

ONTARIO COURT OF JUSTICE

DATE: March 7, 2023

COURT FILE No.: 0911-998-21-5732

B E T W E E N :

HIS MAJESTY THE KING

— AND —

VAUGHAN ROBERTS

Before Justice A. Wheeler

Heard on January 19, 2023

Reasons for Judgment released on March 7, 2023

G. Skerkowskicounsel for the Crown
S. Pieters..... counsel for the defendant

WHEELER J.:

1. Vaughn Roberts pleaded guilty to unlawful possession of a loaded restricted firearm, contrary to s. 95(1) of the *Criminal Code*. A lengthy sentencing hearing was held on January 19, 2023.

2. The guilty plea proceeded on the basis of an agreed statement of facts. A presentence report was prepared and the defence provided letters of support from Mr. Roberts’ mother,

stepfather, older brother, younger brother, older sister and nephew. The defence also relied on an expert report and testimony from historian Dr. Barrington Walker.

3. It needs to be stated clearly that Mr. Roberts is being sentenced on a charge of possessing a loaded illegal firearm. He is not being sentenced for firing it, although the circumstances of him firing the gun are an important consideration in my decision.

The evidence

Circumstances of the offence

4. The facts that make out the offence are actually very simple. Mr. Roberts came to Kingston from Ajax to visit friends and traffic Percocet. He brought a Glock 9 mm handgun with him for protection. He had no advance plan or intent to actually use the gun. Mr. Roberts discarded the gun behind a convenience store when chased by police shortly before his arrest. The gun was loaded.

5. The full context of the case is much more complicated. In the days leading up to his arrest Mr. Roberts had been staying at an apartment on Fergus Street in Kingston. The residents of that apartment and their associates were living an anti-social lifestyle and were entrenched in the local criminal and drug subculture. Jason Wagar was one of the residents of the apartment. He was much older than Mr. Roberts and had a serious, lengthy criminal record.

6. Jason Wagar and his associates formed a plan to rob Mr. Roberts for his drugs. Police discovered this in part through text messages exchanged between Jason Wagar and his associates. The plan was fueled by hateful racist attitudes towards Mr. Roberts, who is Black.

7. The robbery attempt occurred when Mr. Roberts was sleeping on the couch at the Fergus Street apartment on the morning of August 12, 2021. Mr. Roberts was threatened with a machete and a pellet gun that looked like a genuine firearm. Mr. Roberts believed that he would be killed or seriously harmed. It was reasonable for him to think that. Mr. Roberts shot and killed Jason Wagar in self-defence. Two of the other people involved in that incident have been charged with attempted robbery and conspiracy to commit robbery of Mr. Roberts. Jason Wagar would also have been charged if he had survived.

8. Mr. Roberts fled from the apartment but was arrested nearby after a brief police chase. He ran behind a convenience store where he discarded a fanny pack containing the gun which was loaded with a chambered round and two more in the magazine. He had on his person 76 tablets of Percocet, 4 tablets of Oxyneo and a substantial amount of cash. He has not been charged with any drug-related offences.

Circumstances of the offender

9. Mr. Roberts was just 20 years old when these events occurred. He recently turned 22.

10. Mr. Roberts was born in Scarborough but raised in Ajax, Ontario where he still resides with his mother, step-father and siblings.

11. Mr. Roberts' mother immigrated to Canada as a single mother to Mr. Roberts' older half-sister after her first husband passed away. She did not have family in Canada. Mr. Roberts and his older brother were born here but their father has not been a big presence in their lives. Mr. Roberts' mother and stepfather married when Mr. Roberts was two years old, and Mr. Roberts considers his stepfather to be his "real father". Mr. Roberts has two younger half siblings – a brother and a sister.

12. Both Mr. Roberts' mother and his step-father are hard-working and pro-social. Mr. Roberts told the presentence report writer that he had a good childhood. He was expected to help around the house. He attended family gatherings and church. In her letter of support, Mr. Roberts' mother states, "this entire episode is absolutely incongruous to the idea, dreams and beliefs of our family."

