SUPREME COURT OF NOVA SCOTIA
Citation: *R. v. Cox*, 2022 NSSC 200

Date: 20220721
Docket: CRH 505889
Registry: Halifax

Between:

Her Majesty the Queen

v.

Kaz Henry Cox

SENTENCE DECISION

Judge: The Honourable Justice Jamie Campbell

Heard: June 28, 2022, in Halifax, Nova Scotia

Counsel: Rick Woodburn and Scott Morrison, for the Crown
Kaz Cox, self-represented

By the Court (Orally):

[1] Kaz Cox is being sentenced for his part in the assault of Stephen Anderson at the Central Nova Scotia Correctional Facility in Burnside on December 2, 2019. He has been found guilty of aggravated assault.

[2] After two trials 11 other people involved in that incident have also been found guilty of aggravated assault and one of obstruction. The person found guilty of obstruction has been sentenced, *R. v. Nagendran*, 2022 NSSC 14. Six of the people found guilty of aggravated assault have been sentenced, *R. v. Ladelpha*, 2021 NSSC 352, *R. v. McIntosh*, 2021 NSSC 351, *R. v. Clarke-McNeil*, 2022 NSSC 63, *R. v. Mitton* 2022 NSSC 123, *R. v. Hardiman*, 2022 NSSC 198, and *R. v. Crawley*, 2022 NSSC 199. Mr. Ladelpha was sentenced to 6 years, Mr. McIntosh to 5½ years, Mr. Clarke-McNeil to 6 years, Mr. Mitton to 6 years, Mr. Hardiman to 6 years, and Mr. Crawley to 5 years.

[3] As with the others, Mr. Cox's sentence should not be set only in reference to those sentences, but the sentencing principle of parity must be acknowledged. Mr. Cox was not one of the people who entered Stephen Anderson's cell. Each of Mr. Ladelpha, Mr. Hardiman, Mr. McIntosh, Mr. Clarke-McNeil, Mr. Mitton, Mr. Carridice, and Mr. Crawley entered the cell in which Stephen Anderson was assaulted. Mr. Cox did not. He was involved in the planning and in the effort to prevent correctional officers from intervening to stop the assault that was in progress when they arrived. Mr. Cox's personal circumstances are unique to him. But each of the people convicted of the aggravated assault on Stephen Anderson were part of the group, the same crime, on the same victim, at the same time. Fairness would require some explanation for why Mr. Cox's sentence should be different when he participated in the same offence as the others. That is not to suggest that parity is presumed to be the governing or most important factor. It is nevertheless a factor that is brought into sharper focus in the circumstances of this case in which a group of people were involved in the commission of the same offence at the same time.

[4] In the trial of this matter Mr. Cox represented himself. He has chosen to represent himself at the sentencing as well. The *Gladue* Report that was prepared for an earlier matter has been brought forward for reference in this file.

Criminal Record

[5] Kaz Cox has been found guilty of First-Degree murder in the death of Triston Reece. That murder took place on July 26, 2019, before this offence took place. The sentence for that offence is set by the *Criminal Code* as life imprisonment with no eligibility for parole for 25 years. I imposed that sentence on June 21, 2022. Parole eligibility with respect to the life sentence is calculated from the date on which he was taken into custody for that offence, November 15, 2019.

[6] But Mr. Cox had been arrested before that. He was arrested in August of 2019, after his car was stopped near Bridgewater and he was found in possession of cocaine and had possession of a loaded, prohibited firearm. He was placed on remand at the Central Nova Scotia Correctional Facility pending trial in that matter. While there, he was arrested on November 15, 2019, for the murder of Triston Reece. He was on remand for the drug and firearms charges and for the murder charge when the assault took place on Stephen Anderson.

[7] Kaz Cox has a lengthy criminal record. He was found guilty with respect to the charges of possession of drugs for the purpose of trafficking and several firearms offences in Bridgewater and sentenced to 6 years and 6 months, *R. v. Cox*, 2022 NSSC 95. He has more than 66 criminal convictions during the period from 1995 to 2022. His criminal record reaches back to when he was a youth. He spent time in youth detention facilities. Mr. Cox's record includes 4 firearms or weapons convictions, 13 drugs related convictions, 27 breaches of various kinds, 5 property related convictions, 11 *Criminal Code* driving convictions, multiple breaches of court orders and undertakings, and several violent offences.

