NOVA SCOTIA COURT OF APPEAL
Citation: *R. v. Murphy*, 2015 NSCA 14

Date: 20150205
Docket: CAC 422769
Registry: Halifax

Between:

Jonathon David-James Murphy

Appellant

v.

Her Majesty the Queen

Respondent

Judges:	Saunders, Farrar and Scanlan, JJ.A.
Appeal Heard:	December 4, 2014, in Halifax, Nova Scotia
Held:	Appeal allowed per reasons for judgment of Farrar, J.A.; Saunders, J.A. concurring; Scanlan, J.A. dissenting.
Counsel:	Roger A. Burrill, for the appellant Kenneth W.F. Fiske, Q.C. and Melanie Perry, for the respondent

Reasons for judgment:

Introduction

[1] This is an appeal from sentence. After 14½ months custody on remand, the appellant was sentenced by Nova Scotia Supreme Court Justice Felix A. Cacchione to a term of imprisonment of eight years and six months for his role in a home invasion break and enter on January 25th, 2013. Mr. Murphy appeals from sentence arguing the sentencing judge erred in failing to give him credit for remand time and in failing to address the principle of totality in sentencing him.

[2] For the reasons that follow I would allow the appeal and reduce the overall sentence of eight years and six months by 441 days, the time spent on remand.

Background

[3] The appellant, in his factum, provides a helpful summary of Mr. Murphy's convictions and sentences:

Count in the Indictment	Offence	Sentence
Count 3	s. 348(1)(a)	four (4) years' imprisonment
Count 5	s. 88	six (6) months' consecutive
Count 6	s. 90(2)	six (6) months' consecutive
Count 7	s. 92(1)	six (6) months' concurrent
Count 8	s. 95(2)	three (3) years' consecutive
Count 18	s. 117.01(firearm)	six (6) months' consecutive
Count 19	s. 117.01 (ammunition)	six (6) months' concurrent
TOTAL:		eight (8) years, six (6) months.

[4] The appellant committed the offences with his co-accused, Justin Cole. Mr. Cole received a sentence of eleven and-a-half (11.5) years for his participation in the crimes.

[5] The facts as found by the sentencing judge are as follows:

> [10] The offences arose from two separate incidents which occurred approximately one hour apart on the evening of January 25th, 2013. Earlier that day Cole had been in contact with the victim, Mr. Willner who was a drug dealer, regarding the purchase of a large quantity of marijuana. The deal did not go ahead because Cole had not produced the money for the drugs. The drugs were not kept at Willner's residence. Willner was exercising access rights to his young son when both accused arrived at his home. Cole wanted Willner's assistance in a drug ripoff. Willner refused and an argument ensued between he and Cole. In the presence of Willner's young son, Cole produced a 9mm pistol and fired a shot which penetrated the ceiling.
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> [11] The accused left the residence and Willner contacted his live in girlfriend, Cole's sister Kelly, at work and she returned to their apartment. Willner told her in private what had happened in the presence of his son.
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> [12] A short time after Ms. Cole's arrival the apartment door was forced open breaking the interior door frame. Both accused ordered Ms. Cole to leave the apartment with the child and the dog. The accused Cole told his sister that she would be needing a new boyfriend. Murphy repeatedly told her to take the child and leave. As she was preparing to leave Willner tried to put his shoes on saying that he was going with his son. Murphy grabbed him and pulled him back. Cole then called to Murphy by his given name at which time Murphy pulled out a loaded 45 calibre semi-automatic pistol.
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> [13] Ms. Cole left the apartment and the police were called. Upon their arrival the accused were still in the apartment. They hid in the bathroom. They were arrested as they tried to leave the apartment.
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> [14] The police found the firearm, a 45 caliber Colt semi-automatic pistol, in a laundry hamper in the bathroom. Cole was obviously under the influence of alcohol and/or drugs that evening. This was noticed by both the police officers who dealt with him and his sister.

[6] The sentencing judge described the appellant's connection to this offence as "more of a backup follower" to Mr. Cole: "… I am satisfied that Murphy was not the instigator of these offences and his participation was secondary to that of Cole" (¶37 and 51).

[7] The sentencing judge described the circumstances of the offender and the aggravating/mitigating circumstances of the case as follows:

> [15] Both Cole and Murphy have extensive records including offences of break and enter and offences of violence. Cole at age 24 has a record of nine prior convictions as an adult and 20 convictions as a young offender. His young offender record began when he was 13 years old.
>
> [16] Murphy at age 27 has a record of 28 prior convictions as an adult and one conviction for mischief as a youth. His sole conviction as a young offender was at age 16. His adult record began when he was 19. His criminality had continued unabated except for periods of incarceration.
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> [17] The aggravating factors in this case are: that an occupied residence was broken into; a firearm was discharged; it was discharged in the presence of a child, and the accused, knowing that there was a child in the residence who had become visibly upset by the discharge of a firearm, returned to the apartment a second time again in possession of a firearm.
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> [18] There are no mitigating factors in the present case.
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> [19] Both accused, by their actions, showed a total disregard for the life and safety of others. Their prior criminal convictions show that they have used weapons in prior assaultive behavior. The circumstances leading to the convictions in this case demonstrate that both had access to and were prepared to use firearms in pursuing their goal. Each has shown an unwillingness to abide by court orders.

[8] Defence counsel in the court below requested "enhanced credit" for the remand time served by the appellant. Submissions by both counsel at the sentence hearing confirmed that the appellant was applying for enhanced credit on the 1.5:1 ratio as contemplated by the **Truth in Sentencing Act**, S.C. 2009, c. 29, amendments which came into effect on February 22, 2010, and as particularized in ss. 719(3), (3.1), (3.2) and (3.3) of the **Criminal Code of Canada**, R.S.C. 1985, c. C-46, as amended.

