IN THE COURT OF APPEAL OF MANITOBA

Coram: Mr. Justice Michel A. Monnin
Mr. Justice William J. Burnett
Madam Justice Lori T. Spivak

B E T W E E N :

HER MAJESTY THE QUEEN	)	***K. E. Smith***
	)	*for the Appellant*
Respondent	)	***A. C. Bergen***
	)	*for the Respondent*
- and -	)	
	)	*Appeal heard and*
MANSOUR MOSLEHI	)	*Decision pronounced:*
	)	***June 4, 2019***
(Accused) Appellant	)	
	)	*Written reasons:*
	)	***July 8, 2019***

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*).

MONNIN JA (for the Court):

[1] The accused appealed his sentence of four years' incarceration, following convictions on charges of sexual interference, invitation to sexual touching and obtaining sexual services for consideration in relation to two minors.

[2] He alleged that the sentence imposed was unfit due to the presence of an existing brain injury that he said drastically reduced his moral blameworthiness.

[3] He was previously granted leave to bring his appeal.

[4] He also brought a motion seeking to adduce fresh evidence for the hearing of his appeal. Through his counsel, he conceded that, if the motion to adduce fresh evidence was denied, there was no merit to his appeal.

[5] We dismissed the motion to adduce fresh evidence, as well as the sentence appeal, with reasons to follow. These are the reasons.

[6] The accused sought to adduce as fresh evidence an assessment by a forensic psychiatrist which allegedly provided new evidence of a link between the accused's brain injury and the offences for which he was sentenced. This same psychiatrist had provided an earlier report that was before the sentencing judge. In addition, the sentencing judge had before him evidence from two neuropsychologists and a psychiatrist.

[7] The test to be applied on a motion to adduce fresh evidence is what is commonly referred to as the *Palmer* criteria. See *Palmer v The Queen*, [1980] 1 SCR 759 (at p 775):

> (1) The evidence should generally not be admitted if, by due diligence, it could have been adduced at trial provided that this general principle will not be applied as strictly in a criminal case as in civil cases: see *McMartin v. The Queen* [[1964] SCR 484].
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> (2) The evidence must be relevant in the sense that it bears upon a decisive or potentially decisive issue in the trial.
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> (3) The evidence must be credible in the sense that it is reasonably capable of belief, and

> (4) It must be such that if believed it could reasonably, when taken with the other evidence adduced at trial, be expected to have affected the result.

[8] The Crown conceded that the accused's motion satisfied the second and third criteria of the test. It argued, however, based on this Court's decision in *R v Henderson (WE)*, 2012 MBCA 93, that, even if the first criterion of the test was to be considered in a more relaxed context, the proposed fresh evidence did not meet the first and fourth criteria. In *Henderson*, Chartier JA (as he then was), commented on the overriding consideration of the interests of justice which governs whether fresh evidence will be admitted (at para 28):

> Those "interests" take in both finality concerns with respect to the trial process and concerns that justice should be done in an individual case (see *R. v. 1275729 Ontario Inc. et al.* (2005), 205 O.A.C. 359 at para. 20). See as well, *R. v. W.R.B.*, 2010 MBCA 116 at para. 4, and *R. v. G.D.B.*, 2000 SCC 22 at para. 19, [2000] 1 S.C.R. 520, where the Supreme Court of Canada adopted the reasoning of Doherty J.A. in *R. v. McBirnie (P.S.)* (1992), 59 O.A.C. 1 (at para. 34):
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> > .... The interests of justice referred to in s. 683 of the **Criminal Code** encompass not only an accused's interest in having his or her guilt determined upon all of the available evidence, but also the integrity of the criminal process. Finality and order are essential to that integrity. The criminal justice system is arranged so that the trial will provide the opportunity to the parties to present their respective cases and the appeal will provide the opportunity to challenge the correctness of what happened at the trial. Section 683(1)(d) of the **Code** recognizes that the appellate function can be expanded in exceptional cases, but it cannot be that the appellate process should be used routinely to augment the trial record. Were it otherwise, the finality of the trial process would be lost and cases would be retried on appeal whenever more evidence was secured by a party prior to the hearing of the appeal. For this reason, the exceptional nature of the admission of "fresh" evidence on

> appeal has been stressed: **R. v. McMartin**, [[1964] S.C.R. 484] at p. 490 ….
>
> (emphasis added)

[9] The Crown's argument that the accused had failed to meet the first criterion of the *Palmer* test was convincing but, basically, we rejected the proposed fresh evidence on the basis that the fourth criterion of the test had not been met. In our view, the proposed evidence adds nothing new to what was before the sentencing judge and would not have affected the sentence imposed.

[10] We are satisfied that there exists no real material difference between the proposed fresh evidence and the material that was before the sentencing judge. The relevant conclusions, namely, that the accused has impulse-control issues and impaired judgment, were all before the sentencing judge. What was being proposed as fresh evidence was largely a synthesis of those earlier reports by the same psychiatrist whose prior report was part of the exhibits before the sentencing judge and added nothing new to what was before the sentencing judge.

[11] In submissions before the sentencing judge, the accused relied on *R v JMO*, 2017 MBCA 59, wherein this Court identified two potential errors to avoid in assessing the moral blameworthiness of an offender with a mental illness or cognitive limitation. The first is being indifferent to the issue of whether an offender's mental circumstances affected his or her degree of responsibility and the second is making an assumption that it did.

[12] The sentencing judge committed neither error. The accused's mental health circumstances were among the central issues he had to consider and were placed squarely before him by the accused's submissions. The sentencing judge was not indifferent to that issue and it is reflected in the reduction of the sentence from what would otherwise have been imposed.

[13] Accordingly, we denied the motion for fresh evidence and denied the sentence appeal for being without merit.

Monnin JA

Burnett JA

Spivak JA