

CANADA / JUDGMENT

R. v. Saboon

2026 ONCA 113

COURT

Court of Appeal for Ontario

DECIDED

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R. v. Saboon

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C70194, COA-22-CR-0329

Judges

Fairburn, J. Michal; Sossin, Lorne; Monahan, Patrick J.

Subject

Criminal

Decision Content

COURT OF APPEAL FOR ONTARIO

CITATION: R. v. Saboon, 2026 ONCA 113[1]

DATE: 20260218

DOCKET: C70194 & COA-22-CR-0329

Fairburn A.C.J.O., Sossin and Monahan JJ.A.

DOCKET: C70194

BETWEEN

His Majesty the King

Respondent

and

Mowafag Saboon

Appellant

DOCKET: COA-22-CR-0329

AND BETWEEN

His Majesty the King

Respondent

and

Kenneth Morrison

Appellant

Janelle Belton and Sebastian Becker, for the appellant, Mowafag Saboon

Colleen McKeown, for the appellant, Kenneth Morrison

Andreea Baiasu, for the respondent

Heard: December 18, 2025

On appeal from the convictions entered by Justice James W. Sloan of the Superior Court of Justice, on November 30, 2021.

Fairburn A.C.J.O.:

I. overview [1] Mowafag Saboon and Kenneth Morrison decided to commit a home invasion robbery. To this end, along with two youths, they entered the home of Shaun Yorke. Things quickly went sideways, Mr. Yorke was shot through the chest and the appellants, along with their accomplices, fled the scene.

[2] In his reasons for judgment, the trial judge addressed more than one mode of liability.

[3] When it came to Mr. Saboon, the trial judge found he was guilty as a principal to the murder. This finding rested on the trial judge's factual conclusion that it was Mr. Saboon who shot Mr. Yorke. The trial judge found that, in "firing a bullet from an extremely close range into [Mr. Yorke]'s chest area", Mr. Saboon meant to cause bodily harm that he knew was likely to cause death. While at points the trial judge referred to s. 229(c) of the Criminal Code, Mr. Saboon accepts that the trial judge found him culpable for murder under s. 229(a)(ii) of the Criminal Code, R.S.C. 1985, c. C-46.

- [4] In the alternative, the trial judge observed that Mr. Saboon was also guilty of murder on the basis that he was a participant in a common unlawful purpose pursuant to s. 21(2) of the Criminal Code, that purpose being the home invasion robbery of Mr. Yorke. While this was an alternative basis to liability for Mr. Saboon, it was the sole basis upon which the trial judge found Mr. Morrison guilty of murder. Therefore, the appellants were both found guilty of murder on the basis that they had agreed in common to commit a home invasion robbery and that in the course of that robbery, Mr. Yorke was shot and killed by Mr. Saboon.
- [5] Finally, the trial judge found that the murder was first degree murder pursuant to s. 235(5)(e) of the Criminal Code because it occurred while the appellants forcibly confined Mr. Yorke or while they attempted to do so.
- [6] Mr. Saboon raised three grounds of appeal, all of which arise from the trial judge's reasons for judgment. The trial judge is said to have erred by:
- (a) failing to consider the defence of a third party, specifically that Mr. Saboon shot Mr. Yorke in an effort to defend Mr. Morrison;
 - (b). failing to address how Mr. Saboon (as opposed to Mr. Morrison) was a party to the forcible confinement of Mr. Yorke; and
 - (c). failing to appreciate that the evidence identifying Mr. Saboon as the shooter was infected by inadmissible hearsay.
- [7] Following oral submissions, the panel dismissed Mr. Saboon's appeal with reasons to follow at the same time as the reasons in Mr. Morrison's appeal.
- [8] As for Mr. Morrison, while he raised numerous grounds, the matter turned on only one which I will address here. Mr. Morrison correctly argued, and the respondent fairly acknowledged, that the trial judge applied an objective test when concluding that he had the requisite mens rea for murder as a party to a common unlawful purpose. Specifically, the trial judge found Mr. Morrison "would have known or ought to have known" (emphasis added) that the shooting of Mr. Yorke was a probable consequence of carrying out the home invasion robbery.
- [9] As will be explained in these reasons, the only constitutional basis upon which to establish mens rea for murder is subjective knowledge of the likelihood of the commission of the incidental offence. In other words, the accused must subjectively foresee that murder will likely be committed by one of the participants to the common unlawful purpose while carrying out the original agreement.
- [10] The respondent again fairly acknowledges that the curative proviso in s. 686(1)(b)(iii) of the Criminal Code cannot apply in this case.

