
CANADA / JUDGMENT

R. v. Robertson

2020 BCCA 65

COURT

British Columbia Court of Appeal

DECIDED

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2020 BCCA 65 R. v. Robertson

COURT OF APPEAL FOR BRITISH COLUMBIA

Citation:

R. v. Robertson,

2020 BCCA 65

Date: 20200226

Docket: CA45101

Between:

Regina

Respondent

And

Jason Robertson

Appellant

Corrected Judgment: The text of the judgment was corrected at paragraphs 4, 9, 25, and 27 on March 23, 2020.

Before:

The Honourable Mr. Justice Frankel

The Honourable Mr. Justice Fitch

The Honourable Mr. Justice Hunter

On appeal from: An order of the Supreme Court of British Columbia, dated February 19, 2018 (R. v. Robertson, 2018 BCSC 521, Kamloops Docket 97803-3C).

Counsel for the Appellant:

E. Purtzki

M. Putnam

Counsel for the Respondent:

L.A. Ruzicka

M.J. Booker

Place and Date of Hearing:

Vancouver, British Columbia

September 20, 2019

Written Submissions Received:

October 3 and 18, 2019

Place and Date of Judgment:

Vancouver, British Columbia

February 26, 2020

Written Reasons by:

The Honourable Mr. Justice Frankel

Concurred in by:

The Honourable Mr. Justice Fitch

The Honourable Mr. Justice Hunter

Summary:

Appeal by R. challenging the constitutional validity of the one-year mandatory minimum penalty required by s. 96(2)(a) of the Criminal Code on a charge of possession of stolen firearms. R. was convicted on a number of charges arising out of the search of his residence. After dismissing R.'s challenge to s. 96(2)(a), the sentencing judge imposed an 18-month global sentence on the possession of stolen firearms charge and lesser concurrent sentences on other charges, the longest of which was six months. R. seeks to have the sentence on the stolen firearms charge varied to six months so that his global sentence is six months. Held: Mandatory minimum declared unconstitutional; sentence appeal dismissed. The mandatory minimum is invalid because it requires the imposition of a grossly disproportionate sentence on a reasonably foreseeable hypothetical offender. However, 18 months is not a demonstrably unfit global sentence having regard to all the charges on which R. was convicted.

Reasons for Judgment of the Honourable Mr. Justice Frankel:

Introduction

- [1] When the Crown proceeds by indictment on a charge of possession of a firearm obtained by the commission of an offence, the mandatory minimum penalty is one year's imprisonment. In the present case, Jason Robertson, was convicted by Justice Watchuk of the Supreme Court of British Columbia on a number of charges, including one relating to possession of two stolen rifles. After dismissing Mr. Robertson's constitutional challenge to the minimum penalty, the judge imposed a sentence of 18 months' imprisonment on the stolen-rifle charge. She imposed lesser concurrent terms of imprisonment on the other charges.
- [2] Mr. Robertson now appeals the 18-month sentence. He renews his constitutional challenge to the mandatory minimum penalty and contends an 18-month sentence is unfit. If the challenge succeeds, then Mr. Robertson seeks a 6-month sentence. If that challenge fails, then he seeks a one-year sentence.
- [3] For the reasons that follow, I would declare the mandatory minimum penalty to be of no force or effect but dismiss the appeal.

General Background

- [4] In May 2014, members of the Royal Canadian Mounted Police executed a search warrant at a residence in Kamloops, British Columbia, occupied by Mr. Robertson, his wife, and their two young children, who were one and five years old. The police seized a number of items, including stolen electronic equipment, brass knuckles, a conducted energy weapon (Taser), stolen firearms, unsafely stored firearms, and an Indian Status Certificate with Mr. Robertson's picture but in another person's name.
- [5] It was immediately apparent that the residence contained numerous firearms. The police found a total of 40 firearms, 34 of which were lawfully owned by Mr. or Ms. Robertson, both of whom held a Possession and Acquisition Licence (a "PAL"), which allowed them to possess and acquire non-restricted and restricted firearms. Many of the firearms were in unlocked cabinets, in piles, or otherwise stored in unlocked containers.
- [6] There were six stolen rifles, two of which were commemorative lever-action rifles: an RCMP Centennial Winchester 30-30 model 94, and a Little Bighorn Centennial Winchester 44-40 model 94. The commemorative rifles were stolen in March 2014. Of the other four rifles, two were stolen in September 2013, one in October 2013, and one in November 2013.
- [7] The electronic equipment included two telecommunication test kits stolen in August 2013, an iPad stolen in November 2013, and a MacBook Pro laptop stolen in January 2014.

[8] The brass knuckles were on a couch in the living room, among a number of items including boxes of ammunition, cash, and what appeared to be crack cocaine. The Taser was sitting on a mantle in the living room next to family photos, marihuana, and smoking paraphernalia. The status certificate was also in the living room.

[9] Mr. Robertson was later charged in a 10-count indictment, in which the charges were grouped as follows, all offences being contrary to the Criminal Code, R.S.C. 1985, c. C-46:

Count 1: Possession of six firearms knowingly obtained by the commission of an offence (s. 96(1)).

Count 2: Careless storage of seven firearms contrary to the Storage, Display, Transportation and Handling of Firearms by Individuals Regulation, SOR/98-209 (s. 86(2)).

Counts 3, 4: Possession of brass knuckles (a "prohibited weapon") (ss. 91(2), 92(2)).

Counts 5, 6: Possession of a Taser (a "prohibited weapon") (ss. 91(2), 92(2)).

