Court of Queen's Bench of Alberta

Citation: R v Soosay, 2021 ABQB 507

Date: 20210630
Docket: 180653420Q1
Registry: Wetaskiwin

Between:

Her Majesty the Queen

Crown

- and -

Jayson Griffith Soosay

Accused

Memorandum of Decision
of the
Honourable Mr. Justice W. N. Renke

This is an edited version of a decision delivered orally. I reserved the right to complete statutory references, citations, and quotations, to add headings and a table of contents, and to make minor stylistic and grammatical changes.

[1] On November 30, 2020 I convicted Mr. Soosay of second degree murder for the killing of Johnathan Nepoose. The trial was by judge alone: ***R v Soosay***, 2020 ABQB 748 (the Trial Decision).

[2] I must determine the period of parole ineligibility for Mr. Soosay.

[3] The Crown argues that a period of parole ineligibility of 15-17 years is appropriate. The Defence advocates for a period of parole ineligibility of 12 years. The Defence does not oppose the ancillary orders sought by the Crown.

[4] I will review the general principles that guide the setting of the period of parole ineligibility, the nature and circumstances of the offence, and the "character" of Mr. Soosay, before addressing Mr. Soosay's sentence and period of parole ineligibility and ancillary orders.

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I. Background Principles

[5] My authority to set Mr. Soosay's period of parole ineligibility is provided by ss. 745 and 745.4 of the *Criminal Code*. These statutory provisions permit a sentencing judge to set a period of parole ineligibility greater than the 10 year minimum period: ***R v Shropshire***, [1995] 4 SCR 227, Iacobucci J at 238. Sections 745 and 745.4 read as follows:

> 745 Subject to section 745.1, the sentence to be pronounced against a person who is to be sentenced to imprisonment for life shall be ....
>
> > (c) in respect of a person who has been convicted of second degree murder, that the person be sentenced to imprisonment for life without eligibility for parole until the person has served at least ten years of the sentence or such greater number of years, not being more than twenty-five years, as has been substituted therefor pursuant to section 745.4 ....
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> 745.4 .... at the time of the sentencing under section 745 of an offender who is convicted of second degree murder, the judge who presided at the trial of the offender or, if that judge is unable to do so, any judge of the same court may, having regard to the character of the offender, the nature of the offence and the circumstances surrounding its commission, and to the recommendation, if any, made pursuant to section 745.2, by order, substitute for ten years a number of years of imprisonment (being more than ten but not more than twenty-five) without eligibility for parole, as the judge deems fit in the circumstances.

[6] My authority to set the period of parole ineligibility has four main aspects.

[7] First, the "sliding scale" of parole ineligibility recognizes that "within the category of second degree murder, there will be a broad range of seriousness reflecting varying degrees of moral culpability. As a result, the period of parole ineligibility for second degree murder will run anywhere between a minimum of 10 years and a maximum of 25, the latter being equal to that prescribed for first degree murder:" ***Shropshire*** at 243.

[8] Second,

> 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, 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: ***Shropshire*** at 242.

If a precondition to setting a period of parole ineligibility beyond 10 years is a finding that a particular set of circumstances falls outside the scope of the general 10 year minimum rule, I make that finding based on the review that follows and on the submissions of both Crown and Defence that presuppose a period of parole ineligibility longer than the statutory minimum.

[9] Third, the factors to be considered in fixing a period of parole ineligibility are

> (1) the character of the offender;
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> (2) the nature of the offence; and
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> (3) the circumstances surrounding the commission of the offence;
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> all bearing in mind the discretionary power conferred on the sentencing judge: ***Shropshire*** at 238.

[10] Fourth, a parole ineligibility period is a form of punishment. The determination of the period of parole ineligibility is part of the sentencing process following conviction for second degree murder. Hence, that determination is governed by the sentencing principles in the *Criminal Code*: ***Shropshire*** at 240. That is, the three statutory factors set out in s. 745.4 should be interpreted in light of sentencing principles.

[11] Those sentencing principles can be briefly reviewed as follows, with more detailed discussion to be provided in connection with the circumstances of the offence and Mr. Soosay's circumstances.

[12] Section 718 of the *Criminal Code* encapsulates the four main elements of sentencing. Sentences for offences are "to protect society and to contribute … 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 … objectives [listed in s. 718]." First, s. 718 recognizes the fundamental purpose or justifying aim of sentencing, social protection and the maintenance of a just, peaceful and safe society. Second, s. 718 refers to "sanctions," the tools of sentencing that include, in this case, a period of parole ineligibility. Third, s. 718 refers to "just sanctions." A "just sanction" is both a sanction authorized by law (in this case, ss. 745 and 745.4) and a "proportionate" sanction. Fourth, s. 718 provides that just sanctions serve one or more of the objectives listed in s. 718 and thereby promote the fundamental purpose of sentencing. The objectives set out in s. 718 are as follows:

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

[13] The elements of a sentencing analysis include the following:

- Under s. 718.1 of the *Criminal Code*, a sentence must be proportionate both to the gravity of the offence (what was done) and the degree of responsibility of the offender (e.g., the how and why of the offence and its connection to the offender's circumstances).
- Under s. 718.2(a), the assessment of the gravity of the offence and the degree of responsibility of the offender must be informed by "any relevant aggravating or mitigating circumstances relating to the offence or the offender." Mitigating factors tend to decrease either the gravity of the offence or the degree of responsibility of the offender. Aggravating factors tend to increase the gravity or the degree of responsibility: ***R v TF***, 2019 SKCA 82, Kalmakoff JA at para 54.
- Pre-offence and post-offence factors may be relevant to the offender's degree of responsibility or to the appropriate objectives of sentencing.
- Parity must be respected. Section 718.2(b) provides that "a sentence should be similar to sentences imposed on similar offenders for similar offences committed in similar circumstances." See ***R v Friesen***, 2020 SCC 9, Wagner CJ and Rowe J at paras 31-33; ***R v Lacasse***, 2015 SCC 64, Wagner J, as he then was, at para 2.
- Under s. 718.2(d), the principle of restraint must be respected: "an offender should not be deprived of liberty, if less restrictive sanctions may be appropriate in the circumstances."
- Under s. 718.2(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 …."

[14] I will assess the s. 745.4 factors by reference to the "nature and circumstances" of Mr. Soosay's offence then his "character," in light of sentencing principles.

II. Nature and Circumstances of the Offence

[15] I have considered the "nature" and "circumstances of the offence" factors together to avoid issues of classification of facts under one heading or the other.

A. The Unfolding of Events

[16] I will review the events before the offence occurred, the offence itself, and the events that followed the offence.

1. Before the Offence

[17] The events took place in a residence on the Samson Reserve, 605 Samson. The residence belonged to Bill Soosay, Mr. Soosay's uncle.

[18] Up until about a month before the events took place, Mr. Soosay had been living in Saskatchewan with Katrina Smallboy. He'd come back to provide support for his brother Percy, who was living at 605 Samson. Their brother Luwen had died in December 2017.

[19] On April 10, 2018, Mr. Soosay, Percy, their mother Emily Soosay, Taylor Threefingers, and Madison Ward were at 605 Samson. Ms. Ward was Percy's girlfriend. Throughout the day, Mr. Soosay had been conversations with Ms. Smallboy and had been "smoking weed on the blades."

[20] Mr. Soosay went out to buy some alcohol. Mr. Nepoose messaged him on Facebook. Mr. Nepoose was a friend of Mr. Soosay and had protected Mr. Soosay when he was younger. Mr. Soosay hadn't seen Mr. Nepoose for awhile, although they did talk off and on, on the phone and on Facebook.

[21] When Mr. Soosay got back to 605 Samson, Mr. Nepoose was there. They went into the house. Mr. Soosay introduced Mr. Nepoose to Percy. Mr. Nepoose already knew Ms. Ward.

[22] Later Mr. Soosay and Mr. Nepoose got a ride to go back to town to buy more alcohol and food. They drove into town again for more alcohol later.

[23] Throughout the evening, everyone was drinking and smoking weed. Mr. Soosay did some "catching up" with Mr. Nepoose.

