NOVA SCOTIA COURT OF APPEAL
Citation: ***R. v. Banfield***, 2012 NSCA 98

Date: 20120918
Docket: CAC 344966
Registry: Halifax

Between:

Her Majesty The Queen

Appellant

v.

Shawn Kenneth Banfield

Respondent

Revised Decision:	The text of the original decision has been corrected on November 1, 2012 by the attached erratum. This replaces the previously distributed decision.
Judges:	Saunders, Oland and Beveridge, JJ.A.
Appeal Heard:	February 7, 2012, in Halifax, Nova Scotia
Held:	Leave to appeal sentence is granted and the appeal is dismissed per reasons for judgment of Oland, J.A.; Saunders and Beveridge, JJ.A. concurring
Counsel:	Shaun O'Leary, for the appellant Ronald Pizzo and Ian Hutchison, for the respondent

Reasons for judgment:

[1] The respondent, Shawn Banfield, was charged with a drug offence and weapons offences. He plead guilty to the weapons offences, and was sentenced. Months later, he plead guilty to the drug offence. While awaiting sentencing for that drug offence, he was charged with and plead guilty to a second drug offence.

[2] Justice Suzanne M. Hood of the Supreme Court of Nova Scotia sentenced the respondent for both the earlier and later drug offences, and other charges. In doing so, she credited the respondent with the time he served for the weapons offence. The Crown appeals the sentence.

[3] For the reasons which I will develop, I would grant leave to appeal sentence but dismiss the appeal.

Background

[4] The execution of a search warrant at a residential property on February 5, 2008, led to the first charges against the respondent. Police officers found the respondent and his co-accused at that property. They also found a loaded .22 pistol, a loaded shot gun, 125.8 grams of powdered cocaine, cutting agent, scales and packing material. At the time, the respondent was on parole.

[5] The respondent was charged with possession of cocaine for the purposes of trafficking contrary to s. 5(2) of the *Controlled Drugs and Substances Act*, S.C. 1996, c. 19 ("*CDSA*"), and with weapons offences pursuant to s. 95 and 88 of the *Criminal Code*, R.S.C., 1985, c. C-46. On February 28, 2008 he plead guilty only to the weapons offences, and was sentenced to 18 months incarceration. His co-accused plead guilty to the cocaine offence and, pursuant to a joint recommendation, was sentenced to three years.

[6] On the morning of his trial on February 1, 2010, the respondent plead guilty to trafficking cocaine. Sentencing was adjourned pending the preparation of a pre-sentence report.

[7] On March 9, 2010, some two years after the cocaine and weapons charges, the respondent was found in possession of 2,527 grams (approximately 5.5

pounds) of marijuana. That May he plead guilty to possession of marijuana for the purposes of trafficking contrary to s. 5(2) of the *CDSA*. He also plead guilty to two breaches of recognizance (s. 145(3) of the *Criminal Code*).

[8] On February 3, 2011, the respondent appeared for sentencing for three offences: (a) the February 2008 cocaine offence, (b) the March 2010 marijuana offence, and (c) the breaches of recognizance. By then, he had completely served the 18 month sentence for the 2008 weapons offences.

[9] The Crown sought 4 years for trafficking cocaine and 2 to 3 years for trafficking marijuana, for a total sentence of 6 to 7 years. Defence counsel urged 3.5 years for the cocaine offence and 1.5 for the marijuana offence, for a total sentence of 5 years. Both counsel also addressed the time the respondent had spent on remand.

[10] The judge sentenced the appellant to 4 years for the cocaine offence, 1.5 years consecutive for the marijuana offence, and 1 month concurrent for each of the breaches, for a total of 5.5 years or 66 months. In determining sentence for trafficking cocaine, she gave the respondent credit for the 18 months served for the weapons offence, and credit of 13.5 months for time on remand. The sentence remaining to be served was 34.5 months.

[11] The Crown appeals the sentencing decision reported as 2011 NSSC 56.

Issues

[12] The Crown framed the issues on appeal thus:

> Whether the sentencing judge erred in law by failing to apply the proper principles of sentencing, and more specifically by:
>
> (a) Concluding the sentences for the weapons and drug offences would have been imposed concurrently.
>
> (b) Reducing the sentence for the charge of possession for the purpose of trafficking in cocaine by 18 months thereby giving inadequate weight to the proper principles of sentencing and resulting in a

> global sentence which is demonstrably unfit in all the circumstances.