Count 7-9: Possession of stolen property, a MacBook Pro laptop, two telecommunications test kits, and an iPad (s. 354).

Count 10: Possession of a false status certificate (s. 56.1(1)).

Ms. Robertson was charged in Counts 2 to 9.

[10] At the outset of their trial, the Robertsons applied to exclude the items seized from their residence based on alleged breaches of their respective rights as guaranteed by the Canadian Charter of Rights and Freedoms, Part I of the Constitution Act, 1982, being Schedule B to the Canada Act 1982 (U.K.), 1982, c. 11. Following a voir dire, the judge found that the police had breached Mr. and Mrs. Robertson's Charter rights but excluded the evidence only in relation to Ms. Robertson: 2016 BCSC 2474, 2017 BCSC 965. As a result, Ms. Robertson was acquitted and the trial continued in relation to Mr. Robertson.

[11] The judge convicted Mr. Robertson on seven counts: 2017 BCSC 2402. She described him as appearing to be "a firearms collector of sorts."

[12] With respect to the stolen-firearms charge (Count 1) the judge was satisfied beyond a reasonable doubt that the essential element that Mr. Robertson had knowledge that the rifles were stolen had been proven only with respect to the two commemorative rifles. She based that finding on the doctrine of wilful blindness. Those rifles had a combined value of \$3,000.

[13] The judge found Mr. Robertson guilty of carelessly storing six firearms, being three 12 gauge shotguns, a Browning 30-06 calibre rifle, a Lee Enfield 40 mark rifle, and the Little Bighorn Centennial 44-40 calibre rifle (Count 2).

[14] The judge found Mr. Robertson guilty of possessing the brass knuckles and Taser while not being the holder of the requisite licences (Counts 3, 5).

[15] On the stolen property charges, the judge was satisfied that the element of knowledge had been proven only with respect to the telecommunication test kits and the iPad (Counts 8, 9). This, again, was based on the doctrine of wilful blindness. The test kits had a value of \$9,200; the laptop had a value of \$1,000. She was also satisfied Mr. Robertson possessed the status certificate (Count 10).

[16] The judge was satisfied on a balance of probabilities that Mr. Robertson was involved in the sale of drugs from his residence. She based that finding on the presence of the following items:

- score sheets;
- digital scales;
- packaging material, including a vacuum sealer and bags used to package drugs;
- \$50,000 in cash, consisting of five bundles of \$10,000 each;
- a money counter;
- a sophisticated audio and video surveillance system; and
- weapons visible in the master bedroom and on a workbench in the garage.

[17] Following his conviction, Mr. Robertson challenged the one-year mandatory minimum penalty on the basis that it infringes the right guaranteed by s.12 of the Charter "not to be subjected to any cruel and unusual treatment or punishment."

[18] In reasons for judgment indexed as 2018 BCSC 521, the sentencing judge upheld the mandatory minimum and imposed a global sentence of 18 months, structured as follows:

Count 1: Possession of stolen firearms; 18 months' imprisonment.

Count 2: Careless storage of firearms; 6 months concurrent.

Count 3: Possession of brass knuckles; 3 months concurrent to count 5 and concurrent to count 1.

Count 5: Possession of a Taser; 3 months concurrent to count 3 and concurrent to count 1.

Count 8: Possession of two stolen test kits; 3 months concurrent to count 9 and concurrent to count 1.

Counts 9: Possession of a stolen iPad; 3 months concurrent to count 8 and concurrent to count 1.

Count 10: Possession of a false status certificate; 1 month concurrent.

[19] This Court dismissed Mr. Robertson's conviction appeal: 2019 BCCA 116.

The Impugned Provision

[20] Section 96 of the Criminal Code provides:

- (1) Subject to subsection (3), every person commits an offence who possesses a firearm, a prohibited weapon, a restricted weapon, a prohibited device or any prohibited ammunition that the person knows was obtained by the commission in Canada of an offence or by an act or omission anywhere that, if it had occurred in Canada, would have constituted an offence.
- (2) Every person who commits an offence under subsection (1)
 - (a) is guilty of an indictable offence and liable to imprisonment for a term not exceeding ten years and to a minimum punishment of imprisonment for a term of one year; or
 - (b) is guilty of an offence punishable on summary conviction.

[Emphasis added.]

- [21] This provision was enacted as part of the Firearms Act, S.C. 1995, c. 39, and came into force on December 1, 1998. Prior to that time, possession of a stolen firearm, etc. could only be prosecuted under s. 354 of the Criminal Code (Possession of Property Obtained by Crime). Under s. 355, the maximum punishment for a s. 354 offence is 10 years' imprisonment where the value of the property exceeds \$5,000 and 2 years' imprisonment where the value is \$5,000 or less. There is no mandatory minimum penalty for a s. 354 offence.

The Reach of Section 96; Other Criminal Code Provisions

- [22] The stolen rifles in this case fell within the definition of "firearm" in s. 2 of the Criminal Code, which reads:

"firearm" means a barrelled weapon from which any shot, bullet or other projectile can be discharged and that is capable of causing serious bodily injury or death to a person, and includes any frame or receiver of such a barrelled weapon and anything that can be adapted for use as a firearm;

- [23] This definition captures firearms whose physical characteristics bring them within the definitions of "prohibited firearm" (e.g., short-barrelled handguns, automatic firearms, sawed-off rifles or shotguns) or "restricted firearm" (e.g., handguns that are not prohibited firearms, semi-automatic firearms, and firearms that are less than a specified length). It also captures pellet guns that are at least capable of causing serious bodily harm, i.e., by shooting a projectile with a muzzle velocity sufficient to injure a human eye: *R. v. Eyre*, 2019 BCCA 333 at paras. 26-30.
- [24] The definition of "firearm" also captures weapons that are incapable of discharging a projectile but which can readily be made operational by the person in possession of the weapon, with or without the assistance of others, e.g., by sourcing and installing a missing or broken part: *R. v. Cook* (1989), 48 C.C.C. (3d) 61 at 63-64 (Man. C.A.); *R. v. Agtural*, 2015 ONSC 2191 at paras. 121-128, *aff'd* 2017 ONCA 404.

