SUPREME COURT OF NOVA SCOTIA
Citation: *Mood v. R.*, 2024 NSSC 45

Date: 20240214
Docket: CRT No. 521594
Registry: Truro

Between:

Nicholas Wayne Mood

Appellant

v.

His Majesty the King

Respondent

DECISION

Judge:	The Honourable Justice D. Timothy Gabriel
Heard:	December 14, 2023, in Truro, Nova Scotia
Oral Decision:	February 14, 2024
Written Release:	February 16, 2024
Counsel:	Leslie Hogg, for the Appellant Brian Warcop for the Respondent

By the Court (orally):

[1] On January 31, 2023, the Appellant was summarily convicted of two counts of uttering threats to inflict bodily harm or death (*Criminal Code* s. 264.1(1)(a), one count of uttering threats (property) (*Criminal Code*, s. 264.1(1)(b)), and a breach of his release order (*Criminal Code*, s. 145(5)(a)). On a second Information he was convicted of three counts of uttering threats to cause bodily harm/death (s. 264.1(1)(a)), one count of criminal harassment (repeated communications) (s. 264(2)(b), one count of criminal harassment ("besetting or watching") (s. 264(2)(c), and one count of uttering threats (property) (s. 264.1(1)(b)).

[2] In a subsequent sentencing, Judge Alain Bégin (the trial judge) imposed a global sentence of 1200 days incarceration, plus three years' probation. Ancillary lifetime weapons prohibition, no contact or communication, and primary DNA orders were also imposed.

[3] Mr. Mood's appeal has essentially three components. First, he contends that he was convicted on one of the counts of uttering threats ("did by telephone knowingly utter a threat to [A.W.] to damage personal property of [A.W.], to wit [A.W.'s] vehicle contrary to section 264.1 (1) b") even though there had been no evidence led in support of the charge. Second, he contends that the trial judge erred in imposing a period of probation on a sentence that exceeds two years' incarceration. Finally, he contends that the trial judge committed an error in principle which had an impact on sentence, and/or that the sentence was manifestly unfit or excessive.

Discussion and Analysis

A. Should the verdict with respect to s. 264.1(1)(b) be set aside on the grounds that it is unreasonable or cannot be supported by the evidence?

[4] The standard of review in relation allegation of an "unreasonable verdict" is uncontroverted. In *R. v. R.P.*, 2012 SCC 22 the Court pointed out:

> [9] To decide whether a verdict is unreasonable, an appellate court must, as this Court held in *R. v. Yebes*, 1987 CanLII 17 (SCC), [1987] 2 S.C.R. 168, and *R. v. Biniaris*, 2000 SCC 15, [2000] 1 S.C.R. 381, at para. 36, determine whether the verdict is one that a properly instructed jury or a judge could reasonably have rendered. The appellate court may also find a verdict unreasonable if the trial judge has drawn an inference or made a finding of fact essential to the verdict that (1) is

> plainly contradicted by the evidence relied on by the trial judge in support of that inference or finding, or (2) is shown to be incompatible with evidence that has not otherwise been contradicted or rejected by the trial judge (*R. v. Sinclair*, 2011 SCC 40, [2011] 3 S.C.R. 3, at paras. 4, 16 and 19 21; *R. v. Beaudry*, 2007 SCC 5, [2007] 1 S.C.R. 190).
>
> [Emphasis added]

[5] Further elaboration is provided in *R. v. Pottie*, 2013 NSCA 68:

> [16] The standard of review for the SCAC judge when reviewing the trial judge's decision, absent an error of law or miscarriage of justice, is whether the trial judge's findings are unreasonable or cannot be supported by the evidence. In undertaking this analysis the SCAC court is entitled to review the evidence at trial, re-examine it and re-weigh it, but only for the purposes of determining whether it is reasonably capable of supporting the trial judge's conclusions. The SCAC is not entitled to substitute its view of the evidence for that of the trial judge.
>
> [Emphasis added]

[6] I have examined both the record and the decision of the trial judge. I agree that there is a complete absence of any evidence in relation to a message or threat of any type by Mr. Mood to damage Ms. [W]s' vehicle as set out in the first Information. The Crown has properly conceded that there was no factual underpinning upon which the Court could convict on this charge, that this conviction should be overturned, and an acquittal entered. Notwithstanding this, it still contends that the sentence of 1200 days incarceration was not improper (Respondent's factum, paras 8 and 9). I will address this contention below.

[7] The appeal with respect to the first issue is allowed.

B. In imposing a period of probation on a sentence which exceeded two years' incarceration, did the trial judge impose an illegal sentence?

