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

Citation: *R. v. Frampton*, 2018 NLCA 23
Date: April 30, 2018
Docket Number: 201601H0101

BETWEEN:

SEAN FRAMPTON — APPELLANT

AND:

HER MAJESTY THE QUEEN — RESPONDENT

Coram: Green, Welsh and White JJ.A.

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

Appeal Heard: April 9, 2018
Judgment Rendered: April 30, 2018

Reasons for Judgment by Welsh J.A.
Concurred in by Green and White JJ.A.

Counsel for the Appellant: Kevin S. Baker
Counsel for the Respondent: Trisha L. McCarthy

Welsh J.A.:

[1] On April 28, 2016, Sean Frampton pleaded guilty to and was convicted of five counts of armed robbery involving four convenience stores and one bank. In each case he was also convicted of having his face masked, having possession of a weapon, a knife, for a purpose dangerous to the public peace, and breach of a recognizance. He was sentenced to a total of eleven years imprisonment. He seeks leave to appeal and, if granted, appeals his sentence.

BACKGROUND

[2] On August 31, 2014, in mid-afternoon, Mr. Frampton robbed Hamilton Convenience store of between $500 and $700. There were other customers present. He wore a mask and was armed with a knife with a seven to eight-inch blade. He told everyone in the store to get down on the floor, and fled on foot.

[3] On September 4, 2014, Mr. Frampton robbed Shalimar Convenience store where an employee was working alone. Mr. Frampton's face was covered and he was armed with a knife with a serrated blade approximately seven inches long. He fled on foot with approximately $300 in cash.

[4] On November 4, 2014, Mr. Frampton robbed the Cornwall Superette store of approximately $360 in cash. The manager was locking up the safe when Mr. Frampton entered the store with his face covered. He was armed with a knife with a blade approximately six to eight-inches long. He fled on foot.

[5] On November 27, 2014, Mr. Frampton robbed Hickey's Convenience Store of between $500 and $800 in cash. His face was concealed and he was armed with "a large machete". He left the scene as a passenger in a vehicle which appeared to have two other occupants.

[6] On November 29, 2014, in mid-afternoon, Mr. Frampton robbed a CIBC bank. He was armed with a knife with a six-inch blade. He was wearing gloves, a waist-length, bright yellow jacket with reflective stripes, a dark hoodie underneath the jacket, sunglasses, a black, shoulder-length wig, and a wool hat with a Pittsburgh Penguins logo on it. He obtained approximately $400 in marked and unmarked bills from two tellers. He was observed leaving the bank and getting into a grey van driven by another person. Shortly thereafter, he was arrested by the police. He was still wearing most of the same clothing. The knife and most of the money were recovered.

[7] When each robbery was committed, Mr. Frampton was on a recognizance to keep the peace and be of good behaviour.

[8] In his oral decision, the trial judge took into account that Mr. Frampton pleaded guilty, though not at the earliest opportunity. At the time of the offences, Mr. Frampton was twenty-six and twenty-seven years of age. He had an extensive criminal record, though no convictions for robbery.

[9] Counsel for the Crown submitted at the sentencing hearing that the lower end of the range of sentence for armed robbery of a bank is five years imprisonment, and for armed robbery of a convenience store, three years. Crown counsel submitted that sentences of one year imprisonment for each count of having his face masked and being armed with a knife, and two months for each breach of the recognizance would be appropriate. The total sentence submitted by the Crown, if all sentences were served consecutively, would have amounted to twenty-seven years and ten months. Counsel submitted that, adjusting for totality, a global sentence of eight years would be appropriate.

[10] Counsel for Mr. Frampton "endorsed the submission as a joint recommendation" (transcript of the trial judge's decision, at page 57). However, the trial judge advised counsel that he was reluctant to accept the recommendation. As a result, he adjourned the hearing to give counsel the opportunity to make further submissions.

[11] In addition, the judge noted that counsel made submissions with respect to Mr. Frampton's drug and alcohol problems, including a submission that "there was a high level of intoxication during the bank robbery" (transcript of the trial judge's decision, at page 58). However, the judge concluded, at pages 58 and 63 to 64:

> … A concern with this submission is there was no evidence before me of this, either in the agreed statement of facts or otherwise.
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> …
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> The court has concerns about purported evidence that was referred to in submissions. During the first sentencing hearing, counsel submitted an agreed statement of facts related to the facts of the bank robbery. There was no reference to the accused being intoxicated at the time of the robbery. Additionally, the second agreed statement of facts was submitted with respect to the other four robberies. Again, there was no reference to any drug or alcohol issues during these robberies. …

[12] The trial judge noted that Mr. Frampton had "admitted all of the essential elements of the robberies including his identity." He cautioned that "[t]he court has to be guarded when counsel, in essence, testify during submissions rather than refer to proven facts." (Transcript of the trial judge's decision, at page 65.)

