Citation: R v Catcheway, 2019 MBCA 75 Date: 20190703
Docket: AR18-30-09092

IN THE COURT OF APPEAL OF MANITOBA

Coram: Madam Justice Barbara M. Hamilton
Madam Justice Holly C. Beard
Madam Justice Karen I. Simonsen

B E T W E E N :

	)	***B. S. Newman***
HER MAJESTY THE QUEEN	)	*for the Appellant*
	)	
Respondent	)	***J. W. Avey***
	)	*for the Respondent*
- and -	)	
	)	*Appeal heard:*
RICHARD JOSEPH CATCHEWAY	)	***June 5, 2019***
	)	
(Accused) Appellant	)	*Judgment delivered:*
	)	***July 3, 2019***

BEARD JA

I. THE ISSUES

[1] The accused is appealing his global sentence of three years' incarceration (after totality but before credit for pre-sentence custody) for a number of offences, all under the *Criminal Code*: possession of a prohibited weapon for a purpose dangerous to the public peace (section 88(1)); unauthorised possession of a prohibited firearm (section 92(2)); unsafe storage of a prohibited weapon while prohibited (section 86(2)); possession of a prohibited weapon while prohibited (section 117.01(1)); and uttering a threat (section 264.1(1)).

[2] The accused was convicted following a judge-alone trial, and leave to appeal his sentence was granted in an earlier proceeding.

[3] The appeal is based on fresh evidence that the accused has applied to have admitted, and he acknowledges that, if the fresh evidence is not admitted, then the appeal must fail.

[4] The fresh evidence relates to the accused's diagnosis of fetal alcohol disorder (also referred to as fetal alcohol syndrome disorder or FASD) contained in a report prepared by Dr. John McCaig (Dr. McCaig) for West Region Child and Family Services in 1999, and includes, in addition, reports by Dr. McCaig in 1990 and 1995 regarding the accused's impairments, and pre-sentence reports prepared for court in 2001 and 2013. It is a reasonable inference that these reports were not known to the lawyer for the accused on the sentencing for the current offences (the sentencing lawyer); they were not provided to the trial judge or referred to in argument at the time of sentencing.

II. THE FACTS

[5] The accused was 31 years old at the time of these offences. He had a significant criminal record that included violence offences, weapons offences involving a knife and a baton, and one that involved a firearm. He had served periods of incarceration, including one of 35 months, and was subject to an outstanding order that prohibited him from possessing a firearm at the time of these offences.

[6] Regarding the circumstances of these offences, the accused and the complainant were in an on-again, off-again relationship, and were together on

February 17, 2017, which is the date of these offences. They went out together that day, but went their own ways and were to meet later. When the accused did not show up, the complainant went home alone. When she got there, the accused was already home, holding a sawed-off rifle (the rifle). The accused initially said that he had "jumped someone for it", but, after persistent questioning by the complainant, he admitted that he had spent the grocery money to purchase it.

[7] The accused was enraged by the complainant's persistent questioning. He hid the rifle in the false ceiling and told the complainant that she had "better not rat or else." The trial judge found this to constitute the offence of uttering a threat.

[8] The accused then told the complainant to get out, placing her personal effects on the porch. The complainant called her mother, who called the police. When the police attended, they found the rifle in the ceiling where the complainant said that the accused had placed it.

[9] The accused pled not guilty. At trial, he testified that he did not buy the rifle, that he was not in possession of it, and that he had no knowledge of it at all. He also denied that he threatened the complainant. The trial judge did not believe the accused, accepted the evidence of the complainant, and convicted the accused. There was no evidence before the trial judge as to how or why the accused purchased the rifle.

[10] The sentencing lawyer (who was not the lawyer at the trial) waived the preparation of a pre-sentence and *Gladue* report but made oral submissions about the accused's background (see *R v Gladue*, [1999] 1 SCR 688). He provided the Court with many of the details about the accused's personal and

family background that would have been included in a *Gladue* report. He also advised the Court that the accused had been "diagnosed according to probation records with ADHD in 2000 . . . and in 2000 he was diagnosed with Fetal Alcohol Spectrum Disorder." No records or reports were filed in relation to that diagnosis.

