NOVA SCOTIA COURT OF APPEAL
Citation: *R. v. Hann*, 2024 NSCA 19

Date: 20240216
Docket: CAC 517954
Registry: Halifax

Between:

Troy Robert Hann

Appellant

v.

His Majesty the King

Respondent

Judge:	The Honourable Justice Elizabeth Van den Eynden
Appeal Heard:	November 24, 2023, in Halifax, Nova Scotia
Subject:	*Criminal Code*, ss. 264.1(1)(a), 88(1), 344(1)(a), 348(1)(b), unreasonable verdict, misapprehension of facts, ineffective assistance of counsel, fresh evidence, fit sentence
Summary:	The appellant was convicted of uttering threats, possession of a weapon for a dangerous purpose, robbery and break and enter. He was sentenced to a five-year term of imprisonment. After remand credit and a reduction for institutional conditions, remaining go forward sentenced to be served was 26 months. Appellant asserts: the verdicts are unreasonable, the judge misapprehended the facts, made errors of law and imposed an unfit sentence. He also made allegations of ineffective assistance of counsel and sought to introduce fresh evidence.
Issues:	1. Is the verdict unreasonable? 2. Did the judge misapprehend the evidence or err in law? 3. Was counsel ineffective? 4. Did the judge err in imposing sentence? 5. Should the fresh evidence be admitted?
Result:	Motion for fresh evidence dismissed. Appeal against conviction dismissed. Leave to appeal sentence denied. Among other deficiencies, the fresh evidence could not have affected the

results in the court below. The appellant did not establish any ground that called the convictions into question nor was there any merit to his claims of ineffective counsel. No error was identified in the judge's sentence decision. The sentence imposed satisfied the fundamental principle of proportionality.

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Judges:	Farrar, Fichaud, Van den Eynden JJ.A.
Appeal Heard:	November 24, 2023, in Halifax, Nova Scotia
Held:	Motion for fresh evidence dismissed; leave to appeal sentence denied; and appeal dismissed, per reasons for judgment of Van den Eynden J.A.; Farrar and Fichaud JJ.A. concurring.
Counsel:	Troy Robert Hann, on his own behalf Glenn Hubbard, for the respondent

Reasons for judgment:

Overview

[1] The appellant (Mr. Hann) was convicted of the following offences under the *Criminal Code*: uttering threats (s. 264.1(1)(a)), possession of a weapon for a dangerous purpose (s. 88(1)), robbery (s. 344(1)(a)), and break and enter (s. 348(1)(b)). Mr. Hann was sentenced to a five-year term of imprisonment. After factoring in remand credit and a reduction for institutional conditions relating to the COVID pandemic, Mr. Hann's remaining go forward sentence was 26 months. Judge Ann Marie Simmons of the Nova Scotia Provincial Court was the presiding judge. Her comprehensive decisions on conviction and sentence were both delivered orally and are unreported.

[2] Mr. Hann appeals against conviction and sentence. He claims the guilty verdicts are unreasonable, the judge misapprehended the facts and made errors of law. He further alleges his counsel was ineffective. Mr. Hann also complains about the length of the sentence imposed and believes he has served more time than the judge ordered. Mr. Hann also applied to adduce fresh evidence on appeal.

[3] Mr. Hann bears the onus of persuading the panel appellate intervention is warranted. Similarly, he must satisfy us the proposed fresh evidence meets the test for admissibility.

[4] With respect, Mr. Hann offers nothing more than unfounded statements that the judge committed reviewable error in convicting him and when imposing sentence. The same can be said about his complaints respecting counsel. Mr. Hann has not established any grounds that warrant our intervention, nor are any apparent on the record. Further, the proposed fresh evidence fails the admissibility test. In addition to other shortcomings, the proposed evidence would not have affected the result in the court below.

[5] I would dismiss the motion for fresh evidence and the appeal against conviction. I would decline to grant leave to appeal sentence. My following reasons elaborate.

