NOVA SCOTIA COURT OF APPEAL
Citation: *R. v. Tamoikin*, 2020 NSCA 43

Date: 20200604
Docket: CAC 482842
Registry: Halifax

Between:

Arthur Tamoikin

Appellant

v.

Her Majesty the Queen

Respondent

Judge: The Honourable Justice Van den Eynden

Appeal Heard: December 4, 2019, in Halifax, Nova Scotia

Subject: Youth record; access period; home invasion; sentencing; totality principle;

Summary: The offender was convicted of several serious offences related to a violent home invasion robbery. The judge imposed an eight-year prison sentence. Although the home invasion robbery that is the subject of this appeal occurred first-in-time, prior to sentencing for these offences the offender pleaded guilty and was sentenced for a second home invasion robbery for which he received a five-and-a-half year prison sentence.

The judge treated the offender as a first-time offender because the home invasion offences before him happened first-in-time. He declined to apply the principle of totality to the remainder of the five-and-a-half-year sentence. The offender says the judge erred in doing so and failed to properly consider his youthful age as a mitigating circumstance. The offender was 18 years old at the time of both home invasions. The offender argues that the judge's errors led to an unduly harsh sentence and seeks relief from the victim fine surcharges imposed by the

judge. The Crown agrees the surcharges should be set aside.

The Crown made a motion to introduce fresh evidence comprised of the offender's youth record, which was not introduced in the court below. The judge was not aware of the offender's lengthy youth record which was available for consideration as the access period was ongoing at the time of offences. The offender opposed the admission of the fresh evidence, arguing that the due diligence criterion should be strictly applied.

Issues:

(1) Should leave to appeal be granted?
(2) Should the fresh evidence by admitted?
(3) Did the judge err in his application of the totality principle?
(4) Did the judge fail to properly consider the offender's age?
(5) Should the victim fine surcharges be set aside?

Result:

Leave to appeal is granted. The fresh evidence is admitted. The sentencing judge erred in principle in his application of the totality principle. Where consecutive sentences are imposed, consideration of the totality principle is mandatory. However, consideration of the totality principle does not equate to an automatic reduction in sentence. Given the circumstances of this offence and this offender, considering the fresh evidence and applying the totality principle, the sentence is not unduly harsh or long. The judge appreciated and considered the offender's age at the time of the offence. The factor of youth diminishes in significance as the severity and violence of an offence increases. Appeal allowed in part by setting aside the victim surcharges. The sentence imposed of eight years' imprisonment consecutive to the existing sentence is undisturbed.

This information sheet does not form part of the court's judgment. Quotes must be from the judgment, not this cover sheet. The full court judgment consists of 25 pages.

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Judges:	Beveridge, Saunders and Van den Eynden, JJ.A.
Appeal Heard:	December 4, 2019, in Halifax, Nova Scotia
Held:	Leave granted, motion to adduce fresh evidence granted and appeal allowed in part, per reasons for judgment of Van den Eynden, J.A.; Beveridge and Saunders JJ.A. concurring
Counsel:	Lee Seshagiri, for the appellant Mark Heerema, for the respondent

Reasons for judgment:

Overview

[1] Mr. Tamoikin seeks leave to appeal his sentence. If granted, he asks this Court to reduce his sentence, claiming the judge made errors in principle.

[2] The Honourable Judge Daniel MacRury found Mr. Tamoikin guilty of several serious offences related to a violent home invasion robbery that occurred in February 2016. The circumstances of this invasion were brutal. The judge imposed an eight-year federal penitentiary sentence.

[3] However, by the time Mr. Tamoikin was sentenced for the February 2016 offences that form the subject of this appeal, he had pled guilty and been sentenced to a five-and-a-half-year federal penitentiary term (less remand time) for a second home invasion, which occurred in October 2016.

[4] MacRury, Prov. Ct. J. treated Mr. Tamoikin as a first-time offender because the home invasion offences before him happened first-in-time. He declined to apply the principle of totality to the remnant of the five-and-a-half-year sentence. Mr. Tamoikin said the judge erred in doing so and failed to properly consider his youthful age as a mitigating circumstance. At the time of both home invasions, Mr. Tamoikin was 18 years old which meant he was charged and sentenced as an adult. He says these errors led to an unduly harsh sentence—13.5 years for both offences. He also seeks relief from the $1,000 victim fine surcharge the judge imposed.

[5] The Crown agrees the surcharge should be set aside. As to the sentence, the Crown contends it is fit and proper and any missteps by the judge were immaterial. The Crown also made a motion to introduce fresh evidence. In the court below, the judge was not provided with Mr. Tamoikin's lengthy prior (youth) record. He was only aware of the second home invasion offence which he did not consider for the purposes of sentencing. The Crown acknowledges its lack of due diligence to provide the judge with this information; however, it now seeks to tender the accurate criminal record to defend the fitness of the challenged sentence.

[6] Mr. Tamoikin conceded the fresh evidence was reliable, cogent and could have impacted the sentence result below. However, he opposes its admission, asking this Court to strictly apply the due diligence criterion.

[7] I would grant leave, admit the fresh evidence and allow the appeal in part by setting aside the imposed victim surcharges. I would not otherwise disturb the sentence.

[8] My reasons follow. First, I set out the background, issues and the standard of review applied to the complaints of error.

Background

Circumstances of the offence

[9] On February 25, 2016, the victim was alone in the home he shared with his mother. He was lying in his bed with his pajamas on. He received a text message from a friend asking him if he was home. He replied that he was. Minutes later, Mr. Tamoikin and a male accomplice walked into the victim's room. They were gloved, armed and masked.

[10] At first, the victim thought it was a joke. He started to laugh and began to list the names of people he thought they could be. One of the masked intruders, armed with a gun and a knife, pointed the gun at the victim's head and told him it wasn't a joke.

[11] The victim was then repeatedly beaten over the head with the gun. The gun was later determined to be an imitation handgun, but the victim did not know that at the time. After this beating, the intruder with the gun went downstairs while the other intruder stayed in the victim's room to search the closet.

