COURT OF APPEAL FOR ONTARIO

CITATION: R. v. Morris, 2021 ONCA 680
DATE: 20211008
DOCKET: C65766

Fairburn A.C.J.O., Doherty, Juriansz, Tulloch and Paciocco JJ.A.

BETWEEN

Her Majesty the Queen

Appellant

and

Kevin Morris

Respondent

Roger Shallow, for the appellant

Faisal Mirza and Gail D. Smith, for the respondent

Nana Yanful, Johnathan Shime and Roger Rowe, for the interveners Black Legal Action Centre and Canadian Association of Black Lawyers

Caitlyn E. Kasper and Douglas Varrette, for the intervener Aboriginal Legal Services

Nader R. Hasan and Geetha Philipupillai, for the intervener the David Asper Centre for Constitutional Rights

Emily Lam and Marianne Salih, for the intervener Criminal Lawyers' Association

Annamaria Enenajor, for the intervener Urban Alliance on Race Relations

Anil K. Kapoor and Victoria M. Cichalewska, for the intervener Canadian Civil Liberties Association

Taufiq Hashmani, for the intervener Canadian Muslim Lawyers Association

Saman Wickramasinghe and Zach Kerbel, for the interveners South Asian Legal Clinic of Ontario, Chinese and Southeast Asian Legal Clinic, and Colour of Poverty/Colour of Change

Heard: February 11, 2021 by video conference

On appeal from the sentence imposed on July 19, 2018 by Justice Shaun S. Nakatsuru of the Superior Court of Justice, with reasons reported at 2018 ONSC 5186, 422 C.R.R. (2d) 154.

By the Court:

INTRODUCTION

[1] It is beyond doubt that anti-Black racism, including both overt and systemic anti-Black racism, has been, and continues to be, a reality in Canadian society, and in particular in the Greater Toronto Area. That reality is reflected in many social institutions, most notably the criminal justice system. It is equally clear that anti-Black racism can have a profound and insidious impact on those who must endure it on a daily basis: see *R. v. Le*, 2019 SCC 34, [2019] 2 S.C.R. 692, at paras. 89-97; *R. v. Theriault*, 2021 ONCA 517, at para. 212, leave to appeal to S.C.C. requested, 39768 (July 19, 2021); *R. v. Parks* (1993), 15 O.R. (3d) 324 (C.A.), at p. 342, leave to appeal refused, [1993] S.C.C.A. No. 481; see also Ontario Human Rights Commission, *A Collective Impact: Interim report on the inquiry into racial profiling and racial discrimination of Black persons by the Toronto Police Service* (Toronto: Government of Ontario, 2018), at p. 19; Ontario Association of Children's Aid Societies, *One Vision One Voice: Changing the Child Welfare System for*

African Canadians (Toronto: Ontario Association of Children's Aid Societies, 2016), at p. 29. Anti-Black racism must be acknowledged, confronted, mitigated and, ultimately, erased. This appeal requires the court to consider how trial judges should take evidence of anti-Black racism into account on sentencing.

OVERVIEW

[2] On June 28, 2017, a jury found the appellant, Kevin Morris, guilty of possession of a loaded prohibited/restricted handgun, contrary to s. 95 of the *Criminal Code*, R.S.C. 1985, c. C-46, carrying a concealed weapon, contrary to s. 90 of the *Criminal Code*, and two other related-gun charges under ss. 91 and 92 of the *Criminal Code*. The trial judge stayed the charge arising under s. 91 and entered convictions on the other charges. All of the charges arose out of Mr. Morris's possession of a loaded .38 calibre Smith & Wesson handgun. Except for the purposes of fixing the sentence on each charge, there is no need in these reasons to examine the charges separately.

[3] In July 2018, the trial judge sentenced Mr. Morris to 1 day in jail to be followed by 18 months probation.[1] In imposing sentence, the trial judge concluded the respondent should receive a sentence of 15 months plus probation for 18 months. Following deductions for breaches of the *Canadian Charter of Rights and*

[1] The sentencing was adjourned several times, for various reasons, at the request of the defence. The hearing of the appeal was also delayed for a lengthy period for reasons beyond everyone's control.

Freedoms (3 months) and pretrial custody (243 days at a rate of 1.5:1), Mr. Morris was left with a net sentence of 1 day plus 18 months probation.

[4] The Crown seeks leave to appeal the sentence imposed. The Crown contends the sentence is manifestly unfit and the trial judge made several material errors in his reasons, particularly in his treatment of the evidence led by Mr. Morris concerning the impact of overt and institutional anti-Black racism. The Crown argues that the decisions of this court in *R. v. Borde* (2003), 63 O.R. (3d) 417 (C.A.), and *R. v. Hamilton* (2004), 72 O.R. (3d) 1 (C.A.), remain good law. These cases acknowledge that an offender's personal circumstances, including those tied to overt and institutional racism and its multi-faceted effects, can be relevant in determining an appropriate sentence. Their ultimate impact on the sentencing process will, as with other facts relevant to sentencing, depend on the specifics of the individual case.

[5] Crown counsel acknowledges the reality of overt and institutional racism and its negative impact, particularly within the criminal justice system. Crown counsel accepts that the courts, and in particular trial judges, must frankly acknowledge that reality and take it into account within the sentencing scheme set out by Parliament.

[6] The Crown maintains, however, that the trial judge allowed his consideration of the impact of overt and institutional racism on Mr. Morris to overwhelm all other

considerations relevant to fashioning a fit sentence. The result, says the Crown, is a sentence that fails to reflect the seriousness of the offences and falls well below the range of appropriate sentences established in decisions from this court and the Supreme Court of Canada.

[7] The Crown submits a fit sentence is three years. The Crown accepts, however, in light of the passage of time and subsequent events, that the incarceration of Mr. Morris at this time would be inappropriate.[2] The Crown asks the court to vary the sentence to three years and permanently stay the imposition of that sentence.

[8] Counsel for Mr. Morris submit the trial judge properly admitted, considered, and assessed the detailed and cogent evidence of longstanding overt and institutional systemic anti-Black racism and how that racism negatively affected Mr. Morris. Counsel do not equate the sentencing of Black offenders with the sentencing of Indigenous offenders. They do contend, however, that the use of social context evidence in fashioning the appropriate sentence, a requirement

---

[2] The court received fresh evidence indicating Mr. Morris had been charged with offences related to a home invasion robbery in April 2017 while on bail on these charges. He was held in custody. Mr. Morris pled guilty to those charges and in June 2019 received a sentence of 3 years, 5 months and 15 days after a credit of 32.5 months for pretrial custody. Mr. Morris was released on day parole in July 2020 and full parole in January 2021. He spent a total of approximately 3 years and 3 months in jail on these charges and the charges related to the home invasion.

It would appear from Mr. Morris's affidavit filed as fresh evidence, that although he continues to have significant problems, particularly with his health, he has taken responsibility for his criminal actions and made several positive steps to better himself and avoid future contact with the criminal justice system.

when sentencing Indigenous offenders, should also play a prominent role in determining the appropriate sentence for Black offenders.

[9] Counsel for Mr. Morris do not ask the court to overrule *Borde* or *Hamilton*. They submit the court can build on the *dicta* in those cases. Counsel argue the trial judge in this case had a wealth of information, combined with the insight of experts, allowing him to much more fully understand the pervasive impact of racism on Mr. Morris throughout his life and its relevance in determining the appropriate sentence for him. Counsel contend the methodology employed by the trial judge sits comfortably with the *dicta* in *Borde* and *Hamilton* and reflects the powerful picture painted by the evidence led by the defence on sentencing. Lastly, counsel for Mr. Morris remind the court that it must defer to the trial judge's factual findings, absent a determination those findings are unreasonable. Counsel submit the appeal should be dismissed.

[10] Several parties intervened. By and large, they support the approach taken by the trial judge on sentencing. There are some differences in the positions taken by the interveners. Most notably, Aboriginal Legal Services takes the position that the detailed "*Gladue*" jurisprudence developed in reference to the application to Indigenous offenders of the restraint principle in s. 718.2(e) of the *Criminal Code*, cannot be applied to non-Indigenous offenders: see *R. v. Gladue*, [1999] 1 S.C.R. 688.

[11] For the reasons set out below, we would allow the appeal and vary the sentence to one of two years, less a day, to be followed by probation on the terms imposed by the trial judge. We would permanently stay that sentence.

[12] This appeal raises important questions of general application in sentencing, as well as specific issues relating to this case. Our reasons are long. We will begin with a point-form summary of what we regard as the principal conclusions in respect of the broader issues. We will then outline the evidence at trial, the proceedings on a motion to stay the charges, and the evidence led on sentencing by counsel for Mr. Morris. Finally, we will turn to the arguments made on the appeal.

PRINCIPAL CONCLUSIONS

[13] For the reasons set out below, we come to the following conclusions:

- The trial judge's task in sentencing is to impose a just sentence tailored to the individual offender and the specific offence in accordance with the principles and objectives laid out in Part XXIII of the *Criminal Code*;

- Social context evidence relating to the offender's life experiences may be used where relevant to mitigate the offender's degree of responsibility for the offence and/or to assist in the blending of the principles and objectives of

sentencing to achieve a sentence which best serves the purposes of sentencing as described in s. 718;

- The gravity or seriousness of an offence is determined by its normative wrongfulness and the harm posed or caused by that conduct in the circumstances in which the conduct occurred. Accordingly, unlike when assessing the offender's degree of personal responsibility, an offender's experience with anti-Black racism does not impact on the seriousness or gravity of the offence;

- Courts may acquire relevant social context evidence through the proper application of judicial notice or as social context evidence describing the existence, causes and impact of anti-Black racism in Canadian society, and the specific effect of anti-Black racism on the offender;

- Consistent with the rules of admissibility, a generous gateway for the admission of objective and balanced social context evidence should be provided;

- The *Gladue* methodology does not apply to Black offenders. However, that jurisprudence can, in some respects, inform the

approach to be taken when assessing the impact of anti-Black racism on sentencing.

THE EVIDENCE AT TRIAL

[14] On December 13, 2014, shortly after midnight, a man contacted the police, claiming that about 20 minutes earlier he had been the victim of a home invasion robbery. He described the robbers as four Black men.

[15] Two plainclothes officers in separate unmarked vehicles responded to the police radio call reporting the robbery. They saw four Black men walking together in a parking lot in the immediate vicinity of the robbery. Two of the men went to one vehicle parked in the lot and Mr. Morris and the fourth man walked toward a second vehicle. One of the officers used his vehicle to block the path of the vehicle Mr. Morris was walking toward. This officer identified himself as a police officer and told the two men to stop. Mr. Morris fled, the other individual remained.

[16] The officer in the other unmarked vehicle moved his vehicle quickly across the parking lot in an effort to cut Mr. Morris off. According to the officer's evidence, he had stopped his vehicle when Mr. Morris ran into it and fell to the ground. Mr. Morris got up quickly and fled. He scaled a high fence and ran into the parking lot of an adjacent No Frills grocery store.

[17] By the time Mr. Morris was running across the No Frills parking lot, uniformed police officers were in pursuit. Officer Faduck quickly gained ground on

Mr. Morris. He identified himself as a police officer and told Mr. Morris to stop. Mr. Morris kept running.