Background

[6] The offences Mr. Hann was convicted of arose from a home invasion robbery. The judge summarized:

> 1. On October 22nd, 2020 Troy Hann committed a series of offences all related to an event that occurred at … the home of the victim, …
> 2. On that date, Mr. Hann and another man entered the home at approximately 5:45am without [the victim's] knowledge or permission.
> 3. Mr. Hann possessed an object that [the victim] believed was a handgun. Mr. Hann and the other man entered, went up the steps into the living room area where they met up with [the victim].
> 4. Mr. Hann pointed the thing, the weapon, at [the victim] demanded, and did take thirty dollars that [the victim] had in his wallet. The other man brandished a weapon [the victim] believed to be a hatchet or a hammer with a claw on the end.
> 5. After the money was turned over, Mr. Hann determined that they should look for other valuables in [the victim's] bedroom on the bottom level of the split entry home. Mr. Hann and the other person went down the stairs first with [the victim] following behind. As [the victim] reached the landing of the front door, he was able to get out of the home, run down the street and the police were called.
> 6. During the altercation Mr. Hann said that if [the victim] called 911 he would put a bullet in his head. The events were short lived, perhaps, five minutes.
> 7. In simple terms this was a home invasion robbery. ...

[7] Mr. Hann was represented by counsel when his trial commenced. Partway through the proceedings, the solicitor/client relationship broke down and counsel for Mr. Hann was permitted to withdraw from the record. Notwithstanding encouragement from the judge that Mr. Hann consider retaining other counsel, he chose to represent himself for the balance of the trial.

[8] The judge was satisfied the Crown established, beyond a reasonable doubt, that Mr. Hann uttered threats, possessed a weapon for a dangerous purpose, and committed robbery and break and enter. Convictions were entered under ss. 264.1(1)(a), 88(1), 344(1)(a) and 348(1)(b) of the *Criminal Code*.

[9] Mr. Hann decided to retain counsel to assist him during the sentencing hearing. His counsel urged a custodial sentence in the three-to-four-year range. The Crown sought a sentence in the six-to-seven-year range.

[10] In crafting a fit sentence, the judge considered, along with other required factors, Mr. Hann's prior criminal record. She said:

> 35. Mr. Hann's prior criminal record forms part of these proceedings and has a very meaningful impact upon the decision I have to make today.

[11] The Crown reviewed Mr. Hann's prior record in its sentence submissions to the judge:

> CRIMINAL RECORD
>
> 29. Mr. Hann has a lengthy criminal record beginning in 1995 with his retainable youth record. The entirety of his criminal record is over 40 convictions, with many being serious in nature. He has been sentenced to Federal terms of imprisonment four separate times, some taking place in Ontario. A summary of Mr. Hann's criminal record reveals the following:
>
> - 6 prior convictions for Robbery;
> - 9 prior convictions for Breaking and Entering and 1 conviction for being Unlawfully in a Dwelling Home;
> - 2 prior convictions for Assault with a Weapon;
> - l prior convictions for Common Assault;
> - 1 prior conviction for Pointing a Firearm;
> - 3 prior convictions for Impersonating a Police Officer;
> - 2 prior convictions for drug related offences, 1 being Possession for the Purpose of Trafficking;
> - 1 prior conviction for Sexual Interference and 1 prior conviction for Indecent Act;
> - 6 prior convictions for minor property crimes
>
> 30. It is the position of the Crown that Mr. Hann's criminal record significantly increases his degree of responsibility for the index offences, particularly the fact that his most prevalent convictions are for Robbery and Breaking and Entering, which are the substantive offences before the Court. Three of the four prior terms of Federal imprisonment have been related to convictions for these two offences, the most recent of which was a five year sentence. With the above in mind, denunciation and deterrence, both specifically and generally are the paramount sentencing considerations as well as protection of the public.

[12] During the course of the trial, the judge became aware that Mr. Hann was convicted in unrelated proceedings of assaulting the victim. The judge explained what use she could make of this conviction in her sentencing of Mr. Hann:

> 39. During the course of the trial I learned that Mr. Hann has been convicted of committing an assault on [the victim], and on June the 11th of 2021 he was

> sentenced to a period of six months. That conviction is relevant only in the sense that when I assessed the quantum of pretrial custody that sentence needs to be deducted from the total amount of pretrial custody because it's in the middle of the period of time that I'm looking at. But otherwise, that conviction predates these offences and so I don't take it into consideration.