13. Although expected to do well in school, Mr. Roberts did not get good grades. According to what Mr. Roberts told the presentence report writer, he was expelled from school in Grade 9 for being involved in a fight. This resulted in him being sent to an alternate school where he did not get along with a teacher, so he stopped attending. He was sent to a different school but was asked to change schools again due to an argument. He was then sent to yet another alternative school where again he did not get along with a teacher and stopped attending. Mr. Roberts has completed only Grade 9 but believes he might have a few Grade 10 credits.

14. Although school did not go well for Mr. Roberts, he excelled at sports, and for some period of time played for a competitive basketball team. That took up his free time throughout the week and on weekends.

15. Mr. Roberts has himself been an innocent victim of gun violence. He was shot in the leg at a community event when he was 16 years old. He never attended any therapy and now has leg pain. This was when he started taking Percocet. Mr. Roberts' mother states that being shot caused many issues for Mr. Roberts and that he has never received the help he needs.

16. Mr. Roberts told the presentence report writer that he was using Percocet and smoking marijuana at the time of the offence, but that he has stopped.

17. For many years now Mr. Roberts has worked for his stepfather's construction company. His stepfather told the presentence report author that Mr. Roberts is hardworking, willing to learn and that he completes any tasks he is given. It is unclear whether Mr. Roberts is a formal employee or hired as casual labour. According to the information put forward on the bail review application (2021 ONSC 8401) that was filed as part of the materials at the sentencing hearing, his stepfather pays him in cash, and he does not have a bank account.

18. Mr. Roberts told the presentence report writer that he wants to get his high school equivalency but has not yet taken steps towards this. He said that he would like one day to own a grocery or convenience store rather than working for someone else. He is not involved in any structured activities in the community. His interests are music, watching TV or movies, playing basketball and spending time with friends. Both of his parents believe that Mr. Roberts' friends are a positive influence.

19. In the presentence report and in their letters of support, Mr. Roberts' family members describe him as kind, respectful, cheerful and helpful. Mr. Roberts' older sister provided a particularly detailed and thoughtful letter. She describes Mr. Roberts as a supportive brother, a good listener, and as a positive, nurturing influence in the lives of her young sons. She says he is logical and level-headed.

20. His family members have seen a difference in Mr. Roberts since his arrest. Mr. Roberts' mother and stepfather say that Mr. Roberts has developed a strong sense of accountability. They report that he has been working and that he has been scrupulous about complying with his bail conditions. Mr. Roberts' sister describes how he has become emotionally withdrawn since the events in Kingston.

Positions of the parties

21. Both Crown and defence agree that I should impose a sentence of incarceration of less than two years followed by a period of probation. They are not far apart in their submissions about the length of incarceration, but they differ on whether it should be served conditionally in the community.

22. The Crown submits that but for the many mitigating factors and the particular and unusual facts of this case, it could easily attract a penitentiary sentence of three years. The Crown says that I should impose a sentence that is the equivalent of two years less a day, and that this would result in a mid-range reformatory sentence once I deduct credit for pretrial custody and make allowance for harsh conditions of pretrial custody as well as restrictive bail conditions. The Crown acknowledges that I must give serious consideration to a conditional sentence but argues that a sentence of actual jail is required in order to send the necessary messages of deterrence and denunciation. The Crown argued that if I impose a conditional sentence, it would need to be longer than a sentence of actual incarceration in order to address the objectives of denunciation and deterrence.

23. The defence submits that in light of the mitigating factors, including the racial context of the case, the case law justifies a conditional sentence of 18 months less credit for pretrial custody and mitigation for harsh conditions of pre-trial custody.

The purpose and principles of sentencing

24. The fundamental purpose of sentencing is to protect society and contribute, along with crime prevention initiatives, to respect for the law and the maintenance of a just, peaceful and safe society by imposing just sanctions that speak to various objectives. *Criminal Code*, s. 718.

