IN THE COURT OF APPEAL OF MANITOBA

Coram: Mr. Justice William J. Burnett
Madam Justice Jennifer A. Pfuetzner
Madam Justice Karen I. Simonsen

B E T W E E N :

HER MAJESTY THE QUEEN	)	***B. S. Newman*** *and*
	)	***M. R. Merriott***
Respondent	)	*for the Appellant*
	)	
- and -	)	***J. W. Avey***
	)	*for the Respondent*
DARRELL ERWIN ACKMAN	)	
	)	*Appeal heard and*
(Accused) Appellant	)	*Decision pronounced:*
	)	***February 14, 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*).

PFUETZNER JA (for the Court):

[1] The accused appeals his conviction for one count of attempting to obstruct justice contrary to section 139(2) of the *Criminal Code*. If the conviction appeal is dismissed, the accused seeks leave to appeal sentence and to appeal his sentence of 18 months' custody.

[2] At the date of the offence, the accused was in custody at the Headingley Correctional Centre awaiting trial on multiple charges relating to seven complainants. Those charges, among others, included sexual assault, making child pornography and living on the avails of prostitution of a person

under the age of 18. The accused was later convicted after trial of 14 offences and sentenced to 15 years' imprisonment.

[3] During a lengthy telephone call that he made using the jail's inmate telephone system, the accused told a material witness that, with respect to his upcoming trial, "you have to go to that courthouse and tell them that you want your name taken off that list if you're a witness." In addition, he instructed the witness to speak to other witnesses and "get them to say . . . that the police were manipulating their heads to get them to testify".

[4] The issue at trial was whether the accused intended to obstruct justice. The accused testified and gave an innocent explanation for the telephone call. The trial judge rejected the accused's testimony and found that it did not raise a reasonable doubt. In convicting the accused, he considered "the evidence . . . as a whole" and found that "[the accused's] comments to [the witness] were part of a concerted effort and pattern throughout this conversation to tamper with [the] Crown's witnesses, none of which efforts were abandoned."

[5] The accused argues that the conviction was unreasonable as the trial judge failed to rule out reasonable alternative inferences to guilt.

[6] The verdict turned on the trial judge's findings of fact, factual inferences and assessment of the accused's credibility. Absent palpable and overriding error, all of these determinations are entitled to deference.

[7] We are not persuaded that the trial judge made any reversible error. All of his findings of fact and factual inferences were available on the evidence. Moreover, the verdict "is one that a properly instructed jury or a

judge could reasonably have rendered" on the whole of the evidence (*R v RP*, 2012 SCC 22 at para 9).

[8] With respect to the sentence appeal, the accused says that the sentence imposed is demonstrably unfit as it is outside a fit and appropriate range, no violence or threats of violence were used and the offence involved only a single phone call. Bearing in mind the highly deferential standard of review applicable on sentence appeals, we are not persuaded that the sentence imposed by the trial judge, in the circumstances of this case, is demonstrably unfit.

[9] The accused also argues that the trial judge erred in principle by failing to consider the unexpired portion of the accused's existing sentence when he imposed the 18-month sentence for this new offence. The totality principle was raised before the trial judge extensively by counsel in submissions. As well, the trial judge was provided with *R v Park*, 2016 MBCA 107, in which this Court stated that, "(I)n most instances the fact that the accused will first have to complete the unfinished portion of a previous sentence will be of little or no significance in the sentence that is imposed for the offence before the court" (at para 14), citing *R v Saran*, 1996 CarswellMan 520 at para 16 (CA).

[10] While the trial judge did not specifically mention the totality principle in his oral reasons for sentence, his reasons must be read in light of the submissions made and the trial judge's statement before delivering sentence that "I have taken into account both the principles to which I have been referred as well as the case law". Totality was one such principle. We are not persuaded that the trial judge erred as alleged by the accused.

[11] The conviction appeal is dismissed. Leave to appeal sentence is granted and the sentence appeal is dismissed.

Pfuetzner JA

Burnett JA

Simonsen JA