NOVA SCOTIA COURT OF APPEAL
Citation: *R. v. Campbell*, 2022 NSCA 29

Date: 20220406
Docket: CAC 504722
Registry: Halifax

Between:

Her Majesty the Queen

Appellant

v.

Eric Albert Campbell

Respondent

Restriction on Publication: ss. 486.4 and 486.5 of the Criminal Code

Judge:	The Honourable Justice Elizabeth Van den Eynden
Appeal Heard:	November 30, 2021, in Halifax, Nova Scotia
Subject:	Leave to appeal sentence, general rule re consecutive versus concurrent sentences, totality principle, fitness of sentence.
Summary:	The appellant was convicted of two sexual assaults. There was no nexus between the offences. The appellant was sentenced to two years' custody and three years' probation for the first offence by another judge. The appellant pleaded guilty to the second offence, and the sentencing judge imposed a two-year custodial sentence and two years' probation to be served concurrently notwithstanding both Crown and defence counsel recommended a consecutive sentence. The Crown applies for leave to appeal sentence, contending the judge's decision to impose a concurrent sentence was grounded in error which affected the sentence imposed. If

granted, the Crown seeks to set aside the concurrent sentence and replace it with a consecutive sentence.

Issues:

(1) Did the sentencing judge err in imposing a concurrent sentence?

(2) Did the sentencing judge impose a manifestly unfit sentence?

Result: Leave Granted. Appeal allowed. The judge made several errors in principle that impacted the sentence imposed and warranted appellate intervention. There was no principled reason for the judge to depart from the general rule—separate offences warrant consecutive sentences. Having found an error in principle, this Court determined a fit and proper consecutive sentence.

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Restriction on Publication: ss. 486.4 and 486.5 of the Criminal Code

Judges:	Farrar, Hamilton and Van den Eynden JJ.A.
Appeal Heard:	November 30, 2022, in Halifax, Nova Scotia
Held:	Leave granted and the appeal allowed, per reasons for judgment of Van den Eynden J.A.; Farrar and Hamilton JJ.A. concurring
Counsel:	Erica Koresawa, for the appellant Nicole Rovers, for the respondent

Order restricting publication — sexual offences

486.4 (1) Subject to subsection (2), the presiding judge or justice may make an order directing that any information that could identify the victim or a witness shall not be published in any document or broadcast or transmitted in any way, in proceedings in respect of

(a) any of the following offences:

> (i) an offence under section 151, 152, 153, 153.1, 155, 160, 162, 163.1, 170, 171, 171.1, 172, 172.1, 172.2, 173, 213, 271, 272, 273, 279.01, 279.011, 279.02, 279.03, 280, 281, 286.1, 286.2, 286.3, 346 or 347, or
>
> (ii) any offence under this Act, as it read from time to time before the day on which this subparagraph comes into force, if the conduct alleged would be an offence referred to in subparagraph (i) if it occurred on or after that day; or

(b) two or more offences being dealt with in the same proceeding, at least one of which is an offence referred to in paragraph (a).

Order restricting publication — victims and witnesses

486.5 (1) Unless an order is made under section 486.4, on application of the prosecutor in respect of a victim or a witness, or on application of a victim or a witness, a judge or justice may make an order directing that any information that could identify the victim or witness shall not be published in any document or broadcast or transmitted in any way if the judge or justice is of the opinion that the order is in the interest of the proper administration of justice.

Reasons for judgment:

Overview

[1] Mr. Campbell was convicted of two sexual assaults. The offences involved different female complainants and were committed about a week apart.

[2] Mr. Campbell was sentenced to two years' custody and three years' probation for the first offence. For the second offence, he was sentenced to two

years' custody and two years' probation to be served concurrently. The latter sentence is the subject of this appeal.

[3] The Crown applies for leave to appeal sentence. If granted, the Crown asks this Court to set aside the concurrent sentence and replace it with a consecutive sentence of three years' custody.

[4] The Crown contends the judge's decision to impose a concurrent sentence was grounded in error and the error had a material bearing on the sentence imposed. I agree. What should have been a straightforward sentencing veered off course and warrants appellate intervention.

[5] I would grant leave, allow the appeal, set aside the concurrent sentence, and impose a consecutive sentence on the terms set out herein. My reasons follow.

Background

[6] The sexual assault that gives rise to the sentence under appeal occurred on September 16, 2018. Mr. Campbell was charged with and pleaded guilty to one count under s. 271 on of the *Criminal Code*. He entered his guilty plea on December 17, 2020 before Justice Peter P. Rosinski.

[7] Sentencing was adjourned until February 8, 2021 to allow for the preparation of a Pre-Sentence Report and the filing of written submissions by counsel. Crown and defence counsel made oral submissions on February 8, 2021. The judge reserved decision and set February 19, 2021 as a return date to deliver his decision.

[8] When the parties returned to court, the judge summarized his reasons and provided counsel with a copy of his written sentencing decision, reported as 2021 NSSC 55.

[9] Before summarizing the circumstances of this sexual assault and the judge's sentencing decision, I will briefly set out the other sexual assault, involving a different female, committed eight days earlier on September 8, 2016.

[10] The record indicates this offence involved non-consensual vaginal intercourse. Mr. Campbell pleaded not guilty. He was tried and convicted in Provincial Court before Judge Daniel A. MacRury. The conviction was entered August 7, 2020, and on that date Judge MacRury sentenced Mr. Campbell to two years' custody and three years' probation and made ancillary orders.

