IN THE COURT OF APPEAL OF MANITOBA

B E T W E E N :

	)	***S. A. Inness*** *and*
	)	***R. M. Wood***
HER MAJESTY THE QUEEN	)	*for the Applicant*
	)	
	)	***J. W. Avey***
(Respondent) Respondent	)	*for the Respondent*
	)	
- and -	)	*Chambers motion heard:*
	)	***July 18, 2019***
ROBERT ALLEN DOWD	)	
	)	*Decision pronounced:*
	)	***July 19, 2019***
(Accused) (Appellant) Applicant	)	
	)	*Written reasons:*
	)	***July 30, 2019***

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*).

CAMERON JA:

[1] The accused applies for leave to appeal his summary conviction for sexual assault. He also applies for leave to appeal his sentence of one year's incarceration. At the hearing of his motion, I indicated that I was dismissing his first proposed ground of conviction appeal but granting leave on the second. I denied his motion for leave to appeal sentence. I indicated that reasons would follow shortly. These are those reasons.

[2] The accused was charged with sexual assault and sexual interference against the nine-year-old complainant. The offence was alleged to have

occurred when the accused and the complainant left the scene of a bonfire taking place at the accused's Manitoba campground site. Neither the complainant nor her brother or father knew the accused before the day of the incident.

[3] A number of people testified regarding the events of the evening. The trial judge noted that, at one point in the evening, a group of people stepped away from the bonfire and walked up the road to look at the stars. She noted that, while the evidence was inconsistent as to who went stargazing, all agreed that the accused, the complainant and her brother were there. She also found that one of the attendees at the bonfire, Ms K, was included in the group.

[4] There was no issue that, at one point, the accused took the complainant to his motorhome situated on his campsite to allow her to use the washroom.

[5] Of import to this case was the layout of the property. The bonfire was located on the south side at the rear of the accused's motorhome and its door was on the south side and was visible from the bonfire. As well, there was a woodpile to the southeast of the motorhome.

[6] Two other attendees, Mr. and Ms M, as well as the complainant's father, testified that, after Mr. and Ms K and Mr. B left the bonfire, the complainant's father realised that the complainant and the accused were absent from the campsite. The complainant's father sent his son to look for them. All parties agreed that the complainant, the accused and her brother emerged from the north side of the motorhome. The trial judge accepted the brother's evidence that he found the complainant in the vicinity of the

accused. However, she was not able to pinpoint exactly where the brother located them.

[7] On the ride home from the bonfire, the complainant disclosed to her father that the accused had sexually touched her. Her father took her to an RCMP detachment where, at 1:08 a.m., she gave a video-recorded statement. She provided a second video-recorded statement later in the day. Each of those statements was admitted in evidence at the trial pursuant to section 715.1(1) of the *Criminal Code* (the *Code*).

[8] When the accused was arrested, he gave a statement denying the offence. He also denied it when he testified at his trial.

[9] The trial judge applied the test as set out in *R v W(D),* [1991] 1 SCR 742. She explained why she did not believe the accused, including the fact that she drew two negative inferences against him based on his failure to question Ms W and Ms K as to whether either one of them had asked him to take the complainant to the washroom. She found that the Crown's case satisfied her beyond a reasonable doubt. She convicted the accused of both charges and entered a conditional stay on the charge of sexual interference. She sentenced the accused to one year's incarceration to be followed by one year's supervised probation.

[10] The summary conviction appeal judge (the appeal judge) dismissed the accused's summary conviction and sentence appeals.

The Conviction Appeal

[11] The accused appealed his conviction on three grounds, only two of which are relevant to this motion for leave:

1. The appeal judge misapprehended the accused's evidence.

2. The appeal judge erred his application of the rule in *Browne v Dunn* (1893), [1894] 6 R 67 (HL (Eng)).

[12] The appeal to this Court is from the judgment of the appeal judge and not the trial judge. The test for leave to appeal to this Court on a summary conviction appeal is set out section 839(1) of the *Code* and was recently explained by Beard JA in *R v Culligan*, 2018 MBCA 60 (at paras 7, 9):

