SUPREME COURT OF NOVA SCOTIA
Citation: *R. v. Cromwell*, 2020 NSSC 14

Date: 20200109
Docket: CRH No. 492748
Registry: Halifax

Between:

Her Majesty the Queen

v.

Dante Warnell Cromwell

Restriction on Publication: Sections 486.3(1) and 486.4 of the *Criminal Code*
SENTENCING DECISION

Judge:	The Honourable Justice Darlene Jamieson
Heard:	December 20, 2019, in Halifax, Nova Scotia
Oral Decision:	January 9, 2020
Written Decision:	January 13, 2020
Counsel:	William Mathers, Crown Counsel Colin Coady, Defence Counsel

By the Court:

Introduction

[1] On October 31, 2019, Dante Warnell Cromwell ("Mr. Cromwell") entered guilty pleas to 56 charges under s. 145(3) of the *Criminal Code*, for breaching a Non-Communication Order with Ms. M. Each of the charges relates to an individual date; however, on a number of these dates, Mr. Cromwell made multiple phone calls to Ms. M.

[2] Section 145 (3) states:

> 145(3) Every person who is at large on an undertaking or recognizance given to or entered into before a justice or judge and is bound to comply with a condition of that undertaking or recognizance, and every person who is bound to comply with a direction under subsection 515(12) or 522(2.1) or an order under subsection 516(2), and who fails, without lawful excuse, the proof of which lies on them, to comply with the condition, direction or order is guilty of
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> > (a) an indictable offence and is liable to imprisonment for a term not exceeding two years; or
> >
> > (b) an offence punishable on summary conviction.

[3] Guilty pleas to counts 3 through 58 were entered on the same date as the indictment was filed with the Court and before a trial date was set.

[4] Prior to the sentencing the Court received the following materials:

- Pre-Sentence report (PSR) dated December 10, 2019 (Exhibit 3)
- Addendum to PSR dated December 16, 2019 (Exhibit 4)
- Crown USB containing audio of various telephone calls made by Mr. Cromwell to Ms. M. and a number of transcripts of telephone calls (Exhibit 1)
- Transcript of February 28, 2019 call provided by Defence (Exhibit 2)
- Briefs and authorities

[5] The Crown confirmed there was no Victim Impact Statement.

The Facts

[6] There was no Agreed Statement of Facts.

Circumstances of the Offence

[7] On December 17, 2018, Mr. Cromwell was arrested. Shortly thereafter, an Information was laid alleging a variety of counts concerning the trafficking of the youth, H.M., whose date of birth is May 05, 2001. That matter is set for trial before this Court in May of 2020.

[8] On December 21, 2018, a bail hearing was held and Mr. Cromwell was detained in custody on the secondary and tertiary grounds. At that time, a Non-Communication Order was imposed with respect to Ms. M, pursuant to s. 515(12) of the *Criminal Code*.

[9] Two months after this Order was put in place, Mr. Cromwell began calling Ms. M. from the remand facility. Between February 25, 2019 and April 30, 2019, Mr. Cromwell called Ms. M. 170 times from the remand facility.

[10] The Crown says that once the police informed Ms. M. they were aware of the calls, there was an immediate gap of seven days in the calls, from March 26, 2019 to April 3, 2019, after which time Mr. Cromwell renewed calling Ms. M. at a new telephone number.

[11] I have listened to the entirety of the audio of the telephone calls provided by the Crown on the USB (Exhibit 1) as listed in the chart in the Crown brief at pages 2-3. I have also listened to the March #67 (March 16, 2019) call. I have read the transcripts of the other calls provided by the Crown. I have listened to the call on February 28, 2019 referred to by Defence counsel and have read the transcript (Exhibit 2) which was provided by Defence. I have also listened to a number of other randomly chosen telephone calls that were not referenced by counsel to ensure I had a full sense of the nature of the calls.

Circumstances of the Offender

[12] Mr. Cromwell is a youthful offender at 22 years of age. He is a first-time offender with no prior record. The Pre-Sentence Report (Exhibit 3) is very positive. I have set out below some of the information provided by Ms. Melissa Murray, the probation officer who prepared the Pre-Sentence Report.

[13] Mr. Cromwell grew up with two parents who both worked. He reported no abuse in the family home. He indicated that his parents drank a lot, but did not, in

his opinion, have an issue with alcohol. With respect to his upbringing, the offender indicated he had to grow up fast, noting that his parents were always busy and he was at home babysitting his siblings. He reported some conflict with his parents in his early years.

[14] Mr. Cromwell has a close relationship with his parents, with whom he has been in contact three to four times per week since being remanded into custody. He also has close relationships with his brother (age 14) and sister (age 13), expressing to his Probation Officer, Ms. Murray, that "they're just like my kids".

[15] Mr. Cromwell also shared a close relationship with his maternal grandfather who passed away since he has been remanded. He is close with his paternal grandmother, Ms. Simmons. She described having a positive relationship with her grandson, indicating that she treats him like a son and that they are very close. Both she and Mr. Cromwell indicated that he planned to reside with his grandmother on release.

