Citation: R v RW, 2021 MBCA 71

Date: 20210901
Docket: AR21-30-09564

IN THE COURT OF APPEAL OF MANITOBA

Coram: Madam Justice Diana M. Cameron
Madam Justice Janice L. leMaistre
Madam Justice Karen I. Simonsen

BETWEEN:

HER MAJESTY THE QUEEN	) ***A. R. Hodge***) *for the Appellant*
Respondent	) ***R. D. Lagimodière***) *for the Respondent*
- and -	)
R. W.	) *Appeal heard and*) *Decision pronounced:*) ***August 23, 2021***
(Accused) Appellant	) *Written reasons:*) ***September 1, 2021***

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On appeal from 2021 MBPC 1

SIMONSEN JA (for the Court):

[1] The accused seeks leave to appeal and, if granted, appeals a total sentence of nine years' incarceration (less a credit of 696 days for pre-sentence custody) imposed following his conviction for two counts of sexual interference. The accused had sexual intercourse on three occasions with the 13-year-old sister of his then common-law wife. In January 2019, he twice had sexual intercourse with the victim, once without a condom. In

October 2019, he again had sexual intercourse with her, this time while she was intoxicated.

[2] The accused asserts that the trial judge erred in the application of the principle of totality, which resulted in an unfit sentence.

[3] Following the hearing, we granted leave to appeal, but dismissed the appeal with reasons to follow. These are those reasons.

[4] The standard of review applicable to sentencing decisions is deferential. Absent an error in principle that had a material impact on the sentence or a sentence that is demonstrably unfit, an appellate court should not intervene (see *R v Friesen*, 2020 SCC 9 at para 26).

[5] The proper approach to be taken in the application of the principle of totality was outlined by this Court in *R v Draper*, 2010 MBCA 35 (at para 30):

> That procedure is for the sentencing judge to first determine whether the offences in question are to be served consecutively or not. Second, if they are to be served consecutively, then an appropriate sentence for each offence should be determined. Third, the totality principle should be applied to the total sentence thereby arrived at to ensure that the total sentence is not excessive for this offender as an individual. In effect, the sentence must be given a "last look". Fourth, if the judge decides that it is excessive, then the sentence must be adjusted appropriately. In some cases that might require a significant adjustment.

See also *R v Arbuthnot*, 2009 MBCA 106; *R v Taylor*, 2010 MBCA 103; *R v Wozny*, 2010 MBCA 115; *R v LLP*, 2016 MBCA 28; *R v McFarlane*, 2018 MBCA 48; and *R v Giesbrecht*, 2019 MBCA 35 at paras 207-208.

[6] The Crown concedes that the trial judge erred in applying the principle of totality when, after concluding that the appropriate range of sentence for the January incidents was four to six years and the appropriate range for the October incident was five to six years, she stated (at para 48):

> Gladue factors [*R v Gladue*, [1999] 1 SCR 688], the totality principle, and taking a "last look" lead me to a final sentence [of four years for the January incidents and five years consecutive for the October incident, amounting] to a total sentence of nine years . . ..

[7] It is evident that the proper procedure was not followed in that the trial judge did not first determine a specific sentence for each offence taking into account all relevant factors, including *Gladue* factors (see *R v Gladue*, [1999] 1 SCR 688), and only then take one last look at the overall sentence to ensure that it was not unduly long or harsh, considering "the gravity of the offences, the offender's moral culpability, the harm done to the victims, that the effect of the sentence is not 'crushing', and that it be in keeping with the offender's record and future prospects" (*Arbuthnot* at para 18; see also *R v SADF*, 2021 MBCA 22 at para 41).

[8] The accused says that, given the trial judge's error, her decision is not owed deference. He further contends that, recognising the range of sentence that she identified as appropriate for each offence, and applying the principle of restraint, this Court should determine the total sentence to be nine years (four years for the January incidents and five years for the October incident) and that, after the proper application of the principle of totality, that sentence should be reduced to seven years. The accused argues that a total sentence of nine years is excessive, applying the principle of parity (see, for example, *SADF*).

