COURT OF APPEAL OF YUKON

Citation: *R. v. Quash*,
2019 YKCA 8

Date: 20190405
Docket: 18-YU835

Between:

Regina

Appellant

And

Wesley Quash

Respondent

Before: The Honourable Madam Justice Stromberg-Stein
The Honourable Mr. Justice Willcock
The Honourable Madam Justice Fisher

On appeal from: An order of the Territorial Court of Yukon, dated December 6, 2018 (*R. v. Quash*, 2018 YKTC 43, Yukon Docket No. 16-00493).

Counsel for the Appellant:	P. Battin
Counsel for the Respondent:	L. Faught
Place and Date of Hearing:	Vancouver, British Columbia March 25, 2019
Place and Date of Judgment:	Vancouver, British Columbia April 5, 2019

Written Reasons by:
The Honourable Madam Justice Stromberg-Stein
The Honourable Madam Justice Fisher

Dissenting Reasons by:
The Honourable Mr. Justice Willcock (p. 21, para. 66)

Summary:

Mr. Quash was sentenced to 10 months' imprisonment, less time served, plus 30 months' probation following his conviction for aggravated assault contrary to s. 268 of the Criminal Code. The Crown appeals the sentence, seeking a sentence of four to five years' imprisonment, on the basis that (1) the sentencing judge failed to take into account as an aggravating factor the impact of the offence on the victim as required under s. 718.2(a)(iii.1) of the Criminal Code; (2) the sentencing judge relied on comparator jurisprudence for the less serious s. 267(a) offence, which violated the parity principle in s. 718.2(b); and (3) the sentence is demonstrably unfit. Held: appeal allowed. The judge did not err in relying, in part, on analogous s. 267(a) cases when sentencing for the s. 268 offence. Although he erred in not considering the impact of the offence on the victim as a statutorily required aggravating factor, this did not in itself impact the sentence. However, the 10-month sentence is demonstrably unfit. The judge minimized the seriousness of the offence and placed undue emphasis on the offender's cognitive limitations in assessing the offender's degree of moral blameworthiness without evidence that these limitations played a role in his criminal conduct. The sentencing range for aggravated assault in the Yukon is clarified to be 16 months to six years' imprisonment. A fit sentence for Mr. Quash in the circumstances is two years' imprisonment, less time served, plus 30 months' probation as originally imposed.

Per Willcock J.A. dissenting: the sentencing judge was in the best position to determine a fit and appropriate sentence for this individual in these circumstances. The judge took into account the relevant mitigating and aggravating factors; although the sentence is outside the normal range for similar offences, that does not mean that it is a demonstrably unfit sentence.

Reasons for Judgment of the Honourable Madam Justice Stromberg-Stein and the Honourable Madam Justice Fisher:

Overview

[1] On December 6, 2018, Wesley Quash was sentenced to 10 months' imprisonment, less 3.5 months credit for time served, and 30 months' probation, following his conviction for aggravated assault contrary to s. 268 of the *Criminal Code*, R.S.B.C. 1985, c. C-46. He is due to be released in mid-April.

[2] The Crown applies for leave to appeal the sentence and seeks an order varying the sentence to four to five years' imprisonment.

[3] The basis for the Crown appeal is threefold: (1) the sentencing judge failed to take into account the impact of the injury on the victim as required under

s. 718.2(a)(iii.1) of the *Criminal Code*; (2) the sentencing judge relied on comparator jurisprudence for the less serious offence of assault with a weapon under s. 267(a), which violated the parity principle in s. 718.2(b); and (3) the sentence is demonstrably unfit.

[4] In our view, the judge did not err in relying, in part, on s. 267 jurisprudence in determining a fit sentence for the s. 268 offence, and although he failed to consider the impact of the injury on the victim, this did not in itself impact the sentence. However, for the reasons that follow, we are of the view that the 10-month sentence is demonstrably unfit. We would increase the sentence to two years' imprisonment, less 3.5 months credit for time served. We would not disturb the 30-month probation order or the terms and conditions imposed by the sentencing judge.

[5] Mr. Quash applies to adduce fresh evidence on appeal. That evidence is the affidavit of his father, Robin Jackie Quash, who says he has health issues and relies on Mr. Quash for financial support. In our view, this is not fresh evidence, because at the time of sentencing the judge knew Mr. Quash assisted his father financially. In any event, the admission of the fresh evidence would not affect the result of this appeal, as Mr. Quash is not the only means of support for his father.

Background facts

The offence

[6] The circumstances of the offence are summarized in the trial judge's reasons for conviction, indexed as 2018 YKTC 5, and reproduced at para. 2 of the reasons for sentence:

> [3] On October 14, 2016, Steven Smith got out of a cab in the McIntyre Subdivision of Whitehorse. This was at approximately 8:00 p.m., or shortly thereafter. He was somewhat intoxicated. He was walking down the middle of the road towards the residence of his partner, Bobbie Bishop, in order to play radio bingo with her. While walking, Mr. Smith was saying things loudly to no-one in particular and for no particular reason, other than the intoxicated and boisterous mood that he was in.
>
> [4] Mr. Quash was sitting inside his father's vehicle outside a house in the subdivision, where he and his father had been playing radio bingo. Mr. Smith's walk to Ms. Bishop's residence took him past where Mr. Quash

> was sitting in the vehicle. Mr. Quash was not intoxicated. As Mr. Smith was walking by, Mr. Quash stepped out of the vehicle where he was listening to music and yelled out words to Mr. Smith to the effect of "Why are you being so loud"?
>
> [5] Mr. Smith, after this was said to him, turned towards Mr. Quash, said words to the effect of: "I am not being loud", and "I can be loud if I want", and went up to him quickly, in an aggressive manner, getting quite close to Mr. Quash.
>
> [6] Mr. Quash, using a pocket knife that he had just purchased that day, and with the blade in the open position, swung it once at Mr. Smith, cutting his face open from just below the ear to his chin.
>
> [7] Mr. Smith required surgery to repair the injury. He was hospitalized for three days. There was considerable nerve damage that will require Mr. Smith to take medication for life. I have seen the photographs of the wound that resulted. It was a significant injury that has left Mr. Smith with a large scar, besides the pain, discomfort and other effects of the nerve damage that he has incurred.

[7] There was a deep 15-centimetre cut across Mr. Smith's face from his earlobe to the base of his chin. The doctor who performed surgery on Mr. Smith noted significant damage to his parotid gland, with it "almost being bisected". The judge described the wound as "horrific, gaping and gruesome".

[8] At trial, the judge rejected the defence of self defence. He noted that Mr. Quash precipitated the encounter by calling out to Mr. Smith, who was a stranger to him. While he found Mr. Quash had a subjective belief that Mr. Smith threatened force against him, and this belief was objectively reasonable, Mr. Quash's response, striking Mr. Smith in the face with a knife, was unreasonable.