[11] Mr. Campbell was serving this sentence when Justice Rosinski sentenced him for the September 16 offence. Although the September 8 assault predated the September 16 assault, it could not be treated as a true prior conviction. In its written submissions to Justice Rosinski, the Crown explained:

> [17] On August 7, 2020, Mr. Campbell was sentenced for one count of sexual assault pursuant to section 271 of the *Code* against a different victim, for which he received the following sentence:
>
> - 2 years custody in a federal penitentiary;
> - 3-year probation order;
> - Firearms prohibition for 10 years;
> - SOIRA Order for 20 years; and
> - DNA Order.
>
> [18] The offence date for that charge is September 8, 2018, which predates the sexual assault against L.A.J. by eight (8) days. However, because that conviction was not entered until August 7, 2020, it cannot be treated as a true prior conviction with respect to the matter currently before the court. It can, however, inform the court with respect to the purpose and principles of sentencing as they apply to Mr. Campbell. This conviction demonstrates a pattern of violence and should inform the court's assessment of the following:
>
> - The need for specific deterrence; and
> - The need to separate Mr. Campbell from society and ensure that the public is adequately protected.

[12] I return to the circumstances of the September 16 offence. The facts underpinning Mr. Campbell's guilty plea were set out in an Agreed Statement of Facts, signed by Mr. Campbell, the Crown, and defence counsel. I reproduce its contents here:

> **AGREED STATEMENT OF FACTS**
>
> **Pursuant to section 724(1) of the *Criminal Code of Canada*, Eric Albert Campbell admits the following facts:**
>
> 1. Eric Albert Campbell ("Mr. Campbell") and […] ("L.A.J.") met on a dating website called Plenty of Fish sometime in May or June of 2018. Mr. Campbell and L.A.J. dated for a couple weeks and Mr. Campbell moved into L.A.J.'s residence during that time. The relationship ended in August 2018 and Mr. Campbell moved out of L.A.J.'s residence.

2. Mr. Campbell and L.A.J. began communicating again by text message in early September 2018. Mr. Campbell stayed at L.A.J.'s residence from September 11, 2018 to September 16, 2018.

3. On September 16, 2018, Mr. Campbell and L.A.J. engaged in consensual vaginal intercourse at approximately 8:00 am. During that consensual vaginal intercourse, Mr. Campbell asked L.A.J. if he could have anal intercourse with her, to which she said "no". Mr. Campbell asked L.A.J. if he could "just insert the tip" of his penis, to which she said "no".

4. Mr. Campbell rolled L.A.J. onto her stomach and continued to have consensual vaginal intercourse with her while he was positioned behind her. Mr. Campbell asked L.A.J. again if she wanted to have anal intercourse, to which she said "no".

5. Mr. Campbell then poured lube onto L.A.J.'s back and inserted his penis into her anus. L.A.J. was able to "squirm away" from Mr. Campbell, but he continued to insert his penis in her anus. L.A.J. began to cry and asked Mr. Campbell to stop.

6. The sexual assault continued for several minutes and ended when Mr. Campbell ejaculated in L.A.J.'s anus. No condom was used.

7. L.A.J. ran to the bathroom and saw that she was bleeding from her anus. L.A.J. said to Mr. Campbell, "what are you doing? I asked you to stop. I said no". Mr. Campbell took his belongings and left L.A.J.'s residence shortly after.

8. L.A.J. sat on her couch and cried for several hours. L.A.J.'s neighbor, [C.H.] came over to L.A.J.'s home that afternoon. L.A.J. disclosed the sexual assault to [C.H.], who convinced L.A.J. to go to the hospital. [C.H.] said she found L.A.J. "curled up" on her couch and described her as a "wreck in a human shell".

9. L.A.J. attended the Cobequid Hospital in Lower Sackville, Nova Scotia on September 16, 2018 around 4:00 pm (approximately 8 hours after the sexual assault).

10. A "Sexual Assault Interview" and examination was completed by a Sexual Assault Nurse Examiner ("SANE") at the hospital. The examination began at 6:25 pm.

11. During the examination, a rectal swab was taken from L.A.J. The rectal swab was provided directly to Cst. Michael Collins at the Cobequid Hospital at 9:33 pm on September 16, 2018. The swab was then sent to the National Forensic Laboratory in Ottawa, Ontario for analysis.

12. The SANE also found bruises on L.A.J.'s lower back, left wrist and left inner thigh.

13. Between September 16, 2018 and September 18, 2018, Mr. Campbell called L.A.J. 78 times and sent her 43 text messages, to which she did not respond.

14. L.A.J. was interviewed by police on September 18, 2018.

15. Mr. Campbell was arrested by Detective Constable Leonard MacDonald on September 19, 2018.

16. A DNA sample was obtained from Mr. Campbell on April 11, 2019.

17. A DNA typing profile was obtained from L.A.J.'s rectal swab. The profile was of mixed origin consistent with having originated from two individuals.

18. The profile of the male component resulted in a match to the known DNA sample taken from Mr. Campbell. The estimated probability of selecting an unrelated individual at random from the Canadian Caucasian population with the same profile is 1 in 990 quadrillion.

19. The profile of the female component matched that of the known DNA sample taken from L.A.J.

[13] At the sentencing hearing, in addition to the Agreed Statement of Facts, the judge also had the benefit of a Pre-Sentence Report, detailed written and oral submissions from both parties, and a victim impact statement.

