Citation: R v DARK, 2018 MBCA 133 Date: 20181210
Docket: AR17-30-08911

IN THE COURT OF APPEAL OF MANITOBA

Coram: Mr. Justice Michel A. Monnin
Madam Justice Freda M. Steel
Mr. Justice William J. Burnett

B E T W E E N :

HER MAJESTY THE QUEEN	)	***M. P. Cook*** *and*
	)	***C. P. Gray***
	)	*for the Appellant*
Respondent	)	
	)	***A. C. Bergen***
- and -	)	*for the Respondent*
	)	
D. A. R. K.	)	*Appeal heard:*
	)	***September 17, 2018***
	)	
(Accused) Appellant	)	*Judgment delivered:*
	)	***December 10, 2018***

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On appeal from 2017 MBQB 17; and 2017 MBQB 139

BURNETT JA

[1] The accused appeals his convictions for sexual offences involving a seven-year-old girl (the girl) and a 10-year-old boy (the boy). He also seeks leave, and, if granted, appeals the sentences imposed for those convictions.

[2] The accused was convicted of one count of sexual assault (section 271 of the *Criminal Code* (the *Code*)), one count of sexual interference (section 151(a) of the *Code*), three counts of invitation/counselling sexual touching (section 152 of the *Code*) and two

counts of making sexually explicit material available to a child (section 171.1(1) of the *Code*). The trial judge sentenced the accused to a combined sentence of 14 years' incarceration, which she reduced to 11 years after considering the principle of totality.

[3] The factual basis for the convictions is described in detail by the trial judge (see 2017 MBQB 17) and need not be repeated here. The trial judge found the evidence supporting the convictions to be overwhelming.

[4] The accused raises four issues, namely that:

1. the trial judge erred in applying greater scrutiny to the evidence of the accused than the evidence called by the Crown;

2. the trial judge erred in her assessment of the girl's credibility;

3. the verdict was unreasonable; and

4. the trial judge erred in imposing a sentence that was harsh and excessive.

[5] The conviction appeal can be dealt with summarily.

[6] I am not persuaded that the trial judge applied a greater degree of scrutiny to the accused's evidence, nor do I believe that she erred in her assessment of the girl's credibility. The trial judge was clearly alive to the fact that the evidence of the children was full of inconsistencies and contradictions. She assessed their evidence on a "common sense" basis (*R v*

W (R), [1992] 2 SCR 122 at 133-34), and she concluded that it was both credible and reliable.

[7] I accept the Crown's submission that the trial judge engaged in a nuanced, careful and thorough consideration of the evidence and that her credibility findings are reasonably supported by the record. Simply put, those findings are entitled to deference and will not be interfered with on appeal. See *R v CAM*, 2017 MBCA 70 at para 37, and the authorities cited therein.

[8] Counsel for the accused submitted that it was the trial judge's credibility assessments that resulted in an unreasonable verdict, and he conceded that, if the credibility assessments were upheld, the convictions were supported by the evidence.

[9] Given my view as to the trial judge's credibility findings, the conviction appeal is dismissed.

[10] Turning to the sentence appeal, the standard of review is well established. As recently stated by Cameron JA in *R v Gladue*, 2018 MBCA 89 (at para 9):

> The standard of review of the sentencing judge's decision is clear. Absent an error in principle, failure to consider a relevant factor or the erroneous consideration of an aggravating or mitigating factor, the decision of the sentencing judge is afforded deference. Even where such an error occurs, appellate intervention is only justified where such an error had an impact on the sentence in more than just an incidental way. See *R v Lacasse*, 2015 SCC 64 at paras 43-44; and *R v Houle*, 2016 MBCA 121 at para 11.

[11] Counsel for the accused also conceded that the trial judge followed the proper approach in crafting the sentence for each offence but submits that the three-year reduction for totality was not enough to avoid a crushing sentence.

[12] While I do not agree that a further reduction in the combined sentence is warranted on the basis that it is unduly long or harsh or that it is not proportional to the accused's culpability, I am of the view that the sentence must be reduced from 11 years to nine years.

[13] At the sentencing hearing, the Crown submitted that, as the accused was being sentenced for multiple sexual offences on each of the victims, consecutive sentences were required given the separate and distinct harm to each of them. And while Crown counsel (not counsel on appeal) did not clearly articulate the specific sentence for each offence, it is clear that the Crown proposed that the sentences for the offences involving the girl alone should be concurrent to one another; that the sentences for the offences involving both the boy and the girl should be concurrent to one another but consecutive to the sentences for the offences involving only the girl; and that the sentences for making sexually explicit material available to the girl and the boy should be consecutive to each other and to the other sentences. In the words of Crown counsel:

> With respect to the custodial sentence the Crown is seeking, I can advise that at the end of the day the Crown is essentially asking you to impose concurrent sentences for [the girl], concurrent sentences for [the boy] but consecutive to that of [the girl], and I'm going to ask the court to impose consecutive sentences for the showing of sexually explicit material to the children.