[8] Section 731 (1) b of the *Criminal Code* provides as follows:

> (b) in addition to fining or sentencing the offender to imprisonment for a term not exceeding two years, direct that the offender comply with the conditions prescribed in a probation order.
>
> [Emphasis added]

[9] The Appellant has referenced *R. v. Knott*, 2012 SCC 42 in support of his argument with respect to this issue:

> [33] The ordinary meaning of s. 731(1)(b) is perfectly clear: A probation order may not be made where the sentencing court imposes a term of imprisonment exceeding two years. In determining whether two years has been exceeded, one looks at the term of imprisonment ordered by the sentencing court on that occasion - not at other sentences imposed by other courts on other occasions for other matters.
>
> [Emphasis added]

[10] With respect, I agree that the trial judge committed a legal error when he sentenced Mr. Mood to a period of probation on top of a sentence of greater than two years' incarceration which had been imposed on that sentencing occasion.

[11] Once again, the Crown has properly conceded the illegality of the imposition of the period of probation in these circumstances.

[12] The appeal with respect to this (second) issue is also allowed.

C. Did the Provincial Court Judge err when determining the sentence by:

(i) Committing an error in principle which had an impact on sentence, and/or

(ii) Is the sentence manifestly unfit or excessive?

General Principles

[13] In *R. v. Friesen*, 2020 SCC 9, the Court confirmed that in a sentencing appeal, an appellate court may only intervene where:

> a) the sentence is clearly unreasonable; or
>
> b) the Sentencing Judge committed an error in principle (which includes an error of law, failure to consider a relevant factor, or erroneously considering an aggravating or mitigating factor), and such an error had an impact on the sentence
>
> (*Friesen* para. 26)
>
> [Emphasis added]

[14] In *R. v. Metzler*, 2008 NSCA 26, Bateman, J.A. said this:

> [24] Sentences are afforded a deferential standard of review on appeal. This has been articulated in a number of ways. In R v. C.A.M., 1996 CanLII 230 (SCC), [1996] 1 S.C.R. 500; S.C.J. No. 28 (Q.L.), Lamer, C.J.C., for a unanimous Court, said:

> [90] Put simply, absent an error in principle, failure to consider a relevant factor, or an overemphasis of the appropriate factors, a court of appeal should only intervene to vary a sentence imposed at trial if the sentence is demonstrably unfit. Parliament explicitly vested sentencing judges with a discretion to determine the appropriate degree and kind of punishment under the *Criminal Code* ...
>
> [91] . . . 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. The discretion of a sentencing judge should thus not be interfered with lightly.

[15] In *R. v. D'Eon*, 2011 NSSC 330, LeBlanc, J. (as he was then) had occasion to elaborate upon these principles:

> [12] The Supreme Court of Canada addressed sentencing review in *R v. Shropshire,* 1995 CanLII 47 (SCC), [1995] 4 S.C.R. 227, where Iacobucci, J. adopted the statement from *R v. Pepin* (1990), 1990 CanLII 2481 (NS CA), 98 N.S.R. (2d) 238 (N.S.S.C.A.D.) that "in considering whether a sentence should be altered, the test is not whether we would have imposed a different sentence; we must determine if the Sentencing Judge applied wrong principles or [if] the sentence is clearly or manifestly excessive" (para. 47). …
>
> [Emphasis added]

[16] In *R. v. Muise* (1994), 94 CCC (3d) 119 (NSCA), Hallett, J.A., as he then was, described a "fit sentence" in the following terms:

> [81] The law on sentence appeals is not complex. If a sentence imposed is not clearly excessive or inadequate it is a fit sentence assuming the Trial Judge applied the correct principles and considered all relevant facts. ... My view is premised on the reality that sentencing is not an exact science; it is anything but. It is the exercise of judgment taking into consideration relevant legal principles, the circumstances of the offence and the offender. The most that can be expected of a Sentencing Judge is to arrive at a sentence that is within an acceptable range. In my opinion, that is the true basis upon which Courts of Appeal review sentences when the only issue is whether the sentence is inadequate or excessive.
>
> [Emphasis added]

[17] Section 718 of the *Criminal Code* sets out the "fundamental purpose" to be served by the sentencing process:

> 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;
> >
> > (*b*) to deter the offender and other persons from committing offences;
> >
> > (*c*) to separate offenders from society, where necessary;
> >
> > (*d*) to assist in rehabilitating offenders;
> >
> > (*e*) to provide reparations for harm done to victims or to the community; and
> >
> > (*f*) to promote a sense of responsibility in offenders, and acknowledgment of the harm done to victims or to the community.

[18] Moreover, a sentence "must be proportionate to the gravity of the offence and the degree of responsibility of the offender" and "where consecutive sentences are imposed, the combined sentence shall not be unduly long or harsh" (*Criminal Code*, s. 718.1 and 718.2). While this latter point is often referenced as the "totality principle", it is integrally related to the concept of proportionality.

