Citation: R v CCC, 2019 MBCA 76 Date: 20190704
Docket: AR18-30-09087

IN THE COURT OF APPEAL OF MANITOBA

Coram: Mr. Justice Michel A. Monnin
Madam Justice Holly C. Beard
Madam Justice Janice L. leMaistre

B E T W E E N :

HER MAJESTY THE QUEEN	)	***B. S. Newman***
	)	*for the Appellant*
	)	
Respondent	)	***S. L. Thomas*** *and*
	)	***J. L. Comack***
- and -	)	*for the Respondent*
	)	
C. C. C.	)	*Appeal heard:*
	)	***May 7, 2019***
	)	
(Accused) Appellant	)	*Judgment delivered:*
	)	***July 4, 2019***

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BEARD JA

I. THE ISSUES

[1] The accused has applied for leave to appeal and, if granted, appeals his three and one-half year sentence for sexual assault pursuant to section 271 of the *Criminal Code*. He was convicted on March 6, 2018, by a jury and sentenced on June 8, 2018. He raises two grounds of appeal:

(i) the trial judge erred in refusing to consider the assault inflicted on the accused by the complainant's partner following the offence as a factor in determining the appropriate sentence; and

(ii) the trial judge erred in using the results of the risk assessment in the pre-sentence report as an aggravating circumstance.

II. THE FACTS

[2] The accused was friends with the complainant's partner, J.B., and, through him, with the complainant. His connection with J.B. was a shared interest in off-road recreational vehicles and in the acquisition, repair, maintenance and use of those vehicles. While the two had gone to school together, they were not friends or even friendly at that time. They had become friendly only a few months before the offence, which occurred in the early morning hours on October 4, 2015.

[3] On October 3, 2015, the accused and others were at the residence shared by the complainant and J.B. Several of those present were drinking, repairing their vehicles and hanging out before they went off-roading. Upon returning, J.B. invited them to stay for a barbeque, and there was more drinking. Some people left at the end of the evening, but the accused and another guest were invited to stay the night because they were too drunk to drive home.

[4] The accused was interested in the complainant and thought that she and J.B. were having relationship problems. The accused woke up at some point during the night and went into the master bedroom. The complainant was asleep in the bed in the master bedroom, while J.B. was sleeping in the

Jacuzzi, which was beside the bed in the same bedroom. The jury accepted the complainant's version of events, which was that she woke up and felt someone having sex with her. At first, she thought it was J.B., but then she opened her eyes and realised that it was not. She looked at the accused, and he immediately left the room and the house. Nothing was said between them.

[5] After the accused left, the complainant woke J.B. and told him what had happened. He grabbed a shotgun and ran outside.

[6] The accused was still outside the house, trying to load his off-road vehicle onto his truck. J.B. beat him up, kicking his chest, and shoved the shotgun into his face as hard as he could (the assault). The accused was bleeding profusely, and he was treated for a broken nose, a concussion and two chipped teeth. He also had internal injuries that caused him to urinate blood.

[7] The accused took the position that the complainant consented to the sexual acts at the time. He explained his later comments in social media posts in which he appears to admit the sexual assault by stating that he was guilty of breaking "the bro code" by being with the complainant.

[8] The accused refused to make a complaint about the assault by J.B. and he told the police that he would not testify about it. As a result, J.B. was never charged.

[9] At the sentencing hearing, the Crown argued for a sentence of five years' incarceration, while the accused argued for a sentence of two years' incarceration plus 18 months' probation.

III. FIRST GROUND—FAILURE TO CONSIDER THE ASSAULT AS A FACTOR IN SENTENCING

(i) The Trial Judge's Decision

[10] The trial judge dealt with the accused's argument regarding the effect on sentence of the assault by J.B. as follows:

> [The accused] argued that among the mitigating circumstances I should consider is the aggression he faced from [J.B.] when [J.B.] learned of the assault. Without undermining the injuries suffered by [the accused] or condoning any aspect of that altercation, I find it is not a circumstance that mitigates the blameworthiness of [the accused] for the deliberate preceding actions against the complainant.

[11] The trial judge did not consider the assault as a factor in determining the appropriate sentence.

(ii) The Parties' Positions

[12] The accused's position is that he suffered serious physical injuries from the assault by J.B. He argues, based on *R v Suter*, 2018 SCC 34, that the trial judge's failure to consider that assault, which was a direct collateral consequence of the sexual assault, in any way in relation to the sentence was a failure to consider a relevant factor and a failure to give weight to that factor. He states that this is an error in principle.

