
CANADA / JUDGMENT

R. v. Russell

2019 BCSC 1039

COURT

Supreme Court of British Columbia

DECIDED

6 March 2019

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2019 BCSC 1039 R. v. Russell

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

R. v. Russell,

2019 BCSC 1039

Date: 20190306

Docket: 66721

Registry: Chilliwack

Regina

v.

Kirkland Joseph Russell

Corrected Judgment: The text of the judgment was corrected at paragraph 87 on July 9, 2019.

Before: The Honourable Mr. Justice Schultes

Oral Reasons for Sentence

Counsel for the Crown:

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A. Fok

Counsel for the Accused Russell:

K.B. Cronin

C. Hiebert, A/S

Place and Date of Trial/Hearing:

New Westminster, B.C.

February 11 & 12, 2019

Place and Date of Judgment:

New Westminster, B.C.

March 6, 2019

Introduction

- [1] Mr. Russell has entered a guilty plea to committing the manslaughter of Douglas Presseau on July 7, 2017, in Chilliwack.

Circumstances of the Offence

- [2] The sentencing hearing proceeded on the basis of a helpfully detailed agreed statement of facts, which I will summarize.
- [3] On the date of the offence, Mr. Russell and his girlfriend Bobbi Compton-Burris, the co-accused Victoria Purcell and her boyfriend, and another couple went to a festival that was being held in downtown Chilliwack. The members of this group drank a considerable amount of alcohol beforehand. Because Mr. Russell's degree of intoxication played a role in the events that followed, including the characterization of the offence for the purposes of his plea, it is necessary to review the admitted facts of his and his companions' consumption.
- [4] In the early afternoon, they drank what the admissions describe as "alcoholic beverages including coolers and beer" at the home of one of the other group members. They then went to Mr. Russell and Ms. Compton-Burris' apartment for one to two hours, during which Mr. Russell drank two 15-packs of beer. At about 4:00 to 5:00 p.m., they decided to go to the festival. They bought coolers at a beer and wine store and then went to nearby Salish Park. In the roughly one-hour period that followed, all the members of the group shared "approximately two to three" two-litre bottles of coolers.
- [5] Then they went to Central Community Park, where music was playing for the festival.
- [6] At around 10:00 p.m., they decided to go to Ms. Purcell and her boyfriend's apartment. One of the other members of the group later told the police that he was highly intoxicated by that point, and that the others were in the same condition.

- [7] As they were passing through another park, "at least two of the three women in the group" got into an altercation with another woman in the parking lot. That woman's boyfriend interceded and he ended up receiving a fatal stab wound in the process, which was not discovered until later. The admissions specify that it is unknown who inflicted that wound and no one has been charged in relation to it. The altercation was broken up by officers of a security company, who did not have any awareness that this wound had been inflicted.
- [8] The owner of the security company, a former RCMP officer, spoke with Mr. Russell and believed him to be intoxicated, based on his physical symptoms of unsteadiness, slurred speech, and sleepy eyes.
- [9] The group continued along Princess Street, with the three women walking ahead and Mr. Russell and the other male member of the group behind them. Ms. Purcell's boyfriend separated from the group and headed towards their home.
- [10] Ms. Compton-Burris ended up lying on the ground, partly on the sidewalk and partly on the road, in the area of an apartment building on Princess Avenue. She was later found to have suffered a stab wound to her arm that severed an artery. It appears that she was unable to continue walking as a result of that serious injury, which was likely sustained in the earlier altercation.
- [11] This is where Mr. Presseau's involvement began. He seems to have come upon Ms. Compton-Burris in this condition. Milton Gabriel, a person Mr. Presseau knew who lived nearby, heard a female voice yelling for help, followed by Mr. Presseau saying, "Milton, I need your help." He went outside and saw Ms. Compton-Burris, who appeared to be injured, lying on the ground. Mr. Presseau was leaning over her and seemed to be trying to assist her. Ms. Purcell was standing near her as well.
- [12] Mr. Gabriel then saw Mr. Russell approach Mr. Presseau and make stabbing motions toward him with a knife, which he described as being "stiletto-style", with an eight to 12-inch long blade.
- [13] Mr. Presseau stood up, put his hands in the air, and backed away into an alley that ran between the apartment building and the one next door. Mr. Russell pursued him, continuing to make stabbing motions ("upwards of eight," according to the admissions), some of which appeared to connect with the area of Mr. Presseau's stomach and chest. While making these motions, Mr. Russell said, "Why don't you fucking die?"
- [14] Mr. Presseau retreated to an enclosed carport in the rear of the building. Mr. Gabriel followed, as did his wife, somewhat after him. Once in the carport area, Mr. Presseau tried to use a parked vehicle to keep distance between himself and Mr. Russell, who was still pursuing him. Mr. Russell momentarily turned his attention to Mr. Gabriel and his wife, who had also reached this area. In what I infer was to have been the basis for her liability (a stay of proceedings has since been directed) Ms. Purcell, who was also in that area by then, yelled at Mr. Russell, asked him what he was doing, and told him to go back to Mr. Presseau.

Mr. Russell then continued toward Mr. Presseau, who backed away, before tripping on a curb at the east end of the carport and falling on his back. Mr. Russell went "over top of him", and stabbed him several more times in the chest area.

