

IN THE SUPREME COURT OF THE NORTHWEST TERRITORIES

BETWEEN:

HER MAJESTY THE QUEEN

-and-

CAMERON BERNARDE

RULING (CONSTITUTIONAL CHALLENGE AND SENTENCE)

I) INTRODUCTION

[1] On May 1, 2017, Cameron Bernarde pleaded guilty to a charge of robbery. Because he used a firearm when he committed the offence, he faced a mandatory minimum punishment of four years imprisonment. *Criminal Code*, s.344(1)(a.1). Mr. Bernarde gave notice early on in the proceedings that he would be challenging the constitutionality of this mandatory minimum sentence.

[2] It took some time before the sentencing hearing could be scheduled because Mr. Bernarde's counsel arranged for a psychologist to assess Mr. Bernarde and prepare a report for the Court. The submissions on the constitutional challenge were made at the sentencing hearing on December 13, 2017. I adjourned my decision to March 26, 2018.

[3] On March 26, 2018, I dismissed Mr. Bernarde's constitutional challenge and imposed the mandatory minimum sentence on him. I gave brief oral reasons at the time and said that written Reasons would follow. These are those Reasons.

II) MANDATORY MINIMUM SENTENCES AND SECTION 12 OF THE CHARTER

[4] Section 12 of the *Canadian Charter of Rights and Freedoms* (the *Charter*) provides that everyone has the right not to be subjected to any cruel and unusual treatment or punishment. In two recent cases, it was successfully invoked in this jurisdiction to challenge mandatory minimum sentences. *R v Cardinal*, 2018 NWTSC 12; *R v Kakfwi*, 2018 NWTSC 13. The provisions that were challenged in those cases were not the same as in this one, but the same legal framework applies. I adopt my comments in those cases about the applicable legal framework. For the purposes of this Ruling, I will only summarize its main features.

[5] A mandatory minimum sentence is contrary to section 12 of the *Charter* if it would result in the imposition of a sentence that is grossly disproportionate. A grossly disproportionate sentence is not merely an excessive sentence. It is a sentence that is "so excessive as to outrage standards of decency" and is "abhorrent and intolerable to society". *R v Lloyd*, 2016 SCC 13, para 24.

[6] The gross disproportionality threshold is a very high one. A mandatory minimum sentence may well result in the imposition of a sentence that would otherwise be considered unfit and would not withstand appellate scrutiny. But that is not sufficient to render it unconstitutional. *R v McDonald*, [1990] O.J. No. 2990 (ONCA).

[7] When dealing with a challenge to a mandatory minimum sentence, the Court must first decide, on a rough scale, what a fit sentence would be in the circumstances, having regard to the sentencing principles and objectives set out in the *Criminal Code*. The Court must then decide whether the mandatory minimum is grossly disproportionate to that fit and proportionate sentence.

[8] In making that determination, a number of factors must be considered: the gravity of the offence; the particular circumstances of the offender; the actual effects of the punishment on the offender; the penological goals and sentencing principles that underlie the mandatory minimum; and a comparison of punishments imposed for similar crimes. *R v Morrissey*, 2000 SCC 38, paras 35-49.

[9] A mandatory minimum sentence may be challenged on the basis of the circumstances before the court or on the basis of a reasonable hypothetical situation. Mr. Bernarde has not put forward any hypothetical situation for this Court's consideration. His challenge is based strictly on his own circumstances.

III) ANALYSIS

[10] As noted above, the first step in the analysis is to assess, on a rough scale, what a fit and proportionate sentence would be under the circumstances, having regard to the sentencing principles and objectives set out in the *Criminal Code*. This requires an analysis that is similar to the analysis a court would have to engage in for any sentencing decision. It requires a consideration of the circumstances of the offence, the circumstances of the offender, and the principles that govern sentencing generally.

1. The circumstances of the offence

[11] On the evening before this offence was committed, Mr. Bernarde had been drinking with one of his friends. He left the friend's house, apparently intending on going home to bed. Instead, for reasons that are unclear, he retrieved a firearm from his home and went to the Rooster Gas Bar in Hay River. He entered the gas bar carrying the firearm. He wore a hoodie over his head and had something covering his face.

[12] William Delorme was working as the cashier that night. Mr. Bernarde pointed the firearm at Mr. Delorme and demanded money from the till and nearby Automatic Teller Machine. Mr. Delorme gave Mr. Bernarde approximately \$200.00 from the till.

[13] The events were caught by a security camera in the store. The investigation quickly led to the identification of Mr. Bernarde as the perpetrator. He was arrested the same day. He gave a warned statement to police admitting to the robbery.

[14] A Pre-Sentence Report was ordered in preparation for the sentencing hearing (the 2017 P.S.R.). The person who prepared that report, in accordance with the usual practice, interviewed Mr. Delorme to find out how these events affected him. Mr. Delorme said that he was not scared during the robbery because Mr. Bernarde seemed nervous and appeared to be a very incompetent thief. Mr. Delorme said that when Mr. Bernarde pointed the firearm at him, the bolt and bullet chamber of the firearm were open. Mr. Delorme also said that he thought that if Mr. Bernarde tried to fire, the gun would backfire because it looked too rusty to shoot. Mr. Delorme was mistaken on that point. Investigators tested the firearm and it did fire.