Standard of Review

[13] In determining the sentence to be imposed on an offender, a judge takes into account the purpose and principles of sentencing as set out in the *Criminal Code.* This calls for the exercise of judicial discretion. Discretionary decisions attract a deferential standard of review. Saunders J.A. writing for the court stated in *R. v. Bernard*, 2011 NSCA 53:

> [10] The standard of review in sentencing matters is well known. In **R. v. Knockwood**, 2009 NSCA 98 this Court observed:
>
> > [11] There is no dispute as to the proper standard of review in this case. This Court's review of a sentencing order is a highly respectful one. We must show great deference whenever we are asked to consider appeals against sentence. Absent an error in principle, a failure to consider a relevant factor, or an over-emphasis of appropriate factors, we should only vary a sentence imposed at trial if we are convinced that the sentence is demonstrably unfit. See for example, **R. v. L.M.**, 2008 SCC 31; **R. v. M.(C.A.)**, [1996] 1 S.C.R. 500; **R. v. Longaphy**, 2000 NSCA 136 and **R. v. Conway**, 2009 NSCA 95.
>
> See also **R. v. Solowan**, [2008] 3 S.C.R. 309; **R. v. Markie**, 2009 NSCA 119; and **R. v. A.N.**, 2011 NSCA 21.

[14] Whether a sentence ought to be concurrent or consecutive is also a discretionary decision. Again, the approach an appellate court is to take to such decisions is one which respectfully acknowledges the advantages enjoyed by the sentencing judge. In **R. v. McDonnell**, [1997] 1 S.C.R. 948, Sopinka J. for the majority wrote:

> 46. In my opinion, the decision to order concurrent or consecutive sentences should be treated with the same deference owed by appellate courts to sentencing judges concerning the length of sentences ordered. The rationale for deference with respect to the length of sentence, clearly stated in both *Shropshire* and *M. (C.A.)*, applies equally to the decision to order concurrent or consecutive sentences. In both setting duration and the type of sentence, the sentencing judge exercises his or her discretion based on his or her first-hand knowledge of the

> case; it is not for an appellate court to intervene absent an error in principle, unless the sentencing judge ignored factors or imposed a sentence which, considered in its entirety, is demonstrably unfit. The Court of Appeal in the present case failed to raise a legitimate reason to alter the order of concurrent sentences made by the sentencing judge; the court simply disagreed with the result of the sentencing judge's exercise of discretion, which is insufficient to interfere.

Analysis

[15] I begin with the judge's reasons. In sentencing the respondent for possession for the purpose of trafficking of both cocaine and marijuana, the judge reviewed the facts, the pre-sentence report, the respondent's previous criminal record, and factors both mitigating and aggravating. She reiterated the importance of deterrence in sentencing drug traffickers. The judge addressed totality:

> [21] Because several offences are being sentenced for at this time arising on two different dates, the principle of totality is important. I quote the method for achieving that from **R. v. Adams** 2010 NSCA 42 at paragraph 23:
>
> > 23. ...The judge is to fix a fit sentence for each offence and determine which should be consecutive and which, if any, concurrent. The judge then takes a final look at the aggregate sentence. Only if concluding that the total exceeds what would be a just and appropriate sentence is the overall sentence reduced.
>
> ...
>
> [34] Using the principle of totality, I must determine the sentence for each offence and then determine whether they should be consecutive or concurrent, and then look overall at what that brings me to.

[16] The judge then set out the Crown and defence recommendations regarding sentence for the drug offences, being a total of 6 to 7 years and a total of 5 years, respectively. She reasoned:

> [36] The main difference between the two counsel is credit for the prior guilty plea that you made with respect to the weapons offences and the sentence you have already served for that, as a result of that early guilty plea. The Crown says I should rely on **R. v. Clarke**, [[1994] N.S.J. No. 474] and your counsel says it should be distinguished. I agree that the **Clarke** decision should not be followed

> with respect to giving consecutive sentences for weapons and drug offences. In my view there were two separate incidents in **Clarke**: the drugs were found in a hotel room and the weapon was found at a later time. So I do not conclude that that stands for the proposition in this case that the sentences must be considered to be consecutive.
>
> [37] Here the drugs and the weapons were found at the same time in the same place. If you were being sentenced for them at the same time, in my view they would be considered to be concurrent. In my view they should not be treated differently, and you should not be prejudiced, because you are being sentenced for those two offences at two separate times.
>
> [38] I therefore conclude that that 18-month sentence already served should be credited on the sentence I am giving today; so therefore, that is a credit of 18 months. It is a novel, I think, submission, but in my view it is consistent with the principle of giving concurrent sentences.