- [11] On that basis, the panel granted Mr. Morrison's appeal, set aside the murder conviction and substituted a conviction for manslaughter, with reasons to follow. We asked for written submissions for sentence. We have since received those submissions and considered them.
- [12] Accordingly, what follows are the reasons for why: (a) Mr. Saboon's appeal was dismissed; (b) Mr. Morrison's appeal was granted; and (c) Mr. Morrison should be sentenced to the equivalent of 12 years in custody.

II. facts [13] On the night of July 7, 2018, four individuals planned to break into Shaun Yorke's house and rob him. The trial judge found that two of those individuals were Mr. Saboon and Mr. Morrison. The other two were young people who later pled guilty to manslaughter. The trial judge had a suspicion that another young man, S.S., who was a friend of Mr. Yorke's son and was living at the Yorke residence at the time of the home invasion robbery, may also have been involved. He was never charged.

- [14] On the night of the offence, Mr. Morrison, Mr. Saboon and the two youths met at Mr. Morrison's home where the plan was hatched. The two young men were familiar with the layout of the home. And they knew that Mr. Yorke, who was believed to be a drug dealer and thus likely to have drugs and money in his home, had mobility issues resulting from the fact that he lived with cerebral palsy.
- [15] Mr. Morrison, Mr. Saboon and the two youths left from the Morrison home and drove to Mr. Yorke's residence. The trial judge found as a fact that Mr. Saboon was carrying a handgun and that Mr. Morrison was carrying a sawed-off rifle.
- [16] S.S., who was living at the Yorke residence at the time of the murder, testified that he unlocked the door for the robbers after "the Black male" among them pointed a gun at him. The trial judge identified the Black robber as Mr. Saboon. The trial judge struggled with S.S.'s credibility but explained why he accepted his evidence on many points.
- [17] S.S. testified that once the men were inside the home, Mr. Morrison and the Black man made their way upstairs. After some looking about, Mr. Morrison, who was carrying the rifle, told S.S. to open Mr. Yorke's bedroom door and followed him inside. They found Mr. Yorke watching television while sitting in shorts on the side of his bed. Mr. Morrison was said to have pointed his rifle at Mr. Yorke, while the Black male whom the trial judge identified as Mr. Saboon stayed in the hallway outside of the bedroom, all the while pointing his gun at S.S.
- [18] Mr. Morrison asked Mr. Yorke for "the stuff." Mr. Yorke resisted, claiming "we don't have anything in here, I don't know what you are talking about."
- [19] Mr. Yorke then lunged at Mr. Morrison, tackled him around the waist and pushed him out of the bedroom and against the railing at the top of the stairs. The trial judge found that as this altercation was taking place, Mr. Saboon was on the staircase and a shot rang out, after which Mr. Yorke fell on top of Mr. Morrison.

[20] As the trial judge recounted, following the shooting, the Black male “extended his hand towards Morrison, and as soon as Morrison got out from under [Mr. Yorke], they both hurried downstairs. Neither [of the youths] ever came upstairs. After Morrison got out from under [Mr. Yorke], all four of the intruders hurriedly left the unit.”

[21] Mr. Yorke died from the gunshot wound to his chest. The bullet penetrated both his heart and his lungs. The forensic pathologist noted that the gun was fired at close range. Although it remains in dispute on appeal as to whether the trial judge erred in concluding that the Black man on the staircase was Mr. Saboon, there is no longer any dispute that the fatal shot was fired by that man.

