WARNING

The President of the panel hearing this appeal directs that the following should be attached to the file:

An order restricting publication in this proceeding under ss. 486.4(1), (2), (2.1), (2.2), (3) or (4) or 486.6(1) or (2) of the Criminal Code shall continue. These sections of the Criminal Code provide:

> 486.4(1) Subject to subsection (2), the presiding judge or justice may make an order directing that any information that could identify the victim or a witness shall not be published in any document or broadcast or transmitted in any way, in proceedings in respect of
>
> (a) any of the following offences;
>
> (i) an offence under section 151, 152, 153, 153.1, 155, 159, 160, 162, 163.1, 170, 171, 171.1, 172, 172.1, 172.2, 173, 210, 211, 213, 271, 272, 273, 279.01, 279.011, 279.02, 279.03, 280, 281, 286.1, 286.2, 286.3, 346 or 347, or
>
> (ii) any offence under this Act, as it read at any time before the day on which this subparagraph comes into force, if the conduct alleged involves a violation of the complainant's sexual integrity and that conduct would be an offence referred to in subparagraph (i) if it occurred on or after that day; or
>
> (iii) REPEALED: S.C. 2014, c. 25, s. 22(2), effective December 6, 2014 (Act, s. 49).
>
> (b) two or more offences being dealt with in the same proceeding, at least one of which is an offence referred to in paragraph (a).
>
> (2) In proceedings in respect of the offences referred to in paragraph (1)(a) or (b), the presiding judge or justice shall
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> (a) at the first reasonable opportunity, inform any witness under the age of eighteen years and the victim of the right to make an application for the order; and
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> (b) on application made by the victim, the prosecutor or any such witness, make the order.

(2.1) Subject to subsection (2.2), in proceedings in respect of an offence other than an offence referred to in subsection (1), if the victim is under the age of 18 years, the presiding judge or justice may make an order directing that any information that could identify the victim shall not be published in any document or broadcast or transmitted in any way.

(2.2) In proceedings in respect of an offence other than an offence referred to in subsection (1), if the victim is under the age of 18 years, the presiding judge or justice shall

(a) as soon as feasible, inform the victim of their right to make an application for the order; and

(b) on application of the victim or the prosecutor, make the order.

(3) In proceedings in respect of an offence under section 163.1, a judge or justice shall make an order directing that any information that could identify a witness who is under the age of eighteen years, or any person who is the subject of a representation, written material or a recording that constitutes child pornography within the meaning of that section, shall not be published in any document or broadcast or transmitted in any way.

(4) An order made under this section does not apply in respect of the disclosure of information in the course of the administration of justice when it is not the purpose of the disclosure to make the information known in the community. 2005, c. 32, s. 15; 2005, c. 43, s. 8(3)(b); 2010, c. 3, s. 5; 2012, c. 1, s. 29; 2014, c. 25, ss. 22,48; 2015, c. 13, s. 18.

486.6(1) Every person who fails to comply with an order made under subsection 486.4(1), (2) or (3) or 486.5(1) or (2) is guilty of an offence punishable on summary conviction.

(2) For greater certainty, an order referred to in subsection (1) applies to prohibit, in relation to proceedings taken against any person who fails to comply with the order, the publication in any document or the broadcasting or transmission in any way of information that could identify a victim, witness or justice system participant whose identity is protected by the order. 2005, c. 32, s. 15.

COURT OF APPEAL FOR ONTARIO

CITATION: R. v. Owusu-Sarpong, 2023 ONCA 336
DATE: 20230510
DOCKET: C70678

Huscroft, Harvison Young and Thorburn JJ.A.

BETWEEN

His Majesty the King

Respondent

and

Jacob Owusu-Sarpong

Appellant

John Fennel, for the appellant

Keith Garrett, for the respondent

Heard: May 2, 2023

On appeal from the sentence imposed by Justice Jane E. Kelly of the Superior Court of Justice on October 7, 2021, with reasons reported at 2021 ONSC 6607.

REASONS FOR DECISION

A. RELIEF SOUGHT

[1] The only issue on this appeal is whether the sentence imposed should be reduced from sixteen to fifteen years.

[2] The appellant advances two arguments: (1) the sentencing judge erred by following the wrong process in imposing a global sentence before adding the total sentences for each of the consecutive counts; and (2) the sentences for possession of a prohibited firearm, and sentence for breach of a court order not to be in possession of a firearm, should be concurrent to one another and consecutive to the sentence for the home invasion. This, he claims, is because the home invasion is a separate incident from the search of the appellant's home resulting in discovery of the firearm. Moreover, the two firearm offences were found to be "distinct" but not "separate" offences and should therefore be concurrent to one another.