[14] The Crown's position on sentencing was summarized in its written submissions to the judge:

> [42] Due to the aggravating factors in this case, the Crown respectfully submits that Mr. Campbell's circumstances and the circumstances of the offence demand a federal period of incarceration of three (3) years, to be served consecutively to the sentence Mr. Campbell is currently serving.
>
> [43] In addition, the Crown seeks the following ancillary orders:
>
> - DNA Order pursuant to section 487.051 of the *Criminal Code* (primary designated offence);
> - SOIRA Order for life pursuant to section 490.013(2.1) of the *Criminal Code*, as Mr. Campbell has been convicted of his second designated offence in subsection 490.011(1);
> - Firearms prohibition for 10 years (mandatory pursuant to section 109 of the *Criminal Code*); and
> - A non-communication order in relation to L.A.J. during his custodial sentence, pursuant to section 743.21 of the *Criminal Code*.

[15] Mr. Campbell's position was summarized by his counsel as follows:

> 41. **Mr. Campbell's sentence on this matter will be served consecutively to the sentence he is serving currently.** As such, the principles of totality and restraint should be considered by the court when crafting the appropriate sentence. The Defence also submits that rehabilitation is not the primary consideration, but rehabilitation should still be considered when crafting a sentence for Mr. Campbell.
>
> 42. For all the reasons outlined in this brief the Defence submits that an appropriate sentence for Mr. Campbell in this matter is a two-year period of custody followed by a three-year period of probation. The Defence suggests that the probation period should include conditions for no contact with the victim, attend for assessment as directed by a probation officer, and participate and complete and counselling program(s) suggested by the probation officer. The defence takes no issue with the ancillary orders suggest [*sic*] by the Crown in this matter.
>
> [Emphasis added]

The proposed defence position of two years' custody was a "go forward" sentence.

[16] It is clear from the record that although the parties disagreed on the range of a custodial sentence, they both agreed the sentence imposed should be consecutive to the sentence Mr. Campbell was serving for the other sexual assault. As noted, this was expressed in their written submissions filed in advance of the sentencing hearing. It was also reiterated during their respective oral submissions at the sentencing hearing.

[17] In fact, all discussions at the sentencing hearing were premised on the expectation that the sentence being imposed would be consecutive to the sentence already being served. For example, at one point during oral submissions defence counsel said:

> **Mr. Brownell**: That's -- consecutive sentencing is something that will come into play here.
>
> **The Court**: Yeah.
>
> **Mr. Brownell**: Clearly, he's going to be serving his sentence for the other 271 offence that he has already been found guilty of, and I think on that note, totality does come into play here.
>
> […]

> **Mr. Brownell**: So I think, while - - the defence would submit it's clear from the *Criminal Code* that, when consecutive sentences are ordered, they shouldn't be unduly long and harsh.
>
> **The Court**: Right.
>
> **Mr. Brownell**: Now, I'm not suggesting that the fact that this is going to be a consecutive sentence alone justifies, I'll say, the lower part, not the complete lowest end but the lower part of the spectrum for sentence, that being a two-year period of custody, but in considering the mitigating factors and totality, that this is going to be a consecutive sentence, I think all of those factors together serve to justify the two-year period of custody that we're suggesting. […]

[18] In this exchange, defence counsel acknowledged a sentence at the lower end of the range, was justified—at least in part—because the sentence was expected to be served consecutively. This implies that prior to the required "last look" in a totality analysis a sentence of more than two years, going forward, was warranted.

[19] Counsel's agreement that any sentence should be served consecutively was not binding on the judge. However, counsel's agreement was no surprise. Mr. Campbell was being sentenced for a second sexual assault—separated by both date and victim from the earlier sexual assault. Counsel's agreement was consistent with these sentencing principles:

- Where an offender is serving a custodial sentence, and subsequently faces a further custodial sentence, the judge at the second sentencing hearing must consider whether to impose the second sentence consecutively or concurrently to the first (*Criminal Code*, s. 718.3(4)(a)).
- Offences that are so closely linked together so as to constitute a single criminal venture may (not must) receive concurrent sentences, while all other offences are to receive consecutive sentences (*R. v. Friesen*, 2020 SCC 9, para. 155).
- Concurrent sentences will rarely be appropriate in cases of sexual violence where there are separate victims (*R. v. C.(D.)*, 2016 MBCA 49, para. 43).

[20] Neither counsel specifically mentioned the principles that guide the imposition of consecutive versus concurrent sentences in their submissions to the judge. Again, in these circumstances, that also comes as no surprise. The principles are well known and uncontroversial. It is apparent from the record both Crown and

defence counsel presumed they would apply. The real live issue between the parties and what counsel put to the judge was quantum—should the consecutive sentence be two or three years' custody?

[21] Before rendering his decision, at no point did the judge indicate to counsel he had any difficulty with their agreement and recommendation of a consecutive sentence or that he was considering a concurrent sentence. Had the judge done so, counsel could have addressed the reasons behind their recommendation and reminded the judge of the principles pertaining to the imposition of consecutive versus concurrent sentences.

[22] As we know, the sentencing judge did not order Mr. Campbell to serve a consecutive sentence. Before considering credit for pre-sentence custody or harsh bail conditions,[1] the judge determined that a fit sentence for Mr. Campbell was 30 months' custody. After calculating credits, the judge imposed a custodial sentence of two years followed by two years' probation and the noted ancillary orders. He ordered it be served concurrently with the August 7, 2020 sentence Mr. Campbell was serving for the September 8, 2018 sexual assault.

[23] I will supplement additional background as needed in my analysis.

Issues

[24] The Crown raises these grounds of appeal:

1. Did the sentencing judge err in imposing a concurrent sentence?
2. Did the sentencing judge impose a manifestly unfit sentence?