- [15] He then got up, told Mr. Gabriel and his wife that he would kill them if they said "anything to anybody" and began to leave with Ms. Purcell back out of the alley. On the way out, he encountered a former friend, who had gone to the building to check on the wellbeing of his mother-in-law after hearing yelling. This former friend saw Mr. Russell, who he said was intoxicated, holding a knife, with "blood on his person". Mr. Russell confronted him, asking, "Do you have a problem with me?" and then walked past him and ran east on Princess Avenue. Ms. Purcell, who was described by the first attending police officer as heavily intoxicated, went to tend to Ms. Compton-Burris.
- [16] Mr. Presseau was taken to the hospital after the attack, where he died of his injuries. An autopsy found 14 separate stabbed or incised wounds and several small lacerations. The most serious wounds were the three to his left neck and chest area. They affected, respectively, his jugular vein, liver, and heart. The specific cause of death was the wound to his heart.
- [17] After leaving the scene of the attack, Mr. Russell went to Ms. Purcell and her boyfriend's apartment, which was about a block away. The boyfriend and the other male member of the group were there and, according to the admissions, reluctantly let him into the apartment. That other male group member saw blood on the torso of Mr. Russell's t-shirt.
- [18] Mr. Russell obtained a t-shirt from Ms. Purcell's boyfriend and went into the bathroom to change into it and wash the blood from his hands. He left the bloody t-shirt on the floor of the apartment and departed. Ms. Purcell's boyfriend put it in a plastic bag and hid it in a nearby vacant lot.
- [19] Mr. Russell then returned to his own home, where a relative of one of the group members had been babysitting all of the members' children. This relative said that Mr. Russell was shaking and had blood on his hands and shoes. When Ms. Compton-Burris' foster sister arrived at the apartment at around midnight, she found Mr. Russell looking distraught and panicky and as though he had been crying. He told her, "I grabbed the knife and kept stabbing and stabbing and I don't know what happened. I didn't mean to leave her" (that is, Ms. Compton-Burris), and "You've got to check the hospitals." The foster sister left to do so.
- [20] The next morning, Mr. Russell was recorded on the security video of his apartment building throwing a plastic bag into a dumpster. When the police obtained a search warrant for the dumpster, they found a bag that contained, among other things, shorts and runners with blood on them. They were also able to locate the t-shirt that Mr. Russell had been wearing behind a tree in the vacant lot that I have referred to.

- [21] Forensic DNA analysis identified Mr. Presseau's profile on the blood on the shirt, and his and Ms. Compton-Burris' profiles on the blood on the shorts and shoes. The knife was not recovered.
- [22] Mr. Russell was arrested on July 21. He gave statements to the police explaining that he saw Ms. Compton-Burris lying on the ground and Ms. Purcell and Mr. Presseau exchanging punches. He could not recall what happened from then until the point that he was leaving the scene, jogging to Ms. Purcell and her boyfriend's apartment.
- [23] For her part, Ms. Purcell told the police that she had been drinking and recalled seeing Ms. Compton-Burris on the ground bleeding. Ms. Purcell herself had no injuries and she remembered no contact with Mr. Presseau.

Victim Impact

- [24] The impact of this offence on Mr. Presseau's family and friends has been extremely serious, as one would expect. Numerous victim impact statements were read by or on behalf of his loved ones.
- [25] The authors of the statements describe, in articulate and compelling ways, the array of feelings that they have endured and continue to struggle with as a result of this offence - grief, anger, confusion, anxiety, hopelessness, and many others. Recurring themes in their statements include a sense of unfairness that Mr. Presseau was killed while trying to help an injured stranger, which was typical of his nature; their worry about how his young son will grow up without his guidance; the powerful ongoing sense of fear and emotional volatility that they now experience; and their constant vigilance about what other tragedies might be in store, now that something that they previously considered unthinkable in their lives has actually happened.
- [26] While the serious harm caused by this offence is a relevant factor in sentencing, in light of their insightful comments I expect that the authors of the victim impact statements will also understand that the sentence that will be imposed in this case is neither intended to reflect, nor capable of reflecting, the inherent value of Mr. Presseau's life, which is of course beyond measure and irreplaceable.

Circumstances of the Offender

- [27] Both a presentence report and a Gladue report were prepared for Mr. Russell. When the information in them is combined with his counsel's helpful submissions, quite a full portrait of his circumstances emerges.
- [28] He is now 36 years old, and was 34 when he committed the offence.

- [29] He had a very tumultuous upbringing. He was never able to meet his father, who was not even aware that he had been born until years later. His mother, who was herself adopted, was addicted to drugs and gave him up to his adoptive grandparents when he was two. Both of his parents are now deceased.
- [30] He lived with grandparents until he was six, when they placed him in foster care, apparently because of his disruptive behaviour. Before that placement, he experienced harsh physical treatment in their home. According to the presentence report, he was also sexually abused in their home by a boarder.
- [31] From there, he reports living in 60 to 65 different foster care situations, until he "aged out" of the child welfare system at age 18. It appears that his behavioural problems played a role in the instability of his placements, but the degree of instability is remarkable even allowing for that factor. His longest placement in any home was for 18 months.
- [32] Despite his Indigenous heritage, he was generally placed in non-Indigenous homes, where he experienced discrimination. Ironically, he did not come to understand that he was Indigenous until he was 12 or 13.
- [33] According to the presentence report, he was also physically and sexually abused in many of these homes. He described the loneliness and sense of abandonment by his family as being very hard to take, more so even than the abuse, and frankly concedes that he was an angry and disruptive child.
- [34] Not surprisingly, he began abusing substances at an early age, beginning with alcohol at 12 and crystal methamphetamine at 13. He eventually began to use every drug available to him on a daily basis, and sold drugs and committed other offences to be able to afford them.
- [35] Also not surprisingly, the only sense of connection he was able to forge with others was with the similarly disaffected young offenders whom he began to meet when he was in custody for his offences.
- [36] Particularly regrettable, given Mr. Russell's strong desire for connection with his family, his aunt and his father attempted to establish contact with him when he was five, but were not allowed to do so. When she and other family members learned of a serious offence for which he was charged as a teenager, they began to attend court and support him. Through that process, he was able to connect with the Cheam First Nation, which was his father's community, and this has proved to be a very beneficial part of his life. He has taken part in ceremonies there over the years, and has also engaged in cultural practices such as hunting, fishing, and harvesting medicines.
- [37] His mother was also Indigenous, from a community in the Williams Lake area, but he has not yet been able to obtain any further information about her side of his family.