2. Mr. Bernarde's circumstances

[15] Thanks to the efforts of Mr. Bernarde's counsel, in addition to the 2017 P.S.R., I have the benefit of other materials: an earlier Pre-Sentence Report (the 2008 P.S.R.); medical records dating back to when Mr. Bernarde was very young; a report prepared by Merrill Dean, the psychologist who assessed Mr. Bernarde in August 2017; and a letter authored by Alan Bowerman, also a psychologist, who met Mr. Bernarde several years ago at the Territorial Treatment Center and is familiar with his background.

[16] Mr. Bernarde's biological mother struggled with substance abuse and consumed alcohol throughout her pregnancy. She gave him up for adoption at birth because she was unable to care for him. Mr. Bernarde was adopted by his maternal aunt and her husband.

[17] There were early indications that Mr. Bernarde had some developmental deficits.

[18] When he was six years old, he was assessed as having moderate to severe delays in his receptive language and in his expressive language. He was diagnosed at that time with "Partial Fetal Alcohol Syndrome". When he was ten years old he was assessed by the Pediatrics Department at the Stanton Hospital in Yellowknife. It was noted then that he had a diagnosis consistent with Fetal Alcohol Spectrum Disorder (FASD) or alcohol-related neurodevelopmental disorder.

[19] By then, it was clear that Mr. Bernarde had global developmental delays that had a significant impact on his ability to function at the level expected for his age. He struggled with academics, impulsivity, focus, understanding cause and effect, and active problem solving. These difficulties were expected to continue into adulthood. The professionals who assessed Mr. Bernarde concluded that he needed considerable adult supervision and intense support. Subsequent pediatric assessments done when Mr. Bernarde was fifteen years old confirmed earlier diagnosis.

[20] Ms. Dean's conclusions, based on her recent assessment, are consistent with the information contained in earlier reports.

[21] As part of her assessment, Ms. Dean administered the Weschler Adult Intelligence Scale test (WAIS-IV), a standardized intelligence test that measures various abilities and generates a score. On most aspects of this test, Mr. Bernarde's results were in the "Extremely Low Range" and "Very Low Range".

[22] The second test she administered was the Weschler Individual Achievement Test (WIAT-III), a test that measures an individual's performance in the areas of reading, mathematics, reading language and oral language. Mr. Bernarde's scores on that test were for the most part in the "Extremely Low Range", although in the "Oral Word Fluency" he performed at the "Average" range.

[23] In summarizing her findings, Ms. Dean writes, among other things:

Cameron is a 22 year old man who has a previous diagnosis of Fetal Alcohol Syndrome Disorder. A cognitive assessment in 2006 indicated a cognitive ability falling in the Extremely Low range. Those results were confirmed by this assessment. On this assessment Cameron's Full Scale Intelligence Quotient was 63. This falls within the Extremely Low Range at the 0.1 percentile, meaning that if 100 individuals Cameron's age were assessed, all of them would have a higher performance score than Cameron.

(...)

Cameron shows a relative strength in the area of Perceptual Reasoning. This explains his strengths in working with his hands, in small engine repairs, etc. Cameron can for example, sufficiently assemble simpler objects from diagrams in a book; he has reasonable skills in interpreting non-verbal content in pictures, diagrams, etc.; prefers to look at pictures, diagrams and other visual information rather than listening to discussion; however, his perceptual reasoning abilities are impacted if there is an abstract component to the task.

(...)

Cameron has considerable difficulty with understanding and expressing the language that is used in conversation with him. His verbal fluency is strong, which means he presents as having stronger language than he does; however the actual breadth of his vocabulary is very limited. Furthermore, while he is able to understand relatively simple oral passages provided to him in a contextual setting, he would have considerable more difficulty understanding language that is not set within previously experienced contextual situations.

[24] In reference to the Comprehension subset of the WAIS-IV, which examines an individual's ability to express social conventions, rules and expressions, Mr. Bernarde performed at the "Very Low Range". Ms. Dean gives this example:

Specifically, during the assessment, Cameron was able to provide partial answers to many of the questions, indicating that he understood the "rule" (e.g. "you should not steal", but could not explain why one should not steal, or why that rule exists).

[25] Ms. Dean concluded that Mr. Bernarde shows a Global Development Deficit and that the results of the tests she performed place him well within the range of an individual with an intellectual disability.

[26] She also concluded that he shows “deficits in adaptive functioning in failure to meet with sociocultural standards for social responsibility”. She found that he exhibits functional characteristics that are viewed as secondary markers of FASD, including uneven development as an adult, language delays, impulsivity and distractibility, memory problems, difficulty storing and retrieving information, ability to repeat instructions or rules but inability to understand them in practice, and cognitive processing deficits (which means “thinking more slowly”).

[27] On the issue of uneven development as an adult, Ms. Dean’s conclusions as to Mr. Bernarde’s level of development in various areas are as follows:

- Chronological age: 22 years
- Developmental age: approximately 9 years
- Strengths (perceptual reasoning): within Low Average for his age
- Expressive Language: 8-8.8 years
- Receptive Language: 11.2-12 years
- Oral Comprehension: 12.8 years

[28] In terms of Mr. Bernarde’s needs if he is to be successful in the future, Ms. Dean’s conclusions are unequivocal:

Cameron requires community support in order to be successful. This support would likely include supportive housing in a safe, clean (drug and alcohol-free) environment, and an effective mentor who could help provide external structures as well as help Cameron with decision making. Cameron requires ongoing, intensive supervision in his day to day social life to assist him in making positive, non-impulse driven choices. This is a life-long condition that Cameron has and he will require support throughout his life in this regard.

