CITATION: R. v. Chan, 2019 ONSC 1400
COURT FILE NO.: CR-15-9423
DATE: 20190311

ONTARIO

SUPERIOR COURT OF JUSTICE

BETWEEN:		
HER MAJESTY THE QUEEN		Andrew Midwood and Frank O. Schwalm for the Crown
– and –		
THOMAS CHAN		
	Defendant	David S. McFadden and L. Joleen Hiland for Mr. Chan
		HEARD: February 19, 2019

REASONS FOR SENTENCE

BOSWELL J.

[1] This case is heartbreaking.

The Circumstances of the Offence

[2] In December 2015, Thomas Chan was a 19 year old college freshman. Good-looking, athletic, popular and with a loving, supportive family, he had a good life and a promising future.

[3] On the evening of December 27, 2015 he and some friends decided to experiment with magic mushrooms. The active ingredient in magic mushrooms is psilocybin; a drug with hallucinogenic properties, but which is known to be generally safe.

[4] The evening started off well. But in the early morning hours of December 28, Mr. Chan began to experience unpleasant side effects. He eventually became psychotic and delusional. He ran two blocks from his mother's home to the home of his father in bare feet and wearing only a pair of pants. He broke into his father's home through a window.

[5] Mr. Chan was afraid and was looking for help from his father, who was a well-respected local doctor. But his delusions overcame him. He hallucinated that his father and his father's partner were devils and were attacking him. A struggle ensued. He ended up stabbing both his

father and his father's partner, Lynn Witteveen. His father died, while Ms. Witteveen was gravely injured.

[6] Mr. Chan was charged with murder and attempted murder. In his defence he argued that he was not criminally responsible for his actions, given that he was in a drug-induced psychotic state at the time of the attack. Substance-induced psychosis does not generally meet the legal test for a verdict of not criminally responsible on account of a mental disorder. But Mr. Chan also has a diagnosed mild traumatic brain injury – the result of a history of concussions, suffered while playing rugby as a teenager. He argued that his brain injury made him more susceptible to the effects of the mushrooms than a typical member of the general population would be. It was the unexpected effect of the drug on his injured brain that he said should relieve him of criminal responsibility for the attack on his father and Ms. Witteveen.

[7] I rejected Mr. Chan's defence, for reasons reported at 2018 ONSC 7158. I convicted him of manslaughter and aggravated assault.

The Impact of the Offences

[8] The impact of the offences has extended far into the community. Dr. Chan and Ms. Witteveen ran a local endoscopy clinic. The clinic could not function without them. The Peterborough community has lost a highly-regarded and difficult to replace medical specialist. Staff lost their positions. Patients have had to travel elsewhere for care.

[9] Offences of this nature are very unsettling in a community. A middle-of-the night home invasion by an armed intruder is a terrifying prospect, particularly for those most vulnerable and unable to protect themselves. The arbitrariness of an event like this makes it difficult to protect against. Everyone in the community feels a little less safe in their homes when offences like these occur.

[10] Far more profound, of course, are the impacts the offences have had on the Chan and Witteveen families.

[11] Dr. Chan lost his life.

[12] Ms. Witteveen survived, but lost the life she once held dear. She experienced nearly unimaginable horror. She watched, helplessly, as her life partner was stabbed to death. She was stabbed repeatedly herself, including through the abdomen, arm, neck and eye.

[13] Her recovery has been painful and seemingly unending. She has undergone multiple surgeries, including three bowel resections, abdominal wall reconstruction and eye surgeries. She endured an abdominal feeding tube for months. She is blind in her right eye. She has difficulty speaking, walking and doing any number of everyday tasks that most of us take for granted, such as showering or simple household chores. And these are just the physical manifestations of her injuries. She has been profoundly affected emotionally. Almost everything that defined her life has been severely damaged or destroyed.

[14] The court received fourteen victim impact statements. Many were from Ms. Witteveen's family and friends. They attest to the severe impact that her experience and injuries have had on her and on them.

[15] Ms. Witteveen herself provided a heart-wrenching account of her experience and its aftermath. She can no longer work. She is on numerous daily medications. She is financially devastated. She is dependent on others in many ways. She is utterly broken. As she said, she has lost her dignity, her purpose and her independence.

