Citation: R v SCC, 2021 MBCA 1 Date: 20210107
Docket: AR19-30-09364

IN THE COURT OF APPEAL OF MANITOBA

Coram: Mr. Justice William J. Burnett
Madam Justice Janice L. leMaistre
Madam Justice Karen I. Simonsen

B E T W E E N:

	)	***S. L. Thomas*** *and*
HER MAJESTY THE QUEEN	)	***R. N. Malaviya***
	)	*for the Appellant*
Appellant	)	
	)	***A. J. McKelvey-Gunson***
- and -	)	*for the Respondent*
	)	
S. C. C.	)	*Appeal heard:*
	)	***September 11, 2020***
(Accused) Respondent	)	
	)	*Judgment delivered:*
	)	***January 7, 2021***

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LEMAISTRE JA

Introduction

[1] The Crown seeks leave to appeal and, if granted, appeals the sentence imposed on the accused for the offences of distribution of an intimate image without consent (section 162.1(1) of the *Criminal Code* (the *Code*)) and failure to comply with a recognizance (section 145(5) of the *Code*). After pleading guilty, the accused was sentenced to 14 months' imprisonment for

distribution of an intimate image without consent (the distribution offence) and 90 days' imprisonment, concurrent, for failure to comply with a recognizance (the breach). He was given credit for 270 days of pre-sentence custody and, therefore, had 150 days remaining to be served.

[2] The Crown argues that the judge erred in principle by initially overlooking the breach, and in her approach to parity and proportionality. It also argues that the sentence is demonstrably unfit.

[3] I am satisfied that the judge erred in her approach to sentencing for multiple offences and that the sentence is demonstrably unfit. For the reasons that follow, I would grant leave to appeal, allow the appeal and vary the sentence for the distribution offence to a period of incarceration of two years less a day. While, in my view, two years less a day is a low sentence for this offence in the circumstances of this case, I would not increase the sentence beyond what the Crown recommended at the sentencing hearing. For the same reason, I would not vary the 90-day sentence for the breach.

Background

Circumstances of the Offences

[4] The victim was 15 or 16 years of age when her relationship with the accused began. He was 30 years old. They lived together off and on for six and a half years.

[5] While the accused was on bail for offences involving the victim and ordered to have no contact or communication with her, they had sexual intercourse. The sexual contact occurred at his grandparents' home where he

was ordered to reside and abide by a 24-hour curfew. The accused filmed the sexual encounter with the victim's consent. However, approximately three to four months later, the accused posted on a pornographic website two explicit excerpts from the recording without the victim's knowledge or consent. Both videos identified the victim by name and her face was "fully visible" in one of the videos.

[6] The accused also posted an explicit photograph of him and the victim engaging in sexual intercourse. The photograph did not show her face, but the victim has a unique tattoo which was visible in the photograph.

[7] The victim only discovered that the accused had posted the sexually explicit videos and photograph when an acquaintance sent her links to the videos from the pornographic website. The videos were viewed 2,006 times before being removed from the website. There is no way of knowing whether the videos have been downloaded or saved in private collections.

[8] Regarding the breach, the accused had contact with the victim contrary to his bail order over a period of two months, including on the day that he filmed their sexual encounter.

[9] A victim impact statement prepared by the victim's grandmother describes the impact of the distribution offence on the victim. Not surprisingly, the victim has suffered significant physical and emotional effects. She struggles with trust, self-confidence and anxiety, as well as being out in public, fearing that she might encounter people who have seen the images.

[10] A community impact statement prepared by the Canadian Centre for Child Protection points out that the permanent destruction of intimate images that have been shared electronically is incredibly difficult and that the victim may never know "if or when the photo will be distributed further".

Circumstances of the Offender

[11] The accused is 38 years of age. Prior to his relationship with the victim, he was married for 10 years. He has three children, but has had some contact only with his eldest child. He has almost completed his Grade 12 education and has worked sporadically in the past in the auto body and tire industries.

[12] The accused has a criminal record for domestic violence involving the victim in this case, as well as two other prior domestic partners, and for breaches of court orders. He has also been convicted of possession of child pornography and voyeurism involving a 16-year-old girl. Since 1999, as a result of these convictions, the accused has spent time in custody and on probation.

[13] The pre-sentence report indicates that, despite participating in some programming while in pre-sentence custody, the accused "refused to take full responsibility for his offending" and was "difficult to work with". Regarding the distribution offence, the accused told the probation officer that he was motivated by spite and the thrill of seeing how many views the videos would get when he posted them.

