
CANADA / JUDGMENT

R. v. Al-Isawi

2017 BCCA 163

COURT

British Columbia Court of Appeal

DECIDED

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2017 BCCA 163 R. v. Al-Isawi

COURT OF APPEAL FOR BRITISH COLUMBIA

Citation:

R. v. Al-Isawi,

2017 BCCA 163

Date: 20170426

Docket: CA43830

Between:

Regina

Respondent

And

Aosama Salim Hmod Al-Isawi

Appellant

Corrected Judgment: text was corrected on page 2, para. 2;

on May 9, 2017

Before:

The Honourable Madam Justice Saunders

The Honourable Mr. Justice Frankel

The Honourable Madam Justice Stromberg-Stein

On appeal from: An order of the Supreme Court of British Columbia, dated July 11, 2016 (R. v. Al-Isawi, 2016 BCSC 1691, Vancouver Docket 26320).

Counsel for the Appellant:

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Counsel for the Respondent:

R.G. Garson

Place and Date of Hearing:

Vancouver, British Columbia

January 17, 2017

Further Submissions Received

February 10 and 17, 2017

Place and Date of Judgment:

Vancouver, British Columbia

April 26, 2017

Written Reasons by:

The Honourable Madam Justice Stromberg-Stein

Concurred in by:

The Honourable Madam Justice Saunders

The Honourable Mr. Justice Frankel

Summary:

Mr. Al-Isawi seeks leave to appeal his seven-year sentence for ten counts of robbery, one count of attempted robbery, and three counts of using an imitation firearm in the commission of robbery. At trial he unsuccessfully challenged the mandatory minimum one-year consecutive sentence imposed for each count of use of an imitation firearm as being cruel and unusual punishment in violation of s. 12 of the Charter. He argues the effective sentence of seven years is demonstrably unfit. HELD: Leave to appeal granted; appeal dismissed. The Supreme Court of Canada in R. v. Brown, [1994] 3 S.C.R. 749, upheld the constitutionality of the mandatory minimum one-year consecutive sentence for use of a firearm in the commission of the offence of robbery. There is no distinction for use of an imitation firearm in the commission of the offence of robbery. Applying the two-step test articulated in R. v. Goltz, [1991] 3 S.C.R. 485, and affirmed in R. v. Nur, 2015 SCC 15, the mandatory minimum one-year consecutive sentence is not grossly

disproportionate for Mr. Al-Isawi or for any reasonably foreseeable hypothetical offender where the underlying offence is robbery. The seven-year sentence is not demonstrably unfit, considering the circumstances of the offences and the offender, sentencing ranges, and proper deference to the sentencing judge.

Reasons for Judgment of the Honourable Madam Justice Stromberg-Stein:

Overview

- [1] There is no dispute that "[g]un-related crime poses grave danger to Canadians" and "[t]he Criminal Code, R.S.C. 1985. c. C-46, imposes severe penalties for violations of these laws": *R. v. Nur*, 2015 SCC 15 at para. 1.
- [2] Section 85 of the Criminal Code makes it an offence to use a firearm (s. 85(1)) or imitation firearm (s. 85(2)) while committing, attempting to commit, or during flight after committing or attempting to commit an indictable offence, whether the offender causes or means to cause bodily harm to anyone. Section 85(3)(a) imposes a mandatory minimum one-year sentence for a first offence under ss. 85(1) or (2). Section 85(4) requires that this sentence be consecutive to any other sentence arising out of the same event or series of events and to any sentence the offender is already subject to at the time of sentencing.
- [3] Between September 29, 2011 and January 10, 2012, Mr. Al-Isawi robbed 10 small pharmacies and attempted to rob one pharmacy. These pharmacies were located in Metro Vancouver along the Kingsway corridor spanning Vancouver, Burnaby and New Westminster, as well as one in Coquitlam. On each occasion he demanded Percocet, an opioid pain medication, and on all but one occasion he received a bottle containing a quantity of the drug or its substitute. On each occasion he produced or partially showed what appeared to be a gun. He made threats, including on two occasions to shoot the pharmacist. On three occasions he cocked or racked the gun. On three occasions he was masked. When he was arrested, the police found a large black BB or pellet gun in the trunk of his car along with a page torn from the Yellow Pages with marks beside 89 pharmacies, many of which had been the subject of the robberies.
- [4] Mr. Al-Isawi was convicted of 10 counts of robbery, one count of attempted robbery, and, pursuant to s. 85(2), 11 counts of using an imitation firearm while committing, or attempting to commit, the indictable offence of robbery. Following submissions on sentencing, the Crown applied for and was granted leave to withdraw eight of the s. 85(2) counts, each of which would have attracted a mandatory minimum one-year consecutive sentence.
- [5] The Crown sought a total sentence of eight years reflected as one-and-one-half years for each robbery and attempted robbery, but reduced to four years concurrent based on the totality principle; one-and-one-half years consecutive each on two of the s. 85(2) counts; and one year consecutive on the remaining count.

- [6] Mr. Al-Isawi submitted that an appropriate sentence would be three years, notwithstanding the legislated mandatory minimum consecutive sentences on each of the s. 85(2) counts. He challenged the constitutionality of ss. 85(3)(a) and 85(4) of the Criminal Code on the basis that these sections constituted cruel and unusual punishment, offended s. 12 of the Canadian Charter of Rights and Freedoms, and were of no force and effect under s. 52 of the Constitution Act, 1982.
- [7] The trial judge rejected the Charter challenge, concluding that the imposition of the mandatory minimum consecutive sentences would not result in a grossly disproportionate sentence for either Mr. Al-Isawi or for a reasonably foreseeable offender. He sentenced the appellant to concurrent four-year terms on the robbery and attempted robbery counts, and imposed consecutive one-year sentences for each of the three firearms counts. The total sentence was seven years.
- [8] For the reasons that follow, I find that ss. 85(3)(a) and 85(4) as applied to s. 85(2) do not violate s. 12 of the Charter when the underlying offence is robbery, and the sentence imposed on Mr. Al-Isawi is not demonstrably unfit. I would grant leave to appeal but dismiss the appeal.