> There is no right to appeal from the decision of a summary conviction appeal judge; rather, leave to appeal is required (see section 839(1) of the *Criminal Code*). The test for granting leave to appeal under section 839(1) is well known, consisting of three criteria:
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> (i) Any ground of appeal must involve a question of law alone.
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> (ii) Even if a question of law does arise, leave should only be granted if the matter raises an arguable case of substance.
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> (iii) The arguable case must be of sufficient importance to merit the attention of the full court. Since the case has already been reviewed by a judge of the Court of Queen's Bench, which is the primary appellate court to review such matters, there should be a compelling reason to allow this second level of appeal. One compelling reason would be that the issue raises matters that are of significance to the administration of justice or the development of the law beyond this case.
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> The test which must be met by an applicant seeking a second-level appeal is quite high and requires that the applicant show both that there is an arguable case of substance and that there is something exceptional about the case warranting a second appeal hearing. The jurisprudence is clear that not all questions of law merit a second appeal—a second appeal in a summary conviction proceeding should be the exception and not the rule.

Ground 1—Misapprehension of Evidence

[13] A misapprehension of evidence that plays an essential role in the reasoning process resulting in a conviction can result in a miscarriage of justice (see *R v Lohrer*, 2004 SCC 80 at para 1). In *R v Whiteway (BDT) et al*, 2015 MBCA 24, Mainella JA stated that, "A misapprehension of the evidence is not to be confused with a different interpretation of the evidence than the one adopted by the trial judge" (at para 32) (also see *R v Scott*, 2016 MBCA 30 at para 11).

[14] The trial judge gave several reasons for rejecting the evidence of the accused. One of those reasons concerned the accused's assertion that the only time that he was alone with the complainant was when he took her to the washroom and that, if he was seen alone with her, it was an "unfortunate confluence of events". The trial judge stated:

> In his direct examination, [the accused] only described the incident where he took the complainant to the bathroom. On cross-examination, he added the possibility that he had made a sandwich and that he obtained firewood. I don't accept these two possibilities as explanations for why he was seen walking back from the north side of the motorhome with the complainant.

[15] The accused argues that the trial judge misapprehended the evidence because he was asked by trial counsel (not the same as counsel on appeal) whether he had had occasion to get up and do anything during the course of the bonfire in his direct examination. He replied that, while he was unsure of the exact order, he did leave the bonfire to do the above activities.

[16] The accused also argues that the appeal judge erred in law and provided insufficient reasons when he held that it "cannot be said the trial

judge misapprehended the evidence" and that "[i]t is not readily obvious from the transcripts and the reasons that the trial judge was mistaken".

[17] At the outset, I disagree with the accused that the above two statements made by the appeal judge were inconsistent. The term "readily obvious" is a judicially created term. In situations where errors constitute an actual mistake in the evidence, they are "readily obvious" (*R v Sinclair*, 2011 SCC 40 at para 53).

[18] Reasons for decision are to be reviewed on the whole of the record, including submissions of counsel. The standard of review with respect to the sufficiency or insufficiency of reasons was explained in *R v Oddleifson (JN)*, 2010 MBCA 44, leave to appeal to SCC refused, 33756 (28 October 2010) (at para 30):

> The standard of review with respect to the insufficiency of reasons is the standard of adequacy. Reasons will not be inadequate if, when read in their entire context, they fulfill the threefold purpose of informing the parties of the basis of the verdict, providing public accountability and permitting meaningful appeal (see *R. v. R.E.M.*, 2008 SCC 51, [2008] 3 S.C.R. 3).

[19] In this case, the appeal judge was clear that he was relying on the transcripts of proceedings, the submissions of counsel and specific portions of the written materials filed by the parties in considering alleged misapprehension of evidence. In my view, the reasons given by the appeal judge, based on the record that he referenced, were sufficient. While I agree with the accused that appellant courts must provide reasons, I do not agree that the reasons provided by the appeal judge amounted to the level of insufficiency found in the case of *R v Minuskin* (2003), 181 CCC (3d) 542 (Ont CA), relied on by the accused. In that case, the summary conviction

appeal judge simply stated that he had considered the arguments and the appellant had failed to satisfy him that the trial judge had made judicial errors in his ruling (see para 1).

