ONTARIO COURT OF JUSTICE

DATE: 2024·October·10

B E T W E E N :

His Majesty the King

— and —

Christiaan Doughty

Judgment – Sentencing

L. Price, K. Jazvac ..... Counsel for the Crown
G. Tomlinson ..... Counsel for the Defendant

Felix J.:

Table of Contents: *R. v. Doughty*

I. Introduction

A. Introduction

[1] The defendant was charged with several *Controlled Drugs and Substances Act* (*CDSA*) and *Criminal Code* offences arising out of a police investigation into drug trafficking. On October 4th I received submissions. On October 10th I sentenced the defendant and provided brief reasons in court. I indicated written reasons would follow. These written reasons were released on the same day.

[2] The defendant was convicted after trial of the following indictable offences:

1. Trafficking cocaine, contrary to s.5(1) of the *CDSA*;
2. Possession of proceeds of crime contrary to s.354(1)(a) of the *Criminal Code*;
3. Trafficking cocaine, contrary to s.5(1) of the *CDSA;*
4. Possession of proceeds of crime contrary to s.354(1)(a) of the Criminal Code;
5. Trafficking cocaine, contrary to s.5(1) of the *CDSA*;
6. Possession of proceeds of crime contrary to s.354(1)(a) of the *Criminal Code*; and,
7. Possession of Cocaine for the purpose of trafficking, contrary to s.5(2) of the *CDSA*.
8. Possession of a restricted or prohibited firearm without a licence contrary to s. 91(1) of the *Criminal Code*;
9. Possession of a restricted or prohibited firearm while knowingly not being the holder of a licence contrary to s. 92(1) of the *Criminal Code*; and,
10. Possession of a loaded prohibited firearm contrary to s.95(1) of the *Criminal Code*.

[3] At trial I acquitted the defendant in relation to a count alleging possession of fentanyl for the purpose of trafficking. Given the submissions of counsel, I have stayed the conviction in relation to s.91(1) of the *Criminal Code*: *R. v. Kienapple*, [1975] 1 S.C.R. 729; *R v. Prince*, [1986] 2 S.C.R. 480, at paras. 17-20.

B. Crown Position

[4] The Crown seeks a global sentence of five years and six months jail comprised of a concurrent 42 month sentence for the firearm convictions, and a consecutive 24 month sentence for the trafficking offences. The Crown also seeks weapons prohibition orders pursuant to 109 of the *Criminal Code* and DNA orders.

C. Defence Position

[5] The Defence seeks a 2 year less one day conditional sentence of jail and three years probation for the firearm offences. As for the trafficking counts, the Defence seeks a "time-served" disposition given sentencing credits. The Defence does not contest the ancillary orders sought by the Crown.

D. Sentence

[6] I hereby sentence the defendant to a global sentence of four years and six months jail (1643 days). Having regard to the relevant sentencing principles I will explain in this judgment, I have structured the sentence as follows:

1. A sentence of three years and six months jail (1278 days) for the firearms offences. This sentence will run concurrently as it pertains to the two counts on Information #0624.

2. A sentence of one year (365 days) for the trafficking cocaine counts and the possession of cocaine for the purpose of trafficking. This sentence will run consecutive to the sentence on the firearm convictions, but concurrently as it concerns the other counts on the drug trafficking Information.

3. A sentence of 6 months jail (180 days) on the proceeds counts. This sentence will run consecutive to the sentence on the firearms convictions, but concurrently as it concerns the other counts on the drug trafficking Information.

[7] In arriving at my overall sentence, I have taken into consideration the conditions associated with the pre-sentence custody and the strict bail conditions.

[8] I have determined that the defendant should receive credit for pre-sentence detention (54 x. 1.5 = 81 days). This will be subtracted from the sentence on the firearms counts. Thus, the sentence remaining to serve on the firearms counts will be 1197 days.

[9] I impose a weapons prohibition pursuant to s.109 of the *Criminal Code* as it concerns the s.95(1) conviction, the trafficking cocaine convictions, and the possession for the purpose of trafficking conviction.

[10] I impose DNA orders on the trafficking counts, possession for the purpose of trafficking count, and the firearms counts, as they are enumerated "generic" secondary designated offences.

[11] The victim surcharge is waived given the hardship circumstances associated with the defendant's immigration status and inability to work.

[12] I have documented this sentence in a chart attached as an appendix to this written judgment and provided to the clerk of the court.

II. Reasons for Sentence

A. Circumstances of the Offence

[13] I have provided a detailed analysis of my findings in my written judgment at trial. In sum, the defendant sold cocaine to an undercover police officer three times. After the third sale, he was arrested. The police obtained a search warrant for a residence associated to the defendant. Inside the residence, a quantity of cocaine was found on top of the stove in plain view. A black satchel with a firearm was seized from atop a toaster. A prescription pill container with a quantity of fentanyl was found in a plastic bag on the kitchen counter.

B. Background of the Defendant

[14] The PSR and Defence exhibits set out the background circumstances of the defendant. The defendant was born on January 23rd, 1992, in Barbadoes. He had a supportive family environment and benefited from a high standard of living that allowed him to travel and life with his family to several different countries. He was afforded opportunities to participate in organized sports thanks to the standard of living provided by his parents. It is clear that the defendant loved and admired his parents for their level of education and approach to life.

[15] The defendant attended international schools for most of his childhood (age one to nine) as his family travelled around the world. He described working hard during and seeking high grades.

