NOVA SCOTIA COURT OF APPEAL
Citation: *R. v. Wrice*, 2024 NSCA 3

Date: 20240104
Docket: CAC 520320
Registry: Halifax

Between:

Paul James Wrice

Appellant

v.

His Majesty the King

Respondent

Judge:	The Honourable Justice Anne S. Derrick
Appeal Heard:	December 5, 2023, in Halifax, Nova Scotia
Subject:	Sentencing. Failure to apply the *R. v. Adams*, 2010 NSCA 42 methodology. Illegal sentences. The "jump" principle. Fitness of sentence.
Summary:	The appellant received a "go-forward" global sentence of two years' less a day (729 days) plus three years' probation applied to each of the offences to which he pled guilty – threats, common assault and five counts of disobeying a court order without lawful excuse. The appellant had already been in pre-sentence custody for the equivalent of 224 days calculated on the basis of a 1:5 to 1 remand credit. The sentencing judge did not apply this Court's direction in *Adams* for sentencing multiple offences. She did not consider the "jump" principle in circumstances where the appellant had a recent criminal record and had never served a custodial sentence. The aggravating factors were the related prior offence, the nature of the appellant's threats and the fact that he was on probation when he re-offended.

Issues:

(1) Did the sentencing judge err in law by imposing a sentence for common assault and the disobeying of a no-contact court order that exceeded the maximum allowable in law and was therefore illegal?

(2) Did the sentencing judge make a consequential error in law and principle by: (a) failing to follow the sequential sentencing methodology directed by this Court in R. v. Adams? (b) failing to consider the "jump" principle"? and (c) effectively treating the appellant's inadequate remorse as an aggravating factor?

Result:

Leave to appeal granted and appeal allowed. The sentencing judge committed reversible error by settling on a global sentence and then working backwards to apply it to each of the convictions. This is contrary to the direction of this Court in *Adams* and subsequent decisions. The sentence of two years less a day was an illegal sentence for the common assault and disobeying of the no-contact order. In the circumstances of this case, the "jump" principle should have been a consideration in sentencing. The appellant's equivocal expression of remorse was not treated by the judge as aggravating. A fresh sentencing of the appellant resulted in a custodial sentence that amounted to time served to be followed by two years' probation on terms imposed by the sentencing judge.

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Judges:	Wood, C.J.N.S., Bourgeois, Derrick, JJ.A.
Appeal Heard:	December 5, 2023, in Halifax, Nova Scotia
Held:	Leave to appeal sentence granted, appeal allowed, per reasons for judgment of Derrick, J.A.; Wood, C.J.N.S. and Bourgeois, J.A. concurring.
Counsel:	Sarah White, for the appellant Jennifer MacLellan, K.C., for the respondent

Reasons for judgment:

Introduction

[1] On December 2, 2022, Paul Wrice received a global sentence from Judge Diane McGrath of 729 days (two years less a day), to be followed by three years' probation. This was in addition to his pre-sentence custody since July 2022. She applied the sentence to each of the offences to which the appellant had pleaded guilty: a common assault, a multi-victim threats charge and each of five charges of disobeying a court order without lawful excuse.

[2] The appellant says the sentencing judge made a number of reversible errors. He says the global sentence exceeded what is allowable in law for the offences of common assault and disobeying a court order. He submits the judge did not follow the procedure established in *R. v. Adams*[1] from this Court for sentencing multiple offences, failed to consider the "jump" principle, and penalized him for not being sufficiently remorseful. He seeks leave to appeal and is asking this Court to impose a new sentence.

[3] I agree the judge committed consequential errors that displace the deference usually shown to a sentencing decision. For the reasons that follow, I would grant leave to appeal, allow the appeal, set aside the judge's sentences, and substitute new custodial sentences and two years' probation. As of the time of this decision, the appellant has served the new custodial sentences.

The Offences

[4] In March 2022, the appellant, who had been born in Sydney and adopted, moved back to Nova Scotia from Ontario. He was 47 years old and left behind a job as an electrician and a broken marriage. Between June 1 and July 7, 2022, he knowingly uttered death threats against various family members and friends. He was arrested on July 7 and taken to the Cape Breton Regional Hospital for a psychiatric assessment. On July 9, while under involuntary commitment at the hospital, he started spitting on the wall and then threw a cup of coffee[2] at a security guard, Kelsey Gilmet. It landed beside her and splashed her pants and shirt. No physical injuries resulted. The appellant was charged with assault with a weapon contrary to s. 267(1) of the *Criminal Code*.

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[1] 2010 NSCA 42.

[2] At his sentencing hearing, the appellant said it was a cup of water. Nothing turns on this.