25. The fundamental principle of sentencing is that a sentence must be proportionate to the gravity of the offence and the degree of responsibility of the offender (s. 718.1). Other relevant principles that inform the sentencing decision include parity, in that a sentence should be similar to sentences imposed in other similar cases (s. 718.2(b)); and restraint as set out in sub-ss. 718.2(c), (d) and (e).

26. Parity means that “to the extent offenders and their offences are similar, their sentences should be similar” but at the same time, sentencing is a highly individualized process that must consider the specific facts and circumstances of the case in order to respect proportionality which is the fundamental principle. See *R. v. Hills*, 2023 SCC 2 at para. 62; *R. v. Morris*, 2020 ONCA 680 at para. 108; *R. v. Suter*, 2018 SCC 34 at para. 4; *R. v. Lacasse*, 2015 SCC 64 at para. 54; *R. v. M.(C.A.)*, 1996 SCC 230 at para. 92.

27. Section 718.2(d) of the *Criminal Code* states that “an offender should not be deprived of liberty, if less restrictive sanctions may be appropriate in the circumstances,” and s. 718.2(e) states:

(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

28. In *Morris*, the Court of Appeal summarized the effect of these provisions as meaning that “imprisonment is a sanction of last resort” (para. 111), but also stated that “[t]he restraint principle, however, operates within the boundaries set by the fundamental principle of proportionality” (para. 112).

29. Restraint takes on particular importance when sentencing a youthful first offender. Even when the offence itself calls for a sentence that gives significant weight to general deterrence and

denunciation, the primary objectives in sentencing a youthful first offender are individual deterrence and rehabilitation. See *R. v. Brown*, 2015 ONCA 361 at para. 7. The Supreme Court recently reaffirmed this principle in *Hills*. Martin J. stated (at para. 165): “To prioritize rehabilitation, youthful offenders should benefit from the shortest possible sentence that is proportionate to the gravity of the offence.”

30. Restraint is also implicated by social context evidence and in particular the disproportionate rates of incarceration of young Black men. The principle of restraint operates both in relation to the length of sentence and to the determination of whether a sentence of less than two years can be served conditionally in the community. In *Morris*, the court stated (at para. 129):

129 The use of conditional sentences when sentencing young Black offenders, in appropriate cases, also carries the added advantage of addressing, at least as it relates to the offender before the court, the ongoing systemic problem of the over-incarceration of young Black offenders.

Analysis

31. In *Hills*, Martin J. recently described the process of determining a fit and proportionate sentence as “a complex and multifactorial assessment.” This description is particularly apt in this case.

Seriousness of the offence

32. In *R. v. Nur*, the Court of Appeal and the Supreme Court acknowledged that the s. 95(1) offence captures a spectrum of conduct, from a near regulatory offence to extremely serious true crimes. Where the accused possesses a loaded illegal firearm in furtherance of other criminal activity their conduct is at the most serious end of the *Nur* spectrum, and it poses a particular

danger to the public. The case law recognizes the guns and drugs are a particularly toxic combination. See *R. v. Nur*, 2013 ONCA 677 at para. 51 aff'd 2015 SCC 15; *R. v. Morris*, 2020 ONCA 680 at paras. 68-71; *R. v. Wong*, 2012 ONCA 767 at para. 11; *R. v. Walters*, 2023 ONCA 4 at para. 37; and *R. v. Omoragbon*, 2020 ONCA 336 at paras. 22-23. The defence submissions acknowledge this.

33. The offence here was objectively very serious. Mr. Roberts brought the gun with him to Kingston and was in Kingston for several days leading up to August 12, 2021. It was loaded when he fled from the police and discarded the gun, and it was obviously loaded when he was at the Fergus Street apartment. His possession of the gun was associated with drug trafficking. This is the most significant aggravating factor here. It makes the offence close to the most serious end of the spectrum of conduct criminalized by s. 95(1) of the *Criminal Code*.

Mr. Roberts' level of responsibility for the offence

34. Mr. Roberts' made a deliberate decision to bring the gun with him to another community while trafficking Percocet. His actions were not impulsive or short-lived.