[24] Mr. Nepoose had brought his machete with him. Mr. Soosay and Percy had their machetes in the house. Mr. Soosay testified that everyone has machetes in Maskwacis. It is a rough place, a bad place. People pack things to protect themselves from others who want to hurt them. In cross-examination Mr. Soosay said that people also need protection from dogs. At one point, the machetes were all out on the dining room table.

[25] When the evening wound down, Percy and Ms. Ward went to Percy's room. Mr. Nepoose went to a couch to sleep. Mr. Soosay stayed at the table, messaging with Ms. Smallboy and smoking weed. It was now early on April 11, 2018.

2. The Offence

[26] Ms. Ward came out. Mr. Soosay paid no attention.

[27] Percy came out.

[28] Ms. Ward had gone to Mr. Nepoose on the couch.

[29] Percy had a machete. He attacked Mr. Nepoose. Percy severely injured Mr. Nepoose. Mr. Nepoose retreated away from the couch. He was trying to get to the front door. Percy pursued him, striking him with the machete.

[30] Mr. Nepoose went down hard near the bay window by the front door. I found that he never got back up.

[31] Mr. Soosay then attacked Mr. Nepoose. He struck Mr. Nepoose with a machete. This machete broke and Mr. Soosay cut his hand on it. Mr. Soosay struck Mr. Nepoose with a wrench.

[32] Mr. Nepoose was hacked by machete blows. He was left to die on some black plastic bags Emily had left by the front door. He took some time to die, but was dead by the time medical first responders arrived.

[33] Emily had texted Bill, who was at another residence. Bill contacted the RCMP. Members attended at 605 Samson.

3. After the Offence

[34] Mr. Soosay ran from the house into the bush, without a shirt or shoes. There was snow on the ground.

[35] His running shoes had been left in an upstairs bathroom. He had taken off his shirt in the house. It wasn't recovered but the evidence did not show that anyone searched for it.

[36] He later returned to the house, coming in through the basement door. He was arrested when officers went into the basement to retrieve Emily, who had been directed to stay in the basement.

[37] Ms. Ward and Ms. Threefingers had made some panicked and unsuccessful efforts to clean the crime scene before the police arrived. There was no evidence that Mr. Soosay was involved with their efforts.

[38] Percy was arrested in his bedroom.

[39] Mr. Soosay gave a recorded statement to police but it was not introduced as part of the Crown's case.

[40] Percy was charged with second-degree murder but, in separate proceedings, pleaded guilty to manslaughter.

B. Assessment of the Nature and Circumstances of the Offence

1. Proportionality

[41] Proportionality is the fundamental principle of sentencing: ***R v Hajar***, 2016 ABCA 222 at para 136; ***R v Hamlyn***, 2016 ABCA 127 at para 7; ***R v Safarzadeh-Markhali***, 2016 SCC 14 at paras 70-71; ***Friesen*** at paras 5, 75, 30. A "just" sanction is a proportionate sanction. A proportionate sentence is "just" because the punishment "fits" the crime. The punishment must be neither excessive nor inadequate. Proportionality ensures that the punishment is what the offender "deserves."

[42] Proportionality has two dimensions, captured in s. 718.1 of the *Criminal Code* – the gravity of the offence and the degree of responsibility of the offender: see ***Lacasse*** at para 12; ***R v Ipeelee***, 2012 SCC 13, LeBel J at paras 36, 37.

[43] The gravity of the offence and the degree of responsibility of the offender may be increased by aggravating circumstances or decreased by mitigating circumstances. I will not reproduce s. 718.2(a), since none of the statutorily-specified aggravating circumstances were engaged, with the possible exception of s. 718.2(a)(iii) concerning an abuse of trust. I will return to that potential aggravating factor.

[44] I will add at this point that some aggravating circumstances identified by Justice Picard in ***R v Ryan***, 2015 ABCA 286 at para 57 were not present in this case. I confirm that the absence of aggravating circumstances is not equated with the presence of mitigation. The absence of aggravating circumstances is not mitigating. The absence simply means that the offence was not made worse than it was. In this case, the offence

- was not committed when Mr. Soosay was on a form of conditional release
- was not committed in public
- was not committed for the purpose of retaliation, revenge, or enforcement
- was not motivated by bias, prejudice, or hate, as contemplated by s. 718.2(a)(i)
- was not committed for profit
- was not committed for a criminal organization, as contemplated by s. 718.2(a)(iv)
- was not committed in the course of committing other offences.

2. Gravity of the Offence

(a) Aspects of "Gravity of the Offence"

[45] The "gravity of the offence" concerns what the offender did wrong: ***R v Arcand***, 2010 ABCA 363 at para 57.

[46] Assessing the gravity of the offence requires consideration of

- the nature of the offence itself, its act element and fault element, as this reflects on the inherent wrongfulness of the offence
- the harm radiating from the offence, from the victim to the broader community and (ultimately) the national community and to social values
- the penalty for the offence, as an indication of Parliament's assessment of the potential wrongfulness and harm associated with the offence
- as provided in s. 718.2(a), "aggravating or mitigating circumstances relating to the offence or the offender."

(b) Victim Impact Statements

[47] Victim Impact Statements are relevant to the gravity of the offence and the harm caused by an offence. Victim Impact Statements were filed by Terri Raine, the sister-in-law of Mr. Nepoose, Taylor Nepoose, his brother, Krismay Nepoose, and Erma Nepoose, Mr. Nepoose's mother.

[48] The statements speak to the fear that the authors now feel in going about their lives. Taylor feels anger. Erma Nepoose spoke movingly of the sadness the family feels for the "one link that is missing." Johnathan's death shattered her world. The family has suffered profound loss.

[49] A sentencing judge must consider filed Victim Impact Statements. Victim Impact Statements are important but must be approached with caution. Victim Impact Statements cannot be treated as an aggravating factor in sentencing: ***R v Deer***, 2014 ABCA 88 at para 21. Sentencing should not depend on the eloquence of survivors' statements or on whether a Victim Impact Statement was filed at all.

[50] On the use to which I may put the Victim Impact Statements, I refer to the decision of Justice Blair in ***R v Taylor***, 2004 CanLII 7199, 189 OAC 388 at para 42 (CanLII):

> What [Victim Impact Statements] do at least … is help the judge to understand the circumstances and consequences of the crime more fully, and to apply the purposes and principles of sentencing in a more textured context ….

Justice Blair's comment is in line with Justice Watson's observation in ***R v Wharry***, 2008 ABCA 293 at para 22: "[v]ictims are entitled to expect that the Court will give due regard to the enormity of the effects of crime."

[51] The statements are a reminder to the sentencing judge to consider the full impacts of the offence, the full human meaning of the loss the offence has caused. The statements are a reminder to the sentencing judge not to forget that the victim of this offence was a son, was a brother.

[52] The statements are also a message to Mr. Soosay, about what he did and the pain he caused. The statements therefore address one of the objectives of sentencing, "to promote a sense of responsibility in offenders, and acknowledgment of the harm done to victims or to the community."

(c) The Gravity of Mr. Soosay's Offence

[53] Mr. Soosay was convicted of second degree murder, by any reckoning one of the most serious offences in the *Criminal Code*.

[54] Mr. Soosay took a life. The protection of life lies at the heart of our politics and way of life. The value of each life, Mr. Nepoose's included, lies at the heart of our culture, our politics, and our law. Mr. Soosay took Mr. Nepoose's life. He knew what he was doing and intended what he did. I wrote the following in the Trial Decision at para 1009:

> [1009] Mr. Soosay knew Percy was killing Mr. Nepoose. Mr. Soosay stepped into that killing attack. Mr. Nepoose was defenceless, low to the floor, covered in blood, in extreme distress. From the force of Mr. Soosay's blows, evidenced by blood on the walls, I infer beyond a reasonable doubt that he intended to cause Mr. Nepoose bodily harm. Given Mr. Nepoose's hacked and weakened state, utterly manifest to Mr. Soosay, I infer beyond a reasonable doubt that Mr. Soosay knew that his blows were likely to cause Mr. Nepoose's death, and, being aware of that consequence of his actions and continuing regardless, he was reckless as to whether Mr. Nepoose died or not.

