Date: 20231221
Docket: CR 22-01-39150
(Winnipeg Centre)
Indexed as: R. v. Whiteway
Cited as: 2023 MBKB 186

COURT OF KING'S BENCH OF MANITOBA

B E T W E E N:

HIS MAJESTY THE KING,	)	Shane V. Smith Rohit Sanggar for the Crown
-and-	)	
NANCY ANGELA WHITEWAY, accused.	)	Taralee D. Walker Kaitlynd M. Walker for the accused
	)	Judgment Pronounced: December 19, 2023 Judgment Delivered: December 21, 2023

ORAL REASONS AS TO SENTENCE

REMPEL J.

INTRODUCTION

[1] The accused, Ms. Whiteway, entered a guilty plea to a reduced charge of manslaughter a few days before her jury trial on a charge of second-degree murder was about to begin.

[2] I published reasons in this matter following a *voir dire* prior to the scheduled trial date in which I ruled that a video statement made by the accused to the Winnipeg Police Service ("WPS") was not admissible as evidence against

her at trial. My reasons on the *voir dire* can be found at ***R. v. Whiteway***, 2023 MBKB 144 (CanLII).

[3] These are my reasons as to the appropriate sentence on the manslaughter charge.

CIRCUMSTANCES OF THE OFFENCE

[4] George Elie Houle was stabbed by Ms. Whiteway while he was crossing Main Street in Winnipeg at a pedestrian crosswalk. The stabbing occurred close to 12 noon on a sunny day and there was busy pedestrian and vehicle traffic along Main Street at that time. Despite the freezing temperatures, the security camera videos obtained by the Crown offered clear images of a brief altercation between Mr. Houle and Ms. Whiteway close to the median boulevard.

[5] There is no evidence that Mr. Houle and Ms. Whiteway knew one another. The surveillance video showed Mr. Houle sitting on a bench close to the crosswalk when Ms. Whiteway walked past him. At the time Ms. Whiteway was walking towards the crosswalk with a male companion. The video suggests that some kind of conversation occurred between Mr. Houle and either Ms. Whiteway or her male companion, but nothing in the body language of the parties suggests that anyone was aggressive or fearful during this brief encounter.

[6] After Ms. Whiteway and her companion passed Mr. Houle and continued on their way at a slow walking speed, Mr. Houle, for whatever reason stood up and slowly followed the couple towards the crosswalk. Mr. Houle kept his distance from Ms. Whiteway but would have probably been within earshot of Ms. Whiteway

as she was crossing the crosswalk ahead of him. After stepping off the curb, Mr. Houle can be seen taking a few steps before Ms. Whiteway quickly spun around and quickly marched towards him. The video shows Ms. Whiteway swinging her arm and making contact with Mr. Houle but it is not clear from the video that Ms. Whiteway was armed given how far away the camera is from the crosswalk.

[7] After the contact occurs Ms. Whiteway can be seen turning around and resuming a leisurely pace as she continues to traverse Main Street and then turn south after reaching the sidewalk. Mr. Houle can be seen slowly continuing on his path across Main Street in the same direction as Ms. Whiteway and pausing when he reaches the sidewalk. Mr. Houle can then be seen standing still and resuming his walk at a slow pace. As he walks south on Main Street towards the camera Mr. Houle can be seen placing a mobile phone to his ear. It turns out Mr. Houle was placing a 9-1-1 call at that time and it was one of the last things he did before his death.

[8] The WPS responded to the 9-1-1 call and found Mr. Houle unconscious and bleeding severely on the sidewalk. Mr. Houle was taken to hospital by ambulance in critical condition. Several emergency surgeries followed but Mr. Houle succumbed to his injuries a few days later.

[9] A passing motorist, who stopped her vehicle at the crosswalk in front of Mr. Houle and Ms. Whiteway, saw an angry altercation between Ms. Whiteway and Mr. Houle from a close distance. The motorist could see Ms. Whiteway swinging her arm and making contact with Mr. Houle's chest but she never saw a weapon in Ms. Whiteway's hand.

[10] The autopsy report placed into evidence shows that Mr. Houle suffered a 3.1 centimetre gash to his chest that was probably caused by a single-edge blade and that the weapon penetrated his chest to a depth of approximately 16 centimetres. The path of the blade perforated the pericardial sac, which caused blood to accumulate around the heart, making it difficult for the heart to beat. According to the pathologist, the blade also penetrated a bone in Mr. Houle's chest and this could only occur if "vigorous force" was applied by the person wielding the weapon.

[11] The defence does not dispute what is obvious on the video, namely that Ms. Whiteway made no effort to run away from Mr. Houle before she swung her arm at him or afterwards and then continued on her way at a leisurely pace. It is also not disputed that Mr. Houle was not carrying a weapon and that Ms. Whiteway made no effort to offer assistance to Mr. Houle or to call emergency services after she stabbed him.

