COURT OF APPEAL FOR ONTARIO

CITATION: R. v. Meszaros, 2013 ONCA 682
DATE: 20131112
DOCKET: C52332

Doherty, Goudge, Cronk, Blair and Tulloch JJ.A.

BETWEEN

Her Majesty the Queen

Respondent

and

Frank Meszaros

Appellant

Timothy E. Breen, for the appellant

Frank Au, for the respondent

Nancy Dennison and Andrea Bourke, for the intervener the Attorney General of Canada

Heard: February 21-22, 2013

On appeal from the conviction entered by Justice Harrison S. Arrell of the Superior Court of Justice, sitting with a jury, on April 7, 2010, and from the sentence imposed on November 2, 2010.

R.A. Blair J.A.:

OPENING

[1] This appeal is one of six appeals that were heard together because, in one fashion or another, they all attack the constitutionality of mandatory minimum sentences in the context of gun-related crimes.

[2] Mr. Meszaros appeals from his convictions and his sentence for the following offences:

> (i) assault on William Thorne, contrary to s. 266 and pursuant to s. 265(1)(c) of the *Criminal Code*, R.S.C. 1985, c. C-46;
>
> (ii) use of a firearm (a loaded shotgun) while committing an indictable offence (the assault), contrary to s. 85(1)(a); and
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> (iii) two counts of unlawful storage of a firearm, contrary to s. 86(2).

[3] He was acquitted on a second charge of assault on another individual, Ryan Gaudet.

[4] The appellant seeks to set aside the convictions on two main grounds. First, he submits that the trial judge erred in his instructions to the jury by failing to correct the Crown's closing submissions regarding the defence of property defence and that the verdicts are therefore unreasonable. Secondly, he argues that the conviction for use of a firearm while committing an indictable offence is barred in these circumstances by what is known as the *Kienapple* rule[1] because liability for the predicate indictable offence of assault pursuant to s. 265(1)(c) of the *Criminal Code* necessarily involves a finding of the use of a firearm in the commission of that offence. The appellant therefore submits as well that the

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[1] *R. v. Kienapple*, [1975] 1 S.C.R. 729.

conviction for use of a firearm contrary to s. 85(1)(a) contravenes his rights under s. 7 of the *Canadian Charter of Rights and Freedoms*.

[5] The appellant was sentenced to one year in prison for the use firearm conviction – the mandatory minimum sentence prescribed for such a conviction. He appeals his sentence on the ground that the mandatory minimum constitutes cruel and unusual punishment, thereby violating his rights under s. 12 of the *Charter*. It is for this reason that the appeal was heard at the same time as five other appeals raising similar issues. The decisions in all appeals are being released at the same time.

[6] This appeal raises distinct issues regarding the convictions, however, and is therefore being made the subject of separate reasons.

[7] For the reasons that follow, I would dismiss the conviction and sentence appeals.

BACKGROUND AND FACTS

[8] Mr. Meszaros is the long-time owner of about ten acres of land, located between Brantford and Paris, Ontario. He has a privately stocked trout pond and the property is clearly marked with "Private Property/No Fishing" signs.

[9] In May 2008, two young men – Ryan Gaudet and William Thorne – were fishing in a nearby creek. After about an hour of fruitless luck, they decided to try

the appellant's stocked pond, knowing when they did so that they were poaching and trespassing on what turned out to be the Meszaros property. Unfortunately for them – and, as it turned out, for him – the appellant's wife spotted them while the appellant was sitting down for his evening meal.

[10] An avid 60-year-old sportsman, the appellant reacted quickly. He ran into a back room where he kept his guns in a closet, took out his 20-gauge double-barrel shotgun and three rounds of ammunition, loaded the gun and went out onto his porch. He yelled at the young men, telling them to stay put and not to move.

[11] Instead of complying, Gaudet and Thorne began to run.

[12] The appellant fired a single shot. There was some debate on the evidence whether the two men were struck with the shot, but in the end it was conceded there was a reasonable doubt as to whether the appellant shot in the direction of the two men and hit them, or simply shot the gun in the air. Gaudet fled and escaped from the property. Thorne was not so fortunate. He slipped and fell to the ground. The appellant approached him carrying the weapon.

[13] According to the appellant, he approached Thorne with his gun pointed up in the air and told him to stay down. He accused the younger man of trespassing and threatened to call the police. Thorne begged him not to do that. The appellant told Thorne to put the two fish the men had caught back into the pond,

which Thorne did. Thorne then promised never to trespass again. The appellant declined to shake Thorne's proffered hand but, satisfied with the apology, told Thorne to get his "coward friend" and "get the hell off [his] property". He denied ever pointing the gun at Thorne.

[14] Mr. Thorne told a different story. He says the appellant ıpproached him with the gun pointed at his chest, while Thorne stayed kneeling on the ground with his hands in the air, begging the appellant not to shoot him. The appellant told him to "get [his] buddy back here". Thorne saw that the appellant's wife had come out of the house and, thinking that he would not be shot in her presence, he got up and declared: "this isn't Texas, you can't shoot people". The appellant laughed and told him they were on his property and he could do whatever he wanted. Thorne did not recall the appellant threatening to call the police, but eventually apologized and put the fish back into the pond as directed by the appellant. He left the property by the creek.