[16] At nine years of age the defendant returned to school in Barbados and self-reported no issues impacting his educational pursuits. The defendant achieved a high school diploma. He continued his educational journey by attending University in Barbados. He studied Computer Science and Entrepreneurship. He completed three out of the four years required to obtain his undergrad and noted he stopped attending as he relocated to Canada.

[17] The defendant's parents were separated. The defendant lost his father in 2008. His mother resides in another country and is unaware of his legal circumstances.

[1] Apart from a dispute over estate succession, the defendant has a positive relationship with his siblings who reisde in the United States and United Kingdom.

[2] The defendant arrived in Canada in 2016. He told the PSR author that he was defrauded by an immigration adviser and believed he was lawfully in Canada. According to the *CBSA*, the subject came to Canada in 2016 as a visitor and was granted entry for three days. The subject was to report back to the airport to confirm his departure, but he failed to do so. In August 2019, the subject was reported for an overstay and issued an exclusion order. The PSR notes that *CBSA* has conducted a pre-removal risk assessment and the defendant is ready to be removed from Canada.

[3] The subject is currently in a relationship. They share a six-month-old child and have been together for two years. This person describes a positive relationship and is an incredible father.

[4] The defendant blamed his involvement in the offences on a "partying" type subculture focused on going out ,drinking, and using recreational drugs. He described poor decision making associated with these endeavours culminating with his involvement with the law. The defendant advised that PSR author that he has removed himself from these negative peer influences. The defendant described using alcohol, marijuana, and cocaine during his involvement in the partying scene. He indicates that he is no longer engaged in such substances. There is no information about substance abuse counselling having been completed.

[5] With respect to employment, the defendant is not legally able to work in Canada because of his immigration status. The defendant told the PSR author he has completed some volunteer work over the years to occupy his time. He also told the PSR author that he has financially supported himself while in Canada through his inheritance money and help from his family and partner.

[6] The defendant was cooperative with the PSR author. He accepted partial responsibility for the offences before the court. I note that he provided some information to the author about being compensated for trafficking – something he denied at trial. At trial he claimed his trafficking was inspired by the possibility of wholesale pricing but not compensation or profit. I also note that the PSR author quoted the defendant as having taken responsibility for "facilitating" a drug deal.

C. Mitigating Factors

[7] Section 718.2 of the *Criminal Code* recognizes that sentences should be increased or reduced having regard to relevant aggravating or mitigating factors relating to the offence or the offender.

1. Credit for Stringent Judicial Interim Release Conditions - *Downes*

[8] The defendant seeks credit for stringent release conditions pursuant to *R. v. Downes* (2006), 79 O.R. (3d) 321 [*Downes*]. A sentencing judge must consider the potential mitigating circumstance of time spent under stringent bail conditions: *Downes*, at paras 26-33; *R. v. Ijam*, 2007 ONCA 597; *R. v. Bullens*, 2021 ONCA 421. Pre-trial bail may be conceived as a mitigating factor on sentence because stringent bail conditions can be punitive like a custodial sentence: *R. v. C.C.*, 2021 ONCA 600, at para. 4 [*C.C.*]; *R. v. Joseph*, 2020 ONCA 733, at para. 108. A sentencing judge must review the relevant factors and determine what credit (if any) is appropriate, and then explain that exercise of discretion: *R. v. Dodman*, 2021 ONCA 543, at para. 10; *Downes*, at para. 33;

[9] The defendant must lead evidence as to the impact of the bail conditions: *R. v. Lewis*, 2021 ONCA 597, at para. 8. In this regard, the crystallization of bail conditions as a mitigating factor is dependent showing how the conditions impacted their life. If a court determines that credit is due, it is acceptable to assign a particular "credit" or simply consider the circumstance in arriving at an overall sentence: *C.C.*, at para 5. There is no mathematical formula.

[10] I have given the stringent bail conditions modest consideration in arriving at my ultimate sentence in this case for several reasons.

[11] First, the defendant was on bail for serious allegations involving a loaded firearm and drug trafficking. He was not a Canadian citizen, permanent resident, or landed immigrant. Further, as set out in the PSR, he was not complying with the immigrations laws of Canada at the time he committed these offences.

[12] Second, while the bail conditions were restrictive, I find that they were responsive to the allegations and the strength of the prosecution case.

[13] Third, the bail terms did not impact the defendant's educational opportunities or employment. He did not attend Canada for the purpose of educational pursuits. As noted, the he was not permitted to work pursuant to his immigration status.

[14] Fourth, the defendant was alleged to have committed additional offences and breached the original release. The defendant was arrested on January 10, 2023. He was in custody until February 6th, 2023, where he was released on a house arrest bail with one surety in the non-deposit amount of $10,000. The Information also shows that the defendant was in bail court on July 17th and released after a contested hearing. The new bail release included other criminal allegations of assault, unlawful entry, and fail to comply. The bail terms were made stricter as GPS monitoring was imposed. The July 17th release was more restrictive having regard to the circumstances.

[15] Fifth, I decline to follow the cases provided by Defence counsel where other learned judges assigned a standard measure of credit per day or recognized a general range of credit. In my view the authorities I have cited above are binding and controlling. There is no specific quotient. There is no "range" of *Downes* credit. There is no specific formula that a court must use to determine the credit.

[16] I have considered the 591 days of stringent bail conditions in arriving at my overall sentence in this case.