[12] The victim grabbed a hammer off his dresser and swung it at the intruder in the closet. Things then got worse for the victim. The other male intruder returned to the bedroom and pushed the victim up against the wall. The victim's orbital bone was broken by punches to his face. The victim was choked in a headlock, kicked and beaten by both assailants. He was then tied up with rope and tape and thrown into his closet. At some point, the victim cut his hand on a knife that was being held to his throat. He also described being poked twice with a knife in the back of his femur.

[13] During his testimony at trial, the victim described the assault this way:

> I was taken out by Male A when he came back in the room. He pushed me up against the wall. That's when my orbital bone broke. Everything went blurry. And then from there I was dizzy, got tossed around the room, was thrown to the

> ground, he came up from behind me and tried to choke me out. And from there I pretended to be knocked out. They let off instantly. Male A got up, with Male B, and they started, just kicked me in the face and beat me, just making sure I was knocked out. I wasn't. They put me back up on the bed, and that's when they tied me and put me in the closet, and that's when I heard them leave.

[14] Mr. Tamoikin and his accomplice then fled from the victim's home with stolen items in hand—100 grams of marijuana, $50.00, a gold watch, a few gold chains, a safe, a TV, an Xbox, a PS3, and an iPad. Police later recovered this stolen property from Mr. Tamoikin's home.

[15] The victim cut himself free and made his way to a neighbour's home to seek help. His neighbour observed him staggering down her driveway, covered in blood. She opened the door and he asked her to call 911. On arrival, the responding police officer said the victim was "crying, bleeding and vomiting a little" and looked "visibly beaten, quite upset and distraught."

[16] The victim required surgery. These details were set out to the judge in an Agreed Statement of Facts:

> - [The victim] presented with several fractures to the bones of his face: to wit, the left cheekbone, the bones of the left and right lower eye sockets, and the left nasal bones, which were impacted and displaced.
> - The muscle behind [the victim's] left eye was herniated.
> - [The victim] required plastic surgery […] to reconstruct the lower left eye socket. A portion of the bone of the eye socket was fractured into [the victim's] maxillary sinus and was not retrieved. Herniated tissue was removed. A permanent 2 x 3.5 cm polyethylene implant was placed onto the left eye socket to reconstruct the fractured bone.
> - [The victim] required surgery […] to disimpact and realign the left nasal bones.

[17] The victim suffered additional physical injuries such as cuts, stab wounds, and chipped teeth. He also experienced severe anxiety and post-traumatic stress disorder as a result of this home invasion.

The ensuing charges and trial

[18] Eight charges under the *Criminal Code*, R.S.C. 1985, c. C-46 were laid against Mr. Tamoikin and the co-accused: breaking and entering with intent (s. 348(1)(b)); robbery (s. 344); aggravated assault (s. 268(1)); assault with a

weapon (s. 267(a)); overcoming resistance to commission of offence (choking) (s. 246(a)); forcible confinement (s. 279(2)); pointing a firearm (s. 87(1)); and, possession of a weapon for a dangerous purpose (s. 88(1)).

[19] Judge MacRury conducted the trial. The only issue was identity. On June 14, 2018, the judge acquitted the co-accused, but convicted Mr. Tamoikin on all counts. The judge was satisfied beyond any reasonable doubt that Mr. Tamoikin was one of the intruders. Mr. Tamoikin did not appeal his conviction.

The second home invasion

[20] In October 2016, about eight months later, Mr. Tamoikin committed a second home invasion. He pled guilty to the following four *Criminal Code* charges:

- Robbery (s. 344);
- Break and enter and commit an indictable offence (s. 348(1)(b));
- Possession of a prohibited or restricted firearm with ammunition (s. 95(1)); and,
- Possession of a firearm while prohibited (s. 117.01(1)).

[21] On July 24, 2018, the Honourable Judge Michael Sherar sentenced Mr. Tamoikin to a period of five-and-a-half years' incarceration. Allowing for remand credit, this resulted in a remaining sentence of 33 months.

[22] The same defence counsel represented Mr. Tamoikin in both of the home invasion proceedings in Provincial Court.

[23] In the record before us, not much is known about the circumstances of the second home invasion beyond defence counsel commenting that it is "a very similar offence" to the first home invasion. The fresh evidence affidavit confirms the Crown did not rely on the facts and convictions relating to first home invasion during sentencing for the second.

[24] I return to the sentencing for the first home invasion, which is the subject of this appeal.

Pre-Sentence Report and sentencing for the matter under appeal

[25] The judge ordered a Pre-Sentence Report (PSR). At the time the report was prepared, Mr. Tamoikin was twenty years old. He committed both home invasions when he was 18 years old. The PSR provided the following details:

- Mr. Tamoikin was raised by his mother and reported a close relationship with her. He has minimal contact with his father. He described his formative years growing up as "okay" but chose to live independently at the age of 14.
- He reported completing Grade 10 in 2014 and averaged decent marks. He was suspended several times and quit school in Grade 11. He has not pursued further education, but says he wants to. He has not had any employment since the summer of 2016.
- He admitted to occasional alcohol and marijuana use (he started using these substances when he was fourteen) and to having a temper. There was reported history of depression and ADHD.
- His mother reported her son was smart and did not present with behavioural problems until he was around the age of fourteen. She was not shocked when she heard of his convictions.

[26] Initially, oral sentencing submissions were presented to the judge. The Crown asked for a sentence of eight to ten years to give effect to denunciation, deterrence, and protection of the public. The Crown argued the sentence for the first-in-time home invasion offences should run consecutively to the latter offences because the two home invasions were unrelated. The Crown argued that if the judge were concerned that the aggregate sentence (totality) would be excessive, then eight years would be appropriate. The Crown acknowledged Mr. Tamoikin was young, but asserted this factor must play a reduced role in cases involving extreme violence. No remand credit was available as it had been used up in the prior sentencing.