35. The agreed facts state that Mr. Roberts "does not acknowledge any intention to discharge or otherwise use the firearm prior to the events of August 12, 2021." I do not see this as diminishing his moral blameworthiness for possessing a loaded firearm while trafficking drugs. As Schreck J. observed in *R. v. Beharry*, 2022 ONSC 4370 at para. 19, handguns are inherently dangerous – they serve no other purpose, and many courts have commented on how drugs and guns create a toxic combination.

36. Trafficking is a dangerous activity. Mr. Roberts obviously knew this. The agreed facts state that Mr. Roberts had the gun for his own protection. It is inescapable that his perceived need to possess a loaded illegal handgun arose because he was dealing.

The racist attack

37. The racist attack on Mr. Roberts by Jason Wagar and his associates adds a significant complexity to the sentencing decision.

38. The defence submissions before me focused on Jason Wagar's hate based attack on Mr Roberts as being an important factor that mitigates Mr. Roberts' moral blameworthiness for the offence. The defence urged me to view this through the analytical framework set out in *Morris* where the Court of Appeal held that social context evidence of anti-Black racism could "offer an explanation for the commission of the offence which mitigates the offender's personal responsibility and culpability for the offence" (para. 99).

39. I agree with the defence that the racist attack is an important consideration in the sentencing analysis. I also agree with the defence that the Court of Appeal's comments in *Morris* are important to the value ascribed to the racist attack. However, I respectfully disagree that *Morris* provides the directly applicable analytical framework. In my view, the racist attack stands apart as a separate, although highly relevant, consideration.

40. Jason Wagar's racist attack on Mr. Roberts was abhorrent, but it does not diminish Mr. Roberts' degree of responsibility for the offence of possessing the gun in the first place. Although justified in shooting Jason Wagar, Mr. Roberts did not go and get the gun because he was threatened by Jason Wagar. He brought the gun with him to Kingston.

41. That said, the racist attack is still a central consideration in how I should blend the sentencing objectives, and in my ultimate conclusion about the appropriate sentence.

42. The first way in which the racist attack is relevant is that it diminishes the weight that I ascribe to Mr. Roberts' actions in running from the police and discarding the gun. *Morris* speaks directly to the dangers created by those actions. However, in *Morris* the Court of Appeal held that “[t]he only reasonable inference is that Mr. Morris ran and disposed of the gun in an effort to avoid being caught and charged with a serious crime” (para. 171). In Mr. Roberts' situation, the flight and disposal of the gun occurred in the immediate aftermath of the traumatic racist attack that specifically targeted him as a Black man, and which reasonably caused him to fear for his life.

43. The second way in which the racist attack is relevant is that it inflicted a significant moral harm on Mr. Roberts, and that moral harm was compounded by the laying of the murder charge when in fact Mr. Roberts was the victim in those events. The Supreme Court has held that because sentencing is a highly individualized process, the sentencing judge should also consider factors related to or arising from the commission of the offence that are not properly characterized as either aggravating or mitigating. These are usually referred to as collateral consequences or as attenuating circumstances. They can arise from the very commission of the offence itself and can be relevant to the determination of a fit sentence as long as they “speak to” the personal circumstances of the offender. There is no requirement that collateral consequences or attenuating circumstances be linked to police or state misconduct in order to factor into the sentencing decision. See *Suter*, at paras. 46-59.

44. When staying at the Fergus Street apartment, Mr. Roberts had to have known that he was dealing with people who were at least not paragons of virtue in the local community. However,

he had no idea that they held racist, anti-Black attitudes that would give rise to an armed attack. If before this incident Mr. Roberts might have seen the world as an unfair place where life would be harder because he is a young Black man, the race-based attack must have left him with an acute sense of distrust. Mr. Roberts was not physically hurt, but he suffered a significant moral wrong. Furthermore, the agreed facts indicate that Jason Wagar either forged or cemented his racist attitudes while in jail. This raises an additional concern that incarcerating Mr. Roberts could contribute to the moral harm.