[11] The Crown advised the trial judge of a 2018 pre-sentence report which was prepared in relation to other charges, but the report was not filed due to the unusual circumstances related to the conviction that led to the report. This will be discussed later in these reasons. As well, the sentencing lawyer had a copy of this report before the sentencing hearing and referred to it during his submissions.

III. STANDARD OF REVIEW

[12] The question of the admissibility of fresh evidence on appeal arises for the first time on appeal. There is no decision of the trial judge to be reviewed and, therefore, no applicable standard of review.

IV. THE TEST FOR ADMITTING FRESH EVIDENCE ON APPEAL

[13] A court of appeal has the power to admit fresh evidence on appeal under section 683(1)(d) of the *Criminal Code* "where it considers it in the interests of justice". The parties agree, as do I, that the test for admitting fresh evidence on appeal is that in *Palmer v The Queen*, [1980] 1 SCR 759. This test was summarised by Gonthier J, for the majority, in *R v Lévesque*, 2000 SCC 47, a case dealing with fresh evidence on a sentence appeal, as opposed to a conviction appeal (at para 14):

> In *Palmer*, . . . this Court considered the discretion of a court of appeal to admit fresh evidence pursuant to s. 610 of the *Criminal Code*, the predecessor of s. 683. After emphasizing that, in accordance with the wording of s. 610, the overriding consideration must be "the interests of justice", McIntyre J. set out the applicable principles, at p. 775:
>
> (1) The evidence should generally not be admitted if, by due diligence, it could have been adduced at trial provided that this general principle will not be applied as strictly in a criminal case as in civil cases: see *McMartin v. The Queen* [*McMartin v The Queen*, [1964] SCR 484].
>
> (2) The evidence must be relevant in the sense that it bears upon a decisive or potentially decisive issue in the trial.
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> (3) The evidence must be credible in the sense that it is reasonably capable of belief, and
>
> (4) It must be such that if believed it could reasonably, when taken with the other evidence adduced at trial, be expected to have affected the result.

[14] Gonthier J concluded that the criteria for admitting fresh evidence are the same, and are applied the same, whether the appeal relates to a verdict or to a sentence (see para 16). (See *R v Zanolli*, 2018 MBCA 66 at para 37 (which involves a conviction appeal); *Lévesque*; *R v Angelillo*, 2006 SCC 55; *R v Sipos*, 2014 SCC 47; *R v Lacasse*, 2015 SCC 64; and *R v Harry*, 2013 MBCA 108 at para 76 (which involve sentence appeals).)

[15] Gonthier J stated as follows regarding the due diligence criterion (at para 15):

> . . . [D]ue diligence is only one factor and its absence, particularly in criminal cases, should be assessed in light of other circumstances. In other words, failure to meet the due diligence criterion should not be used to deny admission of fresh evidence

> on appeal if that evidence is compelling and it is in the interests of justice to admit it.

[16] He concluded that, while due diligence is not a necessary prerequisite for the admission of fresh evidence on appeal, it is an important factor that must be taken into account in determining whether it is in the interests of justice to admit or exclude the evidence (see para 19).

[17] Gonthier J highlighted that the admission of fresh evidence on appeal puts at risk the integrity of the trial process, stating (at para 20):

> . . . The integrity of the criminal process and the role of appeal courts could be jeopardized by the routine admission of fresh evidence on appeal, since this would create a two-tier sentencing system. That kind of system would be incompatible with the high standard of review applicable to appeals from sentences and the underlying "profound functional justifications": see *R. v. M. (C.A.)*, [1996] 1 S.C.R. 500, at para. 91. . . .