C. (i) (a) Error in principle?

The Totality Principle

[19] First, I consider the "totality principle" argument advanced by the Applicant. Simply put, observance of the totality principle requires a sentencing court to ensure that the level of punishment which is imposed is commensurate with the gravity of the offence and the moral blameworthiness of the offender. It comes into play when consecutive sentences are imposed.

How is the totality principle properly applied?

[20] Courts have had many opportunities to elaborate upon the application of this principle over the years. For example, in *R. v. Adams*, 2010 NSCA 42, the Court said this:

> [20] In *R. v. M. (C.A.), supra*, Lamer, C.J.C. [C.A.M.], writing for the Court, referred to the totality principle as a particular application of proportionality which is a fundamental principle of Canadian sentencing law. The Code provides:

> 718.1 A sentence must be proportionate to the gravity of the offence and the degree of responsibility of the offender.

[21] Lamer, C.J.C. describes 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 (2nd ed. 1979), at p. 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 each 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".
>
> …
>
> [Emphasis added]

[22] In *R. v. Gallant*, 2004 NSCA 7, Cromwell, J.A., as he then was, described the totality principle with his usual clarity:

> [18] The purpose of the totality principle, said the Court in *R. v. Dujmovic*, [1990] N.S.J. No 144 (Q.L.)(C.A.) is to ensure that a series of sentences, each properly imposed in relation to the offence to which it relates, is in aggregate just and appropriate. (See also *R. v. ARC Amusements Ltd.* (1989), 1989 CanLII 9781 (NS CA), 93 N.S.R. (2d) 86; N.S.J. No. 331 (Q.L.)(C.A.). . . .

[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), 1996 CanLII 8692 (NS CA), 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), 1989 CanLII 9781 (NS CA), 93 N.S.R. (2d) 86 (S.C.A.D.) and *R. v. Best*, 2006 NSCA 116 but contrast *R. v. Hatch* (1979), 1979 CanLII 4379 (NS CA), 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.

[Emphasis added]

…

> [30] To determine whether this seemingly low global sentence is, in fact, manifestly unfit I will consider what would be a fit sentence for the individual convictions, taking into account consecutively and concurrency, and then take a last look to determine whether the resulting total sentence is excessive. Before doing so it is helpful to discuss the aggravating and mitigating factors.
>
> [Emphasis added]

What did the trial judge do?

[21] In delivering his sentencing decision, the trial judge first considered the principles enshrined in s 718, 718.1 and 718.2 of the *Criminal Code*, as well as some cases which had interpreted these provisions. He proceeded to note that, although there were no victim impact statements filed, he had been able to discern the impact which Mr. Mood's actions had had upon both A.W., and her father E.W.

[22] With respect to A.W., he noted:

> She was scared, felt like she might be killed, that her dad would end up in jail, afraid of being followed, not sleeping well, feared for her safety every day, concerned about more strangers coming to her house, afraid for her and her family, fear of being beaten or shot.

[23] As for E.W.:

> EW felt uneasy after receiving a text from Mr. Mood and he feared for his safety and the safety of his family.
>
> (Record, Tab 5, page 123)

[24] The trial judge discussed the allusion in the Pre-Sentence Report to the difficulties which the Appellant had experienced with drugs and alcohol in the past, adding that "there is no doubt that Mr. Mood was under the influence of substances when he committed some of the offences as we are dealing with today". He also considered that Mr. Mood had committed prior offences while under the influence of illicit substances "so he was well aware of the risks he took in not dealing with his substance issues".

[25] He stated what he considered to be the aggravating factors applicable to the sentencing, making note of Mr. Mood's eight prior convictions for threats and five for assaults, his conviction for a domestic violence incident, and 36 to 39 prior breaches of court conditions imposed with respect to earlier convictions. The trial

judge also considered one mitigating factor: "Mr. Mood has the potential to earn a good living and be a productive member of society." (Appeal Book, Tab 5, pp 124 - 125).

[26] The imposition of the custodial portion of the sentence was outlined in the following terms:

> I am ordering a lifetime section 109 weapons prohibition and I am ordering a primary DNA order. Your behaviour towards AW and her family including threats to kill your own child are among the most serious and violent that I've dealt with in over 6 1/2 years as a judge. You clearly had the intent to terrorize AW and her family and it worked.
>
> I'm imposing a sentence of 600 days for the offences in the first information for the period of September 16 to 22, 2022 to be followed by a period of probation for 3 years I am also imposing a consecutive sentences 600 days for the offence is on the second information for the period of September 22 to October 3, 2022. This equates to a sentence of 1200 days less 368 days for time on remand for a go forward sentence of 832 days... Your probation will start upon your release from prison.
>
> (Appeal Book, Tab 5, p. 125)

