Citation: R v Reilly, 2019 MBCA 84 Date: 20190813
Docket: AR18-30-09158

IN THE COURT OF APPEAL OF MANITOBA

Coram: Mr. Justice Michel A. Monnin
Madam Justice Diana M. Cameron
Madam Justice Jennifer A. Pfuetzner

B E T W E E N :

	)	***M. P. Cook***
HER MAJESTY THE QUEEN	)	*for the Appellant*
	)	
Respondent	)	***J. W. Avey***
	)	*for the Respondent*
- and -	)	
	)	*Appeal heard:*
DANIEL GLENN REILLY	)	***June 12, 2019***
	)	
(Accused) Appellant	)	*Judgment delivered:*
	)	***August 13, 2019***

PFUETZNER JA

[1] The accused was sentenced to 13 years' incarceration for offences arising out of a home-invasion robbery. He seeks leave to appeal and to appeal his sentence, arguing that the sentencing judge erred in principle and that the sentence he imposed is demonstrably unfit because it is harsh and excessive.

Background

[2] The accused was convicted at trial of breaking and entering a residence and committing the indictable offence of robbery with a weapon contrary to sections 348(1)(b)-348.1 of the *Criminal Code* (the *Code*) and

committing an assault causing bodily harm contrary to section 267(b) of the *Code*.

[3] The accused and the complainant were known to each other and lived in different suites in the same apartment building in the City of Winnipeg. The complainant has mobility issues, requiring a scooter to get around outside of her apartment. On the day of the offences, the accused visited the complainant's apartment three times. The complainant was home alone as her husband was out for the day. The first time, the accused attended the apartment to sell the complainant some Hot Rod meat sticks, which she purchased. About half an hour later, the accused returned to the complainant's apartment to ask her for some toilet paper. When the complainant came back from retrieving some, she found the accused in her living room holding her wallet. She took her wallet from the accused and told him to leave and not to return.

[4] About an hour later, the accused forced his way into the apartment wearing a hoodie pulled down to his eyebrows and brandishing a knife. The complainant recognised the accused. When he demanded her purse, the complainant fled with it into her bathroom. The accused burst into the bathroom and hit the complainant on the back. She fell and hit her head on the sink. The accused threatened the complainant and poked her arm with the knife leaving a minor wound. The complainant also suffered bruises that lasted for months. None of her injuries required medical attention. The accused managed to obtain the purse and left the apartment. While the purse and most of its contents were later recovered by police and returned to the complainant, cash in the amount of about $200 was not.

[5] The offences had a significant impact on the complainant. After the incident, she and her husband stayed in a hotel for a week as she was afraid to return to her apartment and she sought to move to another apartment building. Even at the date of sentencing, she continued to be afraid to be alone.

[6] At the date of the sentencing, the accused was 48 years old with a criminal record that the sentencing judge said "disentitled [him] to leniency". The accused had a very difficult childhood. Both of his parents were abusive alcoholics and he was apprehended by Child and Family Services at age eight. After that time, he lived in a series of group homes where he experienced physical and sexual abuse. He began using alcohol at age eight. The accused has struggled with addictions to alcohol and to crack cocaine. He attained a Grade 9 education and, until 2010, was able to maintain regular employment.

[7] In 2010, the accused suffered a serious brain injury as a result of an assault. The brain injury resulted in the accused being prone to anger and frustration. He has been on disability benefits since his injury.

The Sentencing Hearing

[8] At the sentencing hearing, the accused conceded that the starting sentence range for a home-invasion robbery is seven to 10 years' incarceration. However, pointing to the mitigating factors flowing from his troubled background and his brain injury, he suggested a sentence of just under five years. After applying the time already served in custody, this would have resulted in a sentence of less than two years, to which probationary conditions could attach.

[9] The Crown sought a sentence of 13 years, citing the numerous aggravating factors and the accused's record.

[10] The sentencing judge imposed a custodial sentence of 13 years on the charge of break and enter and commit robbery and a sentence of five years concurrent on the charge of assault causing bodily harm. In doing so, he took judicial notice of the fact that home invasions in this jurisdiction are "out of control" and considered that: the accused committed the offences because he "needed the money"; the pre-sentence report assessed the accused as having a high risk to reoffend; the accused's record and his convictions after trial are not mitigating factors but are neutral; the complainant was targeted, alone and physically frail; the attack was planned; the complainant was terrorized and assaulted leaving psychological trauma; "[t]he accused has problems but he is not intellectually challenged"; and the "prognosis" for rehabilitation of the accused "is not good."

Standard of Review

[11] The standard of review in a sentence appeal is well established. Appellate intervention is only warranted if the sentencing judge committed an error in principle which impacted the sentence, or if the sentence was demonstrably unfit. An error in principle includes failing to consider a relevant factor, taking into account an irrelevant factor, or failing to give sufficient weight to, or overemphasising, a relevant factor. See *R v M (CA)*, [1996] 1 SCR 500; *R v Lacasse*, 2015 SCC 64; *R v Ruizfuentes*, 2010 MBCA 90 at para 7; and *R v Gabriel*, 2013 MBCA 45 at para 17.

[12] The proper approach to determining whether a sentence is demonstrably unfit is set out in *Lacasse* at para 40, quoting from *R v Shropshire*, [1995] 4 SCR 227 (at para 46): "A variation in the sentence should only be made if the court of appeal is convinced it is not fit. That is to say, that it has found the sentence to be clearly unreasonable."