[55] The penalty for this offence, in one of its aspects, matches the offender's act. The offender took a life, so for the offender's life he remains sentenced to imprisonment: *Criminal Code*, s. 235(1). The life sentence is a minimum and mandatory punishment: *Criminal Code* s. 235(2). The other aspect of the penalty, the period of parole ineligibility, remains to be proportioned to Mr. Soosay's act and blameworthiness.

[56] In my opinion, there were aggravating circumstances.

[57] The killing was brutal. Mr. Nepoose was hacked to death. The violence was extraordinary. Mr. Nepoose's blood was splashed on the floor, the walls, and the ceiling of 605 Samson. It was cast onto the clothing of those who were in the house. The extreme level of violence was a significant aggravating circumstance.

[58] Mr. Soosay joined in the attack started by Percy. Mr. Nepoose was already severely injured. He was not defending himself.

[59] Mr. Soosay's attack had an element of domination or control. Mr. Nepoose had already been attacked by Percy when Mr. Soosay joined in. There was no evidence that Mr. Nepoose had defended himself or, by the time Mr. Soosay intervened, that he could defend himself. He was down and defenceless.

[60] The Defence contended that Mr. Soosay did not "abuse a position of trust" in committing the offence against Mr. Nepoose. I accept that Mr. Soosay was not in a position of trust respecting Mr. Nepoose as contemplated by s. 718.2(a)(iii). Mr. Soosay, though, was a friend of Mr. Nepoose. It is true that Mr. Nepoose was not Mr. Soosay's best friend. They had not seen each other for years, but they did talk now and then. Mr. Nepoose came to see Mr. Soosay, although not merely out of friendship, but to see if he could get some marijuana to sell so he could make some money. Mr. Nepoose and Mr. Soosay hung out on April 10. They went to town twice to pick up alcohol and food. Mr. Nepoose got Mr. Soosay's permission to stay overnight in 605 Samson. He was Mr. Soosay's guest. In my opinion, Mr. Soosay took on responsibility for Mr. Nepoose. From a civil law perspective he had obligations to take reasonable care in relation to his guest. Regardless of the civil perspective, in my view Mr. Nepoose had a reasonable expectation of security as a guest in Mr. Soosay's home. As the Crown put it, Mr. Nepoose was prepared to sleep in Mr. Soosay's home. That is, Mr. Nepoose was allowing himself to be completely vulnerable in the home while he was sleeping. Given this context, it is extraordinary, unexpected, aggravating that a guest would be attacked. See ***R v Shaw***, 2019 ABCA 106 at paras 19-22.

[61] However, in my opinion as well, the aggravating effect of this factor was tempered or reduced by Mr. Soosay's personal circumstances. I'll return to this point below.

[62] Mr. Nepoose was not dead when the attacks stopped. He lay bleeding for a time. Nothing was done by anyone to assist him. He was left to bleed out, gasping. I accept that there was nothing, though, that anyone could have done. There was no real prospect that he could have been saved.

[63] Mr. Soosay used weapons to harm Mr. Nepoose. He used a machete. Mr. Soosay hit Mr. Nepoose with enough force to break the machete and cut his own finger. Mr. Soosay also used a wrench, a self-protection tool that had been used by his late brother Luwen.

[64] I do take into account that, on the evidence, each of Percy, Mr. Soosay, and Mr. Nepoose had their machetes in the house. A feature of their daily lives was that they needed to carry weapons for self-defence. Mr. Soosay did not bring the machete into the house to harm Mr. Nepoose. In fact, on the evidence, the machete used by Mr. Soosay in attacking Mr. Nepoose was Mr. Nepoose's own machete. Similarly, Luwen's wrench was already in the house.

[65] After the attack, Mr. Soosay took off his shoes and shirt. When he heard the police approaching, he ran. He did come back. He was arrested.

[66] Mr. Soosay's flight was relevant to whether he committed homicide: see Trial Decision at para 996, 973, 763-764. However, I did not find that Mr. Soosay sought to conceal any evidence.

His shoes were found by the upstairs bathroom sink. His shirt was not found, but there was no evidence that anyone looked for it. As I said in the Trial Decision at para 771, there was plenty of bloody clothing in the house.

[67] I observed in the trial decision that there was evidence of crime scene disturbance and clean-up that was bizarrely ineffectual. No evidence tied Mr. Soosay to these efforts at concealment: Trial Decision at paras 522-523.

3. Degree of Responsibility

(a) Aspects of Degree of Responsibility

[68] The "degree of responsibility" concerns the moral culpability of the offender in committing the offence.

[69] That is, while the "gravity" aspect of proportionality focuses on the act and its consequences or on what was done, the "responsibility" aspect of proportionality focuses on the actor, how the act was done, why the act was done, and by whom the act was done.

[70] The degree of responsibility goes to the offender's level of fault in committing the offence, beyond the level of fault required for conviction: ***R v Laberge***,1995 ABCA 196, Fraser CJA at para 7; ***Hamlyn*** at para 12; ***Arcand*** at para 58. All other things being equal, the greater the fault, the greater the justified punitive response; and the more definite, conscious, or deliberate the purpose or intention, the greater the justified punitive response: ***R v Martineau***, [1990] 2 SCR 633, Lamer CJC at 645. Fault lies along a continuum.

[71] At this point, I'll deal with factors bearing on the degree of responsibility independent of Mr. Soosay's Aboriginal background (for the most part). I'll come back to some of these factors under the "Character" heading when considering *Gladue* factors arising under the *Gladue Report*.

(b) Mr. Soosay's Degree of Responsibility

[72] Some factors lowered Mr. Soosay's degree of responsibility.

[73] The evidence did not support an inference that the formation of Mr. Soosay's specific intent was disrupted because of intoxication: Trial Decision at paras 47, 430, 443, 1008. Nonetheless, he had started smoking marijuana early on April 10 and had been drinking in the evening of April 10 and into early April 11. He was not impaired by alcohol or marijuana to the point that he did not form the intent required for his conviction (there was no reasonable doubt about that), but the alcohol would have reduced Mr. Soosay's inhibitions and impaired his judgment.

[74] Mr. Soosay's attack on Mr. Nepoose was not planned or deliberate. Mr. Nepoose was not lured to 605 Samson. He came on his own. He left and returned several times as he chose. He asked to stay the night. Nothing in the evidence tended to show that prior to Percy attacking Mr. Nepoose there had been any argument or falling out between Mr. Nepoose and anyone in the house.

[75] Percy's attack on Mr. Nepoose occurred suddenly, in response, it appeared, to seeing Ms. Ward with Mr. Nepoose on the couch.

[76] Mr. Soosay's attack too occurred suddenly. Just before the attack he was sitting at the table. Moments later he was chopping Mr. Nepoose.

[77] There are two perspectives on these circumstances.

[78] The first perspective is that Mr. Soosay's attack could be said to be "impulsive," or "spontaneous." These are ways of saying that his attack was not planned or prepared for or the product of any significant rational thought or rational judgment. The attack, then, was the product of a less culpable intention or state of mind than if Mr. Soosay had planned to hurt Mr. Nepoose then carried out that plan.

[79] But while the "impulsive" nature of the attack makes it less culpable than a planned attack, that does not mean that Mr. Soosay's culpability was low. His intention was still the intention to murder. While his decisions were made quickly, on the sudden, with no preparation that the evidence can supply, he still decided to pick up a machete, move from the table to where Mr. Nepoose was laid low, chop Mr. Nepoose hard to the point of breaking the machete, then continue by picking up the wrench and striking Mr. Nepoose with it.

[80] In ***Laberge*** at para 18, Chief Justice Fraser cautioned against a simplistic and presumptively lenient approach to impulsive acts, in the context of a manslaughter charge:

> [18] At this stage, I find it convenient to address an issue raised by this case. That is the argument that because Laberge's act was "impulsive", it should be treated as "near accident" and Laberge should be sentenced accordingly. Of course, all other things being equal, impulsivity is less blameworthy than planned or repeated conduct. But simply because an act was impulsive does not automatically mean that it falls at the lower end of the manslaughter scale. I find the contrary argument uncompelling.