[27] The trial judge then proceeded to describe the terms of the probation. This was followed by a discussion directly with Mr. Mood. As this discussion was winding down, counsel for the Appellant asked for a breakdown of the custodial portion of the sentence that had been imposed. It occurred in this context:

> THE COURT: I'm sure you gave one to E.W. saying you'd take out the whole family, you listed them all in order how you could take them out. Good luck, sir.
>
> MS. HOGG: Your Honour, do we have a breakdown?
>
> THE COURT: Get the help you say you want.
>
> MS. FAGE: Your Honour…
>
> MR. MOOD: Thank you, I hope you do too.
>
> MS. FAGE: … I would ask that [K.W.] (A.W.'s mother, E.W.'s wife) be included in the no contact.
>
> THE COURT: Yeah, I'll add [K.W.]…
>
> MS. FAGE: I believe so.
>
> THE COURT: K.
>
> MS. FAGE: With a K.

MS. HOGG: And is it just 600 on each count?

THE COURT: They're all 600 on the first concurrent to each other and consecutive to …

MS. HOGG: Thank you.

(Appeal Book, Tab 5, p. 129)

[Emphasis added]

[28] From the foregoing exchange, it is clear that the judge did not follow the *Adams* methodology. He appears to have arrived at a global sentence, and, only after being asked to break it down by counsel did he do so, in what appears to be a very cursory manner.

[29] In the recent case of *R. v. Wrice*, 2024 NSCA 3, the Appellant had pleaded guilty before the sentencing judge to common assault contrary to s. 266(b), uttering threats against various family members contrary to s. 264.1(1), and five counts of disobeying a "no contact" order contrary to s. 127(1). In overturning the sentence imposed upon him, Derrick, J.A. emphasized the importance of the steps outlined in *Adams* to the formulation of a proper sentence:

> [31] The judge's approach to the appellant's sentence-settling on a global sentence and then working backwards to apply it to each of the offences-has been consistently rejected by this Court. It constitutes reversible error.
>
> [32] Unfortunately, the judge failed to sentence the appellant in accordance with the sequential methodology set out in *Adams* at paragraph 23 and neatly described by Fichaud, J.A. in *R. v. A.N.:*
>
> > [35] … the sentencing judge should not start with an assumed hard-capped number, to be allocated among the convictions. Rather the sentences are to be determined individually as appropriate for each offence, and made consecutive or concurrent in accordance with principles of consecutivity, then the total is to be assessed, with a backward look, to determine whether the global sentence is either just and appropriate or unduly harsh for the aggregated criminal behaviour.
>
> [33] The *Adams* methodology draws from s. 718.2 (c) of the *Criminal Code* that enshrines the principle of totality and provides "where consecutive sentences are imposed, the combined sentence should not be unduly long or harsh". The principle of totality "ensures the aggregate sentence does not exceed the overall culpability of the offender" and serves to uphold the principle of proportionality.
>
> [Emphasis added]

[30] Later in her reasons, she explained:

> [41] The *Adams* "last look" at the overall sentence to assess for totality only comes into play where there are consecutive sentences. It has no application where the sentences imposed for offences are all concurrent. As noted in *Skinner*: "Parliament has explicitly limited the application of the principle of totality to cases where consecutive sentences are ordered".
>
> [42] The judge here was sentencing the appellant for multiple offences: common assault, threats, and five instances of disobeying a no-contact order. The sentence should have been crafted in compliance with *Adams* so that a sentence was attributed to each offence followed by a determination of whether the sentences were consecutive or concurrent. Instead, the sentencing judge simply imposed a global sentence of 729 days and applied it to each offence on a concurrent basis. The sequential sentencing mandated by Adams received no attention in her analysis.
>
> [43] The respondent says the absence of the *Adams* analysis is of no consequence because it did not impact the appellant's sentence. In the respondent's submission the sentences were all properly concurrent (and therefore the "last look" for totality did not apply) because: "These offences were part of a continuum, related in time and with numerous similar victims that called for concurrent sentences. The principle of totality would not have come into question".
>
> [44] I do not agree. It cannot be said the common assault was part of any continuum, and it cannot be assumed that had the judge applied the *Adams* methodology she would nevertheless have concluded the sentences for each offence should run concurrently. Repeated violations of a no-contact order may result in consecutive sentences. For example, in *R. v. Cromwell* the sentencing judge was not persuaded the offences (56 charges for 170 calls in breach of a no-contact order in a two-month period) should be treated as one continuous event.

[31] The "*Adams* approach" was reiterated in *R. v. Bernard*, 2011 NSCA 53. *Bernard* arose out of the sentence imposed in the Provincial Court for three drinking and driving related offences and two breaches of recognizance. The five convictions arose out of four separate incidents. The first occurred on November 5, 2009, and the last occurred on January 28, 2010. Mr. Bernard was possessed of prior convictions for drinking and driving and breaching court orders, however, those priors had led to fines and prohibition but never incarceration. He was sentenced to a period of imprisonment consisting of two years less a day.

