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Introduction

On Friday, October 8, 2021, the Court of Appeal for Ontario released its decision in *R. v. Morris*.[1] On the same day, BLAC issued a statement expressing our disappointment with the decision. Below, we outline the basis for our disappointment.

Background

Kevin Morris was convicted of various firearm offences. In July 2018, the trial judge, Ontario Superior Court of Justice Shaun S. Nakatsuru, sentenced him to a 12-month jail sentence, reduced from 15 months after consideration of *Charter* breaches. Among other factors, the trial judge took into account Mr. Morris' background and the impact that anti-Black racism had on his life. The Crown appealed the sentence and argued, among other things, that the sentencing judge erred in his treatment of social context evidence of racism.

The Court of Appeal for Ontario agreed with the Crown, and increased Mr. Morris' sentence to two (2) years, less a day. However, the Court also permanently stayed the sentence which means that Mr. Morris will not have to go to back to prison on this conviction. The Court also made a number of decisions about how judges should use evidence of anti-Black racism when they are sentencing Black people.

BLAC's submissions to the Court of Appeal

In our submissions to the Court, BLAC argued that when sentencing a Black person, judges:

- must consider how the history of colonialism, enslavement, and segregation, and anti-Black racism in society, impacts Black people in the criminal justice system each and every time they impose a sentence on a Black person
- should give significant consideration to anti-Black racism in sentencing proceedings, in accordance with the remedial nature of s. 718.2(e) of the *Criminal Code*[2], especially when considering alternatives to incarceration
- should not require Black people who are being sentenced to prepare or submit reports that outline the existence of anti-Black racism in society and the impact of anti-Black

[1] 2021 ONCA 680 [*Morris*].
[2] R.S.C., 1985, c. C-46 [*Criminal Code*].

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racism on them, because, if the government does not fund these reports, it is unlikely that they will be able to pay for them, and this will place an unfair burden on them

- if they order or are asked to admit these reports, should not require that the authors of the reports be qualified as experts
- should apply social context evidence (e.g. the impact of racist policing practices) to determine whether something (e.g. fleeing from the police) increases or lessens the severity of a crime

What did the Court of Appeal decision get right?

BLAC is pleased that the Court of Appeal adopted many of our submissions and those made by other interveners. Namely, the Court held that judges:

- should take judicial notice of systemic anti-Black racism[3]
- should not require Black people who are being sentenced to prepare or submit reports that outline the existence of anti-Black racism in society and its impact on them[4]
- if they order or are asked to admit these reports, should not require that the authors of the reports be qualified as experts[5]
- may use evidence relating to the person's life experiences, including the impact of anti-Black racism, to achieve a sentence that reflects the purposes of sentencing as described in s. 718 of the *Criminal Code,* including to evaluate the person's:
  - degree of responsibility[6]
  - history (e.g. employment, education)[7]
  - prospect of rehabilitation[8]
  - need to be deterred[9]
- can consider the impact of anti-Black racism on a Black person who is being sentenced without requiring that the person first establish a link between their experiences of anti-Black racism and the offence(s) of which they have been convicted[10]

[3] *Morris* at para. 173.
[4] *Morris* at para. 13.
[5] *Morris* at para. 135.
[6] *Morris* at para. 97.
[7] *Morris* at para. 104.
[8] *Morris* at para. 81.
[9] *Morris* at para. 81.
[10] *Morris* at para. 96.

- should consider the over-incarceration of Black people when deciding whether to sentence a Black person to prison or to a sentence that is less restrictive (e.g. conditional sentence)[11]
- must seriously consider imposing a conditional sentence (i.e., a sentence served in the community) when the range of appropriate sentences includes sentences at or below the two (2) year mark[12]

Which aspects of the Court of Appeal's decision are disappointing?