[13] The judge imposed a custodial sentence of four years and six months. After factoring in remand credit, Mr. Hann was sentenced to a custodial period of 26 months on a go forward basis. The judge reasoned:

> 120. In sum, then I accept there is a range of sentence that I should carefully consider in relation to home invasion offences as I have discussed in the authorities. Those sentences reflect the need to emphasis denunciation and deterrence and to send [a] meaningful message that invasion of a person's home and violent conduct therein will result in a meaningful penitentiary sentence.
>
> …
>
> 125. I must consider the jurisprudence with the facts of this particular offence in mind. Of course, Mr. Hann's prior criminal record does have meaningful impact upon the analysis given the number of prior convictions for related offences.
>
> 126. I reach the conclusion that the appropriate sentence here in totality would be in the range of five years. I consider this an appropriate case to reduce the sentence on the basis of the collateral consequences of serving pretrial custody during the pandemic and/or treating those consequences as a mitigating feature. The conditions in the institution have been very difficult. This is not comment upon the staff at the institution, simply the reality of the impact of the pandemic and the physical and human resources available to manage the public health restrictions necessary to protect the health of the inmates and the staff at the institution.
>
> 127. So, in the end I reached the conclusion that a sentence of four years and six months is appropriate. Taking into account the pretrial custody that has been served, giving Mr. Hann credit, as he is entitled for 1.5 days of pretrial custody for every day in custody, and also taking into account the fact that a six month sentence was imposed in the interim. I reach the conclusion that a sentence on a go forward basis the sentence ought to be one of 26 months in custody.
>
> …
>
> 129. … [on] the offence of break and enter, I impose a sentence of 26 months to be served on a go forward basis. … the robbery I impose a sentence of 26 months concurrent to be served on a go forward basis. … the threatening charge, in my view, a sentence of 6 months concurrent is appropriate. That, of course, time has served. And … the s. 88 offence. I'm also of the view that a sentence of

> 6 months concurrent would have been appropriate that is the total sentence. So that sentence also [has] been served.

[14] The judge also imposed several ancillary orders, none of which are challenged on appeal.

[15] In Mr. Hann's Notice of Appeal, he lists three grounds:

- unreasonable verdict;
- misapprehension of facts; and
- error of law.

No details are provided.

[16] In Mr. Hann's appeal submissions, the complaints expand to include concerns with his trial counsel's effectiveness as it relates to his receipt of Crown disclosure after her discharge. Mr. Hann also questioned the effectiveness of counsel he retained to assist in his sentencing hearing. Additional background respecting these latter complaints will be discussed later in my analysis.

Issues

[17] The grounds of appeal can be framed as follows:

1. Is the verdict unreasonable?
2. Did the judge misapprehend the evidence or err in law?
3. Was counsel ineffective?
4. Did the judge err in imposing sentence?

[18] The appellate standards of review these grounds attract are set out in my analysis. I will address the motion for fresh evidence before analyzing the grounds of appeal.

Motion for fresh evidence

[19] Mr. Hann seeks to introduce fresh evidence on appeal. The evidence primarily consists of: communications between Mr. Hann and his former trial counsel, institutional prison/correctional records respecting his sentence calculation and statutory release date, court documents such as his warrant of committal, prohibition order, and a *habeus corpus* application filed in the Nova

Scotia Supreme Court, all of which are extensively marked-up with Mr. Hann's comments. Additionally, he submitted numerous written commentaries he views as relevant to his appeal.

