COURT OF APPEAL OF YUKON

Citation: *R. v. Dickson*,
2015 YKCA 17

Date: 20151008
Docket: 15-YU756

Between:

Regina

Appellant

And

Gerald Patrick Dickson

Respondent

Before: The Honourable Chief Justice Bauman
The Honourable Madam Justice D. Smith
The Honourable Madam Justice Fenlon

On appeal from: An order of the Territorial Court of Yukon, dated March 23, 2015 (*R. v. Dickson*, 2015 YKTC 13, Whitehorse Docket 14-00248).

Counsel for the Appellant:	N. Sinclair
Counsel for the Respondent:	R.A. McConchie
Place and Date of Hearing:	Vancouver, British Columbia August 17, 2015
Place and Date of Judgment:	Vancouver, British Columbia October 8, 2015

Written Reasons by:
The Honourable Madam Justice Fenlon

Concurred in by:
The Honourable Chief Justice Bauman

Concurring Reasons by: (p.16, para. 39)
The Honourable Madam Justice D. Smith

Summary:

The respondent, Gerald Patrick Dickson, was convicted of assault with a weapon contrary to s. 267(a) of the Criminal Code and was sentenced to 6 1/2 months' time served plus two years of probation. The Crown appealed on the grounds that the judge erred by over-emphasizing and failing to correctly apply the principle of parity in relation to the sentence of the co-accused and by failing to give appropriate weight to the jurisprudence which establishes the range for similar offenders in similar circumstances. Held: Appeal dismissed. The judge thoroughly canvassed the differences between the two co-accused. He properly considered and carefully balanced the relevant objectives and principles of sentencing, including the Gladue factors. In doing so, his ultimate sentencing decision is entitled to deference. Concurring Reasons of Smith J.: The judge erred in his application of the parity principle but the sentence was not demonstrably unfit.

Reasons for Judgment of the Honourable Madam Justice Fenlon:

[1] The Crown applies for leave to appeal, and if leave is granted, appeals the sentence imposed on the respondent Gerald Patrick Dickson for assault with a weapon contrary to s. 267(a) of the *Criminal Code*, R.S.C. 1985, c. C-46. A judge of the territorial court of the Yukon sentenced Mr. Dickson to 6 1/2 months' time served plus two years of probation.

[2] The Crown submits the sentence is demonstrably unfit and appeals on two grounds:

> 1. The judge erred in principle by over-emphasizing and failing to correctly apply the principle of parity with the sentence received by the co-accused;
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> 2. The judge erred in failing to give appropriate weight to the jurisprudence establishing the appropriate range for similar offenders in similar circumstances.

[3] If leave to appeal is granted, the Crown applies for an order varying the sentence to a period of incarceration between 16 and 18 months, less time served, followed by two years of probation.

Circumstances of the Offence

[4] The offence occurred on May 24, 2014, in Burwash Landing in the Yukon. It involved the respondent, who was then 23, and his younger brother and co-accused, Austin Dickson, who was then 19. Both were intoxicated at the time. There were two complainants: Jonathan Carlick and Owen Miller. The judge made the following findings about the involvement of the two accused (see *R. v. Dickson*, 2015 YKTC 12):

> [29] … Mr. Carlick entered the residence to find Austin Dickson striking Mr. Miller while Gerald Dickson stood behind Austin. As Mr. Carlick reached to grab Austin, he fell to the ground, breaking the coffee table while doing so. Austin Dickson and Gerald Dickson then began to assault Mr. Carlick,

> including assaulting him with a table leg. As Mr. Carlick struggled to defend himself, the three ended up crossing the living room to the bedroom.
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> [30] I find that Gerald Dickson struck Mr. Carlick over the head with the rifle. While Mr. Carlick had stated he believed that Austin Dickson struck him with the rifle, he also stated he did not really know throughout what each of them was hitting him over the head with, and Gerald Dickson stated in his self-defence that he did strike Mr. Carlick over the head with the rifle, and I find I am satisfied that that occurred. The stock was broken in the meanwhile. Further on this, to the extent that Austin Dickson was striking Mr. Carlick over the head with the rifle, they were acting together in concert at that point. So I find that Gerald Dickson, either himself or in concert with Mr. Austin Dickson, struck Mr. Carlick on the head with a broken leg from the coffee table as well.
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> [31] I find that Mr. Miller's injuries were entirely suffered at the hands of Austin Dickson, and that there is no evidence that Gerald Dickson struck Mr. Miller.