[5] The appellant was remanded on the threats and assault charges on July 11. His remand included an order under s. 515(12) of the *Criminal Code*[3] directing him to have no contact with the complainants, most of whom were members of his family. He disobeyed the order and made a total of 106 calls from jail: at least one call on July 11, one call on July 17, three calls on July 19, a total of eight calls between July 20 and 26, and 89 calls on September 6.

[6] On September 12, 2022 the appellant was sent for a 30-day psychiatric assessment to determine whether he was fit to stand trial and whether, at the time of the commission of the alleged offences, he was suffering from a mental disorder and accordingly, not criminally responsible.[4] The assessment concluded that neither fitness nor criminal responsibility was an issue. The appellant's remand continued.

[7] On October 27, 2022, the appellant pleaded guilty before the sentencing judge to the following offences:

- In relation to the s. 267(1) charge, the included offence of common assault of Ms. Gilmet contrary to s. 266(b)).

- Between June 1 and July 7, 2022, knowingly uttering a threat to cause death to Michael Wrice (his stepfather, who legally adopted the appellant when he was seven), Elizabeth Wrice (his adoptive mother), Stephen Turner (a brother), Greg Smuland (a former neighbour), Heather Turner (a sister), Jim Turner (his adoptive father)[5], Greg Turner (a brother), contrary to s. 264.1(1)(a);

- Five counts of disobeying the no-contact order contrary to s. 127(1).[6]

The Sentencing Hearing

[8] The sentencing hearing and the sentencing itself occurred on December 2, 2022. The facts recited to the judge by the Crown indicated that witnesses who had seen the appellant on a regular basis since he moved to Cape Breton heard him

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[3] R.S.C. 1985, c.C-46.
[4] *Criminal Code*, s. 672.11(a) and (b).
[5] The appellant was adopted by Jim Turner and Elizabeth Wrice at the age of six weeks. When he was four, his parents separated and eventually divorced.
[6] The s. 515(12) no-contact order had been imposed on July 11, 2022 and reiterated by Provincial Court judges at the appellant's court appearances on July 15, 19 and 20 and September 6, 2022.

refer to having a "kill list" of more than thirty people, including his family in Ontario. He complained of bring wronged and wanting to "take people out". He talked of killing himself and suicide by the police, in other words, orchestrating being shot to death by the police. He referred to emulating the Portapique massacre and Gabriel Wortman. He claimed to have a loaded Glock semi-automatic pistol with additional ammunition. He made direct death threats to family members.

[9] Defence counsel objected to the mass murder ideation being included in the factual narrative. He said the sentencing hearing should focus on what the appellant had pleaded guilty to: uttering threats to kill specific individuals. The sentencing judge indicated she viewed the broader sweep of homicidal comments as important for context in terms of the state of the appellant's mind when he made the targeted threats.

[10] The Crown described the facts of the assault committed by the appellant while an involuntary patient at the hospital:

> …in relation to the common assault on July 9th, the accused was at the hospital when he began spitting on the wall and referring to the guard that was there as a stupid whore. He then threw a cup of coffee towards her which landed beside her and got coffee on her pants and her shirt…

[11] The Crown then reviewed the appellant's failure to abide by the no-contact order:

> …On July 11th, 2020, he was prohibited from contacting Michelle Wrice[7] in Ontario. Five calls were made from him on that date to her residence. He was further ordered to have no contact with Jim Turner and on the same date, a call was made to Mr. Turner. On July 17th, another phone call was made to the residence of Michael Wrice, which would be the residence of Elizabeth Wrice. On the 19th of July, there were three calls made to the residence of Michael Wrice, in violation of the order. Between July 20th and July 26th, there was [*sic*] three calls made to the Wrices and five calls to Jim Turner's home. And between September 6th and September 9th, there was a total of 48 calls made to the cell number of Jim Turner, 14 calls to his phone, 16 calls to Greg Turner and six calls, six calls to the Wrice residence, and five calls to Mr. Turner's common-law spouse.

[12] The defence took no issue with the facts of these offences.

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[7] The no-contact order did not include Michelle Wrice.

[13] Two victim impact statements were filed, from Heather Turner and Jim Turner, expressing significant fear and anxiety as a result of the appellant's threats to harm them and other family members.

[14] In the appellant's pre-sentence report, Michael Wrice, the appellant's stepfather, described a noticeable deterioration in the appellant's mental health, starting about 2017/2018. He and the appellant's uncle expressed their view the appellant needed psychiatric help. These concerns did not ultimately factor into the judge's decision.

[15] Michael Wrice said the appellant "tries to control people by scaring them". Crown counsel noted this statement in her submissions, arguing the appellant had "achieved his goal", and must now accept the consequences.

