Court of Queen's Bench of Alberta

Citation: R v LL, 2021 ABQB 829

Date: 20211019
Docket: 170965198Q1
Registry: Edmonton

Between:

Her Majesty the Queen

Crown

- and -

L.L.

Defendant

Restriction on Publication

Identification Ban – See the *Child, Youth and Family Enhancement Act*, section 126.2.

No person shall publish the name or photograph of a child or of the child's parent or guardian in a manner that reveals that the child is receiving, or has received, intervention services.

NOTE: Identifying information has been removed from this judgment to comply with the ban so that it may be published.

Sentencing Decision
of the
Honourable Madam Justice Avril B. Inglis

Introduction

[1] After a three week trial that was repeatedly delayed due to the COVID-19 ongoing pandemic, I convicted Miss L.L. of manslaughter for causing the death of her daughter S. The Court has received a Gladue report for her and sentencing briefs from both counsel.

[2] Crown counsel sought a sentence of 7-8 years followed by ancillary orders. Many cases were cited that shared sentences in that same range for offences with similarities of significant assaults and manslaughter of children.

[3] Counsel for Miss L.L. calculated her pre-trial custody, once enhanced sentencing principles are applied, to equate to 8 months and one day. That calculation is accepted and Miss L.L. shall be credited to that much pre-trial custody. He submitted that Miss L.L.'s sentence should be time served plus three years' probation. By referring to the first recognition of Truth and Reconciliation Day in Canada, he suggests that Miss L.L.'s Gladue factors and her experience as a systemically marginalized person in Canadian society should strongly inform the sentencing process sufficiently to reduce her sentence from what much of the case law holds to be a penitentiary sentence.

[4] He is correct that Miss L.L. is a deeply sympathetic woman who has suffered a great deal throughout her life. She accomplished a great deal in the years prior to her daughter's death, and also, she has lost a great deal since S's passing, including the custody of her other children.

[5] However, the Court must balance the sympathies Miss L.L. naturally evokes with the offence that she is convicted of. In ***R. v. LaBerge***, 1995 ABCA 196, our Court of Appeal noted the following:

> The imposition of a denunciatory sentence is designed to express society's absolute repudiation of child abuse which has led to death: ***R. v. Isch*** (1981) 22 C.R. (3d) 106 (B.C.C.A.). However, a denunciatory sentence also serves another legitimate purpose by affirming and validating two of society's core values: respect for human life and dignity and special protection for those most vulnerable to abuse - children. …. That is why the sentence imposed must bear some proportional relationship to the harm done as a result of the parent's actions. The sentence should not trivialize the fact that a child's life has been ended by the person that child was entitled to look to for love and care. Instead, the sentence imposed should signal to all the value that society places on human life and the need to protect children from abuse whether at the hands of strangers or worse yet, their parents.

The Offence

[6] After several years of involvement with Child and Family Services, including a period of time when her children were in foster care, Miss L.L. regained full unrestricted and unsupervised parenting of her two daughters and son in September 2015. The court heard evidence from the support workers that had been assigned to the family who described the challenges and subsequent successes that Miss L.L. had as a parent. In the next month, the following tragedy occurred, quoting from the trial decision ***R v LL,*** 2021 ABQB 384 at paras 6-7:

> On October 13, 2015, L.L. called 911. S, she said, had fallen out of her bed. While S initially had been crying, at that time she was not responding to her mother and required an ambulance. When paramedics arrived, L.L. was home alone with her three children. S was unconscious and was urgently transported by ambulance to the Stollery Children's Hospital. Her condition worsened quickly and she required life saving measures shortly after arriving in the emergency room. Head trauma was soon diagnosed and S was taken into surgery at 5:00 a.m. Immediately, the surgery showed that the damage to S's brain, primarily swelling and bleeding, was untreatable. The neurosurgeon quickly closed the surgical wounds and bandaged her head.
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> On October 15, 2015, an MRI scan further confirmed S had suffered a devastating brain injury. Her outward symptoms were consistent with that imaging. She never regained any consciousness. S's family received and followed the advice of the treatment team to withdraw life sustaining treatment. S died on October 16, 2015.

[7] This Court heard a series of medical experts describe S's injuries from the perspective of various disciplines. Quoting from the trial decision at paras 14 and 15:

> [14] Some experts offered opinions about what could have caused the injuries. The opinions were substantially consistent, but varied in detail and precision. The Crown asks the Court to accept the conclusion that, considering there is no evidence of a motor vehicle accident or some other drastic incident, the brain injury was inflicted deliberately, and that the force required was such that only an adult could have caused such damage.
>
> [15] The timing of the injuries to S is potentially important to the Crown's ability to prove the counts charged. Crown counsel focused the Court's attention ultimately to the opinion of Dr. Melanie Lewis, who opined that S would have been symptomatic immediately and obviously. While other experts opined that the brain injury could have been hours or even a few days old, Dr. Lewis' opinion, based on S's presentation, was that the injury was experienced shortly before the 911 call. Based on the accused's own statements, particularly to 911, the Crown argues that S exhibited the immediate and obviously dire symptoms approximately 90 minutes before the accused called for help, which was the time the injuries were initially caused.

