Citation: R v Lavallee, 2022 MBCA 100
Date: 20221214
Docket: AR21-30-09697

IN THE COURT OF APPEAL OF MANITOBA

Coram: Mr. Justice Christopher J. Mainella
Madam Justice Jennifer A. Pfuetzner
Madam Justice Lori T. Spivak

B E T W E E N:

	)	***O. G. Plotnik***
HIS MAJESTY THE KING	)	*for the Appellant*
	)	
Respondent	)	***D. Sahulka***
	)	*for the Respondent*
- and -	)	
	)	*Appeal heard:*
SEASON LAVALLEE	)	***September 21, 2022***
	)	
(Accused) Appellant	)	*Judgment delivered:*
	)	***December 14, 2022***

SPIVAK JA

[1] The appellant was convicted of contempt in the face of the court for willfully disobeying a subpoena to attend court to give evidence at a murder trial. She was sentenced to 10 months' imprisonment with credit for pre-sentence custody. Previously, this Court dismissed her conviction appeal, but reserved its decision on sentence (see *R v Lavallee*, 2022 MBCA 79). The appellant seeks leave to appeal and, if granted, appeals her sentence, asserting that the trial judge failed to give sufficient weight to relevant mitigating factors.

[2] For the following reasons, I would grant leave to appeal, allow the appeal and vary the sentence to five months' imprisonment before credit for pre-sentence custody. The trial judge made several errors in principle in sentencing the appellant that had a material impact on the sentence.

Background

[3] The appellant is an Indigenous woman who was 24 years old at the time of this offence. She was often homeless and was addicted to drugs. On September 22, 2018, she witnessed the deadly group beating of Jason James (the victim) at a home in Winnipeg where she had been residing for about a month (the home). The home was a "flop house"; a place where people went to do drugs. Following the killing, an individual involved in the crime asked her to clean up the victim's blood and threatened to kill her if she disclosed what had occurred.

[4] The appellant reported the crime to her aunt later that same day. Her aunt then contacted the police. As a result, the police attended the home and found the victim, deceased in the basement, naked, bound and badly beaten. On September 23, 2018, the appellant was interviewed by the police and provided a sworn video-recorded statement in which she described the vicious beating and stabbing of the victim and identified several of the people involved (the statement). She also told the police about the threat she had received if she revealed the incident. Subsequent to the provision of the statement, the police initiated an investigation which led to five co-accused being charged with second degree murder.

[5] The appellant was the subject of further warnings and intimidation. In the fall of 2018, she was warned in a Facebook post wherein witnesses were

told to "make it right by keeping your mouth shut" regarding this matter. More concerning, in November 2018, she was assaulted, robbed and threatened by one of the co-accused who was angry at her for "snitching."

[6] In July 2019, the appellant and her mother attended a meeting with Crown counsel to prepare for the preliminary inquiry in this matter. The appellant was fearful and expressed concerns for her safety. A victim services worker, who was present, offered to assist with safety planning—prior to that time, the option of witness protection had been raised with the appellant's mother. The appellant was not called as a witness at the preliminary inquiry. However, she was subpoenaed to give evidence at the murder trial which was to commence on September 14, 2020. She did not attend a scheduled pretrial meeting with Crown counsel on September 13, 2020. She sent a text message that day saying she was sorry, but it was too dangerous to testify and she would ruin her name.

[7] The appellant failed to attend court when the trial commenced on September 14, 2020, and a witness warrant issued. Given her absence, the Crown commenced a *voir dire* to admit her out-of-court statement and, as a result, the jury was unable to sit for several days. On September 25, 2020, before the *voir dire* concluded, the appellant was arrested on unrelated charges. She met with Crown counsel on September 27, 2020 and testified on September 28, 2020. Two of the co-accused were convicted of manslaughter, the third co-accused was convicted of assault cause bodily harm and a fourth co-accused was acquitted. (Prior to trial, the fifth co-accused pled guilty to accessory after the fact to murder.)