[20] In *R. v. West*, 2010 NSCA 16, this Court explained the framework for admitting fresh evidence:

> [28] Section 683(1) of the **Criminal Code** permits the Court of Appeal, "where it considers it in the interests of justice", to allow the introduction of fresh evidence. In R**. v. Wolkins**, 2005 NSCA 2, Cromwell J.A. (as he then was) reviewed the applicable principles:
>
> > [57] Both the SCAC and this Court have a wide discretion to admit new evidence on appeal where it is in the interests of justice: **Criminal Code**, s. 683(1). Case law has structured the exercise of this discretion in the various contexts in which new evidence may be advanced.
> >
> > [58] Fresh evidence tends to be of two main types: first, evidence directed to an issue decided at trial; and second, evidence directed to other matters that go to the regularity of the process or to a request for an original remedy in the appellate court. The legal rules differ somewhat according to the type of fresh evidence to be adduced. …
> >
> > [59] Fresh evidence on appeal which is directed to issues decided at trial generally must meet the so-called **Palmer** test. …
> >
> > …
>
> [61] The other category of fresh evidence concerns evidence directed to the validity of the trial process itself or to obtaining an original remedy in the appellate court. In these sorts of cases, the **Palmer** test cannot be applied and the admissibility of the evidence depends on the nature of the issue raised. For example, where it is alleged on appeal that there has been a failure of disclosure by the Crown, the focus is on whether the new evidence shows that the failure may have compromised trial fairness: … Where the appellant alleges that his trial counsel was incompetent, the fresh evidence will be received where it shows that counsel's conduct fell below the standard of reasonable professional judgment and a miscarriage of justice resulted: …

[21] The *Palmer* test, set out in *R. v. Palmer*, [1980] 1 S.C.R. 759, is as follows:

> (1) The evidence should generally not be admitted if, by due diligence, it could have been adduced at trial provided that this general principle will not be applied as strictly in criminal cases as in civil cases;

(2) The evidence must be relevant in the sense that it bears upon a decisive or potentially decisive issue in the trial;

(3) The evidence must be credible in the sense that it is reasonably capable of belief; and

(4) It must be such that if believed it could reasonably, when taken with the other evidence adduced at trial, be expected to have affected the result.

Further, as stated in *West*:

> [34] The fresh evidence could only affect the result, under **Palmer**'s fourth factor, if it is admissible under the usual rules of evidence that govern criminal proceedings. Section 683(1) does not dispense with the law of evidence. …

[22] Other than placing the above noted materials before the Court in bulk,[1] Mr. Hann did not address the test for admitting fresh evidence, at least not to any discernible or meaningful degree. Thus, it is not clear whether his proposed fresh evidence is directed to an issue decided at trial or the regularity of the trial process itself or both. And even though Mr. Hann proposes fresh evidence, he also suggests the matters he complains of on appeal are apparent on the face of the lower court record—something which would render his motion for fresh evidence unnecessary.

[23] That said, I have examined the fresh evidence against the above tests to determine if it should be admitted. Regardless of whether the fresh evidence relates to an issue at trial or the trial process, or both, I would not admit it.

[24] The proffered evidence fails to meet the *Palmer* test. Not all the evidence is fresh; some offends the relevancy and credibility requirements aspects of the *Palmer* test; and most of it is not in an admissible form. Even if all of the evidence were in admissible form, it would fail the admissibility test as none of it would have affected the trial results, whether that be on conviction or sentence.

[25] In his appeal submissions, Mr. Hann raises concerns respecting the timing of his receipt of Crown disclosure. His complaint is not with the Crown, rather, with his former trial counsel who withdrew before the trial was completed. Mr. Hann also expressed displeasure with the conduct of counsel assisting him with sentencing. As noted, these issues were not identified in his Notice of Appeal;

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[1] The materials were tendered during the appeal hearing with no accompanying sworn affidavit from Mr. Hann.

however, the Panel considered them. These additional complaints engage the second category of fresh evidence discussed in *West*, para. 61, noted above.

[26] Even though Mr. Hann made allegations against his former counsel, he refused to sign a waiver of solicitor/client privilege so counsel could address the allegations against them. Before the hearing of this appeal, the Crown successfully brought a motion before a Panel of this Court for a declaration of implied waiver[2]. The finding of implied waiver allowed Mr. Hann's former counsel to disclose necessary information to respond to Mr. Hann's claims they were ineffective.

[27] As explained in my analysis, based on the record before us, neither of Mr. Hann's complaints (timing of disclosure and ineffective counsel during sentencing) have any merit and the fresh evidence does nothing to advance Mr. Hann's claims.

