SUPREME COURT OF YUKON

Citation: *R.* v. *Johnson*, 2013 YKSC 126

Date: 20131212
Docket: S.C. No. 12-01510
Registry: Whitehorse

BETWEEN:

HER MAJESTY THE QUEEN

AND:

JESSICA RACHELL JOHNSON

Before: Mr. Justice L.F. Gower

Appearances:

Keith D. Parkkari — Counsel for the Crown
Bibhaz Vaze — Counsel for the Accused

**REASONS FOR SENTENCING
DELIVERED FROM THE BENCH**

INTRODUCTION

[1] GOWER J. (Oral) This is the sentencing of Jessica Rachell Johnson. Ms. Johnson and a co-accused, Christopher Cornell, were jointly charged on the same indictment and were to have proceeded to trial on September 9, 2013, but Ms. Johnson entered her guilty pleas on the morning of that day and her sentencing was adjourned. Ms. Johnson entered guilty pleas to the following offences, all of which occurred on September 26, 2011, at or near Haines Junction, Yukon Territory:

1) discharging a firearm at Cpl. Kim MacKellar and Shane Oakley ("Mr. Oakley"), with intent to prevent her arrest and the arrest of Mr. Cornell, contrary to s. 244 of the *Criminal Code* (the "*Code*");

2) aggravated assault by wounding Cpl. MacKellar while he was engaged in the execution of his duties as a peace officer, contrary to s. 270.02 of the *Code*;

3) using a firearm during flight after committing a robbery, contrary to s. 85(1)(c) of the *Code*; and

4) robbery, by stealing a safe from Madley's General Store, contrary to s. 344(b) of the *Code*.

FACTS

[2] The following facts were agreed to by Ms. Johnson:

1) On the morning of September 26, 2011, Ms. Johnson was one of two individuals involved in the theft of a safe from Madley's General Store (the "General Store"), in Haines Junction.

2) At about 6 AM, Ms. Johnson and Mr. Cornell drove a dark coloured GMC Blazer ("the SUV") into the parking lot of the General Store.

3) During this entire period, Ms. Johnson was high on drugs and has a very limited recollection of the specific events which occurred.

4) Ms. Johnson cannot recall if any other individuals were present at the scene of the General Store other than herself and Mr. Cornell.

5) Frank Parent was in the General Store cleaning it. Ms. Johnson and Mr. Cornell entered the store without permission.

6) Mr. Parent identified two individuals wearing jackets with hoods, but could not identify those individuals specifically, other than knowing they were smaller in stature than himself.

7) When Mr. Parent attempted to restrain one of the individuals, the other person punched Mr. Parent in the nose. He was then pepper sprayed in the face. Mr. Parent was unable to identify which of the two individuals punched him and pepper sprayed him.

8) Mr. Parent suffered from burning eyes, a broken nose, and bruising and swelling of his face. Mr. Parent bled substantially from his nose.

9) While Mr. Parent was washing the pepper spray out of his eyes, a pallet jack was used by the individuals to remove a safe from the office in the General Store and move it out to the store's parking lot. An attempt was made to load the safe into the SUV. Ms. Johnson does not know what specific role she played in the theft of the safe, but knows that she made contact with the safe.

10) While these events were taking place, the RCMP arrived on the scene. Ms. Johnson and Mr. Cornell fled the scene, leaving the safe in the parking lot.

11) When Ms. Johnson left the General Store, Mr. Cornell was in the vehicle with her. She is unaware of anyone else being in the SUV.

12) Upon leaving the General Store, the SUV went north from Haines Junction on the Alaska Highway.

13) Cpl. MacKellar, an RCMP officer, driving a marked police truck, pursued the SUV. The police truck's emergency lights were activated and Cpl. MacKellar used the siren part of the time. Mr. Oakley, a deputy conservation officer, was a passenger in the police truck.

14) Various items, including a compressor, chainsaws, quarters of deer meat and miscellaneous tools, were thrown out of the SUV in an effort to obstruct the police pursuit.

15) The pursuit reached speeds as high as 130 km/h and continued for approximately 31.8 km.

16) Towards the end of the pursuit, the back window of the SUV was kicked out.

17) The pursuit ended when a single rifle shot from a 375 Magnum rifle was fired at the police vehicle. Ms. Johnson was driving the SUV when the shot was fired.

18) When the shot was fired, the police vehicle was occupied by Cpl. MacKellar and Mr. Oakley.

19) Ms. Johnson did not fire the rifle shot. While she says she is unaware of any enterprise to fire a gun shot, she admits and acknowledges that the shot was fired while fleeing from police and attempting to prevent the rest of Mr. Cornell and herself. She further admits that she is legally a party to the firing of the shot.

20) The rifle was examined and determined to be a firearm as defined in the *Code*.

21) The bullet from the rifle shot pierced the windshield of the police vehicle and traveled through a radar detector that was fastened to the dash of the police vehicle by Velcro. Shrapnel resulting from the gunshot scattered and impacted through the truck cab. The driver's side window was shattered.

22) Cpl. MacKellar was wounded by shrapnel resulting from the gunshot. Shrapnel was embedded in his eyes, face and left shoulder. At all material times, he was engaged in the execution of his duties as a peace officer.