[27] Defence counsel acknowledged there were some significant aggravating circumstances, but argued Mr. Tamoikin's young age and the fact that he had no prior adult criminal record were relevant factors that should not be minimized. Defence counsel also argued that rehabilitation is an important factor. He sought a six-year sentence. As to the principle of totality, Mr. Tamoikin argued it should

apply to the prior sentence of five-and-a-half years (imposed for the subsequent home invasion) to negate any crush of the total sentence.

[28] The judge reserved. During a subsequent appearance, he asked counsel for further submissions on sentence. He said:

> [...] I needed more information. In [...] oral arguments, I listened to both of them intently but I want further written arguments on two issues. One, I'm dealing with a youthful offender of only 20 years old and how I should handle that in terms of the quantum of how much time would be a fit and appropriate sentence. The other issue is the issue of totality and the other offence. And, basically, given that that is an important issue, I want written arguments in relation to how the Court should treat the issue of totality in dealing with Mr. Tamoikin.

[29] Both Crown and defence counsel filed written submissions.

[30] In its additional written submissions, the Crown reaffirmed its position that a sentence in the range of eight to ten years' imprisonment was consistent with the purposes and principles of sentencing. The Crown again acknowledged Mr. Tamoikin's relative youth and that, for the purposes of these proceedings, he had no prior criminal record. The Crown nonetheless contended these mitigating factors should receive limited weight due to the need to emphasize denunciation, deterrence and the protection of the public. As to aggravating factors, the Crown noted this was a statutorily defined home invasion pursuant to s. 348.1 of the *Criminal Code*. The Crown noted the violence of the offence as follows:

> - The victim […] was not only beaten but tied up and left in a closet, bleeding. Confinement is not an element of every home invasion case, and this feature should be considered when comparing the present case with the sentencing case law.
> - The perpetrators brandished a pellet gun which looks very much like a real gun; [the victim] did not know it was not a real gun.
> - Given that the perpetrators wore masks and brought a weapon with them, it's clear that these offences were pre-meditated. Further, the court has heard evidence that Arthur Tamoikin knew [the victim]; knew that [the victim] sold marijuana; and he had been to the residence before—confirming an element of planning and forethought.
> - The perpetrators took steps to avoid detection by concealing their faces.
> - […] the victim, was in a vulnerable position: in his bed, having just woken up after working a night shift.

- S. 718.2(iii.1) requires the court to consider as aggravating "evidence that the offence had a significant impact on the victim, considering their age and other personal circumstances, including their health and financial situation." The court has heard evidence concerning the injuries to [the victim], seen photos of those injuries; and heard about the medical treatment he required during his week and half in hospital. [The victim] further testified that, since these offences, he has suffered anxiety and PTSD.
- The offender was in the community awaiting trial on an officer-in-charge Undertaking for a number of serious and similar offences.

[31] The Crown repeated its recommendation of a total overall sentence of eight to ten years' incarceration, broken down as follows (counts 4, 5, and 7 were stayed under the *Kienapple* principle ([1975] 1 S.C.R. 729)):

1. s. 348(1)(b) break and enter – maximum life – seeking eight to ten years consecutive to the sentence currently being served;
2. s. 344 robbery – maximum life – seeking four years concurrent;
3. s. 268(1) aggravated assault – maximum fourteen years – seeking four years concurrent;
4. s. 267(a) assault with a weapon – maximum ten years – stayed;
5. s. 246(a) choke, suffocate, or strangle with intent to commit an offence – maximum life – stayed;
6. s. 279(2) unlawful confinement – maximum ten years – seeking four years concurrent;
7. s. 87(1) pointing a firearm – maximum five years – stayed; and,
8. s. 88(1) possession of a weapon for a dangerous purpose – maximum ten years – seeking four years concurrent.

[32] As to totality, the Crown pointed to authorities that questioned its applicability in this case, noting:

> Mr. Tamoikin is not being sentenced for both home invasions at once. If he were, then the totality principle would be explicitly at play, and the sentencing judge would have discretion to adjust the sentence for each set of charges accordingly. But the October 2016 home invasion is a separate offence for which a separate sentence has already been imposed. No adjustment can be made to that sentence. What role should totality play in this instance, if any?
>
> […]

> As such the Crown's position is as follows. If Mr. Tamoikin's July sentence [5.5 years for second home invasion offences] plays any role in this court's consideration of totality, it should be limited to the recognition that Mr. Tamoikin currently has approximately 30 months left to serve of that sentence. The question becomes whether a sentence of 8-10 years is "just and appropriate" having consideration to the unexpired potion [*sic*] of his current sentence.

[33] Counsel for Mr. Tamoikin subsequently filed his brief. He revised his sentencing recommendation from six years to a range of between three to four years' incarceration.

[34] Defence counsel reiterated the factors of age and the absence of a prior record as mitigating and relevant to determining a fit and proper sentence. Defence counsel argued that a sentence in the eight-to-ten-year range would ignore the age factor. Defence counsel also argued the principle of totality should apply even where the subject offences were not part of the same transaction. There was no contest that serious aggravating factors were present.

[35] In addition to these supplemental written submissions, counsel appeared before the judge one last time to finalize sentencing arguments. Counsel reviewed their respective positions and the authorities they relied upon. The application of the totality principle was clearly in issue. Defence counsel explained to the judge how the requested six years' incarceration had now changed to three-to-four:

> **THE COURT:** I do want to ask one specific point because there seems to be a distinction between your original oral argument and your written argument. And I just wanted to get clarification. In your written ... in your oral argument originally, you were looking at ... or you said the range was appropriately around six years. In your written argument now you're saying three years. Now that may be because you're focussing more on the totality and the age. I just wanted you to clarify that for me. That's all.
>
> **DEFENCE COUNSEL:** Yes, Your Honour. I simply reviewed cases with the focus on young age of Mr. ... of the offender.
>
> **THE COURT:** Okay. Okay. And I'll ...
>
> **DEFENCE COUNSEL:** And that's why I suggest that, yes, normally the proper range would be around six years. However, in the circumstances ... in the current circumstances, I submit that the Court should give significant weight to his age.
>
> **THE COURT:** Yes.
>
> **DEFENCE COUNSEL:** In terms of principle of totality, I do agree with my friend that technically these two incidents were not part of the same transaction; however, as I indicated in my written brief, the Court still has discretion to

> consider the principle of totality even when two crimes are not part of the same transaction. So subject to Your Honour's questions, those are my submissions.

