Citation: R v Hiebert, 2024 MBCA 26
Date: 20240213
Docket: AR23-30-09922

IN THE COURT OF APPEAL OF MANITOBA

Coram: Madam Justice Jennifer A. Pfuetzner
Madam Justice Karen I. Simonsen
Mr. Justice David J. Kroft

***B E T W E E N**:*

HIS MAJESTY THE KING	)	***R. N. Malaviya, K.C.***
	)	*for the Appellant*
Appellant	)	
	)	***C. L. Mahoney** and*
- and -	)	***A. Anderson***
	)	*for the Respondent*
JASON ABE HIEBERT	)	
	)	*Appeal heard and*
(Accused) Respondent	)	*Decision pronounced:*
	)	***February 13, 2024***

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On appeal from 2023 MBPC 15 [the sentencing decision]

SIMONSEN JA (for the Court):

[1] The Crown sought leave to appeal and, if granted, appealed the accused's sentence of eighteen months' incarceration followed by two years of supervised probation for sexual assault and a concurrent sentence of one day, being the accused's court appearance, for breach of an abstention condition of a recognizance.

[2] At the appeal hearing, we concluded that the sentencing judge made a material error in principle in imposing the eighteen-month sentence for

sexual assault. Given that conclusion and the accused's impending early release date of March 14, 2024, we thought it important to give our decision with reasons to follow. We granted leave to appeal, allowed the appeal, increased the sentence for sexual assault to thirty-six months, and concluded that the sentence for the breach as well as the collateral orders made by the sentencing judge would remain. These are our reasons for that decision.

Factual Background

[3] On the night of the offences, the victim, the accused, and the accused's brother (the brother) were socializing and consuming alcohol at the residence where the two brothers lived. The victim was sixteen years of age, and the accused was nineteen. Both are of Indigenous heritage. The victim and the brother were in a relationship. Due to intoxication, the victim had to be helped to the brother's bedroom. She then passed out.

[4] After the brother left the residence, the accused entered the bedroom, and the victim awoke to discover that he was in bed with her. He told her to pull up her panties. The victim could not recall what had occurred, but she had significant bleeding from her vagina. In her statement to the police, she described being sore and unable to sit down. She also said that she "was freaking out, crying" and "scared" following the incident. When she attended at the hospital, she complained of severe genital pain; she was noted to have an external abrasion to her vagina and tenderness to her lower abdomen.

[5] When the accused was subsequently arrested and charged, he admitted to the police that he had digitally penetrated the victim despite her

being intoxicated and unaware of what he was doing. He only stopped the sexual assault because the brother returned to the residence.

[6] After the accused pled guilty at the outset of the trial, a pre-sentence report was prepared to assist the sentencing judge. In the pre-sentence report, according to the probation officer, the accused claimed that alcohol contributed to the choices he made on the night of the sexual assault. However, he was bound at the time by a recognizance not to consume it. Further, according to the probation officer, the accused stated, in connection with the circumstances of the offence: "[He] went to check in on [the victim], and he tugged on the blanket and noticed her 'drawers were down' and thought of this as an 'invitation'."

[7] At the sentencing hearing, the Crown sought a sentence of five years for sexual assault (as it does on appeal), submitting that this accounted for the mitigating considerations of the accused's childhood trauma and *Gladue* factors (see *R v Gladue*, 1999 CanLII 679 (SCC) [*Gladue*]). The accused took the position that a conditional sentence was appropriate, emphasizing his *Gladue* factors, young age, lack of adult criminal record, guilty plea and rehabilitative prospects. No submissions were made by either counsel about the sentence for the breach. The sentencing judge did not deal with the breach in her reasons other than to pronounce the one-day sentence.

Circumstances of the Offender

[8] The accused had an unsettled childhood. There was inappropriate discipline and a significant amount of alcohol in the home. The family moved quite often, and the accused graduated from high school in Winnipeg. He is now the father of a young child.

[9] Both of the accused's parents are Indigenous. The accused has no knowledge as to whether his family members attended residential school, although he believes that his maternal grandmother may have. The sentencing judge noted that the accused had limited information about or exposure to his cultural heritage (see the sentencing decision at para 9).

[10] The accused has one youth criminal conviction for assault, for which he served ten months of probation without breach. The pre-sentence report indicates that he was assessed as a high risk to reoffend generally, and that his risk for sexual recidivism is above average. However, the Crown recognizes that the weight attached to the risk assessment must be viewed in the context of the accused's *Gladue* factors.

[11] The sentencing judge found that the accused's *Gladue* factors were "significant" (the sentencing decision at para 22). With respect to his rehabilitative prospects, she noted that he had been on release for three years without incident, had ceased the use of alcohol and marihuana, and was willing to participate in programming (*ibid* at para 23).

[12] While incarcerated since his sentencing, the accused has successfully completed a number of programs at Headingley Correctional Centre.