[16] Mr. Cromwell completed grade 12 at Cole Harbour High School, graduating with honours as an early graduate in January of the school year. He reported being suspended during high school on a couple of occasions for arguing with teachers and "small things".

[17] Mr. Cromwell is looking to his future. He has been accepted into a carpentry program which begins in September of 2020 at the Ivany campus of the Nova Scotia Community College. While at Central Nova Scotia Correctional Facility, he completed an eight-session employability course through the John Howard Society, an African Canadian communication course, and was involved with the Limitless Program to allow him to attend college in September 2020. Mr. Cromwell also completed the Options to Anger program. He plans to attend the Respectful Relationships program at Northeast Nova Scotia Correctional Facility. He has also been working on a French course. Mr. Cromwell expressed to Ms. Murray that he would try to do any program that he could.

[18] Mr. Cromwell has also been attending individual bi-weekly sessions with the facility social worker at Northeast Nova Scotia Correctional Facility since July 23, 2019. The social worker, Ms. Collin, reported Mr. Cromwell having a positive immediate family and seeming to respect his parents. She indicated Mr. Cromwell "values himself a lot on image".

[19] Mr. Cromwell has worked since age 16. He worked at a number of jobs, including as a cook at McDonald's Restaurant, various call centres, an Irving service station, seasonal work doing landscaping and snow removal, and with different agencies doing demolition work, warehouse work and loading trucks. The PSR indicates he had been working until remanded in December of 2018.

[20] Mr. Cromwell hopes, in the future, to start his own business of buying houses, fixing them and selling them.

[21] Mr. Cromwell recalled using alcohol for the first time at age 17 but on only one occasion. However, by age 20, he was using alcohol on weekends. Prior to being remanded he had been using alcohol daily for a period of approximately six months. He began using marijuana at age 19 and told Ms. Murray he had used "poppers" for a period of one year. The PSR indicates that, following the end of a relationship that Mr. Cromwell had begun at age 17, he stopped going to the gym, was not eating properly and was "smoking weed and drinking". He told Ms. Murray that being remanded was a good experience, as he gained approximately 70 pounds and indicated he planned to get on the right track upon his release. He reported no other history of drug use and no gambling concerns.

[22] Mr. Cromwell was involved with boxing from grade 9 until age 20. Ms. Murray reported that his former boxing coach, Mr. Donovan, at City of Lakes Boxing Club, was quite taken aback at the charges, expressing "he seemed to be a pretty good fella" and noting that "he doesn't seem to have that character in him". Mr. Donovan advised that, in his opinion, the subject wasn't very mature indicating he always seemed like he wanted to be accepted. Another friend, and neighbour, Mr. Callahan, indicated he has known Mr. Cromwell for at least ten years and described him as friendly, polite, hard-working and very kind. Mr. Callahan said he had him do things around his house and that Mr. Cromwell also helped his wife when he was away. Mr. Callahan did not note any anger or mental health concerns.

[23] Mr. Cromwell is African Nova Scotian.

Positions of Crown and Defence

Crown Position

[24] The Crown is seeking a sentence of approximately 18 months' custody, less credit for time served. The Crown says the particular facts of any breach charge

are essential in determining a fit sentence and that the communications grounding the 56 charges are of the gravest severity and highlight the need for a firm emphasis on the principles of denunciation and deterrence in crafting Mr. Cromwell's sentence.

[25] The Crown says the communications within these phone calls are not merely idle conversations between two individuals struggling to negotiate their relationship within the context of the parameters set by the criminal justice system. Rather, portions of Mr. Cromwell's communications are comprised of exhortations to Ms. M. to inform the Crown Attorney's Office that she had been lying in her initial complaint and to come up with explanations for evidence against him. While Mr. Cromwell is not being sentenced for obstruction of justice, the Crown says the nature of the communications is an aggravating factor on sentence.

[26] The Crown says that multiple breaches of a Non-Communication Order over a significant period should not be structured to run concurrently because this would have the practical effect of making crime "cheaper by the dozen". The Crown says there would be no practical reason for an offender to merely call once, as opposed to engaging in repeated breaches of a Non-Communication Order until detected.

[27] The Crown also argues the April #58 (April 30, 2019) telephone call represents an uncharged offence and, pursuant to s. 725(1)(c), is admissible for the limited purpose of showing background and character of the offender.

[28] The Crown says that given the serious nature of the contact, it seeks 90 days' custody for each breach. The Crown says that, structured consecutively, this would yield a sentence of 5,040 days, or (approximately) 13 years, which is clearly an excessive sentence. Considering the principle of totality, the Crown suggests a downward adjustment such that each breach attracts a consecutive sentence of ten days, for a total of 560 days.

[29] The Crown and Defence agree Mr. Cromwell has remand credit from June 4, 2019 to December 20, 2019 which is 200 actual days. The Crown stated it did "not dispute that the loss of eligibility for early release or parole will satisfy the onus upon the accused and justify credit at 1.5:1. Accordingly, the available enhanced credit is 300 days to December 20, 2019. The Defence agrees with this calculation. Counsel agree that added to this would be the time from the sentencing hearing of December 20, 2019 to today's date, being January 9, 2020, totalling 20 actual days. This would give Mr. Cromwell an additional enhanced credit of 30 days using the 1.5:1 calculation, bringing the total remand credit since

June 4, 2019 to 330 days. I find this remand credit calculation to be reasonable in the present circumstances.