The Contempt Proceedings

[8] Following the murder trial, the contempt of court proceeded by way of summary process. After several court appearances, the appellant entered a guilty plea to criminal contempt on February 5, 2021. Of note, she advanced no defence of duress. Despite her guilty plea, she argued that she had "purged" her contempt and sought to relieve her conviction. In her evidence at the contempt hearing, she indicated that she did not testify at the murder trial because she feared for her safety and that she would be labelled a "rat." She acknowledged that she never followed up on the offers of safety planning.

[9] The trial judge declined to find that the contempt had been purged. He accepted that, while her failure to attend the trial was borne out of fear, it reflected a deliberate and intentional decision and demonstrated indifference to officials who offered assistance. He indicated that any consideration of her motivation for not testifying and her personal circumstances was only relevant in assessing her moral blameworthiness for the purpose of sentencing. As previously mentioned, this Court dismissed the appellant's appeal of her conviction holding that, given her formal admission of guilt, these matters were only relevant to potentially mitigate her sentence (see *Lavallee* at para 18).

[10] At the conclusion of the February 5, 2021 hearing, a pre-sentence report with a *Gladue* component was ordered (see *R v Gladue*, [1999] 1 SCR 688) (the PSR). The appellant failed to meet with corrections officials to complete the PSR and the trial judge issued an arrest warrant. On May 30, 2021, the appellant was arrested on the warrant as well as on a new unrelated

charge and the sentencing for contempt ultimately occurred on October 20, 2021.

The Sentencing Hearing

[11] The PSR detailed the appellant's difficult background. The appellant lived between Winnipeg, The Pas and Split Lake. Her treaty is from Tataskweyak Cree Nation. Her life has been marked by violence, abuse, addiction, parenting deficits, poverty, and lack of education and employment. Her father's family attended residential schools. She was abused by her father (who had been subject to horrific abuse), and witnessed his violence towards her mother. Her domestic relationships also involved violence and emotional abuse. She had two children and when the youngest passed away at nine months, her life spiralled downward. She struggled with an addiction to crystal methamphetamine, was often homeless and had a limited relationship with her family. She began associating with other addicts and people involved in gangs.

[12] In terms of a criminal record, at the time of her guilty plea to contempt, the appellant had only received a conditional discharge for a charge of possession of a scheduled substance in August 31, 2020. Subsequently, in September 2021, she was convicted of seven breaches of court orders.

[13] The probation officer reported that the appellant has done well in custody and has expressed a desire to make changes in her life, remain drug free, regain a connection with her family, and refrain from negative associations. Given her criminal connections, poor compliance with court orders, and the severity of her drug use, she was, however assessed as a high risk to reoffend.

[14] At the sentencing hearing on October 20, 2021, the Crown stressed the principles of denunciation and deterrence and sought a sentence of 10 months. The appellant argued that her fear and the consequences she suffered because of reporting this offence were significantly mitigating as were her *Gladue* factors. The defence suggested a sentence between three and six months. It was agreed that the appellant should receive credit for pre-sentence custody of 210 days.

The Sentencing Decision

[15] The trial judge referred to excerpts from the PSR which highlighted the appellant's difficult background. He acknowledged that he was required to take into account the appellant's *Gladue* factors and that much of what brought her to court, her drug and alcohol use, choice of companions, problems with compliance and underachievement are the legacy of colonialism and the residential school system. Nonetheless, he considered that general deterrence is the primary sentencing principle in contempt cases which "strike at the very heart of our judicial system." In his view, the appellant's failure to attend court was "deliberate and intentional" and it demonstrated indifference. He indicated that, while she testified, this was only after she was arrested and "forced into the witness box." He considered that her failure to attend was not only fear driven but also due to the general chaos in her life. He stressed the impact of her non-attendance on the trial, which he emphasized took place during the pandemic and required the jury to be sent home for two days. In assessing the appellant's degree of moral blameworthiness, the trial judge said:

> . . .
> . . . No lawful excuse has been given for her continued refusal to attend court and testify, save for the business about the threats and the fear. I do not doubt that. I consider the parties at play during the course of this crime, but these are people that she has chosen to associate with, to be friendly with, and to live with. So, yes, there probably were fear factors there but you have to bear in mind how the person ended up in a situation where she was dealing with those people.
> . . .
>
> [emphasis added]

[16] The trial judge did not acknowledge that, having pled guilty to criminal contempt, the appellant was a different offender than someone who contests their contempt citation. Rather, he merely mentioned that before she "finally" pled guilty she unsuccessfully attempted to show cause why she should not be held in contempt. In fact, as previously indicated, the appellant pled guilty at the outset of the contempt hearing, but then attempted to relieve her conviction by arguing that her contempt had been "purged".