[17] In the result, the total sentence to be served for the drug offences was 34.5 months, as follows:

(a) 48 months for the cocaine offence less 18 months credit for the sentence already served for the weapons offence, plus
(b) 18 months for the marijuana offence, less
(c) 13.5 months remand credit.

The one month sentence for each of the two breach offences ran concurrently. The 13.5 months remand credit consisted of 1.5 credit for the respondent's 5 months in segregation (7.5 months) and 6 months on the range. A forfeiture order and DNA order were granted, and a lifetime weapons prohibition was imposed.

[18] The Crown argues that the sentence imposed by the judge for the cocaine offence is demonstrably unfit, and that she erred in giving the respondent credit for time served for a separate, earlier offence. It is not appealing the sentence for the marijuana offence.

[19] The test for determining whether a sentence is demonstrably unfit was set out by the Supreme Court of Canada in *R. v. Shropshire*, [1995] S.C.J. No. 52. Iacobucci J. quoted with approval the approach taken by this court:

> **47** I would adopt the approach taken by the Nova Scotia Court of Appeal in the cases of *R. v. Pepin* (1990), 98 N.S.R. (2d) 238, and *R. v. Muise* (1994), 94 C.C.C. (3d) 119. In Pepin, at p. 251, it was held that:
>
> > . . . in considering whether a sentence should be altered, the test is not whether we would have imposed a different sentence; we must determine if the sentencing judge applied wrong principles or [if] the sentence is clearly or manifestly excessive.
>
> **48** Further, in Muise it was held at pp. 123-24 that:
>
> > In considering the fitness of a sentence imposed by a trial judge, this court has consistently held that it will not interfere unless the sentence imposed is clearly excessive or inadequate....
> >
> > . . .
> >
> > The law on sentence appeals is not complex. If 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 . . . . My view is premised on the reality that sentencing is not an exact science; it is anything but. It is the exercise of judgment taking into consideration relevant legal principles, the circumstances of the offence and the offender. The most that can be expected of a sentencing judge is to arrive at a sentence that is within an acceptable range. In my opinion, that is the true basis upon which Courts of Appeal review sentences when the only issue is whether the sentence is inadequate or excessive.

[20] The Crown argues that the sentence of 30 months for the cocaine offence (48 months less the 18 months served for the weapons offence) was demonstrably unfit. It points out that the respondent's co-accused, who had no criminal record, was sentenced to three years. In its view, the respondent was more than a petty retailer. Moreover, there were aggravating circumstances at play: the respondent had a criminal record relating to a previous drug offence, and was on parole when charged with trafficking cocaine. The Crown directs our attention to *R. v. Conway*, 2009 NSCA 95 where this court increased the sentence imposed on a sixty-five year old man without a record, found with 103 grams of cocaine (an amount equivalent to that found with the respondent), to a term of imprisonment of two and a half years. It also refers to *R. v. Steeves*, 2007 NSCA 130 where this court increased the sentence imposed on a man who plead guilty to his first drug-

related offences, trafficking cocaine and ecstasy, to a term of two and a half years. The Crown submits that 48 months incarceration is an appropriate sentence for the cocaine offence.

[21] While the Crown's argument is directed against a 30 month sentence for the cocaine offence, what the judge actually imposed was a sentence of 48 months. This appeal turns on her reduction of that sentence by her application of the time served for the weapons offence.

[22] According to the Crown, the judge erred in principle by not following this Court's decision in *Clarke*, which dealt with the sentence for a drug offence and a weapon offence. The appeal in *Clarke* was dismissed in a short oral decision given by Hallett J.A. for the court. In its entirety, it reads:

