

**SUPREME COURT OF NOVA SCOTIA**

**Citation:** *R. v. Fraser*, 2022 NSSC 215

**Date:** 20220729

**Docket:** CRH 505889

**Registry:** Halifax

**Between:**

Her Majesty the Queen

v.

Robert Victor Fraser

**SENTENCE DECISION**

**Judge:** The Honourable Justice Jamie Campbell

**Heard:** July 26, 2022, in Halifax, Nova Scotia

**Counsel:** Rick Woodburn and Scott Morrison, for the Crown  
Nicholaus Fitch, for the Defence

**By the Court (Orally):**

[1] Robert Fraser 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.

[2] After two trials 12 people were found guilty of aggravated assault and one of obstruction. The person found guilty of obstruction has been sentenced, *R. v. Nagendran*, 2022 NSSC 14. Nine 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, *R. v. Crawley*, 2022 NSSC 199, *R. v. Cox*, 2022 NSSC 200, *R. v. Coaker*, 2022 NSSC 201, and Kirk Carridice who was sentenced in an unreported decision following a joint submission. 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, Mr. Crawley to 5 years, Mr. Cox to 4½ years, Mr. Coaker to 4 years, and Mr. Carridice to 5½ years.

[3] Mr. Fraser’s sentence should not be set only in reference to those sentences, but the sentencing principle of parity must be considered. Mr. Fraser was involved in the same offence. His personal circumstances may be different, but fairness would require some explanation for why his sentence should be different when the circumstances of the offence was the same.

**Background**

[4] An Impact of Race and Culture Assessment (IRCA) has been prepared. Mr. Fraser is a 29 year old African Nova Scotian with connections to Uniacke Square and North Preston. Mr. Fraser is reported to have suffered from marginalization in areas like public education and living in public housing which exposed him early to drugs, violence, and negative interaction with law enforcement. Mr. Fraser did not receive appropriate support for mental health challenges. The assessment notes that he “experienced structural, institutional, and systemic racism that created major barriers throughout his life trajectory”.

[5] The IRCA sets out the history of the traditional African communities in Nova Scotia. Over centuries many of the communities maintained their cultural foundations while others struggled to survive from financial and resource challenges or from governmental interference. The IRCA notes that while it is well known that all communities in Nova Scotia have been affected by shifts in

population caused by economic and urbanizing forces this is particularly true for African Nova Scotian communities.

[6] North Preston is the largest indigenous Black community in Canada and is part of the Preston Township. The community continues to fight against negative press and social media coverage that focuses on crime and prostitution.

[7] Uniacke Square was developed as a result of the relocation of residents from the historical community of Africville. It had been a vibrant community that was forced to be relocated by the City of Halifax to public housing. Uniacke Square is a public housing complex located in North End Halifax and the IRCA points out that it has historically been identified as a low income impoverished community riddled with gun violence and drugs.

[8] Mr. Fraser lived in Uniacke Square until he was about 9 years old and still has close community ties and relationships there. He lived with his parents and sisters in an overcrowded unit with his maternal grandmother and his uncle Chris Kelsie. Mr. Fraser has pleasant childhood memories of growing up in Uniacke Square with family and peers who, as the IRCA says, “looked like him”. His childhood was also conflicted with antisocial and negative influences. The assessment says that there is a normalization of crime, violence, and substance abuse in Halifax’s North End communities.

[9] Mr. Fraser remembered that his childhood in Uniacke Square had involved his family being robbed twice. He said that he does not believe that his family reported either of those robberies to the police. There are “community consensus norms” that reporting such crimes is forbidden. Furthermore, the relationship between police and African Nova Scotian communities is strained. Mr. Fraser's family moved shortly after the second home invasion robbery.