- [25] The "prohibited firearm" and "restricted firearm" definitions also capture items that have been prescribed in the Regulation Prescribing Certain Firearms and Other Weapons, Components and Parts of Weapons, Accessories, Cartridge Magazines, Ammunition and Projectiles as Prohibited, Restricted or Non-Restricted, SOR/98-462.
- [26] The mandatory minimum penalty in s. 96(2) also applies to numerous things defined in s. 84 of the Criminal Code, some of which are prescribed in the just-mentioned Regulation. Those things are, as listed in s. 96(1): a "prohibited weapon", a "restricted weapon", a "prohibited device", and "prohibited ammunition".
- [27] As set out in s. 84, "prohibited weapon", means:
- (a) a knife that has a blade that opens automatically by gravity or centrifugal force or by hand pressure applied to a button, spring or other device in or attached to the handle of the knife, or
 - (b) any weapon, other than a firearm, that is prescribed to be a prohibited weapon;

The list of prescribed prohibited weapons includes devices less than 480 mm in length capable of immobilizing or incapacitating a person by discharging an electrical current (e.g., Tasers), "nunchaku" sticks, brass knuckles, and mace.

- [28] A "restricted weapon" is "any weapon, other than a firearm, that is prescribed to be a restricted weapon". Currently, nothing is prescribed under this provision.

- [29] A "prohibited device" is:

- (a) any component or part of a weapon, or any accessory for use with a weapon, that is prescribed to be a prohibited device,
- (b) a handgun barrel that is equal to or less than 105 mm in length, but does not include any such handgun barrel that is prescribed, where the handgun barrel is for use in international sporting competitions governed by the rules of the International Shooting Union,
- (c) a device or contrivance designed or intended to muffle or stop the sound or report of a firearm,
- (d) a cartridge magazine that is prescribed to be a prohibited device, or
- (e) a replica firearm;

"[R]eplica firearm" means:

any device that is designed or intended to exactly resemble with near precision a firearm, and that itself is not a firearm, but does not include any such device that is designed or intended to exactly resemble, or to resemble with near precision, an antique firearm;

The list of prescribed prohibited devices includes cartridge magazines capable of containing more than five cartridges, designed for use in certain types of firearms.

[30] "[P]rohibited ammunition" means "ammunition, or a projectile of any kind, that is prescribed to be prohibited ammunition". The list of prescribed prohibited ammunition includes cartridges that are capable of penetrating body armour that can be discharged from semi-automatic handguns and shotgun cartridges that contain small dart-shaped projectiles.

Relevant Constitutional Provisions

[31] The relevant provisions of the Charter state:

1. The Canadian Charter of Rights and Freedoms guarantees the rights and freedoms set out in it subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society.
12. Everyone has the right not to be subjected to any cruel and unusual treatment or punishment.

[32] Section 52(1) of the Constitution Act, 1982, states:

The Constitution of Canada is the supreme law of Canada, and any law that is inconsistent with the provisions of the Constitution is, to the extent of the inconsistency, of no force or effect.

Mr. Robertson's Personal Circumstances at the Time of Sentencing

[33] Mr. Robertson was 40 years old at the time of sentencing. He was married with two young children and had two adult children from a previous relationship. He had a strong record of employment.

[34] Mr. Robertson had been on bail for approximately four years. Prior to his arrest, he struggled with overeating and obesity. Following his arrest, he attended a number of counselling sessions to better understand his internal motivations and to improve interpersonal relationships. During that period, he lost over 150 pounds.

[35] Mr. Robertson had the following criminal record:

June 26, 1995 (Youth Court)

Possession of property obtained by crime under \$5,000

6 months' probation, 30 hours community service

January 29, 1996 (Youth Court)

Possession of property obtained by crime under \$5,000

6 months' probation, \$72.50 restitution

November 25, 1998

(1) Theft under \$5,000

- (2) Theft under \$5,000
- (1) 2-month conditional sentence plus 1 year's probation, 40 hours community service, \$161.71 restitution
- (2) suspended sentence, 1 year's probation, 40 hours community service, \$20 restitution

Positions of the Parties at the Sentencing Hearing

[36] The sentencing hearing proceeded in two stages. On the first stage, the parties made their general sentencing submissions. On the second stage, they made their submissions on the constitutionality of the mandatory minimum penalty.

Submissions on Quantum

[37] The Crown submitted the offences were distinct and that a fit sentence on each would be:

Count 1: Possession of stolen firearms, 1 1/2 to 2 years.

Count 2: Careless storage of firearms, 6 to 12 months.

Count 3: Possession of brass knuckles, 6 months.

Count 5: Possession of a Taser, 6 months.

Counts 8, 9: Possession of stolen test kits and iPad, 3 months.

Count 10: Possession of false identification, 1 month.

However, having regard to the totality principle, the Crown said a cumulative sentence in the range of two to three years was appropriate. This, the Crown submitted, could be achieved by making all the individual sentences concurrent.

