NOVA SCOTIA COURT OF APPEAL
Citation: *R. v. Probert*, 2021 NSCA 82

Date: 20211214
Docket: CAC 505152
Registry: Halifax

Between:

Steven Patrick Probert

Appellant

v.

Her Majesty the Queen

Respondent

Judge:	The Honourable Justice Joel E. Fichaud
Appeal Heard:	November 19, 2021, in Halifax, Nova Scotia
Subject:	Criminal law – sentencing – concurrent or consecutive terms – totality
Summary:	Mr. Probert was convicted of five offences for break and enter and one for credit card fraud. Most of the offences occurred over two consecutive days. The Provincial Court judge imposed individual sentences totalling six years of incarceration less credit for time served. Two of the sentences were concurrent with the others while the rest were consecutive. To arrive at this total sentence, the judge reduced the terms of incarceration by over 50% from the term that he determined would apply but for the considerations of concurrency and totality.
Issue:	Mr. Probert appealed his sentences. He submitted that his sentences should be concurrent.

Result: The Court of Appeal dismissed the appeal. The sentencing judge applied the principles respecting length of sentence, concurrency and totality that have been approved by the authorities, including precedent from the Court of Appeal. The judge made no error of principle and the sentences were not demonstrably unfit.

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Judges:	Derrick, Fichaud and Beaton JJ.A.
Appeal Heard:	November 19, 2021 in Halifax, Nova Scotia
Held:	Appeal from sentence dismissed per reasons for judgment of Fichaud J.A; Derrick and Beaton JJ.A. concurring
Counsel:	The Appellant on his own behalf Glen A. Hubbard for the Respondent

Reasons for judgment:

[1] Mr. Probert pleaded guilty to five counts of breaking and entering a dwelling, contrary to s. 348 of the *Criminal Code*, and one count of fraud involving a credit card, contrary to s. 342. By an oral Decision on March 22, 2021, Provincial Court Judge Perry Borden imposed sentences for the individual offences totalling six years of incarceration less credit for pre-sentence custody, leaving a global sentence of five years and 90 days going forward. Mr. Probert appeals his sentence.

[2] The issue is whether all the sentences should be concurrent.

Background

[3] To summarize the circumstances of the offences:

- On March 5, 2020, Mr. Probert entered a dwelling on York Street in Halifax. The building was under renovation. The construction workers entered for their shift and noticed damaged windows, missing tools and blood droplets. Later the blood was matched to Mr. Probert's DNA.
- On September 8, 2020, Mr. Probert entered a dwelling on Elm Street in Halifax. He took a camera, iPhone, jewellery and clothing. Later a fingerprint at the site was matched to Mr. Probert.
- On September 12, 2020, Mr. Probert entered a dwelling on Church Street in Halifax. A tenant came downstairs and found him in the living room. A credit card and debit card were missing. Banking records for the cards and the video surveillance of a convenience store nearby showed Mr. Probert using the cards. In addition to a break and enter, this incident generated the fraud charge.
- Later on September 12 or early on September 13, 2020, Mr. Probert entered a dwelling on Wellington Street in Halifax, after breaking the front door window, then took jewellery and a computer hard drive.
- At 6:00 a.m. on September 13, 2020, the Halifax Regional Police responded to a break and enter in progress at a dwelling on South Park Street in Halifax. Residents were present. Police arrested Mr. Probert at the scene.

> A search located the jewellery, computer hard drive and ID belonging to the resident on Wellington Street.

[4] On March 19, 2021, in the Provincial Court, Mr. Probert pleaded guilty to these offences. Before accepting the pleas, Judge Borden asked whether Mr. Probert agreed with the Crown's factual summaries. Subject to a few variations immaterial to this appeal, Mr. Probert agreed.

[5] The judge turned to sentencing. His unreported decision ("Sentencing Decision") notes:

> Mr. Probert was at times represented by counsel. However, despite having retained counsel, it was his preference to represent himself at sentencing.

[6] As Mr. Probert did not cooperate with probation services, no pre-sentence report was completed. The Sentencing Decision says:

> The court requested a pre-sentence report to assist with the sentencing of Mr. Probert. On March 8, 2021, Probation Officer John Curry wrote the court advising Mr. Probert declined to have a pre-sentence report completed. At the commencement of the sentencing hearing, I inquired whether he wished to have a pre-sentence report completed and he declined.

