Her Majesty the Queen v. Jacko
Her Majesty the Queen v. Manitowabi
[Indexed as: R. v. Jacko]

101 O.R. (3d) 1
2010 ONCA 452
Court of Appeal for Ontario,
Winkler C.J.O., Goudge and Watt JJ.A.
June 17, 2010

Criminal law -- Sentencing -- Aboriginal offenders -- Two youthful, recidivist, aboriginal offenders convicted of offences arising out of home invasion in aboriginal community -- Sentencing circle recommending conditional sentences -- Trial judge sentencing each accused to four years' imprisonment -- Accuseds' appeal allowed -- Trial judge failing to give sufficient weight to aboriginal heritage of accused and to sentencing objective of restorative justice -- Trial judge erring in excluding availability of conditional sentence on basis that paramount sentencing objectives were deterrence and denunciation -- Trial judge failing to give sufficient weight to nature of community in which offences were committed and to community's views about nature of punishment best suited to respond to community's needs and notions of justice -- Trial judge erring in treating range of sentence discussed in previous Court of Appeal judgment as imposing de facto minimum sentence for home invasion offences.

Criminal law -- Sentencing -- Home invasions -- Trial judge erring in treating range of sentence discussed in previous Court of Appeal judgment as imposing de facto minimum sentence for home invasion offences -- Sentences of four years' imprisonment imposed on two youthful aboriginal offenders varied on appeal to two years less a day conditional and two years less a day in jail.

J and M were youthful aboriginal offenders who were convicted of a number of offences arising out of a home invasion in an aboriginal community. In the course of the home invasion, J, who wore a disguise, assaulted one of the victims. M wore no disguise and did not participate in the assault. J was 19 years old at the time of the offences and had a criminal record. After his arrest, he made extraordinary efforts to rehabilitate himself. M was 18 years old at the time of the offences and also had a criminal record. Unlike J, he made minimal efforts to rehabilitate himself. A sentencing circle supported a conditional sentence for both accused. The trial judge sentenced each accused to concurrent terms of four years' imprisonment on each count. The accused appealed.

Held, the appeal should be allowed.

The trial judge failed to give sufficient weight to the aboriginal heritage of the accused and, more generally, to the sentencing objective of restorative justice. He appeared to have excluded the availability of a conditional sentence on the basis that the paramount sentencing objectives were deterrence and denunciation. The prominence of those sentencing objectives does not, on its own, foreclose a conditional sentence order. The trial judge failed to give sufficient weight to the nature of the community in which the offences were committed and the views of that community (as reflected in the recommendations of the sentencing circle) about the nature of punishment best suited to respond to the community's needs and notions of justice. Finally, the trial judge erred in treating the range of sentence discussed in the Court of Appeal's judgment in R. v. Wright as imposing a de facto minimum sentence for home invasion offences. J's sentence was varied to two years less a day conditional, with house arrest for the first year and a curfew for the rest of the sentence. M's sentence was varied to two years less a day in jail, followed by 18 months' probation.

APPEAL by the accused from the sentence imposed by Del Frate J. of the Superior Court of Justice at Gore Bay, Ontario on March 24, 2009.

Cases referred to R. v. Gladue, 1999 CanLII 679 (SCC), [1999] 1 S.C.R. 688, [1999] S.C.J. No. 19, 171 D.L.R. (4th) 385, 238 N.R. 1, J.E. 99-881, 121 B.C.A.C. 161, 133 C.C.C. (3d) 385, [1999] 2 C.N.L.R. 252, 23 C.R. (5th) 197, 41 W.C.B. (2d) 402; R. v. Wright (2006), 2006 CanLII 40975 (ON CA), 83 O.R. (3d) 427, [2006] O.J. No. 4870, 218 O.A.C. 215, 216 C.C.C. (3d) 54, 72 W.C.B. (2d) 101 (C.A.), consd Other cases referred to R. v. M. (C.A.), 1996 CanLII 230 (SCC), [1996] 1 S.C.R. 500, [1996] S.C.J. No. 28, 194 N.R. 321, J.E. 96-671, 73 B.C.A.C. 81, 105 C.C.C. (3d) 327, 46 C.R. (4th) 269, 30 W.C.B. (2d) 200; R. v. M. (L.), [2008] 2 S.C.R. 163, [2008] S.C.J. No. 31, 2008 SCC 31, EYB 2008-133843, J.E. 2008-1117, 77 W.C.B. (2d) 463, 374 N.R. 351, 231 C.C.C. (3d) 310, 293 D.L.R. (4th) 1, 56 C.R. (6th) 278; R. v. Proulx, [2000] 1 S.C.R. 61, [2000] S.C.J. No. 6, 2000 SCC 5, 182 D.L.R. (4th) 1, 249 N.R. 201, [2000] 4 W.W.R. 21, J.E. 2000-264, 142 Man. R. (2d) 161, 140 C.C.C. (3d) 449, 30 C.R. (5th) 1, 49 M.V.R. (3d) 163, 44 W.C.B. (2d) 479; R. v. Wells, [2000] 1 S.C.R. 207, [2000] S.C.J. No. 11, 2000 SCC 10, 182 D.L.R. (4th) 257, 250 N.R. 364, [2000] 3 W.W.R. 613, J.E. 2000-414, 250 A.R. 273, 141 C.C.C. (3d) 368, [2000] 2 C.N.L.R. 274, 30 C.R. (5th) 254, 45 W.C.B. (2d) 80; R. v. Whiskeyjack (2008), 93 O.R. (3d) 743, [2008] O.J. No. 4755, 2008 ONCA 800, 243 O.A.C. 150, 239 C.C.C. (3d) 47 Statutes referred to Controlled Drugs and Substances Act, S.C. 1996, c. 19 [as am.] Criminal Code, R.S.C. 1985, c. C-46, ss. 348.1 [as am.], 687(1), Part XXIII, 718 [as am.] (d)-(f) [as am.], 718.1, 718.2 [as. am.], (a) [as am.], (i)-(v) [as am.], (b) [as am.], (d) [as am.] (e) [as am.], 732.1(5), 742.1 [as am.], 742.3(3) [as am.]

