

# R. v. Claros, [2019] O.J. No. 3910

Ontario Judgments

Ontario Court of Appeal

Toronto, Ontario

A. Hoy A.C.J.O., C.W. Hourigan, D. Paciocco JJ.A.

Heard: June 7, 2019.

Judgment: July 24, 2019.

Docket: C65699

[2019] O.J. No. 3910 | 2019 ONCA 626

Between Her Majesty the Queen, Appellant, and Christopher Marcelo Claros, Respondent

(82 paras.)

## Case Summary

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### Appeal From:

On appeal from the sentence imposed by Justice Frederic M. Campling of the Ontario Court of Justice on June 29, 2018.

## Counsel

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Linda Shin, for the appellant.

Delmar Doucette, for the respondent.

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The judgment of the Court was delivered by

### **D. PACIOCCO J.A.**

1 The Crown seeks leave to challenge the sentence imposed on Christopher Claros for six offences he committed in the course of shooting a drug dealer on a Hamilton street.

2 The trial judge attempted to impose a total sentence of five years in prison for all six offences, before taking into account pre-sentence custody. He sought to achieve this by imposing a

sentence of five years imprisonment on the offence of discharging a firearm with intent to wound, contrary to *Criminal Code*, s. 244(2) ["the discharging offence"], and then imposing concurrent sentences on the other five offences.

**3** The concurrent sentences he imposed for the five other offences consist of:

- 1) Possession of a weapon for the purpose of committing an offence, contrary to *Criminal Code*, s. 88(2) (2 years);
- 2) Possession of a firearm without a licence contrary to *Criminal Code*, s. 92(3) (2 years);
- 3) Unauthorized possession of a firearm in a motor vehicle, contrary to *Criminal Code*, s. 94(2) (2 years);
- 4) Aggravated assault, contrary to *Criminal Code*, s. 268(2) (3 years); and
- 5) Possession of a firearm while prohibited, contrary to *Criminal Code*, s. 117.01(3) (2 years).

**4** The Crown contends that the total sentence the trial judge arrived at is unfit, and that the trial judge made other legal errors in sentencing Mr. Claros.

**5** Mr. Claros concedes one of the alleged legal errors. Specifically, he agrees that the trial judge made mathematical errors that resulted in Mr. Claros receiving less than a sentence of five years imprisonment. For the discharging offence, the trial judge imposed an effective sentence of 3 years and 101 days in custody, after accounting for enhanced credit of 466 days for the pre-sentence custody or "dead time" Mr. Claros spent incarcerated on the Hamilton charges awaiting the completion of his trial and sentencing. The parties agreed that the correct amount of enhanced pre-sentence custody is 416 days, and that the trial judge also erred in quantifying the effective sentence. The actual effective sentence should have been 3 years and 314 days in custody, in order to achieve a total sentence of 5 years. Mr. Claros invited the court to leave the sentence undisturbed despite the difference of 213 days, because of the time that has passed.

**6** In my view, we need not decide whether to fix this error, nor determine whether the sentence is unfit, because I agree with the Crown that the trial judge committed material legal errors. As a result, I would grant leave to appeal the sentence, set aside some of the sentences, and substitute sentences that will achieve a total sentence of eight years in custody.

**7** Specifically, I would set aside the sentences imposed on the discharging offence and the possession of a firearm while prohibited offence. I would substitute a sentence on the discharging offence of seven years imprisonment, and I would substitute a custodial sentence of one year consecutive on the possession of a firearm while prohibited offence.

**8** I would not disturb the other sentences imposed, other than the victim surcharges, which should also be set aside.

## **THE MATERIAL FACTS**

**9** On May 25, 2016, Mr. Claros had a mutual friend arrange a meeting with David Fafinski at 9:00 p.m. in Hamilton's east end. Mr. Fafinski was asked to bring \$14,000 worth of cocaine to

that liaison. Mr. Fafinski thought he was meeting the mutual friend when he showed up, but Mr. Claros was there instead.

**10** At some point after encountering Mr. Claros, Mr. Fafinski attempted to flee. As he ran down a Hamilton street near an intersection, Mr. Claros shot him with a sawed-off shotgun. The shotgun was loaded with buck shot, not bird shot.

**11** Mr. Fafinski was lucky. His lower extremities were sprayed and he was knocked down, but his injuries were not serious.

