IN THE COURT OF APPEAL OF MANITOBA

Coram: Madam Justice Diana M. Cameron
Mr. Justice William J. Burnett
Madam Justice Janice L. leMaistre

B E T W E E N :

HER MAJESTY THE QUEEN	)	
	)	***A. C. Bergen***
	)	*for the Appellant*
Appellant	)	
	)	***B. S. Newman***
- and -	)	*for the Respondent*
	)	
EDWARD NORMAN GARDINER	)	*Appeal heard and*
	)	*Decision pronounced:*
	)	***May 31, 2017***
(Accused) Respondent	)	

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*).

LEMAISTRE JA (for the Court):

[1] The Crown seeks leave and, if granted, appeals the imposition of a discharge in a case involving domestic violence. After hearing argument, leave was granted and the appeal was allowed with reasons to follow. These are those reasons.

[2] The accused was charged with a number of offences arising from events that occurred in January 2013. At the start of his trial, he entered a

guilty plea to assault with a weapon. He was found guilty after trial of an additional charge of assault and acquitted on the remaining charges. In October 2016, he was sentenced to a conditional discharge with two years of supervised probation, concurrent on both charges.

[3] The facts as found by the sentencing judge are as follows. The accused and the complainant were in a relationship that was off and on for approximately three years and they had been living together for approximately two months at the time of the assaults. The accused discovered that the complainant had stolen money from him to buy drugs and became furious with her. They struggled in their bedroom during which the accused choked the complainant and placed one or both of his knees on her chest while they were on the floor. Then, he placed a leather belt around her neck to prevent her from fleeing. He kept the belt around her neck for several hours and they went to attempt to recover his money from her drug dealer. As a result of the assaults, the complainant suffered physical and psychological injuries including bruising to her head and body, abrasions to her throat, anxiety and depression.

[4] In sentencing the accused to a conditional discharge, the judge considered the need for exceptional circumstances before a discharge may be imposed in a case involving violence and in which the need for general deterrence and denunciation was "[o]f particular importance". He recognized the statutorily aggravating factors: domestic violence, the accused's position of trust and the significant victim impact as well as other relevant aggravating and mitigating factors. He considered the sentencing objectives and concluded that "a conditional discharge on both charges is in the best interest of the offender and not contrary to the public interest."

[5] The grounds of appeal are that the sentencing judge erred in his assessment of the relevant sentencing principles and imposed an unfit sentence. The Crown argues that the sentencing judge identified the applicable principles of sentencing, but did not conduct an analysis as to how a discharge addresses the relevant principles, and that a discharge is generally not available when general deterrence is the paramount sentencing principle.

[6] The sentencing judge's decision is entitled to a high degree of deference. However, we are of the view that he committed an error in principle by failing to give sufficient weight to general deterrence, and that this error resulted in a sentence that is demonstrably unfit. See *R v Lacasse*, 2015 SCC 64; *R v Ruizfuentes*, 2010 MBCA 90; *R v Houle*, 2016 MBCA 121; and *R v Francisco*, 2005 MBCA 110.

[7] As stated by Chartier JA (as he then was) in *R v Foianesi*, 2011 MBCA 33 (at para 10):

> I agree with the general proposition that discharges should not be available when general deterrence is the paramount sentencing principle. The reason is simple. General deterrence always causes a sentence to be harsher than what it would normally be if it was not a factor. See *R. v. B.W.P.; R. v. B.V.N.*, 2006 SCC 27, [2006] 1 S.C.R. 941 (at para. 36):
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> > Unlike some other factors in sentencing, general deterrence has a unilateral effect on the sentence. When it is applied as a factor in sentencing, it will always serve to increase the penalty or make it harsher; its effect is never mitigating. ….
>
> As a result, and as was stated by Clayton C. Ruby *et al.*, *Sentencing*, 7th ed. (Markham: LexisNexis Canada Inc., 2008) at para. 9.17, "[a] need for general deterrence is inconsistent with a

> discharge." Since the discharge is the most lenient sentence in the *Code*, any increase in penalty brought about by general deterrence will necessarily take away the discharge provisions as a possible sentencing option.

[8] The circumstances of the offences are serious. The theft by the complainant of the accused's money does not amount to provocation and does not excuse his violent reaction. The initial assault was spontaneous, but the act of putting the belt around the complainant's neck was deliberate, prolonged and demeaning. One of the hallmarks of domestic violence is an attempt to control the behaviour of an intimate partner through the use of violence. It is trite to say that cases involving domestic violence require a strong message of deterrence and denunciation. In our view, the principle of general deterrence is not satisfied in this case by a discharge.

[9] We are mindful of the accused's guilty plea to one of the charges, his lack of record, family support, ongoing employment and low risk to reoffend. After his arrest, the accused spent two days in custody. He was on stringent conditions of judicial interim release for three years and eight months and it is now more than four years since the offences occurred. In our view, these circumstances do not warrant reincarceration.

[10] We wish to make one additional comment. While we do not need to decide the issue for the purposes of this case, we do not believe that there are exceptional circumstances which would warrant the imposition of a discharge.

[11] In the result, leave to appeal is granted. The sentence imposed is

set aside and substituted with a two-year suspended sentence with supervised probation on the same terms imposed by the sentencing judge.

leMaistre JA

Cameron JA

Burnett JA