[18] As Officer Faduck followed Mr. Morris, it appeared to him that Mr. Morris was trying to remove his jacket as he ran. Officer Faduck saw Mr. Morris duck into a stairwell. When he re-emerged from the stairwell, he was no longer wearing his jacket.

[19] Officer Faduck continued his pursuit. Shortly afterward, he caught up to, and tackled Mr. Morris, and placed him under arrest for robbery.

[20] After Mr. Morris was arrested, Officer Faduck went back to the stairwell. He found a jacket in a puddle on the ground. In the jacket he found a loaded .38 calibre Smith & Wesson handgun. Mr. Morris was taken into custody. As it turned out, there was no evidence to charge Mr. Morris or any of his three companions with the robbery.

[21] Mr. Morris testified at trial. He told a very different story. According to him, he and three friends were walking across a parking lot. Mr. Morris moved toward the edge of the parking lot, looking for a place to urinate. Suddenly, a vehicle approached him, moving very quickly across the parking lot toward him. The vehicle struck Mr. Morris and knocked him to the ground. Mr. Morris saw someone getting out of the car. He got up and ran, fearing that he was about to be attacked. Mr. Morris had been stabbed and seriously injured about 22 months earlier.

According to Mr. Morris, the person getting out of the vehicle that struck him did not identify himself as a police officer and Mr. Morris had no reason to think he was a police officer.

[22] Mr. Morris testified that he ran across the parking lot, scaled the fence and ran into the No Frills parking lot. Initially, he did not see anyone behind him.

[23] Mr. Morris indicated, that as he ran, he heard the person chasing him say something and he looked around. He realized it was a uniformed police officer chasing him, so he stopped. The officer tackled him and struck him several times.

[24] Mr. Morris indicated he was wearing an expensive new jacket that night. According to him, the jacket caught on the fence when he was climbing over it. He last saw it hanging on the fence. Mr. Morris denied ducking into the stairwell of the No Frills parking lot. He also denied throwing his jacket into a puddle in the stairwell. Mr. Morris insisted he never had possession of a gun. It was implicit in Mr. Morris's testimony that the police took the jacket from the fence, placed it in the stairwell and planted the gun in the pocket of the jacket.

[25] The jury's verdicts make it clear the jury was satisfied beyond a reasonable doubt Mr. Morris had possession of the loaded handgun and was lying when he testified he did not leave his jacket in the stairwell and did not have possession of the gun found in the jacket.

THE STAY APPLICATION

[26] At the outset of his trial, the respondent brought a motion for a stay of proceedings alleging several *Charter* violations. The trial judge dismissed the motion: *R. v. Morris*, 2017 ONSC 4298, 387 C.R.R. (2d) 154. The trial judge's ruling is not challenged on appeal. Some of the trial judge's findings are, however, relevant to the sentencing proceedings.

[27] The trial judge made detailed findings of fact, including the following:

- the two plainclothes officers, who initially approached Mr. Morris in their vehicles, were engaged in a lawful investigation of the robbery;

- the plainclothes officers identified themselves as police officers, but the trial judge was not satisfied Mr. Morris necessarily heard and understood what they said before he ran;

- Officer Faduck identified himself as a police officer when he was chasing Mr. Morris. Officer Faduck was in uniform. Mr. Morris heard and understood Officer Faduck, but kept running and did not stop until Officer Faduck tackled and arrested him; and

- Mr. Morris removed his jacket as he was running and threw it in the stairwell.

[28] The trial judge held that the police had grounds to detain Mr. Morris for investigative purposes. However, Mr. Morris was not detained prior to his arrest by Officer Faduck. Officer Faduck had reasonable and probable grounds to arrest Mr. Morris.

[29] The trial judge found that the vehicle driven by one of the plainclothes officers struck Mr. Morris and ran over his left foot, causing an injury that required medical attention. The trial judge rejected the officer's evidence that Mr. Morris ran into the vehicle after the vehicle had stopped. The trial judge concluded that, while the officer was engaged in a lawful attempt to stop a fleeing suspect and did not intend to hit Mr. Morris with his vehicle, he was driving quickly, aggressively and, in all of the circumstances, "very careless[ly]". The trial judge held that when the officer struck Mr. Morris with his vehicle, he violated Mr. Morris's rights under s. 7 of the *Charter*.

[30] The trial judge rejected Mr. Morris's claim the police used excessive force in the course of his arrest and confinement. The trial judge found Mr. Morris was not credible on these issues.

[31] The trial judge also accepted, again contrary to Mr. Morris's evidence, that Mr. Morris was advised of his right to counsel and given access to counsel in a timely fashion. The trial judge did, however, find a violation of s. 10(b) of the *Charter* based on certain questions which the officers put to Mr. Morris before he

had a chance to exercise his right to counsel. The trial judge described the questions as “relatively innocuous” and the breach as “far from … egregious”. He also noted the Crown did not seek to rely on any of the statements made by Mr. Morris.

[32] In dismissing the motion for a stay of proceedings, the trial judge described the *Charter* breaches as “relatively minor”. He further indicated that if Mr. Morris was convicted, those breaches could potentially be taken into account on sentencing. The trial judge did just that when he imposed sentence, reducing what would otherwise have been a sentence of 15 months to 12 months.

THE EVIDENCE ON SENTENCING

[33] Mr. Morris was almost 23 years old when he committed these offences. He was 26 at the time of sentencing.

[34] Mr. Morris did not have a criminal record at the time of sentencing. According to information provided by Mr. Morris, he had been charged with offences in the past, and on one occasion, spent “a couple of weeks” in a correctional facility for young offenders. It does not appear that Mr. Morris spent any appreciable time in custody on adult charges until he was arrested on the charges related to the home invasion in April 2017.

[35] Mr. Morris had been attacked and stabbed by an acquaintance in February 2013. It is not clear what motivated the stabbing. Mr. Morris suffered serious

internal injuries requiring surgery. Those injuries have resulted in ongoing medical problems which have interfered with Mr. Morris's ability to obtain employment, and caused him problems while incarcerated after April 2017. The stabbing has also had a negative effect on Mr. Morris's mental health.

[36] Mr. Morris's family doctor sent him for a psychiatric consultation in January 2014, about 10 months after Mr. Morris was stabbed and about 11 months before he committed these offences. The consultation report included the following:

> Mr. Morris is a 22-year-old gentleman with a history of a traumatic event which included severe stab wounds approximately one year ago. The exact circumstances around this event are unknown as Mr. Morris mentioned that it was a robbery at the time. He does suffer from symptoms of post-traumatic stress disorder after this event, including flashbacks, nightmares, re-experiencing the event, and always feeling very hypervigilant and on edge. He feels extremely socially isolated as a result and essentially is nonfunctional. He is not working, unable to go to school, and stays home all day by himself.

[37] The psychiatrist recommended a medication regime and follow-up psychotherapy. Mr. Morris did not take the medication and did not return to the psychiatrist for psychotherapy.

[38] In a statement to the court at sentencing, Mr. Morris apologized to his mother and promised her he would change and make something out of his life.

The Social Context Evidence

[39] Counsel for Mr. Morris tendered two reports at sentencing. The first, entitled "Expert Report on Crime, Criminal Justice and the Experience of Black Canadians in Toronto, Ontario", describes and analyzes the research that has been done on the existence, causes, and impact of anti-Black racism in Canadian society, especially in the Toronto area. The report provides an historical and social account of the Black experience in Canada. It draws a connection between the long history in Canada of overtly racist attitudes and social practices and present day institutional and systemic discrimination against Black people. The report explains how systemic discrimination in many social institutions marginalizes Black people in communities marked by poverty, diminished economic and employment opportunities, and a strong and aggressive police presence. These factors combine to leave many in the Black community with the reasonable perception that Canadian society, and in particular the criminal justice system, is racist and unfair.

[40] The authors conclude:

> It is our opinion that the social circumstances of Black Canadians in general, and of Black male Torontonians in particular, should be viewed as criminogenic. Elevated levels of offending in the types of crimes that typically come to the attention of the police (street crimes as opposed to white-collar and corporate crimes), combined with discrimination in the justice system itself have resulted in the gross over-representation of Black Canadians in our provincial and federal correctional systems. Whereas no one individual should be

> completely absolved of their own responsibility when it comes to offending behaviour, the social realities that have produced or contributed to such behaviour can be acknowledged, and serve to guide judicial decision making.

[41] At the sentencing proceedings, the Crown argued that this report was inadmissible as the trial judge could properly take judicial notice of the existence of overt and systemic anti-Black racism in Canadian society and the criminal justice system in particular. The trial judge rejected the Crown's arguments and admitted the report. On appeal, the Crown takes no issue with the admissibility of this report. We agree with the Crown's concession.

[42] We accept, as did the trial judge, that the trial judge could have taken judicial notice of many of the historical and social facts referred to in the report: see e.g., *Le*, at paras. 82-88; *Theriault*, at paras. 212-18; *R. v. Anderson*, 2021 NSCA 62 ("*Anderson (NSCA)*"), at para. 111; and *R. v. Jackson*, 2018 ONSC 2527, 46 C.R. (7th) 167, at paras. 81-92. Even though much of the report could have been the subject of judicial notice, the admission of the report as a whole had value for sentencing purposes. The report gave the trial judge the benefit of a scholarly, comprehensive, and compelling description of the widespread and pernicious effect of anti-Black racism. As the trial judge observed, it helped him understand how Mr. Morris ended up where he did.

[43] The report bears reading and re-reading by those called upon to prosecute, defend, and sentence Black offenders, particularly young Black offenders. The

report is easily accessible as the trial judge helpfully attached a copy as an appendix to his reasons for sentence.

[44] The second report, a “Social History of Kevin Morris” (the “Sibblis Report”), was prepared by Camisha Sibblis, a clinical social worker and PhD candidate with a research focus on education and social work. Ms. Sibblis, who also co-authored the first report, has had extensive clinical experience, much of it involving assessments of young persons, often Black youth, for various social agencies. In addition, Ms. Sibblis conducts anti-Black racism workshops aimed at educating participants on the manner in which systemic anti-Black racism impacts on Black youth in various contexts, including in the educational system.

[45] Ms. Sibblis was asked to review Mr. Morris’s social history and trajectory with a view to providing an analysis of the impact of systemic racism on his experiences in and out of the justice system. As we understand the Sibblis Report, it is intended to bring the more general social context information provided in the first report home to the specific circumstances of Mr. Morris’s life experiences. In effect, the Sibblis Report sought to demonstrate how the negative consequences of anti-Black racism, identified and described in the first report, were very much a reality for Mr. Morris.

[46] The Sibblis Report provides a biography of Mr. Morris and his mother, Esta Reid. Ms. Reid arrived in Canada from Jamaica in 1978. Mr. Morris was born in

January 1992. Although Mr. Morris's father did not live with Mr. Morris and his mother, Mr. Morris saw him regularly and had a close relationship with him. Unfortunately, his father died when Mr. Morris was seven years old. Ms. Reid had to assume all the parental obligations, while at the same time becoming the sole provider for the family. Ms. Reid worked a variety of jobs, many of which involved long hours.