Defence Position

[30] The Defence did not challenge the admissibility of the telephone calls and acknowledges they can be considered an aggravating factor. However, the Defence cautioned that Mr. Cromwell has not pled guilty to the obstruction charge and must be presumed innocent in relation to this charge. He further says many of the calls do not deal with the pending charges and many illustrate two very youthful people who are not sophisticated and are trying to navigate a relationship. The Defence says the contents of the calls should be countered and balanced by the very positive PSR.

[31] The Defence says, contrary to what the Crown says, these are not the highest forms of breaches. What are categorized as the highest breaches are usually accompanied by new substantive charges and that is not the case here.

[32] The Defence highlighted that Mr. Cromwell is a youthful first offender with a very positive PSR. He says the biggest issue on sentencing is the Crown's position as to sentence with respect to 18 months. The Defence says this is an extreme position that is highlighted by the fact that the Crown's brief and oral submissions did not address any mitigating factors and only referenced mitigating factors when questioned by the Court. The Defence submits that specific deterrence and rehabilitation must be at the forefront for a first time, youthful offender.

[33] The Defence says the sentencing range for s.145(3) is extremely broad and the majority of these types of charges are dealt with in Provincial Courts via unreported oral decisions. The Defence says the Indictment can be broken down into two distinct timeframes. First, counts three to 32 occurred from February 25th through to March 26th, 2019. A call was made each day between these dates. Secondly, counts 33 to 58 occurred from April 3rd through to April 30th, 2019. Again, a call was made each day between these dates. The Defence says there is a close nexus of time in both timeframes and, therefore, 30-day concurrent sentences should be imposed for each timeframe. The Defence says there was a break of eight days between the two time periods – March 26th, 2019 to April 3rd, 2019 - which breaks the reasonably close nexus in time and requires a consecutive approach to the global sentence. The Defence says this would result in a global sentence of 60 days custody in a provincial remand center.

[34] The Defence seeks that "this global sentence be reduced from his earned remand credit that Mr. Cromwell has been accruing since the time of his remand warrant on the above charges – June 4th, 2019."

Case Law

[35] The statutory provisions in s. 145(3) set out the maximum punishments that can be imposed. However, the circumstances of each offence and of each offender vary and so, when deciding upon a sentence, judges must look to the ranges of sentences where the circumstances are similar.

[36] Both counsel for the Crown and for the Defence indicated they were unable to locate any similar cases in this jurisdiction. Further, the Crown says that those from other jurisdictions are not truly comparable, as they do not involve the number of breaches by Mr. Cromwell, totalling 56.

[37] The Crown referred to the following cases:

1. ***R. v. Atkinson***, 2010 YKSC 56 where Mr. Atkinson pled guilty to two counts of breaching a court order under s. 145(3). While in custody, he contacted Ms. A on two occasions. He was noted to have had a "very significant record in the circumstances." Gower, J. indicated he was a contributing member to his community and to his First Nation. He was sentenced to 45 days for each breach, for a total of 90 days (deemed served by his time on remand).
2. In ***R. v. Emmelkamp***, 2013 ABCA 71, Mr. Emmelkamp pled guilty to one count of obstruction of justice and one count of breaching a court order. He had written to the victim 42 times while in jail. The Court of Appeal sentenced him to 18 months on the obstruction charge and six months on the single-count breach, to be served consecutively. The offender had an extensive criminal record.

[38] The Defence says the Crown's position of a sentence of 560 days for a first-time, youthful, African Nova Scotian offender is extremely high and offends the principles of proportionality and parity. Defence counsel says the sentencing range for s. 145(3) is extremely broad for first-time offenders, or low-end breaches, Restorative Justice referrals are the starting point and that custody is typically reserved for individuals with a history of non-compliance of court orders.

[39] Defence counsel referred to ***R v. Hanlon*** (2016), N.S.J. No.188 (NSPC) where Judge Tax noted:

> 47 … Clearly, the range of a sentence for breaches of a Recognizance or an Undertaking will, like other sentencing decisions, vary depending on the nature of the breach and the offender's criminal record, in particular with respect to any breaches of any current or prior court orders. Generally speaking, a breach of an Undertaking or a Court ordered Recognizance can result in a fine, 15 to 30 days of imprisonment for failure to attend on a trial date or a relatively flagrant disregard of the Court order, which will depend upon the circumstances of the offence and the offender, and then using the 'jump principle' between 60 and 90 days of imprisonment for repeated or particularly flagrant violations of those court orders, which may have an impact on the administration of justice.

[40] The Defence also referred to a sentencing held on March 21st 2019 in front of the Honourable Judge Tax – ***R. v. Downey*** (unreported) where the same Crown and Defence counsel as involved in this matter, jointly submitted a 24-month conditional sentence (house arrest) for Alleisha Cory Downey, who after six months of pre-trial custody, pled guilty to 93 of 177 charges on the Information. Defence counsel says the facts in ***R. v. Downey*** were much more egregious than the facts here because Ms. Downey was on the highest form of release, house arrest, pending trial, and not allowed to leave her home. She was bound not to have contact with Mr. Daniel Simmons, not to attend any Nova Scotia Liquor Commission (NSLC) stores, refrain from possessing alcohol, and ordered to keep the peace and be of good behavior.