[25] As this is an appeal against sentence, leave is required. To be granted leave, the Crown must establish the grounds raise an arguable issue or issues that are not frivolous (*R. v. DeYoung*, 2017 NSCA 13, at para. 31).

[26] The Crown contends the judge's decision to impose a concurrent sentence was grounded in errors relating to the prioritization of probation orders and in his application of the totality principle. The Crown further contends the concurrent sentence does not reflect Mr. Campbell's overall culpability and gives no real

[1] Mr. Campbell appeared in provincial court on September 19, 2018, and remained in custody until a show cause hearing on November 9, 2018, at which time he was released on bail with conditions. Later, I further discuss these credits.

effect to the separate harm caused by the September 16 offence. I will elaborate on these errors in my analysis.

[27] The issues raised on appeal meet the threshold, and I am satisfied leave should be granted.

Standard of Review

[28] Sentencing is a highly individualized exercise. Many factors must be weighed and balanced in the exercise of judicial discretion. On appeal, sentencing decisions are afforded deference, and as explained in *R. v. Lacasse*, 2015 SCC 64, this Court may only intervene in limited circumstances:

> [43] … I agree that an error in principle, the failure to consider a relevant factor or the erroneous consideration of an aggravating or mitigating factor can justify the intervention of an appellate court and permit that court to inquire into the fitness of the sentence and replace it with the sentence it considers appropriate. However, in my opinion, every such error will not necessarily justify appellate intervention regardless of its impact on the trial judge's reasoning. If the rule were that strict, its application could undermine the discretion conferred on sentencing judges. It is therefore necessary to avoid a situation in which [TRANSLATION] "the term 'error in principle' is trivialized": *R. v. Lévesque-Chaput*, 2010 QCCA 640, at para. 31 (CanLII).
>
> [44] **In my view, an error in principle, the failure to consider a relevant factor or the erroneous consideration of an aggravating or mitigating factor will justify appellate intervention only where it appears from the trial judge's decision that such an error had an impact on the sentence.**
>
> [Emphasis added]

Analysis

Did the sentencing judge err in imposing a concurrent sentence?

[29] Mr. Campbell was being sentenced for a second serious sexual assault. As stated, each offence involved a different victim. Each assault was separate in time.

[30] When the sentence on appeal was imposed, Mr. Campbell was serving the custodial sentence for his earlier sexual assault conviction. Consequently, s. 718.3(4)(a) of the *Criminal Code* required the judge to consider whether to impose the second sentence consecutively or concurrently to the first:

> **Cumulative punishments**

> **(4)** The court that sentences an accused shall consider directing
>
> > **(a)** that the term of imprisonment that it imposes be served consecutively to a sentence of imprisonment to which the accused is subject at the time of sentencing; …

[31] Consecutive sentences hold offenders like Mr. Campbell responsible for separate harms.

[32] During the sentencing hearing, both parties were operating under the assumption a consecutive sentence would be imposed. However, the unexpected happened—the judge imposed a concurrent sentence.

[33] In *Friesen*, the Supreme Court of Canada said:

> [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** (see, e.g., *R. v. Arbuthnot*, 2009 MBCA 106, 245 Man.R. (2d) 244, at paras. 18-21; *R. v. Hutchings*, 2012 NLCA 2, 316 Nfld. & P.E.I.R. 211, at para. 84; *R. v. Desjardins*, 2015 QCCA 1774, at para. 29 (CanLII)).
>
> [Emphasis added]

In my reasons, reference to the "general rule" encompasses these principles.

[34] Recently, in *R. v. Probert*, 2021 NSCA 82, this Court discussed the reference to "*may*" in the general rule. After referring to the above paragraph in *Friesen*, Justice Fichaud said:

> [21] … Noteworthy in this passage is the comment that the offences "may, but are not required to, receive concurrent sentences". The sentencing judge has a discretion, as Justice Sopinka for the majority wrote in *R. v. McDonnell*, [1997] 1 S.C.R. 948:
>
> > [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 the sentence, clearly stated in both *Shropshire* [*R.* v. *Shropshire*, [1995] 4 S.C.R. 227] and *M.(C.A.)* [*R. v. M.(C.A.)*, [1996] 1 S.C.R. 500], applies equally to the decision to order concurrent sentences 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. …

[35] In short, the general rule does not strictly prohibit the imposition of a concurrent sentence for offences without a nexus. Rather, subject to express exceptions in the *Criminal Code*,[2] the sentencing judge retains discretion. That said, it is well established that sentences should be consecutive unless there is a valid reason for making them concurrent. In *R v. McCarthy*, 2005 NLCA 36, the court said:

> [11] The parties agree that section 718.3(4) grants a sentencing judge the discretion to impose a consecutive sentence and that if there is no order specifying that a sentence is to be consecutive to another it will be concurrent to any existing sentence. **That having been said**, **it is well established that sentences should be consecutive unless there is a valid reason for making them concurrent**. See: R. v. Crocker (1991), 1991 CanLII 2737 (NL CA), 93 Nfld. & P.E.I.R. 222 (NLCA) and R. v. A.T.S (2004), 232 Nfld. & P.E.I.R. 283, 2004 NLCA 1.
>
> [Emphasis added]

This is especially so where offences are committed against multiple victims as recognized in *R. v. Berry*, 2014 BCCA 7:

> [53] This Court has held that consecutive sentences are appropriate not only in relation to wholly unconnected incidents but also in circumstances where the offences are committed against multiple victims in close proximity: *R.* v. *R.J.G.*, 2007 BCCA 631; *R. v. Abrosimo*, 2007 BCCA 406; *R. v. Maliki*, 2005 BCCA 495; *R. v. G.P.W.* (1998), 106 B.C.A.C. 239.

