COURT OF APPEAL OF YUKON

Citation: *R. v. Stein*,
2017 YKCA 14

Date: 20170810
Docket: 16-YU783

Between:

Regina

Respondent

And

Shannon Raymond Stein

Appellant

Before: The Honourable Chief Justice Bauman
The Honourable Mr. Justice Donald
The Honourable Madam Justice Tulloch

On appeal from: An order of the Territorial Court of Yukon, dated July 12, 2016 (*R. v. Stein*, 2016 YKTC 37, Whitehorse Docket 15-00564A, 15-00483, 15-00484, 15-00499, 15-00565A).

Counsel for the Appellant:	V. Larochelle
Counsel for the Respondent:	A. Porteous
Place and Date of Hearing:	Whitehorse, Yukon May 18, 2017
Place and Date of Judgment:	Vancouver, British Columbia August 10, 2017

Written Reasons by:
The Honourable Chief Justice Bauman

Concurred in by:
The Honourable Mr. Justice Donald
The Honourable Madam Justice Tulloch

Summary:

Mr. Stein appeals his global sentence of seven years' imprisonment (before credit for pre-sentence custody) for attempted robbery, assault with a weapon and a number of other property-related offences. He argues the sentencing judge erred in his consideration of the principles of parity (in particular, by comparison to the sentence received by his co-accused) and rehabilitation, and in failing to consider that the offences could be seen as a crime spree and therefore ordered to be served concurrently. Held: Appeal dismissed. The sentencing judge was alive to the principles of parity and rehabilitation and made no error in applying those principles to Mr. Stein's circumstances. The judge considered the principle of totality and it was within his discretion to order that some of the individual sentences be served consecutively.

Reasons for Judgment of the Honourable Chief Justice Bauman:

Introduction

[1] Mr. Stein was sentenced in the court below for attempted robbery, two assaults with a weapon and a number of other property-related offences. The sentencing judge imposed a global sentence of seven years less 385 days' credit for time spent in pre-sentence custody.

[2] Mr. Stein seeks leave to appeal this sentence. He says the sentencing judge erred in his consideration of the principles of parity and rehabilitation, and in failing to order that his sentences be imposed concurrently rather than consecutively. For the reasons that follow, I would grant leave, but dismiss the appeal.

Background

[3] Mr. Stein is a 43-year-old man who was charged with a number of property-related offences in connection with his actions during a two-week period in October 2015. The events occurred while he was in a downward spiral of drug abuse with one Janine Renata Firth following a period of sobriety.

[4] The most serious of Mr. Stein's offences concern two incidents involving Ms. Firth who is eight years his junior and who, according to the trial judge, Mr. Stein knew to be violent, "totally unpredictable" and suicidal. Ms. Firth had previously purchased drugs from the complainant, Mr. Donald Lajoie. On 20 October 2015,

Mr. Stein and Ms. Firth attempted to rob Mr. Lajoie in his hotel room. When the two arrived at his room, Mr. Stein told Mr. Lajoie they were going to rob him. Mr. Lajoie responded by grabbing Ms. Firth. A scuffle ensued. Mr. Stein intervened and grabbed Mr. Lajoie by the neck, breaking his glasses when he did so. Mr. Lajoie called for help from his friend, Mr. Flemming, and held onto Mr. Stein when he then tried to get away. Ms. Firth sprayed Mr. Lajoie with bear spray inside the room and then sprayed Mr. Flemming once the pair made it outside the room.

[5] The trial judge found that Mr. Stein was "in large measure, a party to the offence and may, indeed, have been unduly persuaded and influenced by Ms. Firth but, nonetheless, he was there and he was part of all of this" (at para. 33).

[6] Mr. Stein made a number of admissions of fact in connection with the charges stemming from 20 October 2015, but took the case to trial largely to contest the nature of his role in the offences and his guilt for other offences with which he was charged in connection with the incident. Ultimately, he was convicted of two counts of assault with a weapon (bear spray), one count of attempted robbery and one count of being unlawfully in a hotel room.

[7] On 22 October 2015, Ms. Firth and Mr. Stein smashed the window of a vehicle and grabbed a woman's purse, which contained US$500 and CAD$140. They attempted to use her credit card to withdraw $200 from an ATM. Mr. Stein pled guilty to one count of possession of a stolen credit card contrary to s. 342(1) of the *Criminal Code*, R.S.C. 1985, c. C-46.