[7] The sentence comprised the following:

- For the break and enter of March 5 on York Street, one year less Mr. Probert's pre-sentence custody of 275 days, for a 90-day sentence going forward;
- For the break and enter of September 8, 2020 on Elm Street, one year consecutive;
- For the break and enter of September 12 on Church Street, two years concurrent to the other sentences, plus four months concurrent to the other sentences for the credit card fraud at the convenience store;
- For the break and enter of September 12 or 13 on Wellington Street, one year consecutive;
- For the break and enter of September 13 on South Park Street, three years consecutive.

The total was six years, less 275 days for pre-sentence custody, being five years and 90 days going forward. Later I will review the judge's reasons.

[8] Mr. Probert had 45 prior convictions including six for break and enter.

Issue

[9] Mr. Probert appeals his sentence. He says his activity was a single spree for which all his sentences should be concurrent. He asks for a global sentence of two years less 275 days pre-sentence custody for a go forward term of fifteen months.

Standard of Review

[10] The Court of Appeal may overturn a sentence only if the sentencing judge erred in principle or the sentence is demonstrably unfit. To summarize these principles:

- An appealable error in principle includes an error of law, or the failure to consider a relevant factor or the over-emphasis of an appropriate factor, provided in each of these cases the error impacted the sentence.
- The fitness inquiry focuses on the objectives of sentencing set out in the *Criminal Code* or the authorities. To overturn a sentence as unfit, it is insufficient that the appeal court would just balance the factors differently. Rather, the sentence must be clearly excessive or clearly inadequate, or it must represent a substantial or marked departure from the governing principle of proportionality.

See: *Criminal Code*, s. 687(1); *R. v. Lacasse*, [2015] 3 S.C.R. 1089, 2015 SCC 64, paras. 39-44, 49, 52-53, per Wagner J. for the majority; *R. v. Parranto*, 2021 SCC 46, paras. 13-15, per Brown and Martin JJ. for the plurality; *R. v. Friesen*, 2020 SCC 9, para. 26, per Wagner C.J. and Rowe J. for the Court; *R. v. Alcorn*, 2021 NSCA 75, paras. 25-27, per Derrick J.A.; *R. v. Newman*, 2020 NSCA 24, para. 31, per Van den Eynden J.A.; *R. v. Espinosa Ribadeneira*, 2019 NSCA 7, para. 34, per Oland J.A.

The Sentencing Judge's Approach

[11] The judge considered the issue that arises on this appeal, *i.e.* the interplay of three factors: the *prima facie* sentence per offence, whether the sentences should be consecutive or concurrent and totality. The Sentencing Decision says:

> Our Court of Appeal has directed that when sentencing for multiple offences, a sentencing judge should first determine the appropriate sentence for each individual conviction and then go on to decide whether the sentences should be consecutive or current [*sic* "concurrent"] before ultimately taking a last look at the total sentence and reducing it, if needed, to reflect totality.

[12] This passage correctly summarized the approach enunciated by Bateman J.A. in *R. v. Adams*, 2010 NSCA 42:

> [23] In sentencing multiple offences, this Court has, almost without exception, endorsed the approach to the totality principle consistent with the methodology set out in *C.A.M.*, *supra* [*R. v. M. (C.A.)*, [1996] 1 S.C.R. 500, per Lamer C.J.C. for the Court]. [citations omitted] The judge is to fix a fit sentence for each offence and determine which should be consecutive and which, if any, should be 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 reduced. [citations omitted]

[13] The judge began with *Adams*' first step. Judge Borden said:

> If Mr. Probert were sentenced for all these offences individually without consideration for totality, I would impose the following sentence. For the break and enters into residences, it would be three years, times five, equalling 15 years. The use of the credit card would be six months.

