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Docket: CR 15-01-34490
(Winnipeg Centre)
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COURT OF QUEEN'S BENCH OF MANITOBA

BETWEEN:	)	**APPEARANCES:**
	)	
HER MAJESTY THE QUEEN	)	Brent Davidson
	)	for the Crown
- and -	)	
	)	Scott Paler
DYLAN LENNON ATKINSON,	)	for the accused
	)	
accused.	)	
	)	Judgment delivered:
	)	May 26, 2017

TOEWS J.

Introduction

[1] Following a trial, I delivered a judgment on February 1, 2017, convicting Dylan Lennon Atkinson ("Atkinson") of the following charges:

a) Committing a break and enter into a dwelling house where he committed the indictable offence of robbery using a restricted firearm;

b) Aggravated assault;

c) Committing an assault with a weapon;

d) Possessing a loaded restricted firearm without being the holder of a licence;

e) Pointing a firearm; and

f) Possessing a firearm while prohibited from doing so by an order.

[2] The February 1, 2017 judgment sets out my findings of fact in respect of the offences which Atkinson was convicted of and I do not intend to repeat those findings in this decision on sentence. It is sufficient to say for these purposes that Atkinson along with a co-accused, his father, broke and entered into a residence looking for drugs and money. In the residence the pair assaulted two individuals with a pair of scissors and the butt end of a fully operational loaded 38 calibre restricted handgun. The firearm was not discharged during the course of this home invasion, and was recovered by the police after a short foot chase during which Atkinson attempted to discard the firearm. In short, all of the convictions relate to crimes committed during the course of this home invasion.

[3] Following submissions from counsel at the sentencing hearing, I agreed to conditionally stay count 5 on the indictment, namely, pointing a firearm, on the basis of the principle in ***R. v. Kienapple***, [1975] 1 S.CR. 729 (S.C.C.). I am satisfied that on the basis of ***R. v. R.K.***, [2005] 198 C.C.C. (3d) 232 (Ont. CA), a conviction should be maintained in respect of the other counts, however, given the fact that these counts all arose out of essentially one incident, the sentence in respect of each count, with one exception, should be calculated on a concurrent basis. The exception is in respect of count 6 on the indictment, namely, possessing a firearm while prohibited from doing so

by an order. In my opinion, the breach of a court order prohibiting the possession of a firearm should attract a sentence calculated on a consecutive basis to the other sentences imposed in this case.

[4] A number of exhibits have been filed by the Crown in this case and have been referred to in the course of sentencing submissions by both counsel. These exhibits are:

a) Exhibit S1 - A pre-sentence report compiled on March 6, 2017 (attaching the reasons for decision which I delivered in this matter on February 1, 2017);
b) Exhibit S2 - A joint statement of facts from a sentencing hearing concerning an incident on December 4, 2007, which resulted in a manslaughter conviction for Atkinson on March 23, 2009;
c) Exhibit S3 - A transcript of the proceedings before Joyal ACJ (as he then was), at the sentencing hearing on March 23, 2009 on the manslaughter conviction of Atkinson;
d) Exhibit S4 - A placement report concerning Atkinson dated May 8, 2009; and
e) Exhibit S5 - The record of Atkinson's criminal convictions which sets out the following convictions:
    (i) December 22, 2006: Assault; Break and Enter with Intent; Theft under $5000; Fail to Appear; Robbery. Sentence was probation for two years on each charge concurrent.
    (ii) March 21, 2007 – Fail to comply with disposition; Fail to Appear; Possession of a Schedule 1 substance; Fail to comply with undertaking;

Public mischief. Sentence was time served (24 days) on each charge concurrent.

(iii) May 16, 2008 – Fail to comply with disposition, three charges. Sentence is time served (30 days).

(iv) March 23, 2009 – Manslaughter. Sentence was 54 months (credit for the equivalent of 30 months pre-sentence custody), and Mandatory Prohibition Order.

(v) October 28, 2010 – Assault with a weapon. Sentence was 90 days consecutive to sentence serving, and probation for 1 year.

(vi) November 22, 2012 – Statutory Release Violator – Recommitted.