[32] In rejecting the sentencing approach adopted below, Saunders, J.A. said the following:

> [19] As the transcript reveals, the judge conducted a mental calculus which led him to start with a notional 29 months, from which he deducted a 2:1 remand "credit" of five months, arriving at a global sentence of approximately two years'

> incarceration which he felt would be appropriate. He then asked counsel for the appellant whether he would prefer to be sentenced in a federal, or a provincial institution. After hearing that Mr. Bernard wished to be incarcerated in a provincial facility, the judge resolved that the global sentence should be two years less a day and then worked backwards by dividing the total into three consecutive custodial blocks of eight months each, the last period shortened by a day. The methodology adopted by the judge here was rejected by this Court in *Adams*, and most recently in *A.N.* (see para. 35).
>
> [20] In fairness, it must be remembered that this Court's judgment in *Adams*, (which re-affirmed our earlier directions concerning the proper consideration of the totality principle when imposing consecutive sentences) was released a month after Mr. Bernard's sentencing in this case.

[33] In the case at bar, the trial judge clearly proceeded to formulate a "hard capped" sentence for the multiple offences, without regard to the approach in cases like *Adams* or *Bernard*. In so doing, he committed an error in principle, in addition to the errors in relation to the s. 264(1)(b) (property) charge, and the imposition of a period of probation.

The "step" (or "jump") "gap" principles

[34] The Appellant also argues that the judge overlooked other integral sentencing principles. One such principle is often referred to as the "jump", or "step" principle. He also argues that the "gap" principle was missed as well. (Appellant's factum, para. 72).

[35] In *Bernard*, the Court also had occasion to discuss these concepts:

> [33] In certain circumstances it may be necessary for judges to consider the "jump" (or "step") effect in punishing for unlawful behaviour. This is intended to take into account the level of severity in penalties for previous offences when compared to the sentence about to be imposed. In other words, it is a recognition of the importance of comparing the relative degrees of punishment for past and present offences.
>
> ...
>
> [36] While the so-called "jump", "step" and "gap" factors are not explicitly codified in s. 718, their application has become part of the sentencing lexicon. These three factors may be deduced from what the *Criminal Code* terms the "fundamental principle" of sentencing in s. 718.1, that is, that the sentence "must be proportionate to the gravity of the offence and the degree of culpability of the offender". I need not decide whether these concepts have become elevated to recognized sentencing principles or are simply labels used to explain logical and

> relevant features of sentencing. Essentially, they are concepts or norms which may be applied where consecutive sentences are imposed so as to ensure that "the combined sentence should not be unduly long or harsh" (s. 718.2(c)). As I will explain, it appears to me that the judge erred by failing to consider these factors when sentencing Mr. Bernard.
>
> [Emphasis added]

[36] In those instances where it is appropriate to apply one or more of these principles, the object of the exercise remains the same as that addressed by a consideration of totality - to ensure that the consecutive sentences imposed do not produce an unduly harsh or disproportionate result.

[37] I have already determined that the trial judge did not correctly apply the totality principle in any event.

[38] As a result, I need not consider the jump and/or gap principles at this stage of the analysis before intervening. As will be seen, however, they will nonetheless contribute to my view of what an appropriate sentence, in these circumstances, should look like.

C. (i)(b) Did the error in principle have an impact on the overall sentence imposed?

[39] Having made a finding that the sentence imposed by the trial judge resulted from a failure to correctly follow the *Adams* approach to the totality principle, I do not need to further inquire whether the sentence imposed was also "manifestly unfit" before intervention. To the extent that this requires further elaboration, I again have recourse to *Bernard*, where the court said this:

> [22] Before doing so I wish to dispose of a preliminary point raised by the Crown at the hearing. Mr. Fiske suggested that before we could decide what we felt to be an appropriate sentence, we would first have to address the fitness of the sentence imposed in the court below. In other words, we could not substitute our own sentence for the sentence imposed by the trial judge unless we had first determined that the trial judge's sentence was "manifestly unfit" …
>
> [24] … I respectfully disagree. The Crown's assertion is tantamount to saying, despite the error, the sentence is entitled to deference any way. I would not accept such a proposition. …
>
> [25] <u>In my opinion, once we find that a trial judge has erred in principle when imposing a sentence, any deference which might otherwise have been paid is</u>

> ignored, and we are presented with a "clean slate" to decide for ourselves what constitutes a fit sentence.
>
> [Emphasis added]

[40] Although phrased a little differently in *Friesen*, the resulting logic is the same: I need only find either that the trial judge committed error(s) in principle, which had an impact upon the sentence, or that the sentence is "clearly unreasonable" before intervention (*Friesen*, para 26).