[18] A further risk to the administration of justice by the admission of fresh evidence on appeal relates to the need for finality in the litigation process. Gonthier J adopted the following explanation by Doherty JA in *R v M (PS)* (1992), 77 CCC (3d) 402 at 411 (Ont CA) (at para 19):

> . . . Finality and order are essential to [the integrity of the criminal process]. . . . Section 683(1)(*d*) of the *Code* recognizes that the appellate function can be expanded in exceptional cases, but it cannot be that the appellate process should be used routinely to augment the trial record. Were it otherwise, the finality of the trial process would be lost and cases would be retried on appeal whenever more evidence was secured by a party prior to the hearing of the appeal. For this reason, the exceptional nature of the admission of "fresh" evidence on appeal has been stressed: *McMartin v. The Queen*, *supra*, at p. 148.

[19] The exceptional nature of the admission of fresh evidence on appeal has been emphasised by this Court on many occasions. See, for example, this Court's admonition in *Harry* (at para 84):

> Appellate courts have repeatedly stated that the appeal process cannot "be used routinely to augment the trial record" through fresh evidence on appeal. . . . For that reason, fresh-evidence motions will be granted sparingly.

[20] As this Court found in *R v Flett*, 2015 MBCA 59 at para 9, fresh evidence will not be admitted where there is adequate evidence in the record to address the issues on appeal, in which event the fresh evidence will not be necessary. Fresh evidence that merely adds more details to evidence already provided falls into the category of evidence that is not necessary.

[21] In the end, the risks to the administration of justice that arise from a lack of due diligence at the trial stage must be balanced by considering the strength of the fresh evidence and the effect on the administration of justice of admitting or rejecting it.

[22] In applying the *Palmer* test to the proposed evidence in *Lévesque*, Gonthier J concluded that one of the reports that formed the new evidence in that case did not meet the test because "its probative value [was] not such that if it had been presented to the trial judge it might have affected the result" (at para 37).

[23] Finally, Gonthier J explained the appellate court's use of the fresh evidence, if admitted (at para 24):

> . . . If the fresh evidence is admitted, the court of appeal must again consider its probative value as well as the probative value of

> all the other evidence in order to determine whether the sentence imposed by the trial judge was "demonstrably unfit": *R. v. Shropshire*, [1995] 4 S.C.R. 227, at paras. 46 and 50; *M. (C.A.)*, *supra*, at para. 90; and *R. v. Proulx*, [2000] 1 S.C.R. 61, 2000 SCC 5, at para. 125.

V. THE TRIAL JUDGE'S DECISION

[24] The trial judge, in his reasons, noted that the sentencing lawyer asked him to consider the impact of the FASD as a mitigating factor on sentence, but he declined to do so, stating:

> . . . Although no reports were filed, [the sentencing lawyer] has also advised me that the accused was diagnosed with FASD in the year 2000, and that this [was] confirmed by probation services. [The sentencing lawyer] also submitted, correctly, that individuals with this medical condition often don't understand the consequences of their behaviour, and he has asked me to consider the accused's FASD as a mitigating circumstance on sentence.
>
> I note several things in this respect. There is no evidence before me as to the degree of impairment of [the accused's] executive social, adaptive or cognitive functioning as a result of his FASD. All that I have before me is [the accused's] conduct in the course of these offences, as well as my assessment as a layperson of [the accused's] evidence, neither of which revealed any marked impairment. Further, there is no clear indication of any FASD related deficit involved in the decision [the accused] made to purchase the sawed-off firearm in this case. That cut-down firearm's [*sic*] are created and possessed solely for criminal purpose is confirmed both by logic and the authorities that say so. That this was the case here is further confirmed by the length and breadth of the accused's record, and the testimony of the expert called by the Crown. This does not appear to have been a random acquisition by [the accused]. Rather, this appears to have been a considered and purposeful act by the accused, on its face inconsistent with, and not a product of, the medical condition from which he suffers. There is therefore no evidence before me that FASD played a role in the decisions made by [the accused] in committing these offences.

