

PROVINCIAL COURT OF NOVA SCOTIA

Citation: R. v. Crathorne, 2015 NSPC 1

Date: 2015-January-20

Docket: 2793558; 2793560; 2793563

Registry: Halifax

Between:

Her Majesty the Queen

v.

Justin Roger Crathorne

DECISION

Judge: The Honourable Judge Marc C. Chisholm

Heard: January 13, 2015

Decision: January 20, 2015

Charge Sections 92(1); 117.01(1); 145(3)

Counsel: Brian Cox, for the Crown
Brad Sarson, for the Defendant

By the Court:

Introduction

[1] Justin Crathorne is to be sentenced on three offences having occurred on October 23, 2014. First, for the unlawful possession of a prohibited weapon, a sawed-off shotgun, contrary to Section 92(1) of the Criminal Code. This is an indictable offence. This is a first offence of possession of a prohibited weapon for the accused, as such he is liable to a maximum penalty of 10 years imprisonment. There is no mandatory minimum penalty.

[2] The second offence is the possession of a firearm when prohibited by order not to possess a firearm contrary to Section 117.01. The Crown elected to proceed by indictment. The maximum penalty is 10 years imprisonment. There is no mandatory minimum penalty.

[3] The third offence is breach of a condition of the Recognizance, requiring, in part, that the accused not possess any weapon. The Crown elected to proceed by indictment. The maximum sentence is 2 years.

[4] The accused was arrested on October 23, 2014 and was brought to Court in custody. He has remained in custody on remand until today, some 90 days. On

November 13, 2014, the accused elected trial in the Provincial Court and entered pleas of guilty to the three charges noted.

[5] The issue for the Court is to determine a fit and proper sentence.

[6] A key issue in the determination of a fit and proper sentence is whether a sentence on the s. 117.01 offence ought to be consecutive or concurrent to the sentence on the possession of a prohibited weapon charge. A sentence may be ordered to be served concurrently where there is a nexus in time, place or circumstances. Where the Court imposes consecutive sentences the principle of totality applies. The overall sentence must not be unduly lengthy.

Circumstances of the Offence:

[7] On the morning of October 23, 2014, the accused boarded a Metro Transit bus in Fall River, Nova Scotia. He was in possession of a duffel bag in which he had an unloaded, sawed-off shotgun. The accused showed the gun to another bus passenger and claimed that people were after him. The passenger described the accused as “out of it”.

[8] The bus on which the accused was a passenger proceeded to Halifax, arriving at 11:00 am. At some point on the trip, the accused removed the gun from

the duffle bag and placed it inside his coat. The accused fell asleep during the trip. Halifax was the last stop. The bus driver went to the accused and woke him. When awakened, the accused stood up and the gun fell from under his coat onto the floor of the bus. The driver put his foot on the gun. The accused left the bus.

[9] A short time later, the accused was located by the police in the area of the Scotiabank Centre. He was arrested and searched. The accused had no weapons or ammunition in his possession. The accused had a moderate smell of alcohol on his breath.

[10] The accused told the police that he was involved with a gang. That there was a ¼ million dollar price on his head. That he was scared. That the police couldn't protect him. That he had the gun for protection. That he was going to get ammo. That he had more guns including AKs and 45s and a Glock 9mm. He told the police where he claimed to have hidden the other firearms. A police search failed to locate any other firearms.

Circumstances of the Offender:

[11] Mr. Crathorne is 25 years of age. According to his pre-sentence report, Mr. Crathorne's home environment was relatively stable until he was 12 or 13 and then

very unstable. He began moving between parent's home and other relative's homes and group homes. When he stayed with his father, he was subjected to physical abuse. He stated that his father abused alcohol and drugs. As Mr. Crathorne's situation deteriorated, he began living in homeless shelters or on the streets. He became involved in prostitution as a means of survival. He began abusing drugs.

[12] At present, the accused has the support of his mother, in Halifax. She is willing to have him live with her, as long as he is not consuming alcohol or drugs. She stated that her son has a heart of gold and is not violent when not consuming alcohol. She believes her son would benefit from mental health counselling.

[13] The accused has a limited education. When in school, he was on an Individual Program Plan. The accused has expressed interest in completing high school and attending community college. He also expressed a desire to move to western Canada for work.

[14] The accused has been diagnosed with ADHD. Recently, while on remand, he began taking medication for this condition. His counsel reported that the accused finds the medication helpful, allowing his mind to slow down and think before acting.