[41] Defence counsel says that every day from September 18th, 2018, to December 2nd, 2018, she left her home, went to various NSLC stores (sometimes going to up to three separate NSLC stores in one day), usually with Mr. Simmonds, and either bought or stole alcohol. At the time of sentencing she had cumulatively stolen alcohol valued at $1,325, all while bound by the above-mentioned conditions, which resulted in 75 guilty pleas to s. 145(3) offences. Defence counsel further notes that Ms. Downey was not a first-time offender.

[42] These sentencing decisions from previous cases are used simply as a guide for judges in fashioning an appropriate sentence. The purpose of a range is to encourage greater consistency between sentencing decisions, in accordance with the principle of parity prescribed by the *Criminal Code*. Section 718.2(b) states that "a sentence should be similar to sentences imposed on similar offenders for similar offences committed in similar circumstances." I note that none of the cases provided by counsel deal with a youthful first-time offender.

Principles of Sentencing

[43] In imposing an appropriate sentence, the Court is guided by the purposes and principles of sentencing set out in ss. 718, 718.1, 718.2 of the *Criminal Code*. The general purpose and principles of sentencing are found in s. 718 of the *Criminal Code*. The purpose of sentencing is to protect society and to contribute to respect for the law and maintenance of a just, peaceful and safe society by imposing just sanctions that have one or more of the objectives outlined. I have reviewed s. 718, considering denunciation, deterrence and rehabilitation. The sentencing exercise involves a balancing of the objectives set out s. 718 which states:

> **Purpose and Principles of Sentencing**
>
> Purpose
>
> 718 The fundamental purpose of sentencing is to protect society and to contribute, along with crime prevention initiatives, 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 and the harm done to victims or to the community that is caused by unlawful conduct;
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> (b) to deter the offender and other persons from committing offences;
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> (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 or to the community.

[44] Section 718.1 of the *Criminal Code* requires that a sentence be proportionate to the gravity of the offence and the degree of responsibility of the offender. Section 718.2 identifies specific sentencing principles which must be considered, including that a sentence should be reduced or increased by mitigating or aggravating circumstances relating to the offence or the offender. Section 718.2 states:

> **Other sentencing principles**
>
> 718.2 A court that imposes a sentence shall also take into consideration the following principles:

> **(a)** a sentence should be increased or reduced to account for any relevant aggravating or mitigating circumstances relating to the offence or the offender, and, without limiting the generality of the foregoing,
>
> > **(i)** evidence that the offence was motivated by bias, prejudice or hate based on race, national or ethnic origin, language, colour, religion, sex, age, mental or physical disability, sexual orientation, or gender identity or expression, or on any other similar factor,
> >
> > **(ii)** evidence that the offender, in committing the offence, abused the offender's spouse or common-law partner,
> >
> > **(ii.1)** evidence that the offender, in committing the offence, abused a person under the age of eighteen years,
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> > **(iii)** evidence that the offender, in committing the offence, abused a position of trust or authority in relation to the victim,
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> > **(iii.1)** evidence that the offence had a significant impact on the victim, considering their age and other personal circumstances, including their health and financial situation,
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> > **(iv)** evidence that the offence was committed for the benefit of, at the direction of or in association with a criminal organization,
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> > **(v)** evidence that the offence was a terrorism offence, or
> >
> > **(vi)** evidence that the offence was committed while the offender was subject to a conditional sentence order made under section 742.1 or released on parole, statutory release or unescorted temporary absence under the *Corrections and Conditional Release Act*.
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> shall be deemed to be aggravating circumstances;
>
> **(b)** a sentence should be similar to sentences imposed on similar offenders for similar offences committed in similar circumstances;
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> **(c)** where consecutive sentences are imposed, the combined sentence should not be unduly long or harsh;
>
> **(d)** an offender should not be deprived of liberty, if less restrictive sanctions may be appropriate in the circumstances; and
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> **(e)** all available sanctions, other than imprisonment, that are reasonable in the circumstances and consistent with the harm done to victims or to the community should be considered for all offenders, with particular attention to the circumstances of Aboriginal offenders.

[45] Any sentencing hearing requires a careful consideration of the unique circumstances of the offender and the offence. It requires a balancing of sentencing objectives.

Reasons

Mitigating and Aggravating Factors:

[46] There are a number of mitigating circumstances present in this case. Mr. Cromwell admitted guilt well in advance of the trial and has saved time and resources, as well as sparing Ms. M. from potentially having to testify at trial. The Crown says, because of the telephone recording evidence, the guilty plea should be considered on the lower end as a mitigating factor. Regardless, it does reflect acceptance of responsibility, which is a part of the foundation necessary for an offender to rehabilitate themselves. Mr. Cromwell comes before this Court as a first-time offender with no criminal record. He is relatively youthful at 22 years of age. He has family support from his parents, grandmother and siblings.