[13] At the appeal hearing, the accused argued that there was a further collateral consequence from the assault apart from the physical injuries, being the fear that he expressed in social media posts immediately following the sexual assault that he was at risk of further violence from J.B. and others, and that he would no longer be welcomed by that group of friends. He states that

this collateral consequence should also have been taken into account to reduce his sentence. This argument was not raised at the sentencing hearing or in the accused's factum.

[14] The Crown's position is that:

- there was no medical evidence at the trial to establish that the accused suffered long-lasting effects from the assault;
- the attenuating effect of the assault is lessened because the consequences to the accused were so directly linked to the offence as to be almost inevitable; and
- the trial judge considered whether the assault should have an effect on the sentence and determined that it should not, because a lesser sentence would not be proportionate to the accused's moral blameworthiness.

(iii) *The Law Regarding Vigilante Justice*

[15] This ground of appeal is based on the Supreme Court of Canada's decision in *Suter*. As the decision in this matter was released three weeks before *Suter*, the trial judge did not have the benefit of the reasons in *Suter* when preparing his decision. One of the grounds of appeal in *Suter* was whether the Court of Appeal erred in finding that vigilante violence cannot be considered in sentencing. A summary of the decision of Moldaver J, for six out of seven judges, is as follows (see paras 45-59):

- Collateral consequences include any consequence arising from the commission of an offence, the conviction for an offence, or the sentence imposed, that impacts the offender (see para 47).

- Although collateral consequences are not necessarily aggravating or mitigating, because they do not relate to the gravity of the offence or the level of responsibility of the offender, they do speak to the offender's personal circumstances and are relevant because they relate to the principles of individualisation and parity. In particular (at para 48):

> . . . The question is not whether collateral consequences diminish the offender's moral blameworthiness or render the offence itself less serious, but whether the effect of those consequences means that a particular sentence would have a more significant impact on the offender because of his or her circumstances. Like offenders should be treated alike, and collateral consequences may mean that an offender is no longer "like" the others, rendering a given sentence unfit.

- The attenuating effect of an injury on sentence will likely be lessened where the injury is so directly linked to the offence as to be almost inevitable (see para 50). The reference here, however, is to an injury related to an impaired driving offence.

- Collateral consequences cannot be used to reduce a sentence to a point where it becomes disproportionate to the gravity of the offence or the moral blameworthiness of the offender (see para 56).

- There is no requirement that the collateral consequences emanate from state misconduct (see para 56).

- The violence suffered by Mr. Suter at the hands of non-state vigilante actors could be considered when determining the appropriate sentence. The vigilante attack was connected to the offence and was a relevant collateral consequence to consider at the sentencing (see para 57).

(iv) *The Standard of Review*

[16] Moldaver J set out the standard of review regarding errors that relate to the sentence imposed by a sentencing judge as follows (at para 24):

> In *Lacasse* [*R v Lacasse*, 2015 SCC 64], a majority of this Court held that an appellate court could only interfere with a sentence in one of two situations: (1) where the sentence imposed by the sentencing judge is "demonstrably unfit" (para. 41); or (2) where the sentencing judge commits an error in principle, fails to consider a relevant factor, or erroneously considers an aggravating or mitigating factor, *and* such an error has an impact on the sentence imposed (para. 44). In both situations, the appellate court may set aside the sentence and conduct its own analysis to determine a fit sentence in the circumstances.

[17] That is the standard of review that applies here. In particular, the issue is whether the trial judge erred in principle by failing to consider a relevant factor (the assault), which would be an error of law. If that error had an impact on the sentence, that sentence would not be entitled to deference on appeal, and the appellate court could determine what sentence would be fit.

(v) Analysis

[18] I will first address the Crown's arguments.

[19] The Crown argues that the accused, who had the onus of proof, has not called any medical evidence to establish that there were long-lasting effects from the assault. It points out that the police officer who saw the accused the next day testified that he would not classify the injuries as significant.

