IN THE COURT OF APPEAL OF MANITOBA

Coram: Mr. Justice Michel A. Monnin
Mr. Justice Christopher J. Mainella
Madam Justice Karen I. Simonsen

B E T W E E N :

	)	***C. L. Antila*** *and*
HER MAJESTY THE QUEEN	)	***C. A. D. Olson***
	)	*for the Appellant*
Respondent	)	
	)	***R. D. Lagimodière***
- and -	)	*for the Respondent*
	)	
MAKSYM KRAVCHENKO	)	*Appeal heard:*
	)	***January 14, 2020***
(Accused) Appellant	)	
	)	*Judgment delivered:*
	)	***March 9, 2020***

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MAINELLA JA

Introduction

[1] This sentence appeal epitomizes the comment of Twaddle JA in *R v Shalley*, 2005 MBCA 150, that, "In the pursuit of justice, nothing is more elusive than a fit sentence" (at para 13). The judge in this case had the difficult task of determining a fit sentence for a random, unprovoked and cruelly violent attack by a stranger on a child, at a place of worship, which occurred without explanation.

[2] The accused seeks leave to appeal and, if granted, appeals from a ten-year sentence of imprisonment imposed for aggravated assault (section 268(1) of the *Criminal Code* (the *Code*)), before 839 days' credit for pre-sentence custody.

[3] The accused raises several grounds of appeal. It is not necessary to deal with all of them, as I am satisfied that the ten-year sentence is demonstrably unfit. For the following reasons, I would grant leave to appeal, allow the appeal and vary the sentence to eight years' imprisonment, before credit for pre-sentence custody.

Background

Circumstances of the Offence

[4] On August 27, 2017, the accused attended a Sunday morning worship service at a Baptist church in Winkler, Manitoba. He was sober. The service was attended by more than 700 people of all ages. During the service, he realised he was carrying his folding knife, which had a four-inch blade, that he normally only carried when working. After the service ended at about 12:20 p.m., he briefly visited with other churchgoers and then left to wait for a ride home in his employer's vehicle in the church's parking lot. After several minutes, he returned to the church and committed the offence. He did not plan an attack; he said it happened "spontaneously."

[5] Upon re-entering the church at around 1:00 p.m., he calmly walked a short distance directly towards the women's washroom. He felt a "physical and moral" heaviness. He reached into his pants pocket and pulled out the knife. At that moment, the victim, a 15-year-old girl, was washing her hands. Once inside the washroom, the accused came up to her from behind and

stabbed her in the back. When she turned around, he stabbed her again in the abdomen. At some point during the attack, he also severely cut her left arm. Others were in the washroom, including a woman with her two-year-old granddaughter. The accused did not target the victim. He said "it could have been anyone who was closest to him at that moment."

[6] After the stabbing, chaos ensued as people rushed to attend to the victim, look for loved ones and search for the assailant. The accused left the washroom as if nothing had happened and nonchalantly blended in with the crowd. He folded the knife and put it in his pocket. He exited the church and returned to his employer's vehicle. He sat there motionless with a blank stare until police arrived and he was arrested in possession of the bloodied knife. He confessed to the attack and to not knowing the victim, but provided no explanation for his actions.

[7] The victim had a near brush with death and has experienced permanent scarring of her mind and body. The stabbing caused significant life-threatening internal injuries, as well as lacerations to her left arm. As she was struggling to survive, awaiting first responders, she told her family, "I think I may be going to see Grandma in heaven today, but that's okay, I'm ready for that." She had to be airlifted to Winnipeg for emergency surgery and was not expected to live because of the extent of her injuries and massive blood loss. Fortunately she did. Because of the attack, she had to learn to walk again, suffers ongoing chronic pain, and experiences significant emotional and psychological distress. For example, she requires escort from a trusted person to carry out some routine day-to-day activities to alleviate her concerns for personal safety.

[8] The 24 victim impact statements filed at the sentencing, in addition to one from the victim herself, not surprisingly, confirm that the offence has also had a significant impact on those close to the victim. Like the statement from the victim, the other statements are thoughtful and deeply personal. Many people have experienced psychological trauma for the near loss of the victim, a fear of going to the church because of what happened and spiritual disquiet. The offence has raised mistrust of newcomers to the church, a sense of helplessness and weakness, and a frustration and confusion as to why this occurred. Despite already having some security measures in place, the church has had to install more video surveillance and security mirrors, and provide communication equipment and training to church ushers for critical incidents.

