

CANADA / JUDGMENT

HMTQ v. Spencer

2003 BCSC 1989

COURT

Supreme Court of British Columbia

DECIDED

21 July 2003

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2003 BCSC 1989 HMTQ v. Spencer Citation: HMTQ v. Spencer Date: 20030721 2003 BCSC 1989
Docket: X062531 Registry: New Westminster IN THE SUPREME COURT OF BRITISH COLUMBIA
Oral Reasons for Judgment The Honourable Mr. Justice McKinnon July 21, 2003 her majesty the
queen AGAINST Brandon Shane Spencer Counsel for the Crown: M. Gillespie Counsel for the
Defendant: P. Kendall

- [1] THE COURT: On May 22nd last, following a lengthy trial, Mr. Spencer was found guilty on 92 counts, consequent upon 18 robberies committed over a period of almost four years. The matter was then adjourned to June 26th in order to permit Crown and defence to prepare submissions and also to obtain a pre-sentence report.
- [2] On June 26th I received the submissions and the pre-sentence report, after which I adjourned to this date.
- [3] The Crown seeks a global sentence of 24 years less four years for time spent in custody, for a net sentence of 20 years. Defence says that a global sentence of 18 years less four years credit, for a net of 14 years, is the appropriate sentence.
- [4] In addition to the jail time sought, Crown also seeks a lifetime firearms prohibition order pursuant to ss. 109(1)(a) and 109(3) of the Criminal Code and a "DNA" order in Form 5.04. Crown also seeks forfeiture and destruction, pursuant to s. 491(1)(b), of all firearms and ammunition seized, as well as forfeiture of tools, clothing and other exhibits seized. Defence takes no issue with these applications.
- [5] Accordingly, I direct forfeiture and forfeiture and destruction as requested, and that Brandon Shane Spencer be prohibited for his lifetime from possessing any firearm, crossbow, prohibited weapon, restricted weapon, prohibited device, ammunition, prohibited ammunition and explosive substance. I also authorize the taking from Brandon Shane Spencer, for the purposes of forensic DNA analysis, of any number of samples of one or more bodily substances that are reasonably required for that purpose by means of the investigative procedures described in subsection 487.06(1).

- [6] In accordance with the provisions of s. 737, I direct that the victim surcharge assessment of \$100 is waived. Mr. Spencer has been in custody for two years. He appears to have no financial ability to pay any sum, notwithstanding the cumulative value of money and goods obtained in these robberies. He also faces lengthy incarceration, all of which persuades me that waiver is appropriate.
- [7] I turn now to consideration of the appropriate sentences for these offences. There is no issue that I am obliged to consider the principle of "totality" of sentences. In *R. v. C.A.M.* [1996] 105 CCC 327, Supreme Court of Canada, Lamer C.J.C., at para. 42, commented as follows: In the context of consecutive sentences, this general principle of proportionality expresses itself through the more particular form of the "totality principle". The totality principle, in short, requires a sentencing judge who orders an offender to serve consecutive sentences for multiple offences to ensure that the cumulative sentence rendered does not exceed the overall culpability of the offender. As D. A. Thomas describes the principle in *Principles of Sentencing* (2nd ed. 1979), at p. 56: The effect of the totality principle is to require a sentencer who has passed a series of sentences, each properly calculated in relation to the offence for which it is imposed and each properly made consecutive in accordance with the principles governing consecutive sentences, to review the aggregate sentence and consider whether the aggregate sentence is "just and appropriate". Clayton Ruby articulates the principle in the following terms in his treatise, *Sentencing*, supra, at pp. 44-45: The purpose is to ensure that a series of sentences, each properly imposed in relation to the offence to which it relates, is in aggregate "just and appropriate". A cumulative sentence may offend the totality principle if the aggregate sentence is substantially above the normal level of a sentence for the most serious of the individual offences involved, or if its effect is to impose on the offender "a crushing sentence" not in keeping with his record and prospects.
- [8] In this case Crown contends that in the absence of the totality principle, the appropriate sentence for each offence, even assuming concurrent sentences for less serious counts, would result in a cumulative sentence of 109 years. (I think it is 110 years, if my math is correct.) It is also contended that if only the mandatory minimum sentences were imposed, those minimums would result in an aggregate sentence of 32 years. Thus, the totality principle is invoked.
- [9] Section 718 of the Criminal Code sets forth principles of sentencing which the court is obliged to consider. The Crown, in extensive written submissions, enunciated the aggravating and mitigating factors, the principles of sentencing both in statute and at common law, and referred me to a large number of cases respecting those issues.

