Citation: R v JHS, 2019 MBCA 24 Date: 20190319
Docket: AY18-30-09168

IN THE COURT OF APPEAL OF MANITOBA

Coram: Mr. Justice Michel A. Monnin
Madam Justice Holly C. Beard
Mr. Justice Christopher J. Mainella

B E T W E E N :

HER MAJESTY THE QUEEN	)	***E. J. Roitenberg***
	)	*for the Appellant*
Respondent	)	
	)	***M. E. Carlson***
	)	*for the Respondent*
- and -	)	
	)	*Appeal heard:*
	)	***January 9, 2019***
J. H. S.	)	
	)	*Judgment delivered:*
(Young Person) Appellant	)	***March 19, 2019***

NOTICE OF RESTRICTION ON PUBLICATION: No one may publish any information that could identify a person as having been dealt with under the *Youth Criminal Justice Act* (see section 110(1)).

MONNIN JA

[1] The young person seeks leave to appeal and, if granted, appeals his sentence of open custody and supervision imposed following guilty pleas to one count of robbery and one count of robbery with an imitation firearm.

[2] The sentence imposed for the robbery with an imitation firearm was one of one-year open custody and community supervision. After taking into account pre-sentence custody of 16 days credited at 1.5:1 for a total 24 days, the sentence going forward was 227 days' open custody and 114 days' community supervision. The sentence imposed on the robbery charge was one of six months' open custody and community supervision to be served concurrently.

[3] At the time of the hearing of his appeal, the young person was serving the open custody portion of his sentence and was on a day leave from the custodial institution where he was serving his sentence.

[4] The young person alleges that an overemphasis of certain principles and misconstruction of the facts on which the sentence was to be based led to the imposition of a sentence that was harsh and excessive. He seeks to have the sentence imposed substituted by one of deferred custody or a period of supervised probation.

[5] The sentencing judge had before him a statement of facts, which set out the details of the robberies committed on February 28, 2017, and March 15, 2017. In both instances, the young person was the driver of the vehicle used to get away from the robbery locations.

[6] On February 28, 2017, the young person was driving his father's car and he had with him W. B., S. C., and I. L. S. C. entered a Mac's Convenience Store and told the clerk that he needed money. S. C. had his hands in his hoodie pocket and told the clerk that he did not want to hurt him but needed the money. The clerk could see the outline of an object in the hoodie but did not know what it was. The entire incident was caught on video surveillance.

[7] On March 15, 2017, the young person was again driving his father's car. His passengers were W. B. and N. M. The young person was aware that W. B. had in his possession an imitation firearm, but was not previously made aware of what use he intended to make of it. W. B. and N. M. entered a Subway restaurant, where W. B. told the clerk that this was a robbery and that he had a gun. He lifted his hoodie and showed the clerk the handle of the

imitation firearm. The clerk opened the cash register and W. B. helped himself to the funds. This incident was also caught on video surveillance.

[8] Following this robbery, the trio carried on to two different Subway restaurants which they proceeded to rob in a similar fashion.

[9] Police were patrolling the area and saw the car being driven by the young person. The occupants in the car appeared to match the description of the suspects provided in the three earlier robberies. The car was eventually boxed in. The driver was the young person. W. B. was in the front passenger seat and N. M. was in the rear. The imitation firearm was located on W. B., concealed in his front waistband. All three were arrested. W. B. declined to comment. N. M. implicated himself and W. B., while the young person implicated himself and W. B. and named S. C. and I. L. I. L. had been involved in this group, but the young person and he were not involved in the same incidents.

[10] W. B. was sentenced, following a joint recommendation, to the equivalent of a four-year sentence. He had already served one year in custody for which he received no credit, and was sentenced to an additional three-year youth maximum, of which two years were to be open custody and one year of community supervision.

[11] N. M. was sentenced to a 12-month custody and community supervision order, followed by 12 months of supervised probation.

[12] S. C. was also sentenced to a six-month custody and community supervision order, followed by 18 months of supervised probation.

[13] I. L. received a deferred custody order.

[14] Like the young person, none of the youth co-accused had prior records.

[15] The young person argues that the sentencing judge misconstrued the facts upon which the sentence was based. More specifically, he asserts that the sentencing judge sentenced him based on offences to which he had not pled guilty; that he kept referring to a gun as opposed to an imitation gun; that he failed to recognise the challenges the young person faced; that he failed to recognise or accept the explanation for the young person's participation in the robberies; and, finally, the relevancy of the sentence imposed on a youth co-accused.

[16] The young person further argues that the sentencing judge mixed facts from the different incidents, overstated the evidence or generalised the evidence, making the overall picture more aggravating than it in fact was. In addition, the young person argues that the errors referred to may not be sufficient in and of themselves to warrant appellate interference but, if considered cumulatively, as they should be, they amount to error on the part of the sentencing judge.

[17] Finally, he argues that, as a first-time offender, the sentencing judge should have imposed a sentence that did not include incarceration.

[18] An appellate tribunal will not interfere with a sentence imposed unless a sentencing judge committed a material error in principle or unless the sentence imposed was harsh and excessive.

[19] I am not aware of, nor has the young person provided, any authority that would lead me to accept his argument that a number of complaints, that

in and of themselves are not errors in law can, in fact, become errors in law when considered cumulatively.

[20] Furthermore, I have not been persuaded that the sentencing judge committed any error in principle or that the sentence he imposed was harsh and excessive.

[21] When the reasons of the sentencing judge are reviewed in the context of the submissions of counsel, I find little merit in the young person's litany of complaints that I have set out earlier in these reasons. The sentencing judge was clearly aware that an imitation gun was used in the robberies as opposed to a real gun. He was aware of the young person's issues with Attention Deficit and Hyperactivity Disorder. He imposed a sentence that took into consideration the sentences imposed on the other participants in the robberies.

[22] In the final analysis, based on what the Supreme Court of Canada stated in *R v Lacasse*, 2015 SCC 64, even if I had been satisfied that the sentencing judge committed an error in principle, I would not interfere with the sentence imposed because I consider it to be fit and proper when considered in the context of the offences, the young person and the disposition with respect to the youth co-accused.

[23] Accordingly, I would grant leave to appeal but deny the appeal.

Monnin JA

I agree: Beard JA

I agree: Mainella JA