[9] I will address counsels' submissions on enhanced credit in more detail when considering the first ground of appeal.

[10] The sentencing judge canvassed the principles of sentencing in his reasons. He outlined the positions of counsel and, on the issue of enhanced credit, indicated that there was "no merit in this submission for enhanced credit" (¶23).

[11] At the conclusion of his reasons, in the very last paragraph, the sentencing judge stated: "This is all on a go forward basis. No enhanced credit".

[12] Crown counsel inquired:

> **MS. PERRY:** Just wondering about the issue of remand. I'm assuming - does the credit for remand come off the numbers that you've given us?

[13] The sentencing judge replied:

> **THE COURT:** It's on a go-forward basis.
> **MS. PERRY:** Thank you, My Lord.
> **MR. MURPHY:** I get no credit for…
> **THE COURT:** No enhanced credit.

[14] The Warrant of Committal does not contain a notation respecting remand credits.

Issues

Issue #1 **Did the sentencing judge err by failing to credit the appellant with approximately 14½ months for time served in pre-sentence custody?**

Issue #2 **Did the sentencing judge fail to apply the proper methodology for assessing the totality principle in accordance with the directive in R. v. Adams**, 2010 NSCA 42?

Standard of Review

[15] The standard of review on a sentencing appeal is well-known and is not in dispute here. It is a deferential one. Absent an error in principle, failure to consider a relevant factor or an over-emphasis of appropriate factors as a sentence should only be varied if this Court is convinced it is demonstrably unfit (**R. v. Knockwood**, 2009 NSCA 98, ¶22).

Issue #1 Did the sentencing judge err by failing to credit the appellant with approximately 14½ months for time served in pre-sentence custody?

[16] The appellant and respondent do not differ on the law relating to credit for remand time – where they differ is whether the sentencing judge gave credit for the time spent on remand. The appellant says the sentencing judge failed to take into account the remand time and that the failure was an error in principle which would allow us to intervene.

[17] The Crown does not disagree that it would be an error in principle to fail to take into consideration the remand time in formulating a sentence, however, it says that the sentencing judge did, in fact, take the remand time into account in arriving at the overall sentence.

[18] I am not satisfied that the sentencing judge took the time spent on remand into account. I will explain why.

[19] Section 719(3) of the **Criminal Code** provides:

> (3) In determining the sentence to be imposed on a person convicted of an offence, a court may take into account any time spent in custody by the person as a result of the offence but the court shall limit any credit for that time to a maximum of one day for each day spent in custody.
>
> (3.1) Despite subsection (3), if the circumstances justify it, the maximum is one and one-half days for each day spent in custody unless the reason for detaining the person in custody was stated in the record under subsection 515(9.1) or the person was detained in custody under subsection 524(4) or (8).
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> (3.2) The court shall give reasons for any credit granted and shall cause those reasons to be stated in the record.
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> (3.3) The court shall cause to be stated in the record and on the warrant of committal the offence, the amount of time spent in custody, the term of imprisonment that would have been imposed before any credit was granted, the amount of time credited, if any, and the sentence imposed.
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> (3.4) Failure to comply with subsection (3.2) or (3.3) does not affect the validity of the sentence imposed by the court. [Emphasis added]

[20] A sentencing judge is required as a matter of law to give reasons for any remand credit granted and those reasons are to be stated on the record.

[21] There is no issue in this case that if the sentencing judge gave remand credit, there are no reasons in the record relating to that credit.

[22] Further, as noted earlier, there is no notation on the Warrant of Committal about the credit which was granted. Again, this is clearly a failure to comply with s. 719(3.3).

[23] Section 719(3.4) directs that the failure to comply with s.s. (3.2) or (3.3) does not affect the validity of this sentence.

[24] What, then, is the effect of the failure to comply with s.s. (3.2) and (3.3) in light of s.s. (3.4)?

[25] The answer lies in statutory interpretation. In my view, the interpretation is straightforward. It is an error in principle for the trial judge to fail to comply with s. 719(3.2) and (3.3). Such an error will allow an appellate court to intervene and determine the appropriate remand credit. However, we are not to interfere with the overall sentence imposed by the sentencing judge. Our authority is limited to properly adjusting the credit for time spent on remand.

[26] The principles of statutory interpretation are well-known. The starting point for statutory interpretation is the "modern rule" which was discussed, in detail, by Beveridge, J.A. in **R. v. Carvery**, 2012 NSCA 107 where he held:

> [37] The Supreme Court of Canada has given clear direction that the starting point for statutory interpretation is the "modern rule" espoused by Professor Driedger. Iacobucci J., for the court in *Re Rizzo & Rizzo Shoes Ltd.*, [1998] 1 S.C.R. 27 wrote:
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> > 21 Although much has been written about the interpretation of legislation (see, e.g., Ruth Sullivan, *Statutory Interpretation* (1997); Ruth Sullivan, *Driedger on the Construction of Statutes* (3rd ed. 1994) (hereinafter "*Construction of Statutes*"); Pierre-André Côté, *The Interpretation of Legislation in Canada* (2nd ed. 1991)), Elmer Driedger in *Construction of Statutes* (2nd ed. 1983) best encapsulates the approach upon which I prefer to rely. He recognizes that statutory interpretation cannot be founded on the wording of the legislation alone. At p. 87 he states:

> Today there is only one principle or approach, namely, the words of an Act are to be read in their entire context and in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act, and the intention of Parliament.
>
> Recent cases which have cited the above passage with approval include: *R. v. Hydro-Québec*, [1997] 3 S.C.R. 213; *Royal Bank of Canada v. Sparrow Electric Corp.*, [1997] 1 S.C.R. 411; *Verdun v. Toronto-Dominion Bank*, [1996] 3 S.C.R. 550; *Friesen v. Canada*, [1995] 3 S.C.R. 103.

