Citation: R v Fisher, 2019 MBCA 82 Date: 20190802
Docket: AR19-30-09214

IN THE COURT OF APPEAL OF MANITOBA

Coram: Madam Justice Freda M. Steel
Madam Justice Barbara M. Hamilton
Mr. Justice Marc M. Monnin

B E T W E E N :

	)	***Z. B. Kinahan*** *and*
HER MAJESTY THE QUEEN	)	***M. S. Wire***
	)	*for the Appellant*
	)	
Respondent	)	***N. M. Cutler***
	)	*for the Respondent*
- and -	)	
	)	*Appeal heard and*
EMERY VANCE FISHER	)	*Decision pronounced:*
	)	***July 30, 2019***
	)	
(Accused) Appellant	)	*Written reasons:*
	)	***August 2, 2019***

HAMILTON JA (for the Court):

[1] The accused appealed his sentence of two months' incarceration for being at large without lawful excuse from July 31, 2018 to November 4, 2018, when the police arrested him. He was 20 years old and was serving a youth sentence.

[2] The two-month adult sentence triggered the operation of section 743.5(1) of the *Criminal Code* (the *Code*). As a result, the remainder of the accused's youth sentence was converted to an adult custodial sentence, resulting in a total penitentiary sentence of four years, two months and two days, which the accused is serving in the Saskatchewan Federal Penitentiary.

[3] The accused sought a sentence that would permit him to return to the Manitoba Youth Centre (the Youth Centre) to serve his youth sentence, arguing that the effect of section 743.5(1) was a collateral consequence that was not considered by the sentencing judge and resulted in a sentence that was harsh and excessive.

[4] At the appeal hearing, we granted leave and allowed the appeal, with brief reasons to follow. These are our reasons.

[5] Section 743.5(1) of the *Code* reads as follows:

> **Transfer of jurisdiction when person already sentenced under *Youth Criminal Justice Act***
> **743.5(1)** If a young person or an adult is or has been sentenced to a term of imprisonment for an offence while subject to . . . a youth sentence imposed under paragraph 42(2)(n), (o), (q) or (r) of the *Youth Criminal Justice Act*, the remaining portion of the . . . youth sentence shall be dealt with, for all purposes under this Act or any other Act of Parliament, as if it had been a sentence imposed under this Act.

See also section 92(4) of the *Youth Criminal Justice Act* (the *YCJA*).

[6] The Crown rightly conceded that the effect of section 743.5(1) was not considered at the sentencing and the failure to do so was a material error that materially impacted the sentence, which permits this Court to review the sentence. Therefore, the question is whether the operation of section 743.5(1) of the *Code* resulted in a sentence that was harsh and excessive in the circumstances.

[7] In September 2016, the accused was sentenced for second degree murder under section 42(2)(q) of the *YCJA*. The youth justice court judge

sentenced him to six years, to be served as follows: two years and six months of secure custody; and three years and six months of community supervision.

[8] At the accused's annual review under the *YCJA*, in November 2017, the youth justice court judge converted the secure custody then remaining to open custody allowing for reintegration leaves. On July 31, 2018, the accused did not return to the Youth Centre while on reintegration leave.

[9] The accused was in remand custody for just over six weeks until he pled guilty to being unlawfully at large on December 18, 2018.

[10] At the sentencing, the Crown sought a sentence of six months, relying on *R v Park*, 2016 MBCA 107. The accused sought a sentence of time served.

[11] The record of the sentencing demonstrates that the expectation of the lawyers and the sentencing judge was that the accused would return to the Youth Centre after serving the two-month adult sentence, at which time the youth justice court judge would conduct a review of the accused's youth sentence. In particular, we note that:

- The sentencing judge had before him a copy of the most recent annual report under the *YCJA* with respect to the accused and suggested that the youth justice court judge deal with the review after the sentencing.

- In his submission, counsel for the Crown noted that the accused was still "a very young man" who "has been through a lot," *Gladue* circumstances (see *R v Gladue*, [1999] 1 SCR 688) "are firmly in

play" and that the accused did not engage in criminal conduct while at large. He referred to the accused as a "model prisoner".

- In her submission, counsel for the accused advised that because the accused had been doing so well at the Youth Centre, they want him to return "once he's dealt with this sentence." She sought a sentence of time served because "once he's dealt with his charge he is going back to the Youth Centre where he's going to have opportunities for rehabilitation".

- The sentencing judge commented that regardless of the sentence imposed by him, "that's going to happen" (i.e., the accused would return to the Youth Centre).

- In his reasons, the sentencing judge spoke to the accused about complying with conditions when he is released again, stating, "I know they will give you community release again".

[12] The Crown argues that this Court should be reluctant to vary a sentence so that the provisions of section 743.5(1) of the *Code* are not engaged. It relies on *Erasmo v Canada (Attorney General)*, 2015 FCA 129, which was a challenge under the *Canadian Charter of Rights and Freedoms*. It says that while the result was "rough", it was not harsh and excessive for the offence and this offender. While we agree with the Crown that the intention of it, and the sentencing judge, was that a custodial sentence be imposed, it is obvious that they did not turn their minds to the collateral consequence of the youth sentence being converted to an adult sentence of more than four years.

[13] The collateral consequence under section 743.5(1) of adult federal incarceration is a personal circumstance of the accused and, as such, was a material factor for the sentencing. It is relevant to the issue of whether the sentence is proportional not only for the offence, but for the accused, particularly with respect to his rehabilitation, which had seen progress while in custody at the Youth Centre. See *R v Pham*, 2013 SCC 15 at para 11. Also see *R v Gardiner*, 2019 MBCA 63 at para 16; and *R v CCC*, 2019 MBCA 76 at paras 15, 20.

[14] Furthermore, the sentencing judge did not state that in sentencing the accused, he took into account the approximate six weeks that he spent in pre-sentence custody.

[15] For these reasons, we are of the view that the sentence imposed was harsh and excessive in the circumstances and that a fit sentence is one that will have the accused return to the Youth Centre to serve his youth sentence under the *YCJA.*

[16] For these reasons, we granted leave to appeal, allowed the appeal, set aside the sentence of two months' imprisonment consecutive to the youth sentence and imposed a two-month suspended sentence with unsupervised probation, subject to the compulsory conditions under the *Code*, with the expectation that the accused will be immediately returned to the Youth Centre.

Hamilton JA

Steel JA

Monnin JA