Citation: R v McIvor, 2019 MBCA 34 Date: 20190404
Docket: AR18-30-09089

IN THE COURT OF APPEAL OF MANITOBA

Coram: Madam Justice Jennifer A. Pfuetzner
Madam Justice Janice L. leMaistre
Madam Justice Karen I. Simonsen

B E T W E E N :

HER MAJESTY THE QUEEN	)	***M. B. Cheater***
	)	*for the Appellant*
	)	
Respondent	)	***A. C. Bergen***
	)	*for the Respondent*
- and -	)	
	)	*Appeal heard:*
BRENDON MCIVOR	)	***December 7, 2018***
	)	
	)	*Judgment delivered:*
(Accused) Appellant	)	***April 4, 2019***

LEMAISTRE JA

[1] The accused appeals his sentence of 24 months' incarceration imposed for two counts of armed robbery contrary to section 343(d) of the *Criminal Code* (the *Code*). Leave to appeal was previously granted by the chambers judge.

[2] The accused asserts that the sentencing judge made several errors in principle; failed to consider alternatives to custody; and ought to have concluded that exceptional circumstances warranted a non-custodial sentence. He submits that these errors resulted in a sentence which is demonstrably unfit.

[3] The Crown argues that the sentence imposed is not demonstrably unfit and therefore cannot be varied on appeal.

[4] I have had the benefit of reading the dissenting reasons of my colleague. With respect, I disagree with her conclusions. For the reasons that follow, I would dismiss the appeal.

Background

Circumstances of the Offences

[5] The accused committed two robberies on the same day within approximately eight hours. During the first robbery, he entered a convenience store while armed with a knife, threatened the store clerk in the presence of her five-year-old son and demanded cash and cigarettes. The store clerk gave him all of the bills in the cash register and one package of cigarettes. He fled with $160.

[6] During the second robbery, the accused entered a gas station while armed with a metal bar and demanded cash and cigarettes. He removed $189.19 from the cash drawer and fled.

[7] In order to conceal his identity when he committed the robberies, the accused wore the hood of his sweatshirt over his head and, during the second robbery, he wore sunglasses.

[8] When the accused was arrested, he was in possession of a knife and admitted that he had committed the robberies. He said that the robberies were motivated by his drug addiction.

Circumstances of the Accused

[9] At the time he committed the offences, the accused was 34 years of age with a dated criminal record. His criminal record included convictions for assault, drug possession, break and enter, mischief and breaches of court orders. His last conviction was in 2007.

[10] The pre-sentence/*Gladue* report (see *R v Gladue*, [1999] 1 SCR 688) details the accused's exposure to his parents' substance abuse and violence during his childhood in Cross Lake First Nation and the events that led him to substance use early in his youth.

[11] The accused moved to Winnipeg when he was 15 years old to go to high school and managed to graduate even though he continued to use drugs and alcohol.

[12] The accused has two children who were born while he was living in Thompson, Manitoba with their mother. After the birth of his children, he participated in treatment on multiple occasions and, therefore, was able to maintain periods of sobriety.

[13] In 2012, the accused began a "downward spiral" as a result of a number of events, including marital infidelity; the suicides of co-workers and a close family member; his own suicide attempt; a drug overdose; and the loss of his employment.

[14] At the time he committed the offences, the accused was consuming drugs, including cocaine; benzodiazepines; methamphetamine; and marihuana.

[15] The probation officer assessed the accused as a high risk to reoffend.

[16] The accused's family experienced the effects of colonisation and residential schools. According to the probation officer, "The effects on his family and community include chronic substance abuse, a culture of violence, domestic violence, poverty, unemployment, lack of opportunities and criminal behaviour."

[17] After pleading guilty to the offences, the accused was released on bail to the Behavioural Health Foundation (the BHF) where he lived for almost eight months before being sentenced. While at the BHF, he completed individualized treatment plans, and attended seminars and group sessions. His wife and two children joined him in the program and he obtained full-time employment.

The Sentencing Hearing

[18] The Crown's position on sentence when the guilty pleas were entered was three years' incarceration. After receiving the reports from the probation officer and the BHF's court communicator, the Crown reduced its sentence recommendation to 30 months' incarceration concurrent on both offences less the pre-sentence custody. The Crown argued that, in light of the seriousness of the offences, deterrence and denunciation were paramount and, while the accused's circumstances were "tremendously sympathetic", they were not exceptional.

[19] Counsel for the accused agreed the sentences should be served concurrently, but argued that the accused's circumstances were exceptional and warranted either a non-custodial sentence or a sentence that would not

exceed the pre-sentence custody (equivalent to seven months), followed by a period of probation.

The Sentencing Judge's Reasons

[20] The sentencing judge reviewed the accused's personal circumstances and noted that, "The primary factor in [the accused's] life that has led inexorably to the present crimes is drug addiction." He carefully considered the *Gladue* factors and quoted the pre-sentence/*Gladue* report when he stated, "Background factors that lead indigenous people to have a higher incidence of crime and incarceration are evident in [the accused's] family of origin."

[21] The sentencing judge also considered the progress the accused had made in addressing the issues giving rise to his addiction. He commented that the accused was "doing all that he [could] to rehabilitate himself".

[22] Finally, the sentencing judge noted that the accused's family had joined him in therapy at the BHF; that the accused had letters of support; and that the accused had been crime-free for 10 years.

[23] The sentencing judge stated that the starting point for one armed robbery is 24 to 30 months and that the principles of general and specific deterrence were paramount. He reviewed a number of cases that addressed the issue of exceptional circumstances and concluded that, "the central crux of the exceptional circumstances argument" involves proof of "extreme . . . rehabilitative efforts".