[27] For federal enactments like the **Criminal Code**, the **Interpretation Act**, R.S.C. 1985, c. I-21, in s. 11 directs that "shall" is to be construed as imperative and "may" as permissive.

[28] Reading s. 719 as a whole, the structure of the section is to both limit the sentencing judge's discretion to award remand credit and to provide transparency for the thought process behind any decision to award credit. The purpose of s.s. (3.2) and (3.3) is to require a sentencing judge to disclose the amount of remand credit given and the reasons for that award.

[29] This interpretation preserves the utility of ss. (3.2) and (3.3). It allows the reviewing court to re-evaluate the remand credit, while upholding the sentencing judge's actual sentence and the deference that is owed to it.

[30] This interpretation was adopted by the Manitoba Court of Appeal in **R. v. Stonefish**, 2012 MBCA 116:

> 95 The *Act* specifies that the judge must give reasons for any credit given, whether that credit is less than 1:1, 1:1 or enhanced credit. The Crown has argued that the judge in this case did not give sufficient reasons.
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> 96 As Chartier J.A. recently noted in the case of *R. v. Oddleifson (J.N.)*, 2010 MBCA 44, 255 Man.R. (2d) 68, leave to appeal to S.C.C. denied, [2010] S.C.C.A. No. 244 (QL) (at para. 30):
>
> > The standard of review with respect to the insufficiency of reasons is the standard of adequacy. Reasons will not be inadequate if, when read in their entire context, they fulfil the threefold purpose of informing the parties of the basis of the verdict, providing public accountability and permitting meaningful appeal (see *R. v. R.E.M.*, [2008] 3 S.C.R. 3; 380 N.R. 47; 260 B.C.A.C. 40; 439 W.A.C. 40; 2008 SCC 51).

> 97 The Quebec Court of Appeal case of *R. c. Chicoine*, 2012 QCCA 1621 (QL), involved offences committed both before and after the coming into force of the amendments. While the court concluded that the sentence was not unfit and did not warrant its intervention, it also noted that the sentencing judge failed to provide reasons for using the 1.5:1 ratio instead of 1:1, contrary to s. 719(3.2) of the Code. Consequently, the trial judge committed an error in principle. While the Quebec Court of Appeal acknowledged that, pursuant to s. 719(3.4) of the Code, the failure to comply with this obligation does not affect the validity of the sentence imposed, since there were no reasons given for the enhanced credit, the appeal court owed no deference to the sentencing judge's decision with respect to PSC credit.
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> 98 Thus, in the result, the Court of Appeal only credited the accused for PSC using the ratio of 1:1. This would appear to be due to the fact that there was no evidence of circumstances justifying the use of any higher ratio (i.e., the defence failed to discharge its evidentiary burden).
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> 99 I do not believe the reasons given by the sentencing judge in this case were adequate. She indicated that issues of fairness required the enhanced credit. The accused argues that the issues of fairness include, besides the loss of statutory remission, the other mitigating factors mentioned by the sentencing judge, which include that the accused was not actually in the process of selling drugs when he was arrested, that no evidence was led as to the level of drug trafficking involvement by the accused and that he was still a youthful and aboriginal offender. However, these issues relate to the nature and length of his sentence, not to the question of PSC credit, which credit is given after the fit and appropriate sentence has been determined (see *R. v. Irvine (C.W.)*, 2008 MBCA 34 at para. 27, 225 Man.R. (2d) 281). With respect to the reasons for granting enhanced credit, other than the loss of remission, it is not clear what issues of fairness the sentencing judge relied upon to come to her decision.
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> 100 Similar to the Quebec Court of Appeal in *Chicoine*, while the inadequacy of reasons for giving enhanced credit does not invalidate the sentence, the error in principle means that this court owes no deference to the sentencing judge's decision to award enhanced credit. [Emphasis added]

[31] Although **Stonefish** and the Quebec Court of Appeal in **R.v. Chicoine**, 2012 QCCA 1621 are addressing a situation where a sentencing judge awarded enhanced remand time, the principles are equally applicable where 1:1 credit has been given for remand: it would be an error in principle to fail to provide reasons for any credit given.

[32] The failure of the sentencing judge to comply with s. 719(3) leads to three possible conclusions: the first two are that the sentencing judge did not turn his mind to the remand credit to be given; or, he turned his mind to remand credit and determined that none would be given. Either would be an error in principle which would allow us to intervene.

[33] The third possibility, one that the Crown suggests occurred here, is that the sentencing judge gave 1:1 remand credit and, although he failed to comply with s. 719, the error is of no consequence. Put another way, even if the sentencing judge committed an error of principle for failing to provide reasons for granting remand time, we can infer that he took the remand time into account in the overall sentence. As a result, the error would not result in the change in the sentence.

[34] The circumstances of the sentencing hearing militates against the Crown's argument. Enhanced credit for time on remand was, clearly, a live issue before the sentencing judge.

[35] At the outset of the sentencing proceedings on April 1, 2014, mention of "enhanced" credit is made. The Crown says:

> …it becomes relevant because Mr. Murphy is seeking enhanced remand credit for the time that he spent in custody over the past 14 months. As a result of that, I had indicated to the court and to my friends that I was going to be seeking records from Central Nova, and as well we were going to be seeking the Capital Health records.