James E. Weppler, for appellant Lance Jacko.

William Thompson, for appellant Cody Sebastian Manitowabi.

Gillian Roberts, for respondent in the Jacko appeal (C50301/M37540).

Joan Barrett, for respondent in the Manitowabi appeal (C50571).

The judgment of the court was delivered by

[1] WATT J.A.: -- These appeals require us to consider the fitness of penitentiary sentences of four years imposed on each of the appellants, youthful recidivists and Status Indians, who committed various offences during a home invasion in Wikwemikong, a village in Wikwemikong Unceded Indian Reserve on Manitoulin Island.

[2] I would allow both appeals, but impose different sentences on each appellant.

The Facts

The circumstances of the offences

[3] Orien Roy, Jasmine Shawanda and Amsay Osawamick lived in a two-floor apartment in the Bayheights east area of Wikwemikong. Late in the evening of April 16, 2006, Mr. Roy and Ms. Shawanda were at home watching television. Ms. Osawamick was away from the apartment.

[4] Mr. Roy answered a knock at the apartment door. Four men, all wearing dark clothing, pushed their way into the apartment. Among the intruders were the appellants and Christopher Cooper. The fourth person was never identified. Two of the men, including the appellant Jacko, wore bandanas covering most of their faces. The appellant Manitowabi was not masked, but wore the hood of his sweatshirt pulled over his head.

[5] Two of the intruders beat up Mr. Roy just inside the front door of the apartment. The men punched and kicked Mr. Roy in the head and ribs. One man pushed Mr. Roy's head through the drywall and, at the direction of the other intruder, took his watch and necklace. The blows rained on Mr. Roy caused him injury.

[6] Christopher Cooper, armed with a knife about one-foot long, approached Ms. Shawanda and pressed the knife to her throat. Ms. Shawanda did not suffer any physical injury in the attack.

[7] Manitowabi and the fourth intruder ran downstairs into the bedroom of Ms. Osawamick and vandalized her room. Items were strewn about. Figurines and paintings were smashed. Several coins were taken.

[8] Jacko was one of the two men who punched, kicked and robbed Mr. Roy. His blows were inflicted with significant force to Mr. Roy's head and ribs. Jacko also pushed Mr. Roy's head through the drywall and took his necklace and watch. Mr. Roy valued the property taken at $150 to $250. Although Jacko wore two bandanas that covered most of his face, Ms. Shawanda recognized him.

[9] Manitowabi, who wore no disguise, ransacked and stole things from Ms. Osawamick's basement bedroom. He did not participate in the beating of Roy nor the assault on Ms. Shawanda.

[10] Jacko was convicted of robbery while armed with an offensive weapon, break, enter and commit assault, and disguise with intent. He was sentenced to concurrent terms of imprisonment of four years on each count.

[11] Manitowabi was convicted of robbery while armed with an offensive weapon and break, enter and commit theft. He was sentenced to concurrent terms of imprisonment of four years on each count.

[12] Christopher Cooper, the leader of the group, was convicted of assault with a weapon, robbery while armed with an offensive weapon, break, enter and commit assault, and disguise with intent. He was sentenced to concurrent terms of imprisonment of five years on each count.

The circumstances of the offenders

The appellant Lance Jacko

[13] Jacko is now 23 years old. He committed the offences that are the subject of this appeal on the day before his 19th birthday. His several convictions as a young person include both assault and aggravated assault, possession of property obtained by crime and four entries for breach of a recognizance. Each disposition included terms of probation, although the conviction of aggravated assault also attracted a term of deferred custody and supervision. Several weeks after he committed the current offences, Jacko was convicted of two counts of breach of probation. These convictions, his first as an adult, resulted in another term of probation.

[14] Jacko is a lifelong resident of Wikwemikong, one of two siblings from a long-standing common law relationship. His father was a police officer. The relationship between Jacko's parents was abusive, dominated by assaults and excessive alcohol consumption. The appellant suffered excessive physical discipline at home.

[15] Jacko struggled at school, in part because other students bullied him. He fought back. He began to use illicit drugs. He drank alcohol to excess. A follower by nature, he fell in with a dysfunctional group. He came into contact with the law and left high school.

[16] The events of April 16, 2006 proved an epiphany for Jacko. He returned to high school, completed his final year with honours and received an award for proficiency in Ojibwe, his native language. He stopped using drugs and drinking alcohol. He got a job and worked hard.

[17] Later in 2006, Jacko began a relationship with Wahss Wabano, a young woman of similar age whom he had met in high school. The couple lived together at Ms. Wabano's family home, a stable and nurturing environment for both of them. They now have two young children.

[18] The appellant's father died in September 2007, after a five-year battle with Alzheimer's disease. The appellant spent a great deal of time with his father in the final months of his father's life. He remains a constant source of support for his mother, a devoted father to his children and a dedicated worker for his employer.

[19] Jacko was accepted for admission at community college in a carpentry and building program. His common law partner applied for admission to a nursing program. According to the fresh evidence filed without objection on appeal, Jacko is now a full-time student at Canadore College in North Bay, has achieved considerable academic success and should graduate from his program in August 2010. His common law partner is enrolled in a nursing program at the same college. They live together with their two young children.

[20] A sentencing circle, which included relatives of two of the victims of Jacko's offences, but lacked any input from law enforcement or prosecution sources, supported a sentence to be served in the community, subject to several conditions.

The appellant Sebastian Manitowabi

[21] Manitowabi was 18 years old when he committed the offences and is now 22. After his parents separated when he was three years old, he was raised by his mother and maternal grandmother. During his formative years, Manitowabi suffered the unexpected loss of a cousin in a motor vehicle accident. His grandmother, with whom the appellant was especially close, died in 2004.

