NOVA SCOTIA COURT OF APPEAL
Citation: *R. v. Abdi*, 2025 NSCA 39

Date: 20250603
Docket: CAC 531183
Registry: Halifax

Between:

Abdikarim Ahmed Abdi

Appellant

v.

His Majesty the King

Respondent

Judges:	Bryson, Scanlan, Gogan, JJ.A.
Appeal Heard:	January 16, 2025, in Halifax, Nova Scotia
Facts:	In the early hours of July 31, 2021, the Appellant drove a black BMW into a mall parking lot in Dartmouth, where his passenger was observed handling a firearm. The events were recorded by a mall security system. Police quickly identified and located the passenger and found a revolver in a vehicle associated with him. The Appellant was charged with multiple offences but was only convicted of being an occupant of a vehicle knowing there was a firearm (paras 1-3).
Procedural History:	*R. v. Abdi*, 2023: The trial court found the Appellant guilty of being an occupant of a vehicle knowing there was a firearm and sentenced him to two years of incarceration (paras 3, 20).
Parties' Submissions:	Appellant: Argued that the trial judge erred in law and rendered an unreasonable verdict regarding his conviction. He contended the brief period during which he was aware of the firearm should not result in criminal

liability. He also argued the sentence was unfit and disproportionate (paras 4, 24-26, 68).

Respondent: Maintained that the trial judge correctly applied the law and the verdict was reasonable based on the evidence. The Respondent also argued the sentence was appropriate given the seriousness of the offence and the Appellant's criminal history (paras 26, 74).

Legal Issues: Did the trial judge err in law or render an unreasonable verdict in convicting the appellant of an offence under s. 94(1) of the *Criminal Code*?

Did the sentencing judge commit an error in principle or impose a demonstrably unfit sentence?

Disposition: The appeal was dismissed. The conviction and sentence were upheld (para 5).

Reasons: Per Gogan J.A. (Bryson and Scanlan JJ.A. concurring):

The Court found that the trial judge did not err in law or render an unreasonable verdict. The trial judge correctly applied the legal principles from *R. v. Swaby* and assessed the evidence, including the Appellant's knowledge of the firearm and his conduct in the vehicle. The evidence supported the conclusion that the Appellant had knowledge of the firearm and did not take steps to distance himself from it, making the conviction reasonable (paras 34-49).

Regarding the sentence, the Court held that the sentencing judge did not err in principle. The sentence was proportionate to the gravity of the offence and the Appellant's responsibility, considering his criminal history and the seriousness of the offence. The judge properly considered the Appellant's personal circumstances and the principles of parity and proportionality, resulting in a fit sentence (paras 70-87).

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Respondent

Judges:	Bryson, Scanlan, Gogan, JJ.A.
Appeal Heard:	January 16, 2025, in Halifax, Nova Scotia
Written Release:	June 3, 2025
Held:	Appeal dismissed per reasons for judgment of Gogan, J.A.; Bryson and Scanlan, JJ.A. concurring
Counsel:	David J. Mahoney, K.C., for the appellant Glenn A. Hubbard, for the respondent

Reasons for judgment:

Introduction

[1] Just after 4:00 a.m. on July 31, 2021, Abdikarim Abdi drove a black BMW into a mall parking lot in Dartmouth and parked underneath a commercial streetlight. A security guard noticed the unusual activity and the mall video security system captured the events that followed. Mr. Abdi and another man were observed moving about the black BMW. When the second man was seen handling a gun, the police were called. Minutes passed before the police arrived. In the meantime, a white BMW arrived in the parking lot, the two men parted ways, and the vehicles left the parking lot with Mr. Abdi driving the black BMW directly behind the white BMW. From arrival to departure, the entire sequence of events took about nine minutes.

[2] After police arrived and viewed the security video, the second man was identified as Marco Simmonds. Mr. Simmonds was associated with the nearby address of 75 Collins Grove, a location about a five-minute drive from the mall. Police proceeded to the address where they found both the white BMW and Mr. Simmonds. When arrested, Mr. Simmonds had the white BMW keys in his pocket. Police later seized a revolver from the rear footwell of the white BMW. As a result of these events, Mr. Abdi and Mr. Simmonds became co-accused on a long list of offences. The charges against Mr. Simmonds were disposed of when he entered guilty pleas and was sentenced.

[3] Mr. Abdi was arrested on September 1, 2021, and charged with eleven criminal offences.[1] On August 16, 2023, following a trial, Judge Michael Sherar found him guilty of only one offence — being the occupant of a motor vehicle in which he knew there was a firearm, contrary to s. 94(1) of the Criminal Code.[2] On February 9, 2024, he was sentenced to a two-year period of incarceration. Before this Court Mr. Abdi appeals both his conviction and sentence.

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[1] The original Information was replaced with a second one on November 8, 2021. The eleven offences all involved a .357 caliber Taurus revolver seized from the white BMW: s. 86(1) (careless handling of firearm), s. 88(1) (unlawful possession of weapon dangerous to public peace), s. 90(1)(unlawfully carry a concealed weapon), s. 91(1) (possession of a firearm without a licence), s. 92(1) (possession of a prohibited firearm without a registration certificate), s. 94(1) (being the occupant of a vehicle in which they know there is a firearm), s. 95(1) (possession of a prohibited firearm without licence or registration), s. 117.01(1) (possession of a firearm while prohibited) (2 counts), and s. 117.01(1) (possession of ammunition while prohibited) (2 counts).

[2] In closing arguments, the Crown did not pursue convictions on five charges: s. 86(1), s. 88(1), s. 90(1), s. 117.01(1) x 2.

[4] Mr. Abdi raises a number of issues on this appeal. On his conviction, he says the trial judge erred in law and came to an unreasonable verdict. On sentence, he says the judge erred in principle and imposed a sentence that is demonstrably unfit. The particulars of the alleged errors and the standard of review are discussed below.

[5] For the reasons that follow, I would dismiss the appeal.

Overview

The Trial Evidence

[6] Mr. Abdi's trial took place on December 16 and 20, 2022. The Crown's case consisted of both direct and circumstantial evidence. The key evidence was the mall security video. The footage captured the events giving rise to the various charges. But there was other evidence offered, including the testimony of the mall security guard, and security camera recordings from a residential building at 75 Collins Grove. Before trial, Mr. Abdi agreed to having rented a black BMW at the time of the offence. Part way through the trial, he admitted to being the driver of the black BMW in the mall security video.

The Parties' Closing Arguments

[7] The parties provided the trial judge with both written and oral closing submissions. The Crown's written submission contained a timeline based on the trial evidence. The timing and sequence of events depicted in the timeline was not disputed. The inferences available from this evidence were strongly contested and became the focus of final arguments to the trial judge.

[8] The Crown argued the totality of the evidence proved Mr. Abdi had joint possession of a prohibited weapon — a Taurus revolver — while he was driving the black BMW. It further argued the revolver seized from the white BMW was the same firearm being handled by Mr. Simmonds in the mall security footage. When the entirety of the evidence was considered, it was clear Mr. Abdi and Mr. Simmonds were together at 75 Collins Grove before going to the mall parking lot and both returned to that location afterward. Although the full scope of events involving Mr. Abdi and Mr. Simmonds remained unknown, the Crown argued Mr. Abdi's conduct in the video footage established two things: (1) he was not surprised, nor afraid, when the revolver became visible (on the video footage) in

Mr. Simmonds' hands; and (2) he made no effort to remove himself away from the firearm or the vehicle.

