IN THE SUPREME COURT OF NEWFOUNDLAND AND LABRADOR
COURT OF APPEAL

Citation: *R. v. O'Quinn*, 2017 NLCA 10
Date: 20170102
Docket: 201501H0015

BETWEEN:

MATTHEW FRANCIS O'QUINN APPELLANT

AND:

HER MAJESTY THE QUEEN RESPONDENT

Coram: Green C.J.N.L., Welsh and White JJ.A.

Court Appealed From: Provincial Court of Newfoundland and Labrador
Corner Brook

Appeal Heard: June 7, 2016
Judgment Rendered: February 2, 2017

Reasons for Judgment by Welsh J.A.
Concurred by Green C.J.N.L. and White J.A.

Counsel for the Appellant: John Duggan
Counsel for the Respondent: Frances Knickle Q.C.

Welsh J.A.:

[1] Matthew O'Quinn is an habitual offender who was convicted of several offences on November 29, 2012. He consented to designation as a long-term offender and to a term of supervision of ten years. For the offences for which he was convicted, he was sentenced on February 24, 2015 to a total of nine years imprisonment less approximately four years for time served on remand. He applies for leave and, if granted, appeals the sentences for particular offences as well as the total term of imprisonment.

BACKGROUND

[2] Mr. O'Quinn was convicted under the *Criminal Code* of three counts of break and enter (section 348(1)); one count of theft (section 334(b)); three counts of assault (section 266); three counts of uttering a threat (section 264.1(1)); one count of unlawful confinement (section 279(2)); five breaches of probation (section 733.1); use of a firearm in the commission of an offence (section 85(1)(a)); and unlawful possession of a firearm and ammunition (section 117.01). The Crown proceeded by way of indictment on all charges where that was an option except the one count of theft.

[3] Mr. O'Quinn, who is forty years of age, has an extensive criminal record including violent offences, particularly against women. In considering the sentences imposed for each offence, the judge canvassed relevant case law. He was concerned with the nature of the offences in the context of Mr. O'Quinn's criminal background:

> [341] In this case, Mr. O'Quinn has committed a number of serious offences. These include three break and entries into cabins, one of which was left in shambles. These are offences which are the equivalent of breaking and entering a person's residence.
>
> [342] Mr. O'Quinn assaulted [the complainant] on three occasions; threatened to kill her and her daughter; unlawfully confined her; and pointed a firearm at her. The unlawful confinement extended over a significant period of time through Mr. O'Quinn's use of intimidation, threats, assaulting [the complainant] and pointing a firearm at her.
>
> [343] The offences committed against [the complainant] are of the utmost severity and deserving of the imposition of significant periods of imprisonment. The unlawful confinement offence committed here is of a much more serious

nature than those cases referred to in which periods of imprisonment in the range of six months were imposed.

[344] It is the offences in relation to [the complainant] which are of the greatest concern. They are of the greatest concern because of the violence and intimidation involved and because they form part of a pattern of violent behaviour by Mr. O'Quinn toward women with whom he was involved in intimate relationships. This is the fifth time that Mr. O'Quinn has shown significant violent behaviour toward a woman with whom he was involved in an intimate relationship.

[345] The evidence strongly suggests that when released this pattern of violence will continue as Mr. O'Quinn has been unwilling to curb his violent actions toward women. In addition, as pointed out by Dr. Gill, Mr. O'Quinn has previously been subject to efforts to "control his potential for recidivism with little overall benefit."

[346] The pointing of the rifle at [the complainant] is illustrative of Mr. O'Quinn's behaviour. For [the complainant], who thought the rifle was loaded, this must have been a terrifying experience.

[4] In the result, the judge imposed the following sentences:

[349] I conclude that considering the circumstances of the offences, Mr. O'Quinn's circumstances (including his aboriginal heritage, his childhood and the delay), and the need to protect the public from Mr. O'Quinn, that for the individual offences committed by Mr. O'Quinn the following sentences are appropriate:

> (1) for the break and entry into WH's cabin, a period of twelve months imprisonment;
>
> (2) for the break and entry into DW's cabin, a period of twelve months imprisonment;
>
> (3) for the break and entry into RF's cabin, a period of fourteen months imprisonment (this is the cabin that was left in "shambles");
>
> (4, 5, 6) for the three breach of probation offences arising out of the three break and entries, a period of six months imprisonment in relation to each [eighteen months in total];
>
> (7) for the theft offence, a period of four months imprisonment;
>
> (8) for the assault offence upon [the complainant], involving the pulling of her hair, a period of four months imprisonment;

> (9) for the assault offence upon [the complainant], involving Mr. O'Quinn having slapped her with the back of his hand, a period of six months imprisonment;
>
> (10) for the assault offence upon [the complainant], involving Mr. O'Quinn having grabbed her hair and having struck her on the side of her head (twice), a period of nine months imprisonment;
>
> (11, 12) for having threatened to kill [the complainant] on two occasions, a period of six months imprisonment in relation to both offences [twelve months in total];
>
> (13) for having threatened to kill [the complainant's] daughter, a period of six months imprisonment;
>
> (14, 15) for the two breach of probation offences arising out of the two uttering threat offences, a period of seven months imprisonment in relation to each [fourteen months in total];
>
> (16) for having unlawfully confined [the complainant], a period of twelve months imprisonment;
>
> (17) for the use of a firearm in the commission of an offence, a period of two years imprisonment;
>
> (18) for having possession of a firearm in contravention of a section 110 *Criminal Code* prohibition, a period of nine months imprisonment; and
>
> (19) for having possession of ammunition in contravention of a section 110 *Criminal Code* prohibition, a period of nine months imprisonment [concurrent to (18) since they "involve the same act" (paragraph 354)].
>
> [350] I have imposed a period of two years imprisonment for the section 85(1)(a) offence [using a firearm in the commission of an offence] (despite the Crown's submission [one year imprisonment]) because I am satisfied that the circumstances of this offence and Mr. O'Quinn's moral culpability demand a sentence significantly greater than the minimum prescribed by the *Criminal Code* [one year imprisonment].