Grounds of Appeal

[13] The focus of the appeal is on the sentence for sexual assault. The Crown asserts that the trial judge erred by failing to appreciate the harm caused by the accused's actions, and by misapprehending his moral

culpability and the gravity of the offence. The Crown further contends that the sentence was demonstrably unfit.

Standard of Review

[14] The standard of review on a sentence appeal is highly deferential. As stated in *R v Friesen*, 2020 SCC 9 at para 26 [*Friesen*]:

> As this Court confirmed in *Lacasse*, an appellate court can only intervene to vary a sentence if (1) the sentence is demonstrably unfit (para. 41), or (2) the sentencing judge made an error in principle that had an impact on the sentence (para. 44). Errors in principle include an error of law, a failure to consider a relevant factor, or erroneous consideration of an aggravating or mitigating factor. The weighing or balancing of factors can form an error in principle "[o]nly if by emphasizing one factor or by not giving enough weight to another, the trial judge exercises his or her discretion unreasonably" (*R. v. McKnight* (1999), 135 C.C.C. (3d) 41 (Ont. C.A.), at para. 35, cited in *Lacasse*, at para. 49). . . .

Discussion and Decision

[15] The principle of proportionality is central to sentencing. A sentence must be proportionate to the gravity of the offence and the degree of responsibility of the offender. Although sentencing judges exercise a broad discretion in determining the weight to be assigned to the sentencing principles, whatever weight a judge accords to the various objectives and principles listed in the *Criminal Code*, RSC 1985, c C-46 [the *Code*], the resulting sentence must respect the fundamental principle of proportionality.

[16] In *Friesen*, the Supreme Court of Canada provided important guidance on sentencing for sexual offences involving children. It stressed the need for courts "to take into account the wrongfulness and harmfulness of

sexual offences against children when applying the proportionality principle. . . . The wrongfulness and the harmfulness impact both the gravity of the offence and the degree of responsibility of the offender" (*ibid* at para 75). Courts must impose sentences that are proportional to the gravity of sexual offences against children and the degree of responsibility of the offender, as informed by Parliament's sentencing initiatives and by society's deepened understanding of the wrongfulness and harmfulness of sexual violence against children. 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 (*ibid* at para 5).

[17] The jurisprudence also provides that, when the principles of denunciation and deterrence are paramount, the focus of a sentencing judge is to be more on the offence committed than on the offender. While factors personal to the offender remain important, they must take on a reduced role (see *R v KNDW*, 2020 MBCA 52 at para 21 [*KNDW*]; *R v Siwicki*, 2019 MBCA 104 at para 40 [*Siwicki*]; *R v McMillan (BW)*, 2016 MBCA 12 at para 12 [*McMillan*]).

[18] In this case, the sentencing principles of denunciation and deterrence are clearly paramount. Section 718.01 of the *Code* prescribes that denunciation and deterrence are to be given primary consideration when imposing a sentence for an offence that involves abuse of a person under the age of eighteen. As well, s 718.04 of the *Code* mandates sentencing courts to give primary consideration to the objectives of denunciation and deterrence in circumstances where the victim is vulnerable because of personal circumstances, including because the person is Aboriginal and female (see *R v Bunn*, 2022 MBCA 34 at paras 109-10 [*Bunn*]; see also *ibid* at paras 98-

108). In *Bunn*, when addressing the effect of s 718.04 of the *Code*, this Court stated (at para 110):

> In summary, section 718.04 mandates sentencing courts to give primary consideration to the objectives of denunciation and deterrence in circumstances where the victim is vulnerable because of personal circumstances—including because the person is Aboriginal and female. It is not intended to diminish *Gladue* principles. The application of *Gladue* principles will not necessarily result in a lesser sentence, but they may, depending on the circumstances. Nonetheless, the principles of denunciation and deterrence often mandate a harsher sentence in the interest of the protection of the public.

[19] We appreciate that a sentencing judge is owed deference in the weighing of relevant factors. We also recognize that the sentencing judge mentioned *Friesen* and was aware of the importance of denunciation and deterrence in sentencing the accused. Nonetheless, in our view, she erred by unreasonably focussing on the personal circumstances of the accused and underemphasizing the gravity of the offence and his moral culpability. As a consequence, she failed to give effect to the primary sentencing objectives of denunciation and deterrence and imposed a disproportionate sentence. We will explain.

[20] First, we come to this conclusion because the sentence does not reflect the seriousness of the offence, including the aggravating factors, and the accused's moral responsibility for his conduct. While the accused had *Gladue* factors and there were mitigating factors relating to him such as his young age, there were the following multiple aggravating factors which, while identified by the sentencing judge, collectively warranted significant weight:

- The victim, at sixteen years of age, was, by definition, a child (see the *Code*, s 718.2(a)(ii.1)).