[29] The 2017 P.S.R. provides detailed information about Mr. Bernarde's background and personal circumstances. With respect to his family circumstances, there are important discrepancies between that report and the 2008 P.S.R.

[30] In the 2008 P.S.R., Mr. Bernarde's home environment is described in positive terms. This was based on what Mr. Bernarde's adoptive parents told the author of that report:

“[he] has resided in Tulita with his family since his birth. He was raised in a healthy environment. His parents informed that there was no dysfunction in their home and all children were shown love and affection. (...) Mr. Bernarde was probably shown more love and attention than any of the other children (...) there was structure and discipline in the home”.

[31] The 2017 P.S.R. tells a very different story. It states that Mr. Bernarde's home environment was very dysfunctional and plagued by substance abuse issues. Mr. Bernarde reports that he was physically abused, in particular by his adoptive father, and was subjected to physical punishment that included hard spankings and slaps and punches to the head. He says the spankings were sometimes so violent that they prevented him from attending school. Mr. Bernarde reports being abused almost daily by the time he was 8 or 9 years old. He would sometimes leave home for a few days when his parents were drinking.

[32] Mr. Bernarde also told the author of the 2017 P.S.R. that he was sexually abused by an adult man in Tulita when he was nine years old. He described being punched and raped by that man. He never told anyone about this.

[33] The author of the 2017 P.S.R. was aware of the contents of the 2008 P.S.R. and spoke to other family members in an attempt to clarify the circumstances of Mr. Bernarde's home environment. He was not able to obtain conclusive information either way.

[34] At the sentencing hearing, through his counsel, Mr. Bernarde confirmed that the information in the 2017 P.S.R. is accurate. I have no reason for finding otherwise. In particular, the fact that Mr. Bernarde did not disclose these things when the 2008 P.S.R. was prepared is inconsequential. Mr. Bernarde was not even thirteen years old when that report was prepared. It is not at all surprising that he did not talk about those things then.

[35] Mr. Bernarde told the author of the 2017 P.S.R. that he has had suicidal ideations in the past and has attempted to commit suicide on a number of occasions. He also said his girlfriend committed suicide a few years ago.

[36] At the time of his arrest Mr. Bernarde lived in Hay River. He has held various jobs since 2011, which have included seasonal work as a firefighter and slasher in the summer and working on ice roads in the winter. He has a young daughter but is not in a relationship with the child's mother. He told the author of the 2017 P.S.R. that he calls the mother often to see how the child is doing. After I

imposed sentence on him on March 26, 2018, Mr. Bernarde commented that he is a young father, and that he needs to “straighten everything”.

[37] Mr. Bernarde has a criminal record dating back to 2008. He was just under thirteen years old the first time he was sentenced. By December 2009 he had accumulated a number of additional convictions for property-related crimes and breaches of court orders. Sentenced at that point for another string of offenses, he received his first custodial sentence, a relatively short one. In 2010 he committed further offenses and again received custodial sentences.

[38] During the year 2013 he committed a number of offenses. These included property offenses, possession of marijuana, and failing to attend court. In December of that year he committed a sexual assault. He was sentenced for all of these offenses on May 1, 2014.

[39] There is a small discrepancy between the sentence recorded on the Probation Order filed as Exhibit S-3 (which states the jail term was eighteen months) and the record of convictions filed as Exhibit S-2 (which indicates a global jail term that falls short of that). Whatever the total jail term was, it was followed by a period of Probation of three years. Mr. Bernarde was still bound by that order when he committed the robbery.

[40] The steady stream of offenses that Mr. Bernarde has committed over the past ten years and the apparent ineffectiveness of the various sentences that were imposed on him is entirely consistent with what the medical records state about the manifestations and expected consequences of Mr. Bernarde's FASD diagnosis. In particular, it is consistent with his inability to integrate the link between his behaviour and the punishments received.

3. Legal principles that would govern sentencing absent the mandatory minimum sentence

[41] The evidence referred to above at Paragraphs 17 to 28 establishes that Mr. Bernarde has significant deficits in his level of development and cognitive abilities. Although he was diagnosed at a very young age and while specific needs were identified and documented, those needs were not met. Indeed they could not have been met within his family unit, given the chaotic and abusive environment he grew up in. Significant outside intervention would have been required, and that did not take place.

[42] The impact that Mr. Bernarde's deficits should have on the determination of a fit sentence, and by implication, on the outcome of his constitutional challenge, was at the heart of the dispute at the sentencing hearing.

[43] The Crown invited the Court to adopt the principles articulated in *R v Ramsay*, 2012 ABCA 247. In that case, the Alberta Court of Appeal dealt with the impact that a FASD diagnosis should have on sentencing. Mr. Ramsay had been convicted of a series of serious offences. He suffered from FASD and had cognitive deficits. He was sentenced to a lengthy jail term. He appealed from that sentence and argued that the sentencing judge had not placed sufficient weight on his cognitive deficits and FASD diagnosis.

[44] Although it ultimately dismissed Mr. Ramsay's appeal, the Court of Appeal confirmed the relevance of a FASD diagnosis in assessing the moral culpability of an offender. The Court noted that where an offender suffers from a mental illness, a more lenient sentence, reflective of that offender's diminished responsibility, is called for. It also found that where an offender's cognitive deficits significantly undermine his capacity to restrain urges and impulses, to appreciate that his acts are morally wrong and to comprehend the causal link between the punishment and the crime, the relevance of general deterrence and denunciation as sentencing principles is reduced. The Court endorsed the reasoning articulated in *R v Quash*, 2009 YKTC 53, that the greater the cognitive deficits of the offender, the less role specific deterrence should play. *R v Ramsay*, paras 21-25.

