SUPREME COURT OF CANADA

CITATION: R. *v.* S.B., 2025 SCC 24

APPEAL HEARD: October 15, 2024
JUDGMENT RENDERED: July 18, 2025
DOCKET: 40873

BETWEEN:

S.B.
Appellant

and

His Majesty The King
Respondent

- and -

Attorney General of Canada,
Director of Criminal and Penal Prosecutions,
Attorney General of Alberta,
Justice for Children and Youth,
Queen's Prison Law Clinic,
Criminal Lawyers' Association (Ontario),
Peacebuilders Canada,
British Columbia Civil Liberties Association,
Canadian Civil Liberties Association and
African Nova Scotian Justice Institute
Interveners

CORAM: Wagner C.J. and Karakatsanis, Côté, Rowe, Martin, Kasirer, Jamal, O'Bonsawin and Moreau JJ.

REASONS FOR JUDGMENT: (paras. 1 to 73)	Kasirer J. (Wagner C.J. and Karakatsanis, Martin, Jamal, O'Bonsawin and Moreau JJ. concurring)
JOINT CONCURRING REASONS: (paras. 74 to 103)	Côté and Rowe JJ.

S.B. *Appellant*

v.

His Majesty The King *Respondent*

and

Attorney General of Canada,
Director of Criminal and Penal Prosecutions,
Attorney General of Alberta,
Justice for Children and Youth,
Queen's Prison Law Clinic,
Criminal Lawyers' Association (Ontario),
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Present: Wagner C.J. and Karakatsanis, Côté, Rowe, Martin, Kasirer, Jamal, O'Bonsawin and Moreau JJ.

ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO

Criminal law — Young persons — Sentencing — Adult sentence — Presumption of diminished moral blameworthiness or culpability — Accountability — Social context evidence — Young person found guilty of first degree murder in shooting death of teenager — Youth justice court ordering that adult sentence be imposed — Court of Appeal confirming adult sentence despite youth justice court having erred in failing to address presumption of diminished moral blameworthiness or culpability — Whether Court of Appeal erred in concluding that presumption of diminished moral blameworthiness or culpability rebutted and in finding adult sentence necessary to hold young person accountable — Whether Court of Appeal erred in considering social context evidence — Whether adult sentence should be imposed — Youth Criminal Justice Act, S.C. 2002, c. 1, s. 72(1).

When B was 16 years old, he and several others carried out a plan to shoot and kill another 16-year-old in the stairwell of an apartment building. B was the shooter, he directed his co-accused to assist with covering up the murder, and he expressed a desire to kill a co-accused who had witnessed the murder as well as the co-accused's mother and sister. B was convicted of first degree murder by a youth justice court. The Crown applied to have B sentenced as an adult. The youth court judge granted the application and imposed a life sentence on B without possibility of parole for 10 years.

On appeal by B, the Court of Appeal held that the youth court judge had erred by failing to consider and apply the presumption of diminished moral blameworthiness in s. 72(1)(a) of the *Youth Criminal Justice Act* ("*YCJA*"), and therefore conducted B's sentencing afresh. In doing so, the court considered social context evidence highlighting racial and cultural factors that influenced B's life. The court ultimately concluded that the Crown had successfully rebutted the presumption and that a youth sentence would not be sufficient to hold B accountable for his actions. It imposed the same adult sentence as that imposed by the youth court judge.

Held: The appeal should be dismissed.

Per Wagner C.J. and Karakatsanis, Martin, **Kasirer**, Jamal, O'Bonsawin and Moreau JJ.: The principles and legal framework to determine when a young person should be sentenced as an adult pursuant to s. 72 of the *YCJA* are set out in the companion case, *R. v. I.M.*, 2025 SCC 23. B's case is governed by that same framework. The Court of Appeal erred in law when sentencing afresh by failing to apply the constitutionally-required standard of beyond a reasonable doubt to the Crown's burden of rebutting the presumption of diminished moral responsibility; however, the error had no impact on the sentence. Considering the reasons and record functionally and as a whole, the Court of Appeal properly concluded the presumption was rebutted, and did not err in its treatment of social context evidence when evaluating the Crown's position on rebuttal of the presumption. The court examined this evidence in respect of B's maturity and independent judgment, as was appropriate under

s. 72(1)(a). There was no error in principle or any other error in the Court of Appeal's measure of B's accountability under s. 72(1)(b). The Court of Appeal engaged in a balancing of relevant factors, including B's personal circumstances, informed by the social context evidence. The weighing and balancing of these factors, including rehabilitation, reintegration, and protection of the public, is owed deference.

As set out in *I.M.*, the two prongs of an application for an adult sentence to be imposed on a young person must be considered separately. The court must consider whether the presumption of diminished moral blameworthiness in s. 72(1)(a) has been rebutted, and whether a youth sentence would not be of sufficient length to ensure accountability pursuant to s. 72(1)(b). Social context evidence may be relevant to both prongs: first, it may be relevant to rebutting the presumption and provide context for the analysis of a young person's childhood, life experiences and independent judgment; second, social context evidence may inform a youth court's determination of the moral responsibility of the young person in assessing what length of sentence will hold them accountable.

Concerning the first prong, while the objective seriousness of the offence has no bearing on a young person's capacity for moral judgment and is not relevant to rebutting the presumption, a youth justice court's mere reference to how serious an offence is, as an abstract matter, does not justify intervention unless it impacts the sentence. Expressing empathy for victims by noting the violent nature of an offence cannot, in itself, be wrong in law. Appellate courts should not hunt down references to

the seriousness of the offence as signs of error but must instead read the whole of the judgment contextually with an eye to what the youth court judge really decided.

The instant case is unlike *I.M.*, where the youth court judge explicitly cited the seriousness of the offence as a basis for rebutting the presumption, without reference to the rationale of the rule in s. 72(1)(a), and made further errors, including a failure to consider the young person's background. Here, the Court of Appeal did refer to seriousness, but in part to allude to the circumstances of the offence rather than their objective gravity. The Court of Appeal recognized, in connection with its reference to the seriousness of the offence, that the analysis of whether the presumption has been rebutted must focus on B's level of maturity and his capacity for moral judgment. The court did not lose sight of the rationale for the presumption in its analysis and conclusion under s. 72(1)(a). Further, it was open to the Court of Appeal to conclude that the social context evidence was of limited probative value with respect to the presumption and that it did not diminish factors demonstrating judgment and maturity, such as B's clear leadership role. The whole of the evidence demonstrated beyond a reasonable doubt that B's developmental age was akin to that of an adult; the Court of Appeal properly concluded that the presumption was rebutted.

Concerning the second prong, the Court of Appeal made no reviewable error in considering evidence of B's conduct in custody on the issue of accountability or in its assessment of social context evidence. It is not an error in principle for sentencing judges to consider events occurring after an offence. Rehabilitative potential

may be relevant to the accountability analysis and, in this case, the evidence of B's lack of progress and history of challenging, aggressive behaviour in custody was relevant to his rehabilitative potential. Further, while the social context evidence provided insight into the personal, social, and systemic forces that shaped B's life and circumstances, it did not provide any explanation for the commission of the offence — that is, why B murdered a young person he did not know, execution-style. There is no basis to disturb the Court of Appeal's use of this evidence in coming to its conclusion that an adult sentence was necessary to hold B accountable for his actions.

Per **Côté** and **Rowe** JJ.: As explained in the companion appeal, *I.M.*, there is disagreement with the majority that proof beyond a reasonable doubt is the proper standard to apply in determining whether the Crown has rebutted the presumption of diminished moral blameworthiness. However, in the instant case, there is agreement with the majority that the Court of Appeal did not err in concluding that the Crown had rebutted the presumption and that the court also did not err in its treatment of social context evidence or in relying on misconduct set out in a pre-sentence report.

Section 72(1) of the *YCJA* imposes an evaluative question on a sentencing judge as well as a burden of persuasion on the Crown. Where the Crown has rebutted the presumption of diminished moral blameworthiness, the analysis shifts to the second prong: whether a youth sentence would be of sufficient length to hold the young person accountable for his offending behaviour. It is appropriate to consider the seriousness of the offence at this stage as opposed to the first stage. To achieve accountability, the

sentence must be long enough to reflect the seriousness of the offence and the offender's role in it. Section 38(1) of the *YCJA* requires consideration of a young person's prospects for rehabilitation and reintegration, which would include taking note of the offender's attitude towards rehabilitation and history with rehabilitative programs.

In the instant case, the Crown rebutted the presumption of diminished moral blameworthiness. The circumstances of the offender show a difficult upbringing. B is a Black male who was brought up primarily by his mother, lived in poverty, and was 16 years old at the time of the offence. Connections with gang-affiliated members of the community made him feel connected, noticed, protected, and safe. The circumstances and complexity of the offence show he played a lead role in planning and carrying out the murder, demonstrating a lack of impulsivity and an ability to exercise adult judgment and foresight. He was clearly the leader of the event, coordinating a plan for the day of the murder but also leading the group after the commission of the offence, including efforts to avoid detection. His actions indicate adult-like judgment and critical thinking. They include coordination of two other individuals to carry out the killing according to the plan, and efforts to cover it up, both immediately after the killing and on an ongoing basis. The Court of Appeal rightly concluded that the Crown had rebutted the presumption of diminished moral blameworthiness.