[24] The sentencing judge found that the threat made by the accused and the presence of the child during the first robbery were aggravating factors. He noted the conclusion of the probation officer that the accused was a high risk to reoffend. He also acknowledged the mitigating factors including:

- his significant rehabilitative efforts;
- his lack of criminal involvement for a period of 10 years;
- his confession to police, early guilty pleas and apology in court;
- his family support;
- his *Gladue* factors; and
- his addiction issues.

[25] Ultimately, the sentencing judge concluded that the accused had not made "a complete turnaround in his life, although obviously he [was] well on his way." Accordingly, he determined that the criteria for exceptional circumstances had not been met in this case.

[26] Initially, the sentencing judge imposed 24 months' incarceration for the first robbery. Relying on the "spree" principle and to ensure the accused did not get a "free ride" (*R v Wozny*, 2010 MBCA 115 at para 44), he imposed 18 months' incarceration consecutive for the second robbery for a total sentence of 42 months. Then he stated the following:

> However, I also must apply principle of proportionality and taking a last look at the offence. Forty-two months, in my view, is a crushing amount of incarceration for these offences that occurred within hours of each other. Simply based upon the principles of

> proportionality, totality and last look, the 24 months will be reduced to 16 months; 18 months will be reduced to 14 months.

[27] Following this "last look", the sentencing judge reduced the sentence on the basis of the accused's "reduced moral culpability by the combination of the Gladue factors and his severe drug addiction as well as his demonstrated pathway towards rehabilitation." While the sentencing judge said that he was reducing the sentence by seven months, he in fact reduced the sentence by six months:

> The 16-month sentence will be reduced to 13 months. The 14-month sentence will be reduced to 11 months. The total sentence will be 24 months minus seven months' time in custody calculated at 4.7 months times 1.5.

[28] Finally, the sentencing judge subtracted the time in custody from the "16-month sentence", leaving a go-forward sentence of 17 months.

Post-Sentencing Information

[29] Counsel for the accused filed an affidavit with the Crown's consent prior to the appeal hearing which provided updated information regarding the accused. He provided additional information orally at the hearing. The accused continues to do well at the BHF. He and his family continue to live in transitional housing at the BHF where they will remain at least until January 2019. The accused's children are enrolled in school in Winnipeg and his wife is working in Winnipeg. The accused obtained new employment with Thorpe Construction in Winnipeg.

Grounds of Appeal

[30] The accused raises seven grounds of appeal. He says that the sentencing judge erred by:

1. imposing consecutive rather than concurrent sentences;

2. applying the principle of totality prior to assessing the accused's moral blameworthiness;

3. making a calculation error;

4. overemphasising the principle of general deterrence;

5. failing to consider alternatives to custody as required by section 718.2(e) of the *Code*;

6. failing to conclude that the accused's circumstances were exceptional in light of his findings of fact; and

7. imposing a sentence that is harsh and excessive.

[31] The accused argues that the crux of the appeal is whether the sentencing judge failed to consider alternatives to custody and whether the sentence is demonstrably unfit. He says that the decision of *R v Peters*, 2015 MBCA 119 supports his argument that a non-custodial sentence is appropriate in this case. He submits that the sentencing judge committed technical errors that, when considered together, render the sentence unfit.

Analysis

Standard of Review

[32] Absent an error in principle, failure to consider a relevant factor, or an overemphasis of the appropriate factors, the decision of the sentencing judge is entitled to deference. An appellate court can only intervene when the sentencing judge commits an error which impacts on the sentence in a material way, or where the sentence is demonstrably unfit (see *R v Lacasse*, 2015 SCC 64 at paras 43-44, 52; and *R v Gladue*, 2018 MBCA 89 at para 9).

Grounds 1 to 4—Consecutive Sentences, Totality, Sentence Calculation and General Deterrence

[33] The accused argues that the sentencing judge made four errors in principle which impacted on his determination as to the appropriate sentence.

Concurrent vs Consecutive Sentences and Totality

[34] In *R v RJ*, 2017 MBCA 13, Mainella JA explained the proper procedure for sentencing when the accused is facing multiple counts (at para 13):

> First, the judge examines the degree of nexus between the offences, as required by section 718.3(4) of the *Code*, to decide whether any or all of the offences will be served concurrently or consecutively. Second, where concurrent sentences are imposed, the judge determines a fit sentence for the most serious offence and makes the other sentences lesser in length or determines a single sentence for the set of offences. Where concurrent sentences are imposed, the judge is required to ensure that the length of the sentence does not give an offender a free ride for any criminal conduct. Alternatively, if consecutive sentences are imposed, the judge determines a fit sentence for each

> offence. Third, in the case of consecutive sentences, the judge totals the sentences and then gives the combined sentence a last look in accordance with the totality principle to see if the combined sentence is "unduly long or harsh" because it exceeds the overall culpability of the offender (see section 718.2(c) of the *Code*). Fourth, where the judge determines that the combined sentence is excessive, the sentence is adjusted to the point where it is proportional to the offender's overall culpability. When a sentence is reduced to maintain the fundamental principle of proportionality, the judge must, as far as possible, ensure that the offender does not get a free ride on any criminal conduct.

See also *R v Draper*, 2010 MBCA 35 at para 30; and *Wozny*.

[35] Offences that are separate and distinct should generally attract consecutive sentences whereas offences that are sufficiently interrelated should be sentenced concurrently (see *Wozny* at para 46). Robberies involving "a series of similar, continuous and recurring offences with the same gravamen within a sustained and relatively short period of time" (*R v Arbuthnot*, 2009 MBCA 106 at para 24) may be considered sufficiently interrelated to constitute a crime spree and warrant concurrent sentences (see also at para 25).

[36] When consecutive sentences are imposed, the factors relevant to the "last look" include the gravity of the offences, the offender's degree of moral culpability with respect to the crimes committed and the harm done to the victim or victims (see *Draper* at para 31).

