NOVA SCOTIA COURT OF APPEAL
Citation: ***R. v. LeBlanc***, 2011 NSCA 60

Date: 20110628
Docket: CAC 337601
Registry: Halifax

Between

Jeremy Alvin LeBlanc

Appellant

-and-

Her Majesty the Queen

Respondent

Judge(s):	Oland, Fichaud and Bryson JJ.A.
Appeal Heard:	May 27, 2011, in Halifax, Nova Scotia
Held:	Leave to appeal is granted and the appeal is allowed in part per reasons for judgment of Fichaud, J.A.; Oland and Bryson, JJ.A. concurring.
Counsel:	W. Brian Smith, Q.C., and Lindsay E. McFadden, for the appellant Mark Scott, for the respondent

Reasons for judgment:

[1] Mr. LeBlanc was convicted of attempted murder and sentenced to sixteen years incarceration, without eligibility for parole until he serves at least one half of his sentence. He appeals the sentence. He says the judge over-emphasized denunciation and deterrence, erred respecting credit for remand time, and wrongly delayed Mr. LeBlanc's eligibility for parole.

Background

[2] Mr. LeBlanc was charged with several offences related to the attempted murder of Jimmy Melvin, Jr. He elected trial by jury in the Supreme Court. The Crown and Defence agreed to narrow the issues, and there was a one-half day preliminary inquiry with consent to committal.

[3] Mr. LeBlanc then pled guilty to attempted murder under s. 239 of the *Criminal Code*. At the sentencing there was an Agreed Statement of Fact that recited the events constituting the offence.

[4] The Agreed Statement of Fact said:

> 1. On December 4, 2008 Jeremy LeBlanc planned and executed a hit on James Melvin Junior. LEBLANC was unaware that while he made his plan the police were listening.
>
> 2. Operation Intrude was a joint investigation by the RCMP and Halifax Regional Police into *Criminal Code* and *C.D.S.A.* offences being committed by a targeted group of individuals who were subject to surveillance of different varieties including phone intercepts, room probes and vehicle probes. LEBLANC was known to police to be a member of a group working in the illicit drug trade and referring to themselves as the "Spryfield M.O.B."
>
> 3. In addition to having his phone calls monitored on the date in question, LEBLANC was traveling in a Chevrolet Blazer license plate ENM 609, which contained a vehicle probe and GPS Tracking Device. The conversations which took place within the vehicle were therefore recorded and its location was monitored.

4. Coincidentally, on December 4th, 2008, MELVIN was under overt surveillance by the Halifax Regional Police. He was not, however, subject to any covert electronic surveillance.

5. Sometime in the afternoon, MELVIN left his residence in Fall River and traveled to a residence in Sackville belonging to LEBLANC's half-brother.

6. Using a cell phone registered to Alicia Higgins, the girlfriend of LEBLANC's half-brother, MELVIN sent the following text message to LEBLANC at 14:33:03 "*Can you get out to sackville to talk to mad dog I'm alone I'm stressed get the fuck out here to talk to me*."

7. The following text messages (in their original form) were subsequently exchanged between MELVIN and LEBLANC:

LE BLANC: who is this?????

MELVIN: Its me the one that still loves ya mad dog

LEBLANC: I am out spry wit no drive if I cant get a car u will have to come out here or somethin closer

MELVIN: I just got a cab here bud I left my family so nobody knows I'm out here

LEBLANC: so, I will pay for your cab out here

MELVIN: Ofl

(2) What's up whhat the address

LEBLANC: u got police following u every where

MELVIN: That's what I'm satin bud what cut I'll get in the cab you go there now they won't know

LEBLANC: text me back when you lose the police

MELVIN: I don't got a phone just tell me wher to go

LEBLANC: then how u textin me idiot

MELVIN: I will lose them are you deep in the hood or cowie

(2) I'm on your brothers phone

(3) I had to see him cuz I don't want nobody to know

(4) Lol. I'm sittin here let's do this what buildins mad dog I gotta leave here

(5) I'm callin a van right now wher do I go?

LEBLANC: well I got to make quick $ so come to spry and text me back not all of us r ritch like u

MELVIN: OfL

(2) You better be jokin rich like me. Cuz that really make me mad. Your brother aint coming with me I'm by myself I

(3) to go. Ill go to that buildin where my cousin fary' used to live brfor he ran out of town.