To hold B accountable, a longer period of incarceration is required notwithstanding his upbringing and age. B was central to planning and carrying out the killing and took the lead in attempts to conceal it, including contemplating the murder of witnesses. He was the central player in an offence with high moral blameworthiness, one in which he displayed adult-like judgment. This calls for a high level of accountability. There was little evidence of remorse or rehabilitative potential. The sentence determined by the sentencing judge and upheld by the Court of Appeal was not imposed in error.

Cases Cited

By Kasirer J.

Applied: *R. v. I.M.*, 2025 SCC 23; **distinguished:** *R. v. I.M.*, 2020 ONSC 4660; **considered:** *R. v. D.B.*, 2008 SCC 25, [2008] 2 S.C.R. 3; *R. v. O. (A.)*, 2007 ONCA 144, 218 C.C.C. (3d) 409; *R. v. B.J.M.*, 2024 SKCA 79, 441 C.C.C. (3d) 316, aff'g 2022 SKPC 38; *R. v. Sipos*, 2014 SCC 47, [2014] 2 S.C.R. 423; **referred to:** *R. v. Lacasse*, 2015 SCC 64, [2015] 3 S.C.R. 1089; *R. v. Morris*, 2021 ONCA 680, 159 O.R. (3d) 641; *R. v. Friesen*, 2020 SCC 9, [2020] 1 S.C.R. 424; *R. v. R.N.S.*, 2000 SCC 7, [2000] 1 S.C.R. 149; *R. v. W. (M.)*, 2017 ONCA 22, 134 O.R. (3d) 1; *R. v. Sullivan*, 2022 SCC 19, [2022] 1 S.C.R. 460; *R. v. Gardiner*, [1982] 2 S.C.R. 368; *R. v. Chol*, 2018 BCCA 179; *Joseph v. R.*, 2018 QCCA 1449; *R. v. Okemow*, 2017 MBCA 59, 353 C.C.C. (3d) 141; *R. v. McClements*, 2017 MBCA 104, 356 C.C.C. (3d) 79; *R. v. Hills*, 2023 SCC 2; *R. v. Nasogaluak*, 2010 SCC 6, [2010] 1 S.C.R. 206; *R. v. Lévesque*, 2000

SCC 47, [2000] 2 S.C.R. 487; *R. v. Angelillo*, 2006 SCC 55, [2006] 2 S.C.R. 728; *Sirois v. R.*, 2017 QCCA 558.

By Côté and Rowe JJ.

Referred to: *R. v. I.M.*, 2025 SCC 23; *R. v. Okemow*, 2017 MBCA 59, 353 C.C.C. (3d) 141; *R. v. O. (A.)*, 2007 ONCA 144, 218 C.C.C. (3d) 409; *R. v. Ferriman*, 2006 CanLII 33472; *R. v. McClements*, 2017 MBCA 104, 356 C.C.C. (3d) 79.

Statutes and Regulations Cited

Criminal Code, R.S.C. 1985, c. C-46, ss. 235(1), Part XXI, 745.1(b).

Safe Streets and Communities Act, S.C. 2012, c. 1, s. 195.

Youth Criminal Justice Act, S.C. 2002, c. 1, ss. 2(1) "young person", 3(1)(b), 34, 37(1), (4), Part 4, 38, 42(2)(q), 64, 72 [am. 2012, c. 1, s. 183].

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Kobayashi, Brenda, and Joseph H. Michalski. "The Meaning of Accountability under Section 72(1)(b) of the Youth Criminal Justice Act" (2024), 72 *Crim. L.Q.* 373.

Parent, Hugues. *Traité de droit criminel*, t. I, *L'imputabilité et les moyens de défense*, 6th ed. Montréal: Thémis, 2022.

Ruby, Clayton C. *Sentencing*, 10th ed. Toronto: LexisNexis, 2020.

APPEAL from a judgment of the Ontario Court of Appeal (Simmons, Tulloch and Huscroft JJ.A.), 2023 ONCA 369, 426 C.C.C. (3d) 367, [2023] O.J. No. 2273 (Lexis), 2023 CarswellOnt 7579 (WL), affirming the sentencing decision of Nordheimer J., 2014 ONSC 3436, 2014 CarswellOnt 7925 (WL). Appeal dismissed.

Dirk Derstine, *Laura Remigio* and *Kristen Duylsh*, for the appellant.

Alexander Alvaro and *Justin Reid*, for the respondent.

Roy Lee and *Ginette Gobeil*, for the intervener Attorney General of Canada.

Julie Nadeau and *Philippe Desjardins*, for the intervener Director of Criminal and Penal Prosecutions.

Sarah Clive, for the intervener Attorney General of Alberta.

Mary Birdsell, *Jin Chien* and *Katherine Long*, for the intervener Justice for Children and Youth.

Annamaria Enenajor and *Heather Gunter*, for the intervener Queen's Prison Law Clinic.

Maija Martin and *Jolene Hansell*, for the intervener Criminal Lawyers' Association (Ontario).

Stephanie Di Giuseppe and *Maya Borooah*, for the intervener Peacebuilders Canada.

Vincent Larochelle and *Safiyya Ahmad*, for the intervener British Columbia Civil Liberties Association.

Cori Singer and *Samara Secter*, for the intervener Canadian Civil Liberties Association.

Brandon P. Rolle, for the intervener African Nova Scotian Justice Institute.

The judgment of Wagner C.J. and Karakatsanis, Martin, Kasirer, Jamal, O'Bonsawin and Moreau JJ. was delivered by

KASIRER J. —

I. Overview

[1] When S.B. was 16 years old, he and several others of about the same age planned to kill T.B., another 16-year-old, in the stairwell of an apartment building. At the appointed hour, S.B. held a gun to T.B.'s head and pulled the trigger twice. T.B.

died instantly. S.B. was convicted of first degree murder by a youth justice court. The Crown applied to sentence S.B. as an adult. The youth court judge granted the application and imposed a life sentence on S.B. without possibility of parole for 10 years. On appeal, the Court of Appeal granted a motion for fresh evidence bearing on S.B.'s background and life circumstances. After noting that the youth court judge had erred by failing to apply the presumption of diminished moral blameworthiness in s. 72(1)(a) of the *Youth Criminal Justice Act*, S.C. 2002, c. 1 ("*YCJA*"), the Court of Appeal conducted S.B.'s sentencing afresh. In the end, it concluded, as had the youth court judge, that S.B. should be sentenced as an adult and dismissed the sentence appeal.

[2] Like its companion case, *R. v. I.M.*, 2025 SCC 23, this appeal asks the Court to determine when a young person should be sentenced as an adult pursuant to s. 72 *YCJA*. The principles and legal framework applicable to that decision have been set out in the reasons for judgment in *I.M.* I now propose to rely on that framework and endeavour to explain, in answer to the issues raised by parties in this sentencing appeal, how that law applies to S.B. In the result, I conclude that the Court of Appeal made no reviewable error warranting this Court's intervention.

[3] First, in respect of s. 72(1)(a) *YCJA*, the Crown was required to satisfy the sentencing court that the presumption of diminished moral blameworthiness benefitting S.B. as a young person had been rebutted. While the Court of Appeal rightly noted that the Crown was bound to prove aggravating factors it would rely upon beyond a

reasonable doubt, in my respectful view, the court erred in law by not applying that standard to the ultimate burden of whether the presumption itself had been rebutted. As noted in *I.M.*, the effect of rebutting the constitutionally-mandated presumption is to substantially increase the prospect that a young person will receive a more severe sentence. The jurisprudence of this Court on standard of proof in sentencing, when read alongside *R. v. D.B.*, 2008 SCC 25, [2008] 2 S.C.R. 3, requires proof by the Crown that a young person has, in fact, the developmental age of an adult. The Crown seeks to prove this fact in support of a lengthier sentence, rendering it akin to an aggravating factor that must be established by the Crown beyond a reasonable doubt.

[4] While the Court of Appeal erred in respect of the applicable standard of proof under s. 72(1)(a), this error did not undermine its overall conclusion that the presumption of diminished moral blameworthiness was rebutted by the Crown in S.B.'s case. Moreover, the Court of Appeal committed no reviewable errors in its account of the factors relevant to s. 72(1)(a) on the standard of review set out in *R. v. Lacasse*, 2015 SCC 64, [2015] 3 S.C.R. 1089, at paras. 44 et seq.

[5] It is true that some of its allusions to the seriousness of the offence, as an abstract consideration, might be understood as wrongly suggesting that this factor is relevant to rebutting the presumption. But when read in context, these references cannot be said to have distorted the Court of Appeal's analysis of s. 72(1) on re-sentencing. This case is unlike *I.M.*, where the youth court judge wrote that the presumption was rebutted "[b]ased on" the seriousness of the offence as a relevant factor, without

reference to the rationale of the rule in s. 72(1)(a) (*R. v. I.M.*, 2020 ONSC 4660 ("*I.M. ONSC*"), at para. 38, reproduced in A.R., *I.M.*, vol. I, at pp. 15-16). Here, the Court of Appeal correctly recognized, in connection with its reference to the seriousness of the offence, that the analysis of whether the presumption has been rebutted must focus on S.B.'s level of maturity and his capacity for moral judgment. It did refer to seriousness, but in part to allude to the circumstances of the offence rather than their objective gravity. While rebutting the presumption based on seriousness in the abstract is an error, I see no basis to intervene with respect to this point in the Court of Appeal's re-sentencing of S.B. because the court did not lose sight of the rationale for the presumption in its analysis and conclusion under s. 72(1)(a).

