

COURT OF APPEAL FOR ONTARIO

B E T W E E N:

**HER MAJESTY THE QUEEN**

Appellant

- and -

**KEVIN MORRIS**

Respondent

- and -

**THE DAVID ASPER CENTRE FOR CONSTITUTIONAL RIGHTS, CRIMINAL  
LAWYERS' ASSOCIATION, ABORIGINAL LEGAL SERVICES, SOUTH ASIAN  
LEGAL CLINIC AND COLOUR OF POVERTY/COLOUR OF CHANGE NETWORK,  
THE BLACK LEGAL ACTION CENTRE, CANADIAN CIVIL LIBERTIES  
ASSOCIATION, CANADIAN MUSLIM LAWYERS ASSOCIATION, URBAN  
ALLIANCE ON RACE RELATIONS AND CANADIAN ASSOCIATION OF BLACK  
LAWYERS**

Interveners

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**FACTUM OF THE INTERVENER  
CANADIAN MUSLIM LAWYERS ASSOCIATION**

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**PART I: STATEMENT OF THE CASE**

1. The appellant seeks to overturn a sentencing decision that considered systemic racism and the interrelated background factors of the respondent, a Black offender, under s. 718.2(e) of the *Criminal Code of Canada*. The appellant asks this Court to repeal the sentence imposed and instead levy a higher sentence.

2. The main issue on appeal is whether the consideration of systemic racism and background factors of the respondent justified the sentence imposed in this particular case. Prospectively, this appeal seeks guidance from this Court on the framework for receiving and applying social and historical context evidence in determining fit and proportionate sentences for Black offenders.

## **PART II: CMLA POSITION ON QUESTIONS IN ISSUE**

3. The appellant's grievance against the sentence imposed takes issue with the sentencing judge's emphasis on the social context reports and focus on systemic and background factors of the respondent, suggesting that the import placed on these factors by the sentencing judge rendered the sentence manifestly unfit. The appellant's position is that only an *exemplary* sentence would be fit in this case, given the presence of a firearm.

*Appellant's Factum*, at paras. 1 – 2.

4. The CMLA concurs with the appellant's submission that this appeal presents an opportunity for this Court to develop a clear analytical framework that provides guidance to sentencing judges on the application of systemic and background factors in sentencing racialized, non-Indigenous offenders.

*Appellant's Factum*, at paras. 4.

5. The CMLA submits that, in order to address the issues of the over-incarceration of Black offenders and concomitant substantive equality in sentencing, the framework developed must:

- i. Be focused through the lens of “intersectionality” in order for sentencing judges to thoroughly appreciate the compounding nature of discrimination and marginalization suffered by Black persons in Canada;
- ii. Readily accept that social context evidence, as presented through Impact of Race and Cultural Assessments (“IRCA”), is critical to understanding how the intersectional sources of disadvantage and marginalization suffered by Black persons in Canada contribute to disproportionately heightened levels of involvement in criminality; and
- iii. Confirm that systemic oppression and intersectional sources of disadvantage can reduce moral blameworthiness for non-Indigenous offenders, and thus the emphasis placed on denunciation (*vis-à-vis* other sentencing principles) in sentencing Black offenders.

### **PART III: SUMMARY OF THE FACTS**

6. The CMLA intervenes pursuant to an Order of this Court dated June 18, 2019.
7. The CMLA is a Toronto-based non-profit association of Muslim lawyers from all Canadian provinces and territories. The CMLA has over 200 members across Canada, with active members in Ontario and Quebec.
8. The CMLA accepts the facts as set out in the appellant's factum and takes no position on any facts to be disputed by the Respondent.

### **PART IV: ARGUMENT**

9. The appellant submits that the sentencing judge *overemphasized* systemic racism in determining the fit and appropriate sentence for the respondent.  
*Appellant's Factum*, at para. 22.
10. Respectfully, the appellant's submission is premised upon a factional approach to assessing the impact of systemic racism on Black offenders, one which hives off social context evidence from assessments of moral blameworthiness when offences are categorized as "true crime".
11. Conversely, the CMLA submits that an appreciation of the sentencing process, analysis, and sentence imposed in this case is gained once the compounding nature of the intersectional sources of oppression affecting Black offenders is accepted to constrain choices, and thus moral blameworthiness relative to the offence being punished, irrespective of the categorization of an offence.
12. The CMLA submits that once focused through the lens of intersectionality, as incorporated by the sentencing judge, the sentence imposed in this case can be appreciated for its validity within the range of available sentences.