[10] When the family moved out of Uniacke Square they moved to the “Pubs” which is another low income public housing neighborhood. That was when Mr. Fraser was about 9 years old. After a few years Mr. Fraser said that his mother, Vicki Kelsie, wanted to get out of public housing and moved to a home in Spryfield on a rent to own basis. To offset costs his maternal grandfather moved into the basement. Mr. Fraser, his mother, grandmother, and sisters lived upstairs.

[11] Mr. Fraser's grandmother was an important person and an important influence in his life as a child. He was devastated by her death when he was 14 years

old. That was when things started going downhill for him. He became involved in the criminal justice system and appears to never really got out of it.

[12] After the death of his grandmother Mr. Fraser spent significant amounts of time in detention at the Nova Scotia Youth Centre in Waterville. He immersed himself in the street life and looked for ways to make money illegally. That led him to the drug trade. He described the desperate situation of some of his teenage years in which he lived between Waterville and couch surfing with friends. He was selling drugs. His mother did not want that in her house.

[13] When Mr. Fraser reached 18 years old and was treated as an adult for legal purposes he started going to jail. When he was not in jail, either in Nova Scotia or in other provinces, he was moving from place to place. In between times of serving custodial sentences, he has lived in multiple locations with various family members in Ontario, Quebec and British Columbia.

[14] The IRCA notes that “calamitous” public school experiences “generated poor consequences for Mr. Fraser's involvement and engagement in his learning environments”. Beginning in early elementary school until he left the public school system he was often in trouble, encountered racism and struggled in “Eurocentric schooling spaces”. His school experiences are described as being reminiscent of the phenomenon sometimes called the “school-to-prison pipeline”. This phenomenon takes shape through detrimental circumstances and factors ascribed to racialized students. It includes streamlining of Black students into lower level high school courses, the overrepresentation of Black students on Individual Program Plans, lower expectations from teachers of Black students, and limited representation of teachers and curriculum content. Other things impacting future failures of Black learners are racism in the learning environment, chronic suspensions and other disciplines and perceptions of inferiority in Eurocentric school systems. The IRCA notes that African Nova Scotian students’ engagement with crime and deviance and ultimately their “pathway to prison” is reflective of their negative and depressive learning experiences.

[15] In Mr. Fraser’s case the factors included systemic racism, discrimination, absence of Black teachers, chronic suspensions and later expulsion and limited education. Rather than framing Mr. Fraser's departure from public school as a “self-directed failure” emphasis on the historical school-to-prison pipeline structure that exists for Black students is suggested by the IRCA a key factor.

[16] Robert Fraser was expelled in Grade 8 and shortly after that was sent to the Halifax Youth Attendance Centre. After a couple of months, he was sent back to Waterville on the breach. When he was released, he came back to the Halifax Youth Attendance Centre for another three weeks. He said that he left because it felt “like a jail”. He went back to Waterville again after another breach. He said he was released this time but was not interested in re-engaging with education.

[17] The IRCA notes that Mr. Fraser was chronically suspended throughout his public school education beginning as early as Grade 2. He missed a lot of time during his elementary schooling from his chronic suspensions and remembered being home schooled by one of his aunts at one point to compensate for lost curriculum content. He said that his suspensions in early elementary school were a result of his response to racism of his white peers. He said that he got into fights with white students who called him racial slurs.

[18] The IRCA writer says that from a Critical Race Theory lens, the school-to-prison pipeline is evident in Mr. Fraser's school experiences. Racism was endemic. His experiences in school were tainted with unequal access to learning resources through his attendance at schools within lower socioeconomic demographics. There were representation deficits among teachers. He had a negative relationship with the school culture as shown in his own narrative.