CIRCUMSTANCES OF THE ACCUSED

[12] Ms. Whiteway is an Indigenous person who is now 35 years of age and the mother of three children. The family of Ms. Whiteway is from the God's Lake First Nation reserve in northern Manitoba.

[13] Ms. Whiteway was not raised by her birth parents due to their problematic relationship with alcohol and drugs. The grandmother of Ms. Whiteway did her best to raise Ms. Whiteway along with many other grandchildren in a Christian environment, disconnected from their Indigenous culture and spirituality.

[14] Despite the best efforts of her grandmother, the home life of Ms. Whiteway in her formative years was worse than chaotic; it was fraught with abuse, neglect and loss.

[15] Ms. Whiteway's father committed suicide when she was only a toddler and she never really got to know her mother due to her mother's chronic substance abuse. Ms. Whiteway spent the first five years of her life on the God's Lake First Nation reserve and then was relocated to Thompson, Manitoba. During those years she was raised with eight of her cousins and extended family members by her grandmother, who was the sole provider for all of these children.

[16] Ms. Whiteway was sexually abused by a relative between the ages of nine and 14. Ms. Whiteway indicated that there was no one she could turn to for help or report these crimes. Ms. Whiteway started smoking cannabis at age nine and consuming alcohol when she was 12. At this early stage in her life she spent most of her weekends in various stages of intoxication. The ability of Ms. Whiteway to advance in school was severely limited by the emotional and physical trauma she experienced at home and the fact that she was a regular user of alcohol and cannabis before she entered her teen years. After grade nine Ms. Whiteway quit school to work at a hotel and a grocery store in Thompson.

[17] Ms. Whiteway moved away from her dysfunctional home situation at age 18 and was unable to find a stable home environment again. At that age she had no emotional, social or educational skills that could have offered a way to earn enough to maintain a home and provide for the necessities of life.

[18] Ms. Whiteway then entered into a relationship with a man with whom she had three children. During the course of this relationship she was exposed to intimate partner abuse. After leaving this relationship, Ms. Whiteway had no way to support her children or offer them a home and they were taken into care by a child protection agency. The severance of the mother and child relationship was a devastating blow to Ms. Whiteway.

[19] The options open to Ms. Whiteway with respect to housing or employment were non-existent after she left the relationship with the father of her children and with no skills or training that offered her a chance to earn income, she turned to the sex trade as a means to survive. In the pre-sentence report ("PSR") Ms. Whiteway commented that she was frequently the victim of physical and sexual abuse while she was a sex trade worker and that she struggled with depression and bi-polar disorder.

[20] Ms. Whiteway has been experiencing homelessness for the last 10 years and the PSR highlights how difficult it was for her to find treatment for her disorders and to take her prescribed medications. The fact that she was using methamphetamines and dealing with other addictions for most of her life only compounded the fragile nature of her mental health. Ms. Whiteway also had no meaningful relationships with her three children at the time of this offence, due to her inability to maintain a stable home life and her frequent run-ins with the legal system. All of these factors only compounded her emotional instability.

[21] The inter-generational dysfunction flowing from the residential school experience of her older family members has clearly manifested itself in the life of

Ms. Whiteway, who never had a chance to get to know who her parents were or benefit from their love and support. This inter-generational dysfunction deprived Ms. Whiteway of any chance of claiming her true identity as an Indigenous person. The risk now of course is that a custodial sentence will result in Ms. Whiteway having very limited possibilities of having a meaningful relationship with her children.

[22] The following excerpts from the PSR address the circumstances of Ms. Whiteway in the years prior to and at the time of the offence, at pp. 4, 7, 8, and 19:

> In discussing the offence currently before the Court, the subject stated, "This is a situation where victimization turned into criminalization. I was in a state of desperation of survival mode in life and was always a victim". She described a history of physical abuse by men while living on the street "and I often feel unsafe". The subject disclosed that she and the victim were unknown to each other. She believed the victim was following her and asserted her actions were out of fear for her personal safety. She stated, "I have been attacked before. I am always so exhausted on Main Street". The subject also noted she had been using methamphetamine the night prior and had not slept, however stated she had not used substances on the day of the offence
>
> . . .
>
> The subject shared she has spent the last 10 years living on the streets in Winnipeg. She has utilized homeless shelters and has slept in bus shacks. She reported thinking numerous times about how to make changes in her life however has not felt equipped to do so. The subject was on Employment and Income Assistance (EIA) prior to her incarceration. The writer received information from EIA worker, Kevin Albo, who confirmed the subject was on social assistance from 2016 until her most recent incarceration. The subject was approved for a 10 year disability status term in April 2019. Kevin stated, "Aside from her aforementioned incarceration history, her primary barrier was mental health. She had frequent hospitalizations for mental health while she was on assistance. Her other barriers were addictions related, with known substance abuse issues for most of the duration of her time on assistance. She also experienced frequent homelessness while on EIA assistance".