The offender

[9] Mr. Quash has a criminal record dating back to 2009 when he was 19 years old and includes nine convictions: one for spousal assault in 2013, for which he received a nine-month suspended sentence; two for impaired driving in 2012 and 2017; and several breach offences.

[10] Mr. Quash's personal circumstances were derived from a *Gladue* report that was prepared in November 2012 for a sentencing hearing being conducted at that time, an updated *Gladue* report prepared in May 2018, a pre-sentence report with a

risk-assessment component, and a psychological report. These latter two reports were prepared at the request of the court.

[11] Mr. Quash is a member of the Liard First Nation. His mother attended residential school and his father was subject to the “Sixties Scoop”. His mother and father had a brief but violent relationship. When his father was jailed for a criminal offence, he lived with his mother and her new partner and was exposed to abuse and violence. His mother abandoned the family, went missing, and was later murdered. Once released from jail, Mr. Quash’s father and paternal aunts cared for Mr. Quash. His father maintained sobriety for over 25 years.

[12] Thanks to his father and his aunts, Mr. Quash was brought up in a positive environment from the age of five years old. He developed a drinking problem in his teen years, which he attributed to the abandonment and loss of his mother. However, he was able to receive a School Leaving Certificate. He has attempted to upgrade his education, focusing on skills and work-related courses. He has extensive work experience in the mining sector and is considered a conscientious and hard-working employee with a good work ethic and attitude.

[13] The original *Gladue* report noted “the unsubstantiated possibility” that Mr. Quash may have had some kind of cognitive impairment “that could be consistent with … FASD” (Fetal Alcohol Spectrum Disorder), but Mr. Quash’s father advised that the mother did not drink alcohol when she was pregnant. The psychological report indicated that Mr. Quash has a mild intellectual disability and extremely low cognitive abilities, but also that he has functional skills including an ability to manage his impulses. Because he has demonstrated that he is capable of serious physical harm, he was assessed as posing a risk for violence unless he is in a highly-regulated, alcohol-free environment (such as a work-camp).

Victim impact

[14] Mr. Smith, who is also a First Nations person as the judge noted in his trial reasons, provided a victim impact statement. In that statement, he described the significant physical and emotional trauma he experienced as a result of the injury, as

well as permanent and debilitating physical damage that includes visible scarring and nerve damage. He will require medication for the rest of his life. He was unable to work or carve for a period of time and lost substantial income. He turned to alcohol. The injury has, and will continue to have, a substantial impact on his life.

[15] Mr. Quash wrote an apology to Mr. Smith stating he cannot forgive himself for what happened.

The decision on sentencing

[16] The Crown sought a sentence of four to five years' imprisonment; the defence sought a sentence of four months' imprisonment followed by two years' probation.

[17] The judge reviewed in some detail the circumstances of the offence, the injuries to Mr. Smith and the circumstances of Mr. Quash. He acknowledged the statutory minimum and maximum penalty for the offence of aggravated assault, encompassing a suspended sentence, a fine, or up to 14 years' imprisonment. He canvassed numerous cases of aggravated assault, and some cases of assault with a weapon, both within and outside the Yukon. He noted the cases impose a broad range of sentences having regard to the circumstances of the offence and offender, stating the cases were "helpful to varying degrees, both for their similarities and dissimilarities to the circumstances of the offence and the offender…before me". The judge also noted that general sentencing ranges are simply suggestions or guidelines and not rules.

[18] The judge identified two sentencing ranges for aggravated assault offences in the Yukon. The first range was from six months to six years' imprisonment, which stemmed from *R. v. Porter*, 2017 YKTC 13 [*Porter*]; *R. v. McGinty*, 2002 YKTC 81 (*sub nom R. v. D.B.M.*, 2002 YKTC 81) [*McGinty*]; and *R. v. Wiebe*, 2006 YKTC 80 [*Wiebe*]. The second range was from 16 months to six years' imprisonment, stemming from *R. v. Bland*, 2006 YKTC 103 [*Bland*] and *R. v. Dick*, 2008 YKTC 6 [*Dick*]. The judge was satisfied, however, that the general range for such offences in the Yukon was from six months to six years' imprisonment, "with cases falling outside either end of the range when the circumstances warrant it". He added:

> [62] For premeditated and deliberate actions causing serious injury, a penitentiary sentence is generally warranted.
>
> [63] Where the aggravated assault is unplanned and in response to some degree of provocation, some sense of a need to defend oneself not amounting to self-defence in law, or arising out of a consensual fight, even where there is serious injury as a result of the assault, when a custodial sentence is imposed, such a sentence will generally be within territorial or provincial time.

[19] The judge considered that the seriousness of the injury militated towards a higher sentence but that the circumstances of the offence were towards the lower end. This was because "Mr. Quash did not pre-meditate his action of slashing Mr. Smith with the knife. He was not looking for a fight". He noted, however, that Mr. Quash needlessly decided to call out to Mr. Smith as Mr. Smith walked by.

[20] The judge identified a number of aggravating and mitigating circumstances:

> [79] The aggravating circumstances are as follows:
>
> - the severity of the injury;
> - the use of a knife; and
> - the prior criminal history of Mr. Quash.
>
> [80] The mitigating circumstances are as follows:
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> - the presence of *Gladue* factors;
> - the cognitive limitations Mr. Quash suffers from;
> - Mr. Quash's positive employment history and future prospects; and
> - the circumstances in which Mr. Quash's actions were a response to an act of aggression by Mr. Smith.

[21] He was mindful of the need for denunciation, deterrence, and proportionality and also considered that rehabilitation was important in this case. He noted that jail is a "last resort" only to be used when no other reasonable alternatives exist, especially considering the overrepresentation of Indigenous offenders in the Canadian correctional systems.

[22] While he considered this to be a "very serious offence of considerable gravity", the judge found that Mr. Quash's degree of responsibility had to be weighed in the context of his "significant cognitive deficiencies and limitations". He concluded that Mr. Quash could not be held accountable for his actions to the same degree as someone without such deficiencies and limitations. In doing so, he relied on *R. v.*

Harper, 2009 YKTC 18 [*Harper*], where an offender with severe cognitive impairments was found to have lower moral responsibility in a sexual offence.

[23] The judge specifically considered three Yukon cases and found them distinguishable from the circumstances of this case and supporting a lesser sentence for Mr. Quash: *R. v. Elias*, 2009 YKTC 59 [*Elias*] (15 months' imprisonment and two years' probation on a guilty plea for assault with a weapon); *Porter* (15 months' imprisonment on a guilty plea for aggravated assault); and *R. v. Blanchard*, 2007 YKTC 62 [*Blanchard*] (nine months' imprisonment on a guilty plea for assault with a weapon).

