NOVA SCOTIA COURT OF APPEAL
Citation: *R. v. Laing*, 2022 NSCA 23

Date: 20220324
Docket: CAC 504859
Registry: Halifax

Between:

Her Majesty the Queen

Appellant

v.

Travis James Terry Laing

Respondent

Judge:	The Honourable Justice Joel E. Fichaud
Appeal Heard:	January 24, 2022, in Halifax, Nova Scotia
Subject:	Criminal law – sentencing – concurrent and consecutive sentences – totality – reincarceration
Summary:	Mr. Laing was convicted of three counts of the careless use of a firearm contrary to s. 86(1) of the *Criminal Code*, and four counts of being an occupant in a motor vehicle while knowing there was a firearm present contrary to s. 94(1). The Provincial Court Judge's sentencing decision said that, subject to considering concurrency and totality, the appropriate sentence would be 12 months for each of the three offences under s. 86(1), 12 months for one of the offences under s. 94(1) and 18 months for the other three under s. 94(1). After applying the totality analysis under s. 718.2(c) of the *Code*, the judge concluded that all Mr. Laing's sentences would be concurrent. This meant the total term of incarceration for the seven sentences was 18 months less his remand credit. Mr. Laing served his time and was released over 11 months ago.

The Crown applied for leave to appeal the sentencing decision.

Issues: Did the sentencing judge err in principle respecting concurrency and totality and, if so, what is the appropriate sentence and should Mr. Laing be reincarcerated?

Result: The Court of Appeal granted leave to appeal and allowed the appeal in part.

The sentencing judge made two errors in principle by: (1) not determining whether or how the sentences should be concurrent or consecutive before the consideration of totality and (2) making all the sentences for Mr. Laing's most serious offences concurrent without regard to their seriousness, which was disproportionate to his overall culpability.

The sentence was varied by:

- reducing the terms of incarceration for each of the three offences contrary to s. 94(1) on January 1, 2020, January 4, 2020 and January 10, 2020, from 18 months to 12 months,
- ordering the 12 months of incarceration for the two offences committed on January 1, 2020 be served concurrently to each other but consecutively to the terms of incarceration for the other five offences, and
- ordering the terms of incarceration for the other five offences be served concurrently to each other.

Mr. Laing's cumulative term of incarceration increased from 18 months to 24 months, before the remand credit. Mr. Laing's service of the additional term of incarceration was stayed.

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Judges:	Wood C.J.N.S., Fichaud and Bryson JJ.A.
Appeal Heard:	January 24, 2022, in Halifax, Nova Scotia
Held:	Leave to appeal granted, appeal allowed in part, sentence varied but service of further incarceration stayed per reasons for judgment of Fichaud J.A., Wood C.J.N.S. and Bryson J.A. concurring
Counsel:	Jennifer A. MacLellan, QC and Dakota Bernard, articled clerk, for the Appellant Nicole A. Rovers for the Respondent

Reasons for judgment:

[1] Mr. Laing pleaded guilty to three counts of the careless use of a firearm contrary to s. 86(1) of the *Criminal Code*, and four counts of being an occupant in a motor vehicle while knowing there was a firearm present contrary to s. 94(1). Provincial Court Judge Elizabeth Buckle convicted Mr. Laing of those seven offences.

[2] The offences involved two semi-automatic rifles, a shotgun and a .22 calibre lever action rifle. These weapons could be owned legally with a non-restricted firearms Possession and Acquisition Licence. At the time of the offences, Mr. Laing did not have such a licence.

[3] Videos made by Mr. Laing captured his conduct. The videos show Mr. Laing with loaded firearms in his vehicle and either discharging or directing others to discharge the firearms in his backyard, from a moving vehicle on Highway 103 and in a wooded area near an ATV trail.

[4] Judge Buckle's sentencing decision (2021 NSPC 14) said that, subject to considering concurrency and totality, the appropriate sentence would be 12 months for each of the three offences under s. 86(1), 12 months for one of the offences under s. 94(1) and 18 months for the other three under s. 94(1). After applying the totality analysis under s. 718.2(c) of the *Code*, the judge concluded that all Mr. Laing's sentences would be concurrent. This meant the total term of incarceration for the seven sentences was 18 months less his remand credit. Mr. Laing served his time and was released over 11 months ago.

[5] The Crown applies for leave to appeal the sentencing decision. The issues are whether the sentencing judge erred in principle respecting concurrency and totality and, if she did, what is the appropriate sentence and should Mr. Laing be reincarcerated?

The Offences

[6] On January 6, 2020, Halifax District RCMP received a complaint about a white Ford Crown Victoria with a black hood and black trunk driving erratically on Lucasville Road in Hammonds Plains several days earlier. It was reported the driver had waived a brown and black "assault style" rifle out the driver's side

window. The police determined the vehicle was owned by the Respondent Mr. Travis Laing. The police obtained a search warrant for Mr. Laing's Crown Victoria and residence. The search located a GoPro camera, SD cards and a USB stick containing videos. The videos' contents were summarized by Judge Buckle in the passages I will quote below. The videos had been made by Mr. Laing or under his direction.

[7] At the sentencing hearing, the video recordings were entered as exhibits and were supplemented by an agreed statement of facts. I quote Judge Buckle's findings that I have titled by the offences of which he was convicted:

- **December 29, 2019 – offence contrary to s. 94(1):**

> [14] The video from December 29, 2020 [*sic* 2019] shows Mr. Laing driving a motor vehicle in the Halifax area at night. On the passenger seat is a Type 81 semi-automatic rifle with a loaded magazine and a second, which appears to be loaded, attached to the firearm with tape. These facts support an offence contrary to s. 94(1) (Count 22).

