LET RIGHT PREVAIL

Law Society of Ontario | Barreau de l'Ontario

TAB 12

THE SIX-MINUTE

Criminal Lawyer 2018

Parity in Sentencing: Comparing Apples to Oranges

Alana Page, Barrister & Solicitor

April 14, 2018

cpd Continuing Professional Development

Parity in Sentencing: Comparing Apples to Oranges

Alana Page

Section 718.2(b) of the *Criminal Code* instructs judges to consider the parity principle: the notion that similar **sentences** should be imposed on similar **offenders** for similar **offences** committed in similar **circumstances**. This principle has the greatest force when the comparison is being made between two or more persons who were jointly involved in the same crime.

Disproportionate sentences imposed on co-accused must be justified on the basis of relevant sentencing principles.

Understanding the Differences

As noted by Weiler J.A. in *R. v. Choquette,* the parity principle does not require that sentences given to persons who commit the same crime must be the same; it only requires that the differences in sentences be understandable. In dismissing the sentence appeal, the Court concluded that the judge had explained the differences between the two parties by referencing the co-accused's guilty plea, lack of criminal record and particular personal circumstances. In dissent, Armstrong J.A. held that the sentencing judge misapplied the parity principle because there was a "complete disconnect" between the two sentences that could not be accounted for by the distinguishing factors, considering the relative roles of each individual involved in the criminal enterprise.[1]

Where it gets complicated

Where the same judge is sentencing all offenders involved in the criminal activity at the same time, the parity principle may only require a comparison of each participant's background and their level of involvement in the crime.

[1] [2010] O.J. No. 1851 at par. 11

But what if one participant is sentenced earlier on in the proceedings? Or by a different judge? Or on a joint submission? Or what if the judge who sentenced the first offender didn't have all the information regarding the relative culpability of each participant? To what extent should that first offender's sentence be considered by the judge sentencing the other participants in that same crime?

To properly apply section 718.2(b) a judge must consider not only the role and background of the offender but also the sentences of any other participants and the mitigating and aggravating factors considered by the first sentencing judge.

This issue has come up recently in the cases of *R. v. O'Loughlin* and *R. v. Innis*.

***R. v. Innis,* 2017 ONSC 2779 (CanLII)**

Innis plead guilty to importing cocaine. The co-accused Edwards had previously been sentenced on a joint submission following a Judicial pre-trial to ten years in custody.

In sentencing Innis, the judge made findings of fact regarding Innis' role in the importation scheme as compared to that of the co-conspirator Edwards. After reviewing the circumstances of the offender, Justice Forestell considered the principle of parity. Referencing *R. v. Beauchamp* [2] and *R. v. Lacasse*[3], Her Honour noted that the principle of parity is but one of many principles that must be considered and cannot be applied in a rigid fashion since each crime is committed in unique circumstances by an offender with a unique profile.

While giving some weight to the sentence of the co-conspirator, Her Honour held that the principle of parity had reduced utility because Edwards' sentence emanated from a joint submission. She then reviewed the information provided on the Edwards' plea to

[2] 2015 ONCA 260 (CanLII) at paras. 276 and 277
[3] 2015 SCC 64 (CanLII)

understand the **rationale** behind his sentence, and compared the factors considered by the judge in arriving at that sentence.

***R. v. O'Loughlin*, 2017 ONCA 89 (CanLII)**

Mr. O'Loughlin appealed his sentence for assault causing bodily harm. He, along with Kennedy and Schaeffer, had been found guilty of attacking a fellow inmate at a detention centre. By the time of the appellant's trial, both other participants had pleaded guilty and been convicted for their involvement in the assault. The trial judge concluded that O'Loughlin was the least culpable participant in the attack – more of an aider than a joint principle – and that a fit sentence was one of twenty months incarceration minus credit for pre-trial custody. Counsel for O'Loughlin argued that, since the more culpable co-accused Schaeffer received eighteen months in jail, O'Loughlin should receive a sentence of less than that.