[19] Mr. Fraser said that he encountered continuous racism while in school. Some of the racism included experiences like conflicts with peers, school staff and school bus drivers. Mr. Fraser’s earliest recollection of racism began in Grade 2. The elementary school that he was attending was “geographically situated in his African Nova Scotian lower social economic neighborhood”. The school population was diverse, and he said that he got into a lot of fights mostly with white peers. These altercations were racially motivated. He was frequently called racial slurs. White students thought that it was acceptable to use the N-word towards or in front of their Black peers. He described the comfort that many white students had to make brazen insults and negative references towards Black students. He said that other white peers would use the N-word in front of Black students because they wanted to “act Black”. These white students assumed they could use the same language they heard in popular music. The IRCA notes that the trend among some young people is that some form of “pass” has been given for white people to use the N-word by their Black friends. It is critical to note that it is not accepted or adopted practice for the Black community in Nova Scotia. Mr.

Fraser described his position in this regard and his frustration with the exposure to excessive racist comments, specifically the N-word.

[20] Mr. Fraser's mother shared that a school principal threatened to suspend Mr. Fraser because he wore a bandana to school. She reported that lice were going around the school at the time and her children wore bandanas in part to protect their hair from bugs. She said that a secondary reason Mr. Fraser wore something on his head was cultural. Many Black people wear some form of hair wrap such as a durag for various hair care reasons.

[21] Mr. Fraser reported that he never had a Black teacher in the public school system. The IRCA says that contributed to his low educational achievement. He attended a homogeneous white school in Grade 6. He said there were only two Black students in the entire school, and he believed he was treated differently by staff, students, parents, and administrators. This was not a comfortable or welcoming learning environment for him, and he was eager to get the chance to leave. He asked his mother to enroll him in another school. Eventually he was transferred to another school with a more diverse student population. He was more comfortable with peers who shared the same racial and cultural backgrounds but unfortunately, he was not successful as completing his Junior High education.

[22] Mr. Fraser's limited education coupled with his criminal record has created hardships for him in getting employment. He was engaged with courses to complete his GED in the Springhill Institution, but Covid affected delivery of services and he did not get the opportunity to finish that. He reported that he had completed a GED pretest and was notified by his instructor that he was at a Grade 11 level. He wants to continue working toward educational goals and feels confident that he can complete his GED.

[23] Mr. Fraser said that he learned “to hustle” at a very early age trying to emulate and gain respect from older youth who were able to create a glorified and steady income. His mother was concerned about his exposure at such a young age to “the life” and thought it would be best to be living with his uncle in Vancouver. Mr. Fraser moved to Vancouver at the age of 15 and worked with his uncle. That has really been his only legitimate job.

[24] Mr. Fraser reported that even while working for his uncle he sometimes experienced racial comments and slurs from people who worked on the jobs with him. These names were sometimes triggering for him because he had experienced similar treatment as a young person in the school system and in general. Despite

the racist comments he indicated he was a good and hard worker and learned skills quickly. His uncle agreed. Mr. Fraser's uncle has been successfully operating his own business for 10 years and said that he wished that his nephew had stayed with him and stayed out of trouble.

[25] Mr. Fraser experienced challenges with the education system and grew up around the “street life”. He also experienced trauma and loss. These factors may have contributed to his health.

[26] Mr. Fraser’s mother said that the schools tried to say that he had ADHD. She had concerns with the labeling associated with ADHD for her Black son in the public school system. This caused strains in her interaction with the school psychologist. It is not confirmed whether Mr. Fraser has ADHD. His mother has been one of the strongest advocates and indicated that as her son began to get into more trouble with the law, she requested that he be assessed. From her perception she felt the reports she received was insinuating that her parenting was to blame.