LEBLANC: there aint noones phone u could use

MELVIN: I'm by my self bud who's phone

LEBLANC: jim shut up u know aswell as I do there is 100 phones u can use in spry

MELVIN: I can use farys mothers in the big buildin

LEBLANC: there u go

MELVIN: Is that what you want me to do. Call your hot line I'm on my way answer the phone

(2) Yeah the cab is here. Answer the phone j any spy number

LEBLANC: just talk like a woman

8. While communicating with MELVIN via text messages, LEBLANC was driving with others in the monitored Chevrolet Blazer. His conversations concerning MELVIN's overture and his planned response were therefore recorded.

9. Also recorded were subsequent telephone conversations between LEBLANC and MELVIN as well as conversations between LEBLANC and other associates. Transcripts of intercepts from the vehicle probe and from LEBLANC's cell phone are included in this package under separate cover. ("Transcripts of Intercepted Communications")

10. While texting back and forth with MELVIN, LEBLANC began making his plan to shoot him and over the next several hours enlisted help from other associates and strategized as to how to manipulate MELVIN into meeting in a location where they could ambush him and evade police.

(See for example Transcripts tab 7 where a call is made to "Mark Michaels". LEBLANC states at line 14 *"It's goin down"* and at line 16 *"just get ready"*)

11. MELVIN left Sackville and traveled to 30 Ridgevalley Road. RIDGEVALLEY is a large apartment complex located in a highly residential area of Spryfield. It houses a daycare facility and several floors of apartments. It is in close proximity to a local school and other single and multiple family dwellings

12. Police officers who were conducting surveillance on MELVIN followed him to RIDGEVALLEY and positioned themselves at the front and back entrances to the building. MELVIN was aware that the police were following him. Margaret Murphy, a friend of MELVIN's mother, lived at RIDGEVALLEY and also worked at the daycare. She allowed MELVIN to come into the daycare where he borrowed the phone and contacted LEBLANC at 16:03:57. (See Transcripts tab 17)

13. MELVIN repeats his request to meet LEBLANC and appeared anxious about recent violence directed towards him. (See Transcripts tab 17, lines 97-100 and tab 19 lines 5-21). Children can be overheard in the background of this call.

14. Throughout his exchanges with MELVIN, LEBLANC stalled for time, lying to MELVIN about his whereabouts and means of transportation, claiming he had none when in fact he was traveling in the Chevrolet Blazer.

15. After getting off the phone with MELVIN the following exchange took place between LEBLANC and a fellow passenger in the Blazer (Transcripts tab 18 Lines 21-37):

LEBLANC: Yeah, he wants me to call him up Ridgeway, right?

MALE 1: Hmmm

LEBLANC: He's gonna run in the back, ____ let me in. He wants me to come in the buidin'

MALE 1: Fuck that's dangerous though. He might have a ____ in there.

LEBLANC: Yeah but if someone hides ____, soon as he opens the door, blast the shit out of him.

MALE 1: Yeah, true

LEBLANC: Fuck, he also, he said, well, do you want me to run up to that buildin'. He said, up to Elaine's buildin'. So I could say, when we were up there ____ run out. That way we'll catch him running up.

MALE 1: Um Hmmm

LEBLANC: Blap. Right up in ____ field blap

MALE 1: Yeah, we could do that. Tell him yeah

LEBLANC: That's the plan right there

MALE 1: Go up, go up through there. We'll blap him right in the fields.

LEBLANC: Blap him, right in the field When he walks up there, blap him.

16. And minutes later at Tab 19 lines 26- 38:

LEBLANC: Oh that's a perfect plan. There ain't no plan better than what that plan I just made. Think of all ____ scenarios and shit in their head, and then, you know what I mean? There ain't ____ no plan better than this ....

LEBLANC: 'Cause he told me, well, where do you want me to go up to that buildin'. Where God rest her soul ____ mama. That must be the ____

MALE 1: ____ he was talking about. That's, that's the way your drive there, brother. It's bram, right when he's, when he's running through the field. But we'll, we'll tell him that while we're there.

LEBLANC: No, we gotta be hiding in the woods, can't let him see it all comin'. You ____ gotta jump out of the woods, right when he's right there.

17. At the end of Margaret Murphy's shift she, her co-worker Ms. Cameron and MELVIN went to Ms. Murphy's apartment where MELVIN borrowed her phone. MELVIN again contacted LEBLANC at 16:46:53. (Transcripts tab 26, 28 and 31) They continued to discuss where they would meet.