[16] Her entire extended family is in an unforgiving grip of trauma and grief. They are caught in a web of complex and interwoven emotions: pain, grief, fear, worry, despair and anger. Jenna Witteveen has become her mother's caregiver at a time when she should be starting her own, independent life. She has made huge sacrifices in terms of time and expense in order to support her mother.

[17] Ms. Witteveen's family and friends are saddened to see the changes in her and are struggling to find ways to help. They are angry at Mr. Chan. Ms. Witteveen went from a vibrant and bubbly person to withdrawn, depressed and easily triggered. She has, in the words of her sister, "lost her sparkle".

[18] Mr. Chan's family is also suffering. Christina and Thomas have lost their father. Their mother and her partner, Jeff Phillips, did everything they could to intervene on the night in issue. They too have been traumatized by this incident which they were helpless to stop. Ms. Vestano had to watch as her bloodied son was taken down by armed police officers. She and her daughter, Christina, have made enormous sacrifices to support Mr. Chan both financially and emotionally since his arrest. And they are consumed with worry about him, his well-being and his future.

The Circumstances of the Offender

[19] Thomas Chan is responsible for the immense suffering of others. He knows it. And the weight of it is crushing him.

[20] Thomas Chan did not intend to harm anyone. He intended to get high with his friends. It was entirely unforeseeable to him that he would become psychotic and kill his father and maim Ms. Witteveen. But of course, he did just that. And I have found him criminally liable for doing so.

[21] These offences aside, Mr. Chan is a good person. He has never been in trouble with the law before. He was a leader in his group of friends. He was popular, a great athlete and a cherished son.

[22] Mr. Chan was not a heavy user of drugs. Like many in his cohort, he smoked marijuana, though he had actually given that up a short time before the offences occurred. He had some very limited, apparently positive, experience with magic mushrooms prior to the night in issue.

[23] The knowledge that he has so horribly harmed virtually everyone close to him has been difficult for Mr. Chan to manage. His treating psychologist, Dr. Menendez, has observed that Mr. Chan "continues to struggle with the fact that he is both the person who did the horrible things that

hurt so many people and, at the same time, is one of the people most hurt" by those same horrible things.

[24] Mr. Chan was at risk of self-harm following the offences, as one might well imagine. He continues to have constant feelings of self-loathing. He is, and likely will be for a long time to come, unable to allow himself to have positive feelings about himself. It will be very challenging for him to reach a stage in his life where he feels deserving of any happiness or success.

The Principles and Purposes of Sentencing

[25] The circumstances of this case understandably cause one to pause and consider the nature of punishment and the goals it is intended to serve in our society.

[26] Punishment, laid bare, is the imposition of suffering on an offender by the state. In Canada, the imposition of such suffering is intended to achieve certain objectives. They are codified in s. 718 of the *Criminal Code ("Cr. C.")* and include: the denunciation of unlawful conduct; general and specific deterrence; the separation of the offender from society where necessary; rehabilitation; reparation for harm done to the victims and the community; and the promotion of a sense of responsibility in offenders and acknowledgment of the harm done. The importance of these individual objectives, and how they interact, varies from case to case.

[27] To get a sense of how much punishment is necessary to achieve the relevant objectives in any given case, the court is guided by the fundamental principle of proportionality. A sentence must be proportionate to the gravity of the offence and the degree of responsibility of the offender: s. 718.1 *Cr. C.*

[28] Proportionality engages two concepts: censure and restraint. As Lebel J. explained in *R. v. Ipeelee*, 2012 SCC 13, at para. 37:

> 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...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.

[29] The concept of proportionality compels courts to treat like cases alike and to recognize where there are material differences between different offenders and difference offences. Section 718(2)(b) *Cr. C.* specifically provides that "a sentence should be similar to sentences imposed on similar offenders for similar offences committed in similar circumstances".

[30] Having said that, proportionality, as a guiding sentencing principle, must be considered through an individualized lens. As former Chief Justice McLachlin described it in *R. v. Nur*, 2015 SCC 15, at para. 43,

> ...[I]mposing a proportionate sentence is a highly individualized exercise, tailored to the gravity of the offence, the blameworthiness of the offender, and the harm caused by the crime...