[9] The Crown submission focused on a detailed timeline created by the various pieces of security camera video footage. The timeline began at 3:30 a.m. on July 31, 2021, when Mr. Abdi entered the building at 75 Collins Grove, remained inside briefly, then left. A person appearing to be Mr. Simmonds approached the building with Mr. Abdi but did not enter. At 4:02 a.m., a white BMW departed the parking lot at 75 Collins Grove. At 4:05 a.m., Mr. Abdi's black BMW entered the mall parking lot and thereafter the mall security camera captured events until 4:14 a.m.

[10] The mall footage shows the interaction between Mr. Abdi and Mr. Simmonds beginning at 4:06 a.m. including Mr. Simmond's handling of a firearm in view of Mr. Abdi. Mr. Abdi is seen smiling and laughing while having an animated conversation with Mr. Simmonds.[3] At 4:09 a.m., Mr. Abdi exits the driver's side of the vehicle and walks around to the passenger side where Mr. Simmonds is standing outside the vehicle loading bullets into the firearm. At 4:10 a.m., Mr. Simmonds puts the revolver in his waistband, and it is not seen again in the video footage. At 4:13 a.m., a white BMW arrives, and Mr. Simmonds moves toward that vehicle which then departs the parking lot followed by Mr. Abdi driving the black BMW.

[11] At no time during the parking lot events does the video footage show Mr. Simmonds sitting inside the black BMW. When the video first comes into focus, Mr. Simmonds is outside the passenger side of the car with the door open, leaning inside and conversing with Mr. Abdi. At this point, the two men are in close proximity. Mr. Simmonds' hands are not visible in the footage until 4:07:08 a.m. when his right hand is captured holding a gun while still leaning into the passenger side of the vehicle.[4] Mr. Simmonds then remains outside the vehicle handling the gun until he can be seen again leaning into the vehicle with the revolver tucked into his waistband beginning at 4:08:12 a.m.

[12] At 4:19 a.m., two white vehicles and a black vehicle are recorded entering the parking lot at 75 Collins Grove. One white vehicle departs at 4:28 a.m. and a black vehicle departs at 4:36 a.m. Police locate a white BMW in the parking lot at 75 Collins Grove at 4:48 a.m. and observe Mr. Abdi's black BMW entering the lot

[3] I note the video footage does not have corresponding audio.
[4] The video footage shows Mr. Simmonds leaning into the vehicle talking to Mr. Abdi for just under 30 seconds before his right hand is captured holding the gun.

at 4:54 a.m. Various police officers then observe both Mr. Abdi and Mr. Simmonds on foot in the parking lot. When Mr. Abdi sees the police in the parking lot, he changes direction and is recorded entering the building at 4:57 a.m.

[13] At 4:55 a.m., Mr. Simmonds is arrested as he approaches the white BMW. The white BMW keys are in his pocket. A number of firearms are found inside that vehicle, including a Taurus revolver. At trial, expert evidence was offered to establish the similarities between the Taurus revolver found in the white BMW and the one handled by Mr. Simmonds in the mall security footage.[5]

[14] After his arrest, Mr. Abdi provided a statement to police, later offered as trial evidence by the Crown. In the statement, Mr. Abdi denied any knowledge of the driver or passenger, or any recollection of the events recorded in the mall security video. The Crown argued Mr. Abdi's exculpatory statements were not credible when considered against the totality of evidence, including his own subsequent admissions.

[15] In its closing submission, the Crown's theory on the s. 94(1) charge was that Mr. Abdi had the required knowledge of the presence of the firearm to ground a conviction. It cited *R. v. Villaroman*,[6] and argued "the circumstantial evidence, assessed as a whole, demonstrates that there is no innocent explanation inconsistent with the guilt of the accused". In the Crown's view, the web of circumstantial evidence defied coincidence and clearly established Mr. Abdi knew of the firearm in the vehicle and took no steps to distance himself from it.

[16] The defence took a different view of the inferences available from the evidence. Mr. Abdi argued in closing there was no evidence he and Mr. Simmonds knew each other or arrived together at the mall parking lot. Neither was there a basis to conclude Mr. Abdi had any knowledge of the firearm before Mr. Simmonds leaned into the vehicle "pointing the firearm." It was Mr. Abdi's contention the only reasonable inference on the evidence was that Mr. Simmonds concealed the firearm from Mr. Abdi until he is seen displaying it while leaning into the black BMW. From the point he had knowledge of the firearm, Mr. Abdi acted appropriately by "being calm until it was safe to remove himself" and attempting "to manage a situation he found himself in". Mr. Abdi also argued the Crown had not proven the revolver being handled by Mr. Simmonds in the mall

[5] There is no dispute the Taurus revolver was a functioning prohibited firearm loaded with ammunition.
[6] 2016 SCC 33 [*Villaroman*].

security video was the same one later found in the white BMW at 75 Collins Grove.

[17] In oral argument, the trial judge questioned defence counsel on the submission that reasonable inferences other than guilt were available on the evidence. Specifically, he queried the inferences available from the evidence of Mr. Abdi being present at 75 Collins Grove after the events at the mall. In response, counsel emphasized the lack of evidence about why Mr. Abdi was at 75 Collins Grove and, more importantly, what bearing that could have on Mr. Abdi's state of mind in the mall parking lot in the presence of the firearm. On this point, the Crown was insistent — Mr. Abdi's "demeanor and reaction to that firearm is not [consistent with] somebody who has just seen a gun for the first time or is surprised to see that gun". It emphasized Mr. Abdi's behaviour — smiling and laughing, scrolling on his phone, smoking, exiting the vehicle to move closer to Mr. Simmonds and the gun, leaving and then returning to the vehicle, then finally shaking hands with Mr. Simmonds before they left the parking lot at the same time but in separate vehicles.

The Trial Decision

[18] The trial judge delivered his decision orally on August 16, 2023, noting the Crown's case included both direct and circumstantial evidence. He cited several key authorities in support of the direction that guilt based upon circumstantial evidence must be the only reasonable inference available.[7] He also instructed himself on the elements of the s. 94 offence, referencing the decision of the Ontario Court of Appeal in *R. v. Swaby*,[8] saying:

> To establish guilt on this count, the Crown had to prove the coincidence of two essential elements of the offence as defined by s. 91(3), namely occupancy of the vehicle and the appellant's knowledge of the weapon. In my view, it is implicit as well that the Crown had to prove that the coincidence of occupancy and knowledge was attributable to something amounting to voluntary conduct on the part of the appellant. […]
>
> Voluntary conduct is a necessary element for criminal liability […]. The requirement for voluntary conduct applies even if the provision creating the offence does not explicitly require it so.
>
> […]

[7] *Villaroman*; *R. v. Griffin*, 2009 SCC 28; and *R. v. Lilly*, 2022 NSPC 32.
[8] [2001] O.J. No. 2390 (ONCA) [*Swaby*].

> If one acquires knowledge of an alleged [*sic*] weapon while travelling in a moving vehicle, it surely cannot be the law that criminal liability instantly attaches. … It is the conduct of the driver following the coincidence of occupancy and knowledge that counts, and if the driver acts with appropriate dispatch to either get the gun or himself out of the vehicle, there is no voluntary act for the criminal law to punish.
>
> Parliament has subsequently codified the defence in *R. v. Swaby* as follows: Section 94(3): "Subsection (1) does not apply to an occupant of the motor vehicle who, on becoming aware of the presence of the firearm, weapon, device or ammunition in the motor vehicle, attempted to leave the motor vehicle, to the extent it was feasible to do so, or actually left the motor vehicle."

