ONTARIO COURT OF JUSTICE

CITATION: *R. v. Hazell*, 2020 ONCJ 358
DATE: 2020 08 14
COURT FILE No.: Niagara Region 998 18 S4755

B E T W E E N :

HER MAJESTY THE QUEEN

— AND —

Tiroune Hazell

Before Justice J. De Filippis
Heard on August 4, 2020
Reasons for Judgment released on August 14, 2020

Ms. M. Colacarro..... counsel for the Federal Crown
Ms. S. Sheehan..... counsel for the Provincial Crown
Mr. S. Buchanan..... counsel for the defendant

De Filippis, J.:

INTRODUCTION

[1] The defendant pleaded guilty to trafficking in fentanyl (by bringing it into a correctional facility) and assaulting a correctional officer at the Niagara Detention Centre. The guilty plea to the trafficking charge was entered before me during a trial before Justice Watson. This was done with the consent of that trial judge. Setting a trial date for the assault charge had been delayed because of COVID 19.

[2] The defendant committed the first offence when he was 21 years old and the second one at 22 years old. He is now 23 years old. At the time of these offences, he did not have a criminal record. However, the defendant was recently found guilty by Justice Wolfe for possessing 51.9 grams of cocaine and 23.1 grams of fentanyl for the purpose of trafficking. He was sentenced to 15 months in jail, in addition to 996 days of pretrial custody, for an effective sentence of four years.

[3] A presentence report was prepared. I also have the benefit of a lengthy affidavit from the defendant's mother. Much of the information in the former is repeated, in greater, detail in the latter.

THE OFFENCES

[4] The facts before me are as follows: On October 26, 2018 the defendant was admitted to the Niagara Detention Centre because of a surety revocation. The results of a body scan caused officials to place him in a "dry cell". When he was eventually strip searched, correctional officers found six plastic packages in his inner thigh, covered in fecal matter. These packages contained a total of 8.5 g of fentanyl as well as tobacco and tobacco/marihuana mix. Several months later, on March 12, 2019, while still in custody at the detention centre, the defendant confronted a correctional officer who was preparing for the daily lockup. He approached the officer, said "hey tough guy", and tried to punch him in the face. In the struggle that followed, both men fell to the floor. The defendant punched the victim in the head and wrapped his arms around his neck. Two other officers intervened and after a brief scuffle, the defendant was subdued when one of them pepper sprayed him. The first officer suffered scratches and bruising to his face and neck. The other two had minor bruises.

THE POSITION OF THE PARTIES

[5] The Federal Crown submits that, for the trafficking offence, the defendant should be sentenced to three years in jail, consecutive to the sentence currently being served. Counsel points to the danger of bringing such a dangerous drug into a correctional facility and points to aggravating statements made by the defendant during the preparation of a presentence report. The Provincial Crown argues that a sentence of six to nine months should be imposed for the assault charge, consecutive to the sentence currently being served and consecutive to the penalty for the trafficking offence. Counsel points out that, but for the intervention of two other guards, the first victim could have sustained significant injuries.

[6] Defence counsel fairly concedes that the trafficking offence was premeditated. He suggested that the guilty plea, during a trial, is mitigating because of the serious *Charter* issues related to the defendant placement in a dry cell for one week as well as delay in the continuing trial. I am unable to assess this submission but I accept that a guilty is almost always worthy of some mitigation. This, of course, also applies to the second offence. Counsel argues that the right sentence is a total of five to six years – including the four-year sentence already imposed by Justice Wolfe. The trafficking offence carries a minimum penalty of two years because it occurred in a correctional facility; section 5(3) of the *Controlled Drugs and Substances Act.* The Defence suggests a consecutive three-month penalty for the assault on the guard. To give effect to the Defence position, this 27-month sentence must run concurrently with the 15 months remaining on the sentence currently being served. The Defence position rests on three pillars; the impact of COVID 19, the existence of anti-black systemic racism, and the principle of totality.

[7] I agree with the Defence position. However, I come to it by a somewhat different route. In passing sentence, I consider the seriousness of the offences and the defendant's personal circumstances. I do not focus on anti-black systemic racism. I am concerned that to do so risks unfairness to others who share the defendant's personal circumstances.

