

CANADA / JUDGMENT

R. v. Marshall

2025 ONCA 638

COURT

Court of Appeal for Ontario

DECIDED

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C68658

Judges

Trotter, Gary T.; Thorburn, Julie; Sossin, Lorne

Subject

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Decision Content

COURT OF APPEAL FOR ONTARIO

CITATION: R. v. Marshall, 2025 ONCA 638

DATE: 20250916[1]

DOCKET: C68658

Trotter, Thorburn and Sossin JJ.A.

BETWEEN

His Majesty the King

Respondent

and

Sinbad Marshall

Appellant

Mark C. Halfyard and Robert Nanni, for the appellant

Katie Doherty, for the respondent

Heard: June 17, 2025

On appeal from the conviction entered by Justice Robert F. Goldstein of the Superior Court of Justice, sitting with a jury, on December 6, 2019, and from the sentence imposed on September 8, 2020.

Thorburn J.A.:

A. OVERVIEW [1] Sinbad Marshall was convicted of one count of second-degree murder after a trial by jury. He appeals his conviction and his sentence of life without the possibility of parole for 15 years and 9 months, after receiving credit for time served prior to sentencing, including time spent in segregation.

[2] On the conviction appeal, the appellant claims his trial was unfair as the trial judge:

1. Refused to make further edits to his criminal record and misused his Indigeneity in the analysis of probative value and prejudicial effect on his application under *R. v. Corbett*, [1988] 1 S.C.R. 670;
2. Failed to properly instruct the jury by way of a midtrial instruction and gave an insufficient final instruction on the use they could make of his criminal record;
3. Failed to provide a post-offence conduct instruction covering a broad scope of post-offence conduct; and
4. Refused to take sufficient corrective action after the trial Crown's inflammatory closing argument.

[3] The appellant also appeals his sentence. He claims that the trial judge erred in principle by refusing to give full effect to the principles from *R. v. Gladue*, [1999] 1 S.C.R. 688, and to exercise his discretion to afford him further credit toward his parole ineligibility period for his pre-sentence custody conditions (including those that were found to have infringed his rights under s. 12 of the Canadian Charter of Rights and Freedoms).

[4] The appellant therefore requests that either his appeal from conviction be allowed, his conviction be quashed, and if the Crown is agreeable, a conviction for manslaughter be substituted and a sentence of time served imposed; or that he receive a new jury trial on the charge of second-degree murder. In the alternative, he seeks leave to appeal his sentence and a reduction of his parole ineligibility period to ten years.

[5] For the reasons that follow, I would dismiss the appeal.

B. THE CIRCUMSTANCES OF THE OFFENCE [6] The following disturbing circumstances of the offence are not disputed.

[7] The appellant broke into Ms. Tetsos' Scarborough home. She was an 82-year-old woman who was 5 feet 2 inches tall and weighed 126 pounds. He assaulted her, stole items from her home, cut her telephone lines, took her telephone handsets, and fled.

[8] A few days later, Ms. Tetsos was found dead in the basement of her home. The home had been ransacked.

[9] When the police arrested the appellant, he was in possession of several pieces of Ms. Tetsos' jewellery.

[10] Ms. Tetsos' injuries were catastrophic. She suffered blunt-force injuries to her head and face, multiple scrapes and contusions to her face, scalp, chest and the back of her skull, two black eyes, multiple injuries to her torso and arms, a broken sternum, 45 breaks to her ribs resulting in fractures to every single one of her 24 ribs, brain clots and bleeding, tears to the broad band of tissue that joins the right and left hemispheres of her brain, a second tear deep in the root of her brain, and nerve fibre injuries to her brain.

[11] The forensic pathologist who performed the post-mortem examination testified that Ms. Tetsos died of multiple blunt force injuries to her head and torso.

C. THE TRIAL PROCEEDINGS [12] The trial proceeded by judge and jury. During the jury selection process there was a challenge for cause to screen out potential bias on the part of prospective jurors based on the appellant's Indigenous heritage.

The Only Question for the Jury to Decide was the Appellant's Intent

[13] There was no question that the appellant killed Ms. Tetsos. The only question for the jury to decide was whether the appellant had the required intent for murder.

The Positions of the Parties on the Issue of Intent

[14] The appellant testified that he hit Ms. Tetsos in the face and rest of her body "a few times". He said, however, that she had been "fine" after he assaulted her, after which he briefly searched for things to steal, and fled. He said he wore gloves so as not to leave fingerprints. The appellant said he did not intend to kill Ms. Tetsos.

- [15] The appellant admitted that he lied to police when he told them he did not do anything to Ms. Tetsos but said he did so because he thought if he lied, he would not be charged with her murder.
- [16] The Crown took the position that the appellant intended to kill Ms. Tetsos or meant to cause her bodily harm that he knew was likely to cause her death, and was reckless as to whether she died. The appellant denied that he intended to kill Ms. Tetsos, or that he knew the harm he inflicted on her was likely to cause her to die.
- [17] Before analyzing the five grounds of appeal, I will set out the background facts in respect of those issues.

The Corbett Application

- [18] At the close of the Crown's case, the appellant brought a Corbett application to prohibit the use of convictions in his criminal record for the purpose of attacking his credibility on cross-examination.
- [19] The appellant has a lengthy criminal and youth record pre-dating this offence. It contains 21 entries under the Youth Criminal Justice Act, S.C. 2002, c. 1, and a further 7 adult convictions.
[2] The offences in his youth record were committed within five years of this offence.
- [20] The appellant took the position that none of his lengthy criminal record should be before the jury as its prejudicial effect outweighed any probative value. In the alternative, he argued that only his adult conviction for breach of probation should be admitted.
- [21] In submissions on the application, the appellant's experienced trial counsel did not (1) raise the fact that the appellant is Indigenous, (2) lead any evidence relating to any unique systemic or background factors that may have played a part in bringing the appellant before the courts, or (3) provide any submissions regarding any broader systemic and background factors relevant to the appellant's convictions.
- [22] During those submissions, in the absence of the jury, the trial judge raised the fact that the appellant is Indigenous. He pointed out however that he did not "know much about Mr. Marshall other than that ... he's clearly had troubles as a youth and as an adult in his young life." He also noted that there had been a challenge for cause before jurors were selected. The trial judge went on to say that:

THE COURT: On traditional Corbett principles it's certainly true that there are all these dangers but there are also no doubt numerous people in the community who might well take a sympathetic look at Mr. Marshall whether, you know, regardless of the fact that he's committed some serious crimes and perhaps committed murder here, certainly committed a lesser offence. Some people might actually be sympathetic to him. What do you think of that?

[DEFENCE COUNSEL]: That's a possibility but we're here left to try to predict how they're going to interpret it. And I think...

THE COURT: It's a predication that goes both ways, though, doesn't it?

[DEFENCE COUNSEL]: It does, but there's also the possibility that they will view him a criminal with a criminal past and they won't be sympathetic, because this is someone who's done this in the past and now this person died. It may be this is what he had coming to him because of his criminal lifestyle.

THE COURT: Um hmm.

[DEFENCE COUNSEL]: We don't know how they're going to interpret.

THE COURT: I'm just talking about here today, 2019, in small "L" Liberal Toronto as opposed to perhaps some other parts of the country that might take a different view of it. I'm not saying this is determinative, obviously, but I mean I'm just wondering, I mean, you know, Justice Dickson who did write the majority decision in Corbett did say, look, you know, we have to give the jury some credit for common sense. And I think most people, you know, notwithstanding a great deal of discrimination against aboriginal people in our society, I do think a lot of people also understand that there are reasons why troubled young men can get into trouble that had nothing to do with them and have a lot to do with their surroundings. Do you follow me?

[DEFENCE COUNSEL]: I do, and I acknowledge that. That could be a possibility...of how they interpret it. But without any way of knowing, there's also the other possibility that I spoke of...

THE COURT: Um hmm.

[DEFENCE COUNSEL]: ...where they're going to take the, I guess the more cynical approach and say, this is someone with a criminal lifestyle.

THE COURT: That could be realistic, it could be cynical. I wouldn't want to go that far.

[DEFENCE COUNSEL]: Fair enough.

THE COURT: Right. Okay. I understand. You're taking the traditional view that more harm than good would come of it, essentially, is what you're saying.

[DEFENCE COUNSEL]: Yes.

THE COURT: Okay. All right.

[23] The application was argued on November 19, 2019. On November 25, the trial judge provided an edited version of the appellant's record, with reasons to follow. The edited record reflected the trial judge's decision to exclude 12 of the appellant's 28 convictions, including many of his violent and his dated convictions, from the record presented to the jury.[3] The trial judge also read down one additional conviction from aggravated assault to assault.[4]

[24] The appellant testified on November 27 and 28. The trial judge's written reasons for his ruling on the Corbett application are dated December 4 (the first day of jury deliberations), and were made an exhibit at trial on December 5: see *R. v. Marshall*, 2019 ONSC 6989.

[25] In the written reasons for his Corbett ruling, the trial judge stated that,

I am not entirely convinced that the jury will look at Mr. Marshall's record and find that he is a hardened criminal who lives a criminal lifestyle and is therefore more likely to have the intent to commit murder. It is also possible that the members of the jury, being a cross-section of major urban population, are well acquainted with the systemic racism and difficulties faced by Aboriginal youth.

