IN THE COURT OF APPEAL OF MANITOBA

Coram: Chief Justice Richard J. Chartier
Mr. Justice Christopher J. Mainella
Madam Justice Lori T. Spivak

B E T W E E N :

HER MAJESTY THE QUEEN	)	***S. A. Inness***
	)	*for the Appellant*
Respondent	)	*(via videoconference)*
	)	
- and -	)	***C. R. Savage***
	)	*for the Respondent*
EVAN MURPHY AMYOTTE	)	*(via videoconference)*
	)	
(Accused) Appellant	)	*Appeal heard and*
	)	*Decision pronounced:*
	)	***November 23, 2020***

COVID-19 NOTICE: As a result of the COVID-19 pandemic and pursuant to r 37.2 of the Manitoba, *Court of Appeal Rules*, Man Reg 555/88R, this appeal was heard remotely by videoconference.

CHARTIER CJM (for the Court):

[1] The accused contends that the sentencing judge committed three errors in imposing a global sentence of three and one-half years' custody after he pled guilty to charges of flight from a peace officer contrary to section 320.17 (formerly section 249.1(1)) of the *Criminal Code* (the *Code*); operation of a motor vehicle while prohibited (drive prohibited) contrary to section 320.18 (formerly section 259(4)—operation of a motor vehicle while disqualified) of the *Code*; and possession of a firearm without a license contrary to section 92 of the *Code*. The accused submits that the sentencing

judge misunderstood the terms of a joint recommendation; that he failed to apply the totality principle; and that he failed to give sufficient weight to the *Gladue* factors and prospects for rehabilitation (see *R v Gladue*, [1999] 1 SCR 688).

[2] We would not give effect to any of these grounds.

[3] With respect to the joint recommendation, and as fairly conceded by the Crown, it is apparent from the sentencing judge's reasons that he erred. The parties had agreed that the sentences for each offence were to be consecutive to each other and that they were jointly recommending that the sentence for the possession of a firearm charge should be a one-year period of incarceration. The sentencing judge misconstrued the recommendation, thinking that the parties were also jointly asking for a one-year consecutive sentence on the drive prohibited charge.

[4] The critical issue on this appeal is whether this error had an impact on the sentence imposed. In our view, it did not. A fair reading of the reasons establishes that the sentencing judge did not base the imposition of a higher sentence on the drive prohibited charge on the purported joint recommendation. He stated:

> Similarly, the Court is satisfied that one-year consecutive can be imposed on the driving while prohibited at count 31. [The accused] was prohibited for life from driving. He has been convicted many times for this offence and has to learn that if he drives, he will be punished. A more lenient sentence would send a message to him that the Court's nominal sentence is simply the cost of a licence to drive
>
> [emphasis added]

[5] The record referenced in the above passage shows that the accused has nine motor-vehicle-related *Code* convictions (four drive while disqualified; one fail or refuse to provide sample, one dangerous operation of a motor vehicle, one flight while pursued, one drive while impaired and one leave scene of accident). The last drive while disqualified entry was in November of 2017 or 15 months before this incident. The accused also has a further five drive while disqualified convictions on his driver abstract for non-*Code* offences. The fact that the accused is involved in yet another offence soon after his last drive while disqualified conviction, coupled with his terrible driving record, buttresses the sentencing judge's conclusion that an incarceratory sentence of less than one year would have been inappropriate in the circumstances.

[6] We also note that the *Code* was recently amended to provide that the maximum penalty for the drive prohibited offence would be increased from five years to 10 years on indictment. There is also a new section containing a list of aggravating factors that a judge must consider when imposing a sentence for this offence, as well as the flight offence. In this case, the accused ran afoul of section 320.22(a) because the commission of the offence resulted in bodily harm, and section 320.22(g) given that the accused was not permitted under provincial law to operate the vehicle having been previously banned for life.

[7] In the end, despite the able argument of counsel for the accused, it cannot be said that the one-year sentence for the drive prohibited charge, having regard to the circumstances surrounding the commission of the offence and the circumstances of the accused, is anything but fit.

[8] The second and third grounds can be dealt with together. The accused submits that the sentencing judge's failure to explain why he did not reduce the global sentence after taking a "last look" shows he failed to apply the totality principle. He also argues that the sentencing judge failed to give sufficient weight to the *Gladue* factors and prospects for rehabilitation.

[9] We disagree. The reasons establish that the sentencing judge expressly addressed the totality principle when he stated that he was "obligated to take a last look to determine if the overall sentence is crushing in nature" and that "there is no need to reduce the sentence any further." The use of the adverb "further" is there for a reason. In imposing sentence, the judge said that "here there was an injury to victims and [the accused's] driving record. This is to be balanced off with [the accused's] *Gladue* factors." The reasons show that, by the time the sentencing judge took his "last look" at the global sentence, he had already factored in a reduction in the sentence to address the *Gladue* factors.

[10] Moreover, the sentencing judge's reasoning for refusing "to reduce the sentence any further" is apparent from his reasons, the live issues, the evidentiary record and what was said during submissions (see *R v REM*, 2008 SCC 51 at para 37). During submissions, the Crown argued "that there was no need for a reduction under the totality principle" because the global sentence did not exceed the accused's "overall culpability". This submission has to be read together with what the sentencing judge said with respect to the accused's moral culpability and the *Gladue* factors. He stated:

> When the whole of [the accused's] background is considered through the lens of the *Gladue* factors, the Court is better able to ascertain [the accused's] moral culpability in a fulsome way. As

> stated, the Court is satisfied that [the accused] knew full well of his criminality, the criminality of the circumstances when he was in that car. He chose to continue on because that is a life he had come to know. Much of [the accused's] life to date had been lived surviving in the moment. Legitimate change cannot happen overnight especially given the limited resources that he has had.

[11] In our view, the sentencing judge did consider the totality principle and decided that a sentence reduction, in addition to what he had already given to address *Gladue* considerations, was not warranted in the circumstances given the accused's overall moral culpability. Moreover, it cannot be said that he erred by primarily focussing on specific deterrence and denunciation rather than rehabilitation when sentencing someone with over 60 convictions on his criminal record and who repeatedly drives while prohibited. There is no basis for appellate intervention on the second and third grounds.

[12] In the result, while leave to appeal sentence is granted, the sentence appeal is dismissed.

"Chartier CJM"

"Mainella JA"

"Spivak JA"