SUPREME COURT OF NOVA SCOTIA
Citation: R v. Benson, 2011 NSSC 137

Date: 20110202
Docket: PtH No. 311961
Registry: Port Hawkesbury

Between:

Her Majesty the Queen

v.

Richard James Benson

Judge:	The Honourable Justice Cindy A. Bourgeois
Heard:	February 2, 2011, in Port Hawkesbury, Nova Scotia
Written Decision:	April 5, 2011
Counsel:	Diane McGrath, Q.C., for the Crown Gerald A. MacDonald, Q.C., for the Defence

By the Court (Orally):

INTRODUCTION:

[1] By way of preliminary comment, and due to the fact that I intend to render my sentencing decision orally today, the Court reserves the right to make additions or deletions of a grammatical nature should any subsequent written decision be required. As Counsel would be well aware, those changes will not in any way change the substance of the sentencing disposition that I am about to render.

[2] I want to thank both Counsel for the very professional and thorough manner in which they addressed the issues before the Court. Your submissions have been extremely helpful to me.

[3] Richard Benson has plead guilty to a charge that:

> On or about the 1st of June, A.D. 2008, at or near Inverness, Inverness County, Province of Nova Scotia, did unlawfully kill Ivan Joseph Rorison and thereby commit manslaughter contrary to Section 236(b) of the Criminal Code.

[4] I have considered the evidence called at the sentencing hearing today, submissions of Counsel, case authorities submitted to the Court, as well as the

remarks of Mr. Benson at the conclusion of the sentencing hearing. The Court has also had the benefit of reviewing and considering a Pre-sentencing report, as well as a Gladue report in relation to Mr. Benson, given that he is a person of aboriginal heritage. I have also considered the victim impact statement of James Wendell Rorison, the son of the victim.

[5] At this juncture, I wish to review the facts relating to the offence and to the offender. Other than one fact which is in dispute, and will be addressed shortly, there is agreement with respect to the facts surrounding the offence which the Court can consider. These can be summarized as follows:

[6] Richard James Benson was born on August 19, 1983. At the time of the offence, he was 24 years of age. Although born in Big Cove, New Brunswick and raised for the most part on Grand Manan, Mr. Benson has lived on the First Nations Reserve of Waycobah, Cape Breton, for approximately 8 years. Although now separated, he was involved in a long term relationship, by which he has 4 children.

[7] On the evening of May 31, 2008, Mr. Benson travelled from Waycobah with 4 others for the purpose of attending a birthday party in Inverness, Inverness County, Nova Scotia. The party was for Kyle Timmons, and was held at his mother's home. Travelling with Mr. Benson was Kyle's father, John Richards, his partner Ms. Bernard, and two younger individuals who ended up being co-accuseds in relation to the events that unfolded.

[8] According to evidence provided at the Preliminary Inquiry for a co-accused, Mr. Benson smoked marijuana en route from Waycobah to Inverness. At the party, Mr. Benson smoked 4 to 6 further marijuana joints. He also consumed some alcohol, although this appears to have been limited to 2 beer.

[9] At some point in the evening, it was noted that the alcohol supply was dwindling. Several individuals at the party drove to the home of Mr. Rorison in Inverness. Their purpose was to purchase alcohol and apparently, at least some in the group were of the understanding and knowledge that Mr. Rorison would have alcohol for sale. After making a purchase, the group returned to the Timmons' home, where the party continued. Mr. Benson did not go to the Rorison home on this occasion.

[10] Later, somewhere between 4:30 and 5:30 a.m., Mr. Benson became aware that another trip to the Rorison home was being planned. The group of seven left the home, and after checking on the well being of Mr. Richards who was asleep in a truck outside, Mr. Benson caught up with the group who was travelling to the Rorison home on foot. When the group arrived at Mr. Rorison's residence, there were no lights on. A knock did not result in Mr. Rorison attending to answer the door. At that point, another in the group attempted to gain entry to the residence by kicking in the door. When this proved unsuccessful, the door was knocked off its hinges. Mr. Rorison, who was 70 years of age at the time, came to the door, and was physically assaulted by one or more members of the group.