[6] I also reject the argument that the Court of Appeal erred in its treatment of social context evidence relating to S.B. when it evaluated the Crown's position on rebuttal of the presumption. The Court of Appeal was careful on re-sentencing to examine S.B.'s background and personal circumstances at the time of the murder, and specifically alluded to this evidence in respect of "SB's maturity and independent judgment", as was appropriate under s. 72(1)(a) (2023 ONCA 369, 426 C.C.C. (3d) 367, at para. 65). And contrary to the appellant's submissions, S.B.'s post-sentence conduct was properly analyzed from the perspective of his "independent judgment and moral sophistication" (para. 68). This is unlike the sentencing undertaken in *I.M.*, where the cumulative effect of errors on the factors relating to the presumption, coupled with the error in principle on the standard, warranted intervention by this Court on appeal.

[7] To succeed in obtaining an order for an adult sentence, the Crown also had to satisfy the sentencing court that a youth sentence would not be of sufficient length to hold S.B. accountable for his offending behaviour pursuant to s. 72(1)(b) *YCJA*. Once again, the appellant alleged the Court of Appeal's treatment of social context evidence was inadequate, but this time in respect of its bearing on S.B.'s moral responsibility and his accountability for the offence. The Court of Appeal did consider S.B.'s difficult upbringing, his family circumstances as well as possible systemic anti-Black racism relevant to his situation. Despite these matters, it concluded that a youth sentence would not be sufficient to hold him accountable for his offending conduct. S.B. now disagrees with the weight assigned to these considerations by the Court of Appeal but has failed to show an error in principle or any other error in the Court of Appeal's measure of S.B.'s accountability under s. 72(1)(b) that would undermine the order. The evaluation a sentencing court undertakes under this second step in s. 72(1) has been appropriately compared to the discretionary weighing of factors explained in *Lacasse*. I see no error made by the Court of Appeal that had a material impact on the decision to sentence S.B. as an adult.

[8] None of the other grounds raised by S.B to have the order of an adult sentence set aside has merit. All told, I would dismiss the appeal.

II. Background

[9] On November 17, 2010, three young persons, S.B., M.W., and T.F. carried out a plan to shoot and kill 16-year-old T.B. He was shot in the west stairwell of an

apartment building in Toronto, where he lived with his mother and sister. He died from a single gunshot that entered his skull behind his right ear. The gunshot was fired inches from T.B.'s head. A second gunshot grazed his right cheek.

[10] On the day of his murder, T.B. was on bail in respect of drug offences and living in Brampton with a friend of his mother. The morning of November 17, T.B. travelled to Toronto to appear in court on his drug offences.

[11] After appearing in court, T.B. travelled to his family's apartment in Toronto. It was known in his circle that he would be spending the night there. T.F. arrived at the apartment shortly after T.B. and the two socialized with others in the hallway. They eventually left together and T.B. was shot shortly thereafter.

[12] M.W., T.F., and T.B. were friends, while S.B. was known primarily to M.W. Although no motive was established at trial, text messages among the three co-accused sent before and after the murder disclosed an organized plan established in advance to kill T.B. Each of the three played a role. M.W. was involved in the planning and was the link between S.B. and T.F., facilitating S.B.'s arrival at the apartment building upon T.F.'s confirmation that T.B. was present. T.F. opened a side door to let S.B. into the building at around 3:13 pm and lured T.B. into the stairwell where the murder took place about 20 minutes later.

[13] S.B. was the shooter. He provided instructions to ensure T.B. was kept in the building and would be located in a staircase. After the murder, S.B. texted T.F. to

delete all messages, and directed M.W. to tell others that people from a nearby rival neighbourhood were responsible. He also said that a fourth co-accused, who had witnessed the murder, should be killed, as well as the co-accused's mother and sister.

III. Judicial History

A. *Ontario Superior Court of Justice, 2014 ONSC 3436 (Nordheimer J.)*

[14] The Superior Court of Justice, sitting as a youth justice court under the *YCJA*, convicted S.B., M.W., and T.F. of first degree murder (2013 ONSC 3139 ("trial reasons")). The fourth co-accused was acquitted. The Crown applied for the offenders to be sentenced as adults. The parties agreed that the applicable provisions of the *YCJA* were those that existed at the time of the offence, prior to the 2012 amendments made to s. 72. Unlike the provision amended in 2012, the former s. 72 made no reference to the presumption of diminished blameworthiness or culpability of the young person and the Crown's burden to rebut it.

[15] The youth court judge concluded that an adult sentence was the "only appropriate sentence" that would hold S.B. accountable for his role as the shooter and his conduct surrounding the murder (sentencing reasons, at para. 56). With respect to the first statutory factor in s. 72(1) (as it existed at the time), he concluded that the seriousness and circumstances of the offence favoured an adult sentence, observing that "it would be a rare and unusual case where the offence of first degree murder would not incline one toward the imposition of an adult sentence" (para. 52). He then

considered the other factors set out in the former s. 72(1): age, maturity, character, background, and previous record.

[16] The youth court judge observed that S.B. had gravitated towards negative peers, that his mother had raised him alone from age 10, he had a youth record, and was subject to a weapons prohibition order and on probation at the time of the murder. The pre-sentence report was mixed. While S.B. had participated in some programming while in custody, the judge noted that he was "described by staff as a 'skilled behind the scenes manipulator' who tries to run the unit in which he is housed" (para. 21). S.B. had also incurred a large number of incident reports while in custody, including being in possession of drugs, assaults on other inmates and two incidents of threatening staff (*ibid.*). The youth court judge described the circumstances of the offence as a planned and deliberate murder where S.B. shot the victim execution-style. The judge wrote that the circumstances of the murder were "inexplicable and inherently alarming", and reflected conduct that "instils fear in the minds of ordinary people" (para. 55).

[17] The youth court judge considered, as an aggravating factor, the fact that in post-offence conversations S.B. expressed the wish that he had shot the fourth co-accused and suggested he was prepared to find and kill him, his mother and sister.

[18] A psychological assessment of S.B. was ordered under s. 34 *YCJA* but was not completed because S.B., on the advice of counsel, refused to participate due to charges pending against him. In lieu of a direct assessment, the youth court judge relied on a review of available materials conducted by a forensic psychologist, who expressed

"serious concerns" regarding S.B.'s persistent pattern of antisocial attitudes and behaviour (para. 22). The judge explicitly noted that no negative inference was drawn from S.B.'s refusal to participate in the s. 34 assessment.

[19] The youth court judge concluded that an adult sentence was necessary to address the continuing risk posed by S.B. to society, noting that there was "little evidence whether [he was] capable of being rehabilitated and, if so, on what terms", and that his behaviour in custody did not suggest any "change in his attitude" (para. 56).

B. *Court of Appeal for Ontario, 2023 ONCA 369, 426 C.C.C. (3d) 367 (Simmons, Tulloch and Huscroft JJ.A.)*

[20] The Court of Appeal for Ontario unanimously dismissed S.B.'s appeal from sentence. Writing for the court, Tulloch J.A., as he then was, decided that the failure of the youth court judge to consider and apply the presumption of diminished blameworthiness for S.B. as a young person was an error in principle. However, in sentencing the appellant afresh, the court concluded that it would impose the same adult sentence as that imposed by the youth court judge.

[21] The court noted that trial counsel had agreed that the 2012 amendments to s. 72(1) *YCJA* did not apply to the offence committed before their coming into force. However, the parties' agreement on this point ignored the fact that in *D.B.*, the presumption of diminished moral responsibility was recognized as a constitutionally-mandated principle of fundamental justice, and that, "[a]s such, there should be no

offence for which a youth should be presumptively sentenced as an adult" (C.A. reasons, at para. 38, citing *D.B.*, at para. 70). Given that s. 72(1) was amended in 2012 to reflect the holding in *D.B.*, the youth court judge should have considered the presumption for the appellant and he failed to do so. While a judge must be presumed to know the law, the importance of the principle set out in *D.B.* was such that it was incumbent upon the youth court judge to identify and discuss the presumption in his reasons. The court concluded that this was an "error in principle which justifie[d] intervention by this court" (para. 39). The Court of Appeal conducted the sentencing afresh, taking into account the fresh evidence he filed consisting of an enhanced pre-sentence report ("EPSR") detailing his troubled upbringing. The court found, in particular, that the report "highlights overarching racial and cultural factors which have played a role in shaping SB's life" (para. 47). Had the information in the report been available at the original hearing on sentence, said the court, it could have affected the result.