[28] For these reasons, I would dismiss the fresh evidence motion.

[29] For completeness, I note the Crown submitted an affidavit from Mr. Hann's trial counsel wherein she responded to the allegations against her. It is unnecessary to admit this evidence because Mr. Hann has not demonstrated any prejudice arising from his complaints against counsel.

Analysis

Is the verdict unreasonable?

Did the judge misapprehend the evidence or err in law?

[30] Mr. Hann's claims the verdicts are unreasonable, the judge misapprehended evidence and erred in law can be addressed together. I turn to the principles that guide my determination of whether these alleged grounds have been established.

[31] Assessing the reasonableness of a verdict requires consideration of whether the verdict is one that a properly instructed jury or a judge could reasonably have made. I examine whether the verdict was based on an inference or finding of fact that, (a) is plainly contradicted by the evidence relied on by the trial judge; or (b) is shown to be incompatible with evidence not otherwise contradicted or rejected by the judge. Furthermore, a judge's credibility assessments are not interfered with

[2] When a client puts the professional conduct of their counsel in issue, the client risks being found to have waived privilege to the extent necessary for counsel to respond to the impugned conduct. For a discussion on implied waiver see *R. v. Hobbs*, 2009 NSCA 90.

unless it is established, they cannot be supported on any reasonable view of the evidence (see *R. v. Thompson*, 2015 NSCA 51 at paras. 59-61 and *R. v. Newman*, 2020 NSCA 24 at paras. 29 and 30).

[32] A misapprehension of evidence may refer to a mistake as to the substance of evidence, a failure to consider evidence relevant to a material issue or a failure to give proper effect to evidence. The misapprehension must play an essential part in the reasoning process that led to conviction. This is not to be confused with a different interpretation of the evidence than that adopted by the trial judge (see *R. v. Lohrer*, 2004 SCC 8 at paras. 1 and 2 and *Newman* at para. 30).

[33] The standard of appellate review on a question of law is correctness (see *Thompson* at para. 59). In other words, the judge had to be correct in her identification and application of the governing legal framework.

[34] Having set out the standards of review applicable to these alleged grounds, I am satisfied Mr. Hann's complaints of error are without merit. These grounds can and should be summarily rejected.

[35] Just saying the judge made reviewable errors does not make it so. Mr. Hann has not identified anything that:

- supports his unreasonable verdict claim. He did not establish there was an inference or finding of fact that was contradicted by the evidence relied on by the judge; or incompatible with uncontradicted evidence or evidence rejected by the judge;
- calls into question the judge's credibility assessments;
- establishes his misapprehension of evidence claim, let alone a misapprehension that played an essential part in the judge's reasoning path to conviction;
- indicates the judge erred in law. No erroneous principle of law was identified nor any misstep in its application.

[36] Having reviewed the record from the court below, I am satisfied it does not reveal the errors asserted by Mr. Hann. Nothing further need to be said about these grounds, which I would dismiss.

Was counsel ineffective?

[37] As noted, partway through the trial Mr. Hann's counsel withdrew. She spoke to her motion:

> **Trial Counsel:** Yes, good morning, Your Honour. This is an application for me to be removed as solicitor of record. There's been a breakdown in the solicitor/client relationship between myself and Mr. Hann. I understand, I've spoken with Legal Aid here who will be able to provide him with a new certificate. I did put him in touch to speak with two other lawyers who would be able to take on his file in the circumstances. My understanding, through Legal Aid, that Mr. Hann may want to complete the closing himself but that would be up to Mr. Hann. But I have provided him with the disclosure, and also I have drafted some closing remarks as well and hope that Mr. Hann received those as well which will be of assistance to him. And he also received the last few days of the transcript which came in, I believe last Monday or Tuesday.

[38] The judge granted counsel's motion to withdraw as solicitor of record. Thereafter, Mr. Hann decided to represent himself notwithstanding the judge, on several occasions, impressed upon him he should reconsider and retain counsel. For example, the judge said:

> **THE COURT:** Mr. Hann, … You are facing extremely serious allegations here. If you are found guilty the consequence will be meaningful. You have, you had very capable representation. There's been a breakdown… that happens. But there is a way to have another lawyer become involved and you don't want that.

