SUPREME COURT OF YUKON

Citation: *R. v. Sheepway*, 2018 YKSC 26

Date: 20180508
S.C. No. 16-01511
17-01501
Registry: Whitehorse

BETWEEN:

HER MAJESTY THE QUEEN

AND

DARRYL STEVEN SHEEPWAY

Before: Mr. Justice L.F. Gower

Appearances:

Jennifer Grandy and Leo Lane — Counsel for the Crown
Lynn MacDiarmid and Vincent Larochelle — Counsel for the Defence

REASONS FOR SENTENCING

Introduction

[1] GOWER J. (Oral) This is the sentencing of Darryl Sheepway on one count of second-degree murder, eight counts of robbery and one count of attempted robbery. I found Mr. Sheepway guilty of second degree murder following a trial in November and December 2017. The victim was Christopher Brisson. The killing occurred in the course of a crack cocaine drug transaction, which turned into a robbery by Mr. Sheepway. The offence was committed on August 28, 2015, in Whitehorse. He pled guilty to the

robberies on an earlier court date. They were committed between November 9 and 25, 2015, in Ontario.

[2] The sentence that must be imposed for second-degree murder is life imprisonment. The issue at this hearing is the number of years Mr. Sheepway must remain in prison before he is eligible to apply for parole. Under s. 745.5 of the *Criminal Code*, R.S.C. 1985, c. C-46 (the "*Code*"), that period is a minimum of 10 years and a maximum of 25 years. The Crown's position is that Mr. Sheepway should be ineligible for parole for a period of 15 years. The defence position is that the range is 10 to 15 years, but that the period of ineligibility should be limited to 10 years, because the mitigating factors substantially outweigh the aggravating factors.

[3] The Crown's position on the robberies is that there should be a global sentence of seven years on each count concurrent, with all of those offences to be concurrent with the life sentence for the murder. The defence position is that this global sentence should be five years.

Circumstances of the offences

[4] The circumstances of the second degree murder are set out in some detail in my reasons for judgment filed January 31, 2018, and cited as 2018 YKSC 4.

[5] Mr. Sheepway was addicted to crack cocaine for about three months prior to the shooting. He had been using Mr. Brisson as his cocaine supplier. Following an argument with his wife, Katherine Scheck, Mr. Sheepway no longer had any access to his credit or debit cards, nor any cash with which to purchase crack. He met briefly with Mr. Brisson at Mr. Brisson's motel room, where he persuaded Mr. Brisson to front him a $50 baggie of crack on credit. He was feeling suicidal as a result of his argument with

his wife. Mr. Sheepway originally intended to get high and then to commit suicide with a shotgun he brought along in his pickup truck. However, after consuming the $50 baggie of crack, Mr. Sheepway felt like he needed more crack in order to complete the suicide.

[6] A few minutes later, Mr. Sheepway arranged to meet again with Mr. Brisson at a remote location on the McLean Lake Road in Whitehorse, at an entrance way to a gravel pit. He planned to rob Mr. Brisson with the shotgun and to take all the crack cocaine that he had in his possession. Mr. Brisson arrived in his pickup truck and parked opposite to Mr. Sheepway, driver's window to driver's window, within arm's length of Mr. Sheepway's truck. When Mr. Sheepway pointed the shotgun towards Mr. Brisson, a struggle ensued during which the shotgun was discharged once accidentally, blowing out the passenger window of Mr. Brisson's truck. Mr. Brisson then attempted to drive forward, but could only do so for a few feet because of a metal gate blocking the entrance way to the gravel pit. Mr. Sheepway then stood up in his driver's seat, leaned out of the open driver's side window, turned around and fired two shots into the back of Mr. Brisson's truck from a distance of about six feet. The shotgun was armed with slug-type ammunition. One slug went through the rear window of Mr. Brisson's truck, through the sun visor and out the front windshield, at about the level of the rearview mirror. The other slug also went through the rear window, through the driver's side headrest, and into Mr. Brisson's back. This was the fatal shot. It is unclear which of the two shots were fired first.

[7] Mr. Brisson was able to put his truck into reverse and he accelerated across the McLean Lake Road, crashing into the bush. He was ejected from the pickup truck in the course of the crash and ended up on the ground a few feet away from the truck.

[8] While driving away, Mr. Sheepway noticed the truck in the bush and confirmed that Mr. Brisson was lying dead. He took some cocaine and also about $2,300 in cash from Mr. Brisson's pockets.

[9] Mr. Sheepway then drove to his rural home about half-an-hour south of Whitehorse. He stopped a couple of times on the drive home to smoke some of the crack he had just stolen from Mr. Brisson. Once at home, he called Ms. Scheck, changed his clothes, and arranged to meet up with her in Whitehorse.

[10] On the way into town, Mr. Sheepway returned to the location on the McLean Lake Road and picked up some spent shotgun shells from the incident. He also found another five baggies of crack cocaine lying on the ground. He loaded Mr. Brisson's body into the bed of his pickup truck and drove to the Miles Canyon Bridge parking lot. Just up the hill from the parking lot, he backed his pickup truck up to a steep slope and pushed Mr. Brisson's body out of the back of the truck. Mr. Brisson's body rolled down the hill, coming to rest against some trees.

[11] Mr. Sheepway then drove to a self-service carwash where he sprayed the blood out of the back of his pickup truck and smoked some more of Mr. Brisson's crack. He then proceeded to the Canada Games Centre, in search of his wife and daughter. Discovering she was not there, he phoned her from inside the building and learned that she was at a friend's house nearby. Before leaving the Canada Games Centre, Mr. Sheepway discarded the shotgun shell casings in a garbage bin in the parking lot.

[12] Mr. Sheepway then drove to his wife's friend's house, where he picked up their 2½ year-old daughter, drove home, made supper and put her to bed. Later that night,

Mr. Sheepway had a further confrontation with his wife about his cocaine use, but he said nothing about the homicide.

[13] Mr. Sheepway continued to use crack in the days following August 28, 2015. His wife helped him get into the Detox Centre in Whitehorse on August 30, 2015, which was also approximately the date on which the couple separated.

[14] In late October 2015, Mr. Sheepway went to Ontario and entered a residential treatment program for drugs at an institution called “Homewood”. While in Ontario, he committed several armed robberies, but was not apprehended at that time. He returned to the Yukon in March 2016.

