SUPREME COURT OF NOVA SCOTIA

Citation: R. v. Chan. 2011 NSSC 471

Date: 20111216
Docket: CR. No. 334922
Registry: Halifax

Between:

Her Majesty the Queen

-and-

Joseph Endelle Chan

Sentencing Decision

Judge: The Honourable Justice Robert W. Wright

Heard: December 16, 2011 at Halifax, Nova Scotia

Oral Decision: December 16, 2011

Written Decision Released: January 5, 2012

Counsel:
Crown Counsel - Chris Morris
Defence Counsel - Don Murray

Wright, J. (Orally)

[1] In a decision rendered on November 2, 2011 following an 11 day trial, the Court determined that the accused, Joseph Chan, was the perpetrator of a shooting at the Catch a Look barbershop and clothing store in Sackville, Nova Scotia which took place on April 8, 2010.

[2] The facts surrounding this incident were set out in detail in my oral decision rendered on November 2nd (unreported). I will therefore recite here a brief synopsis of those factual findings in order to put my present reasons on sentence in context.

[3] During business hours on April 8, 2010 with several persons present, a shooting took place at the Catch a Look barbershop/clothing store which was entirely captured by a surveillance video camera. Although the shooter attempted to shield his identity by the successive use of a newspaper and an improvised bandana to cover his face, the Court found on the evidence, beyond a reasonable doubt, that the identity of the shooter was that of Mr. Chan.

[4] Mr. Chan had apparently gone to Catch a Look that afternoon to get a haircut, the establishment being owned by acquaintances of his. Somehow, an altercation broke out between Mr. Chan and another unidentified person who was also getting a haircut. After the incident escalated with animated exchanges of words, and a couple of punches being thrown at the victim, Mr. Chan fired three rounds in his direction with a Glock 9mm handgun, two of which pierced the wall into an adjacent clothing store. Fortunately, no one was injured and both Mr. Chan

and the victim left the scene in short order.

[5] It was only six days later, on April 14, 2010 that Mr. Chan was apprehended by police after running from them over an intended *Liquor Control Act* charge. He was then found by the Court to be in possession of what proved to be the same Glock handgun as was used in the shooting on April 8th. The detailed facts surrounding this second incident can be found in an earlier *voir dire* decision reported at 2011 NSSC 350.

[6] Mr. Chan was ultimately charged under a 14 count indictment, the first eight counts pertaining to the incident on April 8, 2010 and the remaining six counts pertaining to the incident which occurred on April 14, 2010. He was found not guilty of the most serious of those charges, namely, attempted murder because of a reasonable doubt raised by the defence as to whether Mr. Chan had the requisite specific intent to kill the victim. The impression left with the court was that Mr. Chan's intention was to threaten or intimidate the victim by firing the three shots in his direction, ending the altercation. In the result, Mr. Chan was convicted of the following offences in respect of the April 8th incident:

(a) discharging a firearm with intent to endanger the life of a person (s.244)
(b) common assault (in respect of the punches thrown) (s.266)
(c) pointing a firearm (s.87(1))
(d) unauthorized possession of a firearm (s.92(1))
(e) possession of a restricted firearm with ammunition (s.95(1))
(f) possession of a weapon obtained by commission of an offence (s.96(1))
(g) possession of a weapon contrary to court order (s.117.01(1)).

[7] Mr. Chan was also found guilty of the following offences arising from the incident on April 14, 2010:

(a) resisting peace officers (s.129(a))

(b) possession of a restricted firearm with ammunition (s.95(1))

(c) unauthorized possession of a firearm (s.92(1))

(d) carrying a concealed weapon (s.90(1))

(e) possession of a weapon contrary to court order (s.117.01(1))

(f) possession of a weapon obtained by commission of an offence (s.96(1)).