45. Dr. Walker reports that Mr. Roberts is genuinely saddened by Jason Wagar's death and that he is particularly concerned for how the loss has impacted Jason Wagar's family. I would think that this is a normal reaction even though Mr. Roberts is not legally responsible for Jason Wagar's death. Mr. Roberts' family is also cognizant of the moral complexity of what happened. His sister notes that Mr. Roberts "will have to live with what he has done for the rest of his life." The fact that Mr. Roberts has responded to the incident with compassion for Jason Wagar's family rather than callousness or hatred speaks to his potential for rehabilitation.

46. The racist attack makes this case very factually unusual. It makes it much harder to apply the principle of parity and to determine a fit sentence by reference to other cases. A fit sentence for Mr. Roberts must take account of this complexity when it comes to blending the sentencing objectives of deterrence, denunciation and rehabilitation. Furthermore, the weight ascribed to the racist attack has to be evaluated in light of the evidence of systemic racism. I return to this below.

Systemic racism

47. In addition to the overt racism that was specifically directed at Mr. Roberts, racism on a systemic level is relevant to the task of sentencing in two ways.

48. The first issue is whether Mr. Roberts' moral blameworthiness is diminished when I consider the evidence of systemic anti-Black racism. In *Morris*, the Court of Appeal held that social context evidence could "offer an explanation for the commission of the offence which mitigates the offender's personal responsibility and culpability for the offence" (para. 99). The offender need not show a direct causal link between the effects of anti-Black racism and their commission of the offence, but there must still be "some connection between the overt and systemic racism identified in the community and circumstances or events that are said to explain or mitigate the criminal conduct in issue" (para. 97). To be relevant to the assessment of moral blameworthiness, the social context evidence must help "explain how the offender came to commit the offence" (para. 106). The Court of Appeal firmly cautioned that there can be no sentencing discount based only on the offender's colour (para. 97). See also *R. v. Ellis*, 2022 BCCA 278 at para. 88.

49. A second way in which social context evidence is relevant is in determining how to blend the sentencing objectives in a given case in order to achieve a case-specific proportional sentence. See *Morris*, at paras. 58-66, 79-81, 102-107. Social context evidence can help the trial judge understand the offender's background in a way that results in giving more emphasis to rehabilitation and less emphasis to specific deterrence of the offender by giving the sentencing court "a more informed and accurate assessment of the offender's background, character and potential when choosing from among available sanctions" (*Morris*, at para. 106). For example, the fact that an offender has not achieved success in school or has limited employment prospects might not, when seen through the lens of social context evidence, mean that they have poor rehabilitative potential. Their background could reflect their experience of systemic racism rather than a lack of potential or ability. In addition, social context evidence can assist the sentencing

judge in deciding “how those parts of [the accused’s] background might be addressed in a positive way that benefits [the accused] and ultimately the community” (*Morris*, at para. 104). As Schreck J. noted in *Beharry* at para. 42, rehabilitation is ultimately what will promote public safety.

50. In addition to Dr. Walker’s report and testimony I have also been assisted by reading the expert report that was filed in *Morris* and appended to Nakatsuru J.’s sentencing decision (2018 ONSC 5186). In its decision in that case, the Court of Appeal stated (at para. 43) that that report “bears reading and re-reading by those called upon to prosecute, defend, and sentence Black offenders, particularly young Black offenders.”

51. Black people face bias in many spheres of life that many other Canadians take for granted. Dr. Walker’s report explains how anti-Black racism became pervasive. Slavery gave way to institutionalized discrimination because Black people only had equal rights on paper. Black Canadians faced discrimination in every important sphere of life, including the justice system.