[15] The accused has attended more than one drug rehabilitation program.

[16] The accused acknowledged some past use of cannabis marijuana, abuse of prescription medications and during the most recent 2 years, use of cocaine. In his view, alcohol abuse has been the most destructive factor in his life.

[17] He is reported to have stated that at the time of the offence, his situation had deteriorated, he was not in a good place, he was trying to impress the wrong people.

[18] Mr. Crathorne has not done well on previous community based orders. He began attending addiction treatment but stopped. He had poor reporting habits and had several convictions for breaches of probation.

[19] The pre-sentence report (PSR) identified substance abuse, mental health and negative peer associations as issues to be addressed.

[20] Defence counsel advised that the accused has begun seeing a psychiatrist for mental health issues while at the Correctional Centre.

Prior Record

[21] The accused has 12 prior convictions; for 3 assaults, 3 uttering threats, 1 mischief and 5 breaches of probation.

[22] In February 2010, for assault, he received probation for 1 year and a firearms prohibition order for 3 years which ended prior to present offences.

[23] In March 2010, for assault, uttering a threat and breach of probation, he received a 6 month conditional sentence order and 1 year probation, with a 10 year firearms prohibition.

[24] In July 2010, for a breach of probation, he received 12 days consecutive.

[25] In October 2010, for an assault, uttering threats, property damage and breach of probation, he received 30 days custody and 1 year probation, with a 10 year firearms prohibition.

[26] In October 2011, for breach of probation he received a fine.

[27] In January 2012, for breach of probation he received 30 days intermittent custody.

[28] In April 2012, for uttering a threat he received probation for 1 year.

[29] The longest straight time sentence he served was 30 days.

Position of Parties

Crown

[30] The Crown recommendation is for 2 years imprisonment, less credit for remand time.

[31] The Crown submitted that for the possession of a prohibited weapon, s. 92, the range is 1 to 2 years. The Crown recommended 18 months imprisonment.

[32] For the s. 117.01 offence, the Crown argued that the range is 6 to 12 months consecutive and recommended 6 months consecutive.

[33] For the s. 145 offence, the Crown recommended 30 days concurrent.

[34] The Crown urged the Court to consider the following aggravating factors:

- 1) Location. The offence was in a very public place, a bus shelter, a transit bus, and downtown Halifax.
- 2) Gang affiliation. This has not been proven. The accused made a statement of gang involvement but did not admit the statement was true. He also

referred to involvement with the wrong people but did not elaborate. Reference to negative peers was not clarified.

- 3) The firearm was concealed. This was so, although it was shown to another passenger. The reason for doing so is unknown.
- 4) The firearm was transported on a public bus.
- 5) The accused has a record for violence and disregard of court orders. He and committed the present offence while bound by two Recognizances. He was also in violation of two firearm prohibition orders, his second and third such orders.

[35] The Crown also sought:

- 1) A DNA Order;
- 2) A Forfeiture Order for the firearm;
- 3) A Firearms Prohibition Order for life; and
- 4) The Victim Fine Surcharge.

[36] The Crown referred the Court to a number of case decisions to support the Crown position regarding the range of sentence and for a consecutive sentence on s. 117.01 offence. I will review those cases momentarily.

Defence Position

[37] The Defence argued that the case law demonstrates that the range of sentence for a s. 92(1) offence is wider than the range urged by the Crown. The Defence argued that, depending on the aggravating and mitigating factors, sentences from probation to federal incarceration were appropriate.

[38] The Defence urged the Court to consider the following mitigating factors:

- 1) The age of the accused;
- 2) The accused cooperated with the police;
- 3) The accused plead guilty;
- 4) The accused had no prior weapons offence convictions;
- 5) The accused had an unstable background, substance abuse and mental health issues, and is now seeing a psychiatrist;

6) The accused has ADHD causing or contributing to impulsivity. He is now on medication to assist with impulsivity and better decision making, including considering consequences before acting.

[39] In relation to the s. 117 offence, he has no prior weapons offence convictions and no prior 117.01 convictions.

[40] The Defence urged the Court to impose a concurrent sentence for the s. 145 offence.

[41] The Defence recommended a total sentence of 9 to 12 months imprisonment, if the s. 117 is concurrent and 12 to 15 months if the Court decides the s. 117 sentence ought to be consecutive.