[17] The trial judge stated that he saw no reason to depart from the sentencing range of one to three years' incarceration for contempt for refusing to testify or be sworn set out by this Court in *R v Asselin*, 2019 MBCA 94, "save for the Crown's reasonable position that 10 months in the circumstances is appropriate." He imposed a sentence of 10 months' imprisonment less pre-sentence custody credit of 210 days, leaving a go-forward sentence of 90 days.

Standard of Review

[18] The standard of review for sentence appeals is well known and highly deferential. 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). An error in principle includes an error of law, a failure to consider a relevant factor or an erroneous consideration of an aggravating or mitigating factor. A sentencing judge's decision to weigh aggravating and mitigating factors in a particular way does not itself permit appellate intervention unless the weighing is unreasonable (see *R v Lacasse*, 2015 SCC 64 at paras 49, 78; and *R v Sinclair*, 2022 MBCA 65 at para 18).

Issues and Positions of the Parties

[19] The appellant argues that the trial judge failed to properly account for the mitigating factors which reduced her moral culpability. In particular, she asserts that the trial judge failed to give sufficient weight to her *Gladue* factors and inappropriately assessed her moral blameworthiness by finding that she deliberately selected her circumstances and lifestyle. The appellant also contends that the trial judge underemphasized the personal circumstances that led to her failure to attend the trial, including her fear and the repercussions she faced.

[20] The Crown asserts that, given the nature of this offence, which placed a significant strain on the judicial system, the primary sentencing principle of deterrence, and the deferential standard of review, there is no basis for appellate intervention. The Crown argues that the trial judge was aware of the appellant's personal factors but was entitled to consider that they necessarily took on a lesser role.

Analysis and Decision

[21] At the outset, I point out that, even though the appellant has now served her complete sentence for this offence, she asks this Court nonetheless to determine the appeal. She asserts that the length of the sentence imposed has an impact upon her and further that the issues raised by the alleged errors of the trial judge should be addressed. The Crown takes no issue with this Court's determination of this appeal. In all the circumstances, it is appropriate to do so.

Did the Trial Judge Err in Weighing the Appellant's Mitigating Factors?

Criminal Contempt

[22] Criminal contempt derives from the inherent jurisdiction of the court (see sections 9 and 10 of the *Criminal Code* (the *Code*)).

[23] The purpose of criminal contempt is explained by EG Ewaschuk, *Criminal Pleadings & Practice in Canada*, 3rd ed (Toronto: Thomson Reuters, 1988) (loose-leaf updated 2022, release 4) pt X, ch 29 as follows (at section 29:5):

> . . . Criminal contempt is aimed at *punishing* public acts which tend to bring the administration of justice into disrepute and interfere with the due administration of justice. It is directed at the protection of the integrity of the administration of justice. Its general purpose is to protect the fairness of the trial process. . . .

See also *R v Jacob*, 2008 MBCA 7 at para 25.

[24] "The 'general rule' is that the state is entitled to every person's evidence" (*Asselin* at para 26). The importance of the duty of a witness to testify was addressed in *R v Abdullah (G) et al*, 2010 MBCA 79, where Hamilton JA stated that "[a] person has a general duty to testify when called upon to do so . . .. This duty is owed not just to the courts, but to society as a whole, and is essential to the proper administration of justice" (at para 34).

[25] As Prowse JA noted in *R v Neuburger*, 1995 CarswellBC 1682 (CA), "It is not the prerogative of witnesses to criminal events to decide whether or not they will testify" (at para 9).