- **January 1, 2020 – offences contrary to ss. 86(1) and 94(1):**

> [15] The first video from January 1, 2020, shows Mr. Laing again driving a motor vehicle at night with what appears to be the same Type 81 semi-automatic rifle. According to the ASF [Agreed Statement of Facts], he is driving on Highway 103, near Exit 2. The car radio is playing and within a minute or two of the New Year's Eve count down. Mr. Laing discharged the firearm three times out of the driver's side window. According to the ASF, at the time, he was less than 400 metres from residences.
>
> [16] A second video from January 1, 2020, shows the vehicle stopped at night in an area identified in the ASF as being outside Halifax. A male, seated in the passenger seat, is shown discharging a semi-automatic rifle out the passenger side window under Mr. Laing's direction. The events of January 1, 2020 support offences contrary to ss. 86(1) and 94(1) (Counts 1 and 23).

- **January 4, 2020 – offences contrary to ss. 86(1) and 94(1):**

> [17] A series of videos from January 4, 2020, show Mr. Laing with a male and a female at Mr. Laing's residence. The male and female are seen handling a shotgun and the female loads a lever action .22 calibre rifle under the direction of Mr. Laing. The male and female then shoot rounds out of the back door of the residence. According to the ASF, Mr. Laing's residence is in a sub-division with another dwelling located about 60 metres away in the direction they were firing the rounds. They were shooting at beer cans located about 25 feet (7-8 metres) away, in front of a hill that divides the two properties.

> [18] It is agreed that the rounds they were shooting on January 4th were "sub-sonic". Mr. Labori testified that sub-sonic rounds have a reduced speed and range, the specifics of which would depend on the manufacturer, type of ammunition and angle. If angled toward the sky, the distance would still be measured in kilometres not metres. Mr. Labori acknowledged that a sub-sonic round from a .22 calibre rifle could travel at 750 feet/second and there are pellet guns that fire pellets at that speed, however, a pellet gun that fires at a speed of more than 500 feet/second would be deemed a firearm for purposes of the applicable legislation.
>
> [19] In a later video from the same date, Mr. Laing's vehicle is shown parked in a wooded area in daylight. Mr. Laing is in the driver's seat and the same male and female are with him. A group of ATV drivers go by the car. The male who is in the passenger seat has a shotgun and the female in the rear passenger seat has a semi-automatic rifle. A few minutes after the ATVs pass the vehicle, the male and female begin shooting out the passenger side of the vehicle under Mr. Laing's direction. The events of January 4, 2020 support offences contrary to ss. 86(1) and 94(1) (Counts 2 and 4).
>
> - **January 10, 2020 – offences contrary to ss. 86(1) and 94(1):**
>
> [20] In videos from January 10, 2020, Mr. Laing is shown in his vehicle at night with a female. The vehicle is stopped in a wooded area off the 103 Highway, near Exit 5. The female is clearly impaired, and it is agreed that they met earlier that night. She can be seen handling a semi-automatic rifle while in the vehicle and then discharging it under Mr. Laing's direction while out of the vehicle. These facts support offences contrary to ss. 86(1) and 94(1) (Counts 3 and 25)

Mr. Laing's Circumstances

[8] Judge Buckle (paras. 29-39) reviewed Mr. Laing's circumstances from the Pre-Sentence Report, counsel's comments and character letters filed at the sentencing hearing. To summarize:

- Mr. Laing has no history of substance abuse but was taking medication for depression.
- He has a long-standing interest in firearms and has taken them into the woods for practice.
- He is remorseful for careless behaviour that may have endangered others.
- His criminal record comprised seven convictions between 2011 and 2014. These included possession of a weapon (bear spray) for a dangerous

purpose contrary to s. 88(2) of the *Criminal Code* and three breaches of probation. He had not been sentenced to custody.

- On the instant charges, Mr. Laing spent about ten months in remand custody during which he was assaulted by other inmates.

- The Pre-Sentence Report said Mr. Laing would be suitable for community supervision.

[9] Later the judge added:

> [45] … I accept that some of his regret is associated with filming himself and getting caught, however, he has also expressed some appreciation for the risk he exposed others to and remorse for that.
>
> [46] … The [character] letters here show that Mr. Laing is a hard worker, quiet, kind and generous to his family, friends and neighbour, and non-violent and non-aggressive with those people. …
>
> [47] Mr. Laing has a trade, good employment history and community support. He has a relatively minor criminal record and there is no indication that he is entrenched in a criminal lifestyle. He appears to have good prospects for rehabilitation and successful reintegration into society.

The Sentencing Decision

[10] The judge reviewed the sentencing principles. She emphasized denunciation and general deterrence but noted the Crown had de-emphasized specific deterrence:

> [42] When sentencing for firearms offences, protection of the public, denunciation and general deterrence must be emphasized [citing authority]. Emphasizing these objectives recognizes the reality that misuse of firearms, whether with ulterior criminal intent, negligence or carelessness, has potentially lethal consequences. It also reflects society's condemnation of such conduct and the strong need to deter others from committing similar offences.
>
> [43] The goal of specific deterrence is to discourage Mr. Laing from committing further offences. Here, the Crown does not emphasize this objective and there is nothing in his background or circumstances to suggest that a lengthy period of custody is required to accomplish that objective.