[11] All seven proceeded to enter the Rorison residence. Mr. Benson was involved in removing a case of beer from the home. There is no suggestion that Mr. Benson physically assaulted Mr. Rorison at any point. In addition to the 24 case of beer, Mr. Rorison's wallet was removed from the home. Mr. Benson received $20 of the money from the wallet. The group returned to the Timmons' home, with Mr. Benson returning to Waycobah shortly thereafter.

[12] After Mr. Rorison's residence had been broken into and he was assaulted, he called his son, Wendell, who went to his father's home. Wendell Rorison arrived, presumably was told what had happened and called the police and an ambulance. Paramedics attended at Mr. Rorison's residence and he was assessed by them. Unfortunately Ivan Rorison refused to go to the hospital for treatment that morning.

[13] As it turned out, Ivan Rorison remained in bed throughout the day on June 1. The following day, Monday, June 2, Wendell Rorison attended at his father's home to check on him and noted that his condition had worsened. He called an ambulance and Mr. Rorison was taken to the hospital in Inverness. Several attempts were made to stabilize his condition so that he could be transferred to a larger centre for further investigation and treatment. Sadly, those attempts were unsuccessful and Mr. Rorison ultimately passed away on the evening of June 2, 2008. Dr. Matthew Bowes, the Chief Medical Examiner for the Province of Nova Scotia, performed an autopsy and concluded that Ivan Rorison died as a result of internal bleeding caused by blunt trauma to his abdomen. Dr. Bowes also noted Mr. Rorison had a peculiar medical condition involving his spleen being tethered

to other parts of his abdomen. It was Dr. Bowes' opinion that, in the absence of this condition, the blows he sustained may not have been fatal.

[14] I am acutely aware, that no sentence this Court can pass, will reverse the events of June 1, 2008. I cannot bring back Ivan Rorison. His death was tragic, unnecessary and was a great loss to his family and community. I have had the benefit of reading the Victim Impact Statement of Mr. Rorison's son, Wendell. It is very obvious that Wendell Rorison has been deeply affected by this incident, and the death of his father. He misses his father, who he describes as having been the "rock" of his family. Mr. Rorison expresses concern about the safety and well being of older people living in the community, and the actions of some younger people who prey upon them. Mr. Rorison asks that this Court consider this in reaching a fit and proper sentence.

[15] I have also had the opportunity to review carefully the Pre-sentence and Gladue reports prepared in relation to Mr. Benson, and his personal circumstances. Beginning first with the Pre-sentence report prepared by Probation Officer Sampson, prepared on September 4, 2009. It discloses that Mr. Benson is of aboriginal heritage, being a member of the Mi'Kmaw people. He has resided for

several years prior to this offence on the Waycobah Reservation. His parents are still alive, residing in what was formerly known as Big Cove, now the Elsipogtog First Nation, and also spending considerable time in Grand Manan, where they are fishers. Mr. Benson maintains regular telephone contact with his parents, and frequent electronic contact with his three siblings.

[16] Family members were contacted, all of whom described Mr. Benson as posing no problems as a child or young adult within the home. He was described as non-aggressive, a helpful person, and a follower as opposed to a leader. His present involvement in the criminal justice system has been a shock to those who know him best.

[17] Mr.Benson completed Grade 9 in Grand Manan and reportedly quit school due to racism and bullying. While there, however, he did well academically. He expressed a desire to complete Grade 12 and potentially obtain a trade. In terms of employment, at the time of the Pre-sentencing report, Mr. Benson was not employed, but was waiting to hear from the Waycobah Band as to potential landscaping jobs. Probation Officer Sampson contacted Ms. Bernard, an Employment Officer for the Band, who reported that Mr. Benson had previously

worked for the Band, and posed no problems. Chief Morley GooGoo reported that he knew Mr. Bernard well, and would be assisting him with searching out employment opportunities. Chief GooGoo spoke highly of Mr. Bernard, indicating that his involvement in this particular offence is entirely out of character for him.