[8] The experts called included a pediatric emergency room physician, radiologist, pediatric neurosurgeon, ophthalmologist, child maltreatment medical expert, neuropathologist and pathologist. Of those that offered possible explanations for S's injuries, they agreed about the significant impact required noting that normally either motor vehicle accident or deliberate assault causes such injury. Other typical accidents such as falling from bed or even from playground equipment were said to not cause such severe brain damage.

[9] Based on the evidence before the Court, I concluded that S's fatal injuries were caused by inflicted rather than accidental trauma. I noted that the force that caused brain damage was so significant that it was purely speculative to attribute a random accidental cause. I determined that Miss L.L. was the only adult in S's presence throughout the time that the force was inflicted upon her, and that a child, namely either of her siblings, could not have inflicted these injuries. I concluded that the circumstantial evidence proved beyond a reasonable doubt that only Miss L.L.

had the opportunity to cause the injuries to S. I could not conclude the exact mechanism of how the blunt force trauma was inflicted. I could not conclude that a weapon was used or not.

[10] I found that the test for the mental element of the offence of second degree murder had not been met; however based on the above conclusions the offence of manslaughter had been proved beyond a reasonable doubt.

Gladue Report

[11] This court had the benefit of evidence during the trial about Miss L.L.'s personal history in the time leading up to S's death. A Gladue report was provided prior to sentencing to provide further specific information. Crown counsel offered no objection to the contents of the report and I accept the report as true. Miss L.L. is a member of Kipohtakaw, also called Alexander First Nation.

[12] Miss L.L.'s family directly experienced the trauma of residential schools in Alberta. She recalls both her grandmothers speaking of being abused there. Miss L.L. also spoke of her mother having been neglected and abused by her parents, who used alcohol.

[13] Miss L.L.'s father, who has supported her throughout the trial and sentencing, downplayed the effects of residential schools on his mother; instead he emphasized the cultural connections he and his family, including Miss L.L., have including regularly participating in Sundances.

[14] Miss L.L. had a stepfather in her early years who died suddenly and violently. She expressed that she had not been able to talk about her grief and suffering with anyone in her family then.

[15] Miss L.L. stated that she and her siblings suffered abuse by their mother; and that she was sexually abused by family members. The women in her family failed to recognize this abuse, due to alcohol dependency. At times Miss L.L. was left to the care of an older sister when her mother left the home as her addictions worsened. Eventually Miss L.L. was placed in foster care, separated not just from her mother but her siblings. She had many foster and group homes and she reports abuse occurred against her in some of them. Despite this, she carries positive memories of her childhood with her mother and siblings.

[16] She attended school at the first nation completing up to Grade 9. It is one of Miss L.L.'s goals to go back to school to continue her education.

[17] Miss L.L. said that once her father returned to her life as a regular presence when she was ten she has remained close with him. He is the person she called when S suffered her injury. He attended her home that night, has been present throughout this trial and sentencing. He has cared for Miss L.L.'s children since S's death. He reports her children miss their mother a great deal.

[18] Miss L.L. reports that she was significantly abused by the father of her three children. After freeing herself from that relationship, she moved to Edmonton where she struggled with addictions. She has been living with her mother, who still struggles with addiction which has meant that the home has been unstable for her. When she is home with her mother, she takes care of her and the home.

[19] Miss L.L. was exposed to marijuana and alcohol use when she was 14. She has struggled with alcohol addiction but has been primarily sober since November 2020. Prior to that, she

attended residential treatment programs for addictions twice. She was addicted to cocaine and prescription pills until 2015, and also used methamphetamine for a time. At the time of S's death, she had been sober for some time and was living independently with her children.

[20] Currently, Miss L.L. feels isolated from other friends she once had, as they were not positive influences for her. It is distressing to see that Miss L.L. has not had any community agency support since S's passing, including access to financial support despite the prior significant involvement of government services earlier in her life.

[21] Miss L.L. believes she was exposed to alcohol during her mother's pregnancy. She has struggled with depression and suicidality throughout her life. Sadness is regularly present for her. At this time, she is not connected to others or her culture. Her family members hope she will re-connect with the Sundance ceremonies that she once enjoyed in her youth.

[22] Miss L.L. has been on supervised release for several years, and it is hopeful that she positively reports the influence of her probation supervisor has been a supportive figure in her life. Her Gladue report identifies resources for her for the future, and hopefully in the future she will be able to access those resources and will feel more supported, treated, and connected once again.

[23] The Court received many letters of support from Miss L.L.'s family. She is described as a hard working, traditional and devoted woman who is loved by her family. Her counsellor from Alexander First Nation described Miss L.L.'s grief over S and her lost contact with her other two children. This grief and the impact of her significant childhood traumas are being addressed in counselling. Struggles with anger for Miss L.L. are also noted. Miss Ott described future planning for Miss L.L. that can include parenting classes, anger management and addictions treatment.