[3] For the reasons that follow, the sentence appeal is dismissed.

B. THE CIRCUMSTANCES OF THE COMMISSION OF THESE OFFENCES AND THE APPELLANT'S INVOLVEMENT

[4] The appellant was convicted of being unlawfully in a dwelling house, robbery, forcible confinement, aggravated assault, sexual assault with a weapon, possession of a loaded restricted or prohibited firearm and possession of a firearm contrary to a court order. (The charges of forcible entry and assault with

a weapon were stayed following the principles in *R. v. Kienapple*, [1975] 1 S.C.R. 729.) The individual sentences imposed are set out below:

Count	Offence	Sentence
1	Being unlawfully in a dwelling house.	5 years concurrent.
2	Forcible entry.	Stayed.
3	Robbery.	10 years less 3 years, 3 months for a further 6 years, 9 months to serve.
4	Forcible confinement.	2 years concurrent.
5	Aggravated assault.	10 years concurrent to count 3.
6	Assault with a weapon.	Stayed.
7	Sexual assault with a weapon.	2 years concurrent.
10	Possession of a loaded restricted or prohibited firearm.	5 years consecutive to count 3.
11	Possession of a firearm contrary to a court order.	1 year consecutive to count 3.

[5] The circumstances of the commission of these offences are as follows: On the morning of September 27, 2018, the homeowner of a north Toronto home heard the doorbell ring. Upon opening the door, two men entered wearing reflective vests and hard hats. They forced their way into the house, demanding money and asking where the safe was located. He told them there was no safe and he had only a small amount of money on his person.

[6] They proceeded to beat the victim. They bound his wrists with a zip tie and took him into the basement where they continued to beat him. The victim said that at least one of the men showed him a handgun. One of them bent back his

fifth finger and broke it, they removed his trousers and underwear, bound his feet, and told him they were going to cut him. They continued to beat him after his underwear was removed and the victim believes they also tasered him. They eventually left, whereupon the victim tried to call 9-1-1 but his phone had no dial tone. He went to his neighbour's house and the police were called.

[7] The victim sustained multiple injuries from the beating including a broken finger, wrist, nose, and six rib fractures, rupture of his right thumb tendon, cuts on his scalp and lips, hearing loss in his right ear that required surgery, bruises and swollen eyes, and psychiatric complications including post-traumatic stress disorder.

[8] The day after the home invasion, a Band-Aid with DNA on it was found in the victim's master bedroom closet. Expert evidence was proffered that it was one trillion times more likely to have come from the appellant than to have originated from a person unrelated to him.

[9] On August 14, 2019, about eleven months after the home invasion, a search warrant was executed on the appellant's residence. Police found items similar to things observed on surveillance video and identified by the victim, namely: hard hats, a blue and white cooler with zip ties inside, a clipboard, orange and black coloured gloves, black shoes with white soles, a taser, and two handguns – a firearm and a pellet gun.

[10] Two of the hard hats had DNA on them and zip ties were found in the cooler with DNA on them, all of which were one trillion times more likely to have originated from the victim than from a source unrelated to him. Inside the headband of one of the hard-hats, DNA was found that was one trillion times more likely to have originated from the appellant than from another, unrelated source.

[11] At a *Gardiner* hearing, three videos were taken from a cellphone with the appellant's phone number that showed someone resembling the appellant discharging a firearm. The sentencing judge concluded that the appellant was the person discharging the firearm.

C. THE AGGRAVATING AND MITIGATING CIRCUMSTANCES

[12] There were many serious aggravating circumstances that were carefully laid out by the sentencing judge as follows:

[13] The victim suffered very serious physical injuries.

[14] In addition to his painful and debilitating physical injuries, the victim's disposition changed. Prior to the crime, he was a highly successful professional "known as a 'gentle, mild-mannered man with unbounded energy' and as someone whose 'grandkids mean the world to him.'" Since the crime he "has become increasingly reclusive and quiet." These events "created deep and permanent emotional trauma" for his family, along with "overwhelming and

paralyzing anxiety" and loss of the family's ability to find joy. The victim's colleagues visited him in the emergency room the morning after the attack and did not recognize him. After the attack, the victim withdrew from everyone, which loss resulted in significant and long-lasting effects on his professional colleagues.