[15] The incident leading to the assault charge regarding Gaudet arose at about this time. What happened exactly is again a subject of debate, but at some point Gaudet returned and words were exchanged.

[16] Gaudet says the appellant called him a "f…… coward" from the other side of the creek and told him to "come here", and that he responded by saying: "hey, pa, you got a shotgun, I'm not coming anywhere near you". The appellant

testified, on the other hand, that Gaudet said to him: "I'd kick your ass if you didn't have a gun", and Thorne is said to have chimed in at some point by suggesting that the appellant was lucky because he (Thorne) "[didn't] beat up old men." According to the appellant, he turned to Gaudet, held the open shotgun up, and said, "putting it down". He then placed the shotgun on the ground and said, "if you want some, come on back". In effect, he told Gaudet to "bring it on".

[17] A scuffle ensued. In the end, the 60-year old appellant bested the younger Gaudet, who ended up on the ground.

[18] The jury acquitted the appellant on the charge of assaulting Gaudet.

ANALYSIS

[19] The appellant raises three issues: (i) the defence of property jury charge issue; (ii) the *Kienapple* and s. 7 *Charter* issue; and (iii) the s. 12 *Charter* issue regarding the mandatory minimum one-year sentence upon conviction of the use of a firearm offence contrary to s. 85(1)(a) of the *Criminal Code*.

The Charge to the Jury/Defence of Property Issue

[20] The appellant's defence to the assault charge involving Thorne was that his use of force was justified in order to apprehend the trespassers, recover his

property and/or defend his premises. He relied particularly on s. 38(1) of the *Criminal Code*, which at the time stated:[2]

> 38(1) Everyone who is in peaceable possession of personal property, and every one lawfully assisting him, is justified
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> *(a)* in preventing a trespasser from taking it, or
>
> *(b)* in taking it from a trespasser who has taken it,
>
> if he does not strike or cause bodily harm to the trespasser.

[21] There was no element of disproportionate use of force in this defence, provided the accused did not strike or cause bodily harm to the trespasser.

[22] No criticism is levelled against the portion of the trial judge's charge to the jury in which he explained the elements of that defence. The appellant argues, however, that in Crown counsel's closing address to the jury, counsel incorrectly misstated the law by arguing that the defence of property was unavailable to the appellant because his actions in confronting Thorne while armed with a shotgun were unreasonable and disproportionate to Thorne's act of trespass. The trial judge's error, the appellant submits, was that he failed to correct this

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[2] Section 38(1) of the *Criminal Code* was repealed by the *Citizen's Arrest and Self-defence Act*, S.C. 2012, c. 9, s. 2, which came into force on March 10, 2013. Section 35 of the *Criminal Code* now contains the reformulated defence of property defence, which, among other changes, does not require an individual to refrain from striking or causing bodily harm to the trespasser, but instead requires that the act committed be reasonable in the circumstances.

misstatement and instead reinforced it in his instructions and in his answer to a question from the jurors.

[23] I would not give effect to this ground of appeal.

[24] In the portion of his charge setting out the elements of the s. 38 defence of property defence, the trial judge explained that "the degree or extent of the force and the circumstances in which we may use it for this purpose *must come within the limits the law allows*" (emphasis added). It is clear from the balance of his instructions on the defence of personal property that "the limits the law [allowed]" in that context involved not striking or causing bodily harm to the trespasser. The trial judge said:

> An accused who is in peaceable possession of his property acts lawfully in using force to prevent a trespasser from taking it or to get it back if he does not strike or cause bodily harm to the trespasser.
>
> An accused who uses force to prevent a trespasser from taking his property or to get the property back, *but does not strike or cause bodily harm to the trespasser must be found not guilty. He has committed no crime.* [Emphasis added.]

[25] The appellant was relying on additional self-defence and other provisions in the *Criminal Code* that bring into play elements of reasonableness and proportionality of the force used, however. These included the defence of real property (then s. 41, now s. 35), the right to make a citizen's arrest (s. 494) and,

with respect to the count alleging assault against Gaudet, the defence of self-defence generally (s. 34 and then also s. 37).[3] All these were limited by the concepts of reasonableness and proportionality of the force used.

[26] It is understandable, then, that in the Crown's closing and in the trial judge's outline of the Crown's submissions, counsel for the Crown and the trial judge would focus on whether the appellant's response to the situation exceeded what was reasonable in the circumstances. While it would have been preferable for the trial judge to exclude the s. 38 defence from his general comments about proportionality, I am not persuaded that this flaw led to a miscarriage of justice. First, I note that defence counsel did not object to the charge on this issue. While the failure to object is not fatal in a criminal case, it does provide some measure of the egregiousness of the error in the mind of defence counsel, who was there and attuned to the dynamics of what was happening at trial.