[22] The court considered the different sentences for murder available under the *YCJA* and the *Criminal Code*, R.S.C. 1985, c. C-46, noting that under the *YCJA*, the maximum sentence is 10 years, of which a committal to custody cannot exceed 6 years (s. 42(2)(q)), while, under the *Criminal Code*, the applicable sentence is life with eligibility for parole after 10 years given S.B.'s age (ss. 235(1) and 745.1(b)). The question of whether an adult sentence should be imposed required an analysis of the "current iteration" of s. 72(1) *YCJA* that has two steps, each of which must be considered separately (para. 58).

[23] The court concluded that the Crown had successfully rebutted the presumption because S.B.'s actions demonstrated the level of maturity, moral sophistication and capacity of independent judgment of an adult. It first observed that S.B. was "involved" in a very serious offence given that murder affects society as a whole, and none more than the victim's family. The court wrote that the seriousness and circumstances of the offence "do not automatically lead to the conclusion that an adult sentence should be imposed" (para. 61). Here, noted the court, S.B.'s involvement "far surpassed" that of his co-accused, given that he was leader and executioner, and he took initiative to cover up the crime that he directed (para. 62).

[24] S.B.'s personal circumstances were analyzed as relevant to rebutting the presumption, including his difficult childhood and exposure to older gang members from a young age. An EPSR containing social context evidence about the racial and cultural factors that influenced S.B.'s life was considered in light of *R. v. Morris*, 2021 ONCA 680, 159 O.R. (3d) 641, at para. 99, which held that evidence may, where relevant, mitigate an offender's degree of responsibility for an offence or help in crafting an appropriate sentence. The evidence was used to place the analysis of S.B.'s independent judgment under s. 72(1)(a) in context. Ultimately, the court found that it did not suggest a lack of capacity for adult-like judgment or maturity and did not "outweigh all of the factors pointing to the opposite conclusion" (para. 66). The court further observed S.B.'s lack of positive change and manipulative and aggressive conduct evident from the pre-sentence report. It concluded that S.B.'s unwillingness to

change supported the view that his actions at the time of the murder were not guided by immaturity or lack of insight.

[25] Finally, the court found that a youth sentence would not be sufficient to hold S.B. accountable at the second step of the s. 72(1) *YCJA* analysis. Again at this stage, the court considered S.B.'s difficult upbringing "in a drug and gang-ridden community undoubtedly had an impact on the trajectory of [his] life" (para. 71). However, in balancing the factors and principles set out in the *YCJA*, including rehabilitation as one sentencing principle promoting protection of the public, the court concluded a youth sentence would not be of sufficient length to hold S.B. fully answerable for the offence. The sentence for first degree murder under the *YCJA* would not "strike the appropriate balance" between objectives of accountability to society and the victim and rehabilitation, noting that S.B. had not demonstrated a willingness to change or insight into the consequences of his conduct (para. 72). An adult sentence was necessary, wrote the court, "to hold SB accountable for his actions" (para. 73)

IV. Issues on Appeal

[26] S.B. says that, in sentencing S.B. afresh, the Court of Appeal erred in imposing an adult sentence, justifying intervention by this Court. Specifically, the court was mistaken in its interpretation and application of s. 72(1) *YCJA* when it concluded that the Crown had rebutted the presumption of diminished blameworthiness and found that an adult sentence was necessary to hold S.B. accountable.

[27] The appellants in both this appeal and *I.M.* ask this Court to clarify aspects of the legal framework that apply to an adult sentence application made pursuant to s. 64 *YCJA*. In *I.M.*, the relevant principles and framework are reviewed for determining whether the Crown has discharged its onus to justify an adult sentence under s. 72(1) *YCJA*. S.B.'s appeal is governed by that same framework. His appeal also raises the questions of whether the Court of Appeal erred in its consideration of social context evidence in the EPSR and post-sentence conduct.

V. Analysis

[28] An order by a youth justice court to impose an adult sentence is appealed as part of the sentence in accordance with Part XXI of the *Criminal Code*, with any modifications the circumstances require (s. 37(1) and (4) *YCJA*). The Court of Appeal's decision sentencing S.B. afresh, including its consideration of the new evidence admitted on appeal, is owed due deference, in accordance with the principles set out in *Lacasse*. The appeal to this Court is a first review of the Court of Appeal's decision.

[29] Appellate intervention is only justified where it appears an error in principle, failure to consider a relevant factor, or erroneous consideration of a factor had an impact on the sentence, or if the sentence is demonstrably unfit (*Lacasse*, at paras. 43-44 and 52-53). In *R. v. Friesen*, 2020 SCC 9, [2020] 1 S.C.R. 424, the Court explained that in sentencing afresh, the appellate court will defer to the sentencing judge's findings of fact "to the extent that they are not affected by an error in principle" (para. 28). Sentencing decisions by appellate courts are owed less deference than that

accorded to sentencing judges who hear evidence first-hand (*R. v. R.N.S.*, 2000 SCC 7, [2000] 1 S.C.R. 149, at para. 23). That said, there is no basis in this case to intervene with the Court of Appeal's decision. I would not disturb the order to sentence S.B. as an adult.

A. *Principles That Apply to an Adult Sentence Application Post-D.B.*

[30] Section 72(1) *YCJA*, the key provision at issue in this appeal and in *I.M.*, was amended in 2012 (*Safe Streets and Communities Act*, S.C. 2012, c. 1), in part to address this Court's 2008 decision in *D.B.* As part of the amendments, Parliament restructured the provision as a "codification" of the principle set out in *D.B.* that the Crown has the onus to rebut the presumption of diminished moral blameworthiness (J. Campbell, "In Search of the Mature Sixteen Year Old in Youth Justice Court" (2015), 19 *Can. Crim. L. Rev.* 47, at p. 50). Amendments to s. 72(1) removed the formal list of enumerated factors that a sentencing judge was required to consider. The revised version of s. 72(1) provides that the Crown must satisfy the youth justice court that the prerequisites for imposing an adult sentence, presented in a two-prong provision, have been met. The applicable principles of sentencing were also amended to include denunciation and specific deterrence (s. 38(2)(f)). As Abella J. recognized in *D.B.*, the presumption is the very reason why young persons benefit from a separate sentencing regime (para. 41), a matter now confirmed by s. 3(1)(b) as a governing principle for the *YCJA*.

[31] For the reasons set out in *I.M.*, I agree with the appellant that the two issues on an adult sentence application — whether the presumption of diminished moral blameworthiness has been rebutted and whether a youth sentence would not be of sufficient length to ensure accountability — must be considered separately. Furthermore, in order to ascertain whether the presumption is rebutted, the sentencing court must make a factual determination regarding the young person's developmental age at the time of the offence. The Crown must show that the young person's developmental age, contrary to their chronological age, demonstrates the maturity and capacity for independent and moral judgment of an adult. The objective seriousness of the offence is not relevant to this factual inquiry except insofar as an application may only be brought for an offence for which an adult is liable to imprisonment for two or more years (s. 64(1)). But as explained in *I.M.*, the seriousness of an offence does not shed light on the personal developmental attributes of the young offender. Finally, given that developmental age is a factual inquiry, and rebutting the presumption must be considered an aggravating factor that substantially increases the jeopardy the young person faces, the Crown must discharge its onus in s. 72(1)(a) *YCJA* beyond a reasonable doubt consonant with the constitutional principles recognized in *D.B.*

[32] This framework applies equally to S.B., who was 16 at the time of the offence, a "young person" pursuant to s. 2(1) *YCJA*. As such, he benefitted from the presumption of diminished moral responsibility spoken to in *D.B.* that was later codified in s. 72(1)(a) *YCJA*. I agree with the Court of Appeal that, notwithstanding the date of the offence, the constitutionally-mandated presumption of diminished moral

responsibility applied to S.B. The sentencing court had to be satisfied, as a threshold matter to ordering an adult sentence, that the presumption of diminished blameworthiness was rebutted by the Crown. Only then could the youth court judge consider if a youth sentence would or would not be of sufficient length for S.B. The Crown must therefore demonstrate why the presumption no longer applies to a particular young person before the court can consider whether a lengthier, more severe, adult sentence is necessary to hold them accountable for their offending behaviour (*D.B.*, at paras. 70 and 76-78). This is reinforced by Parliament's choice to structure the amended provision as a two-prong conjunctive test, with the presumption listed first. The distinct nature and order of the respective inquiries is grounded in the principles set out in *D.B.* (see also *R. v. W. (M.)*, 2017 ONCA 22, 134 O.R. (3d) 1, at paras. 93-97).

[33] Since proceedings against S.B. had commenced before the amendments came into force in October 2012, the previous version of s. 72(1) is the applicable law (see s. 195 of the *Safe Streets and Communities Act*). However, this does not change the way in which a youth justice court must approach the analysis on an application for an adult sentence, as described above, based on the constitutionally-mandated presumption recognized in *D.B.* While the offence pre-dated the amendments to the *YCJA*, it took place after *D.B.* established the principle of diminished moral blameworthiness as a principle of fundamental justice under s. 7 of the *Canadian Charter of Rights and Freedoms*. It was therefore incumbent on the youth court judge, as the Court of Appeal observed, to identify and discuss the presumption. With respect,

the court rightly concluded that the youth court judge's "silence" on this constitutional requirement could not be explained by the presumption that a judge knows the law (para. 39). The omission amounted to an error of principle in the youth court judge's reasons that required the Court of Appeal to conduct the sentencing analysis afresh (*ibid.*).