[45] The Court concluded:

The degree of moral blameworthiness must therefore be commensurate with the magnitude of the cognitive deficits attributable to FASD. The more acute these are shown to be, the greater their importance as mitigating factors and the less weight is to be accorded to deterrence and denunciation, all of which will serve to "push the sentence (...) down the scale of appropriate sentences for similar offenses"

R v Ramsay, para 25.

[46] Mr. Bernarde's counsel urged this Court not to follow this approach. He argued that those aspects of Mr. Bernarde's circumstances should be *the* paramount consideration in assessing what a fit and proportionate sentence should be for this offence, even to the exclusion of sentencing objectives, such as the protection of the public. Counsel argued that this would be a more principled approach, and one that would be more in line with what the Supreme Court of Canada said about

proportionality in *R v Ipeelee*, 2012 SCC 13. Counsel relied, in particular, on the following excerpt:

The fundamental principle of sentencing (i.e., proportionality) is intimately tied to the fundamental purpose of sentencing - the maintenance of a just, peaceful and safe society through the imposition of just sanctions. Whatever weight a judge may wish to accord to the various objectives and other principles listed in the Code, the resulting sentence must respect the fundamental principle of proportionality. Proportionality is the *sine qua non* of a just sanction. First, the principle ensures that a sentence reflects the gravity of the offence. This is closely tied to the objective of denunciation. It promotes justice for victims and ensures public confidence in the justice system. As Wilson J. expressed in her concurring judgment in *Re: B.C. Motor Vehicles Act*, [1985] 2 S.C.R. 486, at p. 533:

It is basic to any theory of punishment that the sentence imposed must bear some relationship to the offence: it must be a "fit" sentence proportionate to the seriousness of the offence. Only if it is so can the public be satisfied that the offender "deserved" the punishment he received and feel a confidence in the fairness and rationality of the system.

Second, the principle of proportionality ensures that a sentence does not exceed what is appropriate, given the moral blameworthiness of the offender. In this sense, the principle serves a limiting or restraining function and ensures justice for the offender. In the Canadian criminal justice system, a just sanction is one that reflects both perspectives on proportionality and does not elevate one at the expense of the other.

R v Ipeelee, para 128.

[47] With the greatest of respect, I do not think that this passage from *Ipeelee* supports the approach advocated by Mr. Bernarde's counsel. On the contrary, it underscores the intimate link between proportionality and the objectives of sentencing, which include the protection of the public. In it, the Supreme Court of Canada makes the point that a truly proportionate sentence is one that reflects *both* the gravity of the offence *and* the degree of blameworthiness of the offender. It specifically guards against elevating one of these components at the expense of the other.

[48] This accords with other things that the Supreme Court of Canada has said about proportionality. While it is the fundamental principle of sentencing, it does not operate in isolation from the rest of the legal framework set out by Parliament:

Proportionality is determined both on an individual basis, that is, in relation to the accused him or herself and to the offence committed by the accused, and by comparison with sentences imposed for similar offenses committed by similar offenders. Individualization and parity of sentences must be reconciled for a sentence to be proportionate.

R v Lacasse, 2015 SCC 64, para 53.

[49] To my mind, elevating moral blameworthiness at the expense of the gravity of the offence is what Mr. Bernarde's counsel was asking this Court to do at the sentencing hearing, and it is precisely what the Supreme Court of Canada warned against in *Ipeelee*.

[50] The analysis of the Alberta Court of Appeal in *R v Ramsay* is entirely consistent with the sentencing framework set out in the *Criminal Code* and with the jurisprudence from the Supreme Court of Canada. It recognizes that the characteristics of an offender that have an impact on his or her blameworthiness must be taken into account as part of the proportionality analysis. It recognizes that some sentencing objectives, such as specific deterrence, are less relevant for offenders who have certain cognitive challenges. But that does not mean that the gravity of the offence and the protection of the public can or should be ignored. The principles of sentencing set out in the *Criminal Code* are helpful in informing the analysis and in balancing the blameworthiness of the offender with the gravity of the offence to arrive at a proportionate sentence.

[51] As the Supreme Court of Canada noted in *R v Lacasse*, proportionality includes a consideration of parity. Another reason why the range of sentences ordinarily imposed for any given offence is relevant is that it is an indication of the courts' views about the gravity of that particular offence.

[52] Robbery is a serious offence. It is punishable by life imprisonment. Many years ago, the Alberta Court of Appeal established a starting point of three years imprisonment for "an unsophisticated armed robbery of unprotected commercial outlets in the absence of actual physical harm to the victim and with modest or no success" *R v Johnas*, 1982 ABCA 331, para 19. This was reiterated by the same court a decade later. *R v Welsh* [1991] A.J. No.44 (Alta.C.A.).

[53] This Court has not, to my knowledge, ever explicitly adopted that starting point. Still, the sentences imposed in the Northwest Territories in robbery cases are consistent with it. *R v Qitsualik & Michael*, 2012 NWTSC 73; *R v McInnis*, 2004 NWTSC 42.

[54] The starting point adopted in *Johnas* reflects the objective seriousness of a robbery, even an unsophisticated one, when the target is a vulnerable target, such as a taxi driver (as was the case in *R v Qitsualik & Michael*), or an unprotected store (as was the case in *R v McInnis* and is the case here).