THE AFFIDAVIT BY MS. JULIE HAZELL

[8] The defendant is a young, black man born to a single mother, Julie Hazell, in Scarborough, Ontario when she was 20-years old. Ms. Hazell was born and raised in working class family in Scarborough. Her parents came from St. Vincent and the Grenadines. There was emotional abuse between her parents and they physically disciplined their children.

[9] Ms. Hazell moved out of her parents' home when she was 16-years old and lived in public housing. She met the defendant's father around this time. He had immigrated to Canada from Jamaica when he was approximately 14-years old. This man verbally and physically abused Ms. Hazel, including sexual violence. He had several affairs during their relationship and had children with several other women. Ms. Hazell left, with her son, shortly after he was born. The defendant's father was never involved in his life and the defendant has never met his half-siblings.

[10] When the defendant was just over two years old, Ms. Hazell began dating a man named "Tim". Tim did not live in her home but regularly visited. The defendant believed Tim to be his biological father and called him "dad". Ms. Hazell did not correct this. Tim was physically abusive towards her and the defendant witnessed this violence at times. When he was about five years old, Tim assaulted Ms. Hazell so badly that the police were called to intervene. Tim was charged and convicted accordingly.

[11] When the defendant was six years old, Ms. Hazell met "Gary". They married the following year. Gary had three children from a previous relationship and they would visit their home every other weekend. The defendant had difficulty adjusting to this new relationship and blamed his mother for having left Tim, his "dad". During this time, he began acting out in school as he would frequently leave the classroom, not listen, talk back to teachers, and distract other students by being the class clown. Gary suddenly ended the relationship and left when the defendant was 11 years old.

[12] Ms. Hazell has always been employed full time, with the Anne Johnstone Community Health Centre (from approximately 2003 to 2008) and subsequently at the Toronto Children's Aid Society (from 2008 to 2017) as an administrative supervisor. She was able to provide the defendant with the necessities of life but there were times when her son wanted things she could not afford. Her work commitments meant that the defendant was left unsupervised for several hours each day after school. During this time, the defendant associated with undesirable people and was "often in trouble". This was aggravated by the fact that Ms. Hazell suffers from depression and, on occasion, was "unable to properly cope with her parenting responsibilities".

[13] By the time the defendant reached grade five, his grades dropped significantly and his behaviour in class worsened. He was subject to detentions and suspensions. Ms. Hazell asked school officials to assist her son with his disruptive conduct by providing one-on-one learning, a social worker, or an individualized education plan. She was told the school did not have the resources to comply with these requests.

[14] In 2009, the defendant was suspended after he threatened another student's life. As a result of this incident, Ms. Hazell enrolled him in a residential treatment program administered by the Youthdale Psychiatric Crisis Service. The defendant was diagnosed with Tourette's Syndrome and Oppositional Defiant Disorder. It was

recommended that the defendant participate in further family therapy and enroll in residential program that offers a structured, supportive classroom setting.

[15] Ms. Hazell enrolled her son at Scarborough Centre for Alternative Studies in grade 9 and he "performed adequately with only a few altercations with students". He was not subject to any suspensions during this time. As a result of this improvement, Ms. Hazell allowed him to go to a public high school. This change was a setback. The defendant's behavioural issues resurfaced. He was suspended for two days for calling the science teacher an idiot and using profane language. He was the further suspended for one month after threatening to shoot the hall monitor in the head. Although, he was not expelled as a result of this incident, the defendant stopped going to school.

[16] After the defendant dropped out of school, Ms. Hazell tried to enroll him in employment programs. However, after a few months of sporadic employment, he stopped working. The relationship between mother and son deteriorated and, at the age of 18, the defendant left her mother's residence.

PRESENTENCE REPORT

[17] The defendant acknowledges that he has always had a caring mother. He confirms he dropped out of school at the age of 15 and has been unemployed since that time. He admits earning money by selling marihuana in high school and afterwards, began "dealing in harder drugs". He does not feel that this is a "big thing" as illicit substances were part of his social life. He has an interest in culinary arts or welding, but does not rule returning to drug trafficking is a possibility for his future, if he needs money.

THE APPLICABLE LAW

[18] As already noted, by virtue of the *Controlled Drugs and Substances Act,* the drug offence in this case carries a mandatory minimum sentence of two years in jail. Section 270 of the *Criminal Code* states that a person who assaults a public officer or peace officer is liable, when the Crown proceeds by Indictment, to a sentence of up to five years jail.