[13] After reviewing case law and considering submissions of counsel, the trial judge imposed a sentence of seven years imprisonment for the bank robbery based on "the brazen nature of the robbery in broad daylight just before bank closing hours, the large knife used, the full disguise, the presence of a getaway vehicle and the comments made to the bank employees" (transcript of the trial judge's decision, at page 67).

[14] He imposed a sentence of four years imprisonment for each of the four robberies of convenience stores. Considering the range of sentence set out in *R. v. Hutchings*, 2012 NLCA 2, 316 Nfld. & P.E.I.R. 211, the judge was satisfied that the robberies would not "carry a sentence at the low end of the range" and that "the appropriate sentence for each robbery should be four years as it was in *Hutchings*" (transcript of the trial judge's decision, at page 67). (I note that the judge made an error in calculating that the total sentence for the robberies was nineteen years. In fact, four years for the first four robberies plus seven years for the last robbery amounts to twenty-three years.)

[15] In addition, the trial judge imposed sentences of one year imprisonment for each count of having his face masked, one year for each count of possession of a weapon dangerous to the public peace, and three months for each count of breach of a recognizance. He concluded that all the sentences, served consecutively, resulted in a total of thirty years and three months, comprised of nineteen years for the robberies, five years for the masked-face offences, five years for the weapons offences and fifteen months for the breaches of probation. (Adjusting for the above error, the total would have been thirty-four years and three months.)

[16] The judge was satisfied that such a sentence would "clearly be excessive" (transcript of the trial judge's decision, at page 68). In the result, he ordered the four-year sentence for one count of robbery of a convenience store to be served consecutively to the seven-year sentence for the bank robbery, for a total of eleven years imprisonment. The remaining sentences were ordered to be served concurrently.

ISSUES

[17] In addition to leave to appeal, consideration is given to: (1) the distinction between a joint recommendation and a joint submission; (2) admissions by counsel; (3) characterization as a single criminal venture; (4) application of the *Hutchings* analysis in the assessment of a sentence for multiple offences; and (5) effect of errors by the trial judge.

ANALYSIS

Leave to Appeal

[18] Leave to appeal is required because this is an appeal by Mr. Frampton 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). In this case, based on the discussion that follows, I am satisfied that the test is met. Accordingly, I would grant leave to appeal.

General Principles Regarding Appeal of a Sentence

[19] Principles to be applied in a sentence appeal are discussed in *R. v. Lacasse*, 2015 SCC 64, [2015] 3 S.C.R. 1089. Wagner J., for the majority, summarized:

> [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.

Joint Recommendation and Joint Submission

[20] Counsel agreed that the recommendation for an eight-year total sentence was not a joint submission, but rather, a joint recommendation. The difference between these two, as referenced in this case, is that a joint submission results from a resolution or agreement between the Crown and defence following discussions that led to a guilty plea; while, in the case of a joint recommendation, defence counsel agrees that the sentence proposed by the Crown would be appropriate. That is, in contrast to a joint recommendation in which the Crown and defence have come to a similar conclusion or agreement regarding an appropriate sentence, a joint submission generally involves a *quid*

pro quo in which, through discussions, the Crown and defence counsel agree to some accommodation.

[21] The benefit of a joint recommendation usually flows mainly to the defence because, by virtue of the Crown's agreement, it is an indication to the court that the sentence is considered by the parties to be reasonable and appropriate. Generally, it is expected that the Crown would be seeking a more onerous penalty than would be submitted by the defence. In the case of a joint submission, based on the *quid pro quo* and accommodation by the parties, benefits generally flow to both the Crown and defence.

[22] While a joint submission and a joint recommendation are distinguishable, the factors relevant in assessing a joint submission help to inform the consideration of a joint recommendation. I begin with the approach to a joint submission on sentence as discussed in *R. v. Anthony-Cook*, 2016 SCC 43, [2016] 2 S.C.R. 204. The basic proposition is that a judge should not depart from a joint submission "unless the proposed sentence would bring the administration of justice into disrepute or is otherwise contrary to the public interest" (paragraph 32). This is a high threshold explained by language, such as, a sentence so "markedly out of line with the expectations of reasonable persons aware of the circumstances of the case that they would view it as a break down in the proper functioning of the criminal justice system", or the sentence would cause an informed and reasonable person "to lose confidence in the institution of the courts" (paragraph 33).