[27] Mr. Fraser is concerned about his own mental health. There have been diagnoses of bipolar disorder in his mother's family and it possibly applies to his father as well. Mr. Fraser shared with the IRCA writer that a doctor he had seen in the past wanted him to get tested for bipolar disorder. He has not had the opportunity to access those services. Based on generational history and some of his behaviors he wants to know if he is bipolar. The IRCA notes that his mental health challenges could be connected to trauma and loss, negative school experiences, growing up in communities that have been marginalized, the death of his grandmother and friends close to him, and his experiences with and in the formal justice system. Mr. Fraser said that as a youth he smoked marijuana a lot and thought that it made him paranoid, but he also said that it helped him to socialize and kept him calm. He also shared that in the past he self medicated for a while using clonazepam, but his girlfriend gave him an ultimatum that he would have to choose either the drugs or her. He said that the pills he was using were making him aggressive and sometimes he blacked out. He valued his relationship with his partner, so he quit. He described that sometimes he self medicated for feelings of anxiety and depression and to help him cope with personal struggles. He remains interested in seeing a psychiatrist but indicated that he had been on the wait list for three years. He says that he does not think that Black men are a priority in the justice system in accessing health care. He reported he suffered from anxiety attacks in the past, but he has not been formally diagnosed.

[28] Mr. Fraser used to go to Sunday school at the St. Thomas Baptist Church in North Preston. The IRCA notes that in the African Nova Scotian Community church is central to many as it is a place where people gather, seek refuge and maintain traditions. While living in Montreal in his early 20's Mr. Fraser connected with one of his friends who practiced the Islamic faith. He later converted to that religion. The IRCA notes that as a Black man and a Muslim he may face further discrimination and isolation based on his race and his religious beliefs. While in prison Mr. Fraser would meet with the Imam and engage in his daily prayers. Mr. Fraser noted that there are no longer Juba prayers on the range because of Covid restrictions. Seeing the Imam and having the opportunity to practice his faith is something that Mr. Fraser said he missed. He would read the Quran and seek clarification from the Imam to better understand the faith. Mr. Fraser said that he does his best to maintain the practice, but it is difficult without the direction from the Imam.

[29] Mr. Fraser said that he had been introduced to and was familiar with substances like marijuana and alcohol at an early age he said that at the age of 10 or younger he would experiment with alcohol and by the time he was only 14 years old he was drinking at parties. Also, at 14 he started experimenting with other drugs. For some time, Mr. Fraser found himself dependent on drugs to cope and said that he could not handle withdrawals. He found himself going back to drugs and alcohol and he eventually quit because of his girlfriend's ultimatum. The IRCA notes that research indicates that some individuals resort to alcohol and drugs as a coping mechanism against racism discrimination and trauma. Furthermore, the IRCA says that in Nova Scotia, health services for mental health and addictions do not appear to meet the needs of many individuals of African descent. Few mental health clinicians are of African descent and many others are often not educated on the lived experiences of African Nova Scotians in relation to their health and well-being.

[30] The IRCA noted that Mr. Fraser experienced loss at an early age. His father left the family when he was in Grade 2. He said that his family was close and used to visit his father's community in North Preston. This seemed to stop once his father and mother separated. At the age of 14, Mr. Fraser suffered the loss of his beloved grandmother. He experienced the violent death of four friends, three of whom were shot and one of whom was stabbed. He said that he saw one of his friends "die on the stretcher". Mr. Fraser told the IRCA writer that these deaths significantly impacted him. The death of a loved one is traumatic for most people. The IRCA notes that Black communities in general are experiencing a significant



number of homicides and murders that are affecting those communities. Many of them are a result of gun violence and remain unsolved. Mr. Fraser did not have counseling to help him with these deaths nor was he interested in grief or bereavement support. He shared that he resorted to drugs and alcohol to numb the pain. His mother tried to connect him with programs such as Leave Out Violence, but he was too old for that and the Big Brothers Big Sisters program in which his assigned Big Brother left for a job.

[31] Mr. Fraser was very close to his grandmother. When she died the family was no longer as close as it had once been. Her death left a huge gap in the family. Mr. Fraser found that his grandmother was someone he could talk to. When she died he said that his world was shattered. Extended families are often part of the “immediate” families in Black communities. Many Black families grow up in multi generational households which provide spiritual, emotional and financial support for each other. Many grandmothers engage in “overmothering”. Mr. Fraser’s mother and grandmother both supported him the best they could.