[27] Secondly, there is another basis upon which the jury may well have rejected the s. 38 defence. The Crown argued strongly that s. 38 did not apply because the *purpose* of the appellant's conduct – quite apart from the proportionality of his response to the situation – did not bring him within the elements of that defence. The Crown contended that the appellant's purpose

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[3] Recent amendments came into force on March 10, 2013, in accordance with the *Citizen's Arrest and Self-defence Act.*

was not to prevent Thorne and Gaudet from taking his property (the fish) or to recover the fish from them – reasons that would have made s. 38 available. Rather, his purpose in shooting the gun and accosting them was to frighten them and to teach them a lesson – reasons that did not fall within the scope of s. 38.

[28] It was open to the jury to make this finding on the evidence.

[29] Since the thrust of the appellant's argument that the verdict was unreasonable is tied to the argument that his actions did not exceed the limits of s. 38, the submission that the verdict is unreasonable must fail as well.

Kienapple

[30] It is a fundamental principle of criminal law that no person may be convicted twice for the same criminal wrong (*nemo debet bis puniri pro uno delicto*). As developed in subsequent Supreme Court of Canada and appellate jurisprudence, the *Kienapple* rule is an expression of that principle. The rule is that there ought not to be multiple convictions for the same "delict", "matter", or "cause": *Kienapple*, per Laskin J. at pp. 749-50. For *Kienapple* to apply there must be *both* a sufficiently close factual nexus *and* a sufficiently close legal nexus between the two offences in the circumstances: see *R. v. McGuigan*, [1982] 1 S.C.R. 284; *R. v. Krug*, [1985] 2 S.C.R. 255; *R. v. Prince*, [1986] 2 S.C.R. 480; *R. v. Provo*, [1989] 2 S.C.R. 3; *R. v. Langevin* (1979), 47 C.C.C. (2d) 138 (Ont. C.A.); and *R. v. R.K.* (2005), 198 C.C.C. (3d) 232 (Ont. C.A.).

[31] Whether there is a sufficient factual nexus is not usually the difficult enquiry. That question is easily answered, generally, by determining whether the charges arise out of the same transaction, i.e., whether the same acts of the accused ground each of the charges.

[32] The more difficult question in the *Kienapple* analysis is whether there is a sufficient legal nexus between the offences, *i.e.*, whether the offences constitute a single wrong or delict: *R.K.*, at paras. 31-32; and *Prince*, at pp. 489-90. This requirement focuses on the presence of distinguishing elements between the offences rather than on the presence of common elements. As Dickson C.J.C. put it in *Prince*, at pp. 498-99:

> I conclude, therefore, that the requirement of sufficient proximity between offences will only be satisfied if there is no additional and distinguishing element that goes to guilt contained in the offence for which a conviction is sought to be precluded by the Kienapple principle.

[33] As I read the authorities, the rationale for this two-fold approach is to ensure that the *Kienapple* principle is not too easily triggered by the simple finding of a factual nexus. Parliament is entitled to abrogate the application of the *Kienapple* rule and to provide for the registration of more than one conviction where offences overlap but where the offender has been guilty of more than one wrong, or to impose an additional penalty for what is, in effect, an aggravated form of the underlying indictable offence: see *Prince*, at p. 498; *McGuigan*, at p.

318; *Krug*, at pp. 263-64; and *R.K.*, at paras. 52-53. An approach that founds the application of *Kienapple* on a simple factual connection might well frustrate Parliament's legitimate intentions in that regard.

[34] The same may be said for an approach that founds the application of *Kienapple* on a common element giving rise to a conviction as between the two offences: see *Prince*, at pp. 43 and 47.

The Provisions of the *Criminal Code*

[35] Here, the overlapping offences are described in ss. 265(1)(c) and 85(1)(a) of the *Criminal Code*, which, for purposes of the appeal, state:

> 265(1) A person commits an assault when
>
> > *(c)* while openly *wearing or carrying a weapon* or an imitation thereof, he accosts or impedes another person …
>
> 85(1) Every person commits an offence who *uses a firearm*, whether or not the person causes or means to cause bodily harm to any person as a result of using the firearm,
>
> > *(a)* while committing an indictable offence, other than … [the exceptions do not apply here.]

The Factual Nexus

[36] On the facts, the basis for a conviction under both provisions is made out. The appellant fired the shotgun. Whether he fired it in the air or in the direction of

the poachers is immaterial: he used the firearm. He ordered Thorne to remain, accosting and impeding him from leaving the premises; and he did so while carrying the gun. Whether the gun was pointing at Thorne or was pointing in the air is also immaterial.

[37] Both offences arise out of the same transaction and are based on the same acts of the accused.

The Legal Nexus

[38] Whether the *Kienapple* rule applies depends on the outcome of the legal nexus analysis. The question is whether there are sufficient additional and distinguishing elements between the s. 265(1)(c) assault and the s. 85(1)(a) use of a firearm offences to preclude the operation of the rule. In my view, there are.

[39] In *Prince*, at pp. 499-503, there is a lengthy analysis of when it can be said that the elements of two or more offences are "substantially the same" or "alternative" to one another for these purposes. Dickson C.J.C. found the question to be one that "defies precise answers". He nonetheless outlined three different ways in which elements would be considered to be sufficiently correspondent to permit the application of *Kienapple* – always subject to "the manifestation of a legislative intent to increase punishment in the event that two or more offences overlap" (p. 500). They are:

> (i) where an element of one offence is simply a particularization of another element in the other offence (p. 500);
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> (ii) where there is more than one method embodied in more than one offence, to prove a single delict (p. 501); and
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> (iii) where Parliament in effect deems a particular element to be satisfied by proof of a different nature, not necessarily because logic compels that conclusion, but because of social policy or inherent difficulties of proof (pp. 501-02).