[5] As to the effect of the assault on Mr. Carlick, the trial judge observed:

> [11] Mr. Carlick suffered five serious lacerations to his head area that required in excess of 30 sutures to repair. Some were sutured at the nursing station in Destruction Bay and the rest in Whitehorse after he had been medevaced there. Mr. Carlick was treated for his injuries at Whitehorse General Hospital and released.

Circumstances of the Offender

[6] The respondent is an Aboriginal offender. The sentencing judge reviewed the respondent's difficult family history at some length:

> [16] According to the pre-sentence report, Mr. Dickson describes his upbringing as "chaotic and dysfunctional". His parents separated when he was approximately five years of age. Mr. Dickson resided with his mother in Whitehorse, as she had full custody of him. During the summers he would reside with his father in Burwash Landing. While residing with his mother, he frequently witnessed her being physically abused by her boyfriends. He also witnessed other violence in the home. There were frequent parties in the home. At times his mother would leave the home for extended periods. She drank heavily and abused crack cocaine.
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> [17] Mr. Dickson and his younger siblings often had to fend for themselves. He would have to steal food at times as there was often no food in the home. He and his siblings were removed from the home on several occasions by Family and Children Services, only to be returned there.
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> [18] When he was 14, Mr. Dickson's mother simply walked away from the home and did not return. He and his younger brother Austin did not realize that she had left the home for good until the landlord showed up looking for rent. Mr. Dickson has seen his mother on two occasions since then and he describes their relationship as not being good. He describes his relationship

> with his father, however, as being good. His father moved to Whitehorse to care for Gerald and Austin after their mother left.
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> [19] Mr. Dickson left home at 16, however, and dropped out of school, spending his time partying and drinking. He subsequently moved to Burwash Landing, where he lived in a cabin for approximately one year. He resided with his father for a further period of time in Burwash Landing until the First Nation provided him a residence there. Mr. Dickson states that through his relationship with his father and paternal family members he has learned cultural traditions such as hunting, fishing, and trapping.
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> [20] Mr. Dickson has a Grade 9 education, dropping out in Grade 10. He stated that he was in a lot of fights at school. His mother did not care about what he was doing at school and often did not get up in the mornings to get him and his brother ready for school and often did not provide them with lunches.
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> …
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> [25] Mr. Dickson was exposed to alcohol and drugs at an early age through his mother. When working, he drank as a binge drinker in order not to miss work. He stated that he has been sober for several months at a time in response to certain events that occurred, including from November 2012 until October 2013. He stated that he began drinking heavily again when he returned to Burwash Landing in April 2014. He acknowledges that he has an addiction problem with alcohol and that he needs treatment for his addiction. Prior to the May 2014 assault, Mr. Dickson had taken steps with a First Nation's counsellor to attend a residential treatment program in British Columbia. This has been delayed pending outcome of his sentencing. It is hoped that he will access this programming in future.
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> [26] Mr. Dickson scores as having a severe level of problems related to alcohol abuse. He scores as having no problems related to drug abuse.

[7] The circumstances of the respondent included his commission of a number of offences for which he had not yet been convicted at the time he committed the assault on Mr. Carlick:

1. assault causing bodily harm to his spouse on October 22, 2013 contrary to s. 267(b) of the *Criminal Code*;

2. assault of his spouse on April 6, 2014 contrary to s. 266 of the *Criminal Code*; and

3. two counts of failure to comply with a recognizance on April 6, 2014: failing to abstain from the consumption of alcohol and being in contact with his spouse contrary to s. 145(3) of the *Criminal Code*.

