

CANADA / JUDGMENT

R. v. Kruger-Allen

2021 BCSC 445

COURT

Supreme Court of British Columbia

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2021 BCSC 445 R. v. Kruger-Allen

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

R. v. Kruger-Allen,

2021 BCSC 445

Date: 20210305

Docket: 46301

Registry: Penticton

Between:

Regina

v.

Thomas Brayden Kruger-Allen

Before: The Honourable Mr. Justice Gomery

Reasons for Sentence

Counsel for the Crown:

N. Devji

Counsel for the Accused:

J. Pennington

Place and Dates of Hearing:

Penticton, B.C.

February 23-24 & March 5, 2021

Place and Date of Judgment:

Penticton, B.C.

March 5, 2021

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Introduction

- [1] The City of Penticton's attractions include a stretch of beach where the city fronts on Lake Okanagan. A concrete walkway runs along the beach, on the landward side. In the late spring of 2019, the City established firepits on the beach. On the night of May 3, a Friday night, bonfires were alight in the firepits and people were gathered about, drinking, smoking, and socializing in front of the fires. Those people included Thomas Kruger-Allen, Jewel McCullough, Lesley Forsyth, and Bradley Eliason. Things took an awful turn due to the actions of Mr. Kruger-Allen.
- [2] Mr. Kruger-Allen had been drinking and paying attention to Ms. McCullough. He pinched or grabbed her on the buttocks. She protested, there was a confrontation, and he punched her in the chest. Ms. Forsyth intervened, and Mr. Kruger-Allen punched her in the chin. Mr. Eliason and a companion, Mr. Giesbrecht, had left the bonfire and were returning. Standing on the concrete walkway, one of them asked what was going on. Mr. Kruger-Allen jumped onto the walkway and delivered an uppercut to Mr. Eliason's head. The blow incapacitated Mr. Eliason. He fell and his head struck the concrete. Mr. Kruger-Allen ran away.

- [3] Mr. Eliason suffered life changing injuries. He was taken to Penticton Hospital, and then transported to Kelowna General Hospital for emergency surgery. A portion of his skull was removed. He was in an induced coma for weeks and underwent further surgery. He is disfigured and has suffered a significant traumatic brain injury. He has lost his employment and his home, and his marriage collapsed.
- [4] Mr. Kruger-Allen has pleaded guilty to assaulting Ms. McCullough and Ms. Forsyth, and to an aggravated assault of Mr. Eliason. He is now before the court for sentencing.

Facts

Circumstances of the offences

- [5] I have already outlined the essential circumstances of the offences. A few more details are pertinent.
- [6] The assaults took place at around 11 pm. First responders were called and were on the scene shortly afterwards.
- [7] Mr. Kruger-Allen was the aggressor on all three assaults. His assault on Mr. Eliason was completely unprovoked, and caught Mr. Eliason by surprise. Mr. Eliason had no opportunity to protect or defend himself.
- [8] Mr. Kruger-Allen's counsel, Mr. Pennington, suggests that, by the time Mr. Giesbrecht and Mr. Eliason arrived on the scene, Mr. Kruger-Allen was at the centre of a confrontation and feeling outnumbered by a growing crowd of bystanders. He says that Mr. Kruger-Allen punched Mr. Eliason because he was looking to create a diversion and get away from the crowd. This differs from an account provided by Mr. Kruger-Allen to the author of his presentence report. According to that account, an unknown person stabbed Mr. Kruger-Allen and he responded by punching the next person who approached him (Mr. Eliason).
- [9] Mr. Kruger-Allen had nothing to do with Mr. Eliason prior to the assault. There is no doubt that he intended to attack Mr. Eliason, although I am sure that he did not foresee the injuries he would inflict. I do not think it assists Mr. Kruger-Allen if he attacked Mr. Eliason, an innocent bystander, as a diversionary strategy to get away from a gathering crowd. There is no independent evidence of a stabbing or that anyone on the scene other than Mr. Kruger-Allen was behaving badly. There is only evidence that Mr. Kruger-Allen suffered a scratch on his chest and no satisfying explanation as to how or when that occurred.

