IN THE COURT OF APPEAL OF MANITOBA

Coram: Mr. Justice Marc M. Monnin
Madam Justice Jennifer A. Pfuetzner
Madam Justice Karen I. Simonsen

B E T W E E N :

	)	***I. N. MacNair***
HER MAJESTY THE QUEEN	)	*for the Appellant*
	)	
Respondent	)	***A. C. Bergen***
	)	*for the Respondent*
- and -	)	
	)	*Appeal heard:*
TYLER JASON GARDINER	)	***January 8, 2019***
	)	
(Accused) Appellant	)	*Judgment delivered:*
	)	***May 31, 2019***

MONNIN JA

[1] This is an unusual appeal. It involves consideration of the collateral consequences of a sentence and the role of an appellate court.

[2] Some ten years after the imposition of an 18-month conditional discharge for possession of child pornography, the accused seeks leave to appeal that sentence and to have this Court replace it with an absolute discharge. He brings a motion for fresh evidence consisting primarily of affidavits filed by him to explain what has occurred since he was sentenced.

[3] The facts to which the accused entered a guilty plea and upon which the sentencing judge rendered her decision were that, in January 2004, as a result of information from an ex-girlfriend of the accused, police located a

dozen short video clips depicting pornographic images of females between the ages of eight and 14 on the accused's computer. The files had been placed on the computer at a time when the accused had one or more roommates with access to it. The guilty plea was with respect to one incident of opening one of these files on November 12, 2001. The accused maintained that he did not watch the entirety of the video and shut it down after watching what he estimated were 10 seconds of it.

[4] As noted by the sentencing judge, the facts were "somewhat flimsy to support a plea to a charge of possession." However, given that the accused was anxious to deal with the outstanding matter, which had been pending for over four years by the time it appeared before the sentencing judge, and that he was represented by experienced defence counsel, she accepted his plea of guilty to the charge but characterised the facts "as among the most minimal on which any guilty plea to this offence could be grounded."

[5] Crown counsel sought a conditional sentence of less than one year to be served in the community on the grounds that deterrence and denunciation were the primary factors in the sentencing for this kind of offence. Defence counsel, pointing to "the disproportionate impact that the sentence proposed by the Crown would have on [the accused]", sought a discharge. Part of the reason submitted by defence counsel was that the accused's maternal grandparents lived in the United States and that the accused had continued to visit them almost yearly as an adult, particularly given that his grandfather was in ailing health. In his submissions, defence counsel noted:

> Even a discharge may cause difficulties in terms of crossing into the United States but it's my respectful submission that if he receives a discharge versus a conviction that the fact that a discharge was received may give an indication to US Customs

> Authority that this was, as I submit it to be, the very minimum case and that's why a discharge was given. So if he gets a discharge is he home free to the States? I don't know, but it's my respectful submission that a discharge versus a conviction would at least certainly enhance his ability to travel into [the] United States.

[6] The sentencing judge, noting that a discharge was an exceptional sentence for the offence but that it was not contrary to the public interest, "particularly if general deterrence can be addressed in another way by both restrictiveness of the probation conditions and the imposition of further community service work", she imposed an 18-month conditional discharge with conditions, some of which included:

(a) to keep the peace and be of good behaviour;

(b) to participate in and complete any relevant counselling directed by Probation Services;

(c) to not possess or utilise wiping software and to not encrypt any information on his computer; and

(d) to perform 80 hours of the community service work as directed by Probation Services.

She advised the accused that, "If you abide by these conditions without incident, at the end of that period of time you will be entitled to say that you do not have a criminal conviction registered against you in relation to this charge."

[7] The Crown sought an order under the *Sex Offender Information Registration Act*, SC 2004, c 10 (*SOIRA*), requiring the accused to be

registered on the sex offender registry. However, the sentencing judge noted that:

> I am satisfied for the other reasons articulated above as well, that for this offence committed by this individual, the impact of registration, and with it the virtual certainty that it would mean that he would not be able to enter the United States, would be "grossly disproportionate to the public interest in having the offender registered".

