

CANADA / JUDGMENT

R. v. McLeod

2021 BCSC 1004

COURT

Supreme Court of British Columbia

DECIDED

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IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

R. v. McLeod,

2021 BCSC 1004

Date: 20210510

Docket: 109377

Registry: Kamloops

Regina

v.

Kenneth Ernest McLeod

Before: The Honourable Justice L.S. Marchand

Oral Reasons for Judgment on Sentence

Counsel for the Crown:

K.E. Bouchard

Counsel for the Accused:

S. Tate

Place and Date of Trial:

Kamloops, B.C.

January 18-20, 2021

Place and Date of Judgment:

Kamloops, B.C.

May 10, 2021

Introduction

- [1] On January 20, 2021, Kenneth Ernest McLeod pleaded guilty to one count of assaulting Munish Mahajan with a weapon. The offence relates to events that occurred in Kamloops on February 16, 2020. These are my reasons for sentence.

The Circumstances

- [2] The circumstances are not in dispute.
- [3] Just before 11:00 p.m. on February 16, 2020, Mr. Mahajan and two friends had just finished dinner at the Moon Wok restaurant on Rogers Place in Kamloops. They were on the street waiting for a cab when Mr. McLeod approached them and, for no apparent reason, brandished two knives and stabbed Mr. Mahajan in the neck. Mr. McLeod was in the midst of an active methamphetamine addiction and hearing voices at the time. He was also in breach of a release order that required him to reside in Saskatchewan and abide by a curfew.
- [4] One of Mr. Mahajan's friends called 911. The police set up a perimeter. They located and arrested Mr. McLeod within the hour. Mr. McLeod has been in custody since that time.

Impact on the Victim

- [5] Following Mr. McLeod's attack, Mr. Mahajan was transported to the Royal Inland Hospital for treatment. He was hospitalized overnight. Mr. Mahajan suffered a two centimetre long penetrating stab wound to the left side of his neck, which was closed with four stitches. Though Mr. Mahajan's wound healed without complications, the events of February 16, 2020 have had a profoundly negative impact on him.
- [6] At the time of the attack, Mr. Mahajan was in Canada on a student visa to attend Thompson Rivers University. He had a part-time job delivering pizza. Mr. Mahajan's wife, child and the rest of his family remained in India.
- [7] As a result of the attack, Mr. Mahajan was traumatized. He is fearful of strangers and of being out in the dark. He suffers from nightmares. He worries that he could have been killed, leaving his family without his financial and emotional support. As a result of his fears, he had to leave Kamloops. He quit school, quit his job and moved to Alberta to find work. He suffered substantial financial losses, including his paid tuition.
- [8] Commendably, Mr. Mahajan holds no grudge against Mr. McLeod. He understands that he has no reason to fear Mr. McLeod in the future. Nevertheless, he continues to fear strangers and is concerned about the risk to public safety posed by Mr. McLeod.

Circumstances of Mr. McLeod

- [9] In preparing these reasons for sentence, I have had the benefit of a pre-sentence report with a Gladue component as well as a psychiatric assessment.
- [10] Mr. McLeod is 39 years old. He is a member of the Cumberland House First Nation in Saskatchewan. He did not meet his father until he was 12 years old and does not have a relationship with him. His mother suffered extensive physical and sexual abuse in her childhood. Though the details are somewhat sparse, it appears that Mr. McLeod's mother was physically abused at a school run by Catholic nuns and was sexually abused in her family home. Mr. McLeod's mother has had many struggles with her health, mental health, addictions and poverty. She was unable to provide a stable home for Mr. McLeod.
- [11] During his childhood, Mr. McLeod experienced neglect and trauma. He was exposed to substance misuse and violence. He was in and out of foster placements where he suffered various forms of abuse. He was unable to remain in school past grade two. At times, he lived on the street. He began using alcohol at age ten and marihuana and heroin at age 12. He has been diagnosed with a substance use disorder.
- [12] Mr. McLeod has two children from previous relationships. He sees his daughter infrequently. He has no contact with his son whose mother committed suicide when his son was four.
- [13] Mr. McLeod has been diagnosed with a congenital cognitive disorder (attention deficit hyperactivity disorder and fetal alcohol spectrum disorder). To his credit, despite his cognitive impairments and learning challenges, Mr. McLeod obtained his GED in 2004. He has also had a number of minimum wage jobs, primarily in restaurants.
- [14] Given his background, it is not surprising that Mr. McLeod has an extensive history of coming into conflict with the law. His criminal record includes 30 youth and, now, 69 adult convictions. Mr. McLeod's record consists primarily of property and administration of justice offences. He also has several driving offence convictions, three uttering threats convictions, three assault convictions and one youth robbery conviction. Mr. McLeod has served many community based sentences as well as many periods of imprisonment. His longest period of imprisonment was the 16 month jail sentence he received for break and enter with intent in 2004.
- [15] At the time of the present offence, Mr. McLeod was not suffering from a mental disorder. Rather, he was in active addiction and struggling with paranoia and fearfulness, likely caused by prolonged methamphetamine use. Mr. McLeod says voices in his head told him that Mr. Mahajan and his friends were going to hurt him. He maintains that he did not mean to hurt anyone.