[31] In the result, the court must carefully consider the particular circumstances of the offence and of the offender. Any aggravating and mitigating circumstances must be taken into account. In my view, any punishment imposed must also be considered in light of what Professor Berger has described as "the lived experience" of the offender. The lived reality of the offender is defined not only by the number of months or years of impaired liberty imposed upon him or her, but also by an aggregate of his or her experience of suffering, including stigma, alienation, pain and loss. See Benjamin Berger, "*Sentencing and the Salience of Pain and Hope*" (2015), 70 SCLR (2d) 317.

The Legal Parameters

[32] Mr. Chan has been convicted of both manslaughter and aggravated assault. The maximum sentence for manslaughter is imprisonment for life: s. 236(b) *Cr. C.* The maximum sentence for aggravated assault is 14 years imprisonment: s. 268(2) *Cr. C.*

[33] There are no applicable minimum sentences in the circumstances of this case.

The Positions of the Parties

[34] The Crown seeks a penitentiary sentence of eight years. They submitted a number of precedents involving manslaughter in the context of extreme intoxication that tend to point to the high single digits as a proportionate sentence in cases with facts similar to those here.

[35] Defence counsel submit that a more appropriate sentence would be in the four to five year range, less credit for time served, enhanced credit for the conditions of pre-trial custody and a credit for time during which Mr. Chan was subject to restrictive bail conditions while awaiting trial. Defence counsel's submissions tended to focus on Mr. Chan's exemplary character and what they argued was a diminished moral blameworthiness in the circumstances of this case.

Discussion

[36] Before I move on with my discussion of the sentence I am imposing today, I want to make several points clear:

(a) The sentence imposed today cannot undo the damage that has been done by the offences. No sentence is capable of restoring Ms. Witteveen's health or her joie de vivre. Regardless of the sentence imposed today, the victims of the offences will be left with the same pain and heartache that they have been carrying with them for the past three years;

(b) No sentence is capable of satisfying all interested parties. Emotions are undoubtedly running high amongst those significantly impacted by the offences. The sentence imposed today is not designed to make any particular constituency happy. It is intended to adhere to the purposes and principles of Canadian sentencing law and to maintain the confidence of the broader public in the administration of justice; and,

(c) I am hugely sympathetic to Ms. Witteveen and to her extended family and friends. She and they have suffered immensely. She did nothing to deserve what happened to her. Her circumstances are the result of Mr. Chan's actions and they are entirely unfair to her. At no time, while crafting the sentence imposed today, have I lost sight of the substantial impact these offences have had on her. I am similarly hugely sympathetic to the Chan family for the same reasons. The sentence imposed is in no way meant to reflect the value of the losses anyone has suffered. One cannot put a price, in dollars or in years of incarceration, on a life lost or significantly impaired. Having said that, the analysis must now focus on Mr. Chan and the determination of what sentence best fits his particular circumstances and the particular circumstances of these offences.

[37] In *R. v. Lacasse,* 2015 SCC 64, Justice Wagner, now Chief Justice Wagner, observed that "sentencing remains one of the most delicate stages of the criminal justice process in Canada". It is certainly the most delicate stage of *this* proceeding. Mr. Chan is a good person who committed atrocious acts of violence while in a substance-induced psychosis of his own making. The principles and purposes of sentencing are not easily applied in circumstances like those present here.

[38] How does one begin to assess what a proportionate sentence is in the circumstances of this case? A young and valued member of the community ingested some recreational drugs with his friends – something young people have been doing for thousands of years. That is the morally blameworthy conduct in issue here. It is on the low end of the scale of morally blameworthy behaviour. Yet it led to consequences undeniably at the high end of the gravity spectrum.

[39] As a starting point, sentencing judges frequently search for an established range of sentences applicable to the subject offence. Ranges are helpful guidelines. They assist courts in adhering to the parity principle – ensuring that like cases are treated alike. Ranges are not, however, meant to be fixed or inflexible: see *R. v. D.D.*, [2002] O.J. No. 1061 (C.A.). They must play a servient role in the individualized sentencing process: see *R. v. Nasogaluak*, 2010 SCC 6, at para. 43.

[40] The identification of an appropriate range of sentence in manslaughter cases is notoriously difficult, largely because manslaughter may be committed in many different ways. Justice Fuerst made the following observation in *R. v. Jiwa*, 2011 ONSC 4071, at para. 35:

> A diverse range of circumstances will found a conviction for manslaughter. Accordingly, while the maximum sentence is life imprisonment, there is wide variation in the range of sentence for this offence. At one end of the manslaughter spectrum, the circumstances may approximate an unintentional and almost accidental killing, while there will be those approaching murder at the opposite extremity.

