Citation: R v Kirton, 2020 MBCA 113 Date: 20201120
Docket: AR18-30-09031

IN THE COURT OF APPEAL OF MANITOBA

Coram: Madam Justice Freda M. Steel
Madam Justice Diana M. Cameron
Mr. Justice William J. Burnett

B E T W E E N :

HER MAJESTY THE QUEEN	)	***Z. M. Jones***
	)	*for the Appellant*
	)	
Respondent	)	***D. A. Mann*** *and*
	)	***C. R. Boutin***
- and -	)	*for the Respondent*
	)	
	)	*Appeal heard:*
JASON DAVID TONY LAWREN KIRTON	)	***October 19, 2020***
	)	
	)	*Judgment delivered:*
(Accused) Appellant	)	***November 20, 2020***

On appeal from 2018 MBQB 20

BURNETT JA

[1] The accused was convicted of six offences: breaking and entering into a dwelling-house and committing an indictable offence (count 1); aggravated assault (count 2); assault with a weapon (count 3); possession of a loaded restricted firearm (count 4); and two counts of possession of a firearm contrary to a prohibition order (counts 7 and 8).

[2] He was designated a dangerous offender and sentenced to an indeterminate sentence in relation to counts 1, 2 and 3. In addition, he received a five-year sentence for count 4, a one-year consecutive sentence for count 7 and a one-year concurrent sentence for count 8.

[3] The accused appealed his convictions as well as sentence. The conviction appeal was dismissed (see *R v Atkinson et al*, 2018 MBCA 136).

[4] In this proceeding, the accused seeks leave to appeal and appeals sentence on the basis that:

1. the sentencing judge erred when he found the accused to be a dangerous offender and imposed an indeterminate sentence on the predicate offences (counts 1, 2 and 3); and

2. the sentencing judge erred when he failed to credit the accused for pre-sentence custody at the rate of 1.5:1 in relation to counts 4, 7 and 8.

[5] The Crown agrees that pre-sentence custody was not taken into account by the sentencing judge, does not oppose leave and requests that this Court adjust the sentence for counts 4, 7 and 8 accordingly.

[6] The only issues that remain to be decided are whether the sentencing judge erred in finding the accused to be a dangerous offender and in deciding that an indeterminate sentence was appropriate.

[7] The standard of review for these issues was dealt with by Steel JA in *R v Sanderson*, 2018 MBCA 63 (at para 8):

> The standard of review in an appeal of a dangerous offender designation is more robust than that in ordinary sentence appeals, but nonetheless, the appellate court must give some deference to the findings of the sentencing judge. The question to be asked by the appellate court is whether the decision of the sentencing judge was reasonable (see *R v Osborne (CG)*, 2014 MBCA 73 at para 51, citing *R v Atatise (BF)*, 2012 MBCA 117 at para 8; and more recently, *R v Laporte (PLR)*, 2016 MBCA 36 at para 188).

[8] The accused submits that the sentencing judge placed too much weight on the evidence of the Crown's expert, Dr. Woodside. In particular, the accused submits that Dr. Woodside's evidence should be discounted because he has never undertaken one-on-one treatment with an offender similar to the accused, that many aspects of his assessment were totally subjective in nature, and that the tools which he used in assessing the level of the accused's risk in the community are flawed.

[9] The accused further asserts that the sentencing judge failed to consider or give any weight to the fact that he "had at times taken positive steps in his life", that "at the sentencing hearing the [accused] gave clear and compelling evidence about his desire to rehabilitate himself", and that during the last four years, while in prison, "his behavior and management was exemplary, as opposed to what it was historically."

[10] In his reasons for sentence, the sentencing judge said that Dr. Woodside "was qualified as an expert in the area of Forensic Psychiatry, including the assessment and treatment of violent offenders. His education, experience and other qualifications are extensive and I have no difficulty in accepting his opinions in respect of his assessment of [the accused]" (at para 26).

[11] When asked in cross-examination whether he had personally undertaken one-on-one intensive treatment with an offender like the accused, Dr. Woodside testified:

> A I've certainly dealt with many individuals and treated many individuals, primarily those with sexual offending histories who are serving long-term supervision orders, but I'm not

> saying they precisely resemble [the accused], but they face similar types of issues.

[12] The sentencing judge carefully reviewed Dr. Woodside's assessment report and his testimony. Among other things, the sentencing judge considered Dr. Woodside's evidence that:

- The accused met the criteria for substance use disorders relating to alcohol, cocaine and opiates, and his substance use disorder was severe and chronic in nature (see paras 28-29);
- An individual with substance abuse issues is 15 times more likely to commit an aggressive act (see para 29);
- The accused presented with significant psychopathic traits, he met all of the criteria for antisocial personality disorder and his disorder was severe (see paras 31-32);
- The accused self-reported that he had only spent eight of the last 30 years out of custody (see para 33);
- "Antisociality" is a potent predictor of future violent behaviour and this disorder, combined with psychopathic traits, increases the risk for all forms of violent behaviour (see para 34); and
- The accused's previous offending behaviour supports the position that his violent behaviour was escalating in both severity and frequency prior to his arrest on the predicate offences. Overall, he viewed the accused as being at very high risk for violent recidivism (see para 46).