III. decision below [22] The trial judge convicted Mr. Saboon and Mr. Morrison of first degree murder.

[23] The trial judge concluded that Mr. Saboon was the shooter on the basis that:

i.. Mr. Morrison’s girlfriend and another of Morrison’s friends, who were also at the Morrison home prior to the shooting, testified that a Black man called Fuji or Fufu was at the house that night.

ii. Mr. Morrison’s girlfriend identified Mr. Saboon, seated in court during her evidence, as the man she knew as Fuji or Fufu. That transpired when she was asked to describe the man she knew as “Fufu” and she simply pointed at Mr. Saboon and said: “he’s over there.”

iii. Mr. Morrison’s girlfriend also testified that there were only two Black men in Mr. Morrison’s circle of friends, the other being Mr. Saboon’s brother who wore glasses and was much taller than Mr. Saboon.

iv. An agreed statement of fact acknowledged that Mr. Saboon had known Mr. Morrison for a long time and lived around the corner from him and that people sometimes called Mr. Saboon Master Fuji or Fufu.

v. Another man, Mr. Fracas-Bradley, who stayed at the Morrison home on the night Mr. Yorke was killed, also testified that there were two Black males at the Morrison home that night, one of whom introduced himself as “Fuji”. The other was named “Rugged.” Fuji was the shorter of the two.

vi. The two youths who attended at the home invasion robbery said that the Black man who came with them to the Yorke home was introduced to them as “Fuji” and that this was the name everyone referred to him as. Specifically, one of the youths said Mr. Morrison introduced his friend to him as “Fuji”.

- [24] As for why the trial judge found that Mr. Saboon fired the deadly bullet, forensic evidence showed that the muzzle of the gun was between one to three feet away from Mr. Yorke's body. It was unlikely that Mr. Morrison could have shot his sawed-off rifle at an angle consistent with the bullet's path through Mr. Yorke's body, especially since Mr. Yorke was pressing up against Mr. Morrison as he pushed him out of the bedroom.
- [25] As well, S.S. testified that the shooter was the Black man with the gun who was standing on the stairs at the time of the shooting.
- [26] The trial judge found Mr. Saboon was culpable as a principal to the shooting, as he "meant to cause [Mr. Yorke] bodily harm" and "knew he was likely to cause [Mr. Yorke's] death by firing a bullet from an extremely close range into [Mr. Yorke's] chest area." The first degree murder conviction rested on the trial judge's finding that Mr. Saboon was also a participant in unlawfully confining Mr. Yorke.
- [27] As for Mr. Morrison, his liability for murder rested strictly on the application of s. 21(2) of the Criminal Code.[2] Section 21(2) applies where an accused has agreed with another to commit an offence and, while carrying out that agreed-upon unlawful purpose, the other participant to the original agreement commits a different offence. In this case, the agreed-upon purpose was the home invasion robbery and the different offence was the murder committed by Mr. Saboon.
- [28] I will return to the trial judge's reasons later in these reasons, but for now, suffice to say that an objective standard was used to assess Mr. Morrison's mens rea:

I find that each of the accused would have known or ought to have known that the shooting ... was a probable consequence of their carrying out the home invasion robbery with two guns at the ready. I therefore find Morrison also guilty of the murder [Emphasis added.]

As I will explain later in these reasons, applying an objective standard to Mr. Morrison's mens rea for murder constitutes reversible error.

IV. Mr. saboon's appeal 1. The trial judge did not err in failing to consider the defence of a third party [29] Mr. Saboon argues that the trial judge erred by failing to consider whether Mr. Saboon shot the deceased in defence of a third party, specifically in defence of Mr. Morrison. Recall that as Mr. Morrison stood in Mr. Yorke's bedroom with the rifle in his hands, Mr. Yorke rose from his bed, grabbed Mr. Morrison around the waist and pushed him out of the bedroom.

- [30] As Mr. Yorke and Mr. Morrison landed against the staircase railing, a shot rang out, the shot coming from Mr. Saboon's firearm.