B. *The Court of Appeal's Analysis of the Presumption of Diminished Blameworthiness Does Not Justify Varying the Sentence*

[34] I am of the respectful view that the Court of Appeal itself erred in law when sentencing afresh: the court failed to apply the constitutionally-required standard of beyond a reasonable doubt to the Crown's burden of rebutting the presumption of diminished moral responsibility recognized in *D.B.* and codified in s. 72(1)(a) *YCJA*.

[35] In fairness to the court, it was silent as to the standard it applied to deciding whether the Crown had met its onus. In its summary of the first reasons on sentence, the Court of Appeal, at para. 15, noted the youth court judge's formulation of the applicable standard as simply imposing "an onus of satisfying the court, nothing more" (sentencing reasons, at para. 8, quoting *R. v. O. (A.)*, 2007 ONCA 144, 218 C.C.C. (3d) 409, at para. 38). After that reference, the court did not avert to this standard for its own exercise of re-sentencing. It did not explicitly say it was applying *O. (A.)*, nor did it say it was setting that precedent aside (see paras. 56 et seq.). Yet, it seems best to assume that the Court of Appeal applied *O. (A.)*: it would have had to confront the matter if it had chosen not to follow *O. (A.)* and apply a different standard, given that it was

theoretically bound by that precedent according to the rules on horizontal *stare decisis* (see *R. v. Sullivan*, 2022 SCC 19, [2022] 1 S.C.R. 460). In any event, the court said nothing on the standard that engaged a constitutionally relevant principle of fundamental justice. Just as it noted that it was inappropriate for the sentencing judgment to remain "silent" on the constitutionally-mandated presumption, in the circumstances of S.B.'s re-sentencing, it could not properly remain silent on the standard associated with the application of *D.B.* The court plainly understood the central importance of that case to the presumption (see paras. 38-39).

[36] It is true that the court acknowledged that the principles in *R. v. Gardiner*, [1982] 2 S.C.R. 368, applied on an adult sentence application, requiring aggravating facts to be proven beyond a reasonable doubt (see C.A. reasons, at para. 26). But holding the Crown to the higher beyond a reasonable doubt standard in respect of rebutting the presumption could well have had an impact on the sentence given that issues relating to the proper application of s. 72(1)(a) *YCJA* — including the relevance of S.B.'s personal circumstances of hardship — were key to the Crown meeting its burden of proof. As the court itself suggested, a "connection" between the offender's life experience and his responsibility plainly existed in this case (para. 47). This evidence, wrote the court, "contextualize[d]" the analysis of S.B.'s maturity and judgment (para. 65). The matter of the applicable standard had to be decided, and the one set out in *O. (A.)* predates *D.B.* and the 2012 amendments to s. 72(1) and was wrong in law. Respectfully stated, and for the reasons set out in *I.M.*, it was an error in

principle not to apply the standard of beyond a reasonable doubt to the Crown's onus for rebutting the presumption.

[37] S.B. raises the applicability of the beyond a reasonable doubt standard in his reply factum (para. 7). Apart from this matter, the principal thrust of his argument before this Court in respect of s. 72(1)(a) *YCJA* is the alleged misapplication by the Court of Appeal of factors relating to the Crown's onus to rebut the presumption of diminished blameworthiness.

[38] In particular, S.B. asserts that it was improper for the Court of Appeal to consider the seriousness of the offence when determining whether the presumption was rebutted in this case. S.B. says that the Court of Appeal also erred by misstating his role in the murder, and by considering evidence of his conduct while in custody pending trial. These factors are irrelevant, says S.B., to drawing a conclusion about his maturity and judgment at the time of the offence. Finally, S.B. argues that the Court of Appeal erred in concluding that the evidence in the EPSR relating to this background and personal circumstances was of limited probative value.

[39] I agree that the Court of Appeal should not have considered the objective seriousness of the offence in relation to the presumption, but, on a careful reading of the court's reasons, this did not amount to an error that had an impact on the sentencing afresh of S.B. As I will explain, the Court of Appeal did not err in respect of its consideration of social context evidence and I am satisfied that the record in this case

demonstrates that the Crown has discharged its onus beyond a reasonable doubt. In the circumstances, this Court's intervention is not warranted.

(1) Factors Considered by the Court of Appeal Do Not Justify Intervening

[40] As I sought to explain in *I.M.*, the objective gravity of the offence of murder is not relevant in resolving the factual question of developmental age, and thus can have no bearing on whether the Crown has rebutted the presumption. The appellants in both appeals properly note that a youth justice court's focus in this step of the inquiry is the young person's maturity and development. As an abstract matter, the seriousness of an offence has no direct bearing on a young person's capacity for moral judgment.

[41] I acknowledge that the Court of Appeal stated that S.B. was involved in a "very serious offence", that "murder affects society as a whole" and that, in respect of the presumption, "the severity of the crime help[ed] to inform [the court's] analysis on this issue" (para. 61). On their own, such comments suggest consideration of a factor irrelevant to s. 72(1)(a) *YCJA* that would be an error of law. However, the court recognized that, together, "the seriousness of the offence and the circumstances of the offence" were not determinative of whether an adult sentence should be imposed (*ibid.*). Most importantly, it is apparent from their reasons that the court was cognizant of the correct focus under the presumption. The reference to seriousness of the offence must be read in light of the immediate recognition that "[t]he analysis of whether the

[p]resumption has been rebutted must focus on the level of maturity displayed by the individual" (*ibid.*).

[42] While objective seriousness of the offence should not be considered under the presumption, it is open to the youth court judge to consider the circumstances of the offence if they shed light on the young person's maturity and capacity for independent, moral judgment (see *I.M.*, at para. 145). Following the Court of Appeal's initial reference to the seriousness and circumstances of the offence, the reasons focus on the latter and S.B.'s particular role in the crime.

[43] When read as a whole, it is evident that the court was focused on the circumstances as they related to S.B.'s "degree of independent judgment and moral sophistication" (C.A. reasons, at para. 68). And, as I have noted, a youth justice court's mere reference to how serious an offence is, as an abstract matter, does not justify intervention unless it impacts the sentence. Given that s. 64(1) *YCJA* applications only apply to crimes which entail two or more years' imprisonment for adults, this is a formal statutory qualification. I would add that expressing empathy for victims by noting the violent nature of the offence in a sentencing judgment cannot, in itself, be wrong in law. Appellate courts should not hunt down references to the seriousness of the offence as signs of error but must instead read the whole of the judgment contextually with an eye to what the youth court judge really decided. When the whole of the reasons are considered, the Court of Appeal did not conclude that the presumption was rebutted because of the abstract seriousness of the offence. And even

if the court improperly relied on the seriousness of the offence in making its determination, I am satisfied that the reference did not have a determinative impact on the sentence in this case, and particularly so since it is clear from the remainder of the reasons and record that the Crown had discharged its onus to rebut the presumption.

[44] The Court of Appeal's analysis in sentencing afresh may be contrasted with that of the youth court judge in *I.M.*, in which the seriousness of the offence was reiterated a number of times as an important premise of his conclusion that the presumption had been rebutted (*I.M.*, at para. 190) and was disconnected from the proper focus at this stage of the inquiry. The youth court judge in *I.M.* explicitly cited the seriousness of the offence as a basis for rebutting the presumption, which is mistaken (*I.M. ONSC*, at para. 38). The Court of Appeal in *I.M.* should have noted the youth court judge's error on seriousness, which, when added to other errors in that case, had a cumulative effect of materially impacting the sentence. Here, no such cumulative errors impugn the Court of Appeal's decision.

[45] Furthermore, I find no error in the court's reliance on S.B.'s role in the offence. I respectfully disagree with the appellant that the Court of Appeal contradicted the findings of the youth court judge when it observed that S.B.'s role "far surpassed that of MW and TF" (para. 62). Even when sentencing afresh, appellate courts owe deference to the youth court judge's findings of fact, including the identification of aggravating and mitigating factors (*Friesen*, at para. 28). In the initial conviction and sentencing judgments, the youth justice court found that S.B. was the person who fired

"the fatal shot . . . mere inches from [T.B.]'s head" and was "clearly the leader of this event, both before and after it occurred" (sentencing reasons, at paras. 3 and 5; trial reasons, at paras. 106-7). The appellant acknowledges this (A.F., at para. 103). The Court of Appeal went on to observe that, in addition to being the leader and executioner of the murder, S.B. took initiative to cover it up and gave directions to the others in this regard.

[46] In support of his argument that the appropriate sentence was a youth sentence, S.B. argues that his co-accused, involved in the same planned murder, were sentenced initially as adults but those orders were set aside on appeal. He points in particular to the explanation given by the Court of Appeal in *W. (M.)*, at paras. 162-66, in an effort to illustrate that the conduct of two of S.B.'s co-accused in the murder was seen as justifying a youth sentence with intensive rehabilitative custody and supervision orders that would hold them accountable for the crime. But that same outcome is of course not necessarily transposable to S.B., whose role in the offence and conduct after the murder was different, as was the fact that the court did not have the benefit of a complete psychological assessment. It was open to the Court of Appeal, which was aware of the decision to re-sentence the co-accused as young persons, to decide that S.B. was not protected by the presumption and should be held accountable according to an adult sentence (see paras. 22 and 37). The appellant has shown no error that could have undermined the sentence here.