18. LEBLANC and MELVIN agreed that MELVIN would proceed out the back of RIDGEVALLEY and "run up to the other building" where LEBLANC said he would be waiting out back. (See Transcripts tab 31). This corresponds to the location LEBLANC had decided would be the perfect place to "Blap Him".

19. After getting off the telephone in Ms. Murphy's apartment, MELVIN told Ms. Cameron that he was going to meet "Jeremy" and left the apartment. Within 5 minutes he returned to the apartment and told everyone he had been shot.

20. Police who were doing surveillance of RIDGEVALLEY did not see MELVIN initially leave the building but quickly responded to Ms. Murphy's 911 call for help after he had returned to the apartment having been shot.

21. MELVIN suffered injuries to the jejunum (middle section of small intestine) at 2 points, an injury of his sigmoid colon (part of the large intestine that is closest to the rectum and anus) and a fracture of his sacrum (bone at the base of the spine). He received surgery and developed a wound injury post-operatively. He wore a colostomy bag for at least a year.

22. There is no evidence to suggest that MELVIN was armed at any relevant time.

23. Subsequent investigation by police uncovered six 45 caliber shell casings in a wooded area that borders that field behind RIDGEVALLEY. One of the bullets also entered a vacant apartment in that complex. Another bullet was found in the back parking lot of RIDGEVALLEY having ricocheted off the building. (See photographs enclosed under separate cover.

24. Police continued to monitor the phone calls of LEBLANC and were able to track his movements to Bayers Lake Industrial Park where he was arrested outside of the Future Shop at approximately 20:00 that evening.

25. Testing revealed that particle characteristics of gun shot residue were located on LEBLANC's right hand at the time of his arrest.

26. MELVIN has never co-operated with the authorities in their investigation.

[5] As to Mr. LeBlanc's record, between 1999 and 2008 he had three convictions for violent offences, two convictions for break and enter, five convictions for breaching court orders, and four convictions, including two of possession for the purpose of trafficking, under the *Controlled Drugs and Substances Act*, S.C. 1996, c. 19. At the time of this offence Mr. LeBlanc was bound by a recognizance.

[6] There was no joint recommendation on sentence. At the sentencing hearing, the Crown tendered transcripts of intercepted communications. Several intercepts were played for the sentencing judge, Justice Cacchione of the Supreme Court of Nova Scotia.

[7] After the submissions, the judge's sentencing decision (2010 NSSC 347) ordered Mr. LeBlanc to be incarcerated for "[s]ixteen years go forward". He ordered, under s. 743.6 of the *Criminal Code*, that Mr. LeBlanc serve at least half that sentence before being eligible for parole. One of the issues on the appeal is the interpretation of the sentencing judge's comments about credit for remand. Later I will discuss the judge's reasons respecting the length of sentence (para 15), credit for remand (para 18), and the use of s. 743.6 to delay parole eligibility (para 29).

Issues

[8] Mr. LeBlanc applies for leave to appeal his sentence. His factum says that the sentencing judge erred by: (1) overemphasizing deterrence and denunciation and insufficiently considering other sentencing principles; (2) not providing credit for remand and not giving clear reasons for his ruling on credit for remand; (3) denying procedural fairness in the use of s. 743.6 to delay parole eligibility; and (4) failing to consider remand credit or the appropriate length of delayed parole eligibility for similar offenders in similar circumstances. I will discuss the first three issues directly, and deal with the fourth in the context of the second issue (para 26). Given my conclusion on the third issue, it will be unnecessary to discuss the fourth point respecting delayed parole eligibility.

Standard of Review

[9] In *R. v. Shropshire*, [1995] 4 S.C.R. 227, paras 46-50, Justice Iacobucci for the Court stated or adopted the views that: (1) an appellate court should vary a sentence only when "the court of appeal is convinced it is not fit" or "clearly unreasonable", or if the sentencing judge "applied wrong principles or [if] the sentence is clearly or manifestly excessive"; (2) "[i]f a sentence imposed is not clearly excessive or inadequate it is a fit sentence assuming the trial judge applied the correct principles and considered all relevant facts"; (3) "sentencing is not an exact science", but rather "is the exercise of judgment taking into consideration relevant legal principles, the circumstances of the offence and the offender"; (4) "[t]he most that can be expected of a sentencing judge is to arrive at a sentence that is within an acceptable range"; and (5) "[u]nreasonableness in the sentencing process involves the sentencing order falling outside the 'acceptable range' of orders".