[38] Mr. Robertson submitted concurrent sentences should be imposed because all the offences were part of one transaction, i.e., they were all possession type offences that occurred on one day. He submitted that if the minimum penalty was invalid, then the global sentencing range would be 6 to 9 months. If the mandatory minimum was valid, then the global range would be 12 to 18 months. He suggested the following individual sentences:

Minimum Invalid

Minimum Valid

Count 1:

6 months

12 months

Count 2:

3 months

3 months

Counts 3, 5:

1 to 3 months

1 to 3 months

Counts 8, 9:

1 month

1 months

Count 10:

1 month

1 month

Submissions on Section 96(2)(a)

[39] Mr. Robertson's position was that the mandatory minimum penalty is invalid because it constitutes cruel and unusual punishment and, therefore, violates s. 12 of the Charter. He advanced his arguments under the framework set out in *R. v. Nur*, 2015 SCC 15, [2015] 1 S.C.R. 773, and *R. v. Lloyd*, 2016 SCC 13, [2016] 1 S.C.R. 130. First, he submitted the one-year penalty is grossly disproportionate as applied to him personally. Second, he submitted that if that penalty is not grossly disproportionate as applied to him, then it is grossly disproportionate as applied to four hypothetical offenders, who can be described generally as:

- (i) a person with no criminal record who steals a firearm from their employer, has a change of heart, disposes of the firearm, and later admits to the theft;
- (ii) a drug trafficker's domestic partner with no criminal record, who is aware the trafficker sometimes trades drugs for stolen property and who observes the trafficker trade drugs for a shotgun; after the domestic partner complains about the shotgun being in the home with children present, the trafficker hides the shotgun in the bedroom closet;
- (iii) a hunter with a dated criminal record for impaired driving who holds a PAL and arranges to buy a second hand rifle through a website; when the hunter and seller meet, the hunter becomes suspicious that the rifle may be stolen but decides to buy it because the price is low; and
- (iv) a 19 or 20 year-old person with no criminal record who purchases a "hot" replica firearm either knowing or being reckless as to it being stolen, because they thought it was "cool" and planned on possibly using it as part of a costume; the person does not know a replica firearm is a prohibited device.

[40] The Crown's preliminary argument was that if the sentencing judge found a fit sentence for Mr. Robertson to be equal to or greater than one year, then she should decline to consider the constitutional challenge based on hypotheticals. It went on to submit that the one-year minimum penalty does not violate s. 12 of the Charter, as it is not grossly disproportionate as applied to either Mr. Robertson or the hypothetical offenders. With respect to some of the hypotheticals, the Crown's position was that the fact patterns advanced by Mr. Robertson do not amount to an offence.

[41] The Crown did not seek to justify a breach of s. 12 under s. 1 of the Charter.

Sentencing Judge's Reasons

(2018 BCSC 521)

[42] At the outset of her reasons, the sentencing judge stated that the one-year mandatory minimum penalty was not grossly disproportionate as applied to Mr. Robertson personally:

[6] I find that the fit sentence for Mr. Robertson is equal to or greater than the mandatory minimum of one year. As I find the mandatory minimum sentence in this case does not materially exceed the bottom of the sentencing range for Mr. Robertson, it is not grossly disproportionate on the particularized inquiry for Mr. Robertson. Therefore it does not constitute cruel and unusual punishment in relation to Mr. Robertson.

[43] The judge then considered the hypothetical offenders Mr. Robertson had advanced. In rejecting those hypotheticals, she held that:

(i) the remorseful thief hypothetical was not one in which a one-year sentence would be grossly disproportionate;

(ii) the drug trafficker's domestic partner hypothetical was not reasonable as it did not reflect the elements of the offence or, in any event, the one-year minimum would not be grossly disproportionate;

(iii) the reckless hunter hypothetical was not reasonable as it did not reflect the elements of the offence or, in any event, the one-year minimum would not be grossly disproportionate; and

(iv) the youthful purchaser was not reasonable or, in any event, the one-year minimum would not be grossly disproportionate.

[44] Turning to the issue of what sentence should be imposed on Mr. Robertson, the judge found the following to be aggravating factors:

- the inherent danger of unsafely stored firearms, particularly when there are young children in the home; and

- Mr. Robertson's involvement in the market for stolen firearms, particularly when he is knowledgeable about firearms and their inherent danger, and holds a PAL.

[45] The judge rejected the Crown's submission that she should find beyond a reasonable doubt that Mr. Robertson trafficked drugs from the residence. She said her earlier finding in that regard based on a balance of probabilities was "a circumstance of the offender and the offences."

[46] The judge found the following to be mitigating factors:

- the prior property-offence convictions, as they were dated and resulted in minor sentences;
- Mr. Robertson's strong personal and familial support;
- his expression of sincere remorse and regret as reflected in a letter he wrote to the court;
- his compliance with bail conditions; and
- breaches of his Charter rights that occurred in the execution of the search warrant, i.e., the failure of the police to abide by the "knock and announce" rule and seizure of items outside the scope of the warrant.

[47] As mentioned above, the judge sentenced Mr. Robertson to 18 months' imprisonment on Court 1 (possession of two stolen rifles) and imposed the following concurrent sentences on the remaining counts, repeated here for convenience:

Count 2: Careless storage of six firearms, 6 months, noting Mr. Robertson had been negligent even though he was aware of proper storage requirements and that the presence of children in the home made the matter more serious.

Counts 3, 5: Possession of brass knuckles and a Taser, 6 months, noting these weapons had not been used or brandished.