[42] The Defence urged the Court to grant credit at the rate of 1.5 x1 for the 90 days on remand for a credit of 135 days, i.e. 4 months and 15 days.

Unrelated Incident

[43] Counsel indicated that these offences occurred the day after the shooting at the Parliament buildings in Ottawa last year. Consequently, the concern raised by the accused's action was significantly heightened. However, the Crown concedes that there is no evidence to suggest the accused was aware of the Ottawa incident,

nor that his actions were, in any way, related thereto. The timing of his actions vis-à-vis, the Ottawa incident, was purely coincidental. I have proceeded on this basis.

Section 117.01 offence – Consecutive v. Concurrent

[44] Crown counsel referred the Court to several decisions on the issue of whether a sentence for a Section 117.01 offence ought to be consecutive or concurrent to any sentence for the s. 92(1) offence arising from the same incident.

[45] Crown counsel summarized the case law by stating that some courts have treated the violation of a firearms prohibition order as an aggravating factor on a weapons offence charge and then imposed a concurrent sentence on the s. 117.01 offence. (e.g. *R. v. Hill*; *R. v. Greencorn*)

[46] Other courts have imposed a consecutive sentence on the s. 117.01 offence. Crown counsel urged the Court to find that this was the proper or better approach.

[47] Crown counsel referred the Court to the decision of Wright, J. in *R. v. Chan* 2011 NSSC 471. In *Chan*, the accused was convicted, at trial, on several serious weapons offences including the discharging of a firearm with intent to endanger life. Mr. Chan was sentenced to a total of 11 years imprisonment. In relation to the sentence for an offence under s. 117.01, Justice Wright stated at para. 40:

“The case authorities generally suggest that the appropriate sentence for breaching such a weapons prohibition order is in the range of one year imprisonment and that it should be made consecutive to reflect the seriousness of flouting court orders aimed at controlling firearms...”

[48] In *Chan*, Justice Wright was sitting as a trial Judge of Nova Scotia. As such, under the principle of stare decisis, his decision is not binding on other trial judges. It is highly persuasive. After reviewing the cases submitted by counsel, I am persuaded that the need to communicate a strongly deterrent message for a violation of a firearms prohibition order favors the imposition of a custodial sentence which ought to be consecutive to any other custodial sentence imposed for an offence relating to the same transaction. This may not translate into a longer sentence than if the Court imposed a concurrent sentence as the Court must consider the totality principle.

[49] I have reviewed and considered the sentencing provisions of the Criminal Code of Canada.

Principles of Sentencing

[50] Section 718 provides:

The fundamental purposes of sentencing is to contribute to respect for the law and the maintenance of a just, peaceful and safe society by imposing just sanctions that have one or more of the following objectives:

(a) to denounce unlawful conduct;

(b) to deter the offender and other persons from committing offences;

(c) to separate offenders from society, where necessary;

(d) to assist in rehabilitating offenders;

(e) to provide reparations for harm done to victims or to the community; and

(f) to promote a sense of responsibility in offenders, and acknowledgment of the harm done to victims and to the community.

[51] In *R. v. Murphy*, [1981] N.S.J. No. 32 (ASSCAD), the appeal division, stated that the primary consideration on sentencing of an offender for the possession of a prohibited weapon, a firearm, was deterrence. That decision is binding on this Court.

[52] While deterrence is the primary consideration, I have considered the other objectives in s. 718, including the rehabilitation of the offender. The accused is still young. The accused's recent commencement of medication for ADHD and the commencement of counseling with a psychiatrist supports the views that there is a potential for rehabilitation.

[53] Section 718.1 requires that a sentence be proportionate to the gravity of the offence and the degree of responsibility of the offender.

[54] As to the seriousness of the s. 92 offence, in *R. v. Wilkening* [2007] ABPC 299, Cummings PCJ at para. 7 quoted Allen J in *Raglon* [2001], wherein ABPC 117 wherein he stated:

...The possession of such firearms have always been tightly controlled in Canada. Weapons of this nature are generally devoted to dealing with other humans. They are not firearms that are generally used for hunting or other sport...Young men in urban landscapes do not need weapons of this nature to wander the streets. His possession in these circumstances was indicative that the weapon would be produced to confront others as a weapon if necessary...

[55] In my view, the possession of a prohibited weapon, in a public area, in this case on the Metro Transit bus, creates a serious risk to the public simply by its being available to the offender to be utilized.

[56] This is a serious offence.

