PROVINCIAL COURT OF NOVA SCOTIA
Citation: *R v. Robinson,* 2021 NSPC 20

Date: 2021-03-31
Docket: 8476481, 8476483, 8476486
Registry: Halifax

Between:

Her Majesty The Queen

v.

James Joseph Robinson

DECISION ON SENTENCE

Judge:	The Honourable Judge Elizabeth Buckle,
Heard:	March 8, 2021 in Halifax, Nova Scotia
Decision	March 31, 2021
Charges:	Section 268 *Criminal Code* Section 88(1) *Criminal Code* Section 145(4)(a) *Criminal Code*
Counsel:	Kim McOnie, Adam McCulley for the Crown Alex MacKillop, for the Defence

By the Court:

Introduction

[1] James Robinson is before the Court for sentencing having been found guilty after trial of aggravated assault contrary to section 268(1) of the *Criminal Code,* possession of a weapon for dangerous purpose contrary to section 88(1) of the *Criminal Code* and breach of an undertaking contrary to section 145(4)(a) of the *Criminal Code,* R.S.C., 1985, c. C-46.

[2] These convictions relate to an altercation between James Robinson and his brothers, Wayne Robinson and Gerry Robinson, on June 5, 2020. Because the main participants have the same last name, when discussing the circumstances, I will refer to them by their first names. There was longstanding animosity between James and Wayne which came to a head on that day. They had an altercation in the morning which caused Wayne to call police. James was arrested, charged and released on an Undertaking not to have contact with Wayne. Later in the day, James returned to the area near Wayne's residence. They again became involved in an altercation and James stabbed Wayne. Their older brother, Gerry, intervened and James also stabbed him. James was not convicted of charges relating to stabbing Gerry as I had a reasonable doubt about whether he was acting in self defence.

[3] The Crown seeks a custodial sentence of between six and eight years. The Defence seeks a custodial sentence of approximately 15 months, which equates to the time James has served in pre-trial custody. The Defence does not dispute additional Orders sought by the Crown: a firearms prohibition under s. 109; a DNA order under s. 487.051; and, an order prohibiting contact with Wayne during any period of custody under s. 743.21.

[4] I now have to determine a fit and proper sentence for Mr. Robinson.

Circumstances of the Offence

[5] Details of the offence are contained in my trial decision and further background was provided during the sentencing hearing.

[6] Mr. Robinson's longstanding animosity toward his brother, Wayne, stemmed from his belief that, in 2011, Wayne had reported him to police causing him to be

arrested, charged and incarcerated. As a result, for years, James had been regularly harassing Wayne by calling him a “rat”.

[7] At the time of the current offences, James was staying with their mother who lived in the same apartment building as Wayne. On the morning of June 5, 2020, both men were outside the building and became involved in an altercation. Wayne called police and James was arrested and released on an undertaking not to have any contact with Wayne. Later that day, James returned to the area with friends. He and Wayne exchanged words from a distance. Then, James and his friends ran at Wayne and Wayne took out a box cutter style knife. James obtained a knife from one of his friends and stabbed Wayne. Gerry, who had been watching from his vehicle, intervened to stop James. He grabbed James from behind and James stabbed him. Gerry was able to disarm James and beat him up. Police arrived and arrested James.

[8] Evidence about Wayne’s injury and its consequences was provided by Wayne, in his testimony at trial and in his victim impact statement, and the physician who treated him. Wayne sustained a stab wound in the abdomen. Surgery was performed to determine the extent of his injury and it was discovered there was a small laceration on his liver (Affidavit of Dr. Ellsmere and discharge summary – trial Exhibit 7). He remained in hospital for three or four days. In his testimony and victim impact statement, Wayne reported that his physical recovery was slow and he had a setback when the staples holding the incision let go. He continues to experience discomfort from the scar. He also described the persistent psychological effects which have included general anxiety and specific fear.

Mr. Robinson’s Circumstances

[9] Information about Mr. Robinson came from a pre-sentence report and comments of counsel.

[10] He is 44 years old. His father died when he was an infant and he was raised by his mother. She worked outside the home and both he and his mother report that he was physically abused by a babysitter. He remains close with his mother.

[11] He has two brothers, Wayne and Gerry, but clearly does not have a good relationship with either.