[47] There is a very strong bond between Mr. Morris and his mother. He loves her very much and she has done everything she can to provide for Mr. Morris.

[48] The Sibblis Report traces Mr. Morris's experiences with the educational system and refers to his interactions with the Children's Aid Society. The report describes the injuries suffered by Mr. Morris when he was stabbed in 2013 and the ongoing medical problems he has suffered. The report sets out Mr. Morris's experiences within the community in which he grew up and how he has come to perceive that community as a threatening and unsafe place. The report also summarizes Mr. Morris's perceptions of how he has been treated by the police and correctional authorities.

[49] In her report, Ms. Sibblis writes:

> Under the weight of anti-Black racism, Mr. Morris had little option than to live his life as best he could having been influenced by the streets. His overall social circumstances, while not excusing his behaviour, have undeniably contributed to Mr. Morris being involved with the justice system today.

> Mr. Morris has also lived, and continues to live, in constant fear. He fears the police, other community members, friends and foes alike, rivals, unknown dangers, life, death. He fears fellow inmates. He fears for his mother's safety. Mr. Morris fears both freedom and incarceration. Mr. Morris's imagination for what he could become was significantly limited by fear, anxiety, and actual threats; it is not positively fostered as his suffering was not sufficiently tended to.
>
> At this time, it would be appropriate to provide him with the support and treatment he ought to have received long ago. Early intervention might well have changed Mr. Morris's trajectory and it appears as though anti-Black racism was a contributing factor in this omission. Since Mr. Morris shows empathy, and has many redeeming qualities, it is a reasonable expectation that he will respond well to mental health treatment.

[50] The persons contacted by Ms. Sibblis described Mr. Morris as a person with many positive personal characteristics, notably a strong sense of empathy. However, in Ms. Sibblis's opinion, those characteristics have been largely submerged in a lifetime of negative experiences, many of which are tied, in part at least, to institutional or overt racism. According to Ms. Sibblis, the combined impact of those events have left Mr. Morris physically and emotionally damaged, unable to obtain meaningful employment, in constant fear for his physical safety from both people in his community and the police, and without hope for the future.

[51] In preparing her report, Ms. Sibblis interviewed Mr. Morris, his mother, his pastor, and a family friend. She received a supporting letter from a social worker and childhood friend. Ms. Sibblis obtained extensive documentation from various schools and educational programs Mr. Morris had attended, as well as some

medical records. We do not understand the Crown to question the admissibility of the documentation gathered by Ms. Sibblis, or to suggest that the trial judge could not rely on the factual content of that documentation if the trial judge concluded it was reliable.

[52] A great deal of the information relied on by Ms. Sibblis, particularly about Mr. Morris's interactions with the police and correctional authorities, came exclusively from Mr. Morris. In parts of her report, Ms. Sibblis refers to these as Mr. Morris's perceptions, but in other parts of her report she treats them as established facts.

[53] At trial, the Crown took issue with the Sibblis Report, arguing Ms. Sibblis was not qualified to give the opinions contained in the report and that much of the information in the report was unreliable. The Crown asked the trial judge to conduct a *voir dire* to determine whether Ms. Sibblis was qualified to give the opinions contained in her report.

[54] The trial judge declined to hold a *voir dire*. He admitted the Sibblis Report, noting it was similar to the report he received in *Jackson* and to the Impact of Race and Cultural Assessments ("IRCAs") received in criminal courts in Nova Scotia: see *Anderson (NSCA)*, at paras. 104-10. The trial judge was anxious to have whatever information he could about Mr. Morris. He made it clear he was not bound by any opinion Ms. Sibblis might give, and would make his own independent

evaluation of the relevance and reliability of any information in the report. The trial judge also permitted the Crown to cross-examine Ms. Sibblis, both to ensure procedural fairness and to enhance the trial judge's ability to accurately assess the reliability of the contents of the report. Her evidence added little to her report.

[55] On appeal, the Crown accepts that the Sibblis Report was properly admissible to the extent that it provided biographical information and documents relevant to that information. We also do not understand the Crown to suggest that the report was not admissible insofar as it spoke to Mr. Morris's background, character, and circumstances. The Crown argues that Ms. Sibblis offered various opinions she was not qualified to give. We will address that argument below.

THE ARGUMENTS

A. THE RELEVANCE OF EVIDENCE OF ANTI-BLACK RACISM ON SENTENCING

[56] A sentencing judge has a specific and focused task. A sentencing judge must impose a sentence tailored to the individual offender and the specific offence. While evidence relating to the impact of anti-Black racism on an offender will sometimes be an important consideration on sentencing, the trial judge's task is not primarily aimed at holding the criminal justice system accountable for systemic failures. Rather, the sentencing judge must determine a fit sentence governed by the fundamental tenets of criminal responsibility, including free will, and the

purposes, principles and objectives of sentencing laid down in Part XXIII of the *Criminal Code*: *R. v. Nur*, 2015 SCC 15, [2015] 1 S.C.R. 773 ("*Nur (SCC)*"), at para. 43, aff'g 2013 ONCA 677, 117 O.R. (3d) 401 ("*Nur (ONCA)*"); *R. v. Nasogaluak*, 2010 SCC 6, [2010] 1 S.C.R. 206, at paras. 39-45; *Hamilton*, at paras. 2, 87; see also Michael C. Plaxton, "Nagging Doubts About the Use of Race (and Racism) in Sentencing" (2003) 8 C.R. (6th) 299, at pp. 306-7.

(i) The Statutory Framework

[57] The comprehensive statutory scheme governing sentencing first appeared in the *Criminal Code* in 1996: *An Act to amend the Criminal Code (sentencing) and other Acts in consequence thereof*, S.C. 1995, c. 22. Section 718 identifies the fundamental purpose of sentencing as being:

> to protect society and to contribute, along with crime prevention initiatives, to respect for the law and the maintenance of a just, peaceful and safe society by imposing just sanctions….

[58] Section 718 recognizes that "just sanctions" will have one or more of the objectives identified in ss. 718(a)-(f). Those objectives will not necessarily point toward the same sentencing disposition. The individualization of the sentencing process requires sentencing judges to prioritize and blend the different objectives of sentencing so as to properly reflect the seriousness of the offence and the responsibility of the offender. The objectives identified in s. 718 are:

> (a) to denounce unlawful conduct and the harm done to victims or to the community that is caused by unlawful conduct;

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

[59] The search for a just sanction which reflects a proper blending of the objectives of sentencing is guided by the loadstar of proportionality. This fundamental principle of sentencing is laid down in s. 718.1:

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

[60] Additional guiding principles are found in ss. 718.2(b)-(e):

> (b) a sentence should be similar to sentences imposed on similar offenders for similar offences committed in similar circumstances [the parity principle];
>
> (c) where consecutive sentences are imposed, the combined sentence should not be unduly long or harsh [the totality principle];
>
> (d) an offender should not be deprived of liberty, if less restrictive sanctions may be appropriate in the circumstances [the restraint principle]; and
>
> (e) all available sanctions, other than imprisonment, that are reasonable in the circumstances and consistent with the harm done to victims or to the community should be considered for all offenders, with particular attention to the circumstances of Aboriginal offenders [the restraint principle as applied to incarceration].

(ii) The Proportionality Principle

[61] Proportionality is the fundamental and overarching principle of sentencing. The other sentencing principles set out in s. 718.2 must be taken into account and blended in a manner which produces a sentence that is proportionate to the gravity of the offence and the degree of responsibility of the offender. A sentence which does not comply with the proportionality principle is an unfit sentence: *R. v. Ipeelee*, 2012 SCC 13, [2012] 1 S.C.R. 433, at para. 37.

[62] Proportionality measured by reference to both the offence and the offender has been an integral part of sentencing in Canada since long before the enactment of s. 718.1: see *R. v. M. (C.A.)*, [1996] 1 S.C.R. 500, at para. 40. Under the statutory scheme, proportionality is "central": *R. v. Friesen*, 2020 SCC 9, 391 C.C.C. (3d) 309, at para. 30; see also *Hamilton*, at para. 89.

[63] Jurisprudence from the Supreme Court of Canada postdating the enactment of s. 718.1 repeatedly confirms the paramount role of proportionality in sentencing. As explained in *Ipeelee*, at para. 37:

> The fundamental principle of sentencing (i.e., proportionality) is intimately tied to the fundamental purpose of sentencing — the maintenance of a just, peaceful and safe society through the imposition of just sanctions. Whatever weight a judge may wish to accord to the various objectives and other principles listed in the *Code*, the resulting sentence must respect the fundamental principle of proportionality. Proportionality is the *sine qua non* of a just sanction. First, the principle ensures that a sentence reflects the gravity of the

> offence. This is closely tied to the objective of denunciation. It promotes justice for victims and ensures public confidence in the justice system….
>
> Second, the principle of proportionality ensures that a sentence does not exceed what is appropriate, given the moral blameworthiness of the offender. In this sense, the principle serves a limiting or restraining function and ensures justice for the offender. In the Canadian criminal justice system, a just sanction is one that reflects both perspectives on proportionality and does not elevate one at the expense of the other.

[64] In *Nur (SCC)*, at para. 43, McLachlin C.J. drew a straight line from proportionality to the imposition of a "just" sentence under s. 718:

> It is no surprise, in view of the constraints on sentencing, that imposing a proportionate sentence is a highly individualized exercise, tailored to the gravity of the offence, the blameworthiness of the offender, and the harm caused by the crime…. Only if this is so can the public be satisfied that the offender 'deserved' the punishment he received and feel a confidence in the fairness and rationality of the system…. [Citations and quotation marks omitted.]

[65] In *Nasogaluak*, at para. 42, LeBel J. described the duality of proportionality. On the one hand, it looks to the offender's culpability and responsibility. On the other, proportionality is measured by reference to the seriousness of the crime. LeBel J. said:

> It [proportionality] requires that a sentence not *exceed* what is just and appropriate, given the moral blameworthiness of the offender and the gravity of the offence. In this sense, the principle serves a limiting or restraining function. However, the rights-based, protective angle of proportionality is counter-balanced by

> its alignment with the "just desserts" philosophy of sentencing, which seeks to ensure that offenders are held responsible for their actions and that the sentence properly reflects and condemns their role in the offence and the harm they caused…. [Citations omitted; emphasis in original.]

[66] In *R. v. Lacasse*, 2015 SCC 64, [2015] 3 S.C.R. 1089, at para. 12, the majority said:

> [P]roportionality is the cardinal principle that must guide appellate courts in considering the fitness of a sentence imposed on an offender. The more serious the crime and its consequences, or the greater the offender's degree of responsibility, the heavier the sentence will be. In other words, the severity of a sentence depends not only on the seriousness of the crime's consequences, but also on the moral blameworthiness of the offender. Determining a proportionate sentence is a delicate task.

(a) Proportionality: The Gravity of the Offence

[67] An assessment of the gravity or seriousness of the offence is one part of the proportionality analysis. The seriousness of the offence is reflected in the essential elements of the offence; the more blameworthy the required *mens rea*, and the more harmful the prohibited conduct, the more serious the crime. The gravity of the offence is also reflected in the applicable penalty provision. In addition, the specific circumstances surrounding the commission of the offence can make the crime more or less serious. Parliament has identified some of the features which aggravate the seriousness of an offence in s. 718.2(a): see *Hamilton*, at para. 90; *Ipeelee*, at paras. 53-55.