[40] In *R.K.* – a more recent decision of this court – Doherty J.A. summarized these three categories, at para. 37, as follows: "[i]n essence, each presents a situation in which the offences charged do not describe different criminal wrongs, but instead describe different ways of committing the same criminal wrong."

[41] Dickson C.J.C. also outlined three factors in *Prince* that would defeat the sufficient legal nexus argument. Doherty J.A. summarized these factors at para. 38 of *R.K.*:

(i) where the offences are designed to protect different societal interests;

(ii) where the offences allege personal violence against different victims; and

(iii) where the offences proscribe different consequences.

[42] After examining the evolution of *Kienapple* and its progeny, including the *Prince* considerations – and after agreeing with the former Chief Justice's characterization of the legal nexus problem as one to which there can be "no precise answer" – Doherty J.A. concluded, at para. 36 of *R.K.*, that "[t]he sufficiency of the legal nexus between offences will depend on an interpretation of the statutory provisions that create the offences and the application of those statutory definitions to the circumstances of the case." At para. 39, he condensed the essence of the legal nexus inquiry into the following succinct proposition:

> The crucial distinction for the purposes of the application of [the] Kienapple rule is between different wrongs and the same wrong committed in different ways" (emphasis added).

Kienapple Does Not Apply

[43] *Charter* considerations aside, I am not persuaded that the *Kienapple* principle applies to prevent multiple convictions in the circumstances of this case. I say this for two principal reasons. First, sections 265(1)(c) and 85(1)(a) deal with different wrongs, not the same wrong committed in different ways. Secondly, by enacting s. 85 (and its predecessor, s. 83), Parliament has signalled its intention to displace the operation of the *Kienapple* rule in such circumstances.

Different Wrongs

[44] First, there is a well-settled line of Canadian jurisprudence leading to the conclusion that "wearing or carrying a weapon" is not synonymous with the "use" of that weapon for these purposes. *McGuigan* and *Krug* are illustrative and deal with an analogous situation. In both cases, the Supreme Court of Canada affirmed that "[stealing]... *while armed* with an offensive weapon", contrary to s. 302(d) (now s. 343(d)) of the *Criminal Code* does not necessarily involve *the use* of a firearm as contemplated in s. 83 (now s. 85(1)). The element of "use" was an additional, distinguishing element from that required for a conviction for stealing "while armed". See also *R. v. Steele*, 2007 SCC 36, [2007] 3 S.C.R. 3, at paras. 26-27 ("carrying" is not "using"; "discharging", "pointing", "pulling out"

and "displaying a firearm for the purposes of intimidation", are); and *R. v. Poisson* (1983), 8 C.C.C. (3d) 381 (Ont. C.A.), at p. 390 (wounding and using a firearm).

[45] In both *McGuigan* and *Krug*, the Supreme Court of Canada relied upon the decision of this court in *Langevin*, where Martin J.A. said, at p. 145:

> Being "armed" with an offensive weapon and "using" an offensive weapon are not synonymous. A person is "armed" with an offensive weapon if he is equipped with it: see *R. v. Sloan* (1974), 19 C.C.C. (2d) 190 [B.C.C.A.] at p. 192. "Using" a firearm includes pulling out a firearm which the offender has upon his person and holding it in his hand to intimidate another: see *Rowe v. The King* (1951), 10 C.C.C. 97 at p. 101 [S.C.C.] [other citations omitted]. Notwithstanding that in most cases of "armed robbery" the offender will have used the weapon, nonetheless, s. 83(1) [now s. 85(1)], by making the *use of a firearm an essential element of the offence* created by the subsection, unlike s. 122 [now s. 343(d)] which required only that the offender have a firearm on his person, imports a further element in addition to those which suffice to constitute theft while armed with a firearm. [Underlining added; italics in original.]

[46] For the appellant to have been convicted under s. 265(1)(c), the jury must have been satisfied that he accosted or impeded Mr. Thorne while "openly wearing or carrying" a weapon, thereby committing an assault as defined in that section. If "carrying" or being "armed" with or "equipped" with a weapon, alone, is not enough to constitute the "use" a weapon, I do not see how "wearing or carrying" a weapon alone can do so, given the foregoing jurisprudence. I see no practical distinction between "carrying" or being "equipped with," or in possession

of, a weapon and "wearing or carrying" that weapon. Indeed, in *Steele*, at para. 26, the Supreme Court of Canada was unequivocal that it has been "settled law," at least since *Krug*, "that *carrying* a concealed weapon while committing an offence *is not 'using'* a firearm within the meaning of s. 85(1)" (emphasis added).

