



**IN THE SUPREME COURT OF NEWFOUNDLAND AND LABRADOR
COURT OF APPEAL**

Citation: *R. v. Hillier*, 2016 NLCA 21

Date: May 12, 2016

Docket: 201501H0023

BETWEEN:

ANGUS JOHN HILLIER

APPELLANT

AND:

HER MAJESTY THE QUEEN
IN RIGHT OF CANADA

FIRST RESPONDENT

AND:

HER MAJESTY THE QUEEN
IN RIGHT OF NEWFOUNDLAND
AND LABRADOR

SECOND RESPONDENT

Coram: Welsh, Harrington and Hoegg JJ.A.

Court Appealed From: Provincial Court of Newfoundland and Labrador
Grand Bank

Appeal Heard: March 18, 2016

Judgment Rendered: May 12, 2016

Reasons for Judgment by Welsh J.A.

Concurred in by Harrington and Hoegg JJ.A.

Counsel for the Appellant: Donald A. MacBeath Q.C.

Counsel for the First Respondent: William G. Howse

Counsel for the Second Respondent: Vikas Khaladkar

Welsh J.A.:

[1] Angus Hillier pleaded guilty to charges of trafficking in marihuana and cocaine, unlicensed possession of a prohibited weapon, and breach of an undertaking. Other charges were withdrawn. He was sentenced to twenty-four months imprisonment for trafficking in cocaine, three months concurrent for trafficking in marihuana, one month consecutive for possession of brass knuckles, one month concurrent for possession of a throwing star, and one month consecutive for breach of an undertaking, for a total of 780 days imprisonment (twenty-six months, one month being defined as thirty days).

[2] Mr. Hillier seeks leave to appeal, and if granted, appeals against only the sentence for trafficking in cocaine on the basis that the trial judge erred in principle by considering irrelevant facts and that, as a result, he imposed a sentence that was not proportionate and just.

BACKGROUND

[3] The offences to which Mr. Hillier pleaded guilty, which are relevant for purposes of this appeal, are set out in the following counts; count #2 deals with trafficking in cocaine, #4 with brass knuckles, and #5 with a throwing star:

Count #2

On or about the 21st day of May, 2014 A.D., at or near the Town of Fortune, in the Province of Newfoundland and Labrador, did traffic in a substance included in Schedule 1, to wit: cocaine, contrary to s. 5 of the Controlled Drugs and Substances Act.

Count #4

On or about the 21st day of May, 2014 A.D., at or near the Town of Fortune, in the Province of Newfoundland and Labrador, did have in his possession a prohibited weapon to wit: brass knuckles, knowing that he was not the holder of a licence under which he may possess it contrary to s. 92(2) of the Criminal Code of Canada.

Count #5

On or about the 21st day of May, 2014 A.D., at or near the Town of Fortune, in the Province of Newfoundland and Labrador, did have in his possession a prohibited weapon to wit: throwing star, knowing that he was not the holder of a

licence under which he may possess it contrary to s. 92(2) of the Criminal Code of Canada.

[4] A positive pre-sentence report was provided to the Court. Mr. Hillier, who was thirty-one years of age at the time of the offences, had no previous record. He had been employed, accepts responsibility for his actions and has expressed remorse and apologized for the harm caused by his conduct. Mr. Hillier, who did not seek judicial interim release pending his appeal, is currently on parole.

[5] For purposes of sentencing, Staff Sergeant Conohan was qualified as an expert witness for specified purposes related to drug trafficking. The officer provided a report and testified at the sentencing hearing. His classification of Mr. Hillier as a mid-level trafficker in cocaine was accepted by the judge.

[6] Mr. Hillier challenges that classification, alleging that the judge erred by considering cellphone conversations that occurred in December 2013 because the charge to which he pleaded guilty specified the parameters of time to be “On or about the 21st day of May, 2014”. In addition, Mr. Hillier submits that the judge erred in relying on the officer’s evidence regarding the effect of the presence of weapons and in considering the weapons as a serious aggravating factor.

ANALYSIS

Leave to Appeal

[7] Leave to appeal is required because this is an appeal as to sentence only (section 675(1)(b) of the *Criminal Code*). The test to be applied is whether the appeal is “frivolous in the sense of having no arguable basis or sufficient merit” (*R. v. B.(A.)*, 2015 NLCA 19, 365 Nfld. & P.E.I.R. 160, at paragraph 15; *R. v. Kane*, 2012 NLCA 53, 325 Nfld. & P.E.I.R. 78, at paragraph 2). Given the issues discussed below, the Court concluded that this test was met and leave to appeal was granted at the hearing.

Deference to the Trial Judge’s Decision

[8] The approach to reviewing a sentence imposed by a trial judge is discussed in *R. v. Lacasse*, 2015 SCC 64, [2015] 3 S.C.R. 1089:

[11] ... Ultimately, except where a sentencing judge makes an error of law or an error in principle that has an impact on the sentence, an appellate court may not vary the sentence unless it is demonstrably unfit.

[12] In such cases, proportionality is the cardinal principle that must guide appellate courts in considering the fitness of a sentence imposed on an offender. The more serious the crime and its consequences, or the greater the offender's degree of responsibility, the heavier the sentence will be. In other words, the severity of a sentence depends not only on the seriousness of the crime's consequences, but also on the moral blameworthiness of the offender. ...

The Sentence for Trafficking in Cocaine

[9] In sentencing Mr. Hillier to two years imprisonment for trafficking in cocaine, the trial judge considered the presence of weapons for two purposes: (1) as an important factor in characterizing Mr. Hillier as a mid-level trafficker; and (2) as an aggravating factor in determining an appropriate sentence ((2015), 363 Nfld. & P.E.I.R. 88):

[70] While the weapons used by the accused at Bar were not functioning firearms, the accused did have a knife, an extendable baton and a very realistic looking starter pistol in his car: he had clearly armed himself. In terms of the amount of time that the accused was involved in the cocaine trade, the sample conversations referenced during the sentencing hearing were from December, 2013 to May, 2014. These factors assist in placing the accused within the range set by the Court of Appeal in *Bearns*.