[9] The Crown did not allege that the offence was motivated by bias, prejudice or hate based on religion or sex (see section 718.2(a)(i) of the *Code*). The evidence before the judge—in particular, the psychiatric report—provides no satisfactory explanation for the accused's actions.

Circumstances of the Accused

[10] The accused, a construction worker by trade, is 41 years old and is originally from Ukraine. His first language is Russian and he speaks only limited English. While his parents were alcoholics and he suffered physical and sexual abuse growing up, as an adult, he has displayed a general ability to live a pro-social lifestyle. Upon immigrating to Canada in 2013, he settled in Manitoba in the Morden/Winkler area with his wife and young daughter. He is a permanent resident of Canada. The couple separated in 2014 after an incident of domestic violence for which, in 2015, he was convicted of assault and received a sentence of a $400 fine and one year of probation. That was

the extent of his prior criminal record. At the time of the offence, he was living alone and working in Winkler.

[11] The accused's lifestyle was, as the Crown described, "dangerously isolated." He had little contact with family in Ukraine and was estranged from his wife and daughter. He had few friends. The combination of his poor English skills and difficulty in getting along with others resulted in little in the way of relationships of any consequence. His employer spoke Russian and was one of his limited positive influences. The accused was upset that coming to Canada had not resulted in more prosperity for him than what he expected. He was described as presenting as a "stoic" person who showed little emotion and was reluctant to discuss his feelings based on his upbringing and culture.

[12] The accused is in good physical health and has no cognitive limitations or mental-health issues of any significance. While a language barrier hampered his psychiatric assessment, there is no evidence of a major mental illness, perceptual abnormalities, psychosis, psychotic illness, disorder or sexually deviant arousal or interests. He did display some symptoms of depression.

[13] The accused had little insight into his actions or his future rehabilitation other than to tell the psychiatrist that, on the day of the offence, he was "tired," his "mood was bad" and he had a "heavy feeling" because of the "accumulated problems" of separation from his wife and child and work pressures. The psychiatric report stated that the underlying causes and motivations for the accused's actions were "largely unknown" but his conduct was not the result of the "effects of a mental disorder." The only opinion provided was that the offence could have occurred during a "major depressive episode" that was the "culmination of months of negative feelings which were

finally released" (isolation from wife and child, and stress and fatigue from work).

[14] The accused's language barrier prevented him from participating in any programming or counselling while in pre-sentence custody.

The First Sentencing Hearing

[15] At the first sentencing hearing, the Crown requested a sentence of six years' imprisonment, less credit for pre-sentence custody. Crown counsel (not appellate counsel) advised the judge that sentences for aggravated assault cover a "broad" spectrum and, unlike in British Columbia or Saskatchewan, "the Manitoba Court of Appeal has not laid out any sort of ranges, or starting points, for aggravated assault." She argued that a fit sentence should be arrived at, therefore, by a "principled approach" bearing in mind the maximum sentence was 14 years' imprisonment. She said the Crown's recommendation of six years was based on eight years for the offence with some credit for the mitigating factors.

[16] Counsel for the accused (not appellate counsel) asked for a sentence of four years' imprisonment, less credit for pre-sentence custody.

[17] After hearing the submissions, the judge advised that she was "struggling" with the case because of the sentences being proposed and that she did not have an answer as to why the attack had occurred. She stated:

> But the whole point, at this stage, is to craft a sentence that we think will balance all [the relevant] factors. And I'm just left with, sort of, this unknown part. And I appreciate you arrived at four years, and you arrived at six years. I still don't know why he's not looking at ten years.

She adjourned the case for the preparation of a pre-sentence report by the probation officer and further submissions from counsel.

[18] The accused told the probation officer that he viewed himself as "normal, safe, trustworthy" and this was a one-time incident that surprised him. He provided no explanation for the attack. Using the standard probation services risk assessment tool, the probation officer assessed the accused as a "[l]ow risk to re-offend", but made the following comment:

> The [accused] took responsibility for his actions in the offence, but offered no insight into the reasons for his behaviour, and gave no indication he understands the severity of his actions and the impact they have had on others, particularly the fear they have of him. Nor is he making any efforts to discover the underlying causes of his behaviour. The writer submits that until this changes, in view of the severity of the offence, the [accused] cannot be safely supervised in the community and as a result, is not a suitable candidate for community supervision at this time.