[81] The second perspective is that, on the evidence, there was no explanation for Mr. Soosay's attack on Mr. Nepoose, there was no reason for Mr. Soosay to have done what he did. I realize that there's mention in the *Gladue Report* that Mr. Soosay felt "overprotective" toward Percy, his only remaining brother. I acknowledge that this information about motive, in an unsworn third-party document should be approached with caution, at the very least. The Court of Appeal provided the following reminder in ***R v Corbiere***, 2017 ABCA 164 at paras 14 and 15:

> [14] Concerns about the contents of reports in sentencing are not new. Generally, a pre-sentence report should not include new facts relating to the offence itself: Allan Manson, *The Law of Sentencing* (Toronto: Irwin Law, 2001) at 187; Clayton Ruby, Gerald Chan & Nader Hasan, *Sentencing*, 8th ed (Markham: LexisNexis, 2012) at 3.203. The same rationale applies, by extension, to other reports frequently prepared for use by sentencing courts in Alberta, including a Forensic Assessment and Community Services Report and a Gladue Report. As this Court noted in [***Arcand***] at para 287 ... in commenting on reports available for sentencing:

> .... A cautionary note about pre-sentence reports. They are not designed to explore the gravity of the offence nor the *mens rea* degree of responsibility of the offender for it. Further, the fact that authors of these reports or others may make recommendations as to a suitable disposition in no way reduces the obligation of the sentencing judge to assess what is a just sanction.
>
> [15] That said, sentencing judges rely on the content of these reports every day in courts across this province. And while they typically focus on the offender's personal circumstances, including history and family, as well as age, maturity, character, behaviour and attitude, they may also include facts, or references to facts, involving the offence for which the person is to be sentenced. Section 724(1) of the Criminal Code permits sentencing judges to accept as proved any information disclosed in the sentencing proceedings. That includes reports admitted during the sentencing proceedings themselves. Both Crown and defence counsel have an important role to play in this regard. At the very least, they should make their position on disputes about facts clear so that the sentencing judge knows what the ground rules are: *R v Alcorn*, 2015 ABCA 182 at para 32, 600 AR 182. This would then allow for those disputed facts to be resolved in accordance with the procedure set forth in s 724(3) of the Code.

Moreover, a disposition to be "overly protective" might be thought not to provide much help in understanding Mr. Soosay's thinking. Percy was the aggressor, not the victim. By the time that Mr. Soosay intervened in the attack, Mr. Nepoose was already seriously injured. Protection of family might be argued not to enter into these circumstances at all.

[82] In ***Shropshire***, Justice Iacobucci confirmed that the absence of an explanation for a killing may be an aggravating factor respecting the period of parole ineligibility. One of the factors considered by the sentencing judge in ***Shropshire*** was that "the circumstances of the killing were strange in that they provided no real answer to why it took place, and the respondent was unwilling or unable to explain his actions:" at 246. Justice Iacobucci affirmed the analysis of Justice Goldie: "the crux of Goldie J.A.'s comments is that, in the absence of any explanation for a random and seemingly senseless killing, the trial judge was correct in sentencing the respondent in light of his refusal to offer an explanation." At 247, Justice Iacobucci wrote that "I conclude that in certain circumstances, such as those presented in this case, it is proper to take into account the absence of an explanation of attenuating factors."

[83] The apparently senseless and unmotivated nature of Mr. Soosay's attack on Mr. Nepoose has an aggravating character. I will, however, return shortly to the assessment of this aggravating factor in the broader context of the *Gladue Report*.

[84] As for Mr. Soosay's after the fact conduct, he ran away and returned. On the evidence, he did not conceal or destroy any evidence. While his conduct had evidential significance, his conduct was not an aggravating factor for sentencing purposes.

D. Pre-Offence and Post-Offence Factors

[85] Some pre-offence and post-offence factors considered in sentencing do not relate directly to the offender's degree of responsibility in committing the offence but may nonetheless be

relevant to the offender's blameworthiness or to the objectives appropriate to the offender's sentence or both. At this point, I will consider these factors independently (for the most part) of the factors arising from the *Gladue Report* bearing on Mr. Soosay's parole ineligibility.

1. Pre-Offence Factors

[86] Pre-offence factors include

- age (particularly the youth of the offender – see ***Friesen*** at para 174 and ***R v Shrivastava***, 2019 ABQB 663, Antonio J, as she then was, at paras 52-55)
- criminal record.

(a) Age

[87] Mr. Soosay was 26 at time of the offence and is now 29. He was and is a relatively youthful offender. In response to the Crown's submission on this point, I accept that Mr. Soosay is not a very young adult. He was not 19. But neither is he older, in his 30's, 40's, or 50's.

(b) Criminal Record

[88] Mr. Soosay had a criminal record at the time of the offence. His record was made an Exhibit in the sentencing proceedings. His convictions included the following (not including administration of justice offences):

- October 2007, assault with a weapon, x2 (youth)
- June 2009, assault with a weapon, assault (youth)

  careless use of a firearm, weapon, prohibited device, or ammunition
- November 2010, assault
- October 2012, assault causing bodily harm, uttering threats
- July 2016, assault with a weapon, possession of a weapon
- April 2017, assault causing bodily harm, uttering threats.

The Crown noted that his last conviction was entered not long before the present offence, about a year before.

[89] Mr. Soosay had been convicted of at least 10 violence offences.

[90] The significance of the criminal record is not to re-punish Mr. Soosay for what he has already been punished for. Rather, the record goes to the issues of the prospects of rehabilitation, to specific deterrence (deterrence through this sentence from committing future offences) and to the assessment of Mr. Soosay's dangerousness or risk of reoffending. Past offences are also relevant to his personal responsibility for committing the offences for which he is to be sentenced. Past offences demonstrate an understanding of what was done and the potential consequences. Past offences may also rebut an inference that the offences for which he is to be sentenced arose out of unusual or peculiar circumstances that impelled him toward offending.

[91] The *Gladue Report* is relevant to the assessment of the significance of Mr. Soosay's criminal record. I'll return to this matter below.

2. Post-Offence Factors

[92] Post-offence factors include

- guilty plea
- cooperation with the authorities
- pre-sentencing rehabilitative steps
- remorse.

[93] These factors tend to mitigate by showing remorse and insight into responsibility. Remorse, in turn, shows that the offender is a good candidate for rehabilitation and shows that the objective of acknowledgement of harm and promotion of a sense of responsibility has already been at least partially fulfilled.

[94] Mr. Soosay did not plead guilty. He exercised his constitutional right to trial.

[95] Mr. Soosay did cooperate in the focusing of the trial. With the Crown's consent, he elected to be tried by judge alone. This had the effect of saving significant time and resources for the administration of justice and for those who would have sat as jury members. Mr. Soosay gave a statement to the police and did not challenge its admissibility. Mr. Soosay accepted a Statement of Admitted Facts that significantly shortened trial time. These factors have a mitigating effect on Mr. Soosay's punishment.

[96] Mr. Soosay has not expressed remorse. That is not an aggravating factor. In the circumstances, this simply points to the absence of a mitigating factor. See ***R v Ledesma***, 2019 ABQB 204, Gates J at para 74; ***R v Wowk***, 2020 ABCA 119 at paras 23 and 25.

[97] As regards this factor, I accept Defence counsel's submission that Mr. Soosay is in a difficult position. I rejected his evidence respecting his involvement in the death of Mr. Nepoose. For him to express remorse now, for what he said didn't happen, would at least raise the issue of his sincerity. In addition, if there are further proceedings, there would be a risk that anything he said now would be used against him. Again, the absence of expressed remorse only marks the absence of a mitigating factor and is not aggravating.

[98] Mr. Soosay has taken some significant rehabilitative steps while in custody. Letters and certificates were attached to the Defence Brief.

[99] A letter by CSW Pomeroy of March 9, 2020 confirmed that Mr. Soosay participated in Bootcamp at ERC. I take this to be a significant accomplishment. Individuals must apply to get into Bootcamp. It is an exclusive program. The rules of Bootcamp are tough. As was said by CSW Pomeroy, Bootcamp imposes a "strict, structured daily regime." If individuals don't comply, they are removed from the program. Mr. Soosay thrived in this program.