[12] Prior to his incarceration, he had been living with his mother in Halifax. He continues to have her support and she is prepared to have him back in her home when he is released from custody. However, he reports a desire to find employment

and an apartment of his own. He has had sporadic employment during his life. He has limited education, no vocational training and reports that his criminal record and need to obtain methadone daily have been barriers to finding employment. At the time of these offences he was supported by income assistance.

[13] He reports having good physical health. However, he has suffered from substance abuse issues. He reports using crack cocaine from time to time and for the past 10 years has been on methadone as a result of an addiction to Dilaudid which began in 2001 and continued until approximately 2011. He has never been in a treatment program for substance abuse, other than what was required to participate in the methadone program. He recognizes that he has issues with anger control and appears willing to participate in treatment for both substance abuse and anger management.

[14] He reports a connection to the aboriginal community through his maternal grandmother who is Mi'Kmaw. He declined the opportunity to have a Gladue Report and only limited information was available from the pre-sentence report and his counsel. He has always known that he had some aboriginal ancestry but only became aware recently that his grandmother was Mi'Kmaw. He has had no connection to any specific aboriginal community and has only participated in ceremonial practices when in custody. At this time, he expresses no interest in pursuing his connection to his ancestry upon release. He reports that he wants to focus on finding employment.

[15] Mr. Robinson has a criminal record which includes crimes related to violence and weapons (Ex. 1 & 2). The most serious of his convictions is quite dated. However, in the intervening years, he has regularly been convicted of related criminal offences of varying severity:

- 1995 - aggravated assault, break and enter and trafficking a narcotic (in JEIN the conviction is recorded as attempted murder, however, the Crown advises that this is an error) – 6 years custody;

- 1998 (while serving a sentence) - assault on a police officer – 1 month custody;

- 1999 (while serving a sentence) - common assault – 9 months custody;

- 2004 – possession of a prohibited/restricted firearm with ammunition, break and enter, breach of a recognizance and possession of a controlled substance – 2 years custody;
- 2004 - carrying a concealed weapon – 6 months custody;
- 2007 - assault with a weapon and other offences - 3 years custody;
- 2011 - possession of a firearm while prohibited, unauthorized possession of a firearm and contravening a firearm regulation – 1 year custody; and,
- 2016 – two counts of common assault – 9 month conditional sentence order.

[16] He also has convictions for minor and unrelated offences. His most recent convictions are for mischief in 2016 and two counts of "theft under" in 2018.

Application of Sentencing Principles

General

[17] In sentencing Mr. Robinson, I have to apply the objectives and principles set out in 718 to 718.2 of the *Criminal Code*. The best means of addressing these principles and attaining the ultimate objective of sentencing will always depend on the unique circumstances of the case. Because of that, it has been consistently recognized that sentencing is a delicate and inherently individualized process (*R. v. LaCasse,* 2015 SCC 64 at para. 1; and, *R. v. M. (C.A.)*, [1996] 1 S.C.R. 500, at paras. 91-92).

Objectives of Sentencing

[18] The purpose of sentencing is to protect the public and contribute to respect for the law and the maintenance of a safe society. Section 718 instructs that this purpose is to be accomplished by imposing just sanctions that have one or more of the following objectives: denunciation; general and specific deterrence; separation from society where necessary; rehabilitation of the offender; promotion of responsibility in offenders; and acknowledgment of the harm done to victims and to the community.

Denunciation and Deterrence

[19] The emphasis in sentencing for serious crimes of violence like aggravated assault will almost always be on denunciation and deterrence (*R. v. Best,* 2012 NSCA 34, at para. 15; *R. v. Marsman*, 2007 NSCA 65, at para. 16; *R. v. Perlin*, [1977] 23 N.S.R. (2d) 66, at para. 8; and, *R. v. Moller,* 2012 ABCA 381). Emphasizing these objectives reflects the need to show society's condemnation for violence and to discourage Mr. Robinson and others from committing similar offences.

[20] Specific deterrence is not a concern in every case. However, Mr. Robinson's related criminal record and comments in his statement to police make it a concern here.

[21] Over the past 25 years, Mr. Robinson has regularly been engaged in criminal conduct that is either violent or involves weapons. Further, in his statement to police, he expressed a great deal of anger and a future intent to harm Wayne and others. I accept that he was in a highly emotional state at the time, but his words cannot be ignored in assessing his risk of future violence. In the long-term, protection of the public will be best served if Mr. Robinson learns to control his anger through rehabilitative measures but, in the shorter-term, the sentence I impose will have to attempt to deter him from future violence by imposing a punitive consequence for his actions.