[47] Mr. Cromwell addressed the Court before sentencing, expressing remorse to the Court and to Ms. M.

[48] Mr. Cromwell has largely led a pro-social life. He has been employed in various capacities. The Court was advised that prior to being on remand he maintained employment. I do not have any verification of the details of his work history but see from the PSR that he worked at various positions over the years, as I noted previously. The PSR illustrates the insight and sincerity of Mr. Cromwell regarding self improvement. Mr. Cromwell's steps to participate in programming, while in custody, represent a positive sign. On the facts that are before the Court, Mr. Cromwell has high prospects of rehabilitation.

[49] As noted, an important mitigating factor is that, at 22 years of age, Mr. Cromwell is a youthful first-time offender. I refer to the Ontario Court of Appeal decision in ***R. v. Priest***, [1996] O.J. No. 3369, where Rosenberg, J.A. highlighted the primary objectives, in sentencing first offenders, are individual deterrence and rehabilitation:

> **17** The primary objectives in sentencing a first offender are individual deterrence and rehabilitation. Except for very serious offences and offences involving violence, this court has held that these objectives are not only paramount but best achieved by either a suspended sentence and probation or a very short term of imprisonment followed by a term of probation. In *R. v. Stein (1974), 15 C.C.C. (2d) 376* (Ont. C.A.) at page 377, Martin J.A. made it clear that in the case of a first offender, the court should explore all other dispositions before imposing a custodial sentence …

[50] Rosenberg, J.A. also commented on youthful first offenders:

> **22** The rule laid down by this court is that ordinarily for youthful offenders, as for first offenders, the objectives of individual deterrence and rehabilitation are paramount. See *R. v. Demeter and Whitmore (1976) 32 C.C.C. (2d) 379* (Ont. C.A.). These objectives can be realized in the case of a youthful offender committing a nonviolent offence only if the trial judge gives proper consideration to alternatives to incarceration.
>
> **23** Even if a custodial sentence was appropriate in this case, it is a well-established principle of sentencing laid down by this court that a 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….
>
> **24** Martin J.A. also stated that this emphasis on individual deterrence rather than general deterrence was particularly applicable in the case of a youthful first offender. Those statements of principle were binding on the trial judge in this case and should have been applied. He should not have imposed a sentence, to paraphrase MacKenna J., that was very long, disproportionate to the gravity of the offence, and imposed as a warning to others.

Cultural Background

[51] The Defence asks that I take into account Mr. Cromwell's cultural background as an African Nova Scotian. While I was given very little by way of submissions, I have considered Mr. Cromwell's cultural background as an African Nova Scotian and have considered the impact of systemic racism. I refer to Justice Nakatsuru's decision in ***R. v. Jackson,*** 2018 ONSC 2527, where he stated that cultural background factors could be considered in the absence of an Impact of Race and Cultural Assessment. I accept this and accept that there is an overrepresentation of African Canadians in custody in Canada as a result of systemic discrimination (see also ***R. v. "X",*** 2014 NSPC 95, ***R. v. Gabriel***, 2017 NSSC 90, and ***R. v. Downey***, 2017 NSSC 302).

[52] Justice Nakatsuru stated the following in ***R. v. Jackson, supra***:

> [82] I find that for African Canadians, the time has come where I as a sentencing judge must take judicial notice of such matters as the history of colonialism (in Canada and elsewhere), slavery, policies and practices of segregation, intergenerational trauma, and racism both overt and systemic as they relate to African Canadians and how that has translated into socio-economic ills and higher levels of incarceration. While this does not in and of itself justify a different sentence, it is an important first step in providing the necessary context in which to understand the case-specific information in sentencing. I have come to

> this conclusion not simply because it provides substance to the principle of restraint found in s.718.2(e), but also because it is in keeping with the development of the doctrine of judicial notice and the legal recognition in the jurisprudence of the discrimination against African Canadians.
>
> [83] A sentencing judge is given the opportunity to obtain relevant information about the offender and his background without the restrictive evidentiary rules common to a trial. The judge has wide latitude as to the sources and type of evidence upon which to base their sentence: *R. v. Gardiner*, 1982 CanLii 30 (SCC), [1982] 2 S.C.R. 368 at para. 109. This includes taking judicial notice of the social framework in which the law is to operate at sentencing: see D.M. Pacciocco (as he then was) "*Judicial Notice in Criminal Cases: Potential and Pitfalls*" (1998), 40 C.L.Q. 35 at 51.
>
> …
>
> [86] Taking judicial notice of the historical and systemic injustices committed against African Canadians and African Canadian offenders is preferable to a strict adherence to the traditional rules of evidence which will only serve to advantage the *status quo.* The offender should not be burdened with the requirement to bring such evidence, usually in the form of expert evidence, to their sentencing when these social and historical facts are beyond reasonable dispute.
>
> …
>
> [92] It is my belief that provided it is not forgotten that this social context is an aid that complements but does not supplant the traditional sentencing process which is focused on proportionality, no harm will be suffered and only benefit will be gained. Taking judicial notice of such uncontroverted matters will make effective use of the limited resources of the courts. It will encourage better education of sentencing judges about these important systemic issues and increase their sensitivity to them.