[8] Mr. Cox was convicted of escaping lawful custody for an offence dated May 5, 2006. In June 2008 he was sentenced for an assault and assault causing bodily harm. He served a sentence of 18 months incarceration.

[9] In August 2009 he was sentenced for possession of drugs for the purpose of trafficking. He was sentenced to three years in federal custody.

[10] In June 2013 he was sentenced for production of a substance and possession of drugs for the purpose of trafficking. He was sentenced to 16 months.

[11] Mr. Cox told the writer of the *Gladue* Report that from the ages of 18 to 42 he spent most of the time incarcerated. That may be somewhat of an exaggeration but if it is, it makes the point. Mr. Cox's record is very long. And he has spent considerable periods of his life in institutions.

Gladue Report

[12] The *Gladue* Report was prepared by the Mi'kmaq Legal Support Network. The information in the report was collected from 4 in-person interviews with Mr. Cox, and interviews with his mother Valerie Llewelyn, and his sister Joanne Gibson. Olivia Zinck, the mother of one of his children, was interviewed for an earlier report and her previous comments were referenced in the report. A genealogy report was prepared by the Native Counsel of Nova Scotia, and it showed no link to indigenous ancestry. The writer of the *Gladue* Report, Keah Googoo-Gloade noted however that "there is sufficient oral history within the family to continue with this report".

[13] *Gladue* Reports are prepared to provide courts with some insight into the circumstances of indigenous people who have been convicted of criminal offences. They contain historical context, and that information is, not surprisingly, consistent from one report to the next. They provide information about the person's own circumstances and address how those have been affected by that person's culture or the person's separation from that culture. A person who is indigenous but who has not grown up in an indigenous community is entitled to have a *Gladue* Report prepared to identify how separation from indigenous culture and community have affected them.

[14] Kaz Cox's genealogy does not show a link to the Mi'kmaq people. But he identifies as being Mi'kmaq. And for several reasons the writer of the report concluded that Kaz Cox is indigenous.

[15] Mr. Cox reported on the hardships of living with neglect and abuse in the home. He said that he remembered his father being around before he was school aged but that he was no longer there once Mr. Cox started school. He said that he was repeatedly physically and sexually abused when he was perhaps 5 or 6 years old. He said that he did not have a lot of memories of his father but those he did have involved hiding under the bed when the police were talking with his mother.

[16] By the time Mr. Cox was 8 years old he was being shuffled around like he didn't belong anywhere. He used to ride his bike to his maternal grandmother's home so that he would not have to be in the house when people were visiting and drinking. He reported that went on until he was about 12 years old. He ended up in Shelburne in youth detention and after that became transient.

[17] Mr. Cox said that his mother's father drank every day and since he was old enough to drink, he began hanging out there. Mr. Cox said that his grandfather was "visibly Native" and one of Mr. Cox's friends was making jokes, drinking, and saying Mi'kmaq words to him. He said that his grandfather started to cry, and he had not seen him cry before. He said that he was "pretty sure" that his grandfather was from the Grand Pre First Nation (now Glooscap First Nation). He said, "I really don't know because there was a lot of secrecy in my family and no one talked about anything, everything I know is what I had to find out on my own."

[18] When asked about a family history surrounding residential schools Mr. Cox again mentioned the extreme level of secrecy within the family. He said that he distinctly remembered that his maternal grandmother had gone to school in Shubenacadie. There were no records to verify that. His mother noted that many of the family members attended residential schools in other provinces and there is an oral history on both sides of his mother's family that are reported as being consistent with several factors that are often seen in Indigenous families.

[19] The writer of the *Gladue* Report also notes that "Kaz is visibly bi-racial, being of both Indigenous and Black ancestry."