Counts 8, 9: Possession of two stolen test kits and a stolen iPad, 3 months.

Count 10: Possession of a false status certificate, 1 month, noting there was no evidence the certificate had been used for an unlawful purpose or any suggestion Mr. Robertson was impersonating a person whose identity had been stolen or compromised, and also noting that counsel had agreed a sentence of 1 month should be served concurrently with the weapons possession offences.

Analysis: The Validity of Section 96(2)(a)

Legal Framework

[48] As mentioned above, the framework for determining whether a mandatory minimum penalty violates s. 12 of the Charter is set out in the Supreme Court of Canada's judgments in *Nur* and *Lloyd*.

[49] An applicant seeking to have a mandatory minimum penalty declared unconstitutional bears a heavy onus. Apposite is the following from the judgment of Justice Stromberg-Stein in *R. v. Al-Isawi*, 2017 BCCA 163, 348 C.C.C. (3d) 524:

[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."

See also: R. v. Serov, 2017 BCCA 456 at para. 24, 358 C.C.C. (3d) 203.

[50] As discussed by Chief Justice McLachlin in Nur, a s. 12 challenge engages a two-step process:

[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.

[51] In regard to those two steps, Al-Isawi is again apposite:

[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: [R. v. Goltz, [1991] 3 S.C.R. 485] 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.

See also: Serov at paras. 26-28.

Is the Mandatory Minimum Unconstitutional as Applied to Mr. Robertson?

[52] Although Mr. Robertson argues that a one-year sentence would be grossly disproportionate to him personally, he does not "stake his case" on that argument. Even though his goal is to have this Court vary the sentence on Count 1 to 6 months' imprisonment, he concedes a 9-month sentence would be fit and that a one-year sentence is not significantly greater. Given this concession, it cannot be said that the imposition of a one-year sentence on Mr. Robertson would be so excessive as to outrage standards of decency or be considered by Canadians to be abhorrent or intolerable: see R. v. Wiles, 2005 SCC 84 at para. 4, [2005] 3 S.C.R. 895.

Is the Mandatory Minimum Unconstitutional as Applied to Hypotheticals?

[53] Mr. Robertson no longer relies on the four hypotheticals the sentencing judge rejected. Rather, he now advances two new ones:

(i) a person with no criminal record who possesses brass knuckles (a "prohibited weapon"), knowing they were stolen; and

(ii) a person charged with a s. 96(1) offence whom the Crown elects to prosecute summarily.

[54] At the hearing of the appeal, the Court asked the parties for written submissions on a further hypothetical and on a modified version of one of Mr. Robertson's original hypotheticals:

(i) a 19-year-old with no criminal record found in possession of a pellet gun that has a muzzle velocity sufficient to make it a "firearm", knowing it was stolen; and

(ii) a 19-year-old with no criminal record found in possession of a replica firearm (a "prohibited device") incapable of discharging a projectile, knowing it was stolen.

[55] The Crown does not object to the Court considering Mr. Robertson's new hypotheticals or to the Court raising hypotheticals itself.

[56] With regard to Mr. Robertson's new hypotheticals, I note that in *R. v. Bernarde*, 2018 NWTCA 7 at para. 10, the Court summarily declined to consider a hypothetical raised for the first time on appeal. With respect, I do not consider there to be an absolute bar to a party raising a hypothetical for the first time on appeal. However, as in *R. v. Oud*, 2016 BCCA 332 at paras. 45-49, 339 C.C.C. (3d) 379, evidentiary reasons may exist for not considering such a hypothetical.

[57] Nur evinces the ability of an appellate court to consider its own hypotheticals. In that case, the Court of Appeal for Ontario declared the three-year minimum penalty for possession of a loaded prohibited firearm (i.e., a handgun) provided for in s. 95(2)(a)(i) of the Criminal Code unconstitutional. It did so on the basis of its own hypothetical, what the author of the judgment, Justice Doherty, referred to as "my hypothetical": see 2013 ONCA 677 at para. 165, 303 C.C.C. (3d) 474. In upholding that decision, Chief Justice McLachlin not only relied on Justice Doherty's hypothetical but, as well, on modified versions of it: at paras. 81-83. As Justice Fitch stated in *R. v. Elliott*, 2017 BCCA 214 at para. 34, 349 C.C.C. (3d) 1:

[A] Nur analysis permits a court to modify a hypothetical presented by an offender or devise its own hypothetical at first instance or on appeal. Indeed, the Court did so in Nur.

[58] I note, however, that in *R. v. Plange*, 2019 ONCA 646, Justice Benetto, in dismissing a challenge to a minimum penalty, stated the court's function is not to construct a hypothetical in order to declare the impugned provision unconstitutional: at paras. 29-30. Justice Doherty, in dissent, would have declared the sentencing provision unconstitutional on the basis of a modified version of a hypothetical the Court had raised during oral argument: at paras. 54, 72. As I read Benetto J.A.'s reasons, the decision not to construct a hypothetical in that case turned principally on her view, which I share, that the parties be given an opportunity to make submissions with respect to any hypothetical the court wishes to consider. That, of course, is the reason why, in the present case, this Court asked for submissions with respect to the hypotheticals raised from the bench.