[16] The appellant's statements to the author of the pre-sentence report expressing remorse brought the issue into focus at the sentencing hearing. The appellant said his remorse was "through the roof" and he regretted frightening Heather. He blamed his conduct on being "off [his] meds" and emphasized: "I will never let anything like that happen again".

[17] In response to these assertions, Crown counsel tendered the transcript from the appellant's March 2022 sentencing in Ontario for criminal harassment. She submitted it exposed the accused's insincerity. The transcript from that sentencing indicated the appellant was referred to "as a completely different person" who had learned his lesson. Crown counsel picked up this theme, observing that only three months later the appellant perpetrated the death threats. She urged the sentencing judge to put no stock in the appellant's expressions of remorse as they were no more sincere this time than they had been in March 2022.

[18] Describing the threats as at "the higher end" of seriousness due to their number and nature, including the invoking by the appellant of Gabriel Wortman's murderous rampage, the Crown discounted any suggestion the appellant's conduct was explained by a serious mental health issue. His guilty plea was characterized as of limited value in mitigation in the face of overwhelming evidence. Crown counsel said protection of the public required the appellant to be placed "under conditions and monitored for the longest period of time".

[19] In response, defence counsel said the appellant needed supervision and access to resources for his mental health issues. He acknowledged the threats offences were serious and warranted a custodial sentence. He agreed with Michael

Wrice's observation about the appellant's use of threats to control people but characterized the threats as hollow words. He described his client having no intention of acting on the threats, in need of mental health services, and benefitting from medication.

[20] Echoing comments in the pre-sentence report, defence counsel noted the appellant had been devastated by the collapse of his marriage, likely needed grief counselling and had tried to better himself through online programs while in custody, such as anger management. Defence counsel referred to positive comments in the pre-sentence report that spoke to the appellant's work ethic, trustworthiness and appropriate social behaviour. He said an unduly harsh sentence would not serve the appellant's rehabilitation. In his submission the sentence should be in the six to nine-month range, in effect, time-served.

[21] At the conclusion of submissions by counsel, when asked if he wished to say anything, the appellant rambled through a disjointed statement in which he minimized his responsibility for the offences. He became emotional and stressed the fact that he had never physically hurt anyone and had no intention of ever doing so. He said his mental health was improving.

The Sentencing Judge's Decision

[22] The judge delivered her sentencing decision immediately following the appellant's allocution. She did not discuss the content of the pre-sentence report other than to find it "points out quite clearly that Mr. Wrice has a history of attempting to control individuals by scaring them". She viewed this as capturing what the appellant had attempted in this case with his threats. She saw him as using manipulation to get what he wanted. She commented on the "extreme fear and anxiety" expressed in the victim impact statements, the disruption to the victims' lives and to their feelings of personal safety and security.

[23] The judge regarded the appellant's statements about never harming anyone as indicative of a lack of insight and a failure to appreciate the impact his conduct had on his victims. She noted the appellant's recent and "not that dissimilar" criminal record for criminal harassment. She concluded the appellant's expressions of remorse were insincere, citing the calculated threats against multiple people and his statements in court.

[24] The judge discounted the appellant's assertion that he had no intention of carrying through with his threats. Finding he had not been rehabilitated since his

conviction for criminal harassment, she concluded he was a danger to the public. She identified the appellant's guilty plea and the fact that he was continuing to take programs while in custody as mitigating factors. She emphasized a number of aggravating factors: the extent to which the appellant defied the no-contact order, the fact he had been on probation for the very similar offence of criminal harassment, and the effect on the victims. She held that protection of the public took precedence over the appellant's rehabilitation in the community.

[25] The judge accepted the Crown's sentencing recommendation for a sentence of two years' less a day in addition to the time the appellant had served on remand, followed by three years on probation.[8] She said:

> I have to say that any hesitation I may have had with respect to the length of the sentence that the Crown is requesting has been put to rest after hearing from Mr. Wrice himself.

Issues

[26] The appellant has focused primarily on the following issues:

(1) Whether the sentencing judge erred in law by imposing a sentence for the common assault and the disobeying of the no-contact order that exceeded the maximum allowable in law. In other words, was a jail sentence of two years less a day an illegal sentence for offences under ss. 266(b) and 787(1)[9] of the *Criminal Code*?

(2) Whether the sentencing judge made a consequential error in law and principle by:

(a) Failing to follow the sequential sentencing methodology directed by this Court in *R. v. Adams*.[10]

(b) Failing to consider the "jump" principle.

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[8] The sentencing judge also imposed a 10-year firearms prohibition order.
[9] "Unless otherwise provided by law, every person who is convicted of an offence punishable on summary conviction is liable to a fine of not more than $5,000 or to a term of imprisonment of not more than two years less a day, or to both".
[10] *Adams* note 1.