[26] Service of a subpoena compels both attendance at court and the provision of testimony (see *Abdullah* at paras 65-79).

[27] The refusal of a witness to be sworn or testify constitutes a contempt of court committed in the face of the court (see *Vaillancourt v The Queen*, [1981] 1 SCR 69).

[28] "General deterrence is the principal factor to be considered when a witness refuses to testify" (*Jacob* at para 26).

[29] Against this backdrop, I turn to the appellant's claims of error by the trial judge.

<u>*Gladue* and the Trial Judge's Assessment of Moral Culpability</u>

[30] Section 718.2(e) of the *Code* and the Supreme Court of Canada in *Gladue* and *R v Ipeelee*, 2012 SCC 13, direct sentencing judges to consider the unique systemic or background factors which may have played a part in bringing the particular Indigenous offender before the courts in crafting a fit

sentence (see *Gladue* at para 66; and *Ipeelee* at paras 72-75). Those factors may bear on an offender's level of moral blameworthiness and are mitigating in nature in that they may have played a role in the offender's conduct (see *Ipeelee* at para 72). As noted by the Court in *Ipeelee*, "Many Aboriginal offenders find themselves in situations of social and economic deprivation with a lack of opportunities and limited options for positive development. . . . [T]he reality is that their constrained circumstances may diminish their moral culpability" (at para 73).

[31] As recognized by the Court of Appeal of Alberta in *R v Swampy*, 2017 ABCA 134, "There can be no sound proportionality analysis in the case of an Aboriginal offender without considering the impact of the offender's Aboriginal heritage on [their] moral culpability" (at para 36; see also *R v Parranto*, 2021 SCC 46 at para 50).

[32] In my view, the trial judge erred in his assessment of the appellant's *Gladue* factors and how these affected her moral culpability.

[33] As I have already mentioned, the trial judge acknowledged that the appellant's drug addiction, homelessness and choice of companions resulted from the legacy of colonialism and residential schools and contributed to bringing her before him. Despite this, as the quote at para 15 herein from the trial judge's reasons illustrates, in assessing the appellant's moral culpability, he essentially considered that she was responsible for her misfortune in choosing to associate and live with the people who committed this homicide. In doing so, he effectively negated the myriad of *Gladue* factors which informed how she ended up homeless, in a drug house and in contact with persons who engage in criminal behaviour.

[34] It is the consideration of an Indigenous offender's systemic or background factors that provide the necessary context for evaluating moral culpability and determining an appropriate sentence as required by section 718.2(e) of the *Code*. Instead of treating the appellant's constrained circumstances as an Indigenous offender as diminishing her moral culpability, the trial judge erroneously blamed her for her predicament, viewing it as a lifestyle choice. The trial judge also expressed this view during defence counsel's submissions. To the contrary, the appellant's addiction to crystal methamphetamine led to her involvement with criminal associates and the drug subculture, and explains her contemptuous conduct, thereby lessening her culpability. The perspective that the appellant is at fault for willingly selecting her circumstances, which should therefore not lessen her moral blameworthiness, is antithetical to *Gladue* principles. This was an error in principle which clearly impacted the sentence.

[35] While this error alone justifies appellate intervention, there are other errors which warrant mention.

The Other Mitigating Factors

[36] In my view, the trial judge also erred in failing to consider and in underemphasizing several mitigating factors that were important to the determination of the appropriate sentence.

[37] What separates this case from others is that it was because of the appellant's actions that this crime was discovered and the perpetrators were arrested. It was her report to police that led to finding the victim and the investigation of the crime. She did the right thing at that time. Furthermore, this was after she was forced to clean up the victim's blood and threatened if

she disclosed the offence. Nowhere is this mentioned in the trial judge's reasons. No credit is afforded to the appellant for her role in reporting the crime. The trial judge's failure to consider this significant mitigating factor in determining a fit sentence was an error in principle.