The result was a total of thirteen years imprisonment.

[5] The judge then turned to the question of whether the sentences should be adjusted based on the totality principle, that is, whether the combined sentence is unduly long or harsh (*R. v. Hutchings*, 2012 NLCA 2, 316 Nfld. & P.E.I.R. 211). He concluded:

> [360] Considering the totality principle I must ensure that the total sentence is not a "crushing one" (see *Hutchings*, at paragraph 73). I must consider Mr. O'Quinn's age and his prior convictions.
>
> [361] In considering the totality principle I must consider the seriousness of the overall nature of the offences committed by Mr. O'Quinn and his previous convictions. I conclude that considering the nature of the offences committed by Mr. O'Quinn that a period of thirteen years imprisonment is unduly long and harsh. Accordingly, I have reduced the overall sentence imposed to a period of nine years imprisonment.

[6] The individual sentences were adjusted as follows to achieve a sentence of nine years:

> 1. The sentence for breaking and entering into WH's cabin was reduced from twelve months to ten;
>
> 2. The twelve-month sentence for breaking and entering into DW's cabin was made concurrent;
>
> 3. The sentence for assault involving pulling the complainant's hair was reduced from four months to three;
>
> 4. The sentence for assault involving slapping the complainant was reduced from six months to five;
>
> 5. The twelve-month sentence for threatening to kill the complainant on two occasions was made concurrent;
>
> 6. The six-month sentence for threatening to kill the complainant's daughter was made concurrent;
>
> 7. The sentences for breach of probation related to uttering threats were reduced from fourteen to twelve months and made concurrent.

[7] The judge concluded that a nine year sentence was severe, but that it was proportionate to the gravity of the offences and Mr. O'Quinn's degree of responsibility (section 718.1 of the *Criminal Code*).

ISSUES

[8] The appeal engages the following issues:

(1) Leave to appeal against sentence only;

(2) Mr. O'Quinn's aboriginal status;

(3) The application of principles regarding characterization of multiple offences as a single criminal enterprise;

(4) Sentencing for multiple breaches of probation;

(5) Sentencing for use of a firearm in the commission of an offence;

(6) Long-term offender designation;

(7) Delay between conviction and sentencing;

(8) Application of the principle of totality.

ANALYSIS

Leave to Appeal

[9] Leave to appeal is required because this is an appeal by Mr. O'Quinn 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. Hillier*, 2016 NLCA 21, 377 Nfld. & P.E.I.R. 121, at paragraph 7). Given the issues as discussed below I am satisfied that this test is met and that leave should be granted.

Analytical Approach to Sentencing Appeals

[10] In *R. v. Lacasse*, 2015 SCC 64, [2015] 3 S.C.R. 1089, Wagner J., for the majority, discussed basic principles applicable in an appeal against sentence:

> [43] … I agree that an error in principle, the failure to consider a relevant factor or the erroneous consideration of an aggravating or mitigating factor can justify the intervention of an appellate court and permit that court to inquire into the fitness of the sentence and replace it with the sentence it considers appropriate. However, in my opinion, every such error will not necessarily justify appellate intervention regardless of its impact on the trial judge's reasoning. …
>
> [44] In my view, an error in principle, the failure to consider a relevant factor or the erroneous consideration of an aggravating or mitigating factor will justify

> appellate intervention only where it appears from the trial judge's decision that such an error had an impact on the sentence.
>
> (Emphasis added.)

[11] Regarding the sentencing judge's discretion to weigh relevant factors, Wagner J. concluded:

> [49] For the same reasons, an appellate court may not intervene simply because it would have weighed the relevant factors differently. …
>
> > … Only if by emphasizing one factor or by not giving enough weight to another, the trial judge exercises his or her discretion unreasonably should an appellate court interfere with the sentence on the ground the trial judge erred in principle.

[12] With respect to the choice of a sentencing range or category, Wagner J. explained:

> [51] Furthermore, the choice of sentencing range or of a category within a range falls within the trial judge's discretion and cannot in itself constitute a reviewable error. An appellate court may not therefore intervene on the ground that it would have put the sentence in a different range or category. It may intervene only if the sentence the trial judge imposed is demonstrably unfit.

Further, regarding sentencing ranges, Wagner J. cautioned:

> [60] In other words, sentencing ranges are primarily guidelines, and not hard and fast rules: *Nasogaluak* [2010 SCC 6, [2010] 1 S.C.R. 206], at para. 44. As a result, a deviation from a sentencing range is not synonymous with an error of law or an error in principle. …

[13] Regarding a demonstrably unfit sentence, Wagner J. explained:

> [52] It is possible for a sentence to be demonstrably unfit even if the judge has made no error in imposing it. As Laskin J.A. mentioned, writing for the Ontario Court of Appeal, the courts have used a variety of expressions to describe a sentence that is "demonstrably unfit": "clearly unreasonable", "clearly or manifestly excessive", "clearly excessive or inadequate", or representing a "substantial and marked departure" (*R. v. Rezaie* (1996), 31 O.R. (3d) 713 (C.A.), at p. 720). All these expressions reflect the very high threshold that applies to appellate courts when determining whether they should intervene after reviewing the fitness of a sentence.