Circumstances of the offender

- [10] Mr. Kruger-Allen was born in June 1997 and is 23 years old. He had a terrible childhood. His parents abused alcohol and crack cocaine, and he grew up witnessing domestic violence, when his father was around. He recalls an incident when his father pinned his mother on a bed, choking her, and his mother pointed to the telephone for Mr. Kruger-Allen to call 911. Mr. Kruger Allen does not recall exactly when this took place; on different occasions he has

estimated that it may have been when he was 7 years old, or it may have been when he was 9. His parents divorced when he was 10 years old.

- [11] Prior to the divorce, Mr. Kruger-Allen was often abandoned by his parents. He lived on the Penticton Indian Reserve and he would wander the reserve, looking for his mother. He sometimes went hungry, and he was subjected to sexual abuse. He spent a year in foster care. He says that he was an angry child, and difficult to care for. Given his upbringing, it is not surprising that he would be angry and difficult.
- [12] Mr. Kruger-Allen lived with his father for a time after the divorce. His father physically abused him and he eventually left after an episode in which his father punched him in the head.
- [13] Mr. Kruger-Allen started smoking marijuana at age 11 and began drinking alcohol at age 15. He engaged in binge-drinking and sometimes blacked out. He got into fights. He became aware that, when he drinks a lot, he can become angry very quickly.
- [14] This background is important to an understanding of Mr. Kruger-Allen and what led him to assault Mr. Eliason, Ms. McCulloch and Ms. Forsyth in May 2019, shortly before his 22nd birthday. That night he was intoxicated, and angry for no good reason. This was not unusual. A forensic psychiatric report was prepared for sentencing by Dr. Matthew Burnett based on testing and an interview of Mr. Kruger-Allen. It concludes that Mr. Kruger-Allen suffers from "serious substance-related difficulties, serious anger-related difficulties, and a general pattern of antisocial attitudes/behaviours". In light of his background and early upbringing, none of this is surprising.
- [15] Mr. Kruger-Allen's sad upbringing has its roots in the experiences of his mother and his community as indigenous persons in Canada and the United States. He is a member of the Penticton Indian Band on his mother's side. Her mother (his grandmother) and his mother's aunts and uncles attended a residential school in Washington State where, according to the family, they were victims of abuse. As an adult, Mr. Kruger-Allen's grandmother struggled with alcoholism and abandoned his mother when she was 7 years old. The pattern of neglect followed by abandonment repeated in the next generation; it explains his mother's struggles with addiction and her repeated abandonment of her children while they were growing up.
- [16] Broken families, community fragmentation, substance abuse, and the transmission of violence and dysfunction from one generation to the next in aboriginal communities are a sad part of the history of this country, recognized by academics, Royal Commissions, and repeatedly by judges. We see in this courtroom the consequences of this history for Mr. Kruger-Allen and Mr. Eliason.
- [17] Mr. Kruger-Allen's mother eventually turned her life around and has been clean and sober for the past 8 years. She has established herself as a businesswoman and taken steps to repair her relationship with Mr. Kruger-Allen. They speak every day.

