



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

Citation: *R. v. Hynes*, 2016 NLCA 34

Date: June 30, 2016

Docket: 201601H0009

BETWEEN:

HER MAJESTY THE QUEEN

APPELLANT

AND:

ALVIN SCOTT HYNES

RESPONDENT

Coram: Welsh, Barry and Harrington JJ.A.

Court Appealed From: Provincial Court of Newfoundland and Labrador
Happy Valley-Goose Bay

Appeal Heard: June 6, 2016

Judgment Rendered: June 30, 2016

Reasons for Judgment by Welsh J.A.

Concurred in by Barry and Harrington JJ.A.

Counsel for the Appellant: Iain R. W. Hollett

Counsel for the Respondent: Derek J. Hogan

Welsh J.A.:

[1] Alvin Hynes was convicted of break and enter, assault, mischief and breaches of an undertaking contrary to provisions of the *Criminal Code*. He was sentenced to time served, which was 105 days, plus 90 days to be served intermittently. The Crown seeks leave to appeal and, if granted, appeals against the sentences imposed for the two counts of break and enter contrary to section 348 of the *Code*. The Crown submits that the trial judge failed to recognize the seriousness of the offences, did not take proper account of the appropriate range of sentence, considered irrelevant factors, and imposed demonstrably unfit sentences.

BACKGROUND

[2] The convictions for which Mr. Hynes was sentenced arose from two similar incidents.

The First Charges

[3] The first incident occurred on June 29, 2015. Mr. Hynes and the complainant had been in a dysfunctional relationship for approximately two years. At times, Mr. Hynes moved into the complainant's apartment, sharing expenses and domestic chores with her. The trial judge described the relationship as "up and down" and "on again, off again", with Mr. Hynes leaving and the complainant demanding that he return the key to the apartment, or the complainant demanding that Mr. Hynes leave the apartment, and he would give her the keys. The judge commented that "this kind of activity happened routinely", due largely to disagreements related to Mr. Hynes' drinking and abuse of drugs.

[4] In April 2015 the complainant asked Mr. Hynes to return his key to the apartment which he did. Nonetheless, the two continued to see each other. On June 28, 2015, the complainant had company who was staying overnight. Mr. Hynes telephoned to suggest that he might come over. The complainant told him not to come.

[5] At approximately 7:15 a.m. on June 29, 2015, the complainant was awakened by her alarm clock and noise outside. The complainant testified that Mr. Hynes had "kicked in" the exterior door at the top of the stairs leading to her basement apartment and broke the deadbolt such that the door had to be replaced. The complainant was in the doorway at the bottom of the stairs leading into her apartment. Mr. Hynes told her he wanted to get

his belongings from the apartment, but was told that there were none. The judge accepted that Mr. Hynes then “put [his] two hands on her left shoulder and pushed her out of the way and entered the apartment”. When Mr. Hynes saw the complainant’s visitor, he kicked the screen of the television twice, damaging it. While Mr. Hynes said that he owned the television, the trial judge concluded that he was not the sole owner, the complainant having some property interest in it.

[6] In his oral decision at trial, the judge concluded:

... When you forced entry into [the complainant’s] apartment, you were not there to get your work jacket. You were there to cause a disturbance, to confront and frighten [the complainant]. You entered her apartment with the specific intent of disturbing her quiet enjoyment of the apartment. ...

[7] In the circumstances, the judge found that the assault in which Mr. Hynes pushed the complainant aside “was a technical one at the lower, if not lowest, possible level ... on the scale of assault”.

[8] As a result of this incident, the police were called. Mr. Hynes was released on an undertaking not to have any contact with the complainant. He breached that undertaking by telephoning her.

[9] In convicting Mr. Hynes of mischief, assault, break and enter and breach of an undertaking the trial judge took into account:

... all the circumstances and that we had a dysfunctional relationship between Mr. Hynes and [the complainant]. There’s the background on the original damage to the door and the habit of entering [the apartment] without a key. We’re dealing with a break and enter at the minor end of the range of break and enters. This gentleman was not a stranger. There is some argument of colour of right but not enough for a defence. The assault is minimal and the breach of undertaking was egregious but still at a time of high emotion as a result of the event.