2. First Sentence of Jail

[17] The defendant is a 32-year-old adult first time offender. He is not a youthful first offender. Nevertheless, criminal law sentencing principles demand that the first jail sentence be proportionate, tailored, and the minimum necessary to achieve the sentencing objectives given the principle of restraint: *R. v. Batisse*, 2009 ONCA 114; *R. v. Borde*, [2003] O.J. No. 354(Q.L.)(C.A.); *R. v. Priest* (1996), 110 C.C.C. (3d) 289 (Ont. C.A.)

3. Remorse

[18] The defendant's statement in court deserves some recognition as he acknowledged partial responsibility.

4. Rehabilitative Potential

[19] Having regard to the defendant's upbringing, evident intelligence, educational background, and articulate presentation, I find that the defendant has good rehabilitative prospects.

D. Aggravating Factors

1. Firearms, Illicit Drugs, and the Greater Toronto Area

[20] In a recent reported decision named *R v. Mesinele,* 2023 ONCJ 28, I re-stated my characterization of aggravating circumstances inherent in the possession of non-registered handguns:

> **30** In a recent decision I addressed why the illegal possession of firearms was an aggravating circumstance: *R. v. Rudder*, 2022 ONCJ 367. I repeat the broad conclusion at paragraphs 47 to 50:
>
> > 47 For decades, countless courts have emphasized the societal harm associated with the possession and use of illegal firearms:(A selection of these cases includes, Nur, (Moldaver, J in dissent) at paras. 131 and 136; R. v. Brown, 2010 ONCA 745 at para. 14; R. v. Danvers (2005), 199 CCC (3d) 490 (Ont. C.A.) at paras. 77-78; R. v. Martin, 2022 ONSC 2354, at para. 6; R. v. Donison, 2022 ONSC 741, at paras. 32, 46-49; R. v. Chizanga and Meredith, 2020 ONSC 4647, at paras. 5-14,18-20; R. v. St. Clair, 2018 ONSC 7028, at para. 47; R. v. Kawal, 2018 ONSC 7531, at paras. 11-12; R. v. Thavakularatnam, 2018 ONSC 2380, at para. 21; R. v. Ferrigon, [2007] O.J. No. 1883 (S.C.J.) at para. 25.

> 48 As a jurist living in the GTAA, I may take notice of the number of violent crimes, shootings, and murders associated with illegal firearms: R. v. Lacasse, 2015 SCC 64, at paras. 11,12, 89-90. I may also observe that on May 30th, 2022, the Federal Government tabled new gun control legislation seeking to limit access to handguns. The issue of illegal firearms is topical. It is being discussed many communities in Toronto. It is being discussed in the news media. It is being discussed on social media. It is being discussed in coffee shops and restaurants. The community has no tolerance for illegal handguns.
>
> 49 While the mandatory minimum sentence is no longer available, at paragraph 82 in Nur, Justice McLaughlin suggested that a three year sentence may be appropriate for the vast majority of "true crime" possessions. I also recognize that sentence ranges are simply collected summaries of minimum and maximum sentences: Lacasse, at para. 57.
>
> 50 In my view, seven years later, given the persistent problem with illegal firearms in the Toronto area, higher sentences should be the norm. In my view, people in Toronto and the surrounding locales have little tolerance for "true crime" possession of loaded illegal firearms and the attendant criminal offences that result. To use the local vernacular -- people are "fed up" with gun crime. I am entitled to take judicial notice of this sentiment in my community.

> **31** As I indicated in *Rudder*, many courts have emphasized the toll that firearms-related crime exacts on the broad community. I suggest that courts should also recognize that racialized communities are part of this broad community. Perhaps, along with taking judicial notice of the prevalence of anti-Black racism per *Morris*, it is also time to recognize that persons in racialized communities have no tolerance for the firearms-related crime plaguing their communities. Persons living in all communities reject firearms-related crime. Persons living in all communities are entitled to the protection of the law and a safe community. Surely such observations are not limited to Judges who are racialized and who share a similar background and community as the defendant.
>
> **32** I say that Judges are able to absorb media sources and take notice of a crisis of firearms-related crime in the Greater Toronto area. I take judicial notice of the prevalent shootings, murders, and violent crime extant. I join the community of Judges who have addressed this issue.

[21] I maintain this perspective in October of 2024. The combination of illegal drugs and firearms is a potent aggravating circumstance: *R v. Crevier,* 2015 ONCA 619, at paras. 128-130.

2. True Crime Spectrum Offence

[22] The loaded firearm was found on top of the toaster in the defendant's apartment within arms-length of a substantial amount of narcotics the defendant had prepared for sale. Having disavowed possession of the loaded firearm at trial, the defendant has not added any new information at the sentencing phase relevant to his reasons for possessing the loaded firearm.

[23] On this record, and based on my analysis of possession in the trial judgment, I am totally convinced that the defendant's possession of the firearm was a "true crime" possession. This is clearly not a regulatory infraction: *R. v. Nur*, 2013 ONCA 677, at paras. 5, 82 [*Nur*]; *R. v. Morris*, 2021 ONCA 680, at para. 71[*Morris*]; *R. v. Mohiadin*, 2021 ONCA 122, at para. 12; *R. v. Beharry*, 2022 ONSC 4370, at paras. 20-24[*Beharry*]; *R. v. Mansingh*, 2017 ONCA 68, at paras.