[22] Manitowabi was a rebellious youth who was bullied by his schoolmates. He never completed high school and, despite being told that he needed to advance his educational qualifications in order to improve his employment prospects, he has done nothing to further his education. Likewise, he has not undertaken any treatment or participated in any counselling for substance abuse.

[23] Manitowabi has previous convictions for break, enter and commit an indictable offence, possession of stolen property and assault. He was also convicted of robbery and disguise with intent in connection with an incident that took place after April 16, 2006, but for which he was sentenced to a term of imprisonment that he served before the sentence under appeal was imposed.

[24] Since his conviction, Manitowabi has become more interested in the traditional way of life and expressed an interest in beginning anew in British Columbia with relatives of his family. He remains a high risk to reoffend because he has never come to grips with his abuse of drugs and alcohol, lacks both academic and vocational qualifications to obtain gainful employment and has committed offences of increasing severity as he has become older.

[25] The sentencing circle convened to consider a disposition for Manitowabi also recommended that he not be incarcerated, rather that he serve his sentence in the community, subject to certain conditions.

The positions of the parties at trial

[26] Counsel representing the appellants at trial and counsel for their co-accused, Christopher Cooper, each sought conditional sentences of two years less one day. The prosecutor sought mid-range penitentiary terms of four to seven years for Manitowabi and a more lengthy term, of five to ten years, for Jacko.

The reasons of the trial judge

[27] The appellants were convicted on April 21, 2008 and sentenced about 11 months later on March 24, 2009. In the interim, both a Gladue report and pre-sentence report had been prepared for each appellant.

The trial judge also had the benefit of viva voce evidence, several letters attesting to the appellants' character, victim impact statements from two victims and lengthy submissions from trial counsel.

[28] The trial judge acknowledged the need to consider the aboriginal background of each appellant [at para. 29]:

> Since these accused are of an aboriginal background, consideration must be given to any systemic and background factors that may have affected these individuals and if so, then a restorative approach may be considered. And I am citing as authority the R. v. Gladue case 1999 CanLII 679 (SCC), [1999] 1 S.C.R. 688 and R. v. Wells, 2000 SCC 10 (CanLII), [2000] 1 S.C.R. 207. And also the more recent decisions by the Court of Appeal of Ontario in R. v. Kakekagamick (2006), 2006 CanLII 28549 (ON CA), 81 O.R. (3d) 664 and R. v. Whiskeyjack, 2008 ONCA 800 (CanLII), [2008] O.J. 4755.

[29] After noting that, in determining an appropriate sentence, a sentencing judge must consider increasing or reducing a sentence as a result of aggravating or mitigating circumstances, the trial judge underscored the seriousness of "home invasion" crimes and addressed the aggravating and mitigating factors [at paras. 37-39]:

In this case the aggravating factors are as follows:

> (1) All three have significant criminal records involving violence.
>
> (2) They broke into a private dwelling.
>
> (3) There was planning and premeditation of the offence. All four individuals attended at the same time and all four wore disguises and all four were looking for money or other valuable assets.
>
> (4) Violence was involved. Lance Jacko thrust Orien Roy's head through the wall and then he and Cooper proceeded to strike Orien repeatedly in the face and in the stomach. Christopher Cooper grabbed Jasmine Shawanda and placed a knife to her throat.
>
> (5) These incidents have had a traumatic impact on both Jasmine Shawanda and Amsay Osawamick in that both remain angry and fearful and feel that they have been violated.

> The mitigating factors on behalf of the accused are the rehabilitation efforts undertaken by them, and in particular, by Lance Jacko and their young ages.
>
> As stated previously since this offence, Lance Jacko has completed high school and has found employment and may have turned his life around. With respect to Christopher Cooper, he has remained in custody and has undertaken counselling. Sebastian Manitowabi has not been in any further problems since his release from prison in January 2008 and has found occasional seasonal employment.

[30] The trial judge acknowledged that rehabilitation was a significant factor influencing his sentencing decision, but he considered protection of the public, denunciation and deterrence to be of paramount importance. The trial judge emphasized the importance of general deterrence. The offences were "planned and premeditated" and crime was prevalent in the Wikwemikong community. It was doubtful whether Manitowabi, or the co-accused, Christopher Cooper, would be deterred from committing further violent crimes.

[31] The trial judge concluded that the imposition of a conditional sentence would be inconsistent with the fundamental purpose and applicable principles of sentencing. The offences committed were premeditated, violent and serious, thus attenuating the influence of Gladue factors and favouring sentences similar to those for non-aboriginal offenders. The range of sentence appropriate for home invasion cases warranted

sentences beyond dispositions that could be served in the community. The sentencing objectives of denunciation and general deterrence could not be met by imposition of a conditional sentence.

[32] The trial judge rejected the recommendations of the sentencing circles. The prosecutor and judge were not present. No one advanced the position of the prosecutor or apprised circle members of the prior convictions of each appellant. The recommendations lacked specifics, especially regarding enforcement and control mechanisms. The trial judge concluded [at para. 55]:

> These were serious, violent, senseless offences, which took place in the privacy of the victims' home, where they were entitled and are entitled to expect a feeling of security. This is especially so in smaller communities where generally everyone knows each other. Here, the offences were perpetuated by three individuals, actually four but three were found, who could be considered neighbours and were known to each other either through their community or by having attended school together. The victims feel that they have been violated in their own home by people that they knew. The citizens of Wikwemikong and of Manitoulin Island, and in fact anywhere, should not live in fear that someone will invade them in their own homes. In addition, the accused committed these offences to support their addictions.

The positions of the parties on appeal

[33] Each appellant alleged that several errors tainted the trial judge's sentencing decision, including, but not only, errors relating to the application of the provisions of s. 718.2(e) of the Criminal Code, R.S.C. 1985, c. C-46 and implementation of the principles mandated by R. v. Gladue, 1999 CanLII 679 (SCC), [1999] 1 S.C.R. 688, [1999] S.C.J. No. 19.

