

**PROVINCIAL COURT OF NOVA SCOTIA**

**Citation:** *R. v. Drake*, 2019 NSPC 18

**Date:** 20190611

**Docket:** 8170692; 8170695; 8170697; 8170699;  
8170707; 8170709; 8256957; 8256962;  
8256957; 8256962; 8256950; 8256950

**Registry:** Dartmouth

**Between:**

Her Majesty the Queen

v.

Tristan Gary Lestat Drake

<b>Judge:</b>	The Honourable Judge Theodore Tax,
<b>Heard:</b>	April 26, 2019, in Dartmouth, Nova Scotia
<b>Decision</b>	June 11, 2019
<b>Charge:</b>	Section 465(1)(d); 344(b); 351(2); 88(1); 264.1(1)(a); 85(2)(a); 91(2) and 145(3) of the <b>Criminal Code</b> and Section 5(2) and 5(2) of the <b>Controlled Drugs and Substances Act</b> .
<b>Counsel:</b>	Richard Hartlen, for the Nova Scotia Public Prosecution Christian Girouard, for the Public Prosecution Service of Canada Christine Cooper, for the Defence Counsel

**By the Court:**

**Tristan Drake –Sentence - Robbery, Firearms and CDSA Consolidation**

[1] Mr. Tristan Drake is before the court for sentencing after having pled guilty to several charges contained in three Informations before the Court, which offences occurred as two separate events on different days, which were months apart.

[2] He has pled guilty to the following offences contrary to the **Criminal Code**, which occurred on or about November 22, 2017 in Dartmouth, Nova Scotia, namely:

1. robbery contrary to section 344(b) of the **Code**;
2. conspiracy with two other named individuals to commit an offence (robbery) contrary to section 465(1)(c) of the **Code**;
3. having masked his face with intent to commit an indictable offence contrary to section 351(2) of the **Code**;
4. possession of a weapon for a dangerous purpose (knife) contrary to section 88(1) of the **Code**;
5. possession of an imitation weapon for a dangerous purpose (imitation firearm) contrary to section 88(1) of the **Code**;
6. carrying a concealed weapon (imitation firearm) contrary to section 90(1) of the **Code**;
7. uttering threats to cause death or bodily harm contrary to section 264.1(1)(a) of the **Code**; and
8. using an imitation firearm while committing the indictable offence of robbery, contrary to section 85(2)(a) of the **Code**.

[3] In addition to those offences, Mr. Drake has also entered guilty pleas to two **Criminal Code** offences which occurred on or about August 22, 2018, in Lower Sackville, Nova Scotia, namely:

1. possession of a prohibited weapon (a switch blade) contrary to section 91(2) of the **Criminal Code**; and

2. failure to comply with a condition in a recognizance, namely, to not have any weapons, ammunition or explosive substances in his possession, contrary to section 145(3) of the **Code**.

[4] Furthermore, with respect to the incident and events which occurred on or about August 22, 2018, Mr. Drake also entered guilty pleas to two offences under the **Controlled Drugs and Substances Act (CDSA)** in Lower Sackville, Nova Scotia, namely:

1. possession of cocaine, a substance listed in schedule I of the **CDSA** for the purpose of trafficking (in the amount of thirty grams) contrary to section 5(2) of the **CDSA**; and
2. possession of cannabis (marijuana) not in excess of 3 kg, a substance listed in schedule II of the **CDSA**, for the purpose of trafficking (in the amount of two hundred and seventy-four grams) contrary to section 5(2) of the **CDSA**.

[5] The Crown Attorneys had proceeded by indictment on all of the charges before the court.

[6] Mr. Drake had originally elected to have a trial in the Supreme Court in relation to the **Criminal Code** offences alleged to have occurred on November 22, 2017. However, he re-elected to proceed in the Provincial Court on November 6, 2018 and entered guilty pleas to every count on that Information on February 8, 2019. On that same date, Mr. Drake entered his guilty pleas to the two **Criminal Code** offences which occurred on August 22, 2018 in Lower Sackville, Nova Scotia as well as the two **CDSA** possession for the purpose of trafficking offences which also occurred on August 22, 2018.

[7] The issue before the court is to determine a just and appropriate sentence in all the circumstances of these offences and this offender. Given the fact that Mr. Drake is a youthful, first-time offender, with no prior criminal record, the court will have to consider and apply several purposes and principles of sentencing in this case. In particular, the fundamental principle of proportionality in sentencing, what, if any, offences should be conditionally stayed by the court pursuant to the **Kienapple** principle, the principle of totality, what, if any, sentences should be ordered to be served concurrently with or consecutive to the other sentences imposed by the court and the principle of restraint in that the combined sentence ought not to be unduly long or harsh.

[8] Defence Counsel recommends a global sentence of five and a half years of imprisonment for all of the offences, reduced to four years on the basis of the principle of totality in section 718.2(c) of the **Code**. The global sentence would then be further reduced by taking into account Mr. Drake's enhanced pre-sentence custody credits of 1 ½ days for each day served prior to this sentencing decision.

[9] The Provincial Crown Attorney recommends a total sentence in the range of five to seven years of imprisonment based upon several particularly aggravating factors which were involved in the commission of offences during the armed and violent robbery of an unsuspecting victim. The Crown Attorney submits that the range of sentences for armed robberies would be three to five years for that offence alone and that the section 85(2) **Code** offence for using an imitation firearm while committing an indictable offence carries with it a statutory minimum sentence of one year, which must be imposed on a consecutive basis.

[10] The Federal Crown Attorney recommended a two-year sentence for the possession of cocaine for the purpose of trafficking contrary to section 5(2) of the **CDSA** and a shorter concurrent sentence for the possession of the cannabis (marijuana) for the purpose of trafficking, contrary to section 5(2) of the **CDSA**, which occurred on August 22, 2018. He also recommends a sentence of six months consecutive to the **CDSA** sentences imposed by the Court for the **Criminal Code** offence of possession of a prohibited weapon (the switch blade) and six months concurrent for the breach of the recognizance by having possession of that weapon contrary to section 145(3) of the **Code** on August 22, 2018.

[11] In addition to those recommendations with respect to the sentences to be imposed, the Federal Crown Attorney also seeks ancillary orders, including, a firearms prohibition pursuant to section 109 of the **Criminal Code**, a section 487.051 **Criminal Code** order to obtain a DNA sample from Mr. Drake and a forfeiture order pursuant to section 16 of the **CDSA**. Defence Counsel does not oppose any of those ancillary orders.

### **Circumstances of the Offences:**

[12] On November 22, 2017, Mr. Drake's girlfriend exchanged several messages on an Internet dating site with the twenty-eight-year-old male victim. Through the messages, an arrangement was made for her to offer sexual services for money with the male victim and thereafter, the victim arrived at her apartment. Shortly after the victim entered the apartment of Mr. Drake's girlfriend, Mr. Drake and

another male used violence and weapons to rob the victim of his money and some personal effects. Mr. Drake and the other male had conspired with Mr. Drake's girlfriend to commit the robbery of the victim in a planned and premeditated manner.

[13] At the time when the robbery was committed, Mr. Drake, who was then twenty-one years old, was in a relationship with his nineteen-year-old girlfriend, but convinced her to use an online profile to offer sexual services for money. He also convinced her to participate in luring the victim to her residence under the pretense of a paid sexual encounter, with the plan being that when the victim got to her apartment, Mr. Drake and the other male would rob the victim.