[8] He also pled guilty to the remaining offences with which he was charged in connection with his actions both before and after the above two incidents. On 14 October 2015, Mr. Stein obtained a credit card from a customer at a gas station under the pretext of being an employee and used it to purchase lottery tickets and cigarettes worth approximately $1800. He pled guilty to one count of theft of a credit card (s. 342) and one count of possession of a credit card knowing it was obtained by commission of an offence (s. 354). On 28 October 2015, Mr. Stein stole a Samsung Galaxy Tablet from the Whitehorse General Hospital. He pled guilty to one

count of theft (s. 334). On 29 October 2015, Mr. Stein approached two individuals in downtown Whitehorse claiming he could get them cigarettes at a discounted price. They gave him $40 and $80, respectively, and he absconded with the money. Mr. Stein pled guilty to two counts of theft (s. 334).

[9] On 12 July 2016, Mr. Stein was sentenced for all of these offences.

Sentencing Decision

[10] The sentencing judge began his analysis by setting out the maximum sentences for each of the offences Mr. Stein had committed to demonstrate the "very serious jeopardy" in which Mr. Stein had placed himself. He noted that, generally, the offences would be consecutive for separate days such that Mr. Stein had subjected himself to a potential maximum of 38 years' imprisonment.

[11] The judge then noted Mr. Stein's lengthy criminal record and explained that this showed his weak prospects for rehabilitation. He had a number of related property offences on his record, and had received three prior federal terms of imprisonment.

[12] The judge acknowledged the sentence received by Ms. Firth and Mr. Stein's position that he should receive no greater sentence. The judge rejected this position on the basis that Ms. Firth pled guilty very early and the sentence was the product of a joint submission.

[13] The parties took very different positions in the court below. The Crown sought a global sentence of seven years' imprisonment less credit for time served. The defence sought a custodial sentence of three years' imprisonment (less credit for time served), followed by three years' probation. The judge agreed with the Crown. He distinguished a number of cases relied upon by Mr. Stein because they involved offenders who were either younger than Mr. Stein or had other mitigating factors not present in his case.

[14] In the course of imposing sentence, the judge noted that Mr. Stein's mother was very sick, which he said was a compassionate though not a particularly mitigating factor (at para. 35). He summarized the circumstances of Mr. Lajoie: he is approximately 60 years of age, lives on a disability pension, was grabbed by the neck, had his glasses broken by Mr. Stein and was sprayed with bear spray by Ms. Firth. The judge held that it was important to make a statement about the increasing use of bear spray as "a weapon of choice in crimes of violence" (at para. 37). He also noted that the woman whose car window they smashed was significantly impacted (at para. 44).

[15] With respect to Mr. Stein's personal circumstances, the judge acknowledged that he had remained sober for some time but then came back up to Yukon with Ms. Firth. He began using drugs again when Ms. Firth's brother brought them back to the residence. The judge highlighted the absence of any particular trauma causing Mr. Stein's relapse. He also emphasized that Mr. Stein has committed dozens of property-related offences to support his addiction, but acknowledged that these prior offences did not involve violence.

[16] In considering whether to impose the sentences consecutively or concurrently, the judge noted the need to consider the totality principle. He then imposed the following sentences, reduced as indicated in brackets below following application of the totality principle:

(a) 14 October 2015:

- s. 342: 18 months concurrent (reduced to one year);
- s. 354: 18 months concurrent (reduced to one year);

(b) 20 October 2015:

- s. 344 attempt: five years, consecutive to the offences from October 14th, but concurrent to the remaining offences committed on the 20th (reduced to four years);
- s. 267(a): three years concurrent;
- s. 267(a): three years concurrent;
- s. 349: three years concurrent;

(c) 22 October 2015: s. 342: 18 months consecutive (reduced to one year);
(d) 28 October 2015: s. 334: one year consecutive (reduced to six months);
(e) 29 October:

- s. 334: one year consecutive (reduced to six months); and
- s. 334: one year concurrent (reduced to six months).

[17] This resulted in a sentence of ten years, which the judge reduced to seven years in the manner indicated above. He gave Mr. Stein credit of 385 days for time spent in pre-sentence custody and applied that credit to the attempted robbery charge (s. 344), further reducing the sentence on that count from the four years indicated above.

