NOVA SCOTIA COURT OF APPEAL
Citation: *R. v. Lilly*, 2023 NSCA 80

Date: 20231108
Docket: CAC 518778
Registry: Halifax

Between:

Jacob Matthew Lilly

Appellant

v.

His Majesty the King

Respondent

Judge: The Honourable Justice David P. S. Farrar

Appeal Heard: September 25, 2023, in Halifax, Nova Scotia

Subject: Recusal motion – Bias of trial judge who heard related proceedings – Consideration of extrinsic evidence – Fitness of sentence

Summary: Justice Peter Rosinski was scheduled to hear the appellant's trial for engaging in conduct for the purpose of intimidating a justice system participant. Prior to the trial, the appellant made a motion for Justice Rosinski to recuse himself, arguing Justice Rosinski had a reasonable apprehension of bias because he had heard a bail application of a co-accused of the appellant in another proceeding.

The trial judge dismissed the recusal motion.

The appellant was convicted of the offence charged. In his decision, the trial judge made reference to *R. v. Ladelpha*, 2021 NSSC 324, where the appellant was one of the co-accused convicted of aggravated assault. The appellant argued that the trial process was tainted by the trial judge viewing extrinsic evidence which gave rise to a reasonable apprehension of bias.
The appellant also took issue with the credibility findings made by the trial judge.

Finally, the trial judge imposed a sentence of 25 months' imprisonment consecutive to any other sentence the appellant was serving. The appellant argued that the sentence was manifestly unfit.

Issues:

(1) Did the trial judge err by denying the appellant's recusal motion?
(2) Did the trial judge err by considering extrinsic evidence, the decision in *R. v. Ladelpha*, which created a reasonable apprehension of bias?
(3) Did the trial judge err in finding CO Hicks and CO Whynot credible?
(4) Did the trial judge impose a demonstrably unfit sentence?

Result:

The trial judge did not err in failing to recuse himself. The appellant failed to show that the judge would have a reasonable apprehension of bias as a result of having heard a related proceeding.

Similarly, the reference to *R. v. Ladelpha* was solely for the purpose of putting the issues in the present trial in context. The trial judge did not use any information or facts from that proceeding in finding the appellant guilty.

The trial judge made clear findings of credibility and did not commit any error of law in considering the credibility of the two correctional officers.

Finally, the sentence was a fit sentence that reflected the seriousness of what had occurred.

Leave to appeal sentence allowed. Conviction appeal and sentence appeal dismissed.

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Judges:	Farrar, Bryson and Van den Eynden JJ.A.
Appeal Heard:	September 25, 2023, in Halifax, Nova Scotia
Held:	Appeal dismissed, per reasons for judgment of Farrar J.A.; Bryson and Van den Eynden JJ.A. concurring
Counsel:	Ian Hutchison, for the appellant Timothy O'Leary, for the respondent

Reasons for judgment:

Background

[1] Jacob Matthew Lilly was charged that on March 31, 2021 he engaged in conduct for the purpose of intimidating a justice system participant, Correctional Officer Matthew Hicks ("CO Hicks"), a correctional officer at the Central Nova Scotia Correctional Facility (Burnside), contrary to s. 423.1(1)(b) of the *Criminal Code*.

[2] Justice Peter Rosinski was given conduct of the trial.

[3] The trial was scheduled to commence on October 6, 2021. On October 1, 2021, counsel for the appellant wrote to the trial judge and asked him to recuse himself. The recusal motion was heard on October 6, 2021. The trial judge denied the motion in an oral decision on that day. He later provided written reasons (*R. v. Lilly*, 2021 NSSC 292).

[4] On May 17, 2022, the trial judge convicted Mr. Lilly of the offence charged (*R. v. Lilly*, 2022 NSSC 138).

[5] On October 3, 2022, the trial judge sentenced Mr. Lilly to 25 months' imprisonment (*R. v. Lilly*, 2022 NSSC 276).

[6] Mr. Lilly appeals his conviction, including the trial judge's refusal to recuse himself, and seeks leave to appeal sentence. For the reasons that follow, I would dismiss the appeal, grant leave to appeal sentence, and dismiss the sentence appeal.

Recusal Motion

[7] As noted above, prior to the commencement of the trial, counsel for Mr. Lilly asked the trial judge to recuse himself. The trial judge asked for written submissions from the appellant outlining the reasons for the request.

[8] The appellant replied. The recusal motion was based on the trial judge's refusal to grant bail to K.C.—a co-accused of Mr. Lilly in another proceeding (*R. v. K.C.*, 2020 NSSC 186).

[9] To understand the appellant's arguments on the recusal motion, some background is necessary. CO Hicks was one of twelve correctional officers present in the North Unit Day Room at Burnside on December 2, 2019. While there, he witnessed a number of criminal offences committed simultaneously by a group of inmates who became publicly known as the "Burnside 15".

[10] CO Hicks saw several inmates enter Cell 8 where a new inmate had just been lodged. He and other correctional officers immediately became concerned about this congregation of inmates and the cell door being closed.

[11] CO Hicks made his way toward the cell, but was impeded by inmates who came between him and the other correctional officers, preventing them from intervening in the violence inflicted on the new inmate by the inmates in his cell.

[12] During the incident, Mr. Lilly was directly in front of the cell which CO Hicks was trying to enter. He told Mr. Lilly to move. Mr. Lilly said he would not permit CO Hicks near the cell, and for several minutes physically prevented him from reaching the cell. CO Hicks gave a statement to police in relation to what happened, including reference to Mr. Lilly's involvement.

[13] Mr. Lilly, K.C., and 13 other inmates were charged with criminal offences relating to the December 2, 2019 incident. The offences involved life-threatening injuries.

[14] K.C. applied for bail. Justice Rosinski heard the bail application and denied it. In denying bail, he found, among other things, there was "a substantial likelihood that [K.C.] will be found guilty of *at least* aggravated assault" (at ¶45).

[15] The appellant argued that given findings the trial judge made in K.C.'s bail hearing there was a reasonable apprehension of bias, and, as a result, he should recuse himself.

[16] After hearing submissions, the trial judge gave a "bottom line" decision refusing the recusal motion with written reasons to follow.

The Trial for Intimidating a Correctional Officer

[17] The Crown called CO Hicks as its main witness. At Burnside, CO Hicks' duties included doing rounds to ensure the inmates were well-behaved and not in unauthorized areas.

[18] CO Hicks testified the appellant was an inmate in Burnside on March 31, 2021. He had known the appellant for approximately two years. He recognized the appellant's voice. CO Hicks indicated the appellant's voice was "very loud, almost deeper. It stands out".

[19] On the evening of March 31, 2021, CO Hicks was doing a round with Correctional Officer Tyler Whynot ("CO Whynot"). During that round, CO Hicks testified he heard the appellant yell, "Stop snitching. Why are you testifying on the crew?"

[20] CO Hicks wrote an occurrence report about what had happened that evening. In the report, he wrote the time of the occurrence of the events as 7:30 p.m. He submitted the report four days later to his shift captain.

[21] At times during his testimony, CO Hicks described the appellant's statement with slightly different wording:

> A: I heard Mr. Lilly say, Stop snitching on the crew. Why are you testifying?
>
> […]
>
> **THE COURT:** Stop ... ?
>
> A. Stop testifying. Why are you snitching on the crew?
>
> **THE COURT:** Okay. "Why are you snitching on the crew?"
>
> A. Yes.
>
> […]
>
> Q. Because this is the quote that we need. Tell me what's ... what, if anything, Mr. Lilly said to you? Say it slowly and in the order that you heard it.
>
> A. I believe I recall it saying ... him saying, Why are you snitching? Stop testifying on the crew.
>
> Q. All right. Why are you testifying? Stop ...
>
> A. Snitching on the crew.