[23] One underlying rationale for the high threshold is a recognition that "Crown and defence counsel are well placed to arrive at a joint submission that reflects the interests of both the public and the accused", and that "they will be highly knowledgeable about the circumstances of the offender and the offence and the strengths and weaknesses of their respective positions" (paragraph 44). Defence counsel is responsible for ensuring that the accused's guilty plea is voluntary and informed. In addition, counsel, as officers of the Court, "are bound professionally and ethically not to mislead the court" (paragraph 44).

[24] Finally, the Court in *Anthony-Cook* offered guidelines for sentencing judges. Moldaver J., for the Court, explained:

> [51] First, trial judges should approach the joint submission on an "as-is" basis. … If the parties have not asked for a particular order, the trial judge should assume that it was considered and excluded from the joint submission. …

> [53] … The greater the benefits obtained by the Crown, and the more concessions made by the accused, the more likely it is that the trial judge should accept the joint submission, even though it may appear to be unduly lenient. For example, if the joint submission is the product of an agreement by the accused to assist the Crown or police, or an evidentiary weakness in the Crown's case, a very lenient sentence might not be contrary to the public interest. On the other hand, if the joint submission resulted only from the accused's realization that conviction was inevitable, the same sentence might cause the public to lose confidence in the criminal justice system.
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> …
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> [58] … [If not satisfied with the joint submission] the judge should notify counsel that he or she has concerns, and invite further submissions on those concerns, including the possibility of allowing the accused to withdraw his or her guilty plea, as the trial judge did in this case.
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> …
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> [60] Finally, trial judges who remain unsatisfied by counsel's submissions should provide clear and cogent reasons for departing from the joint submission. These reasons will help explain to the parties why the proposed sentence was unacceptable, and may assist them in the resolution of future cases. Reasons will also facilitate appellate review.

[25] In this case, the trial judge had concerns about the joint recommendation. He adjourned the hearing to permit further submissions, which were made by both counsel. The Crown provided additional case law and maintained her position that a sentence of eight years in total would be appropriate.

[26] In rejecting a total sentence of eight years imprisonment, the trial judge explained (transcript of the trial judge's decision, at pages 69 and 70):

> Counsel have joined in a global sentence presentation of eight years less time served in pre-trial custody. Would that be a just, fit and proper sentence in this case? In my opinion, the answer is no. This is not a case where there was any dispute about what happened at CIBC. Given the accused's age and background with no real prospects having been articulated, I see no need to adjust the seven-year sentence to be imposed for that robbery. However, I am dealing with a rash of robberies. The other four robberies all involve weapons, Mr. Frampton was masked, his victims in the convenience stores were vulnerable. The total sentence must reflect these factors. I am not satisfied that a global sentence of eight years adequately addresses the gravity of these offences and the offender's degree of responsibility. The proposed sentence would not serve as much of a deterrent with respect to the bank and the other four robberies, given that the accused was basically caught red-handed in the bank robbery. Deterrence and protection of the public are the most important sentencing principles in this, in a case such as this. I affirm that the appropriate sentence for the other four

> robberies should be four years on each; however, in giving one last look at totality, these sentences should be made concurrent to each other but consecutive to the seven year sentence for the CIBC robbery. Therefore, prior to credit for pre-trial custody, the total sentence to be imposed is 11 years imprisonment. …

[27] I am satisfied that the trial judge followed an appropriate procedure when he rejected the joint recommendation. He advised counsel of his concerns and adjourned the hearing to permit further submissions. Having heard the submissions, he gave reasons for declining to follow the recommendation.

[28] I hasten to reiterate that, in assessing a joint recommendation, while procedural considerations similar to those that apply to a joint submission may be engaged, the high threshold discussed in *Anthony-Cook* would not apply in the case of a joint recommendation. I turn, then, to a consideration of Mr. Frampton's submissions regarding error by the trial judge.

<u>Admissions by Counsel</u>

[29] At the sentencing hearing, both defence and Crown counsel advised the judge that Mr. Frampton's drug and alcohol addiction issues were relevant. In explaining the rationale underlying the Crown's recommendation for a total sentence of eight years, Crown counsel addressed factors that were taken into account, including:

> … Mr. Frampton's serious drug problem, the fact that I guess the bank robbery itself on its facts was not particularly well thought out given that the police found him 20 minutes later highly intoxicated and still wearing a very distinctive disguise. …

Defence counsel referred, for example, to Mr. Frampton's "serious drug addiction for a number of years".

[30] The trial judge declined to take Mr. Frampton's addictions issues into account because there was no reference to those issues in the two statements of facts, and he was of the view that this was a matter of evidence. Further, the judge commented, there was no evidence that Mr. Frampton would receive rehabilitative counselling and treatment while in prison and no plan for addressing his addictions.