[15] The RCMP interviewed Mr. Sheepway on April 7, 2016. He said he had bought cocaine off Mr. Brisson many times. He admitted to phoning Mr. Brisson for drugs on August 28, 2015, but said Mr. Brisson was too busy to meet and they never saw each other again.

[16] On May 28, 2016, Ms. Scheck told the RCMP that Mr. Sheepway was on the phone from Prince George, British Columbia, threatening to commit suicide. She said he also admitted he had killed Mr. Brisson. An officer went to speak with Ms. Scheck and, while he was at the house, Mr. Sheepway phoned again. The officer heard Mr. Sheepway on the speakerphone admitting to killing Mr. Brisson. The Prince George RCMP quickly found Mr. Sheepway and arrested him under the *Mental Health Act*.

[17] On May 30, 2016, Mr. Sheepway was discharged from hospital in Prince George and arrested on charges of theft and fraud committed in Whitehorse between April 15 and May 25, 2016. He was returned to the Yukon and ultimately pleaded guilty to these charges.

[18] The RCMP interviewed Mr. Sheepway at the Whitehorse Correctional Centre ("WCC") on June 25, 2016. He denied killing Mr. Brisson and again claimed that he had called Mr. Brisson on August 28, 2015, but that Mr. Brisson was not available.

[19] In July 2016, Mr. Sheepway met with Ms. Scheck at WCC and gave her a detailed description about shooting Mr. Brisson.

[20] On August 19, 2016, Mr. Sheepway was released from WCC and was immediately arrested for Mr. Brisson's murder. He gave statements to the RCMP on August 19 and 20, 2016, during which he admitted killing Mr. Brisson.

[21] On October 4, 2016, Mr. Sheepway accompanied RCMP officers to participate in a video recorded re-enactment of the events of August 28, 2015. They attended the McLean Lake Road and Miles Canyon Road areas where Mr. Sheepway described in detail the killing of Mr. Brisson.

[22] The circumstances of the robberies are that they all occurred between November 9 and 25, 2015, in and around the communities of Port Rowan and Brantford, Ontario. The robbery locations were gas stations, convenience stores and restaurants. Mr. Sheepway would commonly enter these locations with his face partially hidden by a black ski mask or balaclava. In every case he carried a black baseball bat, which he brandished as a weapon when demanding money from the tills. He ended up stealing a total of about $2,000 from the various establishments. No actual violence was used in any of the robberies. In one case where a gas station attendant refused to give him any money and advised that she was calling 911, Mr. Sheepway simply walked out of the store.

[23] Mr. Sheepway confessed to all the robberies on August 20, 2016, and soon after made arrangements for those charges to be waived from Ontario to Whitehorse for guilty pleas and sentencing.

Circumstances of the offender

[24] Mr. Sheepway turned 40 on January 8, 2018. He was born in Mississauga, Ontario and was raised in the Mississauga-Oakville area of that province.

[25] Mr. Sheepway was interviewed by two psychiatrists in preparation for the trial: Dr. S. Lohrasbe, for the defence, on August 6, 2017; and Dr. P.E. Klassen, for the Crown, on November 3, 2017. He disclosed to each of these psychiatrists a distinct level of unhappiness about his parental upbringing. However, at the sentencing hearing, he instructed his counsel to indicate that, in general, his upbringing was very good and that he appreciates the support of his parents.

[26] Mr. Sheepway has one sister, LeeAnne Sheepway, who is 10 years younger. Both of Mr. Sheepway's parents, Steven and Deborah Sheepway, as well as his sister travelled from Ontario to attend the sentencing hearing.

[27] Mr. Sheepway submitted that he also has supportive grandparents on both sides of the family.

[28] His counsel pointed to a particularly traumatic event in Mr. Sheepway's childhood, which was the death of LeeAnne's twin brother by sudden infant death syndrome, when the child was about two months old. At that time, Mr. Sheepway was about 10 years old and he vividly recalls the day that this happened. He also recalls the stress of having to monitor his little sister, in order to ensure that the same thing did not

happen to her. He believes that this event had a significant negative impact on the entire family.

[29] Mr. Sheepway began to use cannabis at age 12 or 13, and was soon typically using one to two grams per day. Cannabis use remained central to Mr. Sheepway's daily life throughout his adulthood. Dr. Lohrasbe noted that his drive to get high daily was powerful and difficult to resist. His cannabis use became an issue in his two romantic relationships, including in his marriage. He lied to both his wife and his former romantic partner about his marijuana use. He faked urine tests with his wife by using dog urine. Ms. Scheck eventually insisted that he attend at Narcotics Anonymous ("NA") and see professionals about his marijuana use. Mr. Sheepway stated to Dr. Klassen that although he did so, it was all "for show", that he had no intention of discontinuing cannabis, and that he was capable of hiding his use of the drug. He would collect sobriety chips from NA meetings while he was continuing to use marijuana. Both psychiatrists diagnosed Mr. Sheepway as being cannabis dependent.

[30] Mr. Sheepway did well academically at school, graduating from high school in 1996. He moved out of the family home at the age of 18, and went on to complete two college diplomas as a fish and wildlife technologist and a fish and wildlife technician.

[31] At age 21, Mr. Sheepway and a friend rode their bicycles from Ontario to Whitehorse. He arrived in 1999 and has made the Yukon his home until now.

[32] Mr. Sheepway has been steadily employed since his arrival in Whitehorse. He worked for about 10 years as a fish and wildlife technician in various bush camps. He then went on to take employment as a correctional officer at WCC from 2007 to 2012. Just prior to the homicide, he was employed by Canada Post as a rural mail carrier.

[33] Mr. Sheepway met his wife-to-be, Ms. Scheck, at WCC, where they were co-workers. They were married less than a year later, in August 2012, and soon had their first child, A., whom I referred to earlier in my discussion of the circumstances of the offence. The couple's second child, a son named F. was born on July 31, 2015.

[34] Mr. Sheepway became quite accomplished at raising sled dogs and skijoring, which was a pastime he kept up until the homicide.