[24] The judge was mindful that he was sentencing Mr. Quash for aggravated assault, not assault with a weapon or assault causing bodily harm, and in doing so he was considering the general range of sentencing for aggravated assault. He concluded:

> [106] Taking into account the circumstances of the offence and of Mr. Quash, the aggravating and mitigating factors, the sentencing precedents in case law, the harm caused to Mr. Smith, and being mindful of my need to impose a sentence that strikes a balance between all the relevant considerations set out in ss. 718–718.2 of the *Criminal Code*, I find that a custodial disposition of ten months is appropriate.

[25] After giving 3.5 months' credit for pre-trial custody, the judge imposed a net sentence of 6.5 months' imprisonment.

Standard of review

[26] Trial judges, with experience in their communities, are uniquely situated to determine an appropriate sentence, and appellate courts must accord deference to such decisions. An appellate court may interfere with a sentence imposed by a lower court only where there has been a material error that has impacted the sentence or where the sentence is demonstrably unfit. A material error includes an error in principle, a failure to consider a relevant factor, or an erroneous consideration of aggravating or mitigating factors: *R. v. Lacasse*, 2015 SCC 64 at paras. 11, 39, 43–

44 [*Lacasse*]; *R. v. Joe*, 2017 YKCA 13 at para. 40; *R. v. Agin*, 2018 BCCA 133 at paras. 56–57 [*Agin*].

1. Did the judge fail to consider the impact of the injury on the victim under s. 718.2(a)(iii.1)?

[27] Section 718.2(a)(iii.1) of the *Criminal Code* deems as an aggravating circumstance,

> … evidence that the offence had a significant impact on the victim, considering their age and other personal circumstances, including their health and financial situation …

[28] The judge considered the severity of the injury as an aggravating circumstance but not specifically the impact of the offence on Mr. Smith. The victim impact statement that was read at the sentencing hearing was as follows:

> Emotional Impact:
>
> I've been a mess a lot of the time. It was very hard thinking I was going to die in front of my spouse. Fear, sadness, helpless, anger — all these emotions rushed in. My relationship has been affected because I was angry a lot, and I turned to booze. I was very mad, sad, hurt, and felt helpless because I couldn't work or carve for four months. I feel embarrassed to eat in public now, so I don't eat at spots no more. I feel a lot of stress now.
>
> Physical Impact:
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> I had my face stitched up and was hospitalized for four days. I'm always numb in my lips and face because my split gland was cut in half. I have a scar from ear to chin now, which makes shaving harder. I eat differently now; I first have to take meds, then I can eat.
>
> I went to a specialist for a second opinion. They couldn't do nothing to help. I am now on medication for life. These are for pain and for helping my nerves to calm down. This makes it so I don't slur my words and so I can eat good. I have this scar for life and I have to be on meds for life.
>
> Economic Impact:
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> I was not able to work for four months after this incident happened. This affected my finances a lot. I was not able to look for work because I was cut wide open. A fear of getting an infection was always present. Could've went to work for two weeks when this happened. I had to refuse work. I could have made approximately $2,500 for doing drywall boarding.
>
> Feelings for Security:
>
> I'm always on guard now, have a huge respect for sharp objects and am very head shy now. I'm concerned that I will bump into attacker again. I have nothing to do with him. I don't go out at night a lot anymore because of what

> happened. I am in a bit of fear for my friends' and family's safety. When this offender is out in public, he is unpredictable and should be given space.

[29] Early in his reasons, the judge described the impact on Mr. Smith:

> [7] As outlined in the Victim Impact Statement that was filed, the impact upon Mr. Smith has been considerable. Besides the immediate physical and emotional trauma, he suffers from permanent and debilitating physical damage, far beyond the visible scarring, including nerve damage. It appears that Mr. Smith will be required to be on medication for the rest of his life as a result of this injury. He also continues to suffer the emotional and psychological impacts caused by this assault against him.

[30] The judge did not refer to some aspects of the impact, such as Mr. Smith's personal and financial circumstances, but more importantly, he made no further mention of the impact in his reasons other than a fleeting reference to "the harm caused to Mr. Smith" (at para. 106). It is our view that s. 718.2(a)(iii.1) requires more than an acknowledgement of harm; it requires the judge to consider "evidence that the offence had a significant impact on the victim" to be an aggravating circumstance. There was clear evidence of that here.

[31] Our colleague, Willcock J.A., equates the judge's consideration of the severity of the injury with the impact of the offence on the victim. While of course the two are closely related, the severity of an injury is itself a separate aggravating circumstance for this offence, and forms only a part – albeit an important part – of the evidence about the impact on the victim.

[32] We agree with the Crown that the judge erred in failing to consider the impact of the offence on the victim as a separate and distinct statutorily prescribed aggravating circumstance. However, given the judge's obvious appreciation of the severity of the injury and the resulting harm to Mr. Smith, we do not consider this to be an error that in itself impacted the sentence.

2. Did the judge err in principle in considering s. 267(a) sentences when determining a fit sentence for the s. 268 offence?

[33] The Crown submits that the judge drew guidance from sentencing authorities that were not comparable to Mr. Quash's offence thus violating the parity principle in

s. 718.2(b) of the *Criminal Code* that "a sentence should be similar to sentences imposed on similar offenders for similar offences committed in similar circumstances."

[34] Here, the judge reviewed many authorities involving sentences for aggravated assault, both within the Yukon and elsewhere, but paid particular attention to two cases stemming from offences of assault with a weapon under s. 267(a) of the *Criminal Code*: *Elias* and *Blanchard*. He noted that both cases involved guilty pleas to a s. 267(a) offence but considered the nature of the assault and injuries suffered to be comparable to s. 268 offences. The other case the judge paid particular attention to was *Porter*, which involved a guilty plea to a s. 268 offence, where the judge had also considered cases involving both s. 267 and s. 268 offences.

[35] We agree that the offence of aggravated assault is the most serious category of assaults because however the offence is carried out the victim is wounded, maimed, or disfigured, or has their life endangered: see *R. v. De Freitas (D.A.)* (1999), 134 Man R. (2d) 78 at para. 11 (C.A.). Generally, there may be no need for a sentencing judge to consider cases involving less serious assault offences given that there is no lack of cases involving sentences for aggravated assault.

[36] However, in our view, it is not an error for a judge to look at broadly analogous cases for guidance to satisfy the parity principle, as long as the judge is alive to the distinctions between such cases: *Agin* at paras. 6, 63.

[37] In this case, the judge recognized that Mr. Quash was being sentenced for the offence of aggravated assault, not for assault with a weapon or assault causing bodily harm, and he appreciated the distinction between these offences:

> [104] While appreciating that different offences and different elections, where elections are available, may have different statutory consequences and limitations, and being mindful of this, it nevertheless remains my obligation, in determining a just and fit sentence for Mr. Quash, to sentence him for what he actually did, and who he is.
>
> [105] In saying this, I am sentencing Mr. Quash for the offence of aggravated assault, not assault with a weapon or assault causing bodily

> harm, and, in doing so, in consideration of the general range of sentences for aggravated assaults.