[22] The Crown relies on Mr. Robinson's criminal record and specific deterrence to support their submission that the appropriate sentencing range for Mr. Robinson is six to eight years. They argue that he was sentenced to six years for his last aggravated assault and that did not deter him, so the sentence this time must be more severe. They argue that this is particularly so given the similarities between the two offences – both involve stabbing of someone he believed to be "a rat".

[23] I accept that Mr. Robinson's prior conviction for aggravated assault is relevant to specific deterrence despite the passage of time because of the similarities noted by the Crown and because Mr. Robinson has continued to offend violently and possess weapons. However, I am not satisfied in the circumstances that concepts of progressive sentencing require that his sentence for this offence necessarily be more severe than the sentence he received for the same offence 25 years ago.

[24] Progressive sentencing – the concept that stricter sentences are imposed for offenders who repeat the same or similar offences - is not a discrete sentencing principle which is automatically applied. It is a reflection of other sentencing principles and has to be applied in light of those principles. It is grounded in the need for specific deterrence and premised on the notion that harsher sentences have

to be imposed when earlier sentences have not been sufficient to deter similar conduct (for example, see *R. v. Wright* (2010), 261 CCC (3d) 333 (Man. CA); and, *R. v. McCrea,* 2008 BCCA 227, at para. 11; *R. v. Calliou,* 2019 ABCA 365).

[25] Mr. Robinson's six year sentence for aggravated assault was imposed 25 years ago. In the intervening years, he has continued to commit violent or weapons-related offences but their frequency and severity have decreased. This is some indication that there has been a deterrent effect and/or that he has made some progress toward rehabilitation. It is also relevant that, as of the date of these offences, it had been almost five years since he had committed a violent offence. Those offences were common assault and he was sentenced to a nine month custodial sentence to be served in the community. Finally, he has not been sentenced to a period of actual incarceration in 10 years. In these circumstances, I cannot conclude that a sentence of more than six years is warranted simply because he received a six year sentence previously for the same offence. The passage of time, the reduction in severity of offences during that time, and the recent gap of five years in violent offending make progressive sentencing less imperative.

Rehabilitation

[26] Rehabilitation continues to be a relevant objective even in cases requiring that denunciation and deterrence be emphasized (*LaCasse*, at para. 4).

[27] Mr. Robinson has limited education and employment history. He has been on methadone for a long-standing addiction to opiates and admits occasional use of crack cocaine. He recognizes that his use of illicit substances has caused problems in his life and acknowledges that he could probably use programming. The Crown correctly points out that there is no indication that he was under the influence of any substances at the time of this offence, but his willingness to address these issues is relevant to his rehabilitation prospects in general.

[28] In the pre-sentence report, he recognizes that he sometimes loses control when he gets angry. That demonstrates some minimal insight and may lead to a desire to address that problem. Given his criminal record for serious violence, that is essential to his rehabilitation.

[29] He has the support of his mother who is prepared to have him live with her upon his release from custody. The Crown argues that this isn't particularly helpful since he was living with his mother when he committed these offences which suggests she is not able to influence him in a pro-social way. I agree that his mother

is unlikely to have tremendous influence on his decisions, however, the mere fact that he would have a place to live is of some relevance to rehabilitation.

[30] Mr. Robinson's record suggests that he will struggle with rehabilitation. He has been given the benefit of rehabilitative sentences in the past. Mr. Robinson has no significant gaps in his record. However, as I said, prior to these offences, the general trend showed a decrease in severity and frequency of offending which is perhaps an indication that those sentences had some benefit. Rehabilitative efforts directed at anger control, employment and treatment would clearly contribute to the long-term protection of the public and I have some hope for their success. However, given Mr. Robinson's age and criminal record and the seriousness of the offences, my hope for rehabilitation will have limited impact on the sentence I impose.

Proportionality

[31] Section 718.1 says that the fundamental principle of sentencing is that a sentence must be proportionate to the gravity of the offence and the degree of responsibility of the offender. It requires that a sentence not be more severe than what is fair and appropriate given the seriousness of the offence and the moral blameworthiness of the offender. It also requires that the sentence be severe enough to condemn the offender's actions and hold him responsible for what he has done (*Lacasse, supra.,* at para. 12; and, *R. v. Nasogaluak*, 2010 SCC 6, at para. 42).