- [10] Although now only 32 years old, Mr. Spencer has a long criminal record, commencing in 1988. Between 1988 and 2001, he had amassed some 39 convictions for a variety of offences ranging from theft to escaping lawful custody. He now has an additional 92 counts to add to that record. At the time of the first of these robberies, he was bound by a probation order which continued over six more robberies. Obviously he never considered himself bound by any probation orders, a fact commented upon in the pre-sentence report.
- [11] Mr. Spencer is characterized by his counsel as a person whose life has gone out of control due to heroin dependency. These robberies, it is submitted, were for the purpose of feeding that habit. Although the use of guns is conceded, defence suggests that in no case was any victim shot at directly, and submits that therefore it is different and less serious than cases cited respecting the use of firearms.
- [12] I accept that Mr. Spencer had a heroin dependency, although I have little information about that. However, these were highly planned robberies over a period of almost four years from which almost five million dollars worth of goods in retail value were taken. Almost nothing has been recovered. The evidence indicates the goods were fenced for about ten cents on the dollar.
- [13] Mr. Spencer professes some remorse, but it seems to me it is relatively shallow and does not seem to include any good insight into the trauma he has caused so many people. Twenty-one victims of the many involved in these robberies filed impact statements. A few were only marginally affected, but most were badly traumatized and badly victimized. One victim was not insured and lost hundreds of thousands of dollars from which he has never been able to recover. His financial losses affected his immediate and extended family. Another has never been able to return to work due to the emotional distress resulting from the trauma of the robbery. The list goes on. I found it a moving yet compelling experience to read these statements and come to some appreciation of the suffering victims of robberies endure. I am not much persuaded by the offender's contention that as no shots were intended to strike victims of the robberies, this somehow makes it less serious.
- [14] I accept that the following represents aggravating factors:
- 1) the robberies involved a high degree of planning;
 - 2) firearms were used in many of the robberies;
 - 3) the amounts taken were cumulatively very large;
 - 4) the method of robberies created a high degree of trauma for victims.
- [15] In mitigation, Mr. Spencer made many admissions at trial, thus sparing the need for victims to testify. An original estimate of 250 witnesses was thereby reduced to 23. In addition, he confessed to police and assisted in naming others involved, the result of which, as counsel says, will cause him great difficulty within the prison system.

- [16] The Crown cited 27 cases which covered consideration of issues involving general sentencing principles, imposition of life sentences, sentencing ranges, the totality principle, and sentences imposed on other accused involved in some of these robberies. Bruce Kiloh received a seven-year sentence for the Murdoch robbery and four years for the Penner robbery. Trevor Barembruch received a six-year sentence for the Gold Room robbery. Timothy Thiessen received six years for his part in the Murdoch robbery.
- [17] I accept the Crown's submission that the rule against multiple convictions is not offended by consecutive terms for each of the 18 robberies, with concurrent terms appropriate for delicts within each robbery. I also accept that even within each robbery, given different victims, consecutive sentencing is available, although not necessarily appropriate.
- [18] Considering all of the submissions, the case law, and the principles of sentencing, I accept that the appropriate sentence for each offence should be: Count 2: six years; Count 3: six years concurrent; Count 4: six years concurrent; Count 5: two years concurrent; Count 8: two years concurrent; Count 9: four years consecutive; Count 10: six months concurrent; Count 11: four years; Count 12: four years concurrent; Count 13: six months concurrent; Count 14: one year consecutive; Count 17: five years; Count 16: six months concurrent; Count 18: five years concurrent; Count 19: two years concurrent; Count 20: six months concurrent; Count 21: I will impose a conditional stay of proceedings pursuant to the rule in *R. v. Kienapple*, the conditional stay becoming absolute upon expiration of all appeals; Count 22: four years; Count 23: four years concurrent; Count 24: two years concurrent; Count 25: one year minimum consecutive; Count 26: six years; Count 27: two years concurrent; Count 28: seven years concurrent; Count 29: seven years concurrent; Count 30: two years concurrent; Count 31: five years; Count 32: five years concurrent; Count 33: two years concurrent; Count 34: one year consecutive; Count 35: five years; Count 36: five years concurrent; Count 37: five years concurrent; Count 38: five years concurrent; Count 39: two years concurrent; Count 40: one year consecutive; Count 41: five years; Count 42: five years concurrent; Count 43: five years concurrent; Count 44: two years concurrent; Count 45: one year consecutive; Count 46: six years; Count 47: six years concurrent; Count 48: two years concurrent; Count 49: two years concurrent; Count 50: two years concurrent; Count 52, six years; Count 51, six months concurrent; Count 53: six years concurrent; Count 54: two years concurrent; Count 55: five years; Count 56: two years concurrent; Count 57: five years concurrent; Count 59: one year consecutive; Count 60: five years; Count 61: five years concurrent; Count 62: five years concurrent; Count 63: six months concurrent; Count 64, two years concurrent; Count 65: five years; Count 66: five years concurrent; Count 67: five years concurrent; Count 68: five years concurrent; Count 70: one year consecutive; Count 71: five years; Count 72: five years concurrent; Count 73: five years concurrent; Count 74: five years concurrent; Count 75: two years concurrent; Count 76: one year consecutive; Count 77: five years; Count 78: five years concurrent; Count 79: one year consecutive; Count 80: two years concurrent; Count 81: five years; Count 82: five years concurrent; Count 83: one year consecutive; Count 84: six months concurrent; Count 85: five years; Count 86: five years concurrent; Count 87: five years concurrent; Count 88: two years concurrent; Count 89: six months concurrent; Count 90: one

year consecutive; Count 91: four years; Count 92: four years concurrent; Count 93: four years concurrent; Count 94: four years concurrent; Count 95: five years concurrent; Count 96: four years concurrent; Count 97: four years concurrent; and Count 98, one year consecutive.

- [19] The cumulative result of those sentences totals 107 years, if my math is correct, which clearly is not just and appropriate. Accordingly, relying upon the principle of totality, I impose six years on Count 3; four years consecutive on Count 9; five years consecutive on Count 17; six years consecutive on Count 26; and one year consecutive on Count 34. These total 22 years, which I will reduce by four years for time in custody, for a global sentence of 18 years. All other sentences will be concurrent. (EXCERPT CONCLUDED) "R.A. McKinnon, J." The Honourable Mr. Justice R.A. McKinnon

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