[37] Both Crown and defence counsel sought concurrent sentences for the two offences on the basis that they were sufficiently interconnected. The accused submits that the sentencing judge erred by imposing consecutive sentences in light of the recommendation made by counsel and the

jurisprudence regarding crime sprees in cases such as *Arbuthnot*. He also argues that the sentencing judge applied the principle of totality before assessing the moral blameworthiness of the accused.

[38] The determination as to whether sentences ought to be concurrent or consecutive is a fact-driven analysis. Such a determination is generally owed deference (see *Arbuthnot* at para 21).

[39] It is important that both counsel concluded that concurrent sentences ought to be imposed on the facts of this case.

[40] In *R v Anthony-Cook*, 2016 SCC 43, Moldaver J concluded that the public interest test ought to be used when a judge is considering the acceptability of a joint submission. He explained (at paras 32, 44):

> Under the public interest test, a trial judge should not depart from a joint submission on sentence unless the proposed sentence would bring the administration of justice into disrepute or is otherwise contrary to the public interest. . . .
>
> [A] high threshold for departing from joint submissions is not only necessary to obtain all the benefits of joint submissions, it is appropriate. Crown and defence counsel are well placed to arrive at a joint submission that reflects the interests of both the public and the accused (Martin Committee Report [Ontario, *Report of the Attorney General's Advisory Committee on Charge Screening, Disclosure and Resolution Discussions*, (Toronto: Queen's Printer, 1993)], at p. 287). As a rule, they will be highly knowledgeable about the circumstances of the offender and the offence and the strengths and weaknesses of their respective positions. The Crown is charged with representing the community's interest in seeing that justice is done (*R. v. Power*, [1994] 1 S.C.R. 601, at p. 616). Defence counsel is required to act in the accused's best interests, which includes ensuring that the accused's plea is voluntary and informed (see, for example, Law Society of British Columbia, *Code of*

> *Professional Conduct for British Columbia* (online [: <www.lawsociety.bc.ca/docs/publications/mm/BC-Code_ 2016-06.pdf>]), rule 5.1-8). And both counsel are bound professionally and ethically not to mislead the court (*ibid.*, rule 2.1-2(c)). In short, they are entirely capable of arriving at resolutions that are fair and consistent with the public interest (Martin Committee Report, at p. 287).

[41] While this case did not involve a joint submission arising from a plea bargain, certainty; accessibility; clarity; and predictability are important values that underpin the rule of law (see *R v Ferguson*, 2008 SCC 6 at para 69). While ultimately the determination of a fit sentence lies solely in the discretion of the sentencing judge, when both counsel have come to the same conclusion on the application of the law to the facts of a particular case, the judge should provide cogent reasons for disregarding that submission.

[42] The sentencing judge expressed concern about imposing concurrent sentences during submissions "[b]ecause it doesn't respect the victim" when there are multiple offences that are serious. In doing so, he focussed only on the separate interests involved in the two robberies and failed to consider the proximity of the offences. He failed to explain why he did not view the offences to be "sufficiently interconnected to form a single criminal transaction or crime spree and thereby attract concurrent sentences" (*Arbuthnot* at para 24).

[43] The robberies were committed within a period of approximately eight hours and were motivated by the accused's drug addiction. In light of these factors and the recommendations of counsel, in my view, the sentencing judge erred by imposing consecutive sentences.

[44] However, I am not persuaded that the imposition of concurrent sentences would have changed the ultimate sentence imposed by the sentencing judge. If the sentencing judge had imposed concurrent sentences, then he could have increased the sentence for the first robbery to ensure the second robbery would not go unpunished (see *Wozny* at para 65; and *R v Cook (N)*, 2014 MBCA 29 at para 35). Therefore, in my view, the error did not impact the sentence in more than just an incidental way (see *R v Houle*, 2016 MBCA 121 at para 11).

[45] Regarding the accused's argument that the sentencing judge erred by considering totality prior to assessing the accused's moral blameworthiness, the Crown argues that moral blameworthiness was a central consideration throughout the sentencing hearing. It says that the impugned reasons must be evaluated holistically and in the context of the record. I agree.

[46] In my view, the submissions of counsel and the sentencing judge's reasons provide context for the sentencing judge's explanation as to how he calculated the final sentence. While the last look for totality ought to be conducted after the sentence has been determined for each offence, I am not convinced that any error the sentencing judge made when explaining the reductions impacted on the final sentence.

Sentence Calculation

[47] During his calculation of the final sentence, the sentencing judge stated that he would reduce the sentence by seven months as a result of the accused's reduced moral culpability but, in fact, he only reduced the sentence by six months. In my view, when his reasons are read in the context of his detailed calculations, it becomes clear that he intended to reduce the sentence

by six months (from 30 months to 24 months) and merely misspoke when he said seven months. The seven-month reduction related to the pre-sentence custody.

General Deterrence

[48] The nature of the crime and the circumstances of the offender establish the relevance and relative importance of each of the sentencing objectives. Particularly serious offences will usually result in an emphasis on the objectives of denunciation and general deterrence (see *R v Hamilton* (2004), 186 CCC (3d) 129 at paras 102-3 (Ont CA)). Deterrence is generally the paramount sentencing objective for the offence of armed robbery. Therefore, the emphasis during sentencing is on the offender's conduct rather than the offender's personal circumstances (see *R v Dalkeith-Mackie*, 2018 MBCA 118 at para 21).

[49] The accused argues that the sentencing judge overemphasised general deterrence and that general deterrence is not usually invoked for someone who has not previously faced a penitentiary sentence. He says that restraint must be considered.

[50] I am not persuaded that the sentencing judge erred when he concluded that deterrence "takes precedence over any other sentencing principle in this case". He considered all of the sentencing principles, the accused's personal circumstances and the theory behind general deterrence as explained in *R v BWP; R v BVN*, 2006 SCC 27 at para 2. He found that, in this case, the need for general and specific deterrence outweighed rehabilitation and, in my view, he was entitled to do so. Moreover, the 24-month sentence is at the bottom of the range for armed robbery of a

convenience store or gas station (see *Dalkeith-Mackie* at paras 18-20) and demonstrates that he considered factors other than general deterrence, including rehabilitation and restraint.

