

IN THE COURT OF APPEAL
OF NEWFOUNDLAND AND LABRADOR

Citation: *R. v. Flynn*, 2018 NLCA 61
Date: October 30, 2018
Docket Number: 201701H0042

BETWEEN:

WILLIAM FLYNN — APPELLANT

AND:

HER MAJESTY THE QUEEN — RESPONDENT

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

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

Appeal Heard: September 14, 2018
Judgment Rendered: October 30, 2018

Reasons for Judgment by: Welsh J.A.
Concurred in by: Fry C.J.N.L. and White J.A.

Counsel for the Appellant: Jennifer Curran
Counsel for the Respondent: Arnold Hussey Q.C.

Welsh J.A.:

[1] William Flynn was convicted of two robberies in July 2014 and one robbery in July 2016, together with related offences of possession of a weapon, wearing a mask, assault, and breaches of probation. He was sentenced to a total of ten years in prison. Mr. Flynn appeals his convictions and sentence.

BACKGROUND

[2] The events leading to Mr. Flynn's convictions are summarized in the trial judge's sentencing decision (2017 NLPC 0116A02466):

> [1] Mr. Flynn was convicted of two robberies that occurred within five minutes of each other in 2014 and a third robbery which occurred almost exactly two years later. …
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> [3] In the first robbery at PharmaChoice, the evidence was that a male dressed all in black, wearing a hoodie and large black sunglasses, entered the pharmacy. He proceeded directly to the dispensary area and asked the pharmacist, Ms. Haye, for narcotics. The narcotics were in an open safe. He grabbed what he wanted from the safe, putting the narcotics in a knapsack and left through the front of the pharmacy.
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> [4] Mr. Jeff Earles, a customer in the pharmacy, was standing at the front of the store. His attention was drawn to the fact that someone was trying to rob the pharmacy by Ms. Haye throwing something into the aisle. He saw the male dressed in black running from the pharmacy. He pursued the male and noted he had a backpack or book bag in his possession. He stopped pursuing when two other gentlemen gave chase. One of the men, Mr. Mayonka, had been waiting for the bus and saw and heard Mr. Earles shouting. He and another individual managed to catch up to the robber who abandoned the knapsack by the Fish Exchange parking garage. Mr. Mayonka lost sight of the individual when he got into a taxi cab at the corner. The taxi driver, Mr. Dunn, testified he had picked up an individual all dressed in black and had dropped him in the area of Healy's Pharmacy.
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> [5] After the perpetrator got into the taxi, Mr. Mayonka returned and recovered the knapsack and brought it back to the PharmaChoice store. At the store, Mr. Earles took the knapsack and placed it in a container at the front of the store. It was found to contain pill bottles taken from the pharmacy and clothing identified as Mr. Flynn's via DNA analysis.
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> [6] The second robbery took place approximately 20 minutes after the first.
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> [7] The facts in that case were that an individual dressed in black and wearing large sunglasses entered Healy's Pharmacy on Casey Street. The individual entered the pharmacy and proceeded directly to the dispensary at the rear walking rapidly. He

> walked up behind Mr. Layman who he pushed and said "Give me the Dilaudid" or words to that effect. He grabbed a bag of Dilaudid from the safe (Mr. Layman noted that coincidentally the Dilaudid happened to be on the top of the bags of narcotics in the drug safe). The narcotics were kept in bags in their stock bottles in the safe. The perpetrator removed the pills and left the pharmacy. Ms. Harding who was also working at the pharmacy testified that she saw the individual leave the pharmacy and turn left out the door.
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> [8] Constable Farrell was responding to the call. He observed an individual dressed all in black running in the area of Monroe/Charlton Street. He noted the individual was wearing black heavy clothing including a hoodie and as it was a hot day that made the individual stand out. He followed the person who ran around the back of #5 Coronation Street. In the rear garden of the home, he located four stock bottles and some loose pills on the ground. The bottles were similar to those stolen from Healy's Pharmacy both in type and dosage. One of the bottles was opened. The bottles were subsequently photographed by Constable Hickey and they were swabbed. Mr. Flynn's DNA was discovered on the bottles.
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> [9] Mr. Flynn entered a guilty plea to a third robbery, robbing the Seal Cove Convenience Store on July 27, 2016. The facts in relation to the robbery were that Mr. Flynn entered the store with his face masked and confronted Mrs. Georgina Kennedy with a large knife, demanding money. Mrs. Kennedy shouted and resisted Mr. Flynn. This alerted Mr. Michael Peddle, one of the owners of the store. Mr. Peddle lived on the premises and rushed downstairs to assist Mrs. Kennedy. He grabbed Mr. Flynn and Mr. Flynn attempted to run from the store. They struggled through the store, eventually ending up outside the store and in the process Mr. Flynn stabbed Mr. Peddle in the arm causing a couple of puncture wounds. The robbery itself was captured on video and Mr. Flynn can be seen brandishing a large knife and pounding on the counter intimidating Mrs. Kennedy before fighting with Mr. Peddle. Mr. Flynn was held at the scene by Mr. Peddle and two other men.