[20] First, Moldaver J did not state that there must be "long-lasting effects" to constitute collateral consequences. What he said was (at paras 46-47):

> . . . Tailoring sentences to the circumstances of the offence and the offender may require the sentencing judge to look at collateral consequences. Examining collateral consequences enables a sentencing judge to craft a proportionate sentence in a given case by taking into account *all* the relevant circumstances related to the offence and the offender.
>
> There is no rigid formula for taking collateral consequences into account. They may flow from the length of sentence, or from the conviction itself. . . . In his text *The Law of Sentencing* (2001) [Alan Manson, *The Law of Sentencing*, Toronto: Irwin Law, 2001], Professor Allan Manson notes that they may also flow from the very act of committing the offence:
>
> > As a result of the commission of an offence, the offender may suffer physical, emotional, social or financial consequences. While not punishment in the true sense of pains or burdens imposed by the state after a finding of guilt, they are often considered in mitigation. (Emphasis added; p. 136.)
>
> I agree with Professor Manson's observation, much as it constitutes an incremental extension of this Court's characterization of collateral consequences in *Pham* [*R v Pham*, 2013 SCC 15]. In my view, a collateral consequence includes any

> consequence arising from the commission of an offence, the conviction for an offence, or the sentence imposed for an offence, that impacts the offender.

[21] Second, it was not necessary, in this case, for the accused to call medical evidence to prove his injuries. J.B., called by the Crown, described, in significant detail, the beating that he inflicted on the accused. He stated that he had so much blood on him that he had to take a shower before taking the complainant to the hospital. Further, the photographs that were filed as exhibits at the trial show the accused's condition following the assault. Finally, the accused described both the beating and his injuries, and his testimony was neither subjected to any cross-examination by the Crown nor otherwise challenged.

[22] In my view, this argument has no substance.

[23] The Crown also argues that the attenuating effect of the assault is lessened because the consequences to the accused were so directly linked to the offence as to be almost inevitable.

[24] While Moldaver J did say that "the attenuating effect of an injury on the sentence imposed will likely be lessened where the injury is so directly linked to the offence as to be almost inevitable" (at para 50), he went on to give the example of an injury resulting from an impaired driving offence. In my view, being assaulted by a complainant during a sexual assault, if that occurred, may be almost inevitable. Having the complainant's partner grab a shotgun, follow you outside and beat you is not an inevitable consequence of the offence, and it would set a dangerous precedent to accept that argument.

Vigilante justice is never acceptable, and it cannot be regularised or condoned by a finding that it is "inevitable".

[25] In my view, this argument should not be accepted.

[26] Finally, the Crown argues that the trial judge did consider whether the assault should have an effect on the sentence and determined that it should not because a lesser sentence would not be proportionate to the accused's moral blameworthiness. That is not how the trial judge addressed the treatment of the assault. He said that he was not considering it as a factor in sentencing because "it is not a circumstance that mitigates the blameworthiness of [the accused] for his deliberate preceding actions".

[27] The trial judge's dismissal of the argument in that way does not correctly apply the principles related to vigilante justice as set out in *Suter*. Moldaver J specifically states (at para 48):

> . . . The question is not whether collateral consequences diminish the offender's moral blameworthiness or render the offence itself less serious, but whether the effect of those consequences means that a particular sentence would have a more significant impact on the offender because of his or her circumstances. Like offenders should be treated alike, and collateral consequences may mean that an offender is no longer "like" the others, rendering a given sentence unfit.

[28] I would reject this argument.

[29] Applying the principles in *Suter*, I am also of the view that the assault on the accused was a collateral consequence arising from the commission of the offence and that the trial judge erred in refusing to consider it when determining the appropriate sentence. While this is a failure to

consider a relevant factor, the error will open the sentence to appellate review only if it had an impact on the sentence.

[30] Moldaver J addressed the question of impact, stating "Like offenders should be treated alike, and collateral consequences may mean that an offender is no longer 'like' the others, rendering a given sentence unfit" (at para 48). Following this logic, it seems to me that, if two offenders committed the same offence but only one was assaulted in relation thereto, the collateral consequence of the assault would render the two of them unlike, such that sentencing them to the same penalty could render the penalty to the assaulted offender unfit. The failure to consider the assault as a factor in the sentencing would have an impact on the sentence, with the result that this Court may set aside the sentence and conduct its own analysis to determine a fit sentence in the circumstances.

[31] In determining a fit sentence, the question becomes what effect, if any, the collateral consequence, being the assault, should have on the sentence. Moldaver J had this to say (at paras 45, 58-59):

> The sentencing judge found, correctly in my view, that the vigilante violence experienced by Mr. Suter could be considered — to a limited extent — when crafting an appropriate sentence. . . .
>
> . . . [T]his particular collateral consequence should only be considered to a limited extent. Giving too much weight to vigilante violence at sentencing allows this kind of criminal conduct to gain undue legitimacy in the judicial process. This should be avoided. Vigilantism undermines the rule of law and interferes with the administration of justice. It takes justice out of the hands of the police and the courts, and puts it into the hands of criminals. As a general rule, those who engage in it should expect to be treated severely.