Crown's sentencing cases

[24] Crown counsel provided thirteen cases and relied on others submitted by defence counsel to support their sentencing submission. I will not summarize every one of them but refer to the key cases and their principles now.

[25] A foundational precedent was provided by Defence counsel, relied on by Crown counsel and by most of the cases brought before this court.

1. ***R. v. LaBerge*** 1995 ABCA 196

[26] Until ***Nickel*** (below), which expands on this case, ***LaBerge*** was the mainstay case in Alberta for sentencing principles regarding manslaughter of a child by inflicted trauma. Our Court of Appeal provided a detailed outline of assessing the moral blameworthiness of an offender for the unlawful act of manslaughter, noting at the outset that there is a broad continuum of conduct that may amount to manslaughter. They cite the well-known spectrum of circumstance that range from those that are near accident to near murder. Given that broad range, they determined that "for sentencing purposes, one must make a clear distinction between fault in terms of an offender's mens reas at the time of the commission of an offence and fault in terms of the offender's overall moral blameworthiness for the crime," para 7.

[27] The court then categorizes the unlawful act of manslaughter into three broad groups: those that are likely to put the victim at risk of bodily injury; those that put the victim at risk of serious bodily injury, and those that put the victim at risk of life-threatening injuries.

[28] The court sets a framework of questions in paragraph 17 to assess where a person will fall in this spectrum, which are briefly summarized here:

> Was the unlawful act, viewed objectively, likely to subject the victim to the risk of bodily harm which was neither trivial nor transitory?
>
> Did the offender know that the unlawful act would likely subject the victim to the risk of bodily harm which was neither trivial nor transitory or did the offender, knowing of the probable consequences of the act, proceed recklessly in the face of the risk?
>
> Was the unlawful act, viewed objectively, likely to subject the victim to the risk of *serious* bodily injury?
>
> Did the offender know that the unlawful act would likely subject the victim to the risk of *serious* bodily injury or did the offender, knowing of the probable consequences of the act, proceed recklessly in the face of the risk?
>
> Was the unlawful act, viewed objectively, likely to subject the victim to the risk of *life-threatening* injuries?
>
> Did the offender know that the unlawful act would likely subject the victim to the risk of life-threatening injuries, short however of what would be required to establish the intention to kill required for murder, or did the offender, knowing of the probable consequences of the act, proceed recklessly in the face of the risk?

[29] ***Laberge*** also emphasizes the importance of a judicial response in cases such as these, reminding us that "the imposition of a denunciatory sentence is designed to express society's absolute repudiation of child abuse which has led to death" (para 30) and "serious crimes of violence against defenseless children warrant a strong and firm response from the courts…. Where a parent or someone who stands in a trust relationship to a child abuses a child, that will be an aggravating factor in sentencing" (para 28).

[30] Factually, in this case the accused struck his nine-month-old baby's head onto the floor causing injuries similar to S's. The court said that the unprovoked assault against his daughter was "of a kind and ferocity sufficient to properly place it within the second category of objective intent – an act which was likely to cause serious bodily injury. Both the nature and extent of the injuries inflicted on his nine-month-old baby belie any assertion to the contrary," (para 35).

[31] Ultimately for Mr. LaBerge, the court considered a combination of mitigating and aggravating factors and sentenced him to 4.5 years in prison. The key mitigating factor was that the offence was an impulsive outburst of anger. The court emphasized that this was a single act with no gratuitous violence against the baby, by a 20-year-old man. The Crown had sought a sentence between 10-12 years. Interestingly but not likely persuasive, the dissent referred to this sentence as "the highest end of the range."

2. ***R. v. Nickel*** 2012 ABCA 158

[32] This case, also provided to the Court by the defence, focuses on principles of sentencing for child abuse, not manslaughter. It follows the ***LaBerge*** blameworthiness framework and the principles of sentencing for crimes of violence against children. The CA confirmed that the court must conduct an analysis of the degree of responsibility and moral culpability of the offender which must be reflected by the sentence imposed (para 17). The CA confirmed that it "has always been the position of the court in dealing with crimes against defenseless children that a strong response was warranted," para 19.

[33] Finally, the court confirmed that adherence to the proportionality principle and the "primary objectives of deterrence and denunciation required by s. 718.01" are required areas of focus for a sentencing court.

[34] In light of the moral blameworthiness assessment, the Court of Appeal said this:

> The personal circumstances of the offender are not represented in the above analysis. That is not to suggest that they are not relevant; they are. However, the objective is to provide a framework whereby a court may evaluate the gravity of the offence and the degree of responsibility of the offender, as to the offence itself. Of course, in evaluating the degree of offender's responsibility, a court must have regard to his or her personal circumstances: see, e.g., s. 718.2 of the cause of death. Those circumstances necessarily form part of the considerations leading to a "just sanction" under s. 718. (Para 38).