(c) Effectively treating the appellant's inadequate remorse as an aggravating factor.

[27] The appellant also raises the judge's calculation of his pre-sentence remand—six months and twenty-seven days—which the parties have agreed was incorrect. The judge relied on Crown counsel's representation at the sentencing hearing that the appellant had been on remand since July 14, 2022. Crown counsel said the appellant's pre-sentence custody to the date of his sentencing on December 2, 2022 totaled four months and 18 days. By applying the typical credit of 1.5 days for each day, she informed the judge the appellant had effectively spent the equivalent of six months and 27 days on remand.

[28] However, the appellant was arrested and taken into custody on July 7, 2022. As the appellant has pointed out in his factum, with the remand credit applied, the correct calculation was 224 days, not the 213 days used by the judge.

[29] The respondent has acknowledged the calculation was incorrect. The appellant's sentence was incarceration for two years less a day on top of the equivalent of 224 days he had already served in jail.

Standard of Review

[30] 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".[11]

Analysis

Failing to Apply the Adams *Methodology*

[31] The judge's approach to the appellant's sentence—settling on a global sentence and then working backwards to apply it to each of the offences—has been consistently rejected by this Court.[12] It constitutes reversible error.

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[11] *R. v. Friesen*, 2020 SCC 9 at para. 26; *R. v. Lacasse*, 2015 SCC 64 at para. 11.
[12] *Adams* note 1; *R. v. A.N.*, 2011 NSCA 21; *R. v. Bernard*, 2011 NSCA 53; *R. v. Ellis*, 2023 NSCA 63 at para. 73.

[32] Unfortunately, the judge failed to sentence the appellant in accordance with the sequential methodology set out in *Adams* at paragraph 23[13] and neatly described by Fichaud, J.A. in *R. v. A.N.*:

> [35] …the sentencing judge should not start with an assumed hard-capped number, to be allocated among the convictions. Rather the sentences are to be determined individually as appropriate for each offence, and made consecutive or concurrent in accordance with principles of consecutivity, then the total is to be assessed , with a backward look, to determine whether the global sentence is either just and appropriate or unduly harsh for the aggregated criminal behaviour.[14]

[33] The *Adams* methodology draws from s. 718.2 (c) of the *Criminal Code* that enshrines the principle of totality and provides "where consecutive sentences are imposed, the combined sentence should not be unduly long or harsh". The principle of totality "ensures the aggregate sentence does not exceed the overall culpability of the offender" and serves to uphold the principle of proportionality.[15]

[34] The respondent, in its factum, cites this Court's statement in *R. v. Skinner* that: "…this Court has always cautioned against a slavish, mathematical and formulaic approach to sentencing for multiple offences"[16] in support of the assertion this Court has relaxed the requirement for complying with *Adams*.

[35] I do not agree the quote from *Skinner* allows for this interpretation.

[36] The statement must be read in context. In *Skinner*, the *Adams* methodology was applied by the sentencing judge. Saunders, J.A. described it as error-free:

> [41] Neither would I interfere with the judge's application of the sequential steps described by this Court in *Adams*. There, this Court directed that when sentencing for multiple offences, sentencing judges should proceed in the following order:
>
> Fix a sentence for each offence;
>
> Determine which should be consecutive and which, if any, concurrent;

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[13] *Adams* at para 23: "…The judge is to fix a fit sentence for each sentence 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" (*citations omitted*).
[14] *A.N.* note 12.
[15] *R. v. Campbell*, 2022 NSCA 29 at para. 54 citing *R. v. C.A.M.*, [1996] 1 S.C.R. 500 at para. 42. (See also: *R. v. Laing*, 2022 NSCA 23 at paras. 16, 29-30).
[16] 2016 NSCA 54 at para. 42.

> Take a final look at the aggregate sentence; and
>
> Only if the total exceeds what would be a just and appropriate sentence is the overall sentence reduced.

[37] Crown counsel in the *Skinner* appeal argued the sentencing judge should have reversed the first two steps; first, before fixing the individual sentences, decide whether the sentences to be imposed should be consecutive or concurrent. Saunders, J.A. flatly disagreed, describing the Crown's assertion as contrary to the sequence mandated by this Court in *Adams*. He then said:

> [42] …Further, and in any event, this Court has always cautioned against a slavish, mathematical and formulaic approach to sentencing for multiple offences…

[38] A fair reading of the no "slavish, mathematical and formulaic approach to sentencing" statement in *Skinner* is that simply first deciding whether the sentences to be imposed should be concurrent or consecutive will not automatically amount to an error although it would represent a deviation from the *Adams* sequencing.[17]

[39] The statement in *Skinner* does not modify this Court's direction on the correct approach to be followed in sentencing for multiple offences, including when to assess whether the sentences should be consecutive or concurrent. *Skinner* is unequivocal:

> [43] Our rejection of the approach we criticized and overturned in *Adams*, for reasons we subsequently reiterated in *Bernard*, addressed the mistake judges made when they proceeded to fix a global sentence and then work backwards to fit the individual sentences within the whole. We directed that the proper approach was for the judge to turn his or her mind to the appropriate sentence for each individual conviction and then go on to decide whether the sentence(s) should be consecutive or concurrent before ultimately taking a last look at the aggregate sentence and tempering it, if need be, on account of totality and proportionality.