[32] The proportionality analysis must include an assessment of the general seriousness of the offence and the relative seriousness of Mr. Robinson's conduct and level of moral culpability.

[33] I will focus on the aggravated assault. It is the most serious offence I am sentencing Mr. Robinson for and the Crown concedes that the sentences for the other offences should be concurrent to the sentence imposed for that offence. There is no question that aggravated assault is a serious offence, both in comparison to other offences in general and in comparison to other crimes of violence specifically. The minimum conduct required to constitute the offence requires an assault on someone where the resulting harm is significant - wounding, maiming, disfiguring or endangering the life of the victim. It carries a potential sentence of 14 years in custody and almost always results in a custodial sentence.

[34] The gravity of Mr. Robinson's offending behaviour and moral blameworthiness also has to be assessed in relation to other offenders committing similar offences. I will address this aspect of proportionality in more detail when I

review the principle of parity and consider sentences imposed on other offenders who have committed similar offences. However, in summary, I view the comparative gravity of these offences and Mr. Robinson's blameworthiness as high. At the time of the offence, he was on an Undertaking not to have contact with the victim, he went back to the area where he knew the victim resided, he took friends with him, he remained in the area harassing the victim, he engaged with the victim by yelling at him and calling him a rat, he initiated the physical altercation by running at the victim, rather than disengage when the victim pulled out a knife, he obtained a knife from his friend and stabbed the victim. If Gerry had not intervened, he would have stabbed the victim again. The victim's injury, a puncture wound which struck his liver, was serious but not life threatening. It continues to cause the victim physical and psychological distress.

Aggravating and Mitigating Factors

[35] Section 718.2 requires that I consider the aggravating and mitigating factors relating to the offence and the offender.

[36] The Crown argues that there are many aggravating factors here and none that are mitigating.

[37] Some potentially aggravating and mitigating factors require comment.

[38] The Crown argues that Mr. Robinson's record is an aggravating factor. Mr. Robinson is not a first time violent offender. His record is certainly relevant and in this case justifies a harsher sentence than what would otherwise be imposed. However, as was recently stated by Beveridge, J.A. in *R. v. Mauger,* (2018 NSCA 4), a criminal record is not "on its own", an aggravating factor. It is "aggravating" because of how it impacts consideration of the purpose and principles of sentencing (at para. 64). Justice Beveridge goes on to discuss some of the permissible uses of a criminal record. In doing so, he cites with approval the comments of Justice Chartier in *R. v. Wright,* (2010 MBCA 80, at para. 7).

[39] I have already considered the impact of Mr. Robinson's criminal record on the need for specific deterrence and on Mr. Robinson's prospects for rehabilitation. It is also disentitles him from any special leniency and contributes, along with the nature of the crime, to my conclusion that protection of the public requires a sentence that separates Mr. Robinson from society (permissible uses identified in *Wright*; and, s. 718.2(c))

[40] There are also areas of potential mitigation that require comment.

[41] First, the issue of Mr. Robinson's acceptance of responsibility and possible remorse. In his statement to police and comments to the author of the pre-sentence report, Mr. Robinson admitted he had stabbed Wayne and accepted responsibility for it. That kind of immediate and ongoing acceptance of responsibility is often viewed as a mitigating factor, particularly where it is accompanied by a guilty plea and/or remorse. Mr. Robinson did not plead guilty, however, he has never disputed that he stabbed Wayne. However, the sentiments expressed by Mr. Robinson in his statement to the police are the opposite of remorse. He said he hated Wayne and hoped he died. I accept that he was still emotional, angry and physically injured at the time, however, he also did not show any remorse when interviewed for preparation of the presentence report. When he addressed the Court at the end of the sentence hearing, he said that he had tried to apologize to his brothers through his mother. Familial relationships are complicated and often involve intense, layered and conflicting emotions. This makes it more difficult to determine whether James feels any genuine remorse for his actions. I suspect that if his brother had died, Mr. Robinson would eventually have come to experience significant remorse but I cannot say that at present he feels remorse for stabbing him.