[57] In my view, the offender's limited education and mental health condition and his condition at the time, i.e. smell of alcohol, falling asleep, described as "out of it" slightly lessens his degree of responsibility.

[58] Section 718.2(6) codifies the principle of parity. The Court had the benefit of numerous cases provided by counsel to assist in assessing the range of sentence for these types of offences.

[59] *R. v. Hill*, [2011] NSJ 276, Hoskins PCT. The accused was in a motor vehicle and suspected of conducting a drug transaction. A police take down was conducted. Police found, in a rear toolbox, an unloaded revolver. Accused pled guilty to possession of a firearm under s. 94(1) and possession of a firearm while prohibited under s. 117.01. The accused had a criminal record with 9 prior convictions, all but one dated. The most recent, in 2005 was for drug trafficking for which he received 5 years. He was on parole at the time of the offence and on a Recognizance with house arrest conditions and bound by a firearms prohibition. He pled guilty. He had the ability to be employed. He had a positive PSR. He was sentenced to 12 months for the s. 94 offence and 12 months concurrent on s. 117.01 offence.

[60] *R. v. Croft* [2013] NSJ No 570, Tax PCJ. The accused pled guilty to assault and possession of a prohibited weapon under s. 92(1). The accused believed the victim was stalking his family. He didn't go to the police. The accused located the victim and told him to get out of town. He struck him in the head, several times. On a warranted search of the accused's home, the police found an unloaded shotgun hidden behind a wall panel. No ammunition was found. The accused, age 25, was employed with a dated criminal record. The crown recommended 6 months imprisonment. The defence requested a conditional sentence order. The

court imposed a 15 months conditional sentence order for the s. 92(1) and a 10 day concurrent conditional sentence order on the s. 266 charge.

[61] In *R. v. Chan* [2011 NSJ No. 711] the accused was convicted of discharging a firearm with intent to endanger life, assault, pointing a firearm, two counts of possessing a prohibited weapon with ammunition, two counts of possession of a weapon obtained by commission of offence, two counts of possession of a weapon contrary to a court order, resisting peace officers and carrying a concealed weapon. These offences involved more than one transaction. The accused had a serious, related criminal record. He received 1 year consecutive on the s. 92 for a total sentence of 11 years.

[62] *R. v. Murphy* [1981] NSJ No. 32 (NSSCAD) the accused pled guilty to the unlawful possession of a prohibited weapon, a sawed-off shotgun. The accused had a lengthy criminal record including firearms offences and offences of violence. He had devoted his life to crime. The firearm was unloaded. The accused was unwilling to make an effort at rehabilitation. On crown appeal, a sentence of 1 year imprisonment was overturned and a sentence of 3 years imposed. The court stated that deterrence must be the primary consideration for the unlawful possession of a prohibited weapon.

[63] *R. v. Sithivinayagam* [2000] OJ No. 2115 Ont CJ. Katarynych J. The accused was found in possession of a sawed-off shotgun. Shots had recently been fired from the gun. Two spent shells were found nearby. The evidence did not establish the accused owned or fired the gun. Two other men had fled the scene and were never found. The purpose of the accused and the two men went unproven. The accused was in his 20s with no record. The crown proceeded summarily. The accused pled guilty. A conditional sentence order was rejected and he was sentenced to 30 days custody. No cases regarding parity were considered.

[64] *R. v. Ayala-Barrrios* [2007] OJ No. 5393 Ont SCJ. Walters J. The accused pled guilty to possession of a prohibited weapon, a sawed-off shotgun and carrying a concealed weapon. The firearm was not loaded. It was never pointed or used in a threatening manner. He took it out of his house in response to his friend's pleas for help. The accused was 23 and had no record, a positive PSR and had shown remorse. A 12 month conditional sentence was imposed. The circumstances were described as "a rare fact situation".

[65] *R. v. Billick* [2005] OJ No. 5176 Ont SCJ Hockin J. The accused pled guilty to possession of a prohibited weapon, a sawed-off shotgun. The weapon was

found in his home. It was unloaded with no ammunition. There was a joint recommendation for a fine of \$200 and probation of 1 year.