VI. THE PARTIES' POSITIONS

The Accused's Position

[25] The accused's position is that his disability due to FASD reduces his moral culpability and shifts more of the emphasis on sentencing to that of rehabilitation. According to the accused, the fresh evidence is the key that undercuts the trial judge's assessment of moral culpability and the rationale for the three-year incarceratory sentence that was imposed.

[26] The accused points out that, while his sentencing lawyer stated that he suffered from FASD, he indicated at the sentencing hearing that they were not in possession of any materials that would give the trial judge any insight into his cognitive deficits or specific challenges.

[27] The accused notes that, while the trial judge accepted that he had FASD, he dismissed its role in the commission of the offences, pointing to the trial judge's following findings:

> . . . There is no evidence before me as to the degree of impairment of [the accused's] executive social, adaptive or cognitive functioning as a result of his FASD.
>
> . . . [T]here is no clear indication of any FASD related deficit involved in the decision [the accused] made to purchase the sawed-off firearm.
>
> . . . [T]his appears to have been a considered and purposeful act by the accused, on its face inconsistent with, and not a product of, the medical condition from which he suffers.
>
> . . . There is therefore no evidence before me that FASD played a role in the decisions made by [the accused] in committing these offences.

[28] The accused argues that the trial judge's factual findings and conclusions are consistent with the effects of FASD, rather than to "considered and purposeful act[s]", and that that would have been clear if the trial judge had access to the fresh evidence. He points to the following:

- The complainant's evidence was that the family was "starving" and that the accused had spent their grocery money to buy the rifle. The accused argues that this is clear evidence of impulsive conduct and of his diagnosed issues with adaptive function and behaviour management that are disclosed in the fresh evidence.

- The accused had pled guilty to an earlier offence and was serving a prison sentence when the corrections officers determined that he was incarcerated on another matter at the time of that offence and, therefore, could not have committed it. That led to the conviction being overturned in 2018. (See *R v Catcheway*, 2018 MBCA 54.) The accused argues that this is consistent with the degree of his impairment and reduced functioning that is disclosed in the fresh evidence.

- The trial judge found that the accused's testimony showed no "marked impairment", but also stated that his testimony was riddled with "inconsistencies within the versions" and was "illogical and unbelievable". The accused argues that this is, again, evidence of the degree of his impairment, which is disclosed in the fresh evidence.

[29] On the criterion of due diligence, the accused states that the sentencing lawyer did not have any of the documents that form the fresh

evidence. When his appeal lawyer (who was not the sentencing lawyer) began looking, he was able to obtain these reports from the West Region Child and Family Services and Probation Services. The appeal lawyer contacted the sentencing lawyer to determine why this information was not tendered at the sentencing. The reply was that the sentencing lawyer was at home recovering from a car accident and unable to reply meaningfully.

[30] The appeal lawyer argues that the sentencing lawyer told the trial judge that "we don't have his IQ here. We don't have the testing done," which indicates that it was not being withheld for tactical reasons, but that they just did not have it. The accused's position is that the failure to obtain the fresh evidence for the sentencing hearing was an error or oversight by the sentencing lawyer that should not be determinative of the fresh evidence motion. (See *R v Kunicki*, 2014 MBCA 22 at para 49.)

[31] On the fitness of the sentence, the accused argues that the sentence of three years, when considered in the context of the fresh evidence, is unfit because it does not recognise either the accused's reduced moral blameworthiness or his prospects for rehabilitation. He argues now, as he did at the sentencing hearing, that he has a new partner whom he will be marrying when he is released, and he states that she has the education, training and experience to support his rehabilitation. The new partner provided a letter that was filed at the sentencing hearing to confirm this information. As a result, the accused argues that the three-year sentence that was imposed is unfit because it does not give sufficient weight to his rehabilitation prospects.

The Crown's Position

[32] The Crown argues that the fresh evidence pre-dates the sentencing hearing and could, with due diligence, have been adduced at that hearing, pointing out that there is no explanation to suggest that the reports could not have been obtained for that hearing. It states that the sentencing lawyer is an experienced lawyer, and no claim of ineffective assistance has been made.