[10] In *R. v. M.(C.A.)*, [1996] 1 S.C.R. 500, paras 89-92, Chief Justice Lamer for the Court reaffirmed *Shropshire*'s principles and added (para 92):

> Appellate courts, of course, serve an important function in reviewing and minimizing the disparity of sentences imposed by sentencing judges for similar offenders and similar offences committed throughout Canada. [citations omitted]. But in exercising this role, courts of appeal must still exercise a margin of deference before intervening in the specialized discretion that Parliament has explicitly vested in sentencing judges. It has been repeatedly stressed that there is no such thing as a uniform sentence for a particular crime. [citations omitted]. Sentencing is an inherently individualized process, and the search for a single appropriate sentence for a similar offender and a similar crime will frequently be a fruitless exercise of academic abstraction.

[11] To similar effect: *R. v. L.M.*, [2008] 2 S.C.R. 163, paras 14-15; *R. v. Solowan*, [2008] 3 S.C.R. 309, para 16; *R. v. McDonnell*, [1997] 1 S.C.R. 948, paras 15-17.

[12] This court, of course, applies these principles derived from *Shropshire* and *M. (C.A.)*: *e.g.*: *R. v. Longaphy*, 2000 NSCA 136, para 20; *R. v. Knockwood*, 2009 NSCA 98, para 11; *R. v. Markie*, 2009 NSCA 119, para 11; *R. v. A.N.*, 2011 NSCA 21, para 16, among many others.

First Issue-
Overemphasis of Deterrence and Denunciation

[13] Mr. LeBlanc's factum says:

> As it is not sufficiently clear from the decision that sentencing principles and objectives were considered, other than denunciation and deterrence, it is respectfully submitted that the learned sentencing judge erred in overemphasizing the sentencing principles of denunciation and deterrence and failed to take adequate consideration of additional sentencing principles.

[14] The sentencing decision says:

> [2] Mr. LeBlanc has a criminal record dating back to 1999 through to 2008. There was a respite there for a few years: some of them while he was in custody; others I acknowledge while he was not in custody. So, the only real break in his record is, save for a short time, when he has been in custody. It would appear to me Mr. LeBlanc that you have made a conscious decision to lead your life outside the parameters or the boundaries that are associated with others in society, that is respecting the law and not harming others.
>
> [3] From the intercepts that we heard today and which I read before, it is quite unnerving to think that you could just drive around as if nothing was happening, very carefree, but talking about knocking somebody off, killing somebody. Worse, actually making plans to do it and carrying it out. ...
>
> [4] You have absolutely no respect whatsoever for anybody other than yourself, despite your acknowledgement or your apology to your mother, you do not give a damn. All you are interested in is moving Jeremy LeBlanc's criminal career forward. ...
>
> [5] This did not take place in the middle of the woods when nobody else was around. It took place in an area where there are two large apartment buildings, multiple residential, single family dwellings, schools, baseball diamonds, basketball courts. And it is clear from the wiretap evidence, your words, that this was premeditated. Your plan was to kill him and you took steps to accomplish that plan. You are just lucky he did not die, because then you would be going away for 25 years without parole eligibility.
>
> [6] Another aggravating factor is the time of day when this occurred. This was approximately a quarter to six in the afternoon. A time when people would

be coming home from work, when kids who dawdled at school might be coming back from school. But that obviously played no part whatsoever in your consideration of what you were going to do that day. You heard, we all heard children in the background as Jimmy Melvin is talking to you. He is in a daycare centre, for God's sakes, and yet you are thinking, "Well when he comes out of here I'm going to get him to come down this path and I'll blow him away. Me or one of my cronies."

[7] The number of shots that were fired, six of them, 45 calibre slugs is a further aggravating factor. One of those made it into an apartment four stories above where this took place. You are just lucky there was nobody in that apartment. It is not uncommon, and in fact in the last few years there have been people who have suffered injuries as a result of bullets going through apartment walls and hitting somebody who is minding their own business watching television. But that did not really matter to you, just point and shoot. ...

[8] As I have said your attitude, as shown through the wiretaps, supports a finding of utter disregard for the lives and safety of others. People who had nothing to do with whatever dispute, real or imagined, existed between you and Mr. Melvin. Mr. Melvin suffered some injuries. They are significant injuries. ...

...

