**NOVA SCOTIA COURT OF APPEAL**
**Citation:** *R. v. McInnis*, 2017 NSCA 79

**Date:** 20170928
**Docket:** CAC 458474
**Registry:** Halifax

**Between:**

Jeremy McInnis

Appellant

v.

Her Majesty the Queen

Respondent

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| **Judges:** | MacDonald, C.J.N.S., Saunders and Bourgeois, JJ.A. |
| **Appeal Heard:** | September 13, 2017, in Halifax, Nova Scotia |
| **Held:** | Appeal allowed, in part, per reasons for judgment of Saunders, J.A.; MacDonald, C.J.N.S. and Bourgeois, J.A. concurring |
| **Counsel:** | Laura McCarthy, for the appellant<br>Marian Fortune-Stone, Q.C., for the respondent |

**Reasons for judgment:**

[1] Acting on a tip, police placed a flea-market in Dartmouth under surveillance, where it was thought that Mr. McInnis was selling items said to be prohibited weapons. Further investigation led to a variety of charges against the appellant involving the purported possession, and possession for the purpose of transfer, of assorted knives and devices said to conceal knives.

[2] In general terms, the items fell into three categories: so-called "spring torque" or "centrifugal" knives, of which there were twenty-one; so-called bullet knives where items that resembled Springfield 30-06 bullets contained a blade inside that pivoted on a rivet, of which there were nine; and two walking sticks/canes with, purportedly, "dog head" handles. The head of the handle could be unscrewed, and once pulled out of the cane, the handle (attached perpendicular to the sharpened blade) might then serve as a push dagger.

[3] Mr. McInnis was tried in the Nova Scotia Provincial Court before the Honourable Judge Alanna Murphy on a 64 count Indictment which specified the following offences: a single count of carrying a concealed weapon, that being the knife he had clipped inside his pocket when arrested (s.90); 32 counts of possessing a prohibited weapon (s. 91(2)); and 31 counts of possessing a prohibited weapon for the purpose of transfer (s. 100(3)) of the *Criminal Code of Canada*, R.S.C. 1985, c. C-46).

[4] At trial, police officers testified as to the items they seized, their appearance, and the motion or mechanics required to open them for use. They were marked as exhibits and used to demonstrate their size and the action needed to deploy them.

[5] Mr. McInnis gave extensive testimony concerning his knowledge of knives, his purchasing the items through American distributors online as merchandise for his store, and his interactions with the Canada Border Service Agency (CBSA) and the RCMP as well as his own research in attempting to ensure that his commercial transactions were "legal".

[6] His principal defences were that the seized items did not, either physically or operationally, meet the relevant statutory definitions of weapons for which possession was prohibited, and that, in any event, his actions ought to be excused because he was a victim of officially induced error, having acquired an honest but

erroneous belief that the knives were not prohibited, after reasonably relying upon inquiries made to authorities.

[7] After considering all of the evidence and counsels' submissions, Judge Murphy was not persuaded that either the knife Mr. McInnis had in his possession at the time of his arrest, or the twenty-one "centrifugal" knives seized from his business, met the statutory criteria to qualify as prohibited knives. Accordingly, Judge Murphy acquitted Mr. McInnis on all counts relating to those items. That outcome is not the subject of appeal, and we need not concern ourselves with that assortment of weapons.

[8] The trial judge was satisfied that the characteristics of the two walking sticks would allow the blade, housed in the canes, to be pushed with considerable force, because the handle was affixed perpendicular to the blade. She found that the characteristics of the weapon caused it to fall within the definition of prohibited weapon. It was not rendered "legal" simply because there might be alternative methods of grasping or using it.

[9] Further, based on her observations and her findings concerning the function of the nine bullet knives, Judge Murphy was satisfied that they too met the statutory definition. The devices were less than 30 centimeters and were designed to conceal a knife or blade. Murphy, J. recognized that the legislation's rationale was to prevent someone from being "caught unaware and placed at risk" and that a bullet, in and of itself, was innocuous when not in or near a firearm.

[10] Based on these findings, the judge convicted the appellant of 22 offences relating to possession, and possession for the purpose of transferring prohibited weapons, they being the two walking sticks and the nine bullet knives, contrary to s. 91(2) and s. 100(3) respectively.

[11] Judge Murphy then considered and rejected Mr. McInnis's claim to be excused on account of officially induced error. She found that some of his inquiries post-dated these offences, and that he had not reasonably relied upon any erroneous legal opinion or advice given by any official responsible for the administration or enforcement of that law. A bare assertion that certain items had "passed through customs" could hardly support the claimed exemption. Accordingly, the judge decided that the appellant had no legal excuse for committing the offences and that a stay was not warranted.