[33] The Crown concedes that due diligence is not a prerequisite to the admissibility of the fresh evidence, but argues that the rejection of the fresh evidence will not lead to a miscarriage of justice as the accused's innocence is not a stake. Its position is that the denial of an opportunity to argue for a slightly reduced sentence does not constitute a miscarriage of justice.

[34] Regarding the fourth criterion, the Crown argues that there are several reasons why the fresh evidence could not have affected the result at sentencing:

- Most of the reports and much of the information is extremely dated, with no evidence to explain how the assessments impacted on the accused's behaviour.

- To the extent that the assessments address impulsive behaviour, they do so only in general terms that cannot rationally apply to the specific behaviour in this case.

- The inferences that the accused asks this Court to draw regarding the effects of his impulsivity in relation to the purchase of the rifle and the inconsistency of his testimony are all speculative

and contrary to the facts as found by the trial judge, who heard all of the witnesses as they testified.

- The assessments would not have affected the sentence, which was based not only on the offences, but the accused's criminal record and a weighing of the mitigating and aggravating circumstances.

[35] Finally, the Crown argues that, even if the fresh evidence is admitted, the sentence is not unfit. The Crown argues that any offence involving a firearm is very serious and attracts a severe penalty. It relies on the Supreme Court of Canada's decision in *R v Nur*, 2015 SCC 15, wherein an accused of only 19 years of age with no criminal record was sentenced to 40 months' incarceration for possession of a prohibited firearm. That sentence was approved by the Court, leading the Crown to argue that the three-year sentence in this case was lenient, and is certainly not unfit, even when considered in the context of the fresh evidence.

VII. ANALYSIS

Admissibility of the Fresh Evidence

[36] The live issues regarding the admissibility of the fresh evidence relate to the *Palmer* criteria of due diligence and whether the fresh evidence, if admitted, could reasonably be expected to affect the sentence.

[37] I agree with the Crown that there are questions regarding the due diligence criterion. The sentencing lawyer was aware that the accused had been diagnosed with FASD and that a report had been prepared in that regard.

He had seen the pre-sentence report prepared regarding the conviction that was overturned in 2018 and was aware that the accused had a fairly lengthy criminal record, which should have flagged the possibility of earlier pre-sentence reports. Yet, for some unexplained reason, those reports were not presented for the sentencing, even though the accused's FASD diagnosis was an important part of the sentencing submissions.

[38] It was incumbent on the appeal lawyer to determine from the sentencing lawyer why those reports were not presented. In my view, the one or two calls that he made to the sentencing lawyer were not adequate.

[39] That said, I would agree that it is arguable that the failure to obtain this information was not a tactical decision on the part of the sentencing lawyer. As noted earlier, he stated to the trial judge that he did not have the accused's IQ or "the testing done". In the end, while the apparent lack of due diligence is a serious concern, its effect on the admissibility of the fresh evidence must be assessed in the context of the interests of justice, based on all of the evidence in this case.

[40] As noted earlier, the Crown argues that the fresh evidence should not be admitted since its rejection will not lead to a miscarriage of justice because innocence is not at stake and there is no risk of a wrongful conviction.

[41] A miscarriage of justice can arise in the context of fresh evidence when the fresh evidence is of sufficient strength that it might reasonably affect the verdict. (See *R v GDB*, 2000 SCC 22 at para 19.) While a verdict that could reasonably be wrong can constitute a miscarriage of justice, it can only arise where there is an appeal from a conviction. (See *GDB*; *R v Hay*, 2013 SCC 61 at para 64; and *Zanolli* at para 47.) An appeal from sentence will

never raise issues of innocence at stake or the risk of a wrongful conviction because the conviction is not being challenged.

[42] It is clear from cases like *Lévesque*; *Angelillo*; *Sipos*; and *Lacasse* at para 116, all of which are sentence appeals, that the *Palmer* test for fresh evidence applies equally to an appeal of a sentence. This is the case even though, clearly, sentence appeals do not raise issues of innocence at stake or the risk of a wrongful conviction. Thus, these issues have no relevance to the admissibility of fresh evidence on a sentence appeal.

