

IN THE COURT OF APPEAL
OF NEWFOUNDLAND AND LABRADOR

Citation: *R. v. Mahoney*, 2018 NLCA 16
Date: March 21, 2018
Docket: 201701H0050

BETWEEN:

RAYMOND JOSEPH MAHONEY APPELLANT

AND:

HER MAJESTY THE QUEEN RESPONDENT

Coram: Welsh, Hoegg and O'Brien JJ.A.

Court Appealed From: Provincial Court of Newfoundland and Labrador
St. John's

Appeal Heard: January 18, 2018
Judgment Rendered: March 21, 2018

Reasons for Judgment by: Hoegg J.A.
Concurred in by: Welsh and O'Brien JJ.A.

Counsel for the Appellant: Derek Hogan
Counsel for the Respondent: Lisa Stead

Hoegg J.A.:

INTRODUCTION

[1] Raymond Joseph Mahoney pleaded guilty to eight indictable and three summary conviction *Criminal Code* offences, as well as two *Highway Traffic Act* offences, on the basis of an agreed statement of facts. The summary conviction offences were for fraud and forgery, and the indictable offences included two robberies, being masked when he committed one of them, being armed with a knife when he committed the other, two breaches of probation and two breaches of undertakings. Both robberies were committed with a co-accused, Jessica Dunphy, who was charged, convicted and sentenced separately from Mr. Mahoney. The *Highway Traffic Act* offences were considered and sentences imposed, by consent, separately.

[2] The Judge set out individual sentences for the *Code* offences at page 76 of the transcript of her oral decision:

> For each of the [three] forgery and fraud offences, 30 days;
>
> For the robbery home invasion, 4.5 years;
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> For using the knife in the commission of that offence, 3 months concurrent;
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> For the breaches of undertaking and probation, 30 days on each of those counts;
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> For the robbery of the Marie's Mini Mart, 2 ½ years;
>
> For having the face masked during the commission of that offence, 3 months concurrent; and
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> For each of the breaches of undertaking and probation, 30 days.

[3] In setting the above sentences, the Judge considered the sentences Mr. Mahoney's co-accused had received for the same two robberies, and imposed the same sentences on Mr. Mahoney that she had received. The Judge then made the offences of being masked while committing the Marie's Mini Mart robbery and using a knife in the robbery of Ms. George concurrent with the sentences for the respective robbery offences, and went on to apply the totality principle before arriving at the ultimate incarcerating sentence of seven years for Mr. Mahoney.

Leave to Appeal

[4] Mr. Mahoney seeks to have his sentence reduced by 18 months. As his appeal relates only to sentence, he is required by section 675(1)(b) of the *Code* to obtain leave to appeal. He must therefore establish that his appeal is not frivolous in the sense that it has an arguable basis or sufficient merit (*R. v. Perrier*, 2009 NLCA 61, 293 Nfld. & P.E.I.R. 92).

[5] Mr. Mahoney has two grounds of appeal. First, he argues that his sentence for the robbery of Ms. George ought to be reduced by a year because the Judge treated it as a break and entry like the home invasion in *R. v. O'Keefe,* 2007 NLCA 58, 270 Nfld. & P.E.I.R. 136 when in Mr. Mahoney's view the agreed facts did not support that treatment. Second, he argues for a six-month reduction in the sentence he received for the robbery of Marie's Mini Mart on the basis that the Judge erred in her application of the parity principle to his case. In this regard, Mr. Mahoney maintains that his sentence for the Marie's Mini Mart robbery was 30 months, while his co-offender was sentenced to 30 months for the Marie's Mini Mart robbery as well as another armed robbery in which he was not involved.

[6] I am satisfied that Mr. Mahoney's grounds of appeal have sufficient merit to warrant granting leave. His first ground of appeal will help to clarify sentencing law respecting home invasions and his second ground of appeal will clarify application of the parity and totality principles when they present together in the same sentencing case.

Did Mr. Mahoney break and enter Ms. George's home?

[7] The essence of Mr. Mahoney's argument respecting his first ground of appeal is that the sentencing Judge, by her words, equated Mr. Mahoney's robbery of Ms. George with the robbery committed by Mr. O'Keefe in *O'Keefe* effectively finding that Mr. Mahoney committed a break and enter and sentencing him accordingly.

[8] In *O'Keefe,* the offender, along with a co-offender, had forcibly entered a dwelling armed with fence palings and robbed the occupants of some marihuana while threatening them with death. The Court treated the robbery as a home invasion and considered it an aggravating factor in sentencing.