> [53] This inquiry must be focused on the fundamental principle of proportionality stated in s. 718.1 of the *Criminal Code*, which provides that a sentence must be "proportionate to the gravity of the offence and the degree of responsibility of the offender". A sentence will therefore be demonstrably unfit if it constitutes an unreasonable departure from this principle. Proportionality is determined both on an individual basis, that is, in relation to the accused him or herself and to the offence committed by the accused, and by comparison with sentences imposed for similar offences committed in similar circumstances. Individualization and parity of sentences must be reconciled for a sentence to be proportionate: s. 718.2(a) and (b) of the *Criminal Code*.

[14] These principles underlie the analysis to be applied in this appeal.

Mr. O'Quinn's Aboriginal Status

[15] The relevance of aboriginal status to sentencing is discussed in *R. v. Ipeelee*, 2012 SCC 13, [2012] 1 S.C.R. 433. LeBel J., for the majority, explained:

> [60] Courts have, at times, been hesitant to take judicial notice of the systemic and background factors affecting Aboriginal people in Canadian society (see, e.g., *R. v. Laliberte*, 2000 SKCA 27, 189 Sask. R. 190). … These matters, on their own, do not necessarily justify a different sentence for Aboriginal offenders. Rather, they provide the necessary *context* for understanding and evaluating the case-specific information presented by counsel. Counsel have a duty to bring that individualized information before the court in every case, unless the offender expressly waives his right to have it considered. In current practice, it appears that case-specific information is often brought before the court by way of a *Gladue* report, which is a form of pre-sentence report tailored to the specific circumstances of Aboriginal offenders. …
>
> (Underlining added.)

[16] The sentencing judge recognized that Mr. O'Quinn has aboriginal status, but concluded that it was "of minor relevance in determining an appropriate sentence" (paragraph 83). Having reviewed the law set out in *R. v. Ipeelee* and *R. v. Anderson*, 2014 SCC 41, [2014] 2 S.C.R. 167, as well as the statutory obligations under sections 718.1 and 718.2 of the *Criminal Code*, the judge explained:

> [75] Mr. O'Quinn has aboriginal status. [His counsel] indicated Mr. O'Quinn has Métis heritage. No evidence was presented. There was no evidence of any specific aboriginal related systemic or background factors having played a part in bringing Mr. O'Quinn before the courts.

…

> [82] … [C]ounsel for Mr. O'Quinn made no suggestion that there are any "systemic or background factors" affecting Mr. O'Quinn as an Aboriginal offender which would be relevant in determining an appropriate sentence (see *Ipeelee*, at paragraph 59). Nor [were] there any specific sentencing procedures or sanctions referred to which might have been appropriate in the circumstances for Mr. O'Quinn because of his Aboriginal heritage or connection (see *Ipeelee*, at paragraph 72). …

[17] No "*Gladue* report" was provided at the sentencing hearing. On appeal, Mr. O'Quinn specifically reiterated that he waived his right to have a *Gladue* report prepared. He did not challenge the sentencing judge's conclusion that his aboriginal status was "of minor relevance in determining an appropriate sentence" (paragraph 16, above).

Single Criminal Enterprise

Principles of Law

[18] Principles of law relevant to characterization of multiple offences as a single criminal enterprise are discussed in *R. v. Hutchings*, *supra*, at paragraphs 18 to 27. Green C.J.N.L., for the Court, described a three step approach to be applied in the case of convictions for multiple offences. The first step is to assign an appropriate sentence to each offence. The presumption is that the sentences will be served consecutively. Regarding a single criminal enterprise, he explained:

> [21] The second step is to consider whether some or all of the offences are related in a manner such that they can be considered a single criminal adventure. If so, those that are so regarded should generally be made concurrent with the heaviest sentence arising out of that single criminal adventure. It is not always easy to determine what offences constitute a single criminal adventure. …

Examples include a "single rampage", "repetition of the same behaviour towards the same victim", a "crime spree" (*Hutchings*, at paragraph 22). In determining whether multiple offences constitute a single criminal enterprise, the nature of the offences is a factor to be considered.

[19] In *Hutchings*, Green C.J.N.L. reiterated that the decision to characterize multiple offences as a single criminal enterprise is a matter of discretion to which deference applies. Deference also applies to the decision to impose a concurrent or consecutive sentence:

> [24] It is to be noted as well that Goodridge, C.J., in *Crocker* [(1991), 93 Nfld. & P.E.I.R. 222 (Nfld. C.A.)] stressed that where multiple offences arise out of a single criminal adventure, concurrent sentences "may, but are not required to be" imposed. …

[20] That said, the fact that the sentences are generally made concurrent results from the relationship among the offences and their characterization as a single criminal activity. Under step one of the sentencing analysis, the fact that an offence is committed in conjunction with others will ordinarily increase the seriousness of, and appropriate sentence for, each of the offences. That is, the fact that other offences were committed at the same time will form part of the circumstances surrounding the offence and would be relevant in determining an appropriate sentence. Viewed from another perspective, whether separate offences are charged or one charge is laid in respect of related criminal activity is a matter of prosecutorial discretion. (See, for example, *R. v. Power*, 2008 NLTD(G) 6, where one count of assault was laid based on eleven separate assaults against the complainant (paragraph 51, below).) It can be expected that the sentence for an offence involving multiple instances of criminal conduct will be harsher than where there is one instance of criminal conduct, regardless of how the Crown chooses to prosecute. Care must be taken to avoid double punishment in the case of multiple charges while giving effect to the totality of the circumstances surrounding each offence. Where appropriate, characterizing multiple offences as a single criminal enterprise and imposing concurrent sentences may achieve a proper balance.

[21] Nonetheless, as discussed in *Hutchings*, there are exceptions to the proposition that concurrent sentences will generally be imposed:

> [24] … For example, this Court has determined that breaches of court orders, such as probation orders, will generally result in a sentence to be served consecutively to a sentence for the related offence that constitutes the breach: *R. v. Murphy*, 2011 NLCA 16, at para. 27; … .