Legislative Background

- [9] Section 85 was enacted as part of Parliament's response to the proliferation of firearm-related crimes: *R. v. Krug*, [1985] 2 S.C.R. 255 at 267-8.
- [10] Section 85, which creates the offence of use of a firearm, real or imitation, in the commission of an indictable offence provides:

Using firearm in commission of offence --

85 (1) Every person commits an offence who uses a firearm, whether or not the person causes or means to cause bodily harm to any person as a result of using the firearm,

- (a) while committing an indictable offence, other than an offence under section 220 (criminal negligence causing death), 236 (manslaughter), 239 (attempted murder), 244 (discharging firearm with intent), 244.2 (discharging firearm -- recklessness), 272 (sexual assault with a weapon) or 273 (aggravated sexual assault), subsection 279(1) (kidnapping) or section 279.1 (hostage taking), 344 (robbery) or 346 (extortion);
- (b) while attempting to commit an indictable offence, or
- (c) during flight after committing or attempting to commit an indictable offence.

Using imitation firearm in commission of offence --

85 (2) Every person commits an offence who uses an imitation firearm

- (a) while committing an indictable offence,

- (b) while attempting to commit an indictable offence, or
- (c) during flight after committing or attempting to commit an indictable offence

whether or not the person causes or means to cause bodily harm to any person as a result of using the imitation firearm.

[11] Sections 85(3) and (4) mandate a consecutive minimum punishment for an offence under ss. 85(1) and (2):

Punishment --

85 (3) Every person who commits an offence under subsection (1) or (2) is guilty of an indictable offence and liable

- (a) in the case of a first offence, except as provided in paragraph (b), to imprisonment for a term not exceeding fourteen years and to a minimum punishment of imprisonment for a term of one year; and
- (b) in the case of a second or subsequent offence, to imprisonment for a term not exceeding 14 years and to a minimum punishment of imprisonment for a term of three years.

Sentences to be served consecutively --

- (4) A sentence imposed on a person for an offence under subsection (1) or (2) shall be served consecutively to any other punishment imposed on the person for an offence arising out of the same event or series of events and to any other sentence to which the person is subject at the time the sentence is imposed on the person for an offence under subsection (1) or (2).

[12] In relation to firearms, the mandatory one-year consecutive minimum was enacted (formerly as s. 83) in the 1970s: Criminal Law Amendment Act, 1976-77, c. 53, s. 3. The provision prohibiting use of an imitation firearm was added to s. 85 in 1995 (in force January 1996) with the present definition of "imitation firearm" (in force December 1998): Firearms Act, S.C. 1995, c. 39, s. 139.

Issues

[13] Mr. Al-Isawi submits the sentencing judge erred in the first step of the s. 12 constitutional analysis by not determining an appropriate sentence absent the mandatory minimum consecutive one-year sentence for each s. 85(2) offence, and further erred by not properly considering and creating reasonable hypotheticals at the second step of the analysis. He maintains the judge failed to address the impact of the Crown's withdrawal of the eight s. 85(2) counts and the effect on the determination of whether the "stacking effect" of consecutive sentences in s. 85(4) violated s. 12 of the Charter. Finally, he submits the seven-year sentence was unfit in the circumstances of the offences and the offender.

[14] I would re-state the issues as follows:

1. Does the minimum one-year consecutive sentence mandated by ss. s. 85(3)(a) and 85(4) of the Criminal Code violate s. 12 of the Charter, where the underlying offence is robbery?
2. If so, is it justified under s. 1 of the Charter?
3. Is the sentence demonstrably unfit?

Does the minimum one-year consecutive sentence mandated by ss. s. 85(3)(a) and 85(4) of the Criminal Code violate s. 12 of the Charter, where the underlying offence is robbery?

Test for Infringement of s. 12 of the Charter

- [15] Section 12 of the Charter provides that everyone has the right not to be subjected to any cruel and unusual treatment or punishment.
- [16] "Cruel and unusual" punishment is a "high bar" (Nur at para. 39), requiring the punishment to be "so excessive as to outrage standards of decency" and considered by Canadians as "abhorrent and intolerable": R. v. Ferguson, 2008 SCC 6 at para. 14. A minimum sentence provision attacked on this ground must be "grossly disproportionate" to the punishment that is appropriate, having regard to the nature of the offence and circumstances of the offender: R. v. Smith, [1987] 1 S.C.R. 1045 at 1073. It is a "very properly stringent and demanding" test, and it will "only be on rare and unique occasions that a court will find a sentence so grossly disproportionate. A lesser test would tend to trivialize the Charter": Steele v. Mountain Institution, [1990] 2 S.C.R. 1385 at 1417. To be "grossly disproportionate," it must be "more than merely excessive": Smith at 1072. Gross disproportionality is a higher standard than the "demonstrably unfit" standard applicable for reviewing sentences generally: R. v. McDonald, 40 O.R. (3d) 641 (C.A.). In R. v. Lloyd, 2016 SCC 13 at para. 33, the majority described a grossly disproportionate sentence as one that would "shock the conscience of Canadians."
- [17] In Nur, the Supreme Court of Canada clarified and reaffirmed the two-step s. 12 analysis described in R. v. Goltz, [1991] 3 S.C.R. 485, which must be followed when a mandatory minimum sentencing provision is challenged:
- [77] In summary, when a mandatory minimum sentencing provision is challenged, two questions arise. The first is whether the provision results in a grossly disproportionate sentence on the individual before the court. If the answer is no, the second question is whether the provision's reasonably foreseeable applications will impose grossly disproportionate sentences on others.
- [18] If the answer to either of these questions is "yes", the minimum sentence provision is *prima facie* in violation of s. 12, and the court must consider whether it is saved under s. 1 of the Charter.
- [19] In addressing the first question, the court must consider whether the mandatory minimum sentence would be grossly disproportionate for the actual offender. In doing so, the court must balance the gravity of the offence, the particular circumstances of the offence, and the personal characteristics of the offender: Goltz at 499. The court must also consider the

actual effect of the sentence imposed on the offender, and may consider general deterrence or other penological goals and principles of sentencing including the existence of valid alternatives to the punishment imposed and a comparison of punishments imposed for other crimes: Goltz at 499-500; R. v. Morrissey, 2000 SCC 39 at paras. 27-28; R. v. Stewart, 2010 BCCA 153 at paras. 20-21. In addition, the court must also consider and defer to the valid legislative objectives underlying the criminal law responsibilities of Parliament: R. v. Latimer, 2001 SCC 1 at paras. 76-77.