[100] According to CSW Pomeroy, Mr. Soosay met and exceeded all expectations. He was one of the best performers in the program. He maintained a positive attitude and showed great discipline. He progressed to the top tier of the program and served as a mentor to new members. In recognition of his excellent conduct, he was named Drill Team Leader.

[101] I consider Mr. Soosay's performance in Bootcamp to be a very positive and significant mitigating factor.

[102] Mr. Soosay has done many courses and programs while in custody. He has not wasted his time. The courses and programs he has completed include

- AA/NA
- Anger Management, NorQuest College
- Relapse Prevention, AB Health Services
- Life Management 1 (Intrapersonal Skills) & 2 (Interpersonal Skills), NorQuest College
- Parenting, NorQuest College
- Creative Writing
- Life Enhancement and Development Skills
- SHARE Group

Mr. Soosay's efforts and successes again are a very positive and significant mitigating factor. His hard work demonstrates his potential for rehabilitation.

[103] Mr. Soosay has also acquired experience working in the laundry. He was a good worker. This work experience is very significant and valuable, since we learned in the *Gladue Report* that Mr. Soosay's prior lawful work experience amounted to 3 days work at a donair shop in Saskatchewan. Mr. Soosay has taken steps to acquire the discipline and habits that will enable him to make positive contributions to society and to support his responsibilities in the outside world.

[104] The *Gladue Report* states that Mr. Soosay's plans are to finish his schooling and to be a proper father to his children. These are important, focused, and practical ambitions. These plans also go to show Mr. Soosay's rehabilitative potential.

[105] Finally, the *Gladue Report* states that Mr. Soosay does not want to go back to Maskwacis. He does not want to be around a negative peer group and environment. This, in my view, is an important insight on Mr. Soosay's part. It shows that he is maturing and making good decisions about his life. Again, his ambition supports his rehabilitative potential.

III. Character

A. *Gladue Report*

[106] As directed by the Supreme Court in ***Ipeelee*** at para 60, I take judicial notice of

> the history of colonialism, displacement, and residential schools and how that history continues to translate into lower educational attainment, lower incomes, higher unemployment, higher rates of substance abuse and suicide, and of course higher levels of incarceration for Aboriginal peoples.

These matters "provide the necessary context for understanding and evaluating the case-specific information presented by counsel:" ***Ipeelee*** at para 60.

[107] A *Gladue Report* dated April 5, 2021 and prepared by Jason Gorman was filed in the proceedings. This report moves from general information to the particular circumstances of Mr. Soosay.

[108] Maskwacis is the former home of the Ermineskin Residential School. It opened in 1894 and closed between 1969 and about 1975. Through separating parents from children and children from parents, cutting off children from their culture and traditions, and exposing children to the power of strangers and their institutions, trauma was induced that has passed through generations, from grandparents to parents to children.

[109] The *Gladue Report* author noted that in the 1920s, 50% of the students were affected with tuberculosis. There were deaths.

[110] As a judge who has done some work in the Wetaskiwin/Maskwacis area, I also take judicial notice that Maskwacis suffers from a high level of suicide, alcoholism, drug use, and gang affiliation. Unemployment is estimated at 70%. There are housing shortages. Large families - sometimes parents, adult children, young people – may share accommodations.

[111] These facts of place shaped Mr. Soosay and the world into which he was thrown.

[112] Mr. Soosay's parents were Emily Soosay, who testified for the Crown at trial, and Jayson Soosay. Both were from Maskwacis.

[113] There was family discord.

[114] His father was incarcerated when Mr. Soosay was very young. At the time of Mr. Soosay's birth, his father was in youth custody.

[115] Essentially, Mr. Soosay was rejected by Emily. Emily struggled with drug abuse.

[116] His brothers went into foster care.

[117] For an unknown reason, he was separated from his siblings and placed with his paternal grandmother.

[118] Life with his grandmother and grandfather was strict and structured. They were good parental figures for Mr. Soosay. However, when they were absent, he was targeted and mentally and physically abused by his grandfather's older children. They would take his things. He was assaulted. He said he was sexually assaulted by an older family member, although he did not disclose this to the authorities.

[119] His grandfather's oldest son was released from the penitentiary and came to live with the family. He would beat Mr. Soosay.

[120] Mr. Soosay told the report author that it was a constant fight and struggle to protect and defend himself against the older people living in the home.

[121] When he was old enough he tried to run away numerous times. He was caught and made to return, until he was 12.

[122] When he turned 12, his grandparents let him stay with his father. His father had gang involvement, and asked local gang members to look out for Mr. Soosay. I make the inference suggested by Defence counsel that directly or indirectly Mr. Soosay's father led Mr. Soosay into the gang life.

[123] Mr. Soosay spent 2 years with his father. His father was trying to turn his life around to be the parent that Mr. Soosay needed and had lacked. His father soon died due to illness. Mr. Soosay went back to his grandmother.

[124] By this time, his grandmother had left his grandfather. She was not working. She had little income. Mr. Soosay sold drugs to earn money.

[125] Mr. Soosay had tried alcohol and marijuana when he was 9. To support himself, he began selling marijuana when he was 9.

[126] Mr. Soosay was first incarcerated when he was 14. He was living a gang-involved lifestyle. He was in and out of jail. He purchased guns to protect himself.

[127] His younger brother Jacob ran away from a group home to live with him.

[128] Mr. Soosay had 4 children with Alyssa. They are separated.

[129] Mr. Soosay met Ms. Smallboy. He moved to Saskatchewan to be with her. They were together before the offence. The relationship ended in 2019. He told Katrina he didn't want to hold her back. He didn't know how long he'd be incarcerated.

[130] Mr. Soosay completed his grade 12 education.

[131] He has attended some college courses and has taken culinary arts courses.

[132] Mr. Soosay had gainful employment only when he worked at a donair place in Saskatchewan for 3 days.

[133] Jacob was shot and killed when he was 21.

[134] Mr. Soosay's brother Luwan committed suicide in December 2017. He was 24. His passing, and its effect on Percy, is why Mr. Soosay had returned to Maskwicis from Saskatchewan before the offence.

[135] Mr. Soosay has been stabbed "a couple of times" and shot. The bullet is still lodged in lower back and gives him severe back problems. He has been assaulted and has been involved in physical altercations.

[136] Mr. Soosay told the report writer that his family history made him "overprotective." The result was that he would too easily lose control. He is working on correcting this disposition.

B. Effect of *Gladue* Factors

[137] I am guided by principles set out by the Court of Appeal in para 63 of ***R v Laboucane***, 2016 ABCA 176:

> 1. An offender is not required to establish a causal link between background factors and the commission of the current offence before being entitled to have those matters considered by the sentencing judge: ***Ipeelee*** at para 83 ....
>
> 2. There is nothing in the *Criminal Code* or ***Gladue*** that places the burden of persuasion on an Aboriginal accused. As expressed in ***Gladue***, [***R v Wells***, [2000] 1 SCR 207] and ***R v Kakekagamick***, (2006), 81 OR (3d) 664 (CA), the sentencing judge must, "give attention to the unique background and systemic factors which may have played a part in bringing the particular offender before the courts": ***Gladue***, at para 69. This is a much more modest requirement than the causal link suggested by some trial judges: ***R v Collins***, 2011 ONCA 182, 277 OCA 88.
>
> 3. Systemic and background factors "do not operate as an excuse or justification for the criminal conduct. Rather, they provide the necessary context to enable a judge to determine an appropriate sentence": ***Ipeelee*** at para 83.
>
> 4. Unless the unique circumstances of the particular offender bear on his or her culpability for the offence or indicate which sentencing objectives can and should be actualized, "they will not influence the ultimate sentence": ***Ipeelee*** at para 83.

[138] In my opinion, the information provided in the *Gladue Report* assists in understanding and mitigating two main factors bearing on the period of Mr. Soosay's parole ineligibility.

1. Criminal Record

[139] First, Mr. Soosay's personal history provides important context for his criminal record. He has been convicted of numerous violence offences.