- [18] Mr. Kruger-Allen maintained a relationship with his father after he left his father's home to escape his father's physical abuse. They drank together and went hunting and fishing sometimes until his father died in January 2019 from a heart attack while in custody.
- [19] Commendably, considering the difficult circumstances I have described, Mr. Kruger-Allen completed grade 12 at Penticton High School. A year after graduation, he found employment working for a cousin as a drywaller. He held that job for three years, until he was remanded into custody in connection with these offences. His employer appreciates his work ethic and would hire him back.
- [20] Mr. Kruger-Allen began counselling in April 2018. In 2019, his counsellor described him as a motivated client who had suffered from and bottled up heavy feelings of abandonment and loss of trust and had been exposed to violence and lack of consistency in his life. His counsellor thought that he had much room for growth.
- [21] Mr. Kruger-Allen has a criminal record that includes three convictions for breach of an undertaking or recognizance, all apparently involving broken bail conditions, and a related conviction for an assault he committed on August 12, 2017. At the beginning of May 2019, he had pleaded guilty and was awaiting sentencing for this assault. He was out of jail on a recognizance of bail that included a condition that he abstain from the consumption or possession of alcohol. He was in breach of that condition, having drunk a great deal on the night of May 3.
- [22] Following the assaults, Mr. Kruger-Allen was arrested on May 5, 2019 and was held in custody until he was released on bail on June 24, 2019. On July 22, 2019, he was sentenced for the 2017 assault. The sentence was a four month conditional sentence order. He remained out of jail until October 19, 2019, when he was charged in respect of a further offence or offences that remain unresolved, and his bail was revoked. He has been in custody ever since.
- [23] While in custody, Mr. Kruger-Allen has had to abide by institutional rules. He did very poorly at first. His institutional convictions include possession of contraband, threatening or abuse of staff, assault of another inmate, disobeying staff direction, and obstructing an officer. His conduct improved over time.
- [24] While in prison, Mr. Kruger-Allen has completed courses in living without violence and substance abuse management. His supervising probation officer reports that he was hostile, insolent and indifferent at first, and has demonstrated significant improvements in his attitude, insight and maturity.
- [25] Using an actuarial tool developed for risk assessment, Dr. Burnett estimates that Mr. Kruger-Allen's overall degree of risk for recidivistic criminal behaviour is high. He recommends that Mr. Kruger-Allen should receive intensive treatment to address his capacity to regulate anger, develop effective coping mechanisms with respect to anger, reduce aggressive behavioural responses, and address antisocial attitudes and aggressive behavioural patterns.

He also recommends that Mr. Kruger-Allen should receive intensive substance abuse treatment of long duration. I accept Dr. Burnett's assessment and find his recommendations persuasive.

- [26] Speaking with his probation officer charged with the preparation of a presentence report, Mr. Kruger-Allen took responsibility and expressed remorse for his actions. He expressed concern for the impact of his actions on Mr. Eliason, and a desire to apologize to him. As Crown counsel points out, it detracts from these acknowledgments that Mr. Kruger-Allen still seemed to minimize or make excuses for his conduct in his description of the events of the night of May 3, 2019. However, in this sentencing hearing, having heard everything that Crown counsel had to say, he offered a transparently sincere and heartfelt apology. He said that someday he would like to tell Mr. Eliason that he is sorry, and hopes one day to make amends.

Impact on the victims

- [27] The most direct and serious victim of Mr. Kruger-Allen's conduct is Mr. Eliason. I have already summarized what happened to him: a fractured skull, two surgeries, and a long stay in the hospital, much of it in a coma. Mr. Eliason has been unemployed since the assault. He says, in his victim impact statement:

I lost my life. I have lost everything, my wife left me, lost our house, I lost our pets, I cannot work, having these screws attaching my skull, is such a pain in the butt, some days it is ok, others I would much rather deal with something else.

- [28] Mr. Eliason's former wife, Chelsea Townend, is also a victim.

- [29] Mr. Eliason and Ms. Townend were newly married in 2019. Mr. Eliason worked as a foreman in a roofing company. Ms. Townend was working in a hospital. They were planning on starting a family at some point. On the night of the assault, Ms. Townend was called to the hospital. She held Mr. Eliason while he vomited, urinated, bled, and had seizures. A neurologist told her that the brain damage might leave him a vegetable.

- [30] After the second surgery in July 2019, Ms. Townend found that Mr. Eliason had changed. He was angry, aggressive, and depressed. He suffered from memory loss and had to take anti-seizure medications. Their marriage did not survive these changes. Ms. Townend is receiving counselling for the trauma she suffered from these events.