- [20] If the mandatory minimum sentencing provision is not grossly disproportionate for the offender, then the court must address the second question; that is, whether the provision's reasonably foreseeable application will result in a grossly disproportionate sentence for a reasonably foreseeable hypothetical offender. This second stage of the analysis requires the court to conduct an inquiry into the "range or scope of the law": Nur at para. 60. The matter is essentially one of statutory interpretation as the court must consider the "reach" of the law and what kind of conduct the law may reasonably be expected to catch: Nur at para. 61.
- [21] Chief Justice McLachlin emphasized the importance of keeping in mind the "reasonable" aspect of a "reasonable hypothetical": Nur at para. 57. The reasonable hypothetical must be one that may reasonably be expected to arise, and not one that is "far-fetched" or "marginally imaginable": Goltz at 506. While the reasonable hypothetical may take into account personal characteristics relevant to persons who may be caught by the mandatory minimum sentence, the inquiry must be grounded in common sense and experience: Nur at paras. 62, 75. The construction of the reasonable hypothetical must exclude "using personal features to build the most innocent and sympathetic case imaginable -- on the basis that almost any mandatory minimum sentence could be argued to violate s. 12 and lawyerly ingenuity would be the only limit to findings of unconstitutionality": Nur at para. 75.

Trial Judge's Reasons for Sentence

- [22] Before undertaking the two-step s. 12 analysis described in the authorities, the trial judge outlined the sentencing principles articulated in s. 718 of the Criminal Code. He referred to paras. 42 and 73 of R. v. M. (C.A.), [1996] 1 S.C.R. 500, and acknowledged his duty to impose sentences that are not "unduly harsh", that are "just and appropriate" in all the circumstances and, in the context of consecutive sentences, to consider the applicability of the totality principle to ensure the aggregate sentence is "proportional to the overall culpability of the offender".
- [23] The judge (at para. 26) noted that sentencing submissions had been made before the Crown had sought and obtained leave to withdraw eight of the 11 s. 85(2) counts; therefore, Mr. Al-Isawi was facing approximately 13 years' imprisonment at the time of the submissions (11 two-year concurrent sentences for the robbery counts and 11 one-year consecutive sentences for the s. 85(2) counts).

- [24] The judge noted (at para. 31) that although he must apply the totality principle, it cannot operate to "undo the instruction from Parliament" (citing *R. v. Leggo*, 2003 BCCA 392 at para. 9; *R. v. Stauffer*, 2007 BCCA 7 at para. 40). He commented that the totality principle may be applied in several ways, referring to *Boucher v. The Queen*, [1986] 1 S.C.R. 750; *R. v. MacLean* (1979), 32 N.S.R. (2d) 650 (C.A.); and *R. v. Saint Amand* (1982), 67 C.C.C. (2d) 130 (Ont. C.A.), such as imposing what would otherwise be a "non-sentence" on the most substantive charge, so as to fashion an appropriate overall sentence given the operation of the required consecutive sentences.
- [25] Engaging in the first step of the analysis and considering whether the mandatory minimum sentence would be grossly disproportionate for Mr. Al-Isawi, the judge reviewed Mr. Al-Isawi's personal circumstances. He had various psychiatric reports and a pre-sentence report. These reports reflect, in part, that the 49-year-old appellant was born in Iraq. He was a captain in the Iraqi military during the First Gulf War in 1991 and sustained head trauma from shrapnel. He defected and was detained as a U.S. prisoner-of-war for nine years before being sent to Canada. He was employed as a forklift operator until he was injured in the workplace. This injury exacerbated his chronic post-traumatic stress disorder. He received social assistance disability benefits and was under the care of a psychiatrist. He was diagnosed with clinical depression. One report indicates he showed prominent signs of having a personality disorder with borderline characteristics. He was on anti-depressant and anti-psychotic medication and received cognitive behavioural therapy. He has an unidentified heart condition and lung problems in addition to severe edema. He suffers from chronic migraines and chronic pain due to his head injury and developed an addiction to Percocet that was prescribed by his doctor. He now receives methadone for chronic pain since opioid medication is unavailable in a custodial institution.
- [26] In determining a fit sentence, the judge recognized a number of mitigating factors, as outlined in his sentencing reasons at para. 61:
1. Mr. Al-Isawi has an insignificant criminal record.
 2. He is in ill health and faces difficult circumstances. He is addicted to painkillers and is disabled from work.
 3. Mr. Al-Isawi complied, by and large, with strict bail conditions for some four-and-a-half years.
 4. Today, for the first time, the accused expressed remorse. It is a mitigating factor, but given the lateness of it, it is not significant.
- [27] He also considered the following aggravating factors, at para. 60:
1. The offences by their very nature are violent.
 2. The victims were vulnerable. The offender chose small and isolated pharmacies where the pharmacist would be alone or almost alone.

3. The offender engaged in threatening behaviour, cocking the weapon on more than one occasion. This is inherently frightening.
 4. In three robberies, the offender masked his face.
 5. There were multiple offences in multiple locations over a span of three-and-a-half months.
- [28] I note, in addition, the record reflects that Mr. Al-Isawi threatened to shoot the pharmacists in two of the robberies.
- [29] The judge commented on the impact on the victims of the robberies. Five of the 12 victims had been contacted and recounted hypervigilance, fear of personal safety, trauma, and concern for their continued safety as pharmacists given the endemic nature of these kinds of robberies.
- [30] The judge considered the high threshold of "grossly disproportionate" articulated in Steele, Goltz, and Nur. He canvassed the case law analyzing and upholding the constitutionality of ss. 85(3) and (4). He noted that the Supreme Court of Canada in *R. v. Brown*, [1994] 3 S.C.R. 749, had rejected a s. 12 challenge to the s. 85 mandatory minimum consecutive sentence. The judge considered *R. v. Burleigh*, 2015 BCCA 245, where Willcock J.A. imposed an effective total sentence of nine years for seven robberies with associated s. 85 offences involving an imitation firearm.
- [31] Considering *Burleigh*, the judge commented that in the circumstances of Mr. Al-Isawi a sentence in the range of 12 years (11 years for the s. 85 counts, and one year concurrent for the robbery counts) "could possibly be unfit", "but even if excessive, it would not be grossly disproportionate": para. 83. He held that the appropriate sentence was seven years and said, "[t]hat sentence respects the requirement of s. 85, and is not disproportionate in any way, let alone 'grossly disproportionate': para. 84. He concluded "the mandatory minimum consecutive aggregate sentence does not render a grossly disproportionate result in the circumstances of the offender": para. 84.
- [32] Next, at the second step of the s. 12 analysis, the judge considered the application of reasonable hypotheticals.
- [33] Mr. Al-Isawi had relied on two hypotheticals. First, he argued the court was required to "ask whether any number of offences is too many to continue adding on years of incarceration. For example, 20 offences?" Mr. Al-Isawi argued that as the number of offences increases, which is reasonably foreseeable, the mandatory minimum consecutive sentence will at some point reach a grossly disproportionate level. By way of example he argued 20 years for 20 offences may result in a punishment more serious than that for manslaughter.
- [34] The judge rejected the first hypothetical on the basis of common sense and experience, as referred to in *Nur* at para. 62, for reasonable hypotheticals. In his view, Mr. Al-Isawi was putting forward a "mythical offender who is convicted of a mythical number of s. 85 offences": para. 93.