[68] As described in *Friesen*, at paras. 75-76, the gravity of an offence takes into account the normative wrongfulness of the conduct and the harm posed or caused by the conduct. Gun crimes involving the possession of loaded, concealed firearms in public places pose a real and immediate danger to the public, especially anyone who interacts with the gun holder. When the person with the gun is confronted by the police, who are engaged in the lawful execution of their duties, the risk increases dramatically. It increases yet again when the gun holder flees, and still again when the gun holder discards the weapon in a public place. A person who carries a concealed, loaded handgun in public undermines the community's sense of safety and security. Carrying a concealed, loaded handgun in a public place in Canada is antithetical to the Canadian concept of a free and ordered society: see *Nur (ONCA)*, at paras. 82, 206; *R. v. Felawka*, [1993] 4 S.C.R. 199, at pp. 214-15.

[69] The seriousness or gravity of an offence affects the ordering and weighing of the various objectives of sentencing identified in s. 718. Generally speaking, the more serious the offence, the stronger the need to denounce the unlawful conduct and deter the offender and others from further offending. Parliament has drawn the connection between the seriousness of the offence, and denunciation and deterrence by identifying various categories of serious crimes (e.g., crimes against children, the police, and vulnerable persons) for which primary consideration must be given to the objectives of denunciation and deterrence: *Criminal Code*, ss. 718.01, 718.02, 718.03, 718.04.

[70] When the gravity of the offence demands an emphasis on the objectives of denunciation and deterrence, the proportionality principle will most often require a disposition that includes imprisonment. Wagner J. (as he then was) observed in *Lacasse*, at para. 6:

> [A]s in all cases in which general or specific deterrence and denunciation must be emphasized, the courts have very few options other than imprisonment for meeting these objectives, which are essential to the maintenance of a just, peaceful and law-abiding society.

[71] Apart from the specific provisions in the *Criminal Code*, Canadian courts have long recognized that the gravity of certain kinds of offences requires sentences emphasizing denunciation and general deterrence. Gun crimes involving the unlawful possession of loaded handguns in public places fall squarely within that category. McLachlin C.J., in *Nur (SCC)*, at para. 82, observed that a three-year sentence may be appropriate "for the vast majority of offences" under s. 95: see also *Nur (ONCA)*, at para. 206; *R. v. Mansingh*, 2017 ONCA 68, at para. 24; *R. v. Marshall*, 2015 ONCA 692, 340 O.A.C. 201, at paras. 47-49; and *R. v. Danvers* (2005), 199 C.C.C. (3d) 490 (Ont. C.A.), at para. 77.

[72] The trial judge acknowledged that deterrence and denunciation were the most important objectives when sentencing Mr. Morris. He accepted that those objectives required a significant jail term.

[73] The trial judge went on, however, to hold that systemic racism and its effects:

> must surely have some impact upon the application of general deterrence and denunciation. It can impact upon on [*sic*] how we characterize the seriousness of the offence.

[74] The trial judge indicated that if systemic racism effectively limited the choices available to an offender, general deterrence and denunciation should have a less significant role in sentencing.

[75] With respect, we do not agree that the gravity or seriousness of Mr. Morris's offences is diminished by evidence which sheds light on why he chose to commit those crimes. We do agree with the trial judge that an offender's life experiences can certainly influence the choices made by the offender, and can explain, to some degree at least, why an offender made a choice to commit a particular crime in the specified circumstances. Those life experiences can include societal disadvantages flowing from systemic anti-Black racism in society and the criminal justice system.

[76] Evidence that an offender's choices were limited or influenced by his disadvantaged circumstances, however, speaks to the offender's moral responsibility for his acts and not to the seriousness of the crimes. Possession of a loaded, concealed handgun in public is made no less serious, dangerous, and harmful to the community by evidence that the offender's possession of the loaded handgun can be explained by factors, including systemic anti-Black racism, which will mitigate, to some extent, the offender's responsibility: see *Hamilton*, at paras.

134-39; *R. v. Hazell*, 2020 ONCJ 358, at paras. 30-32; see also Dale E. Ives, “Inequality, Crime and Sentencing: *Borde*, *Hamilton* and the Relevance of Social Disadvantage in Canadian Sentencing Law” (2004) 30 Queen's L.J. 114, at p. 149.

[77] It is important to preserve the distinction between factors relevant to the seriousness or gravity of the crime on the one hand, and factors relevant to the offender’s degree of responsibility on the other. Unless the distinction is maintained, the proportionality principle may be misapplied. A sentence, like the sentence imposed here, which wrongly discounts the seriousness of the offence to reflect factors which are actually relevant to the offender’s degree of responsibility, will almost inevitably produce a sentence that does not adequately reflect the seriousness of the offence and, therefore, fails to achieve the requisite proportionality.

[78] Nothing in the social context evidence adduced on Mr. Morris’s behalf detracted from the seriousness of his crimes, or the need to denounce that criminal conduct and deter others from committing similar crimes. Mr. Morris’s own experiences in his community, as related to Ms. Sibblis, strongly make the case for the very real and deep harm caused to everyone in the community by persons who, like Mr. Morris, choose to engage in dangerous criminal conduct that inevitably compromises the security of the entire community.

[79] The social context evidence can, however, provide a basis upon which a trial judge concludes that the fundamental purpose of sentencing, as outlined in s. 718, is better served by a sentence which, while recognizing the seriousness of the offence, gives less weight to the specific deterrence of the offender and greater weight to the rehabilitation of the offender through a sentence that addresses the societal disadvantages caused to the offender by factors such as systemic racism.

[80] Blending the various objectives of sentencing is the essence of the sentencing process. There is seldom one and only one fit sentence. As long as the sentence imposed complies with the proportionality requirement in s. 718.1, trial judges are given considerable discretion to decide how best to blend the various legitimate objectives of sentencing. If trial judges operate within that band of discretion, the different weight assigned to different objectives may produce different but nonetheless equally fit sentences.

[81] In the present case, the social context evidence provided a basis upon which the trial judge could give added weight to the objective of rehabilitation and less weight to the objective of specific deterrence. By doing so, the trial judge would not diminish the seriousness of the crime, but would recognize that the ultimate sentence imposed must be tailored to the specific offender and the potential rehabilitation of that offender. As long as the sentence ultimately imposed remains proportionate to the offence and the offender, the actual sentence imposed would be a fit sentence.

[82] In a somewhat related submission, some of the interveners argue that because society as a whole is complicit in the anti-Black racism the trial judge found played a role in Mr. Morris's commission of the offences, the court loses much, or at least some, of its moral authority to denounce the offender's conduct through the sentence imposed. If this submission were to be accepted, the objectives of denunciation and deterrence, always viewed as paramount objectives when sentencing for serious gun crimes, would be tempered in cases involving Black offenders by a countervailing objective requiring that the sentence imposed acknowledge the offender's status as a victim of society's racism.

[83] On the interveners' submission, the allocation of responsibility for the offender's crime, as between society at large and the offender, would become an objective of sentencing to be calibrated along with denunciation, deterrence, and rehabilitation. There is no such objective identified in s. 718 of the *Criminal Code*. Nor are we aware of any appellate jurisprudence recognizing the allocation of societal fault as an objective of sentencing.[3] Allocating moral responsibility for crimes as between society at large and the individual offender should play no role in fixing the appropriate sentence in gun-related crimes: *Hamilton*, at paras. 2, 148.

---

[3] In *Anderson (NSCA)*, at para. 159, the court indicates "the use of denunciation and deterrence to protect societal values should be informed by a recognition of society's role in undermining the offender's prospects as a pro-social and law-abiding citizen." If this passage means that deterrence and denunciation take on less significance in sentencing for serious crimes if society is somehow complicit in the circumstances relevant to the commission of the offence, we must, with respect and for the reasons set out, disagree with that conclusion.

[84] If society's complicity in institutional racism means denunciation and general deterrence should play a lesser role in sentencing for serious crimes, it will follow that Black offenders who commit those serious crimes, such as gun crimes, will receive shorter jail sentences than other similarly situated non-Black offenders.

[85] As pointed out in the "Expert Report on Crime, Criminal Justice and the Experience of Black Canadians in Toronto, Ontario", Black communities experience a disproportionate share of serious violent crime in the Toronto area. Black youth in particular report higher levels of both violent victimization and violent offending than youth from other racial groups. Law-abiding members of those communities are the victims of overt and systemic anti-Black racism. They are also the victims, both direct and indirect, of the harm caused by gun-related crimes in their communities. Are these law-abiding members of the community to be told that the message of denunciation and deterrence, which applies to gun crimes committed in other communities, is to be muted in gun crimes committed against them in their community so the court can acknowledge the reality of anti-Black racism, a reality that those members of the community know only too well? We strongly doubt that more lenient sentences for the perpetrators of gun crimes will be seen by the law-abiding members of the community as a positive step towards social equality. Any failure to unequivocally and firmly denounce serious gun crimes, like those committed by Mr. Morris, through the punishment imposed,

implies tolerance of those crimes when committed by certain offenders in certain communities.

[86] Although we reject the claim that societal complicity in anti-Black racism diminishes the need to denounce and deter serious criminal conduct, we accept wholeheartedly that sentencing judges must acknowledge societal complicity in systemic racism and be alert to the possibility that the sentencing process itself may foster that complicity. A frank acknowledgement of the existence of, and harm caused by, systemic anti-Black racism, combined with a careful consideration of the kind of evidence adduced in this case, will go some distance toward disassociating the sentencing process from society's complicity in anti-Black racism.

(b) Proportionality: The Offender's Degree of Responsibility

[87] While we do not agree that evidence of the impact of anti-Black racism on an offender can diminish the seriousness of the offence, or that systemic inequalities diminish the court's authority, or indeed, its obligation to denounce serious criminal conduct, we do accept that evidence of anti-Black racism and its impact on the specific offender can be an important consideration when determining the appropriate sentence.

[88] Sentencing judges have always taken into account an offender's background and life experiences when gauging the offender's moral responsibility

for the crime and when choosing from among available sanctions. Over 40 years ago, the Appeal Division of the Nova Scotia Supreme Court in *R. v. Bartkow* (1978), 24 N.S.R. (2d) 518 (App. Div.), at p. 522, put it this way when describing the purposes of a presentence report:

> Their function is to supply a picture of the accused as a person in society - his background, family, education, employment record, his physical and mental health, his associates and social activities, and his potentialities and motivations.

[89] In *Gladue*, at para. 69, and *Ipeelee*, at paras. 75-77, the court accepted that "background and systemic factors" should be taken into account when sentencing all offenders. These factors take on added significance in respect of Indigenous offenders, given their unique history and circumstances: see also *R. v. Anderson*, 2014 SCC 41, [2014] 2 S.C.R. 167 ("*Anderson (SCC)*"), at paras. 21, 23-24; *R. v. F.H.L.*, 2018 ONCA 83, 360 C.C.C. (3d) 189, at paras. 31-32; *R. v. Brown*, 2020 ONCA 657, 152 O.R. (3d) 650, at paras. 50-51.