[22] CO Hicks was of the view the appellant's comments were with respect to a trial scheduled for May of 2021 involving the December 2, 2019 incident with the Burnside 15. CO Hicks was scheduled to be a witness in the May trial.

[23] CO Hicks believed the appellant's comments were meant to convey there would be repercussions if he testified in the May trial. He felt the appellant was trying to put pressure on him not to testify.

[24] CO Hicks thought "the crew" referred to the inmates who were part of the Burnside 15.

[25] CO Hicks was shown video from the Day Room during his cross-examination. The video was taken at approximately 7:30 p.m. on March 31, 2021. It did not show CO Hicks conducting a round with CO Whynot. It showed him conducting the round at approximately 7:30 p.m. with a female correctional officer, Holly White. As well, the video did not show the appellant in the same area CO Hicks had testified to the appellant being when the appellant made the statement in question.

[26] During his re-direct examination, CO Hicks testified:

> Q. Okay. Is that video a video of the incident that we're talking about here today?
>
> A. No.
>
> Q. Okay. Although it says 19:30, what can you say about the time? You said it happened at 19:30. That says 19:30. What can you say about the time?
>
> A. It's approximate time. I may have got the time wrong on the report.

[27] The Crown also called CO Whynot as a witness. He testified to what occurred on the night of March 31, 2021. He stated, in part:

> A. Sorry. Inmate Jacob Lilly was at the far left of the day room, sitting at the large table in front of Cells 1, 2, and 3. He was playing cards with the individuals who were there with him. At that time, I had observed Jacob Lilly looking in the direction of Officer Hicks. And as loud throughout the day room, I heard him say the phrases, Don't testify. Stop snitching on the crew, and, Stop being a snitch.

[28] CO Whynot knew it was the appellant who made the comment because he had a direct view of the appellant and observed him saying it. As well, CO Whynot recognized the appellant's voice from working at Burnside.

[29] On May 3, CO Whynot submitted a report on what had occurred on March 31, 2021. In his report, CO Whynot also wrote the comment occurred at 7:30 p.m. He testified he used his memory to prepare the report.

[30] During cross-examination, when shown the video of the Day Room at approximately 7:30 p.m., CO Whynot confirmed he was not in the video. The following exchange took place with counsel for the appellant:

> Q. Okay. Now having seen, sir, what you've just had the opportunity to review that video, are you sure, sir, about your testimony that you heard Mr. Lilly say at approximately 19:30 hours on the 31st of March 2021, Stop snitching on the crew, Don't testify, Stop being a snitch.
>
> A. I am confident as to what I heard; however, after watching the video, I can say that as I wrote my report a month later, I am most likely wrong on the time.
>
> Q. Okay. Couldn't be wrong, sir, in terms of what you heard?
>
> A. No.
>
> Q. Okay. But wrong in relation to the time now.
>
> A. Yes. I do multiple rounds a night.

[31] CO Whynot testified that rounds are done every half hour by two correctional officers. CO Whynot, CO Hicks and CO White were on duty the night of March 31, 2021, and they rotated doing rounds.

[32] The appellant did not testify in his defence. However, he called two witnesses. They were Captain Ryan Hill and D/Cst. Bradley Murray.

[33] Cpt. Hill was a Captain at Burnside. Based on CO Hicks' report, he burned a video of what occurred in the Day Room at approximately 7:30 p.m. on March 31, 2021. After burning the video, he sent it to the police. He had not shown the video to CO Hicks or verified if it was the correct video.

[34] D/Cst. Murray was a member of the Halifax Regional Police. He seized the video from Cpt. Hill.

R. v. Ladelpha

[35] The trial decision included several footnotes. Two of the footnotes referred to the decision of Justice Jamie Campbell in *R. v. Ladelpha*, 2021 NSSC 324.

[36] In *R. v. Ladelpha*, the appellant was one of the co-accused convicted of aggravated assault with respect to the December 2, 2019 incident. The two footnotes read:

> [3] While I in no way rely upon the following in my decision herein, I include it for completeness. The May 2021 trial was adjourned, and CO Hicks then testified in the Fall of 2021. Ultimately Mr. Lilly was convicted as a party to aggravated assault of the injured inmate, and of obstruction of CO Hicks – though the latter charge was judicially stayed – 2021 NSSC 324.
>
> […]
>
> [11] While not relevant to my determination, for completeness I note 13 were found guilty – 2021 NSSC 324 and 325 – and 1 plead guilty – 2021 NSSC 53.

Sentencing

[37] The Crown argued for a sentence in the range of two to three years' imprisonment. The appellant argued for a one-year sentence on a go-forward basis.

[38] The trial judge found a fit sentence was 25 months' imprisonment. The sentence was to be served consecutively to any sentence the appellant was serving.

Issues

[39] I will reframe the issues on appeal and address them in the following order:

1. Did the trial judge err by denying the appellant's recusal motion?

2. Did the trial judge err by considering extrinsic evidence, the decision in *R. v. Ladelpha*, which created a reasonable apprehension of bias?

3. Did the trial judge err in finding CO Hicks and CO Whynot credible?

4. Did the trial judge impose a demonstrably unfit sentence?

Standard of Review

Issue 1: Did the trial judge err by denying the appellant's recusal motion?

[40] Judges are granted considerable deference by appellate courts inquiring into an allegation of apprehended bias. The standard of review for a reasonable apprehension of bias is set out in detail for the second ground of appeal below.

[41] The decision to recuse is an exercise of judicial discretion that should not be interfered with unless it was based on an erroneous principle or resulted in a miscarriage of justice (*R. v. Werner*, 2005 NWTCA 5 at ¶16).

[42] In *R. v. Baldovi*, 2018 MBCA 64, the court stated:

> [11] Pure questions of law are reviewed on a standard of correctness. In the criminal law context, the application of a legal test to the facts is a question of law and is reviewed on correctness (*R v Shepherd*, 2009 SCC 35 at para 20). In this case, the application of the legal test to the facts entailed the motion judge performing a judicial bias analysis. Such an analysis is highly fact-driven and is deserving of deference. However, appellate courts do retain some scope for review because such claims raise serious and sensitive issues. See *R v S (RD)*, 1997 CanLII 324 (SCC), [1997] 3 SCR 484 at para 102.

Issue 2: Did the trial judge err by considering extrinsic evidence, the decision in *R. v. Ladelpha*, which created a reasonable apprehension of bias?

[43] The appellant argues that by referring to *Ladelpha*, the trial judge demonstrated he had exposed himself to extrinsic material that created a reasonable apprehension of bias.