- [35] Mr. Al-Isawi advanced a second hypothetical describing an offender with an imitation firearm who threatened a group of people at a bus stop. He suggested the number of offences would equal the number of people threatened, each charged on a separate count, which could add up to a large and grossly disproportionate sentence. The judge rejected this second hypothetical. First, he applied the same reasoning as in the first hypothetical of "adding offences until too many". Secondly, he noted that the Ontario Court of Appeal had rejected a similar hypothetical on the basis that the Kienapple rule (*R. v. Kienapple*, [1975] 1 S.C.R. 729) would apply to limit the number of offences: *R. v. Kinnear*, [2005] 198 C.C.C. (3d) 232, O.J. No. 2434 (Ont. C.A.) at paras. 76-77.
- [36] The judge concluded that the mandatory minimum sentence in s. 85(3)(a) and the requirement that it be served consecutively in s. 85(4), as applied to s. 85(2), did not violate s. 12 of the Charter.
- [37] He decided that a fit and proportionate sentence was seven years, consisting of four years for each of the 10 counts of robbery and the one count of attempted robbery, to be served concurrently, and one year for each of the three s. 85(2) counts, each to be served consecutively to each other and to the four years for the robberies.

Analysis

- [38] In *R. v. Scott*, 2000 BCCA 220, aff'd 2001 SCC 73, a case dealing with the definition of "imitation firearm", this Court reviewed the history and purpose of s. 85(2):

- [36] In *R. v. Langevin* (1979), 47 C.C.C. (2d) 138 (Ont. C.A.), Martin J.A. stated at p. 146:

It is clear to me that Parliament intended by s. 83 [now s. 85(1)] to repress the use of firearms in the commission of crimes by making such use an offence in its own right, and one which attracts a minimum sentence of one year consecutive to that imposed for the offence which such use accompanies. The use of firearms in the commission of crimes is fraught with danger and gravely disturbing to the community, and Parliament has sought to protect the public from danger and alarm caused by that use by enacting the present legislation.

The Supreme Court of Canada agreed with this articulation of the legislative intent underlying the provision in *R. v. McGuigan*, [1982] 1 S.C.R. 284 at 316-8 per Dickson J., as did this Court in *R. v. Watkins and Grabber* (1987), 33 C.C.C. (3d) 465 (B.C.C.A.) at 474-5 per McLachlin J.A.

- [37] In *R. v. Covin*, [1983] 1 S.C.R. 725, the Supreme Court of Canada interpreted the term "firearm" strictly, so that only barrelled objects capable of causing serious bodily harm would be caught by s. 85(1). Lamer J. made the following statement which is relevant to this discussion of "imitation firearm." He stated at p. 729:

The offence we are considering in this case is the use of a firearm during the commission of another offence. The purpose of s. 83 is to protect the victim of the commission of an offence from serious injury or death by discouraging, through mandatory consecutive imprisonment, the use, by him who commits the offence, of a firearm that is capable of being fired. It has been said

that s. 83 is not only aimed at preventing physical injury but also to prevent the cause of alarm. [R. v. Belair (1981) 34 O.R. (2d) 302 at 304 per Martin J.A. (C.A.)]. With respect, I do not agree. Had that been the section's purpose, Parliament would have included imitations of firearms, as it did in s. 85 or again in s. 302 of the Code.

In this passage, Lamer J. explicitly disagreed with statements of the Ontario Court of Appeal in Belair and Langevin that the purpose of what is now s. 85(1) was to prevent something other than serious bodily injury caused by a firearm. The prevention of "alarm" or trauma produced by the use of an object that later turns out to be an inoperable firearm or a toy gun was not part of the legislative intent of what is now s. 85(1).

[40] In 1995, Parliament passed the Firearms Act which amended s. 85 of the Criminal Code to include the present prohibition against using an "imitation firearm" during the commission of an indictable offence

[43] After surveying the recent history of firearms legislation in Canada, it becomes clear that the purpose of s. 85(2) is to prohibit persons from using an object that has the appearance of a gun during the commission of a crime, so as to prevent the alarm and trauma that such an activity produces. Parliament must have been aware of the Supreme Court of Canada's decision in Covin [R. v. Covin, [1983] 1 S.C.R. 725] which ruled that s. 85(1) does not cover such situations.

[Emphasis in original.]

[39] The relevant provisions have not materially changed since Scott. While s. 85(1) prohibits the use of a firearm, there is no meaningful distinction insofar as s. 85(2) prohibits the use of an imitation firearm. The purpose of s. 85 is to combat the fear, alarm and trauma caused by the use of a firearm, real or imitation, and it has been recognized that whether an offender uses a real or imitation firearm does not impact the harm to the victim who would not know the difference. In R. v. Steele, 2007 SCC 36 at para. 23, a case defining "use" under s. 85, Fish J., for the Court, commented, "[t]he use of a firearm in the commission of a crime exacerbates its terrorizing effects, whether the firearm is real or a mere imitation. Indeed, they share that very purpose."

[40] Moral culpability is not diminished by the use of an imitation, and not a real, firearm. In fact, Parliament has equated the moral culpability of these offences by providing the same sentencing provisions for ss. 85(1) and (2) (except for certain designated offences in the case of a real firearm). The distinction between a real and an imitation firearm does not bear on the culpability analysis. Nor does Mr. Al-Isawi posit any hypothetical premised on the distinction between a real and an imitation firearm.

[41] Section 85 has been given extensive post-Charter analysis by many courts. Most notably, the Supreme Court of Canada in Brown upheld the constitutionality of the mandatory minimum consecutive sentencing provision in a s. 12 challenge where the offender was sentenced to three concurrent four-year terms for three counts of robbery; two concurrent one-year

terms for two counts of using a disguise; and three consecutive three-year terms on three counts of using a firearm in the commission of the robberies. The global sentence was 13 years. It was conceded that 13 years for the particular offender was not a grossly disproportionate sentence.