The Second Charges

[10] The second incident occurred on September 26, 2015 at approximately 10:40 p.m. The complainant answered a knock on the door to find Mr. Hynes who said he wanted his watch. The complainant went down into her apartment, got the watch and gave it to him. However, Mr. Hynes then pushed the complainant to one side. There was some struggle on the stairs and Mr. Hynes, who was intoxicated, fell. When he got to his feet he went into the apartment briefly, then left.

[11] Regarding the breach of the undertaking requiring Mr. Hynes to have no contact with the complainant, the judge commented:

... [The complainant] testified about the fact that she'd gotten some nasty messages on text the previous night from you and she admitted though that you and she had been together between the first incident in June and this incident and despite the no contact order, but with her consent each time and she said that she had met you at a bar the previous night. ...

[12] The trial judge concluded that Mr. Hynes' intention was to cause a disturbance if anything in the apartment got him "worked up". In convicting Mr. Hynes of break and enter, assault and breach of an undertaking, the judge said that these offences

... must be taken in the context of the case and they fall on the low end of the scale again. I make – you were essentially making a nuisance of yourself. It's the actions of an alcoholic, a drug addict, a bully and a bore.

[13] For purposes of sentencing, the judge referred to Mr. Hynes' criminal record comprising two instances of unrelated offences for which he received fines and suspended sentences. The judge did not consider the criminal record to be a factor in determining an appropriate sentence. The Crown did not submit that the judge erred on this point.

[14] One factor in sentencing considered significant by the judge was the victim impact statement. In addressing the complainant's statement, the judge commented:

... I do take into account the victim impact statement but there is something in the evidence here that suggests the impact was not as severe in that there was a continuation of the relationship at times, at least on a number of occasions between June 29th and September 26th.

[15] Again, the Crown did not submit that the judge erred on this point. There was no evidence that the complainant was not acting independently in the relationship or that she was subject to undue pressure or control by Mr. Hynes.

[16] The judge considered that the commission of the second set of charges within two months after the first set was an aggravating factor to be taken into account in imposing sentence.

[17] In the result, for the first set of charges, the judge sentenced Mr. Hynes as follows: (1) mischief for damaging the television and door (section 430(4) of the *Criminal Code*), fifteen days time served; (2) assault for pushing the complainant (section 266 of the *Code*), suspended sentence; (3) break and enter (section 348 of the *Code*), sixty days time served; and (4) breach of an undertaking by contacting the complainant (145(5.1) of the *Code*), thirty days time served; all consecutive, for a total of 105 days time served. In addition, the judge imposed a period of twelve months probation.

[18] Regarding the second set of charges, the judge sentenced Mr. Hynes to: (1) break and enter, sixty days to be served intermittently (sections 348 and 732 of the *Code*); (2) assault (section 266 of the *Code*), suspended sentence; and (3) breach of the no contact provision in a recognizance (section 145(3) of the *Code*), thirty days consecutive; for a total of ninety days to be served intermittently.

[19] In addition, on the second set of charges, the judge imposed a period of twelve months probation with “very strict conditions”. The most significant are: (1) to live with his mother or a place the probation officer approves, unless he is attending a residential treatment program or working outside central Labrador; and (2) a curfew from midnight to 7:00 a.m. The judge told Mr. Hynes that the police would be checking on his curfew and his “alcohol and drug situation and on any other terms”.

[20] In concluding the oral sentencing decision, the judge addressed the underlying rationale for his decision. He had assessed the offences to be at the minor or low end of the range for the types of offences. He pointed out that Mr. Hynes would be under court supervision for a year with a strict curfew, followed by a second year of probation, and that he would be in jail over the weekend for “the better part of six months”. The judge explained:

... What changes behavior is meaningful supervision in the community. It serves – the sentence serves to keep the complainant safe and the public safe. By putting people in jail it only serves to keep the complainant safe and the public safe for short periods of time. And they – a major part of the sentence in this case is rehabilitation. You have virtually no record, you have expressed considerable intent to get addictions counselling and you also have reasonable employment prospects. You have a letter from Husky Builders indicating that you will be able to work with them if you are out of jail and you have a safe place to live with your mother and as I said before, changing behavior happens best in the community and not in jail. ...