The position of the appellant Lance Jacko

[34] For Jacko, Mr. Weppler submits that the trial judge failed to properly apply the analysis required by s. 718.2(e) and under Gladue in relation to serious violent offences. The trial judge appears to have held the view that in cases of serious violent offences, the sentences imposed on aboriginal offenders, like Jacko, must be the same as those imposed on similarly situated non-aboriginal offenders. According to Mr. Weppler, such a conclusion does not follow from either Gladue or any of its progeny.

[35] Mr. Weppler says that the trial judge gave inadequate, if any weight to restorative justice principles. He unfairly cast aside the recommendations of the sentencing circle and failed to give effect to the principle of restraint as it is described in Gladue. More to the point, the trial judge imposed a sentence driven exclusively by denunciation and deterrence despite the remarkable, if not unique rehabilitative measures undertaken by Jacko and advice from the community about the harmful effects of incarceration in distant jails.

The position of the appellant Sebastian Manitowabi

[36] For Manitowabi, Mr. Thompson submits that the trial judge erred in treating the appellant's conviction for a similar offence committed after the offences under appeal as part of Manitowabi's prior record for sentencing purposes. In the result, Mr. Thompson continues, the trial judge regarded Manitowabi as an incorrigible recidivist worthy of a denunciatory sentence. The trial judge should have recognized that the deterrent effect of the prior custodial sentence rendered unnecessary a further sentence dominated by the same sentencing objective.

[37] Mr. Thompson further contends that the trial judge erred in treating the lower end of the sentencing guidelines for home invasion sentences as a mandatory minimum sentence from which no departure was permissible. Such a determination effectively precluded a conditional sentence.

[38] In common with Mr. Weppler for Jacko, Mr. Thompson says that the trial judge failed to take proper account of the aboriginal heritage of the appellant, as well the perspective of the aboriginal community in reaching his sentencing decision. No principled reason existed to refuse a conditional sentence.

The position of the respondent

[39] The respondent affirms the fitness of the sentences imposed on both appellants. According to the respondent, there was no error in principle and no failure to consider a relevant or irrelevant factor. There was no overemphasis of appropriate factors and nothing demonstrably unfit about the sentences.

[40] For the respondent, Ms. Roberts submits that the trial judge properly considered Jacko's aboriginal status as required by Gladue and s. 718.2(e) of the Criminal Code. The offences were serious and violent. The predominant sentencing objectives, for aboriginal and non-aboriginal recidivists alike, are denunciation and deterrence. The trial judge gave appropriate weight to the recommendations of the sentencing circle that were vague, barren of specifics and based on erroneous and incomplete information.

[41] Ms. Roberts says that the trial judge was right in not imposing a sentence on Jacko that could be served conditionally. A penitentiary sentence was appropriate despite Jacko's rehabilitative progress. The offences were planned and took place while the apartment was occupied. The perpetrators wore disguises. A weapon was produced and held at the throat of one of the victims. Jacko inflicted violence on one of the occupants, causing him injuries and damaging a wall in the apartment. Jacko is a youthful recidivist who received a sentence within the appropriate range, and the sentence should not be disturbed.

[42] Ms. Barrett takes the position that the sentence imposed on Manitowabi is untainted by error and sits comfortably towards the lower end of the range of fit sentences for Manitowabi and his offences. The trial judge considered the proper sentencing objectives, assigned them appropriate weight and applied the proper methodology in considering the effect of Manitowabi's aboriginal status and modest rehabilitative efforts.

[43] Ms. Barrett says that the trial judge did not err in the use he made of the appellant's 2007 related convictions. He was well aware that those offences took place after those upon which Manitowabi was to be sentenced. Similarly, the trial judge properly treated the sentencing guidelines for home invasion cases as a tariff, rather than a statutory minimum, and was correct in his application of the Gladue methodology and restorative justice principles.

[44] According to Ms. Barrett, the trial judge did not err in rejecting the recommendations of the sentencing circle. He was entitled to weigh those recommendations and assign limited weight to them in light of their myriad weaknesses. These offences, committed by a youthful recidivist, warranted penitentiary sentences. A conditional sentence order and a reformatory sentence are inconsistent with the governing principles and would not protect the community from Manitowabi's demonstrated recidivistic tendencies.

Analysis

[45] The appellants have concentrated their claims of unfitness on four discrete yet related grounds: (i) failure to assign appropriate effect to the circumstances of each appellant as an aboriginal offender and to apply the teachings of Gladue; (ii) overemphasis on the sentencing objectives of denunciation and deterrence and inadequate attention to the ameliorating influence of the objectives of restorative justice; (iii) treatment of sentencing ranges as the equivalent of minimum sentences, thereby indirectly eliminating the availability of conditional sentences; and (iv) failure to allot sufficient importance to the considered recommendations of the sentencing circles in determining the sentences to be imposed.

[46] To avoid unprincipled substitution of appellate hindsight for first instance experience, the discussion of governing principles can begin with a gentle self-reminder of the limits of appellate intervention.

The governing principles

The standard of review

[47] Despite the expansive language of the mandate awarded us by s. 687(1) of the Criminal Code, absent an error in principle, a failure to consider a relevant factor, an overemphasis of the appropriate factors or the imposition of a sentence that is demonstrably unfit, we are disentitled to intervene to vary a sentence imposed at first instance: R. v. M. (C.A.), 1996 CanLII 230 (SCC), [1996] 1 S.C.R. 500, [1996] S.C.J. No. 28, at para. 90; R. v. M. (L.), 2008 SCC 31 (CanLII), [2008] 2 S.C.R. 163, [2008] S.C.J. No. 31, at para. 14.