[36] After introducing evidence relating to Mr. Murphy's time in custody, the Crown made its submissions on the issue of "enhanced credit" and the relevant case law. The representations were clearly directed towards preventing the provision of an enhanced 1.5:1 credit ratio in s. 719(3.1):

> So as a result of the above, My Lord, the Crown would submit that, although the current state of the law in Nova Scotia is that there do not have to be exceptional circumstances in order to get enhanced credit for remand, the Crown would argue that the default position for credit for remand is one to one unless the accused can convince you on a balance of probabilities that he should get more than that. Quite frankly, since Mr. Murphy has been in custody, he's committed – continued to commit offences making him responsible for his own conditions while he was in jail. And I would submit that he's not entitled to more than a one to one credit.

[37] Defence counsel, in his submissions, argued:

> …Primarily, the primary reason that we're seeking enhanced remand credit is for the particular injuries that were received by Mr. Murphy and the pain and suffering that he has sustained as a result of those injuries. …

[38] In concluding his argument, defence counsel re-iterated his request for enhanced credit when making his recommendation on sentence:

> … And in light of all of the circumstances, we would ask for a global sentence of five to seven years less remand credit, and that remand credit to be calculated at one point five to one.

[39] The sentencing judge agreed with the Crown saying:

> [23] There is no merit in this submission for enhanced credit. Murphy greatly exaggerated his injuries. For example, he told the author of the presentence report that he suffered a broken arm and fractures of both arms as well as a shattered jaw which required metal plates and screws to mend.

[40] The sentencing judge concluded:

> [54] This is all on a go forward basis. No enhanced credit.

[41] The sentencing judge said nothing about the issue of 1:1 credit.

[42] I am unable to conclude the sentencing judge took remand time into account in formulating the sentence. The evidence and exchange set out above, together with a careful reading of his reasons, as a whole, suggests the opposite. I will explain further.

[43] The sentencing judge goes through each of the counts on which Mr. Murphy was convicted and sets out the sentence for each offence in, what I will call, round numbers. For example, on the charge of break and enter he was given three years in prison; on the possession of a loaded firearm he was given three years in prison. The sentencing judge looked at the various offences and determined whether or not the sentences would be consecutive or concurrent. At no time did he reduce any sentence imposed by him by the amount of time spent on remand.

[44] The New Brunswick Court of Appeal in **R. v. Doiran**, 2005 NBCA 30 reduced a sentence because a sentencing decision did not mention remand time. In doing so the Court synthesized three principles from the case law which I will summarize:

1. Section 719(3) allows a sentencing court to take pre-sentence custody into account in determining the appropriate sentence. But it does not obligate the court to give credit for time served. However, disallowance of remand time cannot be capricious. The Court's reasons must provide a principled justification if credit for pre-sentence custody is refused.
2. The amount of credit is left to the discretion of the sentencing judge.
3. The pre-sentence custody is deemed part of the punishment ultimately imposed on the convicted person (¶22).

[45] Although the second principle – the discretion of the sentencing judge – is now limited by the amendments to s. 719(3), the other two principles remain apposite.

[46] The British Columbia Court of Appeal provided a helpful framework for how a trial judge should articulate consideration of remand credit in **R. v. Orr**, 2008 BCCA 76:

> 21 However, a credit can be afforded by a sentencing court by different methodologies. A sentencing judge may take account of such custody at an appropriate ratio and then impose a specified term of incarceration for an offence or offences, or the judge may indicate that X is the appropriate temporal sentence and then deduct therefrom the time to be credited to arrive at the actual custodial sentence imposed. An example of the former approach is afforded by the case of *R. v. Chiasson*, 2005 NBCA 78, 200 C.C.C. (3d) 423. The appellant there had been sentenced to five years for an aggravated assault on a female neighbour. He sought to appeal the sentence on the basis that the judge had failed to give him credit for five and one-half months spent in custody in remand prior to sentence. The New Brunswick Court of Appeal sought and obtained a report from the trial judge who stated she had considered this factor in the sentence she imposed. The practice of obtaining such a report has not been a favoured practice in this Court in recent times. Having received this further information, the New Brunswick Court of Appeal was satisfied that the sentencing judge had appropriately taken

> account of the pre-sentence custody in arriving at what the appellate court found to be a fit sentence. The sentence appeal was therefore dismissed.
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> 22 While what occurred in that case is not a perfect example of what ought to occur because of a lack of clarity, it is an example of one way to approach sentencing, namely a consideration by a judge of the pre-sentence custody period before pronouncing the actual custodial sentence. I venture to suggest it may be preferable to do it in the other fashion I advert to supra, namely stipulate what is considered a fit sentence and then deduct the appropriate amount to be credited on account of pre-sentence custody. The ideal for a sentencing court is to afford clarity and transparency in the process so that it is clear what credit is being given on account of the earlier custody. Such a practice avoids the type of problem encountered on appeal in Chiasson and provides clarity in any subsequent appellate review of the sentence imposed by the court at first instance. [Emphasis added]

[47] In this case, the only finding made by the sentencing judge was that there would be no enhanced credit. At no time did he provide reasons for how he accounted for remand time, either by indicating he was taking it into account when determining a fit sentence or by first arriving at the fit sentence and then deducting remand time. The only reasonable conclusion from the manner in which the sentencing hearing was conducted, the failure to give reasons on remand time and the way in which the sentencing judge formulated the overall sentence, is that he failed to take remand time into account in formulating the sentence. In the end result, he failed to give Mr. Murphy any credit at all for the time he spent on remand. His failure is an error in principle.

[48] I would allow this ground of appeal and reduce the sentence of eight years and six months currently being served by 441 days of remand time from January 25, 2013 to April 10, 2014.

Issue #2 The sentencing judge failed to apply the proper methodology for assessing the totality principle in accordance with the directive in R. v. Adams, 2010 NSCA 42.

[49] Appellate counsel candidly acknowledged that this ground of appeal was a bit of a "Hail Mary". He explained it this way. The sentence of 8½ years would not be manifestly unfit if remand credit were applied to that sentence. However, if the sentence were actually 8½ years plus the 14½ months spent on remand, the

total sentence would be approximately 10 years. If that were the end result, the application of the totality principle would have reduced the sentence.