[19] On this foundation, the trial judge proceeded to conduct an extensive review of the evidence, including admissions made by Mr. Abdi before and during trial. He then made several key findings:

(a) the prohibited Taurus revolver seized from the white BMW at 75 Collins Grove was the same firearm in Mr. Simmonds' possession in the mall parking lot;

(b) Mr. Abdi drove Mr. Simmonds to the mall parking lot;

(c) Mr. Abdi is first seen in the vehicle with the firearm when Mr. Simmonds leaned into the vehicle in the mall parking lot;

(d) Mr. Abdi did not exhibit any fear or trepidation in the presence of the firearm. To the contrary, he continued having an "amicable and animated conversation" with Mr. Simmonds and "took no steps to get away from Mr. Simmonds or the handgun"; and

(e) Mr. Abdi took no steps to extricate himself from the situation.

[20] Mr. Abdi was convicted of the s. 94(1) offence. He was acquitted of all other charges. On February 9, 2024, he was sentenced to two years in custody. More will be said about the sentencing proceeding below.

Issues

[21] The appellant's Notice of Appeal, amended Notice of Appeal, and factum raised three issues:

1. Did the trial judge err in law in the test for culpability for an offence under s. 94(1) of the *Criminal Code*?
2. Should the verdict be set aside as unreasonable or unsupported by the evidence?
3. Did the trial judge err in law when he sentenced the appellant to a two-year period of federal incarceration by:
    a. Failing to apply the principle of proportionality set out in s. 718.1 of the *Criminal Code*?
    b. Failing to apply the principle of parity required under s. 718.2(b) of the *Criminal Code*? and
    c. Imposing a manifestly unfit sentence?

[22] Although the Crown responded to the issues as raised by Mr. Abdi, I am of the view the arguments on the conviction can be addressed more efficiently as one issue. As a result, I would frame the issues to be addressed as follows:

> 1. Did the trial judge err in law or render an unreasonable verdict in convicting the appellant of an offence under s. 94(1) of the *Criminal Code*?
>
> 2. Did the sentencing judge commit an error in principle or impose a demonstrably unfit sentence?

[23] I turn now to consider these issues.

Analysis

Issue One - Did the trial judge err in law or render an unreasonable verdict in convicting the appellant of an offence under s. 94(1) of the *Criminal Code*?

(a) Position of the Parties

[24] The appellant seeks an acquittal or a new trial as a result of the alleged errors made by the trial judge. Mr. Abdi contends the brief period of time during which he was aware of the prohibited firearm in the vehicle should not give rise to any criminal liability. In his factum, he summarized his argument this way:

> 51 In short, it is submitted that the trial judge misunderstood the standard of proof for culpability under s. 94(1) as he did not appreciate that the very short time (10 — 12 seconds) that the firearm was within the air space of the interior of the motor vehicle, did not require Mr. Abdi to take any steps to avoid culpability under the *Criminal Code*. Although he became aware that Mr. Simmonds had a

> revolver in his possession at 4:07:08 a.m., Mr. Simmonds was at all times standing outside the motor vehicle after the Appellant became aware that he had a revolver in his possession.
>
> 52 The only time that the Appellant may have known that the revolver was within the interior space of the vehicle (aside from Mr. Simmonds waving it in the air for 1 — 2 seconds between 4:07:08 and 4:07:10) was when Mr. Simmonds had it concealed in his waistband and was rooting through the front of the vehicle for his belongings for a period of 8 — 12 seconds prior to departing.
>
> 53 Neither Mr. Simmonds nor the firearm re-entered the air space of the vehicle after that short period of time and no action was required by Mr. Abdi as it was clear that both the firearm and Mr. Simmonds would be leaving the vehicle within seconds, and would be leaving the area momentarily, without the necessity of any further action by the Appellant.
>
> (Emphasis in original)

[25] In asserting he was not legally obligated to do anything more in the circumstances, Mr. Abdi cites *Swaby* and *R. v. Martin*,[9] and says in convicting him of the s. 94(1) offence, the trial judge erred in law and rendered an unreasonable verdict. To this argument, Mr. Abdi adds the trial judge made palpable and overriding factual errors in his decision that are not consistent with what can be plainly seen on the video evidence and must have impacted the judge's reasoning on conviction.

[26] The Crown submits the trial judge did not misunderstand the path to culpability under s. 94(1). The record clearly shows he instructed himself on the elements of the offence consistent with *Swaby*, and his verdict was reasonable and supported by evidence. The Crown specifically disputes Mr. Abdi's contention that he was not required to do anything more because he knew of Mr. Simmonds' imminent departure from the parking lot. The Crown says this is inconsistent with the evidence at trial, including all of the competing versions of events contained in the statement Mr. Abdi gave police following his arrest.

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[9] 2011 ONCA 348.

(b) The Standard of Review

[27] The first issue raises two standards of review, each uncontroversial. First, a trial judge must correctly interpret and apply the law. On this point, the respondent cites *R. v. Alves*,[10] which is instructive:

> [21] It is an error of law for the trial judge to mistake the elements of the offence. In *R. v. Johnson*, [1975] 2 S.C.R. 160 at p. 170, Ritchie J. for the majority held that "it appears to me that the question of whether or not certain conduct constitutes an offence under the *Criminal Code* is a question of law in the strict sense." Similarly, in *R. v. Ciglen*, [1970] S.C.R. 804 at p. 819, Martland J. held that when a trial judge considers evidence "under a misconception of law as to what was necessary to be proved in order to establish the Crown's case," the trial judge errs in law.

[28] Second, a trial judge's verdict must be reasonable in view of the law and evidence. When reviewing verdicts based on circumstantial evidence, the question is "whether the trier of fact, acting judicially, could reasonably be satisfied […] the accused's guilt was the only reasonable conclusion available".[11] Recently, in *R. v. Hann*, 2024 NSCA 19 [*Hann*], Justice Van den Eynden explained:

> [31] Assessing the reasonableness of a verdict requires consideration of whether the verdict is one that a properly instructed jury or a judge could reasonably have made. I examine whether the verdict was based on an inference or finding of fact that, (a) is plainly contradicted by the evidence relied on by the trial judge; or (b) is shown to be incompatible with evidence not otherwise contradicted or rejected by the judge. […]
>
> [32] A misapprehension of evidence may refer to a mistake as to the substance of evidence, a failure to consider evidence relevant to a material issue or a failure to give proper effect to evidence. The misapprehension must play an essential part in the reasoning process that led to conviction. This is not to be confused with a different interpretation of the evidence than adopted by the trial judge […].

[29] Whether a verdict is unreasonable is a question of law.[12]

[30] Before considering the trial judge's reasoning and the alleged errors, it is convenient to briefly review the elements of the offence central to this appeal.

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[10] 2014 SKCA 82.
[11] *Villaroman* at para. 55.
[12] See *R. v. J.M.M.*, 2012 NSCA 70 at para. 35.

(c) The Section 94(1) Offence

[31] Section 94(1) of the *Code* makes it an offence to occupy a vehicle having knowledge it contains a prohibited weapon:[13]

> Unauthorized possession in motor vehicle
>
> 94(1) Subject to subsections (3) and (4), every person commits an offence who is an occupant of a motor vehicle in which the person knows there is a prohibited firearm […].

[32] The section prescribes an exception to criminal liability:

> Exception
>
> (3) Subsection (1) does not apply to an occupant of a motor vehicle who, on becoming aware of the presence of the firearm […] in the motor vehicle, attempted to leave the motor vehicle, to the extent that it was feasible to do so, or actually left the motor vehicle.

[33] In one aspect, this offence has a basic construction. The elements of the offence are: (1) occupancy of a vehicle containing a prohibited weapon — the *actus reus*; and (2) knowledge of the weapon in the vehicle — the *mens rea*. The exception in s. 94(3) creates an additional consideration. As noted by the trial judge, *Swaby* instructs that a conviction will require proof of two things: (1) the coincidence of essential elements of occupancy and knowledge; and (2) voluntary conduct. This means "[t]here must be some period of time, however short, afforded to the person who has acquired that knowledge [of the prohibited weapon] to deal with the situation".[14]

(d) Is there an error of law?