[14] The male victim had actually responded to the online advertisement posted by Mr. Drake's girlfriend, a few days before the robbery occurred. They had exchanged messages for a few days until they reached an agreement. Once the agreement was concluded, Mr. Drake's girlfriend instructed the victim to meet her at her apartment in Dartmouth at about 4:00 A.M. on November 22, 2017.

[15] Mr. Drake's girlfriend met the victim and took him into the bedroom of her apartment. After a brief discussion, the victim gave Mr. Drake's girlfriend \$300 in cash and she instructed him to remove his clothing. After the victim had removed his clothing and was lying on the bed, Mr. Drake's girlfriend came back into the bedroom, got on top of him and began kissing his chest. In accordance with the plan, at that time, Mr. Drake's girlfriend sent a text message to Mr. Drake to come into the bedroom.

[16] Within moments, two people burst into the room wearing dark T-shirts which were pulled over the bottom halves of their faces. Mr. Drake entered the room with a knife in his hand and he brandished it in front of the victim. Mr. Drake also had an imitation firearm tucked into the waistband of his pants, which he displayed in such a way so as to be readily observable to the victim. Mr. Drake and the other male had apparently met earlier, to complete the planning and preparation for the robbery and had painted the air pistol black to more closely resemble an operational firearm. The other male who had concealed his face with the dark T-shirt was armed with a machete during the robbery.

[17] Both of the males who burst into the room to confront the victim, told the victim not to move. Mr. Drake threatened him with violence if he did not comply. The other male, who had the machete in his hands, held that weapon near the victim's face and threatened to harm him if he did not comply.

[18] After Mr. Drake and the other masked male searched the victim's clothing for articles of value, they located and took four hundred and twenty dollars (\$420) in cash, an Apple iPhone and his Apple watch. The two masked males then allowed the victim to put his clothes back on, warned him not to say anything to anyone and escorted him out of the apartment building.

[19] Mr. Drake's girlfriend had not had any weapons in her possession, nor did she remove any of the money or other items that were stolen from the victim. Although the victim was certainly threatened by the two males who burst into the bedroom, brandishing weapons to affect their robbery of him, the victim did not suffer any physical injuries as a result of their actions.

[20] Shortly after the victim left the apartment of Mr. Drake's girlfriend, he contacted the police to report the incident. Police officers arrived at that apartment within minutes and arrested Mr. Drake, his girlfriend and a second male. After that, a warrant was obtained to search the premises and police officers recovered all of the victim's cash in the exact denominations that he had reported stolen. Police officers also retrieved his iPhone case and the Apple Watch which had been damaged. However, the victim's Apple iPhone was not located.

[21] With respect to the **CDSA** and **Criminal Code** offences which occurred on August 22, 2018, Mr. Drake had been released on a recognizance on November 23, 2017 in relation to the **Criminal Code** charges on November 22, 2017. Among the other terms and conditions in that recognizance, Mr. Drake was required to comply with the condition that he was not to have any weapons, ammunition or explosive substances in his possession during the term of the order.

[22] On August 22, 2018, police officers executed a search warrant at Mr. Drake's residence in Lower Sackville, Nova Scotia. As a result of that search, police officers located thirty grams (30 g) of cocaine and two hundred and seventy-four grams (274 g) of cannabis [marijuana]. During the search of that residence, police officers also located and seized four digital scales, one can of bear spray, a knife with the single-action blade [a switchblade], baggies and two cell phones. Mr. Drake and his girlfriend were arrested, and their cell phones were examined and revealed multiple messages consistent with drug trafficking.

[23] During a cautioned statement, Mr. Drake admitted that he alone had possessed the cocaine and marijuana for sale as he could not get a job. He also acknowledged that he had used his girlfriend's cell phone to complete transactions when his cell phone broke. The Crown Attorney noted that Mr. Drake was a street-

level trafficker with that amount of cocaine, which is a schedule I **CDSA** substance, but he did have possession of two different **CDSA** substances for the purpose of trafficking.

[24] Mr. Drake's possession of the switchblade, without being the holder of a license under which he might be able to possess it, was a contravention of section 91(2) of the **Criminal Code**. As a result, he was also in breach of the condition in the recognizance that required him to not possess any weapons.

### **Circumstances of the Offender:**

[25] Mr. Drake was twenty-one years old at the time of both incidents before the court. He is now twenty-two years old. He is the only child born to his parents, who divorced when he was four years old. Both parents have since remarried, and he now has three stepbrothers and a younger stepsister. Mr. Drake reported that he now has good relationships with all of his family members.

[26] Mr. Drake's mother was shocked to learn of her son's involvement in the incidents before the court. She described him as a kind person who is devoted to his extended family, but acknowledged that he does struggle with anger management issues and had substance abuse issues in the past. Mr. Drake's grandfather was also "shocked and surprised" when he learned of Tristin Drake's involvement in the matters before the court. He also indicated that this was out of character for him.

[27] Mr. Drake advised the Probation Officer that he graduated from grade twelve in 2015 and was very active in extra-curricular activities at school. He attended the first year at Nova Scotia Community College in auto body repair and finish, but did not return, as he gained full-time employment in that industry. However, Mr. Drake told the Probation Officer that had been fired or left a couple of jobs in that industry as he had "a lot of drug problems" at that time.

[28] Mr. Drake stated that he is in good physical health, but has been diagnosed with depression and anxiety for several years. He has been prescribed medications for the issue of depression. He also acknowledged that he has had mental health issues and has been working with a social worker to address those concerns. He began smoking marijuana at age twelve and began drinking and taking pills at age fourteen, continued to regularly do so during high school. After his year at community college, he began using cocaine and it became an "habit" which led to him getting fired from an auto body shop. Since being incarcerated on remand, Mr.

Drake has received Certificates of Completion for the Substance Abuse Management Program [December 10, 2018] and to address his self-identified anger management issues, he has also completed the Options to Anger program [April 5, 2019].

[29] The Probation Officer also contacted a Case Manager at the Central Nova Scotia Correctional Facility who confirmed that Mr. Drake had completed the substance abuse program. However, the Case Manager also stated that Mr. Drake has had over ten “Level 3’s” which involved several serious institutional incidents and resulted in various institutional consequences.

[30] The Crown Attorney had filed Mr. Drake’s Offender Incidents Report as an Exhibit during this sentencing hearing, which confirms that there have been twelve incidents between October 1, 2018 and April 19, 2019. The Exhibit had been filed in response to a defence application for the Court to consider additional enhanced pre-sentence custody credits due to the conditions under which Mr. Drake has been held at the Correctional Centre. Ultimately, counsel agreed on the issue that Mr. Drake be credited with 1 ½ days of enhanced pre-sentence custody credits for each day served in pre-sentence custody.

[31] The Pre-Sentence Report had been prepared by the probation officer for the sentencing hearing on the **Criminal Code** charges of November 22, 2017. With respect to those charges, Mr. Drake had stated that he accepted full responsibility for the incident, but added that he “wasn’t in the right frame of mind”, due to his difficulties with addiction and mental health issues at that time.

[32] Mr. Drake has no prior adult or youth criminal convictions.

### **Victim Impact Statement:**

[33] The Court canvassed whether the victim wished to file a Victim Impact Statement and was advised by the Crown Attorney that no statement had been received prior to the scheduled dates for the sentencing hearing.

### **Principles of Sentencing:**

[34] The fundamental purpose of sentencing stated in section 718 of the **Criminal Code** is to protect society and to contribute to respect for the law and the maintenance of a just, peaceful and safe society by imposing just sanctions. The imposition of just sanctions requires the Court to consider one or more of the



sentencing objectives set out in section 718 of the **Code**. Those objectives are denunciation of the unlawful conduct, specific and general deterrence, rehabilitation of the offender, separating offenders from society, where necessary, providing reparations for harm done to victims and promoting a sense of responsibility in the offender.