[36] As noted, Mr. Tamoikin was 20 years old at the time he was sentenced and 18 years old when he committed the offences. There is dispute as to whether the judge did and/or should have considered Mr. Tamoikin's age at the time of the offence versus sentencing.

[37] Next, I turn to summarize the judge's unreported sentencing decision, delivered orally on November 14, 2018.

The judge's sentencing decision

[38] The judge started out by reviewing the sentencing principles in ss. 718, 718.1 and 718.2 of the *Criminal Code*, and then moved on to summarize the mitigating and aggravating factors he considered. He said:

> In this case, the mitigating factors I have to consider is that Mr. Tamoikin is 20 years of age. He had no prior record prior to this incident. He was convicted of a number of offences in July 24, 2018, but that was after this and, therefore, he's a young first-time offender and I have to take that into account.
>
> In relation to aggravating features, this was a home invasion, statutorily defined [s. 348.1]. The accused knew that it was reckless as to whether there was someone in the dwelling house at the time of the break and enter. Violence was used on [the victim]. The victim [...] was not only beaten but tied up and left in a closet, bleeding.
>
> The perpetrator in this case, used a pellet gun. Obviously, the victim did not know that it was not a real gun. The accused also wore masks and brought a weapon with them. And it's clear from the nature of this offence that it was a premeditated act.
>
> The Nova Scotia Court of Appeal has repeatedly and consistently emphasized that crimes of violence, particularly home invasions, will require significant custodial sentences. In Nova Scotia, as in other jurisdictions, the range of sentence imposed for break and enters and committing indictable offences in the context of home invasions is broad. In Nova Scotia, they range from suspended sentence or probation to significant several years' incarceration depending on the mitigating and aggravating features.
>
> I am mindful that premeditated, well-planned, and executed home invasions where violence is inflicted usually carries significant periods of federal incarceration. Indeed, it's argued that the Parliament's concern about the nature and gravity of these offences being committed in communities across the country

> was the impetus for the amendment of the *Criminal Code* enacted in 348(1) of the *Criminal Code*.

[39] The judge canvassed relevant case authorities respecting the range of sentences and concluded:

> […] [I]n Nova Scotia, as in other jurisdictions, [the] range of sentencing for home invasion is very broad. In my view, this case is similar to cases of *Harris* [*R. v. Harris*, 2000 NSCA 7], *Foster* [*R. v. Foster*, 1997 N.S.J. No. 392 (C.A.)], *Matwik* (*sic*)[*R. v. Matwiy*, 1996 ABCA 63], and *Doyle* [*R. v. Doyle*, 2008 NSSC 380] in that there was premeditation in planning and there was also extreme violence.
>
> This is a very troubling case. We have Mr. Tamoikin who, before this incident, had no criminal record. It comes before the Court in a very violent, premeditated home invasion. The victim was beaten, the victim was tied up, and the victim required major surgery and still suffers post-traumatic results of the injuries that he received.
>
> While Mr. Tamoikin is of young age and had no prior record, the major factor that I have to consider is denunciation and deterrence. Having considered the principles of sentencing as outlined, the submissions of counsel, the presentence report, the comments of the victim during the trial, it is my view that this offence calls for a substantial federal sentence in a federal institution to send a message to Mr. Tamoikin and to anyone else that if you invade the private residence and commit this kind of violence, that there are going to be severe consequences.
>
> Having taken into account the ranges of sentencing and Mr. Tamoikin's age, and this was his first offence, my view is is that a fit and proper sentence is eight years in a federal institution consecutive to any time he's already serving**. I don't believe totality comes into it in relation to the other offence because it happened after this offence and clearly was not related to this offence.**
>
> [Emphasis added]

[40] The judge proceeded to impose a sentence of eight years under s. 348, to be served consecutively to any unexpired portion of the existing sentence for the second home invasion; eight years concurrent under s. 344; eight years concurrent under s. 268; eight years concurrent under s. 279(2); and, four years concurrent under s. 88(1). The judge also made several ancillary orders (DNA, weapons prohibition, forfeiture of a weapon and no contact). These orders are not in issue. However, as noted, Mr. Tamoikin appeals the victim fine surcharges.

Issues

1. Should leave to appeal be granted?
2. Should the fresh evidence be admitted?
3. Did the judge err in his application of the totality principle?
4. Did the judge fail to properly consider the offender's age?
5. Should the victim fine surcharges be set aside?

Standard of Review

[41] I will set out the test for leave and accepting fresh evidence when I address those issues. As to an appeal against sentence, the standard of review is deferential.

[42] Sentencing is a highly individualized exercise; many factors must be weighed and balanced. This Court may only intervene where a sentencing decision discloses an error in principle, the failure to consider a relevant factor, or the erroneous consideration of aggravating or mitigating factors and the error in question had a bearing on the sentence. I refer to *R. v. Lacasse*, 2015 SCC 64:

> [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. If the rule were that strict, its application could undermine the discretion conferred on sentencing judges. It is therefore necessary to avoid a situation in which [TRANSLATION] "the term 'error in principle' is trivialized": *R. v. Lévesque-Chaput*, 2010 QCCA 640, at para. 31 (CanLII).
>
> [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]

Analysis

Should leave to appeal be granted?

[43] In *R. v. DeYoung*, 2017 NSCA 13, this Court set out the test for leave to appeal from sentence as follows:

> [31] In Nova Scotia the test for leave requires that the grounds of appeal raise "arguable issues" or are "not frivolous" (See *R. v. Johnston*, 2014 NSCA 78 and authorities cited therein).

[44] I am satisfied the issues raised on appeal meet that threshold and leave should be granted.

Should the fresh evidence be admitted?

[45] In his appeal factum, Mr. Tamoikin said he had no criminal record prior to these home invasion offences and never faced incarceration.