## **A. Intersectionality**

13. Rooted in feminist critical race analysis of the layered discrimination suffered by Black women in America – as a result of being subjugated on account of both their race and their gender – “intersectionality” is a framework for appreciating that overlapping marginalized social identities compound the impact of discrimination and oppressive hierarchies.

Kimberly Crenshaw, “Demarginalizing the Intersection of Race and Sex: A Black Feminist Critique of Antidiscrimination Doctrine, Feminist Theory and Antiracist Politics” (1989) U. Chicago Legal F. 139.

14. The lens of intersectionality helps us recognize that people of marginalized backgrounds are often subjected to multiple intersecting systems of social and economic oppression on account of their race, gender identity, sexual orientation, ability, class, national and ethnic origins, religion, and other identities.

15. Intersectionality posits that the convergence of two or more of these identities creates a unique and pronounced harm that is greater than the sum of discrimination on the basis of any particular ground independently.

## **B. The applicability of an intersectionality analysis in evaluating and addressing systemic discrimination**

16. The applicability of intersectionality as a framework for assessing the true impact of discrimination has been appreciated by members of our Supreme Court since the early 1990s:

[...] categories of discrimination may overlap, and [...] individuals may suffer historical exclusion on the basis of both race and gender, age and physical handicap, or some other combination. The situation of individuals who confront multiple grounds of disadvantage is particularly complex. Categorizing such discrimination as primarily racially oriented, or primarily gender-oriented, misconceives the reality of discrimination as it is experienced by individuals.

*Canada (Attorney General) v. Mossop*, [1993] 1 S.C.R. 554, at para. 152, L’Heureux-Dubé J.

17. An intersectional approach goes further than simply recognizing an individual's overlapping protected identities; it requires an exploration of the resultant systemic barriers, modes of oppression, and exclusionary practices that flow as a result of those intersecting identities. As the Ontario Human Rights Commission expounds:

An intersectional approach takes into account the historical, social, and political context and recognizes the unique experience of the individual based on the intersection of all relevant grounds. This approach allows the particular experience of discrimination, based on the confluence of grounds involved, to be acknowledged and remedied.

Ontario Human Rights Commission, "An Intersectional Approach to Discrimination: Addressing Multiple Grounds in Human Rights Claims", (Ontario: OHRC, 9 October 2001), p. 3.

18. Using an intersectional approach, to move from simply identifying modes of systemic oppression to recognizing and accepting the consequent intersectional sources of disadvantage on a group of individuals, was highlighted by our Supreme Court in the context of sentencing for Aboriginal offenders in *Ipeelee*:

To be clear, courts must take judicial notice of such matters as the history of colonialism, displacement, and residential schools and how that history continues to translate into lower educational attainment, lower incomes, higher unemployment, higher rates of substance abuse and suicide, and of course higher levels of incarceration for Aboriginal peoples.

*R. v. Ipeelee*, 2012 SCC 13, [2012] 1 S.C.R. 433 at para. 60, LeBel J. [*Ipeelee*]

19. Similarly, the histories of colonialism, slavery, racism, segregation, and other forms of discrimination against Black people have had a negative impact on their societal integration, social strata, and thus overrepresentation in criminal justice settings and carceral facilities in Canada, which must not simply be appreciated by courts across this province through judicial notice, but also dissected through an intersectional approach in order to render fit sentences for Black offenders.

**C. The sentencing judge's analysis of the social context evidence was rooted in an intersectional approach**

20. It is clear that the sentencing judge was guided by an intersectional approach from the outset of his receipt and analysis of the social context evidence in this case:

[46] Ms. Sibblis assesses how anti-Black racism, education, socio-economic factors, mental health, social influences, and criminal justice involvement have affected you. How it has brought you here. Before me. To be sentenced on these serious charges. I will explore this more in my own analysis [...]

*R. v. Morris*, 2018 ONSC 5186, at para. 46 [*Morris*].