[35] The fundamental principles of sentencing to be applied by the Court in sentencing decisions, are set out in sections 718.1 and 718.2 of the **Code**.

### **The Principle of Proportionality – Section 718.1 Code**

[36] The principle of proportionality is the fundamental or cardinal principle in considering the fitness of the sentence imposed on an offender. The principle set out in section 718.1 of the **Criminal Code** states that the sentence must be proportionate to the gravity of the offence and the degree of responsibility of the offender. Put another way, the imposition of a just and appropriate sentence should not be disproportionate to the gravity or seriousness of the consequences of the offence and the offender's degree of responsibility or moral blameworthiness.

[37] The gravity of the offence is primarily determined at the time when the offence was committed and is informed by a range of sentence – both minimum and maximum – provided for by Parliament in the **Criminal Code**. Similarly, the degree of responsibility or moral blameworthiness of the offender is primarily informed by the circumstances existing at the time of the offence. Subsequent events such as remorse or rehabilitation, do not inform the moral blameworthiness or degree of responsibility of the offender, but their presence or absence may be considered as aggravating or mitigating circumstances in determining the just and appropriate sentence for the offender.

[38] In **R. v. C.A.M.**, [1996] SCJ No 28 at para. 91, Chief Justice Lamer stated that the determination of a just and appropriate sentence is a delicate art which attempts to balance carefully the societal goals of sentencing against the moral blameworthiness of the offender and the circumstances of the offence, while at all times, taking into account the needs and current conditions of and in the community.

[39] The Supreme Court of Canada also stated in **CAM** at para. 92, there is no such thing as a uniform sentence for a particular crime and that sentencing is a highly contextual and an inherently individualized process. While there is a principle of parity that a sentence should be similar to sentences imposed on

similar offenders for similar offences committed in similar circumstances, it may be as a “fruitless exercise” to locate those similar situations, given the unique circumstances of the offender and the offence itself in an inherently individualized process.

[40] More recently in **R. v. Lacasse**, 2015 SCC 64 (CanLII) at para. 1, Justice Wagner (as he then was) speaking for the majority, reiterated the very delicate nature and balancing required by a judge in making a sentencing decision:

“[1] Sentencing remains one of the most delicate stages of the criminal justice process in Canada. Although this task is governed by ss. 718 et seq. of the **Criminal Code** RSC 1985, c. C-46, and although the objectives set out in those sections guide the court and are clearly defined, it nonetheless involves, by definition, the exercise of a broad discretion by the courts in balancing all the relevant factors in order to meet the objectives being pursued in sentencing.”

[41] In **R. v. Ipeelee**, 2012 SCC 13 at para. 37, the Supreme Court of Canada pointed out that assessing a person’s moral culpability is an extremely important function in the determination of any sentence. This is because the principle of proportionality as set out in section 718.1 of the **Criminal Code** requires that a sentence must be proportionate to the gravity of the offence and the degree of responsibility of the offender. The Supreme Court of Canada also noted that the principle of proportionality is tied closely to the objective of denunciation, promotes justice for victims and seeks to ensure public confidence in the justice system.

[42] Furthermore, in **Lacasse**, *supra*, at paras. 53-54, Wagner J. pointed out that the determination of whether a sentence is fit requires that the sentencing objectives set out in section 718 of the **Criminal Code** and the other sentencing principles set out in section 718.2 of the **Code** be taken into account. However, the trial judge must properly weigh those various principles and objectives. Justice Wagner observed that their relative importance will necessarily vary with the nature of the crime and the circumstances in which it was committed. However, Wagner J, concluded that the principle of parity of sentences is secondary to the fundamental principle of proportionality found in section 718.1 of the **Code**, since a sentence must be “proportionate to the gravity of the offence and the degree of responsibility of the offender.”

[43] Justice Wagner added, in **Lacasse**, *supra*, at para. 53, that proportionality is determined both on an individual basis, that is, in relation to the accused him or

herself and to the offence committed by the accused, and by comparison with sentences imposed for similar offences committed in similar circumstances. Individualization and parity of sentences must be reconciled for a sentence to be proportionate: sections 718.2(a) and (b) of the **Criminal Code**.

[44] In this case, the Crown Attorney submits that there ought to be a primary focus on specific and general deterrence and denunciation of the unlawful conduct. However, he also acknowledges that the Court is required consider the fact that Mr. Drake is a youthful, first-time offender and other mitigating factors which would focus on the purposes of restraint, rehabilitation and promoting a sense of responsibility in the offender by making reparations to the victim or the community.

[45] Defence Counsel does not take serious issue with those primary purposes. However, she also submits that, given the fact that Mr. Drake is a very youthful, first time offender, the court should place an equal focus on the purposes of restraint and promoting a sense of responsibility in the offender to support his efforts towards rehabilitation. Defence Counsel submits that when the court considers the mitigating circumstances, applies the principle of totality and the **Kienapple** principle, the just and appropriate sanction would be to sentence Mr. Drake to a much shorter term of imprisonment in a federal penitentiary than recommended by the two Crown Attorneys.

[46] I agree with Defence Counsel that, given the fact that Mr. Drake is a very youthful first-time adult offender, I find that it is also appropriate to consider the impact of this sentencing decision on his rehabilitation. This principle of restraint in imposing a first sentence of imprisonment was succinctly stated by Rosenberg JA in **R. v. Priest**, 1996 CanLII 1381 (Ont. C.A.) at page 5:

“Even if a custodial sentence was appropriate in this case, it is a well-established principle of sentencing laid down by this court that the first sentence of imprisonment should be as short as possible and tailored to the individual circumstances of the accused, rather than solely for the purpose of general deterrence.”

### **Aggravating and Mitigating Circumstances:**

[47] The sentencing principle contained in section 718.2(a) of the **Code** requires the Court to consider that the sentence should be increased or reduced to account

for any relevant aggravating or mitigating circumstances relating to the offence or to the offender.

[48] I find that the Aggravating Circumstances are:

- The conspiracy to commit the robbery offence and the robbery offence itself required a significant degree of planning and premeditation to lure the victim into the apartment where he was robbed by Mr. Drake, in concert with his co-conspirators;
- Although the victim was not actually physically harmed, the robbery was committed by a group of people while the victim was unclothed and completely vulnerable which reflected the fact that this was a significant crime of violence, which would have had psychological and emotional impacts on the victim;
- The robbery offence involved the use of weapons including an imitation firearm and a knife to threaten the victim;
- The **CDSA** offences of possession for the purpose of trafficking involved the presence of weapons [bear spray and switchblade knife];
- The **CDSA** and related weapons offence on August 22, 2018 were committed while Mr. Drake was on the release conditions of a Recognizance from the robbery and related charges.

[49] I find that the Mitigating Circumstances are:

- Mr. Drake is a very youthful, first-time adult offender who was twenty-one-years old at the time of these offences;
- Mr. Drake entered guilty pleas which saved significant court time and relieved the Crown of the burden of establishing a significant number of charges beyond a reasonable doubt;
- Mr. Drake has no prior youth or adult convictions;
- Mr. Drake has accepted full responsibility for his role in the robbery and related offences from November 22, 2017 as well as the **CDSA** and weapons offences from August 22, 2018;
- Mr. Drake has expressed his remorse for these offences;

- Mr. Drake has suffered from mental health issues for several years and maintains that he resorted to trafficking in cocaine in order to feed his addiction to that substance.