[19] With respect to sentencing generally, the *Criminal Code* provides as follows:

> 718. The fundamental purpose of sentencing is to protect society and to contribute, along with crime prevention initiatives, to respect for the law and the maintenance of a just, peaceful and safe society by imposing just sanctions that have one or more of the following objectives:
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> (a) to denounce unlawful conduct and the harm done to victims or to the community that is caused by unlawful conduct;
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> (b) to deter the offender and other persons from committing offences;
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> (c) to separate offenders from society, where necessary;
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> (d) to assist in rehabilitating offenders;

(e) to provide reparations for harm done to victims or to the community; and

(f) to promote a sense of responsibility in offenders, and acknowledgment of the harm done to victims or to the community.

718.1 A sentence must be proportionate to the gravity of the offence and the degree of responsibility of the offender.

718.2 A court that imposes a sentence shall also take into consideration the following principles:

(a) a sentence should be increased or reduced to account for any relevant aggravating or mitigating circumstances relating to the offence or the offender, and, without limiting the generality of the foregoing…

…….

(b) a sentence should be similar to sentences imposed on similar offenders for similar offences committed in similar circumstances;

(c) where consecutive sentences are imposed, the combined sentence should not be unduly long or harsh;

(d) an offender should not be deprived of liberty, if less restrictive sanctions may be appropriate in the circumstances; and

(e) all available sanctions, other than imprisonment, that are reasonable in the circumstances and consistent with the harm done to victims or to the community should be considered for all offenders, with particular attention to the circumstances of Aboriginal offenders.

THE IMPACT OF COVID 19

[20] In *R v Yzerman* 2020 ONCJ 224, I stated that there are cases in which the current pandemic justifies a lower sentence than might otherwise be appropriate, provided always, that public safety is not compromised. This is not one of those cases. Unlike Mr. Yzerman, the defendant does not have health issues that make him more susceptible to the virus. Moreover, any concern the defendant may have about contracting the illness in a close environment is outweighed by the need to denounce and deter, as I will explain.

SENTENCES FOR FENTANYL

[21] It is not controversial that trafficking in fentanyl is treated as a serious offence by the courts. In *R v Loor* 2017 ONCA 696 (CanLII), the Court of Appeal for Ontario declined the invitation by the Crown to establish a range of sentence for trafficking in fentanyl cases, stating that it was too early to do so. However, the Court noted that those who traffic in significant amounts of fentanyl should expect to receive significant

penitentiary sentences. Fentanyl is such a dangerous drug that trial judges have sentenced offenders to the penitentiary for lesser amounts, as in the present case, to reflect denunciation and deterrence.

ANTI-BLACK RACISIM

[22] Defence counsel, citing two decisions by Justice Nakatsuru, states that,

> …there is growing jurisprudence which supports the ability of Ontario courts to consider the history of colonial violence and systemic racism experienced by Black Canadians when crafting just and appropriate sentences under section 718.2(e) of the *Criminal Code* in order to address the disproportionate jailing of Black offenders in Canada…

[23] The two decisions in question are *R v Morris* 2018 ONSC 5186 and *R v Jackson* 2018 ONSC 2527. In *Morris*, Justice Nakatsuru noted that to balance competing pressures and to arrive at a just sentence is not always easy. He added that it would be wrong to only consider general deterrence and denunciation. I take the latter statement to mean that it is his view that there are cases in which denunciation and deterrence need not be given prominence, notwithstanding that legal principles and precedent say otherwise. I conclude so because it is obviously wrong for a judge to only consider general deterrence and denunciation; the *Criminal Code* provisions cited above make this abundantly clear. I am strengthened in my conclusion by the words Justice Nakatsuru said in speaking directly to Mr. Morris:

> [9] Let me briefly explain to you what I did in *Jackson*. I began my judgment in that case by saying sentencing is a very individual process. The criminal law has recognized that there are cases where, in order to determine a fit and proportionate sentence, consideration must be given to an individual's systemic and social circumstances. These circumstances may extend beyond a person who is being sentenced to include factors such a systemic discrimination and historical injustice. This has been recognized by the criminal courts, particularly in the case of Indigenous offenders. While the distinct history of colonial violence endured by Indigenous peoples cannot simply be analogized to Black Canadians, I found that the ability to consider social context in a sentencing decision is extended to all under section 718.2(e) of the *Criminal Code*. This allowed me to consider the unique social history of Black Canadians in sentencing Mr. Jackson. Mr. Jackson was a Black male offender not too much older than you who pleaded guilty to a charge of possession of a prohibited gun. His lawyers presented a great deal of evidence to me on systemic anti-Black racism and its role in Mr. Jackson's life. I took note of this evidence. I also took judicial notice, independently of these materials, of the history of colonialism, slavery, policies and practices of segregation, intergenerational trauma, and both overt and systemic racism that continue to affect Black Canadians today. With an understanding of these social factors I was able to better appreciate the circumstances that led Mr. Jackson to come before me. I sentenced him accordingly.
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> ……

> [55] Before I get to the specifics of your case, I want to say a few words about some interplay between the sentencing principles of general deterrence and denunciation and the analysis presented in *Jackson* [regarding Black Canadians] and, indeed, in the *Gladue* framework to sentencing….
>
> [56] ….when looked at in a principled manner, broader systemic factors such as racism and the effects of colonialism must surely have some impact upon the application of general deterrence and denunciation. It can impact upon on how we characterize the seriousness of the offence. Recognizing, as the law must, that individuals are held responsible for the acts they commit that breach the criminal law, the reality is that this choice to act may be constrained by an offender's life circumstances. This can include the limited choices available to the offender due to discrimination or racism. The effects may be subtle but significant. They may be significantly influenced by history. They can become hardwired into out institutional practices. Over the lifetime of the offender, negative influences such as poverty, addiction, mental illness, neglect and abuse in childhood, disrupted family and social networks, and the denial of employment and social advancement can constrain this field of choice. It can also be adversely affected by the environment or community in which the offender was raised or presently lives; fragile communities that are under daily stress given their marginalization and in-cohesion. General deterrence of people who live in such circumstances and have experienced such lives is not a concept that should be applied in a rigid and simplistic way.
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> …….
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> [58] Thus, I pose this question, is it right that we harshly deter and denounce conduct of people who have been subject to such injustices by giving them stiffer sentences? Is it right to denounce their conduct when the conduct was constrained in choice; a constraint that was inequitably imposed upon them?

[24] Defence counsel in the present says that "it is clear that racial systemic factors regarding socioeconomic status, education, and housing has impacted Mr. Hazell's moral blameworthiness". This is not clear to me. Moreover, with great respect to Justice Nakatsuru, I am troubled by the potential unintended consequences of his approach.

[25] To illustrate my doubt and concern, I will return to the submissions made by the Defence in the case before me and reproduce several points from his factum:

- The issues surrounding these low-income neighbourhoods are outlined in the appended report of *Morris*, supra (see page 13, top paragraph). In the report, the authors state that Black Canadians are overrepresented in Toronto neighbourhoods that are mostly afflicted by poverty and other forms of disadvantage. These neighbourhoods are underserved by public transit and essential services meaning that Black people in Toronto have poorer access to recreational and community centres, libraries, good schools, community health

hubs and hospitals which are the very services that create strong communities and protect young people from crime, gang membership, and violence.

- Mr. Hazell himself stated in his pre-sentence report that he did not feel dealing harder drugs was a “big thing” as they were part of his social life and attributed this behaviour and mindset to the companions he kept. As this was a concerning aspect of the pre-sentence report, Mr. Hazell was asked what he meant by this and he stated that everybody sells drugs in his community. He stated it was in his schools; in his neighbourhood; it was everywhere. Mr. Hazell stated there was not a lot of other things to do in the neighbourhood.

- In terms of Mr. Hazell’s education, it is respectfully submitted that Mr. Hazell was subject to system failures in the education system likely attributable to racial bias as it is well recognized that the education system has continued to underserve Black Canadians (see p. 8-11 of appended report in *R. v. Morris,* supra).