The respondent pleaded guilty to these offences and to a breach of recognizance on the night of the assault on Mr. Carlick: failing to abstain from consumption of alcohol. Crown and defence made a joint submission on these offences which was accepted by the judge. In the result, he imposed the following sentences on the respondent for those offences:

a) **October 22, 2013, domestic assault causing bodily harm, s. 267(b)**

one day deemed served and a two year probation order (taking into account Mr. Dickson's partial completion of the Domestic Violence Treatment Option court process and 27 days of pre-sentence custody);

b) **April 6, 2014, domestic assault, s. 266**

90 days conditional sentence, less 5 days pre-sentence custody (at 1.5:1) = 82 days conditional sentence and a two year probation order, served consecutively;

c) **May 24, 2014, failure to comply with recognizance (abstain from possession and consumption of alcohol), s. 145(3)**

60 days conditional sentence, served consecutively;

d) **April 6, 2014, failure to comply with recognizance x 2 (abstain from possession and consumption of alcohol and no contact), s. 145(3)**

30 days served concurrently.

The respondent's net sentence for these offences was an approximate five month conditional sentence order and two years of probation.

[8] I turn now to the sentence imposed on the respondent arising out of the assault on Mr. Carlick.

The Sentence in Issue on Appeal

[9] The Crown proceeded summarily against the co-accused, Austin Dickson, who pleaded guilty to two counts of assault causing bodily harm: the assault on Mr. Miller and the subsequent assault on Mr. Carlick. The judge at an earlier hearing had accepted as appropriate a joint submission of a six-month conditional sentence in addition to 3 1/2 months' credit for pre-sentence custody (calculated at the enhanced rate of 1.5:1), followed by a one year probation order. He noted that Austin Dickson received a sentence that gave "full credit to his youth, lack of [a] prior criminal record, acceptance of responsibility, positive performance on conditions after his release from custody, and proactive steps towards rehabilitation" (para. 51). The effect of the sentence imposed on the co-accused was a custodial sentence of 9 1/2 months.

[10] With respect to the respondent, the Crown submitted that a custodial sentence of 16 to 18 months' incarceration, less time served of 6 1/2 months, followed by two years of probation, would be an appropriate sentence. In support of this position the Crown relied on the following decisions: *R. v. R.R.J,* 2012 YKTC 14; *R. v. Currie,* 2008 YKTC 23; *R. v. Johnson*, 2011 YKTC 70; and *R. v. Germaine and Moses*, 2007 YKTC 90. These cases establish a range of sentences from a six-month conditional sentence order to 18 months' incarceration for a serious assault similar to the one for which the respondent was convicted.

[11] Counsel for the respondent submitted a sentence of time served of 6 1/2 months, or a short period of additional custody would be appropriate.

[12] I note that because the Crown proceeded by indictment against the respondent, under s. 742.1(e) of the *Criminal Code,* a conditional sentence order was not an available sentencing option. Further, the respondent did not receive enhanced credit for time served. Instead, he received credit at a rate of 1:1 in accordance with section 719(3.1) of the *Code* because he was in pre-sentence custody due to a breach of release process.

[13] The pre-sentence report confirmed that the respondent "has a long-standing and fairly serious alcohol problem that needs to be addressed if he is to work towards his goal of leading a pro-social lifestyle and 'succeeding in life'". The author of the PSR also found that as result of the spousal assault convictions the respondent was now at a moderate level to reoffend violently against an intimate partner or against strangers and acquaintances. In spite of these findings however, the author of the report was of the view that the respondent would be a candidate for community disposition, stating:

> The positives in Mr. Dickson's life include his work history, his many interests and talents, his future oriented goals, his connection with his First Nation traditions, family support, specifically his father, and his motivation to make some changes in his life.

[14] The judge commented on these positive aspects of the respondent's current circumstances:

> [50] There is much that is positive in Mr. Dickson's PSR. He has a good employment record. He completed the DVTO program and was accepted back into the program. He understands his need for programming and alcohol addiction treatment and wishes to engage in it. I understand Crown counsel's submissions in regard to the less than aggressively proactive approach Mr. Dickson has taken in respect to accessing programming.

[15] The judge also noted the impact of the offence on the victim Mr. Carlick and his family:

> [31] This event was obviously very traumatic for the mothers of both Mr. Miller and Mr. Carlick. The victims and the offenders are related to each other, and this has created many difficulties. It has created what has been termed as "layers of pain" in the community. The mothers of the victims of these assaults consider it important for both Austin and Gerald Dickson to accept responsibility and move on wiser, humbler and healthier. They offer forgiveness.