52. The prejudice and marginalization that Black Canadians continue to experience today are built on those historical patterns. This includes bias in education where Black students have lower rates of success and higher rates of expulsion and dropout. The *Morris* report states: “Exclusion from school is widely recognized as a driver for wider social exclusion and is highly correlated with unemployment and involvement in crime.” Black Canadians have a harder time finding jobs, being hired for positions that they are qualified to hold and advancing in their careers. Black Canadians’ experience of the justice system is also tainted by systemic racism. This manifests in police interactions as well as alarmingly disproportionate rates of incarceration.

53. The impact of systemic racism is magnified for young Black men in Canada. Among other things, they are disproportionately likely to be a victim of violence, to be targeted in interactions

with the police, and to be incarcerated and treated unfairly in custodial settings. The ways in which they are marginalized makes it harder to find a route to a successful adult life than it is for people who do not experience racism.

54. In his testimony Dr. Walker explained that a stable family and good home life are not always enough to insulate against the impact of systemic racism. Children and young people go out into the world and have the experiences that they have. Parents can only do so much and may well themselves encounter systemic bias when they interact with the institutions that are meant to set their children up for success and that are supposed to, but do not, operate fairly.

55. There are indications of systemic racism in Mr. Roberts' life experiences. The school system failed him. There is no indication that any behavioural issues were thoroughly explored. The impression from the presentence report is that Mr. Roberts was shunted around. With only a Grade 9 education, Mr. Roberts' employment prospects are limited. In addition, Mr. Roberts has first-hand experience as an innocent victim of gun violence. I accept what his mother reports, that the shooting caused many issues for Mr. Roberts and that he did not get the help he needed. Again, it seems that protective systems failed Mr. Roberts.

56. Mr. Roberts' older sister's letter implicitly speaks to the impact of racism. She states that Mr. Roberts has "faced adversity all his life, realized or not. Being the child of an immigrant learning to survive did not make that easier." She also states: "As a black man before this incident it was hard enough. Now he has not one, but two mountains before him that he cannot help but expect to be crushed beneath." And, as Dr. Walker explained, having a stable, prosocial home life does not insulate against systemic discrimination, a point that the Court of Appeal implicitly accepted in its recent decision in *R. v. Abdulle*, 2023 ONCA 32 at paras. 38-39.

57. In his report, Dr. Walker stated (at p. 10):

It is undoubtedly true that the contexts outlined above have had a profound impact upon the societal structure in which Mr. Roberts was reared, his behavior and life choices and the particulars of this case. Anti-Black racism is evident across virtually all spheres of life in Canada and significantly impacts the lives and life chances of African-descended people. These overlapping and intersecting spheres of racial disadvantage in the aggregate comprise the institutional and attitudinal structures that have been labeled systemic anti-Black racism. The impact of anti-Black racism is that it limits the horizons of possibility (both materially and psychologically) and it makes it difficult for Black people to thrive both in terms of their objective social position and their perception of whether such opportunities exist. [emphasis added]

58. In my view it would be unrealistic to believe that there is no connection between anti-Black racism and the trajectory to date of Mr. Roberts' life. It would also be unrealistic to believe that systemic racism has not affected the choices available to him, and the way in which he has perceived and evaluated those choices.

59. I have concluded that the real force of the social context evidence bears on the second *Morris* issue of how I blend the sentencing objectives. When viewed with the benefit of Dr. Walker's evidence and the *Morris* report, I do not see Mr. Roberts as lacking in potential or ability. My overall impression is that more should have been done to help him succeed at school, and to help him recover both physically and psychologically from being shot when he was just a teenager. When Mr. Roberts' background is considered through the lens of Dr. Walker's evidence, I conclude that the impact of systemic racism on Mr. Roberts' life is an important consideration in blending the sentencing objectives in order to achieve a proportionate sentence.

