Citation: R v Peters, 2020 MBCA 17 Date: 20200204
Docket: AR19-30-09293

IN THE COURT OF APPEAL OF MANITOBA

Coram: Mr. Justice William J. Burnett
Madam Justice Jennifer A. Pfuetzner
Madam Justice Lori T. Spivak

B E T W E E N:

HER MAJESTY THE QUEEN	)	***M. Wasyliw***
	)	*for the Appellant*
Respondent	)	
	)	***D. C. Sahulka***
- and -	)	*for the Respondent*
	)	
OMAR JEROME PETERS	)	*Appeal heard and*
	)	*Decision pronounced:*
(Accused) Appellant	)	***February 4, 2020***

BURNETT JA (for the Court):

[1] The accused appeals his convictions for one count of breaking and entering a dwelling house contrary to section 348(1)(b) of the *Criminal Code* (the break and enter offence) and one count of wounding a dog contrary to section 445(1)(a) (the wounding offence).

[2] The accused also seeks leave to appeal his sentence of seven years for the break and enter offence and two years concurrent for the wounding offence.

[3] With respect to his conviction appeal, the accused says:

1. that the trial judge erred in failing to find the police violated his section 10(*b*) *Charter* right to counsel during his interrogation (see the *Canadian Charter of Rights and Freedoms*); and

2. that the trial judge erred in his assessment of credibility by failing to consider all of the evidence, that he failed to provide reasons and that the verdict was unreasonable and unsupported by the evidence.

[4] The standard of review to be applied to a *Charter* finding is set out in *R v Farrah (D)*, 2011 MBCA 49 at para 7 and is summarised in *R v Richard (DR) et al*, 2013 MBCA 105 at para 48. Applying that standard, we have not been persuaded that the trial judge erred when he determined (a) that a *Charter* breach had not been established, and (b) that, even if a breach had been established, admission of the accused's statement would not bring the administration of justice into disrepute.

[5] As to the second ground, it is long established that a trial judge's credibility determinations are subject to great deference.

[6] In *R v Jovel*, 2019 MBCA 116, Mainella JA observed (at para 52):

> In considering whether a verdict is unreasonable, the appellate court must re-examine and, to some extent at least, reweigh and consider the effect of all of the evidence at the trial through the lens of judicial experience with due regard to the advantage enjoyed by the trial judge. Ultimately, an evaluation of testimony may only be interfered with where it cannot be supported on any reasonable view of the evidence (see *R v W (R)*, [1992] 2 SCR 122 at 131-32; *Burke* [*R v Burke*, [1996] 1 SCR 474] at paras 3-7; *Gagnon* [*R v Gagnon*, 2006 SCC 17] at para

> 10; *R v Beaudry*, 2007 SCC 5 at para 63; *RP* [*R v RP*, 2012 SCC 22] at para 10; *WH* [*R v WH*, 2013 SCC 22] at para 34; and *R v Walker*, 2015 MBCA 69 at para 15). In particular, when a conclusion on a disputed fact turns on an assessment of the credibility of witnesses, it will be only in the rarest of instances where that assessment cannot be supported on any reasonable view of the evidence (see *Burke* at para 7; *Gagnon* at para 20; and *R v Vuradin*, 2013 SCC 38 at para 11).
>
> [emphasis added]

[7] This is not one of those rare instances. The trial judge's evaluation of the evidence and his credibility assessments are easily supported on a reasonable view of the evidence.

[8] We agree with the Crown's submission that, given both the lack of an air of reality and the absence of evidence, it was not necessary for the trial judge to specifically address the accused's theoretical defences to the wounding offence.

[9] The conviction appeal is therefore dismissed.

[10] With respect to the sentence appeal, the accused submits that both sentences were "harsh and excessive having regard to the circumstances, antecedents and background" of the accused.

[11] The standard of review for a sentence appeal is well known and need not be repeated.

[12] In our view, there is no basis for appellate intervention with respect to the sentence for the break and enter offence. We are not persuaded that the trial judge erred, and the sentence is not demonstrably unfit. The trial

judge accepted that the accused's African-Canadian background and difficult upbringing were relevant and took them into account.

[13] However, the sentence for the wounding offence is unfit and must be set aside.

[14] Although the Crown recommended a 90-day concurrent sentence for the wounding offence, the trial judge imposed a two-year concurrent sentence. While the Crown's position cannot bind a judge's discretion, it was an error in principle for the trial judge to impose a sentence eight times greater than the sentence proposed by the Crown without first giving the parties an opportunity to address his concerns (see *R v Beardy*, 2014 MBCA 23 at paras 5-7).

[15] Moreover, the two-year sentence is demonstrably unfit considering the circumstances of the offence. It is well in excess of sentences imposed in cases where the facts are far more serious (see *R v Alcorn*, 2015 ABCA 182; *R v Camardi*, 2015 ABPC 65 at para 27; and *Springer v Her Majesty the Queen*, 2019 NBQB 216). In our view, the 90-day concurrent sentence suggested by the Crown is fit in the circumstances.

[16] To summarise, the conviction appeal is dismissed. Leave to appeal sentence is granted. The sentence appeal regarding the break and enter offence is dismissed, while the sentence imposed by the trial judge for the wounding offence is set aside and replaced with a 90-day concurrent sentence.

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