[22] The third step in the sentencing analysis is an application of the principle of totality.

[23] Finally, I would caution against conflating steps two and three. That is, assigning concurrent sentences at step two is not an application of the totality principle, which addresses the question of whether a total sentence is unduly long or harsh. Step two is designed to assign appropriate sentences

for individual offences. Whether the total sentence should be adjusted for totality is a different, and subsequent question.

The Break and Entry Offences

[24] At the second step in the analysis, Mr. O'Quinn submits that the sentencing judge erred by failing to characterize the three cabin break-ins as a single criminal enterprise. In the circumstances, it was open to the judge to make that characterization. The break-ins occurred sequentially over a few hours in roughly the same location while Mr. O'Quinn and his accomplice were under the influence of drugs.

[25] In deciding not to characterize the break-ins as a single enterprise, the sentencing judge explained:

> [356] The three break and entry offences do involve a spree, but they also involve three separate victims and three separate cabins. These factors persuade me that in this case the sentences imposed for these offences should be served on a consecutive basis. If I were to order that they be served concurrently, then no actual sentence would be imposed for two of the break and entries committed by Mr. O'Quinn. In addition, an offender who commits one break and entry should not receive the same sentence as an offender who commits three break and entries.

[26] The judge misconstrues the effect of the characterization of multiple offences as a single criminal enterprise when he concludes that concurrent sentences would result in "no actual sentence" for some of the offences and in multiple offences receiving the same sentence as one offence. As discussed above, the fact that there are several related offences will be considered in imposing the individual sentences under step one. That is, the circumstances to be taken into account for each offence will include the fact that it was part of a larger criminal transaction or enterprise. This factor will affect the seriousness of the offence and, therefore, the appropriate sentence.

[27] In this case, under the first step in the analysis, the heaviest sentence would be imposed where the cabin was left in a shambles. Nonetheless, the sentence for breaking into each of the three cabins should reflect the multiple nature of the related activity. This approach takes account of the concerns raised by the sentencing judge who had, in fact, characterized the break-ins as a "spree". His rationale does not support the exercise of his discretion to treat each break-in as a separate offence rather than as part of a single criminal enterprise.

[28] Viewing the three break-ins as completely independent events, the judge imposed two sentences of twelve months and one of fourteen months, a total of three years and two months for the break and enter offences. Such a result does not reflect the nature and circumstances of the offences. The break-ins occurred sequentially over a few hours while Mr. O'Quinn and his accomplice were under the influence of drugs. To gain entry, minimal damage was done to the cabins. At the first cabin, a lawnmower and croquet set were stolen; at the second, a fishing rod, reel and case, a half bottle of rum and a small amount of food. No items were stolen from the third cabin. Mr. O'Quinn and his accomplice then returned to the first cabin and vandalized it, leaving it in a shambles.

[29] In the circumstances, I am satisfied that the sentencing judge erred by relying on a mistaken rationale and failing to give effect to the circumstances surrounding the offences with the result that he exercised his discretion unreasonably. It is necessary, then, for this Court to determine appropriate sentences for these offences (section 687 of the *Criminal Code*).

[30] In determining the length of sentence for break and entry into cabins, general and specific deterrence are important considerations. This factor is discussed in *R. v. Adams*, 2014 NLTD(G) 104, 379 Nfld. & P.E.I.R. 279:

> [40] Cabin properties are easy targets for thieves because they are usually found in remote locations. Crimes relating to them are hard to detect and harder to prosecute because of the lack of surveillance. Cst. Nash stumbled on the satellite receiver in the trunk of Chelsea Harmen's car when he was investigating an unrelated complaint that Ms. Rogers called in to the police herself. Otherwise, Ms. Adams and her co-accused may have never been discovered. When the police solve these and identify the perpetrators, the sentences that are imposed must reflect the need to deter others from exploiting the vulnerability of cabin properties.

In *Adams*, a sentence of twelve months imprisonment was imposed where the offender had a criminal record, and she and her accomplice had stolen several expensive items after breaking into five cabins.

[31] In this case, the Crown submits that an appropriate sentence is twelve months for each of the three break-ins. The range submitted by Mr. O'Quinn is six to eight months for each offence.

[32] These submissions do not take into account the variation in seriousness of the three offences. The sentencing judge recognized that

vandalizing RF's cabin was more serious than the minor damage to DW's cabin where nothing was stolen. As discussed above, it is also relevant that the circumstances surrounding each break and entry would include the fact that it occurred in conjunction with two related offences. This factor increases the seriousness of each offence with a resultant effect on the appropriate sentence.

[33] In light of the submissions of counsel, the decisions of the convicting and sentencing judges, the circumstances surrounding the offences, Mr. O'Quinn's circumstances, and application of the principles of sentencing, particularly specific and general deterrence, I am satisfied that appropriate sentences would be:

> (1) For the break and entry into RF's cabin where the lawn mower and croquet set were stolen and Mr. O'Quinn returned for the purpose of vandalizing the cabin, leaving it in "shambles", a period of fourteen months imprisonment;
>
> (2) For the break and entry into WH's cabin where the fishing equipment, rum and food were stolen, a period of ten months imprisonment;
>
> (3) For the break and entry into DW's cabin where there was damage to the door but no items were stolen, a period of six months imprisonment.

[34] Under the second step in the sentencing analysis, given the nature of the offences and the surrounding circumstances, I am satisfied that the three break and entry offences are properly characterized as a single criminal enterprise. The general approach of imposing concurrent sentences applies. In the result, I would order the sentences in respect of the WH and DW cabins to be served concurrently with the sentence in respect of RF's cabin.

Breaches of Probation – Break and Entry

[35] Mr. O'Quinn did not challenge the length of sentence of six months imprisonment for the breach of probation related to the break and entry of each cabin. Rather, his submission relates to the total of eighteen months that results from consecutive sentences.