60. On the first *Morris* issue of whether there is a connection "between the overt and systemic racism identified in the community and the circumstances or events that are said to explain or mitigate the criminal conduct in issue" (para. 97), the case law provides examples where the

accused's life experiences of racism were connected to fears for their safety which in turn provided a mitigating explanation for possessing a firearm. See *Morris*, at para. 100; *Beharry*, at paras. 25-28; *R. v. McLarty-Mathieu*, 2022 ONCJ 498 at para. 86. However, in *Morris* the Court of Appeal held that fear engendered by anti-Black racism was "only a limited mitigating factor" (para. 101). In *R. v. Goodridge*, 2022 ONCJ 139, Dumel J. held that the accused's moral blameworthiness was "mitigated by his educational/economic disadvantages resulting from systemic anti-Black racism" (para. 42). This finding was predicated on detailed evidence from the accused that explained how and why he got involved both in trafficking and possession of a firearm.

61. The defence submissions before me focused on the racist attack as providing the *Morris* connection. For the reasons set out above, I see that issue differently. As I have explained, it is my view that the racist attack is more properly analyzed as an attenuating circumstance pursuant to the Supreme Court's decision in *Suter*. However, *Morris* and other decisions that address the impact of racism in Canada such as *R. v. Theriault*, 2021 ONCA 517 are still very important when it comes to ascribing weight to the racist attack as an attenuating factor. Jason Wagar did not attack Mr. Roberts for idiosyncratic reasons. Jason Wagar's actions were a horrific, frightening and overt manifestation of racism.

62. The record before me does not otherwise establish the type of connection contemplated in *Morris*. Mr. Roberts has indicated that he was trafficking to make money and it was in relation to that activity that he had the gun. Even though he did not have a specific intent or plan to use it and "didn't go to cause any trouble," that does not mitigate the moral blameworthiness of possessing a loaded handgun. See *Morris* at paras. 96-101 and 152-154.

Aggravating and mitigating factors

63. The above discussion has addressed the aggravating factors.

64. There are several mitigating factors:

- Mr. Roberts pleaded guilty. He has unequivocally taken responsibility for possessing the loaded firearm.
- Mr. Roberts is very young. He was just 20 years old at the time of the offence and has recently turned 22.
- Mr. Roberts has no prior criminal record.
- The time that Mr. Roberts spent in custody was during the height of the Covid-19 pandemic. Conditions were restrictive and difficult.
- Mr. Roberts spent eight months on a highly restrictive house-arrest bail with an ankle monitor without incident. (The conditions were then loosened in August 2022.)
- Mr. Roberts is working for his stepfather's company, his family are prosocial, law-abiding people, they support Mr. Roberts and report that he has been scrupulous in complying with his release conditions.

Pretrial custody

65. Mr. Roberts spent 127 days in custody prior to his release on strict conditions. This is the functional equivalent of a custodial sentence of 191 days, which is over six months. See *Criminal Code*, ss. 719(3) and (3.1); *R. v. Summers*, 2014 SCC 26.

Is a reformatory sentence appropriate?

66. The Court of Appeal and the Supreme Court of Canada have upheld substantial sentences for youthful first offenders convicted under s. 95(1) of the *Criminal Code*. *Nur* is a good example.

See also *R. v. Marshall*, 2015 ONCA 692 at paras. 43-56; and *R. v. Mansingh*, 2017 ONCA 68 at paras. 21-25. In *Morris* the Court of Appeal reiterated that in most cases where the conduct falls at the “true crime” end of the *Nur* spectrum, a penitentiary sentence will be required. However, the Court of Appeal also recognized that there are cases where a sentence at or near the maximum reformatory sentence will be appropriate. See paras. 151, 177.

67. Both Crown and defence submitted that a reformatory length sentence should be imposed here. Based on the very unusual facts of the case along with the many mitigating factors, I agree with that.

Is a conditional sentence appropriate?

68. Mr. Roberts’ track record while on bail satisfies me that he would comply with a conditional sentence, such that it would not endanger the safety of the community.

69. The more difficult question is whether a conditional sentence would be consistent with the purpose and principles of sentencing.

70. The mitigating factors provide reason for optimism about Mr. Roberts’ prospects for rehabilitation. He has taken responsibility for the offence by pleading guilty. He is young. He has good family support. Ordinarily, Mr. Roberts’ lack of educational achievement coupled with his somewhat limited work experience might be cause for concern. However, as stated above, having regard to Dr. Walker’s evidence and the likely impact of systemic racism, I accept that I should not view this as reflecting a lack of potential on Mr. Roberts’ part.