[47] I do not think the use of the word "openly" in s. 265(1)(c) changes the analysis for these purposes. While "pulling out" or "displaying" a weapon for purposes of intimidation may constitute a use of that weapon, s. 265(1)(c) does not require an element of intimidation to be made out. It requires only that the person wearing or carrying the weapon "accost" (i.e., approach or address) or "impede" (i.e., obstruct or hinder) the victim.[4]

[48] There is an additional element further distinguishing the ss. 265(1)(c) and 85(1)(a) offences, in my view. The former provides for the commission of the defined assault where the offender is wearing or carrying a "weapon". The term "weapon" is broadly defined in s. 2 of the *Criminal Code* in a manner that includes, but is not limited to, a firearm. It could include a wide variety of other objects. Thus, a conviction pursuant to s. 265(1)(c) does not presuppose the presence of a firearm as an essential element.

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[4] *The Oxford English Dictionary*, 2d ed, *sub verba "accost"* and *"impede"*.

[49] I do not think it matters for these purposes that Mr. Meszaros was undoubtedly convicted of the s. 265(1)(c) assault on the basis that he had, in fact, used the shotgun by firing it. That circumstance simply reinforces the factual nexus and indicates there was a common element – use of the firearm – that was *sufficient* but *not required* for the s. 265(1)(c) conviction.

[50] The "same act" and the "common element" approaches were both rejected by the Supreme Court of Canada in *Prince*, however. Dickson C.J.C. observed that both principles were based upon the "used up" theory, i.e.,

> [t]he principle that an act which constitutes an element of an offence can only be used to sustain a single conviction. It is thereafter "used up" for the purposes of the criminal law.[5]

[51] Dickson C.J.C. declined to accept that analysis regarding either the "same act" or the "common element" tests: see *Prince*, at pp. 43 and 47. At p. 47, he concluded:

> The majority in *Coté*[6] thus pointed in the direction of a test which focused not on the presence or absence of a *common element*, but on the presence or absence of *additional, distinguishing elements*. [Emphasis in original.]

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[5] See Alan W. Mewett, "Nemo bis Vexari", 16 C.L.Q. 382 (1973-74).
[6] *Coté v. the Queen* (1974), 18 C.C.C. (2d) 321 (S.C.C.).

[52] This view was articulated as well in a decision of this court that pre-dated *Prince*, *R. v. Poisson*, (1983) 8 C.C.C. (3d) 381, where Lacourcière J.A. for the majority said, at p. 390:

> As I read the precisely worded statements of Martin J.A. in *R. v. Langevin*, *supra*, and in *Allison and Dinel*[7], the invocation of [the predecessor of s. 85] is precluded only where the indictable offences, *by their Code definitions*, make the use (as distinct from the possession) of a firearm a constituent element of the offence. [Emphasis added.]

[53] In short, for a conviction to have been registered against Mr. Meszaros under the use firearm provisions of s. 85(1), "it was necessary to prove that the accused did something beyond what is required to establish the offence under [s. 265(1)(c)]", to adopt the language of LaForest J. in *Krug*, at p. 263. See also *Langevin*, at p. 145. The element of "use" is an additional and distinguishing element from that required for a conviction for assault under s. 265(1)(c).

[54] The decision of this court in *R. v. Osbourne* (1994), 21 O.R. (3d) 97 also supports this analysis. In that case, the accused was convicted of aggravated assault and of using a firearm in the commission of the aggravated assault. He grabbed a gun from a police officer and shot at, but missed, the police officer. Because his conduct endangered the life of the police officer, he was convicted

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[7] *R. v. Allison and Dinel* (1983), 5 C.C.C. (3d) 30

of aggravated assault. Finlayson J.A. upheld both convictions. Notwithstanding that the *actus reus* of the aggravated assault offence was the firing of the gun – the very same conduct involved in the charge of using a firearm in the commission of the aggravated assault – he rejected the *Kienapple* argument. In doing so, he accepted (at p. 102) the Crown's argument that:

> … the offence of aggravated assault can be committed in a variety of ways and with the use of different weapons, but if the perpetrator elects to use a firearm as a weapon, he can expect to receive an additional and mandatory sentence by reason of s. 85 of the Code.

[55] Similarly, the offence of assault under s. 265(1)(c) "can be committed in a variety of ways and with the use of different weapons". Having elected to use a firearm to perpetrate the offence, Mr. Meszaros "can expect to receive an additional and mandatory sentence by reason of s. 85". To the same effect, see also *R. v. Switzer* (1987), 75 A.R. 167 (C.A.), and *R. v. Griffin*, [1996] B.C.J. No. 2142 (C.A.).

Kienapple Displaced

[56] Secondly, the *Kienapple* rule does not apply here, in my view, because its application has been displaced by Parliament in the enactment of s. 85 (and its predecessor, s. 83). In putting that provision in place, Parliament has signalled its intention to provide for multiple convictions for offences that may overlap, but that involve the use of guns. Combatting the use of firearms during the

commission of indictable offences is the purpose of s. 85. Moreover, the fact that the commission of the indictable offence contemplated in s. 85(1)(a) may in many cases involve the use of a firearm is not sufficient to attract the operation of the *Kienapple* rule if "use" is not an essential element of the predicate offence.