[9] The facts respecting Mr. Mahoney's robbery of Ms. George disclose that Mr. Mahoney, armed with a knife, attended at Ms. George's home with

Ms. Dunphy, who was also armed with a knife as well as a dirty syringe. Mr. Mahoney and Ms. Dunphy initially requested that Ms. George sell them some prescription medication. When she refused, Mr. Mahoney threatened Ms. George and her adult daughter who was present with Ms. George in her residence, with the knife and demanded the medication. Ms. Dunphy threatened Ms. George and her daughter with the dirty syringe. Ms. George then implored her daughter to fetch medication from her medicine cabinet and give it to Mr. Mahoney. After obtaining the medication, Ms. Dunphy demanded $10.00 of Ms. George, but she told them she did not have any money. Mr. Mahoney and Ms. Dunphy then left Ms. George's home.

[10] Section 348.1 of the *Code* is entitled "Aggravating circumstance – home invasion". It mandates that a robbery committed in relation to an occupied dwelling house is to be treated as an aggravating factor on sentence:

> If a person is convicted of an offence under section 98 or 98.1, subsection 279(2) or section 343, 346 or 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.

[11] In this case, Ms. George was occupying her home when she was robbed by Mr. Mahoney. As the offence of robbery involves violence and/or threats of violence, the requirements of section 348.1 are clearly met on the facts. Counsel for Mr. Mahoney acknowledged this on appeal.

[12] The Judge's words, which Mr. Mahoney says show that she found that he had committed a break and entry, are found at page 65 of the transcript:

> "…I have been referred to *R. v. O'Keefe*, [2007 NLCA 58] where the Newfoundland and Labrador Court of Appeal treated a robbery in a home as a home invasion. As in *O'Keefe,* the criteria for a home invasion are made out in the case before me and this is an aggravating circumstance…"

[13] Mr. Mahoney seems to be suggesting that because he did not forcibly enter Ms. George's home, and only robbed her when she refused to sell him

morphine, he did not commit a break and entry like he maintains the Judge intimated.

[14] The purpose of section 348.1 of the *Code* is to recognize that when robberies are committed in relation to an occupied home, they must be taken more seriously than other robberies, like those committed in relation to commercial premises or on the street. The reason is because people expect to be safe in their homes – they do not expect to be violated in the very places where they have respite and protection from the risks of the outside world. In the outside world inevitable interaction with people and situations in which one has no direct involvement present risks over which one has little to no control.

[15] In *O'Keefe* this Court referred to the factors respecting home invasion which were listed in *R. v. Matwiy*, 1996 ABCA 63, 178 A.R. 356. One of the factors the *Matwiy* Court described as a basic feature of a home invasion is the entering of a dwelling by breaking into it or by forcing entry. In *O'Keefe* this Court referred to the *Matwiy* factors as helpful; but it did not adopt them as determinative or as constituting a complete list. In any event, the *Matwiy* factors do not constitute an exhaustive list of criteria that must be met before a set of facts can be considered a home invasion for the purposes of section 348.1 of the *Code*. Moreover, the section does not require that entry to a home must be forced in order for it to be considered an aggravating factor on sentence.

[16] The facts of *O'Keefe* are arguably more serious than those in Mr. Mahoney's case. In *O'Keefe,* Mr. O'Keefe forcibly entered the dwelling in which that robbery occurred whereas Mr. Mahoney did not forcibly enter Ms. George's residence. Rather, he entered Ms. George's residence, ostensibly, with a request to buy morphine. When Ms. George refused to sell him morphine, he robbed her, having come prepared with a knife and a friend who also had a knife and a dirty syringe, and then demanded money. Such facts suggest that Mr. Mahoney entered Ms. George's home on a ruse, with a plan to rob Ms. George in any event. In this regard see *R. v. Barry*, 2016 NLTD(G) 103 where entry to the home where the robbery occurred was not forced. Rather, the victim opened his front door for a former girlfriend and the robber entered with her and then attacked and robbed the victim. The robbery was treated as a home invasion for the purposes of section 348.1 of the *Code.*

[17] The argument that the Judge effectively found that Mr. Mahoney committed a break and entry by equating Mr. Mahoney's robbery of Ms. George with the facts of the *O'Keefe* robbery has no merit. The Judge's words are simply a statement that the criteria for home invasion for the purposes of section 348.1 were made out in Mr. Mahoney's case as they had been in Mr. O'Keefe's case, and that Mr. Mahoney's robbery of Ms. George in her own home could be treated as an aggravating circumstance on sentencing just as Mr. O'Keefe's robbery had been. The Judge did not speak in error.