24-25; *R. v. Ellis*, 2016 ONCA 598, at paras. 78-80; *R. v. Marshall*, 2015 ONCA 692, at paras. 47-49; *R. v. Doucette*, 2015 ONCA 583, at paras. 59-60; *R. v. Dulfour*, 2015 ONCA 426, at para. 8

3. Repeated Trafficking

[24] The defendant voluntarily engaged in three drug trafficking incidents on January 5th, 7th, and 10th. The quantity of drugs and money exchanged increased over these transactions.

[25] The trafficking offences were not impulsive "one-off" events, or the modest efforts of an addict trafficker designed to sustain a habit. The defendant did not "facilitate" a drug deal as he told the PSR author. He was the principal.

4. Commercial Trafficker

[26] While I acknowledge the defendant's information at sentencing that he succumbed to the "partying lifestyle" and was using drugs, I am satisfied that he was a commercial trafficker for profit.

[27] The defendant claimed to be a businessman when he testified. He referred to his commerce in Barbados. But he lost credibility with the court when he claimed at trial that he trafficked drugs for the first time in his life to "help a friend", and was not concerned about profit. Legitimate businessmen do not launch a drug trafficking enterprise (for the first time ever) to "help friends", let alone perfect strangers who happen to be undercover police officers.

[28] The defendant told the undercover offer that if he continued to buy drugs from him the price would get better. As pointed out by the Crown during submissions, a review of the pricing for each trafficking shows that this in fact occurred.

[29] I have already indicated in my findings at trial that the defendant secured a car and drove a great distance to obtain product to sell on his last trafficking transaction. I did not believe any of his evidence at trial that he performed these actions for a "friend" who was in fact, an undercover officer, who was a stranger to him. I also did not believe his explanation at trial that he performed these actions in the hope that he might benefit from a wholesale price for drugs from his supplier. I also do not believe his evidence to the PSR author that he was compensated with cocaine.

[30] The defendant did not testify that he was an addict-trafficker. While he told the PSR author that he refrains from using illegal drugs, there is no evidence of the defendant having engaged in counselling or treatment to address an addiction brought on by the "partying lifestyle".

[31] The simple truth is, on the entire record at trial, the defendant was a low-level commercial trafficker. His evidence about his efforts to obtain product on the last trafficking occasion clearly showed his planning, deliberation, and commitment to the trafficking enterprise. The notion that he would borrow a car and drive from downtown to the airport area to resupply solidified the record that this was a commercial enterprise. The defendant did not tell the truth about the terms of his commercial drug trafficking.

5. Factors – Neither Mitigating nor Aggravating

a) No Guilty Plea

[32] The defendant did not plead guilty, so he does not receive the substantial mitigation normally accorded to a plea. I infer that the defendant instructed his counsel to narrow issues at trial. While I also understand he essentially admitted the trafficking counts, he also instructed his counsel to raise an entrapment issue. There was a strong prosecution case on the trafficking.

b) Expressions of Innocence

[33] The defendant's statements in the PSR maintaining innocence may not be characterized as an aggravating circumstance. I have also declined to weigh the statements the defendant made to the PSR author that conflict with his evidence at trial. This circumstance may not be characterized as an aggravating factor.

c) Morris

[34] The defendant relies upon the Ontario Court of Appeal in *R. v. Morris*, 2021 ONCA 680, as a relevant consideration on sentence. The defendant is a middle-aged black man from the Caribbean island of Barbados.

[35] There is no question that anti-Black racism and evidence of the impact of such racism on the specific offender can be important when determining sentence: *Morris*, at para. 87. As noted by the Court, the defendant's background and life experiences are important considerations when gauging moral responsibility: *Morris*, at paras 87-89. Indeed, systemic and background factors, including any explanation for the defendant's commission of the crime may provide insight into how systemic racism may have contributed to the defendant's criminal conduct: *Morris*, at paras. 92-93.

[36] The Court in *Morris* emphasized that disadvantaged circumstances, including those circumstances associated to systemic racism, are capable of mitigating the personal responsibility of the offender to some degree: *Morris*, at para. 94. While a direct causal link between the offences and anti-Black racism is not required, there must be some connection between systemic racism identified in the community and the circumstances that are said to mitigate the criminal conduct: *Morris*, at para. 97.

[37] In my view, little weight should be assigned to this area of consideration on sentence.

[38] There is no evidence suggesting that the defendant has experienced systemic racism in Canada *and* that this experience has contributed to the offences before the court. Further, there is no evidence of a causal connection between anti-Black racism and the defendant's involvement in these crimes.

[39] The defendant is not a Canadian citizen or permanent resident. He attended Canada voluntarily. He led a privileged existence in his home country. His parents gave him every opportunity and modelled the behaviour of law-abiding citizens.

[40] The defendant had the opportunity to come to Canada and prosper. At trial he claimed to be a businessman. He claimed to be able to support a $1900.00 lease payment. He claimed to be supported by an inheritance. There is no evidence of the defendant's experience with anti-Black racism in Canada. This nation did nothing but offer an opportunity to the defendant as it has done for so many migrants.

[41] Not only is there no evidence of the defendant's experience with anit-Black racism, there no evidence that the defendant's experience with anti-Black racism inspired his criminality. The defendant testified at trial that he trafficked in drugs simply to help a friend. He asserted his innocence as it concerns the firearm. He has placed no further evidence before the sentencing court suggestive of the circumstances animating his criminal conduct.