[8] In my earlier decision, the conviction under s.87(1) was stayed so as not to offend the rule against multiple convictions articulated in *R. v. Kienapple* since its essential elements were subsumed by the more serious s. 244 offence. On reflection, this principle should also be applied in respect of the two s.92(1) offences whose essential ingredients, in my view, are subsumed by the more serious s.95.(1) offence (as was the result in *R. v. Johnson* 2010 ONSC 3213).

[9] Resultingly, there are 10 offences for which Mr. Chan is to be sentenced today, five of which pertain to each of the dates of April 8 and April 14, 2010.

[10] The crafting of an appropriate sentence in this case is complicated by the multiple number of offences for which Mr. Chan has been convicted, pertaining to two different dates. The starting point nonetheless is a review of the purpose and principles of sentencing set out in s.718 of the Criminal Code.

[11] Under s. 718 of the Criminal Code, the fundamental purpose of sentencing is

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

[12] Section 718.1 goes on to state that a sentence must be proportionate to the gravity of the offence and the degree of responsibility of the offender. As oft stated, this principle of proportionality is central to the sentencing process.

[13] When it comes to sentencing for gun crimes, the principles of sentencing to be emphasized, as both Crown and defence counsel have acknowledged, are denunciation and both specific and general deterrence. Two recent affirmations of this by our Court are found in the cases of *R. v. Muise* 2008 NSSC 340 and *R. v. Johnston* 2009 NSSC 218. In the latter case, Justice Cacchione, after referring to recent statistics in Halifax Regional Municipality showing that gun related shootings are on the rise, expressed the following conclusion (at para. 49):

> The risk posed by such shootings to law abiding citizens who are going about their daily

> business is high and increasing. A clear message must be sent to those in our community who believe in living by the gun and settling their disputes through the use of a gun. The message is that there will be severe consequences for those who behave in such a fashion.

[14] Similar comments were recently made by the Ontario Court of Appeal in *R. v. Brown* [2010] O.J. No. 4707 in which the court noted that first and foremost, the sentences imposed for firearms offences must further the sentencing goals of denunciation, deterrence and protection of the public.

[15] Under s. 718.2 of the Criminal Code, a sentencing court is also required to take into consideration other sentencing principles; notably here, any aggravating or mitigating circumstances relating to the offence or to the offender as well as the principle of parity (i.e., having regard to sentences imposed on similar offenders for similar offences committed in similar circumstances).

[16] Section 718.2(c) is also of particular significance in this case where it embodies the principle of totality. The totality principle requires that a last look be taken by the sentencing judge to ensure that the total or cumulative sentence is a fit one that does not exceed the overall culpability of the offender.

[17] Superimposed upon the foregoing sentencing principles are statutory periods of minimum terms of imprisonment for certain prescribed offences. As will be dealt with in more detail later, the convictions in the present case that carry such minimum terms of imprisonment are ss. 244, 95(1) and 96(2).

[18] The approach to be taken by a sentencing judge faced with a situation of convictions for multiple offences was helpfully summarized in the recent decision of the Manitoba Court of Appeal in *R. v. Wozny* [2010] M.J. No. 384. It was there stated (at paras. 44-46) as follows:

> 44. In my opinion, there are three important factors which must be at the forefront of consideration by a sentencing judge when determining and imposing sentence in respect of multiple offences:
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> (1) Whether the sentence imposed will be a consecutive sentence, a concurrent sentence or a combination of both. Included within this is the need to ensure that whatever the sentence, there will be no free ride given in respect of any offence.
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> (2) The sentencing principles of proportionality and totality. . . .
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> (3) Transparency, which must be included in factors (1) and (2) and the sentencing process as a whole.
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> 45. The first step a sentencing judge must take when required to sentence on multiple offences is to determine whether any or all of the sentences are to be served concurrently or consecutively. This question and the decision does not relate to the overall length of sentence. Rather, they pertain to the nature and circumstances of the criminal activity under consideration and the connectedness of two or more offences to each other.....
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> 46. While this is often not a simple issue to decide, the general rule is that if the offences are sufficiently interrelated to form part of one single, continuous criminal transaction, a concurrent sentence is called for. However, if the offences are separate and distinct, then a consecutive sentence is to be imposed. Many of the aforementioned cases (*Grant*, *Golden*, *Draper*, and *Maroti*) make this clear. But this is only the general or basic rule.