[51] At the end of the day, although the sentencing judge may have made technical errors while arriving at the accused's ultimate sentence, those errors did not have a material impact on the sentence and do not entitle this Court to interfere.

Ground 5—Alternatives to Custody

[52] The accused argues that, while the sentencing judge conducted "a thorough review of [the accused's] background, and the systemic context which informed that background", he failed to consider alternative sentencing sanctions that would permit the accused to remain at the BHF and continue his treatment plan.

[53] At the sentencing hearing, defence counsel submitted that the *Gladue* factors mitigated the accused's moral blameworthiness. He argued that the exceptional circumstances in this case warranted a non-custodial sentence and proposed a number of options that would allow the accused to continue his treatment plan.

[54] As the accused acknowledges, the sentencing judge carefully considered the *Gladue* factors, both personal and systemic. He concluded that the accused's moral culpability was reduced as a result of *Gladue* and other factors. The accused's success at the BHF was squarely before the sentencing judge and was also carefully considered by him.

[55] When the sentencing judge's reasons are considered in this context, it is clear that his reasons were responsive to the submissions made and the issues raised, and that he considered the relevant sentencing principles, including section 718.2(e) of the *Code*. Moreover, the reasons indicate the sentencing judge found the offences to be serious and concluded that alternatives to custody were not reasonable in the circumstances of this case.

Ground 6—Exceptional Circumstances

[56] The accused argues that the sentencing judge's conclusions amounted to a finding of exceptional circumstances and relies on the following:

- he was addicted to drugs;
- he confessed to police, entered early guilty pleas and expressed remorse;
- he had an abusive childhood and experienced parental addiction and neglect;
- he had significant *Gladue* factors;
- he had not been convicted of an offence in 10 years;
- he was doing extremely well at the BHF; and
- he had family support and employment.

[57] The accused submits that the sentencing judge erred by failing to impose a non-custodial sentence based on these exceptional circumstances.

[58] It is apparent from the sentencing judge's reasons that he found multiple mitigating factors warranting a reduction in sentence. However, he also found that although the accused was "well on his way", he had not completely turned his life around.

[59] The sentencing judge's reasons demonstrate an understanding of the principle of exceptional circumstances and the high standard that must be met before a finding of exceptional circumstances will be made. Relying on *R v Voong*, 2015 BCCA 285, the sentencing judge recognised "there must be circumstances that are above and beyond the norm to justify a non-custodial sentence" (at para 59). He also acknowledged "the limited and rare role exceptional circumstances should play in day-to-day sentencing in the courts of this province, even for a sympathetic accused" (*R v Burnett*, 2017 MBCA 122 at para 41). However, his ultimate conclusion was that the accused had not made "a complete turnaround in his life".

[60] The sentencing judge's finding that this case does not meet the standard of exceptional circumstances is entitled to great deference. As explained by Mainella JA in *Burnett* (at para 31):

> Like any sentencing decision on appeal, a finding by a sentencing judge of exceptional circumstances is entitled to great deference (see *Tran* [*R v Tran (A)*, 2015 MBCA 120] at paras 13, 30). That said, the rarity of the exceptional-circumstances principle being available to sentencing judges is illustrated by the remarks of Drapeau CJNB in *Murdoch v R*, 2015 NBCA 38 (at para 47): "fair warning to sentencing judges, it is a reversible error of principle to 'categorize the ordinary as exceptional'".

[61] I am not persuaded that the sentencing judge erred when he exercised his discretion and declined to find the circumstances in this case to be exceptional.

[62] I agree that the accused was "well on his way." However, he was living in a supportive, therapeutic environment and had not demonstrated that he would be able to maintain his rehabilitative efforts once he is living in the community without the support of the BHF community. This is concerning particularly when considered in the context of his previous efforts to treat his addictions which he was unable to maintain.

[63] Furthermore, while I accept that the accused's progress at the BHF sets him apart from other offenders, as I stated in *Dalkeith-Mackie*, it is expected that individuals with addictions who engage in criminal acts will take steps to address their addictions (see para 29).

[64] Finally, while I do not wish to minimise either the trauma experienced by the accused during his life nor the rehabilitative strides he has made, the factors he argues are exceptional are, in my view, very sympathetic and significantly mitigating, but not so unusual that they meet the high threshold required to be exceptional.

The Peters Decision

[65] The accused relies on the *Peters* decision in which this Court upheld a suspended sentence with probation and community service for the offences of possession of cocaine and two breaches of a judicial interim release order. The accused argues that his case is strikingly similar to *Peters* and that *Peters* supports his position that a non-custodial sentence is appropriate in this case.

[66] In *Peters*, the sentencing judge emphasised the *Gladue* principles as a result of the systemic and background factors affecting the accused. While on bail, he completed residential treatment and other programming. After parental capacity and home assessments, Child and Family Services gave him sole custody of his one and one-half-year-old twins and his two-month-old infant. Based on these facts, the sentencing judge found that there were no public safety concerns and on appeal, this Court defined the accused's actions as "a major turn-around in [his] life" (at para 25). M. A. Monnin JA wrote (at para 26):

> In my view, because of the changes that the accused brought into his life following his arrest, he would have been a good candidate for a conditional sentence. However, because that option has been taken away from judges, the sentencing judge had to consider what other options were available to her, short of incarceration. She was dealing with an exceptional set of circumstances and, in my view, dealt with them in a manner that was open to her. In addition, in crafting her sentence she properly considered what the Supreme Court of Canada has said with respect to sentencing Aboriginal offenders.
>
> [emphasis added]

[67] I am not convinced the circumstances in the present case are sufficiently similar to the circumstances in *Peters* and warrant a similar sentence. While there are similarities regarding the mitigating facts, including the *Gladue* factors and the rehabilitative efforts of both accused, the accused in *Peters* had been living in the community after residential treatment and the sentencing judge concluded that, "Child and Family Services has no concerns about [the accused's] abstinence and has no concerns about [the accused's] risk to become a criminal" (at para 11).