- [38] He continued to struggle with addiction after becoming an adult. According to the presentence report, he divided his time between the reserve, Chilliwack, and jail until 2011, when he quit using drugs entirely. He had only used crystal meth from age 25 onwards and was able to obtain work during that period. He told the authors of the reports that he only drank alcohol socially from then on, but also candidly conceded, both in the Gladue report and through his counsel in submissions, that he is an alcoholic, as his consumption on the day of the offence strongly suggests. He affirmed that he now needs to embrace complete sobriety as a key part of his rehabilitation. He has been attending the weekly Alcoholics Anonymous meetings that are offered in the remand centre.
- [39] As a youth, he was diagnosed with attention deficit disorder, for which he was prescribed medication, and fetal alcohol syndrome. There is no information available at this point about their impact on his offending.
- [40] He now experiences feelings of depression and of being overwhelmed, but unfortunately discontinued the antidepressant and antianxiety medication that he had been prescribed, because he did not like its other effects. He currently focuses on meditation and one-on-one counselling (during the times that the latter is available in the remand centre) to assist in managing his mood.
- [41] His education was sporadic as a youth because of his many different living situations, but he obtained his grade 12 as an adult during one of his periods of imprisonment. He has also taken introductory electrical and carpentry courses.
- [42] He was employed in demolition work for eight months before committing this offence and has previously done work roofing and landscaping. When he is eventually released, he hopes to take advantage of the fact that several of his family members operate contracting businesses and work in the construction field.
- [43] A positive development in his life has been his relationship with Ms. Compton-Burris, which began in 2012. She had been clean from drugs for 10 years by that point and supported him in his recovery from drug addiction. They moved in together in 2014 and lived what the author of the presentence report described as "a prosocial lifestyle", in which they were both employed. She has a son from a previous relationship who is now eight years old. Mr. Russell is devoted to him and treats him as his own son. A painful by-product of his incarceration for this offence is that because of some unspecified administrative issue at the remand centre, the child has not been permitted to visit him.
- [44] He has amassed a very lengthy criminal record - a total of 50 convictions. As a youth, there were numerous property-related offences and failures to comply with Youth Court dispositions, as well as individual convictions for such offences as drug possession, assault, possession of a weapon, and obstruction.

- [45] By far his most serious convictions as a youth, and indeed until this offence, were in 2002 in Surrey - for breaking and entering with intent and sexual assault with a weapon. The seriousness of those offences is demonstrated by the fact that he received the maximum Youth Court disposition of three years as a result. Crown counsel advised that the weapon involved there was a knife and that the ingestion of drugs and alcohol by Mr. Russell was a part of the circumstances.
- [46] His adult record runs from 2006 to 2012 and is also quite lengthy. His main offences have involved non-compliance with court orders. He has 18 such convictions in that period - for breaching bail recognizances, recognizances pursuant to s.811, or probation orders. One of his 2007 convictions was for breaching a condition not to possess a knife except during his employment. There are also three convictions for resisting or obstructing a police officer, and two for weapons possession.
- [47] The current offence is his fifth conviction involving a knife. The circumstances of two of the previous offences resonate ominously with the present ones. His weapons conviction in 2007 involved him producing a knife to escape from a property manager who had confronted him at the rear of an apartment building. He was arrested later and found in possession of a folding knife. The 2011 conviction resulted from his being stopped by a police officer for riding a bicycle at night without a light or helmet. He was unable to produce any identification after he was stopped. The officer, after noticing that Mr. Russell was touching something in his pocket, discovered that he had a folding knife in his hand.
- [48] Mr. Russell has attempted to make the most of his time on remand. His counsel provided copies of certificates showing his completion of numerous modules of programs that teach life skills and essential skills for success. He has provided a current letter from the person who facilitated the life skills program in 2017 commenting positively on his level of motivation "to improve himself for the good of his son", as well as his openness and honesty in their one-on-one sessions about the struggles he has faced in the past and the things that he needs to overcome. She said that over time Mr. Russell was more accepting of discussing matters such as his addiction and his coping resources. In particular, she wrote that he understands the difficulties of his history and the negative effects of not coping with stressors appropriately. In terms of future prospects, she said that, "He is also open and willing to accept further help to ensure that change occurs in his life."
- [49] In addition, his counsel provided letters from Ms. Compton-Burris, and his cousin, Billi Pike. Ms. Compton-Burris speaks of his normally kind and thoughtful nature and his devotion to her and their son. In her view, he has grasped the gravity of his actions towards Mr. Presseau and is taking all available programs to improve himself. Ms. Pike, who expressed herself in a frank and realistic way, spoke of Mr. Russell's efforts to enter "a transitional stage of life" after gaining a family. Despite his involvement in this offence, she has noted his genuine intentions to be a good father and husband and a productive member of society, and his willingness to work hard towards those goals.