She therefore declined to make an order under that *Act*.

Events After Sentencing

[8] What transpired after these sentencing proceedings is described in the affidavits filed by the accused on his application for leave to extend the time for his appeal.

[9] On August 24, 2009, the accused attempted to travel to the United States and was denied entry at the border. In his most recent affidavit, he explained what occurred on that occasion. Although 18 months had not passed since the date of the sentencing, he had completed his community service work and had attended a number of meetings with probation officers. He believed that he had complied with all of his probationary conditions and that his discharge was therefore effective. According to a U.S. Customs and Border Protection (USCBP) decision filed by the accused, their position is that he completed an immigration declaration that specifically asked if he had ever been "arrested, fined, convicted, imprisoned, charged or indicted in any court in either Canada or the United States" to which he answered in the negative. When he was then placed under oath by a USCBP officer, he refused to give a statement, insisting that he had been advised by his grandfather to never acknowledge anything if questioned by law enforcement

officials. He was denied entry into the United States on that occasion for having been convicted of a "crime involving moral turpitude", namely, the possession of child pornography charge and for deliberately misrepresenting his criminal conviction.

[10] Over the next few years, at times with advice of individuals knowledgeable in the area, he sought a waiver and a renewed application of the decision. In a decision dated October 4, 2017, the U.S. Department of Homeland Security denied his application for advanced permission to enter the United States for the reasons described above. The accused has filed a further appeal to the Board of Immigration Appeals and is of the view that it is unlikely to succeed.

[11] In his discussions with members of USCBP, the accused received information in the form of a conversation followed by confirmation by way of email from the Chief of Field Operations of the Department of Homeland Security that "an absolute discharge" would have been viewed differently.

[12] As a result of that information, the accused applied for leave to appeal his sentence and to ask this Court to modify his sentence to an absolute discharge. He was granted an extension of time to file an appeal which is now before us.

Motion for Fresh Evidence

[13] The accused moved to file fresh evidence consisting of three affidavits. The first two affidavits were filed in the application to extend time and a further affidavit was filed before the panel of this Court. The contents of these affidavits have to do with events which occurred after the sentencing and, more particularly, provide details of what occurred when the accused

attempted to enter the United States, as well as information concerning what reasons he was given for that denial of entry. Such information was of course not available at the time of the sentencing. It forms the basis upon which this appeal has been brought and it is necessary and relevant information for this Court to deal with the matter. The Crown, while not formally consenting to it being admitted, agreed that it should be considered in the determination of the appeal. Out of fairness to the accused and given that the appeal was heard with the information being available to us, I would grant the motion and deal with the appeal on the basis of the information the affidavits contain.

Standard of Review

[14] Notwithstanding the unusual facts of this case, it is still a sentence appeal. Therefore, the applicable standard of review is one of deference unless there is an error in principle or the sentence is demonstrably unfit as discussed by this Court in *R v Gabriel*, 2013 MBCA 45 (at para 17): "An error in principle includes failing to consider a relevant factor, taking into account an irrelevant factor, failing to give sufficient weight to a relevant factor or overemphasizing an appropriate factor".

[15] Absent such an error in principle, the issue then becomes whether the sentence is unfit in the circumstances.

Collateral Consequences

[16] The decision of *R v Pham*, 2013 SCC 15, recognised that collateral consequences of a sentence (in that case, those related to immigration) could be relevant in tailoring a sentence as long as their significance depended on and had to be determined in accordance with the facts of a particular case. More specifically, Wagner J, as he then was, stated (at paras 14-16):

> The general rule continues to be that a sentence must be fit having regard to the particular crime and the particular offender. In other words, a sentencing judge may exercise his or her discretion to take collateral immigration consequences into account, provided that the sentence that is ultimately imposed is proportionate to the gravity of the offence and the degree of responsibility of the offender.
>
> The flexibility of our sentencing process should not be misused by imposing inappropriate and artificial sentences in order to avoid collateral consequences which may flow from a statutory scheme or from other legislation, thus circumventing Parliament's will.
>
> These consequences must not be allowed to dominate the exercise or skew the process either in favour of or against deportation. Moreover, it must not lead to a separate sentencing scheme with a *de facto* if not a *de jure* special range of sentencing options where deportation is a risk.

