

IN THE COURT OF APPEAL OF MANITOBA

Coram: Madam Justice Holly C. Beard
Mr. Justice William J. Burnett
Mr. Justice Christopher J. Mainella

BETWEEN:

<i>HER MAJESTY THE QUEEN</i>)	<i>J. F. Rogala and</i>
)	<i>M. A. J. Kruse</i>
)	<i>for the Appellant</i>
<i>Respondent</i>)	
)	<i>J. M. Mann and</i>
<i>- and -</i>)	<i>B. M. P. Moen</i>
)	<i>for the Respondent</i>
<i>TRISTAN ANTONIO PROVINCIANO</i>)	
)	<i>Appeal heard and</i>
<i>(Accused) Appellant</i>)	<i>Decision pronounced:</i>
)	<i>February 13, 2019</i>

MAINELLA JA (for the Court):

[1] After a trial by judge alone, the accused was convicted of assault with a weapon (section 267(a) of the *Criminal Code* (the *Code*)) and possession of a weapon for a dangerous purpose (section 88 of the *Code*). He was acquitted of a charge of breaking, entering and committing the assault (section 348(1)(d) of the *Code*) as the judge had a reasonable doubt as to whether the accused had been invited into the victim’s residence. The accused received a sentence of three years’ imprisonment plus 84 days’ time served for the first offence and 10 months concurrent for the second offence. He appeals his convictions, seeks leave to appeal and, if granted, appeals his sentence.

[2] We are not persuaded that the verdict is unreasonable within the meaning of section 686(1)(a)(i) of the *Code* (see *R v Sinclair*, 2011 SCC 40 at para 69). The accused admitted he struck the victim in the head with a hammer inside the residence. The dispute at the trial was why that occurred. In our view, the judge's findings as to the credibility of the witnesses can be reasonably supported by the record (see *R v RP*, 2012 SCC 22 at para 10). His reasons adequately explain why he disbelieved the accused's claim of self-defence and why he was satisfied of the guilt of the accused on two of the three offences, despite inconsistencies and other frailties in the evidence of the victim and his common-law spouse.

[3] The issue on the sentence appeal is whether the judge gave appropriate regard to the principle of restraint in light of the *Gladue* factors in the case (see *R v Gladue*, [1999] 1 SCR 688). In reaching his decision, the judge stated, "a heavy weighting of Gladue factors in this case does a disservice to those people whose aboriginal background has more closely shaped their upbringing and development. I place little weight on Gladue factors in this sentencing."

[4] By way of background, the accused is 31 years old, single and has a number of family supports. He has a lengthy record, primarily for property offences and breaches of court orders. There is a history of substance abuse in his family and he has a substance abuse problem. One of his grandparents is Indigenous and attended a residential school. While he self-identifies as being part Indigenous, he has minimal connections to any Indigenous community.

[5] It is noteworthy that the Crown conceded at the sentencing that the accused was an “Aboriginal [offender]” within the meaning of section 718.2(e) of the *Code*, in light of the accused’s mixed Indigenous/European heritage and the circumstances set out in the *Gladue* report (see *R v Powley*, 2003 SCC 43 at paras 30-33).

[6] In our view, the judge’s comments regarding *Gladue* are unfortunate and erroneous. However, on the facts here, the error did not materially affect the sentence (see *R v Houle*, 2016 MBCA 121 at paras 11-12). The accused’s moral blameworthiness is high. He entered the victim’s residence armed and had an accomplice armed with a knife. While it is unclear as to exactly what crime was going to be committed, under the accused’s version of events the assault was a drug deal gone bad. He committed the offences while sober, on a probation order for an assault conviction and had set up the drug deal in prison (for a profit motivation), having been released the day before the assault. Also relevant is that the *Gladue* report assessed the accused as a high risk to reoffend and Probation Services recommended against a community-based sentence. On these facts, it was open to the judge to have given the *Gladue* factors in this case little weight.

[7] In the result, while leave to appeal sentence is granted, the appeals as to conviction and sentence are dismissed.

Mainella JA

Beard JA

Burnett JA