- [16] Mr. McLeod has expressed that he is sorry for his actions. He has backed up his expression of regret through a number of positive steps while in custody. He is taking medication, attending groups, taking correspondence courses, learning essential life skills and working through an addictions program. As a result, Mr. McLeod's weight, physical health, level of cognitive functioning and social interactions have all improved.
- [17] Mr. McLeod recognizes that he needs to deal with his past traumas and maintain his sobriety in order to achieve stability in his life. He hopes to reconnect with his culture as one step along his path to doing so.

Crown and Defence Positions on Sentencing

- [18] The Crown and defence take similar positions on sentencing. Both submit that Mr. McLeod should serve some additional time in custody to be followed by a lengthy period of probation. The Crown submits that Mr. McLeod should serve the equivalent of three years in custody while the defence submits that Mr. McLeod should serve the equivalent of two to two and a half years in custody.

Sentencing Principles

- [19] Sections 718-718.2 of the Criminal Code [Code] set out the purpose and principles of sentencing.
- [20] Under s. 718, the fundamental purpose of sentencing is to protect society and promote respect for the law and the maintenance of a just, peaceful and safe society by imposing just sanctions. The objectives of these sanctions include denouncing unlawful conduct, deterring offenders and others from committing crimes, separating offenders from society where necessary, rehabilitating offenders and promoting a sense of responsibility in offenders.
- [21] Section 718.1 sets out the fundamental principle of sentencing. Under s. 718.1, a sentence must be proportionate to the seriousness of the offence and the degree of responsibility of the offender.
- [22] Section 718.2 sets out a number of other sentencing principles. Under s. 718.2(a), sentences are to be increased or reduced to account for any aggravating or mitigating circumstances. Section 718.2(b) sets out that sentences should be similar for similar offences committed by similar offenders in similar circumstances. Finally, s. 718.2(c) to (e) promote restraint in sentencing.
- [23] Given Mr. McLeod's First Nations heritage, s. 718.2(e) has special importance in the circumstances of this case. It provides as follows:
- (e) 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.

Gladue Principles

- [24] Section 718.2(e) was introduced in 1996. Cases such as *R. v. Gladue*, [1999] 1 S.C.R. 688 and *R. v. Ipeelee*, 2012 SCC 13 make it clear that it is a remedial provision that was and is intended to deal with the crisis of over-representation of Indigenous offenders in the Canadian criminal justice system. Sadly, the statistics are worse today than they were in 1996.
- [25] The crisis described by the Supreme Court of Canada has been driven by the alienation, poverty, substance abuse, lower educational attainment, lower rates of employment, and bias experienced by Indigenous Canadians as a result of Canada's colonial history and destructive assimilationist policies, including a disproportionate number of child apprehensions.
- [26] While these are broader societal issues, the Court in *Gladue* and *Ipeelee* has recognized that sentencing Indigenous offenders has a role to play in addressing their over-representation in the criminal justice system. Indigenous offenders are different from other offenders because, in the words of the Supreme Court of Canada, they "are victims of systemic and direct discrimination".
- [27] To help address the crisis, *Gladue* and *Ipeelee* changed the way Indigenous offenders are sentenced, though not necessarily the result. In sentencing an Indigenous offender, a sentencing judge must consider two factors:
1. The unique systemic or background factors which may have played a part in bringing the particular offender before the courts; and
 2. The types of sentencing procedures and sanctions which may be appropriate in the circumstances.
- [28] According to *Gladue* and *Ipeelee*, a sentencing court must take a holistic approach to imposing a fit sentence. A fit sentence is one that is proportional and appropriately balances the seriousness of the offence with the moral blameworthiness of the offender. In striking the appropriate balance, the unique systemic or background factors that may have played a part in bringing the particular offender before the court speaks to the moral blameworthiness of the offender. While a causal connection between systemic and background factors, and the offence at issue, need not be established, a link may be important or helpful in finding a fit sentence.
- [29] Finally, restorative sentences may be more appropriate for Indigenous offenders, but taking a restorative approach will not necessarily lead to a reduced sentence. Generally, the more serious or violent the crime, the more likely it will be, as a practical matter, that the sentence will be the same for an Indigenous and a non-Indigenous offender.