[11] Judge Buckle began with s. 718.1's "fundamental principle" of sentencing, that the "sentence must be proportionate to the gravity of the offence and the degree of responsibility of the offender". The judge said "[t]here is no doubt that

any offence involving a firearm is serious" and "[t]he combination of a firearm in a vehicle which is prohibited by s. 94(1) is recognized as particularly serious" (paras. 50 and 53). She said:

> [56] The context of the offending behaviour is very important to a proper proportionality assessment. Mr. Laing was raised in a relatively rural environment, so I accept that Mr. Laing would have had a comfort and familiarity with long-guns. I also accept that he was motivated by an interest in firearms and a desire to show off or impress others and not by a desire to use the firearms to hurt or intimidate anyone or even in self-defence. There is no evidence that he is criminally entrenched or was using the firearms in any manner connected to a broader criminal context such as the drug trade. No one was hurt or intimidated, and he thought he was taking safety precautions.
>
> [57] However, his behaviour was reckless and the risk to the public was high. Had the police come upon Mr. Laing while he was in a vehicle with a loaded rifle or had a round gone astray when either Mr. Laing or one of the inexperienced users were firing off rounds, the outcome could have been tragic. Mr. Laing, one of his friends, a police officer, neighbour or other users of the highway were all in danger. I fully appreciate the risks here and some aspects, such as sawing the barrel off the rifle, are very concerning.

[12] Turning to s. 718.2(a), the judge considered the aggravating and mitigating circumstances (para. 61):

> **Aggravating Factors**
>
> • the number of firearms, number of dates and number of locations;
>
> • the fact that the firearms in the vehicle were loaded and in one instance discharged from a moving vehicle;
>
> • the involvement of inexperienced and impaired users;
>
> • the very high level of risk – the discharge of firearms in residential areas, from motor vehicles and by inexperienced and/or impaired individuals, and the use of modified ammunition created a high risk of serious harm to the users of the firearms and the public at large;
>
> • Mr. Laing's lack of respect for licensing rules as evidenced by his failure to obtain a PAL [Possession and Acquisition Licence] and his general conduct *vis-à-vis* these firearms; and,
>
> • Mr. Laing shortened the barrel of one of the firearms, making it potentially less accurate and more easily hidden, so more dangerous.
>
> **Mitigating factors**
>
> • Mr. Laing pleaded guilty;

> • He has training, experience and stable employment in the past which makes him a better candidate for rehabilitation and successful reintegration;
>
> • He takes responsibility and has expressed remorse and regret for his actions; and,
>
> • He has the support of his family, ex-partner and current partner.

[13] The judge elaborated on "other factors which are relevant but which I do not view as clearly aggravating or mitigating":

> [63] It is concerning that the weapons have not been recovered, particularly so with respect to the rifle with the shortened barrel. I have no evidence of where the weapons are. I cannot conclude that Mr. Laing's failure to co-operate with authorities by telling them where the weapons are is an aggravating factor, rather, I view it as the absence of a mitigating factor. It detracts from his expression of remorse and acceptance of responsibility.
>
> [64] There is no evidence that he used or intended to use the weapons for any extraneous or illegal purpose, caused harm or intended to cause harm. That is not a mitigating factor but is the absence of a potential aggravating factor.
>
> [65] I accept that the ammunition he used on January 1st was modified, that the result was a reduced range and that Mr. Laing believed this reduced the risk. However, despite his experience and belief that the rounds were safe, I accept that there was an increased risk of malfunction and the ammunition would have had an unpredictable trajectory and distance. As such, while there would have been decreased risk to those who occupied the residences that were 400 metres away, there was increased risk to Mr. Laing and increased risk to other users of the highway if he were injured given that he was driving at highway speeds.

[14] Moving to s. 718.2(b), Judge Buckle considered parity, namely that Mr. Laing's sentence should be "similar to sentences imposed on similar offenders for similar offences committed in similar circumstances". The judge (paras. 68-71, 76-79) discussed and distinguished firearms sentences in authorities from Nova Scotia and several from other provinces.

[15] The judge then turned to concurrency and totality:

> **Restraint and Totality**
>
> [72] Finally, I have to consider the principle of restraint contained within s. 718.2. Restraint, in general, requires that the punishment should be the least that would be appropriate in the circumstances.
>
> [73] One aspect of restraint is the principle of totality which applies where consecutive sentences are imposed. It says the combined sentence should not be

> unduly long or harsh. A sentence needs to be just and reflect the moral blameworthiness of the offender but not be so crushing that it removes hope and undermines rehabilitation.
>
> [74] Our Court of Appeal has directed that when sentencing for multiple offences, a sentencing judge should first determine the appropriate sentence for each individual conviction and then go on to decide whether the sentence should be consecutive or concurrent before ultimately taking a last look at the total sentence and reducing it if need be to reflect totality (*R. v. Adams*, 2010 NSCA 42).

[16] In *R. v. Adams*, 2010 NSCA 42, para. 23, this Court adopted the methodology from *R. v. M.(C.A.)*, [1996] 1 S.C.R. 500, para. 42, per Lamer C.J.C. for the Court. That is – the judge sentencing for multiple offences should make three sequential determinations: (1) the sentence per offence apart from concurrency and totality, (2) whether the sentences should be concurrent or consecutive under the general principles of concurrency, and (3) whether the cumulative sentence should be reduced under principles of totality.

[17] Judge Buckle addressed *R. v. Adams*' first step as follows:

> [80] Mr. Laing is to be sentenced for seven offences occurring on four separate days. All are serious and involve some risk to the public. However, I view the most serious as those involving the discharge of a firearm from a moving vehicle on January 1 and discharging the firearm on January 4 after ATV drivers go by.
>
> [81] Prior to considering totality or credit for pre-trial custody, I have concluded that the appropriate sentence for each offence is as follows: 12 months for the offence of having a loaded firearm in his vehicle contrary to s. 94(1) on Dec. 29, 2019; 18 months for each of the other three 94(1) offences; and 12 months for each of the three offences of careless use of a firearm contrary to s. 86(1).