[17] In that case, the accused had received a two-year sentence for drug trafficking. As a result of the sentence, the accused could not appeal his deportation order but could have if his sentence was one day less. The effect of the sentence on his deportation was not known to the sentencing judge. The Supreme Court of Canada was of the view that it was a relevant factor and, since the sentencing judge essentially had not dealt with it, it was open for the appellate court to intervene. Similarly, a few years earlier, this Court, in *R v Arganda (JR)*, 2011 MBCA 54, had reduced a two-year sentence by one day to alleviate the immigration consequences to an accused who would have faced deportation. Again, the sentencing judge was not aware of the immigration consequences of imposing a sentence of two years rather than the reduction of the sentence by one day.

[18] In its most recent pronouncement on the issue of collateral consequences, *R v Suter*, 2018 SCC 34, the Court had to consider a vicious vigilante attack on an accused occurring as a result of the offence. On this

issue, the unanimous view of the Court was that it could be considered as a collateral consequence and was therefore relevant in the sentencing process. Moldaver J, for the majority, wrote as follows (at para 47):

> There is no rigid formula for taking collateral consequences into account. They may flow from the length of sentence, or from the conviction itself: see *R. v. Pham*, 2013 SCC 15, [2013] 1 S.C.R. 739, at para. 11; *R. v. Bunn* (1997), 118 Man. R. (2d) 300 (C.A.), at para. 23; *R. v. Bunn*, 2000 SCC 9, [2000] 1 S.C.R. 183 ("*Bunn* (SCC)"), at para. 23; *Tran v. Canada (Public Safety and Emergency Preparedness)*, 2017 SCC 50, [2017] 2 S.C.R. 289. In his text [Professor Allan Manson, *The Law of Sentencing* (Toronto: Irwin Law, 2001)] *The Law of Sentencing* (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*. **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.**
>
> [bold added]

[19] I agree with the Crown that the situation before us is not the same as was before the Courts in *Pham* and *Arganda*. It is not the effect of Canadian immigration law, enacted by our own Parliament, which creates a collateral consequence to the accused. It is the immigration law of another country and the decisions made by officials in the United States which have brought about these consequences.

[20] However, when one considers the rationale behind the consideration of collateral consequences in the sentencing process, I believe the outcome is the same. In all circumstances, the reason for doing so is to ensure that the accused does not receive a sentence disproportionate to those of others given his personal circumstances. It is therefore a relevant consideration.

[21] It could be expected that less weight would be given to a restriction on a Canadian's ability to travel to a foreign state than to the deportation from Canada of a long-term permanent resident. However, ultimately, the weight to be given to these collateral consequences is a matter for the sentencing judge.

Accused's Position

[22] The accused argues that, while the sentencing judge did contemplate the possible consequences of the sentence, she did not have the complete information as to how the American authorities would treat the discharge. Therefore, by inadvertence, she did not give appropriate weight to a relevant consideration. Not knowing that a conditional discharge would constitute a conviction for the purposes of American immigration law and an absolute discharge would not, she proceeded to impose a sentence which had consequences she did not intend—a disproportionate one in the circumstances.

Crown's Position

[23] In this appeal, the Crown argues that the imposition of a conditional discharge on the basis of the information that was before the sentencing judge was itself an error, relying on *R v Relph*, 1991 CarswellBC 1676. In that case, the British Columbia Court of Appeal held that a factual foundation justifying

the collateral consequences of a sentence required that it be an established fact that the consequence would ensue, not merely the possibility that it would. That argument was not advanced before the sentencing judge.