[50] **The Principle of Proportionality and the Parity Principle:**

[51] As I mentioned previously, section 718.1 of the **Criminal Code** contains the fundamental principle of sentencing that a sentence must be proportionate to the gravity of the offence and the degree of responsibility of the offender.

[52] I find that the gravity or seriousness of Mr. Drake's possession of cocaine for the purpose of trafficking, which is a controlled substance listed in schedule I of the **CDSA**, is very high. There can be no doubt of the objective seriousness or gravity of that offence. Parliament has determined that the trafficking or possession for the purpose of trafficking of a controlled substance listed in schedule I of the **CDSA** schedule, is an indictable offence and that the offender is liable to imprisonment for life.

[53] In this case, Mr. Drake also possessed cannabis (marijuana) for the purpose of trafficking, not in excess of three kilograms (3 kg), which is a controlled substance, but it is listed in schedule II of the **CDSA**. It is also an indictable offence; however, Parliament has indicated that the maximum punishment for that offence is a term of imprisonment of not more than five years. Given the significant difference in the maximum sentences which may be imposed for those two **CDSA** offences before the court, there can be no doubt that Parliament regarded the trafficking of cannabis (marijuana) as a moderately serious offence.

[54] In terms of Mr. Drake's degree of responsibility or moral blameworthiness for the **CDSA** offences, it appears that Mr. Drake made a conscious decision to participate as a trafficker in the drug subculture for greed and profit. However, based on the information contained in the Pre-Sentence Report, I find that his degree of responsibility is somewhat attenuated by the fact that both he and his collateral sources stated that he had become addicted to cocaine himself, which led to him being fired from his jobs in auto body shops. Notwithstanding that mitigating circumstance, given the dire consequences of a cocaine addiction that Mr. Drake was himself experiencing, I find that his degree of responsibility or moral blameworthiness for his actions is still relatively high.

[55] As for the **Criminal Code** charges, which were all indictable offences, there can be no doubt that Parliament regarded the objective gravity of the offences of

robbery and a conspiracy to commit an offence such as robbery as very serious offences as they render an offender liable to imprisonment for life.

[56] In addition, there can be no doubt that Parliament has determined that the objective gravity of the offence of using an imitation firearm in committing an offence contrary to section 85(2)(a) of the **Code** is also a very serious offence as an offender is liable to a maximum term of imprisonment of not more than fourteen years and there is a one year minimum sentence for first-time offender such as Mr. Drake. Moreover, there is also a statutory requirement that the minimum sentence be served on a consecutive basis to any other sentences from the same event or series of events.

[57] Parliament has also determined that the objective gravity of an offender masking his or her face with the intent to commit an indictable offence contrary to section 351(2) of the **Criminal Code** is also a relatively serious offence as an offender is liable to imprisonment of up to a maximum of ten years for that offence. An offender who had possession of a weapon for a dangerous purpose contrary to section 88(1) of the **Code** is also liable to that same maximum penalty.

[58] I find that the objective gravity of other offences for which Mr. Drake has entered guilty pleas are of a moderately serious nature, as Parliament has determined that an offender who is convicted of those offences, prosecuted by indictment, is subject to a maximum of five years of imprisonment. I should also note that an offender who has failed to comply with a condition in an undertaking or recognizance contrary to section 145(3) of the **Code**, which proceeded by indictment, is liable to a term of imprisonment not exceeding two years.

[59] I find that Mr. Drake's degree of responsibility or moral blameworthiness for the **Criminal Code** offences, is also very high. The **Criminal Code** offences reflect a very significant degree of planning, deliberation and premeditation on his part, which also involved not only the plan to rob the victim, but also required him to convince his girlfriend to be prepared to offer sexual services to the victim for money.

[60] While the offender may not have developed the most sophisticated plan, since the victim was lured into his girlfriend's apartment and she had used her name and cell phone to make the arrangements, Mr. Drake and one other person armed themselves with weapons to threaten and intimidate the victim during the robbery with their faces being masked to minimize the likelihood of them being

identified by the victim. As a result, I find that Mr. Drake's degree of responsibility for the **Criminal Code** offences is very high.

[61] The principle of parity in sentencing is found in section 718.2(b) of the **Criminal Code** and requires the court to take into consideration, in imposing a sentence, that the sentence imposed should be similar to sentences imposed on similar offenders for similar offences committed in similar circumstances.

[62] This sentencing principle often results in the court establishing a system of sentencing ranges and categories of sentences. The range of sentences is used to establish minimum and maximum sentences that have been imposed in the past, which provide guidelines, but not hard and fast rules: see **Lacasse**, *supra*, at para. 60. But, as the Supreme Court of Canada has said on numerous occasions, the determination of a just and appropriate sanction is a highly individualized exercise, which depends on the offender's degree of responsibility, the gravity of the offence and any applicable special circumstances in the case.

[63] In this sentencing consolidation, Mr. Drake has entered pleas of guilty to twelve offences contained on three separate Informations, which involve both **CDSA** and **Criminal Code** offences which occurred roughly nine months apart. In those circumstances, there is no doubt that the Court will have to consider the principle of totality found in section 718.2(c) of the **Code** that where consecutive sentences are imposed, the combined sentence should not be unduly long or harsh.

[64] As I indicated previously in determining the objective gravity of the offences before the court, there is no doubt that the robbery charge and the conspiracy to commit the robbery as well as the possession of the cocaine for the purpose of trafficking charge are the most serious, as an offender convicted of any one of those offences is liable to imprisonment for life. During their submissions, the Crown Attorneys and Defence Counsel provided several decisions to assist the court in establishing a range of sentence for those most serious offences.

[65] With respect to the robbery offence, the Crown Attorney noted that, in the case of **R. v. Butler**, 2008 NSCA 102 at para. 23, our Court of Appeal has "repeatedly held that the starting point for robbery is a penitentiary term of three years," but "occasionally might go as low as two years." At the same time, the Court of Appeal also noted, in that paragraph, that a "starting point is not a rigid position from which a sentencing judge cannot depart" and that there may be special circumstances where a fit sentence falls below that range." In **Butler**, *supra*, at para. 23, the Court listed several cases which supported that proposition.

[66] During his submissions, the Crown Attorney also noted that our Court of Appeal had come to the same conclusion approximately ten years earlier in the case of **R. V. Izzard**, 1999 NSCA 52. In that case at para. 18, Glube CJNS referred to several Nova Scotia Court of Appeal cases between 1976 and 1997 to underline the seriousness with which the offence of robbery was viewed by the Court:

“[18] For many years, this court has consistently viewed robbery with violence and armed robbery as cases requiring strongly deterrent sentences. The cases referred to a minimum benchmark sentence of three years and occasionally going as low as two years.”

[67] With respect to the possession of cocaine for the purpose of trafficking, the Federal Crown Attorney submitted that the Court would be well aware of the two to three year range of sentencing established in Nova Scotia for the possession of cocaine for the purpose of trafficking contrary to section 5(2) of the **CDSA**. The Crown Attorney had noted that he had recently referred the Court to several cases in **R. v. Lafitte**, 2019 NSPC 13, which established a range of sentence from two to three years in a federal penitentiary for even a youthful, first time adult offender who was a petty retailer of relatively small amounts of cocaine for profit.

[68] It is also important to note that, since the established range of sentence for certain offences is not a hard and fast rule, the sentence imposed in any particular case may be affected by a number of aggravating circumstances with relatively few mitigating circumstances which may result in a sentence at the top or above that range. On the other hand, there may be relatively few aggravating circumstances and several significant mitigating circumstances or exceptional circumstances where the sentence imposed involved incarceration in a provincial correctional centre or a lengthy community-based disposition.