[43] The key issue in this case is whether the fresh evidence could reasonably be expected to have affected the sentence.

[44] The fundamental principle of sentencing is proportionality, which includes the degree of responsibility of the offender (see section 718.1 of the *Criminal Code*). A mental disability can have a significant impact on an accused's degree of responsibility and, therefore, his or her moral culpability and prospects for rehabilitation. This, in turn, can have an impact on the sentence. When an accused's personal circumstances include a mental disability, it is of the utmost importance that as much information as possible be provided to the judge so that the sentence fairly addresses the degree of responsibility of the offender.

[45] The fresh evidence in this case is comprised of five reports. The three reports that were prepared by Dr. McCaig for West Region Child and Family Services, while dated, provide a history of the accused's level of functioning at ages five, 10 and 14 years old, with the FASD diagnosis being made in the last report, written in 1999. When read together, it is clear that

the accused has consistently struggled with his behaviour and functioning from an early age.

[46] For example, under "**ADAPTIVE BEHAVIOUR**", the 1999 report states that the accused's score in a number of areas "fell below the 1st percentile and would, in another population, be consistent with mental deficiency." The report identifies deficits in the accused's coping skills that include the inability to follow basic rules, lack of impulse control in public situations, and inability to control anger and hurt feelings. In the conclusion, Dr. McCaig states:

> . . . [The accused] simply cannot anticipate the consequences of his actions and/or is unwilling to . . . forego immediate gratification of his impulses. . . . [He] has extremely poor judgement [*sic*] in social situations, is easily misled, and will very quickly become involved in criminal activities if he is influenced by a negative peer group.

[47] The pre-sentence reports from 2001 and 2013 both identify the accused's diagnosis and provide many details of the effects of that disability. Again, they would have addressed the trial judge's concerns that he had no evidence of either the degree of the accused's impairment or how it could relate to the accused's offending behaviour. The reports provide some evidence of a connection or nexus between the accused's disability and his actions in purchasing the rifle with the grocery money, threatening the complainant and providing inconsistent versions of events. While, in the end, the actual connection between the disability and the offending behaviour was a factual finding to be made by the trial judge, the fresh evidence provides a basis for the accused's argument that there was such a connection. That basis

was simply not available from the information that was provided to the trial judge and, therefore, was not considered by him.

[48] The Crown argues that the trial judge was aware of the accused's FASD diagnosis, so the fresh evidence really just provided more details rather than disclosing fresh information. In my view, this is not a case of just "more details" of evidence provided at the sentencing hearing. While the fact of the FASD diagnosis was disclosed, that was the extent of the information provided. There was no information as to the nature or degree of the accused's impairment or how it affected his ability to function. Thus, my view is that the details in the reports that comprised the fresh evidence explained how the FASD affected the accused, and they were necessary to permit the trial judge to understand the degree of the accused's impairment, how it affected the accused's functioning and the possible nexus between the disability and the offending behaviour.

[49] The trial judge stated that "[t]here is no evidence before me as to the degree of impairment of [the accused's] executive social, adaptive or cognitive functioning as a result of his FASD." That is exactly the information that is in the 1999 report and confirmed in the later pre-sentence reports. Thus, that information was new, in that it was not provided at all for the original sentencing, it was identified as important by the trial judge and it constituted information that could reasonably be expected to have affected the sentence. (See, for example, *Lacasse* at para 120.)

[50] For these reasons, I would find that the fresh evidence meets the *Palmer* criteria, notwithstanding the concerns regarding due diligence, and I would admit the reports.

Fitness of the Sentence

[51] Where fresh evidence is admitted on a sentence appeal, the appellate court must consider it, together with the evidence that was considered at the original sentencing hearing, to determine whether the sentence remains a fit one. Further, I would agree with the accused that the fresh evidence supports his argument of a somewhat reduced moral blameworthiness, which must be considered in determining a fit sentence.

