NOVA SCOTIA COURT OF APPEAL
Citation: ***R. v. O'Brien***, 2011 NSCA 112

Date: 20111206
Docket: CAC 310964
Registry: Halifax

Between:

Marty David O'Brien (No. 2)

Appellant

v.

Her Majesty the Queen

Respondent

Judges:	Fichaud, Beveridge, Farrar JJ.A.
Appeal Heard:	April 8, 2010, in Halifax, Nova Scotia
Held:	Leave to appeal sentence is granted, but the sentence appeal is dismissed per reasons for judgment of Fichaud, J.A., Farrar, J.A. concurring; Beveridge, J.A. dissenting
Counsel:	Robert M. Gregan, for the appellant Kenneth W. Fiske, Q.C., for the respondent

Reasons for Judgment:

[1] After a trial before a judge without a jury, the Supreme Court of Nova Scotia convicted Mr. O'Brien of robbery, disguise with intent and possession of a weapon contrary to ss. 344, 351(2) and 88 of the *Criminal Code*. The judge, Justice John Murphy, sentenced Mr. O'Brien to six years, six months imprisonment.

[2] Mr. O'Brien appealed his convictions and sentence to this court. By a decision dated July 14, 2010 (2010 NSCA 61), this court overturned the convictions and ordered a new trial. The majority's reasons did not comment on the sentence appeal. My reasons, dissenting on the conviction appeal, expressed the view that the sentence appeal should be dismissed (paras. 154-63).

[3] The Crown appealed the conviction issue to the Supreme Court of Canada. By a decision dated June 9, 2011 (2011 SCC 29), the Supreme Court of Canada allowed the appeal and restored the convictions, saying nothing about sentence.

[4] It now remains for this court to deal with Mr. O'Brien's outstanding sentence appeal.

[5] My conclusion, that Mr. O'Brien's sentence appeal be dismissed, and reasons remain as stated in paras. 154-63 of this court's judgment of July 14, 2010. For reading convenience I repeat those reasons *verbatim*.

[6] The judge sentenced Mr. O'Brien to six years and six months for the robbery, two years concurrent for the mask, and three years concurrent for the weapon. The sentence was consecutive to the term of imprisonment Mr. O'Brien was already serving for other unrelated offences.

[7] Mr. O'Brien submits that the six years and six months violated the totality principle. The following extract from his factum summarizes the submission:

> The Appellant was serving prisoner at the time charges were laid. On December 12, 2004 the Appellant was convicted of the following offences: impaired driving contrary to s. 253(b) of the Criminal Code of Canada, 2 counts of theft under $5,000 contrary to s. 334(b) of the Criminal Code of Canada, possession of drugs for the purpose of trafficking contrary to s. 5(2) of the Controlled Drugs and Substances Act, 2 counts of break and enter contrary to s. 348(1) of the Criminal

> Code of Canada, 3 counts of driving while disqualified contrary to s. 259 of the Criminal Code of Canada, and 2 counts of theft contrary to s. 334 of the Criminal Code of Canada. The total sentence imposed was 60 month[s]. On May 15, 2006 the Appellant was convicted of counseling to commit robbery contrary to s. 344 of the Criminal Code of Canada. The sentence imposed was 2 years consecutive to sentence serving.
>
> On April 21, 2009 the Honourable Justice John Murphy imposed a total sentence of 6 and a half years for the offences currently under this appeal, which makes the total period the appellant has to spend in custody thirteen and a half years.
>
> In my respectful submission, as the appellant was serving prisoner at the time of the sentence, the totality principle should have an influence. The appellant was sentenced three times over the past five years. The total time of thirteen and a half years in custody would impose a crushing effect on the appellant.

[8] I am unable to agree.

[9] Mr. O'Brien, wearing a mask and wielding a large knife, robbed a solitary defenseless clerk at night.

[10] The judge's sentencing decision noted (¶ 9) that Mr. O'Brien "has been in constant conflict with the law for approximately 30 years with approximately 70 convictions for various offences, many of them serious, including a previous robbery conviction and break and enter convictions". The judge (¶ 7) properly referred to this record as an aggravating factor.

[11] As to mitigating factors, the judge said:

> [8] Frankly, there are no mitigating circumstances which have been pointed out in this case.