[12] In the lead-up to sentencing Mr. McInnis advanced a constitutional argument against the mandatory minimum sentence of one year, specified in s. 100(3). After receiving detailed written and oral submissions, Judge Murphy concluded that the one year minimum penalty was grossly disproportionate to the circumstances of these offences and this offender. The Crown did not pursue a s. 1 *Charter* justification.

[13] In proceeding to sentence, Murphy, J. accepted the Crown's recommendation, that being a 3-month custodial sentence to be served with conditions in the community, concurrent to the s. 100(3) possession for the purpose of offences, and a fine of $30 on each of the s. 92(2) possessions for a total of $330.

[14] Mr. McInnis now appeals both his conviction and his sentence. He says the judge made several significant factual and legal errors. He asks us to overturn the convictions and substitute acquittals. Alternatively, he asks that we stay certain convictions, or render a lesser sentence, or send it back for a new sentence hearing.

[15] Except in one particular, I am not persuaded by the appellant's challenge to either his convictions or his sentence. Respectfully, I see his complaints of alleged legal error, as dissatisfaction with the trial judge's factual findings and the inferences she reasonably drew from those facts. It is not our function to re-try the case. Judge Murphy was in the best position to draw factual conclusions from her assessment of the evidence and her observations of the witnesses and exhibits at trial.

[16] Having carefully considered the record and counsels' submissions, I am satisfied that Judge Murphy did not err in her evaluation of the evidence or her interpretation and application of the law to the issues before her. Neither can it be suggested that the penalty she imposed was not a fit and proper sentence. She was thoroughly familiar with the facts. She considered, but voiced her difficulty in accepting, the range of sentence proposed by the Crown. She carefully calibrated the aggravating and mitigating circumstances. She applied proper sentencing principles. She addressed proportionality, considered individual sentences, and then applied concurrency to reach the right global sentence.

[17] In my respectful view, her only mistake was failing to correctly apply the *Kienapple* principle to the offences for which Mr. McInnis was convicted (*R. v. Kienapple*, [1975] 1 S.C.R. 729). The rule prohibits multiple convictions for offences under the *Criminal Code* for what is really one criminal act, in

circumstances where there is both sufficient proximity as between the facts, and as between the offences which form the basis of the charges. Where *Kienapple* applies to preclude multiple convictions for the same delict, the trial judge is obliged to enter a conviction on the more serious charge and enter a conditional stay with respect to the alternative, and lesser, charge: *R. v. P. (D.W.)*, [1989] 2 S.C.R. 3, 49 C.C.C. (3d) 417 (SCC); *R. v. Terlecki* (1983), 4 C.C.C. (3d) 522 (Alta. C.A.), aff'd [1985] 2 S.C.R. 483; *R. v. Hammerling*, [1982] 2 S.C.R. 905 (S.C.C.)(per Lamer, J. concurring).

[18] The Crown properly concedes that the convictions for possession under s. 91(2) ought to have been conditionally stayed, once the appellant was convicted on the possession for the purpose of transferring the prohibited weapons charges —that is the nine bullet knives and the two walking sticks (push daggers), pursuant to s. 100(3). To that limited extent, the appeal is allowed and an order will issue to that effect. This means that the fine of $330 is set aside. If that fine has been paid, it must be refunded to the appellant forthwith. However, the slight modification I would make to the trial judge's disposition will not affect the actual sentence the appellant must serve.

[19] Before concluding these reasons, there is one other point I wish to address. In her submissions at the appeal hearing, Ms. McCarthy, counsel for Mr. McInnes, asked us to apply *Kienapple* in a manner that would "whittle down" the appellant's convictions from twenty-two to two. She reasoned that instead of basing the number of convictions on the total number of bullet knives (nine) and the walking stick/cane knives (two) and then factoring in a conviction for both "simple possession" as well as possession for the purpose of transferring, which can be expressed in the formula (9+2=11x2=22), we should instead confine the appellant's convictions to two, by treating the box of nine bullet knives as "one", and the two walking stick/cane knives as "one". This, she said, is because each of the nine bullet knives, and each of the two cane knives, was identical in every respect, to its comparative mate.

[20] Ms. McCarthy presented some analogies to support her proposition. Suppose, for example, a drug trafficker were convicted of possessing cocaine for the purpose of trafficking. In that instance, she said the offender would not be convicted "for the number of bags" found in his/her possession, but rather the overall quantity and value of the drug seized at the time of arrest. Similarly, she suggested that if a person were found to be in possession of stolen property (let's use a pilfered cargo container housing a dozen identical Italian racing bikes as an

example) then the number of potential convictions faced by the accused would not, she said, be determined by the "number" of stolen items (bicycles), but rather by the value of the items seized (i.e. possession of property obtained by crime where the value thereof exceeds, or does not exceed, five thousand dollars, s. 355 of the *Criminal Code*).

[21] Counsel for the appellant did not provide any authority for her proposed methodology. Nor, after searching, did I find any.

