

IN THE COURT OF APPEAL OF MANITOBA

Coram: Chief Justice Richard J. Chartier
Madam Justice Freda M. Steel
Madam Justice Diana M. Cameron

<i>Docket: AR16-30-08539</i>)	
<i>BETWEEN:</i>)	
)	
<i>HER MAJESTY THE QUEEN</i>)	
	)	<i>M. P. Cook and</i>
<i>Respondent</i>	)	<i>J. L. Ostapiw</i>
	)	<i>for B. T. Frost</i>
<i>- and -</i>)	
)	
<i>BRUCE TODD FROST</i>)	
	)	<i>C. T. St. Croix and</i>
<i>(Accused) Appellant</i>	)	<i>N. P. Steen</i>
	)	<i>for Her Majesty the Queen</i>
<i>- and -</i>)	
)	
<i>Docket: AR16-30-08549</i>)	
<i>BETWEEN:</i>	)	<i>Appeals heard and</i>
	)	<i>Decision pronounced:</i>
<i>HER MAJESTY THE QUEEN</i>	)	<i>March 24, 2017</i>
)	
<i>Appellant</i>)	
)	
<i>- and -</i>	)	<i>Written reasons:</i>
	)	<i>April 21, 2017</i>
<i>BRUCE TODD FROST</i>)	
)	
<i>(Accused) Respondent</i>)	

NOTICE OF RESTRICTION ON PUBLICATION: No one may publish, broadcast or transmit any information that could disclose the identity of the complainant(s) or witness(es) (see section 486.4 of the *Criminal Code*).

On appeal from: 2015 MBQB 96; 2016 MBQB 21

CHARTIER CJM and STEEL JA (for the Court):

[1] There are two appeals. The accused appeals against his conviction and the Crown seeks leave to appeal the sentence. The accused was 48 years old at the time of his conviction on one count of sexual exploitation involving a then 17-year-old female complainant. The complainant worked part time for the accused's wife and also eventually became their helper at the family home. He was sentenced to 18 months' incarceration followed by three years of supervised probation. He was also ordered to perform 150 hours of community service work.

[2] The sole issue on the conviction appeal is whether the accused stood in a relationship of trust towards the complainant. The principal issue on the sentence appeal is whether the judge erred by failing to treat the sexual misconduct as a major sexual assault thereby resulting in a sentence that was demonstrably unfit.

[3] On the conviction appeal, we are satisfied that the judge correctly stated and applied the legal principles regarding the notion of "position of trust". His characterization of the relationship as one of trust is largely a factual finding which is owed deference and which cannot be interfered with unless there is palpable and overriding error. We are all of the view that the evidentiary record reasonably supports the judge's "position of trust" finding.

[4] The judge's conclusion that the accused was in a position of trust towards the complainant was based on a cumulative assessment of the nature and circumstances of their relationship which included: that the complainant was the family's helper; that the accused was one of the heads of the family;

that he knew she was particularly vulnerable due to difficulties within her own family, and because of her familial problems, that he provided her with a place to stay overnight. The judge concluded that “[a]ll of this defined the relationship and made her vulnerable to his influence and persuasive powers” (at para 52). As the person in the position of trust, the responsibility to avoid sexual contact fell on the accused. Rather than doing so, he took advantage of the complainant’s vulnerability. Appellate intervention is unwarranted.

[5] We now turn to the leave to appeal sentence application.

[6] The Crown argues that the underlying facts of this offence constitute a major sexual assault and therefore the jurisprudence requires a starting point sentence of four to five years. Moreover, even taking into account the mitigating circumstances of this particular offender, it is submitted that 18 months is demonstrably unfit.

[7] The accused argues that the offence of sexual exploitation is fundamentally different than sexual assault, sexual interference or invitation to sexual touching and it would not be appropriate to apply that sentencing jurisprudence. The accused submits that 18 months is not demonstrably unfit given this offence and this offender.

[8] While we acknowledge that this is a confused and difficult area of the law, we do not believe that this is the case to attempt to resolve it. Even if we agreed with the Crown that there was an error in principle here, we do not agree that the sentence imposed was demonstrably unfit for this offender.

[9] The accused had no criminal record. He was 48 years old, had been married for 17 years with two children and was steadily employed. A pre-sentence report was filed which outlined the accused's remorse for his actions. It found him to be at a very low risk to reoffend generally and at a low risk for re-involvement in sexual offences. The report of a psychologist was consistent with the pre-sentence report and concluded that:

Mr. Frost presents as a very low risk for a re-occurrence of a similar type of behaviour. As well, there is nothing to indicate that he is at risk to engage in any type of inappropriate sexual behaviour or boundary violation related to children. Mr. Frost does not require sex offender specific treatment and would not fit in or be an appropriate candidate for a sex offender treatment group.

He and his wife have chosen to remain together and work on their relationship and their family. He has the possibility of returning to work and living in the community as a productive community member helping to care for and provide for his family would be therapeutic and support him in being responsible, other-oriented and more mature. Should a custodial sentence be considered, it is important to note this would only serve as a punitive measure, which of course is an important consideration for the court.

[10] While not wishing to minimize in any way the traumatic impact on the complainant, we agree with the judge's comments in his reasons for sentence when he said (at para 32):

In terms of balancing the factors that I must, there is no doubt that denunciation and deterrence are primary sentencing considerations, yet I have no concern respecting specific deterrence. Nevertheless the community, and other victims, must know that the courts will treat these charges seriously in order to protect the vulnerability of young persons. I agree with the assessment of the forensic psychologist that a period of

incarceration “would not play any role in community safety and risk management” and if prolonged would “negatively impact his ability to re-establish himself and his family and employment, factors that would promote improved functioning”. Further his employment is in jeopardy even with the minimum mandatory one-year jail sentence.

[11] In the result, the conviction appeal is dismissed and, while leave to appeal sentence is granted, the Crown’s sentence appeal is also dismissed.

Chartier CJM

Steel JA

Cameron JA