None were pointed out on appeal either.

[12] The sentence was within the range, given the circumstances of the offences and Mr. O'Brien's record. The judge properly referred to the decision of this court in *R. v. Longaphy* (2000), 189 N.S.R. (2d) 102 (C.A.), which said:

> [27] In my view, the sentencing judge erred in concluding that here a penitentiary term of two years or more imprisonment was not appropriate. The

> considerations to be taken into account when determining sentence for robbery have been reviewed by this court in numerous cases. It has emphasized that the primary consideration in cases of armed robbery must be protection of the public: see, for example, *R. v. Brewer* (1988), 81 N.S.R. (2d) 86 at § 8.

The judge also properly referred to *R. v. Leet* (1989), 88 N.S.R. (2d) 161 (C.A.):

> [14] Robbery is a very serious offence, carrying a maximum punishment of imprisonment for life. The sentencing court is thus left with a very wide discretion as to the penalty in any given case. Rarely is a sentence of less than two years seen for a first offence and terms ranging up to six years are commonly imposed. In the more serious robberies, including those committed in financial institutions and private dwellings, the range has generally been from six to ten years.

[13] At the sentencing, the Crown recommended 9 to 12 years, and the defence recommended 5 to 6 years. The judge's sentence was much closer to the defence's request than to the Crown's.

[14] Section 718.2(c) of the *Code* cites a totality principle respecting consecutive sentences. The sentences for the three offences here were concurrent. So Mr. O'Brien's submission relates to totality between his sentence of six years plus six months here and his existing sentences for prior convictions, to which the sentence here was consecutive. The submission effectively would turn Mr. O'Brien's prior record, for which he was serving time, into a mitigating factor instead of an aggravating factor.

[15] This court recently discussed sentencing totality in *R. v. Adams*, 2010 NSCA 42, ¶ 19-30 and 65-69. I adopt, without repeating, Justice Bateman's statement of principles in *Adams*. Mr. O'Brien's sentence is within the range, given the circumstances and his record, is not unfit, and does not offend any principle of totality under s. 718.2(c) of the *Code* or the authorities.

Fichaud, J.A.

Concurred: Farrar, J.A.

Dissenting reasons for judgment:

BACKGROUND

[16] The appellant was convicted of robbing a convenience store and was sentenced to six and one-half years. He appealed conviction and sentence. His conviction was quashed and a new trial was directed by a majority decision of this Court on July 14, 2010 (2010 NSCA 61).

[17] Our Court was unanimous that the trial judge erred in permitting the Crown to adduce bad character evidence of the appellant at trial. I wrote the majority reasons for judgment, and would not apply the proviso set out in s. 686(1)(b)(iii) of the *Criminal Code* to save the conviction. Justice Fichaud would have applied the proviso and therefore dissented. Based on that dissent, the Crown secured the right to appeal to the Supreme Court of Canada. It did so, and the appeal was successful (2011 SCC 29). As a result, the conviction was reinstated.

[18] Sentence was not before the Supreme Court of Canada. The appellant has since written to this Court on October 2, 2011 requesting consideration of his sentence appeal, since the effect of the reinstatement of the robbery conviction is to send him back to prison. Counsel for the Crown and the appellant were subsequently contacted. Both are content to rely on their earlier submissions.

[19] Justice Fichaud has already addressed the appellant's appeal from sentence (see 2010 NSCA 61, paras. 154-64). He would have granted leave, but dismiss the appeal. Justice Fichaud maintains that view. With respect, I do not agree. For the following reasons, I would grant leave and allow the appeal from sentence.

[20] The appellant contends that the trial judge erred in not properly considering the principle of totality. He argues that the imposition of the 6.5-year consecutive sentence, when coupled with the other sentences he was then serving, amounted to a total sentence of 13.5 years, which he says is excessive. To provide the necessary context to the appellant's argument factual background is required.

FACTS

[21] Shortly after 10:00 at night on October 11, 2004 the clerk in the Top of the Hill convenience store turned to face a person. That person was wearing a Halloween mask and holding a knife. Money was demanded. The clerk went to the cash register, opened it and retreated six feet. The person with the knife leaned over the cash register and scooped bills from the till and fled. Mr. O'Brien was found to be the person wearing the mask and in possession of the knife.