The jury are aware that Mr. Marshall is Aboriginal. There was a challenge for cause based on his Aboriginal status. It is possible that rather than assuming that Mr. Marshall is a hardened criminal, they will use a very different kind of reasoning. The jury may well look at Mr. Marshall's record and assume that it is the product of a troubled and difficult upbringing. Unfortunately, the difficulties faced by Aboriginal youth are not unknown in this country: *R. v. Williams*, [1998] 1 S.C.R. 1128 at para. 58; *R. v. Gladue*, [1999] 1 S.C.R. 688 at paras. 67-69. In *Gladue* at para. 67 the Court described these difficulties as "well known."

Williams was 21 years ago. *Gladue* was 20 years ago. It is just as possible that Mr. Marshall's record will engender some sympathy. Mr. Marshall's counsel has taken the traditional view that there is more danger of propensity reasoning than of sympathy. His view is not unreasonable, of course, and is backed up by case law. It may be time to revisit that traditional view.

Instruction on the Dangers of Propensity Reasoning

[26] In his written reasons on the Corbett application, the trial judge stated that the prejudice that may arise from exposing the jury to the appellant's criminal record could be managed through jury instructions specifically forbidding propensity reasoning and that he intended to give both a mid-trial and a final jury instruction to that effect.

[27] Neither party raised the need for a mid-trial instruction to be delivered and, while the appellant's edited record was entered and discussed, no mid-trial instruction was given although the final jury instruction specifically addressed the dangers of propensity reasoning.

Evidence on Post-Offence Conduct

[28] The appellant admitted at trial that he (1) cut the phone lines and took Ms. Tetsos' telephone handsets, (2) ransacked her home and raided the kitchen cabinets and refrigerator, (3) called someone afterward and roamed the city, and (4) lied to police about having entered Ms. Tetsos' home and assaulting her.

- [29] The appellant's trial counsel did not seek an instruction in respect of any post-offence conduct except his lying to police, and no such instruction was given in respect of the other after-the-fact evidence set out above.

The Trial Crown's Closing and the Charge to the Jury

- [30] After all evidence had been adduced, the parties proceeded with their closing submissions. In the trial Crown's closing address, he urged the jury to conclude that the appellant had the necessary intention (or mens rea) to commit murder when he assaulted Ms. Tetsos. The trial Crown focused on the violence of the attack and the gravity of Ms. Tetsos' injuries; he discussed the appellant's post-offence conduct, which he said reflected "clear thinking"; and he repeatedly referred to the appellant as a "liar".
- [31] He emphasized the numerous bone breaks Ms. Tetsos had suffered, and said: "Imagine how she was after he finished with her, with all of those fractures, all of those wounds, being beaten about the head with such force that she's either unconscious or dazed." He also suggested that, if the jury accepted the appellant spent "more than five minutes" in Ms. Tetsos' house after assaulting her, he would have witnessed her getting worse and worse, and that the evidence showed he took his time "in the house rummaging every single drawer where there might be valuables in every single room and taking his sweet time while he does it, to enjoy some beverages".
- [32] The trial Crown sought to refute the defence position that the appellant had been too intoxicated to appreciate that the harm he caused Ms. Tetsos could lead to her death. In addressing the appellant's purported use of ecstasy on the night in question, the trial Crown stated: "[A]gain, actions speak louder than words. Let's look at his actions on that night and ask yourself, does that sound like a guy who's out of it? Like a guy who is incapable of understanding she's a vulnerable 82-year-old woman?"
- [33] The trial Crown called the appellant a liar, or referred to him lying, over 20 times. To attack his credibility, he pointed to instances in which the appellant had admittedly lied, as well as his criminal antecedents:

Now, a lot of my friend's, ... submissions said, well, you know, Sinbad told you this and Sinbad told you that. Sinbad lied. It was entirely predictable, and it was inevitable. Why was it predictable? Look at his criminal record when you assess his credibility. Just consider that from the get-go.

- [34] At one point, the trial Crown incorrectly referred to an item found at the scene of the crime as "a damning piece of evidence of first-degree murder."
- [35] After closing submissions, defence counsel objected that the trial Crown's closing was "mildly outrageous". Counsel took issue with the repeated references to his client being a liar or lying, and characterized much of the trial Crown's closing as expressions of opinion about the evidence and invitations for the jury to engage in conjecture and speculation. He

requested that the trial judge instruct the jury that “they should confine themselves to the evidence they’ve heard”; “that it’s not proper to call someone a liar in these circumstances”; and that jurors should “put that epithet out of their mind”.

[36] The trial judge agreed that the mention of first-degree murder needed to be corrected. He then proceeded to instruct the jury and gave them clear instruction as to what they could and could not do with the appellant’s record and what they could and could not do with the fact that he had lied. As further discussed below, the jury were instructed,

You may consider the prior convictions only to help you decide how much weight to give to Mr. Marshall’s testimony. ...

A previous conviction does not necessarily make the evidence of Sinbad Marshall unbelievable or unreliable. It is only one of many factors for you to consider in your assessment of Sinbad Marshall’s testimony. I emphasize that you must not use evidence of a previous conviction to find that Sinbad Marshall is a person of bad character and therefore likely to have committed this crime.

[37] The jury were also instructed that,

Mr. Marshall’s lies to the police may only be used to assess his credibility. You must not conclude that because he lied to the police, he is guilty of murder. The lies are not evidence for you to assess his level of culpability. They are only evidence to assist you in assessing his credibility when he testified about his level of culpability. By level of culpability, I mean manslaughter versus murder. It is a fine but important distinction.

D. THE VERDICT AND SENTENCE IMPOSED [38] The jury convicted the appellant of second-degree murder. The only issue on sentencing was the duration of the period of parole ineligibility. The defence advocated for the minimum period of ten years, relying on factors that included that the appellant is an Indigenous man with a difficult upbringing and mental health issues. The defence position also pointed to the harsh pre-sentence custody conditions the appellant had experienced, most notably the 27 months he spent in segregation, which he submitted amounted to a breach of his rights under s. 12 of the Charter.

[39] The trial judge adopted the Crown’s recommendation and determined that the mandatory life sentence with an 18-year parole ineligibility period would be appropriate. He held however, that: “I will treat the s. 12 violation and the lockdowns as a mitigating factor and reduce his parole eligibility accordingly.” The appellant was credited 27 months on account of his pre-sentence custody.

E. ANALYSIS OF THE ISSUES UNDER APPEAL THE FIRST ISSUE: The Trial Judge’s Corbett Application Ruling

a. The Parties’ Positions

- [40] The appellant argues that the trial judge's reasons in his ruling on the Corbett application reveal two material errors.
- [41] First, he claims the trial judge failed to appreciate the significance of his Indigeneity. He submits that the trial judge treated his Indigeneity as an "equivocal" factor by reasoning that exposing the jury to most or all of the appellant's record could somehow assist the defence, just as it could prejudice it. The appellant claims this was an error in principle that led the trial judge to overstate the probative value and undermine the prejudicial effect of the appellant's criminal record. He relies on *R. v. King*, 2022 ONCA 665, 163 O.R. (3d) 179, leave to appeal refused, [2022] S.C.C.A. No. 438.
- [42] Second, the appellant claims the trial judge's decision not to edit more of his violent and/or youth convictions shows he failed to recognize the limited probative value of such convictions in evaluating credibility. The appellant submits that remote convictions, and convictions for violence, have long been viewed by the courts as having limited probative value in assessing credibility: see *R. v. Eze*, 2022 ONSC 277, at para. 48. This is especially true for an Indigenous accused, where the probative value tends to be lesser and the prejudicial effect tends to be greater: see *R. v. Young*, 2023 BCSC 276, at para. 24; *R. v. Hikoalok*, 2023 ONSC 406, at paras. 13-23.
- [43] The errors overlap to some degree. The appellant argues that the trial judge's reasons show that his main concern was to avoid presenting an unbalanced and overly sanitized view of the appellant to the jury, given that he had "carried on a criminal lifestyle." He submits that the trial judge prioritized this objective at the expense of giving effect to the important considerations regarding Indigenous offenders as described in *King*.
- [44] The Crown argues that the trial judge committed no error in exercising his discretion based on the information put before him on the Corbett application. He did not improperly treat the appellant's Indigeneity as an equivocal factor, nor did he rely on his observations about the potential for the jury to draw non-prejudicial inferences from the appellant's record to assess its potential prejudicial effect. Despite not having this court's guidance in *King*, the trial judge specifically considered the appellant's Indigeneity in determining how to balance the Corbett factors and exercise his discretion. In the context of his assessment of the appellant as an Indigenous man, he severely curtailed the number of convictions to be admitted before the jury, but determined there was probative value to the remainder.
- [45] The Crown submits that *King* neither requires nor encourages trial judges to presume a lack of probative value of an Indigenous offender's prior convictions. It also does not require trial judges to depart from their role on a Corbett application to ask what, if any, assistance a prior conviction could provide the jury in assessing an accused person's credibility.[5]
- b. The Legal Principles to Be Applied on a Corbett Application Brought by an Indigenous Offender