- [31] Ms. McCullough and Ms. Forsyth are also victims. Ms. McCullough endured groping and a blow to the chest. Ms. Forsyth suffered what she describes as a hard punch to the chin. They did not submit victim impact statements and Crown counsel does not suggest that they suffered any enduring harm.

Legal Parameters

[32] Pursuant to s. 268(2) of the Criminal Code, R.S.C. 1985, c. C-46 [Code] the offence of aggravated assault is punishable by imprisonment for a term not exceeding 14 years. Pursuant to s. 266, the offence of ordinary assault is punishable by imprisonment for a term not exceeding 5 years.

[33] I must bear in mind the purposes and principles of sentencing set out in s. 718 to 718.2 of the Code. Section 718 and 718.1 state:

718 The fundamental purpose of sentencing is to protect society and to contribute, along with crime prevention initiatives, to respect for the law and the maintenance of a just, peaceful and safe society by imposing just sanctions that have one or more of the following objectives:

- (a) to denounce unlawful conduct and the harm done to victims or to the community that is caused by unlawful conduct;
- (b) to deter the offender and other persons from committing offences;
- (c) to separate offenders from society, where necessary;
- (d) to assist in rehabilitating offenders;
- (e) to provide reparations for harm done to victims or to the community; and
- (f) to promote a sense of responsibility in offenders, and acknowledgment of the harm done to victims or to the community.

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

[34] Section 718.2(a) requires that a sentence shall be increased or reduced to account for any relevant aggravating or mitigating circumstances relating to the offence or the offender. It goes on to list certain factors that "shall be deemed to be aggravating factors". One of these of some significance in this case is:

(iii.1) evidence that the offence had a significant impact on the victim, considering their age and other personal circumstances, including their health and financial situation.

[35] Section 718.2(b) requires that a sentence should be similar to sentences imposed on similar offenders for similar offences committed in similar circumstances. This is described in the cases as the principle of parity.

[36] Section 718.2(d) requires that an offender should not be deprived of liberty if less restrictive sanctions may be appropriate in the circumstances.

[37] Sentencing requires close attention to the particular circumstances of the case and characteristics of the offender. Section 718.2(e) requires that "all available sanctions, other than imprisonment, that are reasonable in the circumstances and consistent with the harm

done to victims or to the community should be considered for all offenders, with particular attention to the circumstances of Aboriginal offenders". When dealing with offenders of indigenous heritage, such as Mr. Kruger-Allen, this section obliges judges to use "a different method of analysis in determining a fit sentence"; *R. v. Gladue*, [1999] 1 S.C.R. 688; *R. v. Ipeelee*, 2012 SCC 13 at para. 59. The judge must:

consider: (a) the unique systemic or background factors which may have played a part in bringing the particular Aboriginal offender before the courts; and (b) the types of sentencing procedures and sanctions which may be appropriate in the circumstances for the offender because of his or her particular Aboriginal heritage or connection.

[38] In *Ipeelee*, the Supreme Court of Canada emphasized that s. 718.2(e) reinforces a core requirement of the sentencing process by directing the court's attention to the unique circumstances of aboriginal offenders, so far as they bear on the sentencing process. Giving judgment for the majority, LeBel J. stated:

[75] Section 718.2(e) does not create a race-based discount on sentencing. The provision does not ask courts to remedy the overrepresentation of Aboriginal people in prisons by artificially reducing incarceration rates. Rather, sentencing judges are required to pay particular attention to the circumstances of Aboriginal offenders in order to endeavour to achieve a truly fit and proper sentence in any particular case. This has been, and continues to be, the fundamental duty of a sentencing judge. *Gladue* is entirely consistent with the requirement that sentencing judges engage in an individualized assessment of all of the relevant factors and circumstances, including the status and life experiences, of the person standing before them. *Gladue* affirms this requirement and recognizes that, up to this point, Canadian courts have failed to take into account the unique circumstances of Aboriginal offenders that bear on the sentencing process. Section 718.2(e) is intended to remedy this failure by directing judges to craft sentences in a manner that is meaningful to Aboriginal peoples. Neglecting this duty would not be faithful to the core requirement of the sentencing process.