. . .

> Since the subject's early adult years, she has struggled significantly with her mental health. She has had numerous trips to hospitals in a state of crisis. Her transient lifestyle coupled with her substance use led to non-compliance with her medical treatment plan, as she would often not take her medication once released from the hospital. Her periods of stabilization appear to be when she is either in custody or in the hospital. The subject received the support of the PACT program for her monthly injections in the community however was advised her mental health condition was exacerbated by her substance use. That said, the subject was unable to discontinue her substance use.

[23] The PSR indicates that Ms. Whiteway is at a "*very high risk to re-offend*". The significant risk factors for this assessment are identified on page 21 of the PSR as follows:

- Pro-criminal attitude/orientation;
- Alcohol and drug problems;
- Companions; and
- Education and employment.

[24] The adult criminal record of the accused is significant and highly concerning. From March of 2014 to July of 2022 Ms. Whiteway was convicted of crimes 34 times. Fifteen of these convictions were for violent crimes, uttering threats or weapons offences. Over the course of these years Ms. Whiteway was sentenced on 12 separate occasions, not counting this offence. The crimes from 2014 to 2019 include:

- Assault with a weapon;
- Theft under $5,000 x 2;
- Possession of a weapon;

- Assault (four separate convictions);
- Uttering threats (three separate convictions);
- Disobeying court orders and many other breaches;
- Robbery (12 months custody);
- Assault of a peace officer (four separate convictions); and
- Failing to surrender.

[25] Since 2020 Ms. Whiteway has been convicted of the following offences:

- Failing to surrender;
- Assault; and
- Assaulting a peace officer on two separate occasions.

THE PRINCIPLES AND OBJECTIVES OF SENTENCING

[26] In order to achieve the objectives of sentencing set out in ss. 718 to 718.2 of the ***Criminal Code***, R.S.C., 1985, c. C-46 (the "***Code***"), judges must impose sentences that appropriately balance the seriousness of the circumstances of the offence with the specific circumstances of the individual offender. The fundamental goals of sentencing are:

- To promote respect for the law and peace in society by imposing punishments;
- To denounce criminal behaviour and dissuade others from engaging in crime;
- To separate offenders from society when necessary by imposing prison sentences; and

- To assist in the rehabilitation of offenders and promoting a sense of responsibility on them.

[27] Further, the ***Code*** mandates that a judge consider a number of principles, including, but not limited to the following:

- s. 718.1: that "*a sentence must be proportionate to the gravity of the offence and the degree of responsibility of the offender*";
- s. 718.2(a): that "*a sentence should be increased or reduced to account for any relevant aggravating or mitigating circumstances relating to the offence or the offender* ...";
- s. 718.2(b): that "*a sentence should be similar to sentences imposed on similar offenders for similar offences committed in similar circumstances*" (parity); and
- ss. 718.2(d) and (e): the restraint principle. In other words, impose incarceration sparingly and only after due consideration of all other sanctions that are reasonable in the circumstances.

GLADUE* AND *IPEELEE

[28] The ancestry of the accused requires me to assess any sentence in light of s. 718.2(e) of the ***Code***, which directs sentencing judges to pay particular attention to the circumstances of Indigenous offenders. (See ***R. v. Gladue***, 1999 CanLII 679 (SCC), [1999] 1 S.C.R. 688; ***R. v. Ipeelee***, 2012 SCC 13 (CanLII), [2012] 1 S.C.R. 433.)

[29] These landmark rulings from the Supreme Court of Canada demand that sentencing judges take into account the particular systemic and background factors that may have contributed to the criminal activity of any given Indigenous offender. Further, sentencing judges are required to consider all types of sentencing procedures and sanctions that may be appropriate in all of the circumstances. A key component of these considerations is an effort to address the negative effects of colonialism on Indigenous people in Canada, including the legacy of residential schools that tore apart the bonds tying many Indigenous people in Canada to the land and to their families and communities.

[30] The provision in s. 718.2(e) does not amount to a "*race-based discount on sentencing*" nor does it set out that the court should be "*artificially reducing incarceration rates*" for Indigenous offenders according to ***Ipeelee*** (para. 75). The sentencing process for Indigenous offenders must consider their individual circumstances and life experiences while applying all of the relevant sentencing principles set out in the ***Code***, including deterrence and denunciation. An important part of understanding the unique circumstances and life experiences of an Indigenous offender involves the consideration of how their individual circumstances and life experiences have impacted their moral blameworthiness.