The Crown's Submission

[5] The Crown submits that Atkinson be sentenced to serve a term of 11 years for these offences. The Crown's position is that the 11 year sentence takes into account the factors identified in ***R. v. Gladue***, [1999] 1 SCR 688 (S.C.C.), which the court is required to consider in this case, as well as the principles of sentencing set out in s. 718 of the ***Criminal Code***, R.S.C., 1985, c. C-46 (the "***Code***") and the principle of proportionality.

[6] The Crown submits that the sentence be calculated in the following manner:

g) Ten and one-half years for committing a break and enter into a dwelling house where he committed the indictable offence of robbery using a restricted firearm;

h) Five years concurrent for aggravated assault;

i) Three years concurrent for committing an assault with a weapon;

j) Five years for possessing a loaded restricted firearm without being the holder of a licence;

a) Six months consecutive for possessing a firearm while prohibited from doing so by an order.

[7] The Crown points out that in respect of firearm offences, denunciation and general deterrence are the most important sentencing considerations, citing the decision of the Manitoba Court of Appeal in ***R. v. McMillan***, 2016 MBCA 12, 326 Man.R. (2d) (QL), where the Chief Justice of Manitoba holds (at paras. 12-13):

> **12** The jurisprudence clearly establishes that firearm-related offences are serious crimes (see *R v Nur*, 2015 SCC 15 at para 6, [2015] 1 SCR 773) and that for these type of offences, denunciation and general deterrence are the most important sentencing considerations (see *R v Morrisey*, 2000 SCC 39 at para 54, [2000] 2 SCR 90; and *R v Kennedy*, 2016 MBCA 5 at para 60). When denunciation and general deterrence are the paramount sentencing objectives, the focus is more on an offender's conduct than any circumstances particular to that offender. Put another way, while factors personal to the accused remain relevant, they necessarily take on a lesser role (see *R v Nur (H)*, 2013 ONCA 677 at para 107, 311 OAC 244).
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> **13** In *R v M (CA)*, [1996] 1 SCR 500, the Supreme Court of Canada explained what a denunciatory sentence seeks to accomplish (at para 81):
>
> > The objective of denunciation mandates that a sentence should also communicate society's condemnation of that particular offender's conduct. In short, a sentence with a denunciatory element represents a symbolic, collective statement that the offender's conduct should be punished for encroaching on our society's basic code of values as enshrined within our substantive criminal law. As Lord Justice Lawton stated in *R. v. Sargeant* (1974), 60 Cr. App. R. 74, at p. 77: "society, through the courts, must show its abhorrence of particular types of crime, and the only way in which the courts can show this is by the sentences they pass".
> >
> > [emphasis original]

[8] The Crown submits that a number of factors constitute aggravating factors in this case, including:

a) Atkinson was just released from a custodial sentence only 70 days before this incident;
b) He attempted to discard a loaded firearm in a public place when fleeing police;
c) There were multiple victims including the two victims who were assaulted and robbed and the homeowner;
d) He has a record of prior violence;
e) These offences are crimes of violence;
f) The home invasion was planned and deliberate;
g) The victims were unarmed; and
h) He possessed a restricted and loaded firearm.

[9] The mitigating factors pointed out by the Crown include:

a) Atkinson is intelligent, young and has a future ahead of him;
b) He pursued educational opportunities while in custody;
c) He has been well behaved in custody; and
d) He has demonstrated insight into his situation and responsibility.

[10] In addition to the 11 year sentence, the Crown requests the following ancillary orders:

a) The accused provide a DNA sample;
b) There be a lifetime weapons prohibition pursuant to s. 109 of the ***Code***;

c) There be no contact with the two male victims in this case during his period of incarceration; and

d) There be an order of forfeiture of the firearm seized by the police.

[11] The Crown states that the pre-trial time which Atkinson has served in this matter amounts to 35.5 months to March 17, 2017 and that he should be credited for this time at the rate of 1.5 days per day served. This would result in roughly a credit of 53.25 months and leave a balance of 78 months and three weeks to be served going forward calculated from March 17, 2017, if the 11 year sentence is imposed.