[41] This case involves a knife attack by a young man in a psychotic state, perpetrated against two of the people closest to him. There are, fortunately, relatively few similar cases to use as comparators.

[42] The Crown submitted a number of cases that they say are of a similar nature to the facts and circumstances here. I do not intend to mention every one of them. I accept that they do reflect sentences being imposed in the upper-single digits for manslaughter committed while an offender was in a state of substance-induced psychosis.

[43] In *R. v. Hicks*, [1995] B.C.J. No. 545, the British Columbia Court of Appeal upheld two concurrent ten year sentences imposed on an offender who stabbed two women to death while in a cocaine-induced psychosis. The court's analysis focused on denunciation as the primary factor driving the sentence because, as Lambert J.A. wrote, the objectives of protecting society, rehabilitating the offender, and specific and general deterrence did not lead to a sentence commensurate with the gravity of the offence.

[44] The same can be said here. The gravity of the offence is at the high end. But most of the established objectives of sentencing do not support a punishment proportionate to that elevated gravity. For instance, society is not in need of protection from Mr. Chan. Nor is Mr. Chan in need of rehabilitation. He simply needs to stay clear of hallucinogens, something I am sure he needs no further encouragement to do.

[45] No sentence I could impose today will add any meaningful specific deterrence on top of the overwhelming grief and shame Mr. Chan has already experienced. There is no chance he will be repeating this type of behaviour. There is similarly little value in this sentence as a general deterrent. The extreme nature of Mr. Chan's substance-induced intoxication was not reasonably foreseeable. His acts committed while in that state of psychosis were not reasonably controllable. It is difficult to deter others from committing acts they cannot reasonably foresee or control.

[46] That said, today's sentence will reinforce the message that Canadian law holds individuals to account for their criminal acts committed while in a state of self-induced intoxication. There is certainly some general deterrent value in that message. Even so, denunciation will be the most significant driving factor in establishing the sentence imposed today.

[47] In *R. v. M. (C.A.)*, [1996] 1 S.C.R. 500, former Chief Justice Lamer described denunciation in the following terms, at para. 81:

> [A] sentence with a denunciatory element represents a symbolic, collective statement that the offender's conduct should be punished for encroaching on our society's basic code of values as enshrined within our substantive criminal law... A sentence which expresses denunciation is simply the means by which these values are communicated. In short, in addition to attaching negative consequences to undesirable behaviour, judicial sentences should also be imposed in a manner which positively instills the basic set of communal values shared by all Canadians as expressed by the Criminal Code.

[48] Our criminal law is designed to help maintain a just, peaceful and safe society. When someone voluntarily becomes extremely intoxicated, they run the risk of committing acts while in that state that they otherwise would never commit while sober. And if, by voluntarily assuming

that risk, they harm others, they will be held to account. This accounting is the manner by which our shared communal values are communicated.

[49] Other cases submitted in support of the Crown's position include the following:

(a) In *R. v. Green*, 2001 BCCA 672, the British Columbia Court of Appeal upheld a ten and a half year sentence for a manslaughter conviction involving a stabbing death. The male offender stabbed a female companion some 37 times while in a state of substance-induced psychosis. Low J.A., for a unanimous panel, wrote that most manslaughter cases fall within the four to fifteen year range. Sentences outside that range, he said, are imposed only where there are special circumstances. He noted that "the barbaric violence perpetrated by the appellant in this case encroached on society's basic code of values in the extreme";

(b) In *R. v. Tahir*, [2012] O.J. No. 6449 (S.C.J.), Then J. imposed a twelve and a half year sentence on a male who beat to death another resident in a shared rooming house while in a state of extreme intoxication. It is not clear from the judgment, however, whether Mr. Tahir, albeit extremely intoxicated, was nevertheless aware of what he was doing. He made attempts to mop up the scene of the beating, which suggest to me that he was far from psychotic; and,

(c) In *R. v. Langevin*, 2018 ONSC 6020, Ratushny J. imposed an eight year sentence on an offender who stabbed his female partner to death as she attempted to run from him. He was in a cocaine-induced psychosis at the time of the attack. Justice Ratushny identified the offender's self-induced psychotic state as a mitigating factor because it was an unexpected consequence of his cocaine use. In her view, however, it served to mitigate his moral blameworthiness "only to a limited extent". In fact, as I read the case, she went on to find that the offender's drug use was actually an aggravating factor on sentence. He had been using cocaine daily for years. She found that his choice to consume cocaine *heightened* his moral culpability for the offence. Indeed, she concluded that Mr. Langevin's choice to consume cocaine was a "seriously aggravating" factor.