21. The sentencing judge's use of an intersectional lens enabled him to recognize that the looming systemic clouds of racism and the legacies of colonialism work to constrain an individual's choices and an entire community's assembly into society:

[56] Recognizing, as the law must, that individuals are held responsible for the acts they commit that breach the criminal law, the reality is that this choice to act may be constrained by an offender's life circumstances. This can include limited choices available to the offender due to discrimination and racism. [...] Over the lifetime of the offender, negative influences such as poverty, addiction, mental illness, employment and social advancement can constrain this field of choice. It can also be adversely affected by the environment or community in which the offender was raised or presently lives; fragile communities that are under daily stress given their marginalization and in-cohesion.

*Morris, supra*, at para. 56.

22. The sentencing judge personally appreciated that the multiplicity of challenges and intersectional sources of disadvantage faced by the respondent *were linked* to the commission of the offence, the respondent's corresponding moral blameworthiness, and thus appropriate balancing of the sentencing principles in this particular case:

[74] As Ms. Sibblis, Professor Owusu-Bempah, and Professor James say, anti-racism has shaped your life in a way that has brought you into the criminal court. It shaped your mother's life as well. It has negatively impacted your opportunities in life to date. You lived in a poor neighborhood, with a number

of socio-economic challenges. This was an environment that was affected by anti-Black racism. You yourself have wondered why Blacks seem to live a lot in certain neighborhoods. Yours was affected by danger in the streets, both real and perceived. You did not find a way out through the public education system. I have no doubt that anti-Black racism affected how you were treated in school. Ms. Sibblis notes this very persuasively. I am not saying that your teachers were racist, uncaring, or that you do not share responsibility. Rather, I am recognizing the studies that show systemically this racism exists and have not served Black children well. That failure in the education system makes a child vulnerable to becoming involved in the criminal justice system. Because your mother was working so much and the death of your father impacted you so hard, you became vulnerable to the bad influences of others. You are a follower and not a leader. Your feelings of frustration and powerlessness as you grew up in this environment made the possibility of possessing a gun real to you; something that given your life experiences, you decided that you wanted to do.

[75] These are systemic and case-specific factors that lessen your moral blameworthiness for this offence and soften the impact of general deterrence and denunciation in your particular case, Mr. Morris. They are relevant and compelling in my view. They are factors that tell me that I should choose the length of your sentence with the principle of restraint firmly in my mind.

*Morris, supra*, at paras. 74-75.

**D. The importance of social context evidence, such as IRCAs, in evaluating the impact of intersectionality, assessing moral blameworthiness, and crafting proportionate sentences for all Black offenders**

23. An intersectional approach for receiving and evaluating social context evidence is critical for assessing the moral blameworthiness of all Black offenders, due to the overlapping spheres of their marginalized identities, and is especially important for Black Muslims in Canada given the particularly pernicious discrimination and out-casting they suffer.

24. The experience of Black Muslims in Canada is as distinct and diverse as the groups that comprise the Black Canadian community generally. While subjected to similar histories and current narratives of racism, discrimination, war, and colonialism as other Black Canadians, the issues affecting Black Muslim communities in Canada also intersect at particularly prejudiced

crossroads of racial and religious antipathy. This “anti-Black Islamophobia” amplifies the systemic barriers faced by this group.

Fatima Jackson-Best, “Black Muslims in Canada: A Systematic Review of Published and Unpublished Literature” (2019) The Tessellate Institute, at p. 4.

25. In cases already in the system, the factors that intersect for some Black offenders will also include their experiences with hardship as immigrants fleeing war torn areas who are then subject to racial, cultural, and religious discrimination in Canada.

26. Expressly, discrimination in the education system, racial profiling by police, and mistreatment by child welfare systems have been documented as significant intersectional sources of disadvantage affecting Black Muslim populations living in priority neighbourhoods in Ontario.

Muna Aden, Abdiasis Issa, Siham Rayale, Liban Abokor, “Another day, another Janazah: An investigation into violence, homicide and Somali-Canadian youth in Ontario. (2018) Youth Leaps at p. 25 [*Another Day, Another Janazah*].

B. Heidi Ellis, Alisa K. Lincoln, Saida M. Abdi, Elizabeth A. Nimmons, Osob Issa, Scott H. Decker, “‘We All Have Stories’: Black Muslim Immigrants’ Experience With the Police” (2018) Race and Justice at pp. 15, 17.