- [31] While Mr. Saboon acknowledges that trial counsel did not raise the defence of a third party at trial, he argues on appeal that the trial judge should have nonetheless addressed the defence as it is said to have an air of reality. Mr. Saboon argues that had the trial judge considered this defence, he may have reached a different conclusion as to Mr. Saboon's intention when he shot Mr. Yorke, specifically, that the shooting was merely a response to a perceived threat of harm to Mr. Morrison.
- [32] The trial judge was indeed required to put all defences with an air of reality to the jury, even those not raised by counsel: *R. v. Suthakaran*, 2024 ONCA 50, 433 C.C.C. (3d) 175, at para. 16; *R. v. Mathisen*, 2008 ONCA 747, 239 C.C.C. (3d) 63, at para. 93. In my view, however, there was no air of reality to the defence of a third party and the trial judge was thus under no obligation to address it.
- [33] Section 34(1) of the Criminal Code makes the defence of a third party available where the accused believes on reasonable grounds (i) that force or a threat of force is being applied to another; (ii) that the act constituting the offence is committed for the purpose of defending the third party (the "motive"); and (iii) that the act committed is reasonable in the circumstances (the "response"): *R. v. Khill*, 2021 SCC 37, [2021] 2 S.C.R. 948, at para. 37. Applying that structure to this case, it would mean that Mr. Saboon would have had to believe on reasonable grounds that force was being applied to or threatened against Mr. Morrison, that the shooting of Mr. Yorke was done for the purpose of defending Mr. Morrison and that the shooting of Mr. Yorke was reasonable in the circumstances.
- [34] The air of reality test applies to each element of the defence: *R. v. Cinous*, 2002 SCC 29, [2002] 2 S.C.R. 3, at para. 95. In determining if there exists an air of reality to the defence, the trial judge must engage in a limited weighing of all the evidence to determine if the jury, acting reasonably, could have a reasonable doubt on the basis of the defence: *Cinous*, at paras. 90-91; *Suthakaran*, at para. 18.
- [35] Even assuming that Mr. Saboon, who did not testify, could establish that he subjectively felt the need to respond in the manner he did, the defence of a third party does not rest entirely on his perception of the need to act: *Khill*, at para. 2. The accused's belief must also rest "on reasonable grounds", an objective standard which "incorporates community norms and values in weighing the moral blameworthiness of the accused's actions": *Khill*, at para. 53. As Doherty J.A. noted in *R. v. Pilon*, 2009 ONCA 248, 243 C.C.C. (3d) 109, at para. 73: "The reasonableness standard ensures that the self-defence justification will not extend to killings committed in circumstances that the community ... regards as unreasonable and beyond the pale of any acceptable justification."
- [36] In this case, there was no air of reality to the defence. Even on a limited weighing of the evidence, the essential facts about the shooting were available to the trial judge. These facts involve two armed adults (accompanied by two youths) breaking into a home in the middle of the night. The unarmed resident, threatened at gunpoint in his bedroom, responds by tackling the robber and is almost immediately shot by the robber's accomplice. One is hard-

pressed to think of a jury, let alone a jury acting reasonably, who would accept that the shooting was justifiable as a defensive act. In other words, the shooting of Mr. Yorke for tackling an armed invader in his own home offends community norms. Clearly, if nothing else, this matter founders on the third element: this action was not reasonable in the circumstances.