3. ***R. v. Choy***, 2013 ABCA 334

[35] ***Choy*** relies on both ***LaBerge*** and ***Nickel*** when sentencing for the manslaughter conviction of a foster mother. That child victim was subjected to multiple assaults and left in an unheated garage; the ultimate cause of death was cranial trauma as it is in this case. As well the Court was not able to determine the exact act of force that caused that fatal brain injury, as we have here. Unlike here, that court was able to conclude that Miss Choy's actions were not, overall, spontaneous or a momentary lapse: this was a case of a repeated pattern of abuse. Citing ***Nickel***, the court noted that "the most important consideration when assessing moral culpability of the actus reus is the child's exposure to harm," para 12. The Court of Appeal determined that the original sentencing decision failed to reflect the moral blameworthiness of the offender, having found her moral culpability to be high, nor was there sufficient attention to deterrence and denunciation. The Court of Appeal increased her sentence from 6 to 8 years.

4. ***R. v. CSD*** 2013 ABCA 46

[36] This case also relies on ***Nickel*** and ***LaBerge***. The offender was the 23-year-old aunt who was voluntarily acting as guardian to 6 young children with the support of Child and Family Services. The victim's cause of death was summarized at paras 7 & 11:

> The combination of the Agreed Facts, the autopsy reports, and the photos entered as exhibits shows that the respondent severely beat her niece by the intentional application of tremendous blunt force. Many blows were required to inflict the myriad, head-to-toe, injuries suffered by the deceased child. Notwithstanding this severe beating, the 35-pound 4-year old child did not die immediately. She displayed symptoms of lethargy, vomiting, incontinence, respiratory distress and decreased levels of consciousness over some considerable time. The exact length

> of time forms part of the argument on this appeal and is dealt with below. She ultimately lapsed into a coma and died.
>
> The brain injury had more than one cause. First, there was blunt trauma. Second, there was an acceleration/deceleration injury which results from the brain being jerked around in the skull. This type of injury would have immediate, obvious symptoms including lethargy, vomiting, seizures, limpness, unconsciousness, unresponsiveness, irregular breathing and low heart rate.

[37] The court also noted that the child was left to languish for several days after the injuries were inflicted. Applying the framework from ***LaBerge***, the CA found that the circumstances were close to near murder.

[38] The sentencing judge focused on Gladue factors present for the offender and on rehabilitation. However, he recognized that the victim was also Metis like her aunt. He imposed a sentence of 2 years less a day after credit for pre-trial plus three years of probation which focused on the offender's needs as well as protective orders to keep her from being in the presence of children without supervision. The CA ultimately upheld the sentence, saying it reflected 7.5 years of incarceration followed by probation. The CA made particular reference to deference to sentencing judges and noted that a higher sentence might otherwise have been ordered a higher sentence that precluded probation.

[39] The CA made these observations of the effects of ***LaBerge*** subsequent to ***Nickel,*** at para 49:

> Since I do not view ***Nickel*** as altering or overruling ***Laberge***, the Alberta case law that predated ***Nickel*** is still relevant. The usual range remains 8 to 12 years, with manslaughter of a child in the care of the perpetrator being closer to the upper end of that range.

5. ***R v. Crier*** 2020 ABQB 475

[40] Mr. Crier was convicted as a party to the manslaughter death of his son; he and his partner were the sole caregivers to the 19-month-old in the time prior to when his body was discovered abandoned by a church. Neither accused sought medical help for him prior to leaving him there. His body, particularly face and head, were severely injured. He died of a traumatic brain injury inflicted within 18 hours of his death. The Justice found that the child's death followed ongoing physical abuse and that the fatal injuries were caused by repeat strikes to all sides of his head, calling it a "devastating attack."

[41] The TJ sentenced Mr. Crier to 9.5 years, a submission that was agreed to by both Crown and Defence counsel. He held that deterrence and denunciation were primary considerations, but also paid close attention to the accused's Gladue factors all while balancing those with the gravity of the offence. He observed that while he could not determine which party was ultimately the person who inflicted the harm against the victim, this accused did nothing to attempt to protect him from persistent and escalating abuse when he had a duty to do so as his father.

6. ***R. v. Mack***, Unreported, June 1 ABQB 2020

[42] This offender is the partner of Mr. Crier, who was also convicted as a party. She was not the victim child's biological mother. She was diagnosed with depression, ADHD and had intellectual limitations. However, it was noted she participated in a lengthy pattern of abusive

conduct which ended not just with a child's death but she also actively participated in the concealment of his death. She was of very good conduct on release and herself had suffered an abusive and neglectful childhood. She was sentenced to 8.5 years, while the court noted that "the unlawful death of a child is among the most serious of crimes we face in the courts."

7. ***R. v. Perdomo*** 2019 ABQB 768

[43] This decision was considered in both the ***Crier*** and ***Mack*** cases; the child victim was 5 years old, the grandson of the offender, who died of a brain injury following a pattern of abuse. He was an isolated little boy who was sent to Canada to live with his grandfather. Applying the ***LaBerge*** framework, the court determined that this offender's culpability was toward the higher end of the range. His actions, which included an extended period of abuse, were clearly likely to cause a risk of bodily harm. Similar to the matter before this court, as well as ***Choy***, ***Crier*** and ***Mack***, the exact physical act of applying force to the child victim was not determined. This fact affected the culpability assessment, despite the sentencing justice noting that he had his suspicions of how the fatal injuries were caused.