[20] It would appear as though Mr. Cox's life experiences are used to confirm his Indigenous ancestry. He was placed in temporary foster care as a child. The writer of the *Gladue* Report notes that Indigenous children are placed in care at a higher rate than others. Mr. Cox experienced violence and abuse in the home. As noted in the report, aboriginal children suffer disproportionately from violence and abuse. Mr. Cox used alcohol and drugs and the writer of the report notes that alcohol and drug abuse are problems in First Nations communities. The writer observes that mental health issues are "abundant in Indigenous communities with suicide being a central concern". There are concerns expressed for Mr. Cox's mental health and he has attempted suicide in the past. He reported that he has been told that he has anxiety disorder and post traumatic stress disorder. He is a regular user of alcohol, marijuana and cocaine, and Ms. Googoo-Gloade notes that addictions are a significant issue in Indigenous communities.

[21] Mr. Cox has been incarcerated so much that he has not really had much of an opportunity to develop a work record. His last record of employment was as a sewer/water pipe installer in 2014/2015. Again, aboriginal people have historically faced higher levels of unemployment.

[22] Mr. Cox has a significant criminal record. Aboriginal men represent a disproportionate number of those in the prison system.

[23] Kaz Cox's personal history and life circumstances are used to infer that he is Indigenous.

[24] Mr. Cox was asked about his experience with racism in his daily life. He talked about experiencing it in school and throughout his life. Mr. Cox has negative feelings toward the police and believes that he has been targeted because of his race.

[25] One need not accept a strictly deterministic approach to appreciate that Kaz Cox has been affected by circumstances that have acted upon him. And one need to take on board an entirely "free will" approach to understand that Kaz Cox has made choices in his life that have contributed to bringing him to this point. Those circumstances acting upon him as a child and young person put him in a position to have to make decisions that others do not have to make. And later, as an adult, he has made decisions that have put him in circumstances that have negatively impacted his life.

***R. v. Anderson*, 2021 NSCA 62**

[26] The practical challenge is how all that information factors into the individualized sentence to be imposed in this case. Mr. Cox is not sentenced as part of a group, as a representative of anything or of any group, or as a person who is identified as belonging to any race or any culture. Kaz Cox is sentenced as Kaz Cox. But that requires an understanding of and appreciation of the context of who he is and the life experiences that have helped to make him who he is. In Mr. Cox's case a *Gladue* Report was prepared. Although he also identifies as African Nova Scotian, no Impact of Race and Culture Assessment (IRCA) was prepared. Mr. Cox did not want one.

[27] *Gladue* Reports and IRCA's each provide information to sentencing judges to allow them to sentence people as the individuals they are. They do not operate as a sentencing "discount" so that a person is sentenced more leniently because of their identification with a race or culture. By encouraging a sentencing process that takes into account a person's circumstances, defined more broadly to include the historical background of the community with which they identify, a sentence is more individualized.

[28] If the report does not act as a sentencing discount, it may fairly be asked, "What does it act as?" If a judge should not set a sentence that but for the presence of the factors set out in the *Gladue* Report or the IRCA would be imposed, and then reduce the sentence to account for those factors, how can the use of the report be meaningful at all? What in that case is to prevent a judge from acknowledging those factors in passing, saying they have been given "due consideration" and then imposing the sentence that would have been imposed in the absence of the factors set out in the report? And, if the contents of the reports are to be used to understand the life circumstances that have contributed to bringing the person before the court, to what extent should there be a requirement to show a causal nexus between those life circumstances and the commission of the offence?

[29] Sentencing is not meant to be easy. And it is not meant to be simple. For every aphorism like "Let the punishment fit the crime" there are both exceptions and other things that must be considered. Applying the purposes and principles of sentencing set out in the *Criminal Code* does not involve generating a fit sentence through a mathematical calculation. A fit sentence is the result of the use of moral sense guided by law. That can never be simple.

[30] *Gladue* Reports and IRCA's fit into that already complicated and troubling process and make it, appropriately, more complicated, and more troubling. And they make for a more contextualized and more nuanced process.