The Stolen Pellet Gun Hypothetical

[59] The Crown accepts this hypothetical is reasonably foreseeable. Its position is that a one-year term of imprisonment is not grossly disproportionate even though the supposed offender is young, has no criminal record, and there is nothing to indicate an intention to use the pellet gun in an unlawful manner. The Crown points out that to commit an offence under s. 96(1) of the Criminal Code the offender must not only be in possession of a firearm but also must know, or be wilfully blind to that fact, it was stolen. The Crown notes that pellet guns are often physically indistinguishable from traditional firearms and that for a pellet gun to meet the definition of "firearm" it must be capable of causing serious body harm, i.e., at least be capable of discharging a projectile at a velocity sufficient to harm a human eye. Therefore, the Crown says, a stolen pellet gun that is a firearm poses the same risk as any other stolen firearm, including the risk that it could end up on the black market or be used carelessly, negligently, and/or criminally.

[60] The Crown further points out Canadian courts have become increasingly concerned with firearms-related offences and generally consider them to fall at the serious end of the spectrum. Accordingly, in sentencing for such offences the principles of denunciation, deterrence, and protection of the public are given pre-eminent consideration: see *R. v. Learning*, 2019 BCCA 332 at para. 17.

[61] In *Nur*, Chief Justice McLachlin observed that mandatory minimum penalties are a "blunt instrument" that can deprive courts of the ability to tailor a proportionate sentence having regard to the offence and the offender: at para. 44. Later, in *Lloyd*, she stated that (at para. 35):

[I]n light of *Nur*, the reality is this: mandatory minimum sentences that, as here, apply to offences that can be committed in various ways, under a broad array of circumstances and by a wide range of people are vulnerable to constitutional challenge. This is because such laws will almost inevitably include an acceptable reasonable hypothetical for which the mandatory minimum will be found unconstitutional.

[62] I accept that a stolen pellet gun that minimally meets the definition of "firearm" can cause harm and can be used in connection with criminal activity. However, I do not accept that such a gun poses the same risks to the community as traditional firearms or warrants the same degree of disapprobation as those firearms, in particular ones that are restricted or prohibited. It would be grossly disproportionate to sentence a youthful first-time offender to a year in prison for doing no more than being found in possession of a stolen pellet gun. Indeed, it is not difficult to envisage circumstances in which incarcerating such an offender would be antithetical to the overall interests of society.

[63] This Court's post-*Nur* judgment in *R. v. Sellars*, 2018 BCCA 195, on appeal from 2017 BCSC 2236, illustrates why it would be grossly disproportional to incarcerate a youthful first-time offender for possessing a stolen pellet gun. *Sellars* involved a Crown appeal from a non-custodial sentence imposed following conviction for the following offences:

- possession of a loaded handgun (a "prohibited firearm") (s. 95(1));
- being an occupant of a motor vehicle knowing there was an unregistered handgun for which no occupant held an authorization or licence (s. 94(1)); and
- transporting a handgun in a careless manner or without reasonable precautions for the safety of other persons (s. 86(1)).

[64] The police found the gun after they stopped a vehicle in which Mr. Sellars was a passenger. When the police searched Mr. Sellars, he attempted to discard ammunition for the gun. At trial, he unsuccessfully raised self-defence, testifying he purchased the gun from someone on the street for protection of himself and his family.

- [65] Mr. Sellars, who is Indigenous, was 26 at the time of the offences and 28 at the time of sentencing. He was a past member of the "Indian Outlaw Gang". Because Mr. Sellars is Indigenous, a Gladue report (see *R. v. Gladue*, [1999] 1 S.C.R. 688) was prepared for the sentencing hearing. The information provided to the sentencing judge disclosed that Mr. Sellars had substance abuse issues in the past. When he was 16, peer pressure caused him to engage in a gangster lifestyle that involved criminal activity. However, following the targeted murders of his cousin in 2013 and his best friend in 2014, Mr. Sellars disassociated himself from the gang subculture and took steps to become a productive member of society. At the time of sentencing, he was employed and residing with his spouse and son. He had an unrelated and dated criminal record, except for a 2014 conviction for possession of a weapon (a machete) for a purpose dangerous to the public peace. The Crown sought a four-year sentence. Mr. Sellars sought a non-custodial sentence.
- [66] Having regard to Mr. Sellars's personal circumstances both before and after the offence, and being of the view that the offences were not committed for an illicit purpose, the sentencing judge concluded a suspended sentence with three years' probation was a fit sentence. The Crown appealed, seeking a sentence in the range of three to four years.
- [67] This Court allowed the Crown's appeal but declined to impose a custodial sentence. Rather, taking Mr. Sellars's circumstances as an Indigenous offender into account, it varied the sentence to a conditional sentence order for two years less one day, subject to strict conditions. In doing so, it held that the sentencing judge had erred in principle in characterizing the seriousness of the offences when he stated they had not been committed for an illicit purpose. This was because Mr. Sellars possessed the gun for the purpose of threatening, seriously harming, or killing another person. A conditional sentence was available because none of the offences Mr. Sellars committed is punishable by a minimum term of imprisonment: see Criminal Code, s. 742.1(b).
- [68] If a non-custodial sentence can be a fit punishment for a person with a weapons-related criminal record who possess a loaded handgun for an illicit purpose then, in my view, a provision that demands a youthful first-time offender be sentenced to one year in prison for possessing a far less lethal, albeit stolen, firearm, imposes a grossly disproportionate punishment.
- [69] One further point. It is likely the handgun Mr. Sellars purchased on the street was stolen. Had Mr. Sellars been charged and convicted of possessing a stolen firearm, then by reason of s. 96(2)(a), he would have had to be incarcerated. I consider this variation of the fact-pattern in Sellars to be another reasonable hypothetical in which the minimum penalty demanded by s. 96(2)(a) would be grossly disproportionate.
- [70] I would accede to Mr. Robertson's argument that the mandatory minimum penalty in s. 96(2)(a) violates s. 12 of the Charter.

