslaughter on the basis that she was only involved in the beating of the victim on the second floor, as the accused contends. To the contrary, I accept

that the accused's conviction could only have been reached if the jury was satisfied that she continued to be involved in the group beating in the basement.

[54] I first point out that this conclusion is supported by an examination of the relative verdicts in regard to the accused and Mecas (see *Moreira* at para 52). Mecas's position at trial was that he followed the fight into the basement but only punched the victim in the face several times and then left the house. The jury acquitted him of second degree murder but found him guilty of assault causing bodily harm, yet convicted the accused of the more serious offence of manslaughter.

[55] Moreover, the possibility of a manslaughter verdict, on the basis of the accused's limited involvement in the beating on the second floor, was never argued nor presented as an option to the jury. Furthermore, there was no evidence that the accused did anything other than punch or push the victim while he was on the second floor landing. There was no suggestion, in either the evidence or the submissions of counsel, that the accused's limited participation in an assault on the second floor could have caused an injury that was a contributing cause of death. Rather, the evidence established that the overwhelming majority of the injuries were inflicted in the basement and the extent and severity of those blunt-force injuries contributed to the victim's death. It was in the basement that the victim was stripped naked and beaten, bound and tortured. The manslaughter verdict reflects that the jury was satisfied beyond a reasonable doubt that the accused caused the victim's death but was not satisfied that she had the intent to commit murder. A finding that the accused was involved in the beating in the basement necessarily flowed

from the jury's verdict and it was implicit that it rejected her evidence that she did not go downstairs.

[56] It was therefore open to the trial judge to find on the evidence that the accused followed the group downstairs and was an active participant in the beating until the end. Deference is owed to this finding.

[57] The accused argues that, even if this Court were to accept the trial judge's findings—that the accused went into the basement and was an active participant in the group beating throughout (but was not the planner/organizer)—a fit sentence is in the range of six years' imprisonment. The Crown asserts that, in such circumstances, the sentence for the accused should be roughly equivalent to that imposed on Caribou who received a sentence of 13 years. (This sentence was upheld by this Court in the companion case of *Caribou*.)

[58] Sentences for manslaughter are the widest of any offence in the *Code*. They cover a broad "range of cases extending from those which may be classified as near accident at the one extreme and near murder at the other . . .. Different degrees of moral culpability attach to each along a continuum within that spectrum" (*R v LaBerge*, 1995 ABCA 196 at para 6; see also *R v McLeod*, 2016 MBCA 7 at para 17).

[59] Counsel for the accused relies on the decision of *R v Morin*, 2020 MBQB 4, where the offender received a sentence of seven years for a brutal beating of the victim while under the influence of alcohol. He had moved the victim and concealed his body. The offender had *Gladue* factors but, unlike this case, there was no group assault, he pled guilty and his rehabilitative progress was particularly noteworthy. The offender had spent considerable

time in custody and the trial judge concluded that the interests of justice were best served by facilitating his rehabilitation in a provincial institution.

[60] In *R v Sinclair*, 2012 MBCA 24, also referenced by the accused, a six-year sentence was imposed on the offender who was part of a group of individuals who beat the victim and left him lying injured on the road where he was subsequently run over by a car and died. The offender was young, had family support, had no criminal record, had an excellent pre-sentence report and was remorseful.

[61] The Crown relies on *R v Ahnert*, 2014 BCCA 212; and *McLeod* as supporting a lengthy sentence. Both of these cases were referred to by the trial judge. In *Ahnert*, the British Columbia Court of Appeal upheld an 18-year sentence for the offender who, along with a co-accused, forced the victim into a warehouse and brutally beat him to death over several hours. The Court, stating that, while most manslaughter cases result in sentences of less than 14 years, the exceptional violence, callous attitude and prolonged attack justified an unusually lengthy sentence (see paras 39, 41). In *Ahnert*, the offender pled guilty, but had a long and serious criminal record and no *Gladue* factors.

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

[63] As observed in *R v Parisian*, 2018 MBCA 16, a useful starting point in cases of this kind "is to determine where, on a scale from low moral blameworthiness close to accidental death to high moral blameworthiness close to murder, the conduct under consideration falls" (at para 28).

[64] As this Court indicated, in upholding the 13-year sentence in the related *Caribou* appeal, the trial judge reasonably regarded this case as a high-end manslaughter involving conduct close to murder. He noted that the accused was involved in a brutal and protracted beating, continued to be involved as part of a large group and inflicted injuries after witnessing injuries inflicted by others. This accords with the principle that, when a person decides to participate in a group assault, they accept the consequences which flow from this group action and each assailant advances the violence of the others (see *R v Cabrera*, 2019 ABCA 184 at para 79; and *R v Beardy*, 2022 MBCA 90 at para 9). Understandably, the trial judge viewed this as a case of extreme violence involving a high degree of moral blameworthiness. He described the features that made this offence especially egregious. These included the brutal and vicious nature of the attack which involved acts of torture and gratuitous violence (burning the victim with an open flame and striking him with bicycle parts), the vulnerability of the victim, the indignities heaped upon him, the prolonged nature of the attack, and that the victim was left to die alone, naked, on the floor. A denunciatory sentence is required.

[65] The accused's *Gladue* factors are, no doubt, mitigating and played some role in bringing her before the Court. That said, I see no reviewable error in the manner in which the trial judge weighed these factors in assessing the accused's moral culpability as she contends. He reasonably determined that the accused's actions, nonetheless, reflected a high degree of moral

blameworthiness in light of the extreme violence perpetrated on the victim (see *R v St Paul*, 2021 MBCA 31 at para 6).

[66] That the accused has no criminal record is also mitigating. Further, though she has been disciplined for institutional infractions, she has remained trouble-free for some time and has taken programming while incarcerated. Rehabilitation is a factor for consideration.

[67] I agree with the Crown that, consistent with the parity principle, the sentence of 13 years' imprisonment imposed on Caribou, who was also an active participant in the group assault, is an appropriate comparator. Absent the aggravating factors of planning and leadership, a consideration of their respective roles in the offence and their personal circumstances does not lead to disparate sentences. In contrast to the accused, Caribou does have a record for violence and was assessed as a high risk to reoffend, but was intoxicated, was a more youthful offender and contracted COVID-19 while in custody. Both have significant *Gladue* factors and have had some disciplinary infractions while in custody. Balancing the particular factors attributable to each supports a similar sentence. Not only is this consistent with the parity principle (which I recognize is secondary to proportionality) but, taking everything into account, a sentence of 13 years, while high, is proportionate for this particularly prolonged and extremely violent killing (see *R v Parranto*, 2021 SCC 46 at para 10). I would therefore vary the sentence of 17 years and substitute a sentence of 13 years.

Conclusion

[68] In the result, I would grant leave to appeal the sentence and allow the appeal by varying the sentence to 13 years' imprisonment before pre-sentence custody as determined in the original sentence.

Spivak JA

I agree: Pfuetzner JA

I agree: Simonsen JA