[36] The judge's error discussed above regarding the sentences imposed for the break and entry offences also affects the sentences imposed for

breaches of probation related to those offences. The principle that a breach of probation will generally result in a consecutive sentence is reiterated in *Hutchings*:

> [24] … For example, this Court has determined that breaches of court orders, such as probation orders, will generally result in a sentence to be served consecutively to a sentence for the related offence that constitutes the breach: *R. v. Murphy*, 2011 NLCA 16, at para. 27 …
>
> (Emphasis added.)

[37] As applied in this case, the sentence for the breach of probation related to each break and entry would, in ordinary circumstances, be served consecutively to that offence. However, as a general rule, in the context of a single criminal enterprise, a breach of probation in respect of an offence forming part of the criminal transaction should be treated for sentencing purposes in a manner consistent with the offence to which it relates. That is, where the sentence for the underlying offence is ordered to be served concurrently, the sentence for breach of probation related to that offence should also be ordered to be served concurrently.

[38] In this case, because the sentences for the underlying offences have been varied, it is necessary to review the length of the sentences imposed for the breaches of probation. The variation in sentences for the break and entry offences resulted in sentences of fourteen months for RF's cabin, ten months for WH's cabin and six months for DW's cabin.

[39] The range of sentence for breach of probation is considered in *R. v. Murphy*, 2011 NLCA 16, 304 Nfld. & P.E.I.R. 266:

> [35] I turn next to the range of sentences applicable for breach of a court order. Generally, a sentence in the range of one to three months imprisonment, or up to six months where the Crown proceeds by way of indictment, is imposed for the breach of a probation order (*R. v. Oxford (M.)* (2010), 299 Nfld. & P.E.I.R. 327; 926 A.P.R. 327 (N.L.C.A.)). …

[40] An offender should not be punished for more than one breach under the same probation order for the same event (*Murphy*, at paragraph 39). This proposition may be considered when multiple offences are characterized as a single criminal enterprise.

[41] Further, generally the sentence imposed for breach of probation should be determined taking into account, among other factors, the nature

and seriousness of the related offence. Where the offence is part of a single criminal enterprise, this should also be considered. Regarding the range of sentence, "up to six months where the Crown proceeds by way of indictment" provides a guideline for a breach falling at the more serious end of the continuum.

[42] In this case, the break and entry offences forming a single criminal enterprise resulted in a sentence of fourteen months imprisonment. Taking account of all the circumstances, a sentence of three months for breach of probation related to the RF cabin and two months for the breaches related to each of the WH and DW cabins would be appropriate.

[43] Applying the second step in the sentencing analysis, the three-month sentence for breach of probation related to RF's cabin should be served consecutively in accordance with the principle referenced in *Hutchings*. However, the two-month sentences for breach of probation related to the WH and DW cabins should be served concurrently with the underlying offence to which the breach relates. This approach achieves consistency in applying sentencing principles to a breach of probation in the context of a single criminal enterprise.

[44] In the result, I would vary the sentences for breaches of probation related to the break and entry offences by imposing a sentence of three months consecutive for the breach related to the break-in at the RF cabin and two months concurrent for the breaches related to the break-ins at the WH and DW cabins.

Unlawful Confinement, Uttering Threats, Unlawful Possession of a Weapon and Ammunition, and Use of a Firearm

[45] Under the second step of the sentencing analysis, Mr. O'Quinn submits that the offences of unlawful confinement, uttering threats, unlawful possession of a weapon and ammunition, and use of a firearm in the commission of an offence should be characterized as a single criminal enterprise.

[46] I begin with the offence of use of a firearm in the commission of an offence (section 85(1)(a) of the *Criminal Code*). Section 85(4) requires the imposition of a consecutive sentence, negating its relevance as part of a single criminal enterprise in the circumstances of this case:

> A sentence imposed on a person for an offence under subsection (1) or (2) shall be served consecutively to any other punishment imposed on the person for an offence arising out of the same event or series of events and to any other sentence to which the person is subject at the time the sentence is imposed on the person for an offence under subsection (1) or (2).

The sentence for use of a firearm in the commission of an offence is discussed below.

[47] Regarding unlawful confinement, uttering threats and unlawful possession of a weapon and ammunition, these are distinct offences, different in nature. However, there is a clear nexus among the offences in that they all relate to Mr. O'Quinn's purpose of confining the complainant. The sentencing judge did not address the question of whether these multiple, related offences would constitute a single criminal enterprise. In the circumstances, failure to undertake this analysis amounted to an error in principle. It is necessary, then, to determine whether the error had an impact on the sentences.

[48] Applying step two of the sentencing analysis, it is convenient first to consider the three counts of uttering threats and related breaches of probation. Following this, the relationship of these offences with the offences of unlawful confinement and possession of a weapon and ammunition are discussed.

Uttering Threats

[49] Regarding the three counts of uttering threats, Mr. O'Quinn was convicted of threatening to kill the complainant on two separate occasions and sentenced to six months imprisonment for each count, for a total of twelve months; and of threatening to kill the complainant's daughter on one occasion with a sentence of six months. Mr. O'Quinn has not challenged these individual sentences. However, he submits, the judge erred by failing to consider whether the sentences should be made concurrent under the second step of the sentencing analysis.

[50] The threat to kill the complainant's daughter was made at the same time as a threat to kill the complainant. These threats, made more than once over the two-week period, were intended to intimidate the complainant and stop her from leaving the cabin. (Decision of the convicting judge, 1412A00350,353,365, dated November 29, 2012, at paragraph 5). Given the

nature and purpose of the threats and the manner in which they were made over the period when Mr. O'Quinn had confined the complainant, I am satisfied that these offences would properly be characterized as a single criminal enterprise on the basis that they constituted a repetition of the same behaviour towards the same victim for the same purpose (see paragraph 18, above).