[31] The diminishment of moral blameworthiness arising from ***Gladue*** factors is explained at para. 42 of ***R. v. Smoke***, 2014 MBCA 91 (CanLII), as follows:

> [42] Thus, the factors related to the accused's circumstances as an Aboriginal offender must be taken into account as mitigating factors going to moral blameworthiness and weighed, together with all of the other mitigating and aggravating factors related to the offender and the offence, in determining the appropriate sentence for each offence. This applies

> whether the link is direct or indirect. This is what the sentencing judge failed to do in this case, resulting in a failure to consider a relevant factor, which is an error in law.

[32] Although it is an error not to weigh the ***Gladue*** factors in sentencing an Indigenous offender, it has been recognized that in some cases, the seriousness of an offence may outweigh what would otherwise constitute mitigating factors under a ***Gladue*** analysis and this may result in little if any impact on the overall sentence. This principle is set out in ***R. v. Dick (K.D.)***, 2015 MBCA 47 (CanLII), at para. 26, which states in part:

> [26] Thus, we would agree that the sentencing judge erred in the manner in which she considered the *Gladue* factors. To be clear, the *Gladue* factors are not to be considered as an automatic race-based deduction from an otherwise fit sentence. Instead, they are to be considered as a mitigating circumstance, together with all of the other mitigating circumstances such as youth, a lack of a criminal record, etc., in determining the appropriate sentence for the offence and offender. The weight to be attached to the *Gladue* factors will vary, depending on the nature of the *Gladue* factors, their effect on this accused and the other circumstances of the offence and the offender. *Gladue* should not be considered after the sentencing judge has determined an otherwise appropriate sentence, to see whether that sentence should be reduced to take into account the *Gladue* factors.

<u>Proportionality</u>

[33] ***R. v. Phillips***, 2023 ABCA 210 (CanLII), teaches that s. 718.2(e) of the ***Code*** mandates specific consideration of the circumstances of an Indigenous offender to ensure that the principle of proportionality is adequately assessed by sentencing judges.

[34] At para. 17 ***Phillips*** states that s. 718.2(e):

> [17] … is aimed at addressing the serious problem of overincarceration of Indigenous people and directs judges to undertake individual sentencing assessments which recognize the unique background and systemic factors that may have played a part in bringing the offender before the court. As courts are only beginning to properly recognize, Indigenous woman are

> even more overrepresented in Canadian prison populations than Indigenous men, and the lifelong challenges they face with marginalization, discrimination, sexism, and victimization often continue during their time in prison … (citations omitted).

[35] The ***Phillips*** decision also addresses the nature of the relationship between proportionality and moral blameworthiness that was reviewed in ***Ipeelee***, at para. 18:

> [18] *Gladue* factors, both systemic and those related to the background of the particular offender, can impact the offender's moral blameworthiness. As this Court stated in ***R v Okimaw***, 2016 ABCA 246 at paras 66 and 68, 340 CCC (3d) 225 [***Okimaw***], it is the duty of the sentencing court to properly assess an individual offender's *Gladue* factors as it relates to blameworthiness. "Failing to take these circumstances into account would violate the fundamental principle of sentencing — that the sentence must be proportionate to the gravity of the offence *and the degree of responsibility of the offender*" (emphasis in original): ***Ipeelee*** at para 73.

POSITION OF THE CROWN

[36] The Crown is seeking a sentence of incarceration of eight years less a pre-sentence credit for time served. As at the date of the sentencing hearing (December 8, 2023), the accused had served 713 days in custody, which when multiplied by a factor of 1.5 amounts to 1,069 days. That would leave a sentence of five years and 11 days on a go-forward basis from the time of the sentencing hearing. The Crown is also seeking some ancillary orders which the defence does not contest.

[37] The focus of the submission from the Crown was the serious risk of danger Ms. Whiteway poses to the public. It is not only the fact that Ms. Whiteway inflicted the worst kind of harm imaginable on Mr. Houle that demonstrates the risk posed to the public according to the Crown, but also the lengthy criminal record of

Ms. Whiteway that amply demonstrates that she has not learned from her mistakes and she has not engaged in a process to change her chronic criminal behaviour.

[38] Although the Crown was candid in admitting that many of the "issues" Ms. Whiteway is dealing with are not of her own making and that there is a direct connection between many of the overwhelming problems facing Ms. Whiteway and the ***Gladue*** factors that the facts make plain, the Crown maintains that it is not reasonable for members of the public to bear the risk that Ms. Whiteway poses to them.