[90] In *Gladue* and *Ipeelee*, the systemic and background factors relevant to sentencing included the systemic discrimination, both historical and ongoing, suffered by Indigenous persons, especially in the criminal justice system. The experience of Black people in Canada is also marked by discrimination. Black people share with Indigenous peoples many of the same disadvantages flowing from that discrimination. The reports filed on Mr. Morris's sentencing speak

eloquently to the historical roots of that discrimination and its pernicious ongoing effect on many aspects of the day-to-day lives of Black people in Canada.

[91] There can be no doubt that evidence on sentencing, describing the existence and effect of anti-Black racism in the offender's community and the impact of that racism on the offender's circumstances and life choices is part of the offender's background and circumstances. The evidence is not only admissible, it is, in many cases, essential to the obtaining of an accurate picture of the offender as a person and a part of society.

[92] This court has recognized that systemic and background factors, including those attributable to anti-Black racism, may be relevant when sentencing Black offenders. In *Borde*, at para. 32, Rosenberg J.A. for the court said:

> [T]he principles that are generally applicable to all offenders, including African Canadians, are sufficiently broad and flexible to enable a sentencing court in appropriate cases to consider both the systemic and background factors that may have played a role in the commission of the offence…. [Emphasis added.]

[93] In *Hamilton*, this court followed *Borde*, holding at para. 135:

> Reference to factors that may "have played a role in the commission of the offence" encompasses a broad range of potential considerations. Those factors include any explanation for the offender's commission of the crime. If racial and gender bias suffered by the offender helps explain why the offender committed the crime, then those factors can be said to have "played a role in the commission of the offence". [Emphasis added; quoting *Borde*, at para. 32.]

[94] *Hamilton* goes on to explain at para. 141 how disadvantaged circumstances, including those connected to racism, can mitigate to some degree the personal responsibility of the offender. The court quoted with approval the observation of Durno J. in *R. v. G.B.*, [2003] O.J. No. 3218 (S.C.), at para. 45:

> The offenders [*sic*] background is always a relevant factor on sentencing. A sentence must be appropriate for both the offence and the offender. A person with a disadvantaged background, who had been subjected to systemic prejudices or racism, or was exposed to physical, sexual or emotional abuse, may receive a lower sentence than someone from a stable and peaceful background, where the offence is in some way linked to the background or systemic factors. The relevant factors in one person's background will be case specific. A single factor will rarely be determinative.

[95] *Borde* was recently followed by this court in *R. v. Rage*, 2018 ONCA 211, at paras. 13-14, and has been applied in other jurisdictions: see e.g., *R. v. Gabriel*, 2017 NSSC 90, 37 C.R. (7th) 206, at para. 50 (citing *R. v. "X"*, 2014 NSPC 95, 353 N.S.R. (2d) 130).

[96] Some of the interveners submit that *Hamilton*, at para. 137, wrongly requires a direct causal link between the offence and the negative effects of anti-Black racism on the offender before anti-Black racism can be seen as mitigating personal responsibility. We agree that the concept of causation, as it is used in the substantive criminal law, plays no role when considering the impact of an offender's background or circumstances on sentencing. As one counsel put it, a

young offender does not have to show a causal connection between age and the offence before age will be treated as a mitigating factor.

[97] There must, however, be some connection between the overt and systemic racism identified in the community and the circumstances or events that are said to explain or mitigate the criminal conduct in issue. Racism may have impacted on the offender in a way that bears on the offender's moral culpability for the crime, or it may be relevant in some other way to a determination of the appropriate sentence. Absent some connection, mitigation of sentence based simply on the existence of overt or institutional racism in the community becomes a discount based on the offender's colour. Everyone agrees there can be no such discount: see e.g., *F.H.L.*, at paras. 45-49; *R. v. Elvira*, 2018 ONSC 7008, at paras. 21-25; *R. v. Ferguson*, 2018 BCSC 1523, 420 C.R.R. (2d) 22, at paras. 126-29; and *R. v. Biya*, 2018 ONSC 6887, at para. 36, rev'd on other grounds, 2021 ONCA 171.

[98] *Borde* and *Hamilton* both described the connection between anti-Black racism and factors relevant to the determination of a fit sentence in broad terms. Similar language appears in *Gladue* and *Ipeelee* in respect of the relevance of "background and systemic factors". The evidence may be relevant to sentencing in more than one way.

[99] The social context evidence may offer an explanation for the commission of the offence which mitigates the offender's personal responsibility and culpability

for the offence. Mr. Morris's strong and ever-present fear of many people around him in his community, including the police, was offered as an explanation for his possession of a loaded gun. The information in both reports supported the inference that Mr. Morris's fears were real, justified and existed, in part, as a result of systemic racism that played a role in shaping his perception of his community, his relationship with others in the community, and his relationship with the police.

[100] It was open to the trial judge to find that the evidence of anti-Black racism was connected to, or played a role in, Mr. Morris's strong fear for his personal safety in the community. That state of mind offered a mitigating explanation for Mr. Morris's possession of the loaded, concealed handgun. Looked at in this way, evidence of anti-Black racism, which played a role in generating the fear that helps explain why Mr. Morris had a loaded gun, is akin, for the purposes of sentencing, to evidence that Mr. Morris had been terrorized by somebody in the community and had armed himself because he genuinely feared that person. In either scenario, the offender offers an explanation for possessing a loaded gun, which, to some extent, ameliorates the offender's moral responsibility for that choice: see *R. v. Boussoulas*, 2015 ONSC 1536, at paras. 6-7, 20, aff'd 2018 ONCA 222, 407 C.R.R. (2d) 44.

[101] It must be stressed, however, that Mr. Morris's genuine fear, regardless of its cause, is only a limited mitigating factor. He still chose to arm himself in public with a concealed, loaded, deadly weapon. As indicated above, Mr. Morris's

reasons for choosing to arm himself do not detract from the seriousness of the crime he committed. Even if his conduct is made somewhat less blameworthy by the explanation offered for possessing the loaded handgun, Mr. Morris's conduct still put members of the community, and police officers engaged in the lawful execution of their duties, at real risk.

(c) Proportionality: Blending the Objectives of Sentencing

[102] Social context evidence can also be relevant on sentencing even if it does not tend to mitigate the offender's moral culpability. As indicated earlier, social context evidence can provide valuable insight, both with respect to the need to deter the offender from future conduct, and the rehabilitative prospects of the offender. Evidence about an offender's background and circumstances allows the sentencing judge to more accurately assess how sometimes competing objectives of sentencing, such as rehabilitation and denunciation, can best be blended to produce a sentence that accords with the proportionality principle and serves the fundamental purpose of sentencing articulated in s. 718.

[103] For example, evidence that an offender has had frequent and confrontational contact with the police may mean one thing in one community, but quite another in a community in which the influences of anti-Black racism have shaped a confrontational and adversarial relationship between the police and members of the community, especially young Black men. By understanding the

social milieu in which the offender interacted with the police, the sentencing judge is better able to fashion a sentence that, to the extent possible, realistically addresses the needs and potential of the offender, as well as the seriousness of the offence.

[104] Mr. Morris's educational and employment history provides a further example of how social context evidence can assist in fashioning a fit sentence. Considered without the social context evidence, Mr. Morris's educational and employment achievements are meagre and his future prospects seem bleak. Without any context, a sentencing judge could well conclude Mr. Morris had little interest in either education or employment, and consequently his rehabilitative prospects were dim. However, when Mr. Morris's educational and employment background is considered in the context of the information provided by the Sibblis Report, a sentencing judge could determine that Mr. Morris's trajectory, as it relates to education and employment, is more reflective of the institutional biases and systemic inadequacies faced by Mr. Morris than any lack of potential or interest on Mr. Morris's part. By placing Mr. Morris's educational and employment history in the proper social context, a sentencing judge is better able to decide how those parts of Mr. Morris's background might be addressed in a positive way that benefits Mr. Morris and ultimately the community.

[105] A proper understanding of how anti-Black racism has impacted on various aspects of an offender's life will assist the sentencing judge in fashioning a

sentence which includes terms that enhance the offender's rehabilitation by addressing, in a direct and positive way, the negative impact of systemic racism. The counselling term in the probation order made by the trial judge in this case had that potential. The detailed terms of the conditional sentence imposed in *Anderson (NSCA)*, at paras. 72-73, also serve that purpose.

[106] In summary, social context evidence, which helps explain how the offender came to commit the offence, or which allows for a more informed and accurate assessment of the offender's background, character and potential when choosing from among available sanctions, is relevant and admissible on sentencing. Acknowledging the reality of anti-Black racism and its impact on offenders like Mr. Morris during the sentencing process enhances the legitimacy of the criminal justice system in the eyes of the community and, in particular, those in the community who have good reason to see the criminal justice system as racist and unjust. A sentencing process which frankly acknowledges and addresses the realities of the offender's life takes one important step toward the goal of equal justice for all.

[107] We see nothing new in the approach to sentencing described above. It reflects the individualized offence and offender-specific approach to sentencing that has always held sway in Canadian courts. The sentencing process, as it exists, can properly and fairly take into account anti-Black racism and its impact on the offender's responsibility, and the selection of an appropriate sanction in all

the circumstances. What is new is the kind of information provided in reports like the two filed in this case and a judicial willingness to receive, understand, and act on that evidence.

(iii) The Parity Principle

[108] The parity principle in s. 718.2(b) requires that to the extent offenders and their offences are similar, their sentences should be similar. Parity aims at substantive equality. If there are material differences between the circumstances of the offence or the offender, those differences must be reflected in the sentences imposed. A sentence which takes those differences into account does not offend the parity principle, but instead properly recognizes the relationship between that principle and the fundamental principle of proportionality: *Friesen*, at paras. 32-33; *Ipeelee*, at para. 79.

[109] The trial judge ultimately determined, based on the social context evidence and his findings with respect to the impact of anti-Black racism on Mr. Morris's circumstances and his moral culpability, that a sentence well below the range established for the offences, even when committed by a young first offender, was appropriate. Sentences below the established range are not necessarily unfit: see *Friesen*, at para. 38; *R. v. Suter*, 2018 SCC 34, [2018] 2 S.C.R. 496, at para. 4.

[110] The fitness of Mr. Morris's sentence does not ultimately depend on a comparison of that sentence with those imposed in other gun crime cases. The

fitness of the sentence turns on whether the trial judge erred in holding that the social context evidence both diminished the seriousness of the offences, and mitigated Mr. Morris's personal responsibility to the degree that a sentence well below the sentences normally imposed for the offences was justified in the circumstances.

(iv) The Restraint Principle

[111] Under the statutory regime created by Part XXIII, imprisonment is a sanction of last resort. This principle finds expression in ss. 718.2(d) and (e):

> (d) an offender should not be deprived of liberty, if less restrictive sanctions may be appropriate in the circumstances; and
>
> (e) all available sanctions, other than imprisonment, that are reasonable in the circumstances and consistent with the harm done to victims or to the community should be considered for all offenders, with particular attention to the circumstances of Aboriginal offenders.