Analysis

[13] The accused's first ground of appeal is that the sentencing judge erred in principle by failing to consider or to give sufficient weight to a relevant factor and by overemphasising a relevant factor.

[14] In particular, the accused argues that the sentencing judge did not give proper or any weight to his tragic background and his brain injury, which should have been treated as mitigating factors. On the other hand, the accused submits that the sentencing judge overemphasised the nature of the assault on the complainant. While the accused properly concedes that his "behaviour was horrible," he maintains that it did not amount to "terrorizing" nor did he "brutally assault" the complainant, as the incident occurred quite quickly and did not result in long-term injuries.

[15] I agree with the Crown that the sentencing judge did not err in weighing the sentencing factors. The sentencing judge was well aware of the accused's background and referred in his reasons to the fact that the accused "had a very rough childhood"; "grew up in a home fraught with violence"; "lived in various group homes"; and "has struggled with alcohol all of his life". I would not interfere with the sentencing judge's assessment that the accused's brain injury did not directly contribute to his offending behaviour, which he found was planned and was motivated by greed. Nor would I interfere with the sentencing judge's characterisation of the assault on the complainant. He properly took into account the terrorizing nature of an assault and robbery in one's home.

[16] The accused's second ground of appeal is that the sentencing judge imposed a sentence that is demonstrably unfit. He argues that there is nothing in the circumstances of this case to justify a sentence outside of the range of

seven to 10 years' incarceration established by this Court for home-invasion offences in cases such as *R v Ross*, 1999 CarswellMan 245; *R v Pakoo*, 2004 MBCA 157; and *R v McCowan (KJ)*, 2010 MBCA 45.

[17] The Crown's position is that the sentence is not demonstrably unfit merely because it falls outside of the usual range for this type of offence. It argues that, in light of the minimal mitigating factors and significant aggravating factors, deference should be shown to the sentencing judge's determination of an appropriate sentence for this offender.

[18] I agree with the Crown that it is not an error in itself for a judge to impose a sentence outside of the typical range. As Mainella JA wrote in *R v Burnett*, 2017 MBCA 122 (at para 10):

> So long as a sentencing judge respects the principle of proportionality, based on a reasonable application of the relevant sentencing principles and objectives to the circumstances, he or she may impose a sentence that departs, upward or downward, from a judicially created sentencing range or starting point [citations omitted].

[19] However, with respect, the 13-year sentence imposed in this case is, in my view, demonstrably unfit. The sentence is not proportionate to the gravity of the offence and the moral blameworthiness of the offender. In addition, the sentence offends the principle of parity set out in section 718.2(b) of the *Code*.

[20] Although the sentencing judge referred to the parity principle in his reasons, he ultimately imposed a sentence significantly in excess of both the top end of the usual range of seven to 10 years and the sentences imposed in several other cases of home-invasion robberies committed by adult offenders. See: *R v Matwiy*, 1996 ABCA 63 (10-year sentence imposed for

a home-invasion robbery where a loaded firearm was used); *Ross* (eight-year sentence for a home-invasion robbery where the victims were tied up, a firearm was used and the offender attempted to shoot a victim); *R v Reader (M)*, 2008 MBCA 42 (eight-year and nine and one-half-year sentences, respectively, given for two home-invasion robberies where the victims were hog-tied, threatened and a firearm was used); *R v Emslie*, 2017 MBQB 106 (eight-year sentence imposed for a home-invasion robbery using a firearm); and *R v Sinclair*, 2017 MBCA 9 (seven and one-half-year sentence imposed for a home-invasion robbery where the victim was beaten and threatened with a steel object).

[21] Sentences approaching or exceeding the one imposed in this case tend to be reserved for home invasions where victims are confined, terrorized and seriously injured. See, for example: *R v Sinclair*, 2009 MBCA 91 (11-year sentence given for break and enter and commit aggravated assault where the offender and accomplices broke into the victim's home and beat him with nail-encrusted boards—the victim was hospitalized for three months and left permanently disabled); and *R v DLE*, 2009 MBQB 218 (15-year sentence imposed for break and enter and commit aggravated sexual assault where the offender meticulously planned an attack on his ex-wife who was suffering from terminal cancer—after breaking into her home while she slept, he bound, choked, beat and sexually assaulted her over the course of about two hours—she suffered multiple broken bones, bruises and lacerations).

[22] The nature of the offence in this case simply does not justify a sentence so far in excess of the high end of the usual range. My conclusion should not be taken as in any way condoning the actions of the accused. However, the complainant was not seriously injured and any confinement of her was transitory. In addition, the aggravating factor of use of a firearm,

present in several of the cases where sentences within the range were imposed, was absent here.

[23] For the above reasons, I would grant leave to appeal and allow the appeal.

[24] At the hearing of the appeal, the accused submitted that a sentence of seven years would be appropriate. Taking into account the principles of sentencing, and the aggravating and mitigating factors identified by the sentencing judge, I would impose a sentence of eight years for the offence of break and enter and commit robbery with a weapon. After reducing the sentence for the equivalent of three years' time in pre-sentence custody, the sentence going forward from the date of sentencing is five years. I would not disturb any other aspects of the sentence imposed by the sentencing judge.

Pfuetzner JA

I agree: Monnin JA

I agree: Cameron JA