Citation: R v AAJT, 2022 MBCA 47
Date: 20220516
Docket: AR21-30-09565

IN THE COURT OF APPEAL OF MANITOBA

Coram: Chief Justice Richard J. Chartier
Madam Justice Karen I. Simonsen
Madam Justice Lori T. Spivak

B E T W E E N:

	)	***C. M. A. Glawson***
HER MAJESTY THE QUEEN	)	*for the Appellant*
	)	
Respondent	)	***M. S. Bright***
	)	*for the Respondent*
- and -	)	
	)	*Appeal heard and*
A. A. J. T.	)	*Decision pronounced:*
	)	***May 3, 2022***
(Accused) Appellant	)	
	)	*Written reasons:*
	)	***May 16, 2022***

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On appeal from 2021 MBQB 3

SIMONSEN JA (for the Court):

[1] Following a trial, the accused was convicted of sexual interference, making, distributing and possessing child pornography, and failing to comply with an undertaking (having pled guilty to one count of breach of recognizance). He now seeks leave to appeal and, if granted, appeals his total sentence of 22 years' imprisonment.

[2] After the hearing, we dismissed the appeal with reasons to follow. These are those reasons.

[3] The accused asserts that the sentencing judge (the judge) erred by admitting, and placing significant weight on, a document prepared by the Canadian Centre for Child Protection entitled "Survivors' Survey: Executive Summary 2017" online (pdf): *<https://protectchildren.ca/pdfs/C3P_SurvivorsSurveyExecutiveSummary2017_en.pdf>* (date accessed 6 May 2022) (the survey); giving inadequate weight to his prospects for rehabilitation; and incorrectly applying the principle of totality, all of which led to a sentence that was harsh and excessive.

[4] Over the course of a year, the accused repeatedly abused his then girlfriend's four-year-old daughter (the victim). The abuse included all manner of forced sexual acts, including digital penetration, cunnilingus and penile penetration. The victim's mother (the mother) observed the abuse, and later participated at the behest of the accused. The victim endured repeated two-on-one assaults at the hands of these individuals.

[5] The accused created over 80 images and videos of him and the mother abusing the victim and distributed some of them to other people over the internet in an effort to entice them to send other child sexual abuse images to him. He also used social media platforms to engage in graphic discussions with others about sexually abusing children. He amassed a collection of over 650 child pornography images and videos, many of which showed other children being sexually abused by adults or otherwise engaging in sexual acts. The accused was actively engaged in trading and sharing those images with others online.

[6] The impact on the victim has been devastating. She has suffered from anxiety and symptoms of post-traumatic stress disorder, and has had suicidal thoughts. She does not feel safe with caregivers and authority figures, including her father, who, unaware of what was happening to her, continued to send her to the accused's house. In the words of the victim's art therapist, her "healing from this abuse will be ongoing in her life."

[7] At the sentencing, the Crown sought consecutive sentences totalling 32 years and three months, which it recommended be reduced to 25 years for totality. The accused took the position that a fit sentence would be 17 years, reduced for totality to 14 years. On appeal, the accused says that an appropriate total sentence is 28 years, reduced to 17-18 years for totality.

[8] The judge concluded that the accused's offending placed him "at the extreme end of the scales of both moral blameworthiness and severity of offences" (at para 120). Consecutive sentences for each offence, totalling 30.5 years, were imposed, which the judge then reduced to 22 years for totality. The mother, who had pled guilty just prior to the trial, received a sentence of 20 years' imprisonment for her participation in the sexual abuse of the victim as well as making and possessing child pornography (see *R v RDS*, 2021 MBQB 264).

[9] An appellate court can only intervene to vary a sentence if the sentence is demonstrably unfit, or the sentencing judge made an error in principle that had an impact on the sentence (see *R v Friesen*, 2020 SCC 9 at para 26).

[10] The accused contends that the judge erred in principle by admitting, as a community impact statement under section 722.2(1) of the *Criminal Code*

(the *Code*), and then giving significant weight to, the survey—when there was no accompanying affidavit or letter from either a representative of the Canadian Centre for Child Protection or one of the respondents to the survey, as required by section 722.2(2) (see *R v Jonat*, 2019 ONSC 1633 at para 47). The survey was filed by the Crown to provide the Court, as context, with information about the experience of survivors of child sexual abuse imagery offences, particularly with respect to their ongoing victimization and the trauma they experience throughout their lives as a result of abuse they suffered as children.

[11] Although the Crown concedes that the judge erred in admitting the survey as a community impact statement, it says that he was entitled to receive the document under section 723(2) of the *Code*, which had been relied upon by the Crown and which requires a sentencing judge to hear all relevant evidence presented by either the Crown or the accused.

[12] In our view, the judge's reliance on the survey was limited, with the key points he noted being that the making of images which could be accessed for others to see has an enormous negative impact on victims that can persist into adulthood; survivors have difficulty accessing the specialized services they require for support; and many survivors constantly worry about being recognized in public and reported being the victims of targeted harassment, stalking and assault. We are not satisfied that the judge's error in admitting the survey under section 722.2(1) of the *Code* without the statement required by section 722.2(2) had any impact on the sentence, or that he erred in the way he used the survey. There is also no indication that he gave inordinate weight to the survey.