[3] Regarding the first robbery in 2014, the trial judge convicted Mr. Flynn of the following: robbery, contrary to sections 343-344(1) of the *Criminal Code*; while committing that offence, having his face masked, contrary to section 351(2) and possessing a weapon (a knife which he brandished at Ms. Haye), contrary to section 88(1)-88(2); and breach of probation, contrary to section 733.1.

[4] Regarding the second robbery in 2014, the trial judge convicted Mr. Flynn of the following: robbery, contrary to sections 343-344(1) of the *Criminal Code*; having his face masked while committing that offence, contrary to section 351(2); and breach of probation, contrary to section 733.1.

[5] Regarding the 2016 robbery, based on the guilty plea and a review of the evidence, the trial judge convicted Mr. Flynn of the following: robbery, contrary

to sections 343-344(1) of the *Criminal Code*; while committing that offence, having his face masked, contrary to section 351(2) and possessing a weapon (with which he stabbed Mr. Peddle), contrary to sections 88(1)-88(2); assault causing bodily harm by stabbing Mr. Peddle, contrary to section 267 of the *Code*; and breach of probation, contrary to section 733.1.

ANALYSIS

Appeal Against Conviction – the Two July 2014 Robberies

[6] Mr. Flynn's appeal of the convictions for the two robberies committed in July 2014, and the related offences, is based solely on the question of identity of the robber. He submits that the evidence does not establish beyond a reasonable doubt that he was the person who committed the offences. This submission is without merit. The trial judge made findings of fact, well supported by the evidence, leading to the conclusion that the only reasonable inference that can be drawn is that Mr. Flynn was the robber.

[7] The PharmaChoice robber was pursued and during his flight, he dropped the knapsack, which was retrieved by the pursuers and found to contain pill bottles taken from the pharmacy. Clothing identified as Mr. Flynn's using DNA evidence was in the knapsack. There is no evidence that Mr. Flynn had lent his knapsack or that his clothes were in another person's knapsack.

[8] The taxi driver testified to driving a man dressed all in black to the area of Healy's Pharmacy where the second robbery took place. Mr. Flynn does not challenge the trial judge's conclusion that these two robberies were committed by the same person.

[9] The police officer responding to the call regarding the first robbery saw a person dressed all in black running in the area. What makes this remarkable is that he was wearing heavy black clothing, including a hoodie, on a hot day in July. The officer followed the person and saw him run behind a house where the officer retrieved pharmacy stock bottles similar to those used at Healy's Pharmacy and on which Mr. Flynn's DNA was discovered. The pharmacist at Healy's Pharmacy testified that stock bottles are not issued to customers, raising the question of how Mr. Flynn's DNA was found on the bottles.

[10] Because Mr. Flynn concedes that the two robberies committed in July 2014 were committed by the same person, the trail of evidence described above, beginning with the knapsack, leads inexorably to the conclusion that Mr. Flynn

committed the robberies. Mr. Flynn's guilt beyond a reasonable doubt was the only reasonable inference to be drawn from the proven facts.

[11] There is no basis on which to conclude that the trial judge erred in entering convictions for the offences committed in July 2014. The convictions for the robbery and related offences committed in July 2016 were not appealed.

The Sentence Appeal

[12] In his sentencing decision, the trial judge considered Mr. Flynn's lengthy criminal record with forty-seven convictions for theft, two previous robbery convictions, thirteen break and enter convictions, convictions for assault and thirty-one breaches of probation. At the time of the convictions, Mr. Flynn was thirty-nine years old. He has struggled with addictions which "fueled these latest offences" (sentencing decision, at paragraph 12).

