R v Greenland, **2020 NWTSC 7** **S-1-CR-2019-000112**

IN THE SUPREME COURT OF THE NORTHWEST TERRITORIES

BETWEEN:

JAYDEN GREENLAND

(Appellant)

- and -

HER MAJESTY THE QUEEN

(Respondent)

Transcript of the Reasons for Decision delivered by the Honourable Justice S.H. Smallwood, sitting in Yellowknife, in the Northwest Territories, on the 6th day of February, 2020.

APPEARANCES:

C. Davison:	Counsel for the Appellant
P.L. Bergeron:	Counsel for the Respondent

Charges under s. 733.1, s. 811, s. 145, s. 129, and s. 264.1 of the *Criminal Code*

I N D E X

THE COURT: This is an appeal from sentence. On October 4th, 2019, in Territorial Court, the Appellant entered guilty pleas and was sentenced for 12 offences: 6 counts of breach of probation contrary to section 733.1 of the *Criminal Code*; 2 counts of breach of recognizance contrary to section 811 of the *Criminal Code*; 1 count of breach of recognizance contrary to section 145 of the *Criminal Code*; 1 count of resisting a police officer contrary to section 129 of the *Criminal Code*; and 2 counts of uttering threats contrary to section 264.1 of the *Criminal Code*.

The Crown sought a global sentence of 11 months of imprisonment followed by a period of probation. Defence sought a sentence of eight to nine months custody. The Sentencing Judge sentenced the Appellant to a total of 14 months, exceeding the sentencing recommendation of the Crown. The Appellant argues that the sentence imposed is excessive and overly harsh.

BACKGROUND

The Offences.

The Appellant was subject to a probation order between May 21, 2019 and August 20, 2019. The probation order included conditions that the Appellant comply with a curfew and abstain from the consumption of alcohol.

The Appellant pled guilty to the following:

- From May 31 to June 6, 2019, a breach of probation for failing to comply with his curfew on three occasions. The Crown sought a sentence of 60 days imprisonment for this offence. The Sentencing Judge imposed a sentence of two months imprisonment consecutive to the other offences;
- A June 6, 2019 breach of probation for consuming alcohol. The Crown position was a sentence of 30 days imprisonment concurrent. The Sentencing Judge imposed a sentence of one-month imprisonment concurrent;
- A June 16, 2019 breach of probation for failing to comply with a curfew condition. The Crown position was 60 days imprisonment concurrent to the sentence for the section 811 offence. The Sentencing Judge imposed a sentence of one-month consecutive to the other offences;
- A June 16, 2019 breach of recognizance pursuant to section 811. The Appellant was subject to a section 810 peace bond which required him not to have contact with a person. On that date, the Appellant was found at this person's residence by the

police. The Crown's position was 90 days imprisonment. The Sentencing Judge imposed a sentence of one month imprisonment concurrent;

- A July 19, 2019 conviction for the offence of resisting a police officer. The Appellant resisted police officers following his arrest. The Crown position on sentence was 30 days imprisonment concurrent to the uttering threats offences. The Sentencing Judge imposed a sentence of two months imprisonment concurrent;
- A July 19, 2019 breach of probation for failing to comply with his curfew. The Crown's position was a sentence of 60 days imprisonment concurrent. The Sentencing Judge imposed a sentence of two months imprisonment concurrent;
- Another July 19, 2019 breach of probation for consuming alcohol. The Crown's position was 30 days imprisonment concurrent. The Sentencing Judge imposed a sentence of two months imprisonment concurrent;
- A July 19, 2019 breach of recognizance pursuant to section 811. The Appellant was with the person with whom he was not to

have contact on that date. The Crown's position was 90 days imprisonment consecutive, and the Sentencing Judge imposed a sentence of two months imprisonment concurrent;

- An August 20, 2019 breach of recognizance pursuant to section 145. The Appellant was subject to a recognizance which required that he comply with a curfew. He failed to comply with his curfew on that date. The Crown's position was 60 days imprisonment. The Sentencing Judge imposed a sentence of one month imprisonment consecutive;
- And an August 20, 2019 breach of probation for consuming alcohol. The Crown's position was 30 days imprisonment concurrent. The Sentencing Judge imposed a sentence of one-month imprisonment concurrent.

There were also two counts of uttering threats which arose from July 19, 2019. The sentences that are imposed for these two counts are the sentences that the Appellant takes issue with.