23) Mr. Oakley was not injured.

24) The pursuit ended as a result of the injuries suffered by Cpl. MacKellar. Mr. Oakley drove the police vehicle back to Haines Junction, delivering Cpl. MacKellar to the Community Health Center.

25) Cpl. MacKellar was subsequently medevaced, first to Whitehorse General Hospital, then to Vancouver General Hospital. At the Vancouver General, he underwent three surgeries to remove the embedded shrapnel.

26) There was marked swelling and bruising and multiple lacerations on Cpl. MacKellar's left shoulder as a result of the shrapnel, and some shrapnel was located next to his subclavian vein.

27) Metal and plastic fragments were located in the corneas of his eyes, face and lower lip.

POSITIONS OF THE PARTIES

[3] The Crown is seeking a global jail sentence of seven years, less credit for the 14 ½ months of applicable pre-sentence custody. Crown counsel submits that there should be no more than 1-to-1 credit for the remand time, pursuant to s. 719(3) of the

Code. He also seeks an order for samples for DNA analysis, as well as a 10 year firearms prohibition. Counsel notes that the offence under s. 244 of the *Code* carries a minimum four-year jail term, pursuant to s. 244(2)(b). He also notes that the offence under s. 85 carries a minimum one year jail term, which is to be served consecutively to any other sentence.

[4] Defence counsel submits that there should be a jail sentence of not more than five years, less credit for pre-sentence custody at a ratio of 1 to 1.5, pursuant to s. 719(3.1) of the *Code*.

[5] Although he took no position on the point, defence counsel also brought to my attention *R.* v. *Meyer* (1994), 153 N.B.R. (2d) 316 (C.A.), which held that, where the use of a firearm is a constituent element of one offence as well as a second offence, then, according to the double jeopardy principle in *R.* v. *Kienapple*, [1975] 1 S.C.R. 729, convictions cannot be entered on both. Counsel thus questioned whether this applied to the offences of (a) discharging a firearm with intent to prevent arrest, contrary to s. 244 of the *Code* interest; and (b) using a firearm during flight after committing a robbery, contrary to s. 85(1)(c).

[6] I find that the s. 244 conviction effectively subsumes the s. 85 conviction. In order to be found guilty under s. 244, Ms. Johnson must have:

- i) discharged a firearm;
- ii) at a person;
- iii) with the intent to prevent her or her co-perpetrator's arrest.

In order to be found guilty under s. 85, she must have:

i) used a firearm;

ii) during the flight after committing an indictable offence.

In my view, the use of the word “flight” in s. 85(1)(c) necessarily implies that the offender is attempting to evade arrest. There are no additional or distinguishing elements in s. 85(1)(c) that are not contained in s. 244. The two offences arise from the same delict and there is both a factual and legal nexus between them. In the circumstances, I will apply the *Kienapple* principle and stay the s. 85 charge.

[7] I also note at this stage that s. 718.02 of the *Code* states that when imposing a sentence for an offence under s. 270.02, which is the charge of wounding Cpl. MacKellar in the execution of his duties, “…the court shall give primary consideration to the objectives of denunciation and deterrence of the conduct that forms the basis of the offence.”

CIRCUMSTANCES OF THE OFFENDER

[8] Ms. Johnson’s personal circumstances are set out in-significant detail in a pre-sentence report (“PSR”), a psychological report by Dr. Will Reimer, and a 16 page *Gladue* Report.

[9] Ms. Johnson’s birth date is September 21, 1990. Therefore, she was just 21 years old at the time of the offences, and has only relatively recently turned 23. Her mother, A.S., gave birth to Ms. Johnson when she herself was in her mid-teens. Her biological father, H.J., was not actively involved in Ms. Johnson’s upbringing, with the exception of a brief period when she resided with him in Haines Junction around the age of 13. Ms.

Johnson’s mother is a member of the Little Salmon Carmacks First Nation and her biological father is a member of the Kluane First Nation.

[10] Ms. Johnson was raised by her mother as an only child. She says that her mother suffers from anxiety and anger issues as well as drug and alcohol addiction. Ms. Johnson described her formative years as unstable and chaotic. She says that her mother was in and out of numerous relationships and that the two of them moved often from place to place, including a brief period in Alberta. Ms. Johnson claims that A.S. was verbally and physically abusive towards her.

[11] In the *Gladue* Report, A.S. is reported to have said: “My girl had a heartbreaking upbringing. I’m sorry for it. She’s seen a lot of abuse.” Further, one of Ms. Johnson’s aunts reported that there were times when Social Services was involved with the family because “there were problems”.

[12] When Ms. Johnson was nine years old, her mother began a common-law relationship R.B., which lasted nine years. Ms. Johnson referred to R.B. as the closest thing she had to a father. Although he was not abusive towards her, she reports that he was also an alcoholic and a crack cocaine addict.

[13] Ms. Johnson reported that she was sexually abused by two different family members at the ages of seven and eight and that the abuse continued until she was 13 years old. She claims she received no help from her family dealing with those issues.