The Second Sentencing Hearing

[19] When sentencing resumed seven months after the initial hearing, different counsel than at the first hearing represented both the Crown and the accused (again, not appellate counsel).

[20] The Crown changed its position as to whether there was a range for aggravated assault set by this Court. The decision of *R v Besaw*, 2004 MBCA 196, was cited as standing for two propositions: first, that this Court had "adopted" the position of the British Columbia Court of Appeal that the general range of sentence for aggravated assault is between 16 months and six years' imprisonment; and second, that departure upward from that range will only occur in cases that are "shocking".

[21] Crown counsel argued that a sentence at the top end of the six-year range was appropriate because this was not a "fight" case; a weapon was used; and the victim and the location where the aggravated assault occurred were "vulnerable." Crown counsel said that this was not a "shocking" case that would call for a sentence exceeding the 16-month to six-year range because there was not a prolonged assault or effort taken to prevent medical assistance from reaching the victim. At several points in Crown counsel's submissions, he invoked the range he said had been endorsed by this Court in *Besaw*, to answer questions from the judge about what she considered too lenient a position on sentence. Later in his submissions, he conceded to the judge that this was a "horrifying" case.

[22] Counsel for the accused agreed with the Crown's statement of the law and that there was no reason why a sentence of more than six years should be imposed in the case. She also accepted that this was a "horrifying" case. However, she submitted that, once you get up to eight years or higher, you are talking about a sentence for attempted murder, which was "not what [the court was] dealing with here."

[23] When given the opportunity prior to being sentenced the accused declined to make a statement other than to say he wanted to get help so that he could understand why he acted as he did and so that it did not happen again.

The Judge's Decision

[24] In her reasons, the judge reviewed the circumstances of the offence and the accused's personal circumstances in detail. She considered the significance of the offence being committed in a church; the devastating impact of the offence on the victim and the entire community; the language

difficulties of the accused in the assessment process and for future treatment; the challenges the accused experienced growing up and adjusting to life in Canada; and the risk assessment in the pre-sentence report. She listed the aggravating factors as the randomness of the assault; the lack of remorse or insight; the significant impact on the victim both physically and psychologically; and that the victim was under the age of 18. She accepted that the accused's guilty plea was a mitigating factor.

[25] The judge's classification of a lack of remorse being an aggravating factor was an error in principle (see *R v Wishlow*, 2013 MBCA 34 at para 3; and *R v Giesbrecht*, 2019 MBCA 35 at para 193). However, the error was not material; it had no impact on the sentence (see *Wishlow* at para 4; *R v Lacasse*, 2015 SCC 64 at paras 44-45; and *R v Houle*, 2016 MBCA 121 at para 11).

[26] The judge's ultimate conclusion was that, given the accused's lack of explanation for a "very serious aggravated assault", his moral culpability was "very high." Accordingly, in her view, the sentence should emphasise the objectives of denunciation, deterrence and protection of the public.

[27] The judge rejected the argument that this Court has set a general range for aggravated assault in Manitoba of between 16 months to six years, absent a shocking case. She said that, if she were wrong—that there is no "established range"—then, in her view, the factors of this "offence take us outside of that range."

[28] In jumping the recommended range of counsel to impose a ten-year term of imprisonment, she treated the argument that there is an established range in Manitoba for aggravated assault as a "joint recommendation". Applying the public-interest test set out in *R v Anthony-Cook*, 2016 SCC 43

at paras 33-34, she concluded that a reasonable and properly informed person, aware of all the relevant circumstances of the case, would view the "sentencing recommendations from counsel" as "a breakdown of the proper function of the criminal justice system."

Discussion

The Standard of Review

[29] This Court's power to vary a sentence pursuant to section 687 of the *Code* is "limited only to situations of material error or where the sentence is demonstrably unfit" (*Houle* at para 11). As was explained in *Houle* (*ibid*):

> A sentence will be demonstrably unfit where it unreasonably departs from the principle of proportionality taking into account the individual circumstances of the offence and the offender and the acceptable range of sentence for similar offences committed in similar circumstances (see *Lacasse* at paras 52-55; and *R v Ruizfuentes (HS)*, 2010 MBCA 90 at para 7, 258 ManR (2d) 220).