[69] In this case, I find that there are neither “special or exceptional circumstances” nor are there a significant number mitigating circumstances with relatively few aggravating circumstances present in this case. In those circumstances, I find that the appropriate range of sentence for the **CDSA** offence of possession of cocaine for the purpose of trafficking is two to three years in a federal penitentiary.

[70] With respect to the possession of cannabis (marijuana) not in excess of three kilograms (3 kg) for the purpose of trafficking, which proceeded by indictment, the offender is liable to imprisonment for not more than five years. In those circumstances, the range of sentence is much broader and would include



community-based dispositions. In this case, the Crown Attorney has recommended a short term of imprisonment to be served concurrently with the sentence for the possession of cocaine for the purpose of trafficking.

### **Application of the Kienapple Principle:**

[71] The **Kienapple** principle which emerged from the Supreme Court of Canada's decision in **R. v. Kienapple**, [1975]1 SCR 729, was developed to protect an accused person from multiple convictions from the same transaction for offences which have substantially the same elements and that the accused should be convicted only of the most serious offence.

[72] In **R. v. Rocheleau**, 2013 ONCA 679 at para. 24, the Ontario Court of Appeal described the policy purpose for the **Kienapple** principle and the circumstances in which the principle may be applied:

“[24] The **Kienapple** principle is designed to protect against undue exercise by the Crown of its power to prosecute and punish: **R. v. R.K.** (2005), 198 CCC (3<sup>rd</sup>) 232 at para. 29. It applies where there is both a factual and legal nexus between the offences: **R. v. Prince**, [1986] 2 SCR 480. The requisite factual nexus between the offences is established if the charges arise out of the same transaction whereas the legal nexus is established if the offences constitute a single criminal wrong: **R.K.**, at para. 32.

[73] As Judge Derrick (as she then was) pointed out in **R. v. Cater**, 2012 NSPC 38 at paras. 5 and 6:

“[5] In **R. v. Prince**, [1986] SCJ No. 63, the Supreme Court of Canada clarified the scope of **Kienapple**, finding that:

There must be a relationship of sufficient proximity, firstly as between the facts, and secondly, as between the offences, which formed the basis of 2 or more charges for which it is sought to invoke the rule against multiple convictions. (*Paragraph 24*)

[6] Where an element of an offence is “substantially the same as, or adequately corresponds to” an element in an offence for which the offender has been convicted, then a **Kienapple** stay is justified. (*Prince, paragraph 31*) For **Kienapple** to be applicable, a factual nexus is not enough, there must also be correspondence of elements and a determination that the offences being compared are designed to protect the same societal interests. (**Prince**, paragraph 39)”

[74] In this case, Mr. Drake has pled guilty to eight (8) **Criminal Code** charges contained in the Information relating to the offences which occurred on or about

November 22, 2017 in Dartmouth, Nova Scotia. Based upon my review of the **Kienapple** case, the Ontario Court of Appeal decision in **Rocheleau**, supra, and the Nova Scotia Court of Appeal decision in **R. v. Phinn**, 2015 NSCA 27, I find that the **Kienapple** principle applies equally in cases where an offender has pled guilty or has been found guilty after a trial of a series of charges before the court. If the **Kienapple** principle applies because there is a factual and legal nexus between the charges, then a conditional stay may be ordered by the court instead of convicting the offender of the less serious offence.

[75] Briefly stated, the factual nexus will be satisfied if the same act of the accused grounds each of the impugned charges. However, with respect to the legal nexus, a key question is whether the elements of the offence in question protect the same or different societal interests. If the elements of the particular offences are designed to promote or protect different societal interests or the less serious offence has additional and distinct elements, then, it is less likely that the court will conclude that one of the charges ought to be conditionally stayed.

[76] With respect to the application of the **Kienapple** principle, I agree with Defence Counsel's submissions relating to the two offences contrary to section 90(1) of the **Code**, one being for carrying a concealed weapon (a knife) and the other being for carrying a concealed weapon (an imitation firearm). I find that there is a factual and legal nexus as they arose out of the same transaction to possess them for a dangerous purpose [section 88 **Code**] which, in this case, was committing a robbery and that they do not promote different societal interests, protect different victims or prohibit different consequences.

[77] Moreover, since Parliament has determined that an offender who has been convicted of possession of the weapon for a dangerous purpose contrary to section 88(1) of the **Code** is liable to a much greater penalty, based upon the **Kienapple** principle, I was prepared to enter a conditional stay for the two offences contrary to section 90(1) of the **Code** for carrying a concealed weapon.

[78] However, with respect to Count #6 on the Information which deals with carrying a concealed weapon, to wit, a knife, contrary to section 90(1) of the **Code**, when this sentencing decision was adjourned to today's date, the Court had asked the Crown Attorney to clarify his position with respect to what, if any, charges would be subject to the **Kienapple** principle. On this charge, the Crown Attorney reviewed the facts of the case and has advised the court that there was no available

evidence to support the assertion that the knife in question was concealed when it was “carried” by Mr. Drake.

[79] As a result, in his recent correspondence, the Crown Attorney recommended that Count #6 on the Information should be judicially stayed by the Court, rather than a conditional stay being entered, based upon the **Kienapple** principle. In those circumstances, given the lack of evidence with respect to that charge and the Crown’s recommendation, the Court concluded that the most appropriate course of action in the circumstances would be to allow Mr. Drake to make an application to withdraw his guilty plea to that charge, with the Crown’s consent.

[80] As a result, just prior to delivering this sentencing decision, Mr. Drake made an application to withdraw his guilty plea to Count #6, which was not opposed by the Crown Attorney. The Court granted the Mr. Drake’s application to withdraw the guilty plea to that charge and confirmed that, at the conclusion of the sentencing hearing, Count #6 in the Information would be either withdrawn by the Crown or be dismissed by the Court.

[81] With respect to the offence contrary to section 88(1) of the **Criminal Code** of possession of an imitation weapon for a dangerous purpose (the imitation firearm), I agree with the position advanced by Defence Counsel. The Crown Attorney does not oppose the Defence position with respect to the application of the **Kienapple** principle for this offence in the circumstances of this case. Once again, I find that the offence of possessing the imitation firearm for a dangerous purpose has a complete factual and legal nexus with the offence of using an imitation firearm while committing the indictable offence of robbery, contrary to section 85(2)(a) of the **Code**.

[82] I find that those offences occurred at the same time, in the same place and during the same transaction and that the same act grounds each of those two offences. However, Parliament has regarded the offence of using that imitation firearm while committing, in this case, the indictable offence of robbery contrary to section 85(2)(a) of the **Code**, as a more serious offence which carries with it a much greater penalty, making an offender liable to a maximum of 14 years of imprisonment.

[83] In addition, Parliament has clearly highlighted the seriousness of this offence by legislating that, for an offender’s first offence involving that section, he or she will be subject to a minimum term of imprisonment of one year and that the

sentence imposed for this offence shall be ordered to be consecutive to any other sentences imposed for that same event or series of events.

[84] Given the fact that I have found there to be a sufficient factual and legal nexus between those two offences and Parliament has determined that they are of unequal gravity, I find that entering convictions for both the section 85(2)(a) **Code** and the section 88(1) **Code** offences would effectively punish Mr. Drake twice for the same criminal wrong. In those circumstances, based upon the **Kienapple** principle, I am prepared to enter a conditional stay for the offence contrary to section 88(1) of the **Code** for the possession of an imitation weapon for a dangerous purpose (the imitation firearm).