[39] In assessing moral blameworthiness the Crown takes the position that when placed on a continuum, Ms. Whiteway's conduct should be placed on the "low end of the high range" despite the fact that she expressed fear at what she felt was stalking activity by Mr. Houle as he followed her on the crosswalk. In terms of options, the Crown insists that Ms. Whiteway could have reasonably pursued a different course of action than to act on her violent impulses by using a knife to confront an unarmed person who was a not in her path. Those opinions include running from the scene to escape Mr. Houle or calling for help from her male companion or from many members of the public who were out and about on a busy street in broad daylight.

[40] The Crown also notes that Ms. Whiteway's decision to calmly walk away from Mr. Houle after she plunged a knife into his chest, with enough force to penetrate a bone, without offering him assistance or calling for help adds to her level of moral blameworthiness.

[41] I should add that the Crown was more than fair in pointing to the mitigating circumstances at play here and in particular the ***Gladue*** factors that have made Ms. Whiteway's life excruciatingly difficult and left her vulnerable to a host of problems that she could not cope with. Despite the considerable sympathy for Ms. Whiteway that the facts might arouse, the Crown maintained that emotions should not carry the day here and that the sentence proposed for Ms. Whiteway had to serve as a "wake-up call" that no sentencing judge had successfully been able to deliver to her thus far.

POSITION OF THE DEFENCE

[42] The defence is asking that I sentence Ms. Whiteway to a five-year custodial sentence less the credit of 1,069 days for her time served in pre-trial custody, which would result in just over two years of time remaining on her sentence moving forward.

[43] The sentence proposed by the defence would result in a federal penitentiary term and I have been asked to recommend to Corrections Canada that Ms. Whiteway serve her sentence at the Maple Creek Healing Lodge in Saskatchewan, which offers specific programming to Indigenous women who struggle with the kinds of problems that are evident in Ms. Whiteway's life including substance abuse, mental health problems and roadblocks to finding secure housing and skills training.

[44] Defence counsel focused her submissions on the ***Gladue*** factors evident in Ms. Whiteway's life that have a direct bearing on her level of moral

blameworthiness in the commission of this offence. The ***Gladue*** factors at play here contextualize the drug use of Ms. Whiteway, who admittedly was a regular methamphetamine user at the time of the offence, and when combined with the fact that she suffered from depression and bi-polar disorder her level of moral blameworthiness should be diminished significantly.

[45] In support of her position, defence counsel noted that there is no dispute that Ms. Whiteway acted out of fear at the time of the stabbing and there is no doubt that the ***Gladue*** factors led her to a level of extreme desperation in how she responded to an unknown male who for whatever reason decided to follow after her as she was walking across Main Street on that morning.

[46] Unwanted attention from men, according to the defence, was something that Ms. Whiteway was familiar with because she suffered sexual abuse as a child, in her intimate partner relationship and her regular encounters with men as a sex trade worker. All of her fear and anxiety based on these experiences rushed to her mind on that fateful day and she acted out of a survival instinct in stabbing Mr. Houle.

[47] In assessing her level of moral blameworthiness, the defence points to the fact that it is not disputed that Ms. Whiteway developed substance abuse issues in her childhood and was raised in a chaotic home environment where she was exposed to dislocation and the emotional scars of sexual abuse by a member of her family. Further, it is not disputed that after suffering intimate partner abuse, Ms. Whiteway was unable to maintain a relationship with her three children and

was unable to provide for herself other than through engaging in the sex trade and committing crimes.

[48] The defence proposes that in crafting a sentence for Ms. Whiteway that I consider the fact that all of Ms. Whiteway's horrific and tragic life experiences are directly connected to the ***Gladue*** factors at play in her life. Further, the defence maintains that I cannot adequately assess moral blameworthiness and its link to proportionality as mandated by s. 718.2(e) of the ***Code***, without considering how the vicious cycle of homelessness, untreated mental health problems and substance abuse brought about the criminal behaviour laid bare in Ms. Whiteway's criminal record and her criminal conduct in the stabbing of Mr. Houle.

[49] Attaching a lower level of moral blameworthiness to Ms. Whiteway on these facts is the only fair way to determine the appropriate sentence in this case according to the defence.

CASE LAW

[50] The decision of the Alberta Court of Appeal in ***R. v. Laberge***, 1995 ABCA 196 (CanLII), 165 A.R. 375 (C.A.), provides three broadly defined categories of manslaughter offences. Those categories in terms of degree of severity are defined in para. 9 of that decision as follows:

> [9] … those which are likely to put the victim at risk of, or cause, bodily injury; those which are likely to put the victim at risk of, or cause, serious bodily injury and those which are likely to put the victim at risk of, or cause, life-threatening injuries. …
>
> [Emphasis in the original]

[51] ***Laberge*** also teaches that an assessment of moral blameworthiness at trial is fundamentally different than the process of assessing moral blameworthiness for sentencing purposes (para. 7). This is due to the fact that any assessment as to the moral culpability of an offender after a conviction is entered will be influenced by more than an evaluation of the offender's mental state at the time an offence is committed to determine *mens rea*. The most important factor in assessing moral blameworthiness in a case of manslaughter and the relevant inquiries to any such an assessment are set out, at para. 8:

> [8] … what the unlawful act itself involved. The nature and quality of the unlawful act itself, the method by which it was committed and the manner in which it was committed in terms of the degree of planning and deliberation are all relevant to this inquiry.