[18] In speaking to Probation Officer Sampson, Mr. Bernard reported that he had been prior to the offence, involved in the regular consumption of drugs, marijuana being his drug of choice. He was also having difficulty dealing with the ramifications of childhood sexual abuse by a stranger, and the trauma surrounding a friend's unexpected death. He expressed a willingness to obtain services to address these issues, which are available to him in his community. Mr. Bernard expressed regret for his actions, not attempting to deny, minimize or rationalize his behaviour.

[19] Ms. Sampson contacted Constable Dinsdale, an RCMP officer who had been stationed in Waycobah for three years. Reportedly, Mr. Benson was never a concern in the community, being described by the Constable as a family man who was a follower amongst his peers. Overall, the Court views the Pre-sentencing report as being positive.

[20] Although the Pre-sentencing report certainly addressed issues relating to Mr. Bernard's aboriginal heritage, this was more fully explored in the Gladue Report prepared by Mary-Ellen Paul of the Mi'Kmaw Legal Support Network. This report discusses Mr. Benson's family history. His father is non-aboriginal, hailing from Grand Manan, New Brunswick. His mother is aboriginal, having been born and raised in Elsipogtog First Nation. Mrs. Clements-Benson did not have an easy childhood, unfortunately marked with many of the troubles sadly existing for far too long in aboriginal communities. Her father was an alcoholic for many years, two brothers were sent to residential school in Shubenacadie, and for significant periods of time, she resided with caregivers other than her parents. As a young woman, she met Theodore Benson, and the two have raised their family, although not without some problems. They are described as being a close family.

[21] Richard Benson's sister was contacted for the purpose of the Gladue report. Sherry Benson viewed her brother as having been a helpful child, always willing to assist their parents or others, including others in the community. She reported that during their childhood, there were frequent arguments between their parents, and

their mother over-indulged in alcohol and would become angry. She believes this has impacted on her brother.

[22] When interviewed, Richard Benson acknowledged the alcohol usage and arguing in his family home was troublesome. However, he has also been greatly impacted by an incident of sexual abuse by a stranger which occurred when he was approximately 10 years old. He had never previously shared this experience, as he felt ashamed and embarrassed by it. He attributes this incident to triggering a change in his behaviour, with him acting out and finding himself in trouble accordingly. While in school in Grand Manan, Mr. Benson reported being constantly bullied by older, non-aboriginal students. They called him hurtful and inappropriate names relating to his aboriginal heritage. For a period of time, Mr. Benson was not even aware of his aboriginal heritage, his mother having decided to keep that from her children due to her own negative experiences growing up within a First Nations community.

[23] By the time Richard Benson turned 18, it is clear that he had not only become aware of his aboriginal heritage, but he fully embraced it. He went to live at Elsipogtog, where he eventually met Danielle Paul and they commenced a

relationship. They ultimately returned to her home community of Waycobah. Mr. Benson reported in the Gladue Report that he was welcomed and accepted by that community, were he became involved and even more in touch with his heritage. He and Ms. Paul have been blessed with four children, with their relationship lasting 8 years. Unfortunately, following the incident that we are dealing with today, their relationship deteriorated. Ms. Paul reported however that Mr. Benson is a good man and a good father.

[24] Mr. Benson described the impact emotionally of having two friends commit suicide in the two years prior to the offence in question. He has never addressed the effects of these tragic events, keeping them bottled up inside. Mr. Benson is noted by the writer of the Report as being remorseful in relation to the outcome of the events of June 1, 2008. He wants to seek services to address his personal issues, and to permit him to be a better father and member of his community.

[25] Again, overall the report is very favourable in terms of Mr. Benson's personal circumstances. At page 23 of the Report in particular, the author has identified a number of Gladue factors which apply in particular to Mr. Benson, in that writer’s opinion.

