Citation: R v Abbasi, 2020 MBCA 119

Date: 20201203
Docket: AR18-30-09100;
AR18-30-09101

IN THE COURT OF APPEAL OF MANITOBA

Coram: Madam Justice Freda M. Steel
Mr. Justice Christopher J. Mainella
Madam Justice Karen I. Simonsen

B E T W E E N:

HER MAJESTY THE QUEEN	)	***S. B. Simmonds, Q.C.*** *and*
	)	***A. R. Hodge***
	)	*for the Appellant*
Respondent	)	
	)	***N. M. Cutler*** *and*
	)	***D. C. Sahulka***
- and -	)	*for the Respondent*
	)	
	)	*Appeal heard:*
DARYOUSH ABBASI	)	***September 15, 2020***
	)	
(Accused) Appellant	)	*Judgment delivered:*
	)	***December 3, 2020***

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*).

SIMONSEN JA

[1] The accused appeals his convictions for a number of sexual offences and breaches of recognizance as well as one count of uttering threats, arising from incidents involving three complainants, who ranged in age from 14 to about 16 years old. He also seeks leave to appeal his global 12-year sentence, and if granted, appeals the sentence.

[2] The accused asserts that the trial judge erred by:

(1) allowing the Crown's motion to admit similar fact evidence;

(2) misapprehending the evidence and reversing the onus of proof, specifically, by applying different standards of scrutiny to the evidence of the accused and the complainants;

(3) failing to consider the possibility of innocent collusion amongst the complainants;

(4) allowing the Crown's motion to call rebuttal evidence after the close of the accused's case; and

(5) imposing a sentence that was unfit.

[3] For the reasons that follow, I would dismiss the appeal.

The Trial

[4] In 2012 and 2013, the accused, then in his mid-30s, hired the complainants, AD, KK and AB, to assist with his renovation business, and they were paid $10 per hour for their services, despite the fact that none of them had previously done any construction work.

[5] All three complainants testified as to the circumstances of the offences; the evidence of AD and KK included video-recorded statements they had provided to the police, which were admitted under section 715.1(1) of the *Criminal Code* (the *Code*).

[6] AD testified that in April 2012, when she was 14 years old, she was introduced to the accused by her sister. He offered her a job as a construction assistant, which she accepted. Later that same month, he stopped at a house on Spruce Street in Winnipeg (the Spruce house) at the end of a work day and asked her to come inside. Once inside, he encouraged her to drink some whisky and suggested that they play the "toonie game" in which he hid a toonie on his body and asked her to search him. He grabbed her hand and made her touch his penis. She then hid a toonie in her sock but he started feeling her vagina and breasts. He told her not to tell anyone and threatened her with a gun. He encouraged her to drink a large amount of liquor, which she did until she became heavily intoxicated. He took her to a bedroom where he started taking off his clothes, grabbed a condom from his pocket, put it on and got on top of her. She tried to push him off, but he put his penis inside her vagina. He gave her $60 and told her not to tell anyone.

[7] One or two weeks later, the accused took AD to the same house and offered her $20 to give him a back massage. While she was doing so, he rolled over and made her touch his penis. He told her to take off her pants but she refused. He again told her not to tell anyone.

[8] KK's evidence was that, in the summer of 2012, she met the accused through her then boyfriend (C R-S) and his sister (TR), both of whom knew the accused because their mother was his close friend. TR told KK that she had done work for the accused, for remuneration. KK and TR then went to work for the accused on a few occasions. In April 2013, when KK was 15, she contacted the accused and asked if he had any work so she could again earn some money. They arranged to meet and he drove her to a house on Arlington Street in Winnipeg (the Arlington house). He offered her alcohol,

cocaine and hashish but she declined. After she assisted him putting up cupboards in the kitchen, he approached her from behind, pulled down her pants, offered her money, and put his fingers in her vagina and his mouth on her nipples. He put a red condom on his penis and attempted to force his penis inside her vagina; it went approximately two inches inside her. She kicked him away, and threatened him with a knife she did not actually have. The accused warned her not to tell anyone. Before she ran off, he offered her $70, which she refused.