[34] The appellant cites the exception created by s. 94(3) and the analysis in *Swaby* in support of his contention that the trial judge erred in law. He argues that criminal liability for this offence does not arise until a person has a reasonable opportunity to respond to the knowledge that they are in a vehicle with a prohibited weapon. The appellant relies on paras. 17-20 of *Swaby* as the basis for his argument that the judge erred in law.[15]

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[13] This section of the *Code* also deals with other weapons, but in this case the court was dealing only with a prohibited firearm — the Taurus, model 65, .357 Magnum caliber revolver — established at trial by Certificate of Analysis and uncontested on appeal.

[14] *Swaby* at para. 19.

[15] These paragraphs were reviewed in the trial judge's oral decision as extracted at para. 18 of this decision.

[35] The challenge for Mr. Abdi on this point is that the trial judge considered and applied *Swaby*. Both parties referenced the decision in their final written submissions to the trial judge. Consistent with the direction in *Swaby*, oral arguments focused in part on the point when it was clear Mr. Abdi was in the vehicle with the revolver in plain view, and what he did or did not do thereafter. The governing law was never in dispute. The contest was in whether the Crown had proven the offence beyond a reasonable doubt. The attention of the parties, and the trial judge, was on the body of direct and circumstantial evidence, the available inferences, and whether the totality of the evidence proved the offence.

[36] I am not persuaded the trial judge misunderstood the test for culpability in this case. It is clear from the record the principles the appellant relies on formed the basis of the trial judge's analysis of the offence. His oral decision incorporates, almost verbatim, the passages Mr. Abdi cited as the correct statement of law. In my view, Mr. Abdi argues this point backwards from the result. In other words, given the conviction on Mr. Abdi's view of the evidence, the trial judge must have misunderstood the legal test under s. 94(1). I do not agree. A fair reading of the record supports the trial judge's understanding of the elements of the offence, as well as the exception created by s. 94(3).

[37] One final point before moving on in the analysis. Mr. Abdi emphasizes repeatedly the very brief period of time, he says 10-12 seconds or less, when the mall security video shows the revolver in the airspace of Mr. Abdi's vehicle (when Mr. Simmonds leans through the passenger-side threshold). In his submission, this very brief period, along with the fact the firearm never re-entered the vehicle, did not require Mr. Abdi to take any steps to avoid liability for the offence. In my view, this submission is not about the interpretation of the legal standard but rather how the trial judge applied it to the evidence in this case.

[38] I would reply to this argument in two ways. First, I agree with the Crown that in law there is no specific temporal standard informing the analysis. What is required is the concurrence of the elements of the offence, followed by consideration of whether their coincidence is voluntary or involuntary. In assessing voluntariness, the law provides a reasonable opportunity to respond.[16] Section 94(3) is a codification of this basis to escape liability.

[39] Second, as I will discuss further, the appellant takes too narrow a view of the evidence. In assessing whether the offence is proven, the trial judge was obligated

[16] *Swaby* at para. 19.

to assess more than the direct evidence. He had to consider all of the evidence. In a case involving circumstantial evidence, it is well settled that the question is whether guilt is the only rational inference available on the totality of evidence.[17] The evidence available to the trial judge and his treatment of it in the context of all the charges against Mr. Abdi is central to whether the lone conviction was an unreasonable verdict. I turn now to consider that issue.

(e) Is the verdict unreasonable?

[40] Assessing reasonableness in this context requires consideration of whether the verdict is one that a properly instructed jury or judge, acting judicially, could have reached. In *R. v. Delege*,[18] the British Columbia Court of Appeal, citing *Villaroman*, discussed the lens through which to consider this question in cases involving circumstantial evidence:

> [28] In *Villaroman*, the Supreme Court of Canada emphasized that it was for the trial judge to decide whether the evidence against the appellant in that case, considered in light of human experience and the evidence as a whole (including the absence of evidence), excluded all reasonable inferences other than guilt. It was not for the Court of Appeal to raise "purely speculative possibilities" in order to fill in "gaps" in the Crown's evidence. As we stated in *Robinson*:
>
> > In circumstantial cases, as in non-circumstantial cases, the appellate court may not interfere if the verdict is one that a properly instructed jury could reasonably have rendered. It is generally the task of the finder of fact to draw the line between reasonable doubt and speculation. It is not open to a court of appeal to conceive of inferences or explanations that are not reasonable possibilities, nor to attempt to revive evidence or inferences that the trial judge reasonably rejected…If an appellant is to succeed, an inference other than guilt must be "reasonable given the evidence and the absence of evidence, assessed logically, and in light of human experience and common sense."
>
> (Citations omitted; emphasis altered)

[41] When an allegation of unreasonable verdict rests on the assertion the trier of fact could not have reasonably rendered the guilty verdict on the evidence offered, an appellate court is entitled to consider the accused did not testify at trial or adduce other evidence to support any other reasonable inference consistent with innocence.[19]

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[17] See *Villaroman*.
[18] 2018 BCCA 200. See also *R. v. Lights*, 2020 ONCA 128 [*Lights*].
[19] See *R. v. George-Nurse*, 2019 SCC 12 at para. 2, *Lights* at para. 33, and *R. v. Wu*, 2017 ONCA 620 at para. 16.

[42] As to whether the conviction in this case was unreasonable, it is helpful to clarify the real issue. There is no serious dispute on the evidence about the *actus reas* of the offence — Mr. Abdi was the driver of a vehicle in which there was a prohibited weapon. This conclusion is clearly established by: (1) Mr. Abdi's admission that he was the driver of the black BMW in the mall security video; (2) the mall security video showing Mr. Simmonds handling the revolver; (3) the evidence of the mall security guard that only one vehicle arrived in the parking lot before he observed Mr. Simmonds beside the vehicle with a gun; and (4) the security footage from 75 Collins Grove showing Mr. Abdi and Mr. Simmonds at that location shortly before arriving at the mall together. On this evidence, the trial judge concluded that Mr. Abdi drove Mr. Simmonds (and implicitly, the revolver) to the mall parking lot. The factual issues left for the trial judge to resolve were: (1) at what point did Mr. Abdi acquire knowledge of the gun; and (2) what happened after that point.

[43] The issue of knowledge is central. Like any other fact in issue, knowledge can be established by direct or circumstantial evidence or some combination of both. The parties' written and oral submissions to the trial judge made this point clear. The thrust of Mr. Abdi's post-trial argument was there were reasonable inferences other than guilt available on the evidence. For example, the Crown contended that Mr. Abdi acquired knowledge earlier in the sequence of events on the basis of the evidence that: (1) Mr. Abdi and Mr. Simmonds were together before going to the mall; (2) they travelled to the mall together; and (3) Mr. Abdi's response to the appearance of the gun in Mr. Simmonds' hand. Mr. Abdi argued for a competing inference that Mr. Simmonds concealed the firearm until he "pulled it out from somewhere" in the mall parking lot, prompting defence counsel's comment: "I don't know what Mr. Abdi could have done at that point." Implicit in the defence theory was the fact that the appearance of the revolver in the mall parking lot was a surprise to Mr. Abdi.

[44] In response, the Crown cited *Villaroman* as well as the decision in *R. v. M.C.S.*,[20] underscoring the requirement to consider all of the evidence before deciding on available inferences. Significantly, the trial judge queried the Crown about the possibility that Mr. Abdi first saw the revolver in the mall parking lot after Mr. Simmonds had already exited the vehicle. In reply, Crown counsel relied on Mr. Abdi's reaction as circumstantial evidence of prior knowledge, noting "Mr.