[44] This issue arises for the first time on appeal. The test for determining a reasonable apprehension of bias was set out in *C.B. v. T.M.*, 2013 NSCA 53:

> [31] If a reasonable apprehension of bias arises from a judge's words or conduct, then the judge has exceeded his or her jurisdiction and erred in law: *R. v. S. (R.D.)*, [1997] 3 S.C.R. 484 at ¶ 99. In *C.H.D.* at ¶ 25, Hamilton J.A., for this court set out the test for reasonable apprehension of bias:
>
> > **25** The test for a reasonable apprehension of bias is set out in **R. v. R.D.S.**, [1997] 3 S.C.R. 484:
> >
> > > [31] The test for reasonable apprehension of bias is that set out by de Grandpré J. in Committee for Justice and Liberty v. National Energy Board, [1978] 1 S.C.R. 369. Though he wrote dissenting reasons, de Grandpré J.'s articulation of the test for bias was adopted by the majority of the Court, and has been consistently endorsed by this Court in the intervening two decades: [citations omitted]. De Grandpré J. stated, at pp. 394-95:
> > >
> > > > ... the apprehension of bias must be a reasonable one, held by reasonable and right-minded persons, applying themselves to the question and obtaining thereon the

> required information ... [T]hat test is "what would an informed person, viewing the matter realistically and practically and having thought the matter through conclude. Would he think that it is more likely than not that [the decision-maker], whether consciously or unconsciously, would not decide fairly."
>
> The grounds for this apprehension must, however, be substantial and I ... refus[e] to accept the suggestion that the test be related to the "very sensitive or scrupulous conscience". [Emphasis added]

[32] In *S. (R.D.)* at ¶ 35, the Supreme Court of Canada observed that according to its Commentaries on Judicial Conduct (1991), the Canadian Judicial Council stated at p. 12:

> True impartiality does not require that the judge have no sympathies or opinions; it requires that the judge nevertheless be free to entertain and act upon different points of view with an open mind.

[33] According to *S. (R.D.)*, to successfully assert that a judge might be partial, one must demonstrate that the beliefs, opinions, or biases held by the judge prevent him or her from setting aside any preconceptions and reaching a decision based only on the evidence:

> 113 Regardless of the precise words used to describe the test, the object of the different formulations is to emphasize that the threshold for a finding of real or perceived bias is high. It is a finding that must be carefully considered since it calls into question an element of judicial integrity. Indeed an allegation of reasonable apprehension of bias calls into question not simply the personal integrity of the judge, but the integrity of the entire administration of justice. See *Stark, supra*, at paras. 19-20. Where reasonable grounds to make such an allegation arise, counsel must be free to fearlessly raise such allegations. Yet, this is a serious step that should not be undertaken lightly. [Emphasis added]
>
> [Emphasis in original.]

Issue 3: Did the trial judge err in finding CO Hicks and CO Whynot credible?

[45] The standard of review for this ground of appeal was set out in *R. v. Preston*, 2022 NSCA 66:

> [54] It is well established that credibility is a factual determination, entitled to significant deference on appeal unless palpable and overriding error can be shown. A trial judge's credibility assessment is not to be disturbed unless it cannot be supported in any reasonable review of the evidence. [footnotes omitted]

Issue 4: Did the trial judge impose a demonstrably unfit sentence?

[46] The standard of review for this ground of appeal was explained in *R. v. Clarke-McNeil*, 2023 NSCA 32:

> [34] Sentencing decisions are accorded a high degree of deference in appellate review. Intervention is warranted only if (1) the sentencing judge committed an error in principle that impacted the sentence or, (2) the sentence is demonstrably unfit. Errors in principle include "an error of law, a failure to consider a relevant factor, or erroneous consideration of an aggravating or mitigating factor".
>
> [35] In assessing the issue of demonstrable unfitness, appellate review must focus on whether the sentence is proportionate to the gravity of the offence and the degree of the offender's responsibility. Proportionality is the fundamental principle of sentencing. [footnotes omitted]

Argument

Issue 1: Did the trial judge err by denying the appellant's recusal motion?

[47] The appellant brought a motion for the trial judge to recuse himself. As part of his motion, he argued the trial judge had heard a bail hearing for K.C.

[48] As noted earlier, K.C. and the appellant were co-accused, along with thirteen other inmates, in the Burnside 15 matter. The trial judge had also heard several applications of *habeas corpus* for other members of the Burnside 15. As well, the trial judge had listened to audio of the bail application made by B.J.M., another co-accused in the Burnside 15 matter.

[49] As a result of findings made by the trial judge in the other matters, the appellant argued there would be a reasonable apprehension of bias for the trial judge to decide if the appellant was guilty of intimidating a justice system participant.

[50] The focus of the appellant's motion was K.C.'s bail hearing, and specifically, the factual findings made by the trial judge. The appellant argued (as he does before us) the following findings made by the trial judge raised a reasonable apprehension of bias:

- K.C. was a co-accused of the appellant. The trial judge had found K.C. was part of a planned group action. This finding would be an adverse finding with respect to the appellant's character;

- The trial judge had made positive findings concerning CO Hicks' credibility and reliability in the bail hearing. Therefore, the trial judge had predetermined CO Hicks would be a credible witness at the appellant's trial;

- The trial judge had found the case against a co-accused in the Burnside 15 matter was strong; and

- The trial judge found there was a strong likelihood K.C. would be convicted of, at least, aggravated assault. This was problematic for all of the co-accused in the Burnside 15 matter. It raised a spectre of a reasonable apprehension of bias.

[51] The notion that it amounts to a reasonable apprehension of bias if a judge were to hear a related matter or an earlier proceeding with the same accused was rejected by this Court in *R. v. Jones*, 2008 NSCA 99:

> [26] The case law is clear that the mere fact that a judge heard another related matter is not sufficient to disqualify a sentencing judge. The appellant has not met the threshold of presenting cogent or substantial evidence required to establish a real likelihood of a reasonable apprehension of bias. There was nothing but bare speculation that the sentencing judge's prior dealing with Mr. Bonin would have had any effect on his impartiality and ability to preside fairly and impartially over the sentencing hearing. There is nothing requiring the intervention of this Court.

[52] A similar conclusion was reached by the New Brunswick Court of Appeal in *R. v. Tucker*, 2022 NBCA 59:

> [21] An allegation of reasonable apprehension of bias is not made out simply because the same judge who denied bail subsequently presides over that individual's sentencing hearing. Judges are mandated to discharge their judicial duties with impartiality and integrity, and at all times to do justice according to law. A reasonable person, properly informed, would see no apprehension of bias in the present case. While I do not reject outright the notion that it is conceivable judicial comments made during the course of a bail hearing could potentially give rise to a reasonable apprehension of bias should that same judge be presiding over the eventual sentencing hearing, it would be a rare occurrence. It certainly did not happen here.

[53] A trial judge will be impartial if they maintain an open mind to an accused person's guilt or innocence (*R. v. S. (R.D.)*, [1997] 3 S.C.R. 484 at ¶104-105).

[54] Trial judges frequently hear evidence about an accused during the trial or in earlier proceedings that is not admissible as part of the trial. They are presumed and expected to disabuse themselves of such information and render a verdict based on the relevant, admissible evidence heard in a trial.