- [50] There are unique systemic and background factors here related to Mr. Russell's Indigenous heritage that played a part in bringing him before the Court. His father, grandmother, and some uncles and aunts attended the notorious Indian Residential Schools in Mission and Kamloops. The effects of these institutions on generations of Indigenous children and their communities are now well-documented, as are the broader destructive efforts of colonialism and government intervention on Indigenous society. The author of the Gladue report goes on to identify specific results of this disruption that have carried forward into Mr. Russell's life, including his loss of family, language and culture; incomplete education; substance abuse; physical and sexual abuse; and childhood trauma. The child welfare system played a significant role in this harm, it would appear, by failing to provide him with anything resembling a stable or safe home during his childhood and adolescence - even worse, sometimes placing him in situations where he was further abused.
- [51] As to programs that could form part of appropriate sanctions because of his Indigenous heritage, it is common ground, in light the range of sentence that I will have to consider, that the main focus at this point should be on resources available to him in the federal correctional system. Community resources can obviously be considered later, when he is released.
- [52] To address substance abuse issues and trauma, Mr. Russell expressed interest to the author of the Gladue report in attending a healing lodge in custody, such as the one maintained by the federal system in Harrison Mills. That report details the extensive Indigenous-focussed programs in the federal system to address healing, violence prevention, and substance abuse. There is also a "multi-target" program, which addresses issues for Indigenous offenders such as the impacts of foster care and adoption, the first of which would obviously be vital for Mr. Russell.
- [53] If it would be helpful for Mr. Presseau's family, he is also interested in participating in a victim-offender reconciliation program.
- [54] Mr. Russell took advantage of his right to address the Court by making prepared remarks to Mr. Presseau's family and friends. He expressed regret that the larger number of attendees who had been there on the first day of the hearing were not able to return on the second day, so that he could share what he had to say with them as well. The most important aspects of remorse are of course an actual change in attitude by the offender and the resulting actions they undertake towards rehabilitation (see *R. v. Anderson* (1992), 74 C.C.C. (3d) 523 (B.C.C.A.), at pages 535 and 536), and statements by an offender at sentencing are challenging to assess and weigh standing alone. Despite these qualifications, I found Mr. Russell's remarks to be appropriately insightful and compassionate concerning the harm that he has caused. They were also free of the self-focus and self-pity that mar statements by offenders in some cases. What he had to say was not just all about him, which bodes well for his rehabilitation.

[55] It was common ground at the sentencing hearing on February 11 that Mr. Russell had by then spent 571 days in custody, to which should be added another 23 days to today. At the usual credit of 1.5 days, he should therefore receive a credit for 891 days served, or two years and 161 days.

Positions

Crown

[56] The Crown seeks a sentence in the range of eight to 10 years, minus credit for pretrial custody.

[57] In Crown counsel's submissions, there are significant aggravating factors here:

- Mr. Russell's instigation of the attack against an innocent person who was doing no more than assisting an injured stranger;
- His persistence in pursuing Mr. Presseau, who was retreating from him and signaling the absence of any threat;
- The brutal nature of the attack itself and his use of a knife to carry it out;
- His flight from the scene without attempting to assist the now badly-injured victim;
- His lack of insight into the extent of his alcohol addiction, which is demonstrated his belief at the time of the offence that he could still drink socially, despite confirming in the Gladue report that he is an alcoholic; and,
- His lengthy criminal record, including previous knife-related offences and an abysmal history of complying with court orders.

[58] The Crown concedes the mitigating factors of Mr. Russell's guilty plea, his family and community support, his tumultuous childhood, the Gladue considerations, and his prospects for rehabilitation. On the last point, Crown counsel fairly acknowledged that he was able to put together a meaningful period of time in which he was not before the courts. Nevertheless, she submits that his future rehabilitation remains contingent on his ability to address his substance abuse issues.

[59] Crown counsel provided an accurate and fair analysis of the overarching responsibility of the courts to impose a sentence that is proportionate to the gravity of the offence and the moral blameworthiness of the offender, and to take into account the Gladue factors, which I have summarized, when arriving at a fit sentence.

[60] The Crown submits that the circumstances here require an emphasis on denunciation, deterrence, and protection of the public. In their view, as long as Mr. Russell lacks insight into his alcohol abuse, which contributed significantly to the commission of this offence, his risk to reoffend and the resulting danger to the community will be concerns.

[61] The Crown also submits that the principle of proportionality must lead to a sentence in the range sought. In terms of gravity, the offence was "very violent and deadly," and Mr. Russell's moral culpability with respect to it is high. This is despite the importance of the Gladue factors, which "provide context."

[62] The Crown provided cases to support this proposed range. All of them involved Indigenous offenders who had been convicted of manslaughter. Some are from this province and some are from Ontario:

- R. v. Labbe, 2001 BCSC 123: The offender was convicted after a trial. While intoxicated, he killed the victim, a fellow alcoholic living on the streets, by striking her on the head multiple times with a cinderblock, after which he hid her body. He was a 40-year-old man of Métis heritage. His upbringing was comparable to Mr. Russell's, including sexual abuse by his adoptive mother and time in provincial institutions as a teenager. He had cognitive difficulties and a criminal record that included both property and violent offences. He had spent 17 months in pretrial custody, during which he had completed a number of courses and provided letters of support showing his intention to address his personal issues. He was sentenced to a further eight years in custody, but the amount of credit he was given for presentence custody is not completely clear. The sentencing judge reflected on the availability in this province of programs in remand facilities, in contrast to the situation in Ontario, and mused whether that should have an effect on the amount of credit granted. He noted that double-time credit, which was a judge-made rather than statutory rule at that time, was not mandatory. However, even if no multiplied credit was granted, the effective sentence, based on the actual time served, was approximately nine-and-a-half years.

- R. v. Ward, 2009 BCCA 409: the offender was also convicted after a trial. He had been beaten in a fight at a party and returned to confront the person who had beaten him. He stabbed the victim to death after mistaking him for the person he was intending to confront. The offender was 26 at the time of the offence, had previous convictions for serious violent offences, including having stabbed and shot at people. He was raised by an abusive father and was on the streets from an early age. He had cognitive deficits and problems with anger management. Although the sentence imposed at trial (12 years less credit for presentence custody) was described as being on to be on "the high end", the Court of Appeal declined to interfere with it.

