Citation: R v BS, 2017 MBCA 102 Date: 20171017
Docket: AY17-30-08867

IN THE COURT OF APPEAL OF MANITOBA

Coram: Chief Justice Richard J. Chartier
Madam Justice Barbara M. Hamilton
Madam Justice Janice L. leMaistre

B E T W E E N :

HER MAJESTY THE QUEEN	)	***C. T. St. Croix***
	)	*for the Appellant*
Appellant	)	
	)	***A. S. Pinx***
- and -	)	*for the Respondent*
	)	
B. S.	)	*Appeal heard and*
	)	*Decision pronounced:*
(Young Person) Respondent	)	***October 17, 2017***

NOTICE OF RESTRICTION ON PUBLICATION: No one may publish any information that could identify any child victim or child witness that is connected with an offence committed by a young person that is being dealt with under the *Youth Criminal Justice Act* (see section 111(1)).

On appeal from 2017 MBPC 23

CHARTIER CJM and LEMAISTRE JA (for the Court):

[1] The Crown sought leave to appeal and if granted, appealed the six-month deferred custody and supervision order (DCSO), followed by 12 months of supervised probation imposed on the young person who pled guilty to a major sexual assault (forced sexual intercourse) on a teenage victim. The Crown had sought a five-month custody and supervision order (CSO). The young person had argued that exceptional circumstances warranted a non-custodial sentence of probation.

[2] Both counsel agreed that the sentencing judge erred in principle by not concluding that the victim had suffered "serious bodily harm" within the meaning of section 42(5)(a) of the *Youth Criminal Justice Act* (the *YCJA*) and that appellate intervention was justified.

[3] At the appeal hearing, we granted leave to appeal, allowed the appeal and imposed the five-month CSO, which was stayed. These are our reasons for doing so.

[4] At the sentencing hearing, both counsel had agreed that the victim had suffered "serious bodily harm" in the form of serious psychological harm because the young person forced sexual intercourse on her while sleeping and that, as a result, a DCSO was not an available sentencing option. Section 42(5)(a) of the *YCJA* expressly precludes the imposition of a DCSO if the young person has caused "serious bodily harm" to the victim. Despite that agreement, the sentencing judge imposed the six-month DCSO, followed by 12 months of supervised probation.

[5] The sentencing judge found that while the impact statements of the victim and her mother established "ample evidence of general traumati[z]ation suffered by the victim" (at para 8), it was, in the absence of expert evidence, insufficient to allow him to find that the major sexual assault caused the victim to suffer "serious bodily harm". In doing so, he erred in principle.

[6] A series of appellate court decisions have established that while a court cannot presume that psychological harm has resulted from a sexual assault, the Crown is not required to call expert evidence to find that a victim has suffered "serious bodily harm". Rather, courts have clearly accepted that

a victim's testimony and/or a victim impact statement is sufficient to establish psychological harm for the purposes of determining if "serious bodily harm" has occurred (see *R v McDonnell*, [1997] 1 SCR 948 at para 37; *R v VJT et al*, 2007 MBCA 45 at para 31; and *R v KI*, 2011 MBCA 11 at para 18).

[7] Moreover, and as already stated, counsel for the young person had agreed with the Crown that the young person had caused "serious bodily harm" to the victim. That fact was not in dispute. Unless there is good reason to believe that a fact, which is agreed upon by both counsel for the young person and the Crown, is not accurate or is unreliable, the judge must sentence in a way that accords with that fact. In this case, the sentencing judge erred when he failed to find that the victim had suffered "serious bodily harm" and imposed a sentence (the DCSO) that was precluded. As a result, the sentence cannot stand and we can substitute our view as to a fit sentence.

[8] In *R v JAH*, 2016 MBCA 58, this Court concluded that "it can be inferred or presumed that forced anal and/or vaginal penile penetration committed on young children causes or attempts to cause serious bodily harm on the victims" (at para 27). Relying on *JAH* and *R v McCraw*, [1991] 3 SCR 72, the Crown urged us to expand this conclusion to include all cases involving a major sexual assault where the victim is under the age of 18 years. In our view, this is not the case to do so given the agreement between counsel that the victim suffered "serious bodily harm" as a result of the offence.

[9] The Crown submitted that a five-month open CSO fairly balanced the youth sentencing principles including rehabilitation and accountability. The Crown acknowledged extensive mitigating circumstances including the young person's very low risk to reoffend, remorse, victim empathy and pro-

social lifestyle, as well as the repercussions in his home community. The young person argued that this is one of those rare cases where exceptional circumstances exist to warrant a non-custodial sentence of probation.

[10] As this Court stated recently in *JAH*, absent exceptional circumstances, the statutory preclusion of a DCSO makes a CSO "the only realistic sentence" (see also *R v C (K)*, 2011 ONCA 257 at para 26). In this case, the young person pled guilty to a major sexual assault resulting in serious bodily harm to the victim. Like the sentencing judge, given the seriousness of the offence, we are of the view that the imposition of a non-custodial sentence would be inconsistent with youth sentencing principles.

[11] In our view, the five-month CSO requested by the Crown fairly balances the various youth sentencing principles, the circumstances surrounding the commission of the offence and the circumstances of the young person, and would have been a fit sentence at the time of the sentencing hearing before the sentencing judge.

[12] At the appeal hearing, the Crown acknowledged that it was appropriate to take into account the fact that:

- The young person served 76 days of his DCSO before it was stayed pending the appeal;
- He was on judicial interim release with conditions that mimicked the DCSO for a further 75 days; and
- It is now more than two years since the offence was committed and the young person had no control over the delay.

[13] Furthermore, the Crown took no position as to whether the young person's sentence should be stayed in light of these circumstances.

[14] In the unique circumstances of this case, we found that placing the young person in custody would not be in the interests of justice (see *R v Okemow*, 2017 MBCA 59 at para 141). The young person has been fully compliant with the conditions of his DCSO and undertaking, he has been attending counselling at Youth Forensic Services regularly and he is employed full time. Accordingly, we stayed the five-month CSO.

[15] In the result, leave to appeal the sentence was granted. The sentence was varied and the DCSO was replaced with a five-month CSO, which was stayed. The probation order and all other ancillary orders imposed by the sentencing judge remain the same.

Chartier CJM

leMaistre JA

Hamilton JA