- [37] As a result, the defence of a third party had no air of reality and the trial judge was under no obligation to put it to the jury.
2. The trial judge did not err in finding Mr. Saboon was a party to the underlying offence of forcible confinement [38] Mr. Saboon maintains that the trial judge erred by failing to articulate how he participated in the unlawful confinement of Mr. Yorke.
- [39] I disagree.
- [40] The evidence was clear that Mr. Saboon and Mr. Morrison were co-participants in a plan to rob and confine Mr. Yorke and acted together in carrying out that plan. In my view, they were joint principals in the forcible confinement of Mr. Yorke.
- [41] While there was no evidence suggesting that Mr. Saboon entered Mr. Yorke's bedroom, there was direct evidence that the Black robber (whom the trial judge concluded was Mr. Saboon) remained outside of Mr. Yorke's bedroom when Mr. Morrison was in there. There was also direct evidence that the same man was on the staircase with his gun drawn as Mr. Yorke and Mr. Morrison emerged from the room.
- [42] By standing on the staircase with his gun drawn, Mr. Saboon was a party to preventing Mr. Yorke from exiting the bedroom. In short, Mr. Saboon was blocking the only avenue of escape for Mr. Yorke.
- [43] The murder and the unlawful confinement were all part of a continuous sequence of events forming a single transaction. They were close in time and involved the ongoing domination of Mr. Yorke at gunpoint, first at gunpoint in his bedroom and then at gunpoint as he tackled Mr. Morrison against the railing at the top of the stairs. By the threat of their guns, the appellants unlawfully confined Mr. Yorke through violence, fear and intimidation, even if they did not succeed in physically restraining him: *R. v. Sundman*, 2022 SCC 31, [2022] 2 S.C.R. 368, at paras. 5, 22.
3. There is no error in the trial judge's findings on identification [44] The trial judge devoted a section of his reasons to explaining why he found that Mr. Saboon was the man who shot Mr. Yorke. Mr. Saboon argues that the trial judge erred by reaching this conclusion based on inadmissible hearsay evidence.
- [45] Mr. Saboon argues that while there is no dispute that he uses the nicknames Master Fuji/Fufu and there was evidence that a Fuji/Fufu was at Mr. Morrison's house the night of the robbery, there was no admissible evidence that Fuji/Fufu was one of the robbers.

- [46] Mr. Saboon maintains that the only evidence pointing to him as the shooter came from the youths who attended the robbery and later pled guilty to manslaughter. Mr. Saboon contends that the youths testified to hearing other people refer to the Black man at the Yorke home as Fuji. Therefore, Mr. Saboon argues, this was inadmissible hearsay evidence which the trial judge erroneously relied upon to prove that Mr. Saboon was the shooter. Mr. Saboon submits that, without this impermissible path of reasoning, there was simply no way to identify him as a participant in the robbery.
- [47] I disagree.
- [48] The trial judge's reasons admit of no error on this issue. He found based upon the totality of the circumstantial evidence at trial that the shooter was Mr. Saboon.
- [49] That evidence included the following:
- (a) Mr. Saboon was Mr. Morrison's childhood friend;
 - (b). An agreed statement of fact acknowledged that Mr. Saboon went by the names "Master Fuji" and "Fufu";
 - (c). Mr. Morrison's girlfriend testified that the man whom she knew by the name "Fufu" was at the Morrison home prior to the robbery;
 - (d). In court, Mr. Morrison's girlfriend pointed to Mr. Saboon as the man she knew as "Fufu", refusing to describe him because he was, according to her, "over there";
 - (e). Mr. Morrison's girlfriend testified that there were only two Black people in Mr. Morrison's circle of friends: Fufu and Fufu's brother. She said that Fufu's brother was much taller than Fufu and, unlike Fufu, the brother wore glasses;
 - (f).. Mr. Fracas-Bradley testified that he stayed overnight at Mr. Morrison's house on the night of the robbery. Two "Black males" were present at the home earlier in the evening, one of whom identified himself as "Fuji". The other was "Rugged". Rugged was much taller than Fuji; and
 - (g). The youths who ultimately pled guilty to manslaughter testified that their Black accomplice was someone they knew as "Fuji" as that is how he had been introduced to them. This is what everyone was referring to him as that night.
- [50] Not only was there a significant body of evidence linking Mr. Saboon to the names "Fuji" and "Fufu", but none of it is properly characterized as hearsay.
- [51] The testimony of the two youths did not constitute out-of-court statements admitted for the truth of their contents. Rather, it was their evidence that Fuji is the name that the Black man at Mr. Yorke's home went by. The fact that he went by that nickname was based on the fact that those present at the robbery called him by that name. That was not hearsay.

V. Mr. morrison's appeal 1. Conviction Appeal

[52] The parties are agreed that the trial judge erred in relying upon an objective mens rea to find Mr. Morrison guilty of first degree murder pursuant to s. 21(2) of the Criminal Code. Having regard to the impugned passage in the reasons, and having considered them in totality, I agree with the respondent's fair concession that the trial judge committed reversible error and the curative proviso does not apply.

