IN THE COURT OF APPEAL OF MANITOBA

Coram: Madam Justice Freda M. Steel
Madam Justice Holly C. Beard
Mr. Justice William J. Burnett

B E T W E E N :

	)	***M. T. Gould** and*
HER MAJESTY THE QUEEN	)	***M. S. Wire***
	)	*for the Appellant*
	)	
Respondent	)	***J. M. Mann***
	)	*for the Respondent*
- and -	)	
	)	*Appeal heard and*
KEVIN JOHN PATRICK ROSE	)	*Decision pronounced:*
	)	***March 25, 2019***
	)	
(Accused) Appellant	)	*Written reasons:*
	)	***April 10, 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*).

BURNETT JA (for the Court):

[1] The accused sought leave to appeal and, if granted, appealed a 21-year sentence for 19 offences.

[2] The sole issue on appeal was whether the sentencing judge properly applied the totality principle (see section 718.2(c) of the *Criminal Code* (the *Code*)) and, in particular, whether the accused received an appropriate reduction to ensure that the sentence was not "unduly long or harsh, and therefore not proportionate" (*R v GJM*, 2015 MBCA 103 at para 10).

[3] At the hearing, leave to appeal was granted, but the appeal was dismissed with brief reasons to follow. These are the reasons.

Background

[4] In May 2011, the accused was sentenced for various offences including possession of child pornography, failure to comply with a recognizance and breach of a non-communication order. At the sentencing hearing for those offences, it was disclosed that the accused breached two conditions of his recognizance—not to be alone with anyone under 16 years of age and not to access the internet—and that he breached a non-communication order that was to apply while he was in custody by communicating with a 14-year-old girl while incarcerated at the Brandon Correctional Centre.

[5] The accused was given credit for pre-sentence custody of two years and two months on a 2:1 basis and was sentenced to that time plus one day for the possession of child pornography offence, the equivalent of two years' pre-sentence custody plus one day for the remaining offences, and two years' supervised probation. In addition, an order was made pursuant to section 161(1) of the *Code* (the section 161(1) order) prohibiting the accused from using a computer to communicate with anyone under 16 years old. (All references in this decision to sections are references to sections in the *Code*.)

[6] While subject to the section 161(1) order, the accused used his computer to befriend and foster sexual activity with young, vulnerable teenage girls. A number of these girls were in the care of child welfare authorities, and at least one was in a group home for high-risk youth. In addition to sexually provocative discussions, his conduct included permitting the girls to

stay at his residence, giving the girls drugs, alcohol and money, and video-recording sexual activities in which they were involved while at his residence.

[7] On January 18, 2017, the accused entered guilty pleas to 19 offences. The sentencing judge imposed a combined sentence of 25 years for those offences, which he reduced to 21 years after taking into account the principle of totality. The combined sentence is the subject of this appeal.

[8] A brief summary of the offences and sentences under appeal is as follows.

[9] The accused made child pornography involving D.R. In some instances, the accused paid D.R. to have sex with men which he secretly recorded. Conversations with D.R. continued even when the accused was in custody and subject to a non-communication order. He received a total sentence (i.e., net of any credit for totality considerations) of eight years for the five offences in relation to D.R. (making child pornography (section 163.1(2)); voyeurism (section 162(1)); procuring (then section 212(1), since repealed by section 13 of the *Protection of Communities and Exploited Persons Act*, SC 2014, c 25); procuring (section 286.3); householder permitting prohibited sexual activity of a person under 18 (section 171(b), since amended by section 9 of the *Tougher Penalties for Child Predators Act*, SC 2015, c 23). In July 2016, D.R. committed suicide prior to the completion of the accused's criminal proceedings.

[10] The accused had internet conversations with C.K. contrary to the section 161(1) order. Conversations with C.K. continued even when the accused was in custody and subject to a non-communication order. He received a total sentence of one year for the two offences in relation to C.K.

(breach of the section 161(1) order (section 161(4)); and breach of an in-custody non-communication order (section 145(3)).

[11] The accused lured F.H. over the internet for sexual services. When they met, he paid her for fellatio. F.H. was particularly vulnerable, with an IQ of 40 and mental health issues. He received a total sentence of four years for the two offences in relation to F.H. (luring (section 172.1(1)(a); and obtain sexual services for consideration of a person under 18 (section 212(4), since repealed by section 13 of the *Protection of Communities and Exploited Persons Act*).

[12] The accused lured S.F. over the internet for sexual services which was also contrary to the section 161(1) order. He received a total sentence of one year for the two offences in relation to S.F. (luring (section 172.1(1)(a)); and breach of the section 161(1) order (section 161(4)).