Range of Sentence

- [30] Sentencing is a highly-individualized process. The type of available sentence may be constrained by statutory provisions and the range of appropriate sentence is generally established through a consideration of sentences imposed on similarly-situated offenders who have committed similar offences in similar circumstances.
- [31] In this case, s. 267(a) of the Code provides for a maximum sentence of 10 years imprisonment for assault with a weapon. Under s. 742.1(e)(i) and (iii) of the Code, a conditional sentence order is statutorily not available to me. All other sentencing options are.
- [32] The Crown submits that the range of sentence is two to six years imprisonment. In support of its submission, the Crown relies on *R. v. L.D.W.*, 2005 BCCA 404 and *R. v. Williams*, 2015 BCSC 709. The Crown acknowledges that neither case is a particularly good comparator in the sense that both of these cases involve the objectively more serious offence of aggravated assault. I have to agree with Mr. McLeod that both also involve subjectively more serious attacks.
- [33] Despite the difficulties the parties had identifying a good comparator case, I agree with them that a sentence of between two to three years is within the range for an unprovoked assault of a stranger involving a stab wound to the neck committed by an Indigenous offender with difficult personal circumstances.

Aggravating Factors

- [34] In this case, the aggravating factors include:
1. Mr. McLeod was in breach of a release order at the time of the attack;
 2. Mr. McLeod has an extensive record, including a number of related (though far less serious) offences;
 3. The unprovoked nature of Mr. McLeod's attack on Mr. Mahajan; and
 4. The injuries suffered by Mr. Mahajan.

Mitigating Factors

- [35] The primary mitigating factor is the devastating effect that colonization has had on Mr. McLeod and his family. Given his history of trauma and dislocation, Mr. McLeod has developed serious addiction, mental health, poverty and instability issues, all of which are at the root of his criminal history and the present offence.
- [36] Mr. McLeod also deserves credit for his guilty plea, sincere expression of remorse and progress towards rehabilitation while in custody.

Principles of Sentencing Deserving of Greatest Emphasis

[37] I agree with the Crown that denunciation and general deterrence must be emphasized to send a strong message that random unprovoked violence will not be tolerated. At the same time, it appears likely that protection of the public will be well served by assisting Mr. McLeod in his rehabilitation.

Sentence

[38] In determining a fit sentence, I must take into account that Mr. McLeod has committed a very serious offence. He stabbed Mr. Mahajan, a complete stranger, in the neck for no apparent reason. His attack has traumatized Mr. Mahajan and significantly disrupted Mr. Mahajan's plans to better himself and provide for his family.

[39] On the other hand, Canada's colonial history and assimilationist policies have had a profoundly negative effect on Mr. McLeod and his family. Mr. McLeod's mother had a horrific childhood. Her subsequent struggles left Mr. McLeod with a significant cognitive impairment and made him extremely vulnerable to his own traumas. It is hardly surprising that Mr. McLeod has become disconnected from his community, developed serious addiction issues and repeatedly come into conflict with the law.