[112] Both provisions are remedial in nature and apply to all offenders: *Gladue*, at paras. 36, 45-48. They are intended to remedy the acknowledged overuse of incarceration as a criminal sanction in Canada: *Gladue*, at para. 57. The restraint principle operates both when deciding whether incarceration is an appropriate disposition and, if it is, when fixing the length of that incarceration: *Gladue*, at paras. 79, 93. The restraint principle, however, operates within the boundaries set by the fundamental principle of proportionality. As stated by Moldaver J. in *Suter*, at para. 56, "the fundamental principle of proportionality must prevail in every case".

[113] Although the restraint principle applies when sentencing all offenders, s. 718.2(e) applies with "particular attention to the circumstances of Aboriginal offenders." Not surprisingly, given this language, the courts have interpreted s. 718.2(e) as signalling Parliament's direction that a different approach should be taken when applying the restraint principle to the sentencing of Indigenous offenders. That approach was first laid down in *Gladue* and further developed in *Ipeelee*. None of the parties take exception to the methodology developed in those cases, as applied to Indigenous offenders. Some of the interveners, however, submit this court should extend that approach to the sentencing of Black offenders.

[114] Indigenous offenders were singled out in s. 718.2(e) for two reasons. First, the problems associated with over-incarceration exist with devasting force in Indigenous communities: *Gladue*, at paras. 58-65; *Ipeelee*, at paras. 56-58. Second, for many Indigenous offenders and their communities, some of the principles and objectives underlying sentencing in Part XXIII do not represent Indigenous values or reflect the unique experiences and perspectives held by many Indigenous communities. In short, what amounts to a "just" sentence from a non-Aboriginal vantage point will not necessarily be seen as a "just" sentence from the very different historical and cultural vantage point of the Indigenous offender and community: *Gladue*, at paras. 70-74, 77.

[115] The unique circumstances of Indigenous offenders, which require special consideration when addressing the restraint principle, include both the systemic

and background factors which played a role in bringing the offender before the court, and the unique Indigenous perspective as to how best to achieve a just sentence which protects the community: *Gladue*, at paras. 66, 93.

[116] In *Ipeelee*, at para. 73, the court acknowledged that systemic and background factors, including institutional biases and discrimination, could play a role in determining the Indigenous offender's degree of moral responsibility for the crime. In addition, the unique cultural and historical factors, which shaped Indigenous attitudes toward crime and punishment, could have an effect on the selection of the sanction which best achieves the purpose of sentencing as laid down in s. 718. Addressing the significance of cultural and historical differences, LeBel J. observed, at para. 74:

> The second set of circumstances — the types of sanctions which may be appropriate — bears not on the degree of culpability of the offender, but on the effectiveness of the sentence itself. As Cory and Iacobucci JJ. point out, at para. 73 of *Gladue*: "What is important to recognize is that, for many if not most aboriginal offenders, the current concepts of sentencing are inappropriate because they have frequently not responded to the needs, experiences, and perspectives of aboriginal people or aboriginal communities." As the [Royal Commission on Aboriginal Peoples] indicates, at p. 309 [of its report, *Bridging the Cultural Divide: A Report on Aboriginal People and Criminal Justice in Canada* (Ottawa, 1996)], the "crushing failure" of the Canadian criminal justice system *vis-à-vis* Aboriginal peoples is due to "the fundamentally different world views of Aboriginal and non-Aboriginal people with respect to such elemental issues as the substantive content of justice and the process of achieving justice". The *Gladue* principles

> direct sentencing judges to abandon the presumption that all offenders and all communities share the same values when it comes to sentencing and to recognize that, given these fundamentally different world views, different or alternative sanctions may more effectively achieve the objectives of sentencing in a particular community.

[117] Counsel for some of the interveners argue that the circumstances of Indigenous offenders, which justify a different approach to sentencing, apply with equal force to Black offenders. They point out that over-incarceration of Black offenders is a well-documented phenomenon in the Canadian justice system. Counsel submit that the negative impact of long-term and widespread discrimination against Indigenous people is not unlike the impact of anti-Black racism on the Black community. Both communities share educational, economic, and social disadvantages. Perhaps most significantly, they share a very negative experience with and a profound distrust of the criminal justice system.

[118] We do not agree that this court should equate Indigenous offenders and Black offenders for the purposes of s. 718.2(e). We come to that conclusion for two reasons.

[119] Sentencing policy falls to be set, first and foremost, by Parliament. Parliament chose to specifically single out one group – Aboriginal offenders – in the context of the operation of the restraint principle in sentencing, especially as applied to imprisonment. As said in *Gladue*, at para. 37:

> Rather, the logical meaning to be derived from the special reference to the circumstances of aboriginal offenders, juxtaposed as it is against a general direction to consider "the circumstances" for all offenders, is that sentencing judges should pay particular attention to the circumstances of aboriginal offenders because those circumstances are unique, and different from those of non-aboriginal offenders. The fact that the reference to aboriginal offenders is contained in s. 718.2(e), in particular, dealing with restraint in the use of imprisonment, suggests that there is something different about aboriginal offenders which may specifically make imprisonment a less appropriate or less useful sanction. [Emphasis omitted.]

[120] Similarly, in *Ipeelee*, the court, at para. 59, read the reference to Aboriginal offenders in s. 718.2(e) as indicating their circumstances were unique and materially different from those of non-Aboriginal offenders.

[121] The language of s. 718.2(e) could not be clearer. Aboriginal offenders have been singled out for the purposes of the application of the restraint principle described in s. 718.2(e). It does not fall to the court to effectively amend that language to include other identifiable groups.

[122] In any event, the rationale offered in *Gladue* and *Ipeelee* for applying the restraint principle differently in respect of Indigenous offenders does not apply to Black offenders. Although there can be no doubt that the impact of anti-Black racism on a specific offender may mitigate that offender's responsibility for the crime, just as with Indigenous offenders, there is no basis to conclude that Black offenders, or Black communities, share a fundamentally different view of justice,

or what constitutes a “just” sentence in any given situation. The Indigenous offender’s culture and historical relationship with non-Indigenous Canada is truly unique. That uniqueness explains the very specific and exclusive reference to “Aboriginal offenders” in s. 718.2(e).

[123] Although we would not equate Black offenders with Indigenous offenders, for the purposes of s. 718.2(e), the *Gladue*/*Ipeelee* jurisprudence can inform the sentencing of Black offenders in several respects: see *Borde*, at para. 30. Just as with the discrimination suffered by Indigenous offenders, courts should take judicial notice of the existence of anti-Black racism in Canada and its potential impact on individual offenders. Courts should admit evidence on sentencing directed at the existence of anti-Black racism in the offender’s community, and the impact of that racism on the offender’s background and circumstances. Similarly, in considering the restraint principle, courts should bear in mind well-established over-incarceration of Black offenders, particularly young male offenders. Finally, as with Indigenous offenders, the discrimination suffered by Black offenders and its effect on their background, character, and circumstances may, in a given case, play a role in fixing the offender’s moral responsibility for the crime, and/or blending the various objectives of sentencing to arrive at an appropriate sanction in the circumstances.

[124] The restraint principle plays a specific and important role in sentencing for serious crimes like crimes involving the unlawful possession of loaded handguns.

Because of the seriousness of crimes involving the possession of loaded handguns, some term of imprisonment will usually be required to reflect the seriousness of the crime.

[125] The requirement of a sentence of imprisonment does not, however, end the operation of the restraint principle. That principle requires the court, if it determines that a sentence of less than two years imprisonment would be appropriate, to consider whether the term of imprisonment could be served in the community under a conditional sentence: *Criminal Code*, s. 742.1. The restraint principle favours conditional sentences over-incarceration if a conditional sentence is consistent with the proportionality principle: see *R. v. R.N.S.*, 2000 SCC 7, [2000] 1 S.C.R. 149, at para. 21.

[126] After *Nur* struck down the mandatory minimum, a conditional sentence is statutorily available for offences under s. 95. As persuasively laid out in *Anderson (NSCA)*, a carefully fashioned conditional sentence that is responsive, both to the needs of denunciation and deterrence and the rehabilitative potential of the offender, can, in some situations, be a fit sentence for a s. 95 offence: see also *R. v. Shunmuganathan*, 2016 ONCJ 519; *R. v. Dalton,* 2018 ONSC 544**.**

[127] A conditional sentence, like that described in *Anderson (NSCA)*, at paras. 126-41, can only be available if counsel provides the court with the information needed to warrant the imposition of a conditional sentence. Not only must the

information speak to the offender's circumstances, it must include proposed terms which will meaningfully address the need for deterrence, denunciation, and ongoing supervision of the offender. The information provided by counsel on sentence must give the sentencing judge reason to believe the offender is committed to the terms of the proposed conditional sentence.

[128] Counsel's efforts alone will of course not be enough. The resources needed by counsel to properly put forward this kind of information must be available, as must the resources needed to effectively implement a conditional sentence tailored to the needs of the offender like the sentence in *Anderson (NSCA)*. The proposed federal legislation, combined with commitments made in the government's 2020 economic statement, suggest the previous government intended to make the necessary resources available. Hopefully, that commitment will be renewed and acted upon in the immediate future: see Bill C-22, *An Act to amend the Criminal Code and the Controlled Drugs and Substances Act*, 2nd Sess., 43rd Parl., 2021; see also Canada, *Supporting Canadians and Fighting COVID-19: Fall Economic Statement 2020* (Ottawa: Department of Finance, 2020), at p. 85.[4]

[129] The use of conditional sentences when sentencing young Black offenders, in appropriate cases, also carries the added advantage of addressing, at least as

---

[4] Bill C-22 was introduced and passed first reading in the House of Commons before Parliament was dissolved on August 15, 2021.

it relates to the offender before the court, the ongoing systemic problem of the over-incarceration of young Black offenders.

[130] Restraint also operates in another way. Even if the sentencing judge decides incarceration is necessary, there is still a question of how long the sentence should be. A sentence of more than two years excludes the possibility of probation: *Criminal Code*, s. 731. If the sentencing judge determines that the range of sentence for the particular offence and offender includes a two-year sentence and that probation would assist the offender's rehabilitation, the restraint principle favours imposing a sentence of no more than two years, even if a somewhat longer period of incarceration would also fall within the appropriate range.

[131] As indicated in *R. v. Smickle*, 2013 ONCA 678, 304 C.C.C. (3d) 371, at para. 30, additional reasons, 2014 ONCA 49, 306 C.C.C. (3d) 351, sentences at or just below the two-year mark may be appropriate for some s. 95 offences. When the sentencing judge determines that an appropriate sentence is in that range, counsel and the sentencing judge must fully explore various options which could eliminate or reduce the offender's period of actual incarceration while still giving effect to the proportionality principle.