Did the Judge err in failing to give proper effect to the parity principle?

[18] Mr. Mahoney's second ground of appeal concerns how the Judge applied the parity principle to his sentencing.

[19] As noted, Mr. Mahoney's co-offender Jessica Dunphy was sentenced separately. According to Mr. Mahoney's factum, Ms. Dunphy was sentenced to a total of seven years imprisonment on the following basis:

> … 30 months for a robbery at an ATM machine and an assault with a box cutter on September 13; 30 months concurrent for the robbery at Marie's Mini Mart on September 18 and 12 months concurrent for possession of the knife; and 54 months consecutive for the robbery of Karen George on September 19, 2016 and 12 months concurrent for possession of the knife and needle.

[20] In sentencing Mr. Mahoney, the Judge considered the sentences Ms. Dunphy had received for the two armed robberies she and Mr. Mahoney had committed together. The Judge reduced the six-year sentence for the home invasion robbery she would have otherwise imposed on Mr. Mahoney to four and one-half years to achieve parity with the sentence Ms. Dunphy received for the same robbery. In so doing, the Judge noted that Mr. Mahoney was not a youthful first offender like Ms. Dunphy and also that while both Mr. Mahoney and Ms. Dunphy wielded knives, Ms. Dunphy had also threatened Ms. George with a dirty needle. The Judge went on to reduce the three-year sentence she would otherwise have imposed on Mr. Mahoney for the Marie's Mini Mart robbery to two and one-half years to achieve parity with the 30-month sentence Ms. Dunphy received for the same robbery. Accordingly, Mr. Mahoney received the same sentences for the same robberies that Ms. Dunphy had received. The Judge then took one last look at Mr. Mahoney's sentence and reduced it by another six months by applying the totality principle.

[21] I begin by noting the ranges of sentence for the two kinds of robberies involved in Mr. Mahoney's case. The Judge canvassed jurisprudence from this and other jurisdictions and stated the range for home invasion type robberies to be between four and nine years (*R. v. Lewis*, 2012 NLCA 11, *R. v. Manuel*, 2010 NLTD(G) 177, 302 Nfld. & P.E.I.R. 203, *R. v. King* (2013), 336 Nfld. & P.E.I.R. 255 (N.L. Prov. Ct.), *R. v. Lasaga* (2005), 68 W.C.B. (2d) 203 (N.L. Prov. Ct.), and *O'Keefe*. I have no reason to disagree with her assessment in this regard.

[22] In *R. v. Hutchings*, 2012 NLCA 2, 316 Nfld. & P.E.I.R. 211, Green C.J.N.L. reviewed sentences respecting a number of convenience store robberies in this jurisdiction and concluded, at paragraph 104, that the normal level of sentence for armed robberies of convenience stores "by a young person, masked, late at night, where the money or merchandise taken is relatively small could range from three to five years". I have no reason to suggest differently.

[23] Mr. Mahoney's sentencing involved the application of both the parity and the totality principles.

[24] The parity principle has its genesis in section 718.2(b) of the *Code* which reads:

> … a sentence should be similar to sentences imposed on similar offenders for similar offences committed in similar circumstances …

[25] In *R. v. Roche* (1990), 84 Nfld. & P.E.I.R. 1 (Nfld. C.A.), Goodridge C.J.N. described the principle at paragraph 10 as follows:

> While several persons are convicted of identical offences arising out of the same or a similar set of circumstances the sentences imposed upon them should not be disparate. There may of course be aggravating or mitigating circumstances in an individual case but subject to those factors the sentences imposed should be equal or approximately the same; the person sentenced should not be given a feeling of injustice because he has been treated more severely than a co-offender.

[26] While effect must be given to the parity principle in sentencing co-offenders, there is no requirement that the sentences must be the same. Co-offenders can properly receive different sentences as Rowe J.A. observed in *R. v. Terry*, 2015 NLCA 23, 365 Nfld. & P.E.I.R. 341 at para. 7:

> Parity is important where two or more offenders commit the same offence together. While co-offenders can properly receive different sentences where their

> role in the offence differs or their criminal record differs (among other factors). See *R. v. Roche*, (1990) 84 Nfld. & P.E.I.R. 1 (NLCA), para. 11; *R. v. Melvin*, (1998) 167 Nfld. & P.E.I.R. 180 (Nfld. C.A.), para. 2; *R. v. O'Keefe*, 2007 NLCA 58, 270 Nfld. & P.E.I.R. 136, paras. 26-39; *R. v. Kane*, paras. 30-33; and *R. v. Ipeelee*, 2012 SCC 13, [2012] 1 S.C.R. 433, para. 79. None of the foregoing was applicable in this case.