[55] The Court of Appeal for the Northwest Territories has recognized that the use of starting points is a valid approach on sentencing for serious sexual assaults. *R v A.J.P.J.* 2011 NWTCA 02. Starting points have also been used by this Court in sentencing for trafficking in hard drugs. *R v Castro*, 2016 NWTSC 8; *R v Hache*, 2017 NWTSC 62; *R v Dube*, 2017 NWTSC 77; *R v Stiopu*, 2018 NWTSC 7.

[56] Similarly, in my view, the starting point adopted in *R v Johnas* and *R v Welsh* is useful in guiding the discretion of trial courts in the Northwest Territories in sentencing persons who have committed unsophisticated robberies of vulnerable people such as taxi drivers and unprotected commercial outlets. These victims are easy targets, and these are crimes that can easily degenerate and lead to serious harm and tragic outcomes. Denunciatory sentences are required to demonstrate how seriously the courts view this type of conduct.

[57] As is always the case, when a starting point is used, it is not determinative of the sentence to be imposed. Aggravating and mitigating features must be carefully weighed and the sentence must be adjusted accordingly. In this case, there are a number of aggravating and mitigating factors to consider.

[58] The crime committed by Mr. Bernarde is rendered more serious by a number of things. The use of a weapon is always an aggravating factor. In this case, the weapon was a firearm, which makes things worse. As has been recognized in this jurisdiction and others, the inherent risk in the misuse of a firearm is significant, irrespective of the personal circumstances of the person who is misusing it. *R v Cardinal*, para 72; *R v Lyta*, 2013 NUCJ 1; 2013 NUCA 10; *R v Mikkijuk*, 2017 NUCJ 2; 2017 NUCA 5.

[59] Moreover, Mr. Bernarde did not merely carry the firearm and show it to Mr. Delorme to ensure he would comply with his demands. He pointed the firearm directly at him.

[60] This use of a firearm in the context of a robbery makes general deterrence and denunciation particularly important. I agree with the recent observations made by the Supreme Court of British Columbia in this regard:

(...) firearms, particularly restricted firearms, are extremely dangerous objects. They have a huge potential to harm. That is so, of course, if the offender pulls the trigger and a victim is injured or killed by his bullet, but it is also true if the offender confines himself to threatening his victim with a pistol. People know how easily a handgun can deliver death or a life-changing injury - having a pistol waved in one's face or pointed in one's direction can be an extremely traumatic experience. Society therefore has a strong interest in expressing its opprobrium for the use of a handgun during a robbery and an equally strong interest in deterring would-be robbers from using restricted firearms.

R v Stocker, [2017] B.C.J. No.628.

[61] These comments were made in the context of a robbery where a restricted firearm was used, but in my view, the use of any type of firearm during a robbery raises similar concerns.

[62] I have considered the fact that, unlike the victim in *R v Stocker*, Mr. Delorme was not frightened during this offence. On balance, I do not consider this to be of any significance on sentencing. First, Mr. Delorme complied with Mr. Bernarde's demands and gave him money. It is reasonable to infer that he was not entirely unmoved by Mr. Bernarde's actions. More importantly, Mr. Delorme's subjective reaction to the situation has more to do with his personal characteristics, (and possibly with his erroneous belief that the firearm could not be fired), than with what Mr. Bernarde did. It does not detract from the objective gravity of pointing a firearm at a gas station attendant in the commission of a robbery.

[63] It is also aggravating that Mr. Bernarde took steps to cover his head and face before going into the gas bar. This is relevant to Mr. Bernarde's degree of blameworthiness because it shows a level of planning. Bearing in mind the analysis proposed in *R v Ramsay*, which I adopt, it also shows that whatever Mr. Bernarde's deficits are, he was aware that what he was about to do something that was wrong and he took steps to avoid detection.

[64] Finally, Mr. Bernarde's criminal record is aggravating. His FASD diagnosis, in my view, makes the record far less aggravating than it might otherwise have been. Even so, the recent escalation in the seriousness of his crimes is of great concern because it signals an increasing threat to public safety.

[65] There are also mitigating circumstances. The first is the guilty plea. It has saved the time and resources that would have been required had this matter

proceeded to trial. Importantly, the plea represents an acknowledgement by Mr. Bernarde of his responsibility and confirms that he is remorseful for his actions.

[66] Second, Mr. Bernarde's level of moral blameworthiness is reduced by his circumstances as an indigenous offender. Mr. Bernarde is of Mountain Dene descent. The reality that Mr. Bernarde faced growing up is, sadly, consistent with the reality faced by many indigenous persons in this country, and with what we hear in many sentencing hearings of indigenous offenders in this jurisdiction.

[67] Substance abuse, violence, and the family dysfunction that comes with it are among the consequences of many indigenous persons' traumatic experiences at residential schools and other destructive consequences of colonialism. This, as well as other systemic and background factors that have had an impact on the lives of indigenous people in this country, must be taken into account when sentencing an indigenous offender. *R v Gladue*, [1999] 1 S.C.R. 688; *R v Ipeelee*. Those things operate to reduce the offender's moral blameworthiness.

[68] Finally, and critically, Mr. Bernarde's level of blameworthiness must be assessed in light of his personal characteristics, including his intellectual deficits and his FASD condition. Combined with the difficult circumstances that he faced in the home, this is a very significant factor that reduces his blameworthiness. The real question is to what extent it does.