[51] An example is found in *R. v. Power*, *supra*, where Mr. Power was convicted of one count of assault that involved eleven separate serious assaults against his spouse and one count of uttering threats involving three separate threats. The assaults occurred over several days when, at various times, he hit and kicked the complainant, dragged her up a flight of stairs, struck her head against various hard objects, pulled her hair out, "whacked her in the forehead with his head", threw her around, and stomped on her bare foot while he wore a shoe. He was sentenced to fourteen months imprisonment for the assaults. Mr. Power was also convicted of one count of uttering threats that involved three separate occasions when he threatened to kill the complainant, and on one occasion, to kill her and their child. He was sentenced to four months imprisonment to be served concurrently with the sentence for the assaults. The question of a single criminal enterprise did not arise because Mr. Power was charged with just one count each of assault and uttering threats.

[52] The *Power* case demonstrates how the manner of charging may affect the sentencing analysis. That is, the single criminal enterprise issue is addressed where one count is laid covering several instances. Where separate counts are laid for each instance of related conduct, step two of the sentencing analysis is designed to address the multiple nature of the criminal conduct.

[53] In *R. v. Antle*, 2013 NLPC 0111A02947, Mr. Antle threatened his girlfriend with violence while he held a knife close to her face and throat. She was prevented from leaving for several hours and was choked, bruised and had some of her hair pulled out. The judge referred to the following cases in determining an appropriate range of sentence:

> [37] … In *C.(F.J.)* [1999 CarswellNfld 82 (Nfld. S.C.T.D.)], a sentence of four months' imprisonment concurrent was imposed on an offender who threatened his common-law spouse repeatedly over the course of 11 months. She testified that she would be terrified to go to sleep as a result. A sentence of four months' imprisonment concurrent for threatening to kill the offender's common-law wife was imposed in *R. v. R.J.C.*, [1998] N.J. No. 354 (N.L.T.D.). The threat was

> uttered while the accused pointed a loaded shot gun at her head. In *Philpott*, 2011 NLTD(G) 30, one month imprisonment consecutive was imposed on an offender who threatened his brother. …

[54] The conclusion followed:

> [43] On the uttering threats charge a sentence of three months consecutive would be imposed. However I am satisfied here that the threats were made in conjunction with the assault with a weapon and therefore in applying *Hutchings* will make the three months concurrent to the six months.

[55] In the case now before this Court, it is necessary first to determine whether the sentence of six months imposed for each offence of uttering threats was appropriate given that the relevant circumstances must include the repetitive nature of the related offences. While those terms are longer than the three or four months imposed in the above cases, the judge took account of Mr. O'Quinn's significant history of violence against women, uttering threats being part of that violence and intimidation. The sentences also reflect the relevant circumstances and repetitive nature of the related offences. I am satisfied that a sentence of six months imprisonment is an appropriate sentence for each of the offences of uttering threats.

[56] Applying the above principles and having concluded that the three offences of uttering threats constitute a single criminal enterprise, it is appropriate to order that two of the sentences be served concurrently. Accordingly, I would order the six-month sentence for count 12 (threatening to kill the complainant) and count 13 (threatening to kill the complainant and her child) to be served concurrently with the six-month sentence for count 11 (threatening to kill the complainant).

Breaches of Probation – Uttering Threats

[57] The analytical approach set out above regarding breaches of probation related to the break and enter offences applies to the two counts of breach of probation related to the offences of uttering threats. Mr. O'Quinn was sentenced to seven months imprisonment for each of these breaches of probation for a total of fourteen months. These sentences cannot be said to satisfy the principle of proportionality and are demonstrably unfit.

[58] Absent special circumstances, a sentence for breach of a probation order should not be more excessive than the sentence for the underlying offence. In this case, a six-month sentence was imposed for each offence of

uttering a threat. Applying the range and principles set out in *Murphy*, in the circumstances, a sentence of two months imprisonment for each breach of probation related to uttering threats is appropriate.

[59] Applying the principles set out in *Murphy* and *Hutchings*, the two-month sentence for the first breach of probation should be made consecutive to the sentence for the underlying offence of uttering threats, while the sentence for the second breach of probation should be made concurrent to the sentence for the other offence of uttering threats.

Unlawful Confinement and Unlawful Possession of a Weapon and Ammunition

[60] Mr. O'Quinn has not challenged the sentences of twelve months imprisonment for the offence of unlawful confinement and nine months for unlawful possession of a weapon and ammunition. These sentences fall within an appropriate range. However, as noted above, Mr. O'Quinn submits that the sentences for these and the offences of uttering threats and breaches of probation should be made concurrent as constituting a single criminal enterprise. Applying step two of the sentencing analysis, I agree that these offences should be characterized as a single criminal enterprise.

[61] While concurrent sentences are generally imposed in that situation, exceptions may arise based on the nature of the offences and the circumstances as a whole (paragraph 19, above). In this case, it is appropriate to impose a combination of concurrent and consecutive sentences to take account of the characterization of the offences as a single criminal enterprise while giving effect to the fundamental principle that a sentence must be "proportionate to the gravity of the offence and the degree of responsibility of the offender" (section 718.1 of the *Criminal Code*; paragraph 13, above).

[62] In the circumstances, I would vary the sentences for the offences of uttering threats and related breaches of probation as set out above with a combination of consecutive and concurrent sentences, make the sentence for unlawful confinement consecutive, but make the sentences for unlawful possession of a weapon and unlawful possession of ammunition concurrent.

Assaults

[63] Mr. O'Quinn was convicted of three counts of assault. The judge imposed sentences of four, six and nine months imprisonment. These sentences all fall within an appropriate range. There is no basis on which to conclude that the assaults constituted a single criminal enterprise or that the judge erred by dealing with them as discrete offences.