[13] Regarding the positions of the parties, the judge summarized:

> [13] Counsel for the Crown has asked for a 12 year sentence. She has pointed to Mr. Flynn's lengthy criminal record, the seriousness of the offences, the violence involved and the fact that two of the offences involved attacks on pharmacies and has asked that there be a sentence imposed to protect the public and to deter Mr. Flynn.
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> …
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> [15] Counsel for the accused has acknowledged that given the accused's previous record – and the seriousness of the offences – that a jail sentence must be imposed. She has argued that the sentence should be less than sought by counsel for the Crown. She points out that the accused has several challenges and has suffered from a serious addiction for many years. She submits that an appropriate sentence would be 7 years.

[14] Regarding Mr. Flynn's addiction problems, the trial judge concluded:

> [26] In this case, the accused has been unable or unwilling to address his problems with addiction and has a lengthy history of offending as a result. In the circumstances, the issues he has with mental health and addictions, have to be of secondary importance to the need to protect the public.

[15] In the result, the trial judge concluded:

> [27] [Mr. Flynn] does not have the benefit of guilty pleas in relation to the first two robberies in July of 2014 – he does have the benefit of a guilty plea in relation to the July 2016 offences. He is not a young offender and has a lengthy criminal record.

> The offences are very serious and in the third robbery the accused used a significant amount of violence, stabbing Mr. Peddle in the course of robbing the store.
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> [28] I find that with respect to the first two robberies, a global sentence of five years is appropriate; each individual robbery would attract a term of five years but given the close proximity in time they will be concurrent to each other. With respect to the third robbery, a sentence of five years is appropriate, for a total global sentence of ten years.
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> [29] Given the overall length of the sentence, the terms of imprisonment for the other offences will be one year imprisonment for each of the indictable offences of possession of a weapon, assault, and wearing a mask and one month each for the breaches of probation made concurrent to the ten year term.

[16] Mr. Flynn concedes, and I accept, that the individual sentences imposed for each offence are within an acceptable range. However, he submits that the judge erred in his application of the principle of totality discussed in *R. v. Hutchings*, 2012 NLCA 2, 316 Nfld. & P.E.I.R. 211.

[17] Where, as here, there are multiple offences, the *Hutchings* analysis begins with "identifying a proper sentence for each offence, applying proper sentencing principles" (*Hutchings*, at paragraph 84(1.)). The trial judge did this.

[18] The second step in the *Hutchings* analysis, set out in paragraph 84, which was not addressed by the trial judge, is to consider whether any of the offences constitute a single criminal venture:

> 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.

[19] Characterization of offences as a single criminal venture, and the effect of that characterization, are discussed in *R. v. Martin*, 2018 NLCA 12:

> [25] I begin by cautioning that, when a judge assesses offences as a single criminal venture, concurrent sentences may, but are not required to be imposed. As discussed in *R. v. O'Quinn*, 2017 NLCA 10, at paragraphs 20 and 21, while sentences for a single criminal venture would generally be made concurrent, there are exceptions such as breaches of court orders, including probation orders, which ordinarily would result in a sentence consecutive to the related offence that constitutes the breach.
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> [26] Further, in order to be characterized as a single criminal venture, the offences must be connected or linked. Examples have been described as "a single rampage", "repetition of the same behaviour towards the same victim", "a crime spree" (*O'Quinn*, at paragraph 18). …

[20] The effect of imposing concurrent sentences is discussed in *R. v. O'Quinn*, 2017 NLCA 10, 345 C.C.C. (3d) 326. In summary:

> [20] … 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. …

[21] Finally, the use of masks and possession of a weapon are referenced in *R. v. Frampton*, 2018 NLCA 23:

> [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.)

[22] In this case, the trial judge referred to the close timeframe within which the first two robberies occurred, but did not address whether they should be characterized as a single criminal venture. The robberies were committed against similar victims, carried out in a similar manner within minutes of each other, seeking the same commodity. Applying the above law, the two 2014 robberies are properly characterized as a single criminal venture.

[23] The trial judge imposed sentences of five years in prison for each of the 2014 robberies to be served concurrently. In the circumstances, having characterized the 2014 robberies as a single criminal venture, I agree that imposing a concurrent sentence is appropriate. The total sentence imposed for the three robberies is, therefore, ten years.