[26] The Court must turn its mind now to one serious factual discrepancy, that involving whether or not Mr. Benson, when leaving the Timmons' home on the night in question, was aware that there was a plan amongst some members of the group to rob Mr. Rorison. The Crown has directed the Court's attention to a particular passage at page 21 of the Gladue report which states:

> Mr. Benson reported while at the party he overheard the group of friends make plans to visit the bootlegger [the victim of this offence]. He recalled a trip was made and the beer was brought back to the house. Mr. Benson stated, "I only had two beers at the house". He recalled after the beer was gone the group decided to go back to the victim's home only this time to rob him. Mr. Benson reported while the group was still talking he was asked by Ms. Bernard to check on her boyfriend, who was passed out in the truck. He stated, "When I got back in the house my friends had already left and were walking down the road". He said, "I stopped to tie my shoe and they hollered for me to hurry up. After that I ran to catch up. I went with them to the house but had no intention of touching the man".

[27] It is submitted that this passage shows that Mr. Benson was aware of the intent to rob Mr. Rorison, and the Crown further points to the fact that Mr. Benson was aware, or should have been aware, that the group had no money to purchase anything on the second trip. At a minimum, it is submitted by the Crown, Mr. Benson was willfully blind to the purpose of the trip. He should have known the group had an intention to rob.

[28] Mr. Benson testified that he was not aware of any intention to rob Mr. Rorison, that he simply thought the group was proceeding to purchase more alcohol. Mr. MacDonald argues Mr. Benson's evidence in this regard is unrefuted, and the Court should not place undue weight on the fact that money was scarce for the first purchase. The Court should not conclude that because of that, it should be accepted that Mr. Benson must have been aware of an intent to rob. Mr. MacDonald also encourages this Court to interpret the concerning provision in the Gladue report with the view that such a comment was made significantly past the event in question, and Mr. Benson may simply have been referencing what became known to him, after the fact.

[29] When faced with a factual discrepancy, it must be remembered that the burden of proof remains on the Crown, which is of course, beyond a reasonable doubt. If there is a doubt, it must be resolved in favour of the accused. Frankly, the Court is concerned with the above noted comment, and as I have previously made clear in my comments today, I view it as being a very important consideration impacting on the sentence to be imposed. I have considered that the report was prepared by a professional person, and that Mr. Benson was noted as

being co-operative and forthcoming in the provision of information. In light of that, I ask, why would such a comment be in the report if it was not said?

[30] Mr. Benson's counsel has provided an alternate view of how to interpret that passage. In line with this argument, the Court has further noted that the author of the report, both in that passage and many other places within the report, utilizes quotation marks when referencing direct quotes from the persons interviewed. This technique is not used in relation to the particular sentence of most significance, thus raising in my mind the possibility that the actual statement made by Mr. Benson was something other than what is being suggested by the Crown. This, along with Mr. Benson's unrefuted evidence that he was unaware of any intent to rob Mr. Rorison, leaves me with a reasonable doubt as to what was intended in that particular passage of the Gladue report, and what exactly Mr. Benson did convey to the author. As such, I do not consider that the Crown has proven beyond a reasonable doubt that Mr. Benson was aware in advance of the events in question, and specifically, of any plan to rob Mr. Rorison.

THE LAW:

[31] As noted above, Richard Benson plead guilty to one charge of manslaughter. Section 236(b) of the Criminal Code states:

> 236 Every person who commits manslaughter is guilty of an indictable offence and liable
>
> (b) in any other case, to imprisonment for life.

[32] Given the nature of the involvement of Mr. Benson in the events of the evening in question, Section 21 of the Criminal Code is also relevant and it reads:

> 21.(1) Every one is a party to an offence who
>
> (a) actually commits it;
> (b) does or omits to do anything for the purpose of aiding any person to commit it; or
>
> (c) abets any person in committing it.