[21] The Crown concedes that the sentences for the offences other than the two incidents of break and enter are at the low end of the range, but not so low as to be demonstrably unfit. Accordingly, those sentences are not the subject of this appeal.

ANALYSIS

Leave to Appeal

[22] Leave to appeal is required because this is an appeal by the Crown as to sentence only (section 676(1)(d) 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. Blok-Andersen*, 2016 NLCA 9, at paragraph 8).

[23] Questions as to the effect of section 348.1 of the *Criminal Code*, the range of sentence for break and enter of a dwelling house, and the relevance of costs for and conditions of imprisonment provide the arguable basis for this appeal. Accordingly, I would grant leave to appeal.

The Home Invasion Question

[24] Section 348 of the *Criminal Code* provides that a break and enter committed in respect of a dwelling house is a serious offence:

Every one who

(a) breaks and enters a place with intent to commit an indictable offence therein,

...

is guilty

(d) if the offence is committed in relation to a dwelling-house, of an indictable offence and liable to imprisonment for life, ...

[25] Pursuant to section 348.1 of the *Criminal Code*, the fact that the dwelling is occupied at the time of the offence is an aggravating factor in sentencing:

If a person is convicted of an offence under section ... 348 in relation to a dwelling-house, the court imposing the sentence on the person shall consider as an aggravating circumstance the fact that the dwelling-house was occupied at the

time of the commission of the offence and that the person, in committing the offence,

(a) knew that or was reckless as to whether the dwelling-house was occupied; and

(b) used violence or threats of violence to a person or property.

The Crown submits that the judge erred when he stated:

... This is not a home invasion case. It is a technical break and enter as I found at trial. In pith and substance it is more – it is closer to unlawfully [being] in a dwelling house than the classic break and enter and certainly not a home invasion. The focus of the trial was on the elements of break and enter, perhaps it may have been helpful to explore the legal principles of unlawfully [being] in a dwelling house. These two classes of offences always present technical legal difficulties.

...

[26] The judge's comment that this was not a home invasion must be considered in context. The Crown chose to charge Mr. Hynes with the offence of break and enter under section 348 of the *Criminal Code* rather than unlawfully being in a dwelling house under section 349. The effect of this choice is to focus on the manner in which Mr. Hynes committed the offences that resulted in his being in the complainant's residence.

[27] In the first incident, Mr. Hynes damaged the exterior door. The extent of the damage was unclear because the police photograph had been lost. In the second incident, Mr. Hynes knocked on the door which was opened by the complainant. In both cases, Mr. Hynes proceeded into the dwelling area by pushing the complainant aside. In the first incident, he committed mischief in the dwelling house by damaging the television. In the second incident, he entered the apartment, then left, in the judge's view, essentially making a nuisance of himself.

[28] This is not to say that Mr. Hynes' conduct was not serious. The complainant had a right to quiet enjoyment of her residence and not to have that enjoyment disturbed by Mr. Hynes' behaviour. However, as set out above, the judge placed the nature of the offences in context when considering an appropriate sentence.

[29] The Crown submits that the low end of the sentencing range for an offence under section 348 of the *Criminal Code* is twelve to eighteen months (*R. v. Omilgoituk*, 2011 NLCA 77, 316 Nfld. & P.E.I.R. 15). On this basis,

the Crown submits that Mr. Hynes' sentence, which resulted in a total imprisonment of six and one-half months, with four months attributable to the break and enters, is demonstrably unfit. The Crown also draws the inference that the trial judge erred by failing to apply section 348.1 of the *Criminal Code*.

[30] The Crown's submission regarding the low end of the range effectively establishes a sentencing "floor", which is distinct from a range. A range serves an important function in giving effect to the sentencing principles set out in the *Criminal Code* while providing flexibility to consider the circumstances of a particular case.

[31] The objective underlying the range of sentence is to determine a sentence that is similar to sentences imposed on similar offenders for similar offences committed in similar circumstances (section 718.2(b) of the *Criminal Code*). However, this principle must be read together with section 718.1 which provides that:

A sentence must be proportionate to the gravity of the offence and the degree of responsibility of the offender.