[30] A sentence is not demonstrably unfit simply because the appellate court would have imposed a greater or lesser sentence, or the sentence departs from an accepted range (see *Lacasse* at paras 11-12). The threshold is higher (see *R v Shropshire*, [1995] 4 SCR 227 at para 46; *R v M (CA)*, [1996] 1 SCR 500 at para 92; *Lacasse* at paras 52, 56-61, 67, 69; and *R v Suter*, 2018 SCC 34 at para 25).

The Procedure Followed by the Judge

[31] The judge gave fair warning to the parties that she was considering "jumping" the Crown's submission (*R v Beardy*, 2014 MBCA 23 at para 6). The parties also had an opportunity to address her concerns by obtaining more

information about the accused's explanation for the offence and to provide submissions as to the range of sentence for aggravated assault in Manitoba.

[32] The parties agree that the judge did not have to apply the public-interest test from *Anthony-Cook* to deviate upward from the Crown's position on sentence. What was before her was not a joint submission as there was not a "full agreement as to the appropriate sentence" (*Anthony-Cook* at n 1). It is not disputed that this error was, however, harmless (see *Houle* at para 11). Assuming appropriate caution has been taken to ensure that the requirements of section 606(1.1) of the *Code* are complied with in the case of a guilty plea (as was the case here), fair warning has been given of the possibility of departure from the range suggested by counsel and the parties have had a fair opportunity to respond, the judge is entitled to impose a proportionate sentence outside the range. That said, as I will explain later, a sentencing judge's reasons must adequately explain a principled rationale for the departure.

Sentencing Ranges

[33] Much debate occurred in the sentencing hearings about "ranges" and "guidelines" from this Court. Those concepts have a particular meaning in the law of sentencing.

[34] One of the functions of an appellate court is to "ensure the coherent development of the law while formulating guiding principles to ensure that it is applied consistently in a given jurisdiction" (see *Lacasse* at para 37). In the sentencing context, this Court and other appellate courts have had a long-standing responsibility to do "whatever is possible" to minimise disparity of sentences for cases involving similar offences and similar offenders, so long

as the sentencing judge's discretion to impose an individualised sentence is not interfered with (see *Regina v Jourdain and Kudyba* (1958), 121 CCC 82 at 87 (Man CA); and *R v Stone*, [1999] 2 SCR 290 at para 244). This role arises in large part from section 718.2(b) of the *Code*, which provides:

> **Other sentencing principles**
> **718.2** A court that imposes a sentence shall also take into consideration the following principles:
>
> . . .
>
> **(b)** a sentence should be similar to sentences imposed on similar offenders for similar offences committed in similar circumstances;

[35] As was explained in *Stone*, where an appellate court recognises a "guideline" in the form of a range or starting point for a particular offence, there is a "clarity requirement" meaning that there must be "a clear description of the category created and the logic behind" the guideline (at paras 244-45).

[36] A recognised sentencing range or starting point is a "historical portrait" for judges of how sentencing principles and objectives have previously been balanced in comparable situations and serve as reference points for the crafting of an individualised sentence (*Lacasse* at para 57). In *R v Burnett*, 2017 MBCA 122, I explained the significance of guidelines recognised by appellate courts for particular offences in the following way (at paras 9-10):

> Sentencing ranges and starting points are "tools" (*R v Lacasse*, 2015 SCC 64 at paras 2, 57) that appellate courts have designed to minimize the disparity of sentences between similar offenders committing a particular offence in like circumstances (see section 718.2(b) of the *Code*). As Wagner J (as he then was) explained in *Lacasse*, "sentences that are too lenient and sentences

> that are too harsh can undermine public confidence in the administration of justice" (at para 12).
>
> These sentencing tools are, however, not rigid tariffs that fetter the discretion of a sentencing judge to impose an individualized sentence. Sentencing judges enjoy "considerable discretion" (*R v LM*, 2008 SCC 31 at para 17) as "there is no such thing as a uniform sentence for a particular crime" (*R v M (CA)*, [1996] 1 SCR 500 at para 92). The law requires a sentence to be fit; it does not require the sentence to be right (if such an outcome is possible). So long as a sentencing judge respects the principle of proportionality, based on a reasonable application of the relevant sentencing principles and objectives to the circumstances, he or she may impose a sentence that departs, upward or downward, from a judicially created sentencing range or starting point (see *R v McCowan (KJ)*, 2010 MBCA 45 at para 11; *Lacasse* at paras 57-61; and *R v RJ*, 2017 MBCA 13 at para 18).