[71] For the offence of trafficking in cocaine, the accused is sentenced to two years; were it not for the guilty plea, the positive presentence report, and the s. 726 allocution [allowing the offender to make a statement before sentencing, in which Mr. Rich apologized and said he would not repeat his criminal activity], a sentence of 30 months would have been imposed.

[10] Mr. Hillier submits that the trial judge erred in characterizing him as a mid-level trafficker in cocaine. He points to the "trace" amounts of cocaine found at the time of the search, suggesting this would be consistent with personal use rather than trafficking. However, Mr. Hillier pleaded guilty to trafficking in cocaine and cannot rely on a submission now that he only had possession of cocaine for his personal use.

[11] Mr. Hillier also submits that the judge erred by considering the presence of weapons in his vehicle as indicative of his position as a mid-level trafficker. He submits that it was not proven beyond a reasonable doubt that these weapons related to his dealing with cocaine when he also

pleaded guilty to trafficking in marihuana. He suggests that the significance of the weapons could relate to the latter and not the former. This submission is not persuasive. If Mr. Hillier made the distinction he suggests, it was necessary for him to provide the basis for such an inference. The fact that more marihuana than cocaine was seized the day of the search does not satisfy this burden. Given the guilty plea regarding trafficking in, as opposed to possession of cocaine, in the absence of an explanation to the contrary, it was open to the judge to infer that the presence of weapons was relevant to Mr. Hillier's dealing with any drugs he was trafficking.

[12] Further, the number and type of weapons and their location at the time of the search is relevant. Mr. Hillier's submission that he was simply a collector of weapons does not ring true. In addition to the realistic looking starter pistol found in his car, he had an extendable baton and a knife. He had a number of sets of brass knuckles or replicas and a throwing star at his residence. He did not have the appropriate licences that one would expect a collector to have. Nor were they on display or properly stored. In these circumstances, it was open to the trial judge to determine that the weapons were intended as protection or intimidation relevant to Mr. Hillier's trafficking in cocaine.

[13] I would add here that there is no basis on which to find that the applications judge imposed "double punishment" related to the presence of weapons. First, the judge refers only to the pistol, extendable baton and knife in sentencing on the trafficking in cocaine offence. There were no separate charges related to those weapons. However, their presence could properly be considered as an aggravating factor under section 718.2 of the *Criminal Code*.

[14] Second, even if the judge had considered the brass knuckles and throwing star as aggravating factors in relation to the trafficking offence, in addition to imposing sentences on counts 4 and 5, this would not have amounted to double punishment as discussed in *R. v. Blok-Andersen*, 2016 NLCA 9. The offences under counts 4 and 5, for which one-month sentences were imposed, were for the failure to have a licence for the prohibited weapons. This is an offence entirely separate from the offence of trafficking in cocaine. Accordingly, in addition to sentencing Mr. Hillier for the failure to obtain the necessary licences, there would be no bar to considering those weapons as aggravating factors in the sentence imposed for trafficking in cocaine. On this basis, the decision in *Blok-Andersen* must be distinguished.

[15] Mr. Hillier also submits that the judge erred in considering the contents of cellphone calls made in December 2013 because he was only charged with trafficking in cocaine on or about May 21, 2014. When he pleaded guilty to trafficking in cocaine, Mr. Hillier had a copy of the report of Staff Sergeant Conohan. He knew that the police report relied on evidence from and interpretation of cellphone calls in December 2013 and that those calls would support the offence of trafficking in cocaine. By contrast, the information and interpretation of the one phone call in May and the seizure of only trace amounts of cocaine may not have been sufficient to support the charge to which Mr. Hillier pleaded guilty.

[16] If Mr. Hillier, who was represented by counsel, intended to rely on the date specified in the charge so as to exclude the information in the report regarding phone calls in December 2013, it was incumbent on him to make that clear. If the issue had been raised, it would have been open to the Crown to apply to amend the date set out in the information.

[17] In any event, in the circumstances, Mr. Hillier would have had to establish that the date of the offence was an “essential element” that would preclude consideration of the evidence of cellphone conversations in December 2013. The foundation for such a conclusion was not provided. For a detailed discussion of “Time of the Offence” and its relevance as an essential element of the offence, see the decision of Wilson J., for the Court, in *R. v. B.(G.)*, [1990] 2 S.C.R. 30, at pages 40 to 54.

[18] On the question of date of the offence, I would distinguish the decision in *Blok-Andersen* based on the different circumstances. In that case, it was open to the trial judge to conclude that the evidence of events prior to the January arrests applied to Mr. Strongitharm, but did not apply to Mr. Bloc-Andersen.

[19] Finally, Mr. Hillier submits that the trial judge erred by failing to give effect to mitigating factors. There is no basis for this submission. As set out above, the judge indicated that he would have sentenced Mr. Hillier to thirty months imprisonment for the offence of trafficking in cocaine but for mitigating factors such as the guilty plea and positive pre-sentence report (paragraph 9, above).

SUMMARY AND DISPOSITION

[20] In summary, there is no basis on which to conclude that the trial judge erred in his consideration of the presence of weapons, in accepting evidence of phone calls that occurred in December 2013, or in characterizing Mr. Hillier as a mid-level trafficker in cocaine.

[21] Accordingly, I would dismiss the appeal.

B. G. Welsh J.A.

I Concur: _____

M. F. Harrington J.A.

I Concur: _____

L. R. Hoegg J.A.