The Extent to which Section 96(2)(a) is Invalid

- [71] At the hearing of the appeal, the Court, having regard to s. 52(1) of the Constitution Act, 1982, asked for written submissions with respect to what declaration it should make in the event it found the mandatory minimum penalty in s. 96(2)(a) unconstitutional based on a reasonable hypothetical. It did so because the offence created by s. 96(1) can be committed with respect to a variety of objects, many of which are not firearms.
- [72] Mr. Robertson submits that the Court should declare the minimum penalty invalid in all respects if it concludes that penalty is grossly disproportionate with respect to a reasonable hypothetical based on any object that falls within the categories listed in s. 96(1).
- [73] The Crown submits that if this Court concludes the minimum penalty is grossly disproportionate based on a reasonable hypothetical that involves an object other than a firearm (e.g., brass knuckles), then the minimum penalty should be declared invalid only in regard to that object. However, if the Court concludes the minimum penalty is grossly disproportionate based on a reasonable hypothetical that involves a firearm, then the Crown says it cannot advance a principled argument to support a limited declaration of invalidity.
- [74] As I have concluded that the minimum penalty is grossly disproportionate based on a reasonable hypothetical involving a firearm, I would declare the minimum penalty in s. 96(2)(a) to be of no force or effect.

Analysis: Should the 18-Month Sentence be Varied?

Positions of the Parties

- [75] Mr. Robertson's position is that in the absence of the one-year mandatory minimum this Court should reduce his "global sentence" to 6 months' imprisonment. The Crown's position is that the 18-month sentence on Count 1 should not be varied even absent the one-year mandatory minimum.

Is the 18-Month Sentence Unfit?

- [76] In the preceding paragraph, I have placed quotation marks around the expression "global sentence" not only to reflect Mr. Robertson's use of that expression, but also because it evinces the fact that the sentence imposed on Count 1 was intended to be the aggregate sentence for all seven counts. Having read the sentencing submissions and the judge's reasons it is clear to me that the judge acceded to counsel's view that the sentence imposed on Count 1 should be the global/cumulative punishment for all the offences Mr. Robertson committed. Accordingly, it would be wrong to consider the fitness of that sentence based solely on whether 18 months is a fit punishment for possessing two stolen rifles. In light of the approach taken by the parties at the sentencing hearing and on this appeal, the issue for this Court is not whether 18 months is a demonstrably unfit sentence for possession of two stolen rifles, but whether it is a demonstrably unfit global sentence for all the offences of which Mr. Robertson was convicted. In my view, it is not.

[77] In deciding whether the 18-month global sentence is demonstrably unfit I will apply the methodology applicable when sentencing on multiple counts, namely:

- (1) Without regard to totality, determine the appropriate sentence of each count according to ordinary sentencing principles;
- (2) Without regard to totality, determine whether any of the individual sentences should be made consecutive or concurrent; and
- (3) Review the aggregate sentence having regard to the totality principle to ensure it is not excessive and, if necessary, adjust the individual sentences to arrive at an appropriate global sentence.

See: R. v. Li, 2009 BCCA 85 at para. 28, 267 B.C.A.C. 77; R. v. Hutchings, 2012 NLCA 2 at para. 84, 282 C.C.C. (3d) 104; R. v. Chicoine, 2019 SKCA 104 at para. 66.

Count 1: Possession of Two Stolen Rifles

[78] The maximum penalty for this offence is 10 years: s. 96(2)(a).

[79] In my view, a sentence of 9 months is appropriate. Although I am prepared to accept Mr. Robertson possessed those firearms as "collector's items", anyone who is prepared to acquire stolen firearms provides an incentive to those who would steal them. There is no doubting that stolen firearms pose a risk to the community. It is well known that firearms used by criminals are often stolen from lawful owners and then traded or sold in the underground market. Accordingly, priority must be given to deterrence and denunciation in sentencing an offender who participates in that market.

[80] The fact that Mr. Robertson held a PAL makes his participation in the stolen-firearms market more serious. He was well aware of the controls that govern the lawful acquisitions of firearms. Further, his record, although dated, shows that he is not a stranger to property-related offences.

Count 2: Careless Storage of Three Shotguns and Three Rifles

[81] The maximum penalty for this offence is 2 years: s. 86(3)(a)(i).

[82] I agree with the judge that 6 months is appropriate.

[83] As the holder of a PAL, Mr. Robertson was well aware of the requirement to store firearms in the prescribed manner. He committed this offence by not rendering inoperable and securely storing six firearms and by having readily accessible ammunition nearby. This created a risk to the public, as it left those firearms exposed to being stolen and misused. In addition, it exposed the Robertson family and others to being accidentally injured or killed. Leaving firearms and ammunition within reach of a five-year-old child is a recipe for tragedy.

Counts 3, 5: Possession of Brass Knuckles and a Taser

[84] The maximum penalty for each of these offences is 10 years: s. 92(3)(a).

[85] I agree with the judge that 3 months is appropriate on each of these counts. Although there is no evidence Mr. Robertson used these weapons, they are not collector's items. They are prohibited because of the harm they can inflict and, therefore, denunciation and deterrence must be given priority.

Counts 8, 9: Possession of Two Stolen Test Kits and a Stolen iPad

[86] As the test kits have a value in excess of \$5,000, the maximum penalty on Count 8 is 10 years (s. 355(a)). As the iPad has a value less than \$5,000, the maximum penalty on Count 9 is 5 years (s. 355(b)(i)).