[50] However, appellant's counsel also acknowledged that if on appeal, we were to give credit for remand time, this issue would become somewhat moot.

[51] Although the issue is somewhat moot as a result of my decision on the first ground of appeal, nevertheless, I am satisfied the sentencing judge properly applied the totality principle. The sentencing judge fixed a sentence for each of the six offences and determined which would be served consecutively and which would be served concurrently. He was well aware of the totality principle when sentencing the appellant. In the course of his decision, he said:

> [36] … Given the number of convictions entered, the totality principle must be considered in the sentencing.

[52] I would dismiss this ground of appeal.

[53] Before concluding these reasons, I wish to make a suggestion to aid sentencing judges and counsel, faced with difficult sentencing hearings, in busy courts, every day. Confusion often arises in sentencing decisions when, in an effort to be helpful, judges use terms like "general", "global", " "remaining", "net", or "on a go forward basis" when describing the sentence they have imposed.

[54] In future, to avoid uncertainty and allow meaningful review on appeal, it may be preferable for the sentencing judge to outline the individual sentences imposed on each of the counts for which an accused has been convicted and arrive at a total actual sentence and then credit the accused with the time spent on remand leaving an effective custodial sentence.

[55] In making this suggestion I have deliberately not referenced other sentencing principles such as totality which might cause a sentencing judge to explain a further reduction on that basis if warranted.

[56] While I am not in any way proposing a rigid formula for expressing a sentence, it is hoped that this suggestion will provide some guidance and assistance to busy judges on sentencing.

Conclusion

[57] I would allow the appeal and reduce the sentence by 441 days.

Farrar, J.A.

Concurred in:

Saunders, J.A.

Dissenting Reasons for judgment: (Scanlan, J.A.)

[58] I have the benefit of having reviewed the decision of my colleague. For the reasons set out below I disagree with his conclusion that the sentencing judge did not give credit for presentence custody and the consequent reduction of the sentence by 441days.

[59] The background of this case and circumstances of the offender are sufficiently canvassed in ¶2 through 6 of my colleague's decision. The facts and circumstances of the case are very serious. Offences involving the possession and use of firearms in a home invasion styled break and enter, especially when the offences occur in the presence of young children, are cases that warrant harsh sanction.

Issues:

1. Did the sentencing judge fail to give the appellant credit for the time he spent in pre-trial custody?
2. Should the overall sentence be reduced by 441 days?

Standard of Review

[60] I accept the standard of review is as set out by my colleague at ¶14 above.

Analysis

[61] I will first consider the issue of whether the sentencing judge did give credit for the time the appellant spent in custody prior to sentencing. Counsel for both the Crown and defence put the issue of presentence custody squarely before the sentencing judge. In order to fully appreciate the comments of the sentencing judge on the issue of presentence custody, a more detailed review of counsels' submissions to him are necessary. Crown counsel urged the sentencing judge to sentence the appellant to "a period of custody for the go-forward term of nine years." To explain to the sentencing judge the Crown's position she then proceeded to specifically reference the offences and the sentences that she was urging the court to adopt. To fully appreciate Crown submissions in that regard it is best to

refer to her comments on how it is that the Crown arrived at the nine year term on a go-forward basis.

> … I've divided it out as follows. On the 348(1)(a) term of custody for 108 months. Looking for on the 88(1) 12 months concurrent. Looking for 24 months concurrent on the section 90 conviction. My Lord, you'll note … Mr. Murphy actually has a prior section 90 which is why we're looking for more time, although it's concurrent in any event. We are seeking 12 months concurrent on the 92(1), 36 months concurrent plus we are looking for a DNA order and a section 109 order life on the 95. With respect to the 117.01, with respect to the firearm, we're looking for time served. He's done about 14 months. And 14 months concurrent on the 117.01, which is a go-forward sentence of nine years. …

[62] Crown counsel also discussed the issue of pretrial custody and whether there should be enhanced credit, referencing both s. 719 of the **Code** and **R. v. Carvery**, 2012 NSCA 107 as referred to by my colleague. I am satisfied that in order to fully understand the subsequent comments of the sentencing judge reference should be made to the entirety of the Crown's submission at the sentencing hearing on that point:

> Now, as you know, the – Mr. Murphy is seeking enhanced credit for remand. I'm not exactly positive what the argument for enhanced credit will be, but I can take a guess based on case law. As I'm sure you're aware, in Canada there appears to be sort of two separate schools of thought with respect to enhanced credit for remand. One line of thought says in order to get it you have to show that there have been exceptional circumstances to warrant it, and the other line of thought is that the offender doesn't need exceptional circumstances, the circumstances just have to justify it.
>
> As you know in Nova Scotia we're governed by the Nova Scotia Court of Appeal case in *R. v. Carvery* that holds that there do not have to be exceptional circumstances. Circumstances may justify enhanced credit – circumstances justifying enhanced credit could include lost parole or remission credit despite commonality.
>
> I have submitted the *Carvery* case to you and as well I've submitted two other cases, the first is *R. v. Summers*, and that's from the Ontario Court of Appeal. That court held that trial judges have a broad discretion under 719 to provide enhanced credit based on circumstances and that those circumstances are not required to be exceptional. The court also held that valid justifications for enhanced credit can include, number one, lost parole or remission credit, although

the offender has to provide information that the credit would have been possible and that that may alone suffice, but it doesn't guarantee it. Number two, lack of programming, but if there wasn't any willingness to participate in programming, again, that's not relevant. And, three, onerous conditions while in the jail could qualify someone for enhanced credit.