[18] To this point in Judge Buckle's reasoning, nothing has been challenged on appeal. Her reasoning was clear and thorough.

[19] The judge then dealt with *R. v. Adams'* second and third steps, *i.e.* concurrency and totality. These points are the focus of the appeal. Judge Buckle's reasons said:

> [83] Subject to the principle of totality, courts must consider imposing consecutive sentences for offences that "do not arise out of the same event or series of events" (s. 718.3(4)(b)(i)). The presence of a "reasonably close" nexus between offences can result in concurrent sentences even where the offences

relate to different transactions (for example, a series of "spree" offences, *R. v. Bratzer* (2002), 198 N.S.R. (2d) 303 (C.A.)). Whether concurrent or consecutive sentences are warranted will depend on a number of factors, including the time frame within which the offences occurred, the similarity of the offences, whether a new intent or impulse initiated each of the offences and ultimately, the principle of totality (*R. v. T.E.H.*, [2011] N.S.J. No. 677 (C.A.); *R. v. G.A.W.* (1993), 125 N.S.R. (2d) 312 (N.S.C.A.); and, *R. v. Naugle*, 2011 NSCA 33).

[84] Mr. Laing's offences were all committed within a 13-day period, involve some of the same firearms and similar behaviour. However, **they are not part of a continuous transaction. Mr. Laing had time in between to reflect and they are discrete offences in the sense that they involve a new impulse each time, different people and in some cases different firearms. An argument could be made that even without consideration of totality, the sentences for events on different days should be concurrent to each other**.

[85] **If I were to conclude that they should be consecutive**, I would then be required to take a last look at the sentence and assess whether it respects proportionality by not exceeding Mr. Laing's overall culpability, given the gravity of the offences and his degree of moral blameworthiness.

[86] **If the sentences for each date outlined above were consecutive** to the other dates, Mr. Laing would be sentenced to 66 months (five and one-half years) in custody. In my view, that cumulative sentence would be disproportionate to Mr. Laing's overall culpability and conduct and would be unduly harsh in the circumstances.

[87] **Taking into account the principle of totality**, I am satisfied that the sentencing principles can be adequately addressed by a global sentence of 18 months in custody to be followed by 3 years probation, less credit for the time he has already served.

[88] In reaching that conclusion, I have considered the aggravating factors including the grave risk he put himself and others at, but I have also closely examined the surrounding context for the offences including the absence of an extraneous criminal motive. I am also impacted by the fact that he has never been sentenced to a period of custody before and I believe a period of probation would contribute to the long-term protection of the society.

[89] **To arrive at what I view as an appropriate sentence, I will simply make all the sentences concurrent to each other.** For sentence calculation clarity I will refer to the sentence in days rather than months. [T]he result is:

- Counts 1, 2, and 3 – s. 86(1) [from January 1, January 4 and January 10] – 365 days on each, concurrent;
- Count 22 – s. 94(1) from December 29, 2019 – 365 days, concurrent; and,

> • Counts 23, 24, 25 – s. 94(1) from January 1, January 4, and January 10, 2020 – 540 days on each, concurrent and 3-years' probation
>
> [90] I will give Mr. Laing credit for 474 days already spent in custody that will result in a go forward sentence of 66 days plus 3 years probation with the following conditions: [listing seven conditions of probation].
>
> [91] In addition, Mr. Laing is prohibited under s. 110 of the *Criminal Code* from possessing any firearm, cross-bow, prohibited weapon, restricted weapon, prohibited device, ammunition, prohibited ammunition or explosive substance for a period of 10 years and will provide a sample of his DNA for the DNA databank.
>
> [bolding added]

[20] Under s. 676(1)(d) of the *Criminal Code*, the Crown has applied for leave to appeal and, if granted, appeals the sentence.

Issues

[21] The Crown submits, alternatively, the sentencing judge (1) materially erred in principle with her analysis of totality and concurrency and (2) ordered a manifestly unfit sentence.

[22] I would vary the sentence because of material error of principle. It will not be necessary to consider the second submission.

Standard of Review

[23] As sentencing is highly contextual and discretionary, sentencing decisions attract significant deference from appellate courts. The Court of Appeal may overturn a sentence only if (1) the sentencing judge materially errs in principle or (2) the sentence is demonstrably unfit. To expand:

- An appealable error in principle includes an error of law, or the failure to consider a relevant factor or the over-emphasis of an appropriate factor. The principles that constrain the sentencing judge's discretion include those in ss. 718 to 718.2 of the *Criminal Code* as articulated by the authorities. To be reversible, the error must be material, *i.e.* it must have impacted the sentence.

- The fitness inquiry focuses on the objectives of sentencing set out in the *Criminal Code* or the authorities. To overturn a sentence as unfit, it is insufficient that the appeal court would just balance the factors differently.

> Rather, the sentence must be clearly excessive or clearly inadequate, or it must represent a substantial or marked departure from the governing principle of proportionality.

See: *Criminal Code*, s. 687(1); *R. v. M.(C.A.)*, *supra*, para. 19; *R. v. L.M.*, [2008] 2 S.C.R. 163, paras. 14-15; *R. v. Nasogaluak*, [2010] 1 S.C.R. 206, paras. 43-45; *R. v. Lacasse*, [2015] 3 S.C.R. 1089, paras. 39-44, 49, 52-53; *R. v. Suter*, [2018] 2 S.C.R. 496, paras. 23-24; *R. v. Friesen*, 2020 SCC 9, para. 26; *R. v. Parranto*, 2021 SCC 46, paras. 13-15; *R. v. Espinosa Ribadeneira*, 2019 NSCA 7, para. 34; *R. v. Newman*, 2020 NSCA 24, para. 31; *R. v. White*, 2020 NSCA 33, paras. 20-24; *R. v. Alcorn*, 2021 NSCA 75, paras. 25-27; *R. v. Probert*, 2021 NSCA 82, para. 10.