[42] While I have still considered this factor on sentencing, I find that it is more neutral in the analysis and as such, I characterize the *Morris* considerations as neither mitigating nor aggravating.

d) Addiction

[43] The defendant explained that at the time of the offences he was involved in the partying subculture and was using marijuana and cocaine. As indicated above, the defendant did not suggest that he was an addict. Nor did he suggest that his trafficking activities were in support of an addiction.

e) Credit for Pre-sentence Custody ("Summers Credit)

[44] The defendant has spent a total of 54 days in pre-sentence custody. The parties agree that I may consider two days in custody on the breach allegation which is not before the court. The parties jointly suggest that the defendant receive the maximum statutory enhanced credit for this pre-sentence custody. I agree. I credit the defendant with 1.5 days credit for each day of his pre-trial detention pursuant to s. 719(3.1) of the *Criminal Code*: *R. v Summers*, 2014 SCC 26, at

paras. 7, 34, 68-80, affirming, 2013 ONCA 147. Thus, I credit the defendant with 81 days of pre-sentence custody.

f) Credit for Harsh Custodial Conditions ("Duncan Credit")

[45] The court may allow enhanced credit for "particularly harsh pre-sentence incarceration conditions" based on the impact on the defendant: *R. v. Duncan*, 2016 ONCA 754, at para. 6. Further, where lockdown conditions have had an "adverse effect" on the defendant, credit is available: *R. v. Rajmoolie*, 2020 ONCA 791, at paras. 14-16; *R. v. Omoragbon*, 2020 ONCA 336, at para. 32; *R. v. Henry*, 2016 ONCA 873, at para. 9. There is no mathematical formula. The appropriate credit is left to the discretion of the sentencing judge.

[46] The defendant has also presented a written statement documenting his time in pre-sentence custody. Defence counsel has subpoenaed the jail records demonstrating the lock down time. I am satisfied that this record establishes an adverse impact on the defendant: *R. v. Bristol*, 2021 ONCA 599, at paras. 11-12.

[47] I decline to assign a particular rate or quotient in recognition of these circumstances. I have simply taken this record into account in arriving at a fit and proportionate sentence in this case: *R. v. Marshall*, 2021 ONCA 344, at paras. 50-53

g) Collateral Consequences

[48] A proportionate sentence may require an examination of the collateral consequences including those consequences that arise from the commission of the offence, the conviction for the offence, or the sentence imposed: *R. v. Suter*, 2018 SCC 34, at para. 47 [*Suter*].

[49] A collateral consequence is not necessarily aggravating or mitigating per s. 718.2(a) of the *Criminal Code* as these consequences are not related to the gravity of the offence or the level of responsibility of the offender: *Suter*, at para. 48. Collateral consequences are integrally connected to the goal of an individualized proportionate sentence as the focus concerns whether the impact of the sentence would have a more significant impact on the offender because of the offender's circumstances: *Suter*, at para. 48

[50] In determining the weight of this factor there is no rigid formula or test involved but it is important not to overemphasize this factor thereby leading to a disproportionate sentence: *Suter*, at para. 56.

[51] Defence counsel cites the immigration consequences associated with sentencing the defendant given the application of the *Immigration and Refugee Protection Act* S.C. 2001, c.27 [*IRPA*].

[52] Defence counsel submits that if the defendant receives a custodial sentence of 6 months or more, the *IRPA* limits the ability to appeal any deportation order. The defendant advocates for a conditional sentence because of a belief that such a sentence will preserve the defendant's immigration prospects.

[53] I have sought guidance from several appellate cases: *R. v. Regis, 2017 ONCA 848*; *R. v. Mohammed*, 2016 ONCA 678, at para. 3; *R. v. B. (R.)*, 2013 ONCA 36, at paras. 23-27; *R. v. Badwar*, 2011 ONCA 266, at paras. 44-45; *R. v. McKenzie*, 2017 ONCA 128, at para. 34; *R. v. Curry,* [2005] O.J. No 3763 (C.A.).

[54] I arrive at the following analysis assisted by the case law:

1. Collateral consequences, and in particular immigration consequences, cannot operate to subvert the court's observance of the fundamental purposes and principles of sentencing and the goal of a proportionate sentence: *R. v. Pham*, 2013 SCC 15, at paras. 11-20;

2. The sentencing court should not impose unfit, inadequate, or artificial sentences in an effort to evade the immigration consequences;

3. The sentencing court should consider the will of Parliament as expressed in both the *IRPA* and the *Criminal Code*;

4. Section 718.3(4)(c)(ii) of the *Criminal Code* supports the discretionary use of consecutive sentences;

5. There is no statutory barrier prohibiting the use of serial consecutive sentences; and,

6. The sentencing court should not lose sight of the sentencing principles of totality and proportionality.

[55] I find that on the facts and circumstances in this particular case, it would be inappropriate for a criminal court to allow the immigration considerations to predominate the approach to sentencing. The approach to criminal sentencing must be focused on the criminal justice sentencing objectives and the ultimate aim of proportionality.

E. Purpose and Principles of Sentencing

1. Purpose of Sentencing

[56] Section 718 of the *Criminal Code* states that the fundamental purpose of sentencing is to protect society, prevent crime, promote respect for the law, and maintain a just, peaceful and safe society.

[57] These aims are achieved by promoting sanctions that have certain objectives. In this case the following objectives are important: (a) to denounce

unlawful conduct and the harm done to victims or to the community that is caused by unlawful conduct; (b) to deter the offender and other persons from committing offences; (c) to separate offenders from society, where necessary; (d) to provide reparations for harm done to the community; and (e) to promote a sense of responsibility in offenders, and acknowledgement of the harm done to the community.