Submissions Made on Behalf of Atkinson

[12] Counsel for Atkinson agrees with the ancillary orders requested by the Crown and that count 5 on the indictment - point firearm - be conditionally stayed on the basis of the principle in ***Kienapple***. Counsel also agrees with the manner in which the Crown has suggested that the sentences for each of the offences be determined, however, takes the position that the global sentence recommended by the Crown is too high.

[13] As with many other young aboriginal men and women, Atkinson grew up in a very troubled home environment. As set out in the pre-sentence report, alcohol and substance abuse and criminal activity all had a very real and substantive influence on the lives of his family members and on his own life. He spent much of his youth without appropriate support and guidance and no doubt found that the street gang he was affiliated with became a substitute, however inadequate, for the stable home and supportive biological family that he never experienced. I do not intend to specifically

recount the details set out in the pre-sentence report or in the submissions by defence counsel in this regard, but it is clear to me that in Atkinson's case, his difficult background has undoubtedly had a very adverse impact on his life. The fact that his mother was a severe drug addict as he was growing up and it is his father who was his partner in this home invasion, speaks in a substantive way of the lack of positive support he received from his biological parents.

[14] Counsel for Atkinson points out that while the Manitoba Court of Appeal has stated that the range of sentence for home invasions generally falls within the seven to ten year range (see ***R. v. Ross***, [1999] 138 Man.R. (2d) 75, at para. 14, where the court set out that range and imposed a sentence of eight years), with a number of sentences imposed falling below that range, no sentence exceeding nine and one-half years has been imposed in Manitoba for this type of offence when dealing with only one incident.

[15] Defense counsel states that while the Crown says that there are a number of mitigating factors in this case, its recommendation as to sentence does not reflect those mitigating factors or the ***Gladue*** factors that the court is bound to consider in this case. Counsel referred to a number of cases where the sentences imposed fall far short of the bottom end of the seven to ten year range stated by the Manitoba Court of Appeal in ***Ross***.

[16] Defense counsel suggested that an appropriate sentence in this case would be to impose a two year less a day sentence when the time in custody on this matter is taken

into account, on a go forward basis in addition to a three-year supervised probation order.

Approach to Sentencing

[17] As I did in my decision of ***R. v. Kelly***, 2017 MBQB 19, [2017] M.J. No. 41, I have approached the matter of sentence here in the manner set out by Martin J., in ***R. v. Hanska***, 2014 MBQB 184, 309 Man.R. (2d) 169, where he states at paras. 10 and 11:

> **10** A sentence imposed by a judge on an accused for a serious crime should be tailor-made in the sense that, mindful of principles of sentencing, it responds appropriately to the circumstances of the offence and the particulars of the offender. The ***Criminal Code***, R.S.C. 1985, c. C-46, articulates that the fundamental purpose of sentencing is to contribute to respect for the law and the maintenance of a safe, peaceful society through just sanctions that denounce unlawful conduct; deter persons from committing offences; separate offenders from society, where necessary; assist in rehabilitation; provide reparation; and promote a sense of responsibility in offenders.
>
> **11** Further, the ***Code*** mandates that a judge consider a number of principles, including the following sections:
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> 718.1: referred to as the fundamental principle, that a sentence must be proportionate to the gravity of the offence and the degree of responsibility of the offender;
>
> 718.2(a): that a sentence should be increased or reduced to account for any relevant aggravating or mitigating circumstances relating to the offence or the offender;
>
> 718.2(b): that a sentence should be similar to sentences imposed on similar offenders for similar offences committed in similar circumstances;
>
> 718.2(d): the restraint principle; and
>
> 718.2(e): ***Gladue*** factors for Aboriginal offenders.
>
> In addition to this statutory list are a number of principles developed through the common law. Ultimately, the sentence must be fair and just - neither vengeful nor arbitrary.

[18] Again, as I did in ***Kelly***, the other case which I would like to specifically reference in these reasons, is the decision of the Manitoba Court of Appeal in ***R. v. Harry***, 2013 MBCA 108, 303 Man. R. (2d) 39 (QL). That decision is instructive in this case because of the guidance it provides on the application of ***Gladue*** and the subsequent decision of the Supreme Court of Canada in ***R. v. Ipeelee***, 2012 SCC 13, [2012] 1 S.C.R. 433.