[38] That said, we find it noteworthy that the sentences imposed in *Elias*, *Blanchard*, and *Porter* were all in the low end of the range the judge relied upon for s. 268 offences, and below the range that starts at 16 months' imprisonment. It is our view that the judge's approach to parity, and his reliance on a range for s. 268 offences starting at six months' imprisonment, contributed to his assessment of what we consider to be a demonstrably unfit sentence for Mr. Quash. As we discuss below, the low end of the sentencing range for aggravated assault, absent exceptional extenuating circumstances, should be 16 months, not six months.

3. Is the sentence demonstrably unfit?

[39] As noted above, the judge referred to two lines of authority in the Yukon in respect of the range of sentence for aggravated assault. These two lines were described in *Porter* at paras. 13–14:

> [13] In *R. v. McGinty*, 2002 YKTC 81 (Y.T. Terr. Ct.), I stated, at para. 19:
>
> > A review of the case law and sentencing principles establishes a wide range of sentences for the offence of aggravated assault. These authorities were reviewed at length in *R. v. D.L.*, [2002] B.C.J. No. 1987. I am satisfied that the range of sentence for aggravated assault generally is between 6 months and 6 years imprisonment. Sentences in the lower range tend to be imposed in situations lacking aggravating factors: for example, two adults, not in a position of trust, engaging in a consensual fight, which escalates and results in injuries to the victim. At the higher end of the range, the victim is usually attacked by a weapon, the injuries are life-threatening or result in permanent injury, and other aggravating factors are present such as a position of trust and the presence of children.
>
> [14] In a later Yukon case, *R. v. Dick*, 2008 YKTC 6 (Y.T. Terr. Ct.), Judge Faulkner opined that the range of incarceration for a conviction for aggravated assault is approximately 16 months to six years, depending on the circumstances of the case.

[40] The judge also noted the higher ranges referred to in *R. v. Craig*, 2005 BCCA 484 at para. 10 [*Craig*]:

> [10] It is not disputed, and it appears clear on the cases, that a sentence of two years' imprisonment for the commission of aggravated assault (which is the sentence that was effectively imposed by the judge) is at the low end of the range of sentences imposed on similar offenders in similar circumstances (*R. v. Chana* (1998), 115 B.C.A.C. 159, [1998] B.C.J. No. 2458 (Q.L.) (C.A.) at para. 6). The range of sentence for similar offences was described as being between 16 months and six years in *R. v. Johnson* (1998), 131 C.C.C. (3d) 274 (B.C.C.A.), two years less a day to six years in *R. v. Biln*, 1999 BCCA 369, and, most recently, between 18 months and six years in *R. v. Willier*, 2005 BCCA 404. In determining an appropriate sentence within this broad range, an unprovoked attack with a weapon tends to result in the imposition of a sentence at the higher end while a consensual fight that has escalated with resulting injury tends to result in a sentence at the lower end. See in particular: *R. v. Willier*, at para. 22, and *R. v. Johnson*, at para. 10.

[41] After distinguishing the circumstances in *Craig* as more aggravating and less mitigating than those of Mr. Quash, the judge stated that he was satisfied "that the general range of sentencing for aggravated assault cases in the Yukon is from six months to six years". He did not explain why he was so satisfied.

[42] In light of the disparity in sentencing ranges, the Crown requests this Court to provide guidance on the appropriate sentencing range for the offence of aggravated assault in the Yukon.

[43] The sentencing range that starts from six months' imprisonment runs contrary to numerous decisions in the Yukon and other jurisdictions. The following are examples from many of the cases the judge reviewed:

a) 16 months to six years' imprisonment: *Dick* at para. 7; *Bland* at para. 7; *Craig* at para. 10; *R. v. Johnson* (1998), 131 C.C.C. (3d) 274 at para. 10 (B.C.C.A.), cited in *R. v. Willier*, 2005 BCCA 404 at para. 22 [*Willier*]; *R. v. MacDonald*, 2012 BCCA 155 at para. 40; *R. v. Grant*, 2016 BCSC 2588 at para. 49;

b) two to four years' imprisonment: *R. v. Moller*, 2012 ABCA 381 at para. 31;

c) two to six years' imprisonment: *R. v. Biln*, 1999 BCCA 369 at para. 24, cited in *Willier* at para. 22; *R. v. Foley*, 2017 NLTD(G) 86 at para. 9 [*Foley*];

d) suspended sentence for a low range where exceptional extenuating circumstances, 18 months to two years less a day as a mid-range, and four to six years as a high-range: *R. v. Tourville*, 2011 ONSC 1677 at

paras. 27–28, 30 [*Tourville*]; *R. v. Clymer*, 2017 ONCJ 548 at para. 85 [*Clymer*]; and

e) six to eight years' imprisonment for serious aggravated assaults: *R. v. Payne*, 2007 BCCA 541 at para. 44.

[44] Within any of these ranges, the jurisprudence shows that there is a very broad sentencing range for the offence of aggravated assault, but the starting point is not six months. For example, the actual sentences imposed ranged from 15 months' imprisonment in *Porter*, 21 months in *Tourville*, three years in *Craig*, to nine years in *Clymer*. Additionally, higher sentences were imposed in *Wiebe* and *McGinty*, where the sentencing range was considered to be six months to six years: three years in *Wiebe* and four years and eight months (less time served) in *McGinty*.

[45] In our view, the weight of authority—which includes Yukon authorities—demonstrates that the starting point for sentences for aggravated assault is 16 months' imprisonment, absent exceptional extenuating circumstances.

[46] All that said, sentencing ranges are guidelines, not hard and fast rules, as the judge recognized. As Wagner J. (as then was) stated in *Lacasse* at para. 69, "sentencing ranges must in all cases remain only one tool among others that are intended to aid trial judges in their work". Sentencing ranges assist with the parity principle to ensure similar sentences are imposed on similar offenders in similar circumstances, but the parity principle is secondary to the principle of proportionality. Proportionality is viewed through the lens of the seriousness of the offence in conjunction with the offender's degree of responsibility or moral blameworthiness: *Lacasse* at paras. 12, 54.

[47] The fact that a judge deviates from a sentencing range will not alone justify appellate intervention unless the sentence imposed is demonstrably unfit. A sentence will be demonstrably unfit where it constitutes an unreasonable departure from the principle of proportionality: *Lacasse* at paras. 11, 51, 53, 58.

[48] In this case, the 10-month sentence is below the range we have identified. However, the judge was not deviating from the sentencing range he considered

applicable; rather he imposed a sentence he considered to be just above the low end of the range. In any event, it is our view that the 10-month sentence imposed was an unreasonable departure from the principle of proportionality.