[35] Eleven letters of reference were filed by Mr. Sheepway's counsel at the sentencing hearing. These are primarily from his sister, his parents, grandparents and various aunts, uncles and cousins. There is also one from a friend of Mr. Sheepway's in Whitehorse. They all speak in positive terms about his character and his role in the family when he was growing up in Ontario. Many also reveal the shock several of these people have experienced as a result of Mr. Sheepway's descent into crack cocaine addiction.

[36] I mentioned also in the circumstances of the offence that Mr. Sheepway was charged with offences of theft and fraud following his return to Whitehorse in about May of 2016. In particular, he pled guilty to two counts of uttering forged documents and two counts of possession of stolen property, for which he essentially received time served of 120 days. Prior to these offences, Mr. Sheepway had no criminal record.

[37] Mr. Sheepway's first use of crack cocaine was in late May or early June 2015. He soon developed a daily habit, consuming half a gram to a gram per day. Towards the end of August 2015, he was consuming 3 to 5 grams per day. After the homicide, Mr. Sheepway had various attendances at the Whitehorse Detox Centre, the Whitehorse General Hospital, a hospital in Prince George, British Columbia, and the Homewood

Centre near Oakville, Ontario, in an attempt to recover from his crack cocaine addiction. However, he continued to relapse after all of these attendances. At one point he was evicted from the program at Homewood because of such a relapse. He was allowed to re-attend after a few weeks and completed the program, but then relapsed after leaving Homewood. As I understand the evidence, Mr. Sheepway continued to use crack cocaine until he was arrested in Whitehorse in the spring of 2016 on the theft and fraud charges. He has not had an opportunity to engage in any narcotics addiction recovery programs while in pre-sentence custody. He stated at the sentencing hearing that he feels he has "hit rock bottom" as a result of the homicide and is "eagerly anticipating" enrolling in such programs when he is sent to a penitentiary down south.

[38] Mr. Sheepway apologized to Mr. Brisson's family during his statement at the sentencing hearing. He also made several expressions of remorse for what he has put the family through.

[39] However, Mr. Sheepway also said the following:

> I will always maintain the thought that this was a very tragic accident, an accident that was preventable and should never have happened.

Mr. Sheepway's counsel submitted that he feels he did not intend to kill Mr. Brisson, even though he knows that he is responsible for the death.

Victim Impact Statements

[40] Victim impact statements from Mr. Brisson's father, mother and sister were read aloud in court at the commencement of the sentencing hearing. Copies of each have also been filed as exhibits on the sentencing. I am not going to repeat what each victim said because I could not do justice by attempting to summarize their sad remarks. It is

sufficient to say that the loss of a son and a brother has been devastating to the family and that their lives have been forever changed. Mr. Sheepway also acknowledged during his statement at the sentencing hearing how much the horror of the family's experience was "brought … home" to him after hearing their statements.

Sentencing principles

[41] Having convicted Mr. Sheepway of second degree murder, I am required by s. 235(1) of the *Criminal Code* to sentence him to a term of imprisonment for life. In doing so, I must also decide the extent, if any, to which his period of parole ineligibility should be increased beyond the minimum of 10 years. Section 745(c) of the *Code* specifies that the period of parole ineligibility ranges from 10 to 25 years. In undertaking this assessment, I must also have regard to s. 745.4 of the *Code*, which requires me to consider "the character of the offender, the nature of the offence and the circumstances surrounding its commission".

[42] In the leading Supreme Court case on sentencing for second degree murder, *R. v. Shropshire* [1995] 4 S.C.R. 227, ("*Shropshire*") Iacobucci J., speaking for the Court, observed that the determination under what is now s. 745.4 is "a very fact-sensitive process" (para. 18).

[43] *Shropshire* was decided before the amendments to the *Code* to incorporate ss. 718 to 718.2. However, it is now generally accepted that all of those sections provide context to an analysis under s. 745.4, where applicable: *R. v. M.D.H*., 2005 YKSC 59, at para. 85.

[44] Thus, in determining the appropriate parole ineligibility, I must have regard to the sentencing principles in s. 718, which require that just sanctions be imposed that have one or more of the following objectives:

a) to denounce unlawful conduct;

b) to deter the offender and others 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 acknowledgement of the harm done to victims and to the community.

[45] I must also consider the "fundamental" principle in s. 718.1 that a sentence should be proportionate to the gravity of the offence and the degree of responsibility of the offender.

[46] Section 718.2(a) provides that a sentence should be increased or reduced to account for any relevant aggravating or mitigating circumstances relating to the offence or the offender, and sets out a non-exhaustive list of six factors which are deemed to be aggravating. None of those are applicable to the case at bar. Of the remaining subparagraphs, it seems to me that the only two which are potentially applicable are:

> (b) a sentence should be similar to the sentences imposed on similar offenders for similar offences committed in similar circumstances; and
>
> (c) an offender should not be deprived of liberty, if less restrictive sanctions may be appropriate in the circumstances

[47] In *Shropshire*, the Supreme Court recognized that parole ineligibility is part of the "punishment" for second-degree murder and thereby forms an important element of sentencing policy. Further, *Shropshire* says that courts must be concerned with observing the importance of crime prevention, deterrence, retribution and rehabilitation in undertaking the assessment under what is now s. 745.4 of the Code (para. 23). In determining whether to increase the period of parole ineligibility from the minimum of 10 years, the Supreme Court made it clear that "unusual circumstances, such as brutality, torture or a bad criminal record", are not required (para. 33). Nor is there any burden on the Crown to demonstrate that the period should be more than the minimum (para. 33). The standard set in s. 745.4 was described by the Court as follows:

> 27 In my opinion, a more appropriate standard, which would better reflect the intentions of Parliament, can be stated in this manner: as a general rule, the period of parole ineligibility shall be for 10 years, but this can be ousted by a determination of the trial judge that, according to the criteria enumerated in s. 744 [now 745.4], the offender should wait a longer period before having his suitability to be released into the general public assessed. To this end, an extension of the period of parole ineligibility would not be "unusual", although it may well be that, in the median number of cases, a period of 10 years might still be awarded.

Finally, the Court stated that the power to extend the period of parole ineligibility "need not be sparingly used" (para. 31).

Comparator cases

[48] Counsel have referred me to a number of cases as potential comparators for the case at bar. However, sentencing is a highly individualized process and the facts and circumstances between murders and offenders vary greatly. Accordingly, I am not going

to refer to every case which has been filed, as some are obviously distinguishable and others are less helpful for comparison purposes.