B. THE ADMISSIBILITY OF THE REPORT AND EVIDENCE OF MS. SIBBLIS

[132] We have already summarized the substance of Ms. Sibblis's report and her testimony (see paras. 44-52). The Crown's complaint with respect to the admissibility of Ms. Sibblis's report and testimony is a relatively narrow one. Counsel submits that, although Ms. Sibblis was tendered as an expert witness, she was not properly qualified at the sentencing proceeding. Neither her areas of expertise, nor the specific subject matters on which she was qualified to give opinion evidence were identified. Consequently, argues the Crown, her report and testimony roam over a wide variety of subjects, some of which required that she be properly qualified as an expert. For example, the Crown argues that Ms. Sibblis was not properly qualified to give opinion evidence, either about Mr. Morris's state of mind, or any mental disorder he may have suffered from at the relevant time.

[133] The Crown's argument should be considered in the context of the applicable evidentiary provisions in Part XXIII of the *Criminal Code*. Those provisions swing the evidentiary door open on sentencing. The rules of evidence are relaxed to facilitate the production of any information that could help the sentencing judge arrive at a fit sentence. Given the highly individualized nature of the sentencing inquiry, the concept of relevance captures a broad band of information: see *Criminal Code*, ss. 723, 726.1.

[134] Information that sheds light on the offender's background, character, and circumstances, or helps explain why the offender committed the offence, is relevant on sentencing and potentially admissible. Much of the information provided by Ms. Sibblis goes to the appellant's background, character, and circumstances. She tells Mr. Morris's life story as a young Black man growing up and living in Toronto.

[135] The biographical information tracing Mr. Morris's life experiences laid out in the Sibblis Report was clearly admissible on sentencing. That information included primary source documents and statements from Mr. Morris and others close to him, including his mother. Although much of the information was hearsay, the trial judge could rely on that information if he concluded it was credible and trustworthy: *R. v. Gardiner*, [1982] 2 S.C.R. 368, at p. 414. No particular expertise was required for Ms. Sibblis to chronicle Mr. Morris's background history and circumstances. To the extent that the Sibblis Report chronicles Mr. Morris's life, it is not unlike a presentence report, although it is much more thorough and detailed than most presentence reports.

[136] The Sibblis Report does go on to connect Mr. Morris's disadvantaged upbringing and circumstances to overt and systemic anti-Black racism. Ms. Sibblis offers her assessment of the impact of that connection on the choices Mr. Morris has made throughout his life, and on his outlook for the future. The disadvantages suffered by Mr. Morris are part of his background and character and are relevant

to determining the appropriate sentence. Ms. Sibblis's opinion that anti-Black racism plays a role in the existence and impact of those disadvantages is also relevant to determining the fit sentence. An explanation for a disadvantage or circumstance which played a role in the offender's commission of the offence can shed light on how that disadvantage should be taken into account on sentencing.

[137] The parts of the Sibblis Report that draw a connection between systemic factors and Mr. Morris's commission of the offences have much in common with *Gladue* reports. The Sibblis Report is helpful for some of the same reasons that *Gladue* reports have proven to be helpful when sentencing Indigenous offenders. As with *Gladue* reports, the Sibblis Report places Mr. Morris's history and circumstances in a social context which enhances the sentencing judge's understanding of Mr. Morris. A better understanding of the offender is always a good thing on sentence.

[138] A report very similar to the Sibblis Report was admitted without objection in *Jackson*. Similar reports (IRCAs) are regularly admitted in Nova Scotia criminal courts. In *Anderson (NSCA)*, the Nova Scotia Court of Appeal strongly endorses the use of IRCAs in sentencing, especially for young Black offenders. As the court in *Anderson (NSCA)* notes, at para. 83, the federal government has recently endorsed the use of IRCAs and proposes to provide funding for them.

[139] We accept that, in some respects, offering an opinion that draws the connection between an offender's lived experiences and the impact of anti-Black racism will require expertise. Ms. Sibblis's academic and clinical experiences provided that expertise. She was competent to offer an opinion as to the connection between anti-Black racism and Mr. Morris's involvement in the criminal justice system.

[140] Parts of the Sibblis Report and her evidence arguably offered opinions with respect to matters that went beyond Ms. Sibblis's apparent expertise. Some of her comments about the extent and effect of Mr. Morris's physical injuries suffered in 2013, as well as her opinions about Mr. Morris's mental state and his specific state of mind, arguably required expertise beyond that which is self-evident from a review of Ms. Sibblis's credentials.

[141] Even if Ms. Sibblis was not qualified to offer certain opinions about Mr. Morris's mental state, or the extent of his physical injuries, the Crown was not prejudiced by the opinions she gave. The trial judge had ample evidence, apart from Ms. Sibblis's opinion, to support the conclusion that Mr. Morris had significant emotional difficulties. The trial judge was entitled to accept the psychiatric report prepared 11 months before the offences. That report suggested a diagnosis of post-traumatic stress disorder ("PTSD"). The Sibblis Report provided information from Mr. Morris about his mental state in the ensuing period. According to him, he continued to experience the same intense and ongoing fears, and sense of

hopelessness he had related to the psychiatrist. The trial judge could accept Mr. Morris's statements, as reported by Ms. Sibblis. Those statements supported the continuing applicability of the psychiatric diagnosis.

[142] Similarly, apart from Ms. Sibblis's opinions about Mr. Morris's physical injuries and their ongoing effect, the documentation established the seriousness of those injuries. It was open to the trial judge to conclude those injuries continued to present serious problems for Mr. Morris.

[143] It would have been better had counsel specifically identified for the trial judge the areas of Ms. Sibblis's report with respect to which the Crown maintained there were legitimate doubts as to her qualifications to offer the opinions contained in the report. After hearing argument on the contested areas of the report, the trial judge could have determined the areas in which Ms. Sibblis was entitled to give expert opinion evidence. In doing so, the trial judge would have set the parameters of her testimony and identified the parts of her report, if any, that went beyond her expertise and would not be considered by the trial judge. This approach would have served the same purpose as a formal *voir dire*, but in a more expeditious manner, well-suited to the introduction of evidence on sentencing.

[144] We would add one further observation with respect to reports like the Sibblis Report. Persons authoring presentence reports and *Gladue* reports are required to present an objective and balanced picture of the offender for the court: *R. v.*

Lawson, 2012 BCCA 508, 294 C.C.C. (3d) 369, at para. 28. Persons preparing social context reports are under the same obligation. Ms. Sibblis acknowledged this obligation.

[145] To maintain that objectivity, the report cannot purport to speak for the offender or advocate on the offender's behalf. A social context report must also distinguish between facts and an offender's perceptions and beliefs as stated to the author. Both perceptions and facts are important, but they are not the same thing. For example, an offender's assertion he was mistreated by the police and correctional authorities and subject to unreasonable bail terms cannot be presented as facts in the report. This caution is especially important when the offender, like Mr. Morris, has been found by the judge and the jury to have made serious false allegations of police misconduct while under oath.

[146] A properly prepared social context report must also carefully consider the information available in the primary source documents collected. Any claim that a particular event or incident is explained by institutional bias can only be objectively assessed by reference to the actual events as revealed in reliable primary source documents such as medical records. For example, the Sibblis Report suggests that the failure to follow-up on Mr. Morris's diagnosed psychiatric issues may have been a reflection of systemic racism. The medical records, however, indicate that the psychiatrist did prescribe medication and follow-up psychotherapy. Mr. Morris

chose not to take the medication or go back to the psychiatrist for the psychotherapy.

[147] Reports like the Sibblis Report are not commonly used in Ontario. We agree with the Nova Scotia Court of Appeal in *Anderson (NSCA)* that the reports can be of great assistance to a sentencing judge. Hopefully, their preparation can be adequately funded and they will become a common feature of sentencing in Ontario in appropriate cases. We are confident that with more experience in preparing these reports, and added guidance from the courts, authors of these reports will appreciate the need to present an objective assessment, while avoiding appearing to take on the role of advocate for the offender.

C. THE ALLEGED ERRORS IN THE TRIAL JUDGE'S REASONS

[148] The Crown submits that the 12-month sentence imposed by the trial judge is demonstrably unfit and that the trial judge made errors in principle that had a material impact on the sentence. The Crown contends that either error justifies appellate intervention: *Friesen*, at paras. 25-26. As we are satisfied there were errors in principle, we will address the fitness of sentence from that perspective.

(i) The Trial Judge's Treatment of the Seriousness of the Offences

[149] As indicated earlier (paras. 75-78), the trial judge erred in holding that systemic racism and its impact on Mr. Morris could mitigate the seriousness of the offences committed by Mr. Morris and, in doing so, reduce the significance of the

objectives of denunciation and general deterrence in the fixing of an appropriate sentence. The seriousness of Mr. Morris's crimes is not diminished by evidence which speaks to his reason for committing the crimes. Specifically, the explanation offered by counsel and accepted by the trial judge for Mr. Morris's possession of the gun, his flight from the police, and his disposal of the gun, while possibly relevant to his degree of personal responsibility, in no way reduced the seriousness of the offences, or the need to denounce in no uncertain terms Mr. Morris's criminal conduct.

[150] Although Mr. Morris was convicted of four gun-related charges, when considering the seriousness of his conduct, it is appropriate to focus on the s. 95 charge, the most serious of the four charges. That section prohibits the possession of a loaded restricted/prohibited firearm.

[151] Section 95 criminalizes a broad range of conduct. Mr. Morris's actions fall at the "true crime" end of the spectrum of the conduct prohibited by s. 95. As this court and, more importantly, the Supreme Court of Canada have indicated, crimes like those committed by Mr. Morris call for denunciatory sentences. In most cases, penitentiary terms will be required. In some situations, where there are strong mitigating factors, sentences at or near the maximum reformatory sentence (two years, less a day), may be imposed: see *Smickle*, at para. 30; *Nur (ONCA)*, at paras. 6, 17-23 and 206; and *Nur (SCC)*, at para. 82.

[152] The trial judge imposed a sentence that was far below the range described in cases like *Nur* and *Smickle*. In doing so, he erred in principle by deprecating the seriousness of the offences committed by Mr. Morris and the need to unequivocally denounce the criminal conduct engaged in by Mr. Morris through the sentence imposed on him.

[153] At the same time, the trial judge's reasons overstate the impact of Mr. Morris's circumstances on *his ability to choose* whether or not to arm himself with a loaded, concealed handgun. There is no evidence from Mr. Morris about how he came to carry around a loaded, concealed handgun. In fact, Mr. Morris insisted under oath he did no such thing. Absent any evidence from Mr. Morris as to why he came to arm himself, it simply cannot be assumed that he was armed because he thought he had little choice in the matter.

[154] The evidence does, however, offer an explanation, rooted in the social context evidence, that explains why Mr. Morris made such a bad and dangerous choice. That explanation points to circumstances, many of which were not only beyond Mr. Morris's control, but were in fact imposed on him as a consequence of systemic and overt anti-Black racism in various social institutions.

(ii) Other Alleged Errors

[155] The errors described above (paras. 149-54) had a material impact on the sentence imposed and are sufficient to warrant appellate intervention. We will, however, address some of the other aspects of the trial judge's reasons.

(a) The Finding of Remorse

[156] The trial judge accepted that Mr. Morris was remorseful. There was evidence that Mr. Morris was sorry for the pain he had caused his mother, regretted the mess he had made of his life, and wanted to change.