[52] The Alberta Court of Appeal revisited its decision in ***Laberge*** in ***Phillips***, where it comments that the establishment of three broad categories for manslaughter set in ***Laberge*** were not intended to create three broad categories of moral blameworthiness that ran parallel to one another, at paras. 23 and 24:

> [23] While ***Laberge*** is an instructive starting point when sentencing for manslaughter, the ***Laberge*** categories do not attempt to provide an exhaustive measurement of an offender's moral blameworthiness, nor does it suggest that an offender deserves a punishment at the high end of the sentencing range simply because the offender's actions fall objectively within the highest category: ***R v Naslund***, 2022 ABCA 6 at para 163, 409 C.C.C. (3d) 1; ***R v Shyback***, 2018 ABCA 331 at para 13, 366 CCC (3d) 197; ***R v Campbell***, 2022 ABCA 410 at para 31-33, [2022] AJ No 1544 (QL) [***Campbell***]. In ***Campbell***, "the assessment of moral blameworthiness in a manslaughter case includes a consideration of both the accused's mental state and the nature of the unlawful act. . . While there may be three rough categories of 'unlawful acts', that does not mean that there are three equivalent categories of manslaughter for sentencing purposes."

> [24] As this Court found in ***Swampy*** [2017 ABCA 134] at para 21, this is where the ***Laberge*** analysis intersects with the *Gladue* analysis.
>
> > In sentencing, if the assessment of moral culpability at the core of the proportionality analysis is flawed by failure to consider the mitigating effect of ***Gladue*** factors on moral culpability, this amounts to an error in principle, amenable to review under the ***Lacasse*** principles. As the Supreme Court stated in ***Ipeelee*** at paragraph 87, "application of ***Gladue*** principles is required in every case involving an Aboriginal offender . . . and a failure to do so constitutes an error justifying appellate intervention."

[53] Martin J. in ***R v. Wood***, 2021 MBQB 4 (CanLII) (upheld on appeal in ***R. v. Wood***, 2022 MBCA 46 (CanLII)), offers a neat summary with respect to the broad discretion open to sentencing judges in manslaughter cases that results in a wide range of sentences in Canadian law, at para. 34:

> [34] As to manslaughter sentences generally, I start with the Manitoba Court of Appeal's comments in ***R. v. Caincsa***, 1993 CanLII 14863 (MB CA), [1993] M.J. No. 237 at paras 4 and 5:
>
> > [4] … D. A. Thomas, in his text *Principles of Sentencing*, 2d ed. (London: Heinemann, 1979), commented at p. 74:
> >
> > > "Manslaughter" is a generic term for a group of offences with different definitions, linked only by the common requirement of a death.
> >
> > [5] In *R. v. Cascoe*, [1970] 2 All E.R. 833 (C.A.) Salmon L.J. wrote:
> >
> > > As for sentence, manslaughter is, of course, a crime which varies very, very greatly in its seriousness. It may sometimes come very close to inadvertence. That is one end of the scale. At the other end of the scale, it may sometimes come very close to murder. (p 837)
> >
> > Freedman C.J.M., in *R. v. Sinclair* (1980), 1980 CanLII 3097 (MB CA), 3 Man. R. (2d) 257 (C.A.) made a similar observation:
> >
> > > The offence of manslaughter presents the widest possible range for sentencing among all the offences in the *Criminal Code*. A sentence of life imprisonment may in one set of circumstances not be too much, and a suspension of sentence may in a different set of circumstances not be too little. (p. 257)

> In short, the breadth of the factual circumstances in which the offence of manslaughter may be committed is equalled only by the wide discretion given to the judge on sentencing.

[54] The wide range of sentences for manslaughter reflected in the case law unsurprisingly led counsel in the case before me to disagree as to the length of incarceration. They are about three years apart in their recommendations.

[55] The Crown relies on the following cases in support of its position:

- ***R. v. Hermiz***, 2007 CanLII 13933 (ON SC)
- ***R. v. McKay***, 2010 MBQB 56
- ***R. v. Tony***, 2010 SKQB 258
- ***R. Cioppa***, 2013 ONSC 1242
- ***R. v. Woodford***, 2016 MBQB 72
- ***R. v. Swampy***, 2017 ABCA 134
- ***R. v. Lee***, 2021 ONSC 7672.