No error of law

In our submissions, BLAC argued that judges must consider anti-Black racism each and every time they sentence a Black person. We asked for this because, if it is not a requirement, the courts may not apply evidence of anti-Black racism consistently; i.e., some lawyers may not raise it and some judges may not acknowledge it.[13]

In *R. v. Anderson,*[14] the Nova Scotia Court of Appeal adopted our suggested approach, at para. 123:

> In explaining their sentences, judges should make more than passing reference to the background of an African Nova Scotian offender. It may not be enough to simply describe the offender's history in great detail. It should be possible on appeal for the court to determine, based on the record of the judge's reasons, that proper attention was given to the circumstances of the offender. Where this cannot be discerned, appellate intervention may be warranted. [Emphasis added.]

Seriousness of the offence

The *Criminal Code* lays out the objectives of sentencing (i.e., denounce, deter, separate, rehabilitate, repair, assign responsibility).[15]

The courts have held that the more serious an offence is, the more important the objectives of denunciation and deterrence become.

The trial judge indicated that if systemic racism effectively limits the choices available to an offender, general deterrence and denunciation should have a less significant role in sentencing.

The Court of Appeal, however, held that evidence that speaks to the impact of systemic anti-Black racism on a person's life choices cannot be used to reduce the seriousness of the offence.

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[11] *Morris* at paras. 123-125.
[12] *Morris* at para. 180.
[13] See, as an example, in Marie-Andree Denis-Boileau and Marie-Eve Sylvestre, "Ipeelee and the Duty to Resist" (2018) UBC Law Review vol. 51(2) 548-611. The authors analyzed 635 trial and appellate decisions made after *R. v. Ipeelee*, 2012 SCC 13 (between March 23, 2012 and October 1, 2015) and noted the limited impact of the proposed approach in sentencing Indigenous offenders.
[14] 2021 NSCA 62 [*Anderson*].
[15] Section 718.

BLAC

The Court increased Mr. Morris' sentence in part because of the emphasis it placed on the seriousness of the offence and the sentencing objectives of denunciation and deterrence.

As noted by the Nova Scotia Court of Appeal, "[t]he use of denunciation and deterrence to justify incarceration should be closely interrogated."[16]

> Deterrence assumes that offenders weigh the pros and cons of a certain course of action and make rational choices. It also assumes that people can freely choose their actions and behaviours – as opposed to their offending being driven by socio-economic factors such as poverty, limited education, mental health and addiction issues and systemic discrimination and marginalization.[17]

Also, as noted in the factum of the Intervener, Urban Alliance on Race Relations, while the courts have long accepted the theory of general deterrence, – that making sentences longer means crime will decrease – "social science evidence from the past 40 years has largely discredited it as a criminological theory."[18]

Fleeing from the police as an aggravating factor

Fleeing from the police can be an aggravating factor in sentencing; i.e., it can increase the severity of the offence. As noted above, in our submissions, BLAC argued that judges should apply social context evidence (e.g. the impact of racist policing practices) to determine whether something is an aggravating factor.

The trial judge found that Mr. Morris ran away from the police and threw away the gun in part because he was afraid of police violence and concerned that the police would not treat him fairly. The Court of Appeal held that this was an unreasonable finding of fact and instead found that, "[t]he only reasonable inference is that Mr. Morris ran and disposed of the gun in an effort to avoid being caught and charged with a serious crime."[19]

The Court failed to take into account the social context; i.e., that not everyone trusts the police and that many people, particularly Black people in low-income communities, may run away from police because they are justifiably afraid that the police will harm or kill them.[20] Kevin Morris, for example, grew up in a community in which he was under constant police surveillance and in which his relationship with the police was characterized by distrust and fear.

The impact of incarceration on Black communities

The Court of Appeal held that "more lenient" sentences for the perpetrators of gun crimes would not be viewed as "a positive step towards social equality" by law-abiding members of the

[16] *Anderson* at para. 159.
[17] *Anderson* at para. 69.
[18] Factum of the Intervener, Urban Alliance on Race Relations, at para. 18.
[19] *Morris* at para. 171.
[20] See Ontario Human Rights Commission, *A Collective Impact: Interim report on the inquiry into racial profiling and racial discrimination of Black persons by the Toronto Police Service* (Government of Ontario, November 2018).