[50] In most of the cases submitted by the Crown, the fact that the offender was in a state of extreme intoxication at the time of the offences played an insignificant role in the determination of the punishment to be imposed. Once the offenders were found to be criminally responsible for their actions, punishment was meted out as though there was little distinction to be made between a person in a substance-induced psychosis and a person entirely in control of his or her faculties.

[51] The one exception is the decision of the Alberta Court of Appeal in *R. v. Miller*, 2018 ABCA 356. Mr. Miller had been hiking with a friend. He took three hits of LSD and became disoriented and frightened. He punched and then stabbed his friend with a knife he had brought for cutting brush and making campfires. Mr. Miller was 20 years old and a full time university student. He had no criminal record. The trial judge imposed a sentence of seven years on a guilty plea to manslaughter.

[52] In substituting a five year sentence, the majority of the Alberta Court of Appeal concluded as follows:

> Proportionality is the cardinal principle guiding appellate courts in considering the fitness of a sentence: *Lacasse* at para. 12. Based on our review of the authorities, a seven year sentence is a marked and substantial departure from the sentences customarily imposed for similar offenders committing similar offences. In our view, a seven year sentence does not reflect the moral blameworthiness of the appellant.

[53] Berger J.A., in concurring reasons, held that the trial judge focused pre-eminently on the physical acts of the offender and failed to put sufficient emphasis on his state of mind at the time of the offence. She further failed to properly apply the principle of restraint. He would have substituted a sentence of five years, less a credit for pre-sentence custody.

[54] In the Crown's submission, the cases it marshalled suggest a range of 5 to 12 years for manslaughter with aggravating circumstances, where extreme intoxication is a significant driver of the offence.

[55] Defence counsel, understandably, submitted a number of cases for the court's consideration where custodial sentences were imposed at the low end of the range for manslaughter cases.

[56] In *R. v. Tabbara*, [2009] O.J. No. 4397 (S.C.J.) for instance, Blishen J. sentenced a youthful, first time offender to two years less a day in relation to a classic "one punch" manslaughter. The offender and the deceased were on opposite sides of a group confrontation one evening in downtown Ottawa. The offender punched the deceased one time in the back of the neck, which led to the perforation of an artery and rapid death. Alcohol was not a factor.

[57] In *R. v. Jack*, [2008] B.C.J. No. 2078 (B.C.C.A.), the British Columbia Court of Appeal dismissed an appeal of a three year sentence imposed on a youthful aboriginal offender in relation to a group attack that lead to the death of their target. The target had been abusing his spouse. Her extended family sought revenge. Mr. Jack was undeniably the principal offender, but the trial judge found that the atmosphere of group animosity towards the victim and Mr. Jack's intoxicated condition made rational thought as to the consequences of his actions impossible. Mr. Jack had also made significant steps towards rehabilitation. It must be noted that Mr. Jack's aboriginal status was also a significant factor in the sentence ultimately imposed.

[58] Perhaps more interesting, in the context of this case, is the sentencing decision of Justice Beninger in *R. v. Young*, [2016] O.J. No. 5512 (O.C.J.), which was a local Peterborough case. Mr. Young pled guilty to and was convicted of manslaughter in the stabbing death of his adult son. Mr. Young consumed alcohol and sleeping pills, which resulted in a state of extreme intoxication. His son and his wife got into an argument. He intervened in the argument and stabbed his son some six times, causing his death. It was conceded by the Crown that Mr. Young's actions were not voluntary, given his extreme intoxication. He did not know what he was doing when he stabbed his son.

[59] The Crown sought a sentence at the low end of the penitentiary range. In other words, something just over two years. Defence counsel sought a non-custodial sentence, arguing that

Mr. Young's wrongful conduct was the mixing of alcohol and sleeping pills – which they said was at the low end of the spectrum of moral blameworthiness.