[42] The Defence also argues that the impact of Covid on the conditions of Mr. Robinson's pre-trial incarceration is mitigating. He does not seek mitigation on the basis of any possible psychological impact of being confined during a pandemic. He argues simply that there have been increased restrictions on inmates due to Covid which are well known to this court – no programming, limited or no visits for periods, and reduced time out of one's cell – which have made custody more punitive than normal. If I am entitled to consider this, in my view, it would be relevant primarily to specific deterrence because "harder time" is more punitive and would theoretically have more of a deterrent effect.

[43] No evidence was called, however, the Defence argues that we are at the point where courts can take judicial notice of Covid restrictions in the Province's Correctional Facilities. The Crown disagrees. In *R. v. Dawson & Ross,* (2021 NSCA 29), the Nova Scotia Court of Appeal addressed the impact of Covid in the context of whether it should be a consideration when deciding whether to impose a custodial sentence. In that context, which I acknowledge is different than the one before me, the Court approved of courts taking judicial notice of "… the reality and impact of the pandemic." (para. 101). It seems reasonable, therefore, to take judicial notice of the fact that Covid became a reality in Nova Scotia in March of 2020 so

has been a factor, to a greater or lesser extent, during the entirety of Mr. Robinson's pre-trial incarceration.

[44] While the decision in *Dawson & Ross* seems to support judicial notice of the broader societal reality and impact of the pandemic, it does not address whether it would be appropriate to take notice of the specific impact of Corrections' response to the pandemic. Other reported decisions in Nova Scotia have included evidence about the impact of Covid in provincial institutions (*R. v. Steed*, 2021 NSSC 71; and, *R v Lambert*, 2020 NSPC 39). In *Steed,* Justice Rosinski referred to evidence from an employee of NS Corrections and Mr. Steed apparently confirming that Covid restrictions had contributed to "harsh conditions". These included, "the reduction in programming available, liberty (within the correctional centres where he was housed -- including less outdoor time; less mingling among inmates; less contact with family and friends etc.), and the occasions of "lockdowns". (at para. 193). I heard similar evidence from both the offender and a correctional employee in *Lambert*. Conditions in facilities have not been static over the past year but, in provincial court, counsel and persons in custody regularly report these same conditions and some, such as the absence of programming are regularly included in pre-sentence reports. In these circumstances, I do not believe that evidence is required to establish that inmates of provincial institutions have, at times, experienced harsher conditions due to Covid. These conditions would include reduced or no programming, less time out of one's cell and restrictions on visits. I accept that this has resulted in "harder time" for Mr. Robinson.

[45] Given the absence of specific evidence on how this has impacted Mr. Robinson and the seriousness of the offences for which I am sentencing him, the mitigation provided by this is limited, but it will form part of my sentence calculation.

[46] Because the Crown agrees that the sentences for all offences should be concurrent to each other, I will assess the aggravating and mitigating factors together. In summary, I view the aggravating and mitigating factors to be as follows:

<u>Aggravating Factors</u>

- At the time of the offence, Mr. Robinson was on an Undertaking to have no contact with Wayne;
- He went back to the area with friends and harassed Wayne by calling him a rat;

- He initiated the physical confrontation with Wayne, the assault was essentially unprovoked and did not flow from a consensual fight. The assault was entirely disproportionate to any provocation Wayne's words and actions might have provided. When Wayne pulled out the boxcutter, he was outnumbered and I am satisfied that he was acting defensively. He was not agreeing to a fight;

- The assault involved a knife;

- The extent of the injury and harm to Wayne. The fact that there was a wounding is not in and of itself an aggravating factor as it constitutes a required element of the offence but the extent of harm beyond that minimum is aggravating; and,

- Mr. Robinson has a record for crimes of violence and weapons.

Mitigating factors:

- Mr. Robinson recognizes that anger may be a problem for him which may lead to a desire to address that problem;

- He recognizes that his use of illicit substances has caused problems in his life and is willing to accept programming;

- His immediate and ongoing acceptance of responsibility, however, given the lack of any real remorse this is of limited significance;

- He will have support from his mother upon release from custody; and,

- He has served his pre-trial custody during the Covid pandemic which has resulted in more restrictions on his liberty.

Parity / Range of Sentences

[47] Section 718.2 also requires me to consider the principle of parity which says that, within reason, similar offenders who commit similar offences should receive similar sentences. Ultimately, each sentence has to reflect the unique circumstances of the specific offence and specific offender. However, respect for the principle of parity is encouraged by situating a given case within the range of sentences generally

imposed for a given offence. This promotes consistency, fairness, rationality in sentencing and "gives meaning to proportionality" (*Dawson & Ross,* para. 94),

[48] The Crown and Defence acknowledge that the theoretical range for aggravated assault is broad. However, the range for a given offence is not that theoretical minimum to maximum but is narrowed by the context of the offence and the circumstances of the offender (*R. v. Cromwell,* 2005 NSCA 137, at para. 26).