[20] 2010 NSPC 26.

Abdi's demeanour and reaction to that firearm is not somebody who has just seen a gun for the first time or is surprised to see that gun."

[45] The trial judge began his decision by acknowledging the Crown case was largely circumstantial and the inferences available from the evidence was a "lively issue". The Crown's theory, which encompassed all of the remaining charges, was that Mr. Abdi and Mr. Simmonds were in joint possession of the gun and ammunition. As to the evidence of Mr. Abdi's knowledge under s. 94(1) of the *Code*, the trial judge reviewed the evidence of the parties from the mall security footage:

> As the conversation between Mr. Simmonds and the defendant in the Mic Mac Mall parking lot continued over the next few seconds, the defendant was seen smiling towards Mr. Simmonds as Mr. Simmonds leans into the black BMW. At 4:07:08, we see an item in Mr. Simmonds' hand which is later identified by witnesses as a handgun. The item was pointed into the vehicle but not toward the defendant. Mr. Simmonds then stands up beside the BMW and places the firearm in his waistband. The Court concludes that, by this time, it is obvious that the defendant is patently aware of the handgun. Mr. Simmonds leans back into the vehicle. Conversation between the two continues. The parties shake hands. While smiling towards Mr. Simmonds, the defendant lights up a cigarette. Mr. Simmonds continues to lean into the vehicle, rooting around the front part of the vehicle.
>
> At 4:08:30, Mr. Simmonds pulls an item which resembles a smartphone from the car. At 4:08:37, Mr. Simmonds has the handgun in his right hand and the cell phone, or a smartphone, in his left hand. The defendant at the same time, sitting in the driver's seat, continues to smoke a cigarette and look at his smartphone. At 4:08:40, as Mr. Simmonds holds up the handgun, he opens it and what appears to be bullets fall out of the handgun, dropping to the pavement. In full view of the defendant, Mr. Simmonds retrieves the bullets, cleans them with his shirt and reloads the handgun.
>
> (Emphasis added)

[46] The trial judge continued to narrate what is apparent from the security video — Mr. Abdi is clearly aware of the handgun and does not take any steps to extricate himself from the situation. In the trial judge's assessment, Mr. Abdi appears comfortable, chatting, smoking, scrolling on his phone and, at one point, moves closer to Mr. Simmonds and the revolver. Neither in response to the initial appearance of the gun on the video footage, nor at any time during the remaining recorded interaction, does the trial judge find Mr. Abdi's demeanour suggested shock, agitation, anxiety, impatience or nervousness.

[47] Subsequent to his review of the mall security video and other evidence, the trial judge concluded:

> The Court finds that the defendant is in the company of, or closely approximate to, Marco Simmonds before, during and after Mr. Simmonds is seen handling a loaded firearm at the Mic Mac [*sic*] parking lot.
>
> When arrested at 75 Collins Grove, Mr. Simmonds had the keys to operate the white BMW. A firearm similar to the one he's seen handling in the Mic Mac Mall parking lot is found in the rear passenger seat of the white BMW. Identification […], along with other firearms, are also separately found in the back seat of the BMW. <u>On the evening and early morning hours of July 30th to 31st, 2021, the defendant was in the company of individuals who had access to firearms.</u>
>
> (Emphasis added)

[48] On the basis of what he observed in the mall security footage, the trial judge dispensed with the defence argument that Mr. Abdi was afraid of Mr. Simmonds. Instead, he concluded that Mr. Abdi and Mr. Simmonds were friendly and animated and Mr. Abdi "took no steps to get away from Mr. Simmonds or the handgun." After leaving the mall parking lot, Mr. Abdi returned to the Collins Grove property, where he was seen again with Mr. Simmonds, further undercutting the defence theory that Mr. Abdi had earlier been paralyzed by fear. After considering this evidence, the inferences available, and ss. 94(1) and (3), the trial judge concluded:

> This Court is convinced beyond a reasonable doubt that the defendant knew that Marco Simmonds had a handgun in his possession, even for a limited time period, while in the defendant's motor vehicle and when reasonable opportunities presented themselves to the defendant to exit the situation he did not do so.
>
> […]
>
> The actions or, rather, lack of actions of the defendant in the circumstances to remove himself from the situation has convinced this Court that the defendant did not comply with the requirements of the defence available under s. 94(3) of the *Criminal Code*.
>
> The Court is convinced that the Crown has proven beyond a reasonable doubt that the defendant is guilty of the charge under s. 94(1) of the *Criminal Code* […].

[49] This conclusion is supported by the totality of the evidence. The only rational inference available from the evidence, and absence of evidence, was that Mr. Abdi acquired knowledge of the revolver in the vehicle at some point prior to it being openly brandished in the mall parking lot. Thereafter, he did nothing to

avail himself of the exception in s. 94(3). Nor is there any reasonable inference competing with the conclusion that Mr. Abdi's actions were voluntary.

[50] The strongest piece of evidence supporting the trial judge's analysis on this point is the mall security video showing: (1) the arrival of the lone black BMW just after 4:00 a.m.; (2) Mr. Simmonds handling the prohibited firearm; and (3) Mr. Abdi's demeanour in proximity to the handgun over a period of almost ten minutes. The video provides both direct evidence of the events as they unfolded and circumstantial evidence that Mr. Abdi had some prior knowledge of the firearm and no intention to distance himself from it. At some unknown point prior to what is recorded on the mall security video, Mr. Abdi acquired knowledge of the gun, in the vehicle he was driving, and he did nothing about it.

[51] The appellant presents a technical argument contending the issue is whether the direct evidence demonstrating Mr. Abdi's knowledge of the prohibited firearm for a matter of seconds was a reasonable basis for a conviction under s. 94(1). In support of his position, he relies, in part, on the trial judge's analysis on the five remaining charges against Mr. Abdi pertaining to possession of the prohibited firearm.[21] As explained in the decision, these charges required proof of both knowledge and control of the gun. In conducting his analysis, the trial judge commented on the evidence:

> The Court has already concluded that Marco Simmonds was in possession of a prohibited firearm as defined by the *Criminal Code*. Mr. Simmonds was driven to the Mic Mac Mall by the defendant in the defendant's vehicle. The defendant and Marco Simmonds are seen together at 75 Collins Grove, Dartmouth before they arrive together at Mic Mac Mall parking lot around 4 a.m. on July 31st, 2021.
>
> What we do not see before 04:07 hours that morning is the firearm in Mr. Simmonds' possession. Logic would dictate that, at some point in time, Mr. Simmonds had the firearm in his possession while he was being driven by the defendant to the mall. <u>However, we do not know when it was first brought to the attention of the defendant that Mr. Simmonds was in possession of the firearm.</u> <u>It is possible the defendant first became aware of the firearm by 04:07 hours.</u> <u>There's no direct evidence that the firearm was visible or even present when the two were together at 75 Collins Grove prior to their departure to the mall.</u>
>
> […]
>
> There's no <u>direct evidence</u> as to when the defendant became aware of the existence of the firearm, Exhibit 9, <u>other than when it was visible to him at 04:07</u>

[21] These were counts 4, 5, 7, 30 and 31 of the Information charging offences under ss. 91(1), 92(1), 95(1), 117.01(1) of the *Code*.

