Citation: R v Klyne, 2024 MBCA 90
Date: 20241113
Docket: AR24-30-10077

IN THE COURT OF APPEAL OF MANITOBA

Coram: Madam Justice Diana M. Cameron
Mr. Justice Christopher J. Mainella
Madam Justice Jennifer A. Pfuetzner

B E T W E E N:

	)	***S. W. Brennan*** *and*
	)	***E. M. Chrusch***
HIS MAJESTY THE KING	)	*for the Appellant*
	)	
Respondent	)	***R. N. Malaviya, K.C.***
	)	*for the Respondent*
- and -	)	
	)	*Appeal heard and*
MARKQS KLYNE	)	*Decision pronounced:*
	)	***November 1, 2024***
(Accused) Appellant	)	
	)	*Written reasons:*
	)	***November 13, 2024***

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On appeal from *R v Klyne*, 2024 MBPC 26 [*sentence decision*]

CAMERON JA (for the Court):

[1] The accused applied for leave to appeal and, if successful, appealed the sentence of 2,920 days' imprisonment (eight years) less 455 days at an enhanced rate for time served in pre-sentence custody imposed on him in relation to the guilty plea he entered to one count of sexual interference. After

hearing the matter, we granted leave to appeal, but dismissed the sentence appeal. These are our reasons for so doing.

[2] The charge related to two incidents that occurred within two months. The accused was twenty-one years old at the time and the victim was fourteen years of age. Both are Indigenous. On the first occasion, the victim was with her friend, who was also the accused's girlfriend (the friend), in the friend's bedroom with the accused (whom the victim had just met). The accused and the friend had been consuming alcohol and drugs. He was intoxicated. The victim did not partake in either substance. When the friend left the room, the accused began making suggestive comments to the victim and asked her if she wanted to know how it felt to have sex. She said no and asked him to stop talking to her like that. He responded by putting his hand down the victim's pants and digitally penetrating her vagina. He stopped when he heard the friend returning to the room.

[3] The second incident demonstrated a significant escalation in his criminal actions. At that time, believing herself to be safe because the accused was sober, the victim agreed to go with him for an off-road drive on an ATV. The accused drove to a secluded area and again asked the victim if she wanted to know how it felt to have sex. She again said no. The accused pushed the victim onto the seat of the ATV. He removed her pants and underwear. He penetrated her vagina with his penis while not wearing a condom. The accused held her legs up and continued with the sexual assault while the victim cried. After the assault, he drove her back to the community where they lived.

[4] The victim said the attack was painful and that she was in shock. She feared that the accused had impregnated her and ordered a pregnancy test online. Her father mistakenly opened the package and asked her about it. In response, the victim made a limited disclosure.

[5] The victim was suffering from mental health issues, which the father saw worsening. They culminated in a suicide attempt. A support worker was contacted, the victim disclosed what had happened and the matter was reported to the authorities. Aside from the suicide attempt, the victim suffered significant harm, including developing an eating disorder, changing how she viewed her body, an inability to trust men, feelings of isolation and anxiety and an impaired ability to trust new people she meets.

[6] At the sentencing hearing, counsel for the accused asked for a sentence of two years less one day, to be served in addition to the time the accused had served in pre-sentence custody. The Crown recommended a total sentence of six and a half years less the time the accused had spent in pre-sentence custody at the enhanced rate.

[7] After reserving his decision, the sentencing judge imposed the sentence of eight years less the time served in pre-sentence custody at the enhanced rate. Prior to doing so, he did not advise either party that he had intended to exceed the sentence recommended by the Crown.

[8] The accused appeals on the grounds that the sentencing judge erred in that he failed to advise the parties that he was contemplating a sentence higher than that recommended by the Crown, failed to give proper weight to the accused's *Gladue* factors (see *R v Gladue*, 1999 CanLII 679 (SCC)

[*Gladue*]) and overemphasized the principles of denunciation and deterrence. He contends that the sentence is unfit.