[22] The police were called. The store's security camera had recorded the robbery. The mask, knife and a piece of the cash register were found a short distance away. A red car was observed parked in the vicinity of the items found. It was seen to speed away shortly after the time of the robbery.

[23] The mask and knife were sent to the crime lab for DNA testing on December 13, 2004. The police suspected the appellant was the robber. He had access to a red car and they were aware that he was involved in convenience store robberies in the Amherst area. The police knew he was in custody. They interviewed him in the county jail where he was on remand. The appellant denied involvement in the robbery of the Top of the Hill convenience store.

[24] The police were aware that the appellant was sentenced on December 22, 2004 for a slew of offences committed in the Amherst area, mostly from August to December 9, 2004. He received a total sentence of four years, along with an order to provide bodily samples for analysis and inclusion in the DNA data bank. The appellant provided a sample as required, but it was not entered in the DNA data bank until January 2006.

[25] In the meantime, the crime lab had completed its testing of the mask and knife. A report was sent to Sgt. Blakeney dated April 25, 2005. A DNA profile was obtained from the mask but not from the knife. The profile was of an unidentified male. When the appellant's DNA profile from the December 2004 sentencing was entered into the DNA data bank, it matched the unidentified male DNA profile from the mask.

[26] Sgt. Blakeney then obtained a blood sample from the appellant pursuant to a warrant. That sample was then sent to the crime lab for comparison to the DNA profile from the mask. The crime lab prepared a report dated December 12, 2007 confirming a match of the appellant's DNA profile to the one found on the mask that was said to have been used in the robbery. Charges were laid on February 8, 2008. The appellant was committed to stand trial. The trial commenced on April 8 and concluded with reasons for conviction on April 9, 2009. Sentence was adjourned to April 21, 2009.

[27] On April 21, 2009 the appellant was sentenced to 6.5 years for the robbery consecutive to any other sentence he was then serving, two years concurrent for having his face masked, and three years concurrent for possession of a weapon for the purpose of committing an offence.

[28] What then was the sentence he was serving when sentenced on April 21, 2009? Tendered as exhibits at the sentence hearing were two versions of the appellant's criminal record. Impressive or appalling would be apt adjectives for it. I have already referred to the proceedings in provincial court on December 22, 2004 when the appellant was sentenced for numerous offences. The exhibits demonstrate that he was sentenced on that day on 11 offences to a total period of incarceration of four years, or 48 months. There were other ancillary orders, but they are of no consequence to the issues on this appeal. Ten of the offences occurred between August and December 9, 2004. The other was a driving offence from December 2003, for which he received one month consecutive.

[29] The offences he was sentenced for on December 22, 2004 were described in the appellant's factum as:

> 44. The Appellant was serving prisoner at the time charges were laid. On December 12, 2004 the Appellant was convicted of the following offences: impaired driving contrary to s. 253(b) of the Criminal Code of Canada, 2 counts of theft under $5,000 contrary to s. 334(b) of the Criminal Code of Canada, possession of drugs for the purpose of trafficking contrary to s. 5(2) of the Controlled Drugs and Substances Act, 2 counts of break and enter contrary to s. 348(1) of the Criminal Code of Canada, 3 counts of driving while disqualified contrary to s. 259 of the Criminal Code of Canada, and 2 counts of theft contrary to s. 334 of the Criminal Code of Canada. The total sentence imposed was 60 month(s). …

[30] The description is not quite accurate: the date of sentence was December 22, not December 12; and the total sentence imposed was 48, not 60 months.

[31] To complete the factual background, there were also charges of being a party to two robberies on November 16 and December 10, 2004. The record does not disclose when the charges were laid or any of their procedural history. What is known is that the appellant was found guilty by Scanlan J. of the second offence on April 12, 2006 (see 2006 NSSC 186). Scanlan J. imposed a sentence of two years consecutive to the appellant's previous sentence on May 15, 2006 (2006 NSSC 153).

ISSUE

[32] The issue presented is whether the trial judge correctly applied the principle of totality.