[39] In cases of serious or violent crimes, the cases emphasize that the sentencing objectives of separation, denunciation, and deterrence carry particular weight. The use of the different method of analysis required in the case of an aboriginal offender often leads to the same result. In *R. v. Elliott*, 2015 BCCA 295, at para. 34, Justice Donald explained that:

no observer should be particularly surprised to find that, in cases of violent and serious crimes, lengthy incarceration may be appropriate and warranted for Aboriginal and non-Aboriginal offenders alike.

Positions of the Crown and the Defence

- [40] Mr. Kruger-Allen has spent considerable time in custody awaiting trial, which must be taken into account in fashioning a sentence. By law, he is entitled to a credit of 1.5 days for every day of pre-trial detention. As of today's date, he has spent 532 days in custody and is entitled to a credit of 798 days, or 2 years and 68 days.
- [41] The Crown asks for a sentence of five to six years imprisonment before taking into account the credit for time spent in pretrial detention. After credit is given, the Crown's submission equates to a sentence of about two months less than three to four years and would be served in a federal penitentiary. The Crown says that a federal sentence satisfies the parity principle and the other sentencing principles. It will serve to denounce Mr. Kruger-Allen's actions and deter others. Crown counsel submits that Mr. Kruger-Allen's entrenched and profound anger issues are a threat to public safety, and that a federal institution will offer a mix and range of programming to address Dr. Burnett's recommendations for Mr. Kruger-Allen's rehabilitation.
- [42] The defence asks for a sentence of 12 to 18 months (or 1 to 1.5 years) imprisonment after credit is given for pretrial detention. For comparison with the Crown's submission of five to six years, this would translate into a sentence of 3 years and 2 months to 3 years and 8 months before credit is given.
- [43] As with any net sentence of less than two years, the sentence proposed by the defence would be served in a provincial institution. Unlike a sentence of more than two years, it could be supplemented by a probation order, and the defence proposes a probation order of two years following the term of imprisonment. The defence submits that a lengthy period of probation in a residential treatment facility will offer Mr. Kruger-Allen the treatment he should receive.

The authorities

- [44] The sentencing range in British Columbia for aggravated assaults involving an unprovoked single blow resulting in life-altering injuries to the victim ranges from two years in *R. v. Rai*, 2013 BCSC 1826 to at least 6.5 years in *R. v. Sesay*, 2020 BCSC 41.
- [45] Speaking of aggravated assault in general, in *R. v. Biln*, 1999 BCCA 369 at para. 24, Chief Justice McEachern suggested that the global range, apart from the personal circumstances of the offender, is two years less a day to six years, depending on the degree of violence used, although he accepted that it could be more in some extreme cases. A range of 18 months to six years was proposed in *R. v. Willier*, 2005 BCCA 404. In *R. v. Payne*, 2007 BCCA 541, at para. 29, Justice K. Smith indicated, following a review of the cases, that "sentences in the range of six to eight years for serious aggravated assaults are not uncommon".
- [46] Both Crown and defence are proposing sentences that fall within the range suggested by all of these cases.

Assessment

Aggravating and mitigating factors

[47] As provided in s. 718.2(iii.1) of the Code, the enormous adverse impact of the assault on Mr. Eliason is a powerful aggravating factor in this case. I have already discussed this at length.

[48] In my view, the other notable aggravating factors are:

- a) Mr. Kruger-Allen's criminal record, and in particular, his previous conviction of an assault that occurred on August 12, 2017. This should have served as a wake-up call for Mr. Kruger-Allen, an opportunity to reflect on the consequences of his actions and to change his behaviour. His failure to do so increases his moral blameworthiness;
- b) Mr. Kruger-Allen's decision on the night of May 3, 2019 to go drinking in breach of a court order, also increases his moral blameworthiness. If he had refrained from drinking, it is unlikely that he would have assaulted Ms. McCullough, Ms. Forsyth, and Mr. Eliason;
- c) Mr. Kruger-Allen's assaults on Ms. McCullough and Ms. Forsyth were unprovoked;
- d) The manner of the attack on Mr. Eliason, unprovoked and without warning, rendered Mr. Eliason particularly vulnerable. Mr. Kruger-Allen applied great force in punching Mr. Eliason who was incapacitated, and possibly unconscious, before he hit the ground. These features of the assault increase Mr. Kruger-Allen's moral blameworthiness.