Submissions

[18] Mr. Stein advances a number of grounds of appeal. He submits that the sentencing judge erred in principle in:

a) failing to take into account the principle of parity when considering the sentence imposed on Ms. Firth;

b) failing to give effect to his finding at trial that Ms. Firth had an influential role in the offences;

c) holding that the principle of rehabilitation had no role to play in sentencing Mr. Stein; and

d) failing to consider whether the offences could be seen as a single criminal enterprise.

[19] Alternatively, he argues that the individual and global sentences are demonstrably unfit.

[20] The Crown emphasizes the deference owed to the sentencing judge and argues that he did not commit any errors that call out for intervention by this Court.

[21] Mr. Stein argues that the parity principle is particularly important in the context of joint ventures. Ms. Firth has a lengthy related criminal record involving robberies and violent offences. Further, she was the one who carried and used bear spray on the two victims. Mr. Stein did not use any weapons and has never committed a related violent offence in his life. Even though Mr. Stein took the attempted robbery charges to trial, he pled guilty to the October 22nd offences. In any event, his trial for the October 20th charges was important because he disputed his role in the offence and was acquitted of several of the charges. His trial took under a day and he took full responsibility for his actions at sentencing. The judge erred in brushing aside the relevance of parity.

[22] Mr. Stein also highlights the discrepancy between the judge's finding at trial that he may have been unduly persuaded and influenced by Ms. Firth, and his refusal at sentencing to accept that Ms. Firth "was the leader in this criminal duo". He says this was an error in principle that impacted the sentence imposed.

[23] The Crown submits that the sentencing judge was alive to the issue of parity. He specifically asked the Crown about Ms. Firth's record and whether it was being "consistent and fair" in seeking a longer sentence for Mr. Stein. He properly considered the known circumstances and available information surrounding the offence, Mr. Stein and Ms. Firth. The Crown acknowledges Ms. Firth's lengthy criminal record, but points out that she had never been sentenced to more than 18 months for an offence. On the contrary, Mr. Stein's record includes over 50 related convictions, he has received federal sentences on three prior occasions, and he was on a recognizance at the time of the offences. In short, Ms. Firth and Mr. Stein were not similar offenders. The Crown characterizes the judge's discussion at trial of the role played by each offender as a "musing".

[24] Mr. Stein further submits that the judge erred in holding that rehabilitation has no role to play in his case. This finding disregarded the fact that Mr. Stein has managed to maintain sobriety for significant periods of time in the past. It also neglects his mitigated success in behaving well on parole and probation. He also

says the judge should have considered whether an alternative to imprisonment would adequately protect the public in this case.

[25] The Crown submits that the judge did not disregard any relevant factors when determining his prospects for rehabilitation, and in finding that a custodial disposition was warranted. His record is lengthy and continuous, dating back over 25 years. He has spent much of his adult life in and out of jail. The judge's focus on other principles of sentencing was not an error.

[26] Finally, with respect to concurrent versus consecutive sentences, Mr. Stein submits that there is no rule of law that offences committed on different days necessarily must result in consecutive sentences. Courts have accepted that an individual who commits a number of petty thefts to feed a drug addiction in a close period of time has committed a single "crime spree". Mr. Stein argues that concurrent sentences are warranted in this context because a number of minor thefts were committed while he was in a spiral of cocaine and heroin use.

[27] Mr. Stein argues, as he did in the court below, that an appropriate global sentence would be three years' incarceration followed by a three year period of probation. He says the appropriate range for the October 20th offences is two-and-a-half to three years. For the other theft sentences he says the range is three to six months, to be served concurrently. He submits that if this Court determines that the sentences should not be imposed concurrently then a global sentence of three to four years is appropriate after considering the principle of totality.

[28] The Crown submits that a sentencing judge's determination as to whether sentences should be served consecutively or concurrently is subject to substantial deference. While courts have, in the past, imposed concurrent sentences on offences committed while an accused is on a "crime spree", they are not obliged to do so and, in any event, it is not clear that Mr. Stein's actions constituted a "spree". The judge made no such finding; rather, he imposed consecutive sentences on the basis that the offences were "separate crimes". It was within his discretion to do so. Further, the judge carefully considered the principle of totality. He reduced several of

the individual sentences in the interest of totality, which ultimately resulted in an overall reduction of three years on the global sentence.