- [46] Evidence of “bad character” unrelated to the charge for which the accused is on trial is generally inadmissible at trial: Corbett, [at p. 725, per La Forest J. (dissenting, but not on this point)]; R. v. D.S., 2024 ONCA 831, at para. 24.
- [47] However, s. 12 of the Canada Evidence Act, R.S.C., 1985, c. C-5, creates a legislative exception to this rule by permitting a witness, including an accused person who chooses to testify, to be cross-examined on their criminal record. Accordingly, “cross-examination on the accused’s criminal record will be the usual course”: R. v. R.D., 2019 ONCA 951, 382 C.C.C. (3d) 304, at para. 13, citing R. v. P. (N.A.) (2002), 167 O.A.C. 176 (C.A.), at para. 20.
- [48] The presumptive admissibility of prior convictions rests on the theory that they are relevant to credibility. Prior convictions are used, along with other evidence, to assess a witness’ credibility as “[t]here can surely be little argument that a prior criminal record is a fact which, to some extent at least, bears upon the credibility of a witness ... a fact which a jury might take into account in assessing credibility”: Corbett, at p. 685.
- [49] An accused person with a criminal record who testifies is not, however, like any other witness. In King, at para. 141, this court explained that:
- [T]he concern is that when their criminal record follows them to the witness stand there is a risk that the convictions will be used not only to assess credibility but also for an improper line of reasoning: that the accused’s prior offending conduct means that they are the type of person to have committed the offence with which they are now charged.
- [50] An accused is therefore entitled to bring a Corbett application to seek to edit or exclude entirely, their criminal record.
- [51] The starting point on a Corbett application is that juries should receive all relevant information accompanied, when necessary, by a clear limiting instruction regarding the use that can be made of the tendered record: Corbett, at p. 691. However, if the trial judge is satisfied that the prejudicial effect of a conviction will outweigh its probative value, the trial judge may exercise discretion to exclude that conviction and the Crown will only be entitled to cross-examine the defendant on the admissible convictions: Corbett, at p. 692; P. (N.A.), at para. 17.
- [52] In this context, the probative value of a conviction is informed by “the connection between the fact of the prior conviction and the credibility ... of the accused”, while the prejudicial effect arises out of the potential for propensity reasoning that jurors may engage in, once they are made aware of that conviction: King, at para. 176.

- [53] Whether and to what extent a trial judge may edit a record depends on case-specific circumstances including: (i) the nature of the previous convictions; (ii) the similarity of the previous convictions to the matter under prosecution; (iii) the remoteness of the previous convictions; and (iv) the need to prevent an unbalanced picture being presented to the jury: Corbett, at pp. 698 and 740-44. The nature of a previous conviction directly affects the extent to which it bears upon credibility: Corbett, at pp. 685-86.
- [54] Most notably, convictions for crimes of dishonesty provide circumstantial evidence that the accused has a dishonest character and may demonstrate contempt for laws: King, at para. 140. Convictions for other types of crimes, however, may also bear upon credibility because they may demonstrate a lack of trustworthiness as evinced by an enduring disrespect for the law: King, at para. 140; Corbett, at p. 686, citing *State v. Duke* (1956), 123 A.2d 745 (S.C.N.H.), at p. 746.
- [55] This court confirmed that Gladue principles apply in the context of a Corbett application brought by an Indigenous accused to guide a trial judge's determination of "whether it would prejudice an accused's right to a fair trial to admit into evidence some or all of the accused's criminal record": King at para. 171. Where there are unique systemic or background factors that may have played a part in bringing the Indigenous offender before the courts, judges must take those factors into consideration. They may also consider broader systemic factors affecting Indigenous people more generally: see Gladue, at paras. 66 and 83-84; *R. v. Ipeelee*, 2012 SCC 13, [2012] 1 S.C.R. 433, at para. 59.
- [56] Such factors, where applicable, are to be considered when determining the degree to which a prior conviction of an Indigenous accused will assist in advancing the credibility inquiry, or the probative strength of the conviction-to-credibility inference. They are intended to supplement, not to replace the "long-applied guiding criteria set out in Corbett": King, at para. 192.
- [57] When weighing the probative value of a given conviction, judges should consider whether the accused has proffered evidence to "demonstrate that the systemic and background factors affecting Indigenous people in Canada is tied in some way to the particular accused and the conviction." This is a contextual inquiry to "[allow] the trial judge to determine whether the accused's criminal record makes it more likely that the accused is not the type of person to tell the truth or respect the authority of the law, or whether the impact of the experience of racism on this particular accused's life renders the credibility inference so tenuous that admission of the conviction is gutted of its probative value": King, at paras. 179-92.
- [58] When assessing prejudicial effect, trial judges must "consider whether in the context before them, the accused is at elevated risk of prejudice because of racist stereotypes" that relate to credibility, worthiness and criminal propensity, which "cause analytical problems in applying the law and may prevent triers of fact from assessing the credibility of Indigenous people fairly and accurately": King, at paras. 194, 196.

- [59] There need not be evidence of a direct causal link between a conviction and the systemic racism experienced by Indigenous people, but “there must be some evidence to support the circumstances that have impacted the accused’s life”. The focus must remain on preserving the fair trial right by placing evidence before the trier of fact that will assist their credibility assessment, without risking improper propensity reasoning. As such, “[w]hat the accused must do within the Corbett voir dire is ... demonstrate that the systemic and background factors affecting Indigenous people in Canada is tied in some way to the particular accused and the conviction”: King, at paras. 182-84.
- [60] Applying the Gladue principles on a Corbett application does not necessarily direct a different result, nor is it intended to redress broad social problems or remedy past disadvantage. Instead, “it is intended to advance trial fairness by permitting trial judges to take all relevant factors into account – factors that might otherwise be overlooked – when exercising their discretion to exclude evidence that is more prejudicial than probative”: King, at para. 175.
- [61] King thus reaffirms the Corbett framework, while recognizing that Gladue principles inform the analysis. It represents an elaboration, not an abandonment, of the Corbett framework. King directs trial judges to continue to apply the familiar and established principles set out in Corbett, but in a way that is sensitive to the systemic and background factors that may have affected a particular Indigenous accused’s path to the court.
- [62] On an appeal from a Corbett application, deference is owed to the trial judge’s exercise of discretion in editing the criminal record, unless the trial judge made an error in principle, misapprehended the evidence, or exercised his discretion unreasonably: R.D., at para. 13; P. (N.A.), at para. 17; and R. v. Mayers, 2014 ONCA 474, at para. 3.
- c. Application of the Principles
- [63] The trial judge in this case made no error in principle, did not misapprehend the evidence, and did not exercise his discretion unreasonably. As such, his decision to provide the jury with a partially edited record reading down 1 and excluding 12 of the appellant’s 28 convictions, including many of his violent and his dated convictions, is entitled to deference.
- [64] As I will explain, the trial judge recognized that the appellant is Indigenous and has had a hard life, and he was alert to the systemic and background factors affecting Indigenous people. He stated that he wanted to provide the jury with a record that was fair and balanced, and he did so in a manner that is consistent with the Corbett framework, as more recently elaborated upon in King.
- [65] I begin by first addressing comments made by the trial judge about juror sympathy. I will then explain how, notwithstanding those comments, the trial judge properly applied the Corbett framework in accordance with King such that there is no basis to intervene.
- (i) The trial judge’s remarks about juror sympathy were neither helpful nor relevant

- [66] In arguing that the trial judge erred, the appellant relies in part on remarks the trial judge made about juror sympathy on the Corbett application. These remarks, as set out above, echo comments the trial judge made during the oral submissions on the Corbett application.
- [67] The appellant argues that the trial judge's comments about the possibility of the appellant's record engendering "some sympathy" have no place in the context of his ruling on the Corbett application.
- [68] I agree. The analysis on a Corbett application involves an assessment of the probative value and prejudicial effect of an accused's record as it relates to their credibility.
- [69] There was nothing in the evidence to support the trial judge's comments. On the contrary, the courts have long recognized the harm colonialism has caused to Indigenous people, that "Indigenous people are the target of hurtful biases, stereotypes, and assumptions, including stereotypes about credibility, worthiness, and criminal propensity": *R. v. Barton*, 2019 SCC 33, [2019] 2 S.C.R. 579, at para. 199. The trial judge's speculation about the appellant's record possibly engendering sympathy from the jury was not grounded in the evidence and was not a relevant consideration.
- [70] As the trial judge himself instructed in charging the jury, as triers of fact, they "must consider the evidence and make [a] decision on a rational and fair consideration of all the evidence, and not on passion or sympathy or prejudice against the accused, the Crown, or anyone else connected with this case" (emphasis added). Juries are presumed to follow these instructions: *Corbett*, at p. 692; *R. v. Richards* (2005), 197 O.A.C. 37 (C.A.), at para. 15.
- [71] It follows that the trial judge's remarks about the appellant's record possibly engendering jury sympathy were neither relevant nor helpful. As I explain below, however, his comments ultimately played no part in his reasoning, as the trial judge went on to properly apply the Corbett framework.

(ii) The trial judge applied the Corbett framework

- [72] At the time of the Corbett application, the trial judge and parties did not have the guidance this court would subsequently provide in *King*. As stated above, however, *King* is an elaboration, not an abandonment of the Corbett framework. When deciding a Corbett application, trial judges consider whether the systemic and background factors affecting Indigenous people is tied in some way to this accused and his past convictions, but "continue to take into account all of the well-known and long-applied guiding criteria set out in *Corbett*": *King*, at para. 192.
- [73] In conducting the Corbett analysis, the trial judge considered the probative value and prejudicial effect of admitting some or all the appellant's criminal record for the purpose of evaluating the appellant's credibility. In so doing, the trial judge mentioned the fact that the appellant is Indigenous and "has had a troubled past" and acknowledged the "systemic racism and difficulties faced by Aboriginal youth ... that are not unknown in this country."