[49] The Crown and Defence have each provided me with cases to assist in identifying the appropriate range for Mr. Robinson. The Crown relies on: *R. v. Marsman,* 2007 NSCA 65; *R. v. Tourville,* 2011 ONSC 1677; *R. v. Gaudet,* 2009 NSPC 54; *R v. Ellison,* 2017 NSSC 202; and, *R v. Foley,* 2017 NLTD(G) 86. The Defence also referenced *Ellison* and *Marsman* to highlight the broad range of sentences the offence of "aggravated assault" can attract, but relied on *R v Chisholm,* [1998] N.S.J. No. 274 and *R. v. Gaudet*, [2009] NSJ No 489 in support of a reformatory sentence. I have reviewed additional cases including *R. v. Thomas*, 2015 NSCA 112 and *R. v. Willis,* 2013 NSCA 78, which reviews a number of earlier cases.

[50] The decision in *Tourville* is an Ontario decision so not binding on me but has been cited with approval by the Nova Scotia Supreme Court (*R. v. Melvin,* 2015 NSSC 165; and, *R. v. Reddick,* 2017 NSSC 189, however, in *Ellison*, at para. 39, Justice Wright noted that he did not completely adopt the "tiered approach" outlined in *Tourville*). In *Tourville,* having reviewed a large number of decisions, Justice Code acknowledged the broad range of sentences imposed for aggravated assault. He grouped them into three broad ranges: cases resulting in suspended sentences or low reformatory sentences; cases resulting in high reformatory sentences; and, cases resulting in significant penitentiary sentences. These are not strict categories and there will always be cases that have novel aggravating or mitigating factors or circumstances that bridge the different ranges. However, they are a useful starting point.

[51] At the bottom end of the range are what Justice Code describes as exceptional cases where suspended sentences or low reformatory sentences have been imposed. The example provided by Justice Code was of a young aboriginal woman with no criminal record who had cut the victim's face during a dispute in a bar. She had a very difficult upbringing, suffered from alcoholism and had made progress toward rehabilitation (*R. v. Peters*, 2010 ONCA 30). In my view, the circumstances in *Marsman* and *Gaudet,* Nova Scotia decisions, would have similar features.

Marsman had no criminal record and suffered from a significant mental illness that contributed to his offence. He originally was sentenced to a suspended sentence which was substituted with a conditional sentence order on appeal. *Gaudet* was a youthful offender with a minor youth record who stabbed his brother while intoxicated. He had good prospects of rehabilitation and the victim testified on his behalf at the hearing. He was sentenced to nine months custody and 12 months' probation.

[52] Justice Code's mid-range includes cases where high reformatory sentences have been imposed. He said this category generally involved first offenders with elements of a consent fight where the offender had resorted to excessive force (he provided the following examples from Ontario, *R. v. Chickekoo*, (2008), 79 W.C.B. (2d) 66 (Ont. C.A.) [2008 CarswellOnt 3653 (Ont. C.A.)]; *R. v. Moreira*, [2006] O.J. No. 1248 (Ont. S.C.J.); *R. v. Basilio* (2003), 2003 CanLII 15531 (ON CA), 175 C.C.C. (3d) 440 (Ont. C.A.). The case of Chisholm is a Nova Scotia example of a case that resulted in a high reformatory sentence (18 months in custody, followed by two years probation which was upheld on appeal). The offender was youthful with a minor unrelated record, had taken positive steps toward rehabilitation and was under the influence of alcohol at the time of the offence. The injuries were not significant compared to some cases but the circumstances surrounding the assault were quite aggravating.