> hours on July 31st, 2021. There's no direct evidence proving that he had prior knowledge of the existence of the firearm even as he drove Mr. Simmonds to the Mic Mac Mall. If he did not have knowledge prior to 04:07, he could not have had control.
>
> The evidence reveals that, by 04:07 on July 31st, 2021, the defendant knew that Marco Simmonds possessed a firearm. He did not object to Mr. Simmonds' possession of the firearm, nor did he remove himself from the firearm once it became obvious to the defendant there was a firearm in his vicinity. He acquiesced to Mr. Simmonds' possession of the firearm.
>
> (Emphasis added)

[52] The trial judge acquitted Mr. Abdi on the possession charges concluding the evidence did not prove, directly or inferentially, that Mr. Abdi had control of the firearm concurrent with knowledge. A contextual reading of his analysis reveals his focus was on assessing the evidence of control. On this point, direct evidence was dispositive — there was no direct evidence of the control of the gun before it became visible to the mall security guard and was captured by the security footage. From that point forward, Mr. Simmonds had exclusive control of the gun. There was no evidence, direct or circumstantial, on which to assess whether Mr. Abdi had control at any earlier point in time.

[53] Mr. Abdi argues the trial judge's findings on the possession charges undermine his findings on the s. 94(1) charge. He submits the trial judge found Mr. Abdi only became aware of the prohibited weapon at 4:07 a.m., a point at which Mr. Simmonds was already standing outside of the vehicle. Pursuing this point, he says the law did not require him to do anything — Mr. Simmonds and the gun were already outside the vehicle and Mr. Abdi was anticipating Mr. Simmonds' imminent departure.

[54] I do not agree with the appellant's assertions. There can be no dispute that by 4:07 a.m. there is direct evidence of the presence of a gun. But this evidence is not determinative of Mr. Abdi's knowledge. The evidence includes Mr. Abdi's reaction when the gun becomes visible on the video footage. This evidence, in the context of all the evidence, results in Mr. Abdi's prior knowledge being the only rational inference.

[55] A similar issue arose in *Swaby* where there was contested evidence about knowledge of a restricted handgun. The Ontario Court of Appeal observed that the jury, as it was entitled to do, disbelieved both occupants of the vehicle:

> […] The questions indicated that the jury was concerned about when the appellant had learned of the existence of the gun. Although the appellant testified that he did not know of the gun's existence until after he was arrested, it certainly was open on the evidence for the jury to conclude that the appellant learnt of its existence sometime after he and Johnson embarked on their journey in the appellant's vehicle.[22]

[56] On the appellant's expectation of Mr. Simmonds' imminent departure, there are two points to be made. First, Mr. Abdi's expectations were not in evidence. The only evidence from Mr. Abdi came from his statement to police in which he first denied involvement and then eventually denied recollection. Second, Mr. Abdi's knowledge and occupancy converged at a point which did afford him a reasonable opportunity to act. But the evidence, properly assessed, did not create any expectation — nothing about Mr. Abdi's behaviour on any of the video recordings suggested an attempt, or desire, to distance himself from Mr. Simmonds. On this basis, the trial judge's assessment of Mr. Abdi's conduct in the presence of the gun was sound and the conviction reasonable.

[57] Before concluding on this issue, I note the appellant argued there were a number of errors in the trial judge's review of the evidence. In my view, none of these errors had any impact on the result or provide any basis to conclude the judge reached an unreasonable verdict. The conviction is one that a properly instructed judge or jury could reasonably reach. I would dismiss the conviction appeal.

[58] I turn now to consider the sentence appeal.

Issue 2 - Did the sentencing judge commit an error in principle or impose a demonstrably unfit sentence?

[59] After convicting the appellant of the s. 94(1) offence, the trial judge imposed a two-year sentence with ancillary orders. Mr. Abdi argues the judge erred in various ways and asks this Court to resentence him to a fine, probation or time served. The respondent is opposed, submitting that the sentence Mr. Abdi received was fit and appropriate.

(a) The Standard of Review

[60] A sentence appeal requires leave. If leave is granted, the standard of review requires deference to the sentencing judge. Intervention is only permitted in

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[22] *Swaby* at para. 16.

the event of an error in principle, or a manifestly unfit sentence.[23] In *R. v. B.B.B.*,[24] Justice Scanlan reviewed the constraints of review on sentence appeals:

> [7] In *R. v. Hynes*, 2022 NSCA 51 at paras. 16-20, this Court set out the standard of review on sentence appeals:
>
> > [16] Appeal courts are required to defer to lawful sentences imposed by trial judges unless the sentence is demonstrably unfit or they made an error in principle that materially impacted the type or length of the sentence imposed (*R. v. Lacasse*, 2015 SCC 64 at para. 11; *R. v. Parranto*, 2021 SCC 46, at para. 30).
> >
> > [17] Derrick J.A., writing recently for the Court in *R. v. Cromwell*, 2021 NSCA 36, summarized the appropriate standard of review:
> >
> > > [53] Sentencing decisions are accorded a high degree of deference in appellate review. Appellate intervention is warranted if (1) the sentencing judge has committed an error in principle that impacted the sentence or, (2) the sentence is manifestly 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" (*R. v. Friesen*, 2020 SCC 9, at para. 26; *R. v. Espinosa Ribadeneira*, 2019 NSCA 7, at para. 34).

See also: *R. v. Laing*, 2022 NSCA 23 [*Laing*].

(b) The Sentencing Decision

[61] Mr. Abdi was sentenced on February 9, 2024. Before the sentencing judge, the parties were at considerable odds, with the Crown seeking a three to three-and-a-half-year sentence and Mr. Abdi proposing sixteen months. There was no dispute over the statutory parameters — the *Code* prescribed no minimum sentence and a maximum sentence of ten years. An Impact of Race and Culture Assessment ("IRCA") was before the Court for consideration as well as Mr. Abdi's criminal record.

[62] In his oral decision, Judge Sherar reviewed the relevant considerations. Mr. Abdi had been found guilty following trial of being the driver of a vehicle in which he knew there was a prohibited firearm. When the offence occurred, Mr. Abdi was on parole for offences he committed in 2017. When sentenced, Mr. Abdi was 29

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[23] See *R. v. Kiley*, 2024 NSCA 29 at para. 11; see also *R. v. Chaisson*, 2024 NSCA 11 at para. 66 and *Hann* at para. 50.
[24] 2024 NSCA 17 at para. 7 [*B.B.B.*].

years old with a significant criminal record dating back seven years, including four robbery convictions, two convictions for using an imitation firearm, as well as convictions for forcible confinement, conspiracy to commit indictable offences, possession of an unauthorized firearm, careless storage of a firearm, and failure to comply with a recognizance. He was the subject of two previous weapons prohibitions. In these circumstances, there was obvious concern arising from Mr. Abdi's conviction for the current offence.

[63] As he was required to do, the sentencing judge considered the offender's personal circumstances, quoting extensively from the IRCA. He noted Mr. Abdi to be a first generation Canadian of Somali origin. He had a large immediate family with hardworking and devout parents who had fled their homeland just before he was born. His father had worked hard to provide for his family and Mr. Abdi's seven siblings were all doing well, notwithstanding their early and shared hardships in life. Mr. Abdi was the oldest child and had followed a different path, amassing a significant criminal record. The sentencing judge remarked on the context provided by the IRCA:

> The negative aspects of the Defendant's childhood was [*sic*] that he was forced to grow up in the Driftwood area of Toronto. The author of the IRCA describes the area as being predominantly black and mostly comprised of government housing. The neighbourhood was subject to a lot of negative gang activity and violence. There was a high police presence as a result.
>
> Between the ages of 16 and 18, the Defendant was in and out of his parents' [*sic*] home, finally leaving home at age 18. The Defendant moved out of the Driftwood neighbourhood and resided with his daughter's mother. By that time the Defendant was under a house arrest order and his girlfriend was acting as his surety.
>
> The Defendant's early exposure to the negative influences of his childhood neighbourhood may have contributed to his later antisocial activity. As a result, the Defendant has acquired a criminal record.