[46] If accepted, the fresh evidence confirms that is not the case. The Crown summed up the significance of the evidence this way:

> - On the one hand, we have a picture of the Appellant as painted in his factum. […]
> - On the other hand, we have a picture of the Appellant as painted by his criminal record: A youthful adult who for the 3 years prior to this home invasion robbery engaged in consistent, significant and persistent criminal offending. He frequently carried or possessed unlawful weapons. He was involved in the drug trade. He uttered threats. He resisted arrest. He consistently failed to follow court orders. He made "forcible entry" into real property. Moreover, despite being incarcerated as a young person – an increasingly rare phenomenon – he has continued to offend as an adult.

[47] The form of the fresh evidence is an affidavit deposed by counsel for the respondent Crown. Appended to it is a complete copy of Mr. Tamoikin's criminal record. It sets forth a long list of prior youth convictions.

[48] In his affidavit, Crown counsel explains that in preparing for this appeal he discovered the appeal record did not accurately reflect Mr. Tamoikin's criminal record. Details respecting Mr. Tamoikin's criminal record were appended to his PSR in the court below, but were incomplete. It appears that Crown counsel in the court below did not know the record was incomplete.

[49] The PSR and appended record only contained information about the second home invasion offence. As noted, Mr. Tamoikin had pled guilty and was sentenced for that offence before he was sentenced on this matter. Given the chronology of the proceedings, and at the request of counsel, Judge MacRury expressly said he would not consider the offences related to the second home invasion. To the judge, it would have appeared as though Mr. Tamoikin had no criminal record and as a

result he treated Mr. Tamoikin as a first-time offender when, in fact, he had a lengthy youth criminal record.

[50] Youth records do not remain available forever, but they do remain "open" for a period of time after an offence has been committed—this period of time is called the "access period". After that period is over, youth records are sealed and/or destroyed. However, if an individual commits an offence as an adult while his or her youth record is still open s. 119(9) of the *Youth Criminal Justice Act* (*YCJA*) provides:

> **(9)** If, during the period of access to a record under any of paragraphs (2)(g) to (j), the young person is convicted of an offence committed when he or she is an adult,
>
> > **(a)** section 82 (effect of absolute discharge or termination of youth sentence) does not apply to the young person in respect of the offence for which the record is kept under sections 114 to 116;
> >
> > **(b)** this Part no longer applies to the record and the record shall be dealt with as a record of an adult; and
> >
> > **(c)** for the purposes of the *Criminal Records Act*, the finding of guilt in respect of the offence for which the record is kept is deemed to be a conviction.

[51] This means that if the access period has not ended (as was the case here) at the time a new offence is committed by a now-adult offender, a youth finding of guilt may be considered when sentencing that person as an adult.

[52] As noted, Mr. Tamoikin's appeal factum incorrectly stated he had no prior record and never faced incarceration when he was sentenced for the second-in-time home invasion. There is no suggestion appellate counsel was aware of the correct information at the time the factum was filed. Rather, he too relied on the incomplete records attached to the PSR. Section 721(3)(b) of the *Criminal Code* requires PSRs, wherever possible, to contain all information related to previous convictions and sentences. The correct details only came to light when discovered by the Crown in the course of preparing its response to this appeal.

[53] The Crown's unchallenged affidavit in support of the fresh evidence motion establishes the following:

- Crown counsel in the court below (different than on appeal) did not independently verify the information referenced in Mr. Tamoikin's

PSR. In retrospect, had he known about the prior record he would have brought it to the attention of Judge MacRury.

- Some details of Mr. Tamoikin's prior record appear to have been known by defence counsel in the court below. Mr. Tamoikin was represented by the same defence counsel when he was sentenced for each home invasion and related offences. Mr. Tamoikin's youth criminal record was mentioned during the sentence hearing before Judge Sherar. However, there was no reference of these prior records during the sentencing hearing for the matter under appeal.
- Notwithstanding at least some knowledge of Mr. Tamoikin's prior record, defence counsel made representations to Judge MacRury about an absence of any prior record saying for the purposes of sentencing Mr. Tamoikin had no prior adult criminal record. Apart from the affidavit the record before us also confirms these representations.

[54] Crown counsel on appeal properly acknowledges the missteps of Crown counsel below in not verifying the particulars of Mr. Tamoikin's criminal record. Without detracting from this acknowledgement, Crown counsel argues that the insufficient record arose from a combination of factors: the inaccuracies in the PSR—which was relied upon by the Crown without verifying its contents—and to some extent the representations of trial defence counsel. Although the Crown concedes its lack of due diligence in the court below, it argues the fresh evidence of Mr. Tamoikin's complete criminal record is necessary for this Court to assess a just and appropriate sentence.

[55] Mr. Tamoikin does not dispute: (1) the accuracy of the fresh evidence; (2) that his full criminal record was not provided to the sentencing judge; and (3) that the variance in information is material. However, he says he should have the benefit of an insufficient record because of the lack of due diligence. I reject this submission and begin by explaining the principles that guide my determination.

[56] The criteria for admitting fresh evidence is well-known. It is commonly referred to as the "*Palmer*" test (*R. v. Palmer*, [1980] 1 S.C.R. 759). The test applies to sentence appeals and the overarching consideration is the interests of justice. As Gonthier, J. explained in *R. v. Lévesque*, 2000 SCC 47:

> [14] In *Palmer, supra*, this Court considered the discretion of a court of appeal to admit fresh evidence pursuant to s. 610 of the *Criminal Code*, the predecessor

of s. 683. After emphasizing that, in accordance with the wording of s. 610, the overriding consideration must be "the interests of justice", McIntyre J. set out the applicable principles, at p. 775:

> (1) The evidence should generally not be admitted if, by due diligence, it could have been adduced at trial provided that this general principle will not be applied as strictly in a criminal case as in civil cases: see *McMartin v. The Queen*.
>
> (2) The evidence must be relevant in the sense that it bears upon a decisive or potentially decisive issue in the trial.
>
> (3) The evidence must be credible in the sense that it is reasonably capable of belief, and
>
> (4) It must be such that if believed it could reasonably, when taken with the other evidence adduced at trial, be expected to have affected the result.