27. Unsurprisingly, this “out-group discrimination” has been studied and cited as a specific factor linked to higher incidences of criminal violence among Black Muslim Canadian males.

Michael Ungar, Kristin Hadfield, Amaranth Amarasingam, Sarah Morgan, Michele Grossman, “The association between discrimination and violence among Somali-Canadian youth.” (2018) 44:13 Journal of Ethnic and Migration Studies 2273 at p. 2282.

*Another Day, Another Janazah, supra*, at p. 22.

28. The disproportionately high homicide rates in Black Muslim Canadian communities in Toronto only serves to reinforce the paradox that for many of these individuals their vulnerability to confronting loss of life and prospects of individual survival are no better than the places from which they have fled.

*Another Day, Another Janazah, supra*, at p. 22.

29. Thus, an offender's experience with this combination of socio-economic disadvantage, multi-faceted systemic discrimination, mental health struggles, and direct violence is of inextricable importance to the crafting of a proportionate sentence, not simply to itemize mitigating factors, but more importantly to understand the pathways that contribute to incidence and involvement in crime, which are directly relevant to assessments of an individual's moral blameworthiness for any offence.

30. However, in the past these assessments of moral blameworthiness have suffered from a paucity of social context information pertaining to offenders and their communities being presented to sentencing judges.

31. For example, while acknowledging that anti-Black discrimination and the accompanying societal disadvantages suffered have contributed to the overrepresentation and incarceration of Black offenders for serious crimes, including gun crime, sentencing courts in this province have previously struggled to assess the commensurate impact these factors have on a particular offender's sentence.

*R. v. Nur*, 2011 ONSC 4874, [2011] O.J. No. 3878.

32. Subsequently, when presented with more detail on the background factors of an offender who has faced these same societal and systemic disadvantages – such as dislocation and displacement, loss of family members through violence, resultant mental health disorders, marginalization in housing and employment, and corresponding difficulty in societal integration – sentencing judges have been better able contextualize the impact of intersectional disadvantage in assessing an offender's moral agency and culpability in order to situate an offender's specific conduct within the range of proportionate sentences.

*R. v. Rage*, 2016 ONSC 4605.

33. It is only through a liberal admission and robust reliance on this type of social context evidence that sentencing judges will be able to move from a simple consensus of the existing marginalization and overrepresentation of Black persons in criminal justice settings, to the specific impact that these intersectional factors can and must have on assessments of moral blameworthiness and fit sentences for all Black offenders.

**E. Intersectionality, “True Crime”, Moral Blameworthiness, and Sentencing Principles**

34. The appellant submits that, despite the sentencing judge’s reliance on the social context evidence presented in this case to assess the respondent’s moral culpability and balance the appropriate sentencing principles, the sentence imposed was simply insufficient given the “true crime” nature of the offence.

*Appellant’s Factum*, at para. 18.

35. The CMLA submits that this rigid approach to classification of offences, and implicit requirement to mete out harsh penalties, inadequately recognizes the circumstances of many Black offenders and underappreciates the intersectional sources of disadvantage they suffer, which reduce the moral culpability of their choices.

36. While the nature of an offence is an obviously important consideration in determining which sentencing principles will require priority in any particular case, the CMLA submits that the classification of an offence as “true crime” – to invariably override the flexibility afforded sentencing judges to independently balance sentencing principles through sanction – is less determinative and absolute when working in an intersectionality framework.

37. As Justice LeBel recognized in *Ipeelee*, the impact of systemic oppression, background factors, and social context evidence can bear directly on moral culpability:

First, systemic and background factors may bear on the culpability of the offender, to the extent that they shed light on his or her level of moral blameworthiness. [...] Many Aboriginal offenders find themselves in situations of social and economic deprivation with a lack of opportunities and limited options for positive development. While this rarely -- if ever -- attains a level where one could properly say that their actions were not voluntary and therefore not deserving of criminal sanction, the reality is that their constrained circumstances may diminish their moral culpability.

*Ipeelee*, *supra*, at para. 73.

38. The Court's analysis in *Ipeelee* reinforces that systemic and intersectional constraints on individual choice served to reduce moral blameworthiness.