[49] I accept Crown counsel's submission that the impact of the assault on the community is also an aggravating factor in the particular circumstances of this case. By bringing violence against a stranger resulting in substantial injuries into a sociable gathering in a very public place, Mr. Kruger-Allen made it more difficult for others to feel safe at night, in the heart of their community.

[50] There are also significant mitigating factors. They include:

- a) Mr. Kruger-Allen's age. He is a young man, who has a long life ahead of him;
- b) Mr. Kruger-Allen's response to counselling since his last arrest. He has shown motivation to change and a willingness to work with counsellors and others to obtain treatment for his anger and substance abuse;
- c) Support available to Mr. Kruger-Allen from his mother and other family members, including his aunt, Shayla Allison;
- d) His good work history, stable employment, and an employer who is willing to take him back when he leaves prison;
- e) Mr. Kruger-Allen's guilty plea, which has saved his victims from being forced to testify at a well-publicized trial, and saved court resources;
- f) Mr. Kruger-Allen's genuine remorse.

- [51] The other important mitigating consideration is Mr. Kruger-Allen's aboriginal background which cannot be isolated from the disastrous upbringing I have described. I say this not to cast blame on Mr. Kruger-Allen's aboriginal community, who have endured much at the hands of history. It is simply that the contextualized assessment required by s. 781.2(e) of the Code requires recognition of the fact that Mr. Kruger-Allen's aboriginal background and upbringing are closely connected to the psychological deficiencies and substance abuse that contributed to his actions on May 3, 2019. They mitigate but do not eliminate his moral blameworthiness; *R. v. Finlay*, 2016 BCCA 299 at paras. 43-46.
- [52] In my view, the objective of rehabilitation carries particular weight in this case, for the following reasons.
- [53] First, until he is able to address his aggression and substance abuse, Mr. Kruger-Allen is a danger to public safety. Putting him in prison for a lengthy period of time is a band-aid. I accept Dr. Burnett's opinion that Mr. Kruger-Allen requires intensive, sustained treatment to reduce the risk that he will offend again. Both counsel find common ground on this point, though they differ as to how this should be accomplished. Mr. Kruger-Allen acknowledges that he has work to do to deal with, as he puts it, his grief and sadness and anger.
- [54] Second, Mr. Kruger-Allen is, by virtue of the background and upbringing I have described, a victim in his own right. Constructive recognition of what has brought him here requires an effort on the part of our institutions, so far as they are able, to try to put matters right.
- [55] Third, Mr. Kruger-Allen has potential. He wants to be a better person than he has been and has shown willingness to do the work required for rehabilitation. He has a job to return to some day, and support from his family. It is realistic to think that, with intensive work, he can be rehabilitated to fill a constructive role and take his place again in society.
- [56] Having said that, there is no question that the violent crime in this case must be denounced through a lengthy prison term. Mr. Kruger-Allen must be separated from society for the time being, while he is working on his rehabilitation. A lengthy term of imprisonment will serve the goals of denunciation, deterrence, and separation. This points in the direction of a penitentiary sentence, although not conclusively.
- [57] What term of imprisonment is most likely to accomplish the sentencing objectives I have canvassed? As I have already indicated, quite apart from the simple length of imprisonment, there are significant practical differences between a sentence of four years, or 22 months taking into account time already served, followed by two or three years of probation, and a longer sentence in a federal institution.
- [58] There are no guarantees as to where Mr. Kruger-Allen will end up being placed in either correctional system. My task under the Code is to determine the term of imprisonment that is a fit and proper sentence in the circumstances of this case. It is for the correctional authorities to take it from there. However, I must consider the practical implications of the sentence I impose.

