Citation: R v Johnson, 2020 MBCA 10 Date: 20200130
Docket: AR18-30-09187

IN THE COURT OF APPEAL OF MANITOBA

Coram: Chief Justice Richard J. Chartier
Madam Justice Jennifer A. Pfuetzner
Madam Justice Karen I. Simonsen

B E T W E E N :

HER MAJESTY THE QUEEN	)	***J. A. Hyman***
	)	*for the Appellant*
Appellant	)	
	)	***S. Zaman***
- and -	)	*for the Respondent*
	)	
ALLAN CLIFFORD JOHNSON	)	*Appeal heard:*
	)	***October 4, 2019***
(Accused) Respondent	)	
	)	*Judgment delivered*
	)	***January 30, 2020***

CHARTIER CJM

Introduction and Issue

[1] This is a sentence appeal.

[2] The accused pled guilty to possessing over 600 grams (1.3 pounds) of cocaine for the purposes of trafficking. The Crown asked for a four-year period of incarceration, while the accused argued that "exceptional circumstances" existed that warranted a non-custodial sentence. The sentencing judge agreed with the accused. He suspended the passing of sentence and imposed three years of supervised probation.

[3] The Crown appeals, asking, if leave is granted, to vary the sentence to a four-year period of incarceration. While the Crown raises four grounds

of appeal, its principal ground is that the sentencing judge erred by finding that "exceptional circumstances" existed to warrant the non-custodial sentence.

Factual Background

[4] In February of 2014, the accused had been released on an undertaking not to communicate with the mother of his children or go within 200 metres of her place of residence, work, school, worship or any place she may be. Ten months later, police responded to a 911 domestic disturbance call. They found the accused, the mother of his children and their four children together at the accused's residence. The accused was arrested for breaching his undertaking. While searching him incident to arrest, police located a Ziploc bag containing what appeared to be cocaine.

[5] On November 9, 2018, the accused admitted, pursuant to section 655 of the *Criminal Code* (the *Code*), to the following facts:

- that the police responded to a 911 call indicating that the accused was breaching a no-contact order;

- that, during the pat-down following the accused's arrest, a little over 60 grams (two ounces) of cocaine was found in a Ziploc bag situated in his right front jacket pocket;

- that the accused had $3,120 cash in his wallet;

- that, when police re-entered the home after placing the accused in the cruiser car, they found a large Ziploc bag of powder cocaine in plain view on a nightstand approximately four feet away from the accused's

then four-year old son. That Ziploc bag contained four smaller Ziploc bags divided in three 163 gram (six ounces) Ziploc bags and approximately 53 grams (two ounces) in a fourth bag;

- that the total amount of cocaine in his possession was 604.67 grams (1.3 pounds) with a wholesale value of between $21,000 and $43,000; and

- that the accused was holding the cocaine for a neighbour and knew that it was being sold.

[6] Through counsel, the accused agreed that the amount of cocaine he was holding for the traffickers was significant and consistent with mid-level trafficking. The sentencing judge was advised that, near the date of the offence, the accused was using cocaine on a daily basis and, for stashing his neighbour's drugs, was being paid in cocaine. After his release from custody, the accused completed a 10-week Alcoholics Anonymous program, but then stopped attending meetings. He advises that he has remained sober ever since.

[7] The accused received a positive pre-sentence report. He has no prior record and is assessed as a low risk to reoffend. The accused was 30 years old at the time of arrest and 34 at the time of sentencing. At the time of the offence, the accused had custody of his four children; he was employed full-time and was his children's sole provider. The children, who were 16, 14, 10 and 9 years old in November of 2019, are still in his custody. He is still employed full-time and remains his children's sole provider.

[8] Five letters of reference were also filed on the accused's behalf—one from his employer friend and the others from friends. They describe him

as “a devoted father and a stand up friend . . . who deserves second and even third chances”, who “has changed his life around”, and who “has become a more reliable, responsible person.”

Analysis

[9] Appellate courts must show great deference when reviewing sentencing decisions. Succinctly put, appellate intervention is only justified in cases where a material error has an impact on the sentence or when the sentence is demonstrably unfit. A material error includes an error in principle, a failure to consider a relevant factor or an erroneous consideration of an aggravating or mitigating factor. It also includes an overemphasis of the appropriate factors (see *R v Lacasse*, 2015 SCC 64 at paras 41, 43-44, 51).

[10] The reason for this great deference is that sentencing is an exercise in judicial discretion (see section 718.3(1) of the *Code*; and *R v M (CA)*, [1996] 1 SCR 500 at para 90) and that many judgment calls come into play when imposing a sentence.