[53] The impugned passage reads as follows:

I find that each of the accused would have known or ought to have known that the shooting of the physically-large drug dealer [Mr. Yorke] was a probable consequence of their carrying out the home invasion robbery with two guns at the ready. [Emphasis added.]

[54] As already mentioned, participation in a common unlawful purpose was an alternative path to liability for Mr. Saboon. Accordingly, there is no dispute that the error only touches Mr. Morrison's appeal.

[55] Why is it an error?

[56] Section 21(2) extends liability to those who are not principals, aiders or abettors to offences. It applies in those situations where the accused has agreed with at least one other to commit an offence and, while carrying out that agreed-upon unlawful purpose, one or more of the other participants to the original agreement (not the accused) commits a different offence: *R. v. Mohamed*, 2025 ONCA 611, at para. 41. Section 21(2) applies where the accused knew (or, in the case of offences not requiring specific intent, ought to have known) that one of the participants to the agreed-upon unlawful purpose would likely commit the incidental offence while pursuing the common unlawful purpose: *Mohamed*, at para. 41. Of course, murder is a specific intent offence. Therefore, in the case of murder, s. 21(2) extends responsibility for murder but only if the murder is committed in carrying out the originally agreed-upon unlawful purpose and the accused had the requisite degree of mens rea, specifically subjective foresight of a murder committed by one of his co-participants in carrying out the original agreement.

[57] In other words, only subjective knowledge will suffice if such knowledge is constitutionally required to establish mens rea, as is clearly the case for murder. That is so even though, on its face, s. 21(2) provides for both a subjective and objective basis to establish the requisite foresight ("knew or ought to have known").

[58] As acknowledged by Crown counsel on appeal, the conviction here was based upon a finding of objective mens rea. At no point did the trial judge find that Mr. Morrison had subjective foresight that murder would be a probable consequence of the home invasion robbery.

- [59] As the Crown also concedes, looking beyond the impugned passage, the reasons overall do not provide any comfort that the trial judge was aware of the requirement for subjective foresight of murder. There is no distinction drawn between objective and subjective foresight. Moreover, there is no reference to a need to go beyond what a reasonable person would have foreseen in the circumstances.
- [60] I note one further issue. For Mr. Morrison to be guilty of murder by way of s. 21(2), he would have had to know that one of the participants to the robbery would probably commit murder and not simply a “shooting”. This means Mr. Morrison had to know that, in the course of the robbery, one of his accomplices was likely not only to use his gun but to “cause the victim’s death with one of the intents listed in s. 229(a) of the Code – namely, either the intent to cause death, or the intent to cause bodily harm that the participant knew would likely cause death and recklessness as to whether death ensued or not”: *R. v. McLellan*, 2018 ONCA 510, 362 C.C.C. (3d) 183, leave to appeal refused, [2019] S.C.C.A. No. 338.
- [61] The Crown does not invoke the curative proviso and for good reason. I agree with both parties that the Crown could not meet its burden in showing that the conviction for murder should stand notwithstanding the error. The error was not a harmless or minor one; it had a clear impact on the verdict. And the parties agree, as do I, that the evidence against Mr. Morrison is far from being “so overwhelming that any other verdict would have been impossible to obtain”: *R. v. Van*, 2009 SCC 22, [2009] 1 S.C.R. 716, at para. 34.
- [62] Accordingly, the conviction for murder was set aside at the conclusion of the hearing and a conviction for manslaughter entered.
2. Sentencing
- [63] In light of the substituted manslaughter conviction, the parties have asked that this court sentence Mr. Morrison.
- [64] To this end, the panel requested that the parties file written submissions, setting out their positions on sentence. We have received and reviewed those submissions.
- [65] Mr. Morrison says that a fit disposition for his crime is one of 10 years' imprisonment. Bearing in mind time served and enhanced credit, Mr. Morrison argues that he has already served the equivalent of over 10.5 years in custody. Given the time already served, he asks for a sentence of one day of imprisonment. In addition, he does not object to the imposition of a year of probation.
- [66] The respondent argues that a fit disposition is one of 13 years' imprisonment. Bearing in mind time served and enhanced credit, the respondent maintains that, if Mr. Morrison had been sentenced for manslaughter on the original sentencing date, there would be 2 years left of his sentence. Accordingly, the respondent asks that this court impose a 2-year sentence.