[14] The accused also told the probation officer that, despite never having had a close bond with his mother who abused him emotionally, he had

a stable upbringing and a close relationship with his father. However, his father described a distant relationship and said that "the family has a hard time believing what [the accused] says since he has lied so many times." The accused's sister said that he has a history of anger management issues "especially towards females."

[15] Using the Level of Service Management risk assessment tool, the probation officer assessed the accused as "a [v]ery [h]igh risk to reoffend." Using the Static 99R, the probation officer assessed him "at well above average risk for being charged or convicted of another sexual offence."

Judge's Sentencing Decision

[16] At the sentencing hearing, the Crown advocated for concurrent sentences on the two offences. It recommended a sentence of two years less a day followed by three years' probation for the distribution offence and said the following regarding the breach:

> . . .
>
> In terms of the breaches [*sic*], I'm viewing them as aggravating on the distributing intimate images component, whatever concurrent period of custodial sentence the Court determines is appropriate, so be it, but it's reflected in the two-year-less-a-day sentence that the Crown is seeking. . . .

[17] Because the distribution offence was a relatively new offence, the Crown filed case law to assist the judge with the applicable legal principles. Referring to *R v JS,* 2018 ONCJ 82, it argued that the circumstances of the accused in this case "put him in an entirely different strata" and that the

sentence should, therefore, be higher than the 18 months' incarceration imposed in *JS*.

[18] Counsel for the accused (not counsel on the appeal) recommended a sentence of nine to 14 months' incarceration for the distribution offence, but did not make a submission regarding the appropriate sentence for the breach.

[19] The judge concluded that deterrence and denunciation were the primary sentencing objectives in this case. She found the following aggravating and mitigating factors:

> . . .
>
> This was the abuse of a much younger domestic partner, the images were explicitly sexual, and the descriptions given in the posts, whether that is routine or not, were degrading. The victim's real name was used and her face could be identified. The images were not just sent to one person, they were publicly posted and viewed 2,006 times. There is no way to know if the images were downloaded and where they might turn up next. There is little to be said in mitigation. It is to [the accused's] credit that he pled guilty and saved the victim the added trauma of testifying.
>
> . . .

[20] The judge also found that the distribution offence "was a devastating invasion of [the victim's] privacy interests" and therefore it was domestic abuse. Finally, she concluded that the offence was a "breathtaking" abuse of trust, particularly in light of the accused's motive for posting the images:

> . . .
>
> I thought of Judge Thompson's query at the beginning of the *R. v. B.S.* [*R v BS*, 2019 MBPC 26] decision about what sentence is appropriate when images are weaponized post breakup as I read

> [the accused's] comments about why he did this. It was spite, he said, excitement and thrilling. He wanted to see how many views he would get. Just a pause on the callousness of that, the glee in the mounting view count. Just think for a moment of the confidence, the faith, the trust you need to have in another person to allow them to take explicit pictures during a sexual encounter. The abuse of this trust by posting the resulting images with the victim's name to a porn website is breathtaking.
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> . . .

[21] The judge considered the case law provided by the Crown. She acknowledged that, when new legislation is enacted, it takes time "to develop a sense of what sentence is reasonable" and found that the cases provided helpful guidance. She also found that the circumstances of the offence in *JS* were more aggravating than in this case. The judge concluded that the Crown's recommendation of two years less a day was outside the range suggested by the jurisprudence and that the 14-month custodial sentence she was imposing "extend[ed] the range for a single count of distribution."

[22] After sentencing the accused for the distribution offence and imposing the probation and ancillary orders, the Court took a recess. It is apparent from the transcript that, during the recess, the clerk pointed out that the judge did not impose a sentence for the breach. When the Court reconvened the judge stated, "I had a decision on that. . . . I just forgot to tell you. . . . That's a three-month concurrent sentence, or 90 days concurrent."

Grounds of Appeal

[23] The Crown raises four issues on appeal:

1) whether the judge overlooked that the accused committed the substantive offence while bound by a recognizance prohibiting contact with the victim and erred in her approach to sentencing for multiple offences;

2) whether the judge erred in her approach to sentencing ranges and her consideration of parity;

3) whether the judge erred in her assessment of proportionality by failing to consider the gravity of the offence and the moral blameworthiness of the accused; and

4) whether the sentence is unfit.

Discussion

Standard of Review

[24] The standard of review applicable to sentencing decisions is highly deferential. An appellate court should not intervene unless the judge has committed an error in principle that had a material impact on the sentence or the sentence is demonstrably unfit (see *R v Johnson*, 2020 MBCA 10 at para 9; and *R v Friesen*, 2020 SCC 9 at paras 25-29).