[16] In his reasons for sentence, the judge addressed the application of section 718.2(e) of the *Criminal Code*:

> 718.2 A court that imposes a sentence shall also take into consideration the following principles:
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> …

> (*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.

[17] In this regard the judge noted that the respondent's maternal grandmother had attended residential school. He concluded that the "chaotic and dysfunctional" upbringing the respondent endured while living with his mother could have some connection to his mother's upbringing, which may have been impacted by his grandmother's residential school experiences (para. 48). The trial judge noted that while the respondent's background does not excuse his actions in committing the offences, it places them in context.

[18] The trial judge observed that the circumstances of the offence were very serious and could have resulted in tragic consequences, finding that the principles of denunciation and deterrence were "significant considerations" (para. 51).

[19] In addressing the culpability of the respondent, the judge noted the fundamental principle that a sentence must be proportionate to the gravity of the offence and the degree of responsibility of the offender (para. 55). He reviewed the differences between the respondent's and the co-accused's involvement in the offence and their respective backgrounds:

> [53] Gerald Dickson is, however, being sentenced for the assault against Mr. Carlick only, an assault that, while serious and potentially capable of having resulted in more severe and long-lasting impacts, and which involved weapons, did not involve a vulnerable victim whose injuries would appear to be more significant and longer-lasting both physically and emotionally, than in the case of Mr. Miller.
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> [54] I do not consider Gerald Dickson to be more morally culpable than Austin for the events that occurred that day. Gerald Dickson is not without a reasonable hope of rehabilitation. He is considered to be a good candidate for community supervision. He has a fairly solid work record and his prospects for employment are reasonable. He was actively involved in participating in alcohol and drug counselling services while in custody on remand at Whitehorse Correctional Centre ("WCC"), successfully completing the Substance Abuse Management program. He completed the For the Sake of the Children program because it was available, although he does not have any children. He actively participated in a Men's Healing Circle program in November 2014.

[20] The trial judge gave particular weight to the principle of parity, codified in s. 718.2(b) of the *Criminal Code*. That section provides that "a sentence should be similar to sentences imposed on similar offenders for similar offences committed in similar circumstances." The trial judge crafted the sentence imposed based on the following reasoning:

> [59] Taking into account all the aggravating and mitigating factors, the sentencing range for this offence committed in these circumstances, including the circumstances of Gerald Dickson, the sentence imposed upon Austin Dickson, and the interaction of this sentence with the sentences imposed for the other offences for which he is being sentenced, and the fundamental purposes and principles of sentencing set out in ss. 718 to 718.2 of the *Code* and in particular the principle of parity, I am satisfied that the appropriate sentence for the s. 267(a) offence is six-and-a-half months' time served.

[21] I turn to the first ground of appeal.

Did the sentencing judge err in principle by over-emphasizing and failing to apply properly the principle of parity in relation to the co-accused?

[22] On appeal the Crown submits that, while offenders who commit the same offence together should generally receive similar sentences, different sentencing outcomes are nonetheless justified if there are material differences between the two offenders involved*: R. v. Payne,* 2007 BCCA 541 at paras. 25-26.

[23] The Crown contends that the sentencing judge placed too much emphasis on the relationship between the sentence to be imposed on the respondent for one count of assault with a weapon and the sentence imposed on the co-accused of 9 1/2 months for two counts of assault causing bodily harm. The Crown submits this was evident in the judge's observation that if Mr. Dickson had pleaded guilty and been sentenced shortly after he committed the offence, he would have been credited with pre-sentence credit at the enhanced rate, rather than at 1:1, and would have served an effective sentence of 9 3/4 months, comparable to the sentence imposed on the co-accused.

[24] In short, the Crown argues the judge erred by applying the parity principle in a manner that would permit him to impose a comparable sentence on Mr. Dickson to

the one imposed on the co-accused. The result of this error, the Crown argues, was an actual sentence that was less stringent than that imposed on the co-accused, and that gave insufficient weight to the significant differences in their personal circumstances.