39. In *Ipeelee*, the Court explained that reduced moral blameworthiness heightened the need for restraint, and that restraint itself was the counterweight to denunciation on the fulcrum of proportionality. Contrary to the appellant's argument that systemic and background factors are irrelevant to denunciation for non-Indigenous offenders, Justice Lebel's comments in *Ipeelee* were clearly meant to apply to non-Aboriginal persons as well. Thus, it must be respected that social context evidence is, in and of itself, relevant to the level of emphasis placed on denunciation in sentencing.

*Ipeelee*, *supra*, at para. 37, 77.

*Appellant's Factum* at paras. 54-60.

40. As a result, the use of and emphasis on social context evidence in assessing an individual's degree of responsibility, and thus its impact on the balancing of sentencing principles, should not be limited to the Indigenous offender context; rather it should be "extended to non-Aboriginal offenders undergoing state violence and systemic discrimination such as poor and homeless people, immigrants and racial minorities".

Marie-Eve Sylvestre, "The (Re)Discovery of the Proportionality Principle in Sentencing in *Ipeelee*: Constitutionalization and the Emergence of Collective Responsibility." (2013) 63 Sup. Ct. L. Rev. (2d) 461 at 480 [*The (Re)Discovery of the Proportionality Principle in Sentencing in Ipeelee*].

41. That said, a valid critique of the *Gladue* framework is that, in its application, sentencing judges do not consistently engage in an intersectionality analysis. In order to ensure that any guidance developed in this case does not suffer from the same deficiency in sentencing praxis, it is submitted that this Court must incorporate an intersectionality lens into the blueprint for any framework established in this case.

Canada, Department of Justice, *Spotlight on Gladue: Challenges, Experiences, and Possibilities in Canada's Criminal Justice System* (Ottawa: Research and Statistics Division, Department of Justice, Canada, 2017) at 34.

42. Lastly, recognizing the impact of intersectional sources of disadvantage on an offender's moral blameworthiness, and thus on the nuanced approach to managing principles of general deterrence and denunciation in cases where background factors are present, does not suggest an import of determinism as the appellant has suggested.

*Appellant's Factum*, at para. 29.

43. Rather, it subscribes to compatibilism, an approach that has gained reverence in our sentencing approach under s. 718.2(e):

The recognition that human action and behaviour is embedded in socio-economic contexts does not deny Aboriginal people's autonomy and free will. On the contrary, it rather acknowledges the objective structural constraints in which individual choices are made and it emphasizes the role of the state in perpetuating these living conditions.

*The Re(Discovery) of the Proportionality Principle in Sentencing in Ipeelee, supra*, at p. 479.

## **F. Conclusion**

44. The failed promise of the social contract for many Black Canadians is an important fact that sentencing courts must be enabled to take judicial notice of in order to appreciate how systemic oppression and marginalization of Black persons has led to their overrepresentation in the criminal justice system.

45. However, it is only through social context evidence, such as IRCAs, that sentencing judges will begin to understand how the kaleidoscopic intersectional background factors and sources of systemic marginalization actually contribute to an offender's path to committing an offence and involvement in crime. This understanding is necessary to move forward from a simple appreciation of systemic racism to assessing its impact on offender specific moral culpability and overall proportionality in sentencing.

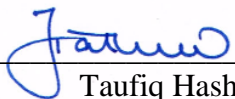
46. In that vein, causal linking of these systemic and background factors to the commission of an offence should not be required to prioritize principles of restraint and restorative justice over unbalanced reliance on denunciation and deterrence, which tend to simply exacerbate the intersectional oppression faced by Black persons and their communities.

47. In order to ensure that any guidance developed in this case does not suffer from deficiency in sentencing praxis, this Court must incorporate an intersectionality lens into the blueprint of any sentencing framework for Black offenders. This will allow sentencing courts and judges to appropriately dissect and evaluate the compounding sources of oppression and marginalization that usher Black persons into the criminal justice system at disproportionate levels, which is critical to the determination of fit sentences for all Black offenders.

#### **PART V: ORDER REQUESTED**

48. The CMLA takes no position on the ultimate disposition of this appeal.

ALL OF WHICH IS RESPECTFULLY SUBMITTED this 19<sup>th</sup> day of July, 2019.

  
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Taufiq Hashmani  
Counsel for the Intervener, CMLA

## Schedule A: Authorities Cited

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