[9] According to AB, she learned of the accused through her friend, KK, in either the spring of 2012 or 2013 when AB was 16 or 17 years old. KK called the accused and he paid for a cab for the two of them to come to the Arlington house. AB went there because she understood that she could do work in return for alcohol, which the accused did in fact provide. About a week later, AB called the accused offering to again do work for liquor. The accused picked her up and took her to the Arlington house. They hung out in the living room and she drank alcohol. He offered her $50 to have sex with him but she refused. He did not persist and he paid for her cab home.

[10] About a week later, AB again phoned the accused so that she could drink, and they went to the Arlington house where she drank vodka to the point she passed out. When she woke up, her shirt was above her bra, the zipper on her jeans was unzipped and her button was undone. Her jeans were open and the accused was standing over her taking photographs with a tablet. When she protested, he started deleting them. She said that she wanted to go home and he paid for a cab for her to do so.

[11] TR and C R-S were also Crown witnesses, who both testified that they too had previously worked for the accused. C R-S said that he had worked for him several times in 2013 when he was 17, including at the same time as KK. TR worked for him in the summer of 2013 when she was 13, including once or twice with KK.

[12] On May 10, 2013, the police executed a search warrant at the Arlington house which resulted in them finding liquor bottles in one of the bedrooms, a condom wrapper in a pile of items on the floor, and a large Ziploc bag full of condoms and an empty condom box in the bottom pot drawer of the stove.

[13] At the conclusion of the Crown's case, the Crown sought and was granted an order to admit as similar fact evidence the testimony of AD and KK for consideration in connection with the charges relating to those two complainants, but not in relation to the charges involving AB.

[14] The defence case consisted of testimony from the accused and AD's sister (the sister). The sister testified about her having previously worked for the accused and introducing him to AD. She described the accused as a friend, and she felt torn between him and AD. The sister also testified that AD never seemed drunk when she returned from work with the accused.

[15] The accused acknowledged that the complainants had worked for him, but denied ever offering them alcohol or engaging in any sexual activity with them. He said that the Arlington house, although not his residence, was a property that he had rented for storage of his tools and for his wife to reside in while she attended school and underwent medical treatment she required as a result of a serious motor vehicle accident. The accused also denied having

alcohol at the Arlington house and said that the liquor bottles found by the police were for decoration and that he would store tea or water in them. He explained that the condoms located at the house were in the bottom of a box of items that he had purchased from a garage sale.

[16] The accused further testified that he had never bought liquor for anyone he knew was under the age of 18, never given liquor to anyone under the age of 18, and never given drugs to anybody or bought drugs for anybody.

[17] The trial judge allowed the Crown to call rebuttal evidence from the sister, who then testified that the accused had provided her with alcohol and cocaine when she was between the ages of 14 and 18.

[18] This case turned on the trial judge's assessment of credibility. The Crown questioned the plausibility of the accused's denials and the defence pointed to frailties and inconsistencies in the evidence of the complainants. The trial judge rejected the accused's evidence about why he had rented the Arlington house and how the items found by the police came to be in that house, as well as his denials of involvement. The trial judge accepted the testimony of the complainants, and found the accused guilty of all counts in the indictment.

Standard of Review

[19] In a criminal context, the admissibility of evidence is usually a question of law, reviewable on a standard of correctness. However, deference is owed to a trial judge's balancing of probative value against risk of prejudicial effect. On a similar fact ruling, appellate courts will defer to a trial judge's assessment of the comparative probative value and prejudicial effect

of the proffered evidence unless an appellant can demonstrate that the result is unreasonable, or is undermined by a legal error or a misapprehension of material evidence (*R v TIE*, 2014 MBCA 40 at paras 10-11; and *R v Wilkinson*, 2017 ONCA 756 at para 27).

[20] A trial judge's evaluation of the evidence of the Crown and the defence by different standards is an error of law that undermines the fairness of a trial and can give rise to a miscarriage of justice under section 686(1)(b)(iii) of the *Code*. The burden of establishing a claim of uneven scrutiny is a heavy one (*R v Glays*, 2015 MBCA 76 at paras 13-14; and *R v Jovel*, 2019 MBCA 116 at paras 37-38).