[47] The conclusion that S.B.'s role exceeded that of the others is well supported by the record. His clear leadership role was highly relevant as an indicator of S.B.'s independence, lack of susceptibility to pressure by others, and considered behaviour, demonstrating a developmental age akin to that of an adult (see *D.B.*, at paras. 61-64; *R. v. Chol*, 2018 BCCA 179, at para. 61).

[48] I also disagree with the appellant that focusing the analysis on evidence of the planning and execution of an offence "is akin to finding [the] presumption should be rebutted in all first-degree murder cases" (A.F., at para. 101). When considering the developmental age of a young person, courts will often be required to draw inferences from evidence of the young person's conduct about their maturity or capacity for independent judgment. Evidence of planning suggests the offender had time to reflect before acting, and was not acting out of impulse (C. C. Ruby, *Sentencing* (10th ed. 2020), at §5.4; see also *Joseph v. R.*, 2018 QCCA 1449, at para. 29; *R. v. Okemow*, 2017 MBCA 59, 353 C.C.C. (3d) 141, at para. 85). Where the circumstances of the offence, including the young person's particular role, provide insight into these aspects of the inquiry, the court may properly consider them.

[49] Finally, when determining whether the presumption has been rebutted, I agree that, in principle, a court must assess developmental age at the time of the offence, since young people are entitled to the benefit of the presumption based on their age at that time pursuant to s. 72(1)(a). Yet evidence of the young person's behaviour while in custody awaiting trial or sentencing may nevertheless be relevant to the question of

developmental age at the time of the offence in some cases. As I explained in *I.M.*, in all cases, the relevance of this evidence is context-dependent. In *Chol*, for example, the British Columbia Court of Appeal observed that "[s]ignificant progress and growth can be indicative of immaturity at the time of the offence" (para. 54; see also *W. (M.)*, at para. 130). Also, where evidence shows consistency in levels of maturity and judgment, this may, depending on the context, shed light on developmental age at the time of the offence (*I.M.*, at para. 158). In this case, the Court of Appeal did not commit an error in principle by considering the consistency of S.B.'s anti-social behaviour while detained pending trial and sentencing as an indication of a "lack of positive change" in his conduct since the offence, suggesting that it was not immaturity or lack of insight that led to his involvement in the murder (para. 67; see also para. 68).

(2) No Error in the Court of Appeal's Consideration of Social Context Evidence Under the Presumption

[50] In *I.M.*, I examined the nature of "social context" evidence, commonly adduced in "enhanced" pre-sentence reports or "Impact of Race and Culture Assessments". This kind of evidence may be relevant to both prongs of an adult sentence application under s. 72(1) *YCJA* (*I.M.*, at paras. 162-67). Following his discussion of the requirements of s. 72(1) *YCJA*, Professor Hugues Parent helpfully observes that agency upon which responsibility in criminal law is founded involves a process by which [TRANSLATION] "the awakening of intelligence does not always follow the progress of the body" (*Traité de droit criminel*, t. I, *L'imputabilité et les moyens de défense* (6th ed. 2022), at para. 109). While not referring specifically to

social context evidence, he adds that [TRANSLATION] "[d]aily observation compels us to recognize the inequalities that mark the transition from childhood to adolescence, and then to adulthood" (*ibid.*). In this case, in considering the social context evidence relevant to both the rebuttal of the presumption and the accountability of S.B. for his offending behaviour, I am of the view that the Court of Appeal made no error in taking the relevant sources of inequality facing S.B. into account.

[51] The Court of Appeal admitted the EPSR as fresh evidence on appeal and neither party disputes its relevance.

[52] Where the appellant and respondent Crown part ways is regarding its impact in this case. The Court of Appeal concluded that evidence in the EPSR about social and background factors that provided context for S.B.'s life experiences was of limited probative value in relation to the presumption. S.B. contends that this was in error, and that the evidence provides context for his criminal conduct and insight into his diminished moral blameworthiness (A.F., at paras. 112-13). The Crown responds that, while the EPSR provides some explanation and context for S.B.'s choices, it did not provide insight into why he murdered T.B. (R.F., at paras. 112-13).

[53] The Court of Appeal found that the social context evidence advanced through the EPSR highlighted the "overarching racial and cultural factors which have played a role in shaping SB's life" and thus had "some connection" to the circumstances argued to explain or mitigate the criminal conduct (paras. 46-47). As the Court of Appeal properly recognized, the EPSR's evidence regarding S.B.'s

background — including living in poverty with a single working mother, his involvement with gangs and evidence of systemic anti-Black discrimination — put S.B.'s childhood and life experiences into context, and the court did measure that in respect of "SB's maturity and independent judgment" (para. 65).

[54] It was nevertheless open to the Court of Appeal to conclude, in S.B.'s sentencing afresh, that the evidence from the EPSR was of limited probative value with respect to the presumption. The court did not ignore or disregard the report. Indeed, S.B.'s troubled childhood, the significant loss he experienced at a young age when his cousin was shot, his upbringing as a Black youth in a crime-ridden neighbourhood, and his experiences with and perception of the police in his community were all reviewed (paras. 63-65). The Court of Appeal's conclusion that the EPSR did not diminish factors demonstrating judgment and maturity, such as S.B.'s clear leadership role, is supported by the record and entitled to deference on appeal.

[55] Before concluding on the presumption, I return to the Court of Appeal's silence on the standard of proof which, as noted, was an error. In my view, however, the record amply supports the conclusion that the presumption is rebutted beyond a reasonable doubt. On appellate review, if there is no impact on the sentence, an error "will not necessarily justify appellate intervention regardless of its impact on the trial judge's reasoning" (*Lacasse,* at paras. 43-44). Here, the Court of Appeal's ultimate conclusion that the presumption was rebutted does not justify our intervention. And while I acknowledge that the EPSR provides insight into S.B.'s personal circumstances,

respectfully, I do not agree that it undermines the force of the overall conclusions drawn from the other evidence even when considered against the proper standard.

[56] S.B.'s conduct at all points leading up to and after the offence was deliberate and measured, showing self-control and independence. There is no evidence that that he was under the influence of adults or older peers — to the contrary, he played "a central role in [the] operation" (C.A. reasons, at para. 12), providing careful and detailed directions to his co-accused, themselves young persons about his age, in planning the murder using two cellphones (R.F., paras. 14 and 116; see also trial reasons, at paras. 40, 98 and 106).

[57] After the offence he continued to behave in a considered way, steadfast in his leadership role and intention to cover up the offence. He directed his co-accused to assist with the cover up, and undeterred by the murder, considered and expressed a desire to kill a co-accused and his mother and sister (C.A. reasons, at para. 13). While in custody awaiting trial, S.B. continued to demonstrate independent judgment and leadership, consistent with his role and behaviour at the time of the offence, reinforcing that it was not immaturity that led to his involvement in the offence. Staff members observed that S.B. "was running the unit in which he was housed as a 'skilled behind the scenes manipulator'" (C.A. reasons, at para. 67; see also sentencing reasons, at para. 21).

[58] The whole of the evidence demonstrates beyond a reasonable doubt that S.B.'s developmental age was akin to that of an adult. Notwithstanding the Court of

Appeal's failure to reference the proper standard, I am satisfied on this record, including the EPSR, that the Crown discharged its onus to rebut the presumption. In the end, this is a case much like *R. v. B.J.M.*, 2024 SKCA 79, 441 C.C.C. (3d) 316, where the Saskatchewan Court of Appeal relied on our judgment in *Lacasse*, at para. 43, in concluding that "[i]n this case, although in my respectful view the judge did not apply the correct standard in connection with the inquiry under s. 72(1)(a) of the *YCJA*, his error had no impact on the sentence that B.J.M. received because I am satisfied the record shows that the Crown had discharged its onus in relation to s. 72(1)(a) beyond a reasonable doubt" (para. 109). In that instance, like this one, the sentencing judge made no other errors and explained, in careful detail, the factual basis for finding that the young offender had the capacity for moral judgment of an adult (*R. v. B.J.M.*, 2022 SKPC 38, aff'd on this point 2024 SKCA 79, at para. 109).

[59] That same attention to detail characterizes the re-sentencing by the Court of Appeal here. With great respect, this stands in contrast with the exercise undertaken in *I.M.* by the sentencing judge where the error in respect of the standard was compounded by other errors, including a failure to consider the young person's background at that stage. Similarly, in this case, the Court of Appeal has erred in principle by not applying the beyond a reasonable doubt standard to the Crown's rebuttal of the presumption for S.B., but it is plain that the error had no impact on the sentence.

(3) <u>Conclusion on Presumption</u>

[60] In the final analysis, no basis has been shown for intervention by this Court arising from the Court of Appeal's conclusion on the presumption. In the absence of the cumulative errors which appear in *I.M.*, and considering the reasons and record functionally and as a whole, I am satisfied the Court of Appeal properly concluded that the presumption was rebutted.