[69] That issue is the most challenging aspect of the analysis in this case. In his submissions, Mr. Bernarde's counsel focused on Mr. Bernarde's deficits, and in particular on Ms. Dean's conclusion that Mr. Bernarde's developmental age is approximately nine years old. Counsel underscored the fact that the criminal justice system does not put nine year old children in jail for four years. That, obviously, is true. But counsel also suggested that a fit sentence for Mr. Bernarde would be two years imprisonment. It was on that basis that he was arguing that the mandatory minimum sentence would be grossly disproportionate for Mr. Bernarde. The problem with the Defence's position is that it is internally inconsistent in this sense: the criminal justice system does not put nine year old children in jail for two years either.

[70] This illustrates why approaching the assessment of Mr. Bernarde's moral blameworthiness by focusing solely on the "developmental age" referred to in Ms. Dean's report is fundamentally flawed. Mr. Bernarde is an adult. He cannot be treated as a nine year old child for the purposes of sentencing because a nine year old child would not bear any criminal liability for his or her actions.

[71] Without question, the evidence demonstrates that Mr. Bernarde has serious deficits. It does not follow that the commission of this offence stems exclusively from these deficits. For example, the evidence suggests that he struggles with impulse control as a result of his condition. But this particular offence was not entirely impulsive. Mr. Bernarde armed himself, took steps to avoid detection, and targeted a relatively vulnerable location where he knew there would likely be cash to be stolen. The plan he formulated and executed was a simple plan, but it was a plan nonetheless.

[72] On the other hand, the evidence shows that Mr. Bernarde's condition makes it difficult for him to make appropriate choices and decisions, and makes it very challenging for him to connect the punishments he receives with the crimes he commits. This, I agree, makes specific deterrence largely irrelevant as a sentencing objective in this case. As I have already noted, it also considerably reduces the weight that should be attached to his criminal record.

[73] A fit sentence for Mr. Bernarde cannot be the sentence that he would receive for this offence if he did not have the deficits that he has. If the only consideration, as counsel suggests it should be, was Mr. Bernarde's own circumstances and deficits, a jail term in the penitentiary range would not be appropriate. Perhaps even a shorter jail term would not be appropriate either. If that were the case, a mandatory minimum sentence of four years would be grossly disproportionate.

[74] But the sentence must also reflect the gravity of the offence. That is the second, and equally important, component of the proportionality analysis. Applying a three year starting point, a sentence in roughly the two year range could only be fit if the factors that reduce Mr. Bernarde's blameworthiness, combined with his guilty plea, significantly outweighs the aggravating factors in this case. I do not find that to be the case. In my view, a fit sentence, on a rough scale, would be in the range of three years imprisonment.

6. Whether the mandatory minimum is grossly disproportionate to what a fit sentence would be

[75] The next step in the analysis is to determine whether the mandatory minimum sentence of four years is grossly disproportionate. Going back to the factors outlined in *R v Morrisey*, referred to above at Paragraph 8, I cannot say that it is.

[76] The first factor is the gravity of the offence. Robbery is a serious offence. One of the features that makes a mandatory minimum sentence particularly vulnerable is when the offence that triggers it captures too wide a range of conduct, and that “the net is cast too wide”. *R v Nur*, 2015 SCC 15, para 82; *R v Lloyd*, paras 27-32. Such is not the case for the offence of robbery committed with a firearm. Any such offence will be extremely serious. This particular net is not cast too wide.

[77] The second factor referred to in *R v Morrissey* is the circumstances of the offender. For reasons already given, Mr. Bernarde’s personal circumstances and his deficits reduce his blameworthiness. At the same time, there are aspects of what he did in committing this offence that show that he was aware that he was about to do something that was wrong and that he took a certain number of steps to avoid detection.

[78] The third factor is the actual effects that imprisonment will have on the offender. I take it as a given that imprisonment for a lengthy period of time has an effect on any offender. Here, there is no evidence that imprisonment has had a particularly adverse impact on Mr. Bernarde. There are concerns about him being subjected to negative influences, particularly in a penitentiary setting, and I have not overlooked those concerns. But this is only one factor to be weighed among others.

[79] The fourth factor relates to the penological goals and sentencing principles that underlie the mandatory minimum sentence. Here, the mandatory minimum sentence is intended to address the serious risk that the misuse of firearms represents. That is an important objective, and it is particularly relevant in the north. As I noted in *R v Cardinal*:

(...) concerns about the misuse of firearms are every bit as pressing in the communities of northern Canada as they are in urban areas. Firearms are prevalent in northern communities. They are essential tools for those who spend time out on the land hunting, fishing and trapping. They are often readily accessible in our communities. The criminal justice system’s response to the misuse of firearms in this jurisdiction must be stern.

(...)

Deterrence and denunciation must be emphasized when firearms are misused. And those objectives are at the heart of Parliament’s choice to establish mandatory minimum sentences.

R v Cardinal, paras 66-67.

[80] The fifth factor is the existence of valid alternatives to the mandatory minimum. There is no suggestion here that a jail term could be avoided in these circumstances. Mr. Bernarde's counsel, as already noted, conceded that a jail term of some significance was warranted notwithstanding Mr. Bernarde's circumstances.

[81] The final consideration is the gap between the mandatory minimum sentence and punishments imposed for other similar crimes. As noted above, robberies, in particular robberies committed with a weapon, usually give rise to penitentiary sentences in this jurisdiction. This has been the case even for offenders who live with FASD. *R v Michael*; *R v Qitsualik*.