[25] In my view, the trial judge's observation at para. 57 that the respondent would have been entitled to additional credit of 3 1/4 months if he had been sentenced prior to the decision in *R. v. Chambers*, 2014 YKCA 13, is better characterized as a self-instruction on the parameters for pre-sentence credit, and recognition of the effect of timing on Mr. Dickson's sentencing.

[26] I do not view the judge's remarks as demonstrating an intention to disregard *Chambers* and attribute enhanced credit of 9 3/4 months for the 6 1/2 months' served so as to notionally give the two offenders the same sentence. To imply that reasoning into the judge's decision would be to ignore his express statements to the contrary at paras. 57 and 58:

> [57] … I cannot, however, consider this additional three-and-a-quarter months' credit for time in remand, as time served and apply this to the sentence I will impose upon Mr. Dickson.
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> [58] This additional time in actual custody as a result of the s. 524 order does not alter the duty on me to impose a sentence that falls within an appropriate range…

[27] Nor do I view the judge's parity analysis as giving insufficient weight to the differences between the co-accused. The trial judge was cognizant of the differences between the two accused. He reviewed those differences at paras. 41 through 45:

> [41] Austin Dickson had no prior criminal record. He was 20 years of age at the time of sentencing. He pled guilty to two s. 267(b) offences against Mr. Miller and Mr. Carlick. He was remorseful and had apologized for his actions. He was taking steps to address the issues that contributed to his having committed these offences. He had the support of his girlfriend and his girlfriend's parents.
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> [42] Certainly the circumstances of Gerald Dickson differ from those of Austin Dickson. Gerald is older and has a prior criminal history, although no prior convictions for offences involving violence. This said, he had committed prior acts of violence for which he is only being sentenced today.

> [43] Gerald Dickson was in violation of the terms of a recognizance he was bound by when he committed the s. 267(a) offence. Gerald Dickson did not enter a guilty plea to the s. 267(a) offence. This is not, of course, an aggravating factor. He is not entitled, however, to any reduction in sentence that would have resulted from pleading guilty to this offence. His counsel notes, however, that Mr. Dickson is remorseful about the entirety of events of that night.
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> [44] Austin Dickson surrendered himself voluntarily to the police when they came to arrest him the morning of the offence. Gerald Dickson was arrested after he had left his father's residence through the back door in an attempt to avoid being arrested. Austin Dickson, attributable at least in part to his guilty plea, has been more proactive in taking steps to address the underlying factors that contributed to his actions in assaulting Mr. Miller and Mr. Carlick. Gerald Dickson, less so. Again, Gerald Dickson's counsel notes that he took steps while in custody to avail himself of programming opportunities. She notes that it has been more difficult for him to do so while residing in Carmacks since his release from custody on December 5, 2014.
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> [45] This said, Austin Dickson was convicted of assaulting a virtually defenceless Mr. Miller as well as Mr. Carlick, while Gerald Dickson was convicted of assaulting only Mr. Carlick. Further, I do not consider Austin Dickson to be any less of a participant in the assault against Mr. Carlick than Gerald Dickson. Certainly Austin Dickson's two acts of violence that evening were more egregious than the single act of violence committed by Gerald Dickson.

[28] The trial judge concluded that even taking these differences into account, in light of the greater culpability of the co-accused and the principle of parity, a significantly harsher sentence for the respondent was not appropriate. He said at para. 46:

> [46] Considering all of these factors, I simply cannot agree with the Crown's submission that Gerald Dickson should receive a sentence between six-and-a-half and eight-and-a-half months higher than the sentence Austin Dickson received. In my view, this would offend the principle of parity. In my opinion, there are no other purposes, objectives, and principles of sentencing that come into play in a manner that would justify me departing so significantly from the sentence imposed upon Austin Dickson.

In the result, the co-accused received a six-month conditional sentence on top of credit for 3 1/2 months of pre-sentence custody and one year probation. The judge imposed a longer period of actual incarceration on the respondent of 6 1/2 months and a significantly longer term of probation of two years to reflect the respondent’s prior convictions and other circumstances.