**12** Immediately after the shooting, Mr. Claros fled. As a result, he was not arrested at the scene. That arrest happened two days later after he and his girlfriend, Halley MacPhee, tried to outrun the police in the car Ms. MacPhee was driving near Thunder Bay. The chase ended when Ms. MacPhee stopped to avoid a spike belt, and the pair was arrested.

**13** During the police chase, Mr. Claros threw the shotgun out of the moving vehicle. It seems the pursuing officers did not see this happen. The shotgun was found on the side of the road by a concerned citizen who called the police. The recovered shotgun proved to have been stolen. It also proved to have Mr. Claros's DNA on its surface. As a result, Mr. Claros was charged with firearms offences related solely to the Thunder Bay incident.

**14** Mr. Claros pleaded guilty and was convicted of three of those Thunder Bay offences: (1) possession of a firearm while prohibited; (2) possession of a firearm obtained by crime, contrary to *Criminal Code*, s. 96(2); and (3) unauthorized possession of a firearm in a motor vehicle. Mr. Claros received a total sentence of two years in custody. After credit for 303 days of pre-sentence custody, Mr. Claros's effective sentence was 14 months in custody.

**15** Almost a month and a half later, Mr. Claros was charged separately with ten offences arising from the Hamilton shooting of Mr. Fafinski. The trial on those charges was not held until his Thunder Bay prison sentence expired. But, Mr. Claros was not released when he completed the Thunder Bay sentence. He was held on the Hamilton charges.

**16** On January 26, 2018, Mr. Claros was convicted of the six Hamilton offences I have described above. He was sentenced on June 29, 2018. As indicated, the trial judge intended to impose a sentence of five years in custody before taking into account the "dead time" Mr. Claros served awaiting his trial and sentencing.

**17** During the sentencing hearing, the trial Crown sought a sentence of ten years imprisonment on the Hamilton charges. In stark contrast, trial counsel for Mr. Claros sought a sentence of approximately three and a half years in custody, which would result in an effective sentence of time served.

**18** Mr. Claros's trial counsel made this submission notwithstanding that the discharging offence carried a mandatory minimum sentence of five years imprisonment in the case of a first offence. She argued that, based on the authority of *R. v. Nasogaluak*, 2010 SCC 6, [2010] 1 S.C.R. 206, the trial judge was entitled to impose a total sentence below the mandatory minimum to remedy *Charter* disclosure breaches that had occurred. Specifically, it was not until the eve of the trial that significant, required disclosure was provided. Then a surveillance video and text messages between Mr. Claros and Ms. McPhee were disclosed only after the trial was underway. These *Charter* breaches resulted in two failed stay applications prior to sentencing.

**19** Mr. Claros's trial counsel maintained that when all of the circumstances were considered, this three and a half year sentence would be fit given the totality of the sentence Mr. Claros would serve for the Hamilton offences, coupled with the sentence he had already received for the "directly related" Thunder Bay offences.

**20** She also urged that the usual practice of imposing a consecutive sentence for a possession of a firearm while prohibited offence should not be followed.

**21** It is not in contest that the trial judge ultimately agreed with Mr. Claros's counsel that a consecutive sentence should not be imposed for the possession of a firearm while prohibited offence. Instead, the trial judge imposed a concurrent sentence for that offence.

**22** The parties also agree that the trial judge accepted the defence submission that the length of the Hamilton sentence should be reduced because of the Thunder Bay sentence Mr. Claros served on "directly related" charges. I will describe the trial judge's reasoning in more detail shortly.

**23** The parties disagree, however, over whether the trial judge gave Mr. Claros a sentencing reduction because of the *Charter* breaches, as his counsel requested. The Crown contends that the trial judge did not do so, but Mr. Claros urges that he did. I agree with Mr. Claros. The trial judge indeed gave a sentencing reduction for the *Charter* breaches.

**24** To be sure, the trial judge did not identify the amount of the sentence reduction. But, in the course of sentencing, he reaffirmed that when he denied a stay of proceedings during trial, he was "rather shocked by the shortcomings in disclosure and felt that there should be some remedy". He commented that of the two remedies he had been considering - either a costs award or a sentence reduction - a costs award would be pointless as Mr. Claros was defended on a legal aid certificate.

**25** In his submissions, the trial Crown agreed that the trial judge was entitled to remedy the *Charter* breaches by reducing the sentence. He asked the trial judge not to do so, and argued that, in any case, this was not one of the exceptional cases recognised in *Nasogaluak* as justifying a sentence reduction below a mandatory minimum sentence.