[19] In ***Harry*** the court held (at paras. 59-66):

> *The Gladue Factors*
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> **59** Section 718.2(*e*) directs that "all available sanctions other than imprisonment that are reasonable in the circumstances should be considered for all offenders, with particular attention to the circumstances of aboriginal offenders." In *Gladue*, the Supreme Court of Canada addressed, for the first time, what this section means when sentencing an aboriginal offender and the factors to be considered by a sentencing judge in those circumstances. These are known as the *Gladue* factors.
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> **60** Later, in *Ipeelee*, the Supreme Court of Canada confirmed the statutory duty of sentencing judges to "consider the unique circumstances of aboriginal offenders" (at para. 87). As stated in *Ipeelee*, a failure to do so (*ibid.*):
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> > .... [R]uns afoul of this statutory obligation. … [S]uch 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 … and a failure to do so constitutes an error justifying appellate intervention.
>
> **61** The unique circumstances of aboriginal offenders are both general and specific in nature.
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> **62** Sentencing judges are entitled to take judicial notice of "the broad systemic and background factors affecting Aboriginal people generally," (*Ipeelee* at para. 59). LeBel J. explains that this provides important context for the sentencing judge, but it does not necessarily demand a different sentence (at para. 60):
>
> > .... [C]ourts must take judicial notice of such matters as the history of colonialism, displacement, and residential schools and how that history continues to translate into lower educational attainment, lower incomes, higher unemployment, higher rates of substance abuse and suicide, and of course higher levels of incarceration for Aboriginal peoples. <u>These matters, on their</u>

> own, do not necessarily justify a different sentence for Aboriginal offenders. Rather, they provide the necessary *context* for understanding and evaluating the case-specific information presented by counsel. ....
>
> [emphasis added]

63 Sentencing judges are to receive the "case-specific information … from counsel and from a pre-sentence report" (*Gladue* at para. 93) with respect to the specific offender. While the pre-sentence report is the usual method of presenting this information, it is not the sole source of relevant information. Unless the Aboriginal offender waives his/her right to have the *Gladue* factors considered, counsel have a duty to advise the sentencing judge of relevant information. See *Ipeelee* at para. 60; and *R. v. Wells*, 2000 SCC 10 at para. 54, [2000] 1 S.C.R. 207. Also see *R. v. Lawson (D.R.M.)*, 2012 BCCA 508 at paras. 25-38, 331 B.C.A.C. 123.

64 *Gladue* applies to all aboriginal offenders, whether or not the offences are serious and violent. See *Ipeelee* at para. 84. Nonetheless, the offence being sentenced will have a significant effect on the impact of the *Gladue* factors on the sentencing. As explained by Iacobucci J. in *Wells*, "s. 718.2(*e*) requires a different methodology for assessing a fit sentence for an Aboriginal person; it does not mandate, necessarily, a different result" (at para. 44). In *Gladue*, the court stated that, "[g]enerally, the more violent and serious the offence the more likely it is as a practical reality that the terms of imprisonment for aboriginals and non-aboriginals will be close to each other or the same, even taking into account their different concepts of sentencing" (at para. 79).

65 As LeBel J. explained in *Ipeelee* (at para. 83):

> .... Systemic and background factors do not operate as an excuse or justification for the criminal conduct. Rather, they provide the necessary context to enable a judge to determine an appropriate sentence. This is not to say that those factors need not be tied in some way to the particular offender and offence. Unless the unique circumstances of the particular offender bear on his or her culpability for the offence or indicate which sentencing objectives can and should be actualized, they will not influence the ultimate sentence.
>
> [emphasis added]

66 Therefore, systemic and background factors "may" have a bearing on the level of moral blameworthiness of the offender. See *Ipeelee* at para. 73. Here, the judge found that the accused's level of moral blameworthiness was very high and the key principles of sentencing were denunciation and deterrence. In other words, given the circumstances of the offences, the judge did not accept that the *Gladue* factors should reduce the accused's moral blameworthiness. I see no error in principle in this regard. Her finding is entitled to deference.