(See also *Canada v. Fizzard*, 2012 NLCA 80, 330 Nfld. & P.E.I.R. 301.)

[27] Giving effect to the parity principle does not require a judge to impose an inadequate sentence on an offender in order to achieve parity with an inadequate or improper comparison sentence (*Roche*, at paragraph 12). See also *R. v. Hunter*, [1970] O.J. No. 927, 16 C.R. (N.S.) 12 (Ont. C.A.).

[28] The totality principle has its genesis in section 718.1 of the *Code.* It reads:

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

The principle was explained in detail by this Court in *Hutchings*, wherein Green C.J.N.L set out an approach to deciding the proportionality issue and a framework for its application whenever an offender is being sentenced for more than one offence. The first step is to determine appropriate individual sentences for each offence on the basis of proper sentencing principles, and the second step is to consider whether any of the sentences can properly be made concurrent and if so, to adjust appropriately. Finally, if there remain two or more sentences to be served consecutively, the judge is to take "one last look at the combined sentence to determine whether it is unduly long and harsh, in the sense that it is disproportionate to the gravity of the offence and the degree of responsibility of the offender" taking into account, and balancing the following factors:

> (a) the length of the combined sentence in relation to the normal level of sentence for the most serious of the individual offences involved;
>
> (b) the number and gravity of the offences involved;
>
> (c) the offender's criminal record;
>
> (d) the impact of the combined sentence on the offender's prospects for rehabilitation, in the sense that it may be harsh or crushing;

> (e) such other factors as may be appropriate to consider to ensure that the combined sentence is proportionate to the gravity of the offences and the offender's degree of responsibility.

After consideration of the factors, another adjustment can be made if appropriate in order to achieve a proper totality (paragraph 84).

[29] Mr. Mahoney argues that when his post-totality sentence is compared with that of Ms. Dunphy, his sentence is more severe. To show this, he has parsed his and Ms. Dunphy's post-totality sentences to show that while he and Ms. Dunphy each received the same 30-month sentence for the Marie's Mini Mart robbery, Ms. Dunphy's sentence for the Marie's Mini Mart robbery was not really a 30-month sentence because it was made concurrent with another armed robbery she alone committed. Put another way, Mr. Mahoney was sentenced to two and one-half years for committing only one robbery, while Ms. Dunphy was sentenced to two and one-half years for committing two robberies. Mr. Mahoney seeks a six-month reduction in his sentence for the Marie's Mini Mart robbery to properly reflect his culpability for only one robbery and Ms. Dunphy's culpability for two robberies "so as to ameliorate a sense of injustice that any offender might feel in these circumstances".

[30] Ms. Dunphy was sentenced by a different judge in a different proceeding. The Judge in her case applied the totality principle to her case by considering the gravity of her offences and her degree of responsibility in them in light of the factors found at paragraph 84 of *Hutchings* and came to an appropriate sentence. In doing so, he made Ms. Dunphy's 30-month sentence for the Marie's Mini Mart robbery concurrent with her 30-month sentence for the ATM robbery. That was a decision that her sentencing Judge made in applying the totality principle to her sentencing. I would also note that the Judge's application of the totality principle in Ms. Dunphy's case reflected her status as a youthful first offender.

[31] In sentencing an offender for multiple offences when the parity principle is engaged, the logical and proper place for a judge to consider parity is when the judge is identifying a proper sentence for each offence in consideration of the purposes and objectives of sentencing. This was the approach taken by Green C.J.N.L. in *Hutchings* (see paragraph 97), and it was the approach taken by the Judge in Mr. Mahoney's case.

[32] On the other hand, the "one last look" in applying the totality principle is the final consideration in sentencing, as the phrase suggests. It follows application of the principles of sentencing in the *Code* including the parity principle, and focuses on the individual circumstances of a particular offender and his role in the offences as *Hutchings* indicates.

[33] In *R. v. Nasogaluak*, 2010 SCC 6, [2010] 1 S.C.R. 206, the Court emphasized the importance of individuality to the sentencing process, and restated that each offender must be sentenced in accordance with his or her degree of responsibility and personal circumstances.