The facts of the offences are that police officers in Fort McPherson encountered the Appellant and had grounds to arrest him. When approached by the police

vehicle, the Appellant ran away and hid underneath a house. He was pursued by the police officers who located him under the house and advised him that he was under arrest for breaching his probation order and the section 810 peace bond. He was told to come out from under the house by both members.

The Appellant stated to each police officer that he would shoot them with a nine-millimeter pistol that he had in his pocket if they approached him. At the time, the Appellant was lying on his back and his right hand was concealed in his pocket. The Appellant was then advised that he would be charged in relation to the threats. The Appellant responded that he would stab each of the officers with his knife if they approached him. The offers were aware of prior situations where the Appellant had carried a knife. The Appellant also stated to the officers that he would kill them if they approached him.

The police officers asked the Appellant several times to show his hands and to come out from underneath the residence. After approximately 10 minutes, the Appellant removed his hand from his pocket and came out from under the residence. The Appellant did not have a gun or a knife. He was then handcuffed. It was noted that the Appellant was highly intoxicated.

The Crown's position on sentence was five

months imprisonment on each count to be served concurrently. The defence's position was four months imprisonment. The Sentencing Judge imposed a sentence of five months imprisonment on each offence to be served consecutively. The Crown's global position on sentence was 11 months imprisonment. The defence's global position on sentence was eight to nine months imprisonment. The Sentencing Judge imposed a global sentence of 14 months imprisonment.

ISSUES

The Appellant appeals from sentence. The Appellant claims that the Sentencing Judge made errors in imposing sentence. The Appellant claims that:

(1) the Sentencing Judge erred in imposing a sentence which was more severe than what the Crown had recommended without giving notice to counsel that he intended to do so,

(2) the Sentencing Judge erred in determining that the sentences should be served consecutively and in his assessment of the relevant factors, and

(3) the Sentencing Judge erred in imposing a sentence that was disproportionately severe, harsh, and excessive in the circumstances of the matter.

The Crown argues that the Sentencing Judge did not commit a reversible error, and the sentence

imposed by the Sentencing Judge does not require appellate intervention. The Crown acknowledges that the Sentencing Judge ought to have given notice to counsel that he was considering imposing a sentence greater than what the Crown had suggested and by failing to allow Counsel to make additional submissions.

The Crown argues that the remedy is to allow counsel the opportunity to make submissions and supplement the record. The Crown's position is that the additional information in submissions before this court does not demonstrate that the sentence imposed was demonstrably unfit. The Crown's position on the other issues is that the Sentencing Judge has significant discretion in determining whether sentences should be served consecutively or concurrently. The Sentencing Judge did not commit an error in principle in imposing sentence and that the global sentence was not demonstrably unfit.

ANALYSIS

The standard of review on a sentence appeal is generally highly deferential. Sentencing judges have a broad discretion to impose a sentence that they consider appropriate in the circumstances of each case.

The Supreme Court of Canada has repeatedly stated that absent an error in principle, the failure to consider a relevant factor or the over emphasis of the

appropriate factors, an appellate court should only intervene to vary a sentence if it is demonstrably unfit. And most recently, that is in *R v Lacasse*, 2015 SCC 64, at paragraph 41.

In cases where a sentencing judge intends to impose a sentence outside the ranges submitted by counsel, the sentencing judge must inform counsel of the intention and give them an opportunity to make submissions *R v Abel*, 2011 NWTCA 4, at paragraph 23.

Where a sentencing judge fails to inform counsel of their intentions, it is a matter of procedural fairness, and the remedy on appeal is to give the parties an opportunity to make further submissions. The issue on appeal ultimately becomes whether the sentence imposed was demonstrably unfit. *Abel*, at paragraph 25; *R v Jacobson*, 2019 NWTSC 9, at paragraphs 31 and 36.

It is acknowledged that the Sentencing Judge did not advise counsel that he was considering imposing a sentence in excess of what the Crown was recommending, and, as such, counsel did not have an opportunity to make further submissions. At the appeal hearing, counsel made further submissions. The focus of the inquiry now becomes whether the sentence imposed was demonstrably unfit or whether other errors of principle were made.