[32] Distinguishing the concept of a sentencing floor from a range in the context of mandatory minimum sentences is discussed in *R. v. Newman*, 2009 NLCA 32, 286 Nfld. & P.E.I.R. 176, at paragraphs 55 to 57. In effect, a mandatory minimum sentence sets the punishment for the "so-called 'best' offender whose conduct is caught by these provisions". This floor stands in contrast to a range as discussed in *R. v. Nasogaluak*, 2010 SCC 6, [2010] S.C.R. 206. Following an extensive consideration of the principles of sentencing, LeBel J., for the Court, explained:

[44] The wide discretion granted to sentencing judges has limits. It is fettered in part by the case law that has set down, in some circumstances, general ranges of sentences for particular offences, to encourage greater consistency between sentencing decisions in accordance with the principle of parity enshrined in the *Code*. But it must be remembered that, while courts should pay heed to these ranges, they are guidelines rather than hard and fast rules. A judge can order a sentence outside that range as long as it is in accordance with the principles and objectives of sentencing. Thus, a sentence falling outside the regular range of appropriate sentences is not necessarily unfit. Regard must be had to all the circumstances of the offence and the offender, and to the needs of the community in which the offence occurred.

[33] In this case, the judge explained his reasons for imposing a sentence that falls outside the normal range for the offence of break and enter of an occupied dwelling house. In the circumstances, the rationale is such that I find no basis for interfering with the total sentence of four months for the two offences of break and enter contrary to section 348 of the *Criminal Code*.

[34] That said, in his oral reasons for decision, the judge did not indicate the reason for imposing the same sentence for the two offences. In the first incident, Mr. Hynes damaged the exterior door before pushing past the complainant and entering the residence without an invitation, thereby committing a break and enter. In the second incident, the complainant answered Mr. Hynes' knock on the door. The break and enter occurred when he pushed past her, uninvited, fell down the stairs after a scuffle and entered the apartment. The judge took into account that this was the second offence within two months. However, he considered this in the context of the ongoing relationship during that period, which occurred with the complainant's consent. In the circumstances, I am satisfied that the trial judge laid sufficient grounds in the exercise of his discretion to impose the same sentence for the two break and enter charges.

[35] In the result, the fact that the sentences for the two offences of break and enter fall outside the normal range for a section 348 offence does not provide a basis for interfering with the trial judge's discretion to impose the sentences of two months imprisonment for each offence.

Relevance of Cost of Maintaining Mr. Hynes in Jail and Conditions in Jail

[36] In his sentencing decision, the trial judge commented on the cost of imprisoning Mr. Hynes together with the conditions in the jail. The Crown submits that those factors are irrelevant. I agree. The cost of housing prisoners is clearly irrelevant and there was no evidence in this case that the conditions of Mr. Hynes' imprisonment were unusual.

[37] In any event, I am not satisfied that the judge's comments influenced his determination as to the appropriate sentences. While the judge focused on Mr. Hynes' rehabilitation, and indicated his view that this would be better achieved in the community rather than with a lengthy prison sentence, he did not rely on the costs associated with incarceration in reaching his conclusion.

Increasing the Period of Probation

[38] The Crown submits that, if the sentences imposed by the trial judge were upheld, it would, nonetheless, be appropriate to extend the total period of probation from two to three years. Reviewing the decision and circumstances as a whole, I am not satisfied that there is a basis for varying the trial judge's decision to impose a two-year term of probation. Strict conditions, including a curfew, apply for the first year. The judge assessed Mr. Hynes' prospects for rehabilitation as positive. Mr. Hynes provided this Court with a letter from his probation officer which would support the judge's view.

SUMMARY AND DISPOSITION

[39] In summary, there is no basis on which to conclude that the trial judge erred when he imposed sentences for the two counts of break and enter of an occupied residence contrary to section 348 of the *Criminal Code*. While the sentences fall outside the range that would ordinarily apply, the judge provided sufficient reasons for his conclusions based on his assessment of the particular facts.

[40] Accordingly, I would grant leave to appeal, but would dismiss the appeal.

B. G. Welsh J.A.

I concur: _____

L. D. Barry J.A.

I concur: _____

M. F. Harrington J.A.