71. I also find that there is relatively little need for specific deterrence. Pretrial custody that is the equivalent of a sentence of over six months is a meaningful amount of time for such a young

person with no prior experience of custody. The reports from his family, particularly his older sister, indicate that it was a difficult and traumatic time for him.

72. The gravity of the offence calls for a sentence that sends strong messages of deterrence and denunciation.

73. The defence pointed out that despite the appellate courts' emphasis on deterrence and denunciation, both trial and appellate courts in Ontario have imposed or upheld conditional sentences for s. 95 offences. See *R. v. Hassan*, 2017 ONSC 4570; *R. v. Dalton*, 2018 ONSC 544; *R. v. Lewis*, 2022 ONSC 1260; *R. v. Beharry*, 2022 ONSC 4370; *R. v. McLarty-Mathieu*, 2022 ONCJ 498; *R. v. Goodridge*, 2022 ONCJ 139; *R. v. Stewart*, 2022 ONSC 6997; *R. v. Roeske*, [2018] O.J. No. 6716; *R. v. Mohamed*, 2020 ONCA 163 and *R. v. Desmond-Robinson*, 2022 ONCA 369. In addition, in *Morris*, the Court of Appeal's comments at para. 181 strongly suggest that a conditional sentence could have been appropriate in that case (Mr. Morris was in custody on other charges so no one suggested it).

74. In most of these cases there was no evidence that the accused was involved in other illegal activity and/or the accused had made significant strides towards rehabilitation after being charged. Those are distinguishing features.

75. I agree with the Crown that ordinarily the possession of a loaded handgun in public when associated with drug trafficking, coupled with flight from police and discarding the gun where anyone could have found it would call for a sentence of actual incarceration even for a youthful first offender.

76. Two factors in particular contribute to my conclusion that in this case the appropriate way to blend the sentencing objectives is to impose a conditional sentence. The first and most significant is the moral harm suffered by Mr. Roberts in being the victim of the racist attack and being charged with murder. In my view, this highly unusual aspect of the facts justifies a sentence that is not driven primarily by reference to other cases. The second factor is the Court of Appeal's comments in *Morris* about the principle of restraint, with particular regard to the over-incarceration of young Black males.

Length and conditions of conditional sentence

77. In my view the maximum reformatory sentence of two years less a day is needed in order to address deterrence and denunciation. Crediting Mr. Roberts for the equivalent of 191 days that he has already served in actual custody, this leaves 538 days or almost 18 months to be served on a conditional sentence. This is to be followed by 18 months of probation. I am also ordering that Mr. Roberts must provide a sample of his DNA suitable for analysis and I am imposing a 10 year firearms prohibition under s. 109 of the *Criminal Code*.

78. In addition to the statutory conditions, the conditional sentence includes the following conditions (the full conditions are set out in the order imposed):

- House arrest for the first 12 months of the sentence, with GPS monitoring.
- Following the period of house arrest, curfew between 10 p.m. and 6 a.m.
- Not to possess any weapons as defined by the *Criminal Code*.
- Attend and actively participate in culturally sensitive assessment, counselling and rehabilitative programming as directed by the supervisor, which is to include:
 - Substance use
 - Trauma counselling

- Mentorship and if deemed suitable by your supervisor, opportunities to mentor
 - Life skills which is to include employment counselling, job readiness skills, educational assessment, academic support
 - Consideration to be given to programming offered through the *Enhanced Youth Outreach Worker Program* and *Tropicana Community Services* if deemed suitable by your supervisor.
- Open a bank account and provide proof to your supervisor that income from employment is deposited into that bank account.
 - Not possess cash in an amount greater than \$200.
 - Perform 200 hours of community service work which is to commence no later than May 1, 2023.

Released: March 7, 2023



Signed: Justice A. Wheeler