[14] In summary, Ms. Johnson says that she experienced significant trauma and neglect throughout her life and has suffered from depression, anxiety and anger as a

result. According to the psychological report, Ms. Johnson appears to have attempted to deal with her emotional and mental distress through the use of alcohol and drugs. She began drinking alcohol at age 8 and started using marijuana at age 11. By age 13, she was consuming mushrooms and cocaine, and by age 17 she began using heroin intravenously. By her mid-teens, it appears that she was consuming either alcohol or drugs, or both, on a daily basis.

[15] Between the ages of 14 and 18, Ms. Johnson was on her own living with friends or couch-surfing.

[16] At about the age of 15, she started selling drugs. This appears to have been her main source of income, together with social assistance, as her employment history is limited to only three jobs, each lasting only a month or two at the most.

[17] At about the age of 19, Ms. Johnson began living with Mr. Cornell in various residences until she was arrested on the charges before this Court.

[18] Ms. Johnson dropped out of school in grade 8. She stated that the reason she did so was because using drugs was more important to her than attending school. However, she also reported completing a grade 8 curriculum at the Independent Learning Center in Whitehorse. Further, Ms. Johnson noted to the author of the PSR that she intends to further her education while in jail and hopes to someday be a youth substance abuse counsellor.

[19] Medically, Ms. Johnson suffers from fibromyalgia and Hepatitis C. The latter is from her intravenous cocaine and heroin use.

[20] The psychological report describes Ms. Johnson as having significant difficulty managing her emotional volatility. She is noted to have a very unstable personality pattern with poor self-control, together with very low-stress and frustration tolerance. She is described as having developed many antisocial values and attitudes and using aggression to keep people at a distance. She is also noted to be easily influenced by others.

[21] The psychologist, Dr. Reimer, has diagnosed Ms. Johnson as primarily suffering from two psychiatric disorders: post-traumatic stress disorder and a personality disorder with borderline and antisocial features. She also meets the criteria for attention deficit hyperactivity disorder (“ADHD”). While she does not have a learning disability *per se*, she does meet the criteria for a central auditory processing disorder, which affects her ability to listen to and understand orally presented information.

[22] In his risk assessment, Dr. Reimer concluded that Ms. Johnson appears to be a moderate to high risk to reoffend, but a low to moderate risk to re-offend in a violent manner. Indeed, he earlier stated that she “does not appear to have a proclivity towards engaging in violence …” Dr. Reimer also stated that Ms. Johnson’s risk for re-offending can be mediated by staying clean and sober, having a positive peer group, and engaging in adequate self-regulation strategies.

[23] Dr. Reimer noted that Ms. Johnson’s selection of peers who have shared antisocial values has contributed to her past offending behaviour. He noted that she also has difficulty engaging in more complex decision-making which, combined with her auditory processing disability and her ADHD, has contributed to her making poor

decisions in the past. He said that Ms. Johnson "continues to have limited insight into her risk factors and … tends to blame others for her choices." Further, when she engages in drug and alcohol use "her already reduced ability to make more complex decisions along with her tendency towards impulsivity elevate her risk to reoffend." Dr. Reimer opined that it will likely take 18 months to two years of regular therapy, combined with treatment for her substance abuse issues, in order for her to learn how to regulate her emotions and stabilize her personality. With implicit reference to the impact of the jail sentence Ms. Johnson is about to receive, he also stated:

> "She becomes discouraged easily and she appears to benefit from having a sense of hope. A lengthy incarceration may further entrench her resentment towards what she perceives as an unjust system. Starting at a low to medium security level and cascading downward over a few years with treatment may be a suitable strategy to provide her with a sense of success along with progression toward living in the community upon release."

[24] The criminogenic risk assessment done by the author of the PSR similarly indicates that Ms. Johnson will require "a high level of supervision" in order to avoid re-offending. He stated: "The supervision level determined to be appropriate for this client is the same as that of a group of offenders that had a 55% recidivism rate."

[25] On a more positive note, Dr. Reimer also commented that Ms. Johnson appears to have gained some maturity during her current incarceration and has a better understanding of some of the things she will need to do in order to manage her emotional world. To that end, he notes that she has already engaged in treatment, counselling and therapy while incarcerated, and has expressed an interest in continuing this when she is transferred to a federal penitentiary. He notes that Ms. Johnson has expressed a desire

to engage in programming which will help her be successful when she is released back into the community.

[26] In particular, Dr. Reimer noted that Ms. Johnson has expressed an interest in becoming involved with learning more about her native spirituality. That point is repeated in the *Gladue* Report, where it is noted: “Jessica indicated a strong desire to learn about her culture and native spirituality, to access culturally relevant treatment and to gain more education.” To that end, the author of the *Gladue* Report asks this Court to make a strong recommendation that Ms. Johnson be considered for attendance at the following residential treatment facilities: the Tsow-Tun Le Lum Substance Abuse Treatment Center in British Columbia; and the Okimaw Ohci Healing Lodge for Aboriginal women operated by Correctional Services Canada in Saskatchewan.

[27] Ms. Johnson’s participation in programming at the Whitehorse Correctional Center (“WCC”) is also emphasized in two reports from that facility dated October 28 and December 6, 2013. These reports note that, while Ms. Johnson was not required to attend programs as a remand inmate, she has nevertheless participated “in a significant amount of programming”. This has included workshops and a cooking program with the Elizabeth Fry Society, attending classes with the Yukon College WCC Campus, counselling sessions with various named counsellors, crafting sessions with Elders, participation in a parenting program, meeting with a psychologist, meeting with a pastor and attending Church services, attending a first aid course, attending a First Nations language class, completing a WHMIS course, attending AA meetings, participating in the White Bison Program, and attending a weekly art therapy program over a seven month period.