The second case, *R. v. Stonefish*, is out of the Manitoba Court of Appeal. The court held that circumstances justifying enhanced credit don't need to be exceptional, but they do need to be individual to the accused. The accused bears the burden of establishing on a balance of probabilities to demonstrate circumstances justifying enhanced credit. The Crown bears the burden if seeking less than one for one credit. The court also held that lost parole and remission credit may suffice if the offender brings evidence that he would have – that he would have probably received credit. And if the offender causes unnecessary delay, like by discharging counsel, not cooperating with the presentence report or refusing treatment programs, then they may not receive enhanced credit. And finally the court held that mitigating factors in the case go to sentence duration, not enhancement.

So with Mr. Murphy's case and, of course, guessing as to what the enhanced credit argument may be, I would suspect that defence is going to be really hanging its hat on two arguments. Number one, that Mr. Murphy would have been earning early parole and remission credit during the time that he has been in and under sentence and, therefore, he should get enhanced credit. And, number two, the conditions when he was in the facility were onerous such that he should get enhanced remand credit.

So, My Lord, the problem with those two arguments are this. Since his incarceration on January 26th of 2013 there have been 21 documented incidents involving Mr. Murphy that caused Correctional staff to discipline him. I'm going to go through those incidents and, as I indicated previously, the information was forwarded to Mr. Tan a couple of weeks ago. So these incidents are as follows.

On January 27th, 2013, just one day after Murphy entered into the facility, Mr. Murphy was seen accepting a shower brush from another inmate as it was passed under the door of his cell. The shower brush was then snapped off. According to Tracy Dominix, a deputy superintendent at the facility, inmates seem to like to use broken shower brushes as weapons. Mr. Murphy denied but then apologized for breaking the brush and as punishment Mr. Murphy was confined to his cell, which is essentially segregation, for a period of five days.

The second incident occurred February 7th of 2013. Central Nova staff were conducting a search of Mr. Murphy and Mr. Cole's cell. Apparently they were being housed together at the time. Initially Mr. Murphy refused to leave the cell for the cell check, so guards had to escort him to a table in the day room. Directly

after that the guards found a shank underneath the table where Mr. Murphy was sitting. In the search of his cell they found two additional shanks as well as a large piece of metal in the light fixture. As punishment, Mr. Murphy was segregated in his cell for a period of 30 days.

The third incident, on March 9th of 2013 Central Nova staff again searched Mr. Murphy's cell. They found a broken pair of nail clippers along with another homemade shank. Mr. Murphy stated he had the weapons for protection. Mr. Murphy received 15 days confined to his cell.

On March 23rd, 2013, Mr. Murphy was locked down in his cell after he was found pressing the intercom button in the day room. So essentially the rest of the day confined to his cell.

On March 29th, 2013, about 9:57 p.m., officers told Mr. Murphy that he had to hang up the phone and confine himself to his cell. After refusing the order several times, the guards finally ended the call and at that point Mr. Murphy began hitting the phone base with the receiver. He was taken to the ground and handcuffed. He was confined to his cell for a period of seven days.

So, as I mentioned, My Lord, that was at 9:57 p.m. Then the same day at about 10:40 p.m. Mr. Murphy managed to get out of his cell when the doors were locked. He entered into the day room. He grabbed the garbage bin and he began swinging the garbage bag around. When officers came to lock him down, they found him trying to use the phone.

Incident number seven happened five minutes later at 10:45 p.m. when Mr. Murphy was found inside his cell manipulating the locking mechanism on the cell door. It was the second time that he managed to get out into the day room after being locked down, and as a result of that incident he received eight days confined to his cell.

On April 22nd of 2013 Central Nova staff were again searching Mr. Murphy's cell when they discovered that a corner piece of the cell light was missing. The piece of light was subsequently found in another inmate's laundry. The inmate told the staff that Mr. Murphy had given him the piece of light and told him to hide it. The offender said he didn't want to but he was afraid of Mr. Murphy. Mr. Murphy received 10 days confined to his cell.

On May 3rd of 2013 staff members witnessed Mr. Murphy smashing the phone receiver on the base of the telephone breaking it. Mr. Murphy stated that he was very upset and he slammed the phone down. He was confined to his cell for 10 days.

May 19th of 2013, Mr. Murphy began swinging and smashing the phone with a broom. And he ended up breaking both the broom and then he broke the mop by smashing them into the walls of the day room. He was ordered to lock

down, but he refused to do so and he also refused to give up the broken pieces of the broom. Two of the Central Nova captains arrived and managed to talk Mr. Murphy into dropping the broom and locking himself up. As a punishment he was served - - he served eight days in segregation, confined to his cell.

A few days later on May 24th, 2013, there had been a changeover in Mr. Murphy's unit and he was instructed by the guard to lock himself in. Mr. Murphy refused. He said that he hadn't had his hour out yet and he was going to shower. The guard indicates that he had been out for over an hour, so she told him again to lock himself in. When he refused to comply, he called her a fucking idiot and a bitch and extra staff had to be called in. Mr. Murphy received additional confinement to his cell of five days.

Then two days later on May 26th of 2013 they were searching Mr. Murphy's cell again when they found that the mirror had been tampered with causing it to be loose from the wall and that the screws were covered with toilet paper. They also found that a razor blade was missing. They found a razor that was missing its blade. Mr. Murphy received cell confinement of seven days.

On June 12th, 2013, while searching Mr. Murphy's cell, staff found a pill as well as a match and a damaged inmate identification band. Mr. Murphy was confined to cell - - to his cell for six days as a result of the contraband.

On July 29th of 2013 Mr. Murphy attempted to escape from the Central Nova Facility by throwing a basketball against the ceiling wire and then attempting to attach a homemade ladder to the ceiling to escape. As a result of the escape attempt he was given segregation, confined to his cell for 30 days.