[31] In *Anderson* the Court of Appeal said that it is not enough for a trial judge to cite the information contained in a report and then generate a sentence. The trial judge's reasons must allow the Court of Appeal to determine that proper attention was given to the circumstances of the offender. Presumably that does not mean that the trial judge must set out what the sentence would have been but for the presence of those factors. The morally complex act of crafting a sentence cannot, and should not, be reduced to a numerical exercise of accounting for the percentage of the sentence to be attributed that any identified factors.

[32] In *Anderson* the Court noted that the African Nova Scotian Decade for People of African Descent asked the Court to recognize that the social context information supplied by an IRCA, and presumably by a *Gladue* Report as well, can assist the Court in:

- Contextualizing the gravity of the offence and the degree of responsibility of the offender.
- Revealing the existence of mitigating factors or explaining their absence.

- Addressing aggravating factors and offering a deeper explanation for them.
- Informing the principles of sentencing and the weight to be accorded to denunciation and deterrence.
- Identifying rehabilitative and restorative options for the offender and appropriate opportunities for reparations by the offender to the victim and the community.
- Strengthening the offender's engagement with their community.
- Informing the application of the parity principle. "Courts must ensure that a formalistic approach to parity in sentencing does not undermine the remedial purpose of s. 718.2(e)".
- Reducing reliance on incarceration. (*Anderson*, at para. 121)

[33] The Court endorsed that approach.

[34] Sentencing judges must "show our work". We must explain how the *Gladue* Report or IRCA has informed the sentencing process. That does not mean assigning a numerical value to each factor or piece of information and setting out counterfactual scenarios of sentences that might have been imposed but for the presence or absence of a certain factor. It means articulating how those factors have been assessed.

[35] A sentence must be proportional to the gravity of the offence and the moral culpability of the offender. Those two concepts are each part of the principle of proportionality. When assessing moral culpability, the court needs to consider the experiences of the offender. It is **not** a way of denying the moral agency of the offender. People make decisions and there are consequences for them. But everyone is not forced into the situation of having to make the same kinds of decisions.

[36] The question is whether the experiences of the offender also inform the consideration of the gravity of the offence. The Ontario Court of Appeal and the Nova Scotia Court of Appeal have taken somewhat different approaches.

[37] In *Anderson* Derrick J.A. noted that even where the offence is very serious, the impact of systemic racism and its effects on the offender must be considered. The objective gravity of a crime is not the only thing that matters in sentencing determination.

[38] The Ontario Court of Appeal in *R. v. Morris* 2021 ONCA 680 noted that it is important to maintain the distinction between the objective gravity of the crime and the moral responsibility of the person who has committed the crime. They are both aspects of the proportionality analysis. The gravity of an offence takes into account the normative wrongfulness of the act and the harm posed or caused by it. The person's moral responsibility for committing that act is a different thing but also part of the analysis. The gravity of certain kinds of offences requires sentences that emphasize denunciation and deterrence. In *Morris* Fairbairn A.C.J.O. said that the gravity or seriousness of the offence is not diminished by evidence that sheds light on why the person "chose to commit those crimes". Evidence that a person's choices were limited or influenced by their disadvantaged circumstances "speaks to the offender's moral responsibility for his acts and not to the seriousness of the crimes." (para. 76)

[39] The moral culpability of an African Nova Scotian or an Indigenous person convicted of a crime must be "assessed in the context of historic factors and systemic racism". The person's background and social context may have a mitigating effect on moral blameworthiness. Sentencing judges are required to consider the impact that social and economic deprivation, historical disadvantage, diminished and non-existent opportunities, and restricted options may have had on a person's moral responsibility.