[49] First, the judge minimized the seriousness of the offence committed by Mr. Quash. Regardless of his application of the lower range, he failed to follow the weight of authority that placed the circumstances of the offence nearer the higher end of the range. As the court outlined in *Porter* (which has been applied in many of the other cases we cite):

> [13] … Sentences in the lower range tend to be imposed in situations lacking aggravating factors: for example, two adults, not in a position of trust, engaging in a consensual fight, which escalates and results in injuries to the victim. At the higher end of the range, the victim is usually attacked by a weapon, the injuries are life-threatening or result in permanent injury, and other aggravating factors are present such as a position of trust and the presence of children.
>
> [Emphasis added.]

[50] Other aggravating factors identified include unprovoked or premeditated attacks and serious related criminal records: see *e.g. Tourville* at para. 30.

[51] In this case, the judge referred to these factors, and although he noted that the seriousness of the injury militated towards a higher sentence, he concluded that the circumstances of the offence were towards the lower end due to a lack of pre-meditation by Mr. Quash. We agree that the absence of pre-meditation justified a sentence below the higher range, but the fact that this was a violent attack with a knife that caused serious permanent injury to Mr. Smith, and which impacted him greatly, does not justify a sentence in the lower range. The judge recognized that Mr. Quash precipitated the encounter with Mr. Smith but placed undue weight on Mr. Quash having a subjective fear of attack when Mr. Smith approached him.

[52] Second, in assessing Mr. Quash's moral blameworthiness, the judge placed undue emphasis on his cognitive limitations in the absence of evidence that these limitations played a role in his criminal conduct. He stated that Mr. Quash

> [87] … cannot be held accountable for his actions to the same degree that someone without such deficiencies and limitations can be. His ability to act in a rational and considered manner is someone diminished when compared to someone who does not suffer from the same cognitive deficiencies.

[53] Referring to *Harper*, which involved an offender suffering from FASD-related cognitive limitations, the judge held:

> [88] … It is not the fact that an offender suffers from FASD alone that requires the offender to be considered as having a lower level of responsibility such as would result in a sentence reduction; it is the associated cognitive limitations that result in the offender being considered to have a lower level of moral blameworthiness.

[54] We fully appreciate that the judge had the advantage of seeing and hearing Mr. Quash at trial and at sentencing and had concerns about possible cognitive impairment, as our colleague Willcock J.A. has outlined. However, an offender's moral blameworthiness is not reduced simply because he or she has cognitive limitations, but rather where such limitations have impacted the commission of the offence. Such findings have been made, for example, in sexual offences, where a cognitive limitation has been found to affect the offender's ability to understand the harm caused by his conduct. This was the case in *Harper*, an offender who suffered from FASD with severe intellectual deficits. Mr. Harper was not considered to be a sexual predator and his inappropriate sexual conduct was found to be due to impulsiveness, an immature understanding of social distance, and a childlike view of boy-girl relationships.

[55] In assessing whether an offender's moral blameworthiness should be reduced due to a cognitive limitation, a sentencing judge must assess the degree to which this limitation played a role in the criminal conduct. This was outlined in *R. v. Okemow*, 2017 MBCA 59 at paras. 72–73 (*sub nom R. v. J.M.O.*):

> [72] … A reduction of moral blameworthiness for the purposes of sentencing, either for an adult or a young person, due to a recognized and properly diagnosed mental illness or other condition where the functioning of the human mind is impaired, is a "fact-specific" case-by-case determination as opposed to an automatic rule that the mental illness or cognitive limitation necessarily impacted the commission of the offence in question (see *R v Roulette*, 2015 MBCA 102 at para 7; *R v Friesen*, 2016 MBCA 50 at para 23; *R v Manitowabi*, 2014 ONCA 301 at paras 55-57; *R v Ellis*, 2013 ONCA

> 739 at paras 107-127; *R v Ramsay*, 2012 ABCA 257 at paras 33-39; *R v Branton*, 2013 NLCA 61 at para 35; and *R v MJH*, 2004 SKCA 171 at para 29).
>
> [73] Ascertaining the moral blameworthiness of an offender with a mental illness or some other form of cognitive limitation is a tactful and considerate exercise. Sentencing judges must avoid committing one of two obvious errors in principle. The first is being indifferent to the question of whether an offender's mental circumstances affected his or her degree of responsibility. The other error in principle is the reverse situation, namely, assuming an offender's moral blameworthiness for an offence is reduced automatically because he or she has a mental illness or other cognitive limitation. It is suggested that, when sentencing offenders with a mental illness or some other form of cognitive limitation, such as a form of FASD, sentencing judges keep separate and properly assess the following questions:
>
> > 1. Is there cogent evidence that the offender suffers from a recognized mental illness or some other cognitive limitation?
> >
> > 2. Is there evidence as to the nature and severity of the offender's mental circumstances such that an informed decision can be made as to the relationship, if any, between those circumstances and the criminal conduct?
> >
> > 3. Assuming the record is adequate, the sentencing judge must decide the offender's degree of responsibility for the offence <u>taking into account whether and, if so, to what degree his or her mental illness or cognitive limitation played a role in the criminal conduct</u>.
>
> See *R v Ramsay*, 2012 ABCA 257 at paras 19-39; *R v Draper*, 2010 MBCA 35 at para 20; and *Manitowabi* at para 64.
>
> [Emphasis added.]

[56] In this case, the judge did not assess the degree to which Mr. Quash's cognitive impairment played a role in the offence. By concluding that Mr. Quash's "ability to act in a rational and considered manner is someone [or somewhat] diminished when compared to someone who does not suffer from the same cognitive deficiencies", the judge simply assumed that it did. He did not take into account the findings in the psychological report that related Mr. Quash's low cognitive abilities to problems with understanding complex ideas, and processing and retaining information; nor did he take into account these findings:

> Although Wesley presented with many areas of difficulty, this does not tell the whole story as he also has some important, functional strengths. Wesley has good attentional capabilities. He is able to focus his attention, sustain his attention, manage his impulses, and remain vigilant to changes in the task he is completing.

[57] The expert evidence did not link Mr. Quash's cognitive limitations to the offence. In fact, the psychological assessment indicated that Mr. Quash had important functional skills and was able to manage his impulses, and it is evident throughout the reasons for sentence that Mr. Quash understood the consequences of his actions.

[58] This is not to say that cognitive limitations or other mental disorders play no role in sentencing. They may bear on the application of the principles of deterrence, denunciation, and rehabilitation, as punishment and deterrence may be ineffective or unnecessary and rehabilitation may be paramount: *R. v. Ellis*, 2013 ONCA 739 at para. 117. In *Harper*, for example, the judge considered that denunciation and general deterrence were not major factors in sentencing in light of the offender's severe cognitive disabilities. In any event, the judge in this case considered that these principles of sentencing were important in sentencing Mr. Quash.