[24] These standards of deference and permitted appellate intervention apply to a sentencing judge's determination respecting concurrency and totality: *R. v. McDonnell*, [1997] 1 S.C.R. 948, para. 46, per Sopinka J. for the majority; *R. v. T.E.H.*, 2011 NSCA 117, para. 36; *R. v. Probert*, *supra*, para. 21. See also the authorities cited below, paras. 29-30, 42-44.

Is There a Material Error of Principle?

[25] In my respectful view, the sentencing judge made two errors in principle.

[26] **First – omission of the second step:** The analysis in the sentencing decision does not determine whether or how the sentences should be concurrent or consecutive before the consideration of totality.

[27] By Stats. Can. 1995, c. 22, s. 6, Parliament added s. 718.2(c) to the *Criminal Code*.

> 718.2 Other sentencing principles – A court that imposes a sentence shall also take into consideration the following principles:
>
> …
>
> (c) **where consecutive sentences are imposed**, the combined sentence should not be unduly long or harsh;
>
> [bolding added]

Section 718.2(c) subsumed what had been the judicial principle of totality.

[28] In *R. v. M.(C.A.)*, *supra*, Chief Justice Lamer for the Court summarized the earlier judicial principle:

> 42 … The totality principle, in short, requires a sentencing judge **who orders an offender to serve consecutive sentences** for multiple offences to ensure that the cumulative sentence rendered does not exceed the overall culpability of the offender. As D.A. Thomas describes the principle in *Principles of Sentencing* (2nd ed. 1979), at p. 56:
>
> > The effect of the totality principle is to require a sentencer who has passed a series of sentences, each properly calculated in relation to the offence for which it is imposed and **each properly made consecutive in accordance with the principles governing consecutive sentences**, to review the aggregate sentence and consider whether the aggregate sentence is "just and appropriate".
>
> [bolding added]

[29] In *R. v. Adams*, Bateman J.A. said:

> [23] In sentencing multiple offences, this Court has, almost without exception, endorsed an approach to the totality principle consistent with the methodology set out in *C.A.M.*, *supra* [*R. v. M.(C.A.)*, [1996] 1 S.C.R. 500]. … 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. … [bolding added]

[30] Many decisions of this Court have adopted the approach from *R. v. Adams*: *R. v. A.N.*, 2011 NSCA 21, para. 35; *R. v. Naugle*, 2011 NSCA 33, para. 24; *R. v. Bernard*, 2011 NSCA 53, paras. 14-16; *R. v. O'Brien*, 2011 NSCA 112, para. 15 (majority) and para. 37 (dissent), leave to appeal denied 2012 CarswellNS 438 (S.C.C.); *R. v. J.J.W.*, 2012 NSCA 96, para. 51; *R. v. Murphy*, 2015 NSCA 14, para. 51; *R. v. Skinner*, 2016 NSCA 54, paras. 42-43; *R. v. White*, *supra*, para. 124; *R. v. Cromwell*, 2021 NSCA 36, para. 90; *R. v. Probert*, *supra*, para. 12.

[31] From s. 718.2(c) and these authorities, clearly a determination that sentences be consecutive is a pre-condition to a reduction for harshness. The cumulative length of those consecutive sentences is the threshold to analyse the appropriate adjustment. Before entering the analysis of totality, the sentencing judge must determine which sentences would be consecutive or concurrent to which others under the general principles governing concurrency.

[32] In Mr. Laing's case, the judge made no determination that any of the seven sentences should be served consecutively. The sentencing decision said:

> [84] Mr. Laing's offences were all committed within a 13-day period, involve some of the same firearms and similar behaviour. However, they are not part of a continuous transaction. Mr. Laing had time in between to reflect and they are discrete offences in the sense that they involve a new impulse each time, different people and in some cases different firearms. An argument could be made that even without consideration of totality, the sentences for events on different days should be concurrent to each other.

[33] The last sentence cites an argument for concurrency. But the sentencing decision neither adopts nor rejects that argument. The judge's findings in the preceding two sentences suggest there was no single criminal adventure, which would support consecutive sentences. The following paragraphs 85, 86 and 87 (quoted above, para. 19) assume, without stating, some of the sentences are consecutive. The decision does not say which of the seven sentences would be concurrent or consecutive to which of the others, before the judge's analysis of totality.

[34] On the appeal, counsel cannot say which of the seven sentences would have been concurrent, but for the judge's totality reduction under s. 718.2(c). Counsel had to premise their submissions with assumptions about the judge's reasoning path.

[35] That the sentencing decision effectively says – "They are concurrent under one step or the other" is insufficient. There are different tests for concurrency under the second step (whether there is a single criminal adventure) and third step (whether the cumulative sentence is unduly long or harsh, subject to the fundamental principle of proportionality). I cite the authorities for these tests later. As the sentencing decision stands, one cannot determine what the judge intended with the second step. Because the steps are sequential, the outcome of the second step is the baseline for the third, and whether a reduction under the third step is excessive depends on the baseline. The absence of clarity in the sentencing decision, under the second step, handicaps the appeal court's ability to assess the second and third steps.