[87] I agree with the judge that 3 months is appropriate on each of these counts. Again, the fact that Mr. Robertson is not a stranger to property-related offences is a factor.

Count 10: Possession of a False Identity Document

[88] The maximum penalty for this offence is 5 years: s. 56.1(4)(a).

[89] I agree with the judge that 1 month is appropriate. There was no evidence Mr. Robertson used the status certificate for a fraudulent purpose, nor was there any suggestion that he had stolen or compromised a real person's identity.

Structuring the Sentences: Concurrent or Consecutive

[90] The test for determining whether concurrent or consecutive sentences are appropriate is "whether the acts constituting the offences were part of a linked series of acts within a single endeavour": *R. v. G.P.W.* (1998), 106 B.C.A.C. 239 at para. 35; *R. v. Bamdad*, 2013 BCCA 87 at para. 24, 334 B.C.A.C. 204; *Li* at para. 42. Some of the factors to consider are: "the nature and quality of the criminal acts; the temporal and special dimensions of the offences; the nature of the harm caused to the community or to the victims; the manner in which the criminal acts were perpetrated; and the offenders' role in the crimes": *R. v. Potts*, 2011 BCCA 9 at para. 89, 266 C.C.C. (3d) 279 (per Rowles J.A.).

[91] However, even when a link is present, consecutive sentences can be imposed when the offences committed protect different societal interests. *R. v. McCrea*, 2008 BCCA 227, 256 B.C.A.C. 312, and *R. v. Reynard*, 2015 BCCA 455 evince this. In *McCrea*, this Court held consecutive sentences were appropriate for the offences of robbery, dangerous driving, and resisting arrest, all of which occurred on the same day. In *Reynard*, this Court held that consecutive sentences were appropriate for the offences of possession of child pornography, distribution of child pornography, and child luring. In both cases, this Court cited with approval the judgment of the Court of Appeal of Ontario in *R. v. Gummer* (1983), 38 C.R. (3d) 46, allowing a Crown appeal against concurrent sentences imposed after convictions for dangerous driving and failing to remain at the scene of an accident, and ordering those sentences to be served consecutively. In *Gummer*, Justice Martin stated (at 49):

We do not consider the rule that sentences for offences arising out of the same transaction or incident should normally be concurrent necessarily applies where the offences constitute invasions of different legally-protected interests.

See also: *R. v. Kandola*, 2014 BCCA 443 at paras. 40-41, 317 C.C.C. (3d) 166, upholding consecutive sentences imposed on a Canada Border Services officer for importing cocaine and breach of trust.

- [92] I turn now to the question of whether any of the sentences I have set out above should be served consecutively. In my view, the answer is "yes".
- [93] The 6-month sentence on Count 2 (careless storage of firearms) should be consecutive to the 9-month sentence on Count 1 (possession of stolen rifles). The link between these offences is minimal, as only one of the six carelessly stored firearms was stolen. In addition, the prohibition against possessing stolen firearms and related items primarily protects society's interest in preventing them from getting into the wrong hands and secondarily protects the property interests of those lawfully entitled to possess them. The prohibition on careless storage protects society's interest in ensuring that those who possess firearms do so in a safe and secure manner. While there is a public safety overlap that could justify concurrent sentences in some circumstances, this is not such a case.
- [94] The 3-month sentences on Count 3 (possession of brass knuckles) and Count 5 (possession of a Taser) should be concurrent to one another because the gravamen of those offences is the same. However, those sentences should be consecutive to the sentences on Counts 1 and 2. Although all the offences Mr. Robertson committed were discovered at the same time, I consider his possession of the brass knuckles and Taser to be a separate "endeavour". This is because he would have acquired those items only because they are capable of inflicting harm. Unlike the stolen commemorative rifles, they are not collector's items.
- [95] The 3-month sentences on Count 8 (possession of two stolen test kits) and Count 9 (possession of a stolen iPad) should be concurrent to one another because the gravamen of those offences is the same. The issue then becomes whether those sentences should be concurrent or consecutive to the other sentences, in particular the sentence on Count 1 (possession of stolen rifles). As all three counts involve possession of stolen property, I would make the sentences on Counts 8 and 9, concurrent with the sentence on Count 1.
- [96] Last is Count 10 (possession of false identification). In my view, the sentence for this offence should also be consecutive. Its only link to the other offences is that it was discovered at the same time; there is no single endeavour to which it is connected. In addition, this prohibition serves a different societal interest than the other offences. Its purpose is to prevent identity theft and to protect third parties from being deceived.

- [97] The next question is whether the cumulative sentence set out above--19 months--should be adjusted by reason of the totality principle. As I do not consider a 19-month sentence unduly long or harsh, or disproportionate to Mr. Robertson's overall culpability, there is no reason for any reduction.
- [98] However, in light of the fact that the arguments on this appeal focused solely on whether 18-months is a fit global sentence--i.e., the Crown did not seek to have that sentence increased--there is no need to consider whether any changes should be made to the structure of the sentences imposed at trial. An 18-month sentence is equally a fit global sentence.

Disposition

- [99] I would dismiss this appeal and declare the one-year mandatory minimum penalty in s. 96(2) (a) of the Criminal Code to be of no force or effect.

"The Honourable Mr. Justice Frankel"

I AGREE:

"The Honourable Mr. Justice Fitch"

I AGREE:

"The Honourable Mr. Justice Hunter"

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