> In sum, the sentencing judge was entitled to consider, to a *limited extent*, the vigilante violence suffered by Mr. Suter for his role in Geo Mounsef's death. As such, the Court of Appeal erred when it refused to give any effect to it.

[32] Moldaver J emphasised that, while vigilante violence is a collateral consequence to be factored into the sentencing process, it is only to have a limited effect to avoid giving it undue legitimacy. Punishment is to be determined by the courts, not by members of the public taking the law into their own hands. To prevent that from occurring, those who do take vigilante action are to be prosecuted and, if convicted, treated severely.

[33] In *Suter*, the violence against the accused was significant and ongoing (at paras 11, 14):

> . . . Mr. Suter was pulled from the driver's seat, thrown to the ground, and beaten by witnesses at the scene. When the police arrived, they found Mr. Suter lying in a fetal position on the parking lot pavement. . . .
>
> Sometime after being charged, Mr. Suter was abducted by vigilantes. Three hooded men took him from his home in the middle of the night, handcuffed him, and placed a canvas bag over his head. His attackers then drove him to a secluded area, cut off his thumb with pruning shears, and left him unconscious in the snow. Mrs. Suter was also attacked by vigilantes in a shopping mall parking lot. Both incidents were linked to Mr. and Mrs. Suter's role in Geo Mounsef's death.

[34] Moldaver J adopts the decision of *Re Moses Japonia Mamarika v R*, [1982] FCA 94, from the Federal Court of Australia as instructive on this issue. In that case, the accused pled guilty to manslaughter for stabbing a man with a knife and causing his death following an argument. He was later attacked by several men with spears and received a number of abdominal

injuries that required two surgeries to repair and necessitated that he spend a number of weeks in hospital, although he did not suffer any residual disabilities.

[35] By contrast, in this case, the assault, while serious, does not rise to the level of seriousness and significant harm that is found in *Suter* and *Mamarika*. It certainly does not warrant the reduced sentence of two years' incarceration and probation that is proposed by the accused. Such a reduction would decrease the sentence to the point where it would be disproportionate to the gravity of the offence.

[36] In my view, the trial judge erred in failing to consider the collateral consequence of vigilante violence against the accused as a factor in sentencing. His failure to do so, however, did not render the sentence of three and one-half years' incarceration unfit in the circumstances of this case, being a sexual assault with both oral sex (cunnilingus) and penetration that occurred in the complainant's home while she was sleeping. The assault on the accused was deplorable and called for a severe sentence for J.B., but it does not warrant a reduction in the sentence that was imposed on the accused.

[37] In oral argument, the accused raised, for the first time, the fact that, in addition to physical injuries, he suffered mental/emotional consequences in the form of fear of further reprisal, and social consequences by being excluded from the group of friends that included J.B. and the complainant. He argues that these were further collateral consequences that should be taken into account in sentencing.

[38] Unlike the physical violence and resulting injuries which were not inevitable, in my view, it was inevitable that the accused would be excluded

from that group of friends and that he would have a fear of reprisal following the sexual assault. It would be unusual and unexpected, in my view, that they would want to continue a friendship with him.

[39] Further, there is no evidence as to the significance of these effects on the accused. The messages on which the accused relies were sent on October 4, 2015, the day of the offence, when emotions were high. They are not, in my view, sufficiently serious to warrant a reduction in what would otherwise be a fit sentence.

[40] For these reasons, I would dismiss this ground of appeal.

IV. SECOND GROUND: USE OF THE RISK ASSESSMENT

(i) The Issue

[41] The accused argues that the trial judge erred in using the risk assessment that formed part of the pre-sentence report as an aggravating factor in sentencing.

[42] In the pre-sentence report, the writer stated:

> [The accused]'s Static 99R was calculated based on official criminal history records. As well, [the accused] was interviewed in order to verify the accuracy of the information.
>
> [The accused] received a total score of zero (0) which places him at Below Average risk for being charged or convicted of another sexual offence.
>
> . . .
>
> Static 99R does not measure all relevant risk factors and [the accused]'s recidivism risk may be higher or lower than that

> indicated by Static 99R based on factors not included in this risk tool.
> The significant risk factors for this offender are: Education/Employment. Other factors which may impact case management are: engages in denial/minimization.
>
> . . .
>
> The subject is a medium risk to reoffend based on the LSCMI and does not accept responsibility for this offence. On a positive note, he has no previous criminal convictions, scored below average on the Static 99R assessment and appears amenable to attending any and all programming, and following all conditions, as deemed necessary by the Courts.