Did the errors have an impact on the sentence which was imposed?

[41] First, the individual charges in respect of which Mr. Mood was facing must be considered. The charges in the two Informations in question are reproduced below:

Information I - Those directed to A.W. occurring from September 16-21, 2022:

a. Threats to cause death or bodily harm - s. 264.1(1)(a) x 2;

b. Uttering threats (property) - s. 264.1(1)(b); and

c. Failure to comply - s. 145(5)(a).

Information II - Those directed at A.W. and E.W. occurring from September 22, 2022 to October 3, 2022:

a. Threats to cause death or bodily harm to E.W., A.W., and K.W. - s. 264.1(1)(a) x 3;

b. Uttering threats (property) - s. 264.1(1)(b);

c. Criminal harassment - s. 264(2)(b);

d. Besetting or watching the dwelling house of A.W. - s. 264(2)(c); and

e. Failure to comply – s. 145(5)(a).

[42] Next, in summary proceedings, I observe that the maximum sentence available to the trial judge was two years less a day, per offence (s. 787(1)). Sentencings in relation to the most serious offences in the two Informations (those

pursuant to s. 264.1 and 264(2)(c)) have varied widely depending on the individual circumstances of each case. They are generally fact specific.

[43] It is acknowledged that these were not pedestrian threats. On the contrary, they were among the most serious imaginable: they were directed against a former domestic partner and her immediate family. They came after the end of her relationship with the accused.

[44] In fact, it appears that the parties' relationship (when they were still together) had followed a cycle of violence inflicted on A.W. by the accused, over a three-year period. During that period she was assaulted violently, and she was followed by the accused if she tried to leave him. Because of this history, A.W. would have known that he was capable of acting violently at the time these threats were made (Appeal Book, Tab 5, pp. 97-98).

[45] In convicting Mr. Mood, the trial judge made note of some pertinent facts, which included:

> Further, any quotes that I attribute to a witness may not be an exact quote but paraphrases and captures the essence of their testimony.
>
> AW. AW is a registered nurse and is 34 years old. She was in a relationship with Mr. Mood for three to four years. They have one child together, and it is clear from the evidence that the relationship ended and that Mr. Mood was then unable to see their child.
>
> Much of AW's testimony was identifying exhibits and confirming their contents that were screenshots of her phone of texts that she stated were from Mr. Mood. Exhibit 1 was for the period of September 19 to 20, '22 and Exhibit 2 was for the period of September 21 to October 3, 2022. Exhibit 3 was emails between AW and Mr. Mood for August 24/25, 2022.
>
> Exhibit 1. There are approximately 121 texts over this three-day period, and many of them are threatening towards AW and her family and they contain texts that are all meant to tell AW that she is being watched at her home or at her parents' home. The texts were obviously sent from a text app that generates false telephone numbers, but it is clear from the phone and context that all the texts are from the same person.
>
> <u>Some selected texts</u> with spelling corrected by the Court for ease of reading:
>
> > Your day is coming. I will get you for this. When I do get you it's not going to be pretty, you piece of shit. Might not be today, might not be tomorrow, but I'll never let it go. You're not getting away with this. Even if I go jail you will never, ever, ever, ever, ever, ever be walking away. I may not survive this, but neither will you. If you think I'm kidding you got another

> thing coming. You're all going to regret doing this to me. It ends today. You think I'm afraid to come to your parents' house? There's nothing in me stopping me, and trust me, I'm not afraid at all. So you got ten minutes to sed (sic) me a pic of the baby, or the next shit is going to happen. Okay. Then get ready for a hell of a night. If I can't have this family no one else will. Do I need to do this? Trust me, I'm not afraid of Daddy. This is going to be a fun night. Come on, you fucking bitch. That's my truck just went by. Did you hear the diesel? You don't deserve that kid, or to live for that matter, you piece of shit. Okay, you fucker. I'm coming. Probably write books and movies about me, love. You don't get out of this alive, AW. I think you figured that out already. Baby's better off without us anyway. Don't worry, I'll get you. Just because I haven't yet don't mean it's not going to happen. Like, I was just going to take myself out. But why do that without taking care of the person that did this to me and is still doing it? I only have one option now. Don't say you didn't know how far gone I was. Well, you won't be able to tell the story anyway. You will be with me. On my way right now. Fuck it, (puts?)- in jail. I can't wait to beat your head off the wall and beat your dad. You know what helps me sleep at night is knowing eventually I'm going to get you. I think deep down you know it, too. Aww, I see Daddy's fixing the house and the garage up. Did he see the convoy with me?
>
> During this time period AW was primarily staying at her parents' home for her and the baby's safety. She identifies a truck on page 4 as the truck that belongs to a friend of Mr. Mood's. She identifies a map on page 6 showing her location and the location of Mr. Mood nearby. She identifies the individual on page…in the photo on page 8 as Mr. Mood. She identifies a photo on page 11 as being taken from inside Mr. Mood's truck with her house in the background.
>
> (Appeal Book, Tab 4, pp. 34-35)
>
> [Emphasis added]