[36] In this case, the Crown argues the judge failed to appropriately consider the general rule and further, there was no principled reason to depart from it. I agree. A review of the judge's reasons will demonstrate why.

[37] The judge appears to have indirectly recognized the general rule in a footnote to para. 94 of his decision. Therein, he parenthetically recognized Mr. Campbell's different offence dates and surmised that had both offences come

[2] For example, s. 718.3(7) of the *Criminal Code* mandates consecutive sentences for offences related to the sexual abuse of children.

before the court for sentencing at the same time, consecutive sentences would likely have been imposed. The footnote provides:

> [18] See s. 718.2(c) CC - I appreciate that these two sexual assault convictions arose from offence dates September 8 and September 16, 2018. If both came before a sentencing court at the same time, **it is very likely that the overall sentence would have been a term of imprisonment in a federal penitentiary of more than two years -** no following probation period would have been possible – **in all likelihood there would have been consecutive sentences imposed (each between two and three years) such that the total was between four and five years imprisonment.** In those circumstances, Mr. Campbell's combined warrant expiry date would have been between August 7, 2024 and August 7, 2025 (presuming they were both sentenced on August 7, 2020).

[Emphasis added]

[38] Despite recognizing this, the judge did not adequately explain why a consecutive sentence was no longer appropriate some six months later when he imposed a concurrent sentence instead.

[39] The judge was aware both Crown and defence counsel recommended a consecutive sentence sentence—he referenced this fact in his reasons. In fact, he went further, stating:

> [75] The Crown and Defence position that the sentence recommended should be consecutive to his August 7, 2020 sentence, is principled, and on its face not unreasonable.

[40] The general rule grounded counsels' aligned position that the sentence to be imposed upon Mr. Campbell should be served consecutively. Why did the judge not apply the general rule?

[41] The Crown argues the judge failed to do so because he erroneously:

- prioritized the existing probation order;[3]
- prioritized an earlier commencement date for his fresh probation order; and
- applied the principle of totality.

I will address each in turn.

---

[3] The probation order imposed by Judge MacRury on August 7, 2020 when he sentenced Mr. Campbell for the September 8, 2018 sexual assault involving a different victim.

[42] As to the judge's error in prioritizing the existing probation order, the Crown argues:

> [56] One reason the sentencing judge imposed a concurrent sentence was to ensure that the probation order imposed on August 7, 2020 (the "existing probation order") not be negated by a further period of custody. This goal was animated by a misunderstanding of when the existing probation order would come into effect. …
>
> [57] The sentencing judge was under the impression that the existing probation order would come into effect immediately upon the expiration of the two year custodial sentence imposed on August 7, 2020 (i.e. on August 6, 2022). However, the existing probation order will actually come into effect only after the Respondent is "released from prison".

[43] The Crown refers to multiple paragraphs in the judge's decision to illustrate his misunderstanding of when the existing probation order would come into effect, including these:

> [86] Bearing in mind that probation orders only commence after the warrant expiry of the associated imprisonment, let me briefly examine when his presently proposed probation order would commence.
>
> …
>
> [91] It would also see a large part of the three-year probation order from his first sentencing (commencing **August 7, 2022 - August 7, 2025**) be in effect *while* he was under sentence and imprisoned on the proposed two-year consecutive sentence (commencing **August 7, 2022 – August 7, 2024**, plus 3 years probation).
>
> …
>
> [99] If on February 19, 2021 he receives a *consecutive* 3 year sentence with a Warrant Expiry Date (August 7, 2022 plus 3 years equals) of August 7, 2025, that second sentence will overlap with, and effectively negate the intention behind the probation order of his first sentence (August 7, 2022 plus 3 years probation). In that case, Mr. Campbell may have no opportunity to experience the greater freedom of being on probation in the community – albeit I expect that he will be paroled and under conditional supervision in the community for some portion of his first sentence.
>
> [100] If Mr. Campbell receives a *concurrent* three-year sentence on February 19, 2021, (Warrant Expiry Date February 19, 2024) that sentence will also overlap between February 19, 2021 and February 19, 2024 with his period of custody and probation from his first sentence, ending August 7, 2025:
>
> 1. remaining custody overlap: February 19, 2021 – August 7, 2022; and

2. probationary period overlap: August 8, 2022 – February 19, 2024.

[Emphasis in original]

[44] Section 732.2(1)(b) on the *Criminal Code* makes clear that an existing probation order will not come into effect until all custodial sentences have been served:

> **Coming into force of order**
>
> 732.2 (1) A probation order comes into force
>
> …
>
> (b) where the offender is sentenced to imprisonment under paragraph 731(1)(b) or was previously sentenced to imprisonment for another offence, as soon as the offender is released from prison or, if released from prison on conditional release, at the expiration of the sentence of imprisonment; …

[45] Because a probation order only comes into force after all custodial sentences have been served, sentencing judges are required to take into consideration any existing probation order (see *R. v. Knott*, 2012 SCC 42, at para. 66 and *R. v. McPherson*, 2020 NSCA 23, at para. 31).