[140] However, since he was beaten in his home, since he had to defend himself from physical attack at the place where he should have been safe, it was no wonder that he took his lessons in violence to his interactions with others outside the home. He had been taught to be violent and he had learned these lessons. Had he not, he would have been only a victim.

[141] Mr. Soosay's history reduces the moral significance of his criminal record.

2. The Offence

[142] Second, Mr. Soosay's personal history provides some context for his offence, its violence and its targeting of a guest. I begin with the Court of Appeal's observations in ***R v Okimaw***, 2016 ABCA 246 at paras 55 and 56:

> [55] ….The important point is that the law since the enactment of s 718.2(e) of the *Code*, and since the pronouncement of the decision in ***Gladue*** and later cases, has reminded courts that personal culpability under s 718.1 of the Code is related to the circumstances which constituted the offender's upbringing and life experience. It cannot be doubted that a life of abuse, hardship, insecurity,

> dislocation and rejection will be braided into the thinking processes of any individual from a young age. Any person with such an upbringing may violently react to perceived aggression in a more pre-emptive or excessive manner than would be the case with others whose lives have not been so afflicted since childhood. In devising the appropriate sentencing response, it is important to understand the individual. Armed assaults that are forethought or driven by malice are not the same as those which are reactive.
>
> [56] Tragically, for all too many Aboriginal people, the situation of the offender as an Aboriginal person may have further entrenched the traumas of youth. The Crown does not dispute, and in our view it is fundamentally incontrovertible that Okimaw's prenatal, childhood and youth experiences were directly connected to his family's intergenerational trauma, which trauma related to indigenous peoples' historical involvement with colonialism, displacement, and residential schools. Mr. Okimaw is a present day, living artefact – that is, an unintended consequence - of how the history of Canada's indigenous peoples continues to translate into lower educational attainment and incomes, higher unemployment, higher rates of substances abuse and suicide, and higher levels of incarceration for Aboriginal peoples. The judiciary is obliged to assess these unique background and systemic factors in determining the appropriate sentence for a particular offender: ***Gladue***, ***Ipeelee***. See also *Honoring the Truth, Reconciling for the Future, Summary of the Final Report of the Truth and Reconciliation Commission of Canada* (2015).

[143] Mr. Soosay's lived experience affects his responsibility, specifically his decision-making. If an offender has been exposed to anti-social behaviour, if the exposure was broad and long, the offender may have learned a repertoire of only anti-social behaviours and little else. The offender's practical possibilities of action or horizons of actions may be limited. Further, chronic exposure to bad decision-making by others and lack of reinforcement of good decision-making may make it easier for an offender to make bad decisions or to make decisions without consideration of consequences. Justice LeBel wrote as follows in para 73 of ***Ipeelee***:

> [73] First, systemic and background factors may bear on the culpability of the offender, to the extent that they shed light on his or her level of moral blameworthiness …. Canadian criminal law is based on the premise that criminal liability only follows from voluntary conduct. Many Aboriginal offenders find themselves in situations of social and economic deprivation with a lack of opportunities and limited options for positive development. While this rarely - if ever - attains a level where one could properly say that their actions were not voluntary and therefore not deserving of criminal sanction, the reality is that their constrained circumstances may diminish their moral culpability. As Greckol J. of the Alberta Court of Queen's Bench stated, at para. 60 of *R. v. Skani*, 2002 ABQB 1097, 331 A.R. 50, after describing the background factors that lead to Mr. Skani coming before the court, "[f]ew mortals could withstand such a childhood and youth without becoming seriously troubled." Failing to take these circumstances into account would violate the fundamental principle of sentencing — that the sentence must be proportionate to the gravity of the offence *and the degree of responsibility of the offender*. The existence of such circumstances may also

> indicate that a sanction that takes account of the underlying causes of the criminal conduct may be more appropriate than one only aimed at punishment *per se* …. [emphasis in original]

See ***Shrivastava*** at paras 83-84; ***Friesen*** at para 174.

[144] Mr. Soosay reacted to the events that unfolded before him with violence that is surely incomprehensible to those of us who have had more protected lives than him. But the point made respecting his criminal record applies to the offence as well. Mr. Soosay, from his earliest age, had been schooled in violence. He was confronted by what might appear to those with more protected lives to have been an argument that should have concluded with Mr. Nepoose being asked to leave the house. Instead, Mr. Soosay perceived a physical struggle that risked serious injury and death.

[145] An aggravating factor I identified earlier was that the offence involved an element of betrayal of hospitality and friendship. But what Mr. Soosay had not learned was that the home was a place of refuge. Home had not been a refuge for him. He would not naturally consider that home should be a refuge for guests. He had no security in his home. He had no reason to consider that guests should have security in his home. Home was not a place of safety for Mr. Soosay. Mr. Soosay's lived experience reduces the aggravating nature of the attack on a guest.

[146] Another aggravating feature of Mr. Soosay's offence was that he assisted his brother in killing Mr. Nepoose. His brother was not in need of protection, clearly enough. But Mr. Soosay had demonstrated through his life his concern with family. Mr. Soosay had tried to return to his father and his father had tried to return to him, but his father's early death stopped that. Mr. Soosay maintained his connection with his grandmother. Jacob came to live with him. After Luwen died, Mr. Soosay came back to Maskwicis from what, to all appearances, was a good developing relationship with Ms. Smallboy. He came back to help his brother who was experiencing difficulties because of Luwen's death.

[147] When the attack began, it was Mr. Soosay's brother against someone who was not family. Practically, I understand Mr. Soosay to have considered himself to have had no choice – he would not have thought of other alternatives. Blood will out. He joined his brother against the outsider.

[148] This makes Mr. Soosay's attack at least comprehensible. It mitigates the aggravating factor of uncertainty of motive I referred to above, but does not neutralize the aggravating nature of his purpose (insofar as this can be discerned) for attacking the defenceless Mr. Nepoose.

C. Risk of Re-Offending

[149] The higher the risk of re-offending, the greater the concern for sentencing purposes. A high risk of re-offending may engage the objective of separation or incapacitation for the sake of public safety. Specific or individual deterrence, stopping this offender from re-offending, would be engaged by a high risk of re-offending.

[150] Public safety is a legitimate concern in sentencing. Section 718 refers to a fundamental purpose of sentencing being to "protect society" and s. 718(c) provides that an objective of sentencing promoting that purpose is separation, where necessary. Dangerousness, the likelihood

of an offender to reoffend, was taken into account in ***R v Nienhuis***, 1991 ABCA 238, Hetherington JA at paras 32 and 44 ("It is, of course, the duty of this court to attempt to ensure the safety of the public"). See ***R v Cooper*** (1997), 117 CCC (3d) 249, 1997 CanLII 14618 (NL CA) at paras 21 and 22 and ***R v Johnny***, 2016 BCCA 61 at para 21.

[151] I do not suggest that concerns for public safety can override proportionality. Proportionality limits a sentence. Public safety should not extend a sentence beyond the limits of proportionality. Public safety can influence the nature of the sentence, though – for example, public safety considerations could influence whether a sentence should be one of incarceration only or a lesser period of incarceration with a period of probation. Public safety does not expand a period of deprivation of liberty beyond what it should be, whether the deprivation is by walls or State-surveillance and compulsion through the terms of an order, but it is a consideration for determining the nature of the sentence, the nature of the deprivation of liberty

[152] In this case, the higher Mr. Soosay's risk of violent reoffending, the greater the support for an extended period of parole ineligibility.

[153] I do not have independent evidence of Mr. Soosay's risk of violent reoffending. I have no evidence of formal risk assessments of Mr. Soosay.

[154] It is not necessary for me to make any definitive pronouncement on Mr. Soosay's degree of risk. That will be done, on a proper evidential basis, by the Parole Board when it considers Mr. Soosay's release.

[155] On the record that I have, I find that Mr. Soosay has managed to significantly reduce what otherwise would be a considerable risk of reoffending.

[156] He has identified his triggers and has taken concrete steps – such as the Anger Management course – to learn to deal with reducing his violent responses.