[40] The direction of this Court could not be more clear.

[41] The *Adams* "last look" at the overall sentence to assess for totality only comes into play where there are consecutive sentences. It has no application where the sentences imposed for offences are all concurrent. As noted in *Skinner*:

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[17] This Court in *Laing* (2022 NSCA 23) at para. 31 held that: "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".

"Parliament has explicitly limited the application of the principle of totality to cases where consecutive sentences are ordered".[18]

[42] The judge here was sentencing the appellant for multiple offences: common assault, threats, and five instances of disobeying a no-contact order. The sentence should have been crafted in compliance with *Adams* so that a sentence was attributed to each offence followed by a determination of whether the sentences were consecutive or concurrent. Instead, the sentencing judge simply imposed a global sentence of 729 days and applied it to each offence on a concurrent basis. The sequential sentencing mandated by *Adams* received no attention in her analysis.

[43] The respondent says the absence of the *Adams* analysis is of no consequence because it did not impact the appellant's sentence. In the respondent's submission the sentences were all properly concurrent (and therefore the "last look" for totality did not apply) because: "These offences were part of a continuum, related in time and with numerous similar victims that called for concurrent sentences. The principle of totality would not have come into question".[19]

[44] I do not agree. It cannot be said the common assault was part of any continuum, and it cannot be assumed that had the judge applied the *Adams* methodology she would nevertheless have concluded the sentences for each offence should run concurrently. Repeated violations of a no-contact order may result in consecutive sentences. For example, in *R. v. Cromwell* the sentencing judge was not persuaded the offences (56 charges for 170 calls in breach of a no-contact order in a two-month period) should be treated as one continuous event.[20]

[45] I will now address the "jump" principle and "insincerity of remorse" issues.

The "Jump" Principle

[46] The "jump" principle, while not codified, can be a consideration in sentencing to account for "the level of severity in penalties for previous offences when compared to the sentence about to be imposed".[21] It is related to the principle of restraint.[22] It is applied in appropriate cases to increase sentences for a repeat

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[18] *Skinner* note 16 at para. 47.
[19] Respondent's Factum at para. 47.
[20] 2020 NSSC 14 at para. 72, per Jamieson, J. (varied on other grounds, 2021 NSCA 36).
[21] *Bernard* note 11 at para. 33.
[22] *Criminal Code*, s. 718.2(d) and (e).

offender gradually and not by large jumps. Arguably relevant here, it does not appear to have been raised in sentencing submissions before the judge.

[47] The respondent correctly notes the "jump" principle is not relevant in every case. A persistent offender whose incrementally increased sentences have not discouraged continued offending is an improbable candidate for the application of the principle. Where the sentencing emphasis is on protection of the public the principle is also unlikely to be a consideration.[23]

[48] The appellant's criminal record was recent. He was sentenced on March 23, 2022 for two counts of criminal harassment, contrary to s. 264(2)(b) of the *Criminal Code* and failure to comply with a court order, contrary to s. 145(5)(a). He had no prior offences. The record before us indicates he received a suspended sentence with three years' probation. He had served 27 days in pre-sentence custody.

[49] Application of the "jump" principle by the sentencing judge should have tempered the length of the custodial sentence imposed. The appellant's previous experience of custody was just under a month on remand. He had never been subject to a carceral sentence. No account was taken of this by the judge.

[50] In fairness, the sentencing judge was not asked to take account of the "jump" principle. Neither counsel raised it. However, in my view it should have been given some consideration by the judge as a principle of sentencing, notwithstanding her foregrounding protection of the public.

The Remorse Issue

[51] The appellant argues the sentencing judge treated a lack of insight and remorse as aggravating factors. With respect, I do not agree she did so. I find she placed no weight on the appellant's expressions of remorse, an exercise of discretion to which deference is owed. In my view she misconstrued the appellant's statements that he had never actually harmed anyone, but nonetheless accurately assessed him as lacking insight. It is apparent the appellant was saying he had never *physically* hurt anyone but his digressive statements before being sentenced plainly indicated an absence of remorse fueled by lack of insight. The sentencing judge tied this to the need for specific deterrence. She committed no error in doing so.