[28] Letters of support were provided by Ms. Johnson from her art therapist and her clinical counsellor from the Kwanlin Dun Health Center, Ms. Lacosse. One of the WCC reports confirms that Ms. Johnson has attended regular counselling sessions with Ms. Lacosse, who incidentally also attended court for the sentencing hearing. In her letter of support, Ms. Lacosse stated that Ms. Johnson has demonstrated several times that she is making some gains in regards to impulse control, and concluded:

> "In summary, Jessica has had some time to think about what is important to her. She recognizes that trauma and addictions have impacted her life considerably and she is taking steps to deal with some of the underlying mental health and cognitive issues that lead to substance abuse. She has identified some hopes for her future, and she is examining some of her beliefs. She is beginning to understand herself a bit more…."

[29] Another positive point that comes through in both the PSR and the psychological report is that Ms. Johnson seems genuinely remorseful and ashamed for her actions and takes responsibility for her behaviour. Indeed, this was confirmed in the written statement which Ms. Johnson read into the record at the sentencing hearing in which she apologized to each of Cpl. MacKellar, Mr. Oakley and Mr. Parent, as well as the entire community of Haines Junction. In that statement, she said: "There are no excuses for what I did on September 26, 2011, and I am deeply ashamed of my participation in those events." Ms. Johnson also indicated a willingness, in due course, to participate in any restorative justice initiatives that the victims might be interested, including the community of Haines Junction.

[30] The *Gladue* Report states that Ms. Johnson used to spend summer vacation time with an aunt and her grandparents doing traditional aboriginal activities such as camping,

hunting, harvesting berries and drying meat. Ms. Johnson also indicated that both of her grandmothers, as well as a number of her father's aunts and uncles attended residential schools. In other respects, Ms. Johnson repeated to the author of that report the same details of her traumatic and chaotic upbringing which are referred to in the PSR and the psychological report.

[31] A letter has also been filed, dated December 12, 2013, which was authored by five members of the Kluane First Nation Elders Council. That letter indicates that Ms. Johnson is a third-generation residential school survivor, as her Grandmother, D.J., attended the Lower Post Residential School in the 1950s. The letter further indicates that although Ms. Johnson left the community of Burwash Landing at a very young age, she has maintained and nurtured her contact with family members; and especially her aging Grandmother over the years. The letter indicates that the undersigned Kluane First Nation Elders would like to see a restorative justice component and a healing plan as part of this sentencing. They note that some of the British Columbia penitentiaries have a healing component to their facilities, which they sincerely hope that my sentencing would take into consideration. Finally they conclude:

> "Please let Jessica Johnson know that the Elders of Burwash Landing, Yukon Territory, support and love her very much. It is a sad day for us to see such a brilliant and promising young woman like Jessica lose so many years of her life when it has been trauma that has put her there."

[32] Not surprisingly, the *Gladue* Report also reminds this Court to take note of the systemic and background factors noted by Supreme Court of Canada in *R.* v. *Gladue*, [1999] 1 S.C.R. 688, at para. 67, where the court stated:

> "The background factors which figure prominently in the causation of crime by aboriginal offenders are by now well known. Years of dislocation and economic development have translated, for many aboriginal peoples, into low incomes, high unemployment, lack of opportunities and options, lack or irrelevance of education, substance abuse, loneliness, and community fragmentation. These and other factors contribute to a higher incidence of crime and incarceration…"

[33] In *R.* v. *Ipeelee*, 2012 SCC 13, at para. 83, the Supreme Court noted that:

> "…Systemic and background factors do not operate as an excuse or justification for the criminal conduct. Rather, they provide the necessary context to enable a judge to determine an appropriate sentence…."

[34] In Ms. Johnson's case, what have become known as the *Gladue* factors, include the following facts and assertions:

1) her parents separated when she was young;
2) she was raised mostly by a single mother in a home where alcohol and substance abuse was present, and moves between communities were frequent;
3) she was the victim of frequent physical and verbal abuse;
4) she was the victim of sexual abuse at an early age, which continued until her mid-teens;
5) she quit school in grade 8 and, until recently, has not pursued her education;
6) she resorted to alcohol and drug use at very early ages in order to cope with the trauma of her chaotic upbringing, and eventually became severely addicted to both substances;

7) she was essentially on her own at the age of 14, couch surfing with friends and family;

8) she has not had close and functional relationships with most of her immediate family;

9) she has never had full-time and steady employment, resorting instead to selling drugs for income; and

10) she acquired a criminal record as a youth, and a brief record as an adult.

[35] On this last point, Ms. Johnson's youth criminal record from 2006 and 2007 indicates six offences for breaching court orders and process. Although the original offence giving rise to that process is not on her criminal record, Ms. Johnson admitted to Dr. Reimer that her first offence was a break and enter at the age of 13. Her adult record is more limited. In 2013, there is a minor theft involving a wallet, for which she received one day in jail and a subsequent trafficking charge for which she received 10 months in jail. The latter offence occurred after the offences to which Ms. Johnson has pled guilty in this matter.