**26** The trial judge evidently agreed with the latter point, concluding that in this case, "the five-year minimum is one that I think is justified." But, it is clear to me that he also acted on the trial Crown's concession that he could lower the sentence because of the *Charter* breaches. The trial judge said as much when he explained to Mr. Claros that "[c]onsidering everything about what you did and about your circumstances, including the disclosure *Charter* breach[es], I do not think you deserve a sentence less than five years, after taking into account your dead time that you have accumulated since serving your Thunder Bay sentence."

**27** In coming to the decision that a five year sentence was justified, the trial judge placed considerable emphasis on the time that Mr. Claros had already served for the related Thunder Bay offences. In the course of his reasons, he said:

You have served your prison sentence for those three offences that you pled-out to in Thunder Bay, and it was a substantial prison sentence, especially considering the credit you were given for your dead time. And two of the three charges are among the offences

for which I have convicted you, namely, possessing the firearm in a motor vehicle, and possessing it contrary to a *Criminal Code* prohibition order.

The other thing that you pled to in Thunder Bay, possessing a firearm obtained by crime, was not among the charges here. I did not, as I recall, hear anything about it being a stolen firearm, although it probably was, if you pled guilty to that in Thunder Bay. The point, though, is that you have already done a fair bit of time for virtually some of the same things I convicted you of.

**28** The trial judge did not settle on the five year sentence for these reasons alone. He also considered the circumstances of the offence and the offender.

**29** He situated the seriousness of the offence, concluding that although shooting a gun with the intent to wound deserves a substantial prison sentence, this was not the most serious of gun offences, as Mr. Fafinski was not significantly wounded after being shot at some distance.

**30** The trial judge expressed the view that the worst thing about the evening shooting was the risk to innocent people in the area, given the stores and apartment buildings at the intersection where the shooting occurred. But, he went on to note that the street was not a main artery, and the shotgun would only be likely to cause serious injury at close range.

**31** The trial judge noted Mr. Claros's personal circumstances without elaboration, beyond accepting the defence submission that Mr. Claros's extensive criminal record was not generally for violent offences. He also said:

I take into account as well that although you do not get the benefit that someone pleading guilty would get, you did not testify in your own defence, you did not lie about anything or try to mislead me.

**32** He then said:

If it were not for the time you have already done on Thunder Bay charges, your sentence on the discharging firearm with intent to wound charge, it will be something greater than the five-year minimum, and there would be a consecutive sentence on the charge of possessing the firearm while prohibited contrary to s. 117.01 of the *Criminal Code*.

However, because of those convictions and the time you have already served, it is my view that the minimum five years is appropriate and that the sentence for the s. 117.01 offence should be concurrent because you have already served a sentence for effectively the same thing.

**33** The trial judge then noted that Mr. Claros had some success working a couple of jobs when living in Alberta, and that he was proud of certificates he earned when imprisoned. The trial judge then said, "I am hopeful that you will go back to working and stay away from this kind of nonsense in the future."

## ISSUES

**34** The Crown on appeal has raised a number of issues for consideration, namely:

- A. Did the trial judge err in reducing the sentence because of the time Mr. Claros served in Thunder Bay?
- B. Did the trial judge err in imposing a concurrent sentence for the conviction of possession of a firearm while prohibited?
- C. Did the trial judge fail to consider relevant facts and consider irrelevant facts?
- D. Did the trial judge impose a demonstrably unfit sentence?

**35** Mr. Claros does not concede any of these errors, but the parties are in agreement that two additional errors did occur.

**36** They agree that the victim surcharges of \$200 per conviction imposed by the trial judge must be set aside. Those orders subsequently proved to be unconstitutional while Mr. Claros's appeal was still "in the system".

**37** As explained, the parties also agree that the trial judge miscalculated the sentence on the discharging offence.

**38** As I have said, I need not address whether this error should be remedied because I would set aside that sentence in its entirety due to other material errors. As I will explain, I propose a substituted sentence, and in doing so have the benefit of agreement between the parties with respect to the credit for pre-sentence custody.