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[23] *R. v. Kory*, 2009 BCCA 146 at para. 7; *R. v. Andel*, 2014 BCCA 158 at para. 19.

[52] Before proceeding further, I will deal with the illegal sentence issue. As noted earlier, the appellant argues the judge's global sentence exceeded the maximum allowable sentences for the common assault and disobeying a court order offences, and as a consequence, she imposed an illegal sentence.

The Illegal Sentence Issue

[53] I find the judge's failure to follow this Court's direction when sentencing for multiple offences led to her imposing an illegal sentence for the common assault and no-contact order violations.

[54] The appellant's global sentence applied to all the offences exceeded the maximum allowable term of imprisonment for the ss. 266(b) and 127(1) offences. The maximum allowable term of imprisonment for the s. 266(b) conviction (common assault) is "not more than two years less a day".[24] The statutory maximum for each of the five indictable offences of disobeying a court order contrary to s. 127(1) of the *Criminal Code* is a term of imprisonment "not exceeding two years".[25]

[55] Relying on the Ontario Court of Appeal decision in *R. v. D.N.*, the appellant says his two years less a day sentence for the common assault and for disobeying the no-contact order was illegal because the total of the 729 days plus the time he had spent in pre-sentence custody exceeded the maximum allowable sentences.

[56] In *R. v. D.N.* the Court of Appeal held:

> [122] …subject to certain exceptions, a term of imprisonment is considered to begin on the day it is imposed, i.e. after taking into account pre-sentence custody. See *R. v. Mathieu*, 2008 SCC 21, at paras. 6, 7 and 14.
>
> [123] However, while a sentence begins on the day it is imposed, in *R. v. Walker*, 2017 ONCA 39, at paras. 14 to 28, this court explained that a sentence will nonetheless be illegal if the sentence imposed plus pre-sentence custody exceeds the maximum allowable sentence under the *Criminal Code*.[26]

[57] In *Walker*, the Ontario Court of Appeal found the Supreme Court of Canada has not considered the precise question that court was dealing with, which is the

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[24] s. 787(1), *Criminal Code*.
[25] s. 127(1), *Criminal Code*.
[26] 2023 ONCA 561.

issue before us in this appeal. However the *Walker* court observed "a consistent line of authority" at the provincial appellate level,

> [22] …that the total of credit for pre-sentence custody plus the sentence actually imposed must not exceed the maximum sentence and that it if does, the sentence is illegal.[27]

[58] Pre-sentence custody was treated by the sentencing judge here as part of the appellant's punishment. This accords with s. 719(3) of the *Criminal Code* and the Supreme Court of Canada's decision in *R. v. Wust* where an unanimous court held:

> [41] …Therefore, while pre-trial detention is not intended as punishment when it is imposed, it is, in effect, deemed part of the punishment following the offender's conviction, by operation of s. 719(3)…[28]

[59] In the course of sentencing him, the judge acknowledged the appellant's time in pre-sentence custody: "He has served six months and 27 days to date". This indicates she was according the appellant credit for his remand time. She was allowing for the statutorily available credit of 1.5 days for each day (which, as I stated earlier, actually should have included an additional 11 days worth of credit.) The judge added a further 729 days to the appellant's pre-sentence custody—which, correctly calculated was 224 days—for a total of 953 days or 2 years and 223 days.

[60] The respondent argues the two years less a day sentence on top of the pre-sentence custody constitutes a legal sentence for the common assault and disobeying the no-contact order convictions by operation of s. 728 of the *Criminal Code*. That provision states:

> Where one sentence is passed on a verdict of guilty on two or more counts of an Indictment, the sentence is good **if any of the counts would have justified the sentence.**
>
> **[**emphasis added]

[61] The respondent submits the maximum allowable sentence of five years' imprisonment for a threats conviction saves the global sentence the judge applied to all the charges. However, s. 728 speaks of the sentencing having to be justifiable. As I will discuss when sentencing the appellant afresh, I do not agree

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[27] 2017 ONCA 39 at para. 22. See paras. 23-25 citing *R. v. Rotman*, 2015 ONCA 663; *R. v. LeBlanc*, 2005 NBCA 6; and *R. v. Severight*, 2014 ABCA 25 (leave to appeal ref'd [2014 S.C.C.A. No. 184).
[28] 2000 SCC 18.

that any of the threats counts could have justified the sentence imposed by the sentencing judge of 953 days. In my view, as a consequence, the respondent cannot obtain the curative benefit of s. 728.