[40] In my respectful view, a fit sentence that balances the seriousness of Mr. McLeod's offence with his highly reduced level of moral blameworthiness is a jail sentence of two years and three months followed by 18 months of probation. A jail sentence of two years and three months:

- adequately reflects the seriousness of Mr. McLeod's actions;
- adequately reflects the terrible impact of Mr. McLeod's actions on Mr. Mahajan;
- is necessary to make clear that unprovoked violent attacks will not be tolerated; and
- will enhance public safety by giving Mr. McLeod additional time to work on his rehabilitation while in custody, including having sufficient time to identify a suitable program to enter following his release to enable him to continue his progress in the community.

[41] In crafting a probation order for Mr. McLeod, I am mindful of how difficult it has been for Mr. McLeod to comply with release, probation and conditional sentence orders in the past. In my view, these difficulties are largely related to his cognitive impairment, traumatic childhood and consequent addiction issues. Through no fault of his own, it is simply the case that it is much harder for Mr. McLeod than others to follow directions and comply with court orders.

[42] I do not want to contribute to the crisis of over-incarcerating Indigenous people in Canada by imposing a long list of conditions that Mr. McLeod will have difficulty complying with while not doing much to enhance public safety. As a result, other than terms to specifically protect Mr. Mahajan, Mr. McLeod's probation order will be exclusively rehabilitative in nature, and no longer than necessary for Mr. McLeod to take advantage of appropriate resources and stabilize in the community.

[43] Mr. McLeod, please stand.

[44] I sentence you to a prison term of two years and three months, which is 820 days. You have already spent 453 days in custody, excluding today. I am granting you credit at a rate of 1.5 days for each day in custody. After rounding up, the total credit I am granting you is 680 days. That means you have an additional 140 days to serve.

[45] Following the completion of your jail sentence, you must comply with a probation order for a term of 18 months. The conditions are:

- You must keep the peace and be of good behaviour.
- You must appear before the court when required to do so by the court.
- You must notify the court or your probation officer in advance of any change of name or address and promptly notify the court or your probation officer of any change in employment or occupation.
- You must have no contact or communication, directly or indirectly with Munish Mahajan.
- You must not go to any place where Munish Mahajan lives, works, attends school, worships or happens to be. If you see him, you must leave his presence immediately without any words or gestures.
- You must report by telephone to a probation officer at 102 - 455 Columbia Street, Kamloops, British Columbia within two business days of your release from custody unless you have obtained, before your release from custody, written permission from the probation officer to report elsewhere or within a different time frame. After that, you must report as directed by your probation officer.
- When first reporting to your probation officer, you must provide them with the address where you live and your telephone number. You must not change your address or telephone number without notifying your probation officer in advance of any change.
- Having consented in court, you must attend, participate in and complete any intake, assessment, counselling, program, treatment or full-time live-in treatment program as directed by your probation officer. This may include programming or treatment for: (a) alcohol or drug addiction; (b) psychiatric and psychological health; or (c) trauma recovery.

- [46] For the benefit of your probation officer, I note that the author of your psychiatric assessment specifically recommended the Baldy Hughes Therapeutic Community & Farm program, which I consider to be a completely appropriate therapeutic program for you. You might also want to discuss attending culturally appropriate treatment programs at places such as the Round Lake Treatment Centre or Tsow-Tun Le Lum with your probation officer.
- [47] I must also make two ancillary orders.
- [48] Pursuant to s. 109 of the Code you are prohibited from possessing any firearm, crossbow, restricted or prohibited weapon, prohibited device, ammunition, and explosive substance for life.
- [49] Your offence is a primary designated offence. Pursuant to s. 487.051(1) of the Code, I authorize the taking of samples of bodily substances from you. The samples will be taken from you while you are in custody and you must submit to the taking of the samples.
- [50] Mr. McLeod, you experienced the kind of childhood that no one deserves. That was not your fault. You, better than anyone else in the courtroom, recognize that you have the ability to lead a better life. It will take a daily commitment to living clean and sober. It will not be easy but you have reached the stage in your life where I sincerely believe you can do it. Your family and your community need you to be at your best. Good luck.
- [51] Mr. Mahajan, I am very sorry about all that you have been through. Your time in Canada should have been peaceful, happy and productive. In sentencing Mr. McLeod, I am unable to replace what you have lost but hope you can put the trauma of February 16, 2020 behind you as you strive for a better life for yourself and your family. I wish you and your family the very best in the future.
- [52] I thank counsel for their helpful submissions.

"L.S. Marchand J."

MARCHAND J

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