[46] During the second interval, September 21 to October 3, 2022, the trial judge highlighted some of the accused's communications with A.W. (with spelling corrected) as such:

> I only have one option now. You think I'm kidding? I don't really care about anything else. Like, I've got whacko. You going to answer me? Just on the road. This is your fault. Just sleep here in my truck near your house. I got nowhere else to go. I know where you are. I followed you. You coming out or am I coming in? I'll send a pic. When I do find out who your fat little ass is fucking I'm going to beat them with you. I can assure you that it's going to be…it's going to in a big way, you little bitch. Bet you the cams aren't working and see me now. When this happens, AW, know that there was a time I did love you and there's a chance for us. You ruined it, so now this has to happen, and I'm not proud of this thing that I've become. I wish I could just die. Burning the house now. Should pick your flyers up. You're

> really going to make me do it, ain't you? You're just a fucking idiot. Whatever happens is your fault. I've got, like, four questions. You can't answer them? Something drastic has to happen? I'm going to kill myself before I do something violent. Thank you for showing me over the first few years that love you did. I'm going out with a big bang, baby. Well, there's ten, and I gave attention…that I gave them attention and your address if you wanted…if they wanted to fight. Anyway, eventually I'll end up getting you. See you got your flyers, and why is there construction after dark? Just making sure you got the message. One, two, Freddy's coming for you. Three, four, better lock the door. Five, six, get a crucifix. Headed your way. Can't see your car from across the lake. So your car's not home. Tonight's the night for real. You got 20 minutes to answer me, or there will be another insurance deductible. I'm not kidding at all. I swear on our child I'll take every window and door out of the house tonight, and I'm dead-sober. LOL, you're going to regret this. I don't care about putting more ventilation in the house. I'll break your fucking BS head in with a bat if I ever find out who it is. One of these times I'll catch you or whoever is going out with…going out something-Lake Road (I'm not identifying the location). And there will be a day of reckoning here soon. Like I said, you know it's kidding. Trust me, Daddy with his little black broomstick [gun] don't scare me in the least. Something will happen soon. You don't send me a pic, I'll be there in ten minutes.
>
> (Appeal Book, Tab 4, pp. 36-37)

[47] The threats were not only directed at A.W., as previously noted, but to her father, E.W., as well. Exhibit 5 at trial consisted of a series of texts that E.W. received from Mr. Mood on September 27, 2022. Some of these texts(in paraphrase) are referenced in the decision as follows:

> Just a heads-up. I'm only saying this because I used to like you. This weekend will cost you around 20 to 25 grand. The boys are in position (that's in reference to EW's restored truck). Trust me, you're not going to like this one. Is there insurance on it? Be a shame if I lit a road flare in there. Hope you got that little black thing loaded, bubba. You're going to need it. K [E.W.'s wife] will be the first one to go, then AW, then you. I'll take every window out in Uniacke. Everyone. The cops just put me in jail for a couple of months. LOL. Then I get to regroup, get stronger, come back at you. I'll go to prison with a clear conscience when she's gone, bubba. Wonder where Todd's guns went? Wonder if they are with me? You know how this ends, and I'll say it. I'm going to kill your daughter. I'm going to kill you, your daughter, your wife. I don't care. Your son may be dead now. There's no stopping it. Charge me with threats. Eventually I'm going to kill you. She's a deviant that needs to die, but like I said, don't ask or ponder why when I come through the door not…bub. That door not bub. We will have time to yarn. Be a man, and don't show fear. Been three months in the plans, and I live on the lake. Ha, plot twist. Didn't know that, did you?

(Appeal Book, Tab 4, p. 40)

[Emphasis added]

[48] It is very clear that the trial judge was appalled by this type of language. After all, Mr. Mood had employed the most extreme threats available in his vocabulary, or anyone else's for that matter.

[49] I have considered counsel's oral and written submissions, the trial judge's recitation of the aggravating and mitigating circumstances (with which I agree), the Pre-Sentence Report and all other information relevant to the imposition of sentence.