[57] Martin J.A. emphasized these considerations in *Langevin*, at p. 146:

> It is clear to me that Parliament intended by s. 83 [now s. 85] to repress the use of firearms in the commission of crimes *by making such use an offence in its own right*, and one which attracts a minimum sentence of one year consecutive to that imposed for the offence which such use accompanies. The use of firearms in the commission of crimes is fraught with danger and gravely disturbing to the community, and Parliament has sought to protect the public from the danger and alarm caused by that use by enacting the present legislation.
>
> ...
>
> Manifestly, the legislation is directed at those crimes in which firearms are likely to be used, such as robbery, and not at offences where they are not likely to be used, for example, forgery. *To construe the section as not applicable to the use of a firearm during the commission of the offence of theft while armed with a firearm would largely defeat the clear intention of Parliament.* [Emphasis added.]

[58] These sentiments are as apt today as they were when they were written in 1979. Similar views are expressed in *Krug*, at pp. 269-70; in *McGuigan*, at p. 318; and in *R. v. Morrisey*, 2000 SCC 39, [2000] 2 S.C.R. 90, at para. 17.

[59] Parliament's intention that *Kienapple* should not apply to preclude multiple convictions in these circumstances is also reinforced by its decision to impose heavier penalties for aggravated forms of committing the predicate indictable offence through ss. 85(3) and (4) of the *Criminal Code*. Section 85(3) provides for a mandatory minimum sentence of one year's imprisonment for a first conviction under s. 85, and three years for a second or subsequent conviction. Section 85(4) provides that a sentence imposed on a conviction under subsections 85(1) or (2) is to be served consecutively to any other punishment *imposed for an offence arising out of the same event or series of events* and to any other sentence to which the person convicted is subject at the time the sentence is imposed for those convictions.

[60] As noted above, Parliament is entitled – subject to *Charter* considerations – to suspend the operation of the *Kienapple* principle in appropriate cases: *Kienapple*, at p. 753; *McGuigan*, at p. 318; and *R.K.*, at para. 40. The dictates of ss. 85(3) and (4) demonstrate that Parliament intended to permit multiple convictions in circumstances where offences overlap yet do not constitute the same wrong but where the use of a firearm aggravates the commission of the predicate offence. So, too, does the history of s. 85, first enacted in 1977 – and reaffirmed in 1995 – as part of a package of firearms regulations designed to protect the public from an escalating gun problem.

[61] I conclude, therefore, that the *Kienapple* rule has no application to prevent a conviction under both ss. 265(1)(c) and 85(1)(a). The trial judge did not err in declining to stay one or another of the appellant's convictions.

<u>There Is No Violation of Section 7 Of The *Charter*</u>

[62] The appellant further submits, however, that the failure to apply *Kienapple* violates his s. 7 *Charter* rights. The argument is that the principles evolving out of the concept of *res judicata* in criminal matters – the bar against multiple prosecutions (the *autrefois* pleas) and multiple convictions (*Kienapple*) and the bar against the re-litigation of issues (issue estoppel) – are all principles of fundamental justice. Failure to give effect to them contravenes s. 7.

[63] I agree that these principles form part of the notion of fundamental justice, but I do not agree that Parliament has violated them by providing for multiple convictions under ss. 265(1)(c) and 85(1)(a).

[64] *Kienapple* and its cousin notions do not apply because the appellant has not been convicted for the same wrong twice. As outlined above, s. 85(1)(a) imports the additional elements of "use" of a "firearm" that are not essential elements of a s. 265(1)(c) conviction for assault by accosting or impeding someone while "wearing or carrying" a "weapon".

[65] Nor do the two offences protect the same societal interests, a factor highlighted in *Prince* and *R.K.*

[66] Section 85 seeks to deter offenders from using firearms in the commission of crimes and to protect the public's life, liberty and security interests from the modern scourge of gun-related violence. It does so by creating a new offence of "use of a firearm" and by imposing a more severe form of punishment on those who commit indictable offences that may – but do not necessarily – involve the use of a firearm when they are committed in the more aggravated fashion. Section 265(1)(c) is designed to prevent interference with a person's liberty and security interests by creating the offence of assault where that goal is accomplished by accosting or impeding the person with a weapon – not necessarily a firearm – present but not necessarily used. As Doherty J.A. observed in *R.K.*, at para. 39:

> If the offences target different societal interests, different victims, or prohibit different consequences, it cannot be said that the distinctions between the offences amount to nothing more than a different way of committing the same wrong.

[67] It is only where "the distinctions between the offences amount to nothing more than a different way of committing the same wrong" that the *Kienapple* or *res judicata*-related notions apply.

[68] LaForest J. dealt directly with the "fundamental justice" issue in the context of s. 85, in *Krug*, at pp. 267-68:

> The question, then, is not so much whether Parliament can displace the *Kienapple* principle, but whether

> "fundamental justice" within the meaning of s. 7 is breached by convicting an accused who has already committed a robbery of a second offence punishable by mandatory imprisonment for using, as opposed to being armed with, a firearm in committing that robbery.
>
> That brings us squarely to what Parliament has done and why it has done it; not how it has done it. Now what Parliament has done in this case, we saw, is in substance to create an aggravated form of robbery, to punish more severely an accused who uses a firearm in perpetrating that offence by imposing an additional penalty including a mandatory period of imprisonment. Parliament's reason for so acting was its grave concern with the proliferation of firearm-related crime.
>
> That this aggravated form of robbery exposes the victim to serious injury or death and that there has been a proliferation of such firearm-related offences in recent years scarcely needs demonstration. *Under these circumstances, the creation of such an offence does not, in my view, constitute a departure from fundamental justice*. [Emphasis added.]