- [74] He noted that the jurors were subject to a challenge for cause to minimize the risk of bias against Indigenous persons. The challenge for cause is a safeguard though not a panacea for addressing racial stereotypes: Barton, at para. 176.
- [75] On appeal, the appellant argues that there are numerous reasons to take a tempered view of the probative value of an Indigenous accused's criminal record, including the fact that "repeated infractions related to offences rooted in addiction ... may well be as consistent with alcohol addiction as with a flagrant desire to ignore court orders"; that "Indigenous people, overrepresented in the criminal justice system, are also disproportionately affected by unnecessary and unreasonable bail conditions and resulting breach charges"; and that "Indigenous people plead guilty at materially higher rates than non-Indigenous accused": King, at paras. 189-90.
- [76] This court in King stipulates, at para. 184, that, "[w]hat the accused must do within the Corbett voir dire is ... demonstrate that the systemic and background factors affecting Indigenous people in Canada is tied in some way to the particular accused and the conviction."
- [77] However, the appellant's experienced trial counsel offered no evidence and made no submissions about the appellant's Indigenous background or how this forms part of the context in which he accumulated his convictions. Nor does the appellant take the position on this appeal that he erred in so doing.
- [78] As such, there was no evidence or argument before the trial judge as to the circumstances tied to the appellant's Indigeneity that related in some way to his convictions.
- [79] Without such evidence or submissions on behalf of the appellant, it is not surprising that the trial judge made no specific determinations as to how the appellant's Indigeneity could inform an analysis of the probative value and prejudicial effect of the appellant's convictions.
- [80] Notwithstanding the lack of specific evidence about the appellant, with the knowledge that the appellant was Indigenous, and having acknowledged the "systemic racism and difficulties faced by Aboriginal youth", the trial judge assessed how to best balance the probative value and prejudicial effect of admitting his convictions.
- [81] He accurately set out the legal considerations on a Corbett application, noting that the objective is "to give the jury information so that they can make an informed evaluation of [the appellant]'s credibility."

- [82] The trial judge mentioned the possibility of the jury feeling sympathy for the appellant but there is no indication that sympathy formed any part of his analysis. He acknowledged trial counsel's position that "there is more danger of propensity reasoning than of sympathy" and that this view was "not unreasonable ... and is backed up by case law." In my view, it can safely be inferred from the trial judge's reasons that the impugned remarks did not bear on his analysis.
- [83] The trial judge noted that the only question the jury had to decide was what, if any, intent the appellant had when he caused Ms. Tetsos' death, and that the jury's evaluation of the appellant's evidence would be based in large part on its assessment of his credibility on this issue because he was going to "admit to breaking into Ms. Tetsos' house and assaulting her." The trial judge accordingly reasoned that "[t]here is no danger of propensity reasoning. The jury will find him guilty of manslaughter at a minimum. They already know he committed a violent act."
- [84] After dividing the appellant's convictions into (1) crimes of dishonesty; (2) crimes involving lack of concern for court orders; (3) crimes indicating antipathy to the justice system; and (4) crimes of violence, the trial judge analysed how each conviction, by its nature and remoteness, could cause undue prejudice to the appellant's right to a fair trial if admitted for the purpose of cross-examination.
- [85] The trial judge specifically considered the appellant's argument that there was limited probative value in (i) his convictions for violence, and (ii) his youth record.
- [86] First, the trial judge noted that the potential prejudicial effect of admitting the convictions for violence was attenuated by the fact that the appellant admitted breaking into Ms. Tetsos' house and assaulting her. The record would therefore only go to the credibility of his submission that he had no intention to kill her.
- [87] The trial judge found that many of the appellant's prior convictions for violent offences were relevant to the assessment of his credibility and that their probative value was not outweighed by their potential prejudicial effect. He nonetheless removed most of the more serious violent convictions from consideration by the jury including: assaulting a peace officer, sexual assault, possessing a firearm knowing it was unauthorized, and aggravated assault (which was put to the jury as an assault).
- [88] Second, he accepted the defence submission that the probative value of the appellant's early youth criminal convictions was diminished, although because the appellant was only 21 years old, the youth record was so recent that some entries should remain for the jury to consider. He therefore removed from consideration by the jury the earliest youth convictions and instructed them that "older, more youthful convictions should carry less force."

[89] After assessing the potential prejudice that could arise from admitting his criminal record, with the knowledge that the appellant is Indigenous, the trial judge concluded that it was necessary to exclude approximately 40 percent of the appellant's convictions, including most of the most serious and the earliest convictions because "some convictions are probably too prejudicial and may resonate with some jurors despite their best efforts. This is, after all, a very human process." He also gave clear instructions to the jury to address the potential prejudice of admission of the edited record.

[90] In my view, the trial judge's significant editing of the appellant's record reflects an appreciation of the appellant's submission about the risk of prejudice that would arise were the Crown permitted to cross-examine the appellant on his entire record. The trial judge balanced the potential prejudicial effect against the probative value and explained why he decided to admit some convictions and not others.

[91] I agree with his reasoning that,

Mr. Marshall's record is admissible but will be edited to remove the most egregious offences. My goals are that the jury should have the appropriate information, that an unbalanced picture is not presented, but that the evidence is not so prejudicial that the fairness of the trial is impaired. The editing should also achieve the goal of providing information while not distracting the jury from their task. Although I do believe the jury will follow my instructions, some convictions are probably too prejudicial and may resonate with some jurors despite their best efforts. This is, after all, a very human process.

[92] It was open to the trial judge to find that some of the appellant's prior criminal convictions, including some violent and less recent offences, were relevant to the assessment of the credibility of his claim that he did not intend that Ms. Tetsos should die.

[93] The significant edits and the reasons for so doing, reflect an appropriate balance between the probative value and prejudicial effect of the convictions to the appellant's credibility, the information he had about the appellant's Indigeneity and the discrimination against Indigenous people more generally, bearing in mind that he was given no evidence of how the systemic factors affecting Indigenous people in Canada were tied to the appellant and his convictions.

[94] As noted by this court in *King*, an accused's Indigeneity does not necessarily direct a different result on Corbett applications and Corbett applications are not intended to redress broad social problems or remedy past disadvantage: at para. 175.

[95] I would accordingly reject the appellant's argument that the trial judge misused the appellant's Indigeneity and overstated the probative value and understated the prejudicial effect of admitting his record. The trial judge provided the jurors with a record that presented a balanced picture, recognizing that the violent and youth convictions of this appellant may carry greater risks of propensity reasoning. I therefore see no error in the trial judge's exercise of discretion as to which criminal convictions to edit. His approach was

consistent with the framework set out in Corbett and subsequent binding authority, which instructs trial judges to consider the nature and timing of prior convictions.

[96] It would have been helpful for the trial judge to more clearly articulate how the appellant's Indigeneity factored into his decision to exclude certain offences, including several of the most serious offences, and admit others. However, given the lack of any evidence or argument before the trial judge relating to the appellant's circumstances and how they relate to the convictions on his record, it is not surprising he did not do so.

[97] For these reasons, I would dismiss this ground of appeal.

THE SECOND ISSUE: The Lack of a Mid-Trial Jury Instruction about the Dangers of Propensity Reasoning

[98] The appellant's second ground of appeal also arises out of the trial judge's reasons for ruling on the Corbett application.

[99] The appellant claims the trial judge erred by stating the need for a mid-trial instruction about using the appellant's criminal record and then failing to give such an instruction. He further claims the final instruction about the danger of propensity reasoning contained in the jury charge was not sufficiently strong to ensure a fair trial.

[100] In his written reasons on the Corbett application, the trial judge stated that the prejudice that may arise from exposing the jury to the appellant's criminal record could be managed through jury instructions specifically forbidding propensity reasoning. He stated that:

At the end of the day, I think that the remedy is not to sanitize the trial but to have faith that the jury will follow instructions. I refer to Chief Justice Dickson's original observation. My view, therefore, is to give the jury information so that they can make an informed evaluation of Mr. Marshall's credibility. That information is to be tempered by careful editing and strong mid-trial and final instructions. [Emphasis added.]

[101] Neither party raised the need for a mid-trial instruction when the appellant testified. The parties did not have the trial judge's written ruling at the time.

[102] As a matter of law, the absence of a mid-trial instruction alone does not necessarily amount to reversible error. The decision to provide a mid-trial instruction is discretionary: see *R. v. Howard*, 2017 BCCA 263, at para. 30. As such, the trial judge was not bound by law to provide such an instruction.

[103] The issue is whether, in the absence of a mid-trial instruction, the jury was nevertheless properly instructed before rendering their decision to ensure that the accused has a fair trial.

[104] Appellate courts must take a "functional approach" in reviewing jury instructions for potential legal error by asking whether a jury was "properly, not perfectly" instructed: *R. v. Lozada*, 2024 SCC 18, 492 D.L.R. (4th) 75, at para. 14. A properly equipped jury is one that is

accurately and sufficiently instructed: *R. v. Abdullahi*, 2023 SCC 19, 483 D.L.R. (4th) 1, at para. 37. In this case, the appellant takes issue with the sufficiency of the trial judge's instructions safeguarding the jury from propensity reasoning based on the appellant's criminal record.