[10] Well it sure looks to me like you have not made any effort whatsoever to distance yourself from that kind of activity. You know, you are on bail and you commit offences. You are on release conditions saying you are not to possess firearms. What do you do - you possess firearms. To me that says: "You know judge you can talk all you want, but I don't care because I'm going to do what I want to do." ...

...

[12] I said it before, in the matter of **The Queen and Johnston**, and I am going to say it again that the risk posed by such actions, such indiscriminate use of firearms is high and it is increasing in this City. A clear message must be sent to those in our community, those such as you Mr. LeBlanc who believe that, "you know I can live by the gun. I can settle my disputes by the gun." That message is that there will be severe consequences for the senseless use of firearms.

[13] I considered the principles under s.718 of the **Criminal Code**. Of all those principles in situations such as this, that is the indiscriminate use of

> handguns in public areas that are populated, densely populated, must be denunciation, closely followed by a need for both general and specific deterrence. General deterrence to others who decide "You know I think I am just going to take a gun today and go shoot somebody", and to you Mr. LeBlanc because you have not learned. I have counted, I think it was 16 entries on your record. Now I am not sure that that reflects that actual number of charges, but just he number of entries. And you know, different things have been tried: probation, fines, short terms in custody, longer terms in custody. It has made no difference. You just came off a 29 month bit and you are right back into it. Worse, you are into it real big time.
>
> [14] You know it is not a pleasure sending somebody to an institution. It really isn't. And it's not something that I take very lightly. I loathe having to do that to anyone because I know what the inside of those institutions is like. But there comes a point when somebody's behaviour and past track record, leaves me no option. You know, psychiatrists say that past behaviour is a good prognosticator or indicator of future behaviour, and if that is true Mr. LeBlanc, then you would be considered to be a very high risk of re-offending, if released.
>
> ...
>
> [16] This was a calculated, cold-blooded shooting. It was committed in a densely populated area which contained schools, basketball courts and day-cares and single family dwellings. The fact that you nonchalantly planned and executed this attempt murder with the use of a firearm with a complete disregard for the safety of others who had nothing to do whatsoever with any dispute between you and Mr. Melvin, to me indicates that you are probably going to be back once you get out. Back in a courtroom. ...
>
> [17] People such as your self, Mr. LeBlanc, who chose to illegally possess and use firearms must know that there will be severe consequences for that action, that such actions will not be tolerated.

[15] The sentencing judge (para 13) considered all the principles under s. 718, but emphasized denunciation and deterrence. Mr. LeBlanc’s submissions neither suggest what other sentencing principles were apposite in his case nor identify a mitigating factor other than his guilty plea, and leave one to wonder why denunciation and deterrence should not predominate as considerations for cold blooded attempted murder.

[16] The judge did not over-emphasize denunciation and deterrence. I would dismiss this ground of appeal.

Second Issue-Remand Credit

[17] Mr. LeBlanc spent 574 days in pre-trial or pre-sentence custody.

[18] The sentencing decision says the following which bears on credit for remand:

> 19 ... The fact that he was on release and in breach of his bail conditions is also an aggravating factor. It speaks against credit being given on a two for one basis for remand time. ...
>
> ...
>
> 22. So let me tell you two things, three things actually. The first is because of the nature of this offence, where it was carried out, the planning and premeditation that went along with it, I am not going to give you credit on a two for one basis. The second thing is that the number that I came in here with in my mind has been reduced by quite a few years because you were looking at close to a first degree 25 years. But that has to be tempered. ...
>
> 23. I am not looking at the 18 years that Crown counsel was looking for as a maximum. I have already told you I was not looking and I am not looking at the figure that I had in mind before I heard the submissions of counsel and the wiretaps. ...
>
> 24.The sentence of this court is that you be incarcerated for a period of 16 years and I will order that you serve at least half of that sentence before you are eligible for parole.
>
> ...
>
> **MS. MACDONALD:** Is that, just to clarify for the record, 16 minus the remand or...?
>
> **THE COURT:** No. He is not getting credit for ... He is getting credit on a one-for-one basis. There is no credit time. He is not being credited for any remand time.

MS. MACDONALD: So that is 16 on a go forward?

THE COURT: Sixteen years go forward.

The judge's signature on the sentencing decision appears beneath this exchange with counsel.

[19] In this court, Mr. LeBlanc submits that the judge erred by not giving any credit for his 574 days of remand. Alternatively, he says the judge's reasons are unclear whether and how the judge calculated any remand credit.