[39] When counsel withdrew, the evidence portion of the trial was essentially complete, but the defence had not formally closed its case. The Crown had presented its evidence and the defence called evidence—Mr. Hann's girlfriend and Mr. Hann testified in his own defence. At the end of Mr. Hann's testimony, the judge inquired whether there was more defence evidence to come. Trial counsel indicated she did not anticipate further evidence but needed to consult with Mr. Hann before closing his case. The proceedings were set over to another date for formal completion and the judge ordered a transcription of the proceedings thus far, given they had stretched over a number of months.

[40] At this juncture of the proceedings, Mr. Hann was representing himself. Closing submissions were next, subject to Mr. Hann confirming he formally closed his case, which he eventually did, without calling any further evidence.

[41] Well in advance of making his closing submissions, the judge enquired of Mr. Hann whether he had everything he needed to prepare. He unequivocally confirmed nothing was outstanding. He was ready to proceed.

[42] As closing submissions were getting underway, the judge became concerned Mr. Hann might wish to refer to events/circumstances that did not form part of the evidence before the court. Once again, the judge raised with Mr. Hann the issue of securing counsel to assist him and explained she could only consider the evidence placed before the court. The judge specifically, and on several occasions, had Mr. Hann confirm he understood this and that he did not wish to call any further evidence. For example, the record establishes:

> **THE COURT:** … Once you close your you case that's it. That's the evidence. I have nothing else. You won't be able to talk about it. You won't be able to argue it. I won't be able to take it into consideration. And I can't give you legal advice about what to do.
>
> **MR. HANN:** Yes, Your Honour.
>
> …
>
> **THE COURT:** Okay. Listen to my question. Do you wish to call any evidence relating to a cell phone or a text messages or evidence you think would exonerate you?
>
> **MR. HANN:** No. No, Your Honour, I don't.
>
> …
>
> **THE COURT:** So, is there anything else that you think should be in evidence?
>
> **MR. HANN:** Your Honour, no I don't believe so.
>
> **THE COURT:** Okay. So, you'd like to formally close your case …
>
> **MR. HANN:** May I please, Your Honour.
>
> …
>
> **MR. HANN:** … I've made it clear, I don't need another counsel to aid me. … And I can guarantee you, … I will bring up nothing to the sort of statements and strictly and solely stay focus on the inconsistencies on which the transcript for say and foretold. …
>
> …
>
> **THE COURT:** And, but also about the rules of evidence and whether or not there are other things you'd like to explore that maybe could be become part of the record you're giving up that right to talk to a lawyer about it by proceeding in this fashion. …

> **MR. HANN:** Yeah, I understand. I don't want another lawyer Your Honour, to speak for me.
>
> **THE COURT:** And you don't want to talk to a lawyer about whether or not there might bits of evidence you could call?
>
> **MR. HANN:** Your Honour, I don't need a Legal Aid or anything, no, trust me. I'm not being smart I just don't need nobody else to help to tell my life events. …

[43] It was after the judge found Mr. Hann guilty of several offences that he sharpened his focus on trial counsel. Before that, notably, in his closing submissions he described his trial counsel as a "terrific" and "great" lawyer and seemed to take responsibility for the breakdown in their relationship:

> **MR. HANN:** … Your Honour, I didn't want her to leave my counsel. I appreciate [trial counsel], I was just impatient and I totally apologized. She's a terrific lawyer despite anybody. I'm sorry, Your Honour, I just questioned whether she was on my side and told…'cause I'm totally, totally blame myself for that one. She's a great lawyer.

[44] Nevertheless, during the sentence phase of the proceedings, Mr. Hann contended he did nor receive, or at least did not receive all of the Crown disclosure from his trial counsel. He says this impaired his ability to present his defence. Mr. Hann asserts information in the Crown disclosure materials exonerates him from any criminal wrongdoing. He wanted the judge to consider this information. The judge explained to Mr. Hann she had found him guilty of several offences and it was now time to deal with an appropriate sentence.