[62] I find the provision cannot be used to immunize a disproportionate sentence. It bears repeating that the fundamental principle of sentencing is proportionality. Section 718.1 of the *Criminal Code* directs that: "A sentence must be proportionate to the gravity of the offence and the degree of responsibility of the offender".

[63] As the Alberta Court of Appeal held in *R. v. Hanna*:

> [20] …Here the trial judge effectively imposed one global sentence, and that sentence should not be disturbed on appeal if any combination of fit sentences on the individual counts would have resulted in the same sentence. In those circumstances, the sentence cannot be said to be "demonstrably unfit", and appellate intervention is not warranted.[29]

[64] In conclusion on this issue, I find the global sentence applied to the ss. 266(b) and 127(1) offences to be illegal.

Errors in Law and Principle

[65] I have concluded the sentencing judge erred by not sentencing the appellant in accordance with the *Adams* methodology. This contributed to her imposing an illegal sentence for common assault and disobeying the no-contact orders. I find the "jump" principle should have been a consideration. These errors had a consequential effect on the sentence imposed.

[66] We must now determine a fit sentence having regard to the circumstances of the appellant, his offences and the applicable sentencing principles. Deference is not owed to the original sentence although we are to defer to the sentencing judge's findings of fact or identification of aggravating and mitigating factors, to the extent they have not been affected by an error in principle.[30]

[67] In undertaking a fresh sentencing analysis, we are not obliged to first address the fitness of the sentence imposed. There is no "ancillary threshold" to be crossed before we are entitled to decide what constitutes a fit sentence.[31]

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[29] 2013 ABCA 134.
[30] *Friesen* note 10.
[31] *Bernard* note 11 at para. 24.

[68] As Saunders, J.A. stated in *R. v. Bernard*:

> [25] In my opinion, once we find that a trial judge has erred in principle when imposing a sentence, any deference which might otherwise have been paid [to the original sentence] is ignored, and we are presented with a "clean slate" to decide for ourselves what constitutes a fit sentence.[32]

Sentencing the Appellant Afresh

[69] I noted earlier the aggravating and mitigating factors identified by the judge. The extensive attempts by the appellant to contact the people he had been ordered not to contact, the invoking of the mass murders to heighten the fear he intended his threats to instill and the impact the threats had on his victims, and the fact he was on probation for similar offences, were all legitimate aggravating factors.

[70] I should note the sentencing judge misstated the facts of the common assault. She said the offence involved the appellant "spitting on and throwing a liquid substance at an employee at the Forensic Hospital…". The facts recited by Crown counsel at the sentencing hearing were that the appellant was spitting on the wall. I agree with the appellant this is less serious than if he had been spitting on the security officer.

[71] The mitigating factors were as the judge found: the appellant's guilty pleas and his engagement in programs while on remand.

[72] In re-sentencing the appellant I would not give any mitigation for remorse. The appellant's expressions of remorse in the pre-sentence report have to be viewed with his statements at sentencing. As found by the judge, the appellant's statements at sentencing disclosed a marked lack of insight. We do not have any more recent information to consider.

[73] What we do have is sufficient information about the appellant's mental health to take it into account in a re-sentencing.

[74] I am satisfied the appellant's deteriorated mental health is relevant to his moral culpability for disobeying the no-contact orders. I find this is a case of reduced moral blameworthiness due to mental illness.[33] I note the following:

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[32] *Ibid*, at para. 21.
[33] *R. v. Bertrand Marchand*, 2023 SCC 26 at para. 158.

- Throughout the time he made the calls in violation of the no-contact orders, the appellant was experiencing significant psychological stress. He was held for an involuntary psychiatric assessment on arrest in July 2022. On September 12, 2022 pursuant to s. 672.11(a) and (b) of the *Criminal Code*, he was sent for a court-ordered forensic psychiatric assessment for fitness to stand trial and NCR-MD (not criminal responsible by virtue of mental disorder).

- The appellant's struggles with his mental health occurred under adverse remand conditions. He complained on August 9, 2022 of not having had a phone call, a shower or a change of clothes in 24 days. His bail hearing had been repeatedly adjourned throughout July. The lack of a viable (or any) bail plan led to him consenting to his continued remand. He said at sentencing that he made calls to try and arrange a surety for a bail plan. His persistent violations of the no-contact orders suggest he was desperate, not menacing. This is supported by the fact that the intense flurry of calls—89—occurred on September 6, the last offence date. Six days later the appellant was sent for a 30-day forensic psychiatric assessment.

[75] Furthermore, the pre-sentence report contains repeated references to the appellant needing mental health and psychiatric services. The s. 672.11 assessment indicated the appellant "should connect with mental health services in the local area". His criminal misconduct—the criminal harassment in Ontario and the offences committed in Nova Scotia—contrasted starkly to what had previously been a prosocial life.