[82] This is the first time this particular mandatory minimum sentence is the subject of a constitutional challenge in the Northwest Territories, but it has been challenged, unsuccessfully, in several other jurisdictions. *R v McDonald*, [1998] O.J. No.2990; *R v McIntyre*, 2017 ONSC 360; *R c Lapierre*, 1998 CanLII 13203(QCCA); *R c Perron*, 2016 QCCQ 13089; *Caron c R*, 2014 QCCQ 10603; *R v Hailemolokot et al.*, 2013 MBQB 285; *R v McIvor*, 2017 MBPC 11; *R v Wust*, 1998 CanLII 5492 (BCCA); *R v Stocker*, 2017 BCSC 542.

[83] The outcomes of these cases are not determinative, but they are instructive. In particular, it is worth noting that some of these challenges were brought by offenders with special vulnerabilities. This raised issues not unlike the ones that arise in this case; namely, whether those vulnerabilities diminished the offender's blameworthiness to the point of rendering the mandatory minimum grossly disproportionate.

[84] For example, in *R v Wust*, one of the offenders was a woman with no criminal record. She had robbed a gas station. She suffered from schizophrenia. The mandatory minimum sentence was upheld, the Court having concluded that compassionate grounds are not sufficient to base a conclusion that a mandatory minimum sentence contravenes section 12 of the *Charter*.

[85] In *R c Lapierre*, the accused entered a hardware store in Montréal, wearing a disguise and armed with a shotgun. She ordered the cashier to give her money. When the cashier did not obey, she fired one shot in the air. This, not surprisingly, caused a commotion in the store and other employees came to assist the cashier.

The accused pointed the shotgun in their direction. Eventually she was given money and left the store. She was arrested shortly thereafter, a short distance away.

[86] Ms. Lapierre was a single mother who was raising, alone, her 3 year old child. She was also caring for a disabled aunt. She was an alcoholic who had attempted to address her addiction through various programs but had not succeeded. Her challenge to the mandatory minimum was dismissed, notwithstanding her addiction and sympathetic circumstances.

[87] In *R v McDonald*, the offender was 21 years old and suffered from a manic-depressive disorder for which he was taking medication. He entered a fast food outlet just before closing time, and demanded that the clerk give him all the money he had. He had a gun tucked in the waist of his pants and showed it to the clerk. He did not point the gun at the clerk or fire it at any point. The clerk handed him the money and he left. The accused said at the sentencing hearing that he needed the money to pay rent and other necessities. The Ontario Court of Appeal concluded that while a four year sentence would likely be set aside on appeal as demonstrably unfit, it did not meet the gross disproportionality threshold.

[88] None of these cases were concerned with an offender living with FASD or one whose sentencing was governed by the principles articulated in *R v Gladue* and *R v Ipeelee*. There are important distinctions between these offenders and Mr. Bernarde. I simply note that they were cases where the offenders' blameworthiness was reduced because of their particular characteristics. Despite this, the courts concluded that the gross disproportionality threshold was not met.

[89] Similar outcomes were reached in the context of challenges to other mandatory minimum sentences applicable to firearm offenses. For example, in *R v Al-Asawi*, 2017 BCCA 163, the offender faced three consecutive mandatory minimum sentences of one year, having been convicted of having used an imitation firearm while committing a robbery. He had been a prisoner of war in Iraq for nine years, had sustained a severe head injury, suffered from Post-Traumatic Stress Disorder, had mental health and health problems and suffered from addictions. Despite these highly sympathetic circumstances, the British-Columbia Court of Appeal concluded that the global mandatory minimum sentence of three years was not grossly disproportionate.

[90] In *R v MacDonald*, the Ontario Court of Appeal's discomfort with the consequences of the legal conclusion it reached was obvious. After referring to the

legal framework that applies in a challenge based on section 12 of the *Charter*, Rosenberg J. said:

Applying those principles to this case, I have these comments. I have real concerns about the punishment imposed on this appellant even allowing credit for pre-sentence custody. A sentence of even three years imprisonment is beyond what is necessary to punish, rehabilitate or deter this appellant or to protect the public from this particular appellant, I am particularly concerned that such a sentence does not take into account the impact of the appellant's mental illness.

I also have reservations about putting this relatively young man into a penitentiary setting. If it were open to this court to review the propriety of this sentence on the usual scale of appellate review (...) I would find a three-to-four year sentence to be demonstrably unfit. However, that is not the same as gross disproportionality and I am not convinced that having regard to the objective gravity of any offence involving the use of a firearm, even an unloaded one, a sentence approaching four years shocks the conscience. (...) the standard under s.12 is not so exacting as to require the punishment to be "perfectly suited to accommodate the moral nuances of every crime and every offender".

R v MacDonald, [1998] O.J. No.2990, paras 71-72.

[91] The same can be said in this case. A four year sentence, for Mr. Bernarde, is a very harsh sentence. It may well be considered to be demonstrably unfit if it were reviewed by an appellate court under the usual sentencing framework. But that is not the same as it meeting the threshold of gross disproportionality.

7. Impact of the recommendations of the Truth and Reconciliation Commission

[92] Mr. Bernarde's counsel pointed out during submissions that mandatory minimum sentences, and in particular their impact on offenders living with FASD, were the subject of specific Calls for Action in the final report of the Truth and Reconciliation Commission of Canada.

[93] This is true. Recommendation #32 calls upon the federal government to allow trial judges to depart from mandatory minimum sentences. Moreover, a portion of Recommendation #34 calls upon the federal government to enact statutory exceptions from mandatory minimum sentences for offenders affected by FASD. FASD is also the subject of Recommendation #33, which calls on the federal government to recognize as a high priority the need to address and prevent FASD and develop, in collaboration with Aboriginal people, FASD preventive programs that can be delivered in a culturally appropriate manner.