[49] *R. v. M.D.H.*, cited above:

- guilty plea to second degree murder;
- 23-year-old offender, married with one child;
- history of drug and alcohol abuse;
- offender stabbed the victim repeatedly then drove over his body with a van;
- offender was high risk and had a criminal record of 12 offences, including two convictions for violence;
- offender expressed qualified remorse, but also attempted to minimize his responsibility for the victim's death;
- letters of reference portrayed the offender as a good father, a good husband and a hard and reliable worker
- offender cooperated to some extent with the police during their investigation; and
- 13-year period of parole ineligibility.

[50] *R. v. White*, 2011 BCCA 328:

- offender brandished a handgun during a dispute outside a nightclub;
- grappling and wrestling involved;
- offender shot the victim while seated on the pavement and posing no immediate threat;

- mitigating factors included lack of a prior criminal record, supportive family and genuine remorse;
- Court of Appeal noted the importance of deterring and denouncing the use of firearms; and
- Court held that the period of 16 years of parole ineligibility was not demonstrably unfit.

[51] *R. v. Bell*, 2013 BCCA 463 ("*Bell*"):

- offender was present at his drug dealer's home when the dealer's wholesaler arrived;
- offender shot the wholesaler, killing him, and then stole cash and drugs and fled;
- offender later carjacked a vehicle;
- offender was on parole at the time of the murder;
- offender had a supportive family and was the father of a young daughter;
- offender had prior convictions for drug offences and his rehabilitative prospects were described as "thin";
- trial judge described the murder as a cold-blooded killing, done randomly and impulsively, and she considered the offender to be a serious danger to the public; and
- Court of Appeal upheld a 15-year period of parole ineligibility.

[52] *R. v. Overall*, 2009 BCSC 1864:

- offender got into an altercation with the victim after refusing to help him with a cocaine debt;

- offender struck the victim about 30 times on the head with a baseball bat, killing him;
- offender then wrapped victim's body in plastic, and later buried the body in his back yard and covered the grave with plywood and a dog house;
- offender had a dated criminal record and no history of violence;
- offender showed some remorse, but did not accept full responsibility for his conduct;
- trial judge held that offender's conduct after the murder demonstrated a callous disregard for the deceased and his family, which was a significant aggravating factor; and
- trial judge imposed a period of parole ineligibility of 15 years.

[53] *R. v. Paterson*, 2001 BCCA 11:

- the offender was 32 years old;
- he murdered the victim at the house of the victim's parents;
- the offender and the victim had been in a romantic relationship a little more than two years earlier;
- the offence was described by the Court of Appeal as not being sudden or impulsive;
- the offender purchased a bat and obtained a rope and then secretly entered the residence where the crime occurred and waited for the victim to arrive;
- the death occurred with great violence and much pooling of blood; and

- Court of Appeal declined to vary the period of parole ineligibility imposed by the trial judge of 14 years.

[54] *R. v. Benham*, 2009 BCSC 1863:

- offender strangled his recently estranged domestic partner in her home;
- offender was 39 years old and had left home at the age of 19;
- offender had several letters of reference describing him in positive terms:
- the offender had no criminal record;
- offender had demonstrated no remorse; and
- trial judge imposed a period of parole ineligibility of 12 years.

[55] *R. v. Bhandher*, 2010 BCSC 1812:

- offender was 30 years old at the time of the killing;
- he was under the influence of alcohol and cocaine throughout the course of the day;
- following an exchange of insults with some individuals outside a restaurant, the offender armed himself with a loaded handgun and proceeded to the victim's residence;
- when the victim armed himself with a sword, the offender shot him six times; however, the first two shots were not fatal, following which the victim turned and fled;
- two fatal shots were fired into the victim's back as he was running away;
- offender had a supportive family and wife, as well as a three-year-old son;
- although he had been a drug user, trafficker and smuggler, he only had one unrelated criminal conviction;

- the offender had expressed an interest in speaking with youth in his community about the dangers of gun use and violence;
- the trial judge accepted that the offender was genuinely remorseful and had good prospects for rehabilitation; and
- trial judge imposed a 10-year period of parole ineligibility.

[56] *R. v. Cook*, 2008 BCSC 1808:

- guilty plea to second degree murder;
- offender and victim were both crack cocaine addicts residing in a crack house;
- offender cut victim's throat, carved a tattoo from her upper arm, and cut hair from her head;
- circumstances were described as "horrific";
- offender was 26 at the time of sentencing;
- he had graduated high school and had a good work record until 2006, when he became a user of crack cocaine and an addict;
- prior to that time, he had no criminal record and appeared to be a young man with prospects;
- he expressed a genuine remorse;
- he provided 10 letters of character reference speaking to the out-of-character nature of his conduct; and
- trial judge imposed a period of parole ineligibility of 10 years.

[57] *R. v. Chretien*, [2009] O.J. No. 2578 (S.C.):

- offender and accomplice had been using crack cocaine over the day and evening;
- victim was a drug dealer;
- later that night, offender and accomplice broke into the residence of the victim, who was asleep on the floor;
- offender hit victim in the head with a heavy Maglite flashlight two or three times, killing him;
- offender was 36 years old and had a lengthy criminal record;
- trial judge accepted that the killing was a spontaneous act and that offender was intoxicated from crack cocaine;
- trial judge accepted that offender expressed sincere remorse;
- offender known to be helpful to others in the community; and
- trial judge imposed a period of parole ineligibility of 12 years.

[58] *R. v. Reierson*, 2007 BCSC 541:

- 49-year-old offender;
- offender and girlfriend living in crack house with victim dealer;
- offender and girlfriend on three day crack cocaine and alcohol binge;
- dispute between dealer and girlfriend angered offender;
- offender obtained shotgun and shot dealer twice, including once in in the face;
- girlfriend talked offender out of shooting himself;

- offender and girlfriend stole dealer's car and began a weeklong drug and alcohol fuelled trip across British Columbia, including breaking and entering and car theft;
- offender had three children plus three stepchildren;
- offender had previously been a successful logger and businessman;
- he began drinking at age 8 and started to use drugs at age 13;
- he had been in rehab a number of times because of his addictions, but never successfully overcame those addictions;
- offender had a number of character references which described him in positive terms;
- offender had dated and unrelated criminal record and no history of violence;
- no indication of future dangerousness;
- trial judge determined crime was out of character and offender had good prospects for rehabilitation; and
- trial judge imposed a period of parole ineligibility of 10 years.