[53] Regrettably, there are also aggravating circumstances here, as outlined by the Crown. The aggravating factors include the number of times and length of time over which Mr. Cromwell contacted Ms. M. While many of the calls do not deal with the pending charges, I find that the content of some of the calls is concerning and represents aggravating circumstances. For example, when Ms. M. does not pick up the phone when Mr. Cromwell calls on March 16, 2019 (March #67) he says to her, "I should jump through the fucking phone and get you." The calls also include exhortations to Ms. M. to advise the Crown Attorney's office she had been lying and to come up with explanations for evidence against Mr. Cromwell. He tells Ms. M. to say she lied due to feeling intimidated. He tells Ms. M that, if she tells the Crown she wants to drop it, she is likely to get, at most, a "slap on the wrist", maybe a fine. He says that it will only be a youth record

(March #1, 3/4/19; March #26, 3/7/19; March #47, 3/13/19; March #51, 3/13/19). The fact that Ms. M. consented to the contact is not a mitigating factor.

[54] There was also planning and deliberation. Mr. Cromwell directed Ms. M on how to set up a payment card using a fake name and address (March #49, 3/13/19) and advised that, once she went to the Crown, she would need to get a new phone (March#51, 3/13/19). He had (and also further contemplated having) third parties involved in executing the calls. During one call (March #38, 3/11/19) Mr. Cromwell refers to having had his buddy call Ms. M. because he was on "a level". In another call he says that the last week before trial either he won't call or he will use someone else's PIN (March #26, 3/7/19).

[55] It is important to note that Mr. Cromwell is not being sentenced for obstruction of justice; however, the nature of the various calls and the period over which they occur is an aggravating factor for sentencing.

[56] The Crown submits that the content of the telephone call made by Mr. Cromwell to Ms. M. on April 30, 2018 (audio April #58) is evidence of an uncharged offence and is admissible under s. 725(1)(c) of the *Criminal Code*. The Crown submits the communication constitutes luring within the ambit of s. 172.1 of the *Criminal Code.* The Crown says there is a sufficient nexus between the facts of the uncharged offence and the charged offence because it concerns the same complainant and is part of the same circumstances. The Crown submits that evidence of the uncharged offence is relevant to Mr. Cromwell's character and the circumstances of the offence. The Crown referred to the Ontario Court of Appeal decision in ***R. v. Edwards,*** [2001] O.J. No. 2582, where the Court said that evidence that discloses the commission by the offender of another untried offence is admissible for the purpose of showing the offender's background and character, as that background and character may be relevant to the objectives of sentencing (paras. 63 and 64).

[57] The Defence says that there was reference to an app and to nude photos but there is no charge and that it is an untested argument. They also point to ***R. v. Edwards***, ***supra,*** at para. 64 and say that consideration must be given to the items listed there by the Ontario Court of Appeal, including the cogency of the proposed evidence and the danger that the focus of the sentencing hearing will appear to be diverted from the true purpose of imposing a fit sentence.

[58] I refer to the Supreme Court of Canada decision in ***R. v. Larche,*** 2006 SCC 56, where Justice Fish, for the majority, confirmed that under s. 725 (1)(c) a judge

may consider any uncharged offences that form part of the circumstances of the offence. Unlike s. 725(1)(b) and (b.1) the offender's consent is not required. The Court said at para.20:

> Section 725(1)(c), on the other hand, allows the court to take into consideration facts that *could* constitute the basis for a separate charge that has not-or at least not yet-been laid.

[59] Justice Fish then commented on the two main purposes of the provision stating:

> 24 This view of the matter is entirely consistent with the purpose of the provision. Read together, s. 725(1)(c) and s. 725(2) serve two main purposes.
>
> 25 First, s. 725(1)(c) dispels any uncertainty whether a sentencing judge can take into account as aggravating factors other uncharged offences that satisfy its requirements.
>
> 26 Second, s. 725(2) then protects the accused from being punished twice for the same offence: incrementally, as an aggravating circumstance in relation to the offence charged, and then for a second time should a separate charge subsequently be laid in respect of the same facts. This protection is essential, since the usual safeguards would not apply: The accused, if later charged with offences considered by the trial judge under s. 725(1)(c), could neither plead *autrefois convict* nor, unless charged with what is found to be 'the same delict', invoke the rule against multiple convictions set out in *R. v. Kienapple* (1974), [1975] 1 S.C.R. 729 (S.C.C.).
>
> [Emphasis added]

[60] The Court further confirmed that it is within the Court's discretion as to whether to consider facts that could support other charges; however, if the Court decides to do so it must note on the record that it has done so (para 32).

> 32 As appears from the plain wording of both provisions, s. 725(1)(c) and s. 725(2), read together, are at once discretionary and mandatory. Discretionary, because courts *may* - not *must* - consider the facts that could support other charges; mandatory, because if they do, they *must* - not *may* - note on the record that they have done so.