[37] In *R v Larose*, 2013 BCCA 450, Saunders JA made similar comments about the significance of a sentencing guideline with reference to that Court's general range for sentence for aggravated assault (at para 17):

> In *R. v. Craig* . . . this Court described the range of sentence for like cases of aggravated assault, as being between 16 months and 6 years' incarceration. While that description is helpful in narrowing the range that may be considered, it is to be remembered that the circumstances of aggravated assault are variable and difficult to organize into categories. As shown in the cases referred to, the range may be broader, depending on the circumstances of the offence.

Is There a General Range in Manitoba for Aggravated Assault?

[38] Crown counsel argued that the judge was correct that *Besaw* is not a general-guideline case for sentences for all forms of aggravated assault. She says there is not an accepted general range of sentence for aggravated assault in Manitoba. Counsel for the accused takes the opposite view. She submits

that there is an accepted general range, as both counsel suggested at the second sentencing hearing, which is 16 months to six years. She asked this Court to endorse that general range.

[39] It is regrettable, particularly on such a serious case involving a child, for the Crown to have changed its position from there is no general range for aggravated assault sentences, to there is a general range and then finally back to there is no general range. It is trite, but important for confidence in the administration of justice, to remember the special role the Crown plays in the proper functioning of the criminal justice system. As was explained in Clayton C Ruby et al, *Sentencing*, 9th ed (Toronto: LexisNexis, 2017), "The general rule is that the Crown is required to do at trial everything that is reasonably required to assist the sentencing judge to avoid error" (at section 4.64).

[40] This, however, is not an appeal by the Crown requesting the sentence be increased based on a change of position. Had it been, different considerations would come into play. This Court is reviewing the sentence imposed by the judge based on her reasoning, after following the correct procedure, that counsel had misstated the applicable range of sentence. Crown counsel, quite fairly, points out that the Crown's position remains that six years would have been a fit sentence, but it is ultimately the judge's responsibility to craft a proportionate sentence based on a correct interpretation of the law (see *R v Anderson*, 2014 SCC 41 at para 25).

[41] Aggravated assault is a serious offence against the person punishable by up to 14 years' imprisonment (see section 268 of the *Code*). In *R v St-Cloud*, 2015 SCC 27, a case about interim release, the Court commented on the potential length of sentence a person accused of aggravated

assault may face, if convicted, in discussion of section 515(10)(c)(iv) of the *Code*. Wagner J (as he then was) noted that it is "likely", because of the objectives of denunciation and deterrence, for "significant term[s] of imprisonment" to be imposed for aggravated assault even in the case of a youthful first-time offender (at para 163).

[42] I agree with the judge in this case that this Court has not endorsed a general range of sentence for aggravated assault in Manitoba, nor the specific range accepted by the British Columbia Court of Appeal discussed in cases such as *R v Craig*, 2005 BCCA 484 at para 10; and *Larose*.

[43] Discussion of the approach of this Court regarding sentences for aggravated assault begins with the fact that, while no longer available, from 1996 until 2007, a conditional sentence order was a possible sentence for aggravated assault. The cases of *R v Hogg*, 2004 MBCA 114; *R v Herzog*, 2004 MBCA 193; and *Besaw* must be understood in that context.

[44] In *Hogg*, a conditional sentence of two years less a day was varied on appeal to a four-year sentence for a mistaken-identity beating with a weapon. The injuries to the victim were extreme and permanent. There were a number of mitigating circumstances in relation to the accused. The Court stated that a "crime of this magnitude must" draw a "penitentiary term" (at para 9). In its appeal, the Crown felt bound to limit its sentencing recommendation to four years as that was the position it took in the lower court.

[45] After it was decided, *Hogg* was treated as a guideline case by some lower courts, that a conditional sentence should not be imposed for aggravated assault. This Court released two decisions on the same day allowing appeals

by the accused that interpreted *Hogg* on sets of facts that were less serious—*Besaw* (16 months—excessive force fight, no weapon); and *Herzog* (two years less a day conditional sentence—drug-debt argument involving a weapon).

[46] In *Herzog*, the point was made that *Hogg* did not establish "guidelines for all cases of aggravated assault" (at para 5). In *Besaw*, the Court split on whether a conditional sentence was appropriate in that case. The majority decision surveyed sentences in several provinces and stated (at para 57):

> . . . A penitentiary term does not accord with the range in cases of aggravated assault which arise from "bar room brawls" combined with the mitigating circumstances of the character and background of the offender. Still, I do acknowledge the Crown's point that *Hogg* does not establish a ceiling for aggravated assaults. . . .