Conclusion

[20] In considering the principles outlined in the forgoing decision, I agree with the Crown's position that Atkinson's level of moral blameworthiness is very high and as noted by the Manitoba Court of Appeal in ***McMillan***, the key principles of sentencing should be denunciation and deterrence. In my opinion, given the circumstances of the offences, I do not accept that the ***Gladue*** factors should reduce the accused's moral blameworthiness, nor should they influence the ultimate sentence.

[21] However, I agree with the counsel for Atkinson, that in view of the other mitigating factors present in this case, including his relative youthfulness, it is my opinion that the global sentence of 11 years requested by the Crown is too high and that a fit and proper sentence falls within the seven to ten year range stated by the Manitoba Court of Appeal in ***Ross***.

[22] In determining the length of the sentence, I have also taken into account the aggravating factors identified by the Crown in its submissions. In particular, I am concerned with the number of very violent offences Atkinson has been involved in and even though he has shown some encouraging progress while in the structured custodial environment he is presently in, I remain concerned that without further insight and improvement on his part, the possibility that he may commit future violent offences is very real.

[23] Accordingly, it is my judgment that a global sentence closer to the upper range set out in ***Ross***, should be imposed in this case. Accordingly, I will impose the following sentences in respect of the five counts on which Atkinson is to be sentenced:

k) Nine years for committing a break and enter into a dwelling house where he committed the indictable offence of robbery using a restricted firearm;

l) Five years concurrent for aggravated assault;

m) Three years concurrent for committing an assault with a weapon;

n) Five years for possessing a loaded restricted firearm without being the holder of a licence;

b) Six months consecutive for possessing a firearm while prohibited from doing so by an order.

[24] Accordingly, there will be a global sentence of nine and one-half years imposed on Atkinson. In respect of the pre-trial time which Atkinson has spent in custody, he is to receive credit calculated at the rate of 1.5 days for each day served from the date of his arrest to today's date.

[25] In respect of ancillary orders:

a) The accused is to provide a DNA sample within two weeks of the date of this judgment;

b) There be a lifetime weapons prohibition pursuant to s. 109 of the ***Code***;

c) There is to be no contact, direct or indirect, with Jessie Ducharme or Maxim Dale Garneau, during his period of incarceration; and

d) There be an order of forfeiture of the firearm and any illegal drugs seized by the police in this case;

e) The accused shall pay a victim surcharge fee of $200 on each of the five counts and the total amount of $1,000 shall be payable within two years of his release from his custodial sentence.

[26] Before I conclude these reasons, there are two further issues which I wish to mention. These comments do not fall within the scope of my responsibilities in sentencing Atkinson and therefore these comments have no legal authority or effect. They are simply observations which I make as a result of considering the submissions and material provided to me in the course of this proceeding.

[27] The first is that Atkinson has shown some initiative in attempting to upgrade his education but remains two courses short for his grade 12 equivalency. I understand that during his time in custody he wanted to take those courses but was unable to pay for them. Assuming that to be true, it seems to me that where a prisoner expresses a desire and demonstrates the motivation to improve himself in this way, every reasonable step should be taken by the correctional authorities to assist him or her in achieving that goal. Perhaps the complete story was not put before me, but accepting such a state of affairs at face value, I find it difficult to understand why a relatively small amount of money should stand in the way of such a laudable goal.

[28] The second issue relates to the fact that Atkinson was released from his prior sentence of custody upon the expiration of his custody warrant. This delay of his release until the last day of that full sentence occurred as a result of a parole violation on his part and therefore he bears the full responsibility of the revocation of the earlier grant of parole. However, this means that he was released without any supervision or

support. In my opinion, the likelihood of a successful reintegration back into the community was almost doomed from the onset of his release. This state of affairs is not the fault of the correctional or parole authorities given that there is no substantive mechanism to assist in his reintegration in these circumstances. However, I would simply observe that this may be an area where government or private agencies could provide a measure of support through an appropriate program, even if it is not legislatively based.

_____ J.