[94] The recommendations of the Truth and Reconciliation Commission, no matter how sound or wise, do not amend the *Criminal Code*, alter Supreme Court of Canada jurisprudence, or relieve this Court of its duty to follow binding decisions.

[95] Under our system of law, the role of courts is to apply the laws enacted by Parliament, subject to those laws being constitutional. Trial courts are bound by the rule of precedent and must follow directions given by the Supreme Court of Canada. Unless and until the Supreme Court of Canada modifies the very stringent test to be applied when section 12 of the *Charter* is invoked, trial courts cannot set aside a mandatory minimum sentence simply because it will result in the imposition of an excessive or harsh sentence. And unless and until Parliament sees fit to create exemptions, as contemplated by the recommendations of the Truth and Reconciliation Commission, to give the courts more flexibility in the application of mandatory minimum sentences in appropriate cases, courts do not have that flexibility.

IV) CONCLUSION

[96] As I said when I imposed sentence on Mr. Bernarde, this is an exceedingly sad case.

[97] In his letter, filed as Exhibit S-6, Mr. Bowerman states that there were specific therapeutic and supportive reasons why the professionals involved in Mr. Bernarde's life early on recommended environments that would provide him supervision, teaching and support. He writes:

Without these types of supportive environments for him it was expected that Cameron would have great difficulty maintaining himself in a community setting. It would also be expected that he would run into difficulty with the law as his lack of appreciation for cause and effect, inability to consistently understand the potential consequences of his behaviours and underdeveloped ability to regulate his own impulses and emotions would result in problematic behaviors that would lead to conflict with legal authorities and potential incarceration.

(...)

It is highly unfortunate that Cameron did not receive the recommended interventions and supports that were mentioned several times in the available reports provided by many

professionals and the lack of support has likely been a key contribution to his current problematic functioning, criminal behavior and subsequent incarceration.

[98] It is difficult to disagree with Mr. Bowerman. Ironically, unlike many people who live with FASD, Mr. Bernarde was actually diagnosed at a relatively young age and recommendations were made about what he needed. The professionals who came into contact with him over the years predicted what would happen absent significant intervention. We now know that Mr. Bernarde, far from receiving the help he needed, was left to fend for himself in a dysfunctional and abusive environment. That is profoundly disheartening and sad.

[99] Going back in time and reversing the events that led to this outcome is, obviously, not possible. But with the amount of information available about Mr. Bernarde, one can only hope, and indeed, society should expect, that every effort will be made, when he is released from custody, to provide him with the structure and supports that he needs to maximize his chances of success. As I already noted, the escalation in the seriousness of his crimes is of great concern. Unless Mr. Bernarde benefits from the highly structured environment that he needs, as described in the conclusions of Ms. Dean's report, there is a significant risk that he will commit further offenses.

[100] All that being said, since I have concluded that section 344(1)(a.1) does not contravene section 12 of the *Charter*, the minimum sentence of four years must be imposed.

[101] As of the date of the sentencing hearing, Mr. Bernarde had been in custody for a total of 504 days. There was nothing on the record suggesting that he should not receive the maximum credit for this time. Having given him credit for two years and three weeks for the time he spent on remand, this left the further jail term to be served to be 23 months and one week. That being so, Probation can be part of the sentence. *R v Mathieu* [2008], 1 S.C.R. 723.

[102] Mr. Bernarde's compliance with court orders has been mediocre at best. I also recognize that he was on Probation when he committed this robbery. Still, the evidence adduced at his sentencing hearing makes it clear that close supervision upon release will be crucial if he is to have any chance of success in staying out of trouble. This was why I ordered that he be on supervised Probation for three years following his release. Aside from the statutory conditions, he will be required to report to probation services within twenty-four hours of release, and thereafter as directed; reside where directed by the Probation Officer; and take educational program recommended by the Probation Officer.

[103] The ancillary orders sought by the Crown, which were not opposed by Defence, were addressed during my oral decision. The various orders issued and there is no need for me to address them any further in this Ruling.

[104] In my view, it is very important that for the rest of the time Mr. Bernarde will be in custody, his case manager have as much information as possible about his situation and his needs. The same is true, and even more so, for the person who will be assigned as his Probation Officer upon release. The degree of supervision that Mr. Bernarde will be under when he is released should be commensurate to his circumstances and needs. With a view of ensuring that those who work with Mr. Bernarde have the maximum information available to them, I direct the Clerk of the Court to send the following documents to the correctional authorities, as well as to Probation Services. I also direct that those documents be made available to the Probation Officer who will be assigned to Mr. Bernarde's case:

1. a copy of these Reasons and of the transcript of the decision I delivered orally on March 26, 2018;
2. a copy of Ms. Dean's report (Tab 4 of Exhibit S-5);
3. a copy of the 2017 P.S.R. (Exhibit S-4).

L.A. Charbonneau
J.S.C.

Dated in Yellowknife, NT this
27th day of April, 2018

Counsel for the Crown:	Brendan Green
Counsel for Cameron Bernarde:	Peter Harte

**IN THE SUPREME COURT OF THE
NORTHWEST TERRITORIES**

BETWEEN:

HER MAJESTY THE QUEEN

-and-

CAMERON BERNARDE

**RULING
(CONSTITUTIONAL CHALLENGE AND
SENTENCE)
OF
THE HONOURABLE JUSTICE L.A.
CHARBONNEAU**