[14] Several times this Court has held that three years or more is a fit sentence for a break and enter: *R. v. McAllister*, 2008 NSCA 103, para. 38, per Oland J.A.; *Adams*, para. 38, citing *R. v. Zong*, [1986] N.S.J. No. 207 (S.C.A.D.), per Clarke C.J.N.S. for the Court (involving a break in to a drugstore, not a residence); R. *v. Publicover*, 2021 NSCA 78, at para. 30; *Alcorn*, paras. 34-51. Of course, a sentence for break and enter is always subject to the consideration of the principles of sentencing in the *Criminal Code*, any mitigating and aggravating circumstances and the overall principle that "sentencing ranges and starting points are guidelines, not hard and fast rules": *Friesen*, para. 37; *Alcorn*, para. 51.

[15] Here the Sentencing Decision considered the circumstances of the offences, the balancing of societal goals of sentencing with Mr. Probert's moral blameworthiness, the purposes of sentencing set out in ss. 718 through 718.2 of the

Code, the aggravating and mitigating circumstances, parity and range, proportionality to the offence's gravity, Mr. Probert's degree of responsibility and lastly, totality. The judge said denunciation and deterrence were primary considerations. Though rehabilitation was relevant, the judge noted Mr. Probert's record suggests rehabilitation has had little impact.

[16] An aggravating circumstance is the presence of a resident in the home during the break in: *Alcorn*, para. 41. Two of Mr. Probert's break and enters occurred while a resident was present. Further, Mr. Probert had a significant criminal record, including six convictions for break and enter. These factors would tend to elevate the period of his incarceration.

[17] The judge made no error in his conclusion that, subject to the considerations of concurrency and totality, the sentences should be three years for each break and enter and six months for the credit card fraud.

[18] Judge Borden then considered *Adams*' second and third steps – *i.e.* concurrency and totality – together. He said:

> The next consideration is to whether the sentence should be concurrent versus consecutive and the principle of totality. Because our Court of Appeal has instructed that whether a sentence is concurrent or consecutive to each doesn't matter much as long as the global sentence is appropriate. I will consider these two concepts together.

[19] I assume the judge's reference was to *Adams*, where Bateman J.A. said:

> [58] However, in giving effect to totality, this Court has commented that the law respecting concurrency and consecutivity need not be slavishly applied. In *R. v. Hatch* [(1979), 31 N.S.R. (2d) 110 (S.C.A.D.)], MacKeigan C.J.N.S. wrote:
>
> > 7 The choice of consecutive versus concurrent sentences does not matter very much in practice so long as the total sentence is appropriate. Use of the consecutive technique, when in doubt as to the closeness of the nexus, ensures in many cases that the total sentence is more likely to be fit than if concurrent sentences alone are used. Conversely, unthinking use of concurrent sentences may obscure the cumulative seriousness of multiple offences.
>
> [59] In *The Law of Sentencing*, (Toronto: Irwin Law, 2001) Professor Allan Manson says, to similar effect, at p., 102:
>
> > There has been some controversy over how to calculate individual sentences when the totality principle operates to cap the global sentence.

> One method would be to artificially reduce the duration of the component sentences so that when grouped together consecutively they add up to the appropriate global sentence. This has been rejected by most courts which prefer to impose appropriate individual sentences and then order that some, or all of them, be served concurrently to reach the right global sentence. The latter method is preferable because it ensures frankness in that each conviction will generate an appropriate sentence, whether served concurrently or consecutively. Moreover, the impact of individual sentences will be preserved even if an appeal intervenes to eliminate some of the elements of the merged sentence.

See also *Adams*, paras. 64-66, for the application of concurrency and totality.

[20] Bateman J.A. quoted *Hatch*, where Chief Justice MacKeigan cited "the closeness of the nexus" – a key factor for concurrency. *Adams* acknowledges the principles governing concurrency include some sentencing discretion to consider the overall impact of the individual sentences. Hence the assessment of "overall impact" does not exclusively occupy the domain of totality.

[21] Though the assessment of overall impact may be shared between the criteria of concurrency and totality, each criterion is governed by principles. The appellate court is to consider whether those principles were followed. To summarize the principles:

- As to concurrency, in *Friesen*, the Chief Justice and Justice Rowe said:

> 155 The decision whether to impose a sentence concurrent with another sentence or consecutive to it is guided by principles. While the issue warrants further discussion in another case, the general rule is that offences that are so closely linked to each other as to constitute a single criminal adventure may, but are not required to, receive concurrent sentences, while all other offences are to receive consecutive sentences [citations omitted].