[20] Section 719(3) of the *Code*, as written at the date of Mr. LeBlanc's charges, said the sentencing judge "may take into account any time spent in custody by the person as a result of the offence". After Mr. LeBlanc was charged, Parliament replaced s. 719(3) with an added limitation "but the court shall limit the credit for that time to a maximum of one day for each day spent in custody", coupled with section 719(3.1) stating that, despite subsection (3), the maximum credit is one and one half days per day of custody: S.C. 2009, c. 29, s. 3.

[21] Under the earlier version of s. 719(3) that governs Mr. LeBlanc's sentencing, a 2 for 1 credit was "entirely appropriate" but remained discretionary with the sentencing judge: *R. v. Wust*, [2000] 1 S.C.R. 455, para 45. This exercise of discretion must be exercised on a principled basis: *R. v. Doiron*, 2005 NBCA 30, para 26; *R. v. A.N.*, para 40. As this court said in *R. v. A.N.*:

> 41. Though 2 for 1 credit has been the norm, there is no strict formula and the calculation of credit for remand is a matter of judicial discretion: *e.g., R. v. Vermette*, 2001 MBCA 64, paras 64-66. ...

[22] Various factors may justify the principled exercise of the sentencing judge's discretion to abridge or even deny credit for remand time, including evidence that earlier release would not promote rehabilitation, failure to seek bail, remand because the accused failed to appear as required, the offender's conduct while on bail such as breach of conditions of release, a significant or violence based criminal record, or that the offender would pose a danger to society. *R. v. A.N.*, para 40; *R. v. Ali*, 2009 ABCA 120, paras 4 and 19; *R. v. Tschritter*, 2006 BCCA 202, paras 3-5, 15; *R. v. Gallant*, 2004 NSCA 7, paras 20-22; *R. v. Vermette*, 2001 MBCA 64,

para 66; *R. v. Gillis*, 2009 ONCA 312, para 11; *R. v. Coxworthy*, 2007 ABCA 323, at paras 9, 16.

[23] The sentencing decision identifies several of these factors in Mr. LeBlanc's case. I see no error in the judge's abridgement of credit for remand from the 2 for 1 practice that existed under the earlier version of s. 719(3).

[24] The judge said: "He is getting credit on a one-for-one basis" and the sentence is "[s]ixteen years go forward". My interpretation of the sentencing decision is that the judge applied a 1 for 1 credit before fixing the sixteen year sentence. Mr. LeBlanc received that credit for his 574 days of pre-sentence custody, leaving "[s]ixteen years go forward" to be served. This was one reason the judge said "I am not looking at the 18 years that Crown counsel was looking for" and "I am not looking at the figure that I had in mind before I heard the submissions of counsel and the wiretaps". A sentencing judge's "go forward" term of incarceration is not erroneous merely because the judge applies the appropriate credit for remand before he pronounces the ultimate term of incarceration. See, for example, *R. v. A.N.*:

> 42. My interpretation of the judge's comments, in tandem with his reasons, is that he took account of the remand time with a 1 to 1 credit, leaving an eight year term of incarceration after that credit. This would be within his discretion and would display no error in principle.

[25] There is no error in the judge's treatment of Mr. LeBlanc's remand time. I would dismiss this ground of appeal.

[26] Neither did the judge err by "not considering the appropriate length of ... remand credit time imposed on similar offenders who committed similar crimes in similar circumstances", as contended by Mr. LeBlanc's fourth point in issue. Mr. LeBlanc's submissions cited no precedent with an example of such a similar offender, crime and circumstances. I reiterate both Chief Justice Lamer's statement quoted above (para 10) from *M.(C.A.)* para 92, that sentencing is an inherently individualized process, and this court's comment in *R. v. A.N.* para 30, that there is no binding matrix of precedent into which each new sentence must be slotted. The judge appropriately considered what s. 718.1 of the *Code* terms the "fundamental principle" that the sentence be proportionate to the gravity of Mr. LeBlanc's

offence and to Mr. LeBlanc's culpability. The sentence inhabits the proper range under *Shropshire.*

Third Issue-
Delayed Parole Eligibility

[27] Section 743.6 of the *Code* permits the sentencing court to order that eligibility for parole be delayed until the offender serves one half of the sentence. Before the sentencing submissions, the sentencing judge and counsel had the following exchange on the topic of delayed eligibility for parole:

> **THE COURT:** Just one question, and the question is directed to both of you, Mr. Eagan and Ms. MacDonald [counsel for Mr. LeBlanc and the Crown respectively]. Have either of you considered Section 743.6, and if you have, may I have your views? 743.6 is the parole eligibility.
>
> **MS. MACDONALD:** I can say, My Lord, that we did not consider it and make no submissions in that regard.
>
> **THE COURT:** Thank you.
>
> **MS. MACDONALD:** And we did not consult Mr. Eagan about that. I assume he's not ...
>
> **MR. EAGAN:** No, I wasn't going to address it, no.
>
> **THE COURT:** I'm sorry?
>
> **MR. EAGAN:** No, I had not planned on addressing it at all, frankly.
>
> **THE COURT:** Okay, thank you.

[28] Nothing more was said about s. 743.6 during the submissions.

[29] The sentencing decision said:

> 22...I have looked at s. 743.6 of the ***Criminal Code*** which allows me, based on the circumstances of the offence and the circumstances of the offender, to delay parole. Given that this offence was committed by somebody who has a criminal record, who was on bail conditions at the time, including a condition not to possess firearms, that it occurred in a densely populated area at a time of day when persons could be expected to be in the vicinity, the number of shots fired, the fact that one of those bullets entered the apartment building, a multi-storey apartment building, leads me to the conclusion that it is important to keep you off the streets for as long as I can.
>
> ...
>
> 24. The sentence of this court is that you be incarcerated for a period of 16 years and I will order that you serve at least half of that sentence before you are eligible for parole.

[30] In *R. v. Zinck*, [2003] 1 S.C.R. 41, Justice LeBel for the Court (paras 25-33) interpreted s. 743.6, then (paras 34-37) discussed procedural fairness to the offender in the application of the provision. Justice LeBel said:

> 34. ... It should be enough that the issue be raised in a fair and timely manner so as to allow the offender to respond effectively. A breach of this basic obligation would justify quashing the order, as courts have done on occasion. ...
>
> 35. The need for fairness does not impose any obligation to give written notice to the offender before the hearing that delayed parole will be applied for. ...
>
> 36. The obligation to ensure fairness in the process is of critical importance, but it may be discharged in different and equally valid ways. When possible, the Crown may give notice in writing or verbally before the hearing. The application may be made at the sentencing hearing itself. The issue may also be raised by the judge in the course of the hearing. Whenever and however the question is brought up, the offender must be informed clearly that he is at risk in this respect. The offender must be allowed to make submissions and to introduce additional evidence, if needed, in response to the request for delayed parole. Courts should be generous if adjournments are requested for this purpose. Fairness must be preserved, but in a flexible manner, taking into account the specifics of each case, without pointless procedural constraints.

[31] In counsel's exchange with the judge at the outset of the sentencing hearing, the Crown expressly declined to raise the topic of delayed parole eligibility. The judge gave no indication that the topic would be in play despite the Crown's abstinence.

[32] Mr. LeBlanc submits that the process denied procedural fairness. The Crown agrees. The Crown's factum says:

> 59. It is clear that a trial Judge can raise the matter on his own motion, in the absence of Crown notice. When the Crown expressly declines to address the issue, however, it is not unreasonable for defence counsel to view the matter as closed. Had the trial Judge still wanted to press the issue, the Respondent acknowledges that he ought to have alerted defence counsel that he was still considering the issue, notwithstanding the Crown's lack of submissions. Then defence counsel should be afforded the opportunity to discuss the issue with his or her client; and, decide whether to seek an adjournment, call evidence, or make specific submissions.
>
> 60. While *Zinck* clearly indicates that procedural formalities are to be avoided, it does not appear that the brief mention of the issue fairly and properly put the Appellant on notice.
>
> 61. Consequently, the Respondent agrees that the Order with respect to parole ineligibility, pursuant to s.743.6 of the *Code*, should be set aside.

[33] I agree with Mr. LeBlanc's position and with the quoted reasoning from the Crown's factum. I would allow this ground of appeal to set aside the order that delayed Mr. LeBlanc's eligibility for parole under s. 743.6 of the *Criminal Code*.

Conclusion

[34] I would grant leave to appeal, and allow the appeal in part to set aside the sentencing judge's order that delayed Mr. LeBlanc's parole eligibility under s. 743.6 of the *Criminal Code*, but otherwise dismiss the appeal.

Fichaud, J.A.

Concurred:

Oland, J.A.

Bryson, J.A.