[59] *R. v. Yliruusi*, 2011 BCSC 268:

- offender was 32 years old at the time of sentencing;
- offender had extensive criminal record, beginning when he was 17;
- offender killed the victim by stabbing him in his apartment;
- only one stab wound inflicted;
- offender had consumed alcohol and drugs before the incident;
- offender had a long-standing drug addiction and victim was his supplier;

- offender called victim to arrange a meeting at his apartment to buy some drugs, but lied about having money;
- offender and victim engaged in a struggle in the apartment before the stabbing;
- offender had supportive mother and sister;
- trial judge accepted that offender was remorseful;
- trial judge described the murder as “a very clumsy and foolish plan” to rob the victim at knife point;
- Crown was seeking parole ineligibility for 12 years; and
- trial judge imposed a period of parole ineligibility of 10 years.

The robberies

[60] Counsel are agreed that the range of sentence for these offences is somewhere between two and nine years, which of course is very broad. That is based on the following cases, which I have reviewed:

- *R. v. Boyle*, [1985] O.J. No. 33 (C.A.);
- *R. v. Osman*, 2016 ONCA 64;
- *R. v. Hayes,* 2016 ONCA 47;
- *R. v. Paul,* 2016 NSSC 125;
- *R. v. Lewis,* 2009 ONCA 792;
- *R. v. McQuade,* 2009 ONCA 22;
- *R. v. W.T.K.,* 2012 ONCJ 228;
- *R. v. Wozney,* 2010 MBCA 115;
- *R. v. Arbuthnot,* 2009 MBCA 106; and

- *R. v. Furness,* 2007 BCCA 492.

[61] There is no dispute that the primary factor to be considered in imposing sentences for these offences is specific and general deterrence. As well, the court must emphasize the need for protection of the public. This applies to the storeowners who are particularly vulnerable, working long hours, often alone, with money on the premises and allowing strangers to enter their places of business. However, it also applies to members of the public attending such premises, as well as the police who are called upon to investigate and apprehend the perpetrators.

[62] As I noted earlier, the parties differ in that Crown counsel seeks a global sentence of seven years concurrent for all of these offences, whereas defence counsel seeks a global sentence of five years. Further, Crown counsel urges me to take these offences into account in assessing "the character of the offender" under s. 745.4 of the *Code,* because it relates to an assessment of Mr. Sheepway's future dangerousness. Defence counsel cautions against using the robberies to justify an increase in the period of parole ineligibility because: (1) they were committed while Mr. Sheepway was still struggling with his crack cocaine addiction, and are not necessarily a reflection of his bad character; (2) there is a risk of double punishment; and (3) as a matter of policy, there would be a disincentive for those charged with murder to plead guilty to other charges and be sentenced at the same time, because of the risk that the period of parole ineligibility would be increased.

[63] Of course, a sentence which is imposed globally for the robberies must be concurrent with the life sentence because of the established legal principle that it is

impossible to serve a sentence that is consecutive to a life sentence: *R. v. Cochrane* (1994), 42 B.C.A.C. 315, at para. 1.

[64] I agree with the Crown that in certain circumstances, post-offence conduct can logically be considered as an indicator of future dangerousness (e.g. *Bell*, cited above, at para. 22). However, largely for the reasons argued by the defence, I am declining to do so in this case. Firstly, it is relatively clear that the robberies were all committed while Mr. Sheepway continued to be in the throes of his crack cocaine addiction and the relatively small amount of cash that he was able to obtain was no doubt used to feed that addiction. It is also significant that, although violence was threatened, no physical force was used. If Mr. Sheepway is successful in recovering from this addiction, then the risk of his future dangerousness will be mitigated. Second, the robberies were committed in fairly quick succession, in what can be described as a “spree”, which makes them less aggravating than they otherwise might be. Third, Mr. Sheepway quickly confessed to all of the robberies almost immediately after his arrest for the murder and made prompt arrangements for the charges to be waived to the Yukon for early guilty pleas. Lastly, I am concerned about the risk of double punishment and the potential for disincentive to other offenders to dispose of collateral charges at the same time as a murder charge, if there is a significant risk that the period of parole ineligibility may be increased if those collateral offences are considered to be an aggravating circumstance.

[65] I have also had regard here to the victim impact statement of Trevor Collins, which was read aloud in court by Crown counsel.

[66] In the result, I am satisfied that a fit sentence for these robberies is one of five years globally. That sentence will apply to each offence. The sentences will be concurrent to each other and concurrent to the life sentence for the murder. In addition, I order that Mr. Sheepway be prohibited from possessing any firearm, ammunition or explosive substance for a period of 10 years, pursuant to s. 109(2)(a)(ii) of the *Code*, and that he be prohibited from possessing any prohibited firearm, restricted firearm, prohibited weapon, prohibited device or prohibited ammunition for life, pursuant to s. 109(2)(b). Lastly, Mr. Sheepway is required to provide a DNA sample pursuant to s. 487.051 of the *Code.*

Conditions of pre-sentence custody

[67] Mr. Sheepway testified at the sentencing hearing about the difficult conditions of his pre-sentence custody. His evidence was that he was originally housed in a segregated unit for about two weeks after his transfer to WCC on August 20, 2016. He did not recall whether he was allowed any time out of his cell, but he had no contact with any other inmates for that time. He said he was then transferred to the secure living unit ("SLU"), but was not informed of the reason for the transfer to that unit. Mr. Sheepway testified that he was in his cell for about 22 hours each day for the first eight months in the SLU. He said that he was never offered any programming and that he had nothing to do each day except watch TV. For the following period of about 10 months, Mr. Sheepway said that he was allowed to be out of his cell for 3 to 6 hours per day. While in both the segregated unit and the SLU, Mr. Sheepway had limited opportunity for contact with other inmates. He said that he filed numerous complaints requesting reasons for the manner of his incarceration, which largely went unanswered,

until his counsel filed a petition in this court. After that, he testified that his custodial conditions changed almost immediately and he has more recently been allowed unlocked contact with other inmates previously deemed compatible.