[21] The failure of a trial judge, in weighing the trial evidence, to consider the possibility of innocent collusion between complainants is an error of law, reviewable on a standard of correctness (*R v F(J)* (2003), 177 CCC (3d) 1 at para 88 (Ont CA); and *R v Clause*, 2016 ONCA 859 at paras 96-97).

[22] As an alternative position, the accused asserts that, if the trial judge did consider possible innocent collusion, he failed to adequately address that possibility and afford it sufficient weight when assessing the evidence of the complainants. Despite this assertion, the accused does not raise insufficiency of reasons as a ground of appeal. And, when assessing credibility findings, an appellate court must defer to the conclusions of a trial judge unless there has been palpable and overriding error (*R v Wright*, 2013 MBCA 109 at para 30; and *R v Kionke*, 2020 MBCA 32 at para 20).

[23] A trial judge's decision to admit rebuttal evidence is "discretionary and, as a result will generally be accorded deference. However, that discretion

must be exercised judicially, and in the interests of justice" (*R v G(SG)*, [1997] 2 SCR 716 at para 29).

[24] Finally, the sentence appeal is governed by the standard of review set out in *R v Friesen*, 2020 SCC 9. An appellate court can only intervene if the sentence is demonstrably unfit, or the sentencing judge made an error in principle that had an impact on the sentence (at para 26).

Analysis and Decision

Conviction Appeal

Similar Fact Evidence

[25] The accused takes the position that the trial judge erred in admitting the testimony of AD and KK as similar fact evidence because, in the process of determining whether the probative value of the evidence outweighed the risk of its prejudicial effect (see *R v Handy*, 2002 SCC 56), he failed to adequately consider the possibility of innocent collusion between AD and KK.

[26] The task of a trial judge on a similar fact application, as it relates to collusion, was well summarised in *Wilkinson* at paras 29-30:

> In similar fact evidence cases, at the admissibility stage, the trial judge's main task is to weigh the probative value of the evidence against its potential prejudicial effect. The possibility of collusion may significantly affect this balancing. As Binnie J. said in *Handy*, at para. 99: "An important element of the probative weight analysis is the issue of potential *collusion* between the complainant and the ex-wife" (emphasis in original). In *Shearing* [2002 SCC 58], Binnie J. again identified collusion as a matter related to the "strength of the evidence." As he said, at para. 40:

> The theory of similar fact evidence turns largely on the improbability of coincidence. Collusion, by offering an alternative explanation for the "coincidence" of evidence emanating from different witnesses, destroys its probative value, and therefore the basis for its admissibility.

Although collusion is a feature of probative value, it is singled out for special consideration at the admissibility stage. It is not simply part of the overall balancing undertaken by the trial judge; instead, the Crown must disprove the possibility of collusion. Justice Binnie articulated the test in *Handy,* at para. 112:

> Accordingly where, as here, there is some evidence of actual collusion, or at least an "air of reality" to the allegations, the Crown is required to satisfy the trial judge, on a balance of probabilities, that the evidence of similar facts is not tainted with collusion. That much would gain admission. It would then be for the jury to make the ultimate determination of its worth.

[27] Contamination of evidence by innocent (sometimes described as "accidental") collusion, as opposed to deliberate tainting, was explained in *F(J)* at para 77:

> … [C]ollusion and discussion among witnesses can have the effect of tainting a witness's evidence and perception of events innocently or accidentally and unknowingly, as well as deliberately and intentionally. The reliability of a witness's account can be undermined not only by deliberate collusion for the purpose of concocting evidence, but also by the influence of hearing other people's stories, which can tend to colour one's interpretation of personal events or reinforce a perception about which one had doubts or concerns.

See also *R v MB*, 2011 ONCA 76 at para 19.

[28] Actual and innocent collusion are to be treated the same way at the admissibility stage (*Wilkinson* at para 45).

[29] In this case, there was evidence of a close friendship and regular communication between KK and AB, which made the possibility of innocent collusion between them very real. Both testified that they had discussed the events involving the accused before giving their police statements. KK indicated that she and AB had also spoken about those events since, and she described AB as such a close friend that she was "like a sister".