Analysis

[29] I return to the grounds of appeal advanced by Mr. Stein.

[30] The first two — failing to take into account the principle of parity and failing to give effect to the judge's alleged finding that Ms. Firth had an influential role in the offences — can be considered together in a discussion of the parity principle.

[31] A consideration of parity in sentencing is mandated by s. 718.2(b) of the *Criminal Code*:

> 718.2 A court that imposes a sentence shall also take into consideration the following principles:
>
> …
>
> (b) a sentence should be similar to sentences imposed on similar offenders for similar offences committed in similar circumstances;

[32] Parity especially comes into play, as in the case of Mr. Stein, where co-accused are sentenced for their participation in the same offence. Where this is so, the very rationale for the rule is at stake: the avoidance, to the extent possible, of convicted persons being left with a sense of injustice or grievance as a result of disparate sentences: Clayton C. Ruby, *Sentencing*, 8th ed. (Markham: LexisNexis Canada Inc., 2012) at 37 ("Ruby").

[33] Parity is intended "to preserve fairness by avoiding disparate sentences where similar facts relating to the offence and offender would suggest light sentences": *R. v. Beauchamp*, 2015 ONCA 260 at para. 276, citing *R. v. Rawn*, 2012 ONCA 487 at para. 18.

[34] The parity principle plays a secondary role after the ordinary principles of sentencing have been applied and the court has considered and weighed all of the relevant aggravating and mitigating factors: Ruby at 38. This helps ensure that sentencing remains an individualized process.

[35] This secondary role was recently discussed in *R. v. Lacasse*, 2015 SCC 64 where Justice Wagner explained:

> [53] This inquiry must be focused on the fundamental principle of proportionality stated in s. 718.1 of the *Criminal Code* , which provides that a sentence must be "proportionate to the gravity of the offence and the degree of responsibility of the offender". A sentence will therefore be demonstrably unfit if it constitutes an unreasonable departure from this principle. Proportionality is determined both on an individual basis, that is, in relation to the accused him or herself and to the offence committed by the accused, and by comparison with sentences imposed for similar offences committed in similar circumstances. Individualization and parity of sentences must be reconciled for a sentence to be proportionate: s. 718.2 (*a*) and (*b*) of the *Criminal Code*.
>
> [54] The determination of whether a sentence is fit also requires that the sentencing objectives set out in s. 718 of the *Criminal Code* and the other sentencing principles set out in s. 718.2 be taken into account. Once again, however, it is up to the trial judge to properly weigh these various principles and objectives, whose relative importance will necessarily vary with the nature of the crime and the circumstances in which it was committed. The principle of parity of sentences, on which the Court of Appeal relied, is secondary to the fundamental principle of proportionality. This Court explained this as follows in *M. (C.A.)*:
>
> > It has been repeatedly stressed that there is no such thing as a uniform sentence for a particular crime. . . . Sentencing is an inherently individualized process, and the search for a single appropriate sentence for a similar offender and a similar crime will frequently be a fruitless exercise of academic abstraction. [para. 92]
>
> [55] This principle of parity of sentences also means that the deference owed to the sentencing judge must be shown except in the circumstances mentioned above. The Court said the following in this regard in *L.M.*:
>
> > This exercise of ensuring that sentences are similar could not be given priority over the principle of deference to the trial judge's exercise of discretion, since the sentence was not vitiated by an error in principle and the trial judge had not imposed a sentence that was clearly unreasonable by failing to give adequate consideration to certain factors or by improperly assessing the evidence (*M. (C.A.)*, at para. 92, quoted in *McDonnell*, at para. 16; *W. (G.)*, at para. 19; see also Ferris, at p. 149, and Manson, at p. 93). [para. 35]
>
> …
>
> [58] There will always be situations that call for a sentence outside a particular range: although ensuring parity in sentencing is in itself a desirable objective, the fact that each crime is committed in unique circumstances by an offender with a unique profile cannot be disregarded. The determination of a just and appropriate sentence is a highly individualized exercise that goes beyond a purely mathematical calculation. It involves a variety of factors that are difficult to define with precision. This is why it may happen that a

> sentence that, on its face, falls outside a particular range, and that may never have been imposed in the past for a similar crime, is not demonstrably unfit. Once again, everything depends on the gravity of the offence, the offender's degree of responsibility and the specific circumstances of each case.
>
> [Emphasis added.]