A fit sentence

[59] Having found the sentence imposed is demonstrably unfit, it is our role to replace it with the sentence we consider appropriate: *Lacasse* at para. 43; *Agin* at para. 55.

[60] We would not accede to the Crown's submission that a fit sentence should be as high as four to five years' imprisonment. Many of the cases upon which the Crown relies to support a sentence of this length are distinguishable; most do not contain similar circumstances of the offence or the offender.

[61] For example, both *Willier* (5.5 years' and two years' imprisonment, concurrent, for two counts of aggravated assault) and *Clymer* (nine years' imprisonment) involved unprovoked, premeditated brutal knife attacks that were more egregious. In *Foley* (four years' imprisonment), the impact on the victim was significantly worse than the impact on Mr. Smith, as the victim nearly died from rapid blood-loss, and the offender showed little remorse, tended to deflect blame, had a significant criminal record and a concerning attitude towards the offence.

[62] A more similar case is *Tourville*. There, the offender slashed the victim causing nine serious injuries to his face and arms. Mr. Tourville, a 28-year-old first offender of Indigenous heritage with a disadvantaged background had supportive parents, was motivated, and had real rehabilitative potential. However, the judge concluded that the seriousness of the offence required a custodial sentence to achieve denunciation and deterrence, and he imposed a sentence of 21 months' imprisonment.

[63] Of course, all cases vary considerably and each case must be considered on its own particular circumstances. Here, there are important *Gladue* factors that must be considered, as well as the other mitigating circumstances identified by the judge (including the cognitive limitations so far as they are related to the principles of denunciation, deterrence and rehabilitation).

[64] In our view, a fit sentence for this offender in all the circumstances is two years' imprisonment, less time served, and the 30-month probation imposed by the judge. This takes into account the circumstances of the offence and the offender, the impact on the victim as a statutory aggravating factor, the relevant aggravating and mitigating circumstances, as well as the principles of sentencing emphasizing deterrence and denunciation but also having regard to the positive prospect of rehabilitation.

Disposition

[65] We would grant the Crown leave to appeal the sentence, and would allow the appeal. We would impose a sentence of two years' imprisonment, less time served of 3.5 months, for a net sentence of 20.5 months, to be followed by 30 months'

probation on the same terms and conditions as imposed by the sentencing judge. We would deny the application to admit fresh evidence on appeal.

"The Honourable Madam Justice Stromberg-Stein"

"The Honourable Madam Justice Fisher"

Reasons for Judgment of the Honourable Mr. Justice Willcock:

Introduction

[66] I have had the benefit of reading my colleagues' judgment in draft form; with respect, I do not agree with their conclusion. In my view, the sentencing judge did not err as suggested by the Crown and did not impose a demonstrably unfit sentence.

Consideration of the impact of the offence

[67] The severity of the injury to the victim was central to the Crown's submissions on sentencing. The sentencing judge spoke about the severity of the injury several times in his lengthy reasons for sentence, indexed as 2018 YKTC 43. He began by noting, at para. 7, that the assault in this case caused immediate physical and emotional trauma as well as permanent and debilitating physical damage, including nerve damage and visible scarring. He later returned to this fact, writing at para. 76:

> The injury to Mr. Smith was very serious and, had the wound been a little lower and on the neck, we may well have been talking a homicide sentencing. The seriousness of the injury militates towards a higher sentence.

[68] The sentencing judge specifically referred to the severity of the injury as an aggravating factor at para. 79 of his reasons for sentence. I have no doubt the trial judge was acutely aware of the severity of the injury inflicted upon the victim in this case.

[69] The Crown's submission in this regard is that we should infer the trial judge failed to give sufficient weight to the impact of the offence on the victim because he imposed a sentence at the low-end or below the sentencing range for aggravated assaults. In effect, this submission adds nothing to the Crown's argument that the sentence is demonstrably unfit.

Use of comparator jurisprudence

[70] Similarly, it is clear from the reasons for sentence that the trial judge was keenly aware of the distinction between the offences described in ss. 266–268 of the *Criminal Code*. These were canvassed by Crown counsel in his sentencing submissions. When referring to sentences imposed in cases where offenders had been convicted of lesser offences, both counsel and the sentencing judge distinguished the offences in those cases from the offence of which Mr. Quash was convicted.

[71] The sentencing judge's awareness of the value and limited use that might be placed upon convictions for lesser offences is evident in the reasons for sentence. In addressing the submission that *Elias*, one of the comparator cases, involved an accused convicted of assault with a weapon contrary to s. 267(a) of the *Criminal Code*, the sentencing judge said:

> [97] I am also aware that the exercise of discretion which allowed Ms. Elias to plead to a lesser charge than a s. 268 charge does not, however, alter what actually occurred, the nature of the assault and the nature of the injuries suffered.
>
> [98] Insofar as the circumstances of the offence are relevant to the moral culpability of the offender at the time of the commission of the offence, it cannot be said that this moral culpability is heightened or lessened by the subsequent exercise of discretion by the Crown with respect to the offence charged. Ms. Elias' actions and the injuries caused as a result could well have resulted in an aggravated assault charge and conviction. I am not aware of the circumstances and factors which resulted in her being convicted on the lesser 267(a) charge.

He later added:

> [104] While appreciating that different offences and different elections, where elections are available, may have different statutory consequences and limitations, and being mindful of this, it nevertheless remains my obligation, in determining a just and fit sentence for Mr. Quash, to sentence him for what he actually did, and who he is.
>
> [105] In saying this, I am sentencing Mr. Quash for the offence of aggravated assault, not assault with a weapon or assault causing bodily harm, and, in doing so, in consideration of the general range of sentences for aggravated assaults.

[72] In this regard, again, the Crown is suggesting the sentencing judge did not do what he expressly said he was doing. This argument, like the argument with respect to the seriousness of the injury inflicted, is founded solely upon the argument that an inference should be drawn from the fact the sentence is demonstrably unfit.

Fitness of the sentence

[73] I accept my colleagues' description of the range of appropriate sentences for the defence of aggravated assault in this Territory. However, in the absence of any error in principle in this case I would not interfere with the sentence imposed.

[74] First, the sentencing judge concluded that, despite the severity of the injury and the fact a weapon was used, the circumstances of the defence pointed at the low-end of the sentencing range.

[75] Second, the sentencing judge considered the *Gladue* factors and Mr. Quash's cognitive limitations to be mitigating factors.

[76] Finally, he placed considerable weight upon specific rehabilitation objectives in this case.