[29] In imposing this sentence on the respondent, the trial judge acknowledged that he was imposing a sentence at the lowest end of the range for this type of offence committed by an offender with the antecedents of Mr. Dickson:

> [60] This is at the lowest end of the range for this offence committed in these circumstances by an offender with the antecedents of Mr. Dickson. Standing alone, I may have been persuaded that a longer custodial sentence should be imposed. I simply cannot, however, view the distinctions that exist in the personal circumstances of Gerald Dickson and Austin Dickson, and the distinction between the mitigation afforded Austin Dickson for his guilty pleas, a mitigation not available for Gerald Dickson, as justifying the imposition of a custodial disposition that would have the single offence committed by Gerald Dickson treated more harshly than the two offences committed by Austin Dickson arising out of the same set of circumstances. The gravity of the offences that were committed that day derive the seriousness with which they should be treated from the facts of the offences and the circumstances of the offenders themselves and not from the election that was made as to how to proceed.

[30] The trial judge was required to take parity into consideration when determining the respondent's sentence. He acknowledged that the principle of parity led him to impose a lower sentence than he might otherwise have imposed if the respondent was being sentenced alone, but he did not lose sight of the important differences between the two offenders. In my view the judge did not commit the error identified in *R. v. Rawn,* 2012 ONCA 487 of failing to appreciate such differences.

[31] In summary on this ground of appeal, in my opinion the sentencing judge did not err in overemphasizing the importance of parity between the sentences imposed on the two offenders in this case.

[32] Even if the judge had committed the error alleged by the Crown, the appellant must still establish that the error resulted in an unfit sentence: *R. v. Johnson* (1996), 112 C.C.C. (3d) 225 (B.C.C.A.) at para. 37. This leads me to the second ground of appeal and the Crown's submission that the judge imposed a sentence that was contrary to the jurisprudence on the range of sentences for similarly situated offenders who have committed similar serious assaults.

Did the Judge give insufficient weight to cases establishing the appropriate range?

[33] The Crown submits that the judge gave insufficient weight to cases involving similar offences and offenders. The Crown submits that the circumstances of this offence placed Mr. Dickson at the higher end of the range of sentences.

[34] The respondent submits that the judge weighed all of the relevant objectives and principles of sentencing and imposed a sentence that fell within the range of acceptable sentences for this offence and offender. The defence cited numerous decisions of the Yukon Territorial Court in which sentences under a year were imposed in similar circumstances. Defence counsel further relies on the comments of Justice Labelle in *R. v. Nasogaluak,* 2010 SCC 6 at para. 44, in which he stated:

> But it must be remembered that, while courts should pay heed to these ranges, they are guidelines rather than hard and fast rules. A judge can order a sentence outside that range as long as it is in accordance with the principles and objectives of sentencing. Thus, a sentence falling outside the regular range of appropriate sentences is not necessarily unfit.

[35] In *R. v. M. (C.A.)*, [1996] 1 S.C.R. 500 at para. 91, the Court observed that far from being an exact science or an inflexible predetermined procedure, sentencing is primarily a matter for the trial judge's competence and expertise. The Court further noted at para. 92:

> Sentencing is an inherently individualized process, and the search for a single appropriate sentence for a similar offender and a similar crime will frequently be a fruitless exercise of academic abstraction. As well, sentences for a particular offence should be expected to vary to some degree across various communities and regions in this country, as the "just and appropriate" mix of accepted sentencing goals will depend on the needs and current conditions of and in the particular community where the crime occurred. For these reasons, consistent with the general standard of review we articulated in *Shropshire*, I believe that a court of appeal should only intervene to minimize the disparity of sentences where the sentence imposed by the trial judge is in substantial and marked departure from the sentences customarily imposed for similar offenders committing similar crimes.
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> [Emphasis added.]

[36] The territorial judges of the Yukon are aware of the issues in their communities and are uniquely positioned to address the challenges in sentencing

Aboriginal offenders such as the respondent. The sentence imposed took into consideration the respondent's "chaotic and dysfunctional" upbringing as a child. The judge found that these circumstances were a significant contributing factor to the respondent's addiction to alcohol, which in turn has been the driving force for his offending. The judge also recognized the respondent's positive efforts to address his addiction, which led the judge to conclude that the respondent's continued presence in the community would not endanger the public, and that a further period of incarceration was unnecessary.