Use of a Firearm in the Commission of an Offence

[64] The sentencing judge imposed a sentence of two years for use of a firearm during the commission of an offence, in particular, uttering threats and unlawful confinement.

[65] In making findings of fact, the convicting judge accepted the complainant's evidence (1412A00350,353,365, dated November 29, 2012):

> [5] [The complainant] testified that while she initially agreed to go to the cabin, she changed her mind after she got there. She wanted to get some cigarettes and speak to the police about why they were looking for her. [The complainant] testified that she could not leave the cabin because Mr. O'Quinn would not let her. When asked by the Crown how he prevented her from leaving, [the complainant] alleged that when she told Mr. O'Quinn of her intentions he threatened physical harm to both her and her daughter. [The complainant] testified that on one occasion he threatened to slit her throat. As well, she indicated that Mr. O'Quinn said he knew her daughter lived in Corner Brook, that it would not take much to find her and that he would chop her up. [The complainant testified that she has not had any contact with her daughter, age 4, for a few years.] [The complainant] described crying when he said this. [The complainant] alleged that Mr. O'Quinn made these threats more than once over the two week period. She testified that on another occasion when she was frustrated and crying, Mr. O'Quinn told her to stop crying or he would shoot her where she was standing. She describes Mr. O'Quinn pointing a gun directly at her when he made the statement. When asked on direct what would have happened if the gun had discharged, [the complainant] responded that the bullet would have gone into her chest. [The complainant] also alleged that throughout the two week period, Mr. O'Quinn had a gun on his person, only putting it down if he was sitting in the cabin.

[66] Section 85(3)(a) of the *Criminal Code* stipulates a minimum sentence of one year imprisonment. While Crown and defence counsel submitted, by agreement, that a sentence of one year would be appropriate, the judge imposed a two-year term on the basis that "the circumstances of this offence and Mr. O'Quinn's moral culpability demand a sentence significantly

greater than the minimum prescribed by the *Criminal Code*" (paragraph 350, paragraph 4, above).

[67] Mr. O'Quinn submits that the judge erred by failing to give any weight to the submissions of counsel. He points out that counsel were familiar with the circumstances and facts of the case in a manner not available to the sentencing judge here, given that he was not the judge who heard the evidence or entered the convictions.

[68] The fact that the sentencing judge of necessity relied on the convicting judge's reasons for decision does not lead to the conclusion that he was not in a position to assess the relevant facts in determining appropriate sentences. The weight to be given to the submissions of counsel was a matter of discretion. In this case, Mr. O'Quinn did not plead guilty to the offence. Therefore, the rationale for generally accepting a joint submission by counsel did not apply. (See: *R. v. Anthony-Cook*, 2016 SCC 43.)

[69] Further, the submissions of counsel did not take into account the effect of the minimum sentence stipulated by section 85(3)(a), which provides in relevant parts:

> Every person who commits an offence under subsection (1) or (2) is guilty of an indictable offence and liable
>
> > (a) in the case of a first offence, … to imprisonment for a term not exceeding fourteen years and to a minimum punishment of imprisonment for a term of one year; …

The minimum sentence is evidence of the seriousness with which Parliament views this offence (*R. v. Nasogaluak*, 2010 SCC 6, [2010] 1 S.C.R. 206, at paragraph 45).

[70] In determining an appropriate sentence, it is necessary to take account of the effect of a minimum sentence, which is to set a sentencing "floor". This factor is relevant to applying the principle of proportionality under section 718.1 of the *Criminal Code*. The issue is discussed in *R. v. Hynes*, 2016 NLCA 34, 380 Nfld. & P.E.I.R. 6:

> [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* …

[71] In this case, the sentencing judge was satisfied that the circumstances surrounding the offence as well as Mr. O'Quinn's conduct and criminal history of violent offences against women mandated a sentence more severe than the minimum. After canvassing judicial authority, he concluded:

> [214] These cases are few in number, but they illustrate that periods of eighteen months imprisonment have been imposed for a breach of section 85(1)(a) of the *Criminal Code* and that a prescriptive range has not been established. None of the offenders in these cases had the history of violent behaviour demonstrated by Mr. O'Quinn.
>
> [215] It is important in imposing sentence for a breach of section 85(1)(a) of the *Criminal Code* not to use the one year minimum as a default position or to impose a period of one year imprisonment as a "mechanical afterthought" (see *R. v. Castro*, [2010] O.J. No. 4573 (C.A.), at paragraph 23). There must be a reason for imposing the minimum prescribed period of imprisonment (see *R. v. Robins*, [2013] O.J. No. 414 (C.A.), at paragraph 8).

[72] The sentencing judge provided a foundation and reasons for imposing a sentence of two years for the section 85(1)(a) conviction. He applied the above principles regarding mandatory minimum sentences by increasing the sentence beyond one year to take account of Mr. O'Quinn's criminal history and other related circumstances. While this is a significant punishment, applying the principles set out in *Lacasse*, there is no basis on which to interfere with the sentence.

Long-term Offender Designation

[73] Mr. O'Quinn agreed to his designation as a long-term offender. There was a joint submission by counsel that the court should make the designation and that he should be under supervision for the maximum period, that is, ten years. The judge accepted the submission. The sentence of two years imprisonment for use of a firearm in the commission of an offence, affirmed in this appeal, satisfies the requirement of a minimum punishment for a term of two years in order to make a long-term offender designation (section 753.1 of the *Criminal Code*).

[74] Mr. O'Quinn submits that his agreement to the long-term offender designation should be considered in determining the sentences for the

offences of which he was convicted. He has provided no authority for this proposition.