[40] In *R. v. Ipeelee*, 2012 SCC 13, the Supreme Court of Canada directly addressed the issue of moral culpability or moral agency. The circumstances of Indigenous people convicted of crimes may involve social and economic deprivation, a lack of opportunities and limited options for positive development. That may not ever reach a level at which it could be said that their actions are not voluntary, the reality is that their circumstances diminish their moral culpability. The Court cited Greckol J. of the Alberta Court of Queen's Bench at para. 60 of *R. v. Skani*, 2002 ABQB 1097, 331 A.R. 50 (*Ipeelee*, at para. 73). After describing the background factors that lead to Mr. Skani coming before the court, the judge observed that "[f]ew mortals could withstand such a childhood and youth without becoming seriously troubled." The failure to take those circumstances into account would violate the principle that the sentence must be proportionate to the gravity of the offence and the degree of responsibility of the offender.

[41] The assessment of moral responsibility or culpability is driven by context. And context is now much broader than it used to be. Whether a clear demarcation is identified between gravity of the offence and moral blameworthiness of the

person who commits it, is a distinction that in some cases may be important. The gravity of the offence may be such that issues of moral culpability of the individual may be less emphasized in the sentencing process.

[42] When mitigating factors are identified it must be acknowledged that everyone does not have the same opportunities. Sometimes the presence of a job and a potentially productive career, or a stable family, may operate in mitigation of sentence. In communities in which jobs are particularly hard to come by and for racial groups who have suffered discrimination in hiring and education, the absence of that mitigating factor should be understood in the context. Where family violence, addiction and family instability are more common, the absence of a stable family environment must also be contextualized.

[43] Aggravating factors must receive that same kind of contextualizing attention. A criminal record may be an aggravating factor in sentencing. First Nations men are disproportionately incarcerated. Unless the criminal record is considered in the context of the *Gladue* Report, it becomes part of a catalytic process. First Nations men are disproportionately sentenced to jail. Serving time in jail makes it more likely that a person will be sentenced to jail again. And that sentence becomes a potentially aggravating factor the next time.

[44] For serious crimes and crimes of violence, denunciation and deterrence are important and often are considered the most import principles of sentencing. When judges consider the principles of sentencing, we are required to specifically consider the weight to be given to each of them, after considering the information provided in the IRCA or *Gladue* Report. For Indigenous people and African Nova Scotians, it appears as though the application of the principles of denunciation and deterrence must be weighed against the efforts aimed at addressing the overrepresentation of those groups within the prison system. When incarceration is used to denounce forms of criminal behaviour or to deter others, it must be understood that this comes at a cost not only to the individual who is sentenced but to the community of which they are a part. Denunciation and deterrence remain applicable principles. They may have to be applied to respond to serious crimes. But, without diminishing the seriousness or gravity of the offence a judge may conclude having regard to the social context that the fundamental purpose of sentencing might be best served by placing more emphasis on rehabilitation than on deterrence. The sentence must ultimately remain proportional to the offender and the offence.

[45] Judges are required to use IRCA's and *Gladue* Reports to identify rehabilitative and restorative options for sentencing. That requirement may not apply only to less serious offences. Aspects of a person's life that may lead a judge to infer that they are not a candidate for a rehabilitative sentence will often be features of their background and social context.

[46] In any case a sentencing judge must use the IRCA or *Gladue* Report to consider ways in which the person's engagement with their community may be strengthened. Presumably, in some cases, that will involve recommendations about the kinds of programming that should be made available whether as part of a custodial or non-custodial sentence.

[47] The *Gladue* Report and IRCA should be used to "inform" the application of the parity principle. Parity is a principle that is grounded in the sense of fairness. And part of fairness is the even handed treatment of everyone. If two people commit the same crime, in the same way, they should receive the same sentence if they are similarly situated. The last part of that sentence is important. People are not given uniform sentences for particular crimes, unless they are prescribed by statute. People are sentenced having regard to their circumstances.

[48] When a person's background and social context are considered that may result in a sentence being imposed that is different to the sentence imposed on another person from a different background. The principle of parity should not be accorded such outsized significance that allows it to act as an obstacle to the effective use of the IRCA or *Gladue* Report. That does not mean that parity, as a principle is discarded. It does mean that it must be applied with the appreciation of the fact that fair and equal are not always the same.