[46] The Crown argues the judge's misunderstanding of the commencement date of the existing probation order led to further error. The Crown explains:

> [60] Not only did the sentencing judge misunderstand when the existing probation order would come into effect, his concern about preserving the existing probation order gave precedence to the sentencing objective of rehabilitation. This was an error.
>
> …
>
> [62] Based on his misunderstanding of when the existing probation order would come into effect, and in order to ensure the existing probation order could fulfill its purpose of focussing on rehabilitation of the Respondent "in the community", the sentencing judge overlapped his sentence with the August 7, 2020 sentence as much as possible by ordering a concurrent sentence.
>
> [63] Crafting a sentence in order to minimally interfere with the existing probation order is to give priority to the sentencing objective at which that order is aimed: rehabilitation. It was not, however, the role of this sentencing judge, addressing a subsequent offence, to prioritize the sentencing objectives as they were weighed by the earlier sentencing court.
>
> …

> [65] The sentencing judge's attempt to preserve the weight given to rehabilitation at the earlier sentencing came at the expense of imposing an aggregate sentence that reflected the overall moral culpability of the offender. To the extent that the sentencing judge imposed a concurrent sentence in order to give the greatest effect he could to the existing probation order, and thereby emphasized rehabilitation over denunciation and deterrence, he was in error.

[47] Although there are other references in the judge's decision that might suggest an awareness of when the existing probation order would come into effect, I am persuaded by the Crown's argument the judge misunderstood or was at least confused as to its effective date. In my view, this is an error in principle that had an impact on the sentence and alone warrants appellate intervention. However, I will continue to address the Crown's remaining arguments.

[48] The Crown further contends the judge erred in principle by prioritizing the commencement date for the fresh probation order he imposed. The Crown expressed its concern this way:

> [66] A second reason the sentencing judge imposed a concurrent sentence was to ensure that his fresh probation order not come into effect too far into the future. The sentencing judge found a "sentence of two years imprisonment *consecutively and three years probation*" was "disproportionate" because the fresh probation order would come into effect too far into the future.
>
> [Original emphasis]

[49] This is a fair synopsis of the judge's reasons.[4] In addition, the Crown persuasively asserts the fresh probation order the judge imposed was not appropriate and the priority it received came at the expense of the denunciatory and deterrence aspect of the sentence:

> [69] A fresh probation order was not appropriate because it was not necessary. The fresh probation order was to have two functions: a) rehabilitative (counselling-related conditions) and b) protective (no contact conditions). Both of these functions would have been fulfilled without a fresh probation order.
>
> [70] The rehabilitative function of the fresh probation would have already been fulfilled by the existing probation order.
>
> [71] Both the existing and fresh probation orders will come into effect … once the Respondent is released from prison, following the conclusion of all of his custodial sentences. Both probation orders have the exact same rehabilitative

[4] Paras. 84, 88-90,108-109 of the sentencing decision.

> conditions. … As a result, there was no need to impose a fresh probation order to fulfill any rehabilitative function.

[50] I am satisfied that in Mr. Campbell's circumstances it was unnecessary for the judge to impose a fresh probation order. Both probation orders have the same rehabilitative conditions and the protective function of the fresh order would also largely have been fulfilled by the uncontested s. 743.21 "no contact" order the Crown sought.

[51] I accept the Crown's position that it was unreasonable for the judge to impose a concurrent sentence so as not to delay when the fresh probation order would come into effect. This came at the expense of an aggregate sentence that reflected the overall culpability of Mr. Campbell. In other words, a concurrent sentence gave practically no effect to the serious second sexual assault. Nor did it sufficiently emphasize denunciation and deterrence.

[52] The Crown's third and final submission under this ground of appeal is that the judge erred in the application of the totality sentencing principle. The Crown argues:

> [77] The third reason the sentencing judge imposed a concurrent sentence was because it was, in his view, "disproportionate" to impose a two year custodial sentence, served consecutively, followed by three years' probation. The sentencing judge attempted to address the "disproportionate" impact of the total – or aggregate – sentence by making his sentence concurrent. … **the failure to follow the accepted methodology to give effect to totality was an error in this case and ultimately resulted in a manifestly unfit (excessively lenient) sentence**.
>
> [Emphasis added]

[53] I will first provide an overview of the totality principle and how it should be applied before setting out the judge's impugned methodology.

[54] The principle of totality applies when consecutive sentences are imposed and ensures the aggregate sentence does not exceed the overall culpability of the offender. It serves to maintain the principle of proportionality. See *R. v. C.A.M.*, [1996] 1 S.C.R. 500 at para. 42 and s. 718.2 of the *Criminal Code* which provides:

> 718.2 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;

[55] Also, in the recent decision of this Court in *R. v. Laing*, 2022 NSCA 23, Justice Fichaud confirmed:

> [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.
>
> …
>
> [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.

[56] When considering the totality principle, these factors are also important to keep in mind:

- The principle does not entitle an offender to a reduction in sentence. Rather, a reduction in the aggregate sentence arises if the total is crushing or exceeds the overall culpability of the offender.
- The principle applies whether consecutive sentences are imposed at the same time or at different sentencing hearings.
- Where a consecutive sentence is imposed at a different sentencing hearing, the remanet[5] must be considered. This ensures an offender's culpability is truly reflected in the aggregate sentence as the totality principle is not intended to reap benefits for additional crimes at discounted rates.

See *R. v. Johnson*, 2012 ONCA 339, paras. 22-25, *R. v. Park*, 2016 MBCA 107, para. 14, and *R. v. Tamoikin*, 2020 NSCA 43, paras. 66-70.

[57] I return to the impugned method the judge used when considering totality. He reasoned:

> [27] I am satisfied that the range of sentence for this offence, the circumstances thereof, and the degree of responsibility of this offender, and his circumstances (I would characterize him as a "first-time offender") is between two and three years imprisonment.
>
> …
>
> [75] The Crown and Defence position that the sentence recommended should be consecutive to his August 7, 2020 sentence, is principled, and on its face not unreasonable.
>
> [76] However, this also requires the court to consider the totality of making a proposed sentence consecutive to an existing sentence – including that the combination of those sentences should not become disproportionate (s. 718.1 *CC*) or, as is sometimes said: "crushing" to the rehabilitative prospects of an offender.