The Appellant argues that a sentence of five months imprisonment on each utter threats charge serve concurrently as requested by the Crown was already a significant punishment which would send the message that the offending behaviour of the Appellant was going to be dealt with seriously. The Appellant argues that a sentence of 10 months imprisonment for the uttering threats offences is excessive and outside the range of sentences imposed for other uttering threats offences.

The Crown argues that the two utter threats sentences cannot be considered in isolation from the other counts. Further, that there is no established range of sentence for uttering threats, and even if there were, imposing a sentence outside the range is not a reversible error. In considering the global sentence, the Crown claims the sentence imposed was not demonstrably unfit.

The Appellant has provided a number of cases which deal with sentencing for uttering threats offences. I don't intend to detail them in this decision, but I have reviewed them. As always, no two offences or accused are the same. There are differences in the circumstances of each of the cases provided and in the circumstances of the accused. Attempting to establish a range of sentence for a particular offence, as noted in *Gully v HMTQ*, 2018 NWTSC 42 at paragraphs 31 to

33, can be fraught with difficulty and often there will be a wide range of sentences imposed depending on the circumstances of the case and of the offender. Even when a range is established, that may not be determinative as there will be cases that fall outside that range for some particular reason. As noted in *Lacasse* at paragraphs 57 to 58:

> Sentencing ranges are nothing more than summaries of the minimum and maximum sentences imposed in the past, which serve in any given case as guides for the application of all the relevant principles and objectives. However, they should not be considered 'averages', let alone straitjackets, but should instead be seen as historical portraits for the use of sentencing judges, who must still exercise their discretion in each case….
>
> There will always be situations that call for a sentence outside a particular range: although ensuring parity in sentencing is in itself a desirable objective, the fact that each crime is committed in unique circumstances by an offender with a unique profile cannot be disregarded. The determination of a just and appropriate sentence is a highly individualized exercise that goes beyond a purely mathematical calculation. It involves a variety

of factors that are difficult to define with precision. That is why it may happen that a sentence that, on its face, falls outside a particular range, and that may never have been imposed in the past for a similar crime, is not demonstrably unfit. Once again, everything depends on the gravity of the offence, the offender's degree of responsibility, and the specific circumstances of each case.

Having said that, the cases provided by the Appellant varied from three months to six months imprisonment for uttering threats involving police officers. Cases not involving a police officer varied from two months to six months imprisonment.

If it could be said that these cases establish a range of sentence for the offence of uttering threats to a police officer, the imposition of a sentence of five months imprisonment for these offences individually is within the range of sentences imposed in those cases. Five months imprisonment for each of the uttering threats offences was not excessive, given the seriousness of the offences and the accused's circumstances.

The Appellant's real complaint is with the imposition of a total 10-month sentence for the two uttering threats offences and whether the sentences should have been imposed consecutively or

concurrently.

The sentencing process provides sentencing judges broad discretion to impose sentences they determine are fit in the circumstances. It is a very individualized and fact-specific process. Sentencing judges are also granted considerable deference in their decision to impose consecutive or concurrent sentences. Imposing sentences outside of the range suggested by counsel or imposing consecutive instead of concurrent sentences may indicate the presence of an error in principle. However, it is within the discretion of a sentencing judge to impose consecutive or concurrent sentences. *Jacobson*, paragraph 44; *R v Keough*, 2012 ABCA 14 at paragraph 16; *R v McDonnell*, [1997] 1 SCR 948, at paragraph 46.

Generally, where offences are committed as part of a single transaction or more than one offence arises out of the same general circumstances, sentences imposed for those offences run concurrently. A sentencing judge has significant discretion in determining whether sentences should be imposed concurrently or consecutively. In exercising that discretion, a sentencing judge must also consider the totality principle. The proper approach was described in *Omilgoituk v HMTQ*, 2011 NWTSC 63, at page 20:

> The correct approach is to examine what a fit sentence is for each offence and determine

> whether the sentences should be consecutive or concurrent. If consecutive sentences are imposed, then the totality principle set out at section 718.2(c) of the *Criminal Code* requires an examination of the global effect of the sentence.

The Sentencing Judge in this case did not mischaracterize the utter threats offences and clearly recognized that the utter threats charges arose from one incident, stating at pages 34 to 35:

> With regards to Count 6, that is the threats to Isabelle Gaudreau, I sentence you to five months imprisonment. With regards to Count 7, the threats to Constable Henry, I sentence you to five months imprisonment, to be served consecutively. Though I appreciate these have occurred out of one incident. But you threatened two different police officers, and I think it should be separated so that you are on notice this kind of behaviour is going to be dealt with seriously.