[33] It is essential in determining fit and appropriate sentences in these circumstances that the Court consider the fundamental principles of sentencing. These have been pointed out to me by Counsel in their submissions and have been enunciated many times by Courts, and adopted by Parliament by virtue of sentencing provisions contained in the Criminal Code.

[34] Counsel are well aware that Section 718 addresses the fundamental purpose of sentencing. It reads:

> 718. The fundamental purpose of sentencing is to contribute, along with crime prevention initiatives, to respect for the law and the maintenance of a just, peaceful and safe society by imposing just sanctions that have one or more of the following objectives:
>
> (a) to denounce unlawful conduct;
>
> (b) to deter the offender and other persons from committing offences;
>
> (c) to separate offenders from society, where necessary;
>
> (d) to assist in rehabilitating offenders;
>
> (e) to provide reparations for harm done to victims or to the community; and
>
> (f) to promote a sense of responsibility in offenders, and acknowledgment of the harm done to victims and to the community.

[35] Further, as a fundamental principle to be considered in rendering sentence, Section 718.1 reads:

> 718.1 A sentence must be proportionate to the gravity of the offence and the degree of responsibility of the offender.

[36] Section 718.2 sets out a number of other principles which the Court must consider and I have done so, most notably the following:

718.2 A court that imposes a sentence shall also take into consideration the following principles:

(a) a sentence should be increased or reduced to account for any relevant aggravating or mitigating circumstances relating to the offence or the offender, and, without limiting the generality of the foregoing,

(i) evidence that the offence was motivated by bias, prejudice or hate based on race, national or ethnic origin, language, colour, religion, sex, age, mental or physical disability, sexual orientation, or any other similar factor,

(ii) evidence that the offender, in committing the offence, abused the offender's spouse or common-law partner,

(ii.1) evidence that the offender, in committing the offence, abused a person under the age of eighteen years,

(iii) evidence that the offender, in committing the offence, abused a position of trust or authority in relation to the victim,

(iv) evidence that the offence was committed for the benefit of, at the direction of or in association with a criminal organization, or

(v) evidence that the offence was a terrorism offence

shall be deemed to be aggravating circumstances;

[37] Although I will outline some aggravating circumstances further in this decision, none of the above-noted instances I have just cited apply in this particular instance to Mr. Benson. Section 718.2(b) states:

> (b) a sentence should be similar to sentences imposed on similar offenders for similar offences committed in similar circumstances;

[38] Subsection (c) relates to consecutive sentences, and is not relevant to this particular matter. I therefore move on to subsections (d) and (e) which in my view, are important to consider. They read:

> (d) an offender should not be deprived of liberty, if less restrictive sanctions may be appropriate in the circumstances; and
>
> (e) all available sanctions other than imprisonment that are reasonable in the circumstances should be considered for all offenders, with particular attention to the circumstances of aboriginal offenders.

[39] Section 718.2(e) as noted above requires special consideration to be given when sentencing those individuals of aboriginal background. That is obviously a necessary consideration in the present case.

[40] The Supreme Court of Canada in the seminal decision of ***R. v. Gladue*** [1999] 1 S.C.R. 688 has provided not only a detailed analysis of the purpose of that subsection, but also direction to sentencing judges as to how an offender's aboriginal heritage is to be considered in reaching an appropriate disposition. It is clear however, that the ***Gladue*** factors cannot be considered in isolation nor be taken as the primary guide to sentencing an aboriginal offender.