[60] Mr. Young had been in pre-sentence custody from August 11, 2013 to September 24, 2013 when I released him on bail. His bail conditions were restrictive. He was on house-arrest, with electronic monitoring. His guilty plea was entered two years later, on September 17, 2015. Justice Beninger credited him with the equivalent of 11 months for his time spent in actual custody and while subject to restrictive bail conditions. He went on to conclude that this was a unique and exceptional case; one where it was not necessary to impose a further custodial sentence. He instead suspended sentence and imposed a three year term of probation with community service.

[61] On the surface, there is relatively little to distinguish Mr. Chan's case from Mr. Young's case. I am reasonably familiar with Mr. Young's case, having presided at the bail hearing. Both cases involve unintentional stabbings of loved ones while in a state of extreme intoxication. Both offences were committed by otherwise good people with substantial support in the community. The one obvious difference, of course, is that Mr. Chan stabbed two loved ones, instead of just one. It seems unlikely, however, in view of Justice Beninger's reasons, that the presence of a second victim would have made a marked difference in the sentence imposed.

[62] Frankly, I think the *Young* decision has to be considered as somewhat of an outlier, in terms of its outcome. It seems to me that substantial emphasis was placed on the reduced moral blameworthiness of Mr. Young and very little emphasis on the gravity of the offence. That said, the Crown was seeking a much more modest sentence in the *Young* case than they are seeking here. I am not, of course, privy to the facts and circumstances that grounded the Crown's position in *Young*.

[63] On the whole, the cases submitted by defence counsel tend to suggest that the lower end of the range for manslaughter involving extreme intoxication may be less than the five years identified by the Crown. At the very least, cases like *Young* clearly underscore the individualized nature of the sentencing process.

[64] I have to this point focused on the range of sentences imposed in manslaughter cases with arguably similar circumstances to this case. That range is far more difficult to pin down than the range for aggravated assault.

[65] In *R. v. Tourville*, 2011 ONSC 1677 (S.C.J.) Code, J. described sentencing ranges for aggravated assault as falling into three general tiers. At the low end are cases with exceptionally mitigating circumstances, where modest punishments are typically imposed. Mid-range cases, frequently involving consensual fights where excessive force is used, typically result in sentences in the upper reformatory range, roughly 18 months to 2 years less a day. At the high end are cases involving seriously aggravating circumstances, such as extreme violence, premeditation, an absence of provocation and/or have been committed by a violent recidivist. Upper end cases tend to attract more significant penitentiary sentences, in the four to six year range. In this instance, the Crown seeks a sentence for aggravated assault at the top end of the upper tier.

[66] I accept the ranges described by Justice Code as accurate. But again, I emphasize that these ranges are merely guidelines and take nothing away from the individualized nature of sentencing.

[67] It remains essential to consider the aggravating and mitigating circumstances of each case.

[68] Here, aggravating circumstances include the following:

(a) There were two victims;

(b) The victims were attacked in their own home in the middle of the night;

(c) A large knife was used;

(d) One victim perished while the other was severely injured;

(e) The attack was unprovoked;

(f) There were at least two separate attacks on Ms. Witteveen, as Mr. Chan came in and out of her bedroom; and,

(g) The community has suffered the loss of an experienced medical specialist.

[69] There are, of course, a number of mitigating circumstances as well, including:

(a) Mr. Chan is a youthful, first time offender;

(b) He is of strong character, pro-social, educated and has strong support from his family and other members of the community. I received some fourteen letters of support for Mr. Chan from a variety of friends and family members. All speak to his kind, gentle and respectful nature;

(c) One could scarcely imagine a person more profoundly remorseful for his actions than Mr. Chan. When given his right of allocution, he spoke in eloquent and heartfelt terms about his regret for the pain he has caused so many people close to him;

(d) The attack on Dr. Chan and Ms. Witteveen was neither planned nor intentional. Mr. Chan did not attend at his father's home to confront him. Rather he was afraid of his negative reaction to the drugs he had consumed. He went to his father for help. But the drugs overcame him. By the time of the attack he was completely delusional and unable even to recognize his father and Ms. Witteveen;

(e) Prior to the attack Mr. Chan had a close and loving relationship with his father and Ms. Witteveen;

