Citation: R v WJS, 2025 MBCA 12
Date: 20250211
Docket: AR24-30-10068

IN THE COURT OF APPEAL OF MANITOBA

Coram: Madam Justice Holly C. Beard
Madam Justice Lori T. Spivak
Mr. Justice David J. Kroft

B E T W E E N:

	)	***J. S. Brar***
	)	*for the Appellant*
HIS MAJESTY THE KING	)	
	)	***J. M. Mann*** *and*
Respondent	)	***J. R. Negrea***
	)	*for the Respondent*
- and -	)	
	)	*Appeal heard and*
W. J. S.	)	*Decision pronounced:*
	)	***January 31, 2025***
(Accused) Appellant	)	
	)	*Written reasons:*
	)	***February 11, 2025***

NOTICE OF RESTRICTION ON PUBLICATION: No one may publish, broadcast or transmit any information that could disclose the identity of the victim or a witness (see *Criminal Code*, RSC 1985, c C-46, s 486.4).

On appeal from *R v WS*, 2024 MBPC 11 [*sentence decision*]; see also *R v WS*, 2023 MBPC 36 [*conviction decision*]

BEARD JA (for the Court):

I. THE ISSUES

[1] The accused applied for leave to appeal and, if granted, to appeal the sentence of seven years' incarceration that was imposed in relation to his convictions for sexual assault under section 271 of the *Criminal Code*,

RSC 1985, c C-46, and sexual touching under section 151 of the *Criminal Code*. The sexual assault conviction was stayed pursuant to the principles in *Kienapple v R*, 1974 CanLII 14 (SCC) (see *conviction decision* at para 84). Leave to appeal sentence was granted and the sentence appeal was dismissed at the end of the appeal hearing, with reasons to follow. These are the reasons.

[2] The accused argues that the trial judge erred:

(i) by not finding any mitigating factors in relation to the circumstances of the accused;

(ii) by imposing a sentence that was too harsh in relation to other similar cases, thereby failing to adequately apply the principles of proportionality and parity; and

(iii) by imposing a sentence that was demonstrably unfit.

[3] The Crown's position is that there was no error, and the sentence appeal should be dismissed.

II. THE FACTS

[4] The accused lived with the complainant, her mother and her younger sister from the time that the complainant was three years old until the accused and her mother's final separation in August 2020, when the complainant was 14 years old. The relationship between the accused and the mother was tumultuous, being marked with domestic violence, alcohol and drugs and many separations. The girls had no contact with their biological father, and the accused was, for all intents and purposes, their father.

[5] The trial judge found that the sexual offending occurred on many occasions when the complainant was between the ages of 9 and 13 years old. During that time, the accused engaged in three types of sexual interference, all of which occurred in the context of a general atmosphere of danger. The behaviour included the accused grabbing the complainant's "breasts and vulva over her clothing many, many times at his mother's apartment"; on one occasion, putting "his finger in her belly button, wiggl[ing] it around and ask[ing] if she felt anything 'down there', referring to her vaginal area"; and, on one occasion, "[rubbing] his hand forcefully against her vagina and push[ing] his finger into her vagina over her clothing to the point that it hurt" (*sentence decision* at para 4).

[6] The trial judge also found that the accused's general behaviour towards the complainant, while not criminal, was sexualized and predatory, including watching pornography in her presence while he was naked below the waist and masturbating when she was six; asking her if she was masturbating when she was sitting on the couch; commenting "about her 'boobs' getting bigger [and] how she looked 'hot' in a shirt" (*ibid* at para 5); entering the bathroom while she was showering on several occasions on the pretext of urinating, and on one occasion, opening the shower curtain; showing her nude photos of her mother; and sending her approximately ten sexualized text messages addressed to her mother, which he later claimed were sent by accident.

[7] Further, the trial judge found that the accused frequently told her not to tell her mother about the touching or it would "ruin everything" (*ibid* at para 8).

III. STANDARD OF REVIEW

[8] The parties are agreed, as are we, that the applicable standard of review is that set out in *R v Friesen*, 2020 SCC 9 at paras 25-29, being that an appellate court must show deference to the sentence decision of a judge and can only intervene if the sentence is demonstrably unfit or if a judge made an error in principle that had an impact on the sentence. Errors in principle include an error of law, a failure to consider a relevant factor or erroneous consideration of an aggravating or mitigating factor.

[9] Further, the Supreme Court of Canada stated that "[t]he 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'" (*ibid* at para 26, quoting *R v McKnight* (1999), 135 CCC (3d) 41 at para 35, 1999 CanLII 3717 (ONCA)).