- R. v. George, 2010 ONSC 6017: 22-year-old offender entered a guilty plea. He had struck a friend during a dispute in a bar and suggested they continue their fight outside. There, he assaulted the friend fatally - kicking him about the head while the friend lay defenceless on the ground in a brutal enough manner that it left his shoeprints on the friend's face. This offender's mother was a residential school survivor who suffered from alcohol addiction, as a result of which she neglected and abused him, and he spent his childhood with relatives or in foster care. He had intellectual disabilities and was on the fetal alcohol spectrum. His consumption of alcohol played a role in the offence and he had a lengthy youth and adult record, including four previous assaults. While expressing sympathy for the offender's difficult background, the sentencing judge felt the need to address the risk that he presented to the public because of his "impaired judgment and inability to control his impulsive behaviour." An effective sentence of seven years'

imprisonment was imposed.

· R. v. Killiktee, 2011 ONSC 5910: this offender also entered a guilty plea. She had been involved in a verbal argument with the victim, who then slapped her and called her a foul name before walking away. The offender pulled the victim to the ground, causing her to strike her head, and then began to kick her repeatedly in the head, until she was pulled away by an onlooker. The offender was 26 years old. She came from an Inuit community that was described by the sentencing judge as being in "a profound state of social misery". Her parents were alcoholics and she was physically and sexually abused throughout her childhood and adolescence. She began sniffing camp fuel at 12 and progressed to abusing various other substances. She had eight previous assault convictions as well as several breaches. She was intoxicated during each offence. She had two children who were in the care of their father, but to whom she was devoted. The sentencing judge concluded that the sentence needed to give paramount importance to protection of the public, so that the offender could receive the supervised treatment that she both required and wanted. An effective sentence of nine years was imposed as a result.

· R. v. Neel, 2014 BCSC 1989: the offender entered a guilty plea. He had been stabbed in the hand with scissors by a sex worker in a disagreement over payment and responded excessively by stabbing her numerous times with a knife. He was 22 and had no previous record. His mother was a residential school survivor who was unable to parent him, which caused him significant trauma, and he was raised by his father. Substance abuse had previously been an issue for him, but not in the months leading up to the offence. The judge acceded to a joint submission for an effective sentence of eight years.

· R. v. Wesley, 2013 ONSC 7197: the offender entered a guilty plea. While they were both severely intoxicated, the offender and victim became involved in an altercation, during which the offender inflicted the fatal injury, likely by strangulation. The offender was 33 and had a lengthy record that included previous assaults and aggravated assaults. He came from a remote and highly dysfunctional Indigenous community and had what the judge described as a horrific childhood - he had been placed in foster care after his mother's death and subjected to extensive physical and sexual abuse. He had cognitive difficulties, was illiterate, and was a chronic substance abuser. He had lived a transient life as a result and was homeless at the time of the offence. An effective sentence of eight years was imposed.

· R. v. Kanate, 2011 ONCJ 770: the offender entered a guilty plea during the preliminary inquiry. After a dispute with his cousin over sharing alcohol, the cousin produced a knife to confront him. He took the knife away and stabbed his cousin in the arm and then left the area. Unfortunately, the stab severed an artery in the cousin's arm, causing his death. The offender was 20 years old. He had a youth conviction for assault causing bodily harm against his father. His father had attended residential schools and both his parents abused alcohol. He himself began using drugs at age 12 and turned to selling them to fund his addiction. Finding the offence to be in the middle of the spectrum, "perhaps closer to mere accident than near murder," the judge imposed a sentence of seven years.

· R. v. Johnny, 2016 BCCA 61: the offender was convicted after a trial. While intoxicated, he had beaten a woman to death in an abandoned house. He had inflicted extensive blunt force injuries, with at least six blows to the victim's head. He was 19 at the time and had no criminal record. His mother was a residential school survivor, but the offender described his upbringing in fairly positive terms. However, he was sexually abused by older children on the reserve. He went to live with relatives in another town when he was 15 and lived substance-free there, but unfortunately returned to the reserve at 17 and was drawn into alcohol abuse and partying. He had been engaged in such activity when he committed the offence. Finding that the trial judge had imposed a sentence that was disproportionate to those imposed on similar offenders and had failed to properly consider the Gladue factors and the offender's prospects for rehabilitation, the Court of Appeal substituted an effective sentence of six years for the seven that had been imposed at trial.

Defence

- [63] Mr. Russell's counsel submits that, balancing all of the relevant considerations, I should consider imposing a sentence in the range of five years.
- [64] First of all, she submits that his guilty plea should be given significant weight. It occurred about as early in the process as was possible. A very focused preliminary inquiry was held, to flesh out the evidence and allow the Crown to determine that it was appropriate, on the basis of that evidence, to accept a manslaughter plea to reflect the intoxication issue. This plea represents Mr. Russell's clear desire to be held accountable and his genuine remorse for the harm he has caused Mr. Presseau and his family, which was further reflected in his comments to the report writers, to the Court, and in his letters of support.
- [65] Counsel agrees that the overarching principles to be applied here are denunciation, deterrence, and rehabilitation, and accepts that the aggravating factors are largely as the Crown has outlined them, with certain clarifications. For example, while Mr. Russell's flight from the scene is an aggravating factor, it is much less aggravated than other kinds of post-offence conduct. More importantly, while his extensive criminal record is definitely a factor here, what I should consider truly significant about it at this point is the gap that Mr. Russell was able to achieve in it, even without the benefit of any supports. He is simply not the same person he was in 2012 and, viewed through the Gladue lens, this shows that supportive programs will likely have a significant beneficial effect on his continued rehabilitation.
- [66] Significantly, Mr. Russell does not allege that Mr. Presseau was actually engaging in any aggressive behaviour at the time of the incident, but rather explains that he acted on the misperception, prompted by his intoxication, that he was defending his partner. Tragic as his actions proved to be, his counsel submits that they are still different than if he had caused the death in the context of attempting to commit a crime, such as a robbery. It is also important to emphasize that during this period he was not in regular possession of a knife. Because of his condition at the time he does not know where he obtained the one he used to stab Mr. Presseau from.