[37] In my view, the judge in this case properly considered and carefully balanced the relevant objectives and principles of sentencing codified in ss. 718 to 718.2 of the *Criminal Code* and identified in *R. v. Gladue,* [1999] 1 S.C.R. 688. The judge's exercise of his discretion in the weighing of these factors in imposing a sentence that falls within the broad range for these types of offences is, in my view, entitled to deference.

[38] In the result, I would grant leave to appeal but would dismiss the appeal.

"The Honourable Madam Justice Fenlon"

I AGREE:

"The Honourable Chief Justice Bauman"

Reasons for Judgment of the Honourable Madam Justice D. Smith:

[39] I have had the privilege of reading the draft reasons of my colleague Madam Justice Fenlon and agree with her proposed disposition. With respect, however, I am of the view that the judge erred in his application of the parity principle although I am not persuaded that the error resulted in an unfit sentence in the circumstances of this offence and this offender.

[40] The principle of sentencing that similarly situated offenders who commit similar offences in similar circumstances should receive similar sentences, or the parity principle, requires a consideration of the blameworthiness of the offenders, including the similarity in the mitigating and aggravating circumstances of the offences, as well as the similarity in the personal circumstances of the offenders. A disparity in either will justify different sentences.

[41] The circumstances of the offences committed by Mr. Dickson and his brother could be said to be similar in that they arose out of the same incident and involved similar aggravating assaults. The judge found that Mr. Dickson's moral culpability was no greater than that of his brother's, or was even less given there was only a single victim with his offending, however most of the mitigating circumstances present with Austin Dickson were non-existent with Mr. Dickson. Significantly, the disparity in the brothers' antecedent history was substantially different, which made the sentence imposed on Austin Dickson in crafting an appropriate sentence for Mr. Dickson, in my respectful view, of little consequence. The two offenders were not similarly situated offenders for the purpose of sentencing.

[42] Of some concern are the judge's comments at para. 60: "[t]his is at the lowest end of the range for this offence committed in these circumstances by an offender with the antecedents of Mr. Dickson. Standing alone, I may have been persuaded that a longer custodial sentence should be imposed." These comments could be seen as having given undue weight to the sentence imposed on Austin Dickson in crafting an appropriate sentence for Mr. Dickson. The jurisprudence would suggest that an offender with Mr. Dickson's antecedents, which include a number of

violations of court orders, would attract a sentence at the higher end of the range. However, the ultimate issue for this Court to determine is whether the sentence imposed on Mr. Dickson was demonstrably unfit.

[43] In *R. v. Bernier,* 2003 BCCA 134, this Court addressed the matter of ranges and concluded that "[t]hey are general guidelines, not hard and fast categories" and "do not preclude lesser or greater sentences, if the circumstances or the applicable principles in the particular case warrant" (para. 105; see also *R. v. Nasogaluak*, 2010 SCC 6 at para. 44). While acknowledging that "ranges" may be helpful in making submissions on sentencing, Madam Justice Newbury observed that their usefulness "will always be limited by the countervailing consideration that in Canada, each case must still be assessed on its own facts and that as also noted in *M. (C.A.)*, '*...* the search for a single appropriate sentence for a similar offender and a similar crime will frequently be a fruitless exercise of academic abstraction.' (para. 92)" (at para. 106).

[44] In this case, the *Gladue* factors in Mr. Dickson's background weighed heavily with the sentencing judge and rightly so. I agree with my colleague that in weighing all of the relevant principles and objectives of sentencing, it was open to the judge to impose a sentence that fell within the range of sentences for these types of offences, albeit at the lower end of the range. In these circumstances, I am unable to find that the sentence was unfit.

[45] I would add the following postscript. In my assessment, Mr. Dickson is at a crossroads in his life. The choices he makes going forward will have significant consequences on how the next stage of his life unfolds. If he continues with his criminal offending, it is likely that the sentencing objectives of specific deterrence and the need to protect society from such conduct will require a sentence of

incarceration. On the other hand, if he continues to pursue his rehabilitation efforts with respect to his addiction to alcohol, which seems to be the driving force of his offending, in the positive manner that he has done since December 2014, it may be expected that he will enjoy a full and productive life in the community.

"The Honourable Madam Justice D. Smith"