[105] The jury was properly instructed that,

1. They must not use the fact the appellant had committed a crime as evidence that he was guilty of this charge;
2. They could only consider the appellant's prior convictions to help them decide how much weight to give his testimony;
3. They were to consider the number, nature, and dates of the convictions. Some convictions, such as those involving dishonesty, may be more important while dated convictions, may be less significant;
4. They may consider the appellant's age at the time of the earliest convictions;
5. A previous conviction does not necessarily make the appellant's evidence unbelievable or unreliable and is only one of many factors for the jury to consider; and
6. They must not use the evidence of a previous conviction to find that the appellant is a person of bad character and therefore "likely to have committed this crime."

[106] The jury charge, which was provided to both Crown and defence in advance and which was accepted by both parties, properly equipped the jury with the tools they needed to decide the case before it and adequately guarded against the risk of general propensity reasoning.

[107] The jury was cautioned to not use the appellant's criminal record to evaluate anything other than his credibility and they were instructed not to use evidence of any previous conviction to evaluate whether the appellant likely committed this crime.

[108] I conclude that the absence of a mid-trial instruction does not constitute a reversible error as there is no requirement to give one and the final instruction was clear. I would therefore dismiss this ground of appeal.

THE THIRD ISSUE: The Post-Offence Conduct Instruction in the Charge

[109] The appellant claims that since he admitted to killing Ms. Tetsos but said he did not intend to kill her, an instruction should have been given that there was no probative value in any of his post-offence conduct.

a. When After-the-Fact Conduct is Relevant

[110] Generally, "[a]fter-the-fact conduct evidence will be relevant if it makes a particular inference more likely, as a matter of logic and human experience". However, such evidence will not be relevant "when the conduct is 'equally consistent' with the proposed inference and an alternative inference", meaning "that the conduct is not capable, as a matter of logic,

common sense, and experience, of favouring one inference over another”: *R. v. Ethier*, 2023 ONCA 600, 430 C.C.C. (3d) 121, at para. 59, citing *R. v. Calnen*, 2019 SCC 6, [2019] 1 S.C.R. 301, at paras. 106, 108-12 and 124.

- [111] For instance, when an accused admits to the *actus reus* of an offence, evidence of their conduct after the fact is often equally consistent with different *mens rea*, in which case it would not be relevant to determining the accused’s intent or distinguishing between levels of culpability. There is however, no bright line rule against using after-the-fact conduct evidence in making these determinations of either the accused’s intent or level of culpability: *Ethier*, at paras. 60-61, citing *Calnen*, at para. 119, and *R. v. Jackson*, 2016 ONCA 736, 33 C.R. (7th) 130, at para. 20.
- [112] In *R. v. Arcangioli*, [1994] 1 S.C.R. 129, at p. 145, the Supreme Court explained that “where an accused’s conduct may be equally explained by reference to consciousness of guilt of two or more offences, and where an accused has admitted culpability in respect of one or more of these offences,” a trial judge should instruct a jury that evidence of this post-offence conduct “has no probative value with respect to any particular offence”: see also *R. v. White*, 2011 SCC 13, [2011] 1 S.C.R. 433, at para. 37 (“*White* (2011)”).
- [113] However, “[t]hat there may be a range of potential inferences does not render the after-the-fact conduct null. In most cases, it will be for the jury or judge to determine which inferences they accept and the weight they ascribe to them”: *Calnen*, at para. 112, per Martin J. (dissenting, but not on this point) (citation omitted).
- [114] If the conduct cannot be said to be “equally consistent” with any alternative inference (i.e., if the conduct favours an inference of guilt), it is up to the jury to decide which inference (if any) it accepts, and how much weight to give to it. This may require determining whether the post-offence conduct is related to the crime before the jury rather than some other reaction or culpable act: *Calnen*, at paras. 124, 133, 135, 144-45, per Martin J. (dissenting, but not on this point); *White* (2011), at para. 137, per Binnie J. (dissenting, but not on this point); *R. v. White*, [1998] 2 S.C.R. 72, at para. 27; *R. v. Salah*, 2015 ONCA 23, 319 C.C.C. (3d) 373, at para. 227; and *Abdullahi*, at paras. 30-70, 72.
- b. The Appellant’s Claim that the Post-Offence Conduct had no Probative Value
- [115] The appellant claims that his post-offence conduct was equally consistent with manslaughter and murder as the evidence could suggest that he was trying to avoid being caught, not that he necessarily intended to kill Ms. Tetsos.
- [116] The appellant therefore claims the jury should have been instructed that post-offence conduct as to him (1) cutting the phone lines and taking the telephone handsets, (2) ransacking the home and raiding the kitchen cabinets and refrigerator, and (3) calling someone afterward and roaming the city (the “other post-offence conduct”), had no probative value to the key issue of *mens rea*.

[117] Instead, the jury was only given a “no probative value” instruction in respect of the appellant lying to police and trying to slip off a ring he had stolen from Ms. Tetsos while being searched by police, which was done at the request of the appellant’s trial counsel.

[118] As set out above, the jury were instructed that,

Mr. Marshall’s lies to the police may only be used to assess his credibility. You must not conclude that because he lied to the police, he is guilty of murder. The lies are not evidence for you to assess his level of culpability. They are only evidence to assist you in assessing his credibility when he testified about his level of culpability. By level of culpability, I mean manslaughter versus murder. It is a fine but important distinction.

c. Analysis of the Probative Value of the Post-Offence Conduct

[119] Limiting instructions are not invariably required with respect to admissible after-the-fact conduct evidence: *White* (2011), at paras. 21, 137.

[120] For the reasons that follow, I find that the other post-offence conduct was relevant to the appellant’s intent in assaulting Ms. Tetsos, and therefore the trial judge’s instruction was appropriate and sufficient. Moreover, I note that the wording of this instruction was vetted with counsel and the appellant’s trial counsel did not seek an instruction in respect of any other post-offence conduct.

[121] The divergent closings of the parties, which both made use of post-offence conduct, demonstrate that the after-the-fact evidence was not equally consistent with manslaughter or murder. Rather, it could be used by the jury to distinguish the two. The parties accepted that the jury should consider the appellant’s post-offence conduct after the beating to help them decide the issue of intent.

[122] The appellant argued that the jury should not be satisfied beyond a reasonable doubt that he intended to kill Ms. Tetsos, based on all the evidence, including how he acted after the assault. The appellant claimed his actions demonstrate that he lacked the intent for murder or was incapable of forming such an intent due to being “drunk on alcohol, whisky, and stoned on a cocktail of street drugs”. He argued, for example, that because of his intoxicated state, his assessment of Ms. Tetsos’ state “may have been flawed”, and he cut the phone lines and took the receivers to “make a clean getaway and not get caught” thinking she was still alive.

[123] The Crown argued that all the evidence, including the appellant’s actions after the assault, should lead the jury to conclude that the appellant had the necessary intent for murder. The Crown argued that the same evidence of the appellant cutting the phone lines and taking the receivers was evidence that he deliberately prevented Ms. Tetsos from “calling out for help”, and that he left her in the middle of the night to die “because he wants her to die.”

- [124] Given that each party was relying on the post-offence conduct to arrive at different conclusions on the central issue of intent, the trial judge correctly concluded that the jury could consider this evidence in evaluating whether the Crown had established beyond a reasonable doubt that the appellant had the intent for murder.
- [125] Moreover, while the trial judge did not expressly tell the jury not to jump from the other post-offence conduct to a finding of intent, there was no dispute that the appellant engaged in the other post-offence conduct. The only issues were the timing of his actions and what inference they might draw regarding intent, from that evidence.
- [126] Since the trial judge provided instructions about how to assess intent, and the competing way the parties asked the jury to use the post-offence conduct when undertaking that assessment, the jury was not left with the misimpression that intent was established once they were satisfied the appellant engaged in the alleged post-offence conduct: see *R. v. Gaetan*, 2023 ONCA 114, 423 C.C.C. (3d) 374, at para. 44. The fact that the jury was not convinced by the defence framing of the post-offence conduct does not mean that this evidence was improperly before the jury, or that the jury lacked the necessary instructions to properly assess the post-offence conduct evidence in determining whether the appellant demonstrated the requisite intent for murder.
- [127] As such, I would dismiss this ground of appeal.

THE FOURTH ISSUE: The Sufficiency of the Charge in View of the Trial Crown's Closing Address

a. The Trial Crown's Closing Address

- [128] The appellant claims that the trial Crown's closing address was unnecessarily inflammatory, that the trial judge refused to give the jury corrective instructions, and that the final charge was insufficient to address the harm created. He claims this resulted in a miscarriage of justice and that a new trial should be ordered.

b. The Law Regarding Crown Closings

- [129] In our adversarial system, both Crown and defence counsel are afforded considerable latitude in making a powerful closing address: *R. v. Boudreau*, 2012 ONCA 830, at para. 15, leave to appeal refused, [2013] S.C.C.A. No. 330; *R. v. McGregor*, 2019 ONCA 307, 145 O.R. (3d) 641, at para. 181; and *R. v. Clyde*, 2021 ONCA 810, 158 O.R. (3d) 641, at para. 35.
- [130] However, the Crown is not like any other party. While the Crown may act as a strong advocate, it must also meet the standard of fairness and propriety that applies given the quasi-ministerial nature of its role: *R. v. Mallory*, 2007 ONCA 46, 217 C.C.C. (3d) 266, at para. 336; *R. v. Hurd*, 2014 ONCA 554, 312 C.C.C. (3d) 546, at para. 32. As Rand J. said in the oft-quoted citation from *R. v. Boucher*, [1955] S.C.R. 16, at pp. 23-24:

It cannot be over-emphasized that the purpose of a criminal prosecution is not to obtain a conviction, it is to lay before a jury what the Crown considers to be credible evidence relevant to what is alleged to be a crime. Counsel have a duty to see that all available legal proof of the facts

is presented: it should be done firmly and pressed to its legitimate strength but it must also be done fairly. The role of prosecutor excludes any notion of winning or losing; his function is a matter of public duty than which in civil life there can be none charged with greater personal responsibility. It is to be efficiently performed with an ingrained sense of the dignity, the seriousness and justness of judicial proceedings.