ANALYSIS

[33] Appeals by an offender from sentence are pursuant to s. 675(1)(b) of the *Criminal Code*. On such an appeal, s. 687 of the *Code* empowers the Court to "consider the fitness of the sentence appealed". This does not give carte blanche to an appeal court to substitute its views as to the appropriate sentence in lieu of that of the trial judge. Considerable deference is owed to the trial judge. The correct approach was authoritatively restated in *R. v. M. (C.A.)*, [1996] 1 S.C.R. 500 where Lamer C.J., for the full Court, succinctly wrote:

> [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.

[34] The focus of the appellant's complaint is that the trial judge failed to articulate and properly apply the totality principle. What is that principle and did the trial judge commit the error described?

[35] Totality has long been accepted as a principle of sentence. It is now found in the *Criminal Code* as one of a number of principles a court is required to take into consideration. Section 718.2 provides:

(*c*) where consecutive sentences are imposed, the combined sentence should not be unduly long or harsh;

[36] In *R. v. M. (C.A.), supra,* Chief Justice Lamer expressed the principle as follows:

> 41 Within broader parameters, the principle of proportionality expresses itself as a constitutional obligation. As this Court has recognized on numerous occasions, a legislative or judicial sentence that is grossly disproportionate, in the sense that it is so excessive as to outrage standards of decency, will violate the constitutional prohibition against cruel and unusual punishment under s. 12 of the *Charter*. See *Smith*, *supra*, at p. 1072; *R. v. Luxton*, [1990] 2 S.C.R. 711, at p. 724; *R. v. Goltz*, [1991] 3 S.C.R. 485, at pp. 498-99. However, as I noted in *Smith*, at p. 1072, "[w]e should be careful not to stigmatize every disproportionate or excessive sentence as being a constitutional violation", and thus the review of the proportionality of sentences should normally be left to the "usual sentencing appeal process" directed at the fitness of sentence.
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> 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:
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> > 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".
> >
> > Clayton Ruby articulates the principle in the following terms in his treatise, Sentencing, supra, at pp. 44-45:
> >
> > The purpose 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". A cumulative sentence may offend the totality principle if the aggregate sentence is substantially above the normal level of a sentence for the most serious of the individual offences involved, or if its

> effect is to impose on the offender "a crushing sentence" not in keeping with his record and prospects.

[37] The correct approach to the application of the principle is well settled. As noted by Fichaud J.A. in his reasons (para. 163), the principle of totality and how it ought to be applied was reviewed recently by Bateman J.A. in *R. v. Adams*, 2010 NSCA 42. Bateman J.A., there wrote:

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

See also *R. v. Rowe*, 2008 NLCA 3.

[38] The trial judge did not refer to the principle of totality in his reasons. He did refer to s. 718 and 718.1 of the *Criminal Code*. He also referred to s. 718.2(b) and (d) that direct consideration of imposing a similar sentence based on similar offences committed in similar circumstances and of restraint. The trial judge concluded there was no reasonable availability of less restrictive sentence than time in custody. This was correct, but with respect, does not tell the whole story of the principle of restraint embodied in s. 718.2(d). This principle is also not new (*R. v. C.N.H.*, [2002] O.J. No. 4918 (C.A.), at para. 29). Neither does it end at the doorstep of the prison. Doherty J.A. wrote in *R. v. Hamilton*,(2004), 189 O.A.C. 90, it also informs the issue of quantum (para. 96).

[39] The trial judge observed there were no mitigating factors or circumstances. He also properly noted the aggravating features of the robbery; that it was committed with a weapon against a lone employee, and the impact the offence had on her. The judge also viewed the lengthy (70 convictions) over almost 30 years as an aggravating factor.

[40] The trial judge also recognized that denunciation and deterrence are very important considerations in imposing a sentence for robbery. He referred to the decisions of this Court in *R. v. Longaphy* (2000), 189 N.S.R. (2d) 102, *R. v. Brewer* (1988), 81 N.S.R. (2d) 86 and *R. v. Leet* (1989), 88 N.S.R. (2d) 161 (C.A.). His reasons for selecting 6.5 years are as follows:

> [15] For the robbery offence, the section 344 offence, bearing in mind all of the considerations that I have referred to, I have concluded that the nine to 12 year range which the crown asks for is more than is appropriate in this situation, given that Mr. O'Brien has not been involved in any criminal activity for more than four years, that he as been serving sentences for the last five years. But considering also the admonition that crimes of this nature attract sentences of six to ten years, even for people without a significant criminal record, in my view the five to six years which the defence asked for is too low, and I have concluded, with respect to the robbery charge, that a sentence of six years and six months will be imposed, to be served in a federal institution, to be served consecutive to any time presently being served.