[43] The trial judge said little about the risk assessment, other than to note that "the pre-sentence report assesses [the accused] to be a medium risk" as an aggravating circumstance.

(ii) The Parties' Positions

[44] In his written argument, the accused challenged both the appropriateness of the use of the risk assessment tools in the preparation of the pre-sentence report and the validity of the conclusion that he was a medium risk to re-offend. He argued, further, that the trial judge should not have relied upon the risk assessment conclusion in the report but, rather, should have taken an in-depth look at the actual risk factors on which that conclusion was based. His position is that, had he done so, he would have rejected the conclusion. Further, he argued that a finding of a medium risk to re-offend is a neutral finding, and it should not be considered as an aggravating factor or finding.

[45] The Crown's position is that the challenge to the use of the risk assessment tools in the pre-sentence report is being raised for the first time on

appeal. It states that, based on the jurisprudence, a new issue should only be allowed on appeal if the interests of justice allow it and where there is a sufficient evidentiary record and findings to do so. (See *Quan v Cusson*, 2009 SCC 62 at paras 36-37; and *R v ERC*, 2016 MBCA 74 at para 18.) Its position is that the accused is making "a wide-ranging theoretical argument about the utility of the LS/CMI as a sentencing tool without any evidentiary foundation."

[46] On the trial judge's use of the risk assessment conclusion as an aggravating factor, the Crown takes the position that this was, essentially, neutralised by the fact that the trial judge also noted, as a mitigating factor, the fact that the accused "has worked at his place of employment for 14 years with positive reviews".

(iii) Standard of Review

[47] The challenge to the appropriateness of the use of the risk assessment tools in sentencing has been argued for the first time on appeal. As the trial judge did not render a decision on the issue, there is no decision to review and, therefore, no applicable standard of review.

[48] The challenge to the trial judge's use of the risk assessment conclusion, and whether he should have found it to be neutral, raises the issue of whether the trial judge erred in his weighing of the evidence. The weighing of evidence is a function that is clearly within the purview of the trial judge and is a discretionary decision. As was emphasised in *R v Lacasse*, 2015 SCC 64, "an appellate court may not intervene simply because it would have weighed the relevant factors differently" (at para 49).

(iv) Analysis

[49] On the issues now being raised regarding the risk assessment tools and conclusions in the pre-sentence report, it is of note that the accused requested the preparation of the pre-sentence report and did not object to its filing or use by the trial judge. In my experience, the use of risk assessment tools and the inclusion of conclusions about an accused's risk to re-offend are part of most, if not every, pre-sentence report. The accused did not require that the writer be called for cross-examination on any aspects of the report or the conclusions and he did not call any evidence to challenge the report or the conclusions.

[50] While there may be a basis for the concerns that are expressed with the use of the risk assessment tools in determining sentence, this challenge would require that evidence be called to explain the social science behind the development and efficacy of the tools for use in sentencing to support that challenge. In my view, the accused's argument about the use of risk assessment tools in sentencing and their strengths and weaknesses has no evidentiary basis and, therefore, cannot be determined for the first time on this appeal.

[51] The accused did question, in argument during the sentencing hearing, the finding that he was a medium risk to re-offend, and he pointed out the weakness regarding the supporting risk factors. The significant risk factors identified in the report were the accused's "Education/Employment." While the trial judge noted the risk finding, he made no further comment about it. In reviewing the accused's background, the trial judge included that he had completed high school, that he had worked at a part-time position for 14 years

and that he had positive reviews from his employer. He also noted that that employment was a mitigating factor.

[52] In my view, the trial judge was entitled to consider the risk assessment conclusion and to find that it was an aggravating factor, because it was evidence presented at the sentencing hearing. While another judge may have come to a different conclusion, that is a factual determination. It was open to the accused to speak to the writer of the report and/or to have him called for cross-examination to challenge that finding at the sentencing hearing. He did not do that. I do not see where the trial judge committed a reviewable error regarding his treatment of that evidence.

[53] Even if his failure to analyse the finding or his decision to list it as an aggravating factor was an error, there is no indication that the trial judge put any significant weight on the finding, and he was clearly aware of the evidence regarding the accused's education and employment history. In my view, his reference to the risk assessment conclusion was not material to the sentence that he imposed.

V. DECISION

[54] For these reasons, I would grant leave to appeal the sentence but I would dismiss the appeal.

Beard JA

I agree: Monnin JA

I agree: leMaistre JA