[36] Under the second step and before considering totality and s. 718.2(c), the sentencing judge must determine which individual sentences would be consecutive or concurrent to which others. In Mr. Laing's sentencing, the failure to do so is an error of principle.

[37] **Second – proportionality and overall culpability:** In *R. v. M.(C.A.)*, *supra*, the Chief Justice explained that the totality principle, as it existed before the

enactment of ss. 718.1 and 718.2, dovetails with the assessment of "overall culpability" or proportionality:

> 40 … guided by the legal obligation that a term of imprisonment be "just and appropriate" under the circumstances, courts have generally avoided imposing excessively harsh and onerous sentences which might test the potential legal ceilings governing the imposition of sentence. It is a well-established tenet of our criminal law that the quantum of sentence imposed should be broadly commensurate with the gravity of the offence committed and the moral blameworthiness of the offender. …
>
> …
>
> 42 In the context of consecutive sentences, this general principle of proportionality expresses itself through the more particular form of the "totality principle". The totality principle, in short, requires a sentencing judge who orders an offender to serve consecutive sentences for multiple offences to ensure that the cumulative sentence rendered **does not exceed the overall culpability** of the offender. … [bolding added]

To similar effect: *R. v. Khawaja*, [2012] 3 S.C.R. 555, para. 126, per McLachlin C.J.C. for the Court.

[38] Sections 718.1 and 718. 2(c) of the *Criminal Code* reflected the Chief Justice's comments in *R. v. M.(C.A.)*. For convenience, I will requote:

> **718.1 Fundamental principle** – A sentence must be proportionate to the gravity of the offence and the degree of responsibility of the offender.
>
> **718.2 Other sentencing principles –** A court that imposes a sentence shall also take into consideration the following principles:
>
> …
>
> (c) where consecutive sentences are imposed, the combined sentence should not be unduly long or harsh;
>
> …

The other sentencing principles to be considered do not displace the mandatory fundamental principle. The outcome of a totality reduction under s. 718.2(c) must be proportionate to overall culpability under s. 718.1.

[39] In *R. v. Nasogaluak*, *supra*, Justice LeBel for the Court explained how the "two perspectives of proportionality … converge":

> [41] It is clear from these provisions that the principle of proportionality is central to the sentencing process [citation omitted]. This emphasis was not borne of the 1996 amendments to the *Code* but, rather, reflects its long history as a guiding principle in sentencing [citation omitted]. It has a constitutional dimension, in that s. 12 of the *Charter* forbids the imposition of a grossly disproportionate sentence that would outrage society's standards of decency. But what does proportionality mean in the context of sentencing?
>
> [42] For one, it requires that the sentence not *exceed* what is just and appropriate given the moral blameworthiness of the offender and the gravity of the offence. In this sense the principle serves a limiting or restraining function. However, **the rights-based, protective angle of proportionality is counter-balanced by the "just deserts" philosophy of sentencing, which seeks to ensure that offenders are held responsible for their actions and that the sentence properly reflects and condemns their role in the offence and the harm they caused** [citations omitted]. Understood in this latter sense, sentencing is a form of judicial and social censure [citation omitted]. Whatever the rationale for proportionality, however, the degree of censure required to express society's condemnation of the offence is always limited by the principle that an offender's sentence **must be equivalent to his or her moral culpability, not greater than it. The two perspectives on proportionality thus converge** in a sentence that both speaks out against the offence and punishes the offender no more than is necessary.
>
> [bolding added]

[40] In *R. v. Friesen*, *supra*, the Chief Justice and Justice Rowe for the Court put it succinctly:

> [30] All sentencing starts with the principle that sentences must be proportionate to the gravity of the offence and the degree of responsibility of the offender. The principle of proportionality has long been central to Canadian sentencing [citation omitted] and is now codified as the "fundamental principle" of sentencing in s. 718.1 of the *Criminal Code*.

[41] I will turn to the decisions of this Court.

[42] *R. v. Adams*, para. 21, adopted the Chief Justice's passage from *R. v. M.(C.A.)*, para. 42. Then Justice Bateman added:

> [24] This Court has addressed and rejected any approach that would suggest that, when sentenced for a collection of offences, the aggregate sentence may not exceed the "normal level" for the most serious of the offences (see *R. v. Markie*, 2009 NSCA 119 at paras. 18 to 22, per Hamilton, J.A.).

Justice Bateman (paras. 65-70) determined the sentences were inconsistent with the offender's overall culpability and revised the sentence upward.

[43] In *R. v. Markie*, para. 22, Justice Hamilton noted that, among the authorities cited, "the total sentences imposed in each of those cases, for all of the offences for which sentences were imposed, were greater than the sentence that would have been imposed had the court been sentencing for the single most serious of the crimes involved".

[44] Other appellate courts similarly have required that a reduction under the totality principle respect the fundamental principle that the eventual cumulative sentence be proportionate to the gravity of the offences and the offender's degree of responsibility: *R. v. Hutchings*, 2012 NLCA 2, paras. 47, 56-7, 69, 71, 80, 84(#4); *R. v. Roberts*, 2019 NLCA 43, para. 76; *R. v. Traverse* (*sub. nom. R. v. Ladouceur and Traverse*), 2008 MBCA 110, paras. 35, 70; *R. v. Arbuthnot*, 2009 MBCA 106, paras. 15, 18; *R. v. SADF*, 2021 MBCA 22, paras. 26, 35-40, 44; *R. v. Leroux*, 2015 SKCA 48, para. 83; *R. v. Briltz*, 2016 SKCA 2, paras. 72-73; *R. v. Chicoine*, 2019 SKCA 104, paras. 74-75; *R. v. Toms*, 2009 ABCA 318, para. 10; *R. v. Tasew*, 2011 ABCA 241, para. 74 (Watson J.A., dissenting in the result but not on this principle); *R. v. Abrosimo*, 2007 BCCA 406, para. 31; *R. v. Li*, 2009 BCCA 85, paras. 51-52. See also *R. v. Khawaja*, *supra*, para. 128, per McLachlin C.J.C. for the Court.