[22] Respectfully, I would reject the appellant's submission, largely for the reasons advanced by Ms. Fortune-Stone, on behalf of the respondent. First, based on the proven facts of this case, it is important to emphasise that Mr. McInnis was involved in a commercial enterprise. He had all of these items on display, for sale. He hoped to sell nine bullet knives, not one; and two cane knives, not one. Further, the framing of the charges against the appellant was a matter for the Crown in the exercise of prosecutorial discretion. There was never a motion made on behalf of the appellant to "join" these various offences, nor any complaint challenging the propriety of the manner in which the Crown chose to prosecute the appellant. Additionally, it would appear from the physical record before us, that his appeal to this Court is the first time the appellant has proposed such an approach for calculating the number of convictions when granting a stay (perhaps excepting a vague reference to the point by defence counsel during a brief appearance before the trial judge on September 29, 2016, particulars of which were not included in the materials copied and filed by the appellant on appeal, nor mentioned by counsel on appeal). One can hardly attribute error to a judge for failing to adopt and apply a submission that was never clearly put to her for consideration.

[23] Finally, and perhaps most importantly, to accept the appellant's invitation that we apply *Kienapple* in the fashion he proposes would, in my view, turn on its head several long-established principles of sentencing and effectively gut the vast discretion available to trial judges when crafting a sentence that properly addresses the unique circumstances of the offence and the offender. It would render meaningless a judge's consideration of proportionality, range, culpability, totality and concurrency, in fashioning a proper sentence, if defence counsel could simply stand up and cite *Kienapple* as a basis for "whittling down" (in other words, ignoring) the <u>real</u> number of convictions, based on purported similarities between the prohibited items or things that formed the basis of the convictions in the first place.

[24] To conclude on this point, I am not aware of any case or text authority that addresses the appellant's proposed methodology. I have summarized my reasons for rejecting it, which include my concern that to accept such a submission would be to perpetuate a fiction by effectively ignoring the true state of affairs and the fact that the Crown *had* secured proper convictions in its prosecution of the appellant. I find some support for my rejection of the appellant's arguments in a decision of the Ontario Court of Appeal which has certain parallels to this case. In *R. v. Smith* (1997), 119 C.C.C. (3d) 547, 36 O.R. (3d) 530, the appellant had been acquitted at trial on a charge of public mischief. At a subsequent trial, he was convicted on six counts of perjury (s. 131(1) of the *Criminal Code*) with respect to six lies he told during his testimony at the public mischief trial. The Ontario Court of Appeal allowed the appeal on count six (a lie for which he was previously acquitted at his public mischief trial) citing *res judicata*, but dismissed the appeal on counts 1-5. The Court then released "Supplementary Reasons" to its decision, addressing the overlooked issue of whether *Kienapple* applied to stay four of the five remaining counts. It wrote:

> 1. THE COURT - The appellant has properly brought to our attention that the reasons released on September 30, 1997, failed to deal with the issue of multiple convictions. In our conference following argument we were agreed that we would not allow the appeal on this ground but then overlooked the issue as we concentrated upon the first ground of appeal.
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> 2. The appellant relies upon what has been termed the rule against multiple convictions which protects a person from being convicted more than once for the same delict. On the basis of our earlier decision he would now be arguing that four of the five convictions should be set aside on the principles set out in *R. v. Prince* (1986), 30 C.C.C. (3d) 35 (S.C.C.) at 43-6.
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> 3. It is true that there is a factual nexus between these charges and a nexus between the offences in that the perjuries tie together to a continuous story told for the single purpose of avoiding conviction for public mischief.
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> 4. Nonetheless, each of the five charges is factually independent of the others. Proof of one does not prove another. If one conviction were to replace five pursuant to the rule against multiple convictions then, in these circumstances, it would be the same result as if the Crown had failed to prove four of the counts. The appellant told five discrete lies under oath and neither he nor others should be encouraged to continue lying once they start because only one conviction will result.
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> 5. There is potential for abuse in dividing perjured evidence into tiny bits of charges but I do not see any such indication here. In the course of argument as to *res judicata* attempts were made to fit some or all of these counts under the

> umbrella of *res judicata*. In the end only one of the six would fit. The uncertainty as to the scope of *res judicata* justified the separate charges and their relationship, each to the others, was undoubtedly considered in the sentencing.
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> 6 I would therefore not accede to this ground of appeal and would confirm the disposition of September 30, 1997.

[Underlining mine]

**Conclusion**

[25] For all of these reasons I would uphold the 11 convictions for possession for the purpose of transferring, contrary to s. 100(3). I would allow the appeal to the extent of staying the 11 convictions for the lesser offences of possession, contrary to s. 91(2). This will result in setting aside the fine of $330 that had been levied for those lesser offences. My slight modification of Judge Murphy's order will not change the *length* of the appellant's sentence.

Saunders, J.A.

Concurred in:

MacDonald, C.J.N.S.
Bourgeois, J.A.