Noteworthy in this passage is the comment that the offences "may, but are not required to, receive concurrent sentences". The sentencing judge has a discretion, as Justice Sopinka for the majority wrote in *R. v. McDonnell*, [1997] 1 S.C.R. 948:

> [46] In my opinion, the decision to order concurrent or consecutive sentences should be treated with the same deference owed by appellate courts to sentencing judges concerning the length of sentences ordered.

> The rationale for deference with respect to the length of the sentence, clearly stated in both *Shropshire* [*R. v. Shropshire*, [1995] 4 S.C.R. 227] and *M.(C.A.)* [*R. v. M.(C.A.),* [1996] 1 S.C.R. 500], applies equally to the decision to order concurrent sentences or consecutive sentences. In both setting duration and the type of sentence, the sentencing judge exercises his or her discretion based on his or her first-hand knowledge of the case; it is not for an appellate court to intervene absent an error in principle, unless the sentencing judge ignored factors or imposed a sentence which, considered in its entirety, is demonstrably unfit. The Court of Appeal in the present case failed to raise a legitimate reason to alter the order of concurrent sentences made by the sentencing judge; the court simply disagreed with the result of the sentencing judge's exercise of discretion, which is insufficient to interfere.

- For totality, *Adams*, para. 23, said the judge "takes a final look at the aggregate sentence" and determines whether "the total exceeds what would be a just and appropriate sentence".

[22] Here, the sentencing judge acknowledged Mr. Probert's offences were discrete for each victim but had an element of continuity or linkage for Mr. Probert:

> In general, sentences for offences arising out of the same transaction will be concurrent. However, this principle doesn't necessarily apply where the offences protect different societal interests.
>
> A series of spree offences may properly attract concurrent sentences, as discussed in *R. v. Bratzer* [2001 NSCA 166], depending on the factors such as timeframe within which the offences occurred, the similarity of the offences, whether or a new intent or impulse intent initiated each of the offences, and whether the total sentence is fit and proper under the circumstances [citations omitted]
>
> Four of the offences that Mr. Probert pled guilty to occurred over a three-day period. These are clearly discrete offences. However, they are proximate in time and have similar features to each other and many are within the same geographical area.
>
> In these circumstances, imposing a 15-year sentence here would be unduly harsh.

Consequently, the judge applied both concurrency and totality. The judge said he suspected "many of these offences were fueled by impulse and/or drug and alcohol consumption." He treated the mid-spree offences at Church Street as concurrent, and the others as consecutive. He applied totality by considering the overall impact, as discussed in *Adams*, to reduce the sentences for March 5 (York Street), September 8 (Elm Street) and September 12 or early September 13 (Wellington

Street) to one year each (instead of three years each). The sentences for September 12 (Church Street) and September 13 (South Park Street), where in each case there was an aggravating factor of occupants in the home, imposed longer terms (two and three years incarceration respectively).

[23] Before any credit for pre-sentence custody, the application of concurrency and totality more than halved the overall sentence from 15 years plus six months to six years.

Mr. Probert's Submission

[24] Mr. Probert submits that all the break and enters comprised a single enterprise and should be sentenced concurrently.

[25] I respectfully disagree.

[26] The break and enters involved separate victims in separate dwellings at different times. Those victims represent different protected interests. They shared no nexus or commonality. These factors entitled the judge to deem the offences as sufficiently "discrete" to order consecutive sentences: *e.g.*: *R. v. Lee*, 2018 BCCA 428, para. 18, per Dickson J.A. for the Court; *R. v. Crevier*, 2015 ONCA 619, para. 129, per Rouleau J.A. for the Court.

[27] The circumstances presented some continuity of criminal behaviour from Mr. Probert's perspective that impacted discrete protected interests for each victim. The judge was entitled to reflect this duality by exercising his sentencing discretion to prescribe an element of concurrency balanced by a residue of consecutive periods of incarceration.

Conclusion

[28] The judge made no error of principle and the sentence is not demonstrably unfit. I would dismiss the appeal.

Fichaud J.A.

Concurred:

Derrick J.A.

Beaton J.A.