[32] Additional trauma involved incidents that happened while Mr. Fraser was incarcerated. Both his mother and girlfriend expressed concern for him. He expressed some of his own fears and anxieties that he has experienced since being incarcerated. He shared loneliness based on Covid restrictions which involved him not being able to see his family. Due to religious reasons and lack of trust with the health care system Mr. Fraser and his family are not vaccinated. This has further marginalized him in deepened his isolation. Covid has resulted in an increase in mental health conditions particularly for people who experience anxiety and depression.

[33] Mr. Fraser's mother, Ms. Kelsie, understood the importance for her son to be in an environment surrounded by positive guidance and leadership. It was difficult for him to find those supports in this community. With the already positive relationship he had with his uncle Chris Kelsie, Ms. Kelsie initiated the idea of his going to Vancouver to remove him from the street life in Halifax. His mother said that she saw criminal activity around him, and the older boys were making him feel important. She saw him hanging out with some of those people and he wanted to be like them when he got older. Ms. Kelsie said that she did her best as a single mother to provide him with male role models.

[34] Mr. Fraser has been involved with the criminal justice system since he was quite young. He started getting in trouble at around the age of 13. His mother did

not accept his bringing anything into her home that was connected to his “criminal occupation”. He said that he had been in and out of youth detention, and provincial and federal jails. His perception of some of his past lawyers’ advice is that they often encouraged him to enter guilty pleas because of anticipated worst outcomes if he went to trial.

[35] Since being incarcerated Mr. Fraser has expressed his frustration with the system that is not designed to help Black men. The IRCA notes that men in prison developed defence mechanisms to protect themselves from any sexual harms that may come their way by other inmates. Mr. Fraser's mother said that she believed that in prison a person does not have a choice. “You either do it or you're the next one who's harmed.” Mr. Fraser talked about the prison culture and how he has been affected by it. He indicated that he realizes that he likes a very structured environment and that when it's not structured, he finds it difficult to manage. It is also well documented according to the IRCA that people who were incarcerated conform to the norms of prison culture particularly with regular patterns of incarceration.

[36] Mr. Fraser discussed with the IRCA writer how he had been transferred between prisons on a few occasions. Sometimes he was “maxed” while other times the score went back to medium. His mother also talked about him being moved because of his good behavior and said that he is a “good kid he just makes bad decisions”. Ms. Kelsie said that she was worried about Mr. Fraser because he could not access any programs in Renous. She also said that he was interested in taking a high intensity program to help him return to a medium security prison, but he indicated that the course is not currently offered at Renous. He has tried to advocate to get it back and is under the impression that you cannot get out on parole until you take the course. However, he said that he is informed that there not enough resources to support the program. The IRCA notes that research identifies the over incarceration of Black men and the lengthy sentences often assigned to them compared to their white counterparts. This furthers the mistrust of Black men with all aspects of the justice system in relation to expecting a fair trial. The IRCA notes that it is important to reinforce Mr. Fraser's limited education, his experience with racism in the public school system and the pull to the streets he felt at an early age to his current situation and pathway to criminality.

[37] The IRCA notes that Mr. Fraser has had limited positive interactions with the police. He shared that he has had numerous experiences in which he believes that he has been racially profiled and/or harassed by law enforcement. The IRCA

notes that the relationship of the police with Uniacke Square is fragmented and there is an aggressive police presence in the community. Mr. Fraser described the experience that he felt was an act of racism involving the police when he was very young. The event gravely affected his trust with the police.

[38] The IRCA notes that cultural mistrust is an individual and collective perspective among people from communities that have been marginalized and exploited. It stems from experiences of discrimination that create a sense of suspicion usually toward the dominant white culture. Mr. Fraser has developed deep cultural mistrust particularly toward the police. In describing his early interactions with the criminal justice system, education, and healthcare systems he said that they did not take his cultural identity into consideration. The IRCA notes that perhaps these systems are also guided by unknown biases and practices as a result of institutional, structural, and systemic racism. “The systems were designed by white people to serve white people and when Black people are introduced to these systems they are often serviced through biased stances and/or confrontation.”