[68] In this case, as I have already stated, the accused has not yet proven his ability to maintain his rehabilitative efforts once he is living in the community without the support of the BHF community. Therefore, I agree with the sentencing judge that, in this case, the long-term protection of the public is not better served by a non-custodial sentence.

Ground 7—Fitness of the Sentence

[69] The accused submits that the sentence is harsh and excessive.

[70] The sentencing judge applied a starting point consistent with the jurisprudence for robberies of convenience stores and gas stations involving a mature accused with no criminal record and prior good character (see *Dalkeith-Mackie* at paras 18-20). He adjusted the sentence for the mitigating factors, including the accused's rehabilitative efforts, the sympathetic personal circumstances and the *Gladue* factors. He recognised the importance of deterrence notwithstanding the mitigating facts.

[71] In my view, the sentencing judge appropriately exercised his discretion when he found that this was not a case of exceptional circumstances. He reduced what would otherwise be an appropriate sentence to account for the significant mitigating factors. In doing so, he imposed a sentence that is proportionate to the gravity of the offences and the degree of responsibility of the offender. Accordingly, I would find that the sentence is not demonstrably unfit.

[72] In the result, I would dismiss the appeal.

leMaistre JA

I agree: Pfuetzner JA

SIMONSEN JA (dissenting):

[73] I have come to a different conclusion than the majority regarding the disposition of this appeal.

[74] For the reasons that follow, I am satisfied that the sentencing judge made errors in principle that led him to impose unfit sentences, namely, incarceratory sentences that would now send the accused to jail. Given the *Gladue* factors that have played a significant role throughout the accused's life and his extraordinary rehabilitative progress since his arrest, a fit sentence is one that does not involve a go-forward period of incarceration. As suggested by counsel for the accused, I would impose a sentence of seven months' custody, satisfied by the credit for pre-sentence custody, followed by a three-year supervised probation order.

Introduction

[75] Despite the well-established deferential standard of review applicable to an appeal of a sentencing decision (as set out in para 32 of my colleague's reasons), I conclude that intervention is warranted in this case because the sentencing judge made the following material errors in principle:

1. imposing consecutive rather than concurrent sentences (Ground 1); and

2. applying the principle of totality prior to assessing the accused's moral blameworthiness (Ground 2).

[76] Given this conclusion, I need not address whether the sentencing judge erred in other respects, including by failing to find that this is a case

involving "exceptional circumstances"(Ground 6). I will, however, say this. The concept of exceptional circumstances has been the subject of much consideration in this Court in the last few years. It has always been and is the case that sentencing ranges are guidelines only and that a sentencing judge may depart from those guidelines, either above or below the range, in appropriate circumstances (see *Lacasse*). What those appropriate circumstances might be are as varied as the individuals who appear in front of the courts. To limit a sentencing judge's discretion to depart from a guideline only in situations of "exceptional circumstances" places an undue restriction on his or her sentencing discretion. Indeed, I need not find exceptional circumstances to conclude that a seven-month jail sentence is appropriate. Rather, it is typically the imposition of a suspended sentence for an offence that ordinarily attracts a lengthy period of incarceration that requires such a finding (see *Burnett* at para 27). In any event, as I will explain, this case is more appropriately viewed through the *Gladue* lens than a case of exceptional circumstances.

[77] I begin by outlining some additional details and amplifying certain facts with respect to the accused's history and current circumstances.

Background

[78] The accused, now 36 years of age, was married in 2009. He and his wife have two children, aged 11 and 14. His mother is from Norway House Cree Nation and his father is from Cross Lake First Nation, which is where the accused has resided for most of his life. He has a Grade 12 education and has been employed in a variety of jobs over the course of his lifetime.

[79] Although the accused has a criminal record, it is limited and dated. He has had no convictions for 10 years and had spent a total of four days in custody prior to his arrest in June 2017 for the offences that are now before the court.

[80] The pre-sentence/*Gladue* report notes that the accused's paternal grandmother attended residential school. According to the probation officer who prepared the report, *Gladue* factors figure prominently in the accused's life.

[81] The accused was exposed to his parents and relatives' substance abuse as a child. He initiated his own substance abuse alongside them. Both parents were alcoholics and his father was physically violent toward him. The trauma he experienced served to fuel his abuse of drugs to numb his emotional pain. He first tried alcohol at age 12 and was drinking regularly by 14. He tried cannabis at age 11, and by age 13 or 14, was using it on a daily basis. He began to use LSD at the age of 15, cocaine at age 16 and crystal methamphetamine at age 17. At about age 21, he turned his focus from alcohol to drugs. He maintained his drug use until his arrest.

[82] From 2006 to 2016, the accused was employed at the Vale Inco mine in Thompson, and in 2012, he was transitioned from a surface to underground job. He personally witnessed the suicide of three of his fellow employees, one of whom killed himself with a knife and two others who took their lives with explosives in the mine. In one of these instances, it was the horrific responsibility of the accused's crew to clean up what had happened. In 2015, the accused's cousin, with whom he was very close, died by suicide. After that, the accused fell further into addiction. He and his wife experienced

marital problems that also caused him to turn further to drug use. He began to abuse cocaine, percocet and morphine. In 2016, his employer sponsored him to attend a residential treatment program. He and his roommate brought heroin tainted with fentanyl into the facility. It was the first time he had used that drug. Both overdosed. His roommate died as a result, which caused the accused to suffer from survivor's guilt. He was then admitted to Nelson House Medicine Lodge for residential treatment. He attempted suicide as he was overwhelmed by the issues he was dealing with. When he returned home, he found that his wife was still abusing drugs, which led to his own relapse. He lost his job. He spiraled further into his drug use until, after an argument with his wife, he left home, came to Winnipeg, and committed the two robberies on June 23, 2017 while under the influence of a number of drugs.