[36] Once a court has determined what would otherwise be a fit sentence for the offender in the particular circumstances of the case it can then compare the sentence with that of the co-accused. Here, the question for the court is whether any disparity between co-accused is unjust. It has long been accepted that parity in sentencing does not require equal sentences, but rather understandable or rationally explicable sentences when examined together: *R. v. Issa* (1992), 57 O.A.C. 253 at para. 9 (Ont. C.A.), leave to appeal to S.C.C. refused, (1993), [1992] S.C.C.A. No. 476; and Ruby at 38.

[37] Relevant factors in comparing the sentences received by co-accused are:

- their respective roles in the offence;
- whether one offender was under the influence or domination of the other;
- the particular offences of which they were convicted; and
- their individual personal circumstances.

[38] See *R. v. Sanghera,* 2016 BCCA 251 at paras. 55-57; *R. v. Eakins*, 2016 BCCA 194 at paras. 24-26; *R. v. Ahmed*, 2017 ONCA 76 at paras. 51-56; *R. v. Knife* (1982), 16 Sask. R. 40 at 43 (C.A.); *R. v. Lesarge* (1975) 26 C.C.C. (2d) 388 at 397 (Ont. C.A.); and *R. v. Roud and Roud* (1981), 21 C.R. (3d) 97 at 115 (Ont. C.A.), leave to appeal to S.C.C. refused, [1981] S.C.C.A. No. 228.

[39] With respect to the offenders' personal circumstances, aggravating or mitigating factors with respect to their age, criminal record and background will often explain variations in sentence. An early guilty plea and the circumstances of any joint submission are also relevant. See *R. v. Mac*, 2016 ONCA 379 at paras. 67-70; and *R. v. Budd*, 2010 BCCA 214 at paras. 11, 12, 18. However, gender alone is not

a sustainable basis on which to impose unequal sentences: *R. v. Malik*, [2002] O.J. No. 387 (C.A.).

[40] With these considerations in mind, I turn to the facts here and in particular the circumstances of Ms. Firth and Mr. Stein. First, it is not the case that the sentencing failed to take into account the principle of parity. The judge specifically noted the importance of parity in this case (at para. 17).

[41] During submissions on sentencing, the Crown specifically addressed parity:

> Your Honour, the Crown submits that an appropriate global disposition would be in the range of seven years or more for all of the offences.
>
> Dealing first with the issue of parity, on the robbery, Ms. Firth on her very early guilty plea received a sentence of three years. The other file that Mr. Stein's involved with that Ms. Firth was also involved with, that's the credit card of Ms. Mosavi, she received 72 days['] time served, and that was basically in the system then for 72 days when she dealt with the robbery and the credit card theft.
>
> THE COURT: Are you in position to comment on a comparison of the record between Ms. Firth and Mr. Stein?
>
> MR. PARKKARI: Yes. Ms. Firth has a substantially less continuous record. It is quite long. A lot of it is theft-type charges. She has one conviction that led her on a — in 2012 — that led to the penitentiary for a total of a global sentence of three years. And I've included that case as the last case in the book of authorities.
>
> THE COURT: Okay.
>
> MR. PARKKARI: And I'll provide the Court with a copy of Ms. Firth's criminal record.
>
> THE CLERK: Thank you. Is this an exhibit?
>
> THE COURT: Yes.
>
> THE CLERK: Thank you. Number 2.

[42] The court inquired further about Ms. Firth's sentencing on the robbery charge:

> THE COURT: Okay, so these were offences from back in 2011. What became of Ms. Firth with regard to the armed robbery charge here?
>
> MR. PARKKARI: For the robbery charge here, she was sentenced — she pled out very early on and was sentenced to three years.
>
> THE COURT: Okay. And that was not subject to a written decision?
>
> MR. PARKKARI: No.