[13] I am not persuaded that the sentencing judge erred in his reliance on Dr. Woodside's evidence or that Dr. Woodside's use of the risk assessment tools was flawed. Dr. Woodside acknowledged that "these are far from perfect tools," but testified that "they represent the best estimates that we have, so that they're of greatest assistance compared with other methods of trying to assess risk."

[14] Dr. Woodside also acknowledged that these tools require a degree of subjectivity. He explained that he had applied three different tools to ensure "that they're pointing in the same direction" and he concluded that the accused was a very high risk for recidivism:

> A . . .
>
> The reason I used that tool is to get a sense of whether -- because you should use the best tool for your purpose. I use additional tools at times just to make sure that they're pointing in the same direction, right? So that you don't have blinders on. You want to see if the same, sort of, magnitude of concern is present in all tools. So, you know, when we look at percentile ranking, he's very high in percentile in the Psychopathy Checklist. He's very high in terms of percentile ranking on the VRAG. We don't have percentile rankings for scores on the HCR-20, but this is a high score. It's trending in the same direction.
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> If you had a very different score, let's say, you know, he comes out high risk on the VRAG, but very low risk on the HCR-20, that would be a cue to me to think, Well, what's going on here? Why am I seeing two widely dispirit risk estimates for this individual? So it can be helpful in that way. In this case, they're both -- they all point in largely the same direction. So they're convergent in that regard.
>
> Q At page 81 of your report, right before the heading "Eight", you indicate that overall when you combine and you consider the clinical and the dynamic and actuarial assessments of risk,

> you -- you view [the accused] at being a very high risk for violent recidivism?
>
> A I do.
>
> [emphasis added]

[15] As noted by the Crown, the risk assessment tools were only one aspect of Dr. Woodside's total assessment of the accused's risk. Dr. Woodside reviewed 19 volumes of background materials detailing the accused's personal, familial, educational and employment history, previous offending, institutional programming and behaviour, and supervision history. In addition, he interviewed the accused for 9.25 hours prior to the preparation of his assessment report.

[16] In *R v Gracie*, 2019 ONCA 658, the Court commented (at para 52):

> Moreover, actuarial testing was only one of many factors taken into account by the experts in this case. They also considered their own clinical assessment of the appellant together with other information concerning him, such as his criminal history. Based on their broad assessment of the appellant, both experts concluded that he posed a moderate to high risk for both sexual and violent recidivism. Placed in context, the concerns raised by the appellant as to the reliability of the risk assessment tools as they apply to Indigenous offenders do not undermine the force of the expert evidence or the conclusions of the sentencing judge.

Similarly, in the present case, I do not believe that the reliability of the risk assessment tools used by Dr. Woodside undermined his evidence or the conclusions of the sentencing judge.

[17] The accused also submits that the sentencing judge only considered whether an indeterminate sentence was appropriate and failed to consider a

less restrictive sentence. I disagree. In his reasons, the sentencing judge considered the requirements of sections 753(1) and 753(4.1) of the *Criminal Code*, and provided a full explanation for his conclusion that (at para 69):

> . . . [B]ased on the evidence, there is no reasonable expectation that the accused's danger to the public can be adequately managed by any measure short of indeterminate incarceration and therefore a lesser sentence is not appropriate or even available.

[18] The sentencing judge "very carefully" (at para 62) considered the accused's prospects for rehabilitation and concluded (at para 63):

> Admittedly, on its face, I have no reason to doubt the sincerity of [the accused's] stated intention while testifying at this hearing that he is done with his lawless past, and which he has sought to demonstrate by pointing to the evidence of correctional officer Funk, that suggests he is a model prisoner. However, in my opinion, there is no reasonable expectation based on the evidence before me that he will not commit a further serious personal injury offence if he is released from custody. The good intentions or apparent sincerity he expressed while testifying at this hearing echo his comments on other occasions, but as his criminal and custodial records demonstrate, the extent and the swiftness of [the accused's] non-compliance with imposed conditions is remarkably consistent when he has been released from custody in the past.

The sentencing judge's observations in this area are supported in the record and are entitled to deference. It is noteworthy that the accused testified that he planned to return to school to work with people, but he conceded in cross-examination that he had made a similar claim in 2001 and did nothing to further that goal.

[19] Having conducted a robust review, it is my view that the sentencing judge's finding that the accused is a dangerous offender and his finding that he cannot be managed with a less restrictive sentence are reasonable and amply supported by the record. The sentencing judge carefully weighed the evidence and provided cogent and detailed reasons to support his conclusions. As was the case in *Sanderson*, "His conclusion that there was no reasonable expectation of managing the accused's risk within the community was more than reasonable in light of the evidence before him" (at para 27).

[20] As the accused has failed to identify any error that would justify appellate intervention, the appeal of the dangerous offender designation and the indeterminate sentence imposed for the predicate offences is dismissed.

[21] The sentence appeal with respect to counts 4, 7 and 8 is allowed, and the accused will receive credit for pre-trial custody at 1.5:1.

"Burnett JA"

I agree: "Steel JA"

I agree: "Cameron JA"