[15] The sentencing judge aptly described this as a "horrific home invasion…[of] a 69-year-old man, [being] viciously attacked and sexually assaulted in his own home." The event was planned, costumes were used to gain access to the home, and a getaway car was used to make a quick exit.

[16] Moreover, at the time he committed these offences, the appellant had a criminal record of offences committed over a ten-year period that included a conviction for possession of a firearm with ammunition, assaults, flight from police, and several failures to comply with court orders.

[17] At trial, the appellant testified that he carried a firearm in self-defence. The sentencing judge found however, that this was contradicted by the video evidence showing that he celebrated birthdays by randomly discharging his firearm in public. He possessed the firearm used on the day in question in breach of three court orders.

[18] In terms of mitigating factors, the sentencing judge held that the appellant attended York University though he did not complete his degree due to other unrelated criminal convictions. From 2010 to 2014 he worked at various jobs and

between 2017 to 2019, he founded a book club for "youth ambassadors who have a history of conflict with the law", and worked to assist other inmates. The appellant has the support of his family.

D. THE SENTENCE IMPOSED

[19] The Crown sought a global sentence of sixteen years while the defence sought a global sentence in the range of twelve to fourteen years.

[20] After considering the circumstances of the commission of these offences, the aggravating and the mitigating circumstances, and the principles of sentencing laid out in s. 718 of the *Criminal Code*, R.S.C., 1985 c. C-46, the sentencing judge imposed a global sentence of sixteen years. In her written reasons, she explained that "[b]ut for the principle of totality and the mitigating circumstances of [the appellant] serving part of his sentence during the pandemic and the significant lockdowns due to staff shortages (i.e., pursuant to *R. v. Duncan*, 2016 ONCA 754 and *R. v. Marshall*, 2021 ONCA 344), I would have had no hesitation in imposing a sentence of 18 – 19 years' imprisonment."

[21] In imposing her sentence, she provided a chart (as set out above) that clearly sets out the sentence for the individual convictions and the rules for combining them.

[22] She then set out the sentences for each offence. The sentences to be served include Count 3 (robbery – 10 years minus time served), Count 10

(possession of a loaded or restricted firearm – 5 years), and Count 11 (possession of a firearm contrary to a court order – 1 year).

E. ANALYSIS AND CONCLUSION

The First Ground of Appeal

[23] First, the appellant claims the trial judge erred by setting a global sentence and only then articulating the sentences for the individual counts. He submits that the sentencing judge must identify the sentence to be served for each set of offences separately, from which the global sentence is rendered.

[24] We disagree.

[25] It is not an error to impose an overall sentence followed by adding up the total for each individual conviction: *R. v. Milani, 2021* ONCA 567, 157 O.R. (3d) 314, at paras. 35-37; and *R. v. Ahmed*, 2017 ONCA 76, 136 O.R. (3d) 403, at para. 85.

[26] In *R. v. Friesen*, 2020 SCC 9, [2020] 1 S.C.R. 424, at para. 157, the Supreme Court explained that two methods have been used by courts across Canada to apply the totality principle when imposing consecutive sentences.

[27] Some jurisdictions require consideration of individual sentences first to ensure that the total sentence does not exceed the offender's overall culpability: see, e.g., *R. v. Adams*, 2010 NSCA 42, 255 C.C.C. (3d) 150, at paras. 23-28;

R. v. Punko, 2010 BCCA 365, 258 C.C.C. (3d) 144, at para. 93; and *R. v. J.V.*, 2014 QCCA 1828, at para. 28.

[28] Others begin with an articulation of the overall fit sentence and then impose individual sentences adding up to the total: see, e.g., *R. v. Stuckless*, 2019 ONCA 504, 146 O.R. (3d) 752, at paras. 78-80; *R. v. S.C.*, 2019 ONCA 199, 145 O.R. (3d) 711, at para. 20; *Ahmed*, at para. 85; and *R. v. Jewell* (1995), 100 C.C.C. (3d) 270, at p. 279 (Ont. C.A.). The justification for doing so was explained by Finlayson J.A. in *Jewell*, at p. 279 (C.C.C.):

> Having determined the appropriate total sentence, the trial judge should impose sentences with respect to each offence which result in that total sentence and which appropriately reflect the gravamen of the overall criminal conduct. In performing this function, the trial judge will have to consider not only the appropriate sentence for each offence, but whether in light of totality concerns, a particular sentence should be consecutive or concurrent to the other sentences imposed.