[36] The current status of Ms. Johnson's relationship with Mr. Cornell is a significant concern to this Court. She indicated to the author of the PSR that she has been in a common-law relationship with Mr. Cornell for four years, including the last two years which she has mostly spent in custody, subject to brief periods of release on bail. She is reported to have said that she loves Mr. Cornell but she is unsure what the future holds for them. She similarly indicated to Dr. Reimer that her only long-term relationship has been with Mr. Cornell and that:

> "They are still a couple and have mail contact despite a no-contact order. She stated that they plan to continue a relationship as long as she is in jail but that when she is released the relationship will likely end."

[37] The WCC reports also suggest that Ms. Johnson was likely making telephone contact with Mr. Cornell during his recent trial on the same indictment this past September, again in contravention of the no contact order.

[38] Here, I agree with Crown Counsel, who questioned why Ms. Johnson would still be involved with Mr. Cornell, when it appears that it was he who led her astray in committing the current offences. I therefore challenged Ms. Johnson to confirm in court whether the relationship was ongoing or not. Her answer was less than clear, but ended with the statement "No, I'm not in a relationship with Chris Cornell then." I certainly hope that is truly the case.

AGGRAVATING CIRCUMSTANCES

[39] I conclude that the following circumstances are aggravating:

1) Both the robbery and the shooting were violent offences. Mr. Parent's nose was broken and he suffered significant blood loss and bruising to both eyes. Further, the agreed facts suggest that both Ms. Johnson and Mr. Cornell were equal participants in the robbery. Cpl. MacKellar's injuries were more significant. He had to be medivaced first to the Whitehorse General Hospital and then to the Vancouver General Hospital, where he eventually underwent three surgeries to remove shrapnel embedded in his torso as well as metal and plastic fragments from his face and eyes.

2) The fact that both Ms. Johnson and Mr. Cornell fled from the scene of the robbery while the police were present, and continued the flight at relatively high speeds for over 30 km.

3) Ms. Johnson's criminal record.

4) Ms. Johnson's apparent disregard for authority, as evidenced by her criminal record for process offences, the WCC reports of internal disciplinary offences, and Dr. Reimer's psychological report.

5) Ms. Johnson's disregard for public safety during the police chase, by participating as a party to the shooting and, apparently, also to the throwing of various tools and other items onto the Alaska Highway in an effort to obstruct the police pursuit.

MITIGATING CIRCUMSTANCES

[40] What follows are the mitigating circumstances in this case:

1) Ms. Johnson's youthful age at the time she committed these offences, that is, she had just turned 21 years of age.

2) Ms. Johnson's role in the police chase and the shot fired at the police vehicle was limited to that of a party. It appears from what Ms. Johnson told Dr. Reimer, that she and Mr. Cornell switched places during the pursuit, such that Ms. Johnson ended up driving the SUV. In any event, Ms. Johnson did not fire the rifle shot and was unaware of any plan to do so. Nor was she aware that Cpl. MacKellar had suffered any injuries until sometime after her arrest.

3) The entry of the guilty pleas, albeit after the preliminary inquiry and on the morning of trial. Here, I accept the submission of defence counsel that it was always Ms. Johnson’s intention to “own up” to what she had done. I also note the other evidence in this sentencing that Ms. Johnson is accepting full responsibility for her actions.

4) The genuine remorse exhibited by Ms. Johnson and her apology for her actions.

5) The extent to which the *Gladue* factors I have mentioned have disadvantaged Ms. Johnson in many ways beyond her control. In that regard, I accept the suggestion by defence counsel that Ms. Johnson never really had much of a chance to make a success of her life given her upbringing, until now.

6) The fact that, apart from these offences, Ms. Johnson does not appear to have any propensity towards engaging in violent behaviour.

7) To a limited extent, the fact that Ms. Johnson was admittedly on a drug binge prior to and during the commission of these offences, and the fact that the psychological report concluded that “She is easily influenced by others”.

CASE LAW

[41] The most serious charge against Ms. Johnson, not in terms of the maximum penalty but in terms of the threat to life and limb, is the aggravated assault of Cpl. MacKellar. Neither Crown nor defence counsel were able to locate any case authorities on the aggravated assault of police officers engaged in the execution of their duties

contrary to s. 270.02 of the *Code*. That is perhaps not surprising given that the offence was enacted in 2009. In any event, counsel have resorted to authorities for related offences in order to get a more accurate sense of the appropriate range of penalty which I should be considering in this case. I note initially that defence and Crown counsel are not far apart in their respective submissions, which range from 5 to 7 years.

[42] Unfortunately, many of the cases provided by counsel were not that helpful in establishing the range, as they often involved more serious offences, such as attempted murder, coupled with additional aggravating circumstances and other charges leading to substantially long total sentences. Other cases involved relatively less serious offences than those at bar.

[43] In *R.* v. *Dick*, 2008 YKTC 6, Faulkner CJ, as he then was, noted that the range for aggravated assault "is a fairly wide one, going from something in the order of 16 months to as much as six years, depending upon the circumstances of the offence."