[55] In *R. v. Keller*, 2020 BCPC 148, the court correctly explains:

> [17] Judges are constantly hearing prejudicial information relating to an accused. In many cases, this information may be irrelevant, unproven, or inadmissible and should receive no consideration in the formulation of the judge's reasons. In such cases, the judge is not required to recuse themselves from the matter as it is expressly assumed and expected that the judge is able to ignore such information when considering the merits of the case. Judges are often required to disabuse their minds of prejudicial information they have received relating to the accused when it is not relevant or admissible in determining the guilt or innocence of the accused. Indeed, all judges have sworn an oath to render justice impartially. There is a presumption that judges will carry out their oath of office: *R. v. S.(R.D.).*
>
> [18] ***Common examples include when the judge renders a verdict in a criminal matter despite having earlier heard extensive prejudicial information about the accused in a bail hearing on the same charge or in a voir dire during the trial***. In some cases, the inadmissible evidence may come to a judge's attention as a result of an application to admit similar fact evidence. Such evidence may recount numerous horrendous offences committed by the accused and, although found to be inadmissible at the trial, the judge is still permitted, indeed expected, to proceed with weighing the admissible evidence.
>
> [19] In *R. v. Perera* 1998 CanLII 14995 (BC CA), [1998] BCJ No. 935, our Court of Appeal observed that:
>
> > Judges who sit in criminal proceedings often hear evidence prejudicial to an accused in a voir dire which, if ruled inadmissible, must be ignored. Such is the training of a judge. (para. 18)
>
> [20] ***This principle has equal application to prejudicial information about an accused the judge may have heard in an earlier proceeding. It is a fundamental duty of a trial judge in performing their judicial function to consider only the admissible evidence before the court in the specific proceedings***. Parties ought not to be concerned about a judge transposing evidence between proceedings. In *Taylor Ventures v. Taylor*, Donald J.A. stated:
>
> > Any reasonable, well informed person would accept the judge's assurance that he would decide the case only on the evidence admitted at the trial.

> This duty is so basic to the judicial function that the appellant's concern amounts to nothing more than groundless suspicion. (para. 9)
>
> [Emphasis added.]

[56] In *R. v. Richards*, 2017 ONCA 424, the court set out the principles to be applied in cases where actual or apprehended bias is alleged:

> [42] No serious dispute arises about the principles that control our decision in this case. A brief reminder will suffice.
>
> [43] First, there is a presumption of judicial integrity, that is to say, that judges will carry out their oath of office: *R. v. S. (R.D.)*, 1997 CanLII 324 (SCC), [1997] 3 S.C.R. 484, at para. 117. This presumption is one of the fundamental reasons why the threshold for a successful allegation of actual or apprehended judicial bias is high: *S. (R.D.)*, at para. 117.
>
> [44] Second, this presumption of judicial integrity does not relieve a judge from their sworn duty to be impartial: *S. (R.D.)*, at para. 117.
>
> [45] Third, although the threshold for a successful claim of actual or apprehended bias is high, it is not insurmountable. The presumption of judicial integrity can be displaced by cogent evidence that demonstrates that something the judge did or said gives rise to a reasonable apprehension of bias: *S. (R.D.)*, at para. 117.
>
> [46] Fourth, in accordance with general principle, the onus of rebutting the presumption of integrity, or put another way, of demonstrating bias, rests upon the party who alleges it, in this case, the appellant: *S. (R.D.)*, at para. 114.
>
> [47] Fifth, allegations of reasonable apprehension of bias, thus inquiries into whether such a claim has been made out, are entirely fact-specific. It follows that it is simply not possible to examine another case and conclude that the determination of the presence or absence of bias in that case must apply to and control the disposition of the case under consideration: *S. (R.D.)*, at para. 136.
>
> [48] Sixth, the apprehension of bias must be a reasonable one, held by reasonable and right-minded persons, applying themselves to the question and obtaining the required information about it. The test is "What would an informed person, viewing the matter realistically and practically – and having thought the matter through – conclude": *Committee for Justice and Liberty v. National Energy Board*, 1976 CanLII 2 (SCC), [1978] 1 S.C.R. 369, at p. 394.
>
> [49] Inherent in this test is a two-fold objective element. The person considering the alleged bias must be reasonable. And the apprehension of bias must also be reasonable in all the circumstances of the case. The reasonable person must be informed, impressed with the knowledge of all the circumstances, including the traditions of integrity and impartiality that form a part of the

> background and cognizant of the fact that impartiality is one of the duties judges swear to uphold: *S. (R.D.)*, at para. 111.
>
> [50] Finally, stereotypical reasoning may give rise to a reasonable apprehension of bias: *S. (R.D.)*, at para. 6, Major J. dissenting.

[57] Although each allegation of bias is entirely fact specific, *R. v. Perciballi*, 146 O.A.C. 1, aff'd 2002 SCC 51, has some similarities to this case.

[58] Two co-accused alleged there had been a reasonable apprehension of bias for the judge who had authorized a wiretap. They argued the apprehension of bias arose from the authorizing judge having heard the bail hearing of one of the co-accused. As a result, they argued the wiretap evidence should not have been admissible. In dismissing their appeal, the Ontario Court of Appeal stated:

> [21] In my view, there is no reason to interfere with the trial judge's decision on this *Charter* application. ***The mere prior involvement of the authorizing justice in an earlier proceeding does not, without convincing evidence to the contrary, displace the presumption of judicial integrity and impartiality. Hence, the bare allegation that Hamilton J. heard "prejudicial evidence" on the bail review that did not form part of the authorization package is meaningless***. Trial judges routinely exclude evidence that they have heard on a *voir dire*, or hear confessions or guilty pleas by co-accused, and go on to preside over the trial of an accused.
>
> [22] Further, there is nothing inherent in the nature of the decision that must be made on either application -- the bail review or the wiretap authorization -- that gives rise to a reasonable apprehension of bias where the same justice presides over both proceedings. Although it is necessary in each proceeding to make an assessment of the evidence presented by the prosecution, the tests are very different and their application does not require any determinative findings on the guilt or innocence of an accused person. The allegation of bias must be based, rather, on what actually transpired during the specific proceedings.
>
> [Emphasis added.]

[59] Hearing K.C.'s bail hearing required the trial judge to apply a different test than he would to determine whether guilt had been established beyond a reasonable doubt. Mere allegations of bias due to hearing prejudicial information are meaningless. Trial judges routinely exclude prejudicial information concerning an accused and go on to impartially decide the trial of that accused. The allegation of a reasonable apprehension of bias must be assessed by determining whether there is cogent evidence of bias based on what actually transpired during specific proceedings.

[60] After setting out Mr. Lilly's concerns in some detail, the trial judge explained in his recusal decision why his involvement in K.C.'s bail hearing did not raise a reasonable apprehension of bias:

> [15] Let me briefly make some salient observations at this point:
>
> […]
>
> 4. my bail hearing decision regarding KC is not of assistance to Mr. Lilly for the following reasons:
>
> a. KC was one of the seven people who were *inside the cell* of SFA, which is the period of time in which SFA's injuries were administered – to my recollection there was no reference to Mr. Lilly during this hearing, and other than through the playing of portions of the videotape without audio showing the area of SFA's cell, the hearing proceeded by way of representations by counsel. I certainly was unable to identify Mr. Lilly during the playing of the videotape given that I had no memory of ever seeing him before. I have no recollection of specifically Mr. Lilly's alleged participation having been mentioned during the bail hearing of KC-only 7 of the Burnside 15 are alleged to have been involved directly in the cell assault of SFA – leaving 8 others remained outside the cell door;
>
> b. concluding that the case against KC was strong or "very strong" is a comment specific to KC and based on the limited evidence presented at a bail hearing (which included that he was one of the 7 inside the cell), and which process is focused on evidence relevant to whether the particular accused person seeking bail can safely be released while pending trial given the considerations in section 515 of the Criminal Code;
>
> c. although Mr. Lilly in his brief states: "you have also reviewed the audio recording for the bail application made by another co-accused Mr. BJM... **[You have] heard the facts as alleged by the Crown in *R. versus Marriott at al*, (we assume this includes your Lordship being told of Mr. Lilly's alleged actions)...**" – I did not listen to any of the bail hearing evidence or submissions regarding BJM, and do not recall hearing of "Mr. Lilly's alleged actions" – moreover, as I stated in my decision regarding KC at para. 52 I only listened to the oral decision of Justice Boudreau, and did so for a limited purpose:
>
> > "K.C. made a concerted effort to get inside the cell of SFA, running down the stairs in haste, directly to that cell; was seen speaking to B.J.M. (**who arguably orchestrated this attack – and who was denied bail by Justice Denise Boudreau in an oral**

> **decision which I have listened to only in order to ensure we are consistently interpreting the legal principles involved**) very shortly before the attack on SFA in his cell;
>
> [Emphasis in original.]