Circumstances of the offence

[77] In the reasons for judgment on the conviction, indexed as 2018 YKTC 5, the judge dismissed Mr. Quash's claim to have acted in self-defence but found:

> [51] Firstly, I am satisfied that the action of Mr. Smith in running towards Mr. Quash as quickly and aggressively as he did, would give rise to a subjective belief on the part of Mr. Quash that there was the threat of force being used against him.
>
> [52] Further, I find that this subjective belief was objectively reasonable. Notwithstanding that Mr. Quash precipitated the encounter by calling out to Mr. Smith, I can accept that he did not intend or anticipate that Mr. Smith would react in the aggressive manner that he did.
>
> [53] Secondly, given that it was reasonable for Mr. Quash to have a belief that the threat of force was being used against him, it was also reasonable for him to react in a defensive and self-protective manner in order to counter this threat of force.
>
> [54] Thirdly, however, I find that Mr. Quash's response to the situation in his use of the knife to strike Mr. Smith in the face was excessive, and this use

> of force was unreasonable in the circumstances. The Crown has met its burden in proving beyond a reasonable doubt that the third element of self-defence was not met.

[78] In his reasons for sentence, the judge referred to this as an "element of self-defence". The sentencing judge distinguished some of the authorities cited to him as cases where the assault was random, without any provocation and without any "element of self-defence". Even before he had any evidence of cognitive impairment, the judge was of the view Mr. Quash's moral blameworthiness was at the low end of the range for this offence. There was no premeditation. The appellant was found to have a reasonable subjective fear that he might need to defend himself.

Gladue **factors and cognitive limitations**

[79] When the sentencing hearing commenced, Crown counsel contended there was an absence of mitigating factors, other than Mr. Quash's relative youth. The Crown noted Mr. Quash had not taken responsibility for his actions and had not taken any proactive measures to address the feeling of being unduly under constant threat, which had led him to commit the offence. The Crown acknowledged cognitive impairment would be a mitigating factor but said there was no evidence of "cognitive disorder":

> There is no cognitive disorder present here. And I'm not saying that's an aggravating factor, but I am saying that's different than what Your Honour had in… *Elias*. There was some suggestion that perhaps Mr. Quash did have a cognitive disorder, which I would say would reduce his moral blameworthiness, which I know Your Honour and I have had this conversation before in court, looking at the decision of *Harper* from Judge Lilles. But there is no evidence here that there is a cognitive disorder.

[80] However, Mr. Stevens, the author of the *Gladue* reports that were then before the court, had noted that a lack of "baseline data" posed a big challenge when preparing his first report. Mr. Stevens said:

> Personal observation and anecdotal information suggest two main areas of concern: one is the degree to which he may be addicted to alcohol, and the other is the possibility that he may be suffering from some kind of cognitive impairment. However, given the lack of any formal assessments, these concerns remain unsubstantiated.

[81] Given the wide range of sentencing submissions and because of his concern cognitive limitations might be a significant mitigating factor, the judge sought a pre-sentence report with a psychological component. In her assessment report, the psychologist summarized her findings as follows:

> Wesley has extremely low cognitive abilities. He struggles with reasoning with all types of information, including verbal, visual, and non-verbal. He particularly struggles with abstract, verbal reasoning. It will be much harder for Wesley to explain ideas to others and to understand complex ideas. He also struggled with skills important for effective language-based learning and communication and will require high levels of support in his daily functioning and within any training or support endeavours. He also struggles with holding information in his mind (i.e. working memory). This will make it harder for Wesley to remember instructions, follow a lengthy conversation or court proceeding, or complete tasks in his mind (e.g. mental math). Wesley also struggles to learn, recall, and recognize new information. He does better with simple visual information but will need many repetitions and corrections to ensure that he has learned the information accurately. Wesley also needs more time to process information; he will take longer to get started on a task, complete a task, and transition between tasks. He struggles to inhibit overlearned responses, shift between tasks and types of tasks, and attend to details in complex tasks. Wesley also had significant difficulties in all academic areas, suggesting that he will likely benefit from support with literacy and budgeting tasks.

[82] Mr. Quash's limited cognitive aptitudes, as described in that report, clearly played a significant role in the sentencing judge's exercise of his discretion. He wrote:

> [85] I am … mindful of the principle of proportionality. As stated in s. 718.1, a sentence must be proportionate to the gravity of the offence and the degree of responsibility of the offender.
>
> [86] As stated, this is a very serious offence of considerable gravity.
>
> [87] However, Mr. Quash's degree of responsibility must be weighed in the context of his significant cognitive deficiencies and limitations. He cannot be held accountable for his actions to the same degree that someone without such deficiencies and limitations can be. His ability to act in a rational and considered manner is [somewhat] diminished when compared to someone who does not suffer from the same cognitive deficiencies.
>
> [88] See, for example, *R.* v. *Harper*, 2009 YKTC 18, paras. 29-42 in the context of an FASD offender suffering from FASD-related cognitive limitations. It is not the fact that an offender suffers from FASD alone that requires the offender to be considered as having a lower level of responsibility such as would result in a sentence reduction; it is the associated cognitive limitations that result in the offender being considered to

> have a lower level of moral blameworthiness. This consideration remains, of course, to be applied to the particular circumstances of each case.

[83] In my view, these comments must be read in the light of the judge's description of the circumstances of the defence as a momentary, unpremeditated reaction to aggression. He found Mr. Quash's conduct to be morally blameworthy but mitigated by his limited intellectual capacity. The judge clearly concluded Mr. Quash's cognitive impairment diminished his ability to act in a rational and considered manner, which was the specific fault in his conduct that resulted in the conviction.

[84] I can see no error in that conclusion.

Rehabilitation

[85] At the continued sentencing hearing on October 5, 2018, after sentencing had been adjourned and the pre-sentence report prepared, the Crown reiterated its position with respect to an appropriate sentence. Crown counsel submitted that in light of the risk assessment in the pre-sentence report, the sentencing judge should consider the programs that might be available to Mr. Quash in the Federal prison system.

[86] Defence counsel at this point emphasized Mr. Quash's significant cognitive deficits. He argued Mr. Quash's lack of initiative to address problems that led to the assault should be seen in light of those cognitive deficits. Mr. Quash was willing to accept counselling but slow to recognize he needed help. Defence counsel argued, in light of his intellectual deficits, Mr. Quash was doing well by finding and maintaining employment. His prospects of rehabilitation were better in the community. He urged the judge to consider territorial jail time with a long probation order, pursuant to which Mr. Quash would be connected to a parole officer.

[87] The update to the *Gladue* report ended with the following recommendation:

> While his present, highly-regulated existence (a dry camp job and an alcohol-free residence) perhaps provides him with the external motivation he needs to maintain sobriety, drinking is still a significant risk factor. If he were to lose

> his job or move to another residence, then the external controls that seem to be preventing the possibility of a relapse would no longer be in place and the risk he potentially poses to the community could increase exponentially. That said, he seems to be doing well right now. He has both a highly supportive employer and highly supportive family members who together seem to be providing Wesley with the external motivation he needs to pursue a healthy and productive life. The prospect of parenthood will doubtless provide even more motivation to stay sober and employed.