[44] The accused had the benefit of strong family and community support, attesting to his good character, and no prior criminal record. The court was aware that the accused had prayed to God for forgiveness. The court considered those factors in light of the offender's culpability and the need for a sentence that appropriately denounces and deters such conduct. The offender was sentenced to 9 years in prison.

8. ***R. v. Noskiye***, 2016 ABQB 254

[45] This case relied on ***Laberge***, ***Choy*** and ***CSD***. The offender was a 29-year-old man caring for a 7-year-old that was not his biological child. She died after receiving multiple injuries due to assaults by the accused. The accused was an aboriginal offender with a very limited criminal record. He was found to be at the serious end of the blameworthiness spectrum, in that he knew or ought to have known his abuse of this child would cause serious bodily injury to the child, and that multiple strikes against the child were made over a 2-3 day period. He entered a guilty plea, and was ultimately sentenced to 7 years.

[46] Sentencing this man of aboriginal descent in Peace River, Alberta, Justice Tilleman paid special attention to the sentencing provisions of the Criminal Code that relate to such individuals. He made the following observations, which I adopt here.

> 42 Section 718.2(e) is not to be taken as a means of automatically reducing the prison sentence of Aboriginal offenders; nor should it be assumed that an offender is receiving a more lenient sentence simply because incarceration is not imposed. It is just that, if there is no option except for jail, the length of the term must be carefully considered; see ***Gladue***.
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> 43 The Court understands its methodology for assessment of a fit sentence of an Aboriginal offender does not necessarily mandate a different result. The Court just has to see if this is a case where different people should be treated differently. A sentence always has to be fit for the offence and the offender; see ***R. v. Wells***, [2000] 1 S.C.R. 207 (S.C.C.) ("***Wells***"). In sentencing the Accused, the Court is mindful of this principle.
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> 44 In other words, the application of section 718.2(e) does not mean an Aboriginal offender must always be sentenced in a manner which gives greatest

> weight to the principles of "restorative justice" and less weight to goals such as "deterrence, denunciation, and separation". The Court understands the more serious and violent the crime, the more likely it will be that the terms of imprisonment will be the same for similar offences and offenders, whether the offender is Aboriginal or non-Aboriginal; see ***Gladue***, ***Wells*** and ***R. v. Morris***, 2004 BCCA 305 (B.C. C.A.).
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> 45 All Canadians, regardless of their cultural background, are entitled to the protection of the law. All Canadians are subject to the control of the law and the protection in (sic) affords. In this case it was a child that was repeatedly struck and kicked. She was vulnerable, and she was bruised and bloodied by a person in a position of care and control, on whom she was entitled to trust.

9. ***R. v. BM*** 2015 ABQB 156

[47] The Crown provided this case but did not refer to it in argument. There, the accused mother severely neglected and abused her twin daughters, both under 3 years of age. One died due to physical abuse. There were many mitigating factors, including severe isolation of this immigrant mother who did not speak English, and whose husband was away frequently for his employment. The court considered ***Nickel***, ***Choy***, ***LaBerge*** and ***CSD*** among others. Justice Macklin found the offender's moral culpability to be very high and sentenced her to 15 years for the manslaughter of one daughter and 10 years consecutive for the aggravated assault of the surviving daughter.

10. ***R. v. McConnell*** 2012 ABQB 369

[48] The facts in this case are very different than those before the court. The mother of two very young boys drowned them in a bathtub while she suffered from a severe depression. She was tried for second degree murder and convicted of manslaughter. Her mental state at the time of the offences was found to be "severely compromised". There was significant sympathetic psychiatric evidence before the court about her state of mind at the time of her sons' deaths and throughout the pre-trial and pre-sentence period.

[49] That court considered other cases, including ***Fujii*** which is addressed below, where the circumstances of the offender at the time of the offence against their child left the offender compromised by some form of mental or emotional disorder.

[50] Defence counsel for Miss McConnell (who is the same as counsel before this court) referred to a number of cases in which the sentences ranged from a suspended sentence on the low end to eight years on the high end (***Fujii***). In ***Camrie*** and in ***Samberg***, the offenders were given a conditional sentence, which is a disposition that no longer was available to Ms. McConnell because of amendments to the Code.

> 56 In all of the cases the Defence relied on, the court concluded that the offender suffered from some form of mental or emotional disorder at the time the offence in question was committed.

[51] Ultimately Miss McConnell was sentenced to 6 years for each manslaughter, served concurrently.

Crown's sentencing argument

[52] Crown counsel recommended a sentence of 7-8 years in gaol for Miss L.L., as well as a DNA order, a mandatory weapons prohibition and forfeiture of all items seized by the police. They argue that similar cases establish a range of 7-9 years.