[61] Mr. Lilly was not one of the seven co-accused who entered the cell. CO Hicks was not a witness at the bail hearing. The trial judge would not have made credibility findings specific to CO Hicks. The trial judge made findings that were specific to K.C. The findings were not meant to apply to the whole of the Burnside 15.

[62] It is simply speculation the trial judge was likely to somehow make prejudicial character or propensity assumptions to decide the appellant's trial for intimidating a justice system participant as a result of findings he made at K.C.'s bail hearing.

[63] The appellant also argues a reasonable apprehension of bias had been recognized by the trial judge because he would not hear the bail application of B.J.M. He says a reasonable apprehension of bias had been acknowledged when "the Supreme Court […] allocated the bail application of […] B.J.M. in *R. v. Ladelpha*, to another Supreme Court Justice [other than Justice Rosinski] so as to reassure [the] parties of any concern as to bias" (Appellant's Factum, ¶46).

[64] At the October 6, 2021 recusal motion, the trial judge explained he did not hear B.J.M.'s bail review as a matter of personal discretion, not because he felt it would give rise to a reasonable apprehension of bias:

> And it goes on. And he indicates that Mr. Marriott was concerned whether he would receive an impartial determination of the application for judicial interim release, which I was scheduled to hear from Mr. Marriott.
>
> In relation to that, that is the extent, if you will, of the evidence on the matter. I can say that there was no recusal motion and so no determination was made of the merits of the suggested recusal. Therefore, what is left, I guess, in ... if you want evidence in this particular case insofar as Mr. Lilly is concerned, is that I, as a matter of my own personal discretion, determined that I wouldn't hear it, which is not legally as effectual or significant as a recusal motion having been found by me. So ends the matter of the evidence insofar as that particular aspect is concerned.

[65] At the conclusion of the evidence for the appellant's motion, no reasonable person informed of all the circumstances would perceive a reasonable

apprehension of bias. The appellant did not present any evidence the trial judge was in some way predisposed to a particular result. There was nothing to suggest the trial judge was not open to persuasion from hearing the trial evidence and submissions from counsel.

[66] The trial judge did not err in refusing the recusal motion. I would dismiss this ground of appeal.

Issue 2: Did the trial judge err by considering extrinsic evidence, the decision in *R. v. Ladelpha*, which created a reasonable apprehension of bias?

[67] The appellant says the trial judge created a reasonable apprehension of bias by citing or referring to *R. v. Ladelpha* in two of the footnotes in his decision.

[68] I have discussed the law on reasonable apprehension of bias under the first ground of appeal and will not repeat it here.

[69] For the trial judge to have created a reasonable apprehension of bias by referencing *R. v. Ladelpha*, an informed and reasonable observer would have to be satisfied of the following:

- There was a real likelihood the trial judge had not complied with his sworn duty to be impartial;
- The trial judge ignored his self-instruction that what had occurred on December 2, 2019 could only be considered for context to decide what had occurred on the March 31, 2021 offence date; bad character or propensity evidence had to be ignored; and
- The trial judge could not be taken at his word that he did not rely on *R. v. Ladelpha*.

[70] The trial judge, in the trial decision, stated:

> [17] Mr. Lilly was consequently charged with criminal offences related to the December 2, 2019, incident. His trial was initially scheduled for May 2021[3]. CO Hicks was subpoenaed as a witness, and I infer that Mr. Lilly was aware of this on March 31, 2021. Mr. Lilly was then also represented by Mr. Hutchison.

[71] The trial judge footnoted the first sentence in ¶17 as follows:

> [3] While I in no way rely upon the following in my decision herein, I include it for completeness. The May 2021 trial was adjourned, and CO Hicks then testified in the Fall of 2021. Ultimately Mr. Lilly was convicted as a party to aggravated assault of the injured inmate, and of obstruction of CO Hicks – though the latter charge was judicially stayed – 2021 NSSC 324.

[72] The appellant argues as a result of the third footnote the trial judge must have reviewed the *R. v. Ladelpha* decision in its entirety and contemplated it when deciding whether he was guilty.

[73] There is no evidence the trial judge took judicial notice of the factual findings in *R. v. Ladelpha* or that he was using any information from *R. v. Ladelpha* to determine if the appellant was guilty. When read in context, the trial judge merely mentioned *R. v. Ladelpha* in the footnotes to provide information for those reading his decision. The footnotes are merely to inform the public, for completeness, that at the end of the day the appellant was convicted for certain offences as a result of the December 2, 2019 incident.

[74] The trial judge stated, "I in no way rely upon the following in my decision". He was entitled to be taken at his word. He is entitled to have his reasons considered based on what he said, not based on speculation. There is nothing in his decision to suggest he relied on inadmissible evidence.

[75] The appellant says the trial judge's knowledge of Justice Campbell's finding of guilt in *R. v. Ladelpha* "provided Justice Rosinski with logical reasons for the Appellant to have committed the act alleged of intimidating a justice participant" (Appellant's Factum at ¶42).

[76] The trial judge did not find the appellant guilty of the offence by referring to *R. v. Ladelpha*. The conviction resulted from the trial judge accepting undisputed, admissible evidence provided at trial.

[77] CO Hicks gave evidence about what occurred on December 2, 2019. It provided context for the threat he received from the appellant. In essence, CO Hicks' evidence explained the motive for the appellant to threaten him. It explained how the appellant knew he was going to be a witness and how the appellant knew what CO Hicks had witnessed.

[78] As well, the appellant argues, "[b]y exposing himself to the written details and outcome of *R. v. Ladelpha*, Justice Rosinski essentially contaminated the proceedings. Logically, it would have been very difficult for Justice Rosinski to set

aside the belief an individual who committed an offence would be more likely to intimidate a witness to that offence than someone who had not" (Appellant's Factum at ¶38).

[79] In other words, the appellant argues the trial judge would have relied on *R. v. Ladelpha* for propensity or bad character evidence.

[80] The trial judge knew he could not make use of propensity or character evidence from what the Burnside 15 had done on December 2, 2019. During the trial, he instructed himself not to:

> So, obviously, I'm going to self-instruct myself that regardless of what Mr. Lilly may have done on this previous occasion, that will be circumscribed because it's the interaction between; namely, Mr. Lilly and Officer Hicks on that occasion as well. And the general context of which I have actually no evidence at this point, from December 2nd, 2019, that will ... any prejudicial effect there is minimal because I'm going to self-instruct myself regardless of what Mr. Lilly did there. It's akin to somebody ... okay, somebody assaulted somebody on "X" date and I'm hearing a trial on "Y" date, but it's related somehow. I'm going to ignore the fact except for contextual aspect of the statements of what Mr. Lilly did on December 2nd, 2019.