[13] As for the accused's contention that the judge erred by failing to give adequate weight to his prospects for rehabilitation, the objectives of denunciation and deterrence have priority in cases involving abuse of children (see the *Code* at section 718.01). Nonetheless, sentencing judges retain discretion when weighing other factors such as rehabilitation, in accordance with the overall principle of proportionality (see *Friesen* at para 104).

[14] The judge was well aware of the need to consider all relevant factors, including rehabilitation. He identified many facts that led him to conclude that the accused was a high risk to reoffend, including that he actively worked to breach the conditions of his release and avoid detection while doing so; was a master of disguising his identity online and zealously attempted to manipulate and encourage others to participate in his deviant interests involving sexual abuse of children; engaged in ongoing manipulation of and hold on the mother; had a horrific collection of child abuse images in his possession; and took obvious pleasure in the degradation and dehumanization of people who were incapable of defending themselves. Although there was evidence that the accused had completed programming while in pre-trial detention, and had a limited and dated record as well as family support, we do not accept that the judge failed to sufficiently emphasize his prospects for rehabilitation in light of the significant public safety concerns that he understandably found the accused posed.

[15] The accused also argues that the judge did not analyze or properly apply the principle of totality and, in particular, did not consider whether the total sentence was crushing.

[16] The Crown acknowledges that the judge erred by not dealing with each offence separately when considering totality, in that, if any adjustment

was to be made "the actual penalty pertaining to each individual offence must be ascribed" (*R v Wozny*, 2010 MBCA 115 at para 73). However, a failure to do so will not necessarily result in an unfit sentence (see *R v LLP*, 2016 MBCA 28 at para 27).

[17] In applying the principle of totality, the judge identified the relevant considerations outlined in *R v GJM*, 2015 MBCA 103 at para 10, including the impact of the combined sentence on the accused's prospects for rehabilitation in the sense that it may be harsh or crushing. While we might question some of the judge's approach in initially arriving at a global sentence of 30.5 years, we are not persuaded that his decision to then reduce that by almost one-third for totality led, as we will explain, to an unfit sentence in the circumstances. Nor are we convinced that his error in failing to ascribe a particular sentence to each offence had an impact on the total sentence he imposed.

[18] Regarding fitness, the judge understood the applicable principles of sentencing for sexual offences against children and the impact of the Supreme Court of Canada's watershed decision in *Friesen*. In *Friesen*, the Court made clear that "sentences must accurately reflect the wrongfulness of sexual violence against children and the far-reaching and ongoing harm that it causes to children, families, and society at large" (at para 5). The Court explained how to impose sentences that reflect the inherent wrongfulness of the offences and the potential and actual harm caused (see paras 75-92).

[19] The judge found that there were a multitude of aggravating factors that led him to impose the sentence he did: the accused's position of trust in relation to the victim; the victim's young age; the duration and frequency of the abuse; the sexual interference was unprotected and the victim had to be

tested for sexually transmitted infections; the sexual abuse occurred in the presence of and with the victim's mother; the very significant impact on the victim and her family relationships; the nature and size of the accused's child pornography collection, which covered all levels of depravity including bestiality; the accused's creation and dissemination of the images of the victim being sexually abused, some of which included images of her face; the accused's advocating and encouraging other people online to sexually abuse children; and his distribution of images of children, including the victim, being sexually abused to other people online.

[20] One particular online contact of the accused warrants mention. He and a man referred to as "Mr. D" exchanged over 1200 messages on social media, many of which discussed their mutual desire to abuse children. The accused sent him multiple images of the victim and the mother which included their faces and real names. Some were accompanied by written comments from the accused where he claimed that the victim "loved" the sexual abuse and that she had invited it. During their online chats, Mr. D. told the accused that he was the father of a six-month-old daughter, and the accused encouraged him to sexually abuse the child and send him photographs of it. Mr. D. sent the accused a photograph of a man, ostensibly himself, placing his erect penis against the vagina of a sleeping infant.

[21] Furthermore, the victim was an Indigenous girl. Young girls, especially those who belong to marginalized groups, are at a heightened risk of sexual violence that can perpetuate the disadvantage they already face. This is particularly true of Indigenous people, who experience childhood sexual violence at a disproportionate level (see *Friesen* at paras 68-70). A sentence for an offence that involves the abuse of a person who is vulnerable

because of circumstances—including because the person is Indigenous and female—also requires that primary consideration be given to the objectives of denunciation and deterrence (see section 718.04 of the *Code*; and *R v Alcorn*, 2021 MBCA 101 at para 37).

[22] The accused's mitigating factors were very limited. As already noted, he attended counselling while in custody, has a dated and unrelated criminal record, and his family is supportive. As well, he entered a guilty plea on one of his breach charges.

[23] Given all of the above, in particular, the gravity of the offending behaviour, the accused's exceptionally high moral culpability and the significant impact on the victims, we are not persuaded that the total sentence, although very high, rises to the level of being demonstrably unfit in the uniquely disturbing circumstances of this case.

[24] Therefore, leave to appeal the sentence was granted, but the appeal was dismissed. As suggested by the Crown, we set the individual sentences for each offence, after totality, as follows:

Sexual interference (the *Code* at section 151):	12 years
Make child pornography (section 163.1(2)):	7 years consecutive
Distribute child pornography (section 163(1)):	3 years consecutive
Possess child pornography (section 163.1(4)):	2 years concurrent to distribution of child pornography

Fail to comply with terms of release (section 145) x 2:	3 months concurrent and concurrent on each count.

Simonsen JA

Chartier CJM

Spivak JA