[30] However, the similar fact application was made in connection with the evidence of AD and KK–not AB. Both AD and KK testified that they did not know one another. As for possible communication between them through AB, AD testified that she and AB had been roommates at the Manitoba Youth Centre (the youth centre) prior to the incidents involving the accused, but that they had not discussed him. Although AD agreed, on cross-examination, that she had spoken with AB on Facebook, she indicated that the communication was not about "coming to court". AB confirmed that she had met AD at the youth centre when she was 14 and said that she had not spoken to her since. Furthermore, as for possible indirect communication between AD and KK through others, KK testified that she also told C R-S and a friend, RR, what had happened with the accused, but AD's evidence was that she did not know either of those individuals.

[31] The trial judge, in his reasons for decision admitting the similar fact evidence, addressed the issue of collusion by stating: "I'm satisfied there's no evidence of actual collusion, nor, on a balance of probabilities do I find there's a possibility of an innocent or intentional witness contamination". He added that "[AD and KK's] only point of connection is the other complainant, [AB] and so I'm satisfied, as I say, on the balance of probabilities, that there is no collusion here".

[32] While the trial judge's reasons are not extensive, he clearly turned his mind to the possibility of innocent witness contamination, was alive to the relevant evidence, weighed it after hearing the oral arguments of counsel which canvassed the issue in some detail, and concluded that the Crown had proven that the evidence was not tainted by collusion. When considered in the context of the evidence and the submissions, his analysis was not unreasonable, nor undermined by legal error or a misapprehension of material evidence. No basis for appellate intervention has been established.

[33] I add that the extent, if any, to which the trial judge relied on similar fact evidence in convicting the accused is not clear. At the outset of his decision on conviction, he stated:

> During the course of the trial I made a ruling on an application by the Crown for similar act evidence. I allowed the Crown's application to admit the evidence of the incidents involving the complainants [AD] and [KK] for consideration as against each other in order to establish a modus operandi of Mr. Abbasi, to support the credibility of each complainant and rebut allegations of fabrication. With respect to the complainant [AB], I have to consider her evidence separate and apart from the other two complainants.

[34] Thereafter, he analysed the evidence of each complainant independently and made no mention of the similar fact evidence or the *modus operandi* of the accused. In my view, it would have been preferable, and of assistance to the parties and this Court, had the extent to which he relied on similar fact evidence, and how, been more clearly articulated, but it does not amount to an error in law or fact justifying appellate intervention.

Assessment of Trial Evidence - Uneven Scrutiny/ Possibility of Innocent Collusion

[35] In support of the accused's assertion that the trial judge evaluated his evidence and that of the complainants by different standards, he focusses on a number of discrepancies and inconsistencies in the testimony of the complainants that he says were either not considered or dismissed. He argues that the trial judge took a very different approach when assessing his evidence, placing an impossible standard upon him that shifted the burden of proof.

[36] Having carefully considered the record and the trial judge's reasons, I am not satisfied that the accused has met his heavy burden of demonstrating "something sufficiently significant" (*R v Phan*, 2013 ONCA 787 at para 34) which clearly establishes that the trial judge applied a stricter level of scrutiny to the defence evidence than the evidence of the Crown (see also *Jovel* at para 38). The trial judge thoroughly explained his reasons for disbelieving the accused, finding that he "tailored his evidence . . . gave implausible testimony, and he had instances of selective memory". The trial judge also critically assessed the frailties and inconsistencies in the testimony of the complainants and concluded that he nonetheless accepted their evidence. I would not accede to this ground of appeal.

[37] The issue of collusion is raised in two contexts. Besides arguing that the trial judge erred in his treatment of similar fact evidence (which I have already dealt with), the accused contends that the trial judge was required to consider the possibility of innocent collusion between the complainants when evaluating their credibility and that he failed to do so.