C. *Deference Is Owed to the Court of Appeal's Weighing and Balancing of the Relevant Factors and Principles Under Section 72(1)(b)*

[61] As I sought to emphasize in *I.M.*, the second part of the youth justice court's inquiry into whether an adult sentence should be imposed is a crucial step in the analysis. The failure by the Crown to meet its onus on s. 72(1)(b) can, on its own, frustrate an application for an adult sentence, even for a young person for whom the presumption of diminished moral blameworthiness has been rebutted.

[62] As a general rule, the sentencing regime in Part 4 of the *YCJA* proceeds on the basis that a youth sentence is of sufficient length to hold a young person accountable for offending behaviour. Section 72(1) requires the court to consider whether the case before them is an exception (see N. Bala, "*R. v. B. (D.)*: The Constitutionalization of Adolescence" (2009), 47 *S.C.L.R.* (2d) 211, at pp. 230-31). Where the Crown has successfully rebutted the presumption of diminished moral blameworthiness, the youth court judge must then engage in a weighing and balancing of the relevant factors and principles set out in ss. 3(1)(b) and 38 *YCJA*. Section 72(1) also requires courts to consider the purpose of sentencing under the *YCJA*, which is "to hold a young person

accountable for an offence through the imposition of just sanctions that have meaningful consequences for the young person and that promote his or her rehabilitation and reintegration into society, thereby contributing to the long-term protection of the public" (s. 38(1)).

[63] This task is evaluative in nature. As I explained in *I.M.*, the exercise is akin to the exercise of discretion by a sentencing judge in the determination of a fit sentence (para. 169; see also *Okemow*, at para. 65; *B.J.M.* (C.A.), at para. 82). Youth court judges are entitled to deference in their assessment of whether a youth sentence will hold the young person accountable pursuant to s. 72(1)(b). It may include consideration of proportionality to the gravity of the offence and the moral culpability of the offender, including their participation in the offence, the young person's needs for rehabilitation and reintegration, any previous record, the normative character of the conduct and societal values, especially when sentencing for a violent crime, and the harm caused by the young person (s. 38 *YCJA*; *I.M.*, at paras. 180-81; see generally *O. (A.)*, at paras. 42-48; *W. (M.)*, at para. 101; *R. v. McClements*, 2017 MBCA 104, 356 C.C.C. (3d) 79, at para. 47; B. Kobayashi and J. H. Michalski, "The Meaning of Accountability under Section 72(1)(b) of the Youth Criminal Justice Act" (2024), 72 *Crim. L.Q.* 373, at pp. 373-74).

(1) Social Context Evidence

[64] S.B. argues that the Court of Appeal erred in its assessment of the EPSR because the report demonstrated that his moral culpability was diminished (A.F., at

paras. 111-13). In an adult sentence application under the second prong of s. 72(1), social context evidence may indeed inform a youth court's determination of the moral responsibility of the young person for the offence to assist in its analysis of what length of sentence will hold them accountable (*I.M.*, at para. 179; see also *R. v. Hills*, 2023 SCC 2, at para. 58). This should be distinguished from the objective gravity or seriousness of the offence in a general sense, which is determined by its "normative wrongfulness" and the consequences of the conduct on the victims and society in the circumstances of a given case (*Morris*, at para. 13; see also *Hills*, at para. 58).

[65] In this case, the Court of Appeal engaged in a balancing of relevant factors, including S.B.'s personal circumstances, informed by the social context evidence. The Court of Appeal was well aware of these circumstances, which had been detailed previously in respect of the presumption. The court also observed that "[l]iving in a drug and gang-ridden community undoubtedly had an impact on the trajectory of SB's life, especially since he was exposed to such influences at a formative age" (para. 71).

[66] I recognize that the EPSR provides insight into the personal, social, and systemic forces that have shaped S.B.'s life and circumstances. However, I agree with the respondent that, in this case, the EPSR does not provide any explanation for the commission of the offence — that is, why S.B. murdered a young person he did not know, execution-style (see R.F., at para. 113; see also *Morris*, at para. 100). The report expressly declined to address the issue, stating, in a section listing the report's

limitations, that it "d[id] not give insight into . . . the dynamics that precipitated the commission of the offence" (A.R., vol. I, at p. 67).

[67] I find no reviewable error in the Court of Appeal's consideration of the EPSR when it re-sentenced S.B. I would not disturb the court's use of this evidence in coming to its conclusion that an adult sentence was necessary to hold S.B. accountable for his actions. The weighing and balancing of the relevant factors, including rehabilitation, reintegration, and protection of the public is owed deference by this Court (*Lacasse*, at para. 49; *R. v. Nasogaluak*, 2010 SCC 6, [2010] 1 S.C.R. 206, at para. 46).

(2) Post-Sentencing Conduct

[68] Finally, the appellant argues that the Court of Appeal erred by considering post-sentencing conduct on the issue of accountability, when it observed that "despite spending a significant portion of time incarcerated, SB has not demonstrated a willingness to change. Moreover, to date, he has shown little insight into the consequences of his actions" (para. 72; A.F., at para. 123). S.B. points to the text of s. 72, which, both before and after the 2012 amendments, frames the accountability inquiry in relation to the young person's "offending behaviour". He contends that the Court of Appeal was limited to considering the sentence that would have held S.B. accountable at the time of the original sentencing, in 2014, and that he should not be punished for conduct that occurred after.

[69] The Court of Appeal made no reviewable error in considering evidence of S.B.'s conduct in custody on the issue of accountability. While the appellant has argued that this is "post-sentencing conduct", I note that, when the reasons are read as a whole, it is plain that the court was referring to misconduct set out in the pre-sentence report, which it had adverted to previously (see especially paras. 67 and 72). This evidence was also before the youth court judge (sentencing reasons, at para. 21). Further, it bears recalling that the Court of Appeal dismissed the Crown's application seeking to adduce fresh evidence of S.B.'s convictions imposed after sentencing so that S.B. would not be punished for later conduct (see C.A. reasons, at para. 52).

[70] In any event, it is not an error in principle for sentencing judges to consider events occurring after an offence. In *R. v. Sipos*, 2014 SCC 47, [2014] 2 S.C.R. 423, this Court acknowledged that fresh evidence addressing events occurring between the time of sentencing and an appeal raised difficult issues, requiring courts to reconcile the potential relevance of post-sentencing events with the limits of appropriate appellate review (para. 30). Cromwell J., writing for the Court, declined to establish any "hard and fast" rules about which sorts of evidence ought to be considered in all cases, "[g]iven the almost infinite variety of circumstances that may arise" (para. 31). He confirmed that principles applicable to the admission of fresh evidence on sentence appeals, set out in *R. v. Lévesque*, 2000 SCC 47, [2000] 2 S.C.R. 487, and *R. v. Angelillo*, 2006 SCC 55, [2006] 2 S.C.R. 728, struck the right balance between the demands of justice and proper appellate review (para. 31).

[71] Although there was no dispute here on the relevance of the fresh social context evidence issue, the principles set out in *Sipos* are relevant. Section 72 *YCJA*, both before and after the amendments, requires courts to consider whether a youth sentence imposed in accordance with the purpose and principles of sentencing set out in s. 38 would be of sufficient length to hold the young person accountable. Section 38 provides that an appropriate youth sentence that would hold a young person accountable would account for the rehabilitative needs of the young person and promote their reintegration into society (see s. 38(1) and (2)(e)(ii)). Rehabilitative potential could thus very well be relevant to a youth justice court's accountability analysis (see *Chol*, at para. 54; *W. (M.)*, at paras. 137-38 and 160; *Sirois v. R.*, 2017 QCCA 558, at paras. 60-63).

[72] The evidence of S.B.'s lack of progress and consistent history of challenging, aggressive behaviour in custody was relevant to his rehabilitative potential, a factor that the Court of Appeal considered important (paras. 69 and 72-73). I also note that, in this case, concerns about the limits of appellate review are less salient because the court was sentencing afresh. Given the statutory direction to consider principles in s. 38 and the clear concerns about the protection of society raised by this case, consideration of evidence in relation to this factor was not in error. I acknowledge, as S.B. argues, that a history of being in custody from a young age may have negative consequences on a young person's behaviour, and discourage progress (A.F., at para. 126-27). But the Court of Appeal was nevertheless entitled to make findings

regarding S.B.'s rehabilitative potential and balance the relevant context with other factors. The appellant has not pointed to any basis to warrant intervention by this Court.

VI. Disposition

[73] For these reasons, I would dismiss the appeal.

The following are the reasons delivered by

CÔTÉ AND ROWE JJ. —

I. Overview

[74] In the companion appeal, *R. v. I.M.*, 2025 SCC 23, we have set out our views as to the interpretation of s. 72(1) of the *Youth Criminal Justice Act*, S.C. 2002, c. 1 ("*YCJA*"). In that appeal, as in this one, we disagree with the majority that proof beyond a reasonable doubt is the proper standard. In our view, s. 72(1) imposes an evaluative question on a sentencing judge as well as a burden of persuasion on the Crown. We rely on that analysis and apply it here.