[61] Justice Fish in ***Larche, supra,*** then concluded that s. 725(1)(c) has three components:

> 47 Section 725(1)(c) has three components, which may be broken down this way:
>
> > In determining the sentence, a court ... [1] may consider any facts [2] forming part of the circumstances of the offence [3]that could constitute the basis for a separate charge." The use of the word "may" signifies that the provision is discretionary, as I have already mentioned. The requirements of "forming part of the circumstances of the offence" and the necessity that these facts be capable of constituting "the basis for a separate charge are two necessary preconditions for the exercise of that discretion.
>
> 48 I begin by considering the requirement that the facts form part of the circumstances of the offence. Parliament has made plain the need to establish a nexus or 'connexity' between the uncharged criminal conduct and the offence for which the offender has been convicted.
>
> …
>
> 50 In my view, whether facts form part of the circumstances of the offence must ultimately be resolved on a case-by-case basis. Broadly speaking, however, there do appear to me to be two general categories of cases where a sufficient connection may be said to exist. These two categories, as we shall see, are not hermetic or mutually exclusive, and will often overlap.
>
> 51 The first would be connexity either in time or place, or both. This flows from the ideal animating s. 725(1)(*c*): In principle, a single transaction should be subject to a single determination of guilt and a single sentence that takes into account all of the circumstances. In its application, this principle is subject, of course, to the constraints fixed by Parliament in the governing provisions of the *Criminal Code*, including, notably, s. 725.
>
> [Emphasis added]

[62] The audio of the April 30, 2018 telephone call illustrates that Mr. Cromwell asked Ms. M. to install an app which would allow a profile picture on a texting app and then to electronically transmit photographs of her "pussy" and "boobs" to him. Contrary to the Crown's position, the audio does not indicate Mr. Cromwell asked her to also send those pictures to another inmate. Mr. Cromwell asked Ms. M. to send a picture of her "beautiful face" to his friend when he goes to another range so that he can see it. Ms. M was born on May 5, 2001 and, therefore, was not yet 18 years old on April 30, 2018.

[63] Section 172.1 states:

> 172.1(1) Every person commits an offence who, by a means of telecommunication, communicates with
>
> > (a) a person who is, or who the accused believes is, under the age of 18 years, for the purpose of facilitating the commission of an offence with respect to that person under subsection 153(1), section 155, 163.1, 170 or 171 or subsection 279.011 or subsection 279.02(2), 279.03(2), 286.1(2), 286.2(2) or 286.3(2);

[64] I find that the facts of the April 30, 2018 (audio April #58) call which form part of the circumstances of one of the offences to which Mr. Cromwell has pled guilty *could* constitute the basis of a separate charge under s. 172.1. There is connexity in time and place - the April 30 call represents a single transaction: the call to Ms. M. that formed the basis for the s. 145(3) charge and the content of the call that *could* constitute the basis of a separate charge. The calls illustrate that Mr. Cromwell knew Ms. M. was not yet 18 as, in one call he notes her birthday and in another indicates that if she tells the Crown she was lying she would, at most, have a youth record (transcript 2-27-19-2045, March #51).

[65] As Justice Fish said at para. 25 of ***Larche, supra***, I, as the sentencing judge can take into account as an aggravating factor this uncharged offence and I have done so. As required in s. 725(2), I have noted on the Indictment that I have considered the facts contained in the April 30 call in determining sentence and, therefore, no further proceedings can be taken in relation to these facts.

[66] I now turn to what is a fit and proper sentence in the present circumstances. First of all, I must be slow to sentence this first offender to imprisonment. However, it is my view that Mr. Cromwell's moral culpability or blameworthiness here is significant. This is highlighted by the sheer number of offences, the uncharged offence, the repetitive nature of the conduct and it being over a lengthy period of approximately three months. Keeping in mind for a youthful, first offender the considerations of individual deterrence and rehabilitation, I am of the opinion that no other sentence but imprisonment is appropriate.

[67] The Nova Scotia Court of Appeal in ***R. v. Adams***, 2010 NSCA 42, set out the methodology for sentencing multiple offences:

> 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. H. (G.O.)* (1996), 148 N.S.R. (2d)

> 341 (N.S. C.A.); *R. v. Dujmovic*, [1990] N.S.J. No. 144 (N.S. C.A.); *R. v. ARC Amusements Ltd.* (1989), 93 N.S.R. (2d) 86 (N.S. C.A.) and *R. v. Best*, 2006 NSCA 116 (N.S. C.A.) but contrast *R. v. Hatch* (1979), 31 N.S.R. (2d) 110 (N.S. 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. H. (G.O.) , supra* at para. 4 and *R. v. Best*, *supra*, at paras. 37 and 38).
>
> [Emphasis added]

[68] Mr. Cromwell's 56 offences challenge this Court to craft an appropriate total sentence considering the proper assessment of the sentence for each individual offence, the consideration as to whether the sentences should be served concurrently or consecutively, and the principle of totality, to ensure that the total sentence is not excessive in the circumstances.

[69] I find that an appropriate sentence for each of the counts (three through 58) is 30 days -- that is 30 days for each of the 56 offences.