[45] From those authorities, I take the following. The option of concurrency features prominently in totality analysis. But the test differs from the second step. The issue is not whether there is a single criminal adventure. Rather it is whether the cumulative consecutive sentences are "unduly long or harsh" according to s. 718.2(c). If so, the cumulative sentence should be lessened to alleviate the undue length or harshness. That adjustment may involve a reduction of individual sentences, or concurrency or both. But the cumulative reduction is curtailed by s. 718.1: *i.e.* the outcome "must be proportionate to the gravity of the offence and the degree of responsibility of the offender".

[46] I will turn to Mr. Laing's sentence.

[47] The sentencing judge (para. 53) said "[t]he combination of a firearm in a vehicle which is prohibited by s. 94(1) is recognized as particularly serious". Then (para. 80) the judge termed Mr. Laing's behaviour on January 1 and January 4 – *i.e.* discharging a firearm first from a moving vehicle and again from a vehicle in the vicinity of some ATV drivers – as the "most serious" of his seven offences. Yet

the 18-month sentences for each of those two offences were made concurrent to his other five sentences, including the 18-month sentence for his offence on December 29. His incarceration was the same whether or not he had committed those "most serious" offences. The judge (para. 88) listed the factors she considered. She did not explain why what she had highlighted as his two "most serious" offences had zero marginal impact on his incarceration.

[48] Mr. Laing's most serious offences should meaningfully affect his sentence. I do not say that full concurrency for multiple offences may never be appropriate. But, in this case, making all the sentences concurrent without regard to their seriousness was disproportionate to Mr. Laing's overall culpability and offended s. 718.1. It was an error in principle that impacted the sentence.

What is a Fit Sentence?

[49] When an error in principle has impacted the sentence or when the sentence is demonstrably unfit, the appeal court is to set aside the sentence and conduct its own analysis to determine a fit sentence in the circumstances: *R. v. Suter*, *supra*, para. 24, per Moldaver J. for the majority. This point applies to material errors in principle involving concurrency and totality, *e.g.*: *R. v. Bernard*, *supra*, paras. 25, 28, 30; *R. v. Chicoine*, *supra*, paras. 115-16; *R. v. SADF*, *supra*, para. 21; *R. v. Arbuthnot*, *supra*, para. 15; *R. v. Leroux*, *supra*, para. 86; *R. v. Briltz*, *supra*, para. 76; *R. v. Flynn*, 2018 NLCA 61, paras. 16-23; *R. v. Provost*, 2006 NLCA 30, para. 12, per Rowe J.A., as he then was; *R. v. Hutchings*, *supra*, paras. 16-17, 23, 92-93; *R. v. Adams*, *supra*, paras. 64-70.

[50] I will move through the three steps from *R. v. Adams*.

[51] **First:** For the first step, I accept the sentencing judge's analysis and conclusion (Sentencing Decision, para. 81): 12 months for the offence contrary to s. 94(1) on December 29, 2019 and for each of the three offences contrary to s. 86(1); 18 months for each of the three other offences contrary to s. 94(1).

[52] **Second:** As to the second step, in *R. v. Friesen*, *supra*, the Chief Justice and Rowe J. for the Court summarized the general test for concurrency:

> 155 The decision whether to impose a sentence concurrent with another sentence or consecutive to it is guided by principles. While the issue warrants further discussion in another case, the general rule is that offences that are so closely linked to each other as to constitute **a single criminal adventure** may, but

> are not required to, receive concurrent sentences, while all other offences are to receive consecutive sentences. [citations omitted, bolding added]

[53] The appellate courts regularly have applied the "single criminal adventure" test: *e.g.* Chief Justice Green's comprehensive reasons for a panel of five justices in *R. v. Hutchings*, *supra*, (N.L.C.A.) paras. 18-19, 84 (#2), which have been applied by many appeal courts.

[54] Whether there is a single criminal adventure is a fact-driven inquiry, subject to some principled guidance from the authorities. For instance:

- In *R. v. T.E.H.*, *supra*, para. 37, this Court said the factors included the time frame during which the offences occurred, the similarity of the offences, whether "a new intent or impulse initiated each of the offences" and the overall suitability of the sentence.

- In *R. v. Flynn*, *supra*, paras. 18-23, the Newfoundland Court of Appeal characterized examples of a single criminal venture as "a single rampage" or "crime spree" or a "repetition of the same behaviour towards the same victim" (see para. 19).

- The existence of different legally protected interests or victims on discrete occasions may exclude the use of concurrent sentences: *R. v. Probert*, *supra*, para. 27; *R. v. Lee*, 2018 BCCA 428, para. 18; *R. v. Crevier*, 2015 ONCA 619, para. 129; *R. v. Chicoine*, *supra* (S.C.A.), paras. 95-97, citing Ontario, Manitoba and British Columbia authorities.

- In *R. v. Arbuthnot*, *supra*, paras. 20-26 (M.C.A.), a "series of similar, continuous and recurring offences with the same gravamen [feeding the offender's drug addiction] within a sustained and relatively short period of time" formed "a single criminal transaction", while the offender's flight from police "transformed itself into a 'separate invasion of the community's right to peace and order' and cannot be considered as part of the same criminal transaction" (paras. 24 and 26).