[131] Where the Crown's closing is so improper that it jeopardizes trial fairness, the trial judge's failure to intervene will constitute an error of law: *R. v. T.(A.)*, 2015 ONCA 65, 124 O.R. (3d) 161, at para. 29, citing *R. v. Romeo*, [1991] 1 S.C.R. 86, at p. 95, and *R. v. Michaud*, [1996] 2 S.C.R. 458, at para. 2. The reviewing court will follow a two-stage analysis to determine whether an appeal must be granted. First, it must consider whether the Crown's conduct was improper. If that is the case, it must then assess "whether, considered in the context of the trial as a whole, including the evidence adduced and the positions advanced, the substance or manner of the Crown's closing address has caused a substantial wrong or miscarriage of justice, including by prejudicing the accused's right to a fair trial": *Clyke*, at paras. 33-37; *McGregor*, at para. 184; see also *R. v. MacKenzie*, 2020 ONCA 646, 395 C.C.C. (3d) 421, at para 18.

[132] For present purposes, some relevant examples of impugned Crown conduct include misstating the evidence or the law; "putting before the jury, as facts to be considered for conviction, matters of which there is no evidence and which come from Crown counsel's personal experience or observations"; expressing personal opinions about the evidence or the veracity of a witness; and resorting to inflammatory rhetoric, demeaning commentary or sarcasm: *R. v. Pisani*, [1971] S.C.R. 738, at p. 740; *Boudreau*, at para. 16; and *Mallory*, at para. 340.

[133] At the second stage of the analysis, the reviewing court will consider several factors to determine whether the Crown's closing address "was unfair in such a way that it might have affected the decision of the jury": *Clyke*, at para. 36, citing *R. v. Grover*, (1990) 56 C.C.C. (3d) 532 (Ont. C.A.), at p. 537. These factors include:

1. The seriousness of the improper comments;
2. The context in which the comments were made;
3. The presence or absence of objection by defence counsel; and
4. Any remedial steps taken by the trial judge following the address or in the final instructions to the jury.

[134] Where the reviewing court is satisfied that one or more aspects of the Crown's closing address was improper, it may find that the trial judge's response to the alleged improprieties sufficiently mitigated the unfairness that would have otherwise resulted.

[135] A trial judge's response to alleged improprieties in a Crown's closing address attracts deference at the appeal stage. Trial judges are "in the best position to assess the significance of the remarks of counsel, to determine if they need to be corrected, and, if necessary, to correct inaccuracies and remedy any unfairness that may arise from the addresses of counsel": *R. v. Rose*, [1998] 3 S.C.R. 262, at para. 126; see also *McGregor*, at para. 182.

c. Application to the Facts of this Case

[136] The appellant alleges the trial Crown's closing contained three types of improprieties: (1) opinions about the appellant and the evidence; (2) assertions that were neither based on the evidence nor put to the appellant; and (3) improper rhetoric, including sarcasm. I address these in turn.

(i) Opinions about the appellant and the evidence

[137] The appellant first argues the trial judge was under an obligation to "denounce" the trial Crown's repeated references to the appellant lying or being a liar. The trial Crown used the words "lie", "lies", "lied", or "lying" 23 times during closing submissions, told the jury the appellant "was hardly in the stand a minute without, without uttering a lie", and stated that the appellant "knows he can't tell the truth." The appellant submits these constitute improper expressions of opinion on the appellant's veracity.

[138] Second, the appellant submits that the trial Crown also proffered many of his own views of the evidence, which he was not entitled to do. For instance, in reviewing the appellant's claim that he was not thinking clearly because he had consumed cough syrup with codeine the trial Crown remarked:

[Codeine cough syrup] makes you sleepy, right? Everyone has seen the label on a cough syrup bottle will make you drowsy. This guy is frantic that night. Frantic. Frantically [sic] beating her to death. Frantically calling to get rid of the TV, I'm going to suggest. But frantically calling and frantically getting out of the area once his dirty deed is done. He's anything but a sleepy guy who's been drinking cough syrup.

[139] I agree this passage illustrates the trial Crown's problematic tone, about which I will say more when addressing his rhetoric. I am not persuaded, however, that the content of this remark and others through which the trial Crown either offered to the jury inferences that could be drawn from the evidence or called the appellant a liar warrant appellate intervention. I say this for several reasons.

[140] First, it was open to the trial Crown to argue that the jury should disbelieve the appellant. Defence counsel objected at trial to the Crown calling the appellant a liar but, the trial judge correctly noted that the appellant had admitted to lying to police during the investigation into Ms. Tetsos' death, and there was other evidence that contradicted his version of events. The trial judge therefore concluded that a corrective instruction on this point was not necessary as, although the trial Crown's delivery was excessive, he was entitled to argue the jury should disbelieve the appellant based on evidence that he lied to police, and adduced

other evidence that could adversely affect his credibility. I see no error in his approach: see *R. v. MacKenzie*, 2020 ONCA 646, 395 C.C.C. (3d) 421, at paras. 28-30.

- [141] Second, the trial Crown did not invite the jury to draw inferences that went beyond those reasonably available from the evidence at trial. For example, at trial, the appellant admitted to consuming alcohol, codeine cough syrup, and other drugs the day the offence was committed. The trial Crown did not invite the jury to consider unproven facts when determining the question of intent.
- [142] Third, to the extent that the trial Crown injected opinion in reviewing the evidence, the jury charge was sufficient to neutralize the prejudice. It is accepted that “[a] caution with precise examples is preferable to a general appeal to the jury to be dispassionate”: *Clyke*, at para 42, citing *Melanson v. R.*, 2007 NBCA 94, 230 C.C.C. (3d) 30, at para. 75. However, general language may suffice “where the impropriety is of a lesser magnitude”: *Robert J. Frater, Prosecutorial Misconduct*, 2nd ed. (Toronto: Carswell 2017), at p. 284; see *R. v. Chambers*, [1990] 2 S.C.R. 1293.
- [143] Although the trial judge did not provide a specific instruction regarding the trial Crown closing, when charging the jury just after the Crown closing, he instructed the jury that: (1) they were the judges of the facts; (2) they had to make their decision based on all of the evidence but only the evidence adduced at trial; (3) what counsel or the trial judge said when speaking to the jury was not evidence; and (4) the jury’s memory or understanding of the evidence is “what counts” in making findings of fact, not that of counsel or the judge. Given that the inferences suggested by the trial Crown were available on the evidence, these comments were not of such a serious magnitude such that the trial judge’s instructions, however general, were insufficient to mitigate any potential unfairness.
- (ii) Assertions that were not based on the evidence and that were never put to the appellant
- [144] The appellant argues that during his closing address, the trial Crown made several assertions that were not based on the evidence and that were never put to the appellant, contrary to the rule in *Browne v. Dunn* (1893), 6 R. 67 (H.L.). The appellant points to the following instances:
- The trial Crown gave evidence about the effects of codeine and ecstasy and the lifestyle of an addict, without leading evidence about these drugs and without asking the appellant about his personal experiences;
 - The trial Crown suggested that there were two distinct beatings without putting this to the appellant; and
 - The trial Crown suggested that the appellant fractured Ms. Tetsos’ neck without putting this to him.

- [145] The rule in *Browne v. Dunn* is a rule of trial fairness that “applies where a cross-examiner intends to impeach a witness with contradictory evidence on a matter of substance”, to ensure that the witness is “given a fair opportunity to challenge contradictory evidence that the witness might have been able to explain away”: *R. v. Powell*, 2021 ONCA 271, at para.76. Compliance with the rule in *Browne v. Dunn* does not require that all evidence on which a party desires to contradict the witness for the opposite party be put to that witness in cross-examination but only matters of substance on which the party seeks to impeach the witness's credibility and on which the witness has not had an opportunity of giving an explanation because there has been no suggestion whatever that the witness's story is not accepted: *Browne v. Dunn* , at pp. 70-71.
- [146] Where the confrontation is general, known to the witness and the witness's view on the contradictory matter is apparent, there is no need for confrontation and no unfairness to the witness in any failure to do so: *R. v. Quansah*, 2015 ONCA 237, 125 O.R. (3d) 81, at paras. 81-82, leave to appeal refused, [2016] S.C.C.A. No. 203.
- [147] The rule in *Browne v. Dunn* has no application in this context as the Crown's position was known, the inferences were based on evidence the appellant had ample opportunity to challenge at trial, or were not material to the sole issue of whether the appellant intended to kill Ms. Tetsos.