[52] The accused argues that a fit sentence would be one of between 18 months and two years in totality, which would allow an order of probation to be added to provide support in the community and address public safety concerns. The Crown, relying on *Nur*, argues that the sentence of three years in totality that was imposed by the trial judge remains a fit sentence.

[53] *Nur* involved a conviction under section 95(1) of the *Criminal Code*, while, in this case, the accused's most serious offence was under section 88(1). I note, however, that both carry a maximum sentence of 10 years' incarceration where, as here, the proceedings are by way of indictment.

[54] There are some similarities between the offences in *Nur* and the present case. In particular, both accused had possession of a prohibited firearm. The accused had possession of the rifle for only a short time, while there was no evidence as to how long Nur had the firearm, and neither accused was using the firearm in a threatening manner.

[55] There are some major differences between the facts of *Nur* and the present case. In *Nur*, the prohibited firearm was loaded, while the rifle in this

case was not, and there was no ammunition found in the accused's residence. This would support a higher sentence in *Nur*. The accused had significant *Gladue* factors, while none were present in *Nur*. This would, again, generally support a higher sentence in *Nur*.

[56] On the other hand, there are several facts which would lead to a higher sentence in this case:

- at the time of the offences, the accused was 31 years old, while Nur was a very youthful adult of 19 years old, which would support a more lenient sentence for Nur;

- the accused has a significant criminal record that includes offences involving violence, weapons and one that involves firearms, and he has served previous custodial sentences, while Nur had no criminal record, which would support a more lenient sentence for Nur;

- the accused was subject to an order that prohibited him from possessing weapons at the time that he committed the offences, while there were no orders against Nur, which would support a higher sentence for the accused;

- in addition to the firearms offences, the accused was convicted of uttering a threat that the trial judge found constituted domestic abuse and the sentence under appeal is a global sentence that includes that offence, while Nur was being sentenced only on the firearm charge;

- the accused was found to be a very high risk to re-offend in both of the pre-sentence reports that are part of the fresh evidence, while Nur's background evidence does not lead to that conclusion and, in fact, indicates that he was a low risk to re-offend; and

- Nur pled guilty, which usually leads to a more lenient sentence.

[57] The majority in *Nur* upheld the 40-month sentence that was imposed on that accused. In reference to firearms offences in general, McLachlin CJC, for the majority, stated (at paras 1, 5, 120):

> Gun-related crime poses grave danger to Canadians. Parliament has therefore chosen to prohibit some weapons outright, while restricting the possession of others. The *Criminal Code*, R.S.C. 1985, c. C-46, imposes severe penalties for violations of these laws.
>
> This does not prevent judges from imposing exemplary sentences that emphasize deterrence and denunciation in appropriate circumstances. Nur and Charles fall into this category.
> . . .
>
> It remains appropriate for judges to continue to impose weighty sentences in other circumstances, such as those in the cases at bar. For this reason, I would decline to interfere with the sentences that the trial judges imposed on Nur and Charles.

[58] In my view, the range of sentence that would be applicable to the accused would include at least the 40 months that was ordered in *Nur*. Further, the sentencing lawyer began his submission to the trial judge by acknowledging that there were cases that imposed sentences of two to three years for the offences in this case.

[59] Looking at the evidence and arguments presented at the sentencing hearing, and taking into account the fresh evidence and the reduced moral blameworthiness, in my view, the sentence of three years' incarceration that included the conviction for uttering a threat is still within the range for the offences and offender and is not unfit. Thus, I would confirm the sentence imposed by the trial judge.

VIII. DECISION

[60] For these reasons, I would admit the fresh evidence. After taking into account the fresh evidence, together with the evidence that was considered by the trial judge, I would find that the sentence that was imposed at trial was a fit one and I would dismiss the appeal.

Beard JA

I agree: Hamilton JA

I agree: Simonsen JA