- [42] In *Brown*, the Manitoba Court of Appeal had considered the consecutive nature of the mandatory minimum sentencing provision and the possibility of multiple sentences "stacking up". It found that s. 85 was unconstitutional and read-down the provision: *R. v. Brown*, [1993] 80 C.C.C. (3d) 275, 83 Man. R. (2d) 216 (C.A.). That Court had accepted as a reasonable hypothetical the scenario of a young offender committing a series of 10 to 20 drive-by property offences (mischief) using a pellet gun, such as shooting out car tires. Mischief is a hybrid offence. If the Crown elected to proceed by indictment the hypothetical offender would be sentenced to 10 to 20 years' incarceration.
- [43] The Supreme Court of Canada rejected this hypothetical. Mr. Justice Iacobucci, writing for the Court in *Brown*, held that the "hypothetical proposed by the respondent relating to mischief is not a reasonable hypothetical envisioned by Goltz" (at 751) where the underlying offence was robbery. Applying the two-step test in *Goltz*, he allowed the appeal.
- [44] The judgment in *Brown* must be considered in light of the Court of Appeal decision it reversed and the constitutional questions the Supreme Court addressed ([1993] S.C.C.A. No. 113):
1. Does ss. 85(1) of the Criminal Code, R.S.C. 1985, c. C-46 infringe s. 12 of the Canadian Charter of Rights and Freedoms by reason of the minimum sentence provided for in clause (d)?
 2. If the answer to question 1 is in the affirmative, is the infringement justified under s. 1 of the Charter?
 3. Does ss. 85(2) [now s. 85(4)] of the Criminal Code infringe s. 12 of the Charter in whole or in part?
 4. If the answer to question 2 is in the affirmative, is the infringement justified under s. 1 of the Charter?

[45] The Supreme Court of Canada answered the constitutional questions as follows (at 751-2):

Questions 1 and 3: No, when the underlying offence is robbery. The operation of s. 85 in conjunction with other potential underlying indictable offences is not at issue in this appeal and no answer is required regarding the validity of s. 85 in conjunction with such other offences.

Questions 2 and 4: These questions do not arise.

[46] *Brown* held that the mandated minimum consecutive sentence for the offence of use of a firearm in the commission of the indictable offence of robbery is constitutional. No reasonable hypothetical led the Court to conclude that s. 12 had been violated.

- [47] In *Nur*, as part of the Court's review of *Smith*, *Goltz*, and *Morrissey* and the reasonable hypothetical jurisprudence, McLachlin C.J.C. commented in footnote 1 (at para. 56) that *Brown*, which was decided in 1994, "did not give sustained consideration to the scope of the reasonable hypothetical." The Chief Justice said:
- [56] These [*Smith*, *Goltz*, *Morrissey*] are the only three cases to directly address the question of what cases, or "hypotheticals", the court should consider on a s. 12 challenge to a mandatory minimum sentencing provision.^[1] In my view, they do not establish that the jurisprudence is "irreconcilable". A single theme underlies *Goltz* and *Morrissey* -- the only two cases to discuss the issue in detail -- reasonable foreseeability. When Gonthier J. in *Goltz* speaks of the "reasonable hypothetical" he is speaking of a situation that may reasonably be expected to arise -- not "marginally imaginable", not "far-fetched", but "reasonable". The early case of *Smith* is not inconsistent in words or result with the theme developed in *Goltz* and *Morrissey* -- in determining whether mandatory minimum sentencing laws violate s. 12, it is appropriate to consider how the law may impact on third parties in reasonably foreseeable situations.
- [48] *Nur* does not purport to overrule *Brown*, which applied the correct legal test articulated in *Goltz* to the s. 12 analysis of the constitutionality of the mandatory minimum consecutive sentence provisions in s. 85 of the Criminal Code. *Brown* expressly held that the mandatory minimum consecutive sentence provision for using a firearm in the commission of robbery does not violate s. 12.
- [49] The question is whether *Brown* is still authoritative. Since *Brown*, have there been different circumstances, new evidence or a significant change in the reasonably foreseeable application of the law?
- [50] The principle of *stare decisis* operates with respect to the analysis of Charter compliance with a mandatory minimum sentencing provision. While a particular offender may argue that a provision violates s. 12 as being grossly disproportionate in his or her personal circumstances notwithstanding a prior constitutional determination, *stare decisis* plays a significant role at the stage of analyzing reasonable hypotheticals: *Nur* at para. 71. Importantly, the threshold for revisiting the constitutionality of a mandatory minimum sentence is high as noted by McLachlin C.J.C. in *Nur*:
- [71] [C]an the offender in a future case argue that the provision as applied to others violates s. 12? The answer to this question is that it depends. Once a law is held not to violate s. 12, *stare decisis* prevents an offender in a later case from simply rearguing what constitutes a reasonably foreseeable range of the law. But *stare decisis* does not prevent a court from looking at different circumstances and new evidence that was not considered in the preceding case. A court's conclusion based on its review of the provision's reasonably foreseeable applications does not foreclose consideration in future of different reasonable applications: *Morrissey*, at para. 89, per Arbour J. That said, the threshold for revisiting the constitutionality of a mandatory minimum is high and requires a significant change in the

reasonably foreseeable applications of the law. In a nutshell, the normal rules of stare decisis answer the concern raised by the Attorney General of Ontario that "each subsequent trial court [will be asked] to duplicate the analysis": A.F. (Nur), at para. 39.

[Emphasis added.]

[51] With respect to "significant change in the reasonably foreseeable applications of the law", the Supreme Court considered the nature of precedents and changing social norms in Canada (Attorney General) v. Bedford, 2013 SCC 72:

[41] In my view, a trial judge can consider and decide arguments based on Charter provisions that were not raised in the earlier case; this constitutes a new legal issue. Similarly, the matter may be revisited if new legal issues are raised as a consequence of significant developments in the law, or if there is a change in the circumstances or evidence that fundamentally shifts the parameters of the debate.

[43] The intervener argues that the common law principle of stare decisis is subordinate to the Constitution and cannot require a court to uphold a law which is unconstitutional. It submits that lower courts should not be limited to acting as "mere scribe[s]", creating a record and findings without conducting a legal analysis (I.F., at para. 25).

[44] I agree a lower court is not entitled to ignore binding precedent, and the threshold for revisiting a matter is not an easy one to reach. In my view, as discussed above, this threshold is met when a new legal issue is raised, or if there is a significant change in the circumstances or evidence. This balances the need for finality and stability with the recognition that when an appropriate case arises for revisiting precedent, a lower court must be able to perform its full role.