[48] By nature, sentencing is profoundly contextual, a delicate exercise requiring a fine balance of competing, if not antagonistic objectives, principles and factors. The inherently individualized nature of the sentencing process, as well the significant advantage of the sentencing judge, especially in cases where, as here, sentence is imposed after trial, rather than on a plea of guilty, fully justifies a deference-based standard of review: M. (C.A.), at para. 91; M. (L.), at para. 15.

[49] This deferential standard disentitles this court to vary a sentence simply because all or a majority of us would have imposed a different sentence at first instance: M. (L.), at para. 14. We must also keep a weather eye on the reality that sentences for particular crimes vary, to some degree, across communities and regions in our province. The "just and appropriate" mix of accepted sentencing objectives, principles and factors depends upon and is a function of the needs and current conditions of and in the particular community where the offender committed the offence. All the more reason for appellate deference: M. (C.A.), at para. 92.

The fundamental purpose of sentencing

[50] Section 718 of the Criminal Code describes the fundamental purpose of sentencing persons convicted of crime. That purpose is 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 on offenders. Among the sentencing objectives that underlie the sentencing decision are -- denunciation; -- deterrence; -- assistance in rehabilitation; -- reparation for harm done; -- promotion of offender responsibility; -- acknowledgement of harm. Sentencing objectives such as the last four listed above demonstrate the influence of restorative justice components in the sentencing decision.

[51] Restorative objectives are of particular importance in determining the sentence to impose on youthful offenders, including immature recidivists. Restorative justice, which underpins s. 718(d)-(f), involves some form of restitution and reintegration into the community. Central to the sentencing process is the need for offenders to take responsibility for and acknowledge the harm caused by their conduct: Gladue, at para. 43.

The fundamental principle of sentencing

[52] The fundamental principle of sentencing, codified in s. 718.1 of the Criminal Code, is that the sentence must be proportionate to the gravity of the offence and the degree of responsibility of the offender. Inherent in this fundamental principle is a legislative recognition and acknowledgement that sentencing is an individualized process, ill-suited to a "one- size-fits-all" approach.

[53] Some measure of the objective gravity of a crime is its maximum punishment as prescribed by Parliament. In some instances, Parliament has also provided a minimum punishment for an offence. Degrees of responsibility vary. Some are principals. Others are aiders, abettors, counsellors or parties to a common unlawful purpose. And even within each mode of participation, some bear greater responsibility than others. Although all are parties in law and equally guilty of the offence, greater punishment is the usual consequence of greater responsibility.

Other sentencing principles

[54] Parliament has included several other sentencing principles in Part XXIII of the Criminal Code and directed sentencing judges to take these principles into account in determining what sentence to impose.

[55] Similar offenders who commit similar offences in similar circumstances should receive similar sentences, according to s. 718.2(b) of the Criminal Code. This principle does not command identical sentences for co-accused, only similar sentences for co-accused whose participation in the offences is similar and who have similar antecedents, present circumstances and future prospects. Disparity of sentences among co-accused is not per se error.

[56] Another sentencing principle, evident from the introductory portion of s. 718.2(a), is that a sentence should be reduced to take into account any mitigating circumstances relating to the offence or offender, or increased to account for any aggravating circumstances, including those deemed to be aggravating in s. 718.2(a)(i) to 718.2(a)(v) and described as aggravating in relation to a listed offence in s. 348.1.

[57] Despite its references to the role of mitigating circumstances in decreasing a sentence, neither s. 718.2 nor any other Criminal Code provision contains a definitive or an illustrative list of mitigating circumstances.

Section 718.2e) and Gladue

[58] On its face, s. 718.2(e) requires a sentencing judge to consider alternatives to the use of imprisonment as a penal sanction. This sentencing factor embodies the principle of restraint and is of general application. Except in cases in which no other sanction or combination of sanctions is appropriate to the offence and offender, imprisonment is a penal sanction of last resort: Gladue, at para. 36.

[59] The juxtaposition of a specific reference to aboriginal offenders in the waning words of s. 718.2(e) signals to sentencing judges that they must pay particular attention to the circumstances of aboriginal offenders because they, or their circumstances, are unique and different from those of non-aboriginal offenders. Section 718.2(e) imposes a duty on the sentencing judge to give the remedial purpose of the provision real force in relation to aboriginal offenders: Gladue, at paras. 34 and 38.

[60] Section 718.2(e) alters the method of analysis a sentencing judge must undertake in their determination of a fit sentence for an aboriginal offender. The sentencing determination must take into account the unique circumstances of aboriginal peoples: Gladue, at para. 75.

[61] As Gladue teaches, it is important to recognize that, for many, if not the vast majority of aboriginal offenders, our current sentencing concepts do not resonate. Frequently, those concepts have not responded to the needs, experiences and perspectives of aboriginal people or aboriginal communities: Gladue, at para. 73.

[62] The appropriateness of a sentence depends on the particular circumstances of the offence, the offender and the community in which the offender committed the offence. Predictably, this individualized focus in sentencing decisions spawns disparity among sentences for similar crimes: Gladue, at para. 76; M. (C.A.), at para. 92. The "just and appropriate" mix of sentencing objectives, principles and factors will depend on the needs and current conditions of and in the community in which the offence was committed: M. (C.A.), at para. 92.

[63] Another lesson from Gladue is that an aboriginal community will often understand the nature of the just sanction in a manner that differs markedly from non-aboriginal communities. Gladue acknowledges that, in appropriate cases, some traditional sentencing objectives will be correspondingly less relevant to

the sentencing decision and the objectives of restorative justice will occupy a place of greater influence: Gladue, at para. 77.