[75] There is, in fact, no relationship between the offences for which he was convicted after trial and his designation as a long-term offender other than the fact that the additional offences support the designation.

Delay Between Conviction and Sentencing

[76] There was a lengthy delay in this case between when the convictions were entered and the sentences were imposed. One of the unfortunate effects was that the judge who ordered the convictions was no longer a member of the provincial court and a different judge imposed the sentences. As a result, it was necessary for the sentencing judge to rely on his interpretation of the facts and analysis as set out in the convicting judge's decisions.

[77] The delay resulted from several circumstances. First, Mr. O'Quinn wished to appeal his convictions. In order to deal with the long-term offender designation, which depended on the convictions, it was efficient to have the appeal decided before addressing the question of sentence. Mr. O'Quinn's factum and material for the appeal were not filed for over a year after completion of the transcript in March 2013. There was no evidence as to the reason for this delay. The convictions were affirmed on appeal by decision on May 27, 2014 (2014 NLCA 23, 350 Nfld. & P.E.I.R. 144). Over the course of the proceedings, Mr. O'Quinn retained three different counsel. He did not apply for judicial interim release and did not indicate any concern with the delay. He received credit of 1.5 for days he served awaiting sentence.

[78] Mr. O'Quinn submits in his factum that the delay in sentencing "should be given significant weight in mitigation of sentence". His reliance on the decision in *R. v. Bosley* (1992), 18 C.R. (4th) 347 (Ont. C.A.), is not helpful since the facts and issue in that case are not similar. In *Bosley* the delay was between completion of the evidence and the conviction.

[79] Mr. O'Quinn has not demonstrated any basis on which to conclude that the delay in imposing sentence after conviction should be considered as a mitigating factor in determining an appropriate sentence. He has not raised a concern under the *Canadian Charter of Rights and Freedoms*. In summary, the delay is not a relevant consideration in this case.

Total Sentence

[80] The total sentence, applying steps one and two of the sentencing analysis, is seven years, as follows:

> (1) For the break and entry into RF's cabin, a period of fourteen months imprisonment;
>
> (2) For the break and entry into WH's cabin, a period of ten months imprisonment, concurrent;
>
> (3) For the break and entry into DW's cabin, a period of six months imprisonment, concurrent;
>
> (4) For the breach of probation related to the break and entry into RF's cabin, three months imprisonment, consecutive;
>
> (5) For the breach of probation related to the break and entry into WH's cabin, two months imprisonment, concurrent;
>
> (6) For the breach of probation related to the break and entry into DW's cabin, two months imprisonment, concurrent;
>
> (7) For the theft, four months imprisonment, consecutive;
>
> (8) For the assault involving pulling the complainant's hair, four months imprisonment consecutive;
>
> (9) For the assault involving slapping the complainant with the back of his hand, a period of six months imprisonment, consecutive;
>
> (10) For the assault involving grabbing the complainant's hair and striking her on the side of her head (twice), nine months imprisonment, consecutive;
>
> (11) For threatening to kill the complainant (count 11), six months imprisonment, consecutive;
>
> (12) For threatening to kill the complainant (count 12), six months imprisonment, concurrent;
>
> (13) For threatening to kill the complainant and her daughter, six months imprisonment, concurrent;

(14) For the breach of probation related to uttering threats (count 13), two months imprisonment, consecutive;

(15) For the breach of probation related to uttering threats (count 14), two months imprisonment, concurrent;

(16) For unlawfully confining the complainant, twelve months imprisonment, consecutive;

(17) For the use of a firearm in the commission of an offence, two years imprisonment, consecutive;

(18) For possession of a firearm in contravention of a section 110 *Criminal Code* prohibition, nine months imprisonment, concurrent; and

(19) For possession of ammunition in contravention of a section 110 *Criminal Code* prohibition, nine months imprisonment, concurrent.

Application of the Totality Principle

[81] Where there are multiple offences, the third step in the sentencing analysis is application of the totality principle discussed in *Hutchings*. In this case, applying steps one and two, the sentencing judge came to a total sentence of thirteen years imprisonment. He then reduced this total to nine years by adjusting some of the sentences. I reiterate here the importance of considering relevant factors when adjusting a global sentence for totality. Some rationale for the determination of a particular sentence in total should be provided by the judge to permit, where necessary, the validity of an appeal to be assessed and to assist in the precedential use of the decision.

[82] In view of the variation in sentences discussed above resulting from errors by the sentencing judge, it is necessary to review the combined sentence of seven years imprisonment, applying the principle of totality. Factors relevant to "determining whether the combined sentence is unduly long or harsh and not proportionate to the gravity of the offence and the degree of responsibility of the offender" are discussed in *Hutchings*, at paragraph 84.

[83] In this case, the Crown submitted that a total sentence of seven years, less time served, would be appropriate, while Mr. O'Quinn submitted a total of four to five years, less time served. Given the number and gravity of the

offences, which occurred over approximately two weeks; Mr. O'Quinn's criminal history, particularly involving violence against women which led the sentencing judge to comment that he "constitutes a significant and ongoing danger to the public and to women in particular" (sentencing judge's decision, at paragraph 1); and the, at best, very limited, prospects for rehabilitation, I am satisfied that the total sentence of seven years should not be adjusted based on the totality principle.

SUMMARY AND DISPOSITION

[84] Accordingly, I would grant leave to appeal against sentence, allow the appeal in part, and would vary the sentences as discussed above. In the result, I would sentence Mr. O'Quinn to a total of seven years imprisonment as set out in paragraph 80, above. I would reduce this total, in accordance with the decision of the sentencing judge, by 1,431 days being the time served by Mr. O'Quinn prior to sentencing.

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B. G. Welsh J.A.

I concur: _____

J. D. Green C.J.N.L.

I concur: _____

C. W. White J.A.