[25] In my view, the judge erred in principle in her approach to sentencing for multiple offences and the sentence is demonstrably unfit. Therefore, I need not address the remaining issues except to the extent that any error in principle affects the judge's findings (see *Friesen* at para 28).

Sentencing for Multiple Offences

[26] The Crown argues that the judge overlooked the breach when sentencing the accused and that this was a material error because it resulted in a "free ride" (see *R v Wozny*, 2010 MBCA 115 at paras 44, 63-66; and *R v RJ*, 2017 MBCA 13 at para 13). I agree.

[27] When sentencing for multiple offences, the first step is to determine whether the offences will be served concurrently or consecutively by examining the degree of nexus between the offences. When imposing concurrent sentences, the judge determines a fit sentence for the most serious offence and imposes a lesser sentence for the remaining offences, or determines a single sentence for the set of offences to ensure that the length of the sentence does not give an offender a "free ride" for any criminal conduct (see *RJ* at para 13).

[28] In this case, the Crown recommended concurrent sentences for the two offences. It argued that the breach was an aggravating factor to be considered when determining the appropriate sentence for the distribution offence and that the appropriate sentence for that offence was two years less a day.

[29] I take no issue with the imposition of a concurrent sentence for the breach in the circumstances of this case. While the breach could have attracted a consecutive sentence because it involved "continuous contact" over a period of two months rather than contact only on the day that the accused made the recording which was the subject of the distribution offence, I am not convinced that the judge erred when she relied on the Crown's recommendation and imposed a concurrent sentence.

[30] However, there is nothing in the judge's reasons which demonstrates that she considered the effect of imposing a concurrent sentence for the breach on the sentence for the distribution offence. She did not refer to the circumstances of the breach or provide reasons regarding her conclusion that a 90-day concurrent sentence was appropriate. In my view, the breach should have resulted in a higher sentence on the substantive offence and, therefore, the judge committed a material error in principle.

Is the Sentence Demonstrably Unfit?

[31] The Crown also appeals on the basis that the sentence is demonstrably unfit. It argues that the sentence imposed for the distribution offence did not adequately address the principles of deterrence and denunciation or the aggravating factors. It also argues that the judge erred in finding the circumstances in *JS* were more serious than the circumstances in this case.

[32] In *R v Houle*, 2016 MBCA 121, Mainella JA explained the meaning of demonstrably unfit (at para 11):

> . . . A sentence will be demonstrably unfit where it unreasonably departs from the principle of proportionality taking into account the individual circumstances of the offence and the offender and the acceptable range of sentence for similar offences committed in similar circumstances (see *Lacasse* at paras 52-55; and *R v Ruizfuentes (HS)*, 2010 MBCA 90 at para 7, 258 ManR (2d) 220).

[33] The offence of distribution of an intimate image without consent was enacted by Parliament in 2014 in order to address "the particularly vile and invasive form of cyberbullying involving the non-consensual distribution

of intimate images" (*House of Commons Debates*, 41-2, vol 147, No 25, (27 November 2013) at 1436 (Hon Andrew Scheer), online (pdf): *Parliament of Canada*, <www.ourcommons.ca/Content/House/412/Debates/025/HAN025-E.PDF> (date accessed 23 December 2020). As Abella J observed in *AB v Bragg Communications Inc*, 2012 SCC 46, cyberbullying is psychologically toxic and "can be particularly harmful because the content can be spread widely, quickly—and anonymously" (at para 22; see also para 20; and *R v NG et al*, 2015 MBCA 81 at paras 33-35).

[34] Distribution of an intimate image without consent is a sexual offence as well as a privacy offence punishable by a maximum term of imprisonment of five years upon indictable proceedings. Deterrence and denunciation are the primary sentencing objectives. Therefore, the focus on sentencing for this offence is more on the offence committed than on the circumstances of the accused (see *R v McFarlane*, 2018 MBCA 48 at para 24; and *Johnson* at para 13).

[35] The judge appropriately recognised the need to prioritise deterrence and denunciation. However, in my view, the sentence she imposed does not reflect the "the intentional risk-taking of the offender, the consequential harm caused by the offender, and the normative character of the offender's conduct" (see *R v M (CA)*, [1996] 1 SCR 500 at para 80).