## **ANALYSIS**

### **A. THE TRIAL JUDGE ERRED IN REDUCING THE SENTENCE FOR TIME SERVED IN THUNDER BAY**

**39** The Crown argues that it was improper for the trial judge to even consider the time Mr. Claros spent in custody in Thunder Bay. Although I am of the view that the trial judge used the Thunder Bay time improperly, I do not share the Crown's view that the time Mr. Claros spent in custody on the Thunder Bay offences is entirely irrelevant in sentencing his Hamilton offences. In my view, the principle of totality applies. The problem here is that the trial judge did not apply the principle of totality. He improperly gave credit to Mr. Claros because he had already served time for distinct but related offences. In the result, he gave undue emphasis to the time served in Thunder Bay.

**40** In recognizing that the principle of totality applies, I appreciate that this case does fall outside of the familiar application of that principle. The principle of totality ordinarily operates where an offender is sentenced at the same time for offences occurring at different times, or when an offender is being sentenced while still serving a sentence imposed for other offences.

**41** However, Mr. Claros's situation is analogous. At the time of the Hamilton sentencing he had served, without interruption, the Thunder Bay "dead time", the Thunder Bay sentence, and then the Hamilton "dead time". The Hamilton "dead time" was credited as part of the sentence for the discharging offence. In substance, the custody Mr. Claros would serve as the result of the Hamilton sentence began when the Thunder Bay sentence ended. The two sentences were therefore consecutive sentences with the meaning of *Criminal Code*, s. 718.2(c). They engaged the goals of the principle of totality, namely, to ensure that the aggregate sentence is "just and

appropriate" and that the effect of the combined sentence is not crushing: *R. v. M.(C.A.)*, [1996] 1 S.C.R. 500, at para. 42.

**42** As indicated, the difficulty here is that the trial judge did not apply totality considerations. These considerations include whether the combined sentences, calculated individually and sentenced consecutively, would be longer than required to serve the principles of sentencing, or whether the combined sentence would be apt to crush the offender by undermining the hope for rehabilitation. Instead, the trial judge appears to have treated the Thunder Bay time as if it was being served in connection with the Hamilton events. His reasoning improperly reflects double jeopardy overtones. Specifically, the trial judge spoke of the Thunder Bay sentence being "for effectively" or "virtually" the same thing as the Hamilton sentence.

**43** First, Mr. Claros was not being sentenced in Hamilton for effectively or virtually the same thing he was sentenced for in Thunder Bay. The relevant offences were committed at different times and hundreds of miles apart, separately endangering two different communities. The fact that the same firearm was possessed and that the offences fell within a few days of each other does not undercut the fact that they were different crimes.

**44** Second, and more importantly, apart from totality considerations, there is no principled reason for reducing Mr. Claros's sentence because he had previously been sentenced for the same kind of conduct, or because the distinct offences involved the same weapon or were temporally linked. Put bluntly, there is no sentencing discount for repeated or temporally linked, but distinct, criminal behaviour.

**45** Things may have been different if the length of the Hamilton sentence was materially influenced by specific deterrence considerations and a case could be made that Mr. Claros's Thunder Bay sentence had already discouraged him from wanting to engage in similar conduct again, but this was not the trial judge's reasoning. He improperly mitigated Mr. Claros's Hamilton sentence simply because Mr. Claros had already served time for similar or linked, but distinct, behaviour. In my view, this was an error in principle.

**46** I would therefore allow this ground of appeal.

## **B. THE TRIAL JUDGE ERRED IN IMPOSING A CONCURRENT SENTENCE FOR THE POSSESSION OF A FIREARM WHILE PROHIBITED OFFENCE**

**47** Relatedly, the trial judge sentenced Mr. Claros to two years in custody to be served concurrently for the possession of a firearm while prohibited offence. The trial judge recognized that ordinarily, possession of a firearm while prohibited offences are sentenced consecutively. Yet the trial judge chose to impose a concurrent sentence, because Mr. Claros had "already served a sentence for effectively the same thing."

**48** In my view, the trial judge erred in principle in imposing a concurrent sentence on this basis. Again, the offences committed were the same, but the crimes were different.

**49** First, the Hamilton offence occurred when Mr. Claros took the shotgun to his meeting with Mr. Fafinski. The Thunder Bay offence arose from Mr. Claros's possession of the shotgun in a motor vehicle two days later.

**50** Second, the prohibition orders breached were different. The Hamilton offence was

predicated on the violation of a 2013 prohibition order made in Calgary. The Thunder Bay offence was based on the contravention of a 2011 prohibition order made in Hamilton.