[64] Restorative justice objectives do not trump other sentencing objectives in every case involving aboriginal offenders. Separation, denunciation and deterrence retain their fundamental relevance for some offenders who commit serious offences. As a general rule, the more serious and violent an offence, the more likely it is that the terms of imprisonment imposed on similarly circumstanced aboriginal and non-aboriginal offenders will not differ significantly, and indeed may be the same. That said, in some instances of serious and violent crime, the length of a sentence of an aboriginal offender may be less than that imposed on a non-aboriginal offender: Gladue, at paras. 79 and 80. Serious crime and the objectives of restorative justice are not incompatibles in the sentencing process -- restorative justice objectives may predominate in the sentencing decision for aboriginal offenders convicted of serious crimes: R. v. Wells, 2000 SCC 10 (CanLII), [2000] 1 S.C.R. 207, [2000] S.C.J. No. 11, at para. 49; R. v. Whiskeyjack (2008), 2008 ONCA 800 (CanLII), 93 O.R. (3d) 743, [2008] O.J. No. 4755 (C.A.), at para. 29.

The availability of conditional sentences

[65] The appellants' claim for conditional sentences of imprisonment warrants a brief examination of the statutory requirements and principles governing the imposition of conditional sentences.

[66] When the appellants were sentenced, the trial judge was required to consider several criteria in deciding whether to impose a conditional sentence. Were any of the offences punishable by a minimum term of imprisonment? Was a sentence of less than two years fit and appropriate? Would the safety of the community be endangered if the appellants served their sentence in the community? Was a conditional sentence consistent with the fundamental purpose and principles of sentencing in ss. 718 to 718.2?: R. v. Proulx, 2000 SCC 5 (CanLII), [2000] 1 S.C.R. 61, [2000] S.C.J. No. 6, at para. 46.

[67] To determine whether a sentence of imprisonment of less than two years in length is fit and appropriate, a sentencing judge must make a preliminary determination to exclude probation and a penitentiary term as sentencing options. This preliminary determination requires the judge to consider the fundamental purpose and principles of sentencing in ss. 718 to 718.2, including, in the case of aboriginal offenders, s. 718.2(e): Proulx, at para. 60.

[68] To assess the risk of endangerment of community safety, a sentencing judge should take into account both the risk of reoffending and the gravity of the harm that could ensue in the event of recidivism. The risk of recidivism must be assessed in light of the conditions proposed and the supervision available under the conditional sentence order: Proulx, at para. 72.

[69] A conditional sentence is available in principle, though not always in practise, for all offences in which the statutory prerequisites are met. Apart from offences excluded by the terms of s. 742.1, for example offences punishable by a minimum term of imprisonment, no specific or category of offence is presumptively excluded from the conditional sentence option:
Proulx, at paras. 79-81.

[70] Section 718.2(e), like other sentencing principles, exerts an influence on the sentencing judge's determination about whether to impose a conditional sentence or a jail term:
Proulx, at para. 95; Wells, at para. 30.

[71] Depending on the severity of the conditions imposed, a conditional sentence may nonetheless be reasonable even where denunciation and deterrence are the predominant sentencing objectives: Wells, at para. 35. A conditional sentence can achieve both punitive and restorative sentencing objectives. As Lamer C.J.C. explained, in para. 100 of Proulx:

> To the extent that both punitive and restorative objectives can be achieved in a given case, a conditional sentence is likely a better sanction than incarceration. Where the need for punishment is particularly pressing, and there is little opportunity to achieve any restorative objectives, incarceration will likely be the more attractive sanction. However, even where restorative objectives cannot be readily satisfied, a conditional sentence will be preferable to incarceration in cases where a conditional sentence can achieve the objectives of denunciation and deterrence as effectively as incarceration. This follows from the principle of restraint in s. 718.2(d) and (e), which militates in favour of alternatives to incarceration where appropriate in the circumstances.

[72] A conditional sentence with house arrest carries a substantial stigma for the offender, especially in a smaller, tightly knit community where everybody knows everybody else and their business. The nature and extent of denunciation achieved by a conditional sentence will vary significantly, depending upon the circumstances of the offender, the nature of the conditions imposed, the community in which the sentence will be served and the knowledge of the offender's crime within that community: Proulx, at para. 106.

[73] Aboriginal status does not guarantee a conditional sentence. It is, nonetheless, an important factor for the sentencing judge to consider in determining whether to impose a conditional sentence: Wells, at para. 30.

The principles applied

[74] It is time to return to the sentencing decision to determine whether, as the appellants contend, it reflects error to such an extent that appellate intervention is justified. In the event of reviewable error, we are required to determine a fit sentence.

Was there a reviewable error?

[75] The trial judge was confronted with a very difficult sentencing decision, one that required a delicate balancing of competing, if not antagonistic sentencing objectives, principles and factors.

[76] On one hand, the appellants' offences were serious, involving the invasion of an occupied home in a small community by a small band of youthful recidivists. Property was taken and damaged. Occupants were assaulted, injured and threatened. One of the invaders, not an appellant, used a weapon. The intruders, save one, were masked. Their conduct was purposeful and bespoke prior agreement.

[77] On the other hand, unique among the youthful recidivists who committed these offences, Jacko had undertaken and persevered with remarkable rehabilitative steps to make reparations for the harm caused by his crimes, to take responsibility for his conduct and to reduce the risk of his future recidivism. Further, the community in which these appellants reside and in which they committed their crimes against other residents and their property adheres to notions of what constitutes just punishment that differ from much of society and assign prominence to objectives of restorative justice.

[78] A combination of factors satisfies me that, despite the well-entrenched and richly deserved deference due to sentencing decisions of trial judges, the sentences imposed on both appellants are infected by error that require our intervention.

[79] In my view, the trial judge failed to accord sufficient weight to the appellants' aboriginal heritage and, more generally, to the sentencing objective of restorative justice. For example, the trial judge does not appear to have considered the impact of the provisions of s. 718.2(e) of the Criminal Code on his preliminary determination of whether a penitentiary sentence could be excluded from the available sentencing options.

[80] Second, the trial judge appears to have excluded the availability of a conditional sentence of imprisonment on the basis that the paramount sentencing objectives were deterrence and denunciation. It is well-settled that the prominence of these sentencing objectives does not, on its own, foreclose a conditional sentence order as a sentencing alternative, since a properly crafted conditional sentence can give full voice to both objectives.