(iii) Use of inflammatory rhetoric and sarcasm

- [148] The trial Crown's closing was graphic, inflammatory, and contained rhetoric that falls below the expected standard of Crown counsel. However, the trial judge provided the jury with clear instructions about what they could and could not do with the evidence adduced and articulated the Crown position without any of the inflammatory and troubling language used by the trial Crown.
- [149] In his final instructions given the day after the Crown closing, the trial judge told the jury that they could not use the appellant's record to find that he was “a person of bad character and therefore likely to have committed this crime.” Both parties agreed to this wording.
- [150] He also instructed the jury that they could not make the impermissible jump from the appellant's criminal record to a determination that he was the type of person to have committed murder or that he was likely because of his record to have committed the charged murder. The weight to be placed on the appellant's edited record, or any portion of it, was for the jury to decide.
- [151] The trial judge also reminded the jury that although in the closing, the trial Crown unintentionally and incorrectly referenced first-degree murder, the trial Crown should have said second-degree murder as no first-degree murder was before them.

- [152] In outlining the positions of the parties, the trial judge provided his outline of the Crown's position without any reference to the appellant lying, or any of the impugned submissions made the previous day.
- [153] The context of the trial Crown's submissions is also important. The appellant admitted to killing Ms. Tetsos; the only question before the jury was whether he intended to do so. The potential prejudicial effect of comments inflaming the accused's character is different where the accused's guilt or innocence is at issue, as opposed to in this case, where the issue to be decided was whether the accused committed murder or manslaughter.
- [154] Unlike the case of *R. v. L.L.*, 2009 ONCA 413, 96 O.R. (3d) 412, at paras. 71-73, cited by the appellant, when viewed in the context of the trial judge's jury instructions and the trial, these improper remarks do not lead me to conclude that the appellant did not have a fair trial and that a new trial is necessary.
- [155] I would therefore dismiss this ground of appeal.

THE FIFTH ISSUE: The Sentence Appeal

- [156] The jury convicted the appellant of second-degree murder. The only issue on sentencing was the duration of the period of parole ineligibility. The appellant's trial counsel advocated for the minimum period of ten years, relying on factors that included the fact that the appellant is an Indigenous person with a difficult upbringing and mental health issues. He also pointed to the harsh pre-sentence custody conditions the appellant had experienced, most notably the 27 months he spent in segregation, which he submitted amounted to a breach of his rights under s. 12 of the Charter.
- [157] The trial judge accepted the Crown's submission that an 18-year parole ineligibility period was appropriate. He nonetheless reduced the appellant's parole ineligibility period by 27 months to reflect the appellant's pre-sentence custody conditions, including the 27 months the appellant spent segregation. The trial judge treated the s. 12 violation and lockdowns as mitigating factors. He ultimately imposed the mandatory life sentence and set parole ineligibility at 15 years, 9 months.
- [158] The appellant argues the trial judge erred in principle in failing to give full effect to Gladue principles in deciding the appellant's sentence, and in failing to give effect to the combined mitigating impact of both the s. 12 Charter violation and the other harsh conditions of the appellant's pre-sentence custody.
- [159] More specifically, the appellant claims the trial judge: (1) failed to mention the Gladue principles or articulate how he applied them in imposing the sentence; (2) did not give weight to the jury's unanimous ten-year parole ineligibility recommendation; and (3) failed to give a sufficient remedy for the s. 12 violation and proper effect to both the s. 12 violation and harsh lockdown conditions.

[160] The appellant submits that his parole ineligibility period should be reduced to ten years.

a. The Legal Principles that Apply on Sentencing

[161] A trial judge has broad discretion in imposing a sentence, including setting a period of parole ineligibility. Because the application of the sentencing factors in the circumstances of the offender is an individualized process, appellate intervention is warranted only where the judge has committed an error in principle that had an impact on sentence or otherwise imposed a sentence that was demonstrably unfit: *R. v. Lacasse*, 2015 SCC 64, [2015] 3 S.C.R. 1089, at paras. 36-55; *R. v. Friesen*, 2020 SCC 9, [2020] 1 S.C.R. 424, at paras. 25-26; and *R. v. Shropshire*, [1995] 4 S.C.R. 227, at pp. 249-51.

[162] The Gladue principles set out in s. 718.2(e) of the Criminal Code must be considered whenever an Indigenous offender is sentenced. Their application is individual and offence-specific: *Ipeelee*, at paras. 71-75. In *Gladue*, at para. 83, the Supreme Court held that,

In all instances it will be necessary for the judge to take judicial notice of the systemic or background factors and the approach to sentencing which is relevant to aboriginal offenders. However, for each particular offence and offender it may be that some evidence will be required in order to assist the sentencing judge in arriving at a fit sentence. Where a particular offender does not wish such evidence to be adduced, the right to have particular attention paid to his or her circumstances as an aboriginal offender may be waived.

[163] *Gladue* instructs courts that “sentencing [Indigenous] offenders, as for all offenders, must be holistic and designed to achieve a fit sentence in the circumstances.” The sentencing judge must consider the surrounding circumstances “regarding the offence, the offender, the victims, and the community, including the unique circumstances of the offender as an aboriginal person.” In other words, the sentencing judge must ask, “[f]or this offence, committed by this offender, harming this victim, in this community, what is the appropriate sanction under the Criminal Code?”: *Gladue*, at paras. 80-81 (emphasis in original).

[164] In other words, the sentencing judge must consider whether these sanctions would achieve the objectives of sentencing for this offender and this offence: *R. v. Wesley*, 2025 ONCA 51, 175 O.R. (3d) 166, at para. 112, leave to appeal refused, [2025] S.C.C.A. No. 103; *R. v. Bourdon*, 2024 ONCA 8, 95 C.R. (7th) 219, at paras. 25-28.

[165] More generally, when imposing a sentence for second-degree murder, “all sentencing principles are relevant in determining the appropriate period of parole ineligibility”: *R. v. Lamba*, 2024 ONCA 778, at para. 24. That includes considering mitigating factors, such as the offender’s pre-sentence custody conditions. The weight given to these factors by the sentencing judge is subject to deference absent an error in principle: *Lacasse*, at para. 49.

b. The Appellant’s Circumstances and Gladue Principles

- [166] The trial judge did not err in his application of Gladue principles. He considered the relevant sentencing principles and factors, including the brutal circumstances of the murder and the appellant's extensive criminal record, including his very recent commission of similar offences. He did so with the knowledge, having heard submissions, and consideration of the appellant's Indigenous heritage and the hardships he endured.
- [167] The trial judge sought and received material regarding the appellant's background, including a Gladue report from a prior sentencing and transcripts of those prior proceedings that address his Indigenous heritage. He asked for an updated Gladue report.
- [168] The Gladue report reveals that the appellant grew up in an abusive family and has a history of mental illness, substance abuse, and violence.
- [169] The trial judge requested and heard submissions from counsel about the effect of Gladue principles. The defence submitted that the appellant's Indigenous background "helps explain many things", and reminded the trial judge of "the historical mistreatment and maltreatment of [I]ndigenous peoples". The Crown submitted that while "[t]here's no doubt that based on what we know about Gladue factors ... that [the appellant] suffered from a significant amount of disadvantages that we can't even imagine" it is also true that "when a person, even with those Gladue and other background factors, commit [sic] serious violent offences ... sentencing for them starts looking more and more like sentencing would for any other offender who didn't come from those disadvantages and didn't have those background factors".
- [170] In his reasons, the trial judge spoke of the unfortunate circumstances of the appellant's past including his difficult upbringing, drug addiction, and other challenges. He was clearly alert to the appellant's Indigeneity. He stated that,

I am very much aware that as an Aboriginal person, Mr. Marshall has been subject to systemic racism all his life. As the Ontario Court of Appeal noted in Weese, however, at para. 26: "The Gladue principles do not apply in a mechanical fashion, nor do they require reductions in sentences for offences committed by aboriginal persons."

As both Crown and defence counsel agree, it is impossible to read of Mr. Marshall's background without feeling a great deal of sympathy. I think it is fair to say that he has had no breaks in life. The song "Born Under A Bad Sign" by Albert Blake applies to Mr. Marshall: if weren't for bad luck, he would have had no luck at all.

Despite feelings of sympathy for Mr. Marshall and sadness at the social conditions that helped to lead us here, I cannot be blind to the danger he poses.

- [171] The trial judge also found that the appellant's criminal record, including similar crimes committed, and occurrences while in custody, reveal that he has failed to avail himself of opportunities to change his life and posed serious public safety concerns.