> [1] This is an offender's appeal from a sentence totalling nine (9) years for the offences of having possession of cocaine for the purpose of trafficking and possession of a prohibited weapon. The learned trial judge imposed a sentence of four and a half years for each offence to be served consecutively.
>
> [2] The appellant, who had flown into Halifax from Montreal, was in constructive possession of one kilo of cocaine which was in his motel room and in actual or constructive possession of a powerful semi-automatic hand gun when apprehended in a taxi cab in the Halifax area.
>
> [3] The appellant's counsel argues that the sentences should have been concurrent rather than consecutive because carrying a gun is part of a drug dealer's modus operandi. We are of the opinion it was appropriate to impose consecutive sentences given the fact that the two offences are designed to protect different legal interests of the public. On the one hand protection against the availability of narcotics and on the other the security of persons from those who possess weapons.
>
> [4] Irrespective of that, considering the gravity of the offences and the lengthy and serious criminal record of this offender, nine years in total was a fit sentence in order to deter this offender and other drug dealers from committing, in combination, these serious offences which pose great danger to the public and, in particular, to the police.
>
> [5] We agree with the Crown's representation that the imposition of concurrent sentences for weapons charges and narcotics charges could only have the effect of

> ultimately encouraging the use of firearms by those conducting drug deals. The appeal is dismissed. (Emphasis added)

[23] The Crown emphasizes that the courts have recognized that offences involving weapons and drugs protect different societal interests and should attract consecutive, rather than concurrent, sentences. It points to *R. v. Gummer*, [1983] O.J. No. 181 (Ont. C.A.) where the respondent had been convicted of dangerous driving and leaving the scene of an accident with intent to escape civil or criminal liability. His sentence was six months for the first offence and six months concurrent for the second offence.

[24] On appeal, the sentences were ordered to be served consecutively. Martin J.A., writing for the court, stated:

> **13** The learned trial Judge considered that it was appropriate to impose concurrent sentences because so many of the ingredients of the offence of failing to remain were "caused by the earlier offence, the consumption of alcohol, the blurring of Judgment" for which the respondent had already been sentenced in respect of the offence of dangerous driving. Counsel for the respondent ably argued that the trial Judge did not err in imposing concurrent sentences and that sentences for offences arising out of the same transaction or incident are properly made concurrent. We do not consider the rule that sentences for offences arising out of the same transaction or incident should normally be concurrent, necessarily applies where the offences constitute invasions of different legally protected interests, although the principle of totality must be kept in mind. The offences of dangerous driving and "failing to remain" protect different social interests. The offence of dangerous driving is to protect the public from driving of the proscribed kind. The offence of failing to remain under s. 233(2) of the Code imposes a duty on the person having the care of a motor vehicle which has been involved in an accident, whether or not fault is attributable to him in respect of the accident, to remain and discharge the duties imposed upon him in such circumstances. (Emphasis added)

[25] The legitimacy of consecutive sentences for driving while impaired, driving while prohibited, and leaving the scene of an accident, on the basis that they protect different societal interests, was not in issue in this court's decision in *R. v. Naugle*, 2011 NSCA 33. However, Beveridge J.A., writing for the court, referred to the principle in *Gummer* and observed at ¶ 34 that it has been applied by the Ontario Court of Appeal in *R. v. Gillis*, 2009 ONCA 312 to uphold consecutive sentences for sexual assault with a weapon, unlawful confinement and theft, and

by the Newfoundland Supreme Court - Court of Appeal in *R. v. Antle,* [1993] N.J. No. 176 for offences related to drinking while intoxicated, dangerous driving and operating a motor vehicle while disqualified.

[26] The Crown relies on *Clarke* and *Gummer* to argue that in trafficking cases, where weapons are involved, the *CDSA* charges and the *Criminal Code* weapons charges should attract consecutive sentences. In its view, the only acceptable exception is when the weapon would be considered an aggravating factor in the drug offence, pursuant to s. 10(2)(a)(i) of the *CDSA*. In this regard, it refers to *R. v. Sherman* [2004] O.J. No. 651 (C.A.) where the appellant appealed both his conviction for importing into Canada at the same time some 600 grams of heroine and a weapon (a switch blade), and his sentence of 12 years on the heroine charge and one year consecutive on the weapons charge. The conviction appeal was dismissed, and the sentence appeal allowed. The Ontario Court of Appeal in its oral endorsement held that where possession of the weapon was an aggravating factor on the drug charge, a consecutive sentence on the weapon charge was not appropriate. It made the sentences concurrent.

[27] In my view, the Crown's position that consecutive sentences should always be imposed whenever drugs and weapons are part of the same incident is too stringent. It would severely limit a sentencing judge's exercise of discretion in determining the appropriate sentence and in deciding whether to impose consecutive or concurrent sentences. Furthermore, this requirement is not firmly established in the law.