[58] However, as the Crown correctly points out, the judge made no reference to, nor did his analytical path even remotely follow, *R. v. Adams*, 2010 NSCA 42. *Adams* required him, after having determined a fit and appropriate sentence, to have then considered whether that sentence should be served concurrently or consecutively to the remanet.[6]

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[5] The "remanet" is the unexpired portion of an existing sentence. See *R. v. Knott*, 2012 42, at para. 22.

[6] The judge never mentioned Mr. Campbell's remanet sentence, which was 17 months, 15 days according to the Crown's calculations. The judge only considered the entire two-year sentence imposed August 7, 2020 for the September 8, 2018 offence.

[59] It appears the judge was focused on finding a path to impose a fresh probation order that would not come into effect too far into the future and to ensure the existing probation order would not be negated. Although the judge found a 30 month (2.5 years) custodial sentence (para. 103) to be appropriate, in order to achieve such probationary goals he had to impose a two year custodial sentence to be served concurrently. He reduced the 30 months to 24 through the application of credits, some of which are challenged on appeal. I will address the credit application under the next issue.

[60] The Crown says the judge's goal-oriented approach gives rise to the same problem that occurs when a judge gives effect to totality by first fixing a global sentence and then assigning individual sentences to fit within the whole—an approach rejected by this Court in *Adams* and other cases noted herein.

[61] Mr. Campbell's response to these complaints of error is straightforward and can be succinctly summarised. Mr. Campbell asserts: notwithstanding any misapprehension the judge might have had respecting the commencement date of the existing probation order, and the position Mr. Campbell advanced at the sentencing hearing (a consecutive period of two years' go forward be imposed); ultimately, the judge had the discretion to impose a concurrent sentence and exercised his discretion properly. In other words, the sentence is appropriate (proportionate) having regard to the circumstances of the offence and the offender, as well as the principles and purposes of sentencing. I am not persuaded by the arguments advanced by Mr. Campbell.

[62] For the foregoing reasons, I accept the Crown's position the judge erred in his application of the totality principle.

[63] To conclude, I would allow this ground of appeal. In the circumstances of this case, there was no principled reason for the judge to depart from the general rule—separate offences warrant consecutive sentences. The foregoing errors in principle had a material impact on the sentence the judge imposed.

Did the sentencing judge impose a manifestly unfit sentence?

[64] The Crown advanced this as a stand alone ground of appeal—arguing the sentence was manifestly unfit. The defence asserts it was not. However, having determined the judge erred in principle and the error impacted the sentence, this Court is to set aside the impugned sentence and conduct it own analysis.

[65] In *Laing*, this Court said:

> [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.
>
> [Emphasis added]

Thus, this issue is more aptly identified as: *What is a fit sentence?*

[66] To begin, I will review the parties' respective positions, followed by an application of the *Adams* framework.

[67] Mr. Campbell's written submissions did not address what would constitute a fit sentence in the event this Court found an error impacting the sentence. During oral submissions, we asked for a revised position. In response, Mr. Campbell's counsel requested the quantum imposed (30 months' custody) remain the same, and the same credits be applied, followed by any totality adjustments.

[68] The Crown advocates for a three-year custodial term (imprisonment), to be served consecutively to the appellant's existing sentence. The Crown says the only credit to be applied is 78 days[7] (approximately 2.5 months) for time spent in pre-sentence custody. This was not the position taken by the Crown during the sentencing hearing. The record confirms the judge specifically requested the Crown's position on whether he could also consider additional credit for strict bail conditions (house arrest). The Crown responded affirmatively and indicated there was no set formula. Other than this brief exchange, there was no further discussion as to what might qualify the terms as harsh nor the credit quantum. The judge gave 3.5 months credit for the strict bail conditions that bound Mr. Campbell for approximately 18 months (para. 106).

[7] The judge applied an enhanced credit of 1.5 days for the 52 days Mr. Campbell spent in pre-trial custody, which equated to 78 days (para.105). On appeal, the Crown acknowledges this was correct.

[69] To defend its change in position, the Crown asserts that notwithstanding its original position below, the sentencing judge erred in giving this credit because the evidentiary base was lacking. The Crown acknowledges the release conditions would have been part of the court record and the judge could have reviewed them on his own. However, apart from this, the Crown says there was no evidence of actual hardship caused by the bail order.

[70] The Crown further argues a 30-month (2.5 year) sentence suggested by Mr. Campbell is inadequate for several reasons, including:

- It fails to reflect the violent nature of the sexual assault. The offence involved unprotected anal intercourse resulting in physical injury and significant emotional/psychological harm.

- The sentence judge's description of Mr. Campbell as a "first time offender", while technically correct, does not genuinely reflect his character. While the September 8, 2018 offence is not a true prior conviction, its close proximity in time and similar nature required consideration when evaluating a fit and proper sentence. However, the judge imposed a sentence as though Mr. Campbell's character was not coloured in any way by the other sexual offence.

- Mr. Campbell committed this assault amid a growing criminal record.[8] He had two true "prior convictions" at the time of this offence—i.e., offences for which he had been sentenced and therefore formed part of his criminal record. However, the Respondent accrued offences both before and after this September 16, 2018 offence. These other offences were relevant to situating the overall moral culpability of the offender in the aggregate sentence, as well as assessing the character of the offender, prospects for rehabilitation, the role of deterrence, and the need to emphasize protection of the public.