[85] After having entered conditional stays for two offences and with a third charge to be withdrawn by the Crown or dismissed by the Court at the conclusion of this sentencing hearing, a just and appropriate sanction will have to be determined for each of the remaining charges. In doing so, given the number of offences involved in this sentencing consolidation, there is no doubt that the Court will have to consider and apply the totality principle and determine what, if any, sentences are to be served on a consecutive basis to or concurrently with other sentences imposed by the court.

### **The Totality Principle:**

[86] As I indicated previously, the disparity in the positions of the Crown Attorney and the Defence Counsel relates primarily to the differences in which they recommend that the Court apply the totality principle which is found in section 718.2(c) of the **Code**.

[87] The Supreme Court of Canada, in **R. v. M. (C.A.)**, 1996 CanLII 230 (SCC); [1996] 1 SCR 500 at para. 42 discussed the totality principle as follows:

[42] In the context of consecutive sentences, this general principle of proportionality expresses itself through the more particular form of the “totality principle.” The totality principle, in short, requires a sentencing judge who orders an offender to serve consecutive sentences for multiple offences to ensure that the cumulative sentence rendered does not exceed the overall culpability of the offender. As D.A. Thomas describes the principle in *Principles of Sentencing* (2<sup>nd</sup> ed. 1979), at page 56:

The effect of the totality principle is to require a sentencer who has passed a series of sentences, each properly calculated in relation to the offence for which it is imposed and properly made consecutive in accordance with the

principles governing consecutive sentences, to review the aggregate sentence and consider whether the aggregate sentence is “just and appropriate.”

[88] In **R. v. Adams**, 2010 NSCA 42 at paras. 23 and 24, the Nova Scotia Court of Appeal clearly endorsed the Supreme Court of Canada’s approach in **C.A.M.** to the application of the totality principle:

[23] In sentencing multiple offences, this Court has, almost without exception, endorsed an approach to the totality principle consistent with the methodology set out in **C.A.M.**, *supra*. (see for example **R. v. G.O.H.** (1996), 148 N.S.R. (2d) 341 (C.A.); **R. v. Dujmovic**, [1990] N.S.J. No. 144 (Q.L.) (C.A.); **R. v. Arc Amusements Ltd.** (1989), 93 N.S.R. (2d) 86 (S.C.A.D.) and **R. v. Best**, 2006 NSCA 116, but contrast **R. v. Hatch** (1979), 31 N.S.R. (2d) 110 (C.A.)). The judge is to fix a fit sentence for each offence and determine which should be consecutive and which, if any, concurrent. The judge then takes a final look at the aggregate sentence. Only if concluding that the total exceeds what would be a just and appropriate sentence is the overall sentence reduced. (See for example, **R. v. G.O.H.**, *supra* at para. 4 and **R. v. Best**, *supra*, at paras. 37 and 38).

[24] This Court has addressed and rejected any approach that would suggest that, when sentenced for a collection of offences, the aggregate sentence may not exceed the “normal level” for the most serious of the offences (see **R. v. Markie**, 2009, at paras. 18 to 22, per Hamilton, J.A.).

[89] More recently, in **R. v. Skinner**, 2016 NSCA 54, at para. 41, Justice Saunders succinctly summarized the sequential steps to follow when sentencing an offender for multiple offences. Saunders JA confirmed that in **Adams**, *supra*, the Court had directed that when sentencing for multiple offences, sentencing judges should proceed in the following order:

- Fix a sentence for each offence;
- Determine which should be consecutive and which, if any, concurrent;
- Take a final look at the aggregate sentence; and
- Only if the total exceeds what would be a just and appropriate sentence, is the overall sentence reduced.

[90] In **Skinner**, *supra*, at para. 42, Saunders JA added that the sequence outlined above had been mandated in **Adams**, *supra*, at para. 23, but he noted further, and in any event, the Nova Scotia Court of Appeal has “always cautioned against a slavish, mathematical and formulaic approach to sentencing for multiple offences.”

He then referred to the remarks of Chief Justice MacKeigan in **R. v. Hatch**, [1979] N.S.J. no. 520:

[6] We have frequently noted that the **Code** seems to require consecutive sentences unless there is a reasonably close nexus between the offences in time and place as part of one continuing criminal operation or transaction: [citation omitted]. This does not mean, however, that we should slavishly impose consecutive sentences merely because offences are, for example, committed on different days. It seems to me that we must use common sense...

[7] The choice of consecutive versus concurrent sentences does not matter very much in practice so long as the total sentence is appropriate. Use of the consecutive technique, when in doubt as to the closeness of the nexus, ensures in many cases that the total sentence is more likely to be fit than if concurrent sentences alone are used. Conversely, unthinking use of concurrent sentences may obscure the cumulative seriousness of multiple offences.

[91] As the Nova Scotia Court of Appeal has clearly pointed out, the last step before the trial judge determines the “just and appropriate” sanction for multiple offences, is that the judge should then take a “last or final look” at the total sentence, to ensure that it is not unduly long or harsh.

[92] In taking that “last or final look,” the judge should consider what he or she has previously determined in the earlier analysis of the fit sentence for the most serious of the offences. In doing so, the judge may conclude that the total sentence for the most serious of the offences is broadly commensurate with the overall gravity of the offences and the offender’s moral culpability. Then, if some adjustment is necessary, the judge may make adjustments to the length of the consecutive sentences as s.718.2(c) of the **Code** stipulates that “(c) where consecutive sentences are imposed, the combined sentence should not be unduly long or harsh.”

[93] Finally, once the Court has concluded what the global sentence will be, then the Court should deduct any pre-sentence custody credits from that total to reach the final “go forward” sentencing decision.

### **The Just and Appropriate Sentence:**

[94] During their sentencing submissions, there was a significant disparity in the recommendations made by the Provincial Crown Attorney and Defence Counsel

with respect to the just and appropriate sentence to be imposed for the **Criminal Code** offences which were committed on November 22, 2017.

[95] The Crown Attorney had submitted that the appropriate range for all of those offences would be between five to seven years of imprisonment. Moreover, it was the position of the Crown that, based upon several significant aggravating factors involved in committing an armed and violent robbery on an unsuspecting victim, the sentence imposed by the court should be at the upper end of that range. The Crown's sentencing position was primarily based on a recommendation of four years of imprisonment for the robbery charge and the fact that the use of an imitation firearm while committing that offence, which was an offence contrary to section 85(2)(a) of the **Criminal Code**, has a one-year minimum sentence which shall be served consecutive to any other sentences imposed by the court.

[96] With respect to the offences committed by Mr. Drake on November 22, 2017, Defence Counsel had recommended a two-year sentence for the robbery charge, one-year consecutive for the use of an imitation firearm while committing an indictable offence and six months consecutive for the section 88(1) **Code** charge of possession of a weapon (a knife) for a dangerous purpose, with the sentences for the remaining three charges being six months, being served concurrently with the other offences. Defence Counsel submitted that the total sentence for the November 22, 2017 offences should be three and one half years in total.

[97] In support of their sentencing positions, the Crown Attorney and Defence Counsel had provided the court with several sentencing precedents which involved robberies.

[98] In **R. v. Butler**, *supra*, the Court of Appeal dismissed the Crown appeal of a twenty-three-month conditional sentence order of imprisonment imposed by the trial judge. The offender had committed a premeditated knife point robbery of a vulnerable taxi driver in the early morning hours. The offender was twenty-one years old, entered an early guilty plea, was remorseful and had accepted full responsibility. He had a prior adult and youth record which was found to be an aggravating factor, but this would have been his first sentence of imprisonment. The Court also noted that he had spent five and one half months on remand between his arrest and sentencing.