[39] Generational cultural mistrust was discussed by Mr. Fraser, his mother and his uncle. There is a family history of not trusting the police to have the concerns of Black people as a priority. This perception was shared through the narratives of Mr. Fraser, his mother and his uncle. He said that it is hard for Black people to be successful especially with a criminal record and they are constantly harassed by the police. Ms. Kelsie recalled negative communications that she had with the police and the way they were dealing with her son. His uncle Chris Kelsie shared accounts that he experienced with police brutality and that his move to Vancouver was in response to racism that he had endured. The family does not view the police as “helpers”.

[40] In summary the IRCA says that Robert Fraser’s life trajectory “has been confronted with a plethora of barriers and systemic racism”. As a product of the North End environment he was subjected to poor housing conditions in impoverished communities. He lived in neighborhoods that had high crime rates. Crimes in the African Nova Scotian communities are higher than statistically presented due to the nature of cultural mistrust from the community to authority and the established street code of no “ratting”. Illegal drugs are heavily present in those neighborhoods. The IRCA notes that this was evident from Mr. Fraser's experimentation and patterns of substance abuse while he was in the community as well as his past involvement in street life activity. The IRCA says that the school system failed Mr. Fraser. He went to schools in poor communities that had less

than adequate resources and materials. School was a negative space where he was always in conflict with his peers and staff. That resulted in the imposition of heavily punitive measures including chronic suspension. He now only has a Grade 7 education. He experienced grief and loss of loved ones at an early age. He did not receive any therapy or mental health support to address the loss. He grew up with his grandmother always in his home and when she died his life seemed to spiral in a negative way. Mr. Fraser's effects from school failures, mental health challenges, trauma and loss all contributed to his “deviant behavior quickly becoming more criminal”. The IRCA notes that this led to Mr. Fraser going into a life “riddled with patterns of criminalization and incarceration”.

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

[41] The practical challenge is how all that information factors into the individualized sentence to be imposed in this case. The IRCA contains a wealth of important information about Mr. Fraser and his background. It shows how racism has affected his life. It is not simply a recitation of empirical data. It contains analysis and that analysis is based on a point of view. It appears, at least to some extent, to have been informed by Critical Race Theory (CRT). That theory maintains that racism is systemic and racial inequality is woven into systems, like the education and legal systems often in ways in which we are not even aware. CRT is not without its critics. The sentencing of Robert Fraser is about Robert Fraser, and it was not a debate about the post modern intellectual origins of Critical Race Theory and whether courts should or must accept it on face value. Quite properly, that issue was not addressed at all by either counsel. The IRCA can be accepted as an immensely valuable tool in the effort to contextualize and individualize the sentencing process, while acknowledging the debates that may rage in the background, but without commenting on either political or philosophical theories.

[42] IRCA's 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 considers a person's circumstances, defined more broadly to include the historical background of the community with which they identify, a sentence is more individualized.

[43] If the IRCA 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 IRCA would be imposed, and then reduce the sentence to account for those factors, how can the use of the IRCA 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 IRCA? And, if the contents of the IRCA’s 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?

[44] 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.

[45] 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.

[46] 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 to any identified factors.

[47] 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 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)

[48] The Court endorsed that approach.

[49] Sentencing judges must “show our work”. We must explain how the IRCA has informed the sentencing process. That does not mean 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.

[50] 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.

[51] 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.

[52] 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.

[53] 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).

[54] A 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.

[55] In *R. v. Ipeelee*, 2012 SCC 13, the Supreme Court of Canada directly addressed the issue of moral culpability or moral agency in the context of Indigenous offenders. The circumstances of Indigenous people, or in this case African Nova Scotian 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.

[56] 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.

[57] 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.