[49] The Supreme Court of Canada in *Ipeelee* addressed the criticism that the use of the information contained in a *Gladue* Report would create a system of race based sentencing in which unjustified distinctions would be made between people who are otherwise similarly situated. The Court noted that similarity is "sometimes an elusory concept." (para. 78)

[50] Similarity is a "matter of degree". No two people are sentenced with the same background and experiences, having committed the same crime in the exact same circumstances. Any disparity between sanctions for different offenders must be justified. When *Gladue* factors are considered there may be different sanctions for Indigenous people who have been convicted of crimes. But those sanctions

must be justified based on their unique circumstances which are rationally related to the sentencing process.

[51] The Supreme Court of Canada in *Ipeelee* noted that while on the surface imposing the same penalty for the nearly identical offence is fair, the Court accepted that it might be closer to the truth in a society that is more equitable, more homogenous, and more cohesive than ours. In a diverse society the same treatment can result in different impacts. Courts were cautioned about having an excessive concern for parity in sentencing.

[52] Kaz Cox's connection with the Mi'kmaw community is not such that he has lived on a reserve or been immersed in the culture or language. The consideration of the information contained in *Gladue* Reports is not limited to those who have that shared experience. If it were, those whose parents or grandparents were removed from their communities by various authorities and who had been separated from their culture, perhaps for some generations, would have no consideration of that loss and separation brought to their sentencing.

Burnside Incident

[53] Mr. Cox was one of the people who had gathered in Cell 28 minutes before the assault on Stephen Anderson. Cell 28 was his cell. That was where the planning took place for the assault.

[54] Mr. Cox did not enter Stephen Anderson's cell where the assault took place. He was involved in the coordinated action of blocking access by the correctional officers who sought to intervene to protect Mr. Anderson by stopping the assault.

[55] Mr. Cox waited by the phones in the dayroom and walked across the room with two others as the officers approached. Mr. Cox can be seen on the security camera video recording confronting the officers and physically blocking their access to Mr. Anderson's cell. He knew that an assault was taking place in the cell.

[56] This was a planned and coordinated attack within a jail. The rule of law applies there. Prison culture cannot be permitted to take its place. The safety of inmates and staff demands that the rule of law run to the internal working of correctional facilities of all kinds.

[57] The inmates involved ganged up on and assaulted Stephen Anderson and did that in a way designed to prevent correctional officers from intervening.

Sentencing Principles

[58] There have been other cases that have addressed sentencing in individual assaults within a prison. They can range from 3.5 years to 10 years in length. All stress the importance of deterrence. *R. v. McNeil*, 2020 ONCA 595, *R. v. Laverdiere*, 2020 ABCA 290, *R. v. Slade*, 2007 NBQB 415, and *R. v. Thompson*, 2017 NBQB 81.

[59] Mr. Cox has noted the Ontario case of *R. v. Barton*, 2016 ONSC 1574. That was a sentencing for an aggravated assault that took place inside the Toronto East Detention Centre. Mr. Barton participated in a "vicious and plainly pre-planned aggravated assault" on another inmate, inside that person's cell. Three people took part, but Barton was not a core principal. He was outside the cell when the injuries were inflicted.

[60] Mr. Barton came "from a good home". His parents were with him during the trial and sentencing. He was 24 years old at the time. Mr. Barton had only one other criminal conviction and it was imposed after the aggravated assault conviction. Mr. Barton had never been to a penitentiary before. The court determined that it was possible to meet the principles of sentencing through a term of provincial incarceration of two years less a day. The sentencing judge said this.

> "I am persuaded instead that this is a unique circumstance where the prospects of rehabilitation for this man in his case and the need to keep him out of the federal penitentiary, do call for a sentence of two years les a day." (para. 24)

[61] In that case the judge expressed concern that if Mr. Barton were to be sentenced to federal penitentiary, he might encounter the victim of the aggravated assault.

[62] Mr. Cox's circumstances are quite different.

[63] Setting a sentence for an offence of this kind does not involve simply finding cases that are the same in some respects and different in others. The offence of aggravated assault is a broad spectrum one. It covers a broad range of offences, from a relatively minor stab wound to a case in which the victim is very close to death. It can happen in a broad range of circumstances, from bar fights to premediated gang beatings.