[14] Significantly, the Crown submitted that the sentences relating to the offences of sexual assault, sexual interference and invitation to sexual touching involving the girl alone should be six years.

[15] Although the trial judge said that she accepted the disposition proposed by the Crown, she sentenced the accused to eight years for those offences. In particular, she imposed a six-year sentence for the offences of sexual assault and sexual interference (to be served concurrently) and a further two-year consecutive sentence for the offence of invitation to sexual touching.

[16] In my view, consistent with the sentencing submissions of both Crown and defence counsel, concurrent sentences should have been imposed for all three offences.

[17] I say this for two reasons.

[18] First, by imposing a two-year consecutive sentence, the trial judge was in fact imposing a greater sentence than the Crown was seeking. The trial judge clearly intended to accept the Crown's sentencing submission and did not intend to increase the sentence proposed by Crown counsel.

[19] Second, while there was evidence which could reasonably support a conviction for sexual assault and invitation to sexual touching, the offences were sufficiently interrelated to warrant concurrent sentences (*R v Dalkeith-Mackie*, 2018 MBCA 118 at para 34). At the conclusion of the trial, Crown counsel submitted that the offending behaviour underlying each offence was essentially the same:

> So if you look at the indictment, counts 1 and count 3 are sexual assault, as well as sexual interference with respect to [the girl], that

> is made out ultimately if the court accepts that the accused had [the girl] suck on his penis or that he put his mouth on her vagina.
>
> Count 4, invitation to sexual touching for [the girl], it's my submission that that's made out if the court accepts that he had asked [the girl] to give him oral sex, or to touch his penis, as outlined.

[20] For these reasons, it is my view that the trial judge erred when she imposed the two-year consecutive sentence for the offence of invitation to sexual touching and that the error "had an impact on the sentence in more than just an incidental way" (*Gladue* at para 9). Accordingly, the sentence for the offence of invitation to sexual touching should be concurrent to the six-year sentence for sexual assault and sexual interference.

[21] I agree with the balance of the trial judge's reasons for sentence, including the ancillary orders and the reduction of the total sentence by three years to account for the principle of totality.

[22] The appropriate sentences, before totality considerations, are as follows:

Count 1—sexual assault on the girl	6	years
Count 3—sexual interference with the girl	6	years concurrent to count 1
Count 4—inviting the girl to sexually touch the accused	2	years concurrent to counts 1 and 3
Count 5—counselling the boy to sexually touch the girl	2	years consecutive

Count 6—counselling the girl to sexually touch the boy	2	years consecutive
Count 7—making sexually explicit material available to the boy	1	year consecutive
Count 8—making sexually explicit material available to the girl	1	year consecutive
Total	12	

[23] The three-year reduction for totality should have been apportioned by the trial judge, but was not (see *R v Banayos and Banayos*, 2018 MBCA 86 at para 52). In my view, the sentences for counts 1 and 3 should be reduced by two years, and the sentences for counts 7 and 8 should be reduced by six months. A combined sentence of four and one-half years for each of the two victims properly reflects the moral blameworthiness of the accused, taking into consideration the totality principle.

[24] The adjusted sentences, after totality considerations, are as follows:

Count 1—sexual assault on the girl	4	years
Count 3—sexual interference with the girl	4	years concurrent to count 1
Count 4—inviting the girl to sexually touch the accused	2	years concurrent to counts 1 and 3
Count 5—counselling the boy to sexually touch the girl	2	years consecutive

Count 6—counselling the girl to sexually touch the boy	2	years consecutive
Count 7—making sexually explicit material available to the boy	6	months consecutive
Count 8—making sexually explicit material available to the girl	6	months consecutive
Total	9	years

[25] As stated by Chartier JA (as he then was) in *R v Ladouceur and Traverse*, 2008 MBCA 110, "to be clear, these reductions in sentences should not be taken as meaning that they are the fit and appropriate sentences . . .. Rather, the sentence adjustments are ordered to address totality principle considerations" (at para 77).

[26] In the result, the conviction appeal is dismissed, leave to appeal sentence is granted, and the custodial portion of the sentence is reduced from 11 years to nine years.

Burnett JA

I agree: Monnin JA

I agree: Steel JA