[13] The accused made child pornography of D.S., advertised her services as an escort and allowed her to use his home for sex with clients. While in custody, he attempted to dissuade her from testifying. He received a total sentence of three and one-half years for the four offences in relation to D.S. (making child pornography (section 163.1(2)); householder permitting prohibited sexual activity of a person under 18 (section 171(b), since amended as noted in para 9 of this decision); advertising sexual services of a person (section 286.4); and attempt to obstruct justice (section 139(2)).

[14] The accused facilitated K.S.'s participation in the sex trade. He advertised her services as an escort and continued to have contact with her despite being in custody and subject to a non-communication order. He received a total sentence of 18 months for the two offences in relation to K.S.

(voyeurism (section 162(1)); and breach of an in-custody non-communication order (section 145(3)).

[15] The accused "wired" his home to allow for surreptitious video-recording of sexual activity, including sexual activity involving a number of persons who were not identified. He pled guilty to a general count of voyeurism (section 162(1)) and another count of possession of child pornography (section 163.1(4)) for which he received a further two years' imprisonment.

[16] The total sentence in relation to each victim was made consecutive to the total sentence for each of the other victims.

[17] The accused is in his mid-40s and has a prior record. A pre-sentence report was not requested by the defence. At his sentencing hearing, the accused acknowledged that he lacks insight into his behaviour and the harm it causes.

Issues and Standard of Review

[18] Two issues were initially raised by the accused but, at the hearing, his counsel advised that the sole issue for determination was whether the sentencing judge erred in his application of the totality principle.

[19] The standard of review for that issue is deference: absent an error in law or in principle that had an impact on sentence or the imposition of a demonstrably unfit sentence, an appellate court must show deference (see *R v James (GM)*, 2013 MBCA 14 at para 18; and *R v Lacasse*, 2015 SCC 64 at para 11).

Submissions

[20] The accused acknowledged that the sentencing judge followed the correct procedure; he did not take issue with the sentences imposed for each offence; and he did not dispute the sentencing judge's determination as to which sentences would be served on a consecutive or a concurrent basis.

[21] The accused also acknowledged that, in his reasons, the sentencing judge identified the correct statutory and jurisprudential aspects of the principle of totality.

[22] The accused submits that:

1. The sentencing judge erred in the application of the totality principle by failing to assess the length of the combined sentence in relation to the normal level of sentence for the most serious of the individual offences involved and by failing to properly consider whether the overall sentence deprived him of all hope. Here, the most serious offence was the offence of procuring in relation to D.R., for which the accused was sentenced to six years. The accused says that six years is the "normal sentence" for that offence and observes that 21 years is three and one-half times that sentence.

2. The result of these errors has resulted in a sentence disproportionate to the overall culpability of the accused.

3. The sentencing judge did not make a determination of the accused's prospects for rehabilitation, with the exception of "harbouring doubts" about the possibility.

4. A 21-year sentence is a crushing sentence not in keeping with any prospects of rehabilitation. According to the accused, a 16-year sentence would be more appropriate.

[23] With respect to the accused's prospects for rehabilitation, his counsel advised that the accused has recently participated in a high intensity sex offender program and that there is one month remaining before he completes that program. Because the accused had not previously received treatment or programming for sex offences, his counsel says that it cannot be definitively said that there is no prospect for the accused's rehabilitation. (This argument was also made at the sentencing hearing.)

[24] In response, the Crown submits that the totality principle requires a "last look" to ensure that the cumulative sentence does not exceed the overall culpability of the offender. It requires a consideration of the gravity of the offences, the moral blameworthiness of the offender and the harm done to the victims. The higher the degree of moral culpability, the less likely it is that the sentence will be reduced to any great extent (see *R v Ladouceur and Traverse*, 2008 MBCA 110 at para 70).

[25] The Crown emphasised that there is absolutely no evidence to support the suggestion that the accused could be rehabilitated. To the contrary, it argues that the evidence establishes that the accused is a sexual predator and that there is a public safety concern.

[26] The Crown submits that the accused's offences were serious and involved repeated acts against extremely vulnerable victims; that the accused continued to find ways to commit offences, including a procuring offence, even when under the strict controls of a jail; and that the accused had an exceedingly high degree of moral blameworthiness, reflected in his planning, deliberation, grooming and manipulation.

[27] It is the Crown's position that the cumulative sentence—reduced by four years for totality—properly addressed the large number of offences and their egregious nature, the number of vulnerable victims, the high moral blameworthiness of the accused and the significant impact of the offences.

Analysis and Decision

[28] The issue raised in this appeal is quite narrow. Simply put, the accused argues that the sentencing judge erred in not giving him a sufficient reduction in his combined sentence on the basis of totality. We disagree.