[64] Deterrence and denunciation must be the primary purposes of the sentence in crimes of violence. An assault within a jail takes the aggravated assault to another

level. Serious injuries take it further. Coordinated activity resulting in a gang assault take it even further. Open defiance of the authorities seeking to intervene, as part of the coordinated effort take this case to a level more serious than the other prison assaults provided as examples.

[65] In any sentencing several factors remain in tension with each other. They are not necessarily contradictory, but they can pull in different directions. They are not merely a checklist of factors. Courts must consider the potential for rehabilitation. That may suggest a shorter sentence of incarceration. But the crime may be one that requires denunciation and deterrence, which cries out for a substantial punitive jail sentence. Similarly situated offenders should be treated similarly. But no two offenders commit the exact same offence, in the exact same way, with the same personal circumstances. A person may have a long criminal record, but it may be, in part, a function of the condition of that person's mental health. A person may be a member of a racialized group and the history of racism and marginalization of those groups as well as their overrepresentation in jails is a factor. Another person may not be a member of a racialized group but may come from an economically disadvantaged family. Parity in sentencing exists in tension with those considerations.

[66] A person should be sentenced in a way that is proportional to their degree of moral blameworthiness. Deterrence may be a factor in crafting an appropriate sentence, but it should never descend to the point of making an example of a person.

[67] Courts must keep all those tensions in mind. A list of sentencing factors may make it easier to explain what is being considered but it loses some of the nuance. Each factor exists in tension with all or some of the others and it is not possible to assign a percentage weight to each of them. Sentencing is not done by algorithm.

The Sentence

[68] The assault on Stephen Anderson was serious. And the offence is even more serious because it took place in jail as part of a coordinated effort. Mr. Cox did not become directly involved in the physical assault within the cell, but he was part of planning and participated in the execution of the plan by preventing the correctional officers from gaining access to the cell. Mr. Cox was not a passive participant. He was directly confronting the officers when they arrived.

[69] A serious and coordinated assault committed within a jail, requires the application of the principles of denunciation and deterrence. It is a serious matter regardless of who commits it.

[70] Mr. Cox's moral blameworthiness or culpability is another part of the proportionality analysis. That must be assessed having regard to what he did and in light of his background and social context. Mr. Cox did not enter Stephen Anderson's cell but the assault on Stephen Anderson could not have happened in the way it did, without the active participation of Kaz Cox and others. He was not one of the people who physically assaulted Stephen Anderson. But he knew that Stephen Anderson was going to be assaulted and took part in the assault by facilitating it. His moral blameworthiness may be reduced only somewhat by his lack of physical contact with the victim of the assault.

[71] Kaz Cox did not grow up as part of a Mi'kmaq community and the genealogical research done by the Native Council showed no Mi'kmaq ancestry. But the writer of the *Gladue* Report noted that there was enough evidence to justify having the report completed. And Mr. Cox does himself identify as being part Mi'kmaq and part African Nova Scotian.

[72] The diminishment of moral blameworthiness because of a person's identification with a racial or cultural group can have implications related to moral agency. Mr. Cox is an individual moral agent. He makes decisions and must take responsibility for them. Failing to recognize his moral agency is to make him into an object upon which other forces act. It is to say that he "can't help himself". And it can lead to the dangerous and thoroughly false assumption that members of some groups are given "special treatment" because less is expected of them.

[73] Recognizing that Kaz Cox, because of the social context in which he has lived has had to make choices that others have not been required to make is not to deny or diminish his moral agency. It is a recognition of the reality that most people would understand. Some people have fewer opportunities to flourish. Kaz Cox is one of them. That does not absolve him from responsibility for his actions and his choices. But it does bring a level of understanding about those actions and choices that may result in a less simplistically judgemental approach being applied.

[74] Mr. Cox's identification as being part of the Mi'kmaw Nation is part of his context. It is not all of it. Many of the life experiences that have gone into forming who he is, would be shared by others, who are not Mi'kmaq. In any case, those

circumstances are considered to develop a more nuanced view of the person being sentenced.