- [59] A provincial sentence could include a probation order that would place Mr. Kruger-Allen in a residential treatment facility for two or three years following his sentence. Defence counsel urges this alternative on the footing that Mr. Kruger-Allen's primary problem is one of substance abuse. I do not accept this proposition. Substance abuse is a part but not the whole of the problem, and it is not clear that the kind of high intensity treatment Mr. Kruger-Allen requires can be provided through the combination of provincial custody and residential treatment under a probation order, as suggested by the defence.
- [60] Crown counsel advises, following inquiries, that the federal system offers more programming calculated to address Mr. Kruger-Allen's needs than the provincial system. Several federal institutions offer high intensity programming.
- [61] I find that a federal sentence offers a greater prospect for treatment and programming that is particularly likely to assist Mr. Kruger-Allen, in light of his aboriginal heritage. As an individual at a high risk to reoffend, Mr. Kruger-Allen would appear to be a candidate for the federal Indigenous Integrated Correctional Program Model described in Ex. 9. The federal Mission institution has a program focused on indigenous inmates that includes a sweat lodge and healing house.
- [62] Taking all these matters into account, and subject to the defence argument I am about to address, I am of the view that a sentence of 5 years before taking pre-trial custody into account is fit and proper.

The defence's Charter application

- [63] When this sentencing first came on for hearing, Mr. Pennington submitted that a sentence in the range proposed by the defence is justified by an alleged breach of Mr. Kruger-Allen's rights at the time of his arrest on May 5, 2019. The defence had not given notice of an application in this regard, and the Crown was not prepared to address an allegation of police misconduct at the time of arrest. The sentencing was completed, except for consideration of this issue, and adjourned to permit both counsel to address the relevant facts.
- [64] Today at the resumption of the hearing, counsel submitted statements of the evidence they would expect to lead concerning the circumstances of Mr. Kruger-Allen's arrest on May 5, 2019. The statements are not in agreement. Mr. Kruger-Allen and his former common law partner, Ms. Clarke, provide one version of events. The police officers involved in the arrest provide a different version. On the defence version, there was a breach of Mr. Kruger-Allen's rights during his arrest. On the Crown version, there was not.
- [65] I could adjourn this hearing again to permit the witnesses to testify and be cross-examined but, as I will explain, I do not think it makes a difference which version of events I accept. I will assume without deciding that the defence version of events is what happened.