[64] In his decision, the sentencing judge quoted extensively from recent authorities on sentencing principles for racialized offenders, including *R. v. Morris*,[25] *R. v. Anderson*[26] and *R. v. Wournell*.[27] He recognized the requirement to consider the circumstances of the offender, including systemic and background factors, in the inherently individualized sentencing exercise he was required to

[25] 2021 ONCA 680.
[26] 2021 NSCA 62.
[27] 2023 NSCA 53 [*Wournell*].

apply. He reviewed the pertinent aspects of the IRCA at length and concluded his review by offering the following summary:

> According to the IRCA report, Mr. Abdi now recognizes, upon reflection as an adult, that he experienced a differential treatment by society as an African Canadian. The Defendant also now recalls that black peers were treated differently from their other community members. The culmination of childhood poverty, community violence, and the difference in intergenerational worries helped define Mr. Abdi's descent into criminality.
>
> Since he made decisions to commit crimes, the Court must now fashion a sentence that reflects not only punishment for the offence but also provides an opportunity for reform and rehabilitation of the Defendant, mindful of his prior actions and future potential.

[65] Against this background, the sentencing judge applied the sentencing principles in the *Code*, making specific mention of the principle of restraint while at the same time recognizing the existence of aggravating factors, in particular that the offence was committed while Mr. Abdi remained on parole for other serious offences, including previous firearm offences. He concluded a further period of incarceration was the least restrictive sanction that could give effect to the principle of proportionality. He also considered totality — the impact of a new period of incarceration in addition to the time Mr. Abdi was then serving after his parole was revoked.

[66] References to the principle of parity punctuated the sentencing decision. Judge Sherar ended his substantive analysis by reviewing other s. 94(1) sentencing decisions, adopting the review conducted by this Court in *R. v. Phinn*,[28] along with two more recent decisions: *R. v. Steed*[29] and *R. v. Arsenault*.[30] *Steed* involved a 25-year-old African Nova Scotian with a history of robbery and firearms offences, but also realistic rehabilitation potential, who received a sentence of three years.

[67] Judge Sherar concluded by considering the time remaining on Mr. Abdi's existing sentence and imposing a two-year consecutive sentence, along with a DNA order[31] and a lifetime weapons' prohibition order.[32]

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[28] 2015 NSCA 27 [*Phinn*], where the majority upheld a six-year sentence while Farrar, J.A., in dissent, would have found the range for the offence to be between eighteen months and three years.
[29] 2021 NSSC 71 [*Steed*].
[30] 2022 NSSC 325 [*Arsenault*].
[31] Sections 487.05(1) and (2) of the *Code*.
[32] Sections 109 and 114 of the *Code*.

[68] The appellant contends the sentencing judge misapplied the principles of proportionality and parity, resulting in the imposition of an unfit sentence. Mr. Abdi's complaints about his sentence reflect how he views the gravamen of the offence, which he describes as only momentary awareness of a revolver in the vehicle.

[69] In my view, there were no errors in the sentencing judge's assessment of the evidence, the principles applied, or the ultimate sentence imposed. In the absence of error, his assessment of the appropriate sentence is entitled to deference. Mr. Abdi's assertions require some elaboration and analysis which follows.

(c) Is the sentence proportional?

[70] Proportionality is the fundamental organizing principle of sentencing.[33] All sentences must be proportionate to the gravity of the offence and the degree of responsibility of the offender.[34] The record indicates the sentencing judge recognized his obligation under s. 718.1 of the *Code* as part of the full suite of sentencing principles. Nevertheless, Mr. Abdi maintains the sentencing judge erred in principle. He criticizes the sentencing judge's assessment of both components of the proportionality analysis. I will address each of the points raised.

[71] Beginning with the gravity of the offence, Mr. Abdi describes the seriousness of the offence as "almost a *de minimus* level." He maintains his view of the offence as only a very brief concurrence of knowledge and occupancy and says, in this context, the sentence imposed was disproportionate.

[72] This was a sentencing exercise following trial. Mr. Abdi was charged with eleven offences and only convicted of the lone s. 94(1) offence. The judge's conviction and sentencing reasons reveal that he was aware of the allegations for which no convictions were entered. He described what he found to be the gravamen of the offence in both the conviction and sentencing decisions. There is no basis to say the sentencing judge misunderstood the circumstances of the offence.

[73] In his sentencing reasons, the judge summarized his findings as to the nature of the offence. Consistent with the evidence at trial, there was no reference to the duration of Mr. Abdi's knowledge of the revolver in the vehicle. What did attract

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[33] See *R. v. Parranto*, 2021 SCC 46 at para. 10.
[34] See *R. v. Freisen*, 2020 SCC 9 at para. 30 [*Friesen*] and s. 718.1 of the *Code*.

weight was that Mr. Abdi (1) was the driver of the vehicle in a heightened position of control; (2) on parole at the time of the offence for previous offences involving violence and firearms; and (3) subject to mandatory weapons prohibitions at the time of the offence.

[74] The Crown strongly asserts the offence committed by Mr. Abdi was inherently serious and harmful to the community. It emphasizes the responsibility courts have to protect the public from firearms, the people that casually take them out in public, and those who support their fluid portability.[35] It submits the sentencing judge properly assessed the serious nature of the offence. I agree. I see no error of any kind in this part of the sentencing analysis.

[75] On the second component of the proportionality assessment, the sentencing judge considered the circumstances of the offender as revealed in the IRCA. He also instructed himself on the requirement to carefully consider the systemic and background factors emerging from the evidence and recognized that a failure to do so may amount to an error of law.[36] Citing *Wournell*, the sentencing judge appreciated the requirement to consider the IRCA to assist in:

> [63] […]
>
> - Contextualizing the gravity of the offences and the degree of the appellant's responsibility for them.
> - Revealing the existence of mitigating factors or explaining their absence.
> - Addressing aggravating factors and offering a deeper explanation for them.
> - Informing the principles of sentencing and the weight to be accorded to denunciation and deterrence.
> - Identifying rehabilitative and restorative options for the appellant and appropriate opportunities for reparations by the appellant to the victims and the community.
> - Strengthening the appellant's engagement with his community.
> - Informing the application of the parity principle.

[76] Mr. Abdi's complaint on this point is that although his personal circumstances were discussed at length, the sentencing reasons do not demonstrate how they were taken into account in the proportionality assessment. A fair review

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[35] See *Phinn* at para. 39.
[36] See *R. v. Anderson*, 2021 NSCA 62.

of the sentencing record does not support this argument. The sentencing judge quoted extensively from portions of the IRCA, including the conclusions offered by the author as to the significance of Mr. Abdi's background and his future prospects. His application of the IRCA information was embedded into various aspects of his decision, demonstrating his understanding of the legal principles. Mr. Abdi's personal circumstances were clearly considered to contextualize his criminal record.

[77] After considering the principles of restraint and parity, the sentencing judge concluded:

> It is mitigating that the Defendant has had a difficult personal history as a first generation Canadian who is a member of a visible minority. This explains, in part, how the Defendant has ended up before the courts on a number of occasions.

[78] The sentencing judge appreciated the significance of Mr. Abdi's personal circumstances in assessing his moral blameworthiness, particularly when concluding there remained a basis to afford weight to rehabilitation as a sentencing objective. After reviewing the IRCA outcomes, the judge found:

> The IRCA report and its recommendations provide this Court with a review of the Defendant's personal history and suggests a plan of action to deal with the deficits his life experiences have created for him.