[69] Replacing the word "robbery" in the foregoing passage with the words "a s. 265(1)(c) assault" makes this case and *Krug* completely analogous. There is no s. 7 violation, in my view.

Sentence

[70] Given my conclusion that the *Kienapple* rule does not apply to bar the appellant's conviction under s. 85 and that there is no violation of s. 7 of the *Charter*, and given my rejection of the other grounds raised by the appellant, it is necessary to deal with the appellant's sentence appeal. He submits, first, that

the mandatory minimum sentence of one year's imprisonment imposed by s. 85(3)(a) is unconstitutional because it violates s. 12 of the *Charter*. Secondly, he argues that the trial judge erred in imposing suspended sentences and probation instead of granting discharges on counts 1, 4, and 5.[8]

[71] Underlying these submissions is the view that Mr. Meszaros is a first offender with an unblemished character, who was simply trying to defend his property, as he was entitled to do. A period of incarceration is unnecessary to meet the goals of the sentencing regime, the argument goes, and therefore a mandatory minimum punishment of one year's imprisonment constitutes "cruel and unusual punishment" as contemplated in s. 12. Similarly, in such circumstances, the imposition of suspended sentences and probation instead of the grant of discharges on the other counts in such circumstances is manifestly unfit.

[72] I accept that Mr. Meszaros is a first offender of previously unblemished character; it may well be that he is the least morally blameworthy of the six offenders whose appeals are being argued together on the mandatory minimum sentences issue. Arguably, there is an unfortunate irony in the fact that his more blameworthy co-appellants are to be relieved of the impact of a mandatory

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[8] The assault on Thorne, contrary to s. 265(1)(c) (Count 1). Contravention of the regulations under the *Firearms Act* regarding the storage of the shotgun (Count 4); Contravention of the regulations under the *Firearms Act* regarding the storage of a different firearm (Count 5).

minimum punishment. Nonetheless, his use firearm offence was serious, and I am not persuaded that the mandatory minimum sentence imposed by s. 85(3)(a) is unconstitutional. Nor do I think there is any basis for interfering with the trial judge's imposition of suspended sentences and probation in relation to Counts 1, 4, and 5.

The Mandatory Minimum Sentence Does Not Contravene Section 12 of the *Charter*

[73] Firearms are inherently dangerous. They always "present[] the ultimate threat of death to those in [their] presence": *R. v. Felawka*, [1993] 4 S.C.R. 199, at p. 211, Cory J.

[74] The use of firearms in the commission of crimes, as Martin J.A. noted in *Langevin*, at p. 146, "is fraught with danger and gravely disturbing to the community". As a result, he added, "Parliament has sought to protect the public from the danger and alarm caused by that use". These observations are as fitting today as they were when made – perhaps more so. While they were first made in the context of the *Kienapple* analysis, in my view they are equally apt to the social reality underpinning the enactment of the mandatory one-year minimum sentence provided for in s. 85(3)(a) of the *Criminal Code*. For the reasons that follow, I am not satisfied the mandatory one-year minimum sentence imposed on Mr. Meszaros for use of his firearm constitutes cruel and unusual punishment, contrary to s. 12 of the *Charter*.

[75] The principles underlying s. 12 and the analysis to be undertaken in determining whether a punishment is cruel and unusual have been thoroughly canvassed by Doherty J.A. in *R. v. Nur*, 2013 ONCA 677, a related decision being released at the same time as this decision. I need not repeat that general analysis here, but I refer in particular to paras. 64-74 in which the question of what is "cruel and unusual" punishment is explored. Although Doherty J.A's analysis is made in the context of the three-year mandatory minimum sentence provided for in s. 95 of the *Criminal Code*, the principles underpinning that analysis are equally applicable to the s. 85 challenge.

[76] For purposes of this appeal, I re-emphasize only the following. To violate s. 12, the punishment must be "grossly disproportionate", and "[t]he test for determining whether a sentence is disproportionately long is very properly stringent and demanding": *Steele v. Mountain Institution*, [1990] 2 S.C.R. 1385, at p. 1417 (Cory J.). Cruel and unusual punishment has been characterized as punishment that is "so excessive as to outrage standards of decency" and to be considered by Canadians as "abhorrent and intolerable": *R. v. Ferguson*, 2008 SCC 6, [2008] 1 S.C.R. 96, at para. 14. Moreover, it is a punishment that is more than excessive or demonstrably unfit in the circumstances; it must be "grossly" disproportionate. See *Nur*, at paras. 64-66; *R. v. McDonald* (1998), 40 O.R. (3d)

641 at p. 665, Rosenberg J.A.; *R. v. Goltz*, [1991] 3 S.C.R. 485, at pp. 498-500; and *R. v. Smith*, [1987] 1 S.C.R. 1045, at pp. 1072-84.