- When Ms. Hazell was asked whether she felt the education system adequately addressed Tiroune’s educational and behavioural needs or whether it was quick to judge and discipline him for his behaviour, she stated she did not believe his elementary school accommodated his behavioural or educational needs and were quick to discipline Tiroune. She states that Tiroune was often segregated from the classroom and left outside the principal’s office where he was not learning. She states when she asked for alternative learning option, she was told they did not have the resources.

- The data from the appended report in *Morris*, supra, would indicate that almost half of the Black student population in the Toronto District School Board is streamed into non- university track programs; Black students are more than twice as likely to be suspended and almost twice as likely to be expelled compared with White students and students from other racialized groups; Black students are twice as likely to drop out of school in comparison to White students; and Black students graduate below the provincial graduation rate (see p. 8-9).

- The relationship between educational failure and criminalization is well-established in this report. Poor academic performance, absence from school, and failure to graduate all increase the likelihood of offending (see p. 9).

- The Crown in *R. v. Morris*, supra, para. 39, argued that the defendant had academic and behavioural problems and was not being targeted. The Court noted that this may be correct but stated they were mindful of the issues raised in the appended report and had no doubt there were systemic failures in the defendant’s education.

- It is respectfully submitted that this Court make the same conclusion based on the information provided about Mr. Hazell. It is clear that Tiroune had been significantly impacted by the abandonment of his biological father and subsequent abandonment of male father figures which manifested itself in anger at a young pivotal age which was not adequately addressed by the school

system. Rather than working with Ms. Hazell on solutions, Tiroune was subjected to repeated forms of discipline which segregated him from the classroom.

- While Ms. Hazell tried her best to advocate and be there for her son, she was the sole financial provider and was required to work to provide the necessities of life. This often left Tiroune unsupervised during this vulnerable time period. Due to lower socioeconomic status, Mr. Hazell often resided in or near underserved communities which led to negative peer groups and associations.

- It is respectfully submitted that these systemic factors which are similar to the factors enunciated in *Morris*, supra, lessen the moral blameworthiness and would call for softened impact on general deterrence and denunciation: see para. 74-75

PERSONAL CIRCUMSTANCES IN SENTENCING; CAUSES AND SYMPTOMS

[26] The affidavit by Ms. Hazell, and the points set out in the Defence factum, show that the defendant had a hard childhood. He was raised, with few luxuries, by a hardworking and loving mother, who was abused by her male partners, and suffers from depression. The defendant lacked a stable family, was exposed to violence, and confused by the absence of his biological father. Too often left alone, he associated with undesirable people. His mental health and learning difficulties compromised his education and contributed to him being an unruly student with adverse consequences to himself and other others at school. He left school at a young age, but his misbehavior continued at home. He did not respond to his mother's efforts to find him work and left home at the age of 18. He sold drugs to make money.

[27] These are some of the symptoms that, according to *Morris* and *Jackson* are caused by anti-black systemic racism. The Defence asserts that is the case here. However, I am not confident in taking judicial notice of it. My caution is grounded in my experience as a judge in Niagara Region.

[28] What I have said in the paragraph 26 applies to most defendants who appear before me in Niagara Region – with this difference; the majority are white. Even the point made, in the Defence factum, about poor public transit, affects these local defendants. I often wait until the morning break before entertaining a request to issue an arrest warrant for failure to attend court, because public transit from other Niagara communities into St. Catharines can be challenging.

[29] After more than 20 years as a judge, I am witness to the fact that the docket of most provincial criminal courts is informed by one or more of the following circumstances; poverty, mental health, and addiction. These defendants often share other common characteristics; namely, family dysfunction, learning difficulties and unstable employment. It is important to note that such defendants come to these circumstances for a variety of reasons. The studies referred to in *Jackson* point to anti-black systemic racism as a cause. In response, *Morris* offers an approach to sentencing that includes a different application of the principles of denunciation and general deterrence. My concern with this approach is that it conflates the two principles of proportionality and can lead to injustice.

[30] *Morris* and *Jackson* proceed from the ruling in *R v Gladue* 1999 SCC 679 (CanLII). Justice Nakatsuru states, "While the distinct history of colonial violence endured by Indigenous peoples cannot simply be analogized to Black Canadians, I found that the ability to consider social context in a sentencing decision is extended to all under s. 718.2(e) of the *Criminal Code".* This finding reaches too far. In my opinion, what Parliament, through s. 718.2(e), and the Supreme Court of Canada, through *Gladue,* recognize, is the unique relationship between the Crown and indigenous peoples in Canada, including a history that has not always been honourable on the part of the Crown.