[19] The Court then went on to discuss the sentencing principles of proportionality and totality and the fundamental difference between them in terms of their application. Rather than quote these passages at length in this decision, I will simply incorporate by reference paras. 54-63 as well as para. 72.

[20] Similar guidance is found in the recent decision of the Nova Scotia Court of Appeal in *R. v. Adams*, 2010 NSCA 42. Justice Bateman there wrote (at para. 23):

> 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).

[21] Further affirmation by the Nova Scotia Court of Appeal of the approach to be taken in sentencing for multiple offences is found in *R. v. Naugle*, 2011 NSCA 33 and *R. v. Bernard*, 2011 NSCA 53. In *Naugle*, after recognizing that there are no specific provisions in the Criminal Code to guide a sentencing judge on when to select a consecutive as opposed to a concurrent sentence, Justice Beveridge went on to say (at para. 24):

> 24. I think it is fair to say that where multiple offences arise out of the same transaction, the Court must ensure that the selection of consecutive, as opposed to concurrent sentences, does not give rise to a sentence out of proportion to the overall gravity of the conduct, or otherwise create a sentence that is unduly long or harsh.

[22] Bearing the foregoing principles in mind, I now turn to the specific offences for which Mr. Chan is to be sentenced. In my view, it is appropriate to divide them into two groups, one pertaining to the events of April 8th and the other pertaining to the events of April 14, 2010.

[23] I should recount at the outset the overall positions advanced by the Crown and defence counsel respectively. The Crown proposes that Mr. Chan should be sentenced to nine years imprisonment to encompass all of the offences committed on April 8th and an additional seven years imprisonment to encompass all of the offences committed on April 14th , to be served consecutively. The Crown further recommends that that global sentence of 16 years imprisonment be imposed without any credit for time served on remand.

[24] Defence counsel, on the other hand, provided the court with a chart outlining his recommendations for an overall sentence of eight years imprisonment, less credit for remand time on a one to one basis. More specifically, it is recommended that Mr. Chan be sentenced to six years imprisonment for the s.244 offence, one year consecutive for the s.90(1) offence, and one year consecutive for the two s.117.01(1) offences (but concurrent to each other). He further recommends that the sentences for all the remaining offences (including the two s.95(1) offences) be served concurrently.

[25] Beginning with the events of April 8th, the two most serious offences for which Mr. Chan was convicted are the discharge of a firearm with intent to endanger the life of a person (s.244) and possession of a restricted firearm with ammunition without authorization (s.95(1)). Both carry substantial statutory minimum terms of imprisonment.

[26] Under s.244, the minimum term of imprisonment for a first offence (as defined in the Code) is five years. The maximum is 14 years.

[27] Under s.95(1), the minimum term of imprisonment for a first offence is three years and for a second or subsequent offence, five years. The maximum is 10 years.

[28] Those provisions lead me to interject here a summary of Mr. Chan's criminal record which is summarized in the Crown's brief as follows:

> Mr. Chan's criminal record, prior to conviction, consisted of a least twenty-seven offences, including: assault with a weapon on September 5, 1995 in Youth Court; aggravated assault on April 18, 1996 in Youth Court; assaulting a police officer, and assault with a weapon on April 10, 1997 in Youth Court; robbery on September 12, 2000 for which he was sentenced to forty months as an adult; flight-from-police-while-pursued, on March 3, 2003; possession of a prohibited or restricted firearm with ammunition, possession of a firearm obtained by crime, and possession of a firearm and ammunition, contrary to a prohibition order on September 1, 2005. He had, as well, at least five convictions for breach of recognizance and five for breach of a Youth Court disposition order. He has a conviction for drug trafficking and three for possession under the *CDSA*.