**51** More importantly, the fact that two offences relating to the breach of a prohibition order occur in close succession, or even at the same time, is not a basis for imposing concurrent sentences. The principle that such offences should be served consecutively is intended to ensure that disregard of firearm prohibition orders, imposed in the interest of public safety, does not go unpunished. This principle also recognizes the fact that the breach of a prohibition order is different behaviour than the associate offences, engaging different social interests: *R. v. McCue*, 2012 ONCA 773, 299 O.A.C. 14, at paras. 21-22; *R. v. Addow*, 2014 ONSC 3225, at paras. 29-35; *R. v. Callaghan*, 2017 ONSC 1853, at para. 80, aff'd on different grounds, 2018 ONCA 969; and by analogy, *R. v. Clouthier*, 2016 ONCA 197, 129 O.R. (3d) 481, at paras. 55, 60.

**52** Similarly, two or more separate violations of prohibition orders generally require their own distinct sentences, unless there is cogent reason to do otherwise given the principles and objectives of sentencing. As I have said, there is no bulk discount.

**53** To be fair to the trial judge, there is no doubt that his decision to impose a concurrent sentence on this charge was influenced by totality considerations, and totality considerations can provide a cogent reason for imposing a concurrent sentence or adjusting the length of consecutive sentences: *Clouthier*, at paras. 55, 60; *McCue*, at para. 20. But as I have just explained, in coming to his conclusion the trial judge focused improperly on the similarity of the crimes. His reasons for imposing a concurrent sentence in this case were therefore not cogent given the principles or objectives of sentencing.

**54** I would therefore allow this ground of appeal, as well.

### **C. THE TRIAL JUDGE ERRED IN CONSIDERING IRRELEVANT FACTS**

**55** I agree with the Crown that the trial judge erred in principle in treating as mitigating the fact Mr. Claros did not testify in his own defence and "did not lie about anything or try to mislead [the court]." The trial judge said he took this "into account". He should not have done so.

**56** First, it is improper to assign sentencing benefits because accused persons have foregone their right to testify in their own defence. This sends an inappropriate message.

**57** With respect to the reliance on the absence of lies or misleading testimony, honesty with the court is something that is expected. It is a crime to do otherwise. The fact that an accused person has not misled the court should not mitigate or lower the sentence otherwise imposed.

**58** I would therefore allow this ground of appeal, as well.

**59** The Crown urged that the trial judge considered other irrelevant material and failed to consider relevant information. I will not address these arguments, given that the errors I have already identified will require that the sentences imposed by the trial judge on key offences be set aside, and these arguments do not raise broader issues of principle that would profit the profession to address.

**60** Nor is it necessary that I address the general challenge made to the fitness of the sentence imposed.

#### **D. THE SUBSTITUTED SENTENCES**

**61** In my view, the legal errors the trial judge committed materially affected the sentence he imposed. Most obviously, the sentence for the possession of a firearm while prohibited offence should have been consecutive and not concurrent.

**62** The legal errors also resulted in an improper and excessive reduction in the sentence imposed for the discharging offence. The trial judge himself said that if it had not been for the time already served in Thunder Bay, Mr. Claros's sentence on that offence would have been something greater than the five-year minimum. I agree.

**63** The offences Mr. Claros committed are extremely serious. The precise reason for the shooting was unknown, but Mr. Claros set up that meeting, linked to the promise of a drug deal, and for whatever reason, chose to bring an easily concealed and dangerous shotgun loaded with buck shot, by design capable of killing a deer.

**64** In my view, the trial judge improperly minimized the danger that the shooting presented, not only to Mr. Fafinski but to other members of the public. This shooting took place in an east end Hamilton intersection with businesses and nearby apartment buildings and houses. One of those houses was struck with errant buck shot and sustained window damage. Not only did Mr. Claros discharge that firearm with intent to wound Mr. Fafinski as he fled, Mr. Claros successfully shot Mr. Fafinski, endangering his life in the process. The fact that Mr. Fafinski gained distance before the shot was fired does not reduce the danger that Mr. Claros's conduct presented. Moreover, one bystander at a nearby apartment building fled inside when he heard the shot, fearing that he might be the target of the shooting.