[66] *R. v. Wilkening* [2007] ABPC 299 Cummings PCJ. The accused, while on a public bus, was found in possession of 3 restricted weapons contrary to s. 92(1). He was also charged with three counts of possession of a restricted weapon knowing it was obtained by the commission of an offence s. 96, three counts of carrying a concealed weapon s. 90, three counts of transporting a restricted weapon s. 86, one count of breach of probation by possessing a weapon contrary to a condition of the probation order and one count of possession of a restricted weapon while prohibited s. 117.01. The accused was young but with a lengthy youth record and 37 adult convictions. There was little reason to believe efforts at rehabilitation would be successful. The accused was on probation at the time of the offences. The accused had a prior conviction under s. 92(1). The accused was on a firearms prohibition order. The PSR was unfavourable. He was sentenced to 1 year concurrent on each 92(1) offence, 1 year consecutive on s. 117.01 offence and 1 year consecutive on the s. 96 offence, for a total 3 year sentence.

[67] *R. v. Dickson* [2007] ABCA 322. The accused was in possession of a sawed-off shotgun with four 12 gauge shotgun shells and an empty .22 calibre

magazine s. 95. The items were in a duffle bag in his possession. The accused was on a firearms prohibition order. The minimum sentence was 1 year. He was sentenced to 25 ½ months imprisonment which was upheld on appeal.

[68] *R. v. Tessman* [2010] SJ. No 737 Semenuk, PCJ. The accused pled guilty to possession of a weapon for a dangerous purpose and possession of a loaded prohibited firearm. The accused, aged 39, went to the residence of his common law partner and sat on her couch. He had a record and was on probation and a peace bond. He spent 9 months in pre-trial custody. On joint recommendation he was sentenced to 3 months.

[69] *R. v. Frohock* 2009 BCCA 227. The accused had a loaded and cocked sawed-off shotgun under his coat when in a stolen motor vehicle which was stopped by police. The judge found he was reaching for the gun. He had 52 prior convictions including offences of violence and a number of prior firearms offences. He was on probation, and on a prohibition from driving and a firearms prohibition order. He was sentenced to 9 years less remand credit.

[70] Based upon the case law, I have concluded that, other than in exceptional circumstances, the sentence for a violation of s. 92 of the Criminal Code, for a first offence under that section, ought to be a sentence of imprisonment. The length of

the custodial sentence will be affected by the aggravating and mitigating circumstances of the offence and the offender. The possession of ammunition is highly aggravating. The purpose and circumstances surrounding the accused's possession of the weapon may be aggravating. The location of the offence is a significant factor. The more public the location of the possession of the prohibited weapon the greater the risk to the public and the more aggravating.

[71] In the present case, the accused's possession of the firearm was at a public bus stop and on a Metro Transit bus with other passengers and a driver. This fact distinguishes this case from cases where the firearm was in a locked box in a motor vehicle as in *R. v. Hill, supra*, or in a locked cabinet in a house, as in *R. v. Croft, supra*, or such other similar, far less public locations in other cases.

[72] In circumstances such as in the present case, I conclude that the range of custodial sentence is between 9 months and imprisonment for a federal term. This view reflects my position that it is preferable not to consider the accused having been on a firearm prohibition order as an aggravating factor on sentencing for the s. 92 charge, but, rather to impose a consecutive term of imprisonment on a s. 117.01 offence.

[73] Where, as in this case, consecutive custodial sentences are being imposed, the Court must consider what sentence is appropriate for each offence and what total sentence is appropriate. The total sentence must not be unduly harsh.

[74] In my view, the total sentence, taking into consideration the purpose, principles and objectives of sentencing, including the principle of totality, and the aggravating and mitigating factors, is 15 months imprisonment.

[75] In my view, the appropriate sentence for the offence under s. 92(1) is a term of 10 months imprisonment. That sentence would have been longer but for the principle of totality.

[76] In my view, the appropriate sentence for the offence under s. 117.01 is 5 months consecutive. That sentence would have been longer but for the principle of totality.

[77] In my view, the appropriate sentence for the s. 145 offence is 3 months concurrent.

[78] This court sentences Mr. Crathorne to serve 10 months imprisonment for the possession of a prohibited weapon, the sawed-off shotgun and 5 months

consecutive on the possession of a firearm while prohibited by court order. He is sentenced to 3 months concurrent on the breach of his Recognizance.

[79] The total sentence of 15 months is to be reduced by 4 months and 15 days for remand credit, credit being granted at the rate of 1 ½ days for each day on remand.

[80] The Court is granting a DNA Order, a Forfeiture Order regarding the weapon seized, a lifetime Firearms Prohibition Order and Victim Fine Surcharge of \$200 for each count payable January 27, 2017.