[41] I have noted in particular the approach of the Supreme Court, as outlined in paragraphs 75, 80, 81 and 85 of the ***Gladue, supra*** decision. They read:

> 75. The role of the judge who sentences an aboriginal offender is, as for every offender, to determine a fit sentence taking into account all the circumstances of the offence, the offender, the victim, and the community. Nothing in Part XXIII of the Criminal Code alters this fundamental duty as a general matter. However, the effect of s. 718.2(e), viewed in the context of Part XXIII as a whole, is to alter the method of analysis which sentencing judges must use in determining a fit sentence for aboriginal offenders. Section 718.2(e) requires that sentencing determinations take into account the unique circumstances of aboriginal peoples.
>
> 80. As with all sentencing decisions, the sentencing of aboriginal offenders must proceed on an individual (or case-by-case) basis: For this offence, committed by this offender, harming this victim, in this community, what is the appropriate sanction under the Criminal Code? What understanding of criminal sanctions is held by the community? What is the nature of the relationship between the offender and his or her community? What combination of systemic or

background factors contributed to this particular offender coming before the courts for this particular offence? How has the offender who is being sentenced been affected by, for example, substance abuse in the community, or poverty, or overt racism, or family or community breakdown? Would imprisonment effectively serve to deter or denounce crime in a sense that would be significant to the offender and community, or are crime prevention and other goals better achieved through healing? What sentencing options present themselves in these circumstances?

81. The analysis for sentencing aboriginal offenders, as for all offenders, must be holistic and designed to achieve a fit sentence in the circumstances. There is no single test that a judge can apply in order to determine the sentence. The sentencing judge is required to take into account all of the surrounding circumstances regarding the offence, the offender, the victims, and the community, including the unique circumstances of the offender as an aboriginal person. Sentencing must proceed with sensitivity to and understanding of the difficulties aboriginal people have faced with both the criminal justice system and society at large. When evaluating these circumstances in light of the aims and principles of sentencing as set out in Part XXIII of the Criminal Code and in the jurisprudence, the judge must strive to arrive at a sentence which is just and appropriate in the circumstances. By means of s. 718.2(e), sentencing judges have been provided with a degree of flexibility and discretion to consider in appropriate circumstances alternative sentences to incarceration which are appropriate for the aboriginal offender and community and yet comply with the mandated principles and purpose of sentencing. In this way, effect may be given to the aboriginal emphasis upon healing and restoration of both the victim and offender.

88. But s. 718.2(e) should not be taken as requiring an automatic reduction of a sentence, or a remission of a warranted period of incarceration, simply because the offender is

> aboriginal. To the extent that the appellant's submission on affirmative action means that s. 718.2(e) requires an automatic reduction in sentence for an aboriginal offender, we reject that view. The provision is a direction to sentencing judges to consider certain unique circumstances pertaining to aboriginal offenders as a part of the task of weighing the multitude of factors which must be taken into account in striving to impose a fit sentence. It cannot be forgotten that s. 718.2(e) must be considered in the context of that section read as a whole and in the context of s. 718, 718.1, and the overall scheme of Part XXIII. It is one of the statutorily mandated considerations that a sentencing judge must take into account. It may not always mean a lower sentence for an aboriginal offender. The sentence imposed will depend upon all the factors which must be taken into account in each individual case. The weight to be given to these various factors will vary in each case. At the same time, it must in every case be recalled that the direction to consider these unique circumstances flow from the staggering injustice currently experienced by aboriginal peoples with the criminal justice system. The provision reflects the reality that many aboriginal people are alienated from this system which frequently does not reflect their needs or their understanding of an appropriate sentence.

POSITION OF THE CROWN:

[42] The Crown submits that a fit and appropriate sentence in these circumstances is 5 years. Ms. McGrath, while acknowledging some mitigating factors relating to Mr. Benson, such as his lack of a previous criminal record and the time it has taken to have this matter resolved, argues the Court should be concerned with the context of the offence, in that it was a home invasion and points

to the fatal outcome. She also asserts that the Court should be mindful of the series of choices Mr. Benson made which prompted his involvement before the Court, from choosing to enter the home once others had broken in the door, to choosing to remove alcohol, to choosing to accept $20 from the victim's wallet.

[43] The Crown is further seeking firearm prohibitions, as well as a DNA order for the primary designated offence of manslaughter.