[75] A person who has been convicted of an offence can sometimes be presented as a caricature. They become almost a two dimensional representation of the offence and their criminal record. The context offered by a *Gladue* Report allows the sentencing judge to see beyond those things. The image of a child hiding under the bed while his mother talks to the police, the image of a 12 year old riding his bike to his grandmother's place to get away from the fighting and drinking, and the image of a teenager being sent off to youth detention, all connect to the later images of a young man who is distrustful of authority and becoming increasing involved with crime.

[76] Race creeps into sentencing, often unnoticed. A person's prospects for rehabilitation may be considered better when they have a support network of family and pro-social friends and come from a "good family". And there is nothing whatsoever objectionable about that. But it is important as well to avoid the unacknowledged or even unconscious inclination to discount the rehabilitation potential of those who lack those supports. The absence of a "good family", however that is defined, is not an aggravating factor in sentencing, and for those from racialized communities, judges must be attentive to the potential the lack of family supports in the traditional sense may unconsciously influence the sentence.

[77] Kaz Cox has not had any consistent or sustained period of work in his life. He has no stable career. His family life is fraught to say the least. There are no employers who can come forward to speak highly of him. The absence of those mitigating factors must be understood considering the comments contained in the Gladue Report. He has not been presented with opportunities to get an education, a career and maintain a stable family life.

[78] At the age of 43, Kaz Cox has spent almost as many years of his adult life in jail as he has spent on the outside. He had a criminal record before December 2, 2019, that suggests that he is prepared to use violence. A criminal record does not lead in a straight line to a harsher sentence, but it is a factor. And that record must be considered having regard to the contents of the *Gladue* Report. That record can be considered but a criminal record should not necessarily be used to draw the inference that Kaz Cox is a "hardened criminal", beyond hope of rehabilitation or has failed to "get the message" that courts have been trying to deliver through prison sentences.

[79] The other people who participated in the assault of Stephen Anderson have had sentences imposed in the range of 5 to 6 years. They are people with criminal records, though in some cases perhaps less significant than Mr. Cox's. Their behaviour was similar to his, though Mr. Cox did not participate in any direct and physical way. He neither entered Mr. Anderson's cell, nor held the door closed.

[80] The comments from the Court of Appeal in *Anderson*, as I interpret them, mean that the principle of parity must give way, at times, to the consideration of social context. Kaz Cox's moral responsibility must be understood in light of his background and the lack of opportunity that he has experienced. The lack of mitigating factors must be understood in light of his background as well. His criminal record must be contextualized having regard to the overrepresentation of Black and Indigenous men in prisons and jails. The requirement for a statement of deterrence and denunciation must be weighed against the importance of not making that situation even worse.

[81] The fit and appropriate sentence for Mr. Cox is incarceration for 4 years and 6 months. Any lesser sentence would not apply the principles and purposes of sentencing while a longer sentence would fail to apply those purposes and principles in a way that is sensitive to Mr. Cox's social context and background.

[82] When Mr. Cox was sentenced in Bridgewater, on March 17, 2022, he was given remand credit for 86 days from the date of his arrest August 21, 2019, to November 15, 2019, when he was arrested on the murder charge. He has not used any remand credit from the date of this aggravated assault, December 2, 2019, until March 17, 2022, when he began serving the sentence on the Bridgewater charges.

[83] Kaz Cox is sentenced to 4½ years for this aggravated assault. That would be 1,642 days without regard to leap years. He has been in custody on this charge from December 2, 2019 to March 16, 2022, which is a total of 835 days. Credit for remand should be given at one and a half days for each day served, which is a total of 1,252 days. To complete a 4½ year term of imprisonment the calculation would be 1,642 days, less remand credit of 1,252, for a total of 390 days, so the go forward sentence is one year and 25 days. The sentence in this matter is to be served consecutive to the Bridgewater charges and concurrent to the life sentence for First-Degree murder.

[84] The s. 109 firearms prohibition and DNA order will be signed.

Campbell, J.