[29] Because Mr. Chan's criminal record includes a prior conviction for a s.95(1) offence in 2005, the minimum term of imprisonment set out in s.95(2) is five years. However, because the Crown did not give a s.727 notice to Mr. Chan prior to plea that it would be seeking such greater punishment by reason of that prior conviction, the effective minimum period of imprisonment for the present offence is three years. The sentencing range for this offence is therefore between three and ten years, depending on the various factors to be weighed (see *R. v. Phinn* 2010 NSSC 99 and the cases therein referred to).

[30] Dealing first, however, with the s.244 offence, I have been provided by counsel with about a dozen case precedents, most of which were decided when the statutory minimum term of imprisonment was prescribed to be four years. In most of these cases (which I need not recite in detail here), the sentence imposed was in the range of five to nine years imprisonment. It appears that the courts have tended to increase the penalty over and above the statutory minimum whenever there are aggravating factors present.

[31] There are two significant aggravating factors present in this case. First is the brazen and reckless behaviour of Mr. Chan in entering the Catch a Look shop with his face covered, and ultimately firing a handgun indiscriminately three times in the direction of the victim to settle an altercation thereby endangering his life, and without any regard whatsoever to the lives and safety of innocent bystanders. Indeed, one of the bullets pierced the wall through to an adjacent store with a trajectory to the exact location where its proprietor had been standing moments before.

[32] The second aggravating factor here is the criminal record of Mr. Chan earlier summarized, which includes a s.95(1) conviction in 2005. As a result of that offence, Mr. Chan was still subject to a weapons prohibition order imposed under s.110(2) of the Criminal Code.

[33] It bears repeating that the foremost sentencing objectives to be emphasized for gun crimes such as this are denunciation, deterrence and the protection of the public by separating the offender from society. While the objective of rehabilitation can never be lost sight of, Mr. Chan's lifestyle over the past 15 years demonstrated by the evidence at trial and by his lengthy criminal record, do not bode well in this regard. Perhaps some encouragement can be taken from the representations by his counsel that Mr. Chan has availed himself of certain rehabilitative programs offered by the Correctional Centre during his time spent on remand.

[34] It should also be noted that there is a complete absence of mitigating factors to be balanced in this case.

[35] All things considered, I conclude that something more than the minimum term of imprisonment is called for with respect to the s.244 offence. I therefore sentence Mr. Chan to seven years imprisonment for that offence.

[36] Returning now to the s. 95(1) offence, the court must first determine the appropriate sentence between the effective minimum term of three years imprisonment and the maximum of ten years.

[37] There are two aggravating factors to be recognized here. One, of course, is the fact that this was a second conviction for this offence, demonstrating that Mr. Chan did not learn his lesson the first time. Also, he was carrying this lethal weapon around with him, in a public place, and in a concealed fashion. Because of these aggravating factors, I conclude that he should be sentenced to a five year term of imprisonment in any event.

[38] The next question to be addressed is whether the sentence on the s.95(1) offence should be consecutive or concurrent to the sentence for the s.244 offence. Because these two offences committed on April 8th are sufficiently interrelated to form part of one single continuous criminal transaction, I would follow the general rule in finding that the sentence for the s.95(1) offence here imposed ought to be served concurrently.

[39] The Criminal Code also prescribes a minimum jail sentence of one year for a conviction under s.96(1), i.e., possession of a weapon obtained by commission of an offence. It is unknown how Mr. Chan came into possession of the stolen handgun used here and I see no reason to depart from the one year minimum sentence. This sentence should similarly be imposed on a concurrent basis.

[40] The remaining gun crime to be dealt with is Mr. Chan's conviction for the s.117.01(1) offence. The case authorities generally suggest that the appropriate sentence for breaching such a weapons prohibition order is in the range of one year imprisonment and that it should be made consecutive to reflect the seriousness of flouting court orders aimed at controlling firearms (see, for example, *R. v. Sadat*,

2011 ONSC 3303 and *R. v. Lambert*, 2011 ONSC 3906). Accordingly, I impose a sentence of one year imprisonment for the s.117.01(1) offence, to be served consecutively to the s.244 sentence.