The application of the parity principle become more complicated because the judge who had sentenced Schaeffer following his guilty plea had done so without the benefit of the surveillance video. Schaeffer was sentenced on the basis that he was the least involved of the three participants, whereas this video proved him to be significantly more culpable than O'Loughlin.

In assessing the role of the parity principle, the Court of Appeal compared the personal circumstances and relative roles of each participant including Schaeffer's early guilty plea and expression of remorse. The Court concluded that the **factors considered by the sentencing judge for Schaeffer did not apply to O'Loughlin**. Accordingly, a sentence of twenty months did not offend the parity principle.

A similar finding was made in *R. v. Rawn* [4], a Crown appeal where other participants in the same criminal activity with lesser culpability had received higher sentences.

[4] 2012 ONCA 487

At paragraphs 26-29, Epstein J.A. noted that the parity principle does not operate so as to give one offender the benefit of the factors that justified leniency to one offender **if the same factors do not apply**. Further, the parity principle must not dominate the determination of an otherwise fit sentence.

Unwarranted disparity to be remedied

At times, the parity principle has been applied to vary an otherwise fit sentence. In *R. v. Laliberte*[5], the Saskatchewan Court of Appeal held that the principle of disparity should be applied **only after the review Court has applied all the other principles of sentencing**. If the reviewing court is unable to rationalize the sentence with sentences for similar offences committed in similar circumstances, the sentence must be substituted.

In *R. v. Thompson*[6], the Court of Appeal found no merit in the appellants' claim that their sentences were manifestly excessive but conceded that they may have been at the high end of the range. However, the Court allowed their appeals and reduced both of their sentences on the grounds that there was unwarranted disparity between their sentences and that of the another co-accused Agbeyaka. At paragraphs 82-87, the Court considered the weight to be attributed to Agbeyaka's guilty plea, the relative roles of each participant in the criminal activity and concluded that the disparity could not be justified.

[5] 2000 SKCA 27
[6] [2000] O.J. No. 2270

A remedy for a sense of injustice

In an effort to reduce the "sting of injustice" and avoid "bitterness and resentment", the Ontario Court of Appeal has applied the parity principle where a "completely inadequate" sentence had been granted to another participant in the same crime. In *R. v. Issa*[7], the appellant drug courier was tried separately than Buhisi, who was said to be the owner of the drugs given to Issa. Both were convicted and sentenced by different judges. The Court of Appeal concluded that, because the sentence imposed on Buhisi was wrong and "incredibly lenient", the appellant had every reason to regard his **otherwise fit** sentence as a serious injustice. While the Court felt it could not reduce the sentence to that of the co-accused, the sentence was reduced from three years to two.

Similarly, in *R. v. Burns*[8], the Court of Appeal reduced the appellant's sentence after finding that the disparity between the sentences imposed on the two brothers was unjustifiable and would give the appellant a "sense of injustice".

Disparate sentences that are **subsequently** imposed on other individuals involved in the same criminal activity have also resulted in a reduction of sentence. In *R. v. Ventrella*[9], the Court of Appeal considered the applicability of s.718.2(b) of the *Criminal Code* and concluded that a reasonable person comparing Ventrella's sentence with those of the other offenders would find that the disparity was unjustified and would leave Ventrella with a "valid sense of having been unfairly treated much more harshly than the other similarly situated accused". In light of the subsequent non-custodial dispositions imposed on the others involved, the Court varied the sentence to a fine and probation with community service hours.