[24] As to the offences of being masked and armed with a weapon, the trial judge did not consider their relationship to the robberies as discussed in *Frampton*, at paragraph 21, above. I would apply the general principle that these offences should be considered as separate offences and sentenced as such, with consideration being given to a potential adjustment when the totality analysis is conducted under the third step of the *Hutchings* analysis. Further, as set out in *Martin*, at paragraph 25, I would order the sentences for breaches of probation to be served consecutively.

[25] In the result, the total sentence for the first robbery would be seven years and one month - five years for the robbery plus one year for each of being

masked and possessing a weapon, and one month for breach of probation. The total sentence for the second robbery would be six years and one month – five years for the robbery, one year for being masked and one month for breach of probation. Following characterization of the two robberies as a single criminal venture, I would order the sentences for the second robbery and related offences to be served concurrently with the sentences for the first robbery.

[26] The total sentence for the 2016 robbery would be eight years and one month - five years for the robbery plus one year for each of being masked and possessing a weapon, one year for the assault, and one month for breach of probation.

[27] The total sentence for all the offences, before consideration of totality is fifteen years and two months. The next step in the analysis is to determine whether that sentence should be reduced because it is unduly long or harsh. Factors relevant to that question are discussed in *Hutchings*, 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:
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> (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;
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> (d) the impact of the combined sentence on the offender's prospects for rehabilitation, in the sense that it may be harsh or crushing;
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> (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.

[28] In this case, the trial judge, without explaining why and without undertaking the *Hutchings* analysis, was satisfied that a total sentence of ten years imprisonment was appropriate. The Crown had requested a twelve year term while Mr. Flynn's submission was for seven years.

[29] Applying the factors set out in *Hutchings*, I am satisfied that a sentence of fifteen years and two months is unduly long or harsh because, in the

circumstances, it is disproportionate to the gravity of the offences and Mr. Flynn's degree of responsibility. The most serious offence was the 2016 robbery when Mr. Flynn was masked, carried a weapon and stabbed Mr. Peddle. A total sentence of eight years for that event is at the high end of the range. Nonetheless, the gravity of the offences, particularly the involvement of a knife and Mr. Flynn's conduct in intimidating the victims, supports a lengthy sentence.

[30] The trial judge was concerned with the need to deter Mr. Flynn from further criminal activity, particularly in light of the escalation of violence by stabbing a victim during the 2016 robbery. Mr. Peddle could have been more seriously hurt or even killed. Protection of the public was a significant factor in the trial judge's sentencing decision.

[31] The judge was also concerned with sending a message that others who might consider robbing pharmacies for drugs and small stores for money while masked and carrying a weapon will face severe consequences. Mr. Flynn has a lengthy criminal record for theft, robbery and assault. As the trial judge noted, Mr. Flynn has not been able or willing to address his serious, long-term drug addiction. In the circumstances, at his age and with his history, Mr. Flynn's prospects for rehabilitation are not promising.

[32] That said, while the trial judge erred in his manner of applying the law in the case of multiple offences, I agree with his conclusion that a total sentence of ten years imprisonment is appropriate in the circumstances. That sentence takes account of and balances the relevant factors, including those referenced in *Hutchings*, resulting in a sentence that is proportionate to the gravity of the offences and Mr. Flynn's degree of responsibility.

[33] This brings me to the next step in the *Hutchings* analysis, discussed at paragraph 84:

> 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.

[34] In this case, I would order the sentence for the 2016 robbery to be served consecutively to the sentence for the first 2014 robbery. I would order the sentences for all the remaining convictions to be served concurrently to the

sentences for the first 2014 robbery and the 2016 robbery, for a total of ten years imprisonment.

[35] In the result, while I reach the same conclusion as the trial judge, I am satisfied that the judge erred when he failed to apply the correct analysis in considering the principle of totality.

SUMMARY AND DISPOSITION

[36] In summary, the trial judge did not err in convicting Mr. Flynn of the offences discussed above. While he erred in failing to apply the analytical approach set out in *Hutchings*, I agree that the total sentence of ten years imposed by the judge is appropriate given the seriousness of the offences and Mr. Flynn's degree of responsibility, considered in the context of all the relevant factors, including those discussed in *Hutchings*.

[37] Accordingly, I would dismiss the appeal against the convictions and the sentence.

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B. G. Welsh J.A.

In concur: _____

D. E. Fry C.J.N.L.

In concur: _____

C. W. White J.A.