Citation: R v Fehr, 2018 MBCA 131 Date: 20181213
Docket: AR17-30-08909

IN THE COURT OF APPEAL OF MANITOBA

Coram: Mr. Justice Michel A. Monnin
Madam Justice Diana M. Cameron
Madam Justice Janice L. leMaistre

B E T W E E N :

HER MAJESTY THE QUEEN	)	***S. B. Simmonds*** *and*
	)	***S. R. Segal***
	)	*for the Appellant*
Respondent	)	
	)	***J. M. Mann***
- and -	)	*for the Respondent*
	)	
CRYSTAL LYNN FEHR	)	*Appeal heard:*
	)	***May 29, 2018***
(Accused) Appellant	)	
	)	*Judgment delivered:*
	)	***December 13, 2018***

MONNIN JA

[1] The accused appeals a sentence of three years' incarceration imposed following a plea of guilty to a charge of counselling obstruction of justice contrary to section 139(2) of the *Criminal Code*.

[2] The accused had originally been charged with counselling to commit murder, to which she pleaded not guilty, but the Crown was satisfied in accepting a plea to the lesser included offence noted above in full answer to the original charge.

[3] The accused argues that the sentencing judge erred in relying on the provisions of section 725(1)(c) of the *Criminal Code*; that he further erred in

misapplying this Court's decision in *R v Okemow*, 2017 MBCA 59, resulting in inadequate weight being placed on the accused's rehabilitative efforts and the mental health conditions from which she was suffering; and finally, that the sentence imposed was harsh and excessive.

[4] I deal firstly with the sentencing judge's reliance on section 725(1)(c). The section reads:

> **Other offences**
> **725(1)** In determining the sentence, a court
>
> > **(c)** may consider any facts forming part of the circumstances of the offence that could constitute the basis for a separate charge.

[5] In imposing the sentence that he did, the sentencing judge stated the following with respect to section 725(1)(c):

> Rarely does the offence of attempting to obstruct justice involve taking steps to have the subject of a legal proceeding killed. I recognize that the facts here support the plea, however, the facts also support a more serious charge of counselling to commit murder, or some similar charge. The Crown has exercised its discretion to accept a plea to the instant charge. Given the disparity concerning counsel's positions, and in support of a fit and appropriate sentence, it's necessary in my view to clearly indicate that the court is proceeding on the basis that [the accused] counselled the police agent to commit murder, and in fact, as I indicated, during the plea inquiry and again here today, it is confirmed that that fact is acknowledged and is before me and being taken into account in consideration of arriving at a fit and appropriate sentence. Pursuant to Section 725 of the Code, and I quote:
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> > "In determining the sentence, a court:

> (c) may consider any facts forming part of the circumstances of the offence that could constitute the basis for a separate charge"
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> In my view, that section has application in this circumstance. Accordingly, the fact that the offence involved a counselling to have someone killed, the court must take that into consideration. Accordingly, that consideration places the severity of the offence significantly higher than the upper end of the spectrum for the offence of attempting to obstruct justice that the court typically deals with and that I've previously described.

[6] The offence to which the accused pled guilty came about between February 1, 2015 and April 14, 2015, when the accused solicited a former employee of her business to procure a hitman to kill her husband's first born child from a prior relationship in an effort to avoid paying an order of child support. Following a number of conversations of this nature, the former employee contacted police and eventually became a police agent and made recordings of his subsequent conversations with the accused.

[7] In arguing that the sentencing judge erred in relying on section 725(1)(c) of the *Code*, the accused relies on what the Supreme Court of Canada said in *R v Larche*, 2006 SCC 56. Fish J wrote (at para 20):

> Section 725(1)(*c*), on the other hand, allows the court to take into consideration facts that *could* constitute the basis for a separate charge that *has not* — or at least not yet — been laid.

[8] He further states (at para 28):

> As we have seen, s. 725(1)(*c*) permits a court, in determining the sentence, to consider any fact that forms part of the circumstances of the offence even if it could form the basis for a separate charge. These uncharged but proven offences, if they are considered at all, will invariably be treated as "aggravating circumstances" within the meaning of s. 718.2(*a*) and related provisions of the *Criminal*

> *Code*. It is true, of course, that not all aggravating circumstances, or factors, are crimes in themselves. The offender's previous convictions, for example, and the vulnerability of the victim due to infirmity or age, are not offences in themselves. But, like uncharged offences that may be considered under s. 725(1)(*c*), they are aggravating as opposed to mitigating circumstances because they warrant *more severe* — not *more lenient* — sentences.

[9] In my view, the operative words in this section are that the facts to be relied on could constitute the basis for a separate charge, namely one that has yet to be laid. Those are not the facts in this case. In this case, a charge of counselling to commit murder had previously been laid.

[10] There are two other decisions which are instructive in considering the accused's argument. In *R v MacLeod*, 2018 SKCA 1, the accused and his two co-accused were originally charged with break and enter with intent to commit an indictable offence, disguise with intent, and weapons charges. Pursuant to a plea deal, the weapons charges against MacLeod were stayed and he pleaded guilty to the remaining charges. The accused then appealed his seven-year sentence, arguing that the trial judge had improperly sentenced the accused as if he had been convicted of weapons charges, and that his sentence offended the principle of proportionality.