- [67] There is no ability to backdate a sentence. Accordingly, when imposing a sentence for a substituted offence pursuant to s. 686(3)(b) of the Criminal Code, the court must impose a sentence as of the date of the court's reasons. While the sentence imposed on appeal commences on the date it is imposed, the appellate court must strive to place the accused in the same position he would have been in had the sentence been received on the date of the original sentencing. In this case, that date was May 26, 2022.
- [68] In my view, had Mr. Morrison been sentenced for manslaughter on May 26, 2022, a fit disposition would have been one of 12 years. I say this for the following reasons.
- [69] Mr. Morrison argues that the range for this type of manslaughter is somewhere between 8-12 years in custody. The respondent argues that the range is somewhere between 12-15 years in custody. I lean toward the respondent's range.
- [70] Sentences for manslaughter cover a wide breadth. They are as varied as the contexts out of which manslaughter convictions emerge. There is no one range. But there are ranges for convictions that arise in similar circumstances, providing judges with a starting point for considering a fit and proportionate sentence.
- [71] While Mr. Morrison points to authorities to support his 8-to-12-year range, the cases he points to are marked by numerous differences, largely involving offenders with lower levels of culpability. The most notable differences are that, unlike Mr. Morrison, the offenders in the cases he leans on did not wield firearms, were much younger or, in some cases, did not enter the home where the killing took place: see e.g., *R. v. Smith*, 2022 ONSC 3800; *R. v. Khan*, 2023 ONCA 553; *R. v. Wabason*, 2016 ONSC 349; [3] and *R. v. Kotzma*, 2024 ONSC 276.
- [72] Looking to the respondent's authorities, they align better with the factual circumstances of this case. For instance, Mr. Warner was a party to the killing, wielded a firearm and in fact took a shot, injuring another person. A 15-year sentence was imposed: *R. v. Warner*, 2019 ONCA 1014. Mr. Jones-Solomon received a 13-year sentence for providing transportation to the deceased's apartment and being involved in assaulting the soon-to-be deceased, before he was shot: *R. v. Jones-Solomon*, 2015 ONCA 654, 329 C.C.C. (3d) 191. As for Mr. Thompson, he received a 13-year sentence for a robbery of a bank where a teller was shot and killed by one of the other robbers. Mr. Thompson brandished a firearm and threatened people, but did not shoot: *R. v. Thompson*, 2008 ONCA 693.
- [73] In my view, the range here is higher than Mr. Morrison says. Even so, I would place Mr. Morrison at the very bottom of 12-to-15-year range.
- [74] While there were numerous aggravating factors at work in this case, there are substantial factors in mitigation.