Black communities in which these gun crimes occur.[21] The Court cited the "Expert Report on Crime, Criminal Justice and the Experience of Black Canadians in Toronto, Ontario" in support of this position. However, the report also provides an analysis of the devastating impact that incarceration has on Black communities.

> For individuals, incarceration significantly reduces later employment rates and income levels (Freeman, 1992). Incarceration also has a significant negative influence on social networks, social relationships, and long-term life chances, thus impacting one's ability to contribute to family and community (Clear, 2008; Roberts, 2004). The families of those incarcerated also suffer financial and emotional costs related to separation, the loss of income, and the need to support an imprisoned family member (Braman, 2002; Wildeman et al., 2012).
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> There is evidence to suggest that the arrest of parents disrupts marital relationships, separates children from their parents, and can result in the permanent dissolution of these relationships (Christian, 2004). Research has also shown that children with parents in prison suffer serious psychological consequences, including depression, anxiety, feelings of rejection, shame, anger, and guilt (Browning et al, 2001). These children are also more likely to experience school failure, under-employment, and illegal drug use (Clear, 2008). Importantly, studies have shown parental incarceration to be a risk factor for juvenile delinquency, further exacerbating crime problems in affected communities.
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> The impact of concentrated incarceration clearly extends from the family unit into the community. As going to prison has a permanent impact on employment and earning potential, it also damages the labour prospects of young people in a community by decreasing the pool of individuals who can act as mentors and social contacts (Sabol & Lynch, 2004). A reduction in the number of people engaged in the labour market not only depletes supplies of human capital, but also affects the local economy because individuals have less money to spend at local establishments (Sullivan, 1989; Venkatesh, 1997). Importantly, concentrated incarceration distorts social norms, leads to the breakdown of informal social control, and therefore undermines the building blocks of social order which are essential for community safety (Clear, 2002).
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> In sum, concentrated incarceration can further exacerbate existing social problems, fostering a cycle of inequality within communities and across generations. The fact that incarceration is becoming increasingly concentrated amongst Black Canadians should be of a concern, precisely because it reproduces the very conditions that contribute to incarceration in the first place. [Emphasis added.][22]

In BLAC's opinion the Court should have given more weight to this impact when evaluating the benefit of "more lenient" sentences.

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[21] *Morris* at para. 85.

[22] *R. v. Morris*, 2018 ONSC 5186, Appendix A, p. 20.

Length of the sentence

The *Criminal Code* requires that to the extent that offenders and their offences are similar, their sentences should be similar. This is known as the parity principle.

In keeping with the parity principle, the Court of Appeal stated that it saw no reason to depart from the range fixed in cases like *R. v. Nur*[23] and *R. v. Smickle*.[24] While this argument was not before the Court, going forward, it may not be suitable for sentencing judges to look to older decisions for the appropriate range. As noted by the African Nova Scotia Decade for People of African Descent Coalition in *Anderson*, "it is unlikely that caselaw being looked to in the assessment of the range will have been informed by an analysis that included a recognition of the historic and systemic factors relevant to African Nova Scotian offenders."[25] Put simply, if the sentencing range remains the same regardless of whether the judge has considered evidence of the impact of anti-Black racism, what real impact will anti-Black racism have on a person's sentence?

Conclusion

BLAC is not the first to articulate the need for the acknowledgement of anti-Black racism in sentencing proceedings. Black communities have been advocating, lobbying and litigating for transformation in sentencing for decades. Meanwhile, Canada has continued to cage hundreds of Black people across the country. *Morris* is certainly a step in the right direction, but it is a small step.

BLAC thanks the lawyers, interveners and report writers involved in this case.

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[23] 2015 SCC 15
[24] 2013 ONCA 678.
[25] *Anderson* at para. 90.