[47] Nowhere in *Besaw* is a general range for aggravated assault sentences in Manitoba endorsed or the exception of a shocking case recognised as was argued here at the second sentencing hearing. The majority decision also takes care to point out that its analysis is not meant to be comprehensive given the "unique" situations of an "assault of a child" or "aboriginal offenders" (at para 44).

[48] *Besaw* has not been interpreted as a guideline case in subsequent decisions of this Court; rather, its precedential value for aggravated assault sentences is limited, as is the case of most decisions of this Court, to "similar offenders" in "similar circumstances" (see section 718.2(b) of the *Code*). For example, see *R v Barnsdale*, 2012 MBCA 56 at para 10.

[49] In two aggravated assault sentencing decisions of this Court, which exceed the purported top end of the range established in *Besaw*—*Wishlow*

(eight years—domestic context where weapon used); and *R v Michelle*, 2015 MBCA 6 (eight years—group beating where weapon used)—*Besaw* is not mentioned. In addition, in neither of those cases does this Court invoke the language of a shocking case to uphold the sentence. This is further indication that *Besaw* is not a guideline case.

[50] Finally, I have difficulty understanding how a sentencing judge could reasonably draw a distinction between a "horrifying" case and a "shocking" one, as counsel at the second sentencing hearing attempted to do. Not surprisingly, counsel in this Court abandoned that submission. The terms are synonymous. The debate is philosophical. Such a standard does not meet the clarity requirement for a guideline from an appellate court as explained in *Stone*.

[51] What then is the range of sentence for cases of aggravated assault in Manitoba? The answer is, it depends. Aggravated assault cases, like situations of manslaughter, are challenging for a sentencing judge, perhaps more so. I see no reason to depart from the traditional approach of this Court to not endorse a general range or starting point for aggravated assault. However, historically, patterns of sentence have developed in reoccurring situations; for example: fights, home invasions, domestic violence, gang activity, the prison context, child abuse by a person in a position of trust, etc. I think it best to leave comment on the applicable range for a particular type of aggravated assault to when such a fact pattern comes before this Court in an appeal.

[52] Regardless of whether or not there is a range or ranges for aggravated assault, there are considerations a sentencing judge must keep in mind, in each case of aggravated assault, when weighing the circumstances of

the case in light of the sentencing principles and objectives set out in sections 718-718.2 of the *Code*.

[53] First, like a manslaughter, an aggravated assault has a spectrum of moral culpability as to whether the assault is near accident or near murder. The task of a sentencing judge is to "determine the extent to which the harm was foreseeable, the risk or likelihood that the offender's conduct would give rise to the harm, as well as the offender's state of mind or state of awareness" (*R v Nickel*, 2012 ABCA 158 at para 35). Often, the nature of the violence used and the offender's state of mind will be telling in this assessment.

[54] Second, the concepts of wounding, maiming, disfiguring or endangering life cover a wide variety, and different durations, of harm, unlike manslaughter where the consequence of that offence is clear—death. The consequences of the assault are central to the section 268(1) offence. As Binnie J explained in *R v Williams*, 2003 SCC 41, "The 'aggravation' in aggravated assault thus comes from the consequences" (at para 45). Therefore, aggravated assault sentences must take into consideration the nature and degree of the consequences to the victim, both proximate to the occurrence of the offence and in the long term. In making assessments of consequential harm, sentencing judges should be careful before making too much of dark analogies comparing and contrasting the harm suffered by victims in other cases (see *R v Kanthasamy*, 2007 ONCA 90 at para 5). Sentencing must always remain an individualised process.

[55] Third, a sentencing judge cannot treat an accused as having committed an attempted murder, even if the facts support that is what occurred, as that would be contrary to the rule that an offender cannot be sentenced for a crime which he or she has not been convicted of (see *Suter* at

para 35; and *Giesbrecht* at para 177). Attempted murder requires proof of a specific intent to kill; nothing less will suffice (see *The Queen v Ancio*, [1984] 1 SCR 225 at 249). The maximum sentence for attempted murder is life imprisonment (see section 239 of the *Code*) which reflects the increased gravity of having an intention to kill another and taking action to achieve that objective.

Is a Ten-Year Sentence for the Accused Demonstrably Unfit?