- [75] I start by acknowledging that Mr. Morrison's role in the events that led up to Mr. Yorke's death was not a minor one. The planning for the home invasion robbery took place at Mr. Morrison's home. And Mr. Morrison provided the vehicle that transported the robbers to the scene. Importantly, he attended at the scene with a firearm. And he wielded that firearm, confining Mr. Yorke to his room while making demands of him. He also fled the scene with the other robbers, after Mr. Yorke had been shot.
- [76] These were seriously aggravating factors, placing the matter squarely in the higher range.
- [77] At the same time, there were numerous mitigating factors at work.
- [78] Mr. Morrison was 27 years of age at the time of the offence. While he had a criminal record, it was minimal, with the longest custodial sentence having been 75 days intermittent.
- [79] Mr. Morrison took responsibility for this offence by pleading guilty to the manslaughter of which he now stands convicted.
- [80] Mr. Morrison also spent a lengthy period of time in lockdown pending his original sentencing. On the defence calculation, the total was 427 days in full lockdown and 71 days in partial lockdown. This is to be treated as a mitigating factor: *R. v. Marshall*, 2021 ONCA 344, at para. 52. In my view, it is a substantial one.
- [81] Mr. Morrison is Indigenous. While he asked for a Gladue report at trial, one was not ordered because of the mandatory life sentence to be imposed. Therefore, Mr. Morrison and his father provided important information by way of affidavit. Those affidavits detail a difficult past, lost connections with relatives who lived on the Six Nations of the Grand River reserve in Ohsweken, Ontario. Mr. Morrison's father recounts a difficult life, marked by alcohol abuse, family violence and alienation. As a result, Mr. Morrison's father became disconnected from his Indigenous roots, which had a reverberating impact on his children. This information would normally be included in a Gladue report to more fully inform the court about the impact of colonialism on Mr. Morrison.
- [82] Importantly, while in custody, Mr. Morrison has had the opportunity to reconnect with his Indigenous heritage. He has attended smudging ceremonies and sought services from the Indigenous liaison officer.
- [83] The case worker at the institution where Mr. Morrison currently resides produced a report which could hardly be more positive. The case worker's assessment bodes well for Mr. Morrison's rehabilitative potential:

Upon consultation with unit staff, everyone this writer spoke with had only positive things to say about MORRISON. ... Personally, my experience with MORRISON has been great. He presents as positive, motivated, and always maintains an optimistic outlook. If I could have 28 inmates like MORRISON on my caseload, I would be very happy.

- [84] Taking into account all of these factors, it is my view that Mr. Morrison's sentence should be one of 12 years, at the very low end of the range. By imposing this sentence, I do not for a moment diminish the seriousness of his crime. A vulnerable man, living with cerebral palsy, senselessly died when attacked in his own home. Normally, for a gun-wielding participant to a home invasion robbery, the sentence would be higher than 12 years. It is the unusual confluence of mitigating factors in this case, including the progress that Mr. Morrison has made while in custody, that provides some confidence that he can be released from custody in the near future and make something of his life.
- [85] The question is how to impose the equivalent of a 12-year sentence today.
- [86] On the date of sentencing, May 26, 2022, the appellant would have around 1,908 days of enhanced credit. I reach this calculation by determining the days in custody between Mr. Morrison's arrest, which was October 26, 2018, and the date of sentencing. I have accounted for a brief period of time on bail. I have then applied an enhanced credit of 1:1.5 for every day in custody.
- [87] So, a 12-year sentence, which is 4,383 days, less enhanced credit of 1,908 days, would have translated into a further term of 2,475 days to serve. That is the equivalent of approximately 6 years and 9 months left to serve as of May 26, 2022. Mr. Morrison likely would have been released at two thirds of his sentence, making his release date December 1, 2026, approximately 54 months after the date of sentence.
- [88] Accordingly, the objective here is to impose a sentence today that would ensure that the appellant will hit two thirds of his sentence on December 1, 2026.
- [89] To achieve the equivalent of a 12-year sentence, I would impose today a sentence of 14 months.

Conclusion

- [90] Mr. Saboon's conviction appeal is dismissed (C70194).
- [91] Mr. Morrison's conviction appeal is granted, the conviction for murder is set aside and a conviction for manslaughter is substituted (COA-22-CR-0329).
- [92] The sentence for Mr. Morrison's manslaughter conviction is one of 14 months running from the release of these reasons. Given the time already served, this achieves the effect of a 12-year sentence imposed on the date of the original sentence.

Released: February 18, 2026 JMF

"Fairburn A.C.J.O."

"I agree. Sossin J.A."

"I agree. P.J. Monahan J.A."

- [1] This appeal is subject to a publication ban pursuant to ss. 110 and 111 of the Youth Criminal Justice Act, S.C. 2002, c. 1.
- [2] While the trial judge also found Mr. Saboon guilty pursuant to s. 21(2), it was an alternative path to liability and need not be addressed in these reasons.
- [3] One further reason not to rely on Wabason is that this court subsequently overturned the conviction: 2018 ONCA 187.
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