[41] The trial judge then added:

> [17] The only comment I'm going to make in making the six year, six month sentence with respect to the robbery, I've considered the total situation with respect to Mr. O'Brien and the fact that he is in custody, and has been in custody for five years, and this will be added to the end of that sentence. I have also considered that it's, although I'm not giving any credit for remand time, it's possible that in a very best case scenario, he might have been out of custody for the last month or two. So I've considered all of those factors and reached the decision which I have just indicated.

[42] With great respect for the trial judge, I am persuaded that he failed to properly consider the principle of totality and imposed a sentence that, when coupled with his other sentence, amounted to an excessive sentence. I will explain.

[43] Although the judge referred to the "total situation" of the appellant, I see no recognition that in fact the aggregate sentence he was imposing would amount to an aggregate sentence of 12.5 years incarceration. Nor, did the trial judge appreciate that all of the offences involved were related in time and place. A consecutive sentence for the robbery of October 11, 2004 was certainly appropriate, but the commission of that offence was part of a string of offences committed by the appellant in the fall of 2004, all apparently linked to his drug

addiction. There was no last, long hard look at the effect of the sentence being imposed to see if it was excessive in the circumstances.

[44] In isolation, the sentence of 6.5 years was at the very upper limit, if not over it, for the range of sentence in these circumstances and for this offender. The cases referred to by the trial judge are referred to in part by my colleague. *Longaphy, supra* has strong parallels to the case under appeal. The offender had a history of substance abuse. He was no youthful offender. He had 12 prior convictions including four for robbery. He had been sentenced to multiple penitentiary terms, including three and seven year terms. He robbed a convenience store at knifepoint. The trial judge imposed a conditional sentence. The Crown appealed. The offender had by then breached his conditional sentence order twice, and had been on parole at the time of the robbery offence. On appeal, a sentence of five years was imposed.

[45] In *R. v. Leet, supra*, the first time offender had been a probation officer. He committed a series of robberies of banks from October 1987 to February 1988 while masked and using an imitation handgun. He made off with large amounts of cash. The motive was he had been short of money. By the time of sentence, full restitution had been made. He was sentenced at trial to a total of three years. On appeal, the sentences were increased to a total of 6.5 years. It was in this context, Chipman J.A., offered the following:

> [14] Robbery is a very serious offence, carrying a maximum punishment of imprisonment for life. The sentencing court is thus left with a very wide discretion as to the penalty in any given case. Rarely is a sentence of less than two years seen for a first offence and terms ranging up to six years are commonly imposed. In the more serious robberies, including those committed in financial institutions and private dwellings, the range has generally been from six to ten years. See *R. v. Brewer* (1988), 81 N.S.R. (2d) 86.

[46] *R. v. Brewer* (1988), 81 N.S.R. (2d) 86 (C.A.) also involved a robbery of a financial institution. The offender was 39 years of age with a lengthy criminal record including a previous conviction for robbery. He entered the Provincial Credit Union on the 8th floor of the Provincial Building, and armed with a sawed off shotgun, which he used to threaten and prod the teller, made off with almost $16,000. Jones J.A. commented:

> Turning to the appeal against sentence: This was a very serious offence. The appellant is thirty-nine years of age and has a considerable record for theft-related offences, commencing in 1963 and including a conviction for robbery in 1972. Counsel have carefully reviewed in their factums sentences imposed by this Court in similar cases. In the more serious robberies, which include robberies committed in financial institutions and private dwellings, the range has generally been from six to ten years.

[47] Although the offence here was serious, it was not in a private dwelling nor a financial institution. The robbery lasted less than a minute. No firearm nor actual violence was used. However, even if the dictum by Chipman J.A. is accepted that terms up to six years are commonly imposed, all of the circumstances and principles of sentence must be considered in arriving at a fit and proper sentence, including that of totality.