[9] The Crown takes the position that there is no basis for appellate intervention because the trial judge's error was not material and the sentence imposed was not unfit. It notes the comment of Cameron JA in *LLP* that, "[w]hile sometimes a failure to follow this procedure [in the application of totality] will not result in an unfit sentence, other times, . . . it will" (at para 27). As we will explain, we agree with the Crown that, in this case, the trial judge's error did not have a material impact on the sentence nor did it result in an unfit sentence.

[10] The consideration of totality has been described as "a more focussed application of the general principle of proportionality" (*Arbuthnot* at para 18; see also *Giesbrecht* at para 208).

[11] In assessing proportionality and determining a fit sentence, the trial judge took into account and weighed a number of factors, in respect of which no challenge is made and with which we see no basis to interfere.

[12] The trial judge concluded that the offences were "grave" (at para 9), and that, apart from *Gladue* factors, there were no mitigating circumstances. She correctly recognised that, despite the victim having initiated the sexual interaction, "[t]here [was] nothing mitigating about the participation of the [victim]. This was an exploitative relationship rooted in a power imbalance" (at para 27).

[13] Many aggravating factors were identified by the trial judge, including the age of the victim relative to that of the accused; the familial relationship between the accused and the victim; the serious and repetitive nature of the sexual violation; the first incident having taken place when the victim was acting as babysitter for the accused's daughter; the accused's

failure to use a condom on at least one occasion; the victim's vulnerability being exacerbated, during the final incident, by her intoxication; that incident having occurred shortly after the accused's release on bail for the earlier incidents, in violation of bail-ordered protective conditions; and the accused's actions having involved a breach of trust. The trial judge appreciated the destructive impact on the victim and her relationships with members of her immediate family.

[14] The trial judge understood that the accused had no criminal record prior to 2019, but that he has since accumulated several convictions, including for numerous breaches of court orders, as well as assault cause bodily harm and assault a peace officer.

[15] Also considered by the trial judge was the accused's background as an Indigenous person and the impact of colonialism. In particular, she found that the accused's father having attended residential school resulted in the accused's "understanding or perspective on family and interfamilial relationships and boundaries [being] skewed to the negative" (at para 31). As well, the accused, like his father, has suffered from substance abuse. The trial judge determined that, although *Gladue* considerations diminished the accused's moral blameworthiness, his "degree of responsibility [was] significant and his moral culpability substantial" (at para 45).

[16] The trial judge turned her mind to the accused's prospects for rehabilitation, concluding that "rehabilitation remains an appropriate consideration but will have to begin in an institutional setting" (at para 38).

[17] The total sentence arrived at by the trial judge reflects her appreciation of the comments made by the Supreme Court of Canada in

Friesen about sentencing for sexual offences against children. In *Friesen*, the Court spoke about the gravity of such offences, the long-term harm caused by the sexual violation of children (see paras 80-81), as well as the appropriate range of sentence (at para 114):

> . . . That message is that mid-single digit penitentiary terms for sexual offences against children are normal and that upper-single digit and double-digit penitentiary terms should be neither unusual nor reserved for rare or exceptional circumstances. We would add that substantial sentences can be imposed where there was only a single instance of sexual violence and/or a single victim, as in this case, *Woodward* [*R v Woodward*, 2011 ONCA 610], and *L.M.* [*R v LM*, 2008 SCC 31]. In addition, as this Court recognized in *L.M.*, maximum sentences should not be reserved for the "abstract case of the worst crime committed in the worst circumstances" (para. 22). Instead, a maximum sentence should be imposed whenever the circumstances warrant it (para. 20).

[18] Given all of the relevant factors considered and weighed by the trial judge, and the applicable law that she referenced, we are not persuaded that she would have arrived at a different sentence had she not erred in the application of the principle of totality. She rejected the Crown's request for a total sentence of 12 years. And the total sentence of nine years that she did impose was within the range that counsel for the accused (different than counsel on appeal) had suggested to her; he put forward a range of seven to nine years.

[19] Furthermore, considering the circumstances of these offences and this offender, and the guidance provided in *Friesen*, we are of the view that the total sentence of nine years was not unfit.

[20] In the result, leave to appeal was granted, but the appeal was dismissed.

Simonsen JA

Cameron JA

leMaistre JA