[81] Third, in my view, the trial judge failed to give sufficient weight to the nature of the community in which these offences were committed and the views of that community (as reflected in the recommendation of the sentencing circle) about the nature of punishment best suited to respond to the community's needs and notions of justice.

[82] And finally, the trial judge appears to have treated the range of sentence discussed in R. v. Wright (2006), 2006 CanLII 40975 (ON CA), 83 O.R. (3d) 427, [2006] O.J. No. 4870, 216 C.C.C. (3d) 54 (C.A.) as imposing a de facto minimum sentence for these offences, despite the prosecutor's apparent acknowledgement of the adequacy of a two-year sentence. To consider guidelines as constituting a de facto minimum sentence is inconsistent with the fundamental principle of proportionality and amounts to either judicial creation of a category of excluded offences or a presumption that conditional sentences are inappropriate for certain offences. Both are wrong.

What is a fit sentence for each appellant?

[83] In my view, a fit sentence for each appellant, in the singular circumstances of these appeals, is a sentence of imprisonment at the upper end of the reformatory range, thus making a conditional sentence of imprisonment available in law if appropriate in all the circumstances. I will explain.

[84] To begin with an acknowledgement of the obvious, the offences the appellants committed were serious. A planned entry, looting and robbery. Facial disguises, except for Manitowabi, albeit inadequate to their task of preventing identification. Physical violence and threats. Use of a weapon. And knowledge or at least recklessness that the premises, a home, was occupied at the time of the forced entry. The sentencing objectives of denunciation and deterrence were destined to occupy positions of prominence in the sentencing decision. No controversy there.

[85] But denunciation and deterrence are not the only sentencing objectives at work here.

[86] Restorative justice sentencing objectives are of crucial importance in the circumstances. They include assistance in rehabilitation, providing reparations for harm done to the victims and to the community, promoting a sense of responsibility in offenders and an acknowledgement by offenders about the harm their conduct has done to the victims and to their community.

[87] In cases such as these, we must do more than simply acknowledge restorative justice sentencing objectives and note approvingly the rehabilitative efforts of those convicted. They must have some tangible impact on the length, nature and venue of the sentence imposed. The rehabilitative efforts here, more specifically those of Jacko, extend well beyond the promises made all too frequently between conviction and sentence, and all too infrequently executed and maintained in the days, weeks and months following imposition of a lenient sentence.

[88] By the time sentence was imposed, Jacko had remedied his educational deficiencies, purged his addictions, jettisoned his anti-social lifestyle, abandoned his confederates and taken on spousal and parenting responsibilities. The passage of time since sentencing confirms the legitimacy of his efforts. College admission. Employment. Spousal and child support. Community involvement.

[89] Third, while our decision in Wright and cases following its lead describe a range of sentence for "home invasion" cases, it is clear from Wright itself that these cases require an especially nuanced approach to sentencing that involves a careful examination of the circumstances of the case at hand, of the nature and

severity of the offenders' conduct and the circumstances of each offender involved in the offences: Wright, at para. 24.

[90] Sentencing "ranges", such as that described in Wright, are not immovable or immutable. They are and represent guidelines, of greater or lesser utility depending upon the breadth of the range. Individual cases may fall within or outside the range. To consider a range of sentence as creating a de facto minimum sentence misses the point, ignores the fundamental principle of proportionality and is not faithful to the teachings of Wright itself. Individual circumstances matter.

[91] Fourth, that sentences for serious or violent offences should approach or be equivalent for aboriginal and non- aboriginal offenders is a rule of general, but not universal or unremitting application: Wells, at para. 50. As in every sentencing decision, sentencing aboriginal offenders proceeds on an individual basis. The analysis is, as it must be, holistic, designed to achieve a fit sentence in the circumstances, the elusive fundamental principle of proportionality: Gladue, at paras. 80-81. Equipped with s. 718.2(e), sentencing courts are furnished a substantial measure of flexibility and discretion that permits the consideration, in appropriate circumstances, of alternative sentences to incarceration that are at once apposite for the aboriginal offender and community, and congruent with the governing purpose, objectives and principles of sentencing: Gladue, at para. 81.

[92] Fifth, the sentencing objective of restorative justice may be assigned greatest weight in the sentencing determination despite the seriousness of an offender's crime: Wells, at paras. 49-50. This case involves significant restorative justice considerations fully developed in the Gladue report and the recommendations of the sentencing circle.

[93] Sixth, sentencing is an inherently individualized process. Sentences can be expected to and do vary to some degree across various communities. The just and appropriate mix of sentencing objectives, the application of the fundamental principle of proportionality depends on the needs and current conditions of and in the particular location where the crime occurred. It is all the more so where the community has offered its input to the sentencing court: M. (C.A.), at para. 92; Gladue, at paras. 76-77.

[94] Seventh, depending on its terms, a conditional sentence order can deliver significant measures of denunciation and deterrence: Proulx, at para. 100; Wells, at para. 35. Incarceration may provide for more denunciation and deterrence than a conditional sentence. But, at least as a general rule, a conditional sentence is more tailored to accomplishing the restorative objectives of rehabilitation, reparation and promotion of a sense of responsibility in the offender: Proulx, at para. 109. Of greater importance, when, as here, the objectives of rehabilitation, reparation and promotion of a sense of responsibility may realistically be realized for a particular offender, a conditional sentence is likely the appropriate sanction, provided denunciation and deterrence considerations are adequately serviced by the sentence: Proulx, at para. 109.

[95] In my view, a conditional sentence is appropriate for Jacko in this case, but not for Manitowabi.

Duration, venue and terms of the sentences

[96] In my view, a sentence at the upper end of the reformatory range accords proper weight to the principal sentencing objectives at work in this case: denunciation, deterrence and restorative justice. Such a term also pays heed to the relevant sentencing principles, as well as the aggravating and mitigating factors at work in the case of each appellant.