[56] The defence, in turn, relies on other cases in support of its position, namely:

- ***R. v. Phillips***, 2023 ABCA 210
- ***R. v. Kurek***, 2018 SKQB 168
- ***R. v. Taniskishayinew***, 2018 BCSC 296
- ***R. v. Raweater***, 2022 ABPC 126
- ***R. v. Larche***, 2013 MBPC 54.

[57] The case law provided by counsel is helpful to me, as it offers a valuable perspective on how other sentencing judges have applied the provisions of the Code and appellate authorities to the unique facts that were before them. The analysis of case law in other fact scenarios also assists me in considering the principle of set out in s. 718.2(b) of the ***Code*** which calls for the imposition of similar sentences "*on similar offenders for similar offences committed in similar circumstances*".

[58] But there is no principal that requires me to impose a sentence within the range of those imposed by other judges in manslaughter offences. It is trite to

say each case turns on its own facts and no two cases are the same. Part of the duty of a sentencing judge is to reflect on the unique lived experiences of the offender who appears before them and the facts surrounding the crimes they committed.

[59] The individualization of sentences in context with the principles of proportionality and parity was explained in ***R. v. Pham***, 2013 SCC 15 (CanLII), [2013] 1 S.C.R. 739, at para. 8:

> [8] In addition to proportionality, the principle of parity and the correctional imperative of sentence individualization also inform the sentencing process. This Court has repeatedly emphasized the value of individualization in sentencing: *Ipeelee*, at para. 39; *R. v. Wust*, 2000 SCC 18, [2000] 1 S.C.R. 455, at para. 21; *R. v. M. (C.A.)*, 1996 CanLII 230 (SCC), [1996] 1 S.C.R. 500, at para. 92. Consequently, in determining what a fit sentence is, the sentencing judge should take into account any relevant aggravating or mitigating circumstances (s. 718.2(*a*) of the *Criminal Code*), as well as objective and subjective factors related to the offender's personal circumstances.

[60] ***R. v. Lacasse***, 2015 SCC 64 (CanLII) offers further instruction on demonstrably unfit sentences that constitute an "*unreasonable departure*" from the principle of proportionality, at para. 53:

> [53] … Proportionality is determined both on an individual basis, that is, in relation to the accused him or herself and to the offence committed by the accused, and by comparison with sentences imposed for similar offences committed in similar circumstances. Individualization and parity of sentences must be reconciled for a sentence to be proportionate: s. 718.2(a) and (b) of the *Criminal Code*.

[61] In ***R. v. EAM***, 2019 ABCA 413 (CanLII), the Alberta Court of Appeal teaches that the principal of proportionality is not dictated by precedent, at para. 14:

> [14] The first error in this analysis is that the mere fact that Crown counsel did not provide a case that involved the same penalty quantum as proposed is not a condition precedent to the ability to impose such a

> sentence. Proportionality is not dictated by precedent. It is determined by the facts and by the application of the overriding principles including that similar crimes should attract similar punishment and that mitigating and aggravating circumstances should be evaluated consistently in accordance with sound values to ensure equal justice under law. Precedent cases may assist in formulating a view as to proportionality but cases are not lined up for comparator items. …

ANALYSIS AND CONCLUSION

[62] Ms. Whiteway slid into a life of alcohol and drug dependency before she reached her teenage years. It is not surprising to me that she turned to alcohol and drugs to cope with the chaos and trauma she experienced in her grandmother's home. All of her ties to her birth parents were severed as a young child and she was not given an opportunity to connect to her Indigenous language (Cree) or Indigenous spirituality. These types of lived experiences by Indigenous people frequently form part of the ***Gladue*** assessments that judges of this court see on a daily basis.

[63] In that sense Ms. Whiteway is a victim of colonialism which included various levels of government in Canada imposing policies on Indigenous people that broke down healthy communities and family structures and also deprived them of access to adequate health care, education and economic opportunities that non-Indigenous Canadians take for granted.

[64] Ms. Whiteway has lived most of her adult life in what she called "survival mode". Like many Indigenous women living on the streets, Ms. Whiteway was barely surviving on the margins of society and was exposed to danger and violence on a daily basis.

[65] With this reality as a backdrop, it should surprise no one that Ms. Whiteway had developed a keen sense of protecting her personal space and perceiving the apparently innocuous actions of Mr. Houle in following her at a leisurely pace as a threat. Defence counsel also notes, correctly I think, that Ms. Whiteway did not have a lot of plausible options open to her with respect to an escape from a potentially dangerous situation. One could rhetorically ask: Who would assist a shabbily dressed Indigenous woman crying out for help when she did not appear to be in danger?