[67] His counsel also stresses that I should not conclude that he has no insight with respect to his alcohol abuse. Through his relationship with Ms. Compton-Burris, he was able to leave behind the excessive alcohol abuse that he had previously engaged in and was trying to be a social drinker, which he viewed as consuming a six-pack or less. At the time of the offence, it was unusual for him to consume the excessive amounts that were involved. The point is that he was already attempting to address his alcohol abuse and the underlying trauma that led to it without any assistance such as residential treatment. He now needs to take these programs, which are aimed at Indigenous men and offer robust support within the institutional setting. The absolute focus of his life, having had no family contact in his formative years, is the family he has been able to form with Ms. Compton-Burris and their son. They provide his strongest motivation to pursue his rehabilitation.

[68] Mr. Russell's counsel also provided helpful sentencing authorities, all of which were from this province. Some were included to illustrate applicable sentencing principles even though they did not involve Indigenous offenders.

- R. v. Ansari, 2009 BCCA 381 was a Crown appeal of a five-year sentence imposed at trial following a conviction for manslaughter. A jury had found that the offender had stabbed a business associate, who had been hounding him for repayment of a loan, in a vehicle, either without intending to cause his death or as a result of provocation by the victim. Aggravating findings by the trial judge were that the offender had brought a knife to this meeting and engaged in some steps to hide the body and send messages from the victim's phone suggesting he was still alive. The offender was in his mid-20s, had no criminal record and, remarkably, had completed two years of law school while on bail. The Court of Appeal rejected the Crown's argument that the trial judge had failed to accurately assess the gravity of the offence and the offender's moral blameworthiness and dismissed the appeal from that five-year sentence that had been imposed.

- The comparable feature of R. v. Feng, 2014 BCCA 71, which also involved a guilty plea, was the element of defending a loved one against an attack. The offender had stabbed the victim, his girlfriend's brother, in the back four times while the victim was physically struggling with the girlfriend, whom the victim had just assaulted. The victim had a history of being physically abusive to his sister and had previously threatened the offender. The offender was originally convicted of second degree murder and spent a period of time in custody, but a new trial was ordered, at which point, he pleaded guilty to manslaughter. He was 25 years old when he committed the offence. He had been the victim of severe physical and emotional abuse by his father as a child. He was placed in a series of group homes and ended up selling drugs in Alberta as a teen. He pursued legitimate employment as an adult, however, and had very strong letters of support from people in every aspect of his life. He had used the six years between the offence and the sentencing to make meaningful efforts towards rehabilitation. The sentencing judge concluded that the effective sentence of four years and three months that would result from imposing one further day in addition to his presentence custody was a fit one in those circumstances.

· In *R. v. Jack*, 2008 BCCA 437, the offender entered a guilty plea, before the conclusion of the preliminary inquiry. While grossly intoxicated, he had attacked and then beaten the victim. The motive was the victim's previous abuse of his own spouse, who was a relative of the offender's girlfriend. The victim was incapacitated by the initial attack by the offender and offered no resistance to the further beating, which other family members took over from the offender. The judge declined to describe the offence as near murder, but said the events fell "very close to that end of the scale." Although he was Indigenous, the offender's specific family background had been alcohol-free and stable. The sentencing judge took into account the efforts that he and the other offenders being sentenced had taken to rehabilitate themselves. The Court of Appeal dismissed the Crown's appeal from the three-year sentence that had been imposed. While finding that the sentence was at the low end, the Court concluded it reflected no error of principle. Denunciation and general deterrence had still correctly been placed at the forefront.

· Finally, in *R. v. Pop*, 2013 BCCA 160, the Indigenous offender pleaded guilty to manslaughter. He and his brother, who was a youth at the time, had been drinking with the deceased in a park. After an argument, the deceased said he was going to get a gun and kill them. He returned with two knives instead. During a further argument, the brother obtained one of the knives and stabbed the victim several times. The offender followed suit. The deceased ultimately suffered 34 stab wounds, but it was unknown who had inflicted the fatal ones and the Court of Appeal made it clear that on this view of the offence it did not matter. The Crown conceded that the offender was severely intoxicated at the time. He was 21 at the time of the offence and had no record at that point, although since then he had been convicted of multiple offences, including having a machete hidden in his pants and carrying bear spray. His upbringing was yet another example of abuse and dysfunction. His father left when he was young, after physically abusing him, and he was similarly abused by three subsequent stepfathers. Both of his parents were alcoholics. He thrived in foster care with a cousin, but was unwisely returned to his addicted mother. His parents had themselves been abused as children and had attended residential schools. The offender was addicted to alcohol, but did not have a drug problem. He had the support of his Indigenous community, but did not wish to live there because of its own pervasive alcohol problems. He was willing to obtain treatment for his addiction. The Court of Appeal allowed the offender's appeal from an effective sentence of five years and two months - reducing it to an effective one of four years and two months. The Court concluded that the sentencing judge had failed to give sufficient weight to the mitigating factors and the reduction in moral blameworthiness that resulted from the offender's Indigenous background, his intoxication, and the victim's initial aggression. Mr. Russell's counsel points out the relevant comments of the Court on the range of sentence:

- [25] A number of cases were cited to the sentencing judge and to this Court to establish a range of sentence for a young Aboriginal offender with no prior record who committed manslaughter in aggravating circumstances. While each case will depend on its unique circumstances, the range appears to be generally between three and eight years' imprisonment with sentences of one and ten years at the outer ends. As noted, sentences in manslaughter cases are very fact specific.
- [69] Finally, with respect to the Crown's authorities, Mr. Russell's counsel makes the observation that, given the distinctive appellate decisions and guidelines in each province, decisions from Ontario such as those that the Crown has cited are not really as applicable to our situation as the B.C. appellate decisions and *Ansari, Jack, and Pop*.