[38] A trier of fact's obligation to consider the possibility that evidence is tainted by both deliberate and innocent collusion was outlined in *F(J)* at paras 86 and 87:

> The Supreme Court has recently addressed the seriousness of the possibility that evidence has been tainted by collusion in the context of the treatment of similar fact evidence. In the cases of *R. v. Handy* (2002), 164 C.C.C. (3d) 481 and *R. v. Shearing* (2002), 165 C.C.C. (3d) 225, the court held that before admitting similar fact evidence, the trial judge must be satisfied of its reliability and exclude it if not satisfied on a balance of probabilities that the evidence is not tainted by collusion. Once admitted, the jury must still be warned to assess the evidence carefully and to consider whether it can be considered reliable given the possibility of deliberate or accidental tainting by collusion among the witnesses (Shearing at para. 44).
>
> [emphasis added]
>
> In *R. v. Burke* (1996), 105 CCC (3d) 205, the Supreme Court discussed concocted evidence outside the context of similar fact evidence. The court held that a trial court must scrutinize crucial evidence with special care, and must consider any circumstances which could affect its reliability, including the possibility of collusion. In that case, the failure of the trial judge to consider that possibility led the Supreme Court to declare the verdict unreasonable.

See also *Wilkinson* at para 40.

[39] In his reasons for decision on conviction, the trial judge did not specifically mention collusion. However, again, those reasons must be considered in context (*R v REM*, 2008 SCC 51 at para 16). The trial judge had addressed the issue of possible witness contamination resulting from collusion between AD and KK on the similar fact application; at the trial, he heard counsel's final submissions on the issue in relation to all complainants;

and, in his reasons for conviction, he included details of the evidence about who had spoken to whom about what. Therefore, the issue of collusion was squarely before him and he was clearly aware of the relevant evidence. Considering the entirety of the record, I am not persuaded that he failed to take into account the possibility of tainting by innocent collusion when concluding that he accepted the evidence of the complainants. Furthermore, his credibility findings are reasonably supported by the record and no palpable and overriding error has been demonstrated.

[40] I would also dismiss this ground of appeal.

Rebuttal Evidence

[41] In exercising his discretion to permit the Crown to call rebuttal evidence from the sister, the trial judge determined that the "nature of the proposed evidence is no longer marginal given the testimony of the accused on this point…". He permitted the Crown to recall the sister to address the credibility of the accused's evidence that he had never offered alcohol to a person under the age of 18, and had never offered drugs to anyone. The accused asserts that the trial judge erred in doing so.

[42] The ability to call rebuttal evidence is governed by the principles set out in *R v Krause*, [1986] 2 SCR 466 at 474:

> The plaintiff or the Crown may be allowed to call evidence in rebuttal after completion of the defence case, where the defence has raised some new matter or defence which the Crown has had no opportunity to deal with and which the Crown or the plaintiff could not reasonably have anticipated. But rebuttal will not be permitted regarding matters which merely confirm or reinforce earlier evidence adduced in the Crown's case which could have been brought before the defence was made. It will be permitted

> only when it is necessary to insure that at the end of the day each party will have had an equal opportunity to hear and respond to the full submissions of the other.

[43] That said, as observed by the Ontario Court of Appeal in *R v P(G)* (1996), 112 CCC (3d) 263 at 273-74:

> Despite the broad language from *Krause* it has always been understood that the trial judge has a discretion to admit evidence in reply concerning an issue that was of only marginal importance during the prosecution's case in chief, but that took on added significance as a result of the defence evidence. . . .

[44] The accused takes the position that the trial judge erred in permitting the Crown to call the sister in rebuttal because the provision of liquor to the complainants was always a key issue, and allowing the rebuttal evidence simply resulted in the Crown splitting its case. The accused notes that there was nothing preventing the Crown from dealing with the matter on cross-examination of the sister when she was called by the defence, as the sister had initially been planned as a Crown witness so the Crown was well aware of the evidence she was able to provide. Furthermore, on direct examination, both TR and C R-S were asked by the Crown whether they had ever been offered alcohol by the accused. TR said that she had, and C R-S said that he had not. C R-S was also asked if he had been offered drugs by the accused and he indicated that he had. Presumably, the same inquiries could have been made of the sister when she first testified.

[45] The Crown maintains that, while the provision of liquor to the complainants was always a central issue, the trial judge did not err in the exercise of his discretion to allow the rebuttal evidence because the accused

took the matter further during his testimony to make broad statements about never providing alcohol or drugs to various categories of people. As such, according to the Crown, the evidence sought to be tendered was more relevant than it had been and was admissible, pursuant to the principle in *P(G)*, to challenge the accused's credibility.

