Citation: R v Clemons, 2020 MBCA 4 Date: 20200116
Docket: AR18-30-09185

IN THE COURT OF APPEAL OF MANITOBA

Coram: Chief Justice Richard J. Chartier
Madam Justice Freda M. Steel
Madam Justice Janice L. leMaistre

B E T W E E N :

	)	***D. N. Gray***
	)	*for the Appellant*
	)	
HER MAJESTY THE QUEEN	)	***S. L. Thomas*** *and*
	)	***M. A. Bodner***
Respondent	)	*for the Respondent*
	)	
- and -	)	***S. A. Inness***
	)	*on a watching brief*
ELMER BILL LAFOY CLEMONS	)	
	)	*Appeal heard and*
(Accused) Appellant	)	*Decision pronounced:*
	)	***January 10, 2020***
	)	
	)	*Written reasons:*
	)	***January 16, 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*).

PER CURIAM

[1] The accused appeals his sexual assault conviction. He raises three grounds of appeal. He argues that there was an unreasonable delay infringing upon his rights under section 11(b) of the *Canadian Charter of Rights and Freedoms*, that he had ineffective counsel and that the verdict was unreasonable.

[2] After the hearing, we dismissed the appeal with reasons to follow. These are those reasons.

[3] The central issue on the unreasonable delay ground is whether the trial judge erred in characterising the 17-month delay caused by a defence adjournment request as delay waived by the accused or, alternatively, as defence delay.

[4] The accused was committed to stand trial following a preliminary inquiry on September 4, 2014. In November 2015, his lawyer became gravely ill and, two months later, announced his retirement. Another lawyer from the same firm tried to reach the accused without success because he had moved without informing his lawyer. Merely a month before his scheduled two-week trial, the accused asked for an adjournment to retain new counsel. Understandably, the Crown was opposed to the request unless the accused waived the resulting delay.

[5] The trial judge concluded that "the circumstances *as a whole* give rise to an inference that [the accused] understood he had the right to have his trial heard in a timely way" and that "he understood he was giving up that right" (2018 MBQB 144 at para 26). In the alternative, she concluded that the delay was caused by the defence. She found that there was a significant delay between the time it became known that the accused's lawyer would be unable to represent him at the trial and his request for an adjournment, and that the Court and the Crown were ready to proceed but the defence was not (see *R v Jordan*, 2016 SCC 27 at paras 63-64).

[6] The trial judge's conclusions that the accused waived 17 months of delay and that this delay was caused by the defence are entitled to deference

(see *Jordan* at para 65; see also *R v Cody*, 2017 SCC 31 at paras 31-33; *R v Schenkels*, 2017 MBCA 62 at para 52; and *R v Tummillo*, 2018 MBCA 95 at paras 47-48).

[7] The accused argues that his waiver was not informed. He was an unrepresented, unsophisticated individual presented with a choice between proceeding to a trial on a serious charge without counsel or agreeing to waive the delay.

[8] We have not been persuaded that the trial judge erred. She considered the proper factors in the context of the circumstances, which include that this was a transitional case under *Jordan*, and correctly stated the legal principles. Consequently, our standard of review with respect to her factual findings and inferences is highly deferential. She reviewed the fact that, as a result of the actions of either the accused or his former counsel, the accused was without counsel only weeks before the trial.

[9] In addition, she found that the record was clear that, despite being unrepresented, the accused understood that his adjournment request, if granted, would cause a lengthy delay to his trial. The judge who granted his adjournment request, after explaining the Crown's position to the accused, stated to the Crown, "you want him to waive whatever delay . . . results from his request, which he is doing." The judge then canvassed the earliest available dates and, when she informed the accused of the new trial date, he stated, "Okay" without complaint. Moreover, at two subsequent pre-trial conferences, no delay concerns were raised by the accused's new counsel. Given all of this, the trial judge concluded that the circumstances as a whole

gave rise to a reasonable inference of informed waiver. This conclusion is entitled to deference.

[10] The second ground of appeal is partly related to the first. Firstly, the accused argues that new counsel failed to object to the timeliness of the trial and should have made a prompt delay motion. He also submits that counsel should have brought a formal motion for recusal.

[11] As this Court stated in *R v Le (TD)*, 2011 MBCA 83 (at para 189): "an appellant must establish, on a balance of probabilities, the facts on which the claim of incompetency is based. If that is not established, there is no need to go any further." In our view, the factual basis for this ground of appeal has not been established.

[12] On the delay motion, the accused argues that the factual component is evident from the trial transcript. We disagree. There is no evidence regarding when new counsel was appointed; whether earlier dates were sought; counsel's availability for earlier dates; and whether there were discussions between counsel and the accused or counsel and the Crown about delay. Moreover, given that a delay motion was ultimately considered by the trial judge, the prejudice component has also not been met.

[13] On the issue of recusal, again, the factual component of the claim of incompetency has not been met. While counsel for the accused did not make a formal recusal motion, the facts show that he did request that the judge recuse herself when he asked that an alternate judge be assigned to hear the matter. We are all of the view that there is no merit to the claim of ineffective counsel.

[14] This leaves the unreasonable verdict ground. The essence of the accused's argument is that the evidence at trial should have left the judge with a reasonable doubt and that, as a result, the verdict is unreasonable. Specifically, he submits that a higher level of scrutiny was applied to the defence witnesses than to the Crown witnesses. This Court recently summarised the law regarding an alleged uneven scrutiny of the evidence (see *R v CAM*, 2017 MBCA 70 at paras 33-37). To succeed, the accused must establish "something sufficiently significant" (at para 34, quoting from *R v Phan*, 2013 ONCA 787 at para 34) in the reasons or the record that shows that the trial judge erred in her credibility assessment. In our view, the accused has not met this heavy burden.

[15] The reasons show that the trial judge properly instructed herself on the principles enunciated in *R v W(D)*, [1991] 1 SCR 742, that she had a firm grasp of the evidence and that she was alive to issues relating to the overindulgence of alcohol on the part of the witnesses. The trial judge recognised that the complainant did not remember certain details from earlier in the evening and adequately dealt with those discrepancies. She also gave careful reasons why she rejected the accused's testimony, highlighting those parts which did "not make sense." On the record before her, these findings were open to the trial judge and are entitled to deference.

[16] In the end, the trial judge did not believe the accused's version of events and she was not left with a reasonable doubt on the basis of the evidence that she accepted. Where credibility is a determinative issue, deference is in order and will rarely warrant appellate intervention (see *R v REM*, 2008 SCC 51). Moreover, when the evidence is considered as a whole,

there is nothing unreasonable with respect to the trial judge's verdict. Appellate intervention is unwarranted.

[17] For these reasons, the appeal was dismissed.

Chartier CJM

Steel JA

leMaistre JA