[28] In *R. v. Hatch*, [1979] N.S.J. No. 520 (C.A.), the appellant appealed his sentence for multiple counts of uttering forged documents, fraud, theft and false pretences. Some sentences were consecutive, others concurrent. MacKeigan, C.J.N.S., writing for the court, stated:

> **6** We have frequently noted that the Code seems to require consecutive sentences unless there is a reasonably close nexus between the offences in time and place as part of one continuing criminal operation or transaction: R. v. Osachie (1973), 6 N.S.R.(2d) 524. <u>This does not mean, however, that we should slavishly impose consecutive sentences merely because offences are, for example, committed on different days</u>. It seems to me that we must use common sense in determining what is a "reasonably close" nexus, and not fear to impose concurrent sentences if the offences have been committed as part of a continuing criminal

> operation in a relatively short period of time. Thus, I would not have thought it wrong in the present case to have imposed more concurrent sentences.
>
> **7** The choice of consecutive versus concurrent sentences does not matter very much in practice so long as the total sentence is appropriate**.** Use of the consecutive technique, when in doubt as to the closeness of the nexus, ensures in many cases that the total sentence is more likely to be fit than if concurrent sentences alone are used. Conversely, unthinking use of concurrent sentences may obscure the cumulative seriousness of multiple offences. (emphasis added)

In *Adams* which is often cited for its discussion of the principle of totality, Bateman J.A., writing for the court, observed at ¶ 58 that, in giving effect to that principle, this court in *Hatch* has stated that "the law respecting concurrency and consecutively need not be slavishly applied."

[29] Even if the decision from *Gummer* were binding rather than only persuasive, the wording in the passage quoted in [24] above is far from definitive. The Ontario Court of Appeal did not state that only consecutive sentences should be ordered for offences which affect different legally protected interests. Rather, it carefully stated that the general rule regarding concurrent sentences does not "necessarily" apply in that situation. Importantly, it concluded by emphasizing that "the principle of totality must be kept in mind."

[30] The decision of this court in *Clarke* did not establish that sentences for drugs and weapons offences arising out of the same incident must be consecutive. The sentencing judge in the decision under appeal accurately distinguished *Clarke* on its facts. There the accused was in possession of a semi-automatic pistol while out in a taxi cab. The drugs were found not on his person, but at a different time in a different location, namely his hotel room. In the case before us, the weapons and the drugs were found during the same police search of the apartment where the respondent was found. Because he was not carrying, using or threatening to use the firearms, they were not an aggravating factor pursuant to s. 10(2)(a)(i) of the *CDSA* in sentencing.

[31] In crafting an appropriate sentence, a judge is to consider both the circumstances of the particular offence and those of the particular offender. While many factors must be taken into account, the totality of the sentence is highly important.

[32] A close examination of the judge's decision here shows that she appreciated the facts of the offences for which she was sentencing the respondent. She also referred to his particular circumstances, noting that he was "still a young man", he had plead guilty, and his pre-sentence report was "generally positive". She observed that he had a previous record and he was on parole at the date of the first offence. The judge referred to the purpose and principles of sentencing and reviewed numerous sentencing decisions regarding deterrence and trafficking offences. She then reminded herself of the importance of the principle of totality and the sentences sought by the Crown and defence counsel. After considering more cases and counsels' submissions, both written and oral, she addressed the *Clarke* decision, and distinguished it based on the proximity in time and place between the drug and weapons offences. She reasoned that the sentences would have been concurrent had the respondent been sentenced for them at the same time and he should not be prejudiced because sentencing was at separate times. The judge acknowledged that a credit for the time served for the weapons offence was "novel", but felt it was consistent with the principle of giving concurrent sentences and exercised her discretion by reducing the cocaine offence by the 18 months served.

[33] The case law does not establish that a concurrent sentence was prohibited in these circumstances. In my view, the judge in her thorough decision took all applicable principles of sentencing, including totality, into consideration before determining an appropriate sentence. In its totality, the sentence falls within an acceptable range and is not demonstrably unfit. The standard of review calls for an appellate court to approach a sentencing decision with deference, and I cannot identify any foundation for appellate intervention.

[34] I would grant leave to appeal sentence, but dismiss the appeal.

Oland, J.A.

Concurred in:

Saunders, J.A.

Beveridge, J.A.

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Counsel:	Shaun O'Leary, for the appellant Ronald Pizzo and Ian Hutchison, for the respondent

Erratum:

[1] Page 7, Paragraph [20], Third Sentence, where it reads “In its view, the respondent was a petty retailer.”, it should read “In its view, the respondent was more than a petty retailer.”