[44] *R.* v. *Stevenson*, [1991] Y.J. No. 122 (S.C.), is a case with some similarities to the one at bar. There, the offender wounded an RCMP sergeant during an altercation by getting a hold of another officer's revolver and shooting the sergeant in the leg. In total, the offender fired six shots and stated "I don't give a shit. I'm going to get all you guys." He also attempted to fire one shot at the sergeant's chest, but was prevented from doing so by another officer grabbing his shooting hand. The sergeant required surgery and was in the hospital for three days. After two months of vigorous therapy, he was able to return to full duties. Maddison J. held that there were no mitigating circumstances and that there was some evidence of alcohol impairment. The offender had a criminal record, but no

prior entries for violence. He was 26 years old, single, and with a grade 10 education. He had a long-standing problem with alcohol and drugs. Maddison J. sentenced him to three years on the aggravated assault and one year consecutive on the offence of using a firearm during the commission of an indictable offence contrary to s. 85 of the *Code*, for a total sentence of four years.

[45] *R.* v. *Redhead*, 2009 MBQB 314 is a case of a 21-year-old female aboriginal offender who was genuinely remorseful for the attempted murder of a police officer. As the officer entered the residence of the offender's sister in response to a complaint, Redhead lay in wait and as the officer rounded a corner she plunged a large knife into his chest area stating "I'm going to fucking kill you." The officer's safety vest saved him from serious physical injury, but had the stab wound been a few centimeters to one side, it might have been fatal. The offender claim to have no memory of the incident based on the consumption of a large amount of alcohol. She also had what the court called "an impressive record for violence" and a severe personality disorder with limited insight. She was given a jail term of 10 years, less credit for pre-sentence custody.

[46] At para. 21 of *Redhead*, Keyser J. further stated:

> "…Police officers perform a public duty in the protection of members of society. They are called upon to put their lives in danger every time they answer a call for assistance. The courts owe a duty to them in return. Deterrence and denunciation are the principal sentencing factors in any case involving the attempted murder of a police officer."

I would adopt those comments as applicable to the case at bar, albeit with the recognition that Ms. Johnson is being sentenced for aggravated assault, not attempted murder.

[47] In *R.* v. *Craig*, 2005 BCCA 484, the British Columbia Court of Appeal observed, at para. 10, that the range for aggravated assault was between 18 months and six years and that “an unprovoked attack with a weapon tends to result in the imposition of a sentence at the higher end” of that range.

[48] In *R.* v. *J.R.F.*, 2010 ONSC 5429, a 22-year-old aboriginal male pled guilty to a number of offences including assault of a police officer and evading a police officer. While subject to a conditional sentence order, he was observed ramming his vehicle into another vehicle and fleeing. When the police located the offender, he rammed the police cruiser with his vehicle three times then fled again. Like Ms. Johnson, he had a dysfunctional upbringing which involved alcohol and substance abuse. He began using drugs at the age of 13 and dropped out of school in grade 9. He had no employment skills and worked in the cigarette smuggling trade. He had both a youth court record and an adult criminal record which included convictions for assault and assault on a police officer. He was the father of two children from different relationships. The Court noted, among other things, several *Gladue* factors and imposed a global sentence of four years and two months, less credit for pre-sentence custody.

[49] In *R.* v. *Schoenhalz*, 1999 BCCA 77, the British Columbia Court of Appeal dismissed a sentence appeal from a global sentence of seven years imprisonment. The female offender, who was 19 years old at the time she committed the offences was raised in foster group homes and was exposed to violence and alcoholism throughout her life. She accompanied her boyfriend, C.N.L., in the robbery of a video store using a semi-automatic pistol. The clerk was menaced with the gun and bound and gagged with duct tape. The offender had carried the gun and the tape into the store. The couple then

escaped with the clerk's vehicle and the clerk notified the police. The offender was driving the vehicle while C.N.L. leaned out the front passenger window and fired the pistol at the following police car. The couple eluded the police and subsequently broke into a private home where they took an 8 ½ month pregnant woman hostage for approximately 60 hours. During that time, C.N.L. shot a police officer who was wearing a bulletproof vest, and was fortunately not seriously injured. The offender did not participate in that event. The offender had no prior record and was not involved in C.N.L.'s attempted murder of the police officer. She was noted to have excellent prospects for rehabilitation and was described as "a model prisoner". The trial judge would have imposed a global sentence of nine years, but reduced it to seven years after giving her credit for pre-sentence custody. As noted, the sentence appeal was dismissed.

[50] In *R.* v. *Seymour*, 2011 BCSC 1682, a male offender who was 21-years-old at the time of the offences went to trial on a number of counts including discharging a firearm with intent to endanger the life of another person, contrary to s. 244 (1) of the *Code*. He fired a restricted firearm in a residential neighbourhood in Victoria at least four times, and one or two of those shots went through the side window of an occupied automobile. Other bullets entered a nearby occupied apartment building, one narrowly missing a woman. The offender was under two weapons prohibition orders at the time. The Court noted several factors similar to those of Ms. Johnson: the offender had been involved in the drug culture and was using and selling drugs; his family was described as dysfunctional and he began living on his own at age 13; he abused drugs and alcohol; he was diagnosed with ADHD; and he was noted to express genuine remorse at the sentencing hearing. However, unlike Ms. Johnson, he had a lengthy criminal record as an

adult. Nevertheless, the Court noted that he was trying to complete his education, deal with his substance abuse problems and take a different course in his life and that, although denunciation and deterrence were prominent factors, his rehabilitation also had to be considered. A global sentence of six years in jail was imposed, less credit for pre-sentence custody.