In *R. v. M. (P.S.)* (1992), 77 C.C.C. (3d) 402 (Ont. C.A.), at p. 410, Doherty J.A. wrote the following concerning these principles:

> The last three criteria are conditions precedent to the admission of evidence on appeal. Indeed, the second and third form part of the broader qualitative analysis required by the fourth consideration. **The first criterion, due diligence, is not a condition precedent to the admissibility of "fresh" evidence in criminal appeals, but is a factor to be considered in deciding whether the interests of justice warrant the admission of the evidence**: *McMartin v. The Queen, supra*, at pp. 148 50; *R. v. Palmer, supra*, at p. 205.

In my view this is a good description of the way in which in the principles set out in *Palmer* interact.

[Emphasis added]

[57] As recognized in *R. v. Manasseri*, 2016 ONCA 703, the proposed evidence must be in an admissible form and consideration is to be given to the explanation why it was not tendered in the court below. Watt, J.A., for the Court, explained:

> [203] The *Palmer* criteria may be expressed as three questions:
>
> 1) Is the evidence admissible under the operative rules of evidence? [*admissibility*]
>
> 2) Is the evidence sufficiently cogent in that it could reasonably be expected to have affected the verdict? [*cogency*]
>
> 3) What is the explanation offered for the failure to adduce the evidence at trial and should that explanation affect the admissibility of the evidence? [*due diligence*]

[58] The importance or cogency of proposed fresh evidence to an issue under appeal bears a direct relationship to how this Court is to assess the lack of due diligence (*R. v. Maciel*, 2007 ONCA 196 at paras. 42-45 and *Lévesque* at para. 15). Furthermore, it is not uncommon for appellate courts to admit an accurate criminal record on appeal and are generally more inclined to do so when it is the intention of the Crown to defend a sentence on appeal (the case here) rather than to increase a sentence (*R. v. Gullett*, 2011 BCCA 17 at para. 14; *R. v. Good* (1995), 66 BCAC 308). Moreover, if the nature of the evidence goes to the circumstances of the offender rather than the circumstances of the offence, appellate courts are generally more willing to admit the fresh evidence. In *R. v. Parr* (1992), 36 BCAC 198, the British Columbia Court of Appeal distinguished between fresh evidence going to the circumstances of the offence and fresh evidence pertaining to the circumstances of the offender. Lambert, J.A. explained:

> [15] In my opinion, the interests of justice are well served by having a very broad basis on which evidence about the circumstances of the offender will be accepted. If it is at all germane to understanding the character of the person whose sentence is being considered then, in my opinion, it should not be excluded. The justices hearing the appeal are entirely capable of giving appropriate weight to such material.

[59] See also: *R. v. Stjepanovic*, 2005 BCSC 1289; *R. v. Ghrairi* (1992), 16 W.C.B. (2d) 494 (Ont. C.A.) (“it would be absurd for the court to consider the fitness of sentence without knowing the full criminal record of the accused” (para. 2)); *R. v. Good* (1995), 66 BCAC 308 at para. 9; *R. v. Kunicki*, 2014 MBCA 22 at paras. 46-47.

[60] Here the proposed evidence is in admissible form, reliable and highly cogent to the assessment of a fit and proper sentence. The lack of due diligence of Crown counsel in the court below is but one factor to consider in deciding whether the interests of justice warrant the admission of the evidence.

[61] I find that rejecting the proposed fresh evidence in the context of this case would be contrary to the interests of justice. I say this because, in my view, the trial judge erred in principle when he refused to consider the principle of totality, and this error impacted the sentence imposed. This error requires this Court to determine afresh what is a fit and appropriate sentence. This requires us to have access to accurate and complete information about the circumstances of the offence and the offender. I would therefore admit the fresh evidence.

[62] Mr. Tamoikin argues the judge erred by failing to apply the principle of totality to the consecutive sentence he imposed and failing to properly consider Mr. Tamoikin's young age, resulting in a sentence that was manifestly unfair. I will deal with these complaints in turn.

Did the judge err in his application of the totality principle?

[63] The sentencing judge concluded the totality principle did not apply in relation to the second home invasion because it "happened after this offence and clearly was not related to this [the first home invasion] offence". The judge cited no authority for this conclusion.

[64] With respect, the learned judge erred in principle. Where consecutive sentences are imposed, consideration of the totality principle is mandated. Section 718.2(c) of the *Criminal Code* provides:

> **718.2** A court that imposes a sentence shall also take into consideration the following principles:
>
> **(c)** where consecutive sentences are imposed, the combined sentence should not be unduly long or harsh;

[65] The principle ensures the aggregate of consecutive sentences do not exceed the overall culpability of the offender. It is a means of maintaining the principle of proportionality (see *R. v. C.A.M.*, [1996] 1 S.C.R. 500 at para. 42).

[66] The Crown acknowledges the judge's error. It agrees the totality principle should have been applied when considering the unexpired portion of Mr. Tamoikin's sentence relating to the second home invasion. The Crown correctly points out:

> 53. [...] This scenario is different from the more traditionally recognized form of totality, where a singular Court is sentencing an offender for a multitude of offences. It has been concisely adopted and explained in *R. v. Johnson*, 2012 ONCA 339 at para. 19 (applied in *R. v. Learning*, 2019 BCCA 332; *R. v. Park*, 2016 MBCA 107; see also *R. v. Markie*, 2009 NSCA 119).
>
> 54. Importantly, it is only the unexpired portion of the unrelated sentence that should be considered in these circumstances.
>
> [*Johnson*, paras. 21 and 22; *Park*, para. 10]

[67] Mr. Tamoikin argues that had the totality principle been properly applied by the judge it should have resulted in an automatic reduction of his aggregate sentence. The Crown agrees totality applies to remnants of unexpired sentences and the judge was wrong not to have considered this. Nevertheless, the Crown's position is that the application of the principle would not have resulted in an automatic reduction of sentence in Mr. Tamoikin's case. The Crown argues that is so because: (1) as applied to remnants, totality has a tempered effect and often does not result in a downward reduction in sentence; and (2) totality is tied to overall culpability. Applied in this case, the Crown says Mr. Tamoikin's overall culpability is one of a repeat home invader—a fact that could not be acknowledged by either sentencing judge simply because of the chronology of proceedings.