[9] We agree that the sentencing judge erred when he failed to advise the parties of his concerns about the sentence recommended by the Crown and by not allowing counsel the opportunity to respond to those concerns (see *R v Beardy*, 2014 MBCA 23 at para 6). Giving counsel such an opportunity provides them with the ability to advise the court of matters that they had not, by design or otherwise, mentioned in the first instance.

[10] However, we are of the view that, in this case, the failure to afford counsel the opportunity to provide further submissions did not impact the sentence. The accused has not advised us that they would have provided additional information to the sentencing judge if given notice that he thought the Crown's recommendation was too low. Moreover, we are not persuaded that the sentencing judge provided unclear or insufficient reasons explaining the imposition of the harsher sentence. Nor did the sentencing judge give erroneous reasons for the harsher sentence (see *R v Nahanee*, 2022 SCC 37 at para 59).

[11] The sentencing judge succinctly explained his reasons for exceeding the recommendations of counsel and for imposing the sentence of eight years. He said (*sentence decision* at paras 35-36):

> In the court's view, neither sentencing recommendation is appropriate. The defence submission focuses too much on the personal circumstances of the [accused] and fails to recognize the seriousness of the offence or of the harm caused to the victim. It fails to account for the high degree of moral culpability which in my view is not reduced to any significant degree by his personal antecedents. While the Crown's position does consider and reflect

> more relevant precedent, in my view, if the sentence requested were to be imposed, its effect would be to only pay lip service to the seriousness of the offence and the high degree of moral blameworthiness of [the accused]. Sentences imposed for adult offenders who seriously sexually assault children on multiple occasions need to be higher.
>
> In my view, a sentence of eight years is warranted. Eight years is the minimum length of sentence that could possibly begin to denounce the fundamental wrongfulness of the [accused's] attacks on his 14-year-old victim. It is a sentence well within the range established by the Supreme Court of Canada. It is also a sentence that sends a strong message of general deterrence, a principle which, unfortunately, still needs to be sent to the community. The message being sent is that the sexual abuse of our children will not be tolerated by Canadian Courts, it is my sincere hope that this decision sends that message clearly and unequivocally to those who need to hear it. An eight-year sentence will separate this [accused] from our community and will hopefully provide at least a sense of reparation for the harm done to the victim. *Eight years is not unduly harsh or crushing and it accounts for the [accused's] youthful age, his lack of a criminal record and the steps that he has taken towards his own rehabilitation. In terms of Gladue considerations, while I am mindful of the impact that our country's shameful legacy of cultural assimilation has had on this [accused], his family and his community, that injustice does not excuse the serious injustice that he, himself, has inflicted on his victim, nor does it reduce in any meaningful way his exceptionally high moral culpability.*
>
> [emphasis in original; italics added]

[12] The above demonstrates that the sentencing judge did consider the personal circumstances of the accused, as well as his *Gladue* factors. That is also evidenced by the discussion that he engaged in with the Crown about the relevance and impact of the *Gladue* factors relevant to the accused. In the end, the sentencing judge simply attributed less weight to those factors than those submitted by the accused. In addition, we are not convinced that the

sentencing judge placed undue weight on the principles of denunciation and deterrence (see *R v Hiebert*, 2024 MBCA 26 at para 17). Since no error in principle or law was demonstrated regarding those grounds, we cannot intervene to vary the sentence unless it is demonstrably unfit (see *R v Friesen*, 2020 SCC 9 at para 26 [*Friesen*]).

[13] Given the nature of the assaults committed against the victim, who was a vulnerable, young, Indigenous female and in consideration of the significant harm she suffered, the sentence imposed was consistent with the statement in *Friesen*, 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" (at para 114; see also *R v S (D)*, 2022 MBCA 94 at paras 91-103). We are not persuaded that the sentence is unfit.

[14] One final comment. Despite the sentencing judge's error being immaterial in this case, in other situations, such an error undermines the fairness of the sentencing process and is detrimental to the integrity of the plea-bargaining process. We would strongly encourage sentencing judges not to follow this practice.

[15] In the result, while we granted leave to appeal, the sentence appeal was dismissed.

Cameron JA

Mainella JA

Pfuetzner JA