IV. ANALYSIS

(i) Mitigating Factors

[10] The accused argues that the trial judge erred by "emphasizing the aggravating factors present, while at the same time completely minimizing and failing to accord the appropriate weight to [his] mitigating factors" and that these errors had a disproportionate effect on the sentence.

[11] As evidence of that error, the accused points to the following statement by the trial judge: "There are essentially no significant mitigating factors, only aggravating factors" (*sentence decision* at para 81). He further argues that, despite his many positive attributes and lifestyle changes over the years, the trial judge erroneously found that they do "nothing to mitigate the

offending against [the complainant], which occurred many years after he professed to turn his life around" (*ibid* at para 53).

[12] The trial judge wrote lengthy and detailed reasons in relation to both the conviction and the sentencing of the accused, in which she set out the facts and circumstances in great detail. She was clearly aware, and considered, all of the mitigating factors that were raised by the accused and on which he now relies, and carefully weighed them together with the aggravating factors. The accused is not arguing that the trial judge failed to consider any evidence; rather, he is taking issue with her weighing of that evidence.

[13] A trial judge's weighing of the aggravating and mitigating factors is only an error if it is unreasonable (see *R v Lacasse*, 2015 SCC 64 at paras 49, 78). The findings referenced by the accused must be read in the context of her detailed weighing of all of the evidence and her conclusions about the significant and long-term harm to the complainant. She concluded (*sentence decision* at para 54):

> I find that his moral culpability in committing this offence is not significantly reduced by anything in his life circumstances. The abuse and creation of the dangerous environment were ongoing for years. He had opportunities to stop abusing his daughter at any point. Instead, his behaviour seemed to escalate.

[14] In our view, the trial judge's reasons, when read as a whole, support the conclusions that she drew after weighing all of the evidence, including all of the aggravating and mitigating factors, and we are not convinced that her conclusions regarding the weight to be accorded to the mitigating factors were unreasonable.

(ii) Proportionality and Parity

[15] The accused does not take issue with the trial judge's review of the sentencing principles of proportionality and parity. Rather, he argues that the cases that were considered by the trial judge, in which sentences of six months to six years' incarceration were imposed, were based on facts that were more aggravating than those in the present case, yet the trial judge imposed a higher sentence—seven years. This, he argues, demonstrates that the sentence in this case is excessive and offends the principles of parity and proportionality.

[16] The trial judge carefully considered the jurisprudence and the nature of the offending behaviour in the cases referred to by counsel in their submissions. She was aware of the admonition in *Friesen* (see paras 137-47) not to put too much weight on the details of the sexual behaviour or the degree of interference (see *sentence decision* at paras 60-61), but to look at the acts together with the harm to the complainant (see *ibid* at paras 20, 57). As stated in *Friesen*, "[t]he modern understanding of sexual offences requires greater emphasis on these forms of psychological and emotional harm, rather than only on bodily integrity" (at para 142).

[17] When reviewing the jurisprudence, the trial judge noted the details of the offending acts, including the nature, number and duration of the conduct. She concluded that "[t]he ongoing nature and duration of the sexual offences committed by the accused in this case takes it out of the range of other recent Manitoba cases where there was only sexual offending against a child on one date (or two, in the case of *MPB*)" (*sentence decision* at para 78; see also para 79). She also noted the significant and ongoing harm suffered by the complainant.

[18] We are of the view that the trial judge did not misapply the principles of parity and proportionality in her analysis or in her conclusion as to a just sentence, or that the sentence that she imposed was harsh or excessive.

(iii) Demonstrably Unfit Sentence

[19] Finally, the accused argues that the seven-year sentence imposed in this case is demonstrably unfit.

[20] In *Lacasse*, Wagner J adopted the following expressions to describe a sentence that is demonstrably unfit: "'clearly unreasonable', 'clearly or manifestly excessive', 'clearly excessive or inadequate', or representing a 'substantial and marked departure'" (at para 52). He stated that "[a]ll these expressions reflect the very high threshold that applies to appellate courts when determining whether they should intervene after reviewing the fitness of a sentence" (*ibid*).

[21] We are of the view that, while the sentence in this case was high, it was not clearly unreasonable or manifestly excessive.

V. CONCLUSION

[22] We granted leave to appeal sentence, but for the reasons set out above, we found that the accused failed to establish that the trial judge erred in imposing a sentence of seven years' incarceration. Thus, we dismissed the sentence appeal.

Beard JA

Spivak JA

Kroft JA