[53] Counsel argued that in light of the ***LaBerge*** blameworthiness framework, her acts were at least likely to subject the victim to serious bodily injury. My decision stated that her actions were forceful enough to cause a devastating injury the type of which is seen in motor vehicle crashes, obviously a high level of force. Such an intense assault on a child's head put her at risk of bodily harm which would be objectively obvious. Given that factual finding, the Crown argues that Miss L.L.'s moral culpability is high, and society's interest in strongly condemning her conduct is important.

[54] ***Laberge*** referred at paras 45-49 to short tempered or aggressive parents and commented that an accused person is not held to a lowered degree of culpability because they are easily frustrated. While Miss L.L.'s counsellor commented about anger, there is not significant evidence of anger or short-temperedness being a factor here.

[55] This position purports to take into mitigation the significant Gladue factors present, Miss L.L.'s own experience with violence against her, having a history of being in the child welfare system herself and being involved with it as a parent, her current depression and history of suicidality, as well as her lack of criminal record. Conversely, the Crown identifies that a child victim abused by a person in a position of trust are statutorily aggravating factors.

Defence's cases and position

1. ***Fujii*** 2002 ABQB 805

[56] These facts are well summarized by Creighton J (as she then was) in ***McConnell*** at para 62:

> First, Ms. Fujii left her two children for 10 days. They died slowly of starvation and dehydration. When Ms. Fujii returned home to her dead children, she disposed of the youngest and kept her older child's body with her in her apartment. Second, Ms. Fujii was difficult to diagnose psychologically because she gave misleading responses to psychological testing. The psychologists agreed she suffered from a personality disorder, but disagreed on whether it was borderline or histrionic personality disorder. The psychiatrists indicated her personality might have been compounded by situational depression arising from her isolation.

[57] Our court considered the very significant stressors present in this offender's life, even though there was no psychiatric diagnosis. Miss Fujii came to Canada as a 19-year-old student and quickly became involved with the man who fathered her children. His presence destabilized her life, as he lived a life of criminality. The accused had two children close together, and repeatedly sought the assistance of women's shelters and services for strained parents experiencing urgent levels of stress or strain. When she began a new relationship she left her infant children first overnight, and then ultimately for ten days. The children both died of dehydration. She hid the body of one, but kept the body of the other with her for days until ultimate discovery.

[58] In sentencing her, Justice Martin (as he then was) noted that she was an immature person with very limited resources as she lived in Canada as an illegal immigrant. She suffered post-partum depression and bi-polar disorder which was why she made such dreadful relationship choices. An argument that the shame she would experience culturally due to her circumstances was rejected as not mitigating. She was sentenced to 8 years for the two deaths.

2. ***R. v. Coombs*** 2003 ABQB 818

[59] This was a case of a 10-week-old child who died due to shaken baby syndrome, which caused cranial trauma. This mother was 18 years old at the time of her child's death, and aboriginal. She was suffering depression at the time of the offence. Aggravating factors were that there were multiple acts of violence, established problems with authority and an attempt by the accused to blame another individual. The Crown sought a sentence of 5-7 years. The court considered many earlier sentences for infanticide and child manslaughter, most of which are outdated. Notably some included conditional sentences which is not available to this court. Miss Coombs was ultimately sentenced to 48 months in prison, which was calculated as time served, followed by three years of probation.

3. ***R. v. Lavoie***, 1987 ABCA 138

[60] The accused pled guilty to manslaughter following the drowning death of a 4-year-old girl that was in his care for the day. The accused threw the girl into a creek in anger, and when she emerged offering apologies he held her head under the water, drowning her. He was 18 years old at the time and lived an anti-social life. He appeared to be angry with his probation officer at the time of the offence. The court held that rehabilitation was possible. He was sentenced to twelve years, reflecting the circumstances as being a case of "near murder" where the accused must have known that his act was likely to cause the little girl's death.

4. ***R. v. MCM1*** 2009 MBQB 226

[61] This accused was the mother of newborn triplets and another slightly older child. She was convicted of manslaughter for "slamming" one of the 3-month olds into his bassinet. She called emergency services 2 hours later when she returned to him and found him limp. Evidence of his brain injury and the force required was similar to the facts here – experts opined that his brain suffered trauma similar to when the force applied to the head is a car crash.

[62] The accused was 23 years old; she had strong family support including that of her husband, the father of her children. The court held this was a single impulsive act of aggression, and that the accused eventually participated in rehabilitation treatment during her pre-sentence time. Justice MacAulay noted the severe impact on her family and parenting access to her other children; and described the personal guilt the accused experienced as an "exacting punishment." She considered the principle of non-imprisonment and sentenced the accused to a conditional sentence order of 18 months. The Court noted that the stresses on this young mother led her to be tired, overwhelmed and overstressed; these factors did not excuse the accused's conduct but diminished her moral culpability. Obviously, this type of sentence is no longer available since the coming into force of s 742.1. As such this case is of very limited precedential weight.