[56] In my review of the fitness of the accused's sentence, I have paid close attention to sentences in the fact pattern of this case—an unprovoked random attack on a stranger with a weapon. That is a clear category of aggravated assault. None of the cases I will discuss involved a misperception of the offenders which may have played a role in the attacks (e.g., *Hogg* at para 2; *R vMO*, 2011 MBPC 47 at para 16; and *R v Haly*, 2012 ONSC 2302 at para 5). The victims were all going about their daily business peacefully. While I considered cases where offenders made a series of unprovoked random attacks on strangers with a weapon (e.g., *R v Kim*, 2010 BCCA 590), it is not necessary to discuss that scenario because of the effect of the totality principle (see section 718.2(c) of the *Code*).

[57] In *R v Khan*, 1991 CarswellOnt 900 (CA), leave to appeal to SCC refused, 23021 (8 October 1992), a ten-year sentence for a conviction after trial for aggravated assault was reduced to eight years on appeal. The accused attacked a commuter in the face with a knife at a subway station. The young women's face was badly cut, requiring plastic surgery and leaving a permanent scar. While there was no forensic assessment, the Court found that the accused obviously had "serious mental [health] problems" (at para 5) based on the circumstances of the offence and her bizarre behaviour

throughout the trial and appeal proceedings. The accused had a dated criminal record, including crimes of violence.

[58] In *R v Canney*, 1995 CarswellNB 395 (CA), a ten-year sentence, imposed upon a guilty plea to aggravated assault, using a firearm in the commission of an offence and discharging a firearm with intent to endanger life, was reduced to seven years on appeal. The accused shot a university student in the shoulder and the leg with a rifle after she had said hello to him while walking past him on her way to campus. He then fired shots at a second woman in the area, missing her. The student's injuries were not life threatening. The accused was 38 years old, lacked a criminal record and had "serious emotional problems" (at para 20).

[59] In *Kanthasamy*, seven-and-one-half-year sentences for convictions after trial for aggravated assault, assault with a weapon and breach of recognizance, were upheld. The two 20-year-old offenders (one with no prior record and the other with a minor, unrelated record), with a co-accused, randomly attacked a high school student with machetes. The victim was slashed 21 times and was left "with serious, life-altering physical and psychological injuries" (at para 4). The accused both had positive personal antecedents. In rejecting a dark analogy to other cases where the consequences of an aggravated assault were the victim being left in a vegetative state or dependent on others, the Court stated (at para 5):

> The sentence imposed was close to the upper range of sentences imposed for this kind of offence. The appellants argue that sentences in the highest range have been imposed where the victim has been left in a vegetative state or wholly dependent on others and that this is not that kind of case. That the victim in this case did not suffer even more catastrophic injuries is not attributable to

> any restraint or care on the part of the offenders and does not materially reduce the culpability of their actions.

[60] In *Beardy*, a six-year sentence, imposed on a guilty plea to aggravated assault and attempted robbery, was reduced to four years on appeal. The highly intoxicated 19-year-old Indigenous accused approached a stranger at a gas station demanding money. Before the victim could respond, the accused stabbed him in the abdomen. When the victim attempted to flee, the accused stabbed him again. The victim suffered internal injuries requiring surgery and hospitalisation for two weeks. This Court determined that the sentence was unfit because of the accused's youth, early guilty plea, lack of criminal record, expression of remorse, *Gladue* factors (see *R v Gladue*, [1999] 1 SCR 688) and positive evidence of rehabilitative prospects.

[61] In *R v Cummings*, 2015 ONSC 3162, a four-year sentence for a conviction after trial for aggravated assault, assault with a weapon, carrying a concealed weapon and possession of a weapon for a purpose dangerous to the public peace, was imposed. The 22-year-old accused randomly swung a knife, cutting the neck of a subway rider. The victim was taken to hospital and released the same day. The accused had a serious and related criminal record, had led a "disrupted life" (at para 32) and was diagnosed as having a psychotic disorder, likely schizophrenia. His mental health "improved dramatically" once he began anti-psychotic medication (at para 13).

[62] My analysis is not exhaustive. There are other decisions, particularly from provincial courts in this province and others, but the cases mentioned fairly reflect the historic concern of the courts to severely punish offenders, for reasons of denunciation and deterrence, who need no outside encouragement to randomly inflict significant violence against strangers with

weapons. That is a clear rationale in my mind for a guideline from this Court, particularly given the apparent confusion on the part of counsel in this case about the range of sentence in such circumstances. I would be remiss to point out the jurisprudence is replete with assault cases where the courts have to struggle with the difficult issue of the potential mitigating effect of provocation. That issue does not arise here.