[Emphasis added.]

[52] In R. v. Nur, 2011 ONSC 4874 (varied on another point, 2013 ONCA 677, aff'd 2015 SCC 15), Mr. Justice Code commented on the development of societal circumstances relating to firearms offences:

[49] Second, social norms and judicial responses to them, have changed since the 1980s and 1990s. The proliferation of handguns has increased, homicides involving handguns have increased, and the justice system has responded to public alarm by stiffening its approach to sentencing in cases involving handguns. It is a common phenomenon, in the law of sentencing, for sentences to increase and decrease as societal and judicial knowledge and attitudes about certain offences change

[Emphasis added.]

[53] While this case concerns an imitation firearm, as I have discussed earlier, this makes no difference. In my view, Brown is binding authority on this court. The Supreme Court considered the very issue of whether the mandatory minimum consecutive sentencing provisions in s. 85 in the context of robbery violate s. 12 of the Charter. Its answer was "no".

While the "consideration" of the "scope of reasonable hypotheticals" was "not sustained", in my view, it was nonetheless correct in terms of the application of Goltz, not changed by Nur, to multiple counts of using a firearm in the commission of robbery. In my view, Mr. Al-Isawi has not established the high threshold of a "significant change in the reasonably foreseeable application of the law" (see Nur at para. 71). Since Brown was decided in 1994 there has been no "significant change in the reasonably foreseeable applications of the law." (Nur at para. 71). Neither the elements of the offence of robbery (and attempt) have materially changed since then, nor the definitions and scope of what constitutes "firearms" or "imitation firearms". There have been no new legal issues or significant societal developments since Brown which detract from its authoritativeness. If anything, societal changes since the time of Brown reflect a heightened concern for the increased proliferation of firearms, real or imitation, and their use in crimes. The justice system has responded to the public alarm by imposing stiffer sentences for gun-related crimes.

- [54] In *Stewart*, this Court, for the reasons of Mr. Justice Frankel, upheld the constitutionality of the one-year consecutive sentence in s. 85. Frankel J.A. found the global sentence of 13 months' imprisonment, which included a one-year consecutive minimum sentence under s. 85, was not grossly disproportionate for the particular offender (the underlying offence was being unlawfully in a dwelling-house). He did not consider any reasonable hypotheticals because the offender restricted her challenge to her circumstances: para. 23.
- [55] *R. v. Meszaros*, 2013 ONCA 682, released by the Ontario Court of Appeal concurrently with its decision in *Nur*, upheld the constitutionality of the one-year consecutive sentence required by s. 85. The offender in *Meszaros* did not seek to strike down the punishment based on a reasonable hypothetical but argued that his case represented that hypothetical. The Court stated it "cannot conceive of a reasonable hypothetical involving the use of a firearm where a mandatory one-year sentence of imprisonment would be grossly disproportionate such a punishment might well be excessive, or perhaps even manifestly unfit, but it would not be grossly disproportionate": para. 79. The Court noted (at paras. 81-82) its earlier decision in *R. v. McDonald*, where it had found a four-year minimum sentence for using a firearm while committing robbery to be constitutional. In *McDonald*, Rosenberg J.A. commented on the "objective gravity of an offence involving a firearm, even an unloaded one": at 666.

Application of the two-step analysis in this case

Step 1: The sentence imposed on Mr. Al-Isawi

- [56] The sentencing judge considered the gravity of the offences of robbery and using an imitation firearm in committing, or attempting to commit, robbery, the particular circumstances of the offences committed, the personal circumstances of the offender, the principles of sentencing and other penological goals. Mr. Al-Isawi has not alleged any misapprehension of any material facts.

- [57] Robbery is a serious and violent offence, reflected by the fact it carries a maximum sentence of life imprisonment. Firearms are inherently dangerous: Meszaros at para. 73. The use of a real or imitation firearm in and of itself creates a highly volatile and dangerous situation. They "present the ultimate threat of death to those in [their] presence: R. v. Felawka, [1993] 4 S.C.R. 199 at 211. The offences and the circumstances of the offences here indicate a high level of moral culpability. These were predatory robberies, targeting vulnerable small pharmacies, in a carefully planned and deliberately executed manner. The victims expressed "themes of hypervigilance, fear of personal safety, trauma, and concern for their continued safety in their respective occupations."
- [58] Had the eight s. 85(2) offences not been withdrawn, the trial judge noted (at para. 83) that Mr. Al-Isawi would have faced a sentence in the range of 12 years. As the trial judge recognized, Mr. Al-Isawi has a complicated medical history, in part related to a war injury. He was addicted to opioid pain medication. Further, he did not have a criminal record and had a good history on judicial interim release. A sentence in the range of 12 years in these circumstances perhaps might have been excessive, or perhaps manifestly unfit, but I cannot say that it would rise to the level of being grossly disproportionate, having regard to the inherently violent and predatory nature of these serious offences, which reflect a high degree of moral culpability, given the risk of harm to the public. I agree with the trial judge that a sentence in the range of 12 years would not be an "abhorrent and intolerable" sentence, and would not "shock the conscience of Canadians."

Step 2: The reasonable hypothetical

- [59] I will consider Mr. Al-Isawi's second hypothetical first. Mr. Al-Isawi's second hypothetical, involving threatening a group of people with an imitation firearm, is not only limited by the rule in Kienapple, but is also contrary to the ratio in Brown that the hypothetical must be based on the same underlying offence, which in this case is robbery. The sentencing judge properly rejected this hypothetical, and Mr. Al-Isawi did not seriously pursue it on appeal.
- [60] What Mr. Al-Isawi has focused on is his first hypothetical; namely that "it takes no imagination to extend this scenario a modest amount to wonder about the degree of disproportionality that would occur when a similar offender comes before the court with 12, 13 or 15 robberies". The hypothetical is premised on a sympathetic offender, which Mr. Al-Isawi says he is, who has committed 20 robberies with an imitation firearm. What if such a hypothetical offender committed 30 robberies?
- [61] In my view, the trial judge properly rejected this hypothetical. This is not a reasonable hypothetical as envisioned by Goltz. Such an offender can hardly be said to be a so-called "small offender".