(f) The offences of manslaughter and aggravated assault are general intent offences. The element of intent in these types of offences is usually inferred from the simple performance of the illegal act. There is no dispute that Mr. Chan intentionally stabbed both Dr. Chan and Ms. Witteveen. But his state of mind at the time he did

so remains, in my view, a significant mitigating factor. He was delusional and thought he was under attack by the devil. In his delusional state, he had a rational reason for what he was doing; and,

(g) His moral blameworthiness is bound up in his voluntary consumption of illicit drugs; ones he knew to have hallucinogenic qualities. But he was a relatively naïve consumer of magic mushrooms. He could not reasonably have foreseen that he would become psychotic and the risks that might be associated with reaching that state.

[70] I have taken into account the views of Ms. Witteveen and Dr. Chan as well. Ms. Witteveen, as I noted, spoke arrestingly of the effects of this attack on her emotional and physical well-being. But while understandably expressing ongoing fearfulness of Mr. Chan, she did not express a desire for vengeance against him.

[71] Dr. Chan expressed his own views, as best he could, in his last few living moments. He can be heard on a Nest Cam video recovered by the police, out of sight, but audible, following his fatal stabbing in his kitchen. He uttered, likely as his last words, "Oh Tom". It is evident to me that, as he lay dying, his final expression was one of concern for his son.

[72] There are some additional mitigating factors relating to Mr. Chan's pre-sentencing circumstances which I will address in a moment as credits against the sentence imposed.

[73] Subject to those credits, the sentence I impose today is a global one of five years imprisonment. For those perhaps unfamiliar with sentencing, a five year penitentiary sentence is a serious sentence. It reflects the gravity of the circumstances here and their tragic aftermath. At the same time, it reflects the mitigating circumstances I have described and achieves, in my view, a proportionate balance between the gravity of the offence and Mr. Chan's moral blameworthiness.

[74] It also takes into account Mr. Chan's lived experience of the punishment inflicted upon him. He will live with the pain and regret of his actions for the rest of his life. He will similarly live with the stigma associated with his actions for as long as he lives. Frankly, the sentence imposed on Mr. Chan, in terms of years to be served, is but a small piece of his suffering.

[75] I will turn now to the credits Mr. Chan is entitled to against the gross sentence of five years.

[76] Counsel are agreed that Mr. Chan spent 122 days in pre-trial custody at The Central East Correctional Centre ("CECC") immediately following his arrest. They are also agreed that he is entitled, pursuant to s. 719 (3.1) *Cr. C.* to a credit for that time on a ratio of 1.5:1, for a total of 183 days, or essentially six months: see *R. v. Summers*, 2014 SCC 26.

[77] Defence counsel have sought two further credits.

[78] In *R. v. Duncan,* 2016 ONCA 754, the Court of Appeal held that in appropriate circumstances, particularly harsh pre-trial custody conditions can provide mitigation apart from and beyond the 1.5 credit provided for in s. 719 (3.1). Defence counsel submit that Mr. Chan should be granted such credit for his pre-trial custody, almost all of which was spent in solitary confinement.

[79] In *R. v. Downes*, [2006] O.J. No. 555, the Court of Appeal held that time spent under stringent bail conditions, such as house arrest, may be taken into account as a relevant mitigating circumstance on sentence. The amount of credit to be given is in the discretion of the trial judge and there is no formula that must be followed. Defence counsel seek a credit of 12 months.

[80] I will deal with these two requests in turn, beginning with the *Duncan* credit.

[81] At the request of defence counsel, CECC delivered a letter to the court particularizing the circumstances of Mr. Chan's stay in that facility following his arrest.

[82] Mr. Chan's time at CECC was, according to their manager of security and investigations, spent entirely in an "alternative housing unit". The description is deceptive. It is a euphemism intended to whitewash reality. The reality is that Mr. Chan – at the time still clothed with the presumption of innocence – was kept in solitary confinement.

[83] Mr. Chan filed an affidavit in which he described his time at CECC. Save for his last week there, he was in segregation unit 8. He had fresh air every other day for 20 minutes and could shower every other day. He was permitted to visit with his family members two times a week for a half hour each time. Apart from that, he spent his time alone in his cell.