- [172] Finally, the trial judge correctly noted that the appellant's moral culpability for the murder of Ms. Tetsos called for a significant denunciatory sentence.
- [173] The trial judge's reasons reflect the challenges the appellant faced, his extremely serious record, and the fact that while on probation for aggravated assault on another woman in her home, he committed this offence.
- [174] The trial judge was required to impose a sentence that would give effect to all sentencing factors. While these include Gladue considerations, these also include the significant aggravating factors such as the vicious beating, the attack on a vulnerable elderly individual in her own home, the appellant's demonstrated pattern of violence including in recent, very factually similar circumstances where vulnerable homeowners were assaulted, and the fact that the appellant was both on bail and on probation at the time of the offence. The trial judge's reasons reflect a careful balancing of all these factors.
- [175] The sentence imposed also reflected both the significant public safety risk and the appellant's poor prospects for rehabilitation.
- [176] In these circumstances, I see no reason to interfere with the sentence imposed on the ground the trial judge failed to articulate how he applied Gladue principles.
- c. The Jury's Parole Ineligibility Recommendation
- [177] The trial judge's consideration of the jury's ten-year parole ineligibility recommendation similarly does not demonstrate that he misapplied Gladue factors or otherwise erred. The trial judge noted that the default period of parole ineligibility for second-degree murder is ten years. However, he explained that s. 745.4 of the Criminal Code allows judges to deviate from this default period considering: (1) the character of the offender; (2) the nature of the offence and the circumstances surrounding its commission; or (3) the jury's recommendation: see *Shropshire*, at p. 242.
- [178] The jury recommended a ten-year parole ineligibility. However, the trial judge was not required to accept the jury's recommendation: *R. v. Chalmers*, 2009 ONCA 268, 243 C.C.C. (3d) 338, at para. 115.
- [179] Notably, the jury's recommendation was made based on incomplete information about the appellant's criminal antecedents (many of the appellant's convictions were removed from his criminal record, including several of the most serious offences). The jury did not know for example, that he had previously been convicted of breaking into another woman's home and assaulting her. Nor did the jury know that the appellant was on bail for another assault in a man's home when this offence was committed.
- [180] The jury did not have all the information that the trial judge did, and the trial judge was entitled to put little weight on their recommendation. The jury's recommendation is not controlling: *Salah*, at para. 271.

[181] Moreover, there was also a clear public interest in imposing a more significant period of parole ineligibility given the character of the offender and the nature of the offence. The appellant committed an extremely violent offence on one of the most vulnerable members of our population, has a lengthy and violent criminal record, and committed many serious breaches while in custody.

[182] Finally, the period of parole ineligibility imposed fell within the range of periods imposed on similar violent offenders. For example, in *R. v. Laforme*, 2022 ONCA 395, an Indigenous offender with an extensive criminal record received a 16-year parole ineligibility for murdering an 81-year-old and stealing her money.

[183] For these reasons, I would not interfere with the trial judge's imposition of the parole ineligibility period on the ground he failed to give weight to the jury's recommendation.

d. Credit for the Time Spent in Segregation and Lockdowns

[184] Finally, although the trial judge initially determined that a period of parole ineligibility of 18 years was appropriate in the circumstances, he reduced that period by 27 months. He did so after holding that keeping the appellant in segregation for a total of 27 non-consecutive months and the lockdowns were mitigating factors.

[185] The appellant argues that the trial judge erred in two respects. First, he claims the trial judge's decision to reduce parole ineligibility by only 27 months is contrary to the conclusions reached by other courts. He submits that the court should be guided by the following cases: *R. v. Prystay*, 2019 ABQB 8, 83 Alta. L.R. (6th) 134, where the court gave 45 months' credit for a s. 12 infringement flowing from 12 months of segregation; and *R. v. Roberts*, 2018 ONSC 4566, and *R. v. Sheepway*, 2022 YKCA 3, where, although no s. 12 infringement arguments were made in either case, the respective courts gave 14 months of credit for 14 months of segregation and 12 months of credit for 18 months of segregation.

[186] Second, the appellant argues that a s. 12 Charter infringement and harsh pre-sentence custody conditions are distinct wrongs that warrant separate remedies. He contends that he was subject to harsh lockdown conditions which warrant a further reduction in his period of parole ineligibility. He notes that this court clarified in *Lamba*, at paras. 7 and 26-27, that harsh pre-sentence conditions warrant mitigation at common law. As such, the appellant claims the trial judge should have reduced parole eligibility for each of the s. 12 Charter infringement, and the harsh lockdown conditions.

[187] For the reasons that follow, I disagree with the appellant's arguments.

- [188] To determine whether a punishment or treatment infringes s. 12 of the Charter, a two-step approach is engaged: *R. v. Boudreault*, 2018 SCC 58, [2018] 3 S.C.R. 599, at paras. 46-48; *Ogiamien v. Ontario (Community Safety and Correctional Services)* 2017 ONCA 667, 416 D.L.R. (4th) 124, at para. 10. First, the judge must determine the appropriate punishment or treatment in the circumstances. Second, the judge must ask whether the punishment or treatment is grossly disproportionate to what would have been fit.
- [189] In this case, the trial judge explained that misconduct may be a justification for constitutionally permissible periods of time in segregation for up to 15 consecutive days. He relied on this court's decision in *Canadian Civil Liberties Association v. Canada*, 2019 ONCA 243, 144 O.R. (3d) 641, at paras. 68-73, 98-99, where Benotto J.A. held that segregation for more than 15 consecutive days amounts to cruel and unusual punishment.
- [190] The trial judge went on to hold that the treatment of the appellant was grossly disproportionate to what would have been appropriate in the circumstances. He highlighted that the appellant spent periods of five, seven and eight months in segregation. He also noted that the appellant spent shorter periods of time in segregation, ranging from one day to two months. The trial judge observed that, altogether, the appellant spent a cumulative total of 27 months in segregation. He noted the serious adverse effect of segregation on one's mental health.
- [191] The trial judge also noted that the appellant was subjected to frequent lockdowns and that although he was not prepared to find those a s. 12 violation, he found that they added to the harsh conditions.
- [192] In crafting his remedy, the trial judge noted that he could not reduce the appellant's sentence, since a life sentence was required by the Criminal Code. Moreover, the trial judge was not referred to any caselaw that granted remedies in analogous situations. Thus, this remedy was novel.
- [193] The trial judge determined that he would "treat the s. 12 violation and the lockdowns as a mitigating factor and reduce [the appellant's] parole eligibility accordingly." At the same time, he observed that he needed to balance the remedy against the fact that the appellant remained a dangerous and violent man. He therefore reduced the appellant's parole ineligibility period by 27 months. I see no error in his approach. Nor did the trial judge fail to adequately account for the impact of the infringement of s. 12 and the harsh pre-sentence custody conditions endured by the appellant.
- [194] The trial judge was not required to specifically quantify the reduction for different aspects of the appellant's pre-sentence custody conditions. The quantum of credit given is discretionary, and the 27 months of credit to account for the appellant's pre-sentence custody was reasonable in the circumstances: see *R. v. Nasogaluak*, 2010 SCC 6, [2010] 1 S.C.R. 206, at paras. 47-48, 55, 65; *Lamba*, at paras. 23-24. The credit given in any particular case depends on the facts of that case and is entitled to deference.

[195] Nor is there any principled reason to grant two remedies, as there is a single wrong to be remedied: the harsh pre-sentence conditions experienced by the appellant at the hands of the State. It was open to the trial judge to determine the credit for the time spent in segregation and lockdown together, even if only the former gave rise to a breach of s. 12. Both forms of confinement relate to pre-sentence custody conditions.

[196] For these reasons, I would dismiss the appeal of the sentencing judge's decision to impose a sentence of life in prison without eligibility for parole for 15 years and 9 months.

F. CONCLUSION [197] For the reasons set out above, I would dismiss the appeal of conviction and sentence.

Released: September 16, 2025 "G.T.T."

"Thorburn J.A."

"I agree. Gary Trotter J.A."

"I agree. L. Sossin J.A."

APPENDIX

The Appellant's Record with Notations Regarding the Edited Convictions

DATE

YOUTH OR ADULT

OFFENCE(S)

Apr 21, 2010

Youth

Sexual Assault

Fail to Comply with Recognizance x 2

Possession of a Schedule II Substance x 2

Nov 10, 2010

Youth

Possession of Property Obtained by Crime Under \$5000

Theft over \$5000

Break and Enter and Theft

Nov 10, 2011

Youth

Fail to Comply with Recognizance x 2

Possession of Property Obtained by Crime Under \$5000

Assault Peace Officer

Escape Lawful Custody

Break and Enter and Commit

Mar 9, 2012

Youth

Break and Enter and Commit x 2

Mischief Over \$5000

Fail to Comply with Recognizance

Fail to Comply with Disposition

July 11, 2012

Youth

Possession of a Firearm Knowing its Possession is Unauthorized

Fail to Comply with Disposition

Sep 22, 2013

Adult

Assault

Sep 27, 2013

Adult

Assault Peace Officer

Jan 30, 2014

Adult

Aggravated Assault (edited to reflect "Assault")

Fail to Comply with Probation Order

Dec 1, 2015

Adult

Assault

July 16, 2018

Adult

Assault Peace Officer

Sexual Assault

- [1] These reasons were released only to the parties on September 16, 2025, to allow submissions as to whether the Youth Criminal Justice Act, S.C. 2002, c. 1, prohibits the publication of Mr. Marshall's identity and/or the details of his youth record. Both parties agreed that this decision could be published without redaction or anonymization, due to s. 119(9)(b) of the Youth Criminal Justice Act. As a result, this decision was published on September 29, 2025.
- [2] For ease, I will refer to all 28 of these matters as "convictions".
- [3] When the trial judge initially provided the edited record to the parties, he inadvertently left in one conviction despite stating that he would remove it. The error was quickly corrected.
- [4] The edits made to the appellant's criminal record are illustrated in Appendix A.
- [5] As part of their submissions, the parties also referred to this court's decision in *R. v. Hussein*, 2023 ONCA 253, 425 C.C.C. (3d) 528, leave to appeal granted and appeal heard and reserved January 23, 2025, [2023] S.C.C.A. No. 492. As agreed at the hearing, the parties reserved the right to make additional submissions on the Supreme Court's decision in *Hussein* if it were released while this decision were under reserve.

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Prepared on 26 October 2026 · Esheria