F. The Fundamental Principles of Sentencing

1. Restraint

[58] Section 718.2(d) and (e) of the *Criminal Code* address the criminal law principle of restraint. The defendant should not be unduly deprived of liberty if appropriate less restrictive sanctions could achieve the aims of sentence. All reasonable and available sanctions, other than imprisonment, should be considered: *R. v. S.K.*, 2021 ONCA 619, at paras. 12-13; *R. v. Desir*, 2021 ONCA 486, at para. 41; *R. v. Borde*, [2003] O.J. No. 354(Q.L.)(C.A.).

2. Totality and Proportionality

[59] Sections 718.1 and 718.2(c) of the *Criminal Code* provide that a sentence must be proportionate to the gravity of the offence and the degree of responsibility of the offender.

[60] Section 718.1 of the Criminal Code mandates that a sentence be proportionate to the gravity of the offence and the degree of responsibility of the offender. Given the number of counts before the court, the principle of proportionality requires that I consider a blend of concurrent and consecutive sentences. Where consecutive sentences are imposed, the combined sentence should not be unduly long or harsh: *R v. Milani*, 2021 ONCA 56, at para. 34;

[61] The Supreme Court of Canada has approved of two methods by which the totality principle may be addressed: *R v. Frieson*, 2020 SCC 9, at para. 157. I have assessed the totality of the sentence in keeping with the guidance of the Ontario Court of Appeal in *R. v. Jewell*, (1995) 100 C.C.C. (3d) 270, and *R. v. Ahmed*, 2017 ONCA 76, at paras. 78 -93.

[62] In my view the gravamen of the firearms counts concerns the illegal possession of a loaded firearm. I view the firearms offences as more serious for the reasons I set out earlier in this judgment about the inherent danger of illegal firearms.

[63] The gravamen of the trafficking counts concerns three trafficking transactions to an undercover police officer and the proceeds counts. These matters are also serious particularly when considered alongside the notoriously troublesome dynamic that illegal drugs and illegal guns present in the Greater Toronto area.

[64] The rule against multiple convictions prevents multiple convictions where there is both a factual and legal nexus amongst the various offences. Where there exists a factual and legal nexus amongst counts, the defendant should be found guilty of the most serious offences and the findings of guilt on the other offences should be stayed by the court: *Kienapple; Prince; R. v. Provo*, [1989] 2 S.C.R. 3.

[65] Having considered totality and proportionality, I arrive at the following approach.

[66] First, the parties agree that the s.91(1) count should be stayed. I agree.

[67] I find that the sentence on the two remaining firearm-related counts should run concurrent to one another.

[68] As it concerns the multiple convictions for trafficking, I will render a global sentence on those counts concurrent to each other but consecutive to the sentence on the firearms offences.

[69] In my view, this approach addresses the relevant interests of sentencing applicable to firearms cases and the interests involved in sentencing those who would engage in commercial drug trafficking. In my view this properly engages the principles of totality and proportionality: *R. v. Hannora*, 2020 ONCA 335, at para. 6-14.

3. Parity – Sentencing Range

[70] Section 718.2 mandates that a sentence should be similar to sentences imposed on similar offenders for similar offences committed in similar circumstances. The challenge for a sentencing judge is to impose a fit and proportionate sentence having properly evaluated the relevant factors: *R. v. M. (C.A.)*, [1996] S.C.J. No 28, at para. 90.

a) Firearms Offences

[71] I have found instructive guidance in a few cases. First, I accept the following guidance from Justice Schreck in *Beharry* at paragraphs 30-31:

> **30** Mr. Beharry's conduct is clearly not in the nature of a regulatory offence. But nor is he an "outlaw" who carried the firearm "as a tool of his criminal trade." Rather, he falls between the two extremes: *R. v. Kongolo*, 2022 ONSC 3891, at para. 69; *R. v. Marsan*, 2020 ONCJ 638, 69 C.R. (7th) 431, at para. 27. Because of this, in my view the sentencing range suggested by the Crown, three and a half to four years, does not apply.
>
> **31** The well established three-to-five year range that is often mentioned in s. 95 sentencing cases applies in situations where "the use and possession of the gun is associated with criminal activity, such as drug trafficking": *R. v. Graham*, 2018 ONSC 6817, at para. 38; *R. v. Marshall*, 2014 ONCA 692, at paras. 47-48; *Nur* (S.C.C.), at para. 82. Lower sentences in the upper reformatory or lower penitentiary range can and

have been imposed in cases in the "middle of the spectrum," that is, where the firearm is not possessed in connection with other criminal activity: *R. v. Smickle*, 2014 ONCA 678, 304 C.C.C. (3d) 371, at para. 30 (additional reasons at 2014 ONCA 49, 306 C.C.C. (3d) 351); *R. v. Johnson*, 2022 ONSC 2688, at para. 38; *R. v. Shomonov*, 2016 ONSC 4015, at para. 12; *R. v. Downey*, 2017 ONCA 789, at paras. 9-12; *R. v. Dalton*, 2018 ONSC 544, at para. 56; *R. v. Filian-Jiminez*, 2014 ONCA 601, at para. 2; *Kongolo*, at para. 74; *Boussoulas* (S.C.J.), at para. 22.