[53] The high end of the range, according to Justice Code, are cases where four to six years have been imposed. He described this category as generally involving repeat offenders with serious criminal records or unprovoked or premeditated assaults. Cases from Nova Scotia and other provinces are consistent with this upper range. In *Thomas,* the Court of Appeal upheld a custodial sentence of five and one half years for an offender with a lengthy and related criminal record who had stabbed the victim in an unprovoked attack, causing serious injury. In upholding the sentence, the appellate court said the sentence was at the higher end of the range (at para. 42). The cases of *Reddick, Ellison* and *Foley* all resulted in four year sentences. *Reddick* was 59 years old, had an extensive and related criminal record and was found guilty after trial of beating another man with a metal cane in an unprovoked attack. *Ellison* was youthful and a respected member of his community but had a related record. He expressed remorse and pleaded guilty, admitting he had beat another man with a golf club causing serious injuries. The Court found the attack was pre-mediated in the sense that following an initial altercation with the victim, he returned with the weapon and was the aggressor in the attack. *Foley* had a prior related record, showed little remorse and blamed the victim for the altercation. He

stabbed or slashed his brother seven times causing life threatening injuries. The Court found that he had gone to his brother's house with a knife intending to get even with him. The victim came out of his house and charged the offender who slashed the victim's face. Further injury to the victim was caused during the struggle over the knife. The offender had taken some steps toward rehabilitation by completing anger management and substance abuse counseling.

[54] The decision in *Willis* straddles the mid to high ranges. On appeal, after reviewing a number of earlier decisions, the Court of Appeal concluded that the appropriate sentence was three years in custody. In doing so, the Court said the most germane features of the case for parity purposes were that it involved, "a serious assault with no weapon, resulting in immediate, but not lasting injury; the offender is a relatively young man with a past record for violence" (at para. 33).

[55] The Crown submits that the *Foley* case is similar in many respects to the case before me. However, the Crown argues that there are additional aggravating factors in this case which justify their proposed range of between six and eight years. Specifically, Mr. Robinson's previous conviction for aggravated assault for which he received a sentence of six years, at the time of the offence, he was on an undertaking not to have any contact with the victim and, unlike in *Foley*, where the victim came out to engage, in the case before me, the victim was terrified and the act was entirely unprovoked with no elements of a consent fight.

[56] The Defence submits that Mr. Robinson shares some characteristics with those offenders who have benefited from the bottom of the range. He is aboriginal, has struggled with substance abuse issues, has support from his mother, and his record shows a recent gap in violent offending.

<u>Restraint</u>

[57] Finally, I have to consider the principle of restraint found in the common law and s. 718.2. Restraint, in general, requires that Mr. Robinson's punishment should be the least that would be appropriate in the circumstances. Section 718.2(e) requires that when considering a custodial sentence, particular consideration should be given to the circumstances of Aboriginal offenders. The Supreme Court of Canada instructs that when sentencing an Aboriginal offender, I must consider "(a) the unique systemic or background factors that may have played a part in bringing the particular Aboriginal offender before the courts; and (b) the types of sentencing procedures and sanctions that may be appropriate in the circumstances for the offender because of his or her particular Aboriginal heritage or connection." (*R. v.*

Ipeelee, 2012 SCC 13, at para. 60; and, *R. v. Gladue,* [1999] 1 S.C.R. 688, at para. 66).

[58] As noted, Mr. Robinson reports that his maternal grandmother is Aboriginal. However, I have very little case-specific information about that aspect of his background or any potential impact on his offending behavior. I don't fault Defence counsel for that. Mr. Robinson knows very little about his heritage and specifically instructed counsel not to delay the sentencing hearing by seeking the preparation of a *Gladue* report. The absence of that information limits my ability to apply this factor but does not relieve me of the responsibility to consider it. The Supreme Court of Canada instructs that notwithstanding the absence of case specific information, I have a *duty* to apply s.718.2(*e*) (*Gladue*, at para. 82; *R. v. Wells,* 2000 SCC 10, at para. 50; and, *Ipeelee*, at para. 85). As the Court said in *Gladue* (para. 82), "There is no discretion as to whether to consider the unique situation of the Aboriginal offender; the only discretion concerns the determination of a just and appropriate sentence.". The Supreme Court also instructs that, "Courts 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." (*Ipeelee*, at para. 60).

[59] The reality is that Mr. Robinson's disconnection from his Aboriginal heritage is a probable consequence of this history. For example, if Mr. Robinson's grandmother married a non-Aboriginal man, she may very well have lost her Aboriginal status leading to disenfranchisement and loss of community.

[60] As was noted by the Court in *Ipeelee*, these factors do not necessarily provide a justification for a lighter sentence, however, they provide context to "understand and evaluate" the individual circumstances of the offence and the offender (at para. 60).