[36] The aggravating factors in this case are numerous and include the following:

1. The accused was on bail for prior incidents of domestic violence when he filmed himself engaging in sexual intercourse with the victim and then distributed the images

without her consent. His recognizance required him to have no contact with her;

2. The accused's relationship with the victim began when she was 15 or 16 and he was 30 years old;

3. The accused posted the images online out of spite;

4. The images were removed only when the accused got caught after posting them;

5. The images were viewed 2,006 times;

6. The victim was clearly identified in the images;

7. The descriptions of the videos were demeaning and suggested the images were sexually explicit images of teens;

8. The victim found out about the presence of the images online because someone she knew saw them and told her about them;

9. The accused has a prior related record;

10. The accused poses a very high risk to reoffend; and

11. The offences involved domestic violence, an abuse of trust and had a significant impact on the victim.

[37] Moreover, the accused has a "history of anger management issues, particularly with women" that has not changed despite prior periods of incarceration and probation, during which he took various programs. The

accused's conduct has the classic hallmarks of domestic violence, including breaches of trust and privacy, and the desire to degrade.

[38] At the sentencing hearing, the Crown argued that the circumstances warranted a higher sentence than the 18 months' incarceration imposed in *JS*. I agree.

[39] In *JS*, the accused posted 11 videos of explicit sexual activity between him and the victim online. The videos showed her face and identified her by name. The accused also placed an advertisement on an escort website which included images of the victim along with her name and telephone number. The videos were viewed over 10,000 times and the victim received over 300 calls in response to the advertisement.

[40] In this case, the judge concluded that the "added aggravating factors found in *J. S.* of signing up the victim and giving her address as an escort" were not present.

[41] I acknowledge that the facts in *JS* are arguably worse than in this case. However, in my view, the accused's moral culpability in this case is higher than that of the accused in *JS*. The accused in *JS* had addiction and mental health issues. He was not on bail when he committed the offence and he did not have a prior criminal record. The accused in this case does not have any identified addictions or mental health issues and he has a lengthy, related criminal record.

[42] In my view, a fit sentence for the distribution offence would have resulted in a penitentiary sentence. However, it would be inappropriate to impose a higher sentence than the sentence recommended by the Crown at the

sentencing hearing. Therefore, I would sentence the accused to a period of incarceration of two years less a day for this offence. Similarly, while the accused has served incarceratory sentences for breaching court orders in the past, I would not increase the sentence for the breach.

Reincarceration

[43] At the appeal hearing, counsel for the accused stated that the accused was granted early release the day prior to the appeal hearing. He argued that, if the Crown's appeal was granted, the execution of any sentence of imprisonment should be permanently stayed (see *R v JED*, 2018 MBCA 123 at para 143). While he did not file any evidence regarding the circumstances in custody, he asserted that this Court could take notice of the conditions of the accused's incarceration due to COVID-19 and that these circumstances warrant a stay of his sentence.

[44] In *R v Find*, 2001 SCC 32, McLachlin CJC explained when a court may take judicial notice of facts (at para 48):

> . . . Judicial notice dispenses with the need for proof of facts that are clearly uncontroversial or beyond reasonable dispute. Facts judicially noticed are not proved by evidence under oath. Nor are they tested by cross-examination. Therefore, the threshold for judicial notice is strict: a court may properly take judicial notice of facts that are either: (1) so notorious or generally accepted as not to be the subject of debate among reasonable persons; or (2) capable of immediate and accurate demonstration by resort to readily accessible sources of indisputable accuracy: *R. v. Potts* (1982), 66 C.C.C. (2d) 219 (Ont. C.A.); J. Sopinka, S. N. Lederman and A. W. Bryant, *The Law of Evidence in Canada* (2nd ed. 1999), at p. 1055.

[45] Like the Ontario Court of Appeal in *R v Morgan*, 2020 ONCA 279, I would take judicial notice of "the fact of the COVID-19 pandemic, its impact on Canadians generally, and the current state of medical knowledge of the virus, including its mode of transmission and recommended methods to avoid its transmission" (at para 8). However, I would not take judicial notice of the specific circumstances in custody due to COVID-19.

[46] I am also not persuaded that the interests of justice warrant a stay of the accused's sentence (see *R v Siwicki*, 2019 MBCA 104 at para 70). In my view, a number of factors warrant reincarceration, including the seriousness of the offence, the length of the sentence remaining to be served and the importance of denunciation.

Conclusion

[47] In the result, I would grant leave to appeal the sentence and allow the appeal by varying the sentence for the distribution offence to a period of incarceration of two years less a day before credit for pre-sentence custody of 270 days. The 90-day concurrent sentence for the breach will remain, as will the probation and ancillary orders.

"leMaistre JA"

I agree: "Burnett JA"

I agree: "Simonsen JA"