[58] Aggravating factors must receive that same kind of contextualizing attention. A criminal record may be an aggravating factor in sentencing. Black men are disproportionately incarcerated. Unless the criminal record is considered in the context of the IRCA it becomes part of a cycle. Black 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 even more aggravating factor the next time.

[59] For serious crimes and crimes of violence, denunciation and deterrence are important and often are considered the most important 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. For 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 African Nova Scotian men 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.

[60] Judges are required to use IRCA's 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.



[61] In any case a sentencing judge must use the IRCA 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 noncustodial sentence.

[62] The 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.

[63] 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. 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.

[64] The Supreme Court of Canada in *R. v. 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).

[65] 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 the contents of an IRCA are considered there may be different sanctions for African Nova Scotians 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.

[66] 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.

### **Sentencing Principles**

[67] 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, *R. v. Thompson*, 2017 NBQB 81.

[68] Mr. Fraser's counsel Mr. Fitch cited the decision in *R. v. Thompson*, 2022 NSPC 25. That is a very recent case from His Honour Judge Tax, involving an assault causing bodily harm committed within the Central Nova Scotia Correctional Facility in Burnside, where this assault took place. In that case the accused entered the victim's cell and assaulted him. The victim suffered severe injuries but there was no evidence of a weapon having been used. The victim spent three months in hospital after the attack. Mr. Thompson had a related record for assault and assault causing bodily harm.

[69] Judge Tax imposed a 15-month Conditional Sentence Order followed by probation. He distinguished the case from the assault involved in this matter based on the level of coordination and premeditation.

[70] 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.

[71] 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.

[72] 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.

[73] 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.

[74] 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.

### **Burnside Incident**

[75] Robert Fraser 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.

[76] Mr. Fraser waited by the phones in the dayroom and walked across the room with Mr. Cox and Mr. Marriott as the officers approached. He can be seen on the security camera video recording blocking their access to the cell. He knew that an assault was taking place in the cell and was part of the coordinated plan.

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

## **Criminal Record**

[78] As noted in the IRCA Mr. Fraser has a criminal record.

[79] It began when he was a young person and it can be seen how he “progressed” through the system, from “administrative crimes”, like breaches of undertakings to robbery, assault with a weapon and assaulting a peace officer. That led to drug trafficking and weapons charges. That continued when he “aged out” of the youth criminal justice system and into the adult system.

[80] Soon after becoming an adult he began to be sentenced for possession of drugs and failure to comply with court orders or recognizances.

[81] In 2014 he was sentenced in London, Ontario for two counts of failure to comply with a recognizance and possession of drugs for the purpose of trafficking. He has spent 7 months in pretrial custody and was sentenced to time served on the drug charge and a further 90 days on the breaches.

[82] A few months later in Brampton, Ontario he was sentenced on another breach after spending 47 days on remand. He was sentenced to one day. In 2015 in Oshawa, Ontario he was sentenced on another breach. After credit for 27 days pretrial custody a sentence of a further 33 days was imposed.

[83] In 2016 he was sentenced in Prince Rupert, British Columbia to 7 months incarceration for drug trafficking.

[84] On June 23, 2019, he was charged with assault and was sentenced in August 2019 to time served.

[85] Mr. Fraser was involved in an incident in November 2017 that led to a firearms charge for possession of a prohibited or restricted firearm with ammunition and possession of drugs for the purpose of trafficking. He was sentenced November 28, 2019. He received a sentence of 4 years and 24 days on the firearms charge and 3 years concurrent on the drug trafficking charge.

[86] Mr. Fraser had just begun serving that sentence in December 2019 when the assault of Stephen Anderson took place. It appears as though he was in Burnside that day, December 2, 2019, because he appeared in Provincial Court for sentencing on a breach charge.

## **The Sentence**

[87] 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. Fraser did not become directly involved in the physical assault within the cell. He was neither in the cell nor held the door shut. He was not as heavily engaged in the confrontation with the correctional officers as were Mr. Cox and Mr. Marriott. But he participated in the execution of the plan by preventing the correctional officers from gaining access to the cell.