[88] The pre-sentence report included a historical clinical risk management assessment summarized as follows:

> Given the risk factors identified through the HCR-20 V3 and through case consultation, Mr. Quash would require a high level of effort or intervention in order to address the risk factors and prevent further violence. Mr. Quash has demonstrated that he is capable of serious physical harm and steps should be taken to continue to minimize the risk of future violence. While the risk of imminent violence is low, this could drastically increase by a change in circumstances such as alcohol use.

[89] The sentencing judge concluded:

> [89] The principle of rehabilitation is also an important factor in this case. Mr. Quash has a demonstrated ability to be a capable, productive and valuable employee. Both his interests and the greater interests of society are best served if the sentence to be imposed does not take him out of the workforce for any longer a period of time than is required, and encourages and enables him to continue to be steadily employed in the future. The more stability there is in Mr. Quash's life, the less the risk of his committing a violence offence in the future. Conversely, the less stability in his life, the greater the risk.
>
> [90] By virtue of ss. 718.2(d) and (e), a custodial disposition is only to be imposed on an offender when a non-custodial disposition cannot adequately serve to give the required emphasis to the applicable purposes and principles of sentencing. Jail is a "last resort" to be used when there are no other reasonable alternatives, properly considering and applying all the relevant statutory requirements set out in ss. 718 – 718.2. This also includes a consideration of the appropriate length of a custodial disposition to be imposed, in those circumstances where it is necessary to impose a custodial disposition.

[90] In my view, the sentence imposed on this 28-year-old member of the Liard First Nation with a limited criminal record and no significant prior custodial sentence was crafted with appropriate regard for the objectives set out in the *Criminal Code,* most of which were specifically referred to by the judge. He appropriately considered

Mr. Quash's limited intellectual capacity in relation both to the circumstances of the offence and in relation to the prospects for rehabilitation and public safety.

[91] In particular, the sentencing judge referred at para. 106 to the "need to impose a sentence that strikes a balance between all the relevant considerations set out in ss. 718–718.2". The territorial judge was keenly aware of the circumstances of Aboriginal offenders and the overrepresentation of Aboriginal offenders in the territorial correctional system.

Conclusion on fitness

[92] I turn now to the argument that, even if he properly took all these mitigating factors into account, the sentencing judge nevertheless erred by imposing a demonstrably unfit sentence. This argument is based on the fact that this sentence is below the range we would describe as appropriate for aggravated assault.

[93] I am mindful, as are my colleagues, that a sentence is not demonstrably unfit simply because it falls outside an established range. In *R. v. Nasogaluak,* 2010 SCC 6, LeBel J., writing for the Court, said:

> [44] The wide discretion granted to sentencing judges has limits. It is fettered in part by the case law that has set down, in some circumstances, general ranges of sentences for particular offences, to encourage greater consistency between sentencing decisions in accordance with the principle of parity enshrined in the *Code*. But it must be remembered that, while courts should pay heed to these ranges, they are guidelines rather than hard and fast rules. A judge can order a sentence outside that range as long as it is in accordance with the principles and objectives of sentencing. Thus, a sentence falling outside the regular range of appropriate sentences is not necessarily unfit. Regard must be had to all the circumstances of the offence and the offender, and to the needs of the community in which the offence occurred.
>
> [Emphasis added.]

[94] Unlike my colleagues, I cannot say the judge failed to impose a sentence that was just and appropriate given the moral blameworthiness of the offender. It is not our role to re-weigh the relative importance of mitigating or aggravating factors in this case. We are compelled, rather, to respect sentencing judges' broad discretion, described in *Nasogaluak*:

> [43] The language in ss. 718 to 718.2 of the *Code* is sufficiently general to ensure that sentencing judges enjoy a broad discretion to craft a sentence that is tailored to the nature of the offence and the circumstances of the offender. The determination of a "fit" sentence is, subject to some specific statutory rules, an individualized process that requires the judge to weigh the objectives of sentencing in a manner that best reflects the circumstances of the case (*R. v. Lyons*, [1987] 2 S.C.R. 309; [*R. v. M. (C.A.)*, [1996] 1 S.C.R. 500]; *R. v. Hamilton* (2004), 72 O.R. (3d) 1 (C.A.)). No one sentencing objective trumps the others and it falls to the sentencing judge to determine which objective or objectives merit the greatest weight, given the particulars of the case. The relative importance of any mitigating or aggravating factors will then push the sentence up or down the scale of appropriate sentences for similar offences. The judge's discretion to decide on the particular blend of sentencing goals and the relevant aggravating or mitigating factors ensures that each case is decided on its facts, subject to the overarching guidelines and principles in the *Code* and in the case law.

[95] In *R. v. Lacasse*, 2015 SCC 64, the Court described the role of the sentencing judge and the "range of sentences" as follows:

> [54] The determination of whether a sentence is fit also requires that the sentencing objectives set out in s. 718 of the *Criminal Code* and the other sentencing principles set out in s. 718.2 be taken into account. Once again, however, it is up to the trial judge to properly weigh these various principles and objectives, whose relative importance will necessarily vary with the nature of the crime and the circumstances in which it was committed. The principle of parity of sentences, on which the Court of Appeal relied, is secondary to the fundamental principle of proportionality. This Court explained this as follows in *M. (C.A.)*:
>
> > It has been repeatedly stressed that there is no such thing as a uniform sentence for a particular crime. . . . Sentencing is an inherently individualized process, and the search for a single appropriate sentence for a similar offender and a similar crime will frequently be a fruitless exercise of academic abstraction. [para. 92]
>
> …
>
> [58] There will always be situations that call for a sentence outside a particular range: although ensuring parity in sentencing is in itself a desirable objective, the fact that each crime is committed in unique circumstances by an offender with a unique profile cannot be disregarded. The determination of a just and appropriate sentence is a highly individualized exercise that goes beyond a purely mathematical calculation. It involves a variety of factors that are difficult to define with precision. This is why it may happen that a sentence that, on its face, falls outside a particular range, and that may never have been imposed in the past for a similar crime, is not demonstrably unfit. Once again, everything depends on the gravity of the offence, the offender's degree of responsibility and the specific circumstances of each case.

[96] I cannot say a 10-month custodial sentence followed by a 30-month probation period on the terms imposed in this case is demonstrably unfit. The Supreme Court of Canada has consistently asserted that appellate courts have a limited role in reviewing sentences: see, e.g., *R. v. Shropshire*, [1995] 4 S.C.R. 227 at paras. 43-53, and *R. v. Proulx*, 2000 SCC 5 at paras. 123–126. Finding no error in principle and that the sentence is not demonstrably unfit, I do not consider this to be a case where this Court should intervene in the exercise of the trial judge's sentencing discretion.

[97] For those reasons, with respect for the views of my colleagues, I would dismiss the appeal.

"The Honourable Mr. Justice Willcock"