[77] Against this background, the s. 12 analysis involves two enquiries: (i) whether the punishment would be grossly disproportionate in comparison to what would otherwise have been appropriate for the offender in question; and, if not, (ii) whether the punishment can be said to be grossly disproportionate having regard to what the jurisprudence refers to as other "reasonable hypothetical circumstances".

[78] I observe at the outset that Mr. Breen did not seek to strike down this punishment on the basis of reasonable hypotheticals. He argued that the appellant's case itself constituted the reasonable hypothetical – an elderly good citizen, never before in trouble with the law, who was simply trying to defend his property against intruders, as he was entitled to do. In the circumstances of this offence and this offender, he submitted, the imposition of the minimum 12 month term of imprisonment amounts to cruel and unusual punishment.

[79] Respectfully, I do not agree. In my view, a mandatory minimum one-year sentence for an offence involving the use of a firearm cannot be said to be "grossly disproportionate" to whatever might otherwise have been an appropriate punishment for such an offender having regard to the general principles of sentencing. Indeed, in spite of Mr. Breen's disavowal of the requirement in these

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

[80] Section 85, and its predecessor s. 83, have survived a number of constitutional attacks, although none has focussed specifically on the identical issue we face here – the constitutionality of the mandatory one-year minimum sentence imposed by s. 85(3)(a). The Supreme Court of Canada upheld the validity of the overall licensing and registration provisions of the *Firearms Act,* S.C. 1995, c. 39, in *Reference re Firearms Act (Can.),* 2000 SCC 31, [2000] 1 S.C.R. 783. In three cases, the s. 85(4) requirement (previously the s. 83(2) requirement) that the mandatory minimum sentence be served consecutively to the sentence imposed for the underlying offence has been held not to violate s. 12 of the *Charter*: see *R. v. Brown,* [1994] 3 S.C.R. 749; *R. v. Spark,* [1986] O.J. No. 1001 (C.A.); *R. v. Wheatle,* [1993] O.J. No. 2747 (C.A.); and *R.K.*.

[81] In *McDonald,* this court rejected a constitutional challenge to the four-year minimum sentence for the offence of using a firearm while committing robbery, contrary to what was then s. 344(a) of the *Criminal Code*. Expressing his reservations about having to send a remorseful and relatively young man with a

mental illness to the penitentiary, Rosenberg J.A. nonetheless refused to strike down the provision. At p. 666, he said:

> I also have reservations about putting this relatively young man into a penitentiary setting. If it were open to this court to review the propriety of this sentence on the usual scale of appellate review as explained in *R. v. M. (C.A.)*, [1996] 1 S.C.R. 500, I would find a three- to four-year sentence to be demonstrably unfit. However, that is not the same as gross disproportionality *and I am not convinced that having regard to the objective gravity of an offence involving the use of a firearm, even an unloaded one, a sentence approaching four years shocks the conscience*. As La Forest J. wrote in *R. v. Lyons*, [1987] 2 S.C.R. 309 at pp. 344-45, the standard under s. 12 is not so exacting as to require the punishment to be "perfectly suited to accommodate the moral nuances of every crime and every offender." [Emphasis added.]

[82] These observations are as appropriate in the s. 85(3)(a) context as they were in *McDonald*. Absent a mandatory minimum, different judges might differ on whether a period of incarceration was required to meet the goals of sentencing in the context of Mr. Meszaros' offence and Mr. Meszaros as an offender. However, use of the firearm is an essential requirement of the s. 85 offence – a factor that distinguishes s. 85 cases from the reasonable hypotheticals presented by Doherty J.A.'s s. 95 analysis in *Nur* – and any offence involving the use of a firearm is high on the gravity scale. I do not think that some period of incarceration would be unreasonable in any such circumstance, and it would certainly not be demonstrably unfit. Even if a one-year punishment were

demonstrably unfit, that would not make it unconstitutional. Adapting the language of Rosenberg J.A. above, and of Lamer J. in *Smith*, I conclude that, "having regard to the objective gravity of an offence involving the use of a firearm", a sentence of one year's incarceration for an assault involving the use of a firearm is not a punishment "that is so excessive as to outrage standards of decency" in the community.

[83] There is no violation of s. 12, in my opinion.

Counts #1, 4, and 5

[84] The appellant raised an additional ground of appeal respecting his sentence, arguing that the trial judge erred in failing to grant discharges for the assault conviction and the conviction for contravention of the storage firearm regulations.

[85] I would not give effect to this ground of appeal either. The trial judge made no error in principle in assessing the gravity of the assault, and the sentence imposed – a suspended sentence and a one-year probation order – was not unfit. While it may have been open to him to impose a conditional or absolute discharge on the storage of firearms counts, I conclude that, in the overall context of this case, he did not err in principle in declining to do so.

DISPOSITION

[87] For the foregoing reasons, I would dismiss the conviction appeal. I would grant leave to appeal sentence but dismiss the sentence appeal.

Released: NOV 1 2 2013

R.A. Blair J.A.
I agree [signature] J.A.
I agree [signature] J.A.
I agree. E.A. Cronk J.A.
I agree. [signature] J.A.