POSITION OF MR. BENSON:

[44] Mr. MacDonald has ably highlighted to the Court a number of positive aspects regarding Mr. Benson, and the nature of his involvement in the events of June 1, 2008. He asserts that there are many mitigating factors which should be considered by the Court, and when also combined with a consideration of the Gladue factors, that a sentence of 2 years would be a fit disposition in the present instance. The Court was advised that Mr. Benson has spent 40 days on remand prior to being released, and Mr. MacDonald asserts that double credit should be given for this time, given the time of the offence.

DISPOSITION:

[45] I turn now to consider what is an appropriate disposition in all of the circumstances of this matter, and this offender. I recognize that Mr. Benson did not participate in the physical assault against Mr. Benson. I am not satisfied that he was aware of any plan to execute a robbery. However, even with that in mind, the Court must consider that matters quickly developed which would have, and should have, triggered Mr. Benson to view matters as having taken on a much more serious hue.

[46] Mr. Benson, after others chose to forcibly break down the door, had his own choice to make. He could have chosen to leave immediately, but he did not. I have no doubt at all that this is a decision that he greatly regrets. As we know, Mr. Benson chose to enter the house. He chose to assist in the removal of beer, and he chose to accept $20 from Mr. Rorison's wallet. Mr. Benson may not have instigated or planned the situation he found himself in, but once in the midst of it, the choices he made were bad ones.

[47] I am mindful of the fact that Mr. Benson is not being sentenced in relation to a home invasion. However, the Court must in determining a fit and appropriate sentence, also be mindful of the context in which the offence occurred. It cannot be ignored that Mr. Benson and the others with him, were involved in entering the home of an individual in the early morning hours, who's door was locked and lights were out.

[48] I have considered the comments of MacDonald, J. in the sentencing of co-accused Mr. MacKinnon in July of 2009. I referenced those comments in the sentencing I undertook of co-accuseds Brandy and Kyle Timmons in September of 2010. I agreed then, and I agree now with MacDonald, J. when he states:

> People have the right to feel secure in their own homes and they should feel freedom therein without the fear that some young persons who are out partying will break in and attack and rob them. Older individuals have few of the modern security devices, I suggest, and most often they live alone. No matter if injured or not, these break-ins into older persons' homes are always terrifying and traumatic to older people. They are often left with a total loss of any sense of security afterwards.

[49] In passing sentence, I must also consider mitigating and aggravating circumstances. I find as aggravating the following:

> Mr. Benson chose to actively participate in entering the home and removing property therefrom, invading the sanctity of the Rorison home once initiated by others;
>
> Mr. Benson accepted and kept money from the victim's wallet;
>
> Mr. Rorison died as a result of the injuries inflicted upon him.

[50] Defence Counsel has submitted the presence of a number of mitigating factors. Counsel for the Crown has also acknowledged the existence of some mitigating factors. I accept as mitigating factors the following:

> Mr. Benson plead guilty, thus avoiding the necessity for a trial;
>
> Given the time frame involved for the preparation of the Gladue report, there has been a delay in sentencing, which I expect would cause distress for Mr. Benson waiting for the outcome of the Court’s decision today;
>
> Mr. Benson did not physically assault the victim;
>
> Mr. Benson did not intend for harm to befall Mr. Rorison, and most certainly did not intend for his death to result;
>
> No weapon was involved in the commission of the offence;
>
> Mr. Benson has absolutely no previous history or involvement with the criminal justice system whatsoever.

[51] I accept that Mr. Benson is genuinely remorseful for his actions and in particular, the consequences for Mr. Rorison and his family. I accept that it is highly unlikely that Mr. Benson will re-offend.

[52] As required, I have also considered the principle of parity in sentencing. I have considered the sentence imposed of 7 years by Justice MacDonald in relation to Mr. MacKinnon. The Crown, in recommending 5 years for Mr. Benson, appears to concede that the aggravating circumstances which were present in relation to Mr. MacKinnon do not apply to Mr. Benson. I agree. I am obviously well aware of the circumstances of Ms. Timmons and Mr. Timmons, having sentenced them to 3 and 3 1/2 years respectively in September of 2010.