**65** There were no meaningful, mitigating circumstances relating to this brazen and disturbing offence.

**66** In terms of the offender, Mr. Claros, although only approaching his 27th birthday at the time of the shooting, had already amassed a significant criminal record of more than 50 convictions in an unbroken string of offending. He has been in custody or under court orders since he was 12.

**67** The fact that only one of his adult offences was a violent offence does temper the required sentence. However, his long list of driving offences reveals a history of disregard for the safety of others that is relevant in sentencing his reckless behaviour during the Hamilton shooting. His numerous breaches of court orders are also relevant to a proper sentence for breaching the firearm prohibition order.

**68** While Mr. Claros's exceedingly difficult family history and personal circumstances do reduce his level of moral fault, the sentencing objectives of deterrence and denunciation remain the paramount considerations.

**69** Simply put, this was an aggravated form of the discharging offence, and the principles of sentencing, including the principle of proportionality, require an aggravated sentence.

**70** I would not allow a sentence reduction for the *Charter* disclosure breaches that occurred. I appreciate that the trial Crown told the trial judge that he could properly order such a reduction.

However, the legal foundation required for a sentence reduction was not present, and so the Crown concession should not have been acted upon.

**71** Specifically, as Lebel J. pointed out in *Nasogaluak*, at para. 48, the ordinary principles of sentencing may support a sentencing reduction where a *Charter* violation "bear[s] the necessary connection to the sentencing exercise." He said that to be a mitigating sentencing factor, the *Charter* breach must bear upon the circumstances of the offence or the offender.

**72** In this case, I agree with the comment made by the trial judge during sentencing submissions that "[i]t would seem difficult to call the *Charter* breach[es] ... a circumstance of the offence or the offender". The *Charter* breaches had nothing to do with the offence, and no persuasive theory has been offered by the defence as to how they impacted on the circumstances of the offender that are relevant in identifying a fit sentence.

**73** Trial counsel did argue that the disclosure breaches delayed the trial, which prolonged pre-sentence custody and thereby warranted a sentencing reduction. In my view, it would not ordinarily be appropriate to grant a sentencing reduction on this basis where, as here, credit is already being given for pre-sentence custody. Things might be different where there is specific evidence that the pre-sentence custody caused by the *Charter* breaches was particularly onerous, but no such evidence was presented here.

**74** Certainly, the trial judge did not explain how he ultimately came to the view that the *Charter* breaches related to the principles of sentencing. If he was going to grant a sentencing reduction for the *Charter* breaches, he should have done so and quantified a fit reduction.

**75** For my part, I can see no connection between the *Charter* breaches and a fit sentence as there may have been, for example, had the *Charter* breaches deprived Mr. Claros of the opportunity to receive information that could reasonably have prompted the mitigating benefit of a guilty plea before trial. I see nothing comparable to the punitive effect that police brutality or an arbitrary detention might have on an offender. Here there is simply no link between the *Charter* breaches and the determination of a fit sentence. In my view, this is therefore not a case for a sentencing reduction.

**76** I do believe, however, that the principle of totality should inform the appropriate sentence for this offence, given that between the Thunder Bay and Hamilton offences, Mr. Claros will be serving sequentially a sentence of two years followed by the total sentence imposed for the Hamilton offences. The ultimate sentence should not be rendered disproportionate nor should it be crushing for Mr. Claros, still a young man.

**77** In all of the circumstances of this case, bearing in mind that Mr. Claros should receive a one year consecutive sentence for the possession of a firearm while prohibited offence, it is my view that the proper sentence for the discharging offence is seven years imprisonment. This produces a total sentence of eight years imprisonment for the Hamilton offences, an outcome that fits into the established sentencing range and is sufficient to respect the material principles and goals of sentencing.

## **DISPOSITION**

**78** I would therefore grant leave to appeal the sentence and allow the appeal.

**79** I would set aside the sentence imposed on Mr. Claros by the trial judge for the discharging offence and substitute a sentence of 7 years imprisonment, resulting in an effective sentence of 5 years and 314 days after Mr. Claros is credited with 416 days for pre-sentence custody.

**80** I would also set aside the sentence imposed on the possession of a firearm while prohibited offence and substitute a sentence of one year in custody to be served consecutively.

**81** Finally, I would allow the appeal from the victim surcharges, setting those orders aside.

**82** I would not disturb the other features of the sentence imposed.

D. PACIOCCO J.A.

A. HOY A.C.J.O.:— I agree.

C.W. HOURIGAN J.A.:— I agree.