Conclusion

[61] The Crown argues that, given the seriousness of the offence in general and the specific circumstances of this particular case, only a lengthy penitentiary term can properly address these objectives. The Defence does not dispute the importance of these objectives in this kind of case but argues that the sentence sought by the Crown is more than what is required to accomplish them and ignores other objectives and sentencing principles such as rehabilitation, parity, proportionality and restraint.

The Defence argues that a proper application of the sentencing principles and appropriate balancing of the objectives should result in a sentence in the reformatory range.

[62] In suggesting that the range for Mr. Robinson is six to eight years, the Crown has provided no authority where a sentence in that range was imposed for aggravated assault. The authorities provided by the Crown suggest that the range for aggravated assault, in these circumstances, is four to six years. This is consistent with the comments of the Nova Scotia Court of Appeal in *Thomas* that a sentence of five and a half years was within the range but at the higher end. The maximum sentence is 14 years so, no doubt, there will be circumstances where a sentence above that range would be appropriate. However, I am not satisfied that this is one of them.

[63] In my view, the circumstances of the offence and Mr. Robinson's personal circumstances do place this offence in the upper range identified by Justice Code. I acknowledge that he has suffered from substance abuse issues, that, because of his Aboriginal heritage, he and his family will have experienced "unique systemic and background" factors that may very well have had the negative consequences referred to in *Gladue* and *Ipeelee* and that these factors have probably contributed to him being before the Court. However, his age, criminal record, absence of true remorse and the circumstances of the offence distinguish him from those cases where offenders have been given non-custodial or reformatory sentences. In all the circumstances, a sentence in that range for Mr. Robinson would not adequately address denunciation and deterrence and would not be proportionate to the gravity of the offence and Mr. Robinson's culpability in light of sentences imposed in other cases.

[64] The circumstances here are most like those in *Foley* and *Reddick.* I agree with the Crown that there are aspects of this case that are more aggravating than in *Foley*. Specifically, that Mr. Robinson was on an undertaking to stay away from the victim, the attack was unprovoked with no aspect of a consensual fight and Mr. Robinson's criminal record is more serious. However, in other respects the circumstances before me are less aggravating and more mitigating. Specifically, the injuries to Mr. Foley were much more severe and had life threatening consequences, there is more evidence of premeditation in the *Foley* case and I have to consider the impact of factors identified in *Gladue* and *Ipeelee* on Mr. Robinson's moral culpability, the fact that because of the reduced severity of his offending, he has not been sentenced to a period of actual custody in 10 years and the collateral negative

consequences resulting from his having served his pre-trial custody with the additional restrictions caused by the Covid pandemic.

[65] Having considered the circumstances of this offence and Mr. Robinson's circumstances in light of the principles of sentencing, I have concluded that a fit and proper sentence for these offences is 4 years (for sentence calculation purposes I treat that as 1,460 days) less the time that Mr. Robinson has already spent in custody. The Crown does not dispute that Mr. Robinson should be given credit at 1.5 days for every day spent in custody. He has been in custody since his arrest on June 5, 2020, 300 days which is the equivalent of 450 days. The global sentence will be applied as follows:

- Count 1 –aggravated assault, contrary to s. 268 – 4 years (1, 460 days) less 450 days remand credit for a go forward sentence of 1,010 days (2 years and 280 days);

- Count 2 - possession of a weapon, to wit a knife, for a purpose dangerous to the public peace, contrary to s. 88 – 6 months concurrent;

- Count 4 –assault with a weapon of Wayne Robinson, contrary to s. 267(a), stayed in light of the conviction for aggravated assault;

- Count 5 - failing to comply with an Undertaking by communicating with Wayne Robinson, contrary to s. 145(a) – 2 months concurrent.

[66] I also make the following additional orders:

- An order under s. 109 of the *Criminal Code* prohibiting Mr. Robinson from possessing any firearm, cross-bow, prohibited weapon, restricted weapon, prohibited device, ammunition, prohibited ammunition or explosive substance for a period of 10 years (no notice of increased penalty had been provided to Mr. Robinson so a life-time prohibition was not imposed);

- Order under s. 487.051 authorizing the taking of a sample of Mr. Robinson's DNA for the DNA databank; and

- Order under s. 743.21 prohibiting contact or communication, direct or indirect, with Wayne Robinson in custody.

Elizabeth Buckle, JPC