[31] There is a further difficulty. In *Morris,* it is stated that, "…broader systemic factors such as racism and the effects of colonialism must surely have some impact upon the application of general deterrence and denunciation. It can impact upon on how we characterize the seriousness of the offence." This breaks new ground by ignoring the doctrine of proportionality. Proportionality means that the severity of a sentence will depend on the seriousness of the offence (and its consequences) as well as the moral blameworthiness of the offender; see *R v Lacasse* 2015 SCC 64 (CanLII). Personal circumstances are relevant in determining proportionality in light of the seriousness of the offence, but they do not alter the seriousness of the offence: see *R v Schofield* [2019] B.C.J. No. 22 (BCCA). The causes of criminality, racism included, cannot change how we characterize the seriousness of the offence.

[32] The factors that lead to poverty, mental health challenges, and addiction are significant and pressing social issues. Few would quarrel about the need to address these issues, including racism. However, it is my opinion, that for the purposes of sentencing, the causes are less important than the symptoms. That is, it matters less *why* an offender is poor, or mentally disordered or addicted. What is more relevant is the *fact* that one or more of these circumstances exist *and* the extent to which they may impact the moral blameworthiness of an offender.

[33] The methodology applied in *Morris* and *Jackson,* with its emphasis on causes, rather than symptoms, may result in injustice because it can lead to a different sentence for individuals whose moral blameworthiness is the same. This unintended consequence is contrary to s. 718.2(b) of the *Criminal Code*: namely, that "a sentence should be similar to sentences imposed on similar offenders for similar offences committed in similar circumstances".

[34] I approach my present duty by holding fast to the doctrine of proportionality. This fundamental sentencing principle requires an assessment of the seriousness of the offence and the personal circumstances of the offender (however caused). I believe this is faithful to what the Supreme Court of Canada said in *Lacasse;* to treat the sentencing process as a highly individualized exercise that arrives at a just result through the application of relevant legal principles and the exercise of judicial discretion in each case.

[35] I am aware that *Morris* is currently before the Court of Appeal for Ontario, with many interveners also participating in the appeal. To the extent that anything I have said is inconsistent with the important decision that court will render, I will, of course, change my approach.

RESULT

[36] The defendant has already been sentenced to 15 months, in addition to presentence custody amounting to an effective sentence of four years, for possession for the purpose of trafficking in two dangerous drugs; cocaine and, especially, fentanyl. While awaiting trial on those charges, a surety revocation brought him back into custody. In a planned and deliberate act, he entered the Niagara Detention Centre, with six packages concealed near his anus. Among other contraband, he tried to smuggle almost 8.5 grams of fentanyl into the institution. While incarcerated, without provocation, he assaulted a guard. He was only subdued after the efforts of three officers and pepper spray. Absent this intervention, the injuries to the first officer assaulted could have been much more serious.

[37] To bring hard drugs into a jail is a most serious matter. While the risk of overdose and death is the same as in the community, inmates high on drugs pose a threat to the safety of other inmates and correctional staff. This misconduct must be denounced and generally deterred. This applies with equal force to the assault on the prison guard. Inmates must be made to understand that to attack those who have the challenging task of maintaining order in a difficult environment will be dealt with appropriately by the court.

[38] It is also necessary to specifically deter the defendant. His statement that he does not rule out continuing to be a drug dealer is troubling. In these circumstances the sentences proposed by the Federal and Provincial Crown are otherwise reasonable. I say “otherwise” because, notwithstanding the seriousness of the offences, the defendant’s personal circumstances point to lessened moral blameworthiness.

[39] The defendant is sentenced to two years for the drug offence and three months consecutive for the assault offence. I direct that this 27 months in jail run concurrently with the existing sentence of 15 months. In coming to this conclusion, I also consider that the defendant’s age and the fact he has never been to the penitentiary. Rehabilitation remains an important factor for this young man. To make all sentences consecutive to each other would be unduly harsh.

[40] The defendant will provide a sample of his DNA and is bound by an order, pursuant to s. 109 of the *Criminal Code* for life.

Released: August 14, 2020 Signed: Justice J. De Filippis