IN THE COURT OF APPEAL OF MANITOBA

Coram: Mr. Justice William J. Burnett
Madam Justice Janice L. leMaistre
Madam Justice Karen I. Simonsen

B E T W E E N :

HER MAJESTY THE QUEEN	)	***A. C. Bergen***
	)	*for the Appellant*
	)	
Appellant	)	***E. G. Murphy***
	)	*for the Respondent*
- and -	)	
	)	*Appeal heard and*
MUSTAF AHMED YARE	)	*Decision pronounced:*
	)	***October 23, 2018***
	)	
(Accused) Respondent	)	*Written reasons:*
	)	***October 31, 2018***

LEMAISTRE JA (for the Court):

[1] This appeal involves the extent to which a sentencing judge can craft a sentence in order to avoid collateral immigration consequences.

[2] The Crown seeks leave to appeal and, if granted, appeals the total sentence of five months and 25 days imposed by the sentencing judge for the offences of flight from police by motor vehicle, uttering threats (two counts) and failing to comply with a recognizance under the *Criminal Code* (the *Code*).

[3] After the hearing, we granted leave to appeal and allowed the appeal with brief reasons to follow. These are our reasons.

[4] The accused pled guilty to the offences. The facts were not in dispute at the sentencing hearing. The accused was driving a motor vehicle with a passenger when the police attempted to pull the vehicle over to conduct a traffic stop. Rather than pull over, the accused accelerated towards the police vehicle, colliding with it and causing it to stall. The accused drove off at a high rate of speed with other police vehicles in pursuit. After travelling for a distance of 500 metres, the accused crashed into a metal sign post and fled on foot. He and the passenger, who also fled, were apprehended after a short chase and arrested. On the way to the police station the accused threatened the police officers when he said, "I'm going to get my gang and I'm going to find you and kill you. I'm a real gangster and you will die. Trust me, you fucking goofs."

[5] After spending a few nights in custody, the accused was released on bail with conditions which included a curfew. Less than two weeks after his release, the accused was arrested while in breach of his curfew.

[6] The accused is a permanent resident of Canada and is therefore subject to the *Immigration and Refugee Protection Act*, SC 2001, c 27 (the *Act*). Section 64 of the *Act* provides, in part, that a permanent resident, who has been found to be inadmissible to Canada due to serious criminality, may not appeal the finding of inadmissibility. Punishment of at least six months for a crime in Canada meets the definition of serious criminality. Pre-sentence custody used in calculating the total sentence is considered to be part of the punishment for the purposes of section 64 (see *R v Amon*, 2009 MBQB 163 at paras 6-7).

[7] On the date of sentencing, the accused had been in custody for

170 days, which is the equivalent of eight and one-half months when credited at a rate of 1.5:1 (see *R v Beardy*, 2016 MBCA 68 at paras 49-52).

[8] At the sentencing hearing, the Crown sought a sentence of 18 to 19 months' incarceration. Counsel for the accused recommended a sentence that would take into account only 179 days of the total pre-sentence custody (which was equivalent to eight and one-half months) in order to avoid the six-month threshold in the *Act*.

[9] The sentencing judge acknowledged the importance of the principles of deterrence and denunciation when sentencing for offences involving threats to police officers and flight involving risk to the police and members of the public. He also acknowledged the accused's prior record, which included custodial sentences of 179 days for assault with a weapon and 90 days for assaulting a peace officer in 2016. Finally, he acknowledged that a sentence greater than six months might result in the accused's deportation from Canada.

[10] The sentencing judge concluded that the accused "ought to be jailed for about a year for these charges", but imposed a sentence that appears to be less than six months' incarceration:

- flight from police by motor vehicle—four months' incarceration plus credit for 30 days of pre-sentence custody (20 days credited at a ratio of 1.5:1) for a total of five months' incarceration;

- uttering threats x2—20 days' incarceration concurrent on each count but consecutive to the five months; and

- failing to comply with a recognizance—five days' incarceration consecutive.

[11] The total sentence imposed was five months and 25 days' incarceration with four months and 25 days remaining to be served.

[12] The sentencing judge explained his decision when he stated:

> The reason why you are staying in jail is because these charges merit you to stay in jail, even though you have been in jail for a long time; however, when the math is done with respect to your sentence, it is less than six months. I am not inclined to subject you to deportation hearings, but you need to know how lucky you are.

[13] The Crown argues that the sentencing judge erred in his assessment of the relevant factors by placing undue weight on collateral immigration consequences and failed to impose a sentence that was proportionate to the gravity of the offences and the moral culpability of the offender.

[14] The accused relies on three cases in support of his argument that the sentence imposed by the sentencing judge was within the range and therefore not demonstrably unfit.

[15] In *R v Muthoka*, 2011 MBCA 40, the accused in that case pled guilty to two counts of dangerous operation of a motor vehicle causing death. Her conduct was described as a "momentary lapse of judgment" (at para 3). She was sentenced to a suspended sentence with probation and community service work. On appeal, this Court reduced the 10-year driving prohibition to four years.