[45] Mr. Hann decided to retain new counsel to assist him with sentence submissions. It is apparent from the record this solicitor/client relationship was not without its struggles. There were several times when counsel questioned the status of his continued retainer; however, the relationship was maintained essentially to the end of the sentencing proceeding. During the sentencing hearing, Mr. Hann continued to personally voice his disclosure grievance; however, that was not a focus of his counsel's submissions on sentence.

[46] Apart from Mr. Hann simply saying information in the Crown disclosure materials exonerates him from any criminal wrongdoing, there is nothing in the record that would substantiate this claim. Nor did he present anything on appeal, including the proposed fresh evidence, that was persuasive of this claim.

[47] I turn to the allegations against Mr. Hann's sentencing counsel. Mr. Hann did not mention any concerns in his written submissions but made passing

comments in oral submissions. It seems Mr. Hann believes he effectively served the time imposed by the judge and his counsel was ineffective in not pointing this out to the judge when he was sentenced. As evident in my following analysis of Mr. Hann's appeal against sentence, he is mistaken. Mr. Hann could not have been released on the day he was sentenced as he had another 26 months to serve.

[48] In *West*, this Court reviewed the principles applicable to claims of ineffective assistance of counsel:

> [268] The principles to be applied when considering a complaint of ineffective assistance of counsel, are well known. Absent a miscarriage of justice, the question of counsel's competence is a matter of professional ethics and is not normally something to be considered by the courts. Incompetence is measured by applying a reasonableness standard. There is a strong presumption that counsel's conduct falls within a wide range of reasonable, professional assistance. There is a heavy burden upon the appellant to show that counsel's acts or omissions did not meet a standard of reasonable, professional judgment. Claims of ineffective representation are approached with caution by appellate courts. Appeals are not intended to serve as a kind of forensic autopsy of defence counsel's performance at trial. See for example, **B.(G.D.)**, **supra**; **R. v. Joanisse** (1995), 102 C.C.C. (3d) 35 (Ont. C.A.), leave to appeal ref'd [1996] S.C.C.A. No. 347; and **R. v. M.B.**, 2009 ONCA 524.
>
> [269] One takes a two-step approach when assessing trial counsel's competence: first, the appellant must demonstrate that the conduct or omissions amount to incompetence, and second, that the incompetence resulted in a miscarriage of justice. As Major J., observed in **B.(G.D.), supra**, at ¶ 26-29, in most cases it is best to begin with an inquiry into the prejudice component. If the appellant cannot demonstrate prejudice resulting from the alleged ineffective assistance of counsel, it will be unnecessary to address the issue of the competence.

[49] In my view, Mr. Hann did not demonstrate conduct or omissions of his counsel in the court below amounted to incompetence, not to mention incompetence that resulted in a miscarriage of justice. I would dismiss this ground of appeal.

Sentencing

[50] Sentencing decisions are accorded a high degree of deference. Appellate intervention is only warranted where (1) the sentencing judge committed an error in principle that impacted the sentence or, (2) the sentence is demonstrably unfit. Errors in principle include an error of law, a failure to consider a relevant factor, or erroneous consideration of an aggravating or mitigating factor. The assessment of

whether a sentence is demonstrably unfit focuses on whether the sentence is proportionate to the gravity of the offence and the degree of the offender's responsibility (see *R. v. Cromwell*, 2021 NSCA 36 at para. 53; *R. v. Friesen*, 2020 SCC 9 at paras. 25 and 26; and *R. v. Lacasse*, 2015 SCC 64 at paras. 39-41).

[51] Further, as I would not disturb the convictions, the question of whether Mr. Hann should be granted leave to appeal his sentence arises. Mr. Hann's grounds of appeal against sentence must raise an arguable/not frivolous issue (see *R. v. DeYoung*, 2017 NSCA 13 at para. 31).

[52] Mr. Hann's sentence complaints primarily stem from his belief sentencing documents issued in the lower court were tampered with, such as his warrant of committal and, he has already served more time than was imposed. Accordingly, he says he should be released immediately.