- [62] Smith, Nur, and Lloyd are the only Supreme Court of Canada cases to date where a mandatory minimum sentencing provision was struck down for a violation of s. 12 of the Charter. In each case the law was struck down not because the sentence was grossly disproportionate for the offender, but because of a reasonable hypothetical. The scope of the impugned provisions in Smith, Nur, and Lloyd were reasonably capable of ensnaring a low-culpability or small offender.
- [63] In Smith, the Court struck down a seven-year mandatory minimum sentence for importing narcotics. The reasonable hypothetical accepted by the court was of a student driving home to Canada from the United States with his or her "first joint of grass".
- [64] In Nur, the Court struck down the mandatory minimum sentence (three years for a first offence and five years for each subsequent offence) for possessing prohibited or restricted firearms where the firearm is loaded or kept with readily accessible ammunition. The reasonable hypothetical accepted by the Court was of a licensed gun owner who left his or her prohibited or restricted firearm in the cottage, instead of the dwelling house, in close proximity of, or loaded with, ammunition: Nur at para. 79.
- [65] In Lloyd, the Court struck down a one-year minimum sentence for trafficking, or possessing for the purpose of trafficking, certain controlled substances where the offender had been convicted of a designated substance offence in the last 10 years. The majority accepted as a reasonable hypothetical that of an addicted offender who was sentenced to one year for sharing a small amount of a controlled substance with a friend or spouse, and who had a single conviction for sharing marihuana at a social occasion nine years ago.
- [66] Section 85(2), in contrast, is a very narrow offence. First, there must be an independent conviction for the underlying indictable offence, in this case robbery, and the court must consider the constituent elements of robbery. Second, proof of the offence requires the use of, and not the mere possession of, an imitation firearm in the commission of the indictable offence of robbery. The offence does not capture simple possession of an imitation firearm. As such, the parameters for constructing a reasonable hypothetical entails someone who must have satisfied all the necessary elements for the crime of robbery (or attempted robbery), and who also used an imitation firearm in committing or attempting to commit that robbery. In my view, the offence does not cast a wide net over a range of potential conduct as, for example, in Nur where regulatory or licensing offenders could be caught at the lower end of the scale of culpability; or in Lloyd, where the Court described a mandatory minimum provision that applied to an offence that could be committed in various ways under a broad array of circumstances by a wide range of people, thus making it constitutionally vulnerable: Lloyd at para. 35.
- [67] In contrast, s. 85(2) implicates only the offender who uses a firearm or imitation firearm while committing or attempting to commit an indictable offence. This section is truly an example in the Criminal Code of sanctioning criminal conduct that poses "real and immediate danger to the public": Nur at para. 82. The section does not capture minimally

blameworthy "small offenders". There is no absence of harm or risk of harm flowing from the conduct captured by s. 85(2). No foreseeability of application can be said to catch those with "little or no moral fault or little or no danger to the public": Nur at para. 83.

- [68] The focus in Smith, Nur, and Lloyd was not on how many iterations of an offence a hypothetical offender can commit. In all three cases where the Supreme Court of Canada has struck down a mandatory minimum sentencing provision, the basis was that the scope of the offence could catch a reasonably foreseeable "small offender" who would be low on the culpability scale, and to apply the minimum sentence to that "small offender" to see if it would be grossly disproportionate. An offence that casts a wide net would be more constitutionally vulnerable because it is more likely to capture someone who is minimally culpable: Lloyd at para. 35. This analysis of "scope" and "reach" is an exercise of statutory interpretation of the provision setting out what conduct is captured: Nur at paras. 60-62.
- [69] Any offence may, hypothetically or actually, be committed any number of times, by an offender. Aside from situations governed by the rule in Kienapple, I cannot agree that just because someone can commit a crime some number of times and may be punished many times for those separate criminal transactions that a long mandatory sentence that results from committing a large number of offences would therefore be grossly disproportionate. As the number of offences increases, so too does the offender's moral culpability and the gravity of the criminal conduct giving rise to the sentence. While I would not foreclose a court developing a response to an aggregate sentence that appears to be unduly long and harsh, this case does not call for that discussion, and I do no more than allude to this as the concept was mentioned by the Crown at the hearing of this appeal.
- [70] Mr. Al-Isawi takes issue with the trial judge's use of the word "mythical" to describe his hypothetical. He argues that it is not unimaginable that someone would commit 20 or 30 robberies. I agree that it is not unimaginable, and Mr. Al-Isawi himself committed 11 robbery offences. However, in my view, the trial judge's use of the label "mythical" was to describe the fact that the "repeat offender" hypothetical is not what is contemplated by the "reasonable hypothetical" analysis envisioned in Nur.
- [71] Further, Mr. Al-Isawi maintains that the trial judge erred at the second stage of the analysis because he failed to define a reasonable hypothetical, having rejected Mr. Al-Isawi's two hypotheticals. Mr. Al-Isawi does not proffer another hypothetical on appeal. The trial judge considered the hypotheticals put before him. He considered whether he could construct a reasonable hypothetical, but concluded that he could not, citing a similar sentiment expressed by Blair J.A. in Meszaros:
- [79] In my view, a mandatory minimum one-year sentence for an offence involving the use of a firearm cannot be said to be "grossly disproportionate" to whatever might otherwise have been an appropriate punishment for such an offender having regard to the general principles of sentencing. Indeed, in spite of Mr. Breen's disavowal of the requirement in these circumstances, I cannot conceive of a reasonable hypothetical involving the use of a

firearm where a mandatory one-year sentence of imprisonment would be grossly disproportionate to what would otherwise be appropriate in the circumstances. Such a punishment might well be excessive, or perhaps even manifestly unfit, but it would not be grossly disproportionate.

- [72] I agree with Blair J.A.'s comments. I also cannot conceive of a reasonable hypothetical (or as the majority in Nur describes, a reasonably foreseeable application) involving the use of a firearm, real or imitation, in the commission of robbery where a mandatory minimum consecutive one-year sentence would be grossly disproportionate.
- [73] In my view, s. 85(2) describes an offence for which moral condemnation is high having regard to the real risk of harm to the public. As Saunders J.A. said in *R. v. Oud*, 2016 BCCA 332, there is specificity in the provision under consideration such that it does not cast an overly broad net: at paras. 32, 33, 44, 51.