[51] In *R.* v. *Brogan*, 1999 BCCA 278, the British Columbia Corner of Appeal, at para. 10, noted that the range for robbery with violence committed by young men such as the offender, who was 30 years of age at the time of the offence, was somewhere between two and nine years. Among the factors which the Court suggested should be considered were:

- the age of the offender;
- the offender's previous criminal experience;
- the level of violence;
- the number of offences;
- the level of premeditation;
- whether the offender was disguised;
- the type of weapon used;
- how the weapon was used;
- the possibility of rehabilitation; and
- the requirement of deterrence in a particular community.

[52] I pause here to note that although neither Ms. Johnson nor Mr. Cornell were "disguised" during the robbery in the General Store, they both were wearing jackets with their hoods up, such that Mr. Parent was unable to identify them.

ANALYSIS

[53] Of the cases provided by counsel, I find the cases of *Seymour*, *Stevenson*, *J.R.F.* and *Schoenhalz* to be the most helpful in determining a fit and appropriate amount of jail time for Ms. Johnson. Balancing the aggravating and mitigating circumstances which I have noted above, I am satisfied that the global jail term need not be any longer than five years in a federal penitentiary. Such a sentence meets the requirement under s. 718.02 of the *Code* to "give primary consideration to the objectives of denunciation and deterrence", while not being so harsh us to crush any hope of Ms. Johnson's continuing efforts towards her own rehabilitation.

[54] In particular, I impose the following sentences on the following offences:

1) for the aggravated assault on Cpl. MacKellar contrary to s. 270.02 of the *Code*, 5 years in prison;
2) for discharging a firearm with intent to prevent arrest, contrary to s. 244 of the *Code*, 4 years imprisonment, concurrent; and,
3) for the robbery contrary to s. 344(b) of the *Code*, 3 years, concurrent.

[55] The next question becomes the extent to which Ms. Johnson should be given credit for her pre-sentence custody. While she was in and out of custody before her sentencing on various bail release periods, and a portion of her time was credited to the trafficking conviction referenced earlier, counsel are agreed that the total time of pre-

sentence custody for which she could receive credit on these offences is 14 ½ months. However, they disagreed on the credit to be given. Crown says it should be no more than 1- to-1 pursuant to s. 719(3) of the *Code*, whereas defence counsel asks for 1- to- 1.5 pursuant to s. 719(3.1). As I noted briefly in my summary reasons in *R.* v. *Mulholland*, 2013 YKSC 77, I respectfully disagree with the British Columbia Court of Appeal in *R.* v. *Bradbury*, 2013 BCCA 280, as that case relates to this issue, and prefer the reasoning in *R.* v. *Carvery*, 2012 NSCA 107; *R.* v *Stonefish*, 2012 MBCA 116; *R.* v. *Summers*, 2013 ONCA 147; and *R.* v. *Johnson*, 2013 ABCA 190.

[56] The reports from WCC list the various incidents of note during each of these periods of custody. Initially, Ms. Johnson was remanded into custody following her arrest from September 27, 2011 to July 20, 2012. Over that period of time, there were 263 entries made in Ms. Johnson's progress log. Of those, 77 (or 29%) were negative in nature. They include the following types of behaviour:

- multiple occasions of possession of contraband;
- failure to comply with living unit rules;
- disrespectful behaviour towards staff, including verbally abusive and profane language;
- attempting to make contact with Mr. Cornell;
- attempting to assault a staff member;
- physical and verbal altercations with other inmates; and
- refusing direction of staff.

At one point, Ms. Johnson was made subject to a Secure Supervision Placement ("SSP"), which I understand to be a form of segregated confinement with a view to improving her behaviour. In relation to that the report states:

> "The number of positive entries compared to negative entries in Ms. Johnson's progress log increased over the course of this incarceration. As time passed Ms. Johnson was more frequently noted by Officers to be attempting to manage her behaviour. The positive entries in Ms. Johnson's progress log indicate that she spoke to Officers about wanting to be a better person and working towards being more respectful of everyone, including herself…."

[57] I have already referred to Ms. Johnson's extensive participation in programming, notwithstanding that she was not required to do so as a remand inmate. In addition, although she was similarly not required to work, she routinely worked as a cleaner in her unit during these various periods of presentence custody.

[58] During the next period of custody from October 3-17, 2012, there were 32 entries in Ms. Johnson's progress log, 14 of which were negative (or 44%). These continued to include the types of behaviours I referred to above, notably the possession of contraband.

[59] The next period of pre-sentence custody was from November 17, 2012 to May 8, 2013. During that period, she was again classified to an SSP placement, which she successfully completed. There were 335 entries in her log, of which 38 (or 11%) were negative. The entries were of the same type I have noted above, but notably this time not including possession of contraband. On the positive side, the report notes:

> "The remaining entries on Ms. Johnson's progress log describe her as being polite and respectful during

> interactions with staff and indicate that for the most part she socializes well with other inmates. One entry indicates that Ms. Johnson “seems to be learning to better manage her emotions”, and another went so far as to say that Ms. Johnson was “a pleasure to deal with… cooperative and following the rules.”