[68] Mr. Sheepway also filed a report from Dr. Lohrasbe dated March 15, 2018, which discusses how these difficult pre-sentence custody conditions have had an impact upon Mr. Sheepway's mental health. In his interview with Dr. Lohrasbe, Mr. Sheepway noted in particular the disturbing behaviour of a fellow inmate who apparently had mental health issues and was frequently yelling and banging on his cell. Mr. Sheepway said that this caused him to experience panic attacks and feelings of intolerable agitation. During the interview with Dr. Lohrasbe, he presented as anxious, morose and distressed. While Dr. Lohrasbe noted that Mr. Sheepway currently suffers from anxiety, depression, despair and suicidal thoughts, he acknowledged that those symptoms predated his incarceration. However, what Dr. Lohrasbe discovered as new and specific to his current placement were the particular manifestations of reactive anxiety, with features of panic attacks and PTSD, which he endured during the screaming and banging of his agitated fellow inmate.

[69] As I understood him, defence counsel conceded that I cannot take the quantity of pre-sentence custody into account as a mitigating or crediting factor in determining parole ineligibility. However, he nevertheless urged me to take the conditions of the pre-sentence custody into account as a qualitative factor which, in this case, should be viewed as mitigating. Counsel pointed to various cases where this was done, as well as cases dealing with strict pre-sentence bail conditions, which he argued are applicable

by analogy, even though none of them involved life sentences for second degree murder.

[70] In *R. v. D.W.*, 2017 ONSC 255, the court treated as a mitigating factor the offender's conditions of pre-trial custody, which included multiple days of lockdown, triple bunking and a lack of proper dental care (paras. 85 and 92). In *R. v. Fournel*, 2014 ONCA 305, the Court of Appeal observed, with approval, that the trial judge properly treated as mitigating the restrictiveness of the offender's bail conditions and the stigma of his being a former police officer while in prison. In the case at bar, the implicit argument is that the same should apply to Mr. Sheepway as a former correctional officer. In *R. v. Downes* (2006), 79 O.R. (3d) 321, the Ontario Court of Appeal again acknowledged that time spent on stringent pre-sentence bail conditions, especially house arrest, is a relevant mitigating factor (para. 37).

[71] In *R. v. Bland*, 2016 YKSC 61, a case which I decided, I referred to the decision of Paciocco J. (as he then was) in *R. v. Pham*, 2013 ONCJ 635. After considering the Supreme Court decision in *R. v. Wust*, 2000 SCC 18, Paciocco J. made a brief reference to the general principles of sentencing as well as "general principles of sentencing that have not been legislated". At paragraph 12 of *Bland,* I quoted the following before continuing:

> … *R. v. Wust*, [2000] 1 S.C.R. 455 provides an example of harmonious construction. There the Supreme Court of Canada held that because of the need to read the provisions of the Criminal Code of Canada harmoniously with other sections, the time served in pretrial custody can be credited even where the Criminal Code of Canada appears to require sentencing judges to impose minimum sentences of incarceration at the time of sentencing. While the Wust decision turned specifically on the statutory authority

> provided to judges in section 719(3) to give credit for "time spent in custody," the same result is required in the case of driving prohibitions, in my view, after consulting the more general sentencing provisions as well as general principles of sentencing that have not been legislated. [emphasis already added]
>
> 13 The respondent's counsel submitted that the "general sentencing provisions" Paciocco J was referring to above are likely those in sections 718 through 718.[2] of the Code, and that the "general principles of sentencing that have not been legislated" are likely the principles of equity, rationality, fairness, justice and common sense regularly employed as a matter of common law. I agree with this analysis. (my emphasis)

[72] In *R. v. Hawkins*, 2011 NSCA 7, the Nova Scotia Court of appeal similarly stated that the three factors in s. 745.4 of the *Criminal Code* (the character of the offender, the nature of the offence, and the circumstances surrounding its commission) “are not to be narrowly construed” (para. 16)

[73] I note that s. 718.2(a) begins with the preamble:

> A court that imposes a sentence shall also take into consideration the following principles:
>
> (a) a sentence should be increased or reduced to account for any relevant aggravating or mitigating circumstances relating to the offence or the offender, and, without limiting the generality of the foregoing, (my emphasis)
>
> [the provision then goes on to list the six specifically enumerated aggravating factors I mentioned earlier, which are not at play in the case at bar]

[74] Thus, it seems at least arguable that mitigating circumstances relating to the offender are to be generally construed and must be taken into account by the sentencing judge: see also *R. v. Doyle*, 2015 ONCJ 492, at para. 41. It also seems arguable that these could include harsh conditions of pre-sentence custody.

[75] However, the weight of the appellate authority seems to run against this argument. Four Courts of Appeal have stated on several occasions, that not only is the duration of pre-sentence custody not to be considered under s. 745.4, but neither are the conditions of that pre-sentence custody. Nor are strict conditions of pre-sentence bail.

[76] In *R. v. Tsyganov*, 1998 NSCA 227, the Nova Scotia Court of Appeal commented on s. 745.4 of the *Code* as follows:

> 17 Where an offender has been convicted of second-degree murder, the trial judge has a discretion to fix the period of parole ineligibility anywhere between 10 and 25 years by applying the criteria set forth in s. 745.4 of the *Code.* There is nothing in s. 745.4 which expressly confers on a sentencing judge a discretion to take presentence custody into consideration. (my emphasis)

[77] *Tsyganov* was cited with approval by the Alberta Court of Appeal in *R. v. Stephen,* 1999 ABCA 190, where the Court also said:

> 5 Moreover, I note that the *Code* mandates a life sentence for second-degree murder. The sole issue for the discretion of the sentencing judge is the period of parole ineligibility, a matter that is guided by the application of the criteria set forth in s. 745.4. There is nothing in that section which speaks of taking pre-trial custody into account. … (my emphasis)

[78] In *R. v. Kitaitchik* (2002), 161 O.A.C. 169, the Ontario Court of Appeal was dealing with an offender who was convicted of second-degree murder and sentenced to life imprisonment without eligibility for parole for 10 years. He appealed and a new trial was ordered. On his re-trial, he was again convicted of second-degree murder and sentenced to life imprisonment without eligibility for parole for 12 years. He appealed once more and his appeal was dismissed. The important passage from the case is the

Court of Appeal's criticism of the first trial judge's sentencing and the fact that she gave considerable weight to the difficult nature of some of the appellant's pre-trial custody:

> 54 In sentencing the appellant at his first trial, German J. gave considerable weight to the length of time the appellant spent in pre-trial custody and the difficult nature of some of that pre-trial custody. Since the period of parole ineligibility runs from the date that an accused is incarcerated on a murder charge, the length of pre-trial custody is irrelevant to the determination of the appropriate period of parole ineligibility. The sentence imposed by German J. was tainted by her failure to recognize that fact.