[29] In *Friesen* the Supreme Court recognized that neither method constitutes an error in principle. If done properly, both can be appropriate ways to ensure that the total sentence is not overly long and harsh, and not disproportionate to the gravity of the offence and the conduct of the offender. Similarly, in *Milani*, at para. 36, this court held that "both can be appropriate ways to ensure that the total sentence is not overly long and harsh, and not disproportionate to the gravity of the offence and the conduct of the offender."

[30] The sentencing judge correctly applied the established sentencing practice in Ontario, which is to determine a global sentence and then apportion individual sentences by counts afterwards: *Milani*, at para. 37. She also explicitly considered the principle of totality and reduced the global sentence accordingly. The appellant does not challenge the sentencing judge's application of totality, nor does he allege that the resulting sentence is unfit.

[31] For these reasons, the first ground of appeal fails.

The Second Ground of Appeal

[32] The appellant's second ground of appeal is that the sentences for these two different offences, the home invasion and the firearms offences, had to be arrived at separately and the two sentences relating to the firearm should have been concurrent.

[33] The first seven counts (Counts 1-7) pertain to the home invasion while the last two counts (Counts 10 and 11) are firearms offences that arose from a search warrant executed after the home invasion. The appellant submits that the sentencing judge did not say that Counts 10 and 11 (the firearms offences) were consecutive to one another; she said only that they were consecutive to Count 3 (the home invasion offence). The appellant also submits that the sentencing judge did not say they were "separate and distinct" offences; she said only that the two firearm offences were "distinct".

[34] The appellant therefore claims that the five-year sentence for possession of a prohibited firearm should be concurrent to breach of the order not to be in possession of a firearm. Doing so would result in a fifteen-year global sentence.

[35] For the reasons that follow, we do not accept the appellant's conclusion.

[36] First, the sentencing judge held that a firearm or imitation firearm was used in the commission of the home invasion, thereby establishing a nexus between the two categories of offences. Her approach is consistent with other decisions from this court, which provide that "offending conduct should not be viewed in a compartmentalized fashion that minimizes the interrelation of the crimes and the corresponding heightened gravity of the offences and moral blameworthiness of the offender": *Stuckless*, at para. 80 (per Huscroft J.A.), citing *R. v. F. (D.G.),* 2010 ONCA 27, 98 O.R. (3d) 241, at paras. 26-27.

[37] Second, it is clear from her reasons, that the sentencing judge intended to make Count 11 consecutive to Count 10 and impose a 16-year sentence.

[38] In her reasons for sentence, the sentencing judge noted that, "[t]he offence of breaching the court order is a distinct offence from that of possessing the firearm", citing *R. v. Ferrigon*, [2007] O.J. No. 1883 (S.C.), which held a sentence for breaching a firearms prohibition order should be served consecutively to a sentence for unlawful firearm possession. *Ferrigon* is but one of many cases, affirmed by this court, that hold the breach of a firearms prohibition order is

generally consecutive to possession of a firearm: see, e.g., *R. v. Claros*, 2019 ONCA 626, at para. 51.

[39] Third, although the appellant is correct that where a sentencing judge fails to indicate if a sentence is concurrent or consecutive it will be deemed to be concurrent, in this case it was clear that the sentencing judge intended to impose a 10-year sentence for Count 3 (the home invasion), followed by a 5-year sentence for Count 10, followed by a 1-year sentence for Count 11, for a total 16-year sentence: *R. v. S.P.M.*, 2005 NLCA 36, 198 C.C.C. (3d) 383, at para. 11; *R. v. Hasiu*, 2018 ONCA 24, 358 C.C.C. (3d) 503, at para. 59.

[40] Moreover, as the respondent points out, if the appellant was not entirely certain, he could have invited the sentencing judge to correct an arithmetic error. "The *functus officio* doctrine does not prevent the correction of errors where no reconsideration of a judicial decision is required and where the court's intention is manifest", as in the case of a "mathematical error" in calculating consecutive sentences: *R. v. Krouglov*, 2017 ONCA 197, 346 C.C.C. (3d) 148, at paras. 35, 42–46, 62. The Crown invited the appellant's counsel to seek such clarification in this case but the appellant declined to do so.

[41] As such this second ground of appeal fails.

Conclusion

[42] For these reasons, the global sentence is sixteen, not fifteen years. The appeal is dismissed.

"Grant Huscroft J.A."
"A. Harvison Young J.A."
"Thorburn J.A."