The Sentencing Judge viewed the utter threats offences as serious, noting that the Appellant had threatened to shoot and stab and kill the police officers. The Sentencing Judge noted that it was one incident, but that the threats were made to two different police officers. He also viewed the need to deter the

Appellant as an important sentencing principle.

In that respect, I do not view Sentencing Judge as falling into error. While offences arising from one transaction are generally dealt with on a concurrent basis, it was not required that the Sentencing Judge do so. It was within his discretion to impose the sentences consecutively.

Similarly, I do not view the Sentencing Judge as having erred in his consideration of the nature of the uttering threats offences. He viewed the uttering threats charges as the most serious before the court, which was accurate as the remaining offences were either breaches of a probation order or a recognizance, and there was also a resisting a police officer offence.

The uttering threats offences were serious, involving multiple threats to two different police officers to shoot, stab, and kill those officers. It occurred in a situation where the officers were attempting to arrest the Appellant and where, for a period of time, albeit not a lengthy period of time, they did not know whether the Appellant had the means to either shoot or stab them as he had threatened as he was underneath a house and had one hand concealed in a pocket. The Sentencing Judge's conclusion that this behaviour was serious and needed to be deterred is subject to deference.

Having decided to impose consecutive

sentences, the Sentencing Judge was then required to give consideration to the totality principle. The justification of the Sentencing Judge for imposing consecutive sentencing was the threats to two different officers and the need to deter the Appellant. In considering totality, a sentencing judge who imposes consecutive sentences for multiple offences is required to ensure that the cumulative sentences do not exceed the overall culpability of the offender. *R v M.(C.A.),* [1996] 1 SCR 500 at paragraph 42.

The ultimate question is whether the global sentence imposed is a fit one. *R v Ewanchuck*, 2010 ABCA 298, paragraph 15.

The Sentencing Judge recognized that the global sentence of 14 months that he had imposed for all of the offences was longer than what was requested by the Crown. He addressed this by stating at page 36:

> In my calculation, that comes to a total of 14 months imprisonment. Well, that is a little more than the Crown's asked for too because in my view, Mr. Greenland, your behaviour is such that a longer term of imprisonment is appropriate. Just completely ignoring court orders and thinking you can do what you want and go around threatening people is not going to fly.

The Sentencing Judge gave consideration to

totality and was cognizant that the sentence he imposed exceeded that was sought by the Crown. He viewed the Appellant's actions in threatening the police officers and disregarding court orders as warranting a longer term of imprisonment than recommended by the Crown. The Appellant was being sentenced for 12 offences, 9 offences of which involved breaching court orders, including 2 separate recognizances and a probation order over a period of months from May to August 2019. The other three offences arose from the same incident, and those were the uttering threats to the police officers which was followed by the Appellant resisting arrest.

The Appellant is a young man, 22 years old, with a criminal record with a number of convictions on it. Significantly, he has prior offences against the administration of justice on his criminal record, as well as prior offences of violence. Since 2013, the Appellant has been consistently before the courts, and there is no meaningful gap in his criminal record.

In my view, the Sentencing Judge's view that a global sentence of 14 months imprisonment, acknowledging that the Appellant had entered guilty pleas, was an appropriate sentence, given the Appellant's circumstances, the number of breaches before the court, and the seriousness of the uttering threats charges.

For these reasons, I conclude that the Sentencing Judge erred in failing to advise counsel that he was considering imposing a sentence in excess of what the Crown was recommending and in not providing counsel with an opportunity to make further submissions.

However, upon hearing from counsel, I conclude that the Sentencing Judge did not err in the imposition of the sentences for the uttering threats charges. It was within his discretion to impose sentences consecutively and not concurrently, and the global sentence imposed was not demonstrably unfit. Therefore, the sentence appeal is dismissed.

(PROCEEDINGS CONCLUDED)

CERTIFICATE OF TRANSCRIPT

Neesons, the undersigned, hereby certify that the foregoing pages are a complete and accurate transcript of the proceedings transcribed from the audio recording to the best of our skill and ability. Judicial amendments have been applied to this transcript.

Dated at the City of Toronto, in the Province of Ontario, this 14th day of May, 2020.

Kim Neeson

Principal