[72] In my view, the defendant's possession of a firearm was associated with drug trafficking as a "tool of the trade" despite a lack of direct evidence that he personally possessed the firearm on each of the trafficking incidents. The gun was loaded and proximate to the cocaine he prepared for trafficking. As indicated in my judgment at trial, the defendant's testimony about the black satchel changed. There is no question in my mind that the defendant possessed the firearm. That there was no evidence of his personal possession of the firearm while engaged in the act of trafficking is simply the absence of a potential aggravating circumstance.

[73] When I consider the intersection of "true crime" firearm possession and the range of sentence I must consider also consider *Nur.* In a recent case called *R. v. Barreira*, 2024 ONSC 4682, J. Stribopoulos J. provided important guidance:

> Sentencing Ranges for the Offences
>
> 31 As noted, the parties disagree on the appropriate sentencing ranges for Mr. Barreira's offences. Consequently, I will address the range of sentences for each offence.
>
> 32 The gravity of gun crimes cannot be exaggerated. Guns intimidate, they maim, and they kill. They are implements of human destruction. That is why criminals seek to possess and use them. The cases recognize that unlawful firearms are a scourge in our community, and their possession must be discouraged through exemplary sentences that denounce and deter their possession and use, and thereby enhance public safety: see R. v. Nur, 2013 ONCA 677, 117 O.R. (3d) 401, at para. 206, aff'd 2015 SCC 15, [2015] 1 S.C.R. 773; R. v. Mohiadin, 2021 ONCA 122, at para. 12.
>
> 33 Further, as the Court of Appeal has recognized, "[d]enunciation and deterrence assume places of prominence in determining a fit sentence for crimes involving firearms, especially loaded semi-automatic firearms in the possession of drug traffickers": R. v. Mohammed, 2017 ONCA 691, at para. 6.
>
> 34 In Nur, in affirming the Ontario Court of Appeal's decision, the Supreme Court of Canada agreed with Justice Doherty that firearm offences fall along a spectrum, with regulatory infractions at one end and guns used for criminal purposes at the other. Cases falling near the "true crime" end of the spectrum warrant sentences of three years or more. Writing for the majority in Nur, Chief Justice McLachlin explained, at para. 82:
>
> > Section 95(1) casts its net over a wide range of potential conduct. Most cases within the range may well merit a sentence of three years or more, but conduct at the far end of the range may not. At one end of the range, as Doherty J.A. observed, "stands the outlaw who carries a loaded prohibited or restricted firearm in public places as a tool of his or her criminal trade. ... [T]his person is engaged in truly criminal conduct and poses a real and immediate danger to the public": para. 51. At this end of the range -- indeed for the vast majority of offences -- a three-year sentence may be appropriate. A little further along the spectrum stands the person whose conduct is less serious and poses less danger; for these offenders three years' imprisonment may be disproportionate, but not grossly so. At the far end of the range, stands the licensed and responsible gun

> owner who stores his unloaded firearm safely with ammunition nearby, but makes a mistake as to where it can be stored. For this offender, a three-year sentence is grossly disproportionate to the sentence the conduct would otherwise merit under the sentencing provisions of the Criminal Code.
>
> [Underlining in original]
>
> **35 Since Nur courts have often imposed sentences approaching or at the maximum reformatory range (two years less a day) in cases involving first offenders who unlawfully possess a restricted firearm but have not otherwise engaged criminal activity**: see R. v. Smickle, 2013 ONCA 678, 304 C.C.C. (3d) 371, at para. 30; R. v. Filian-Jiminez, 2014 ONCA 601 (18 months); R. v. Boussoulas, 2015 ONSC 1536, aff'd 2018 ONCA 222, 407 C.R.R. (2d) 44 (21 months); R. v. Shomonov, 2016 ONSC 4015 (21 months); R. v. Downey, 2017 ONCA 789 (two years less a day); R. v. Hassan, 2023 ONSC 5040 (two years less a day).
>
> 36 In such cases, where exceptional circumstances were also present, sentencing judges have even **imposed conditional sentences. For example, they have done so in cases where Morris factors mitigated an offender's degree of responsibility and/or where the offenders had already made considerable strides toward rehabilitation**: see R. v. Moses, 2022 ONSC 332 (conditional sentence of two years less a day); R. v. Stewart, 2022 ONSC 6997 (same); R. v. Beharry, 2022 ONSC 4370, at paras. 30-31 (same); R. v. Ramos, 2023 ONSC 1094 (same); R. v. Marier, 2023 ONSC 5194 (same); R. v. Stewart, 2024 ONSC 281 (same); R. v. Roy, [2023] O.J. No. 4931 (S.C.J.) (18-month conditional sentence).
>
> **37 In contrast, offenders with prior criminal records, even those who are youthful, tend to receive sentences of three years of imprisonment**: see R. v. Bedward, 2016 ONSC 939 (three years); R. v. Jama, 2018 ONSC 1252 (same); R. v. Johnson, 2022 ONSC 2688 (same).
>
> **38 Similarly, courts have imposed sentences ranging between two and four years of imprisonment where an offender's firearm possession is associated with other criminal activity, like drug trafficking**: see R. v. Wong, 2012 ONCA 767, at paras. 9-15 (three years); R. v. Marshall, 2015 ONCA 692 (42 months); R. v. Mansingh, 2017 ONCA 68 (43 months); R. v. Prosser, 2014 ONSC 6466 (30 months); R. v. Griffith, 2019 ONSC 358 (four years); R. v. Marfo, 2020 ONSC 5663 (two years).
>
> 39 Finally, the sentences for section 95 recidivists who also breached firearms prohibition orders are much longer, ranging between four and nine years of imprisonment: see R. v. Morris, 2023 ONCA 816, at para. 87 (citing the relevant cases).
>
> [Emphasis Added]

[74] In my view the defendant's possession of the loaded firearm in this case is a "true crime", punctuated by his engagement in trafficking cocaine. This is the only real reason to have a loaded firearm sitting on top of your toaster.