[68] The Crown is correct; consideration of the totality principle does not equate to automatic reduction of the sentence (*R. v. W.(J.J.)*, 2012 NSCA 96 at para. 42).

[69] In *R. v. Johnson*, 2012 ONCA 339, the Ontario Court of Appeal explained that the totality principle has a tempered effect on a remnant sentence. This is grounded in the need to protect the public's confidence in the integrity of the sentencing process. In other words, the totality principle is not intended to reap benefits for additional crimes at discounted rates. Blair, J.A. explained:

> [22] At the same time, there is an additional level of concern that comes into play where a subsequent sentence is imposed on top of the remainder of an existing one, and, as a result, the totality principle has a somewhat tempered effect in such circumstances, in my view. The underlying rationale of the sentencing regime supports this notion, too.
>
> [23] The system must be seen to be fair and rational – both to the offender and the community – and its integrity must be preserved. Just as a sentence cannot be unduly harsh and excessive, neither can it be overly lenient or unresponsive to other purposes and principles that underpin the sentencing regime – denunciation, deterrence, the promotion of a sense of responsibility in offenders and acknowledgement of harm done to victims and the community, and the protection of the public: *Criminal Code*, s. 718. In this sense, an offender such as the appellant ought not to be seen to be reaping benefits from his previous serious criminal misconduct. As this Court observed in *Gorham*:
>
> > It was argued that, in its totality, the sentence was too severe and crushing. In our view the principle of totality must have a substantially reduced effect upon a sentence where a part of the total term is based upon a remanet. Neither one who is unlawfully at large nor one who is at liberty on mandatory supervision should be entitled to benefit from the remanet which must be served if a new offence is committed.

[70] To similar effect is *R. v. Park*, 2016 MBCA 107 where the court held:

> [14] However, I also agree with many of the comments in the cases dealing with this issue, that most of the time, this factor will not affect the "last look" significantly. As this Court noted in *Saran* (at para 16):
>
> > [I]n most instances that fact that the accused will first have to complete the unfinished portion of a previous sentence will be of little or no significance in the sentence that is imposed for the offence before the court.

[71] The challenge of evaluating the overall moral culpability of the offender adds to the complexity. Although a sentencing judge must consider the remnant of an unrelated sentence, the amount of information available regarding the circumstances and degree of the offender's responsibility may vary. The limits on such an assessment were canvassed by the Newfoundland Court of Appeal in *R. v. Barrett*, 2012 NLCA 46 at paras. 33-37.

[72] The Crown referred this Court to several cases in which the application of the totality principle to a remnant sentence resulted in no reduction. For example, see *R. v. Learning*, 2019 BCCA 332, paras. 19-32; *R. v. Hassan*, 2012 BCCA 201 at para. 20; *Park*, *supra*; *R. v. Reid*, 2002 CarswellOnt 5724 (C.J.) as aff'd by 2003 CarswellOnt 3168 (C.A.); *R. c. Colegrove*, 2017 QCCQ 8133 at paras. 36-37; and *R. v. Armstrong*, 2019 ONSC 4059.

[73] At the time the judge sentenced Mr. Tamoikin in this case, there were 30 months remaining on his prior home invasion sentence—his go-forward sentence, based on a sentence of eight years consecutive for the first home invasion, equalled 10.5 years. After considering the totality principle, a reduction should only occur if the aggregate sentence is crushing or exceeds the overall culpability of the offender. In this case, the Crown pointed out:

> 65. Here, the Appellant committed two, armed home invasion robberies. Ironically, he was sentenced for each as a <u>first-time</u> adult offender. To situate the <u>overall</u> culpability of the offender, the Appellant should be treated as a youthful (adult), <u>repeat</u> home-invader. The Appellant has not just once engaged in extremely dangerous behaviour, but twice, the second one, eight months after the first. [emphasis in original]
>
> 66. This reality greatly re-shuffles the sentencing objectives. The rehabilitative prospects of the Appellant become significantly more questionable, the need for specific deterrence rises as does the need to protect society.

[74] There is no reason to otherwise question the judge's assessment of an eight-year sentence nor has that been seriously suggested on appeal. There was ample authority provided to the judge to support the range (*R. v. Matwiy*, 1996 ABCA 63; *R. v. Fraser*, 1997 NSCA 210; *R. v. Foster* (1997), 161 N.S.R. (2d) 371 (C.A.); and *R. v. P.J.H.*, 2000 NSCA 7). Nor do I see any error in his assessment of the relevant sentencing factors apart from totality.

[75] It is clear the sentencing judge declined to apply totality, but did this error in principle impact the sentence? The Crown says it did not.

[76] The trial judge's refusal to consider the principle of totality amounts to legal error. Mr. Tamoikin says the judge's improper application of the totality principle impacted the sentence he imposed because, as a youthful first-time offender, this would be a crushing sentence and would exceed his overall moral culpability.

[77] In my view, this Court must undertake its own analysis—which I will limit to the sole issue of totality—to ensure the aggregate of consecutive sentences do not exceed the overall culpability of Mr. Tamoikin and are not unduly long or harsh. As I will explain, there is no merit to Mr. Tamoikin's other complaint. Therefore, the only error in principle is the application of the totality principle to the consecutive sentence.

[78] The fresh evidence will assist in my analysis of whether the aggregate of the consecutive sentences is unduly long or harsh and the appellant's overall moral culpability. Before undertaking that analysis, I will explain why I reject the other complaint of error.

Did the judge fail to properly consider the offender's age?

[79] Mr. Tamoikin says the judge erred in applying the mitigating factor of youth. With respect, this complaint lacks merit.

[80] An offender's age, associated level of moral culpability, and prospects for rehabilitation are among the factors to be considered by a sentencing judge. Here, the judge expressly considered these factors, as he was urged to do by both Crown and defence counsel.

