

IN THE COURT OF APPEAL OF MANITOBA

Coram: Madam Justice Barbara M. Hamilton
Mr. Justice William J. Burnett
Mr. Justice Christopher J. Mainella

BETWEEN:

<i>HER MAJESTY THE QUEEN</i>)	<i>W. Y. Martin White</i>
)	<i>for the Appellant</i>
<i>Respondent</i>)	
)	<i>A. C. Bergen</i>
<i>- and -</i>)	<i>for the Respondent</i>
)	
<i>WILLIAM GUS GENAILLE</i>)	<i>Appeal heard and</i>
)	<i>Decision pronounced:</i>
<i>(Accused) Appellant</i>)	<i>April 5, 2017</i>

HAMILTON JA (for the Court):

[1] The accused appealed his sentence of two years’ incarceration, followed by two years’ supervised probation, for aggravated assault. He, and four co-accused, viciously beat a man for a prolonged period of time. They kicked, stomped and struck the victim, sometimes with objects. The victim suffered serious permanent injuries.

[2] At the appeal hearing, we dismissed the appeal (leave having been given by a judge in chambers), with brief reasons to follow. These are those reasons.

[3] The accused pled guilty, as did the co-accused. Two co-accused received sentences of four years’ incarceration. Another was sentenced to 38.5 months’ incarceration. The fourth received 18 months’ incarceration followed by three years’ supervised probation because there was a causal

link between his mental disability and his criminal behaviour. The accused, who is 54 years old, has a lengthy criminal record, which includes violence. The co-accused are in their twenties with little or no criminal history.

[4] The sentencing judge accepted that there were significant *Gladue* factors in this case (lack of formal education, exposure to alcoholism and domestic violence as a child and personal addiction issues) (see *R v Gladue*, [1999] 1 SCR 688). However, he did not accept the accused's submission that his efforts to turn his life around in the three years after his arrest, particularly in the context of the *Gladue* factors, warranted a three-year suspended sentence. He stated that the offence was so violent that denunciation and specific and general deterrence were the principal sentencing factors and that a suspended sentence was not appropriate to "send a message either to [the accused] or the general public".

[5] From his review of video that captured some of the assault, the sentencing judge described the accused's involvement in the beating as "high" and "certainly significant, by his leading the way". He held that parity of sentences among the co-accused was important.

[6] At the same time, the sentencing judge was also of the view that the *Gladue* factors "should temper what would be a normal sentence in a case such as this". He stated that the most recent pre-sentence report "shines a different light upon [the accused]" and considered the fact that the last offence on the accused's criminal record was in 2005. He emphasized the accused's demonstrated rehabilitation efforts since his arrest, which he referred to as the accused's "post-offence conduct". In this regard, he noted the accused had been making positive lifestyle changes with respect to his alcohol addiction, his relationship with his family and his attitude.

[7] The sentencing judge concluded that the post-offence conduct and the *Gladue* factors warranted a sentence less than the “reasonable position” of four years sought by the Crown.

[8] The stated grounds of appeal are that:

1. the sentencing judge gave insufficient weight to the *Gladue* factors, rehabilitation and the principle of restraint;
2. the sentencing judge placed too much weight on the principles of parity, denunciation and deterrence; and,
3. the sentence is harsh and excessive and therefore is demonstrably unfit.

[9] We see no such errors.

[10] The sentencing judge considered all the relevant factors. He did not overemphasize or underemphasize any of them. His balancing of the factors is entitled to deference. The sentence imposed is not “demonstrably unfit”. Indeed, it can be viewed as a lenient sentence for this offence and this offender. The sentence is entitled to deference and appellate intervention is not warranted. See *R v Lacasse*, 2015 SCC 64; and *R v Park*, 2016 MBCA 107.

Hamilton JA

Burnett JA

Mainella JA