[53] The circumstances relating to Mr. Benson are, in my view, quite similar to that of Mr. and Ms. Timmons. As Counsel will be well aware, neither of those individuals participated in a physical assault against the victim, nor were they aware of a plan to rob Mr. Rorison. I do view there as being an important difference however, between those co-accused and Mr. Benson. Neither Mr. Timmons nor Ms. Timmons were the beneficiaries of any of the stolen property, including money, unlike Mr. Benson. I view this as being more concerning than the circumstances of his co-accuseds. As Counsel are also well aware, I determined that a sentence of less than 2 years was inappropriate in relation to both Mr. and Ms. Timmons and my reasons for that are fully outlined in my decision

reported ***R. v. Timmons, 2010 NSSC 456***. For the purpose of this sentencing, I adopt the same reasoning.

[54] If I was to end my consideration at this stage, based on all of the factors I have discussed so far, I would find a suitable and fit sentence in the circumstances to be in the range of 4 years, however, the Court must turn its mind to the final consideration, that mandated by Section 718.2(e) of the Criminal Code.

[55] I must carefully assess the impact, if any, on the appropriate sentence in this instance as a result of Mr. Benson's aboriginal heritage, and more particularly on the existence of ***Gladue*** factors. I accept that there are a number of factors which should be considered in relation to the sentencing of this particular aboriginal offender. They are as follows:

> - the existence of substance abuse, both personally, and within his family and community;
>
> -the experiencing of overt, and likely covert, racism in his community, most notably when he was a child;
>
> -the experiencing of sexual abuse;
>
> -the witnessing of domestic violence in the form of verbal altercations, within his family of origin;
>
> -unemployment and lack of employment opportunities; and

> -social issues affecting his community, in particular instances of suicide amongst his peer group.

[56] Mr. Benson, prior to sentencing you sir, I want to make very clear to you, and to all those present, that this Court does not view you as being a bad person. You are a good person who became involved in a bad situation and you made wrong choices. It is clear from the material that I have read, that your family, members of your community and others think very highly of you. They believe in you and they will continue to do so. I think that the fact that you have, other than this matter, avoided any type of involvement with the criminal justice system, speaks loudly not only to your character, but to the potential you have for a positive future. You have much to offer to your community - if you choose to, you can be a role model for others, who may decide to make different and better choices because of what you have experienced. Most importantly, you are an essential component to the success of your children in navigating through this life, which we all know, can be difficult and full of many hurdles and obstacles. It is an unfortunate reality that because your children are also of aboriginal heritage, it is highly likely that they will face more difficult obstacles and more difficult hurdles than many other children do. It is essential and important for your children to have a positive and strong male role model in their life and there is no one any better

than you, suited for that job. I would ask that you focus on your children and that they need you to be a positive presence for them, in what may be the difficult days to come.

[57] Mr. Benson, can you stand please. Richard James Benson, considering the facts, your personal situation, the law and my comments above, on the charge of manslaughter, I sentence you to three and a half years of incarceration. You are to receive credit for time spent in remand, and given the timing of this offence, I feel it is appropriate that that credit is on a 2 for 1 basis.

[58] I further impose pursuant to Section 109 of the Criminal Code, a prohibition against you possessing any firearm, other than a prohibited firearm or restricted firearm, and any cross-bow, restricted weapon, ammunition and explosive substance for a period of 10 years.

[59] I further impose a lifetime prohibition from you possessing any prohibited firearm, restricted firearm, prohibited weapon, prohibited device and ammunition.

[60] I further make a DNA order pursuant to Section 487.051 of the Criminal Code for the primary designated offence of manslaughter.

[61] That is my decision in this matter. I wish you luck, Mr. Benson, and hope your future is bright and positive. I wish to thank Counsel again for their most helpful and appropriate representations in this difficult matter.

J.