[75] We conclude that there is no basis to disturb the Court of Appeal's re-sentencing of S.B. and its decision to impose an adult sentence. The Court of Appeal did not err in concluding that it was satisfied that the Crown had rebutted the presumption of moral blameworthiness. We agree with the majority that the Court of

Appeal also did not err in its treatment of social context evidence (paras. 64-67) or in relying on misconduct set out in the pre-sentence report (para. 69). We would dismiss the appeal.

II. Facts and Judicial History

[76] On November 17, 2010, T.B. was shot in the head twice at close range, execution style, in the stairwell of a residential complex in Toronto. The appellant, S.B., fired the gun. Two of the victim's friends, T.F. and S.H.B., were present during the killing. M.W. arrived shortly after the killing. All these individuals were 16 years old at the time.

[77] Text messages adduced at trial between S.B., M.W., and T.F. showed that the three had planned the murder. The youth court judge found that S.B. played a central role as the leader. He had instructed T.F. to keep T.B. in the stairwell until he arrived. After the shooting, the three individuals were involved in trying to cover up the murder. S.B. gave the gun to T.F. to dispose of and instructed him to delete all of their text messages. S.B. told M.W. whom to blame for the shooting in order to deflect blame. S.B. was concerned that S.H.B. could identify him as the shooter; he expressed an intention to kill S.H.B. and his mother and sister. Shortly before S.B.'s trial began, police found a handwritten threat letter in another individual's car. That letter written by S.B. gave instructions to arrange for the killing of three Crown witnesses against him.

[78] S.B. and his co-accused, M.W. and T.F., were convicted of first degree murder by the youth court judge. S.H.B. was acquitted.

[79] At the sentencing hearing for all three youths, the Crown applied under s. 64(1) of the *YCJA* for the three to be sentenced as adults. The youth court judge allowed the application and sentenced the three young men to imprisonment for life with 10 years' parole ineligibility, pursuant to s. 745.1(b) of the *Criminal Code*, R.S.C. 1985, c. C-46.

[80] S.B. appealed his sentence on the basis that the youth court judge erred in: finding that S.B. was the person who fired the gun, and in relying on this as an aggravating factor in sentencing; giving insufficient reasons for sentence; and failing to consider the presumption of diminished moral culpability that applies to young offenders before imposing an adult sentence on S.B.

[81] The Court of Appeal dismissed the sentence appeal.

III. Application

A. *Prong One: Rebutting the Presumption*

[82] Like the Court of Appeal, we are *satisfied* that the Crown has rebutted the presumption of diminished moral blameworthiness. Even viewed in light of S.B.'s difficult upbringing, we are *satisfied* that the Crown has demonstrated that the

circumstances of the offence and, in particular, the complexity of the offence demonstrate adult-like maturity and judgment.

(1) Circumstances of the Offender

[83] The appellant, S.B., was 16 years old at the time of the offence. He is a Black male of Jamaican and Trinidadian descent. He has a number of siblings and half siblings. He was brought up primarily by his mother. His mother struggled and they lived in poverty. S.B. admitted to stealing food for the home. When S.B. was 10 years old, his parents divorced.

[84] When he was 11 years old, S.B. witnessed the murder of a close cousin, who was shot at a mutual friend's funeral. This event, which S.B. attributes to gang violence, left him "severely traumatized" (A.R., vol. I, at p. 74). Other acquaintances subsequently died and he did not want to face the same fate. The family lived in community housing where S.B. was "involved in the wrong crowds" and kids were "groomed" by older, gang-affiliated members of the community (p. 76). S.B. self-reported as being impressionable, immature, and naïve. His connection with these gang-affiliates made him feel connected, noticed, protected, and safe.

[85] S.B. self-reported in the enhanced pre-sentence report ("EPSR") that he was frequently beat up by police officers and subject to "carding" (A.R., vol. I, at p. 82). His youth record is long, starting at the age of 12; it includes convictions for assault, robbery, possession for the purposes of trafficking (marijuana), failure to

comply with court orders, and murder. At the time of the EPSR report, he had been placed in six youth detention centres in Ontario.

[86] With regard to cognitive limitations or emotional or mental health issues, S.B.'s teachers reported that he displayed "immature behaviour" and was assessed to have attention deficit hyperactivity disorder and a learning disability. He briefly took medication but stopped because he did not like how it made him feel.

(2) Circumstances and Complexity of the Offence

[87] S.B. played a lead role in planning and carrying out the murder. His conduct demonstrated a lack of impulsivity and an ability to exercise adult judgment and foresight. The youth court judge noted that S.B. was "clearly the leader of this event" (2013 ONSC 3139, at para. 107).

[88] There was a coordinated plan for the day of the murder put in place by means of text messages. For instance, S.B. updated his co-accused of his location, asked one of his co-accused to let him into the housing complex, and instructed him to keep the victim in place until he arrived. One of S.B.'s co-accused lured the victim out of his apartment into a stairwell and opened a side door to facilitate S.B.'s entry into the stairwell. S.B. ensured he had a gun to carry out the killing. This conduct evidences adult-like ability to plan, as opposed to youthful impulsivity, propensity for risk-taking or on-the-spot bravado.

[89] S.B. also led the group after the commission of the offence, including efforts to avoid detection. He handed the gun to one of his co-accused and instructed all of them to delete their text messages. He also told one of the co-accused to spread rumours that individuals from a rival neighbourhood were responsible for the victim's murder.

[90] After the murder, S.B. expressed an intention to kill a witness and his family; this was followed by the discovery of a handwritten note by S.B. to another person to arrange for the killing of Crown witnesses. S.B.'s attempts to cover up the murder through complex planning demonstrate adult-like maturity and confidence in managing events post-offence, rather than youthful panic.

[91] These actions indicate adult-like judgment and critical thinking. They include coordination of two other individuals to carry out the killing according to the plan, and efforts to cover it up, both immediately after the killing and on an ongoing basis thereafter. This demonstrated a recognition that what they had done would be seen as morally blameworthy.

(3) Conduct After the Offence

[92] As noted, following the shooting, S.B. led efforts to cover up the crime and silence possible witnesses. This does not accord with taking responsibility or demonstrating remorse.

[93] With respect to remorse, the writer of the EPSR found S.B. to be reflective and expressive of "some degree of remorse" for the victim, analogizing him to his cousin who had been shot when S.B. was 11 years old (A.R., vol. I, at p. 83).

(4) Discussion

[94] S.B.'s upbringing was deprived and difficult. His background provides context for the bad choices he made in his youth.

[95] That noted, S.B. committed a murder based on his complex, pre-meditated plan, involving two others. The efforts to cover it up, in addition to the efforts to deflect blame, also show a degree of maturity and reasoned thinking.

[96] We agree with the Court of Appeal that the Crown has rebutted the presumption of diminished moral blameworthiness.

B. *Prong Two: Accountability Analysis*

[97] Having found that the Crown rebutted the presumption, the analysis shifts to the second prong: Would a youth sentence be of sufficient length to hold the young person accountable for his offending behaviour?

[98] S.B. was sentenced as an adult to life imprisonment with a 10-year period of parole ineligibility. A youth sentence would be at maximum 10 years, 6 years of which are in custody.

[99] It is appropriate to consider the seriousness of the offence at this stage. S.B. and his co-accused lured a 16-year-old into a stairwell and shot him execution style. He instructed his co-accused before and after the murder. He took many steps to cover up his involvement in the murder and suggested killing the only eyewitness and his family. He demonstrated foresight and a strong understanding of the consequences by using two different cell phones to communicate with his co-accused, telling one co-accused to lure the victim into the stairwell where there were no closed circuit cameras, and directing the co-accused to delete their messages and cast the blame on others.

[100] To achieve accountability, the sentence "must be long enough" to reflect the seriousness of the offence and the offender's role in it (*R. v. Okemow*, 2017 MBCA 59, 353 C.C.C. (3d) 141, at para. 66, quoting *R. v. O. (A.)*, 2007 ONCA 144, 218 C.C.C. (3d) 409, at para. 50, quoting *R. v. Ferriman*, 2006 CanLII 33472 (Ont. S.C.J.); see also *R. v. McClements*, 2017 MBCA 104, 356 C.C.C. (3d) 79, at paras. 47-48). S.B. was central to planning and carrying out the killing; he also took the lead in attempts to conceal it, including contemplating the murder of witnesses. He was the central player in an offence with high moral blameworthiness, one in which he displayed adult-like judgment. This calls for a high level of accountability.

[101] Section 38(1) of the *YCJA* requires consideration of a young person's prospects for rehabilitation and reintegration, which would include taking note of the offender's attitude towards rehabilitation and history with rehabilitative programs. While he has completed educational programs while incarcerated, this has been limited and there is little evidence of remorse or rehabilitative potential.

[102] To hold S.B. accountable, a longer period of incarceration is required notwithstanding his difficult upbringing and his age. The sentence determined by the sentencing judge, and upheld by the Court of Appeal, was not imposed in error.

IV. Conclusion

[103] We would dismiss the appeal and affirm the sentence for S.B.

Appeal dismissed.

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