[157] Remorse can offer meaningful mitigation when accompanied by an acceptance of responsibility for one's crimes. A combination of remorse and an acceptance of responsibility offers good reason to hope the offender will not reoffend. The trial judge appears to have appreciated that remorse offers meaningful mitigation only when accompanied by an acceptance of responsibility.

[158] Nothing in this record is capable of supporting a finding that Mr. Morris took any responsibility for his crimes at any time in these proceedings.[5] Mr. Morris denied committing the offences at trial. He falsely accused the police of planting the firearm and other serious misconduct, both in his evidence on the stay motion

---

[5] The fresh evidence does indicate, that by the time Mr. Morris had been released on parole on his subsequent home invasion robbery sentence, he had come to accept responsibility for his criminal conduct.

and in his evidence before the jury. He said nothing on sentencing to resile from the false evidence he gave at trial.

[159] Mr. Morris, of course, cannot be punished on sentencing for denying the allegations or falsely accusing the police of serious misconduct. However, both are relevant when considering whether Mr. Morris took any responsibility for his actions. Nothing in the Sibblis Report, or in Mr. Morris's statement at sentencing, suggests he was prepared to take responsibility for anything. A refusal to acknowledge, much less take responsibility for, criminal conduct, did not augur well for Mr. Morris's rehabilitative potential and raises real concerns about the risk that he will reoffend.

[160] The trial judge appreciated that the sentence he imposed was a lenient one. He did not consider whether Mr. Morris's failure to take any responsibility for his criminal conduct rendered a lenient sentence inappropriate in the circumstances.

(b) The Trial Judge's Treatment of Mr. Morris's Reasons for Possession of the Handgun

[161] The trial judge was satisfied that Mr. Morris had the loaded handgun, at least in part, because of his precarious mental state. On the trial judge's findings, Mr. Morris constantly feared for his life in his community. He felt helpless and saw nothing positive in his future.

[162] The trial judge also accepted there was no evidence Mr. Morris had the loaded gun for any specific criminal purpose. We take this to mean there was no evidence Mr. Morris was involved in criminal activity and used the gun as a tool of that trade.

[163] Both findings were open to the trial judge. With respect to Mr. Morris's mental state, the trial judge had Mr. Morris's description of his state of mind, as provided to Ms. Sibblis, the psychiatric report from January 2014, and undisputed evidence concerning specific traumatic events, including two prior stabbings. With respect to the conclusion there was no basis to find he had the gun for an ulterior criminal purpose, the trial judge relied on the character evidence offered on behalf of Mr. Morris at sentencing. Mr. Morris also had no criminal record.

[164] Both factors identified by the trial judge offered some mitigation of Mr. Morris's personal culpability and blameworthiness. The trial judge recognized this mitigation, but also concluded that Mr. Morris's reasons for possessing a loaded, concealed handgun lessened the need to denounce Mr. Morris's conduct.

[165] The trial judge erred in holding that Mr. Morris's explanation for possessing the loaded, concealed handgun rendered denunciation less important. Mr. Morris's explanation in no way diminished the dangerousness of his conduct, or the harm it caused to the community.

[166] The explanation accepted by the trial judge for Mr. Morris's possession of the loaded handgun had to be taken into account, along with other mitigating factors, when assessing the personal culpability component of the proportionality inquiry. The social context evidence accepted by the trial judge put Mr. Morris's choice to carry a loaded, concealed handgun in a light that reduced his personal culpability. That same evidence offered valuable insights into Mr. Morris's background and character and, in particular, his potential for rehabilitation that had to be taken into account when blending the various objectives of sentencing.

(c) The Flight from the Police and the Disposal of the Gun

[167] In his reasons on the motion to stay the proceedings (summarized above, at paras. 26-32), the trial judge found that he was not satisfied Mr. Morris knew the plainclothes officers, who initially attempted to stop him, were police officers. The trial judge was, however, satisfied that Mr. Morris knew the uniformed officer chasing him across the No Frills parking lot was a police officer. Mr. Morris did not stop, but on the trial judge's findings continued to run until he was caught and tackled by the police officer. The trial judge further held that Mr. Morris disposed of the loaded handgun in the stairwell of the parking lot while running from the uniformed police officer.

[168] The trial judge declined to treat Mr. Morris's flight from the police or the disposal of the loaded handgun in a public area as aggravating factors on

sentence. He described both as “reflexive” and “impulsive” reactions to the confrontation with the police. On the trial judge’s reasoning, that reaction was explained in part by Mr. Morris’s fears and distrust of the police. His fear and mistrust were in turn the product of the systemic anti-Black racism engrained in the policing of communities like the one Mr. Morris had grown up in.

[169] The trial judge made his findings as to why Mr. Morris ran in the absence of any such evidence from Mr. Morris. Mr. Morris had falsely denied running from the uniformed officer, claiming he had stopped as soon as he saw that it was a police officer.

[170] On the trial judge’s findings, Mr. Morris’s flight from the plainclothes officers cannot be treated as an aggravating factor. However, his decision to continue to run once he knew he was being chased by a police officer does increase the seriousness of the offence. This is so for two reasons. First, fleeing from the police while in possession of a loaded handgun increases the risk of a confrontation, during which the weapon may be discharged deliberately, or even accidentally. Either substantially increases the risk to the public. Second, Mr. Morris’s decision to run while armed with a loaded handgun endangered the safety of the police officers who were engaged in the lawful execution of their duty. Doing so aggravates the seriousness of the offence.

[171] We would also hold that the trial judge made an unreasonable finding of fact when he concluded Mr. Morris's flight and disposal of the gun was an "impulsive reaction" caused by his fear of the police and a concern he would not be treated fairly. The trial judge's analysis ignores that Mr. Morris was in the act of committing a serious crime when confronted by the police. He had to know that if caught with a loaded gun, he would be arrested and incarcerated. Mr. Morris chose to run and attempted to dispose of the weapon out of the sight of the police before he was apprehended. The only reasonable inference is that Mr. Morris ran and disposed of the gun in an effort to avoid being caught and charged with a serious crime.

[172] The trial judge also made an error in concluding the disposal of the handgun in a public place was not "a weighty aggravating factor" in this case. The trial judge discounted the significance of that factor because the place where the gun was thrown was not "easily accessible to a passerby or innocents." On the evidence, Mr. Morris threw the gun away in a public stairwell located in a parking lot of a grocery store. The stairwell was readily accessible by the public, even if it was not used a great deal. In any event, leaving a loaded firearm anywhere in a public space is clearly a significant aggravating factor.

(d) The Mitigation for the Breach of Mr. Morris's *Charter* Rights

[173] The trial judge reduced the sentence by three months on account of the breach of Mr. Morris's rights under ss. 7 and 10(b) of the *Charter*. Those breaches

are described above (see paras. 28-32). The trial judge was particularly concerned with the breach of s. 7, which involved one of the plainclothes officers driving over Mr. Morris's foot in his attempt to detain Mr. Morris. The trial judge did not invoke s. 24(1) of the *Charter*, but relied on the principle that state misconduct can mitigate sentence.

[174] All parties agree that a trial judge can reduce a sentence to take into account state misconduct relating to the circumstances of the offence or the offender: *Nasogaluak*, at paras. 3, 47. Excessive use of force in the course of detaining or arresting an individual, even if the arrest or detention is for a different offence than the offence ultimately prosecuted, can constitute state misconduct relating to the circumstances of the offence or offender.

[175] The trial judge was satisfied the officer's excessive use of force was sufficiently serious to warrant a reduction in the sentence. In addressing the seriousness of the misconduct, the trial judge relied, not only on the physical consequences suffered by Mr. Morris, but on the negative impact the aggressive police conduct had on the perception of the police within the community. The trial judge concluded that some mitigation of the sentence would recognize the reality of that perception.

[176] The trial judge properly identified the principle laid down in *Nasogaluak*. On the findings he made, it was open to him to invoke the principle from *Nasogaluak* in crafting a fit sentence. This court must defer to those findings.

D. THE APPROPRIATE SENTENCE

[177] As the trial judge acknowledged, the seriousness of Mr. Morris's crimes required a significant term of imprisonment. The possession of a loaded, concealed handgun in a public place, the flight from the police, and the disposal of the loaded weapon in a public place were all aggravating factors. As indicated earlier, we see no reason to depart from the range fixed in cases like *Nur* and *Smickle*. In most cases, at the "true crime" end of the spectrum, a penitentiary sentence will be necessary for a s. 95 offence. In some cases, sentences at or near a maximum reformatory sentence will be appropriate.

[178] There are mitigating factors in this case favouring a sentence at the low end of the range. More importantly, Mr. Morris was a young first offender at the time of sentencing. He has strong emotional support from his mother and others who are close to him. As revealed in the Sibblis Report, Mr. Morris has many positive features, and rehabilitative potential.

[179] The moral blameworthiness of Mr. Morris's conduct is mitigated by his mental and physical health issues, as well as his educational and economic disadvantages. All of those factors are influenced by the systemic anti-Black racism Mr. Morris has experienced. The factors can only properly be understood, for the purposes of determining the appropriate sentence, by having regard to that context. The three-month deduction in the sentence to take account of state misconduct during the attempt to detain and arrest Mr. Morris can also be viewed as a mitigating factor for the purposes of fixing an appropriate range of sentence.

[180] Taking into account the mitigating and aggravating factors, we think the trial judge could have imposed a sentence ranging from a sentence at or near the maximum reformatory term, to a penitentiary sentence of three years. When the appropriate sentencing range includes sentences at or below the two-year mark, a sentencing judge must give careful consideration to the imposition of a conditional sentence. As outlined earlier, conditional sentences, properly used, can ameliorate the longstanding problem of the over-incarceration of young Black men.

[181] Mr. Morris was in custody on other charges when sentenced on these charges. Understandably, given the positions of the parties, no one suggested Mr. Morris should receive a conditional sentence. We would observe, however, that all other factors being equal, had Mr. Morris been before the courts exclusively on these charges and had a conditional sentence, like that ordered in *Anderson*

(NSCA), been available, the trial judge would have had to give that option serious consideration.

[182] We also agree with the trial judge's conclusion that a term of probation was necessary. Probation provided for an extended period of supervision and access to culturally-sensitive counselling. Both had the potential to further Mr. Morris's rehabilitation and provide added long-term safety for the community. As probation can only be imposed if a period of incarceration is no more than two years, the restraint principle favoured a sentence of two years or less: see *Criminal Code*, s. 731.

[183] Taking the factors set out above into account, we would grant leave to appeal, allow the appeal, and vary the sentence as follows:

- On the s. 95 charge (count 3), we would impose a sentence of two years, less a day. Mr. Morris would be entitled to credit for pretrial custody on a 1.5:1 basis. We would also impose probation for 18 months on the terms set by the trial judge;

- On the other two convictions (counts 2 and 4), we would impose concurrent sentences of 15 months.

[184] In keeping with the Crown's concession, this is an appropriate case in which to permanently stay the sentence with the exception of the ancillary orders made by the trial judge on sentencing. Those orders should remain in effect.

Released: "October 8, 2021 JMF"

"Fairburn A.C.J.O."
"Doherty J.A."
"R.G. Juriansz J.A."
"M. Tulloch J.A."
"David M. Paciocco J.A."