[99] The Court of Appeal also observed in **Butler**, *supra*, that sentences for youthful offenders should, where appropriate to the circumstances, lean to

rehabilitation rather than general deterrence. The Court also noted that, if the appeal was granted, it would have been Mr. Butler's first sentence of imprisonment and there was a real prospect that he was genuinely motivated to conquer his drug addiction which had driven his criminal actions. Taking all of those factors into account, Bateman JA stated, at para. 34, that "a fit sentence would have been a thirty-month penitentiary term before credit for remand time, followed by two years of probation."

[100] However, in **Butler**, at para. 39, while the Court of Appeal clearly stated that the sentence imposed by the trial judge "inadequately reflects denunciation and general deterrence," in view of the sentence already served and the very positive post-sentence update, the Court of Appeal concluded that it was not in the interests of justice to substitute incarceration for the existing conditional sentence order.

[101] In **R. v. Rhyno**, 2013 NSSC 217, which involved a similar factual situation to Mr. Drake's robbery charge, the female accused went to the victim's residence at his request to perform sexual services for money. The female offender had brought her son along as protection. There was a dispute in the evidence as to whether the female offender had actually provided sexual services to the victim, but at a certain point, the male offender knocked on the door, was let in by the victim and then, he produced a knife in demanding the money owed to the female offender. When the victim made it clear that he would not provide any money to them, the two offenders filled grocery bags with over \$5000 worth of property and left the residence. Following a trial, the male and female offenders were found guilty of robbery and theft over \$5000.

[102] In **Rhyno**, the Court noted that this was not a home invasion robbery as asserted by the Crown and that there was no preplanning of a robbery as the female offender had entered the home at the victim's request. The male offender was a first-time adult offender who was twenty years old. He was arrested three days after the incident and had remained in custody to the sentencing date, for a total of 639 days of presentence custody credit. He had been sexually assaulted while in custody and has suffered verbal and physical abuse from other inmates, which resulted in him being placed in protective custody and being confined to his cell twenty-three hours a day.

[103] The Pre-Sentence Report indicated that the male offender had a "troubled youth" and a difficult upbringing, only being able to complete grade nine and had no employment history or any form of income. In addition, he had substance abuse



and mental health issues. He had begun using crack cocaine on a regular basis when he was twelve years old, having already experimented with drugs when he was ten years old. The Probation Officer noted that he had not made any “measurable effort” to make changes in his life, although he had expressed genuine remorse and stated that he wished to make changes in his life.

[104] The female offender had twenty prior convictions including five for assault and seven for thefts. She had been raised in a large, dysfunctional family with her stepfather being physically and verbally abusive. She had a long history of substance abuse, experimenting with many drugs and noted that most of her involvement with the criminal justice system was under the influence of drugs or alcohol. The female offender had engaged in several programs while in presentence custody and had a total of seven hundred and forty-eight (748) days credit for pretrial incarceration.

[105] Both offenders were sentenced to three and one half years in jail for the robbery charge, less one to one credit for each day of their pre-sentence custody. They were also ordered to serve one-year concurrent for the theft over \$5000 charge.

[106] Having reviewed those cases and others put forward by counsel to establish a range of sentence for a premeditated and violent robbery perpetrated by a group of people on a vulnerable victim, I find that the appropriate range of sentence for the robbery charge is the one recommended by the Crown Attorney. I find that the significant number of aggravating circumstances are not, in my opinion, completely offset by the mitigating circumstances in this case. In addition, I find that there are several similarities between this case and the **Rhyno** case and that therefore the sentencing recommendation made by Defence Counsel in relation to the robbery charge would not adequately reflect the denunciation and general deterrence of this premeditated and violent conduct.

[107] Having considered all of those factors, the aggravating and mitigating circumstances, the parity principle in sentencing, as well as the consideration that restraint should be exercised when sentencing a first-time adult offender to a term of incarceration, I hereby order Mr. Drake to serve a sentence of three and one half (3 ½ ) years of imprisonment in relation to the robbery charge.

[108] With respect to the just and appropriate sentence for the remaining offences which occurred on November 22, 2017, I find that the use of an imitation firearm in the commission of an indictable offence is another very serious offence for

which Mr. Drake's degree of responsibility is also very high. The offence contrary to section 85(2)(a) of the **Code** is complete when an accused person commits or attempts to commit an indictable offence and uses an imitation firearm in doing so, regardless of whether or not the accused causes or means to cause bodily harm to any person as a result of using the imitation firearm.

[109] Based on the facts and circumstances in this case, although there is no evidence that Mr. Drake actually caused any bodily harm to the victim, I find that, even without a Victim Impact Statement, it is obvious and reasonably foreseeable that the brandishing of an imitation firearm in the commission of a robbery, would have had a significant psychological impact on the victim.

[110] In those circumstances, one can certainly understand why Parliament has stipulated that the punishment for that offence, which is contained in section 85(3)(a) of the **Code** renders an offender liable to a term of imprisonment not exceeding 14 years and to a minimum punishment of imprisonment of 1 year. In addition, section 85(4) of the **Code**, stipulates that the sentence imposed on an offender who has committed an offence under section 85(2) of the **Code** shall be served consecutively to any other punishment imposed on the person for an offence arising out of the same event or series of events.

[111] As a result, with respect to the offence of using an imitation firearm in the commission of the indictable offence of robbery, I hereby order Mr. Drake to serve a term of 1 year in prison for that offence contrary to section 85(2)(a) of the **Code**, which shall be served on a consecutive basis to any other sentences imposed in relation to the offences committed on November 22, 2017.

[112] With respect to what I regard as the next most serious offence which was committed by Mr. Drake on November 22, 2017, that is, the possession of a weapon for a dangerous purpose or for the purpose of committing an offence, which in this case was a knife, contrary to section 88(1) of the **Criminal Code**, I hereby order him to serve a term of imprisonment of 6 months.

[113] While it could certainly be argued that there is a nexus in time and place between this Section 88(1) **Code** offence and the others, I find that Mr. Drake had previously made a conscious decision to arm himself with a knife and possess it for the purpose of committing an offence in addition to an imitation firearm in committing the robbery of the victim. In that respect, I find that this decision involved a separate and distinct criminal act which may have arisen from the same transaction. As a result, I find that the 6 months of imprisonment for this section

88(1) **Code** offence shall be served on a consecutive basis to any other sentences of imprisonment that have been imposed with respect to the offences committed on November 22, 2017.

[114] Finally, with respect to the remaining offences for which Mr. Drake has pled guilty, I hereby order a sentence of imprisonment of 1 year to be served on a concurrent basis with the other offences, for the offence of the conspiracy to commit the offence of robbery contrary to section 465(1)(d) of the **Code**. For the offence of having masked his face with the intent to commit an indictable offence contrary to section 351(2) of the **Code**, I hereby order a sentence of 6 months in prison which shall be served on a concurrent basis with the sentences imposed for the other offences. Similarly, for the offence of uttering threats to cause death or bodily harm contrary to section 264.1(1)(a) of the **Code**, I hereby order a sentence of 6 months in prison, which shall also be served on a concurrent basis with the sentences imposed for the other offences which occurred on November 22, 2017.

[115] After taking into account those sentences which were imposed on a consecutive basis and those which were to be served concurrently with the other sentences imposed by the Court, the total sentence imposed for the offences committed by Mr. Drake on or about November 22, 2017, is 5 years in prison.