> THE COURT: Okay.
>
> MR. PARKKARI: It was — it was — I don't want to say done on the spur of the moment, but it was done quite quickly as far as a negotiated plea, and then dealt with quickly in court.
>
> And the other matter involving Ms. Mosavi, she was also involved in that — she was at the KK at the bank machine — and was sentenced I believe it was to 72 days[']time served on that. Those were the only two matters that — for the time she was with Mr. Stein in Whitehorse that she was charged with.
>
> THE COURT: Okay. So in terms of being consistent and being fair, Ms. Firth received three years, and you're seeking five here based on the fact that he has a much lengthier record, that they were equal players, and there was a very early guilty plea on her part.
>
> MR. PARKKARI: And he's taken no responsibility.
>
> THE COURT: Right.
>
> MR. PARKKARI: And in fact told the Court that, you know, he didn't know there was going to be a robbery, he thought they were just there to —
>
> THE COURT: Yeah.
>
> MR. PARKKARI: — for some other purpose.
>
> THE COURT: All right. Okay, so let's —
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> MR. PARKKARI: And the three years —
>
> THE COURT: — take a look at these —
>
> MR. PARKKARI: — I believe was a joint submission.

[43] In his reasons, the judge discussed the application of the principle of parity in the case (at paras. 17-19):

> [17] It is to be noted that he has a very lengthy property related offences record and that he has three prior federal terms of imprisonment. Ms. MacDiarmid is quite correct to make note of the importance of proportionality and parity.
>
> [18] With regard to Ms. Firth, we know that she was involved with a very early guilty plea and that there was a joint submission from both Crown and defence. We do not know what the *quid pro quo* might have been in terms of her getting the sentence which she got.
>
> [19] The defence argues that the sentence for Mr. Stein should not exceed that of Ms. Firth. I disagree with that.

[44] It is said by Mr. Stein that the judge failed to give effect to his finding at trial that Ms. Firth had an influential role in the offences. This was not a clear finding by

the judge. In his reasons on conviction, as I indicated above, the judge did allude to the possibility of Ms. Firth's influence at para. 33:

> Based on my analysis of the facts in this particular case, and the law, the Court is registering convictions on counts 1, 2, 3, and 6. The accused was, in large measure, a party to the offence and may, indeed, have been unduly persuaded and influenced by Ms. Firth but, nonetheless, he was there and he was part of all of this.

But the judge did not come to a firm conclusion on the issue and he was emphatic in his conclusion on sentencing that "[t]he Court does not in any way accept that Ms. Firth was the leader in this criminal duo" (at para. 11).

[45] In my view, the sentencing judge touched on and considered the relevant factors that I have earlier discussed in the parity analysis and I can discern no error in principle in his consideration of the issue of parity. I would not give effect to this ground of appeal.

[46] I turn to the principle of rehabilitation. Again the judge did consider the issue as he is directed to do by s. 718(d) of the *Criminal Code*. At para. 16 of his reasons, the judge said:

> I want to emphasize that Mr. Stein will not be resentenced for the multitudinous crimes from his past but by his persistence in his criminal ways, he has disentitled himself from consideration of lenient sentencing because he shows little to no prospects of rehabilitation. Unfortunately, all that is likely going to slow Mr. Stein down is advancing middle and old age. Indeed, the Crown's position for an overall sentence of seven years represents only about 18.5 percent of what the maximum sentence could be.

[47] The judge concluded that Mr. Stein shows "little to no prospects of rehabilitation". That is a conclusion based on the judge's assessment of Mr. Stein's personal circumstances and his history as a "career criminal" (at para. 3). Again, I can see no error in principle committed here.

[48] The fourth ground of appeal is the suggestion that the sentencing judge erred in "failing to consider whether the offences, taken as a whole, can be seen as a single criminal enterprise". This is in aid of the submission that the judge erred in making the sentences consecutive. Once again, I do not agree that the judge failed

to consider this issue. He did so expressly at paras. 42 to 43 of his reasons. The judge exercised his discretion in determining that some of the sentences should be consecutive and he then adjusted the result based on the totality principle. I agree with the submission of the Crown that no error in principle has been demonstrated here.

[49] In my view, the sentences imposed here fall well within the appropriate range given Mr. Stein's personal circumstances and the particulars of the offences. No compelling submission can be advanced to suggest the overall sentence for Mr. Stein is demonstrably unfit. I would grant leave to appeal but dismiss the appeal from sentence.

"The Honourable Chief Justice Bauman"

I agree:

"The Honourable Mr. Justice Donald"

I agree:

"The Honourable Madam Justice Tulloch"