[29] As an initial observation, the decision to reduce a sentence to reflect totality considerations is a delicate matter of judgment and discretion. It is most certainly not a matter of mathematical calculation or scientific precision.

[30] Among the factors to be considered are the factors set out in *R v Hutchings*, 2012 NLCA 2 at para 84, which were adopted by this Court in *GJM* (at para 10):

> The question of whether a combined sentence for multiple offences is unduly long or harsh, and therefore not proportionate, on a last look requires a sentencing judge to take into account and balance several factors that Green CJNL neatly summarized in *R*

> *v Hutchings (R)*, 2012 NLCA 2, 316 Nfld & PEIR 211 (at para 84):
>
> (a) the length of the combined sentence in relation to the normal level of sentence for the most serious of the individual offences involved;
>
> (b) the number and gravity of the offences involved;
>
> (c) the offender's criminal record;
>
> (d) the impact of the combined sentence on the offender's prospects for rehabilitation, in the sense that it may be harsh or crushing;
>
> (e) such other factors as may be appropriate to consider to ensure that the combined sentence is proportionate to the gravity of the offences and the offender's degree of responsibility.
>
> See also *R v Arbuthnot (SM)*, 2009 MBCA 106 at para 18, 245 ManR (2d) 244; *R v PK*, 2012 MBCA 69 at para 20, 280 ManR (2d) 258; *R v Draper (TG)*, 2010 MBCA 35 at para 31, 251 ManR (2d) 267; *R v Wozny (CP)*, 2010 MBCA 115 at paras 56-60, 262 ManR (2d) 75; *R v Boissonneault (MJ)*, 2012 MBCA 40 at para 28, 280 ManR (2d) 114; *R v James (GM)*, 2013 MBCA 14 at para 73, 288 ManR (2d) 269; and *R v Golden (BR)*, 2009 MBCA 107 at para 87, 245 ManR (2d) 254.

[31] The accused makes two principal submissions. First, that his sentence is significantly greater than the sentence imposed for the most serious offence. Second, that the sentencing judge failed to properly consider his prospects for rehabilitation.

[32] With respect to the first point, while it is true that the sentence imposed for the most serious offence is one factor to consider, in this case there are a number of other important considerations. Of particular significance are the number and gravity of the offences involved and the fact

that there were, at minimum, five young, vulnerable victims, several of them as young as 13. Each of those victims suffered a separate and distinct harm.

[33] With respect to the second point, we agree with the Crown's submission that no evidence has been presented, either to the sentencing judge or to this Court, that the accused has any prospect for rehabilitation. Indeed, to the contrary, over a long period of time and on numerous occasions, the accused has not only refused to abide by court orders, he has deliberately contravened them. In the context of the present offences, there is incontrovertible evidence that the accused completely ignored non-communication orders and that he committed the offence of procuring while incarcerated (i.e., he arranged further sexual contact with a vulnerable young woman while in prison). Moreover, it is evident from the evidence as a whole, including the intercepted conversations between the accused while incarcerated and some of his victims, that he is untruthful, manipulative and unremorseful.

[34] As to the accused's moral blameworthiness, the sentencing judge's comments are particularly insightful:

> And for the offender to suggest that he thought he was helping the girls must seem ludicrous to any reasonable person. He knew their ages, had them lie about their ages, fed them alcohol and drugs, surreptitiously recorded them in sexual acts, gave some of them money, advertised them for sexual services, told them to lie to the police about having had contact while in custody, and more. It is impossible to accept his position and it is inconsistent with the submission that "he always knew he was looking at a lengthy shot". That implies that he had a much greater understanding of just how abhorrent his behaviour actually was.

[35] Given this offender and his conduct, it would indeed be "ludicrous" to accept his word that he will "fully engage" in counselling and programming and that his sexual offending will never happen again.

[36] The accused acknowledges that the sentencing judge followed the correct procedure, stated the correct principles and imposed acceptable sentences for each offence. His complaint is restricted solely to the amount of the reduction made by the sentencing judge to account for totality. Where, as here, it is acknowledged that there is no other error, the sentencing judge's decision regarding the appropriate reduction for totality is entitled to considerable deference, and it will be a rare case where this Court intervenes to substitute its view for the view of the sentencing judge.

[37] It is true that a 21-year sentence in Canada is rare (see *R v M (CA)*, [1996] 1 SCR 500 at paras 71-75). However, the sexual exploitation of young, vulnerable teenagers is a problem of longstanding concern in Manitoba that requires denunciation by this Court and the community at large. Given the unique circumstances of this case, the sentence is not demonstrably unfit, and we see no basis for appellate intervention.

[38] Leave to appeal sentence was granted but the appeal was dismissed.

Burnett JA

Steel JA

Beard JA