- The victim had passed out at the time of the offence, which the accused saw as an invitation. Sexually assaulting an incapacitated victim is calculated and predatory. It demonstrates complete indifference to the personal integrity of the victim (see *R v Shrivastava*, 2019 ABQB 663 at para 43; *R v Arcand*, 2010 ABCA 363 at paras 283-84).

- Digital penetration is a very invasive form of sexual assault.

- The victim sustained both physical and psychological injuries. She suffered significant bleeding following the sexual assault (see the *Code*, s 718.2(a)(iii.1)).

- The accused was bound by a recognizance that prohibited him from consuming alcohol and he asserted to the probation officer who prepared the pre-sentence report that alcohol was a contributing factor in his committing the sexual assault. The accused's choice to consume alcohol, while bound by a recognizance not to do so, was aggravating. In order to avoid a "free ride" for the breach where a concurrent sentence was imposed for that offence, it should have resulted in a higher sentence on the sexual assault (*R v Wozny*, 2010 MBCA 115 at paras 63-65; see also *R v SCC*, 2021 MBCA 1 at para 30).

[21] There is one additional point about the circumstances of the offence that warrants comment. In the pre-sentence report, the probation officer stated

that the accused reported having had "an affair" with the victim and that they had "kissed and groped each other" on several occasions in the past. The reference to "an affair" was repeated by the sentencing judge in her reasons when describing the pre-sentence report (the sentencing decision at para 5). Neither counsel objected to these comments in the pre-sentence report or sought to have them redacted. At the appeal hearing, the Crown submitted that that should have happened. Nonetheless, the Crown argues that it was ultimately the responsibility of the sentencing judge to ensure that this evidence of the victim's other sexual activity was not admitted without judicial vetting. In the Crown's submission, not only did this information have no relevance, it did not come from the victim herself and suggests myth-based reasoning. While it is difficult to discern what, if any, impact this had on the sentencing judge's decision, this presumptively inadmissible evidence was irrelevant and inappropriate. It should not have been admitted or mentioned by the sentencing judge.

[22] Returning to our conclusion that the sentencing judge erred by focussing on the accused's personal circumstances and underemphasizing the gravity of the offence and his moral culpability, we also find support for this conclusion by looking at the sentence itself, particularly in light of the decisions of this Court and the Supreme Court about the sentences that are appropriate for sexual abuse of children. As indicated in *Friesen*, it is insufficient to simply state that sexual offences against children are serious; sentences "must reflect the normative character of the offender's actions and the consequential harm" (at para 76).

[23] While sentencing guidelines and ranges are not straightjackets for sentencing judges, authorities nonetheless provide assistance in determining

a proportionate sentence. The sentencing judge did not refer to any cases as comparators in determining the appropriate length of sentence. In fairness to her, the cases tendered by counsel mostly addressed the suitability of a conditional sentence and general principles of sentencing other than parity.

[24] On appeal, the Crown essentially relies on two cases to demonstrate that the sentence imposed was not proportionate. The Crown argues that the eighteen-month sentence is "unaligned" with the direction provided by these authorities. We agree. In *R v Sidwell (KA)*, 2015 MBCA 56 [*Sidwell*], this Court established a four to five-year starting point for the major sexual assault of a child when in a position of trust, assuming that the offender is a mature person with no criminal record and prior good character (see para 49). In *Friesen*, the Supreme Court stated (at para 114):

> . . . Nonetheless, it is incumbent on us to provide an overall message that is clear (*D. (D.)*, at paras. 34 and 45). 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 . . ..

[25] Reading the sentencing judge's reasons as a whole, we are persuaded that she made the same error as this Court identified in *KNDW*, *Siwicki* and *McMillan*. Her undue focus on the accused demonstrates a failure to properly assess his moral culpability and the gravity of the offence and to impose a sentence that appropriately reflected these considerations. Her error led to a disproportionate and, therefore, demonstrably unfit sentence.

[26] Because the sentencing judge made a material error in principle, it is for this Court to sentence the accused anew. We must impose a sentence that reflects the paramountcy of the principles of denunciation and deterrence, taking into account the aggravating and mitigating factors. In doing so, we must accept the sentencing judge's findings and conclusions that are untainted by error (see *R v Johnson*, 2020 MBCA 10 at para 11).

[27] This was unquestionably a very serious crime causing significant physical and psychological injury to an Indigenous child. In our view, the principle of proportionality calls for a penitentiary sentence in order to reflect the gravity of the offence and the moral culpability of the accused. Mindful of the guidance provided in *Friesen* and *Sidwell*, and accounting for the accused's *Gladue* factors as well as the mitigating factors such as his youth and prospects for rehabilitation, we conclude that, in all of the circumstances, a fit sentence for the sexual assault is thirty-six months.

Disposition

[28] For the foregoing reasons, we granted leave to appeal, allowed the appeal, and substituted the eighteen-month sentence with a sentence of thirty-six months for sexual assault. The sentence imposed for the breach and the collateral orders made by the sentencing judge remain.

Simonsen JA

Pfuetzner JA

Kroft JA