[24] The Crown also argues that the collateral consequence advanced is not the same as found in *Pham* and *Arganda* (i.e., Canadian immigration consequences) and should not warrant consideration as a factor in the setting of an appropriate sentence.

[25] Finally, the Crown argues that the conditional discharge was within the range and was a fit sentence.

Analysis

[26] I am of the view that the appeal should be dismissed. I am not satisfied that the sentencing judge erred in the manner in which she dealt with the collateral consequences, nor am I of the view that the sentence she imposed is unfit.

Sentencing Judge Did Consider Collateral Consequences

[27] The sentencing judge did consider the collateral consequences to the accused of the sentence she was imposing. In fact, it was defence counsel who advised her that a discharge was an attempt to avoid the consequences to the accused with respect to his travel to the United States and, even then, counsel was unsure that it would be sufficient to avoid the consequences. No request was made for an absolute discharge. The sentencing judge went on to refuse the Crown's request for a *SOIRA* registration in order to avoid collateral consequences to the accused. In short, I am satisfied that she properly

considered the collateral consequences to the accused on the basis of the information that was available to her.

[28] The accused's position is now that that information was incorrect and that an absolute discharge was the sentence that should have been imposed. However, the information to confirm that the collateral consequences would not have occurred is, to say the least, not very convincing. We have no affidavit from an expert in American immigration law confirming that there is a different treatment afforded conditional versus absolute discharges or that the American authorities would have made that distinction at the time of sentencing. As well, the decision given to the accused with respect to his immigration appeal raises another ground for refusal of entry, one which unfortunately may well have a negative effect whether or not the discharge is an absolute one as opposed to a conditional one, namely, his failure to be truthful with the American authorities.

[29] Counsel for the accused, even on the hearing of the appeal, candidly admitted that he was not aware whether the American authorities would allow entry if an absolute discharge was substituted given the events that have occurred. In his words, he was asking for "another tool" to deal with the American authorities. In short, I am not sure that the granting of an absolute discharge would have the effect that is being proposed.

[30] As well, I am of the view that the conditional discharge is not an unfit sentence in the circumstances of this case. Section 730 of the *Criminal Code* provides as follows:

> **Conditional and absolute discharge**
> **730(1)** Where an accused, other than an organization, pleads guilty to or is found guilty of an offence, other than an offence for

> which a minimum punishment is prescribed by law or an offence punishable by imprisonment for fourteen years or for life, the court before which the accused appears may, if it considers it to be in the best interests of the accused and not contrary to the public interest, instead of convicting the accused, by order direct that the accused be discharged absolutely or on the conditions prescribed in a probation order made under subsection 731(2).
>
> . . .
>
> **Effect of discharge**
> **730(3)** Where a court directs under subsection (1) that an offender be discharged of an offence, the offender shall be deemed not to have been convicted of the offence.

The conditions imposed by the sentencing judge, while not onerous, were directed to the nature of the offence for which the accused had pled guilty. She was not asked and apparently did not consider an absolute discharge but felt that conditions were warranted. I see no error in her coming to that conclusion.

[31] The sentencing judge's reasons do not suggest that, had she known of the consequences of her imposing conditions on the ability of the accused to enter the United States, she would not have done so. As I have found earlier, I do not believe that she acted in error when she considered the consequences as she knew them and see no basis to find that a conditional discharge in these circumstances was an unfit sentence.

[32] However, as the section reads, it should be clear that, as of this time, the accused is not, according to Canadian law, convicted of an offence. He has satisfied the conditions imposed by the sentencing judge and is therefore, according to the provisions of the *Code*, deemed not to have been convicted of any offence.

[33] I sympathise with the accused and his position and agree with the sentencing judge that the circumstances of this offence are "the most minimal on which any guilty plea . . . could be grounded" and that a discharge was appropriate in the circumstances, albeit a conditional one.

[34] For these reasons I would grant leave to appeal but dismiss the appeal.

Monnin JA

I agree: Pfuetzner JA

I agree: Simonsen JA