[79] In *R. v. Toor*, 2005 BCCA 333, Ryan J.A., speaking for the British Columbia Court of Appeal, said that "parole ineligibility should be based solely on the statutory provisions of s. 745.4", and that "time spent out of custody, no matter how strict the conditions" was not a proper factor for consideration (paras. 12 and 13). If that is the case for pre-sentence bail conditions, then by analogy the same principle should apply to pre-sentence custody.

[80] It is important to note that the British Columbia Court of Appeal is a very persuasive authority in this jurisdiction, since the Court of Appeal of Yukon is principally composed of the members of that Court.

[81] In *R. v. Toews*, 2015 ABCA 167, the Alberta Court of Appeal briefly touched on the issue of sentencing for second-degree murder, stating:

> 2 In some circumstances, a sentencing judge has discretion to grant enhanced credit for pre-trial custody in determining the sentence to be imposed: *Criminal Code*, RSC 1985, c C-46, s 719(3.1). However, that discretion has no application to the life sentence for second degree murder, which is statutorily prescribed: s 745(c). Section 719(3.1) applies to sentences, not to parole eligibility.
>
> …

> 4 ... These conclusions are consistent with decisions of this Court and other appellate courts: *R v Stephen*, 1999 ABCA 190; *R v Tsyganov*, 1998 NSCA 227; *R v Kitaitchik* (2002), 161 OAC 169 (CA).

[82] A few months later, Picard J.A., speaking for the majority of the Alberta Court of Appeal in *R. v. Ryan*, 2015 ABCA 286, stated:

> 23 The law on this issue is now settled in this province. This Court has ruled that pre-sentence custody is not deductible under s 719(3.1) of the *Code* (on any calculation ratio) from the period of parole ineligibility: see *R v Toews*, 2015 ABCA 167, [2015] A.J. No 538 (QL). That is because Parliament has provided that the entire time spent in custody since arrest is counted by the corrections authorities as part of the ineligibility period imposed after trial: s 746(a) of the *Code*; see also *R v White*, 2011 BCCA 328 at para 13, 309 BCAC 37; *R v Stephen*, 1999 ABCA 190 at para 5, 73 Alta LR (3d) 205; *R v Tsyganov (S.)* (1998), 172 NSR (2d) 43 at para 21 (CA). …
>
> …
>
> 27 The trial judge's error in principle in crediting Ryan for his pre-sentence custody had a profound impact on the disposition made here. … (my emphasis)

However, more to the point, Wakeling J.A., delivering a separate concurring judgment, specifically referred to the conditions of pre-sentence custody as follows:

> 206 The amount of time an offender has spent in pre-sentence custody or the conditions that he or she experienced in pre-sentence custody are not factors listed in s. 745.4 or related to the purposes, objectives and principles of sentencing. It follows that a sentencing judge may not take this into account when considering the duration of an offender's parole ineligibility. (my emphasis)

[83] Most recently, to my knowledge, the British Columbia Court of Appeal commented definitively upon this issue in *R. v. Johnston*, 2016 BCCA 413, where the court stated:

> 14 The respondent argues that to import s. 719(3) considerations into parole ineligibility would be contrary to *Shropshire*, and I agree. Conditions of pre-sentence custody do not fit within the criteria set out in s. 745.4. (my emphasis)

Sentence for the murder

[84] I will now turn to a consideration of the mitigating and aggravating circumstances, to the extent that they relate to "the character of the offender, the nature of the offence and the circumstances surrounding its commission", as set out in s. 745.4 of the *Criminal Code.*

Mitigating circumstances

[85] The mitigating circumstances are as follows.

[86] The murder and the robberies were out of character for Mr. Sheepway. His history prior to his crack cocaine addiction was entirely non-violent. He had no criminal record prior to the forged document and stolen property charges he pled guilty to in Whitehorse on August 19, 2016. Further, the letters of reference and his history as recounted to the two psychiatrists indicate that he was a generally law-abiding and contributing member of society until he succumbed to the crack cocaine. The one exception here was his duplicitous use of marijuana and his dishonesty in that regard with his two former intimate partners.

[87] It is also mitigating that Mr. Sheepway cooperated with the RCMP in undertaking the re-enactment of the murder on October 4, 2016. Had he not done so, many of the details surrounding Mr. Brisson's death would remain unknown.

[88] Along the same lines, it is further mitigating that Mr. Sheepway agreed to many of the facts put forward at the trial, which saved considerable time and resources.

[89] I also view the fact that Mr. Sheepway has a large and supportive extended family as a mitigating factor. That will no doubt be a great asset to him in his attempts to pursue his recovery from addiction and his eventual rehabilitation and reintegration into society.

[90] Mr. Sheepway's remorse and his apology to Mr. Brisson's family is also mitigating. However, I find that this remorse is somewhat qualified by Mr. Sheepway's repeated insistence that Mr. Brisson's death was an accident.

[91] I am troubled by these statements because, as I clearly stated in my reasons for judgment, at paras. 177 through 181, this fatal shooting was no accident. When Mr. Brisson attempted to go forward with his truck, Mr. Sheepway stood up in his driver's seat, turned around and fired two 12-gauge slugs into the back of Mr. Brisson's truck. Both shots were on the driver's side, with Mr. Brisson seated in the driver's seat. Further, Mr. Sheepway admitted to being proficient with the shotgun. On that basis, I concluded that he meant to cause Mr. Brisson bodily harm that he knew was likely to cause his death and was reckless whether death ensued or not. And yet, Mr. Sheepway continues to evade and minimize his responsibility for that conduct.