[16] In *R v Shoyoye*, 2015 MBQB 72, the accused in that case pled guilty to dangerous driving causing bodily harm and dangerous driving causing death. Quoting *R v Eckert*, 2006 MBCA 6, the Court found that, because dangerous driving encompasses a wide range of conduct, the facts become crucial in assessing the moral blameworthiness of the accused (see para 2); "the more flagrant and deliberate the behaviour, the harsher the penalty" (at para 19). In imposing a 90-day intermittent sentence, probation and community service work, the Court found that the offence involved "unintended acceleration" (at para 2).

[17] In *R v Ali*, 2015 MBCA 64, the accused in that case was convicted of two counts of dangerous operation of a motor vehicle causing bodily harm and sentenced to nine months' imprisonment. In finding the sentence was not demonstrably unfit, Mainella JA concluded that a nine-month sentence was "towards the high end of the range for a sympathetic first-time offender convicted of dangerous operation of a motor vehicle causing bodily harm" (at para 7).

[18] However, none of these cases involved deliberate ramming of a police vehicle or an attempt to evade police, and the moral blameworthiness of each accused was found to be low in *Muthoka* and *Shoyoye*. While his moral blameworthiness was found to be high in *Ali*, the accused in that case was a first offender.

[19] The sentencing judge's decision is entitled to a high degree of deference and may only be interfered with if he committed an error in principle that impacted on the sentence in a material way or the sentence is demonstrably unfit (see *R v Houle*, 2016 MBCA 121 at para 11).

[20] Immigration consequences for an accused are a relevant factor on sentencing (see *R v Arganda (JR)*, 2011 MBCA 54 at para 29; and *R v Pham*, 2013 SCC 15 at para 13). Collateral consequences are not aggravating or mitigating factors. They are "any consequences for the impact of the sentence on the particular offender. They may be taken into account in sentencing as personal circumstances of the offender" (*Pham* at para 11).

[21] The focus of sentencing, however, must be on the fundamental principle of proportionality. A sentence must be proportionate, having regard to the gravity of the offence and the degree of responsibility of the offender, and only then may collateral consequences be taken into account (see *Pham* at paras 13-15; and *R v Lacasse*, 2015 SCC 64 at para 53). As explained by Wagner J in *Pham* (at paras 13-15):

> Therefore, collateral consequences related to immigration may be relevant in tailoring the sentence, but their significance depends on and has to be determined in accordance with the facts of the particular case.
>
> The general rule continues to be that a sentence must be fit having regard to the particular crime and the particular offender. In other words, a sentencing judge may exercise his or her discretion to take collateral immigration consequences into account, provided that the sentence that is ultimately imposed is proportionate to the gravity of the offence and the degree of responsibility of the offender.
>
> The flexibility of our sentencing process should not be misused by imposing inappropriate and artificial sentences in order to avoid collateral consequences which may flow from a statutory scheme or from other legislation, thus circumventing Parliament's will.

[22] In *R v Lopez-Orellana*, 2018 ABCA 35, the Court concluded that reducing the sentence from 10 months' incarceration to six months less one

day "to avoid the collateral immigration consequences would render this an unfit sentence and one that is inconsistent with the fundamental purpose and principles identified in the *Criminal Code*" (at para 28).

[23] In our view, the sentencing judge imposed an artificial sentence in order to circumvent Parliament's will and, in doing so, he erred in principle by overemphasising the collateral consequences. Moreover, reducing the sentence by more than six months from what he considered appropriate to avoid immigration consequences resulted in a sentence that is not proportionate having regard to the circumstances of the offence and the moral culpability of the offender.

[24] The sentencing judge imposed the reduced sentence by allowing a credit of 1.5:1 on only 20 days of the 170 days of pre-sentence custody. Had he allowed a credit of 1.5:1 on all of the pre-sentence custody, the total sentence would have been 13 months and 10 days. We are of the view that, while this sentence is low in the circumstances of this case, it is within the range of acceptable sentences for these offences.

[25] The aggravating factors in this case include the following: the accused has a lengthy and related criminal record; he was on probation at the time of the offences; he was in breach of the conditions on his conditional driver's license; he intentionally rammed a police vehicle to facilitate his escape; his manner of driving created a danger in a residential neighbourhood; he continued to flee on foot after crashing into a metal signpost and rendering the vehicle no longer drivable; and this all occurred on the day he was released from custody from a prior sentence.

[26] The accused's guilty plea is a mitigating factor.

[27] The accused was born in Ethiopia and raised in a refugee camp in Somalia. He came to Canada in 2009 with his family. He is 23 years of age, has a Grade 11 education and lives with his parents who are supportive of him. A sentence in excess of six months will affect his right of appeal under the *Act* and may result in his deportation.

[28] Given the deliberate nature of the offences and his conduct towards the police upon his arrest, the accused's moral culpability is high and deterrence and denunciation are the primary sentencing principles.

[29] In the result, we imposed a sentence of 10 months' incarceration for the offence of flight from police by motor vehicle; two months and 10 days' incarceration concurrent for each of the two offences of uttering threats consecutive to the 10 months; and one month consecutive for the offence of failing to comply with a recognizance. The total sentence was therefore 13 months and 10 days' incarceration. We credited the accused for eight and one-half months pre-sentence custody in relation to the offence of flight from police by motor vehicle, leaving a remaining period of incarceration of four months and 25 days. That period of incarceration had been served prior to the appeal hearing. The probation order, driving prohibition and other ancillary orders imposed by the sentencing judge were unchanged.

leMaistre JA

Burnett JA

Simonsen JA