[157] Through Bootcamp, he has shown that he can govern his impulses and not only follow rules but serve as a model for others.

[158] He realizes that he needs to be away from Maskwicis and its malign influences on him.

[159] He accepts his responsibility to be a father and wants to take steps to carry out his obligations to his children.

[160] Insofar as alcohol and drugs played a role in the offence, he has not only participated in AA/NA, but the lengthy period of ongoing incarceration and the lengthy period of incarceration to come will impose abstinence in practice.

[161] I had the opportunity to observe Mr. Soosay when he testified. I did not accept his account of events. Nonetheless, he struck me as quietly intelligent and profound. He was fully in control of himself despite the stresses of testifying and cross-examination. In my opinion, the discipline and structure of incarceration and the opportunities provided by incarceration and taken up by Mr. Soosay have assisted in his maturation and development.

[162] In all the circumstances and for the purposes of the determination of the period of Mr. Soosay's parole ineligibility, I do not consider Mr. Soosay to pose a significant risk for violent reoffending.

D. Sentencing Objectives

[163] The period of parole ineligibility should promote relevant objectives of punishment set out in s. 718.

[164] Certainly Mr. Soosay's offence, elements of his responsibility or blameworthiness, and the aggravating factors I have identified engage the objectives of denunciation and deterrence. An innocent man was killed in shocking circumstances. That cannot be explained away. The community's condemnation of Mr. Soosay's act – the condemnation not only of outsiders but of the people of Maskwicis – must be reflected in Mr. Soosay's sentence. Not only he but anyone else who might take any step towards this type of awful crime should be deterred by the knowledge that the penalty faced will be severe.

[165] Yet at the same time, Mr. Soosay's rehabilitative potential cannot be forgotten. Neither can the circumstances that led to Mr. Soosay being in 605 Samson with Mr. Nepoose on that early April 11 morning.

[166] Denunciation and deterrence must be achieved, but tempered by understanding and by the reasonable prospect of hope of rehabilitation.

E. Parity of Sentences

1. Considerations Bearing on Parity

[167] The Crown and Defence referred to past sentencing decisions relating to parole ineligibility. What was decided in other cases turning on other facts cannot bind the determination of the appropriate sentence for *this* offender for *this* offence. It is true that under s. 718.2(b) "parity" is a feature of a just sentence. The language of s. 718.2(b) betrays the difficulty: similar offenders, similar offences, similar circumstances. The real focus of sentencing is on the particular offender, the particular offence, and particular circumstances. Particularity provides the foundation for comparison, for deciding what is "similar." The parity principle is necessarily secondary. Thus Justice Wagner wrote as follows in ***Lacasse*** at para 54:

> The principle of parity of sentences ... is secondary to the fundamental principle of proportionality. This Court explained this as follows in *M. (C.A.)*:
>
> > It has been repeatedly stressed that there is no such thing as a uniform sentence for a particular crime …. Sentencing is an inherently individualized process, and the search for a single appropriate sentence for a similar offender and a similar crime will frequently be a fruitless exercise of academic abstraction. [para. 92]

[168] The subordination of parity to proportionality is especially important in sentencing Aboriginal offenders. Justice Lebel stated the following in ***Ipeelee*** at para 79:

> In practice, similarity is a matter of degree. No two offenders will come before the courts with the same background and experiences, having committed the same crime in the exact same circumstances. Section 718.2(b) simply requires that any disparity between sanctions for different offenders be justified. To the extent that ***Gladue*** will lead to different sanctions for Aboriginal offenders, those sanctions

> will be justified based on their unique circumstances - circumstances which are rationally related to the sentencing process. Courts must ensure that a formalistic approach to parity in sentencing does not undermine the remedial purpose of s. 718.2(e). As Professor Quigley cautions, at p. 286:
>
> > Uniformity hides inequity, impedes innovation and locks the system into its mindset of jail. It also prevents us from re-evaluating the value of our aims of sentencing and their efficacy.

The Court of Appeal commented in ***Okimaw*** at para 69:

> It is true that on the surface imposing the same penalty for the nearly identical offence is only fair. That might be closer to the truth in a society that is more equitable, more homogenous and more cohesive than ours. But in an ethnically and culturally diverse society, there is a differential impact from the same treatment. Indeed, that has been recognized in the jurisprudence on equality rights under the *Charter*. Thus, there is a constitutional imperative to avoiding excessive concern about sentence disparity.

[169] Hence, as the Court of Appeal noted in ***R v Bigsorrelhorse***, 2012 ABCA 327 at para 10, there is a "futility [in] attempting to divine a sentencing range through reviewing a number of cases with one thing in common, but with otherwise disparate relevant circumstances."

[170] There are yet benefits of considering other analogous cases. Judge Allen made the following comments in ***R v Kidder***, 2016 ABPC 136 at para 68:

> [68] .... Judicial sentencing precedents are useful to sentencing judges in at least three ways: (1) they provide and apply sentencing principles; (2) they give guidance to sentencing judges as to a fit sentence; and (3) by so doing, they serve to prevent unjustified disparity of sentencing for similar offenders in similar circumstances. Nevertheless, sentencing remains an individualized process tailored to the offender and the offence committed.

2. Reflections on Some Cited Cases

[171] The following cases were referred to:

- ***R v Gordon***, 2007 ABQB 329 [offender shot acquaintance at close range in car after dinner party in front of pregnant girlfriend; offence was substantially orchestrated; offender had significant criminal record; offender disposed of body and had others assist in destroying evidence; offender was dangerous; no mitigating circumstances; no guilty plea – 17 year parole ineligibility]
- ***R v Waite***, 2014 ABCA 315 [offender stabbed victim in victim's own home after having been invited into the home as a place to sleep; murder occurred in context of robbery; offender had significant record for violence; offender expressed some remorse; no guilty plea – 18 year parole ineligibility]
- ***R v Ryan***, 2015 ABCA 286 [offender shot victim; context – criminal enterprise/drug trafficking; killing was the product of some planning; offender took steps to dispose of body and other evidence; no guilty plea – 17 year parole ineligibility]

- ***R v Powder***, 2018 ABQB 1028 [killing involved planning and deliberation; occurred in context of robbery; offender was impaired; offender fled and concealed the weapon; mitigation – youth, family support, *Gladue* factors, remorse; no guilty plea – 12 year parole ineligibility]
- ***R v Sinclair***, 2019 ABQB 652 [offence was premeditated – offender got knife, stabbed victim multiple times; offender sexually violated victim after death; victim was a minor; victim was close friend of offender – an aspect of breach of trust was involved; offender was impaired; mitigating factors included the offender's youth, lack of criminal record, remorse, *Gladue* factors; offender was not dangerous; no guilty plea – 13 year parole ineligibility period]
- ***R v Frenchman***, 2019 ABQB 580 [discussed below]
- ***R v Shaw***, 2019 ABCA 106 [victim allowed offender to stay in his apartment; victim was 71, with Parkinson's; while victim was asleep offender killed victim with a hammer in a violent, brutal attack; victim was left to die on his own; there was a gross betrayal of hospitality and friendship but no trust relationship; offender gave a false alibi to cover up involvement; no guilty plea – 13 year parole ineligibility period]
- ***R v Mbaye***, 2020 ABQB 698 [offender killed spouse; circumstances were graphic, horrifying, and public; three knives used that broke in course of murder; offender cooperated with authorities including calling 911; offender had no criminal record; offender did programs at ERC to address underlying mental health condition; offence involved domestic violence and breach of a position of trust; offender entered victim's home; guilty plea – 14 year parole ineligibility period]
- ***R v Newborn***, 2020 ABCA 120 [discussed below]

[172] I'll discuss only the cases of greatest significance to the determination of Mr. Soosay's period of parole ineligibility.

[173] First, the ***Ryan*** decision, on which some significant weight was placed by the Crown. The foundation for the persuasive value of ***Ryan*** was, in my view, undermined by Defence counsel pointing out that the circumstances referred to by Justice Wakeling as attracting more elevated periods of parole ineligibility simply were not similar to the circumstances before us in this particular case. The types of cases discussed in paras 171 and 172 of ***Ryan*** simply are not matched:

> [171] A parole ineligibility period of sixteen to twenty years inclusive is the appropriate range to commence the analysis if
>
> > (a) the offender was or had been the domestic partner or was a parent or grandparent of the victim and the homicide was directly attributable to this relationship;
> >
> > (b) the offender betrayed the kindness extended by the victim; or
> >
> > (c) the victim was a vulnerable member of the community.