[116] In addition to those offences, Mr. Drake has also pled guilty to two section 5(2) **CDSA** offences of possession of cocaine and cannabis (marijuana) for the purpose of trafficking on or about August 22, 2018 in Lower Sackville, Nova Scotia. He also entered pleas of guilty with respect to two **Criminal Code** offences contrary to section 91(2) of the **Code** for the possession of a prohibited weapon (a switchblade) as well as a failure to comply with the term or condition in a recognizance not to have any weapons, ammunition or explosive substances in his possession contrary to section 145(3) of the **Code**.

[117] I find that there is ample authority to establish a range of sentence of 2-3 years imprisonment in a federal penitentiary, even for a first-time offender, who was a petty retailer of a controlled substance which is listed in schedule I of the **CDSA**, such as cocaine. With respect to the sentencing recommendation made by the Crown Attorney and Defence Counsel with respect to the section 5(2) **CDSA** offence of possession of cocaine for the purpose of trafficking, I agree with their recommendation and hereby order Mr. Drake to serve a sentence of two (2) years in prison on a consecutive basis to the other sentences already imposed.

[118] With respect to the possession of cannabis (marijuana), not in excess of three kilograms (3 kg), which is a substance listed in schedule II of the **CDSA**, for the purpose of trafficking contrary to section 5(2) of the **CDSA**, I hereby order a sentence of 1 year of imprisonment, which shall be served concurrently with the other sentences imposed for the offences which were committed on or about August 22, 2018.

[119] In addition to those **CDSA** offences which were committed on or about August 22, 2018, Mr. Drake has also pled guilty to possession of a prohibited weapon (a switchblade) contrary to section 91(2) of the **Criminal Code**. The possession of a prohibited weapon of that nature in combination with drug trafficking represents a conscious decision being made by Mr. Drake to possess the switchblade, knowing he did not have a licence allowing him to do so. Mr. Drake's possession of that weapon was also a flagrant contravention of the recognizance which contained a provision that he was not to possess any weapons.

[120] With respect to the possession of the prohibited weapon, in this case, a switchblade, without being the holder of a license which would have allowed him to possess that weapon, I hereby order Mr. Drake to serve a sentence of 6 months of imprisonment which shall be served on a consecutive basis to the sentence imposed for the two **CDSA** offences which were committed on or about August 22, 2018.

[121] Since the breach of recognizance contrary to section 145(3) of the **Code** occurred at the same time and place as the section 91(2) **Code** offence, I hereby order a sentence of 6 months of imprisonment for the breach of recognizance charge, which shall be served concurrently with the other sentences imposed for the offences which occurred on or about August 22, 2018.

[122] In the final analysis, since Mr. Drake's **CDSA** and **Criminal Code** offences were committed on or about the August 22, 2018, which was approximately nine months after he was arrested and subsequently released on a recognizance for the **Criminal Code** offences which occurred on November 22, 2017, there can be no doubt that they comprise very distinct and separate criminal acts, which serve to protect different societal interests. Moreover, there is no nexus in time or place, nor can they be regarded as part of one continuing criminal operation or transaction. For those reasons and pursuant to section 718.3(b)(i) and (ii) of the **Code**, the sentences imposed by the Court for the offences committed by Mr. Drake on or

about August 22, 2018, shall be served on a consecutive basis to the sentences imposed for the November 22, 2017 offences.

[123] Therefore, after taking into account those sentences which I have determined to be served on a consecutive basis as well as those offences which shall be served concurrently with the other sentences imposed by the court, I calculate Mr. Drake's total sentence imposed by the Court to be 7 ½ years in prison. As indicated above, that total is based upon the imposition of a total sentence of 5 years in prison for the November 22, 2017 offences plus an additional 2 ½ in prison to be served on a consecutive basis to the earlier sentence for the offences committed by Mr. Drake on or about August 22, 2018.

### **Final Determination of Mr. Drake's Sentence**

[124] While I have previously calculated Mr. Drake's sentence to result in a total of 7 ½ years in prison, the sentencing principle contained in section 718.2(c) of the **Criminal Code** requires the court that imposes consecutive sentences to consider that the combined sentence should not be unduly long or harsh. Put another way, the total or cumulative sentence imposed by the court ought not to exceed the overall culpability of the offender.

[125] As our Court of Appeal stated in **Skinner**, the last step in a sentencing decision for an offender who is being sentenced for multiple offences, as in this case, is to take a "last or final look" to ensure that the aggregate sentence imposed reflects a "just and appropriate" sentence which is not excessive for these offences or for Mr. Drake as an individual.

[126] In coming to the earlier conclusions with respect to the just and appropriate sentence for each of the offences for which convictions will be entered, I have already taken into account the mitigating factors present in this case. It bears repeating here, however, that Mr. Drake committed two separate series of very serious offences approximately nine months apart, with the subsequent **CDSA** and **Criminal Code** offences having been committed while he was subject to the terms and conditions of a recognizance pending the disposition of the robbery and other charges which were then alleged to have occurred on or about November 22, 2017.

[127] In those circumstances, notwithstanding the fact that Mr. Drake is a youthful first-time adult offender, the most serious of the offences which he committed on or about November 22, 2017 and on or about August 22, 2018, were offences for which he was liable to imprisonment for life. However, the principle of restraint

found in section 718.2(c) of the **Code** and the principle of restraint enunciated by Justice Rosenberg in the **Priest**, *supra*, still requires the Court to consider that the cumulative sentence imposed should not be unduly long or harsh or crushing to the offender's reasonable prospects of rehabilitation.

[128] After having considered those provisions in the **Criminal Code** and having taken all of the circumstances of the offences and the offender into account on this "last or final look" at the aggregate sentence, I conclude that an aggregate sentence of 7 ½ years in prison for a twenty-two-year-old offender, who had no prior criminal record and has reasonable prospects for rehabilitation and reintegration into society, would be unduly long and harsh. In those circumstances, I am prepared to reduce Mr. Drake's total aggregate sentence by 1 ½ years which will ultimately result in what I find to be a "just and appropriate" aggregate sentence of 6 years in prison.

[129] The final step in determining the actual "go forward" sentence for Mr. Drake is to take into consideration and apply his pre-sentence custody credits. Mr. Drake was arrested on November 22, 2017 and released from custody under the terms of a recognizance the next day. Following that one day in custody, Mr. Drake remained in the community under the terms and conditions of that recognizance until August 22, 2018, when he was arrested on the **CDSA** and **Criminal Code** charges. Since then, he has been detained in pre-sentence custody from August 22, 2018 to today's date, June 17, 2019. Therefore, I find that Mr. Drake has been in actual custody for a total of three hundred (300) days. When I calculate the enhanced pre-sentence custody credit of one hundred and fifty (150) days based upon a credit of 1 ½ for each day already served in custody, Mr. Drake has earned a grand total of four hundred and fifty (450) days of pre-sentence custody credits.

[130] In the final analysis, I find that those four hundred and fifty (450) days of pre-sentence custody credits is equivalent to 15 months of pre-sentence custody based on an average month being thirty days. Once I deduct the 15 months of pre-sentence custody credits from the previously determined total aggregate sentence of 6 years or 72 months, I conclude that Mr. Drake's "go forward" sentence is therefore 57 months in prison which shall be served in a federal penitentiary.

[131] In addition, I am also prepared to grant the ancillary orders which have been requested by the Federal Crown Attorney, namely, a mandatory section 109 **Criminal Code** firearms prohibition order, a section 478.051 **Criminal Code** order for a secondary designated offence to obtain a DNA sample from Mr. Drake

and finally a forfeiture order pursuant to section 16 of the **CDSA** for the items listed in the schedule attached to that order.

Theodore Tax, JPC