[84] Professor Debra Parkes of the Allard School of Law wrote a recent article about human and gender rights issues engaged by the practice of solitary confinement. She noted that "awareness is rising in Canada and around the world that the practice of isolating human beings in small prison cells with little human contact is harmful, inhumane, and amounts to torture." See Debra Parkes, "*Solitary Confinement, Prisoner Litigation, and the Possibility of a Prison Abolitionist Lawyering Ethic*" (2017), 32 No. 2 Can. J. L. & Soc'y 165.

[85] In 2015, the United Nations approved of revised "Standard Minimum Rules for the Treatment of Prisoners" which they refer to as the Nelson Mandela Rules. They are non-binding on Canada, but are certainly deserving of respectful consideration. Moreover, Canadian officials had a hand in drafting them: see *Canadian Civil Liberties Association v. Her Majesty the Queen,* 2017 ONSC 7491 at para. 49. They define solitary confinement as the confinement of a prisoner for 22 hours or more per day without meaningful human contact. *Prolonged* solitary confinement is defined as any period of solitary confinement in excess of 15 days. They propose that solitary confinement should not be used save in extreme circumstances.

[86] I have been offered no explanation as to why a young man like Mr. Chan, obviously under significant mental distress, was housed in solitary confinement for four months. Four months is eight times as long as the United Nations has designated "prolonged" solitary confinement. I agree with Professor Parkes that such treatment is inhumane. It is hard to imagine harsher conditions of pre-trial custody.

[87] Mr. Chan did not provide details in his affidavit as to the effect that solitary confinement had upon him. I am somewhat handcuffed in the result. In *Duncan*, the Court of Appeal directed that, when considering the prospect of enhanced credit, the sentencing judge is to consider both the conditions of pre-sentence custody and the impact of those conditions on the offender. (See para. 6).

[88] That said, many of the effects of solitary confinement are well documented. There is ample support in the research literature that prolonged segregation is traumatizing, stressful, socially disabling, anxiety-provoking, and may lead to cognitive problems or trigger other previously undiagnosed mental illnesses: see *Canadian Civil Liberties Association*, as above, at para. 238; and *R. v. Capay*, 2019 ONSC 535 at para. 194.

[89] I am prepared to accept that intense and prolonged isolation such as that experienced by Mr. Chan over four months in segregation unit 8 would inevitably result in substantial mental suffering. I consider it appropriate to reduce Mr. Chan's sentence by a further six months as a result of the suffering associated with the isolating conditions of his solitary confinement while in the custody of CECC.

[90] Mr. Chan was released on a recognizance of bail on April 29, 2016. The recognizance was relatively restrictive. It required, amongst other things, that Mr. Chan was on house arrest, at his mother's home. He had a curfew from midnight to 6:00 a.m. each day. At other times he could be out of his residence but only when in the company of a surety. His movements were subject to electronic monitoring. He could not be at any premise licensed to sell alcohol, which included most restaurants and sporting events and he could not have contact with most of his core group of friends.

[91] I recognize that bail is not jail. Mr. Chan was still able to regularly attend his gym, go to the movies, play videogames, spend time with his family and do other things generally associated with liberty. That said, the restrictions on his liberty were not insignificant. And they have continued for the better part of three years. In my view it is appropriate to credit him with an additional six months against the sentence imposed today on account of his restrictive bail conditions.

Conclusion

[92] In summary, the gross sentence imposed today is 5 years imprisonment. That sentence is subject to reduction on account of credits totalling 1.5 years. The remaining sentence to be served is 3.5 years.

[93] For greater certainty, the sentence is broken down as follows:

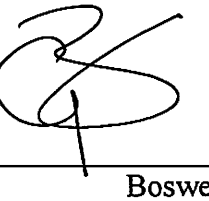
- On Count One: 5 years, less credit for 1.5 years, for a net of 3.5 years;
- On Count Three: 5 years, less credit for 1.5 years, for a net of 3.5 years, concurrent to count one.

[94] The following ancillary orders are made at the request of the Crown and without opposition:

(a) A s. 109 weapons prohibition for 10 years;

(b) An order that Mr. Chan provide a sample of his DNA in relation to counts 1 and 3 on the indictment;

(c) An order, pursuant to s. 743.21 *Cr. C.* prohibiting Mr. Chan from having direct or indirect contact with Lynn Witteveen while serving the custodial portion of his sentence.



Boswell J.

Released: March 11, 2019