[70] There were compelling arguments made both by Defence counsel for concurrent sentences and by the Crown for consecutive sentences. I refer to the Nova Scotia Court of Appeal's decision in ***R. v. Skinner***, 2016 NSCA 54, where Justice Saunders, writing for the majority, indicated that the Court has always cautioned against a slavish, mathematical and formulaic approach to sentencing for multiple offences. He then referred to the following comments of Chief Justice MacKeigan in ***R. v. Hatch***, [1979] N.S.J. No. 520:

> 7. 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: *R. v. Osachie* (1973), 6 N.S.R. (2d) 524. 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 in determining what is a 'reasonably close' nexus, and not fear to impose concurrent sentences if the offences have been committed as part of a continuing criminal operation in a relatively short period of time. Thus, I would not have thought it wrong in the present case to have imposed more concurrent sentences.
>
> 8. 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.

[71] The Defence says that imposing consecutive sentences because each call occurred on a different day would be contrary to the Nova Scotia Court of Appeal decisions in ***Skinner, supra*** and ***Hatch, supra***.

[72] I do not agree with Defence counsel that the entire chain of events which occurred from February 25, 2019 to March 26, 2019 should be treated as one event and hence sentences should be served concurrently. I also do not agree that the offences occurring between April 3, 2019 and April 30, 2019 should be treated as one continuous event. While the conduct giving rise to the charges arose through a series of closely related events, the offences represent intentionally reoffending behaviour over a very lengthy period of time. I consider each day to be separate and distinct. They were not several calls over a few days but were 170 calls over an approximate three-month period. The 170 calls represent a serious, flagrant and repeated disregard of the court order and the Court's authority. The calls were pre-meditated and required planning. On each occasion, Mr. Cromwell made an intentionally conscious decision to re-enter his PIN in order to call Ms. M., knowing the call was in breach. Each call represented a separate bill or cost. In addition, he took steps to avoid being found out. He discussed having Ms. M. purchase a new phone after she went to the Crown, changing his PIN, and employing the assistance of third parties to reach Ms. M.

[73] I am of the opinion that the offences in question should be served consecutively. The global sentence equates to 1,680 days or approximately 4.6 years. In addressing the totality principle found in s. 718.2(c) of the *Criminal Code*, I find these consecutive sentences would be unduly long and harsh in the present circumstances.

[74] I refer again to ***R. v. Adams, supra,*** where our Court of Appeal set out the totality principle (as described by Justice Lamer in ***R. v. M(C.A.)***, [1996] 1 S.C.R. 500 at paragraph 42) and then said as follows:

> 25 Very recently in *R. v. Draper*, 2010 MBCA 35 (Man. C.A.), Steele, J.A. succinctly described the proper approach, as follows:
>
> > 30 … Third, the totality principle should be applied to the total sentence thereby arrived at to ensure that the total sentence is not excessive for this offender as an individual. In effect, the sentence must be given a 'last look.' Fourth, if the judge decides that it is excessive, then

> the sentence must be adjusted appropriately. In some cases that might require a significant adjustment.
>
> 31 In *R. v. Reader (M.)*, 2008 MBCA 42, 225 Man. R. (2d) 118, Chartier J.A. confirmed that this was the approach suggested by the Supreme Court in *R. v. M. (C.A.)* when it explained the totality principle found in s. 718.2(c) of the *Criminal Code*. He explained at para. 27 that at this stage of the sentencing process, the purpose of this last look is to ensure that the total sentence respects the principle of proportionality (set out in s. 718.1 of the *Criminal Code*) by not exceeding the overall culpability of the offender. The 'last look' requires an examination of the gravity of the offences, the offender's degree of guilt or moral blameworthiness with respect to the crimes committed and the harm done to the victim or victims.
>
> [Emphasis added]

[75] Here, I must be mindful of the fundamental principle in sentencing found in s. 718.1 of the *Criminal Code* that a sentence must be proportionate to the gravity of the offence and the degree of responsibility of the offender.

[76] It is my opinion that the application of the totality principle demands reduction of the cumulative sentence. A sentence of 1,680 days would be a crushing sentence far exceeding the overall culpability of Mr. Cromwell. Keeping in mind Mr. Cromwell's moral blameworthiness, in my opinion, a fit and proper sentence in the present circumstances would be three days per offence, representing a global sentence of 168 days. This sentence is in keeping with Mr. Cromwell being a youthful, first-time offender with high rehabilitative prospects.

[77] For each of the counts three through 58 on the Indictment to which Mr. Cromwell pled guilty, I impose a sentence of three days per offence. Each sentence is to be served consecutively for a global sentence of 168 days. Considering the remand credit, which is 330 days, I hereby deduct the 168 days from the total remand credit and deem that Mr. Cromwell has served his 168-day sentence for these offences. This leaves a remand credit of 162 days for the period June 4, 2019 to January 9, 2020. It will be up to another judge, if necessary, to determine how the remaining 162 days of remand credit is utilized.

[78] Being mindful of the Supreme Court of Canada's decision in ***R. v. Boudreault***, 2018 SCC 58, and the fact that the new victim surcharge provisions do not apply here, as they apply to an offender who is sentenced for an offence that was committed after the day on which they came into force being on or after July 22, 2019, I hereby waive the victim fine surcharge.

[79] The Crown offered no evidence on the remaining charges in the Indictment.

[80] The Defence made a motion for dismissal of the remaining charges against Mr. Cromwell which was granted by the Court.

Jamieson, J.