[81] Mr. Tamoikin complains that the judge failed to appreciate his age at the time of the offence simply because he expressly acknowledged he was 20 years old at the time he was sentenced. However, the record is clear the judge appreciated

Mr. Tamoikin's age at the time of the offence. To suggest the judge was not live to all relevant issues related to Mr. Tamoikin's age does not accord with the record.

[82] Recall that after initial oral submissions from the parties, the judge specifically requested additional submissions on this very issue—Mr. Tamoikin's age and the impact it should have on sentence. The judge expressly stated in his sentencing decision that he considered youth as a mitigating factor.

[83] Mr. Tamoikin also suggests the judge should have been more considerate of his rehabilitation prospects given his young age and less focused on general and specific deterrence. This complaint must also be rejected. There was little evidence before the judge of Mr. Tamoikin's rehabilitative prospects. There were some favourable aspects of Mr. Tamoikin's PSR, but some concerning ones as well.

[84] Importantly, while there are numerous cases confirming the mitigating effect of youth (showing leniency on young first offenders to facilitate rehabilitation), this factor diminishes in significance as the severity and violence of an offence increases. Furthermore, grave crimes (such as the offences that are the subject of this appeal) "require substantial emphasis on deterrence even if rehabilitation possibilities are thus not improved but reduced" (*R. v. Hingley* (1977), 19 N.S.R. (2d) 541 at para. 12). See also: *R. v. Fraser*, *supra* at para. 25; *R. v. Foster*, *supra* at para. 39; *R. v. Smith*, 2012 NSCA 37 at para. 24; and *R. v. Johnson*, 2004 BCSC 1310 at para. 29.

[85] To conclude, I reject this complaint of error, and I will now turn to the application of the totality principle.

Is the aggregate of consecutive sentences proportionate?

[86] The fresh evidence is relevant to this determination and negates any concern with the aggregate sentence.

[87] Mr. Tamoikin's appeal submissions were based on the mistaken premise he had no prior record. This underpinned his argument that had the judge applied the totality principle, the eight-year consecutive sentence would have been adjusted downward. Appellant counsel properly acknowledges that, if admitted, the fresh evidence undercuts the position being advanced on appeal.

[88] The fresh evidence confirms that prior to the convictions related to the two home invasions discussed herein, Mr. Tamoikin's accurate criminal record included the following:

<u>Youth</u>:

Offence Date: 2013

- Fail to comply with condition on recognizance or undertaking CC 145(3);
- Fail to comply with condition on recognizance or undertaking CC 145(3);
- Possession of substance CDSA 4(1);
- Possession of substance CDSA 4(1);
- Fail to comply with condition of an undertaking CC 145(5.1);

Offence Date: 2014

- Fail to comply with condition on recognizance or undertaking CC 145(3);
- Fails to attend court as directed CC 145(2)(B);
- Failure to comply with sentence or disposition YCJA 137;
- Possession for purpose of trafficking CDSA 5(2);
- Possession of substance CDSA 4(1);
- Fail to comply with condition of an undertaking CC 145(5.1);
- Possession of weapon for dangerous purpose CC 88(1);
- Possession of substance CDSA 4(1);
- Wilfully fail to comply with section 30 or with an undertaking entered YCJA 139(1);
- Wilfully fail to comply with section 30 or with an undertaking entered YCJA 139(1);

Offence Date: 2015

- Failure to comply with sentence or disposition YCJA 137;
- Uttering threats to cause death or bodily harm CC 264.1(1)(A);
- Failure to comply with sentence or disposition YCJA 137;
- Failure to comply with recognizance or undertaking CC 145(3) – (custodial sentence – 1 day);
- Failure to comply with sentence or disposition YCJA 137 – (custodial sentence – 80 days concurrent);
- Carrying concealed weapon CC 90(1) – (custodial sentence – 80 days concurrent);

- Failure to comply with sentence or disposition YCJA 137 – (custodial sentence – 80 days concurrent);
- Fail to comply with recognizance or undertaking CC 145(3) – (custodial sentence – 80 days concurrent);
- Carrying concealed weapon CC 90(1) – (custodial sentence – 80 days concurrent);
- Resists/obstructs peace officer CC 129(A) – (custodial sentence – 80 days concurrent);
- Forcible entry CC 72 – (custodial sentence – 80 days concurrent);
- At large on undertaking or recognizance and fails to attend CC 145(2)(A) – (custodial sentence – 80 days concurrent);
- Failure to comply with sentence YCJA 137(3) – (custodial sentence – 80 days concurrent);
- Failure to comply with sentence YCJA 137(3) – (custodial sentence – 80 days concurrent);
- Fail to comply with recognizance or undertaking CC 145(3) – (custodial sentence – 80 days concurrent);

[89] At the time of sentencing for the offences related to this appeal, the unexpired sentence from the first home invasion was 30 months' incarceration. When coupled with the consecutive eight-year sentence, the aggregate is 10.5 years. In my view, given the circumstances of this offence and this offender, considering the fresh evidence and applying the totality principle, the sentence is not unduly harsh or long. Therefore, I would make no adjustments.

Should the victim fine surcharges be set aside?

[90] The judge imposed a $200.00 victim fine surcharge on all five convictions, resulting in a total of $1,000.00 to be paid by way of victim fine surcharges. At the time of his sentencing, Mr. Tamoikin was impecunious and already serving a penitentiary sentence. Shortly after being sentenced in this matter, the Supreme Court of Canada declared the victim fine surcharge unconstitutional in *R. v. Boudreault*, 2018 SCC 58. Accordingly, Mr. Tamoikin asks that the surcharges be quashed. The Crown agrees. I would set aside the victim fine surcharges as requested.

Conclusion

[91] I would grant leave, admit the fresh evidence, and allow the appeal in part by quashing the victim fine surcharges. I would not otherwise disturb the sentence imposed and confirm the sentence of eight years' imprisonment consecutive to the existing sentence Mr. Tamoikin is serving.

Van den Eynden, J.A.

Concurred in:

Beveridge, J.A.

Saunders, J.A.