[46] I agree with the Crown that it was open to the trial judge to accept that the accused's testimony changed the situation. In light of his evidence, the proposed rebuttal evidence took on added significance on the issue of his credibility.

[47] The fact that TR and C R-S had been asked by the Crown about having been given alcohol by the accused does not mean that the Crown should have asked the sister on cross-examination whether he had ever provided drugs or alcohol to her—and been precluded from calling her in rebuttal. On direct examination, TR was first asked if the accused had offered her "anything" and she responded that he had given her alcohol. That question immediately followed her testimony about having attended upon the accused with KK, and could, perhaps, have been asked in that context. In any event, the direct evidence of TR and C R-S about the accused generally providing alcohol and drugs to them was likely inadmissible bad character evidence—but it was not objected to. After the accused testified, evidence about whether he had provided alcohol or drugs to young persons other than the complainants was no longer bad character evidence but, rather, admissible evidence to challenge the credibility of his sweeping denials about having provided liquor and drugs to others.

[48] Once again, I would not allow this ground of appeal.

Sentence Appeal

[49] The trial judge imposed a total jail sentence of 12 years, with concurrent sentences for all offences relating to the same complainant, and consecutive sentences for each complainant. The consecutive sentences were seven years for the offences involving AD (reduced to six years for totality), five and one-half years for the offences involving KK (reduced to four and one-half years for totality), and two and one-half years for the offences involving AB (reduced to one and one-half years for totality).

[50] The accused contends that the total sentence was harsh and unfit because the trial judge: (i) failed to consider the existence of mitigating factors; (ii) applied the wrong starting point with respect to the sexual interference charge involving KK; and (iii) imposed a sentence outside the acceptable range in relation to the sexual interference charge involving AD.

[51] In submissions before us, counsel for the accused acknowledged the impact of the Supreme Court of Canada decision in *Friesen*, delivered after the sentencing in this matter, which has given significant direction in the sentencing of offenders who commit sexual offences against children. The Court made clear that sentences for these kinds of crimes must increase (at para 5) and that mid-single digit penitentiary terms are normal and that "upper-single digit and double-digit penitentiary terms should be neither unusual nor reserved for rare or exceptional circumstances" (at para 114).

[52] Thus, the accused chose to focus on the trial judge's comment in his reasons that "[t]here are no particular mitigating factors to speak of". The accused says that the trial judge failed to consider the mitigating factors that: he was a political refugee from Iran, and that because he is not a citizen of

Canada, his sentence may have immigration consequences; he takes prescription medication for anxiety and symptoms of post-traumatic stress disorder; and, as a young boy, he was sexually molested by a relative.

[53] The trial judge had before him a very thorough pre-sentence report and comprehensive submissions from counsel for the accused. Moreover, his reasons must be considered in their entirety and they reflect additional information about the accused that was not favourable: he has a criminal record which includes a conviction for sexual interference relating to a young female; he was on judicial interim release on charges relating to AD and under a condition not to have contact with a person under the age of 16 when he committed the offences on KK; and he is assessed as a high risk to reoffend. In addition, he has previously undergone treatment for sexual offending, which apparently was not successful. The immigration consequences in this case were of little relevance given the length of the sentence that was necessary for several serious sexual offences.

[54] When weighing all of the factors, the trial judge was entitled to conclude that there was nothing in the background of the accused that was significantly mitigating. The accused committed very serious offences on three teenagers, and was found to be in a position of trust in relation to one of them (AD). His predatory behaviour increased in the course of events because he set up an isolated location at the Arlington house, where he then committed further offences. The impact on the complainants has been ongoing and significant.

[55] The accused has not demonstrated that the trial judge erred in principle or that the sentences imposed are unfit. While I would grant leave on the sentence appeal, I would dismiss it.

Disposition

[56] In the result, for the foregoing reasons, I would dismiss the appeal.

"Simonsen JA"

I agree: "Steel JA"

I agree: "Mainella JA"