[55] In Mr. Laing's case, the following points are telling:

- As the sentencing judge found (para. 84), the offences

  > … are not part of a continuous transaction. Mr. Laing had time in between to reflect and they are discrete offences in the sense that they involve a

> new impulse each time, different people and in some cases different firearms.

- Mr. Laing's behaviour on different days implicated different legally protected interests. Discrete segments of the public were at risk on the different occasions and at different locations when firearms were discharged by Mr. Laing or under his direction.

- There was no single catalyst such as substance addiction. Mr. Laing was grandstanding to his friends. That does not qualify as an impulsive "gravamen" with any legal significance.

[56] Under *R. v. Adams*' second test, the offences on the same day were a single criminal adventure. However, the offences on different days were not. Consequently:

- There was only one offence on December 29;

- The sentences for the offences contrary to ss. 86(1) and 94(1) on January 1 should be concurrent to each other;

- The sentences for the offences contrary to ss. 86(1) and 94(1) on January 4 should be concurrent to each other;

- The sentences for the offences contrary to ss. 86(1) and 94(1) on January 10 should be concurrent to each other.

- Subject to the consideration of totality under s. 718.2(c), the sentences for the offences committed on the four different days should be consecutive to each other.

This is 12 months for December 29 and 18 months for each of the other three days, totalling 66 months.

[57] **Third:** The third step, *i.e.* the "final look" as Justice Bateman termed it in *Adams*, is totality under s. 718.2(c). As discussed earlier, this involves the questions: (1) are the cumulative consecutive sentences "unduly long or harsh" and, if so, (2) what reduced cumulative term of incarceration will mollify the harshness while maintaining the proportionality to overall culpability demanded by s. 718.1?

[58] I would make two adjustments to the sentences:

- For each of the three offences contrary to s. 94(1), Mr. Laing's term of incarceration would be reduced from 18 months to 12 months. This channels the sentencing judge's view, which I accept, that a threshold of cumulative consecutive sentences would be unduly long or harsh. It means the individual sentences for each of the seven offences would be 12 months.

- I would order: (1) the two 12-month sentences for the offences on January 1 be served concurrently to each other, but consecutively to the other five sentences, and (2) the other five sentences be concurrent with each other. Consequently, what the sentencing judge termed Mr. Laing's two "most serious" offences, on January 1 and January 4, will be sentenced consecutively to each other. This is consistent with the proportionality principle in s. 718.1.

[59] After these adjustments, Mr. Laing's overall term of incarceration will increase from 18 months to 24 months. His remand credit will remain as determined by the sentencing judge.

Should Mr. Laing be Reincarcerated?

[60] Mr. Laing has served the time ordered by the sentencing judge. Should he be reincarcerated?

[61] In *R. v. Adams*, para. 71, Justice Bateman cited authority from this Court that the appeal court should be "disinclined to send a man back to jail to serve the remainder of a longer term substituted on appeal unless that disinclination is overridden by the need to deter others by a much greater sentence".

[62] In *R. v. J.J.W.*, 2012 NSCA 96, para. 68, this Court drew assistance from the New Brunswick Court of Appeal's approach in *R. v. Veysey*, 2006 NBCA 55, para. 32. That approach is to assess whether reincarceration would "work an injustice", after considering factors such as the seriousness of the offence, the period of time since the offender's release, the responsibility for any delay, and the impact of reincarceration on the offender's rehabilitation. In *R. v. J.J.W.*, para. 77, the Court directed there would be no reincarceration because the negative impact on rehabilitation was not in the interests of justice.

[63] The following points are significant:

- Mr. Laing committed serious offences.

- He accepted responsibility by pleading guilty.
- He has never been sentenced to a period of incarceration before. While serving these sentences in the Central Nova Scotia Correctional Facility, he was assaulted by other inmates more than once. That was an undue consequence of incarceration.
- There has been no undue delay in processing the appeal.
- Over eleven months have passed since his release on April 1, 2021, with no evidence of recidivism. The sentencing judge endorsed Mr. Laing's rehabilitative prospects.
- He remains subject to probation. The sentencing judge noted (para. 88) that the probation "would contribute to the long-term protection of the society".

[64] Reincarceration would be detrimental to Mr. Laing's rehabilitation and would not serve the interests of justice.

[65] In equivalent circumstances, the Supreme Court held the appropriate disposition is to stay the service of the additional term of incarceration: *R. v. Proulx*, [2000] 1 S.C.R. 61, para. 132; *R. v. R.N.S.*, [2000] 1 S.C.R. 149, para. 22; *R. v. R.A.R.*, [2000] 1 S.C.R. 163, para. 35. I would stay the service of Mr. Laing's additional term of incarceration. I would leave intact the length and conditions of probation, the weapons prohibition and the DNA order.

Conclusion

[66] I would grant leave to appeal and allow the appeal in part.

[67] I would vary the sentences by:

- reducing the terms of incarceration for each of the three offences contrary to s. 94(1) on January 1, 2020, January 4, 2020 and January 10, 2020, from 18 months to 12 months, and
- ordering the 12 months of incarceration for the two offences committed on January 1, 2020 be served concurrently to each other but consecutively to the terms of incarceration for the other five offences
- ordering the terms of incarceration for the other five offences be served concurrently to each other.

[68] The outcome is that Mr. Laing's cumulative term of incarceration increases from 18 months to 24 months, before the remand credit. The service of the additional term of incarceration is stayed.

[69] The remand credit, weapons prohibition, DNA order and length and conditions of probation shall remain as ordered by the sentencing judge.

Fichaud J.A.

Concurred: Wood C.J.N.S.

Bryson J.A.