[66] I am also not satisfied that this was a case in which Ms. Whiteway was declining or refusing treatment. The engrained sense of helplessness Ms. Whiteway developed over the years trained her not to reach out for help that would not be forthcoming anyway. Ms. Whiteway was not indifferent to her problems, but she just felt too overwhelmed or hopeless to take action to find a different path than the one she was on.

[67] Defence counsel admits this is not a case of delusional beliefs by an accused person or someone hearing voices to kill, as was the case in the ***Phillips*** decision. But I am satisfied that Ms. Whiteway was experiencing a dangerous mixture of fear, despair and hopelessness in that moment. That was apparent to me as I watched the video from the WPS interview of Ms. Whiteway during the *voir dire*. It was also abundantly clear to me in watching the video interview that Ms. Whiteway was struggling to maintain her emotional equilibrium and she unravelled emotionally in dramatic fashion during the course of her lengthy WPS interview.

[68] Although her initial time in custody was difficult, the evidence as of late shows that Ms. Whiteway is making strides in identifying the nature of her problems and trying to find a way out of the dysfunctional and dangerous lifestyle she has engaged in during the entire course of her adult life. It has taken her a while to articulate her emotional responses and to come to terms with the profound grief she has caused to the Houle family. I am satisfied that the remorse expressed by Ms. Whiteway at the sentencing hearing was genuine and her apology to the family of Mr. Houle was sincere.

[69] For the most part Ms. Whiteway has taken her medications as prescribed while in custody. It has also been noted that her mood regulation has improved as a result of her meetings with psychiatric staff and the proper use of medication. The evidence also shows that Ms. Whiteway has gained insight into what caused her to make poor choices in the past and the difficult changes she will have to make after her release from custody to avoid a return to the destructive behaviours she engaged in most of her life. The insights she has gained about how her future might unfold after her release from custody are based on a realistic understanding of how much work she will have to do in custody to make better decisions. Thus far she appears to be participating in programing, including Alcoholics Anonymous ("AA"), to break the grip her addictions have on her.

[70] This new insight gained by Ms. Whiteway while in custody have caused her not only to attend AA classes, but also to start working with Child and Family Services to start visits with one of her three children.

[71] I agree with defence counsel that the facts of this case do not demonstrate that Ms. Whiteway should be assessed at the highest level of moral blameworthiness, even though the facts clearly place the crime at the highest level under a ***Laberge*** assessment. I am satisfied that Ms. Whiteway's level of moral blameworthiness should be placed closer to the midway point on the ***Laberge*** scale.

Aggravating and Mitigating Factors

[72] In my view the aggravating factors in this case are:

a) The victim was a vulnerable person. Mr. Houle was unarmed and was not expecting a knife attack;

b) Ms. Whiteway fled the scene of the crime and made no effort to contact emergency services;

c) The lengthy criminal record of the accused; and

d) The very high risk of the accused to reoffend that is identified in the PSR.

[73] The mitigating factors in this case are:

a) The guilty plea prior to trial which eliminated the need for the Crown to call evidence;

b) The attack was impulsive and random, as opposed to being planned or an act of revenge;

c) The sincere expression of remorse by Ms. Whiteway at the sentencing hearing;

d) The increased level of awareness Ms. Whiteway has gained into the nature of her mental health problems while in custody and her desire to pursue therapy, including AA, as part of a deliberate strategy to avoid the chronic cycle of homelessness, drug dependency and self-destructive behaviour after her release from custody; and

e) A reduced level of moral blameworthiness when proportionality is assessed pursuant to an analysis of the ***Gladue*** factors.

SENTENCE IMPOSED

[74] Overall I am satisfied that a six-year custodial sentence in this case meets the competing demands set out in the ***Code*** with respect to sentencing and in particular that the sentence must be proportionate to Ms. Whiteway's level of moral blameworthiness. In pronouncing this sentence I am also mindful deterrence both general and specific and that denunciation must form part of my decision-making process. This was an impulsive act of extreme violence against a defenseless person.

[75] I am sentencing Ms. Whiteway to a custodial sentence of six years less a pre-sentence credit calculated at 1,069 days (713 x 1.5 served as at December 8, 2023). That amounts to a pre-sentence credit of 1,085 days as at today's date (December 19, 2023).

[76] I am also issuing the following ancillary orders:

a) Primary DNA order under s. 487.051 of the ***Code***; and

b) A mandatory life weapons prohibition s. 109 of the ***Code***.

[77] Finally, I am issuing a formal request to Corrections Canada that Ms. Whiteway serve her sentence, or a portion thereof, at the Maple Creek Healing Lodge.

_____J.