[81] As well, in response to an objection by counsel for the appellant, the trial judge stated:

> **THE COURT**: ... I think he's saying there's a context to the alleged statements against your client, and this is the context. So it's not as a bad character evidentiary reference. It's because it's necessarily required for the Crown to put this context in, from their perspective, in order to explain the statement. Because the statement is alleged to relate to an upcoming trial.
>
> So I mean there's already that, and so it explains, the Crown would say, to some extent, why Mr. Lilly might have said something like this to this person who is going to be testifying at that trial to explain that, Well, it relates back to this. I certainly ... the fact that ... I mean Mr. Lilly was charged in relation to that. That has no ... like, from the bad-character perspective or, you know, propensity evidence or whatever, that's not at all in play here. That doesn't matter. I totally ignore that. It's ... if that helps your concern.

[82] The trial judge knew propensity or bad character evidence was not admissible. He would know to disabuse his mind of any potential propensity evidence.

[83] The Alberta Court of Appeal in *R. v. Blea*, 2012 ABCA 41, recognized the risks inherent in the admission of propensity evidence:

> [48] Morever, ***the risks inherent in the admission of similar fact evidence arise from either reasoning prejudice***, as where the evidence obfuscates or distorts the reasoning process, ***or moral prejudice***, as where the trier of fact is encouraged to either find the accused is generally deserving of punishment, or is more likely to be guilty because he has committed other unsavoury acts: ***R. v. DeKock***, 2009 ABCA 225, 6 AltaLR 5th 95; ***R. v. B(TR)***, 2009 ONCA 177, 243 CCC (3d) 158. ***There is not a hint here in the reasons of the trial judge to infer that either prejudice occurred. Both forms of prejudice are of reduced likelihood in trials by judge alone***: ***B(TR)*** at para. 33.
>
> [49] A firmer foundation than conjecture is needed to impugn reasons that do not reflect such prejudice or its influence on the reasoning process as we take trial judges at their word: ***R. v. O'Brien***, 2011 SCC 29, 2011] 2 SCR 485 at para. 18 ("The trial judge was entitled to be taken at his word. His chain of fact, law and logic in this case was impeccable. I see nothing about his approach that suggests a subconscious subversion of his articulated thoughts.").
>
> [Emphasis added.]

[84] I agree there are risks associated with the use of propensity evidence. However, that did not happen here. Like *R. v. Blea*, the appellant has not pointed to anything in the reasons of the trial judge that suggests he used *R. v. Ladelpha* for anything other than what he said he was using it for—to put matters into context. More than conjecture is needed to impugn Justice Rosinski's reasons.

[85] I would dismiss this ground of appeal.

Issue 3: Did the trial judge err in finding CO Hicks and CO Whynot credible?

[86] The appellant argues:

> 70. The Appellant wishes to argue that the trial Judge erred in finding that Officer's Hicks and Whynot were credible and reliable, and their evidence established the *actus reus* of the offence. In support of our argument, we draw to the court's attention the following:
>
> - The video evidence did not support the evidence from both witnesses.
> - Both witnesses gave differing evidence as to the words uttered by the Appellant when making the threat.

- Both witnesses gave testimony that the alleged incident occurred at 7:30pm and recorded the same in their reports which were prepared independently.
- The witnesses gave contradictory evidence as to where the Appellant was positioned at the time of the offence. Officer Hicks said the Appellant was [at] a table on the right side of the range. While Officer Whynot said the Appellant was [at] a table on the left side of the range.

[87] Credibility is a factual determination entitled to significant deference on appeal unless it cannot be supported by any reasonable review of the evidence.

[88] Ultimately, the appellant seeks to have this Court re-examine the evidence and simply come to a different conclusion. Respectfully, that is not the role of an appellate court.

[89] The video evidence did not show the appellant making threatening comments to CO Hicks. CO Hicks explained he had mistakenly cited the time of the incident as having occurred around 7:30 p.m. The mistaken time reported by CO Hicks led to the incorrect videotape footage being recorded.

[90] CO Whynot also reported the wrong time of the incident.

[91] The discrepancies in the testimonies of the correctional officers about the timing of when the comments were made was addressed by the trial judge in a footnote. The trial judge found the discrepancies did not undermine the credibility of the witnesses:

> [4] During the trial it became evident that CO Hicks wrote up a report near the end of his shift [6:45 PM – 6:45 AM] of March 31, 2021, and mistakenly cited the time of the incident at around 7:30 PM. CO Hicks did not peruse the contents of his report again, or CO Whynot's report to management created on May 3, 2021 at that time or later, so the error went unnoticed, possibly as late as until the Crown presented video evidence at the trial in October 2021. Neither CO Hicks nor CO Whynot had seen the video tape before trial. The video evidence included video-only recording of the area where Mr. Lilly was an inmate the West Unit at 7:30 PM March 31, 2021. It did not show CO Hicks in the company of CO Whynot at that time, as CO Hicks's report of March 31, 2021, suggested, but rather him in the company of CO Holly White, who was the only other CO working with CO Hicks and CO Whynot during that shift in the West unit. CO Whynot did read CO Hicks's report and witnessed it on March 31, 2021. The videotape was introduced at trial through Capt. Hill, who only received CO Hicks's report on April 8, 2021. He was tasked with producing a true copy of the videotape from the time of the alleged offence. He merely looked at the time on

> CO Hicks's report to ascertain what videotape should be copied so it could be presented to the court at trial. The mistaken time of the offences recorded by CO Hicks, which led to the copying of the incorrect videotape footage, did not undermine the core credibility of CO Hicks and CO Whynot because the videotape did confirm that consistent with their evidence, CO Holly White shown in the video was also working with them during that shift in the West unit on March 31, 2021; and it showed Mr. Lilly was an inmate in their area of responsibility. Moreover, their evidence of their shift times and with whom they were partnered on March 31, 2021, throughout their shift, certainly provided the opportunity for CO Hicks and CO Whynot to have been together at least once in the evening in the West unit when Mr. Lilly was also present in the dayroom.
>
> [*R. v. Lilly*, 2022 NSSC 138]

[92] The trial judge in his decision stated:

> [30] I am satisfied beyond a reasonable doubt that Mr. Lilly is the person who yelled the words (as recounted by COs Hicks and Whynot), and that he intended they be heard by CO Hicks, as Lilly knew he was subpoenaed for the May 2021, trial involving Lilly and the other charged inmates regarding the December 2, 2019, incident. [Footnote omitted.]
>
> […]
>
> [38] I am satisfied beyond a reasonable doubt that Mr. Lilly intended to provoke a state of fear in CO Hicks and intended to impede him in the performance of his duties (whether that be as a correctional officer at the institution or as a witness at the trials of any of the Burnside 15 accused).

[93] Both officers may not have quoted the appellant in exactly the same way. However, they both testified to the appellant's words having the same meaning. Essentially, don't snitch or testify against the crew. Their evidence was corroborative.

[94] The evidence about the appellant's location when he made the threatening comment was confusing. It was confusing because it was based, in part, on the cross-examination of CO Hicks and CO Whynot about where the appellant was in the video. The video did not show the incident.

[95] In any event, CO Hicks did not see the appellant when he made the threatening comment. If he was wrong about where the appellant was located when he made the threat that would not materially affect his credibility.