[63] In summary, the sentencing range for cases involving aggravated assault where there is an unprovoked random attack on a stranger with a weapon and significant resulting consequences is a term of imprisonment of between four and eight years.

[64] Given that range, I have no difficulty accepting the judge could have reasonably imposed a sentence near or at the top of the range, particularly as the victim of the very violent crime was a child who was attacked when she was particularly vulnerable and the offence significantly impacted her (see sections 718.01, 718.2(a)(ii.1), 718.2(a)(iii.1) of the *Code*; *Nickel* at paras 18-19; and *R v MacDonald*, 2009 MBCA 36 at para 16).

[65] The judge's finding of the accused having high moral culpability is unassailable. It was entirely foreseeable that an adult male stabbing a child twice in areas of the body with vital organs would cause the harm the victim suffered, particularly in the absence of evidence that what occurred was the effect of a mental disorder. The fact that the offence occurred without apparent motive or explanation does not assist the accused. The following comments made in Ruby, *Sentencing*, in relation to attempted murder, are equally applicable here (at section 23.127):

> As in sentencing decisions involving many other offences, where the court can find no apparent motive for an attempted murder, it often reacts by raising the sentence. When the source of the offender's aggression cannot begin to be pinpointed and hence removed, the dangerousness of the offender becomes more complete, and is seen to justify lengthy incarceration.

[66] The consequential harm of the assault was also significant. In the short term, the victim barely escaped death thanks in large part to two nurses attending church that day who immediately intervened to attempt to stabilise her and her being transported quickly to Winnipeg. The long-term consequences of the assault to the victim are significant—both physically and mentally.

[67] Counsel for the accused at the second hearing reminded the judge not to sentence as if this were an attempted murder. I see no reason to conclude the judge made that error. She did not sentence the accused in any way based on him having the specific intention to kill the victim.

[68] The problem here is, in light of prior cases for similar offenders in similar circumstances receiving sentences of four to eight years, why did this accused receive ten years? While, as previously stated, *Lacasse* makes it clear that a sentence is not unfit merely because it falls outside a particular range, the reason for the departure must derive from the sentencing judge's assessment of proportionality (see *Lacasse* at para 58; and *Burnett* at para 10). Without minimising the seriousness of the offence, a number of factors satisfy me that the ten-year sentence imposed unreasonably departs from the principle of proportionality in light of all of the circumstances and the accepted range.

[69] Recidivism could be a reason to depart upward from an accepted range. However, the accused was not a recidivist; he had a limited criminal record and, prior to this offence, he was generally law abiding. The offence was largely out of character. While it was well within the judge's discretion to place little weight on his guilty plea, he is not an offender whose past disentitles him to any leniency, particularly as this is his first prison sentence.

[70] In addition, the parties agreed that the collateral consequences of the conviction and sentence, related to immigration, were relevant and significant in this case (see section 718.2(a) of the *Code*; *R v Pham*, 2013 SCC 15 at para 13; and *Suter* at paras 47-48). In terms of the accused's long-term risk to society, leaving aside the risk assessment from the probation officer, it was accepted at the sentencing that, given the accused's immigration status, his conviction will likely result in the collateral consequence of his removal pursuant to the *Immigration and Refugee Protection Act*, SC 2001 c 27, before being released back into the community in Canada.

[71] This case is also quite different from *Lacasse*. The commonality of the offence and local conditions are not a concern here. Unlike impaired driving causing death, particularly as was the case in *Lacasse*, where the incident of that crime in the relevant community was inordinately high, random aggravated assaults with a weapon on children, by strangers, are very rare, particularly in a normally peaceful community like Winkler.

[72] In my view, the sentence was demonstrably unfit having regard to all of the circumstances the judge was entitled to take into consideration and with deference to her emphasis on the objectives of denunciation, deterrence and protection of the public and to her decision that a sentence higher than one recommended by the Crown was required. In order to avoid unjustifiable

disparity, an appropriate sentence in all of the circumstances would be at the top of the applicable range of sentence—eight years' imprisonment.

Disposition

[73] In the result, I would grant leave to appeal sentence and allow the appeal by varying the sentence to eight years' imprisonment, before credit for pre-sentence custody, as determined in the original sentence. The ancillary orders imposed will remain.

Mainella JA

I agree: Monnin JA

I agree: Simonsen JA