[53] Mr. Hann's sentence submissions do not accurately reflect the record. At best, I would say Mr. Hann has misinterpreted the judge's sentencing decision and the supporting record. There is nothing before us that supports the tampering with any document. Mr. Hann is serving the exact sentence the judge meted out. Mr. Hann's mistaken logic seems to be, at least in part, because a six-month sentence for one offence ran concurrent to the 26 months go forward, he only had to serve six months. Mr. Hann also suggests a six-month sentence would have been fit and proper. And since he has already served that time and more, he should be immediately released by this Court.

[54] Mr. Hann did not identify, let alone establish, any error in principle in the judge's sentencing decision. It is apparent from the judge's decision she was mindful of the applicable legal sentencing principles and applied them correctly.

[55] Mr. Hann was convicted of serious offences. He has a lengthy criminal record. The assessment of whether a sentence is demonstrably unfit focuses on whether the sentence is proportionate to the gravity of the offence and the degree of the offender's responsibility. The sentence imposed by the judge satisfied the fundamental principle of proportionality and is not unfit.

[56] Returning to the issue of leave, as noted, Mr. Hann must raise an arguable/not frivolous issue. He has not done so. Consequently, I would deny leave to appeal. Even if leave had been granted, I would not disturb the sentence.

[57] For completeness of this Court's review of the appeal against sentence, I note there appears to be a calculation error regarding the go forward sentence the judge imposed. However, the error benefits Mr. Hann and does not bear on his sentence appeal.

[58] Mr. Hann did not identify the error or speak to it in his submissions. In advance of the appeal hearing, the Panel asked Crown counsel to address the judge's calculation of the go forward sentence in its written submissions. The Crown obliged and explained the judge's apparent miscalculation:

> 53. The Respondent was asked by the Court to address the calculation of the Appellant's sentence.
>
> …
>
> 57. The Appellant was given credit for the time he'd spent in custody prior to his sentencing hearing. Based on his own calculations, supported by the calculations of the Crown, the Appellant had served 600 days in custody prior to sentence. …
>
> 58. Complicating the calculation, was the fact that the Appellant had been sentenced to a 6-month jail term for an unrelated offence, during the 600-day pre-sentence detention period. …
>
> 59. The Trial Judge accepted the calculations of the Crown, in totality, which included:
>
> a. 600 days of time served multiplied by 1.5 = 900 total days credit
>
> b. 900 days total credit - 6 month jail sentence = 718 days remaining.
>
> 60. The Trial Judge concluded that the Appellant's conduct warranted a sentence at the lower end of the range she'd previously outlined. The Trial Judge felt that a 5-year jail sentence was appropriate.
>
> 61. Given the submissions of the Appellant related to the conditions of his pre-sentence detention, as impacted by the Covid-19 pandemic, the Trial Judge reduced the Appellant's 5-year sentence by 6 months, to 4 years and 6 months.
>
> 62. Finally, the Trial Judge gave the Appellant credit for the previously calculated sum of 718 days pre-sentence time served. Subtracting this amount from the 4 years and 6 months sentence imposed, from the Trial Judge's point of view, the Appellant was left with 26 months left to serve, on a go forward basis. **(This appears to be a slight miscalculation by the Trial Judge. This miscalculation was to the Appellant's benefit, reducing his sentence by a further 4 months.)**

> 63. As the sentence was imposed on September 13, 2022, adding 26 months to that date would suggest that the Appellant's sentence will expire in November of 2024.[3]
>
> [emphasis added]

[59] The judge did not provide nor is there any obvious explanation in the record that supports the approximate four-month variance. I take it as an inadvertent miscalculation by the judge. In short, but for the miscalculation, the go forward sentence should have been approximately 30 months—not an unfit sentence in my view. However, the Crown did not request this Court recalibrate the go forward sentence to correct for the miscalculation nor would I do so in these circumstances.

Conclusion

[60] I would dismiss the motion for fresh evidence and the appeal against conviction. I would not grant leave to appeal sentence.

Van den Eynden J.A.

Concurred in:

Farrar J.A.

Fichaud J.A.

[3] References to the Appeal Book are omitted from quotation.