[11] However, this highly deferential standard of review does not mean that sentencing judges are completely shielded from review. In the same way that appellate courts do not have free rein to vary a sentence simply because they feel they should impose a different one, sentencing judges do not have free rein to impose a sentence without regard for the governing legal principles of sentencing. Where sentencing judges act outside the limits of their discretion, appellate courts have a duty to intervene and to vary the sentence as they think fit (see section 687 of the *Code*; and *R v Ipeelee*, 2012 SCC 13 at para 39). Finally, when appellate courts do intervene and vary a sentence, it does not mean that they start their analysis without any consideration for

those findings or conclusions of the sentencing judge that are untainted by error. For recent examples, see *R v Burnett*, 2017 MBCA 122 at para 42; *R v Sass; R v Zammit*, 2018 MBCA 46 at para 43; and *R v Dalkeith-Mackie*, 2018 MBCA 118 at para 32.

[12] The accused was sentenced on one count of possession of cocaine for the purpose of trafficking. Cocaine is a Schedule I substance (see the *Controlled Drugs and Substances Act*, SC 1996, c 19 (the *CDSA*), Schedule I) and, pursuant to section 5(3)(a) of the *CDSA*, anyone who possesses it for the purpose of trafficking is guilty of an indictable offence and liable to imprisonment for life. Consequently, conditional sentences are not an available option to the sentencing judge (see section 742.1(c) of the *Code*). Like all offences that carry maximum life sentences, denunciation and general deterrence are the paramount sentencing considerations.

[13] The objective of denunciation and general deterrence is that the sentence should communicate society's condemnation of that conduct and generally deter others who might consider engaging in such conduct (see *M (CA)* at para 81; and *R v BWP; R v BVN*, 2006 SCC 27 at para 2). When the principles of denunciation and general deterrence are paramount, the focus of the sentencing judge is more on the offence committed (the conduct), than on the offender (the personal circumstances of the accused). Put another way, while factors personal to the accused remain relevant, they necessarily take on a lesser role. See *R v McMillan (BW)*, 2016 MBCA 12; and Clayton C Ruby et al, *Sentencing*, 9th ed (Toronto: LexisNexis, 2017) at para 1.18.

[14] In the case at hand, the sentencing judge found that there existed "exceptional circumstances" that justified a suspended sentence. He reached

this conclusion for two reasons. He found the accused's "moral culpability [to be] on the lower side" because, by stashing the drugs in exchange for cocaine, "[h]e was not part of a commercial enterprise". He also found that the accused had made "significant changes" in his life since his arrest.

[15] The Crown submits that the sentencing judge erred by finding that "exceptional circumstances" existed to warrant the non-custodial sentence. It argues that he erred in finding that the mitigating factors rose to the level of "exceptional circumstances". I agree.

Whether the Accused's Moral Culpability Was Reduced

[16] I will first deal with the sentencing judge's finding that the accused had a reduced moral culpability because he was stashing the drugs in exchange for cocaine rather than for money. This Court recently had occasion to consider the relevance of a non-profit motive on the issue of moral culpability in *Zammit* at para 39. It noted that this assessment requires the judge to take into account all elements relating to moral blameworthiness, not just one. To assess the extent of moral culpability in a particular case, due regard must be given not only to the normative character of the offender's conduct, but also to the intentional risk-taking of the offender and to the consequential harm caused by the offender (see *M (CA)* at para 80; and *R v Ruizfuentes*, 2010 MBCA 90 at para 38).

[17] In the instant case, when considering moral blameworthiness, the sentencing judge only considered the normative character of the accused's conduct. On that factor, let me start by stating that the fact that the accused was being paid in drugs for his own personal use, rather than in cash, is not unusual. Unfortunately, many people traffic to feed a drug habit. Let me also

state that I accept that, on its own, the moral blameworthiness of an accused who commits a crime to feed an addiction is lower than one who does it for greed. However, simply examining the normative character of an accused's conduct does not end the sentencing judge's moral culpability assessment. The other two factors (intentional risk-taking and consequential harm) must also be taken into account.

[18] The accused's home was being used as a stash house. The intentional risk-taking was significant in this case given the amounts involved. The accused agreed, through counsel, that the amount of cocaine found in his home was consistent with mid-level trafficking levels. Such amounts are not left with someone who is not trusted. Moreover, as was pointed out by the Crown, the accused was not a "hands-off" stasher who simply allowed the drugs to be hidden away within his home. When the accused was arrested, he was found to have over 60 grams of cocaine and a significant amount of cash ($3,120) on his person. Finally, the cocaine found in the house was out in the open within the reach of one of the accused's young children.

[19] In terms of consequential harm, the accused admitted to holding the large quantity of cocaine for a neighbour. By allowing his residence to become the stash house, the accused was insulating others in the trafficking business from being directly linked to the drugs. As this Court recently stated in *R v Le*, 2018 MBCA 58, "Storing drugs for others is morally blameworthy behaviour" (at para 4). In addition, by not sharing the name of this neighbour with the police, the accused was successfully protecting him or her from detection and allowing that person to continue with the drug trafficking, a trade which is associated with violence.