Prosecutorial discretion

- [74] The judge's ruling permitting the withdrawal of eight of the s. 85(2) counts following the sentencing submissions has not been appealed. Mr. Al-Isawi argues that the trial judge erred in not addressing the effect of the Crown's withdrawal of these counts on the Charter analysis. What the trial judge said was this:
- [26] It is not determinative, but still noteworthy, that this submission was made in the face of 11 consecutive one-year sentences for a total of 11 years, plus 11 concurrent two-year sentences, for a position of 13 years of imprisonment. This submission was made before the court ruled that the Crown was permitted to withdraw eight of the 11 counts alleging a breach of s. 85.
- [75] The Court in Nur addressed the Crown's submission that the hybrid nature of the firearms offence allowed the application of the mandatory minimum sentencing provision on the "small offender" to be avoided where the Crown elects to proceed summarily. A majority of the Court rejected this argument, holding that to accede to the Crown's view would be "replacing a public hearing on the constitutionality of [the provision] before an independent and impartial court with the discretionary decision of a Crown prosecutor, who is in an adversarial role to the accused": Nur at para. 86.
- [76] The majority noted at para. 88 that Lamer J. (as he then was) rejected this argument in Smith at 1078:

In my view the section cannot be salvaged by relying on the discretion of the prosecution not to apply the law in those cases where, in the opinion of the prosecution, its application would be a violation of the Charter. To do so would be to disregard totally s. 52 of the Constitution Act, 1982 which provides that any law which is inconsistent with the Constitution is of no force or effect to the extent of the inconsistency and the courts are duty bound to make that pronouncement, not to delegate the avoidance of a violation to the prosecution or to anyone else for that matter.

[Emphasis added by McLachlin C.J.C.]

[77] In this case, the effect of the exercise of Crown discretion following conviction, in conjunction with the ruling, was to reduce the sentence by at least eight years. However, the judge did not rely on this reduction in his analysis of gross disproportionality, and to do so would have been contrary to Smith.

[78] After considering the case law in his analysis of the first stage of the s. 12 analysis the trial judge said:

[83] I agree with the Crown that when Burleigh is considered, and compared to the present case before the court, a sentence in the range of 12 years, had the other counts in the indictment not been withdrawn, could possibly be considered unfit. But even if excessive, it would not be grossly disproportionate, as that term has been defined by the Supreme Court of Canada.

[Emphasis added.]

[79] The effect of the exercise of prosecutorial discretion did not inappropriately factor into the trial judge's constitutionality analysis as cautioned against by the majority in Nur. It is clear that the trial judge did not rely on the exercise of prosecutorial discretion to "save" the provision. He conducted the Charter analysis as if no prosecutorial discretion was exercised.

Conclusion on Charter challenge

[80] In my view, the trial judge committed no error in his analysis of the constitutionality of the sentencing provisions in s. 85. The trial judge was correct in concluding that the minimum consecutive sentence mandated by ss. s. 85(3)(a) and 85(4) of the Criminal Code, as applied in the context of s. 85(2), does not violate s. 12 of the Charter where the underlying offence is robbery. Therefore, it is unnecessary to address s. 1 of the Charter.

Is the sentence otherwise unfit?

[81] Having reviewed the circumstances of the offender and the offences the trial judge said:

[99] Having regard to all the relevant circumstances, I conclude that a fit and proportionate sentence is three years for the three counts of using an imitation firearm while in commission of a robbery, that is one year for each count. I conclude that a sentence of four years concurrent for the 11 counts of robbery is appropriate. The total sentence is therefore seven years.

[82] Mr. Al-Isawi submits that the trial judge relied unduly on lack of a guilty plea or remorse when assessing the authorities. Mr. Al-Isawi argues the trial judge erred in citing R. v. Anderson, (1992), 16 B.C.A.C. 14, for the proposition that "remorse is often an important mitigating factor." He argues that Anderson is distinguishable because "there were many mitigating factors" in this case.

- [83] I cannot agree. The trial judge did not rely on the lack of a guilty plea for any purpose. With respect to lack of remorse, the principle in *Anderson* is stated at paras. 45-46:
- [45] The factor of "remorse" is often important. In so far as it might be suggested that the court should regard those who come before it in a submissive or contrite manner as deserving of more lenient treatment than those who accept their predicament with whatever fortitude they are able to summon, there would be little in this factor which could assist the sentencing judge. But to the extent that an accused person is able to demonstrate that he or she has, since the commission of a crime, come to realize the gravity of the conduct, and as a result has achieved a change in attitude or imposed some self-discipline which significantly reduces the likelihood of further offending, the existence of remorse in this sense obviously has much importance.
- [46] The capacity of human beings who have erred to recognize the magnitude of their wrongdoing, and to redeem themselves, offers the only possibility that those who have committed crimes may again become contributing members of the community, rather than its burden for the rest of their lives.
- [Emphasis in original.]
- [84] The judge recognized that Mr. Al-Isawi had many mitigating factors. He listed remorse as one of the mitigating factors. He noted that Mr. Al-Isawi's expression of remorse came late in the day as he "continued to blame corruption among law enforcement officials" for his convictions and it was not a significant factor: paras. 56, 61. There was no error in principle in the judge's approach.
- [85] This Court must accord deference to the sentencing judge. Appellate intervention is warranted where the sentencing judge erred in principle, failed to consider a relevant factor, or overemphasized an appropriate factor in a way that had an impact on the sentence: *R. v. Lacasse*, 2015 SCC 64 at paras. 43-44. Absent such an error, an appellate court may only vary the sentence if it is demonstrably unfit: *Lacasse* at para. 11; *Lloyd* at para. 52.
- [86] While sentencing ranges are not determinative, the sentences imposed in *R. v. Brogan*, 1999 BCCA 278, *Burleigh*, and *Stauffer* are instructive. The sentence imposed here -- seven years' incarceration in total for 10 counts of robbery, one count of attempted robbery and three counts of using an imitation firearm in the commission of robbery -- is not demonstrably unfit.
- [87] In my view, the trial judge considered the appropriate factors and did not err in his assessment of the factual circumstances of the offender and the offences. He did not commit any error in principle, or fail to consider a relevant factor or overemphasize an appropriate factor, in any way that would impact the sentence.
- [88] I conclude the sentence is not demonstrably unfit.

Disposition

[89] For the reasons above, I conclude that ss. 85(3)(a) and 85(4) as applied to s. 85(2) do not infringe s. 12 of the Charter where the underlying offence is robbery. No error is demonstrated that would allow us to interfere with the sentence imposed. I would grant leave to appeal from sentence but would dismiss the appeal.

"The Honourable Madam Justice Stromberg-Stein"

I agree:

"The Honourable Madam Justice Saunders"

I agree:

"The Honourable Mr. Justice Frankel"

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