[38] As well, the trial judge underemphasized the repercussions suffered by the appellant following her report of the crime, which caused her to be fearful and to fail to appear at the trial. The trial judge refers to the appellant's "excuse" for refusing to attend court as being due to "threats and the fear." However, this minimizes the scale of what she experienced. The appellant was a victim of witness intimidation. Not only was she repeatedly threatened, she was also robbed and assaulted by an individual involved in the killing. An appellate court cannot intervene simply because it would have weighed the relevant factors differently, but the trial judge unreasonably underestimated this mitigating factor.

[39] Finally, I add that the trial judge effectively disregarded the appellant's guilty plea. The trial judge's only reference to her guilty plea, which is mischaracterized as "finally" occurring, reveals that he gave no weight to that fact and its significance. A guilty plea is a recognized mitigating factor and a failure to consider a guilty plea as mitigating constitutes an error in principle. Not only are they essential to the proper functioning of the criminal justice system, they can demonstrate acceptance of responsibility and remorse (see *R v Martineau*, 2021 ABCA 401 at para 24).

[40] In light of these errors which impacted the sentence, it falls to this Court to sentence afresh.

The Fit Sentence

[41] To be sure, general deterrence is the dominant consideration when a witness refuses to testify. As stated by the Ontario Court of Appeal in *R v DaSilva*, 1986 CarswellOnt 3603 (SC (H Ct J), the purpose of a sentence of imprisonment for contempt of court is to protect the integrity of the administration of justice. This sends the message to the community about the seriousness of a breach of every citizen's social duty to assist the administration of justice (see para 6). This is especially so here, where the appellant's evidence was of crucial importance to the Crown's case—the only witness to the most serious crime in the *Code*. As remarked in *Jacob*, there is a heavy price to be paid for the calculated refusal to give evidence (see para 32). This form of contempt attracts the highest custodial sentences (see para 26; and Clayton C Ruby, *Sentencing*, 10th ed (Toronto: LexisNexis, 2020) at section 23.794).

[42] It is true that the appellant's failure to attend court was due to genuine fear, as opposed to a nefarious reason such as gang loyalty, often present in other cases. While her fear is a factor to consider, refusing to testify for this reason should not be condoned. The sentence should underscore the seriousness of this behaviour and act as a deterrent to others. Furthermore, the appellant was not without resources. Her mother was a support throughout and she was represented by counsel at the time she was served with the subpoena. She was repeatedly offered safety planning and failed to engage. According to the trial judge, whose factual findings are entitled to deference, she demonstrated indifference to those who tried to help her. As well, the trial judge considered that her failure to attend court greatly affected the trial

process as two extra days were required, four officers were subpoenaed and extensive precautions had to be put in place each day due to the pandemic.

[43] On the other hand, there are compelling mitigating factors which call for leniency. The appellant was young and effectively a first-time offender at the time of this offence. Her *Gladue* factors are significant and include the intergenerational effects of colonization and residential schools: addiction, childhood abuse, and a cycle of violence. Added to her childhood trauma was the loss of her child. She was a homeless drug addict whose life was in turmoil. She pled guilty and apologized for her behaviour.

[44] As I already highlighted, this case is distinct as the appellant was the reason this crime was discovered. Because of this, she endured threats and physical harm. Her failure to appear stemmed from tangible fear together with the general turmoil in her life. And even though she failed to respond to the subpoena and it was her arrest that resulted in her presence at the trial, she did testify at the murder trial which led to the conviction of three of the co-accused.

[45] In *Asselin*, this Court noted that a review of sentences for similar offences demonstrated a range of 12 months to three years' incarceration for a first offence of contempt by persons who refused to be sworn or testify in murder or serious violent-offence trials (see para 57). This Court dismissed the accused's conviction appeal for contempt, as well as his appeal of his nine-month sentence, for failing to attend and testify at a murder trial which resulted in an acquittal (he claimed he was unavailable and would lose wages) (see para 5).

[46] Balancing all the factors, in my view, a proportionate sentence, that gives due regard to these unique and extenuating circumstances yet respects the overriding consideration of general deterrence, is that of five months' imprisonment.

Conclusion

[47] In the result, I would grant leave to appeal, vary the sentence and substitute a sentence of five months' imprisonment.

Spivak JA

I agree: Mainella JA

I agree: Pfuetzner JA