[20] In the end, a fair reading of the sentencing judge's reasons shows that he did not properly consider the intentional risk-taking and consequential harm factors in his moral culpability assessment. I am of the view that the reduced moral blameworthiness of the accused arising from his normative character (i.e., his motivation to commit the offence was to feed an addiction) is counterbalanced by his intentional risk-taking and the consequential harm of his actions. Simply put, there is nothing about the circumstances that reduced his moral blameworthiness to the level of "exceptional".

Whether the Accused Had Made "Significant Changes" Since His Arrest

[21] The sentencing judge examined the personal circumstances of the accused since the arrest. He noted that the accused had maintained full-time employment; was actively engaged in raising his children; was leading a healthier lifestyle; had distanced himself from "former associates"; had taken responsibility for his actions; had followed a 10-week Alcoholics Anonymous program; and had abstained from using illicit drugs. This led him to conclude that the accused had made "significant changes" in his life since his arrest.

[22] The fact that the accused had full-time employment and parented his children after the offence are not factors that demonstrate that he has "made significant changes in his life since his arrest" given that the accused consistently held full-time employment throughout his adult life and had been responsible for his children's parenting before the offence. Moreover, disassociating himself from criminal acquaintances is, at minimum, what is expected of individuals awaiting sentence. Finally, while his abstinence from drugs and his attendance at a 10-week Alcoholics Anonymous program is

laudable and mitigating, there is nothing in the circumstances of this case that demonstrates remarkable steps towards rehabilitation.

[23] In *Burnett*, Mainella JA reviewed in detail the concept of "exceptional circumstances" (see paras 20-31). What emerges from *Burnett* is that the "exceptional circumstances" threshold is very high and that findings occur only "in the clearest of cases when there are 'multiple mitigating factors' of significance" or when an accused's "motive for committing the offence is highly unusual" (at para 29). More importantly, "[t]he law does not require a sentencing judge to find 'exceptional circumstances' to justify imposing a sentence" that is outside "a judicially created starting point or sentencing range" (at para 25).

[24] While exceptional circumstances can arise from the circumstances of the offence or the offender, or a combination thereof, for the reasons I explained, I am of the view that the circumstances in this case are not "exceptional" and certainly fail to meet the high threshold. Moreover, in my view, the errors in principle, relating to the sentencing judge's exceptional-circumstances analysis that I have identified, have had an impact on the sentence to the point of rendering it demonstrably unfit. The three-year suspended sentence imposed cannot stand. I will therefore substitute my view as to a fit sentence.

[25] I agree with the sentencing judge that the amount of cocaine found to be in the accused's possession was consistent with mid-level trafficking. This typically calls for an incarceratory sentence, for those with lesser roles in the trafficking, in the range of three to six years (see *R v Rocha*, 2009 MBCA 26 at para 64). The documentation (reference letters and the pre-

sentence report) filed in the accused's support and the fact that he has no prior criminal record certainly make the point that the accused is an offender for whom the low end of the range should apply.

[26] Normally, I would impose a three-year period of incarceration. However, for reasons I will now explain, the length of custody will be a little shorter. While the Crown successfully moved to suspend the accused's probationary sentence pending this appeal (see section 683(5)(e) of the *Code*), that suspension was granted approximately three months after the sentence had been imposed. I will take into account that, during that time, the accused did abide by the terms of the probation order, which included a curfew and the terms of the order granted under section 683. He had also completed approximately 30 hours of the 240 hours of community service work before the suspension was ordered.

[27] A court must consider all of the principles of sentencing even when denunciation and general deterrence are of paramount importance, such as in this case. It is clear from the sentencing judge's reasons that rehabilitation was top of mind. It is also clear from the sentence he imposed that this principle was overemphasised. Having said this, some deference should be afforded to the sentencing judge's emphasis on rehabilitation to temper the effect of denunciation and general deterrence given the accused's troubled background and the fact that he is the sole caregiver and sole provider for his four children.

[28] In the result, taking into account all of the circumstances of the offence and the offender, the aggravating and mitigating factors and, as detailed above, that the accused has completed part of his probationary

sentence, I am of the view that a 30-month sentence would be fit in the circumstances. I would grant leave to appeal sentence, set aside the three-year probation order and vary the sentence to a 30-month period of incarceration, less the 29 days' credit for 19 days spent in pre-sentence custody, credited at the rate of 1.5 to 1. All other orders (weapons prohibition, DNA sample, destruction of items seized) would remain in place.

Chartier CJM

I agree: Pfuetzner JA

I agree: Simonsen JA