[11] In agreeing that the sentence needed to be lowered, Caldwell JA offered comments on section 725(1)(c). He wrote (at paras 28-29):

> The point here is that the overall fitness of *Mr. MacLeod's* sentence on an individualised basis cannot be assessed from a footing that includes offences for which he has not been convicted, i.e., weapons offences. The question in this appeal is whether this

> amounts to an error in principle and, if so, whether it affected Mr. MacLeod's sentence.
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> Although not directly applicable in these circumstances, s. 725 of the *Criminal Code* assists in answering the first part of the question. That section allows a sentencing court to "consider any facts forming part of the circumstances of the offence that could constitute the basis for a separate charge" (s. 725(1)(c)), provided that the court notes those facts on the information or indictment (s. 725(2)(b)). The sentencing court may do this on its own initiative and there is no requirement that the Crown or the offender consent to the application of s. 725(1)(c) in any sentencing: *R v Larche*, 2006 SCC 56, [2006] 2 SCR 762. But, where the offender objects, the Crown must prove the existence of any aggravating fact beyond a reasonable doubt (s. 724(3)(e)). The section is not applicable in this case because it only pertains to facts that could constitute the basis for a separate charge *that has not been laid* (*R v Larche* at para 20; *R v Henareh*, 2015 BCSC 992). Here, weapons-related offences had been laid but the Crown had agreed to stay its prosecution of them under the plea bargain.
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> [emphasis added]

[12] In *R v Henareh*, 2015 BCSC 992, the original indictment contained three counts and the accused pleaded guilty to the third count of possession of opium for the purpose of trafficking. Before sentencing, the Crown applied to adduce additional evidence which was related to the first two counts, but indicated that those counts would be stayed after the sentencing on the third count.

[13] In concluding that section 725(1)(c) was inapplicable, Watchuk J wrote (at para 33):

> The "circumstances of the offence", although a phrase that is frequently present in sentencing reasons, appears in the *Criminal Code* for the purposes of sentencing only in s. 725(1)(c). Pursuant

> to that provision, the court may consider the facts forming part of the circumstances of the offence that could constitute the basis for a separate charge. However, s. 725(1)(c) does not apply to these circumstances since the facts intended to be relied upon by the Crown do form the basis for separate charges already part of the Indictment in counts 1 and 2.
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> [emphasis added]

[14] Finally, on this issue, I note that the Crown basically conceded that the sentencing judge erred.

[15] Thus, on the basis of these decisions and the Crown's concession, I am satisfied that the sentencing judge erred in his reliance on section 725(1)(c) because the facts that he was prepared to consider did not arise from an uncharged offence.

[16] Having said that, I am not persuaded that the sentencing judge erred by relying on the underlying facts of the offence as aggravating. See *R v Angelillo*, 2006 SCC 55 at para 18. Also, as Wagner J (as he then was) wrote in *R v Lacasse*, 2015 SCC 64 (at paras 42-44);

> My colleague states that a sentence may be unfit if there is a reviewable error in the thought process or reasoning on which it is based (para. 140). For this reason, in his view, where there is a reviewable error in the trial judge's reasoning, for example where the judge has characterized an element of the offence as an aggravating factor (para. 146), it is always open to an appellate court to intervene to assess the fitness of the sentence imposed by the trial judge. Having done so, the court can then affirm that sentence if it considers the sentence to be fit, or impose the sentence it considers appropriate without having to show deference (paras. 139 and 142). In other words, any error of law or error in principle in a trial judge's analysis will open the door to intervention by an appellate court, which can then substitute its own opinion for that of the trial judge.

> With all due respect for my colleague, I am of the view that his comments on this point need to be qualified. 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).
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> 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.
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> [emphasis added]

[17] Nor am I convinced that the sentencing judge placed inadequate weight on the accused's rehabilitative efforts and her mental health conditions.

[18] The argument being made here was the same argument made before the sentencing judge.

[19] He was clearly aware of *Okemow* and quoted from that decision in his reasons. However, he did not accept the accused's argument stating:

> Notwithstanding the reports in evidence of [the counsellor], [the accused] apparently lived a normal life in all respects, in fact, she appeared to thrive, raising a family and acting as a nurturing and supportive mother prior to this matter. There are a number of

> letters in support filed with the court, and that observation appears to be consistent with those who knew [the accused] intimately over the years. The accused also maintained employment and operated several successful stores. Prior to this incident, there is no identified circumstance where grossly irrational thinking or actions were documented. The accused has never previously been diagnosed or sought psychiatric treatment. I recognize that she did briefly see a mental health clinician for several sessions, but did not find it helpful. It is submitted that this petition of paternity was an event of such magnitude that it triggered an episode associated with what would appear to be an otherwise latent, undiagnosed mental illness. In context, [the accused] had been aware previously that her husband might be the father of [the child], it is difficult to conceive that other life events would not have previously precipitated some significant event if [the accused's] psychological makeup was sufficiently delicate that this event could trigger such a wildly inappropriate result. [The counsellor's] reports are in evidence and must be considered by me. Weight, however, is a question to be determined. [The counsellor] is not a doctor specializing in psychiatry, who would typically make a clinical diagnosis. It is not clear, in my view, the degree of nexus between the offending behaviour and the diagnosis. Mindful of the approach advocated in [*Okemow*]. While I recognize the presence of some aspect of mental illness, I do not find it is a significant consideration that would operate to detract to any significant degree from her degree of responsibility.

[20] I find no error in what the sentencing judge said with respect to this issue.

[21] As to the whole of his reasons, it is clear that the sentencing judge saw the underlying facts of this case as being particularly egregious and aggravating and made that known to counsel during their submissions. He made it clear that it was the underlying fact of the plot to kill that he was considering rather than the offence of counselling to commit murder. In doing so, he did not err.

[22] In a final analysis, despite the sentencing judge's error with respect to his reliance on section 725(1)(c), his review of the facts, both aggravating and mitigating, was even-handed. He correctly identified denunciation and deterrence as important sentencing considerations. While the sentence imposed might be at the higher end of an acceptable range for this offence, I have not been satisfied that it was demonstrably unfit.

[23] Accordingly, I would dismiss the appeal.

Monnin JA

I agree: Cameron JA

I agree: leMaistre JA