[60] The last period of pre-sentence custody described was from August 3, 2013 to date. As I understand the combined information in the two WCC reports, there were a total of 207 entries in her log (140 plus 67), of which 48 (or 23%) were negative. Again they include the same kinds of rude and disrespectful behaviour as noted above, but no incidents of possession of contraband. In addition, the final report includes:

> “The positive entries documented indicate that Ms. Johnson socializes with others in the unit, attempts to exercise self-control, completes her chores, maintains a tidy cell space and is polite and respectful.”

[61] There is no affirmative evidence before me as to the likelihood of Ms. Johnson earning her full remission if she had conducted herself as a serving prisoner in the same manner as she did while she was on remand. In *R.* v. *Vittrekwa*, 2011 YKTC 64, Cozens CJ had such evidence from Karen Goldsmith, a case manager at WCC who, by the time she testified in that case had been promoted to Manager of the Integrated Offender Management Team. At paras. 11 and 12 of the decision, Cozens CJ made the following reference to Ms. Goldsmith’s evidence:

> “[11] Ms. Goldsmith's evidence was that, from January through June 2011, out of 202 inmates serving sentences of incarceration (excluding those serving intermittent sentences), 11 failed to earn their full remission credit of 15 days for every 30 served, a total of 5.45%. Of those 11 who failed to earn full remission, "... none have had all of their possible remission denied to them. The denied remission was only for part of their possible remission, very often only

> one or two days of remission is lost by these inmates. (Affidavit, para. 5).
>
> [12] Ms. Goldsmith testified that in August 2011, out of 31 serving inmates, three failed to earn their full remission credit. For all three the cause was related to behavioural issues. One individual failed to earn five out of 15 days, another three out of 15 days, and the third two out of 15 days. Of the additional seven inmates serving intermittent sentences, all received their full remission credit. Ms. Goldsmith did not have the statistics for July 2011 with her."

I am satisfied that I can take judicial notice of this evidence.

[62] Further, according to Cozens CJ, at para. 14, Ms. Goldsmith testified that the remission an inmate can earn is determined by assessing three things: their behaviour; their participation in programming; and their participation in employment. Therefore, poor behaviour is only one aspect of the assessment as to whether any remission will be lost. In the case at bar, the evidence about Ms. Johnson's participation in programming and employment suggests that she would have received full credit towards earning remission from the assessment of those components of the analysis.

[63] I also take into account the fact that Ms. Johnson is suffering from significant psychological challenges, which to a large extent are beyond her control. As noted above, she has been diagnosed with post-traumatic stress disorder and a personality disorder with borderline antisocial features. In addition, she meets the criteria for ADHD. She was also described by Dr. Reimer as having "a very unstable personality pattern with poor self-control… and very low frustration tolerance." In that context it is perhaps not surprising that Ms. Johnson would be reported to have exhibited the type of rude and disrespectful behaviours described in the WCC reports. Further, in general terms, the

seriousness of the negative entries seem to have abated over time, corroborating the other evidence that Ms. Johnson has slowly been acquiring a better ability to understand her impulsivity and her negative behaviour. Certainly, the reported incidents of the possession of contraband are entirely absent in the last two reporting periods.

[64] Taking all the circumstances into account, while it may be likely that Ms. Johnson would have lost some remission as a result of her misbehaviour, had she acted in the same manner as a serving prisoner, I am satisfied that it would not have been a significant loss. In the result, I am prepared to credit Ms. Johnson for 12 months of her pre-sentence custody at the rate of 1-to-1.5, or 18 months. The remaining two and half months will be credited at the rate of 1-to-1, for a total credit of 20 ½ months. That would reduce the sentence remaining to be served to 39 ½ months.

[65] I further order Ms. Johnson to provide samples suitable for DNA analysis pursuant to s. 487.051(1) of the *Code*.

[66] In addition, I prohibit Ms. Johnson from possessing any firearms, ammunition or explosives for a period of 10 years pursuant to s. 109(1) of the *Code*.

[67] The Victim Fine Surcharge is waived.

[68] I further recommend to the Correctional Service of Canada that Ms. Johnson be considered for attendance at the Tsow-Tun Le Lum Substance Abuse Treatment Centre in British Columbia and the Okimaw Ohci Healing Lodge for Aboriginal women, operated by that service in Saskatchewan. Finally, keeping in mind what the Elders council has asked in terms of incorporating a healing component to this sentence, to the extent that

that can be done in a penitentiary in British Columbia, I note that in the case of *R.* v. *Boucher*, 2012 YKSC 06, Justice Veale of this Court, in dealing with that offender, noted the significance of the offender's participation in the following programs. First, the aboriginal Basic Healing Program; second, the Aboriginal Offender Substance Abuse Program; and third, which I understand takes place at the Mountain Institution in British Columbia, the New Pathways Project, which is also run by Elders at that facility. I would encourage you, Ms. Johnson, to investigate those programs to the extent that you are able to.

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Gower J.