[34] In this regard, it is helpful to review the differences in the personal circumstances of Mr. Mahoney and Ms. Dunphy to the extent disclosed in the record before me. Mr. Mahoney was older than Ms. Dunphy when they were sentenced; he was 33 and she was 27. While Ms. Dunphy was being sentenced for a third robbery, she was a first offender when she was sentenced. Mr. Mahoney was not a first offender. He had a criminal record for thefts, fraud, mischief and a breach of probation. More importantly, Mr. Mahoney was on probation and subject to two recognizances when he committed the robberies; Ms. Dunphy was not. Mr. Mahoney's sentence, before totality, included incarcerating sentences for fraud, forgery, and the four breaches of probation and undertakings. I also note from the record the alarming fact that Mr. Mahoney, having struggled with addiction issues for some time, and Ms. Dunphy, a pharmaceutical assistant, told Ms. George that they had just gotten out of rehab where they were told by a friend that Ms. George would sell them morphine. Getting involved in serious criminal activity by procuring drugs directly upon release from rehab is a direct snub of the criminal justice system's efforts to rehabilitate Mr. Mahoney, and does not speak well of his prospects for rehabilitation.

[35] The sentences Mr. Mahoney received for the two armed robberies were on the low end of or below the normal ranges for those offences, as a direct result of the Judge's application of the parity principle. Mr. Mahoney, having already benefitted from Ms. Dunphy's status as a youthful first offender now seeks to benefit a second time through a second application of the parity principle in conjunction with application of the totality principle. He received a fairly considered sentence for what he did, and has no legitimate basis for feeling a sense of injustice.

[36] Accordingly, the sentencing Judge did not err in her application of the parity principle to Mr. Mahoney's sentencing.

[37] Something must be said about how the separate offences of being masked and possessing a weapon when committing a robbery ought to be treated on sentencing. These offences are separate delicts despite their arising out of the same circumstances as the "principal" offence of robbery. In this regard they are much like breaches of probation and breaches of undertakings which usually arise from the commission of a "principal offence". Separate delicts are separate wrongs which address separate criminal behaviors. The separate offences of being masked and possessing a weapon when committing a robbery recognize the specific horror and danger, and hence culpability, associated with those actions. Accordingly, from a principled perspective, the offences ought to be treated separately in the sentencing process.

[38] The above point was made in *R. v. Hennebury* (1996), 138 Nfld. & P.E.I.R. 56 (NFCA), by Cameron J. who said at paragraph 7, in considering sentences for the separate offences of breaches of probation, "there is little point in imposing probation if there is to be no penalty for breaches".

[39] This Court emphasized that principled approach in *R. v. Murphy*, 2011 NLCA 16, 304 Nfld. & P.E.I.R. 266 with respect to sentences for convictions of breaches of probation and undertakings, in deciding that sentences for breaches of probation should generally be made consecutive to sentences for the offences out of which they arise. Accordingly, convictions for the separate offences of being masked and carrying weapons should generally attract separate consecutive sentences.

[40] I recognize that in sentencing cases involving multiple offences the net effect may not make any difference, as this case illustrates, for the Judge's imposition of concurrent sentences for Mr. Mahoney's masking in relation to the Marie's Mini Mart robbery and his knife wielding at the robbery of Ms. George would have resulted in the imposition of concurrent sentences for those separate delicts in any event by application of the totality principle. Nevertheless, for the purposes of clarity and principle, the proper place for making sentences for such offences concurrent is in the totality analysis. That said, in this case the Judge followed established sentencing practice in imposing concurrent sentences for the masking and weapons offences in this case and cannot be said to have done so in error.

[41] It must also be noted that armed robberies are a serious problem in the community of St. John's. Chief Justice Green recognized this problem five years ago in *Hutchings* (paragraph 98). In my view, the problem not only

persists, but has increased. Recognition of a serious local crime problem is a valid consideration on sentencing (*R. v. Lacasse*, 2015 SCC 64, [2015] 3 S.C.R. 1089 at paras. 87-104). The message must be conveyed to the community that the criminal justice system can and will respond appropriately to protect people from robberies in their homes and in their communities.

[42] In summary, the sentencing Judge did not err in her analysis and determination of an appropriate sentence. Accordingly, I would dismiss the appeal.

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L. R. Hoegg J.A.

I concur: _____

B. G. Welsh J.A.

I concur: _____

F. P. O'Brien J.A.