[31] As a general principle, agreement on a fact by Crown and defence counsel would be accepted by the judge as an admission for which evidence is not required. In *R. v. Jordan*, 2016 SCC 27, [2016] 1 S.C.R. 631, in explaining the

responsibility of the Crown and defence to take steps to minimize delay, the majority commented:

> [138] … Both parties should focus on making reasonable admissions, streamlining the evidence, and anticipating issues that need to be resolved in advance.

[32] In this case, for clarity, it would have been preferable for counsel to include the admissions regarding Mr. Frampton's drug and alcohol addictions and their potential relevance to the robberies in the agreed statements of facts. However, where both counsel, as officers of the court, conceded, during submissions on sentencing, that Mr. Frampton had addictions issues, it could be presumed that this was a relevant factor for the judge's consideration in determining an appropriate sentence.

[33] In the circumstances, the judge erred in imposing a requirement for evidence of Mr. Frampton's addictions where the issue had been conceded and the judge did not offer an explanation for refusing to accept the admission. Had he accepted the admission, the judge may, nonetheless, have concluded that Mr. Frampton's addictions were not relevant to an appropriate sentence in the circumstances, but this is different from rejecting out of hand an admission regarding those addictions.

[34] Further, I am satisfied that the judge erred in refusing to consider Mr. Frampton's addictions issues on the basis that he did not present a plan for counselling and rehabilitation programs while in prison. I would take judicial notice of the fact that addictions counselling and rehabilitation programs are offered in federal penitentiaries. However, the administration of such programs falls within the authority of the prison system. The most a court can do is to recommend that programs be provided to an offender.

[35] In the result, I am satisfied that the trial judge erred by dismissing Mr. Frampton's addictions as a relevant factor to be considered in determining an appropriate sentence.

Single Criminal Venture

[36] Having concluded that the total of the individual sentences served consecutively would "clearly be excessive", the trial judge determined that "all charges occurring on the same date should be made concurrent as a result of being part of one criminal event" (transcript of the trial judge's decision, at page 68, underlining added). This rationale misconstrues the *Hutchings*

analysis, which addresses the relevance of characterizing multiple offences as a single criminal venture, at paragraph 84:

> 1. When sentencing for multiple offences, the sentencing judge should commence by identifying a proper sentence for each offence, applying proper sentencing principles.
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> 2. The judge should then consider whether any of the individual sentences should be made consecutive or concurrent on the ground that they constitute a single criminal adventure, without consideration of the totality principle at this stage.
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> 3. Whenever, following the determinations in steps 1 and 2, the imposition of two or more sentences, to be served consecutively, is indicated, the application of the totality principle is potentially engaged. The sentencing judge must therefore turn his or her mind to its application.

[37] Under this analysis, characterizing multiple offences as a single criminal venture precedes, and is not part of, the totality analysis. However, the judge's error in using characterization as a single criminal venture as a rationale for making the sentences for being masked and armed concurrent for purposes of totality is not fatal. It was open to the judge to make the sentences for being masked and armed concurrent in order to achieve an appropriate total sentence, as discussed below.

[38] In passing, I would note that, as a general principle, offences of being masked and armed in the context of the commission of a robbery should be considered as separate offences, not as a single criminal venture. (See discussion in *R. v. Bourgeois*, 2018 NLCA 13, at paragraphs 32 to 37; *R. v. Martin*, 2018 NLCA 12, at paragraphs 24 to 29; *R. v. O'Quinn*, 2017 NLCA 10.)

The *Hutchings* Analysis

[39] The trial judge referred to the decision in *Hutchings* for two purposes: first, in determining the range of sentence for the convenience store robberies; and, second, in assessing the total sentence. Mr. Frampton submits that the judge erred by failing to address factors that should be considered in the totality analysis. In *Hutchings*, Green C.J.N.L., for the Court, explained, at paragraph 84:

> 5. In determining whether the combined sentence is unduly long or harsh and not proportionate to the gravity of the offences and the degree of responsibility of the offender, the sentencing court should, to the extent of their relevance in the particular circumstances of the case, take into account, and balance, 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;
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> (b) the number and gravity of the offences involved;
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> (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.
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> 6. Where the sentencing judge concludes, in light of the application of those factors identified in Step 5 that are deemed to be relevant, that the combined sentence is unduly long or harsh and not proportionate to the gravity of the offences and the offender's degree of responsibility, the judge should proceed to determine the extent to which the combined sentence should be reduced to achieve a proper totality. …
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> 7. Where the sentencing court determines that it is appropriate to reduce the combined sentence to achieve a proper totality, it should first attempt to adjust one or more of the sentences by making it or them concurrent with other sentences, but if that does not achieve the proper result, the court may in addition, or instead, reduce the length of an individual sentence below what it would otherwise have been.
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> …

[40] In this case, the trial judge determined that the total sentence of thirty years and three months imprisonment that, he said, would result from making all the sentences consecutive would be unduly long and harsh and must be adjusted for totality. He considered the number and gravity of the offences and Mr. Frampton's criminal record, giving particular weight to specific and general deterrence.

