Citation: R v Braun, 2023 MBCA 4
Date: 20230116
Docket: AR21-30-09660

IN THE COURT OF APPEAL OF MANITOBA

Coram: Mr. Justice Marc M. Monnin
Madam Justice Jennifer A. Pfuetzner
Madam Justice Lori T. Spivak

BETWEEN:

HIS MAJESTY THE KING	)	***Z. M. Jones*** *for the Appellant*
Respondent	)	***C. R. Savage*** *for the Respondent*
- and -	)	
ROBERT JOSEPH BRAUN	)	*Appeal heard and Decision pronounced:* ***January 10, 2023***
(Accused) Appellant	)	*Written reasons:* ***January 16, 2023***

SPIVAK JA (for the Court):

[1] The accused was convicted of possession of a prohibited firearm with ammunition and unauthorized possession of a prohibited firearm. The latter conviction was stayed pursuant to the *Kienapple* principle (see *Kienapple v The Queen*, [1975] 1 SCR 729). He was sentenced to 40 months' imprisonment.

[2] The accused appeals his conviction on the ground that the verdict was unreasonable and seeks leave to appeal his sentence and, if granted, appeals his sentence on the basis that it is demonstrably unfit. After hearing the appeal, we dismissed the conviction appeal, granted leave to appeal the

sentence, but dismissed the sentence appeal with reasons to follow. These are those reasons.

[3] The circumstances of the offence are that the accused moved into the home of his former girlfriend (the home), Patricia Friesen (Ms Friesen), in March 2018, and moved out in June 2019, after an incident occurred and their relationship deteriorated. While living in the home, he slept on a couch in the basement, which he separated from the rest of the space with makeshift walls. After the accused ceased residing in the home, Ms Friesen found bullets in a drawer beside the couch in July 2019 and a sawed-off shotgun (the shotgun) on the floor between the wall and the couch in August 2019.

[4] At trial, the accused did not testify in his own defence, but argued that other people could have placed the shotgun where it was discovered. In convicting the accused, the trial judge noted that there was no evidence that anyone other than Ms Friesen and the accused were in the area occupied by the accused at any time and that this space was for his exclusive use.

[5] In sentencing the accused to 40 months, the trial judge stressed the importance of the principles of deterrence and denunciation in firearm offences and considered the nefarious nature of the shotgun, the accused's related record and the safety risk to the children in the home.

[6] On the conviction appeal, the accused argues that the verdict is unreasonable as there was no direct evidence of possession and that the trial judge incorrectly applied the law on drawing of inferences, since a reasonable explanation for the presence of the firearm was that someone else could have placed it there.

[7] In our view, there is no basis for appellate intervention.

[8] Where the verdict depends on circumstantial evidence, the reviewing court does not draw its own inferences, but considers whether the inferences drawn by the trier of fact were reasonably available in light of the standard of proof (see *R v Villaroman*, 2016 SCC 33 at para 67). In convicting the accused, the trial judge quoted from *Villaroman* and understood that, where the evidence is based on circumstantial evidence, the court must be satisfied beyond a reasonable doubt that the accused's guilt is the only reasonable inference to be drawn from the totality of the evidence (see para 55). His conclusion that this was so was reasonably supported by the evidence. The evidence supported his finding that the shotgun and ammunition were found in an area used exclusively by the accused. As the trial judge highlighted, this was an area of the basement demarked by makeshift walls where he slept and which no one else used. Further, Ms Friesen maintained that since the accused moved the couch, no one else had been in that area of the home even after he had moved out.

[9] It is fundamental for the trier of fact to draw the line that separates reasonable doubt from speculation where circumstantial evidence is concerned. Such an assessment can only be set aside when it is unreasonable (see *Villaroman* at para 71). In our view, a properly instructed jury, acting judicially, could reasonably have been satisfied that the accused's guilt was the only reasonable conclusion available on the totality of the evidence and that the elements of possession were established beyond a reasonable doubt (see *Villaroman* at para 55; and *R v Hall*, 2018 MBCA 122 at para 166).

[10] Turning to the sentence appeal, 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). A demonstrably unfit sentence is a very high threshold that has been described as unreasonably departing from the principle of proportionality in light of all the relevant circumstances and the applicable range (see *R v Lacasse*, 2015 SCC 64 at para 53; and *R v McLean*, 2022 MBCA 60 at para 82).

[11] The accused argues that his conduct is less serious than an outlaw carrying a loaded weapon in public for a criminal purpose, which according to *R v Nur*, 2015 SCC 15, should attract a sentence at the high end of the range being three years or more. However, *Nur* also confirmed that "[f]irearm-related offences are serious crimes" (at para 6) and that judges should continue to impose "exemplary sentences that emphasize deterrence and denunciation in appropriate circumstances" (at para 5).

[12] Understandably, in sentencing the accused, the trial judge considered that this was a firearm with an altered serial number that had been sawed off. Given the type of firearm and the absence of any other explanation, he reasonably concluded that its purpose was crime-related and dangerous. As well, an aggravating factor for the trial judge was the accused's criminal record, which included convictions for weapons offences. Additionally, while the accused did not have the shotgun and ammunition in a public setting, the trial judge appropriately noted that this nevertheless posed a significant safety risk to the four young children who lived in the home.

[13] In all of the circumstances and bearing in mind the deferential standard of review, we are not persuaded that the sentence is demonstrably unfit and that appellate intervention is warranted.

[14] At the hearing of the appeal, the accused requested that, if this Court upheld the sentence, it should grant a stay of execution of the remaining portion of the custodial sentence to be served. Without deciding the issue of the availability of such a stay on a dismissal of an accused's sentence appeal, we are not of the view that it is in the interests of justice to grant it on the facts of this case (see *R v McMillan (BW)*, 2016 MBCA 12 at para 36).

[15] For these reasons, we dismissed the conviction appeal, granted leave to appeal sentence, but dismissed the sentence appeal.

Spivak JA

Monnin JA

Pfuetzner JA