[88] 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.

[89] Mr. Fraser's moral blameworthiness or culpability must be assessed having regard to what he did and in light of his background and social context. Mr. Fraser 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 Mr. Fraser and others. He knew that Stephen Anderson was going to be assaulted and took part in the assault by facilitating it. His moral blameworthiness is reduced somewhat by his lack of physical contact with the victim of the assault.

[90] The diminishment of moral blameworthiness because of a person's identification with a racial or cultural group can have implications related to moral agency. Robert Fraser is a person who is capable of making decisions for himself. He is not someone to whom things just happen. 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 dangerously false and nefarious assumption that members of some groups are given "special treatment" because somehow less is expected of them.

[91] Because of the social context in which Robert Fraser has lived he has had to make choices that others have not been required to make. That is not to deny or diminish his moral agency. Some people have fewer opportunities to flourish. He is one of them. That does not absolve him from responsibility for his actions and his choices and he will pay a price for them. But it does bring a level of understanding about those actions and choices that may result in a less simplistically judgemental approach being applied. Before he was 9 years old, he was twice subjected to home invasion robberies. By that time, he was already

being suspended from school and was not getting the educational or mental health supports that he needed to thrive. Not long after he was being subjected to racist taunts. Some children are forced to go through that. Some are not.

[92] Those things led him to the street. School was not working for him. Maybe the life of the street would. He adapted to his environment. Mr. Fraser has a Grade 7 education and was subjected to racism as a child and adolescent in ways that drove him away from school. He has not been able to access mental health and other supports that could have helped him to thrive in school. A Grade 7 education offers few opportunities.

[93] Mr. Fraser has had the chance to work with his uncle, Chris Kelsie. But he has really only had one legitimate or real job. He has not had any consistent or sustained period of work in his life. He has no stable career. There is no list of 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 IRCA. He has not been presented with opportunities to get an education, or a career.

[94] Mr. Fraser grew up in a community in which, as the IRCA notes, crime was common. As a young person he was drawn toward the life of the streets and the illegal activities to be found there. Living in his community he could not be sheltered from that reality. As a relatively young child, and despite his mother's efforts, he was confronted with choices that children should not have to make.

[95] Mr. Fraser got into a life of crime and his criminal record shows that. He has spent a lot of time in jail. A criminal record is a factor in sentencing. And that record must be considered having regard to the contents of the IRCA. Black men are disproportionately represented in the prison population. When a criminal record is used to increase a prison sentence that problem is made worse. Deterrence and denunciation can get carried away in the language of its own rhetoric. Communities must be "protected", and racialized communities deserve as much protection as anyone else. That must be understood in the context of the impact of having young men from those communities being sent to live their lives in institutions separated from their families.

[96] Robert Fraser makes his own choices and lives by the consequences of them. The course of his life was not predestined by the circumstances of his birth. But having been born into his community and having experienced racism in its many subtle and egregiously open forms, it would take more than average willpower and

ability to withstand the pull toward the lifestyle in which he eventually found himself.

[97] The other people who participated in the assault of Stephen Anderson have had sentences imposed in the range of 4 to 6 years. Some are those who entered the cell. Among those who did not were Mr. Coaker and Mr. Cox. Mr. Coaker's involvement was at the low end. Mr. Cox's was not but there was a *Gladue* Report prepared that provided context and background with respect to his circumstances.

[98] 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. Robert Fraser'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 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.

[99] The fit and appropriate sentence for Mr. Fraser is incarceration for 4 years. 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. Fraser's social context and background.

[100] Robert Fraser is sentenced to 4 years. At the time of this incident Mr. Fraser had just begun to serve a sentence that had been imposed days before. He is still subject to that sentence and he does not have remand credit to use toward this sentence. This sentence of 4 years is to be served consecutive to the sentence that Mr. Fraser is now serving.

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

Campbell, J.