5. ***R. v. Tippett***, 2011 NLTD(G) 119

[63] This accused was convicted of manslaughter of an 11-month-old that he had agreed to babysit. The child in that case suffered similar injuries to S, and medical evidence was that he had suffered a blunt force injury to the back of his head. Similar to several of the cases

considered by this court, and to the facts found here, the court was not able to make specific findings of how that force was applied to the child's head other than it was done by the accused. While this case is from a different jurisdiction, it cited ***LaBerge*** for principles of sentencing in cases of abuse against children. Deterrence and denunciation were cited as the most important objectives of sentencing. The court noted that Mr. Tippett was not a parent to the victim, but that he was in a position of trust to the victim. The accused was sentenced to 5 years in prison.

[64] Defence counsel argued that given that this court's decision could not determine the exact form of force that Miss L.L. applied to cause S's injuries, the conviction is wrongful and will be appealed. As such, this court should be wary to not comment that the accused has not offered any remorse for actions that she maintains her own innocence. That is obviously within her rights and there is no failure on her part that affects this sentencing, given the apparent legal position that Miss L.L. is taking.

[65] Miss L.L. spent 161 days in custody; with standard enhanced credit her time served already is 8 months and 1 day. Counsel's submission to the court is that she should be sentenced to time served followed by three years' probation. He pointed to the compelling evidence that the accused is capable of being a supportive and loving mother. He identifies her as an impeccable client who is a strong candidate suitable for rehabilitation, and that she is able to abide strictly to any conditions imposed upon her. During the period of probation he proposes that she live with her Aunt in Fort Alexander.

[66] In apparent recognition that this proposed sentence is significantly outside of the range exhibited in the caselaw, counsel argued that this sentence would be in keeping with the principles of the Truth and Reconciliation Commission recommendations. However, he did not clarify how those principles differ or change precedential consideration of ***Gladue*** factors, or how this accused is a particularly different person or S's death is a particularly different circumstance than the similar cases before this.

Statutory provisions

[67] I considered the following statutory principles of sentencing in the ***Criminal Code***, R.S.C. 1985, c. C-46:

718 The fundamental purpose of sentencing is to protect society and to contribute, along with crime prevention initiatives, to respect for the law and the maintenance of a just, peaceful and safe society by imposing just sanctions that have one or more of the following objectives:

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

718.01 When a court imposes a sentence for an offence that involves the abuse of a person under the age of eighteen years, it shall give primary consideration to the objectives of denunciation and deterrence of such conduct.

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

718.2 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,

(i)…
(ii)…

(ii.1) evidence that the offender, in committing the offence, abused a person under the age of eighteen years;

(iii) evidence that the offender, in committing the offence, abused a position of trust or authority in relation to the victim;

…

Shall be deemed to be aggravating circumstances;

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

Victim Impact Statements

[68] This court did not receive any victim impact statements in this matter.

Determining sentence

Purpose of sentencing

[69] The *Criminal Code*, ***Laberge***, and the cases that followed require that deterrence, including general deterrence, and denunciation are the key sentencing principles to apply to a case where a child has died due to injuries inflicted by another. This is true even when the person responsible suffers greatly the loss of that child; when there was no intent to cause the death of the child; or when the person responsible is one who has also suffered violence or trauma historically.

[70] ***LaBerge*** also requires of this court an assessment of Miss L.L.'s moral blameworthiness. This is not a case of near murder. While S had other unexplained injuries, both major and minor, there is no finding of the cause of those injuries nor did they contribute to her cause of death. The medical evidence focused on one blow to her head, not a protracted or repetitive assault. However, given the degree of force required to cause this terrible injury must have been objectively likely to subject S to the risk of serious bodily injury, and Miss L.L. proceeded recklessly anyway by assaulting S with significant force. This places the manslaughter of S in the

midrange of blameworthiness - “unlawful acts likely to cause serious bodily injury” - according to the ***Laberge*** factors.

[71] Defence counsel’s submissions did not explicitly focus on sympathy and the potential for rehabilitation, but were based in those principles. Miss L.L. has experienced the grief of the loss of her child and of the companionship of her other children; these new traumas are experienced after a life that has held other losses and grief. She is in fact a very sympathetic and admirable person. Everyone who gave evidence spoke only of a kind, considerate and responsive person. While she sometimes had friction with the Child and Family Services support workers during her re-unification with her children, I suspect that is a normal dynamic as she must have been anxious to be freed of supervision and control in her personal life, as any adult would be.

[72] Despite the acknowledgement of Miss L.L.’s traumas and future potential, I return to paragraph 31 of ***Laberge*** citing our recently retired Chief Justice McLaughlin of the SCC: “The criminal law must reflect not only the concerns of the accused but the concerns of the victim and, where the victim is killed, the concerns of society for the victim’s fate. Both go into the equation of justice.”

[73] This court cannot lose sight of the severe consequences of Miss L.L.’s actions; she caused the death of her 5 year old child by seriously assaulting her with a high degree of force. However, unlike the cases of ***Crier, Perdomo, Choy, Noskiye, B.M.*** and ***Fujii***, there is insufficient evidence of abuse that extended over a period of time. This is an apparently single, impulsive act as found in the cases of ***Tippet*** and ***Coombs***.