[8] A November 2008 sentence of 30 days in total for two breaches of s. 145 CC, which the judge characterized as "stale" and immaterial to the present sentencing (footnotes 12, 14). The other offences referenced were the September 8, 2018 sexual assault, a s. 145(5) breach on May 3, 2020, and various offences committed on August 3, 2020 (ss. 320.14 / 266(b) / 430(4) / and 145(5) CC). Neither the September 8, 2018 sexual assault nor the offences committed in 2020 were considered prior criminal offenses so as to constitute an aggravating factor (para. 12). The judge described Mr. Campbell of having a limited record and with the exception of the other sexual assault, not one demonstrating significant violence (para. 30). The judge was also satisfied his recent convictions appeared to be relatable to his substance abuse (para. 31).

- The remanet sentence must be considered. At the time of sentencing, it was approximately 17.5 months. A go forward custodial sentence of 30 months is inadequate. A three-year sentence results in a go forward sentence of four years, five months and 15 days. This is not "crushing" upon a "last look" and reflects Mr. Campbell's moral culpability.

[71] Having summarized the parties' respective positions, the application of the *Adams* framework follows.

[72] For the first step—what should the sentence be apart from concurring/consecutive and totality considerations? As a general statement, the judge's identification of aggravating and mitigating factors are not an issue between the parties. Nor do I have any concern with this aspect of his analysis. Accordingly, I do not need to revisit the judge's articulation of the aggravating/mitigating factors.

[73] However, the Crown's complaint is that in imposing a sentence at the low end of the range, the judge did not evaluate whether a three-year sentence was appropriate in light of the aggravating and mitigating circumstances he did identify. Further, he gave primary effect to rehabilitation at the expense of denunciation and deterrence. The Crown said:

> [102] In imposing a sentence at the low end of the range, the sentencing judge gave primary effect to rehabilitation at the expense of denunciation and deterrence. Although the sentencing judge suggested that "much depends on an assessment of the aggravating and mitigating factors" in situating a fit sentence, the surrounding discussion emphasized the impact of the sentence on fresh and existing probation orders. The sentencing judge did not evaluate whether a three year sentence was appropriate in light of the aggravating and mitigating circumstances. Instead, the sentencing judge started from the proposition that a fit sentence must include probation and, therefore, the maximum effective sentence that could be imposed was two years.

[74] I appreciate the Crown's concern. In my view, after consideration of the applicable sentencing principles, including consideration of the aggravating and mitigating circumstances identified by the judge, a custodial sentence of three years, in these circumstances, is appropriate.

[75] Turning to credits, I would reject the Crown's attempt to resile from its position at the sentencing hearing. I would not disturb the judge's total calculation of six months which reflects a combination of credit for pre-sentence custody and

restrictive bail conditions, which included house arrest. Although the record lacked a clear factual foundation for the judge to assess the harshness of the bail conditions, those terms would have been part of the record, something the Crown concedes the judge could consider. In light of this and the Crown's position below, I would not interfere with this exercise of discretion.

[76] In light of the sentence I would impose, there can be no fresh probation order. Furthermore, had I been persuaded to impose a sentence that would permit a probation order, for the reasons explained, there was no need for one given the terms of the existing probation order. However, I would impose a non-communication order (no contact) pursuant to s. 743.21(1) of the *Criminal Code* which provides:

> Non-communication order
>
> 743.21 (1) The sentencing judge may issue an order prohibiting the offender from communicating, directly or indirectly, with any victim, witness or other person identified in the order during the custodial period of the sentence, except in accordance with any conditions specified in the order that the sentencing judge considers necessary.

[77] Next, the second step—should the sentence be served concurrently or consecutively? It is obvious from my reasons a consecutive sentence is appropriate in this case. A concurrent sentence would stray from the general rule that separate offences warrant consecutive sentences.

[78] As noted, Mr. Campbell was being sentenced for a second serious sexual assault. Each offence involved a different victim. Each assault was separate in time. Only a consecutive sentence can address Mr. Campbell's wrongdoing and also properly emphasize denunciation and deterrence, as the sentence should.

[79] Finally, the third step—should the sentence be reduced under principles of totality? In my view, no.

[80] As explained in *Laing*:

> [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;

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".

[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 in original]

[81] At the time of sentencing, Mr. Campbell's remanet sentence was approximately 17.5 months. A three-year consecutive sentence (after credits 2.5 years go forward) is not crushing. In my view, a three-year consecutive sentence is proportionate to the nature of Mr. Campbell's offence and the degree of his moral culpability. I am satisfied the aggregate sentence does not exceed what is a just and appropriate sentence in these circumstances.

Conclusion

[82] For the foregoing reasons I would:

a) Grant leave to appeal and allow the appeal.

b) Set aside the sentence imposed with the exception of the ancillary orders.[9] Those orders shall remain in place, along with the exemption from the victim surcharge payment.

c) Impose a custodial sentence (imprisonment) of three years, which, after the application of credits, is 2.5 years going forward.

d) Impose a no contact order under s. 743.21(1) of the *Criminal Code*.

Van den Eynden J.A.

Concurred in:

Farrar J.A.

Hamilton J.A.

[9] Section 109(1) prohibition order for 10 years from his release from imprisonment; a lifetime SOIRA order pursuant to s. 490.013(2.1) of the *Criminal Code*; and a mandatory DNA order pursuant to s. 487.051 of the *Criminal Code*.