[83] When the accused was arrested the following day, he provided a full confession. He said that he had been in Winnipeg for three days, that he felt he could get help for his drug addiction in the city, and that he needed to be caught because he had to stop using drugs. He explained that his robberies were driven by his drug addiction and that he needed to be locked up.

[84] He then spent approximately four and one-half months in custody until, on November 7, 2017, as a condition of his release on bail, he began residing at the BHF, a residential treatment program located in St. Norbert, which is just outside Winnipeg.

[85] The accused was sentenced on June 28, 2018. By that time, he was performing well at the BHF. He had secured employment in construction in March 2018. The BHF reported that he had been an active participant and had volunteered to help others in the program. It described him as an

"exceptional role model". In January 2018, his wife joined him at the BHF, also as a participant in the program. Their children joined them in the spring of 2018, so that the family could be together. They all lived in transitional housing in St. Norbert that is operated by the BHF. The children were (and are) enrolled in school nearby.

[86] The accused was granted judicial interim release in this Court on July 5, 2018, and his progress at the BHF has since continued. In August 2018, he secured a higher paying construction job. Both employers describe him as reliable and hard-working. His wife works as a personal care assistant. In November 2018, approximately one month prior to the hearing of this appeal, the accused completed his one-year program at the BHF and his wife was expected to complete her program in January 2019. The family still lives in the BHF transitional housing and they intend to remain in the St. Norbert area.

[87] An update from the BHF submitted for this appeal outlines the following report from the accused's keyworker:

> After I had met with [the accused] a few times upon his arrival to treatment, I could see he was determined to change his old behaviors and work hard to get his family back in his life. It is not typical to get a resident who is ready to work hard on themselves once they arrive to treatment however, [the accused] was fully engaged. [The accused] was always open and honest about his past life circumstances and what needed to be addressed in treatment. [The accused] and I were able to work hard together and complete numerous goals and interventions. He has been a delight to work with and I have seen so much positive change in his life as a result of the work we did together. I am fully confident that [the accused] is done with his past life, negative peers, and will no longer resort to substances as coping mechanisms in his future.

[88] The BHF will remain involved with the family. Its representatives indicated at the appeal hearing that, although the accused had completed his one-year program and his wife would soon have done so, the family may stay in transitional housing. There is no fixed time within which they must leave, and some people have continued with the program for as long as two and one-half years. Furthermore, the BHF is prepared to assist throughout a three-year probation order, including being involved in determining appropriate counselling and programming and where the accused should reside.

Analysis

Consecutive Rather Than Concurrent Sentences and the Principle of Totality

[89] The bulk of authority indicates that concurrent sentences are appropriate in "spree" cases involving a number of similar, continuous and recurring robberies committed in a relatively short period of time such that they are sufficiently connected to form a single criminal transaction (see *Arbuthnot*; *Draper*; and *Wozny*). This is clearly such a case, as it involves two very similar robberies committed for the same purpose on the same day.

[90] As noted by my colleague, both Crown and defence counsel sought concurrent sentences at the sentencing hearing. I agree with her that, where both counsel have come to the same conclusion on the application of the law to the facts, the judge should provide cogent reasons for disregarding that submission. I also agree that the sentencing judge erred by failing to explain why he did not view the offences to be sufficiently interconnected to warrant concurrent sentences. I add that the comments he did make about why he imposed consecutive sentences indicate that he did so for reasons that are not recognised in law.

[91] At the outset of his analysis, when he set consecutive sentences of 24 months for the first robbery and 18 months for the second, he explained that he imposed consecutive sentences because "based upon the spree principle, he should not get a free ride with regard to the second offence so I have made it in that way." This is not a basis for the imposition of consecutive sentences. In fact, the concept of "free ride" is considered in connection with concurrent sentences; a concurrent sentence will be increased so that an accused does not receive a "free ride" for committing an additional offence (see *R v Friesen*, 2018 MBCA 69 at paras 38-41). Furthermore, the sentencing judge's comment during submissions about concurrent sentences not being appropriate for "high end offences" because "it doesn't respect the victim" is not a principle recognised in law. I agree with my colleague that this comment indicates that he focussed only on the separate interests involved and failed to consider the proximity of the offences.

[92] Therefore, the sentencing judge erred in principle in imposing consecutive sentences.

[93] I disagree with the majority that the imposition of consecutive sentences did not materially affect the length of the total sentence imposed. Had the sentencing judge imposed concurrent sentences, adding 18 months to the sentence for the first offence would, in my view, have been excessive to satisfy any concern about "free ride" for the second offence. I recognise that this Court has set a range of 24 to 48 months for a first offender who commits a robbery of a convenience store or gas station with a weapon (see *Wozny*; *R v Charlette (JJ)*, 2015 MBCA 32 at para 46; and *R v Okemow*, 2017 MBCA 59). Nonetheless, I am satisfied that, in the particular circumstances of this case given the similarity and proximity of the offences, a concurrent sentence

for the first offence would not have been increased by an amount near that range, but rather likely by just a few months, to avoid a "free ride" for the second offence. Although the sentencing judge did reduce the consecutive sentences on account of the principle of totality, that is not an answer to the impact of his imposing consecutive sentences because he also erred in his approach to totality.

[94] The sentencing judge's application of the principle of totality does not accord with the proper procedure prescribed by the case law (see para 34 of the reasons of the majority). Where consecutive sentences are imposed, totality is to be considered at the end of the analysis, after the sentences have been set, to ensure that the total of the consecutive sentences does not exceed an offender's overall moral culpability and to prevent a crushing sentence, that is, a sentence not in keeping with the offender's record and prospects for rehabilitation (see *Wozny* at para 60; and *R v Hutchings*, 2012 NLCA 2 at para 84). If the judge decides that the total sentence is excessive, it must be adjusted appropriately (see *Draper* at para 30).