[76] The appellant's disorganized, pressured speech when addressing the court at his sentencing indicated the compromised state of his mental health. In this new sentencing analysis, I have taken the appellant's mental health issues into account in assessing the issue of his moral culpability.

Determining Fit Sentences

[77] The determination of a fit sentence is a highly individualized process, requiring the nuanced balancing of the objectives of sentencing "in a manner that best reflects the circumstances of the case".[34]

[34] *R. v. Nasogaluak*, 2010 SCC 6 at para. 43.

[78] As the parties agreed, the threats conviction was the most serious of the offences. Sentences for uttering threats are distributed over a wide range "from probation through to imprisonment of 30 days, three months, six months, one year, etc."[35] In the appellant's case, given the aggravating content of the death threats, I would impose a sentence of 270 days plus two years' probation.

[79] For the common assault conviction I would impose a sentence of two years' probation.

[80] For disobeying the no-contact orders I would impose the following sentences:

Count 1 (order made July 11, 2022) 10 days

Count 2 (order made July 15, 2022) 15 days

Count 3 (order made July 19, 2022) 20 days

Count 4 (order made July 20, 2022) 25 days

Count 5 (order made September 6, 2022) 30 days

[81] It is also necessary to determine whether the sentences should be consecutive or concurrent. The Supreme Court of Canada in *Friesen*, set out the principles for making the determination:

> [155] …the general rule is that offences that are so closely linked to each other as to constitute a single criminal adventure may, but are not required to, receive concurrent sentences, while all other offences are to receive consecutive sentences. (*citations omitted*)[36]

[82] The sentences for the s. 127(1) offences should be concurrent to each other and consecutive to the sentence for the threats conviction and the common assault. The probation orders should run concurrently to each other. This produces a sentence of 300 days followed by two years' probation. I find on a "last look" this sentence does not offend the principle of totality in that the combined sentences are not "unduly long or harsh".[37]

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[35] *R. v. Upson*, 2001 NSCA 89 at para. 60. The respondent has not suggested *Upson* is out-of-date. See also: *R. v. Lyver*, [2010] N.J. No. 92 at para. 41.
[36] *Friesen* note 10.
[37] *Criminal Code*, s. 718.2(c).

[83] I am satisfied the substituted sentences respect the fundamental principle of proportionality and reflect "the gravity of the offences and the offender's degree of responsibility and the unique circumstances" of the case.[38] They represent a "fair, fit and principled sanction".[39]

[84] Had the appellant been sentenced to 300 days' incarceration on December 2, 2022, he would have been entitled to a pre-sentence custody credit of 224 days. This would have left him with 76 days to serve in jail. Since December 2, 2022, the appellant has been incarcerated for a further 398 days.[40]

[85] Simple math establishes the appellant has served the custodial portion of the sentence I am substituting. In light of this, the "jump" principle that should have been a consideration in the appellant's original sentencing is now a moot issue.

[86] The appellant should now be released on probation with the conditions directed by the sentencing judge with one variation that I note below. The conditions are attached as Appendix "A" to these reasons.

[87] I will note there are significant potential consequences for breaching a probation order.[41] Probation is intended to support an offender's rehabilitation and reintegration into society.[42] The appellant needs to use the opportunity afforded by the probation order to address his mental health issues and their impact on his ability to consistently conduct himself in accordance with prosocial norms and obligations. Whether he is eventually able to mend the fractured relationships with his family is unknown but any hope for it lies in him successfully completing the journey to rehabilitation.

Conclusion

[88] The appellant's sentence was flawed by consequential errors, notably a failure to follow the *Adams* methodology, the imposition of illegal sentences, and disregard for the "jump" principle. Deference to the original sentence is displaced and a sentence of time served and two years' probation is substituted.

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[38] *R. v. Parranto*, 2021 SCC 46 at para. 12.
[39] *Ibid* at para. 10.
[40] 365 days to December 2, 2023 plus 33 days to January 4, 2024.
[41] *Criminal Code*, s. 733.1(1): "An offender who is bound by a probation order and who, without reasonable excuse, fails or refuses to comply with that order is guilty of (a) an indictable offence and liable to imprisonment for a term of not more than four years; or (b) an offence punishable on summary conviction.
[42] *R. v. Proulx*, 2000 SCC 5 at para. 32.

Disposition

[89] I would grant the appellant leave to appeal and allow the appeal. The appellant is bound by the conditions of the probation order imposed in the court below, for a duration of two years, with one variation: he is to report to the probation office in Glace Bay within two business days of his release from custody, and thereafter as directed by the probation service.

Derrick, J.A.

Concurred in:

Wood, C.J.N.S.

Bourgeois, J.A.