Discussion

- [70] The recent decision of our Court of Appeal in *R. v. Badhesa*, 2019 BCCA 70, has some helpful comments on sentencing for manslaughter:
- [24] The offence of manslaughter encompasses conduct which has caused the death of another person and falls short of intentional killing. It covers a wide range of cases extending from "near accident" to "near murder" and different degrees of moral culpability attach along a continuum within that spectrum. A sentencing judge assesses moral culpability for manslaughter by considering the offender's mental state in the context of the unlawful act itself and the offender's personal characteristics, blending and balancing all in combination. Factors that weigh in the balance include intentional risk-taking, the harm caused, the normative character of the offender's conduct, the degree of deliberation involved, the existence of provocation and the element of chance involved in the resulting death: *R. v. Plowman*, 2015 BCCA 423 at para. 40, citing *R. v. M. (C.A.)*, [1996] 1 S.C.R. 500 at para. 80; *R. v. Stone*, [1999] 2 S.C.R. 290 at para. 247.
- [25] The purpose of the balancing exercise is to ensure that the sentence fits the degree of the offender's moral fault for the harm done by the unlawful act underlying the offence of manslaughter. The measure of the fitness of a sentence lies in the principle of proportionality: a sentence must be proportionate to the seriousness of the offence and the moral blameworthiness of the offender. If a sentence for manslaughter passes this fundamental test it is a fit sentence. If it does not, it is unfit: *Stone* at para. 233; *R. v. LaBerge*, 1995 ABCA 196 at paras. 6--11; *R. v. Draper*, 2010 MBCA 35 at para. 7.
- [26] Sentences imposed for manslaughter range from a suspended sentence to life imprisonment. Given that wide range, the judge must carefully determine the degree of an individual offender's moral culpability and craft a sentence that accounts adequately for the unique constellation of relevant factors present in a case. The task is complex and sometimes factors unrelated to where the unlawful act falls on the "near accident" to "near murder" spectrum nonetheless bear on the degree of the offender's moral culpability.

[71] A crucial example of such a factor is, of course, the unique systemic and background factors that play a part in bringing an Indigenous offender before the Court.

[72] Badhesa also had helpful comments on the moral culpability of a person who commits manslaughter through self-induced intoxication (once again leaving aside for the moment the impact of the Gladue considerations on moral culpability):

Intoxication by alcohol or drugs often figures prominently in manslaughter cases. While relevant to moral culpability, self-induced intoxication that leads to violence is typically the product of intentional risk-taking, which conduct is itself dangerous, irresponsible and blameworthy. In such circumstances, the offender is held fully accountable for his or her condition and principles of deterrence and denunciation are paramount in the determination of a fit sentence. This is because the offending conduct encroaches on our society's basic code of values and warrants condemnation and punishment

[73] In this case, I agree that there are important mitigating factors. Mr. Russell's guilty plea is entitled to meaningful weight both as an expression of remorse and for sparing those involved the further emotional difficulties of a trial. Even if the forensic evidence and eyewitness testimony would likely have linked him to the stabbing, the closure and finality that a plea brings still has real value.

[74] Despite his terrible personal background, which I will describe more fully, Mr. Russell has been able to put together approximately five years in which he was not appearing before the courts on new charges and was attempting to live a more positive life in the best interests of his family.

[75] He had managed to wean himself from drug use without assistance. Although he was ultimately mistaken in his approach (with the present tragic results), he intended to deal with his alcoholism by restricting himself to what he considered to be social drinking.

[76] He has ongoing support from his spouse, his son, and members of his father's family and I accept that he is strongly motivated to improve himself and address his serious personal problems, the most significant of which are his childhood trauma and resulting alcoholism.

[77] He appears to have taken every program available to him on remand and gained support from on of the facilitators for his positive attitude and increasing insight.

[78] He demonstrated what appeared to be genuine remorse and a notable degree of awareness of the severe harm he has caused to the victim's family.

[79] On the aggravating side, I do not think it is engaging in hyperbole to describe this as a truly appalling crime. Whatever his misperception may have been, and I accept that in his intoxicated state he did misperceive some involvement by Mr. Presseau in Ms. Compton-Burris' injury, and however he may have been encouraged by Ms. Purcell, he reacted by pursuing his no-doubt terrified victim - making multiple attempts to stab him, some of which may have connected, and then, when Mr. Presseau lay helpless on the ground,

engaging in what can only be described as overkill, inflicting multiple serious wounds.

- [80] If I had been inclined to view him as intoxicated beyond the capacity for any rational assessment (as opposed to being simply too intoxicated to form the specific intent necessary for murder), his targeted threats to bystanders to deter them from interfering with the attack or stopping his escape, his flight from the scene, and his efforts to dispose of his blood-stained clothing after having successfully disposed of the knife, clearly counteract any such inference.
- [81] All of this occurred as the culmination of a lengthy criminal history that included previous knife-related offences, as well as offending that was fuelled by drugs or alcohol.
- [82] Denunciation and general deterrence are therefore very important. Society must express its collective condemnation for this type of brutal violence and those who either do it deliberately or render themselves susceptible to engaging in it through voluntary intoxication must understand that they can expect significant sentences.
- [83] Specific deterrence is also very important, too. I know that he has received the message to an extent, but the sentence must emphasize that Mr. Russell's most important task in his life from here on is preventing himself from falling into a similar susceptibility to committing violence, whether based on mistake or provocation, through being in an intoxicated state. As Justice Low put it in *R. v. Green*, 2001 BCCA 272, at para.19:

deterrence is not aimed at violence per se, but is aimed at the highly irresponsible conduct that leads to the violence.