[48] My colleague reasons that the appellant's submissions on totality would "effectively turn Mr. O'Brien's prior record, for which he was serving time, into a mitigating factor instead of an aggravating factor" (para. 162). I make two observations. First, the offences for which the appellant was serving a sentence, were not prior to the present offence, and hence could never be an aggravating factor'. To be aggravating in the sense of cogent evidence of a need to more meaningfully stress specific deterrence, he would have had to have been charged, convicted and sentenced prior to the commission of the robbery. That was not the case.

[49] Secondly, the reality is, the principle of totality does reduce what might otherwise be a fit and proper sentence because of other crimes an offender has committed. In that sense it can be said it does mitigate in the sense that it lessens the total sentence that would otherwise be imposed. Southin J.A. in *R. v. Mulvahill*, [1991] B.C.J. No. 3516, (1991), 69 C.C.C. (3d) 1 referred to it succinctly as follows (p. 13):

> 1. The "totality" principle. This means that if a man commits say ten break ins and enterings for any one of which he might receive a sentence of one-year's imprisonment, he ought not to be sentenced to one year on each to be served consecutively as 10 years is too much.

[50] The principle also applies where the offender is serving a sentence for other offences. The following cases demonstrate. In *R. v. Raymond* (1982), 53 N.S.R.

(2d) 438 (C.A.), the Crown appealed a two-year sentence imposed at trial. The offender robbed a convenience store while masked and armed with a knife. He had previously been convicted of robbery and rape, and was on day parole when he committed the robbery. Macdonald J.A. considered the two year consecutive sentence to be inadequate, since a sentence of three years imprisonment is usually called for in relation to such an offence. The sentence was increased to four years, and would have been somewhat higher if it were not for the totality principle.

[51] In *R. v. Gertz* (1983), 57 N.S.R. (2d) 279 (C.A.), the offender entered a convenience store, pulled a knife out and demanded money. The clerk screamed for her husband, and the offender fled. The offender was on parole at the time of the offence. He had an alcohol problem, but his presentence report was not favourable. The trial judge imposed a three-year concurrent sentence. The Crown appealed, seeking a lengthier term. This Court upheld the sentence, but corrected the oversight in not making the three-year sentence consecutive.

[52] In *R. v. Francis* (1984), 63 N.S.R. (2d) 352 (C.A.) the appellant had a damaging record. He was serving a four-year sentence for robbery. Out on leave for Christmas, he failed to return to jail as directed. On January 10, 1984 he entered a convenience store wearing a mask, armed with a rifle, and robbed the thirteen-year old clerk. When initially confronted by a police officer, he pointed the rifle at the officer, disarmed that officer, and then fled with the officer's sidearm. His presentence report was not favourable. At trial, sentences totaling 10 years consecutive were imposed. This was broken down to six years for the robbery, three years for pointing the firearm at the police officer, and the mandatory one year minimum for use of a firearm in the commission of the robbery. His total sentence to be served was one of approximately 13 years. On appeal, this Court applied the totality principle, reduced the total sentence to one of nine years, to be served concurrently to the prison sentence being served by the appellant at the time the offences were committed.

[53] In my opinion, in this case, the trial judge failed to take a last, long look at the total sentence of 12.5 years in imposing the sentence of 6.5 years consecutive. In these circumstances, it is excessive in light of the sentence the appellant was already serving for offences committed in and around the same time frame. Having found an error in principle, the normal substantial deference owed to the

discretion exercised by the trial judge evaporates and this Court must impose a sentence it thinks fit (see *R. v. Bernard*, 2011 NSCA 53, at paras. 25-30).

[54] It is obvious that the appellant has struggled with a drug addiction throughout his adult life. No dispute was taken with that fact at the sentencing hearing. As noted by Scanlan J. in May 2006, the appellant had by that time, completed two community college courses and undergone high intensity drug rehabilitation. The longest sentence the appellant had received prior to December 22, 2004 was three years in 1985 for a robbery. All of the other sentences were fines, suspended sentences, and periods of incarceration in provincial institutions.

[55] Counsel for the appellant on appeal (not counsel at trial) argues that an appropriate sentence in the circumstances would be one of two to four years consecutive. I agree, and would impose a sentence of four years consecutive for the robbery to the sentences the appellant was then serving. The other sentences for wearing a mask and possession of a weapon would remain the same.

Beveridge, J.A.