[96] Both CO Hicks and CO Whynot testified to the appellant's voice being recognizable. The appellant did not testify. There was no evidence presented that

contradicted the evidence of CO Hicks and CO Whynot. The trial judge did not err when he considered the credibility of CO Hicks and CO Whynot. Finding them credible and reliable was supported by a reasonable view of the evidence.

Issue 4: Did the trial judge impose a demonstrably unfit sentence?

[97] The trial judge imposed a sentence of 25 months of imprisonment to be served consecutively to any sentence the appellant may be serving.

[98] In sentencing the appellant, denunciation and deterrence were the primary sentencing objectives the trial judge had to consider.

[99] Section 718.02 of the *Criminal Code* states:

> 718.02 When a court imposes a sentence for an offence under subsection 270(1), section 270.01 or 270.02 or paragraph 423.1(1)(b), the court shall give primary consideration to the objectives of denunciation and deterrence of the conduct that forms the basis of the offence.

[100] In *R. v. Espinosa Ribadeneira*, 2019 NSCA 7, this Court stated the following about deterrence and denunciation:

> [42] The sentencing objectives of specific deterrence and general deterrence appear in s. 718(b) of the *Code*. In *R. v. B.W.P.*, 2006 SCC 27, the Supreme Court of Canada explained deterrence and the difference between general and specific deterrence:
>
> > 2 Deterrence, as a principle of sentencing, refers to the imposition of a sanction for the purpose of discouraging the offender and others from engaging in criminal conduct. When deterrence is aimed at the offender before the court, it is called "specific deterrence", when directed at others, "general deterrence". The focus of these appeals is on the latter. General deterrence is intended to work in this way: potential criminals will not engage in criminal activity because of the example provided by the punishment imposed on the offender. When general deterrence is factored in the determination of the sentence, the offender is punished more severely, not because he or she deserves it, but because the court decides to send a message to others who may be inclined to engage in similar criminal activity.
>
> […]
>
> [48] The Crown submits that the sentencing judge failed to emphasize both general deterrence and denunciation. The Supreme Court in *R. v. M.(C.A.)*, explained denunciation as follows:

> 81 ... The objective of denunciation mandates that a sentence should also communicate society's condemnation of that particular offender's conduct. In short, a sentence with a denunciatory element represents a symbolic, collective statement that the offender's conduct should be punished for encroaching on our society's basic code of values as enshrined within our substantive criminal law. As Lord Justice Lawton stated in *R. v. Sargeant* (1974), 60 Cr. App. R. 74, at p. 77: "society, through the courts, must show its abhorrence of particular types of crime, and the only way in which the courts can show this is by the sentences they pass." ...
>
> [Emphasis in original.]

[101] The appellant argues the trial judge overemphasized deterrence and denunciation in his sentence.

[102] The trial judge appropriately considered these sentencing objectives given the need to send a message that conduct like the appellant's was unacceptable and would not be tolerated.

[103] The trial judge found the appellant engaged in conduct to intimidate CO Hicks for the purpose of impeding his duties as both a correctional officer and as a witness.

[104] Section 423.1 protects individuals who work in the justice system and who, by nature of their employment, are vulnerable to attack.

[105] Deterrence and denunciation of conduct by inmates that could adversely affect correctional officers is necessary to maintain order within correctional facilities.

[106] The comments from the Court of Queen's Bench of New Brunswick in *R. v. Slade*, 2007 NBQB 415, are instructive on this point:

> [28] I am going to quote from a decision of **R. v. Bernard (R.J.)**, [1989] N.B.J. No. 316; 98 N.B.R. (2d) 54; 248 A.P.R. 54 (T.D.). It's a decision of Mr. Justice Riordon. This case was referred to the court this morning. In that case, a prison guard was stabbed and the attack was unpremeditated and did not cause serious injury. The accused in that case was serving a sentence for second degree murder and had a long record of violent crimes. The mitigating factor in that case was the fact that the accused pled guilty. The Judge in that particular case [at paragraph 15, quoted the following excerpts from the Alberta Court of Appeal decision in **R. v. Littletent** (1985), 59 A.R. 100]:

> "Neither counsel cited any of the cases of this court dealing with assaults on prison guards or assaults by guards on prisoners. There are a number of authorities, but I need only mention **R. v. Brighteyes**, [1984] A.J. No. 108, the case involving a hostage taking of a jail guard and a sentence of eight years. The court in an unreported memorandum of September 7th, 1984, said this:
>
> > 'In affirming these sentences the overriding importance is the maintenance of order in penal institutions. What is needed will be done. Both corrections officers and inmates must know for certainty that assaults by one upon the other will be swiftly and severely dealt with as much as though to the uninvolved including the vast majority of inmates who decry this type of violence.'"
>
> [29] In a recent decision of Mr. Justice Rideout in the case of **R. v. Hubley (J.)** (2007) 322 N.B.R. (2d) 1; 829 A.P.R. 1 (T.D.), decided July 9th, 2007, in paragraph 4 of that decision, Mr. Justice Rideout stated as follows:
>
> > "I believe it is essential to denounce and deter this type of conduct particularly when it occurs in a prison. There must be consequences for this type of conduct. Such conduct is not accepted in our society, nor should it be accepted in a prison. In fact, it is my view, that the penalty for such conduct should be greater because of the offence occurring in a prison. This is very much an aggravating factor to be considered in sentencing."

[107] Intimidation of witnesses is dangerous for the justice system. The community may lose confidence if criminal charges are not decided on their merits, but are resolved because witnesses won't testify.

[108] In *R. v. Michel*, 2010 NWTTC 9[1], the accused had threatened a witness. In sentencing the accused, the Court stated:

> [19] The most important sentencing objectives are general and specific deterrence, and denunciation. Mr. Michel has to realize that the consequences of this type of behaviour will reflect the seriousness of it, and others that think they can avoid the consequences of criminal actions by intimidating and threatening or in any other way attempting to improperly influence or manipulate a witness, have to know such conduct will be dealt with harshly. ***This behaviour has to be stopped, and a strong and clear message has to be sent through the sentence imposed that it will not be tolerated.***
>
> [Emphasis added.]

[1] Cited by the trial judge at ¶53, 54 and 60, in his sentence decision.

[109] In considering the need for deterrence and denunciation, the trial judge did not fail to consider other sentencing objectives such as rehabilitation, as argued by the appellant. He recognized the appellant was only 24. The appellant's age provided some basis to hope his rehabilitation could be effected. However, the trial judge also found the appellant was not motivated to engage in rehabilitation-oriented endeavours (Sentencing Decision at ¶39-40).

[110] The trial judge was alive to balancing the objectives of sentencing when he sentenced the appellant:

> [68] Such challenge to the authority of correctional services in a jail, must be met with a strongly deterrent sentence albeit still proportionate to the culpability of the offender and the gravity of the offences, his potential for rehabilitation as well as bearing in mind the other principles of sentencing.

[111] Simply because the trial judge balanced the objectives or principles of sentencing differently than the appellant would have liked does not mean the trial judge erred in principle.

[112] When the principles of deterrence and denunciation have priority, the focus of a sentencing judge is more on the offence committed than the offender. While factors personal to an offender, such as rehabilitation, remain important, they necessarily take on a reduced role (*R. v. KNDW*, 2020 MBCA 52 at ¶21).

[113] The appellant also argues the trial judge imposed an unfit sentence.