[97] The length of sentence that I consider appropriate in this case falls outside the range of sentence described in Wright, but as the Wright court itself makes plain, the range of sentence described there is a guideline, of general service, not of universal application. Exceptions exist. This case demonstrates one of them.

[98] The principal drivers of the range of sentence described in Wright are the sentencing objectives of deterrence and denunciation. No restorative justice objectives were at work in Wright, unlike here, where their influence is profound, at least in the case of Jacko.

[99] The trial judge considered the roles of the appellants to be of equivalent gravity and reflect the same degree of responsibility. I agree. Neither appellant was the ringleader, but each was an active participant. Their conduct differed. Jacko, along with another, the prime mover, Christopher Cooper, assaulted Mr. Roy. Manitowabi stole property and vandalized the premises. Jacko's facial features were disguised, though not apparently well. Manitowabi was unmasked. And all the participants were known to one another.

[100] To take Jacko first. In my view, an appropriate sentence for Lance Jacko is a sentence of imprisonment of two years less one day to be served in the community.

[101] Jacko, who is now 23 years old, is currently enrolled as a full-time student at Canadore College in North Bay. His partner attends the same college, where she pursues another program. Jacko expects to graduate this year, work for the next two years while his partner finishes her course and pursue further education. He is sober, a responsible father to two young children and has been persistent and consistent in his self-rehabilitation since his release from custody. He poses no danger to his community or to any identifiable segment of that community.

[102] The terms and conditions included in the conditional sentence order for Lance Jacko are these: (i) keep the peace and be of good behaviour; (ii) appear before the Superior Court of Justice at Gore Bay, Ontario when required to do so by the court; (iii) report to a supervisor within two working days of the release of these reasons for judgment and thereafter when and in the manner required by the supervisor; (iv) remain within the Province of Ontario unless written permission to go outside this province is obtained in advance from the supervisor; (v) notify the court and the supervisor in advance and in writing of any change of name or address and promptly notify the court and the supervisor of any change of employment, educational attendance or occupation; (vi) abstain absolutely from the possession, purchase and consumption of alcohol, controlled substances as defined in the Controlled Drugs and Substances Act, S.C. 1996, c. 19 and other intoxicating substances of any kind; (vii) not associate, contact or communicate directly or indirectly by any means with Orien Roy, Jasmine Shawanda or Amsay Osawamick and, in particular, not molest, harass or intimidate them or any of them in any way; (viii) not associate, contact or communicate directly or indirectly in any way with Sebastian Manitowabi, Christopher Cooper or any persons known to you to have a criminal record, except family members approved by your supervisor; (ix) not possess, carry or own any weapon, ammunition or explosive substance as defined in the Criminal Code; (x) provide for the support of your partner Wahss Wabano and your dependent children; (xi) perform 240 hours of community service over the first 18 months of your sentence in an activity approved by your supervisor; (xii) attend the 12-step residential treatment program at Rainbow Lodge in Wikwemikong or any similar program approved by your supervisor; (xiii) participate in the traditional counselling/healing program through the Nandwedidaa Program at the Wikwemikong Health Centre or any similar program approved by your supervisor; (xiv) for the first 12 months of your sentence, remain in your residence except for the purposes of education, employment, medical appointments or emergencies for you or your dependants, or performance of community service or attendance at any treatment, counselling or other program or meeting with your supervisor in accordance with this order; (xv) for the remaining 12 months less one day of this sentence, remain in your residence from 8:00 p.m. until 6:00 a.m. the following day except for the same purposes described in para. (xiv) of this order; and (xvi) actively pursue your education or employment to the best of your ability and provide proof of your progress to your supervisor on each reporting.

[103] Manitowabi, who is not yet 23 years old, has not been either persistent or consistent in his efforts at self- rehabilitation. He has not pursued further education, despite advice of the necessity for it in order to enhance his opportunities for employment. He has undertaken some counselling for abuse of illicit drugs, but seems little motivated in its consistent pursuit. His employment history reveals intermittent seasonal jobs and no attempt to follow any course apt to develop employable skills. But what is more, perhaps predictable, is the likelihood of recidivism.

[104] In my view, an appropriate sentence for Sebastian Manitowabi is a term of imprisonment of two years less one day in a provincial reformatory, preferably in the Thunder Bay Correctional Centre, where he can participate in the Turning Full Circle Program. Following the term of imprisonment, Manitowabi will be bound by a probation order for a further period of 18 months. In addition to the statutory terms, the probation order shall include the following additional conditions:
(i) report to a probation officer forthwith upon his release from custody and thereafter as required by the probation officer; (ii) undertake any counselling and treatment recommended by the probation officer, including residential treatment and traditional guidance of a community elder if deemed appropriate, for substance abuse and anger management; (iii) actively pursue education or employment to the best of your ability and provide proof of your progress to your probation officer on each reporting; (iv) abstain absolutely from possession, purchase and consumption of alcohol, controlled substances as defined in the Controlled Drugs and Substances Act and other intoxicating substances of any kind; (v) not contact directly or indirectly by any means Orien Roy, Jasmine Shawanda or Amsay Osawamick and, in particular, not molest, harass or intimidate them or any of them in any way; (vi) not associate, contact or communicate directly or indirectly in any way with Lance Jacko, Christopher Cooper or any persons known to you to have a criminal record, except family members approved by your probation officer; and (vii) not possess carry or own any weapon, ammunition or explosive substance as defined in the Criminal Code. Conclusion

[105] In the result, I would allow the appeals, set aside the sentences imposed at trial and, in their place, impose the sentences described above on each appellant on each offence of which he was convicted. The sentences are to be served concurrently with each other. The person releasing each appellant shall comply with the provisions of ss. 732.1(5) (Manitowabi) and 742.3(3) (Jacko) of the Criminal Code.

Appeal allowed.