

Date: 20150415
Docket: 15/18
Citation: *R. v. Terry*, 2015 NLCA 23

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

BETWEEN:

ROBERT TERRY

APPELLANT

AND:

HER MAJESTY THE QUEEN

RESPONDENT

Coram: Welsh, Rowe and White JJ.A.

Court Appealed From: Provincial Court of Newfoundland and Labrador
Grand Falls-Windsor

Appeal Heard: April 15, 2015

Decision Rendered: April 15, 2015

Reasons for Oral Decision Filed: May 4, 2015

Reasons for Decision by Rowe J.A.

Concurred in by Welsh and White JJ.A.

Counsel for the Appellant: Derek J. Hogan

Counsel for the Respondent: Lloyd M. Strickland

REASONS FOR ORAL DECISION

Rowe J.A.:

[1] The appellant, Robert Terry, appealed his sentence of nine months each for two counts of break and enter, two months for possession of house breaking instruments, three months for possession of stolen property and three months for breach of probation, the sentences to be served concurrently. (A sentence of one month consecutive for failing to attend was not appealed.) The appeal required leave. This was granted. The appeal was allowed and the sentence varied as set out below. The decision was given orally, with reasons to follow. These are those reasons.

[2] Mr. Terry submitted that the sentencing judge erred in law in failing to give effect to the principle of parity. Mr. Terry and Coady Legge together broke into two cabins. Mr. Legge was given a two month conditional sentence for each break-in to be served consecutively, while Mr. Terry (as noted above) was given nine months for each break-in, the sentences to be served concurrently. In simple terms, while Mr. Terry received nine months imprisonment for the two break-ins, Mr. Legge received only a four month conditional sentence.

[3] Concerning Mr. Legge's sentence, I would note that it was the subject of a joint submission by Crown and Defence counsel, which case law indicates is to be accepted by the judge unless a sufficient rationale to do otherwise is stated. One should exercise caution in considering the precedential value of a sentence imposed as a result of a joint submission. On occasion, such sentences are the result of a "*quid pro quo*" in which the Crown agrees to a lower sentence in return for a guilty plea in a difficult case. On other occasions, there is no such *quid pro quo* underlying the joint submission; rather, Crown and Defence counsel come to a common view as to a fit sentence. See *R. v. Johnston*, 2011 NLCA 56, 311 Nfld. & P.E.I.R. 129, at para. 58; *R. v. Kane*, 2012 NLCA 53, 325 Nfld. & P.E.I.R. 78, at paras. 27-29.

[4] Further, I would reiterate the need for judges dealing with multiple offences to assign a sentence to each offence. This assists the courts by providing useful precedents and, in the case of an appeal, provides a basis for assessing possible error. The sentence may, then, be adjusted for totality. (See *R. v. Hutchings*, 2012 NLCA 2, 316 Nfld. & P.E.I.R. 211, at para. 84.)

[5] The correct analysis was not done by the judge in Mr. Legge's case; rather, he accepted a joint submission as to an overall sentence and applied sentences to various counts so as to total the overall sentence. As a result, the sentences imposed on Mr. Legge are of little, if any, precedential value. Nonetheless, the principle of parity was engaged.

[6] The principle of parity is set out in s. 718.2(b) of the *Criminal Code*:

[A] sentence should be similar to sentences imposed on similar offenders for similar offences committed in similar circumstances...

This is a fundamental principle of sentencing. See *R. v. Kane*, para. 25.

[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.

[8] The trial judge by failing to give effect to the principle of parity erred in law. The sentence he imposed on Mr. Terry was, therefore, varied.

[9] Mr. Terry is a young man with a relatively minor criminal record and good prospects for rehabilitation. He confessed to the offences and gave statements to the police that could have been used in the prosecution of Mr. Legge (who subsequently pleaded guilty); these are mitigating factors. Circumstances are such that he was not seeking a conditional sentence.

[10] Having regard to the principle of parity as regards the two break and enter convictions and, overall, emphasizing the goal of rehabilitation, Mr. Terry's sentence was varied to be:

- (1) break and enter #1: two months
- (2) break and enter #2: two months (consecutive)
- (3) possession of house-breaking instruments: 15 days (concurrent)
- (4) possession of stolen property: 15 days (consecutive)

(5) breach of probation: 15 days (consecutive).

[11] While there were multiple offences, having regard to the test in *R. v. Hutchings, supra*, no adjustment for totality was warranted.

[12] Given that the two month sentence for break and enter has its root in a joint submission relating to the sentence imposed on the co-offender (Mr. Legge), this penalty should not be taken as a sentencing precedent for break and enter.

[13] By way of further explanation, I would note that the possession of house-break instruments was part of the same criminal enterprise as the break-ins and, thus, the sentence for this offence was made concurrent. By contrast, the stolen property in Mr. Terry's possession was from a separate incident, giving rise to a consecutive sentence. Again, this sentence should not serve as a precedent. Regarding breach of probation, it is settled jurisprudence of this Court that the sentence for such an offence is made consecutive to any offence giving rise to the breach.

[14] Accordingly, Mr. Terry's sentence was varied as set out above.

M. H. Rowe J.A.

I Concur: _____

B. G. Welsh J.A.

I Concur: _____

C. W. White J.A.