July 30th of 2013, Mr. Murphy was given another 10 days of cell confinement after he was fighting with staff who were trying to conduct a search. The notes in Mr. Murphy's file indicate that his behaviour since being in the Correctional Facility was poor and his risk level was increasing.

September 9th, 2013, Mr. Murphy was given six days of cell confinement for receiving something from an offender through the door which separated him from the airing court. When they conducted a strip search of him, they found a pill.

Then on September 25th of 2013 Mr. Murphy was given confinement to cell of 10 days because, when they searched his cell this time, they found that his light had been tampered with. The left side of the light had been taken out and had been put back with toilet paper to hold it in place. Also the faucet was tampered with and held in place with a pencil.

October 2nd of 2013, Mr. Murphy covered the camera in his cell and refused to uncover it when directed to. An intervention team had to respond to the cell in

order for him to comply with staff direction. Mr. Murphy was confined to his cell for three days.

On November 16th of 2013 Mr. Murphy was seen on video making an unauthorized entry into another offender's cell. That cell was being occupied at the time by Travis Jackson who was beaten in his cell at that time. The video did not show the assault, and while Mr. Murphy would have been present, the staff weren't able to determine if he was the one who committed the assault or if the other inmate in the cell - - there was another inmate in the cell with Mr. Jackson as well, if he was the one who beat Mr. Jackson. Mr. Murphy received eight days confined to his cell for being in Mr. Jackson's cell when he should not have been.

November 28th, 2013, Central Nova staff took some of Mr. Murphy's personal effects and they put it through the x-ray scanner and they found a razor blade. He was given eight days of cell confinement. That was the 20th incident.

THE COURT: Sorry, how much time?

MR. PERRY: Eight days cell confinement.

THE COURT: Thank you.

MR. PERRY: And finally the 21st incident, My Lord. On the 23rd of December, 2013, Mr. Murphy was involved in an altercation with inmate Chris Cameron where an assault took place. Both offenders had visible injuries sustained to their faces, and Chris Cameron was taken to Dartmouth General Hospital as a result of being slashed with an edged weapon and also stabbed in his left side. You heard about what happened with Mr. Murphy. He suffered a cut on his head that required stitches and was taken the next day to the QEII where he was eventually diagnosed of having that nondisplaced fracture of the nasal bone. Neither offender would cooperate to say what took place. Staff eventually ended up ruling it a consensual fight, and as a result of that incident Mr. Murphy was segregated for 10 days.

So over the approximately 13 month period that we have records for since he was arrested on these charges, by my count Mr. Murphy has been involved in 21 separate incidents and sentenced to 197 days in segregation. That time in segregation, that disciplinary time, wasn't the result of anything else other than Mr. Murphy's own behaviour. The incidents stem from one day after he went into the facility and run right up until the end of December of 2013. So any suggestion that Mr. Murphy would have earned any type of remission or early parole over this time is, in my submission, nonsensical.

Now, with respect to any argument that Mr. Murphy was subject to onerous conditions of segregation and that is much harder time to do, again, the reason he was in segregation was because of his own behaviour and not because he was in protective custody as a result of injuries as he stated in the presentence report.

Seven of those incidents are weapons related. And I'd ask you to keep in my mind, My Lord, that Mr. Murphy is still on a lifetime weapons prohibition and yet, even in the facility, he's refusing to comply.

Mr. Murphy may wish to bring up the fight wherein he had the cut on his head and where he had the fracture of his nose. You see from the presentence report that he told Probation he had a shattered jaw which required six plates to stabilize, that he suffered a broken arm and the fractures of two arms. The medical records, of course, say otherwise. The medical records demonstrate that Mr. Murphy had no broken arms. He had no fractured arms. He had no broken or shattered jaw. He had a nondisplaced fracture of his nasal bone that required no treatment and he had a cut on his forehead that required stitches. In any event, that incident appears to have been a consensual fight that Mr. Murphy entered into wherein another inmate was stabbed.

I'm not sure if defence is going to be arguing anything about a delay in sentencing. Sentencing, as you know, was originally scheduled for March 11th of 2014. There was a three week delay in that sentencing. Now, the delay for Mr. Cole, of course, was because his counsel was ill, but the delay for Mr. - - that three week delay for Mr. Murphy was because he no longer had a lawyer, and that was as a result of effectively firing counsel when he filed an appeal listing the ineffective assistance of counsel as one of the grounds for appeal. So that three week delay I would suggest rests squarely on Mr. Murphy's shoulders. That was his own doing as well.

So as a result of the above, My Lord, the Crown would submit that, although the current state of the law in Nova Scotia is that there do not have to be exceptional circumstances in order to get enhanced credit for remand, the Crown would argue that the default position for credit for remand is one to one unless the accused can convince you on a balance of probabilities that he should get more than that. Quite frankly, since Mr. Murphy has been in custody, he's committed - - continued to commit offences making him responsible for his own conditions while he was in jail. And I would submit that he's not entitled to more than a one for one credit.

With respect to the number that I sought with respect to a go-forward number of nine years, Mr. Murphy didn't discharge a firearm like Mr. Cole did, so the incident itself, I would suggest to you, with respect to Mr. Cole is more aggravating. However, I would also submit that Mr. Murphy's record is more aggravating than Mr. Cole's. Certainly he has spent most of the time since 2008 incarcerated and certainly was only released 18 days prior to these offences.

And I'm just going to sum up by saying - - repeating the same thing I repeated with Mr. Cole with respect to firearms. Seventy-five documented shootings in HRM in 2011, 61 in 2012 and 54 in 2013. Although there's no

> indication, of course, that Mr. - - and no allegation either that Mr. Murphy fired a firearm that evening, he certainly had a firearm and has been convicted of that. And Crown would submit that courts have to be tough on these kinds of crimes. Those are my comments ….