[114] The 25 month sentence is proportionate to the gravity of the offence and the appellant's moral culpability. Under s. 718.1 of the *Criminal Code*, the fundamental principle of sentencing is that a sentence must be proportionate to the gravity of the offence (i.e., how serious the offence is) and the degree of responsibility of the offender (i.e., their moral blameworthiness).

[115] In *R. v. Parranto*, 2021 SCC 46, the Supreme Court of Canada commented on the fundamental principle of sentencing:

> [9] This Court has repeatedly expressed that sentencing is "one of the most delicate stages of the criminal justice process in Canada" (*R. v. Lacasse*, 2015 SCC 64, [2015] 3 S.C.R. 1089, at para. 1). More of an art than a science, sentencing requires judges to consider and balance a multiplicity of factors. While the sentencing process is governed by the clearly defined objectives and principles in Part XXIII of the *Criminal Code*, it remains a discretionary exercise

> for sentencing courts in balancing all relevant factors to meet the basic objectives of sentencing (*Lacasse*, at para. 1).
>
> [10] The goal in every case is a fair, fit and principled sanction. Proportionality is the organizing principle in reaching this goal. Unlike other principles of sentencing set out in the *Criminal Code*, proportionality stands alone following the heading "Fundamental principle" (s. 718.1). Accordingly, "[a]ll sentencing starts with the principle that sentences must be proportionate to the gravity of the offence and the degree of responsibility of the offender" (*R. v. Friesen*, 2020 SCC 9, at para. 30). The principles of parity and individualization, while important, are secondary principles.

[116] The gravity of the offence has two components: (1) the harm or likely harm to the victim; and (2) the harm or likely harm to society and its values. As well, the greater the harm intended, the greater the moral culpability of an offender (*R. v. Hamlyn*, 2016 ABCA 127 at ¶9 and 12).

[117] With respect to the gravity of the offence, the trial judge stated:

> [67] The threats that Mr. Lilly made and the expectation that "the crew" did not want him to testify at all, or testify favourably at the May 2021 scheduled trial regarding the December 2, 2019, incident, the implication that they were in charge of the Burnside Jail, and he was at risk whenever he was at work there, is a significant threat, which strikes at the foundation of safety/security of a correctional facility and it would cause significant anxiety and fear for Correctional Officer Hicks, and others at the institution.

[118] The trial judge also found the appellant to be "particularly culpable":

> [62] Mr. Lilly's conduct was particularly culpable.
>
> […]
>
> [65] Although, he only spoke words towards Correctional Officer Hicks, I am well satisfied he intended everyone present to hear them in person, and that he did so expecting that they would be communicated among the inmates and corrections staff throughout the Burnside Jail.

[119] The significant ongoing levels of fear and anxiety the appellant's threats caused for CO Hicks was an aggravating factor (Sentencing Decision at ¶46).

[120] The fact that the appellant spoke on behalf of the crew/the Burnside 15 was also an aggravating factor (Sentencing Decision at ¶58).

[121] When considering an appropriate sentence range, the trial judge found cases in relation to offences against correctional officers to be of assistance.

[122] The trial judge cited *R. v. Saddleback*, 2019 SKPC 42, which listed cases in relation to offences against Correctional Officers:

> [19] The Court in *Hefferan* also reviewed several Quebec decisions translated from French:
>
> a. *R v Bédard*, 2011 QCCS 518 - the accused, who had a history of convictions for criminal harassment and contempt of court, and who was at the time undergoing trial for another charge of criminal harassment, threatened the Crown prosecutor in the hallway outside of the courtroom. He repeated the threats when subsequently in custody. Although the court rejected the Crown's application to have the accused declared a long-term or dangerous offender (affirmed 2014 QCCA 628), the Court sentenced him to five years in prison for the intimidation charge, together with three months concurrent for a breach of recognizance;
>
> b. *R v Charrette*, 2011 QCCS 5886 - while imprisoned, the accused made threats against two corrections officers. He was sentenced to 18 months;
>
> c. *R v Anglehart*, 2012 QCCA 771 - another case involving threats by an inmate against corrections staff. He had previously received a six-month sentence for a similar offence. The Quebec Court of Appeal overturned the trial judge's sentence of four years imprisonment, and substituted a sentence of 18 months, consecutive to time being served on other matters;
>
> d. *R v Veillette*, 2012 QCCS 4720 - the accused gave "menacing looks" to a police officer scheduled to testify at a preliminary inquiry, then followed the officer in his vehicle and confronted him in person. The accused had no criminal record, and cared for his schizophrenic wife, his adolescent daughter and his two handicapped brothers. He had spent seven days in pretrial custody. The Court held that the principles of denunciation and deterrence did not require further custody, despite a danger of recidivism, and imposed a period of three years' probation, including 120 hours of community service.

[123] In *R. v. Hopwood*, 2020 ONCA 608, the Ontario Court of Appeal found, as a general proposition attempts to interfere with a witness will normally result in a penitentiary term of imprisonment:

> [22] I begin with the principle that efforts by accused persons (whether directly or through others) to interfere with witnesses strike at the very heart of our justice system. There are already very serious concerns regarding the willingness of people, who observe crimes, to come forward and offer themselves as witnesses. Concerns around the "code of silence", and possible repercussions from being

> considered a “rat” or a “snitch”, often lead persons to remain silent when they ought to be coming forward and assisting the authorities to properly investigate and prosecute criminal activities.
>
> [23] ***Against that backdrop, interference with persons who are prepared to be witnesses only serves to exacerbate the problem. It must be clear to all accused persons that attempting to interfere in any way with a witness represents conduct that will not be tolerated***. In that regard, I respectfully adopt what the British Columbia Court of Appeal said in *R. v. Hall*, [2001] B.C.J. No. 560, 2001 BCCA 74, per Saunders J.A., at para. 12:
>
> > Obstruction of justice or attempting to obstruct justice strikes at our system of a lawful society. The message must be clear that this type of interference with the community system for handling criminal offences will not be tolerated. It is for this reason that the courts must act firmly to express society’s disapproval and denunciation of such conduct.
>
> [24] While there may be other conduct that would constitute an attempt to obstruct justice that would warrant a minor sentence of the type that was imposed here, attempting to interfere with a witness does not fall into that category. Indeed, ***I would say that, as a general proposition, attempting to interfere with a witness should normally attract a penitentiary term of imprisonment. I find support for that position in the fact that penitentiary terms of imprisonment are often imposed for persons who refuse to testify***: *R. v. Yegin*, [2010] O.J. No. 1266, 2010 ONCA 238. If a person’s personal choice not to give evidence can attract such sentences, then it seems to me that a person’s choice to interfere with another person’s right to testify should draw, at least, equal condemnation. In this case, therefore, the sentence sought by the Crown of two and one-half years was entirely appropriate.
>
> [Emphasis added.]

[124] In *R. v. Blackman*, 2022 ONSC 3649, the sentencing judge relied on *Hopwood* to sentence an offender to two-and-a-half years of imprisonment for intimidating a justice system participant (*R. v. Blackman* at ¶22-23).

[125] The sentence imposed by Justice Rosinski was a fit sentence that reflected the seriousness of what had occurred.

[126] Although I would grant leave to appeal sentence, I would dismiss the sentence appeal.

Conclusion

[127] Leave to appeal sentence is granted. The conviction and sentence appeals are dismissed.

Farrar J.A.

Concurred in:

Bryson J.A.

Van den Eynden J.A.