[95] In this case, the sentencing judge, after making reductions to the consecutive sentences on account of totality, proceeded to make further reductions due to "reduced moral culpability by the combination of the Gladue factors and his severe drug addiction as well as his demonstrated pathway towards rehabilitation."

[96] In my view, the sentencing judge's incorrect approach materially affected the total sentence he imposed. He could not have meaningfully applied the principle of totality because it requires him to take "one final look" at the fitness of the cumulative sentence—and, in this case, it was not in fact

his last look because he went on to make the further reductions. Furthermore, to take into account reduced moral culpability due to *Gladue* factors, addictions and rehabilitation at the end of the analysis indicates that these important features were not properly or fully addressed when the sentences were initially set. Although the sentencing judge did later make the reductions to reflect these considerations, this cannot properly account for failing to address them when he first determined the appropriate sentences. Determining a fit sentence is a holistic exercise that must consider all relevant factors.

[97] Having concluded that the sentencing judge made errors in principle that materially impacted the sentences he imposed, I now turn to what would have been appropriate sentences (see *Lacasse*; and *R v Suter*, 2018 SCC 34 at para 89).

Fit Sentences

[98] I appreciate that the total sentence imposed by the sentencing judge is at the low end of the range that this Court has set for a first offender who commits a robbery of a convenience store or gas station with a weapon. However, as I stated earlier, the Supreme Court of Canada in *Lacasse* emphasised that court sentencing ranges are not straightjackets for judges and that, "There will always be situations that call for a sentence outside a particular range" and that "[a] judge can order a sentence outside that range as long as it is in accordance with the principles and objectives of sentencing" (at para 58).

[99] Unlike the situation in so many other cases, there is a viable alternative to custody that is available—residence with, or, over time, residence as directed by the BHF.

[100] Furthermore, despite the seriousness of these crimes, there are numerous significant mitigating factors in relation to the accused (many of which were noted by the majority in paras 24 and 56, but which I will repeat):

1. the primary factor in the accused's life that led to the charges was drug addiction;

2. he made a full, immediate and frank confession, and entered early guilty pleas;

3. he made a personal apology in Court as an expression of his remorse;

4. he had an abusive childhood and experienced parental addiction and neglect;

5. his criminal record had ended 10 years prior;

6. he had done "superlatively" during his time at the BHF and had "done everything that has been requested of him";

7. he "is doing all that he can to rehabilitate himself and go along that pathway to rehabilitation"; and

8. he had family support and gainful employment.

[101] In addition, section 718.2(e) of the *Code* and the Supreme Court of Canada in *Gladue* and *R v Ipeelee*, 2012 SCC 13 prescribe that, in crafting a fit sentence, a court must recognise the factors that have led to the overrepresentation of Aboriginal offenders in the Canadian prison population. Section 718.2(e) provides that a court shall consider all available sanctions other than imprisonment that are reasonable in the circumstances and consistent with the harm done to victims or to the community, with particular attention to the circumstances of Aboriginal offenders.

[102] In *Ipeelee*, the Supreme Court of Canada revisited its decision in *Gladue* and stated that any cautious optimism that its decision in *Gladue* might improve the problem of overrepresentation of Aboriginal people in Canadian jail had been misplaced, and that the situation had only worsened over the more than 10 years since *Gladue* was decided.

[103] The Court stated with respect to *Gladue* (at para 59):

> The Court held, therefore, that s. 718.2(*e*) of the *Code* is a remedial provision designed to ameliorate the serious problem of overrepresentation of Aboriginal people in Canadian prisons, and to encourage sentencing judges to have recourse to a restorative approach to sentencing (*Gladue*, at para. 93). It does more than affirm existing principles of sentencing; it calls upon judges to use a different method of analysis in determining a fit sentence for Aboriginal offenders. Section 718.2(*e*) directs sentencing judges to pay particular attention to the circumstances of Aboriginal offenders because those circumstances are unique and different from those of non-Aboriginal offenders (*Gladue*, at para. 37). When sentencing an Aboriginal offender, a judge must consider: (a) the unique systemic or background factors which may have played a part in bringing the particular Aboriginal offender before the courts; and (b) the types of sentencing procedures and sanctions which may be appropriate in the circumstances for the offender because of his or her particular Aboriginal heritage or

> connection (*Gladue*, at para. 66). Judges may take judicial notice of the broad systemic and background factors affecting Aboriginal people generally, but additional case-specific information will have to come from counsel and from the pre-sentence report (*Gladue*, at paras. 83-84).

[104] The Court also confirmed its position on the responsibilities of judges in light of section 718.2(e), as previously enunciated in *Gladue*, and elaborated as follows (at paras 66, 75):

> First, sentencing judges can endeavour to reduce crime rates in Aboriginal communities by imposing sentences that effectively deter criminality and rehabilitate offenders. These are codified objectives of sentencing. To the extent that current sentencing practices do not further these objectives, those practices must change so as to meet the needs of Aboriginal offenders and their communities. . . .
>
> Section 718.2(*e*) does not create a race-based discount on sentencing. The provision does not ask courts to remedy the overrepresentation of Aboriginal people in prisons by artificially reducing incarceration rates. Rather, sentencing judges are required to pay particular attention to the circumstances of Aboriginal offenders in order to endeavour to achieve a truly fit and proper sentence in any particular case. This has been, and continues to be, the fundamental duty of a sentencing judge. *Gladue* is entirely consistent with the requirement that sentencing judges engage in an individualized assessment of all of the relevant factors and circumstances, including the status and life experiences, of the person standing before them. *Gladue* affirms this requirement and recognizes that, up to this point, Canadian courts have failed to take into account the unique circumstances of Aboriginal offenders that bear on the sentencing process. Section 718.2(*e*) is intended to remedy this failure by directing judges to craft sentences in a manner that is meaningful to Aboriginal peoples. Neglecting this duty would not be faithful to the core requirement of the sentencing process.