[74] The mitigating factors here include the fact that Miss L.L. comes before the Court without a criminal record; she has strong family support; she has connected with rehabilitative influences with her counsellor in Fort Alexander and with her probation supervisor; she was responsive to all aspects of her release during the extended time between her arrest and the resolution of these matters. Miss L.L. has significant Gladue factors that inform the court of her own systemic experience of being marginalized in Canada, as well as her family’s and her own direct personal experiences as indigenous people in a historically white supremacist society, including exposure to residential schools. Finally, it is mitigating that she has already shown an ability to do the personal work required to address her addiction disorder and past traumas.

[75] Miss L.L.’s exposure to violence in her childhood both in her home, by extended family members and while in government care must be considered when assessing her overall culpability when she herself resorted to violence while parenting S. While such a history does not excuse her conduct, it helps to explain the roots to such a response, even after the significant intervention and support of Child and Family Services for Miss L.L. and her children.

[76] Justice Labrenz in ***Crier*** well summarized the purpose of requiring this Court to consider Gladue factors, and I adopt his comments here, from para 85:

> When a Court decides to impose a different sanction on an Indigenous Offender, it is not simply because Indigenous offenders have a different racial or cultural background; rather, it is because of the unique and disadvantageous circumstances applicable to many Indigenous offenders, and because a fit sentence must adjust for the moral blameworthiness of the individual offender in consideration of such a disadvantaged background: R. v. Swampy, 2017 ABCA 134 (Alta. C.A.) at para 25.

[77] The issue of remorse for criminal conduct is not before this court as I have already noted; however, it is clear that Miss L.L. herself is suffering terribly from the loss of S. Her expressions of grief throughout the court process have been obviously genuine.

[78] The statutory aggravating factors include the fact that S was a very young child; Miss L.L. was in a position of trust to S. S was small and defenseless in the face of this assault. While Miss L.L. was a single parent to three children and likely still adjusting to that circumstance, she had supports – namely the workers from Child and Family Services and her own father – and did not seek out their assistance if she was in fact struggling with that renewed role. Finally, Miss L.L. is not the only person who has suffered directly from S's loss; all of her extended family have lost S, including S's own siblings. Notably, each of these factors is already accounted for in cases that establish a range of sentencing for this type of offence, and should not artificially inflate Miss L.L.'s sentence a second time.

[79] The Criminal Code and caselaw hold that deterrence and denunciation are the primary sentencing factors to consider when sentencing for the violent death of a child, particularly when the offender is a person in a position of trust. However, that does not mean these are the only sentencing factors listed in the Code that are relevant. Principles of rehabilitation and restraint are key as well. Miss L.L. appears to be a candidate for rehabilitation; she has proved herself to be willing to grow in the face of support and guidance.

[80] Having considered the principles of sentencing, prior sentences for offenders and victims with similar factors, and Miss L.L.'s personal antecedents, I cannot accept the submissions of her counsel. A jail sentence of effectively 8 months does not reflect the seriousness of the offence Miss L.L. has committed regardless of whatever sympathy she may deserve. In short, this Court cannot not respond to the violent actions that caused the death of this young child in this way. Ironically, doing so would breach not only the legal system's duty to society but in itself would breach the broad terms and goals of the Truth and Reconciliation Commission's recommendations. There are many calls to action that focus on child welfare and justice response. Here, in particular, call to action 41 is important:

> We call upon the federal government, in consultation with Aboriginal organizations, to appoint a public inquiry into the causes of, and remedies for, the disproportionate victimization of Aboriginal women and girls.

[81] S is one of those victimized Aboriginal girls, and this court shall not ignore that fact, or the importance of her life that was cut terribly short.

[82] There is effectively an established range of sentence for manslaughter by a caregiver of a child. Relying on ***Laberge*** and ***CSD*** and the other cases presented to the court, that range is 8-12 years. Various factors could, of course, bring an offender outside of that range.

[83] Here, the offence against S was medium in terms of the moral blameworthiness of Miss L.L. However, the mitigating factors present, as well as the principle of restraint, bring the appropriate sentence for her down significantly. Her actions were far less protracted and severe than Mr. Crier's and other offenders, nor did she fail to seek help as in some of the other cases, and as I've said the aggravating factors that are present are already accounted for in the range established.

[84] The appropriate sentence here is 7 years in gaol less 8 months and 1 day credited to her pre-trial custody.

Ancillary orders

[85] Each of the ancillary orders sought by the Crown are granted. There is an order for Miss L.L. to provide a sample of her DNA, this is a primary designated offence. All exhibits seized during the investigation will be forfeited to the police. The mandatory weapons prohibition is for ten years.

Heard on the 1st day of October, 2021.
Dated at the City of Edmonton, Alberta this 19th day of October, 2021.

Avril B. Inglis
J.C.Q.B.A.

Appearances:

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