[92] Defence counsel submitted that it is mitigating that Mr. Sheepway's prospects for rehabilitation are quite good and that there is no indication of future dangerousness, because of his willingness to get addiction treatment. In my view, this is pure speculation. It is true that Mr. Sheepway has publicly acknowledged his willingness and intention to seek treatment and counselling through his oral statement to this Court at the sentencing hearing. However, there was a good deal of evidence at the trial, particularly through the two psychiatrists, that, as an untreated addict, Mr. Sheepway's

thoughts, fantasies and dreams continue to be dominated by his cravings for crack. He was also duplicitous about his marijuana use with his two former intimate partners. Indeed, he admitted to Dr. Klassen that he will continue to use cannabis again, as soon as he can whether he is in custody or out. Thus, even if he seeks treatment for his crack cocaine addiction, it remains unclear to what extent his continued marijuana usage will pose a risk to his ability to recover from the crack addiction. It was also troubling that Mr. Sheepway candidly acknowledged during his testimony in the trial that he looks forward to going to a federal penitentiary where drugs are available.

[93] Of course, all of these negative aspects are symptoms of Mr. Sheepway's drug addiction, which is more in the nature of a disease than a chosen path. Therefore, I do not fault him for his current status and his statements relating to his addiction. However, I do not credit him for the fact that he is addicted either. Nor am I persuaded that his prospects for rehabilitation are good. We simply do not know at this stage.

[94] I prefer to look at Mr. Sheepway's drug addiction as a neutral factor in this sentencing. To the extent that Mr. Sheepway is willing and able to pursue recovery, and I truly hope that he is sincere in that regard, that is a matter for the parole authorities to examine in the future.

Aggravating circumstances

[95] I view the following facts and circumstances as aggravating in this case.

[96] Although the plan to rob Mr. Brisson of drugs at gunpoint was only formulated shortly before its occurrence, there nevertheless was a degree of premeditation and planning to the event. This separates Mr. Sheepway's case from many others where the killings occurred in the midst of a relatively spontaneous struggle or argument.

[97] In the same vein, it is aggravating that Mr. Sheepway employed a loaded firearm in attempting to rob Mr. Brisson. That is particularly deserving of deterrence and denunciation: *R v. White*, cited above, at para. 14. Mr. Sheepway has stated repeatedly that he did not expect resistance from Mr. Brisson. However, any time a loaded firearm is used for unlawful purposes, one must objectively foresee the risk of things going sideways and bodily harm being caused.

[98] It is further aggravating that Mr. Sheepway fired at Mr. Brisson while he was attempting to retreat from the robbery, while apparently unarmed.

[99] In terms of the circumstances surrounding the offence, it is aggravating that Mr. Sheepway stole drugs and cash from Mr. Brisson's person after the shooting, while he was lying dead on the ground.

[100] It is also aggravating that Mr. Sheepway attempted to cover up the shooting by retrieving and disposing of the shotgun shells.

[101] More importantly, Mr. Sheepway's callous disposal of Mr. Brisson's body was also an attempt to cover up the murder and is a significant aggravating factor which caused unusual hardship for Mr. Brisson's family. Mr. Sheepway had no idea how or when the body would be located when he dumped Mr. Brisson's body out of the back of his pickup truck and let it roll down the hill into the bush near Miles Canyon. It was only by chance that the body was discovered about four days later by a mushroom picker. Had that not occurred, the body may well have begun to decompose or become scavenged by wild animals. I note this factor was expressly dealt with by the Alberta Court of Appeal in *R. v. Ryan*, cited above, where the Court stated:

> 26 … Disposal of a body in order to deflect investigation or as indicative of a callous attitude has been held to justify an

> increase in parole ineligibility: see eg *R v Hansen* (1989), 96 AR 276 (CA); *R v Faid* (1984), 52 AR 338 at paras 4, 6 (CA); *R v Peterffy*, 2001 BCCA 698, 162 BCAC 24; *R v Evans*, 2004 BCCA 318, 197 BCAC 52; *R v Wristen* (1999), 141 CCC (3d) 1 at para 73 (Ont CA); *McLeod*, *supra*.

[102] Defence counsel repeatedly submitted at the sentencing hearing that the acknowledged aggravating circumstances have been overridden by the significant mitigating factors. I disagree. Defence counsel also submitted that Mr. Sheepway's moral culpability is at the lower end of the scale because of his addiction and the fact that the robbery was not motivated by anger, jealousy or greed, but rather by a need for drugs. Again, I disagree. As stated, I view Mr. Sheepway's addiction as a neutral factor and not one which he can receive credit for, which I take to be the ultimate impact of this defence submission.

[103] Parole ineligibility greater than 10 years is justified when there is some particularly aggravating feature: *R. v. Bell*, cited above, at para. 40. In my view, the combination of the robbery, the use of the shotgun, the thefts from Mr. Brisson's person and the disposal of Mr. Brisson's body are particularly aggravating and justify a sentence of more than 10 years of parole ineligibility.

[104] In a global sense, I find that this case is roughly similar to the case I decided earlier, cited as *R. v. M.D.H.* above. Obviously, one will never find a case that is squarely on all fours with either the circumstances of the offence or the circumstances of the offender. However, I view the aggravating circumstances in *M.D.H.* as approximately equivalent to those in the case at bar, in terms of the moral blameworthiness of the offender. It is true that I also found that the most significant mitigating factor in that case was the offender's early guilty plea (para. 69). However, to a large extent that was offset in my analysis by the fact that the offender had a rather

extensive criminal record, including two offences for prior violence, and was assessed as being a high risk for future violence (paras. 37 and 49). Although we do not have a guilty plea in the case at bar, it is important to remember that Mr. Sheepway effectively had no criminal record before the murder and there is no affirmative evidence that he poses a risk for committing violent offences in the future. Accordingly, it seems fit to sentence Mr. Sheepway to the same period of parole ineligibility as I did with the offender in *M.D.H.*, that being 13 years.

[105] I also impose the same collateral orders which I made for the robbery offences, pursuant to ss. 109(2) and 487.051 of the *Criminal Code.* I further impose an order for forfeiture of the shotgun pursuant to s. 491 of the *Code.* Lastly, I am required to impose a mandatory victim surcharge of $200 for each of these indictable offences, pursuant to s. 737 of the *Code,* for a grand total of $2,000. The surcharges will be payable forthwith.

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GOWER J.