[41] However, as discussed above, the judge erred by concluding that, due to the absence of evidence and a plan, he would not consider Mr. Frampton's addictions issues and his prospects for rehabilitation in determining an appropriate sentence. These are factors that would properly be considered in the totality analysis.

[42] In addition, I am satisfied that the judge erred in the manner in which he applied the totality analysis as set out in *Hutchings*. Under that analysis a global view must be taken of the multiple offences in determining whether the total that

results from consecutive sentences would be unduly long or harsh in the circumstances. The sentences for individual offences would be adjusted, or left unchanged, in order to achieve the resultant sentence, but only after an appropriate sentence has been determined.

[43] In this case, the judge began by concluding that the seven-year sentence for robbing the bank should not be altered. The effect was that that sentence was not properly incorporated into the totality analysis. While the seven-year sentence would be relevant under the first factor under step 5, the "normal level of sentence for the most serious of the individual offences", it is only one factor that may be helpful in deciding on an appropriate total sentence. The sentence for the most serious of the offences does not operate to set a beginning point from which to determine a total sentence as was done in this case. It is apparent from his decision that the judge had concluded that only the remaining sentences should be assessed for purposes of totality and that a substantial term of imprisonment in addition to the seven years was required to account for the remaining multiple offences. In the result, the trial judge erred in the methodology he employed.

<u>Effect of the Errors</u>

[44] It is necessary, then, to consider whether the above errors had an impact on the sentence such that the sentence should be varied by this Court (*Lacasse*, at paragraph 44). Given the multiple offences, the analysis set out in *Hutchings*, at paragraph 84, applies.

[45] First, the sentences imposed by the trial judge for the individual offences are not challenged. None of the offences could be characterized as constituting a single criminal venture. Served consecutively, the sentences would result in a total of thirty-four years and three months. I agree with the trial judge and counsel that this amounts to a sentence that is unduly long or harsh in the sense that it is disproportionate to the gravity of the offences and degree of responsibility of Mr. Frampton.

[46] The sentence for the most serious of the offences is seven years imprisonment for the bank robbery. Each offence was serious, particularly considering that Mr. Frampton took steps to hide his identity and was armed in each case. The five robberies constituted a series of similar serious criminal activity occurring over a relatively short period of time. The seriousness of the offences escalated with the bank robbery and the involvement of other individuals to drive a "get-away" vehicle in the last two robberies. Mr.

Frampton had a lengthy criminal record including assault, but no previous convictions for robbery.

[47] Regarding rehabilitative prospects, I would take into account that Mr. Frampton is not yet thirty years of age. I accept the admission by Crown and defence counsel that, at the time of the robberies, he had serious drug and alcohol addiction issues that would properly be considered in assessing his potential for rehabilitation. Counselling and treatment would be available to him while serving his sentence.

[48] An additional consideration in this case is the joint recommendation. I agree with the trial judge that these were serious offences and that deterrence and protection of the public are of paramount importance. However, a sentence of eight years imprisonment is a lengthy period of time. I accept the proposition that counsel would be knowledgeable about the circumstances of the offender and the offences and would be in a position to make a joint recommendation on sentencing taking into account the interests of both the public and Mr. Frampton.

[49] In the result, applying the *Hutchings* analysis, I am satisfied that the trial judge's errors, taken together, had an impact on the sentence such that the sentence should be varied by this Court and a sentence of eight years imprisonment imposed. To achieve that result, I would order the sentence of one year for one count of possession of a weapon dangerous to the public peace to be served consecutively to the seven-year sentence for robbery of the bank. I would order the remaining sentences to be served concurrently.

DISPOSITION

[50] I would grant leave to appeal the sentence and allow the appeal. I would vary the sentence by ordering Mr. Frampton to serve a total of eight years imprisonment less credit for pre-trial custody, which was determined by the trial judge to be 846 days. I would affirm the judge's orders regarding victim surcharges, a DNA order and lifetime firearms prohibition.

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B. G Welsh J.A.

I Concur: ____________________________________

J. D. Green J.A.

I Concur: _____________________________________

C. W. White J.A.