[75] The *Morris* factor is muted. The immigration concern can not predominate the sentencing.

[76] As a judge sitting in Toronto, I am readily able to apprehend the public sentiment about illegal firearms and the trafficking of illegal drugs. In my view, the public is fed up with the ancillary impact of these crimes on our community. Again, in my view, sentences should increase.

[77] I find that having regard to the relevant factors in this case, a sentence in the range of between 4 and 6 years in the penitentiary would be fit and proportionate. I arrived at a sentence of three and one-half years on the firearms offences because of my consideration of other factors outlined in this judgment.

b) Trafficking Offences

[78] In *R. v. Woolcock*, [2002] O.J. No 4927 (C.A.) the Court of Appeal set a range of sentence of between 6 months and two years less a day jail for low level accused trafficking for profit. This is not a *de facto* minimum sentence, and ranges of sentences are only guidelines: *R. v. Johnson*, 2021 ONCA 257, at para. 35.

[79] I situate the defendant as a street-level trafficker for profit. I have heard the submissions of the Crown about the available inference that the defendant offered to traffic in a variety of substances during his first interaction with the undercover officer. But I have found the defendant not guilty in relation to the fentanyl count and I am not satisfied beyond a reasonable doubt that the defendant was intent on broad trafficking.

[80] In my view, a sentence in the range of twelve to sixteen months jail is appropriate for the trafficking offences.

G. Conclusion

[81] Balancing all of the aims of sentence and the relevant factors, the primary sentencing principles in this case are denunciation and deterrence. Rehabilitation is also a consideration as the defendant has excellent prospects.

[82] My central focus on sentencing is the aim of a proportionate sentence – a sentence that appropriately balances the mitigation factors, the aggravating factors, and the sentencing principles.

[83] In my view a global sentence of four and one-half years jail is appropriate. A such, a conditional sentence is unavailable. In any event, having regard to the fundamental principles of sentencing, a conditional sentence of jail would be totally inappropriate in this case.

[84] The scourge of loaded firearms and drug trafficking is having a significant impact on the community. The deterrence message is important. While conditional sentences can be fashioned to address deterrence and denunciation, no reasonably informed member of the public would support a house arrest sentence given the balancing of all of the factors in this case. It is also not unimportant that the defendant is a foreign national, who overstayed his visitor status in 2016, and committed these offences while subject to an exclusion order dating back to 2019.

[85] The combination of an accessible loaded firearm, and illegal drugs, is a significant problem in our society. Apart from the countless criminal court cases identifying this issue as a significant problem in our society, as a criminal court judge, I see the impact every single day in our community. These are the reasons for my sentence.

Released: October 10th, 2024

Signed: "Justice M.S. Felix"

Appendix "A"

Count	Info	Sentence
Count 1: Possession of a restricted or prohibited firearm without a licence contrary to s. 91(1) of the Criminal Code	0624	Stayed
Count 2: Possession of a restricted or prohibited firearm while knowingly not being the holder of a licence contrary to s. 92(1) of the Criminal Code	0624	1197 days jail concurrent to count 3 on Information 0624 DNA Order
Count 3: Possession of a loaded prohibited firearm contrary to s.95(1) of the Criminal Code.	0624	1197 days jail concurrent to count 2 on Information 0624 Weapons Prohibition, s.109 for ten years DNA Order
Count 1: Trafficking cocaine, contrary to s.5(1) of the CDSA	0625	365 days jail consecutive to the sentence on Information 0624 but concurrent to all other counts on Information 0625 Weapons Prohibition, s.109 for ten years DNA Order
Count 2: Possession of proceeds of crime contrary to s.354(1)(a) of the Criminal Code	0625	180 days jail consecutive to the sentence on Information 0624 but concurrent to all other counts on Information 0625
Count 3: Trafficking cocaine, contrary to s.5(1) of the CDSA	0625	365 days jail consecutive to the sentence on Information 0624 but concurrent to all other counts on Information 0625 Weapons Prohibition, s.109 for ten years DNA Order
Count 4: Possession of proceeds of crime contrary to s.354(1)(a) of the Criminal Code	0625	180 days jail consecutive to the sentence on Information 0624 but concurrent to all other counts on Information 0625
Count 5: Trafficking cocaine, contrary to s.5(1) of the CDSA	0625	365 days jail consecutive to the sentence on Information 0624 but concurrent to all other counts on Information 0625 Weapons Prohibition, s.109 for ten years

		DNA Order
Count 6: Possession of proceeds of crime contrary to s.354(1)(a) of the Criminal Code	0625	180 days jail consecutive to the sentence on Information 0624 but concurrent to all other counts on Information 0625
Count 7: Possession of Cocaine for the purpose of trafficking, contrary to s.5(2) of the CDSA	0625	365 days jail consecutive to the sentence on Information 0624 but concurrent to all other counts on Information 0625 Weapons Prohibition, s.109 for ten years DNA Order
Count 8: Possession of fentanyl for the purpose of trafficking	0625	Not Guilty