> [172] The subset of second degree murderers whose offences are the most egregious or grave consists, primarily, of offenders who contemplated killing their victims well in advance of doing so – it cannot be said that their acts were impulsive – or who killed someone to effect another criminal purpose. The victim may have been the occupant of a home who died as a result of a confrontation with the intruder or whose death is otherwise directly attributable to a criminal undertaking of the offender. [footnotes omitted]

The present case lacks these features.

[174] Second, ***Frenchman***, a decision of Justice Little. This case strikes me as being as close a case amongst all those cited to the circumstances of our case. In ***Frenchman*** there was a gruesome murder, as described by Justice Little, involving gratuitous violence. There were two offenders, a sister who stabbed the victim and offender who tied the victim to a chair and kicked the victim in the head multiple times contributing to his death. There was definitely domination or control in ***Frenchman*** which I found existed in effect in this case. The murder in ***Frenchman*** was an impulsive and senseless act as was, to a degree, the current offence. There was degradation in ***Frenchman*** in that the victim was left to bleed out as in this case, though in our case there was no hope that a rapid response by EMS might have made any difference.

[175] Of course there were differences between the ***Frenchman*** circumstances and the present circumstances. The ***Frenchman*** offence occurred in the context of other offences. A TV was stolen. In ***Frenchman*** there was post-offence concealment. A fire was started in the house by the offenders as they were leaving. These factors were lacking in the present case.

[176] The offender in ***Frenchman*** was about the same age as Mr. Soosay. *Gladue* factors were also relevant to Mr. Frenchman's blameworthiness. While Mr. Frenchman had a related criminal record, as did Mr. Soosay, Mr. Frenchman's record was less severe, lengthy, and relevant to the homicide than Mr. Soosay's record. In ***Frenchman*** as in this case there was no guilty plea.

[177] Justice Little set the period of parole ineligibility at 13 years.

[178] Third, ***Newborn***. In ***Newborn***, a fatal beating occurred over 10 minutes at an Edmonton LRT station. In that case, the victim was trapped and couldn't escape. In my view, we did have a practically similar situation in the present case. Mr. Nepoose wasn't trapped in the sense of being caught in a corner or under a table, but he was trapped in that he was not able to move away from his assailants. One of the critical differences between ***Newborn*** and the present case is that ***Newborn*** occurred in public. In our circumstances others were in the home besides Percy, Mr. Soosay, and Mr. Nepoose. Emily, though, as Defence counsel pointed out, was in the basement. Certainly Ms. Ward saw what was happening. What Ms. Threefingers saw was less clear on the evidence. Regardless, the events occurred in a private residence. What did not occur was that members of the general public, going about their business, were exposed to a murder – as also occurred in ***Mbaye***. The present case lacks the public nature of the ***Newborn*** offence.

IV. Pre-Trial Custody

[179] Mr. Soosay has been in custody since April 11, 2018, the offence date. As of the hearing date he had served at least 1,150 actual days in custody, a substantial portion of that during Covid. I was advised of this for my information only.

[180] Subsection 719(3.1) of the *Criminal Code* does not apply respecting sentences of life imprisonment and the period of parole ineligibility may not be reduced because of pre-sentence custody. This does not mean that pre-sentence custody counts for nothing. Rather, the period of pre-sentence custody will be counted by the correctional authorities as part of the ineligibility period served after trial under s. 746(a): ***Ledesma***, Gates J at para 50; ***Ryan*** at para 23; ***R v Guignard***, 2008 ABQB 283, Hughes J, as she then was, at paras 52-58, 62-63.

V. Sentence

[181] I have arrived at the determination of Mr. Soosay's period of parole ineligibility.

[182] I confirm that the Crown and Defence understood that the period of parole ineligibility must be set beyond 10 years, beyond the statutory minimum.

A. Factors Summarized

[183] I've taken into account aggravating circumstances bearing on the gravity of the offence –

- the extreme level of violence
- the use of two weapons in succession
- Mr. Soosay having joined in an attack in progress, initiated by his brother
- the helplessness of the victim – while Mr. Nepoose was not confined as in ***Newborn***, he was not able to escape
- the victim having been left to bleed out – while medical assistance would not likely have saved his life, his last minutes were spent gasping for breath with no solace from anyone
- there was not a breach of trust in a technical sense, but there was a violation of norms of civility, of obligations towards a guest in one's home and obligations to a friend, even if not a best friend.

[184] I did qualify the aggravating effect of this last factor by recognizing that for Mr. Soosay home was as much a battleground as a place of refuge.

[185] As for the extreme violence, again I've qualified the aggravating effect by recognizing that violence is what Mr. Soosay had been taught from his early life.

[186] I've taken into account factors bearing on Mr. Soosay's blameworthiness or responsibility for the offence. One of the factors I considered to have an aggravating effect on Mr. Soosay's blameworthiness was the apparent senselessness of what occurred. I have mitigated that factor because of Mr. Soosay's background and his commitment to family. He sided in a

fight with family against an outsider although this did not wholly neutralize the aggravating nature of his purpose or lack of purpose.

[187] There were further mitigating factors relating to Mr. Soosay's degree of responsibility – the influence of marijuana and alcohol consumed all day, up to the time of the offence, and the "impulsive" or sudden nature of the offence by Mr. Soosay. There was no aggravation by planning or forethought. Nonetheless, Mr. Soosay still made a series of conscious decisions.

[188] In terms of pre-offence factors, I've taken into account that Mr. Soosay is a younger offender, then 26 now 29, even if he's not "young."

[189] An aggravating factor is his criminal record for violence, though again that criminal record has to be understood in light of Mr. Soosay's *Gladue* factors.

[190] There was no guilty plea and no expressed remorse. These mitigating factors were absent but this absence does not aggravate.

[191] Mr. Soosay did cooperate to a degree with the authorities – trial was by judge alone and trial was expedited by an Agreed Statement of Facts, for example.

[192] Significantly mitigating as post-offence measures by Mr. Soosay were his efforts while in custody to better himself, especially through the Bootcamp experience, his taking the Anger Management and Parenting courses, and his work in the laundry. By itself this last may not seem very significant but I find that this is a significant step for someone whose only work had been for three days in a donair shop.

B. Sentence for Second Degree Murder and Period of Parole Ineligibility

[193] I found Mr. Soosay guilty of second degree murder. Under s. 235 of the *Criminal Code* I impose a sentence of life imprisonment.

[194] Having taken into account the foregoing factors, and in light of the previous discussion, under s. 745.4 of the *Criminal Code* I extend the period of time during which Mr. Soosay is ineligible to apply for parole from 10 years to 13 years.

C. Ancillary Orders

[195] Again, the Defence does not impose the ancillary orders sought by the Crown.

[196] I therefore make the following Orders:

- pursuant to s.109 of the *Criminal Code*, an order that Mr. Soosay is prohibited from possessing any firearm, cross-bow, restricted weapon, ammunition and explosive substance for life.
- an order requiring Mr. Soosay to provide a sample of his DNA for inclusion in the DNA data bank pursuant to s. 487.051 of the *Criminal Code* (as s. 235 is a primary designated offence)

- pursuant to s. 743.21 of the *Criminal Code*, an order prohibiting Mr. Soosay during the custodial period of his sentence from communicating, directly or indirectly, with Taylor Threefingers, Madison Ward, Erma Nepoose, and anyone who gave a Victim Impact Statement in these proceedings
- forfeiture of offence-related property to Her Majesty.

Heard on June 3rd, 2021 at the City of Wetaskiwin, Alberta.
Delivered on June 3rd, 2021 at the City of Wetaskiwin, Alberta.
Signed at the City of Wetaskiwin, Alberta this 30th day of June, 2021.

W. N. Renke
J.C.Q.B.A.

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Tonii Roulston
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