[41] Lastly in this first group of offences, Mr. Chan is ordered to serve a 30 day sentence for the s.266 offence. This assault consisted of a couple of glancing punches thrown by Mr. Chan, with no resulting injury to the victim. This sentence is also to be served concurrently.

[42] That takes me to the second group of offences committed on April 14, 2010. The most serious one, of course, is the s.95(1) offence, which carries a minimum term of imprisonment of what is effectively three years in this case, for reasons I have already given. However, in similar fashion to the same offence committed on April 8th , I conclude that the appropriate sentence to be imposed for it is five years imprisonment.

[43] I further conclude, however, that this sentence should be made consecutive to the sentences imposed under ss. 244 and 117.01(1). The s.95(1) offence committed on April 14th was not part of the same or a continuous transaction with that which occurred on April 8th. A consecutive sentence is warranted to deter continued re-offending, unconnected with the prior incident. Moreover, the sentence for this same offence committed on April 8th has already been made to be served concurrently with the others.

[44] The other offence committed on April 14th carrying a minimum jail sentence is s.96.(1). Similarly here, I impose the minimum sentence of one year imprisonment, to be served concurrently with the sentence for the s.95(1) offence.

[45] I will next deal with the s.90(1) offence (carrying a concealed weapon). This offence should carry a sentence of imprisonment of 18 months here, to be served concurrently with the sentence for the more serious s.95(1) offence, since it all formed part of a single criminal transaction.

[46] The offence of resisting peace officers in the execution of their duty under s.129(a) can be similarly characterized on the facts of this case as forming part of the same criminal transaction as the other charges. In my view, the appropriate sentence for this offence of 90 days imprisonment should therefore be served concurrently with the others.

[47] That leaves remaining the s.117.01(1) offence which arises once again from the events of April 14th. While a one year term of imprisonment is similarly an appropriate sentence for this, I conclude, having regard to the principle of totality, that it should be made concurrent to the sentence for the same offence committed on April 8th .

[48] The combination of the foregoing sentences produces a total period of incarceration of 13 years.

[49] Having arrived at that cumulative number, the Court must now take a last look, under the totality principle, to be satisfied that this sentence is fit and proper and one that does not exceed the overall culpability of the offender.

[50] The concern I have is that a sentence of 13 years creeps into the range of sentence ordinarily meted out by the courts for the crime of attempted murder, which requires for conviction the highly culpable *mens rea* of a specific intent to kill. That offence was not made out in this case, notwithstanding the reprehensible conduct of Mr. Chan in doing what he did in an apparent fit of temper. I therefore conclude that the totality principle should be applied in this case and it must be applied in a transparent way.

[51] In my view, the most appropriate method for application of this principle in this case is to reduce the sentence for the s.95(1) offence pertaining to the events of April 14th by two years. That will equate it with the effective minimum term of imprisonment of three years prescribed by the Criminal Code (having regard as aforesaid to the effect of s.727).

[52] In the final result, therefore, Mr. Chan is sentenced to imprisonment for a total of 11 years, from which a deduction should be made for his time spent on remand for these offences. In my view, Mr. Chan ought to be given credit for time served on a one to one basis, having regard to s.719(3) of the Criminal Code. I accept the representations made by defence counsel that the amount of time served on remand to be so credited is 16 months. Mr. Chan's sentence of imprisonment will therefore be nine years and eight months on a go forward basis.

[53] Lastly, the Court will grant the three ancillary orders requested by the Crown as follows:

(1) A DNA sampling order pursuant to s.487.051(1)(a);

(2) A weapons prohibition order under s.109(2) for life; and

(3) An order of forfeiture of the Glock handgun and ammunition in favour of its lawful owner, Mr. Sean Simms once all appeal periods have expired.

J.