- [66] According to the defence version of events, on the evening of May 5, 2019, Mr. Kruger-Allen and Ms. Clarke were at home in a fifth wheel trailer they shared. Two or three police officers attended at the trailer and knocked on the door. Ms. Clarke answered. They asked for Mr. Kruger-Allen and he came to the door. They told him that he was under arrest and mentioned a charge of sexual assault. Mr. Kruger-Allen refused to exit the trailer and reached for his telephone.
- [67] The police entered the trailer, grabbed Mr. Kruger-Allen's arm, and began to handcuff him. The commotion upset Mr. Kruger-Allen's dog, which began to bark. One of the officers told Mr. Kruger-Allen or Ms. Clarke to control the dog or they would shoot it. Ms. Clarke shut the dog up in another room. The officers escorted Mr. Kruger-Allen out of the residence and took him away.
- [68] There is no mention in this account of a warrant and I will assume that the police officers were not in possession of a warrant that expressly authorized them to enter Mr. Kruger-Allen's residence to arrest him, as contemplated by s. 529.1 of the Code.
- [69] Mr. Pennington relies on *R. v. Nasogaluak*, 2010 SCC 6, in which the Supreme Court of Canada held that police misconduct in the course of an arrest justified a reduction in the sentence imposed on a conviction for impaired driving. The police had used excessive force during the arrest, breaking two of the offender's ribs, and violating his rights pursuant to s. 7 of the Canadian Charter of Rights and Freedoms. The court held that a Charter breach during arrest can be considered as a mitigating factor. Speaking for the Court, LeBel J. explained, at para. 49, that "the sentencing process includes consideration of society's collective interest in ensuring that law enforcement agents respect the rule of law and the shared values of our society".
- [70] Mr. Pennington puts his argument on two bases: first, that there was a breach of Mr. Kruger-Allen's rights warranting a remedy under the Charter, and second, even if the police misconduct did not rise to the level of a breach warranting a Charter remedy, it constitutes a mitigating factor that should lead to the imposition of a reduced term of imprisonment by comparison to what I would otherwise impose.
- [71] On the defence account of events, the police breached Mr. Kruger-Allen's rights by entering into his residence to arrest him without a warrant. Section 529.3 of the Code permits the police to enter into a residence to effect an arrest even without a warrant if the conditions for obtaining a warrant exist but "by reason of exigent circumstances it would be impracticable to obtain a warrant". Exigent circumstances include reasonable grounds to suspect that entry is necessary to prevent imminent bodily harm or death or the destruction of evidence. Nothing of that sort was imminent and there was nothing to prevent the police from obtaining a warrant while keeping the trailer under surveillance in case Mr. Kruger-Allen decided to leave. The police were simply impatient to take Mr. Kruger-Allen into custody.

- [72] However, the breach of Mr. Kruger-Allen's rights is in no way comparable to the breach in Nasogaluak. The officers' objective was lawful: it was to take Mr. Kruger-Allen into custody. Their entry into the trailer was momentary, and ended as soon as they had him in custody. The police did not use excessive force. Mr. Kruger-Allen was not injured. He waited until the middle of his sentencing hearing to raise the matter.
- [73] In sum, the officers' misconduct was not egregious; compare R. v. Bacon, 2020 BCSC 1377 at para. 30, where police misconduct amounted to an abuse of process, and R. v. Punko, 2010 BCCA 365 at para. 81, where police misconduct causing harm to the accused was contrary to Canadians' shared values. Accepting the defence version of events, a right-thinking Canadian would not consider that the police actions in this case gave rise to an abuse of process or did violence to the shared values of our society.
- [74] Accordingly, a remedy under s. 24 of the Charter is not warranted. If I view the manner of Mr. Kruger-Allen's arrest as an additional mitigating factor, it does not change my view of what constitutes a fit and proper sentence in the circumstances of this case.

Sentence

- [75] Mr. Kruger-Allen, would you please stand. For the reasons I have given, on count 1, for the aggravated assault of Mr. Eliason, I sentence you to imprisonment for five years less two years and 68 days. Your net sentence is two years and 297 days.
- [76] Aggravated assault is a primary designated offence pursuant to s. 487.04(a) of the Code. Pursuant to s. 485.051(1), I make an order in the prescribed form providing for the taking of bodily samples from you that are reasonably required for the purpose of DNA analysis.
- [77] Pursuant to s. 109 of the Code, you are restricted from possessing any firearm, other than a prohibited firearm or restricted firearm, and any cross-bow, restricted weapon, ammunition and explosive substance during the period that (i) begins from today's date, and (ii) ends not earlier than ten years after your release from imprisonment after conviction for this offence; and you are prohibited from possessing any prohibited firearm, restricted firearm, prohibited weapon, prohibited device and prohibited ammunition for life.
- [78] Count 2 has been stayed. On each of counts 3 and 4, the assaults on Ms. Forsyth and Ms. McCullough, I sentence you to a net sentence of one day in jail, to be served concurrently with your sentence on count 1.
- [79] Mr. Kruger-Allen, you have difficult work ahead of you. Despite the grim conditions you endured growing up, you are responsible for your actions and their consequences. Your challenge is to rise above your anger, grief, and sadness, to stay clean, and be the good person you have the potential to be. Your family and your community believe in you. Good luck.

"Gomery J."

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