[50] Following the *Adam's* methodology, I first proceed to fix an appropriate sentence for each charge individually:

I. a) s. 264.1(1)(a) x 2 = [24 months (less one day)] x 2

b) Nil - appeal allowed

c) s. 145(5)(a) - 30 days

II. a) s. 264.1(1)(a) x 3 = [24 months (less one day)] x 3

b) s. 264.1(1)(b) - 60 days

c) s. 264(2)(b) - 60 days

d) s. 264(2)(c) - 90 days

e) s. 145(5) - 30 days

[51] Second, I consider whether they should be made consecutive or concurrent. I begin with s. 718.3(4) of the *Criminal Code*:

> **Cumulative punishments**
>
> **(4)** The court that sentences an accused shall consider directing
>
> **(a)** that the term of imprisonment that it imposes be served consecutively to a sentence of imprisonment to which the accused is subject at the time of sentencing; and
>
> **(b)** that the terms of imprisonment that it imposes at the same time for more than one offence be served consecutively, including when

> **(i)** the offences do not arise out of the same event or series of events,
>
> **(ii)** one of the offences was committed while the accused was on judicial interim release, including pending the determination of an appeal, or
>
> **(iii)** one of the offences was committed while the accused was fleeing from a peace officer.

[52] In *R. v. Campbell*, 2022 NSCA 29, the Court explained the general principles involved in such a determination:

> [19] Counsel's agreement that any sentence should be served consecutively was not binding on the judge. However, counsel's agreement was no surprise. Mr. Campbell was being sentenced for a second sexual assault-separated by both date and victim from the earlier sexual assault. Counsel's agreement was consistent with these sentencing principles:
>
> - Where an offender is serving a custodial sentence, and subsequently faces a further custodial sentence, the judge at the second sentencing hearing must consider whether to impose the second sentence consecutively or concurrently to the first (Criminal Code, s. 718.3(4)(a)).
> - Offences that are so closely linked together so as to constitute a single criminal venture may (not must) receive concurrent sentences, while all other offences are to receive consecutive sentences (*R. v. Friesen*, 2020 SCC 9, para. 155).
> - Concurrent sentences will rarely be appropriate in cases of sexual violence where there are separate victims (*R. v. C.(D.)*, 2016 MBCA 49, para. 43).
>
> [Emphasis added]

[53] It is uncontroverted that the trial judge could have imposed consecutive sentences with respect to any or all of the counts on each Information *inter se*. He clearly chose to treat the individual counts on each Information as part of the same transaction. With that said, he appears to have regarded each of the two Informations as separate transactions, despite the fact only one day separated the two time intervals, and the charges in each were very, very similar.

[54] As noted earlier, I have found an error in principle. I therefore owe no deference to the sentence imposed or any individual aspect of the process through which the trial judge arrived at it. However, I have not been persuaded that his treatment of the concurrency and consecutive aspects of the sentence should be disturbed.

[55] Thus, I arrive at the following:

I. (a) s. 264.1(1)(a) x 2 = 728 days each (concurrent) = 728 days

(b) nil

(c) s. 145(5)(a) - 30 days (concurrent to (a)) above

Total Information I: 728 days

II. (a) s. 264.1(1)(a) - 728 x 3 (concurrent) = 728 days each (concurrent)

= 728 days

(b) s. 264.1(1)(b) - 60 days (concurrent to (a) above)

(c) s. 264(2)(b) - 90 days (concurrent to (a) above)

(d) s. 264(2)(c) - 60 days (concurrent to (a) above)

(e) s. 145(5) - 30 days (concurrent to (a) above)

Total Information II: 728 days

TOTAL: Information I + Information II (consecutive)
= 1456 days' imprisonment

[56] The final step involved in the application of the totality principle requires that I take "a last look" at the above total to make sure that it is not unduly harsh and/or disproportionate to the degree of moral blameworthiness of the offender. In doing so, I have also considered the jump principle, especially the fact that this sentence results in something substantially more than the accused had received the last time he was sentenced for similar or the same offences. I have also considered that these offences were nonetheless extremely serious. I take note of the gap of approximately three years since the accused was last sentenced on the same or similar charges, and I have also noted that the Crown, on appeal, has not filed anything or otherwise argued that the total period of incarceration imposed by the trial judge ought to be increased. (Respondent Factum, paras. 42-43)

[57] Cumulative considerations outlined above have led me to conclude that the trial judge's determination of Mr. Mood's period of incarceration ought not to be

disturbed. This is to say, his errors did not lead to an improper calculation of what is, in my view, an appropriate period of imprisonment.

[58] As a consequence, my calculation of the sentence, as noted above, is reduced to the 1200 days' incarceration. I also impose the ancillary orders as set by the trial judge. It has not been argued that remand credit was improperly calculated, so that will remain undisturbed.

Conclusion

[59] The appeal is allowed, in part. An acquittal is entered with respect to the s. 264.1(1)(b) (threats - property) on the first Information. Also, the period of probation is removed from the sentence imposed. However, the overall period of incarceration of 1200 days, plus the ancillary orders, will remain undisturbed.

Gabriel, J.