[105] The Court further stated (at para 87):

> The sentencing judge has a statutory duty, imposed by s. 718.2(*e*) of the *Criminal Code*, to consider the unique circumstances of Aboriginal offenders. Failure to apply *Gladue* in any case involving an Aboriginal offender runs afoul of this statutory obligation. As these reasons have explained, such a failure would also result in a sentence that was not fit and was not consistent with the fundamental principle of proportionality. Therefore, application of the *Gladue* principles is required in every case involving an Aboriginal offender, including breach of an LTSO [long-term supervision order], and a failure to do so constitutes an error justifying appellate intervention.

[106] The accused's paternal grandmother attended residential school, and the accused endured the intergenerational effects of this. As he was growing up, his father was a violent alcoholic. The trauma the accused endured led to his struggle with drug and alcohol abuse as a way to deal with emotional pain. As noted by my colleague, the probation officer who prepared the pre-sentence/*Gladue* report stated that the effects of colonisation and residential schooling on the accused's family and community include "chronic substance abuse, a culture of violence, domestic violence, poverty, unemployment, lack of opportunities and criminal behaviour."

[107] Unlike the majority, I find this case to be similar to *Peters*, where *Gladue* considerations were central to this Court's decision to uphold a suspended sentence for possession of cocaine for the purpose of trafficking and two breaches of a judicial interim release order. Mr. Peters sold cocaine to an undercover police officer and, on search of his pregnant girlfriend's vagina, the police found drugs which the accused conceded were his. Shortly after his arrest, Mr. Peters relocated from Winnipeg to Long Plains First Nation where he was caring for his three young children. He had a total of 54 convictions, and was assessed as a very high risk to reoffend. He had

completed a 30-day residential treatment program. Child and Family Services conducted an assessment and determined that, despite being a former drug dealer with a gang past, he was a good parent and should have sole custody of the children. Child and Family Services indicated that it had no concerns about his abstinence or his risk to become a criminal. After emphasising the importance of Mr. Peters's Aboriginal background (see paras 22-25), this Court upheld the suspended sentence and found that the sentencing judge had properly followed the approach that the Supreme Court of Canada has directed with respect to sentencing Aboriginal offenders.

[108] As in *Peters*, the accused has been assessed as a high risk to reoffend. However, that assessment must be considered in light of the *Gladue* factors and his addiction, which the sentencing judge found was being addressed "superlatively." Furthermore, although the accused has not undergone a Child and Family Services assessment and is not the single parent of three very young children, he has completed a much lengthier rehabilitation program than Mr. Peters; is an important role model; provides financial support for his two young children; and has an excellent report from the BHF.

[109] The majority notes that the accused has not yet proven his ability to maintain his rehabilitative efforts without the support of the BHF community, such that the long-term protection of the public is not better served by a non-custodial go-forward sentence. I disagree. The accused has done all that he could given the timing of his sentencing hearing and appeal. The only way he could have tested himself in the community would have been to leave the BHF program prior to its one-year conclusion and not live in the BHF transitional housing—all of which would have deprived him of the full benefit

of the support of the BHF. With that support (which will continue), he has proven his ability to maintain his rehabilitation efforts for well over one year.

[110] Although the serious nature of the crimes committed by the accused make the sentencing objectives of denunciation and general deterrence important, other factors such as rehabilitation and the principle of restraint, in light of the *Gladue* features of this case, demand significant weight.

[111] The accused is an offender with a limited and dated prior criminal record who took immediate responsibility for his drug-fuelled actions. He has since taken remarkable steps toward rehabilitation, which have engaged his entire family. Importantly, he has extensive *Gladue* considerations in his life. The sentence to be imposed must reflect not only the systemic and background factors affecting Aboriginal people, but also the specific impact that background has clearly had on the accused. In the particular circumstances of this case, application of section 718.2(e) and the approach mandated by the Supreme Court of Canada in *Ipeelee* call for imposition of the available alternative to a go-forward jail sentence.

[112] Assessing this situation holistically, including the circumstances of the offences and the accused, and the protection of the public, a fit sentence is one that takes into account his pre-sentence custody, but does not send him to jail and remove him from his family and the support of the BHF. As in *Peters*, the long-term protection of the public is better served by him not now being incarcerated, so that he may continue his impressive course of rehabilitation.

[113] Although unusual for crimes of this kind, I conclude that fit sentences are concurrent sentences of seven months in jail, satisfied by the credit for pre-sentence custody, followed by a three-year supervised probation

order with strict conditions that stipulate the ongoing involvement of the BHF. These sentences, while outside the range, do involve a period of custody and accord with the overarching principle of proportionality. I note, as an aside, that it is curious that the sentencing judge did not impose a probation order, despite the joint position of counsel that probation was appropriate.

Disposition

[114] For the foregoing reasons, I would allow the appeal. I would impose concurrent sentences of imprisonment of one day (satisfied by the accused's appearance in Court), with a credit of seven months noted for pre-sentence custody, followed by a three-year supervised probation order on the following conditions, which were proposed by defence counsel with the agreement of the BHF:

- keep the peace and be of good behaviour;
- appear before the court when required to do so by the court;
- notify the probation officer in advance of any change of name or address, or any change of employment or occupation;
- report to the probation officer within two days;
- thereafter, report when required by the probation officer and in the manner directed by the probation officer;
- maintain a curfew as directed by the probation officer;
- attend counselling and programming as directed by the probation officer, in consultation with the BHF;

- reside as directed by the probation officer, in consultation with the BHF;
- abstain from possession and consumption of alcohol, intoxicants and non-prescription drugs;
- abstain from owning, possessing or carrying a weapon; and
- not to attend at either the convenience store or gas station where the robberies were committed.

Simonsen JA