- [84] To the extent that a sentence must be of sufficient length to ensure public safety while these issues are addressed through counselling and treatment, separation from society for that period of time is also an important objective.
- [85] All of that said, a sentence resulting from these considerations must still not be so lengthy that it extinguishes what I am satisfied are meaningful rehabilitation prospects and an enthusiastic attitude towards rehabilitation on Mr. Russell's part. He has shown that he can hold his life together in a positive manner for an extended period without assistance, despite his difficult background and ongoing problems, which suggests that with proper supports that kind of lifestyle can be achieved again.
- [86] Without the application of his Indigenous background and resulting highly dysfunctional upbringing, his moral blameworthiness would be among the highest possible. However, as Gladue and Ipeelee contemplate, many of the factors that led to him being before the Court today, in particular the trauma of parental abandonment, lack of a stable home, physical and sexual abuse, substance abuse, and complete loss of connection to his culture, can be traced directly to the legacy of colonialism and residential schools. As aptly expressed at para. 60 of *R. v. Skani*, 2002 ABQB 1097, which was cited with approval in *Ipeelee*:

Few mortals could withstand such a childhood and youth without becoming seriously troubled.

- [87] That comment applies equally to Mr. Russell. I am satisfied that the devastation that has been inflicted on his culture, which in turn manifested itself in his unstable family life and multitude of foster placements, played a significant role in the alcoholism that underlay this offence and the volatility and capacity for brutal violence that intoxication unleashed in him. Although a direct causal relationship between the Gladue considerations and the offending is not required, it is certainly present in this case. His moral blameworthiness should be reduced accordingly.
- [88] As I have said, there is not much innovation possible in the structure of Mr. Russell's sentence to align with cultural supports. On any version of a fit sentence, he will be in a federal institution, but it is encouraging that the culturally-specific programs available appear to be robust, and I certainly hope that he will take full advantage of them.
- [89] The last major issue is situating Mr. Russell's sentence in the context of similar offences and offenders. Of course, a sentence must always be individualized to take into account the specific circumstances of an offender and the most applicable sentencing principles, but consideration of other comparable decisions does assist in meeting the principle of parity.
- [90] Looking first to Mr. Russell's authorities, he has not had the opportunity to pursue the extensive rehabilitative efforts, nor does he come for sentencing with the absence of any prior criminal history, as the offenders in Ansari and Feng did (although I acknowledge that Mr. Ansari did not have the mitigating effect of a guilty plea as Mr. Russell does, which implies that his sentence following a plea might have been lower).
- [91] The sentencing judge in Jack was strongly, I would say almost uniquely, motivated towards intra-community reconciliation, a fact that is not present here. Mr. Jack also did not have Mr. Russell's extensive criminal history and had already made what were found to be meaningful efforts towards rehabilitation. Even then, the outcome of the appeal was based on deference to a sentence that had been imposed by a very experienced judge and that contained no error of principle, even if it fell at the low end of the range. Its precedential value is that such a sentence can fall within the appropriate range. I do not read it as an endorsement of the specific reasoning that led to the sentence.
- [92] Similarly, the circumstances in Pop were influenced by the offender's age and lack of prior criminal record, and the range identified for "a young Aboriginal offender with no prior record" certainly does not apply to Mr. Russell.
- [93] With respect to the Crown's authorities, I agree with Mr. Russell's counsel that some caution should be exercised with respect to sentencing authorities from other provinces. They may reflect sentencing ranges and governing cases that are unique to that jurisdiction. That acknowledged, however, I think that trial level decisions that transparently identify the facts and principles that led to their sentences can still be of some use.

- [94] The ideal subset of comparators to this case, within the broad manslaughter range, would be those cases involving guilty pleas by Indigenous offenders who are well into adulthood and have extensive criminal records, who committed offences involving the infliction of brutal violence, but whose circumstances are balanced by compelling Gladue factors and positive rehabilitation prospects.
- [95] No two cases are that similar of course, but comparable factors can be identified. The cases of Killiktee and Wesley are at least roughly comparable. The Labbe decision is probably getting somewhat old to remain a relevant reference and Ward was a much less sympathetic offender, with the Court making clear that his sentence was at the high end even so. The fact that the sentences in George and Kanate are higher than those imposed on youthful offenders in the B.C. cases seems to be explained by those offenders' meaningful records, including related convictions. (There could also be, as Mr. Russell's counsel suggested, some jurisdictional peculiarities.) By implication, the sentences imposed on younger and less entrenched offenders, such as in Pop, Johnny, and Neel, can show that sentences for offenders who are more comparable to Mr. Russell would have been higher, just as sentences imposed after trial and conviction can show that a guilty plea might have reduced them.
- [96] Balancing these various factors and giving the weight I think that each deserves, and particularly keeping in mind the reduction in moral culpability brought about by Mr. Russell's background, I conclude, despite the able submissions of his counsel, that the range stated by the Crown already accurately incorporates his guilty plea, his prospects of rehabilitation, and the s. 718(e) considerations fully. But for those factors, the higher range of 10 years and up seen in other manslaughter cases could well have been considered, in light of the aggravating circumstances.

Conclusion

- [97] In the absence of presentence custody, I would have imposed a sentence on Mr. Russell of eight years' imprisonment. Applying credit for presentence custody, I now sentence him to imprisonment for five years and 204 days.
- [98] I recommend that he receive access to all available programs to address the background factors to his offending, whenever possible in a culturally specific manner.
- [99] As this is a primary designated offence, I order pursuant to s. 487.051(3) that the number of samples of bodily substances that are reasonably required for the purposes of forensic DNA analysis be taken from him.
- [100] I also order pursuant to ss. 109(2) of the Code that he is prohibited from possessing any of the items set out in s-s. (a) and (b) for life.
- [101] Finally, I express my thanks to counsel for their very helpful submissions.

"Schultes J."

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Prepared on 25 October 2026 · Esheria