In *R. v. Matthews*[10] the Court of Appeal considered the disparity of sentences where one offender received a global resolution for two sets of charges, and the other offender

[7] O.J. No. 1631
[8] [1999] O.J. No. 254
[9] [1997] O.J. No. 4715
[10] [2002] O.J. No. 670

resolved the same two sets of charges several months apart. Matthews and Boutilier committed robberies together in Ancaster and Brantford. They were equal participants in the robberies. Boutilier plead guilty to both sets of charges and received a global sentence of seven years in jail. Matthews plead guilty to the Brantford offences and received a sentence of seven years jail then plead guilty over a year later to the Ancaster offences and received a 4-year consecutive sentence. Matthews agreed with the length of the sentence but argued that the sentence should be consecutive, not concurrent, raising the issue of disparity. The Court of Appeal agreed that, had Matthews resolved both sets of charges together before the same judge, he would likely have received the same sentence as Boutilier, and varied the 4-year sentence by making it concurrent.

Young Persons and Adults involved in the same criminal activity

In *R. v. Wobbes*[11], Epstein J.A., considered the appellant's "difficulty" in relying on the parity principle since he was a youthful but adult first offender and the other individuals involved in the crime had been sentenced under the *Youth Criminal Justice Act.* The Court noted that the regime established under the *YCJA* was completely different than that established under the *Criminal Code.* In particular, the principle of general deterrence found at s.718(1)(a) of the *Criminal Code* has no application under the *YCJA,* and the *YCJA* places mandatory restrictions on the use of custodial dispositions. This case was cited by Justice Akhtar in *R. v McIntyre*[12] to justify the disparity between the adult and youth sentences, noting that parity cannot be applied due to the different sentencing regimes.

It is worth noting however that s.38(2) of the *YCJA* specifically prevents a youth court judge from imposing a punishment that is "greater than the punishment that would be appropriate for an adult who has been convicted of the same offence in similar circumstances". In B. Jones, E. Rhodes and M. Birdsell, *Prosecuting and Defending*

[11] [2008] O.J. No. 2999
[12] 2017 ONSC 360,

Youth Criminal Justice Cases (Toronto: Emond Montgomery Publications Ltd., 2016), the authors note at page 220:

> This section is most directly applicable in cases where a young person has committed an offence with an adult co-accused. If the adult receives a certain sentence for his or her crime, the young person (assuming a similar role in the offence and a similar degree of moral culpability) cannot receive a sentence greater than his adult co-accused. Counsel should note, however, that because of the principle of proportionality that must also be considered by a sentencing court, **neither this section nor the principle of parity precludes a disparate sentence where warranted by the circumstances**. Thus, if a young person committed an offence with an adult, but the young person's degree of participation was substantially greater than the adult's, this section may not preclude a more serious sentence being imposed on the young person.
>
> **Remember too that this section does not work in reverse for an adult offender.** That is, a young person's disposition received in youth court in no way influences the sentencing of an adult offender in criminal court given the fundamentally different sentencing regimes that exist between the YCJA and *Criminal Code*." (emphasis added)

However, in *R. v. Lund*[13], Justice David A. Harris was willing to consider the principle of parity in sentencing a youthful first offender who was only a few months older than the several young persons with whom he participated in the criminal activity. His Honour had previously sentenced the three young persons to two years' probation in relation to the same underlying incident. In granting the adult offender a conditional discharge with two years of probation, his Honour noted that, *R. v. Wobbes, supra*, the Ontario Court of Appeal did not specifically state that a judge could not consider parity as a factor and that general deterrence was not a predominant principle of sentencing in that case.

[13] 2017 ONCJ 261

Conclusion

In arguing that the parity principle should be applied to reduce a client's sentence, counsel should provide the sentencing judge with the details of the **rationale** behind the sentence of the co-accused. As per the recent cases of *O'Loughlin, Innis,* and *Rawn,* the parity principle does not operate so as to give one offender the benefit of the factors that justified leniency to one offender **if the same factors do not apply**.

Although these three recent judgements make it clear that the parity principle must not **dominate** the determination of an otherwise fit sentence, there is still room for an argument that an otherwise fit sentence should be **influenced** by sentences already imposed on other participants.

Further, since these recent decisions did not a specifically address the use of the parity principle to reduce the "sting of injustice" and avoid "bitterness and resentment", this factor can also be argued to reduce an otherwise fit sentence.