[79] A proportionate sentence is one that condemns the offence and harm caused, while at the same time punishing the offender no more than is just and appropriate.[37] This is a challenging and individualized exercise. The decision reveals the judge's thoughtful assessment of both aspects of proportionality. He clearly considered the IRCA to contextualize Mr. Abdi's culpability for a serious offence. I am unable to identify any error of principle flowing from the judge's conduct of this exercise. I therefore defer to the resulting conclusions.

(d) The Parity Analysis

[80] The principle of parity enshrined in s. 718.2(b) of the *Code* requires similar sentences be imposed for similar offences committed by similar offenders. Parity is

[37] See *R. v. Nasogaluak*, 2010 SCC 6 at para. 42.

a secondary sentencing principle recognized as an expression of proportionality.[38] The relationship between these concepts is intimate. As noted in *Friesen*:[39]

> [33] In practice, parity gives meaning to proportionality. A proportionate sentence for a given offender and offence cannot be deduced from first principles; instead, judges calibrate the demands of proportionality by reference to the sentences imposed in other cases. Sentencing precedents reflect the range of factual situations in the world and the plurality of judicial perspectives. Precedents embody the collective experience and wisdom of the judiciary. They are the practical expression of both parity and proportionality.

[81] The sensitive calibration between proportionality and parity is raised on this appeal. In essence, Mr. Abdi maintains the judge's flawed proportionality assessment tainted his parity analysis. He seeks a significant downward variation in sentence reflecting his view of proportionality. On the other hand, the Crown supports the two-year sentence imposed on Mr. Abdi as one reflecting a proper application of the parity principle to the circumstances of the offence and offender.

[82] If Mr. Abdi were correct on this point, it could constitute an error in principle impacting the sentence imposed. However, I cannot agree with Mr. Abdi's position for two reasons. The first is I found no error in the sentencing judge's assessment of either the severity of the offence or Mr. Abdi's moral blameworthiness. The offence here was serious, committed by a person with systemic and background factors, all of which were addressed by the judge's nuanced assessment of culpability. In the absence of error, the judge's findings must be respected.

[83] The second reason is the sentencing judge conducted a thorough and well-reasoned parity analysis. One of the challenges he identified was the dearth of cases in which a sentencing judge was dealing with a lone s. 94(1) offence. Many involved a concurrent s. 95(1) conviction. Nevertheless, he found decisions to guide his consideration, beginning with this Court's decision in *Phinn*, and

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[38] See *Friesen* at para. 32 and *B.B.B.* at para. 12.
[39] *Friesen* at para. 33.

including *R. v. Cromwell*,[40] *R. v. Blagdon*,[41] *R. v. Clayton*,[42] *R. v. Hill*,[43] *R. v. Smith*,[44] *R. v. Ali*,[45] *R. v. Jones*,[46] *R. v. Muise*,[47] *Steed*, and *Arsenault*.

[84] In conducting his parity analysis, the sentencing judge accorded weight to the decision in *Steed*, a case in which an IRCA had been part of the sentencing evidence. As noted earlier in these reasons, Mr. Steed was a 25-year-old African Nova Scotian with a serious criminal record and realistic rehabilitation potential. He pled guilty to ss. 94(1) and 95(1) offences committed while subject to a lifetime firearms' prohibition and received a three-year concurrent sentence.

[85] Before the sentencing judge, the Crown argued the sentencing range for a s. 94(1) offence was 4-8 years generally, and 5-8 years for recidivist offenders like Mr. Abdi. The judge disagreed, finding the range began at a low-end of one year in custody (such as the co-accused driver in *Phinn*) up to the high-end of six years (*Phinn*), with most sentences falling between eighteen months and three years.

[86] After identifying a range of sentence for like offences, the judge concluded his parity analysis by saying:

> In the circumstances before the Court the Defendant, Mr. Abdi, has a prior criminal record for firearms-related like crimes which is aggravating. The content of his criminal record, which was admitted by the parties, reveals prior weapons prohibitions ordered by the courts. Though it cannot be held against the defendant for requiring the Crown to prove his guilt beyond a reasonable doubt, he did not acquire the mitigating factor of acceptance of responsibility by pleading guilty.
>
> […]
>
> It is mitigating that the Defendant has had a difficult personal history as a first generation Canadian who is a member of a visible minority. This explains, in part, how the Defendant has ended up before the courts on a number of occasions.
>
> Mindful of the range of sentencing [*sic*] imposed for offences under s. 94(1) which have been committed in similar though not identical circumstances to the facts before this Court, and in light of the particular background of the Defendant, his heritage, life experiences, criminal history, and potential for rehabilitation, this

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[40] 2005 NSCA 137 [*Cromwell*].
[41] 2013 NSPC 93.
[42] 2013 NSPC 94.
[43] 2011 NSPC 28.
[44] 2013 NSSC 77.
[45] 2012 ONSC 713.
[46] 2011 ONSC 5330.
[47] 2008 NSSC 340.

> Court imposes a sentence of two years' incarceration consecutive to his remaining sentence for this offence occurring on July [*sic*] 2021.
>
> In arriving at the two-year sentence, the Court takes into consideration the totality of the time remaining he has to serve to complete his prior imposed sentences.

[87] The sentencing judge's analysis is transparent and reveals application of the sentencing principles in the *Code*. I am not persuaded of any error in the judge's application of the parity principle that would impact the sentence imposed in this case.

(d) Is the Sentence Imposed Demonstrably Unfit?

[88] As these reasons no doubt foreshadow, I am of the view that the sentence imposed on Mr. Abdi was fit and just.

[89] On this point, Mr. Abdi essentially restates his contention that the sentencing judge committed errors in principle impacting his assessment of the appropriate sentence. He maintains his culpability must be measured in mere seconds and, if properly assessed, should result in a reduced sanction which could include a conditional sentence order, a fine or probation. A conditional sentence order was not sought by either party before the sentencing court. In spite of that, the judge considered it as part of his analysis under s. 718.2(e) of the *Code* and found it would not be appropriate given existing penal sanctions had not deterred Mr. Adbi from committing another firearms offence. This is sound reasoning not directly challenged on appeal.

[90] As a final point, Mr. Abdi cites the decision of this Court in *R. v. Laing* as authority for his assertion the sentence imposed upon him was demonstrably unfit. He argues the gravamen of the offence and moral responsibility of the offender in *Laing* far exceeded that of Mr. Abdi, and yet this Court in *Laing* imposed a sentence of 12 months for the s. 94(1) offence.

[91] The facts in *Laing* are distinguishable. The offender pleaded guilty to three counts of careless use of a firearm under s. 86(1) and four counts under s. 94(1). On each of the s. 94(1) offences, this Court imposed a 12-month sentence. The offences involved four weapons, each of which could be owned legally but for which the offender did not have the required licence. The offender on each occasion was grandstanding with friends. He had a criminal record, but not comparable to Mr. Abdi's. The issue in *Laing* was the imposition of concurrent

versus consecutive sentences, as well as totality. In my view, there is nothing in *Laing* to support the argument that Mr. Abdi's sentence was demonstrably unfit.

[92] I would grant leave but dismiss the sentence appeal.

Disposition

[93] As set out in these reasons, I am not persuaded the trial judge erred in his interpretation or application of the law in finding Mr. Abdi guilty of the s. 94(1) offence. I am also satisfied the verdict under appeal is one a reasonable and properly instructed jury could reach. I would dismiss the conviction appeal.

[94] On the sentence imposed, I am not persuaded of any error in principle, nor is there a basis to find the sentence is demonstrably unfit. I would grant leave but dismiss the sentence appeal.

Gogan, J. A.

Concurred in:

Bryson, J.A.

Scanlan, J.A.