[63] I agree with Crown Counsel's comment that the default position for remand credit is one to one unless the accused can convince the court, on a balance of probabilities, that he should get additional credit. I have no doubt that the above referenced comments by Crown counsel made it clear to the sentencing judge that the Crown was proposing credit of one day for each day of presentence custody, culminating in the Crown requesting an additional 9 years in custody **after** that one for one credit was given. Crown again used the words: "…on a go-forward basis". Nobody having heard counsel comments would be left guessing. Crown counsel proposed a one for one credit, leaving a balance to be served as nine years (on a go-forward basis).

[64] At the sentencing hearing, counsel for Mr. Murphy urged the court to impose a "… global sentence of five to seven years." He then addressed the issue of enhanced remand credit. He said of the Crown submission that "… she's essentially hit the nail on the head." A full review of counsel's submission would suggest that it is clear that counsel for Mr. Murphy understood exactly what Crown counsel was proposing as a sentence and that counsel understood that the term "go-forward" as proposed by the Crown was after credit was given on a one-to-one basis for pre-custody sentence. Counsel for Mr. Murphy said:

> So then, again, turning to how that affects Mr. Murphy's claim for enhanced remand credit. I agree with my friend with respect to what the law is. *Carvery* case was decided by our Court of Appeal. It does provide the sentencing judge with a great deal of discretion. Nothing has changed in that regard by the *Truth in Sentencing Act*. They do not have to be exceptional circumstances, simply circumstances that do justify the granting of enhanced remand credit.

[65] As noted by my colleague, ¶8 above , the sentencing judge indicated there was "no merit in this submission for enhanced credit". (see 2014 NSSC 140, ¶23) I am satisfied that the reasons of the sentencing judge must be reviewed in their entire context including the entire context of the submissions to the court. I refer to the comments of Chartier J. A. in **R. v. Oddleifson (J.N.)**, 2010 MBCA 44, leave to appeal to S.C.C. denied, [2010] S.C.C.A. 244.

> [30] The standard of review with respect to the insufficiency of reasons is the standard of adequacy. Reasons will not be inadequate if, when read in their entire context, they fulfil the threefold purpose of informing the parties of the basis of the verdict, providing public accountability and permitting meaningful appeal. …

[66] In the sentencing decision the judge at no point suggested that credit at a rate of one for one was not appropriate for pretrial detention. I am satisfied that consideration of the entirety of the submissions and comments of the sentencing judge make it clear that he deferred to the default position of one to one.

[67] I am not able to agree with my colleague that the words of the sentencing judge, when considered with the submissions above, would suggest that the sentencing judge did not give credit for pretrial custody. In fact I am satisfied that the comments of the sentencing judge, when considered as a whole, suggest just the opposite. He did give credit on a one to one basis. This is further confirmed by what occurred when Mr. Murphy suggested that he got no credit for pretrial custody. The sentencing judge, as noted by my colleague, said: "No enhanced credit."

[68] I reference the words of Beveridge, J.A., in **R. v. Awad**, 2015 NSCA 10 where he was describing a different, but no more distinguished judge than the sentencing judge in this case. Of that judge, Justice Beveridge said (at ¶50) he was "… one of this province's most preeminent criminal law jurists."

[69] I am satisfied that after considering all of the submissions and the comments of the sentencing judge, all present, including the judge fully understood what was meant when the Crown suggested nine years on a "go-forward basis". The Crown arrived at nine years giving credit on a one to one basis. The sentencing judge knew what the Crown was asking when she asked immediately after the sentence was announced:

> **Ms. Perry:** Just wondering about the issue of remand. I'm assuming – does the credit for remand come off the numbers that you've given us?
>
> **The Court:** No. It's on a go-forward basis.
>
> …
>
> **Mr. Murphy:** I get no credit for…
>
> **The Court:** No enhanced credit.

[70] Based on a plain reading of all the submissions during sentencing and that exchange I cannot accept that this distinguished jurist did not fully appreciate the difference between credit and enhanced credit. The words on a "go-forward basis" reflected the submissions by counsel that the term of imprisonment would be after consideration of the issue of presentence custody. Perhaps the sentencing judge could have better explained, but for the outburst by Mr. Murphy that immediately followed the judge saying "no enhanced credit".

> **Mr. Murphy:** I get not credit for…
>
> **The Court:** No enhanced credit.
>
> **Mr. Murphy:** You're a piece of shit, straight up.
>
> **Female voice:** Oh, man.
>
> **Mr. Murphy:** Fuck you.

The exchange continued but did not get any more rational on Mr. Murphy's part.

[71] The sentencing judge gave credit on a one for one basis and his sentence should not be disturbed. The sentencing judge gave reasons as to why enhanced credit was not appropriate. (¶22 – 24).

[72] Although the decision did not give reasons for the one for one credit nor was it referenced on the Warrant for Committal that is not a fatal flaw. As per section 719(3) of the **Criminal Code:**

> (3.4) Failure to comply with subsection (3.2) or (3.3) does not affect the validity of the sentence imposed by the court.

[73] I am satisfied there are many ways to inform participants as to what credit is given. How or whether it was done properly, in accordance with the law, is best gleaned from a review of the entire transcript and decision as a whole, not by reference to a paragraph or two. **Oddleifson**, as I have cited above, would suggest that reasons are to be read in their entire context.

[74] Finally I am convinced that the sentence of eight and one half years after giving credit for the remand time on a one to one basis was a fit and proper sentence. I say this considering the applicable principles of sentencing, the circumstances of the offences, the offender, and the totality principle. I am satisfied that the sentence should not be altered in any way.

[75] I would have dismissed the appeal.

Scanlan, J.A.