[20] A review of the whole of the record demonstrates that, while the accused may have referenced the above activities in his direct examination, they were not proffered as an explanation as to what he was doing when he was seen returning from the north side of the motorhome with the complainant contemporaneous to the time it was alleged that the incident had just occurred. The accused only proffered these explanations in response to the Crown's cross-examination of him regarding the circumstances under which other witnesses described seeing the accused with the complainant and the times during which he left the bonfire.

[21] Moreover, in my view, the argument of the accused does not raise a question of law. Rather, it simply constitutes a differing interpretation of the evidence than that of the trial judge. In any event, the argument does not show an arguable case of substance and does not merit the attention of this Court.

Ground 2—The Application of the Rule in Browne v Dunn

[22] The accused argues that the appeal judge erred by failing to consider his argument regarding procedural fairness in relation to the manner in which the trial judge applied the rule in *Browne v Dunn*. He argues that the failure of the trial judge to afford him an opportunity to address the concerns she had prior to drawing the negative inferences against him constituted a procedural error that affected trial fairness.

[23] The accused argues that this potential ground of appeal constitutes a first-instance appeal as it only arose at the summary conviction appeal and, therefore, exceptional circumstances need not be shown (see *R v Fryza*, 2012 MBCA 47 at paras 11-12). To the extent that the accused applies to appeal the failure of the appeal judge to address his argument regarding procedural fairness, I agree.

[24] The factual foundation for the argument revolves around the fact that, at one point during the evening, the accused took the complainant to the washroom. This event was proffered as a possible explanation for his extended absence from the bonfire at the same time as the complainant, as well as a reason why he was seen returning to the bonfire with her.

[25] In her reasons rejecting the accused's testimony as incredible and contrived, the trial judge noted that the accused testified that either Ms M or Ms K asked him to take the complainant to the washroom. The trial judge said that neither of these two women were questioned about this in cross-examination. Without referring to the rule in *Browne v Dunn*, she stated that she drew two negative inferences from the failure to cross-examine. She found that neither Ms M nor Ms K made the request described by the accused. Regarding Ms M, she reasoned as follows:

> In the context of [Ms M's] evidence, she testified that when [the complainant's father] realized his daughter was absent, he began asking questions about whether he should be concerned. Surely, if [Ms M] had just asked [the accused] to take the complainant to use his washroom only a short time prior, she would have said something to that effect to [the complainant's father].

[26] Further, she found that Ms K could not have asked the accused to take the complainant to the washroom as she had left the bonfire before the complainant went to the washroom.

[27] At the summary conviction appeal, the accused argued that the process was procedurally unfair because the Crown did not raise the rule in *Browne v Dunn* and did not challenge or cross-examine him regarding the statement in issue. Further, the trial judge did not express her concerns regarding a possible breach of the rule in relation to this testimony. He argues that, if she had, he would have had the opportunity to respond to the concerns raised or have the witnesses recalled. For example, he maintains that the finding of the trial judge that neither of the two women would have asked the accused to take the complainant to the washroom was arguably wrong on the evidence.

[28] In addition, the accused points out that, during final submissions, the trial judge specifically asked trial counsel about the rule in *Browne v Dunn* in relation to the complainant's testimony and that trial counsel appeared to have addressed the matter to the satisfaction of the trial judge. He reasons that he might have similarly been able to alleviate the concerns of the trial judge if he had been afforded the opportunity to do so.

[29] In his reasons, the appeal judge acknowledged the argument advanced by the accused. However, he reframed it by stating that the accused conceded that "his position would be different had [the trial judge] instead spoken about the breach impacting the 'weight' of the evidence". The remainder of the appeal judge's decision dealt with the discretion of the trial judge to weigh evidence. He found that her use of the term "negative

inference" was unfortunate but did not exceed her discretion. Alternatively, he found that, if negative inferences were drawn, they were the context of many credibility findings found within her reasons as a whole. Finally, he concluded that, absent the negative inferences, the totality of the remaining evidence supported her finding that the accused committed the offences.

[30] In support of his argument that the lack of an opportunity to address the trial judge's concerns impacted trial fairness, the accused relies on the case of *R v Abdulle*, 2016 ABCA 5. In that case, the trial judge questioned defence counsel about a number of omissions that he thought might engage the rule in *Browne v Dunn*, most of which he dealt with in his reasons. Conversely, the trial judge failed to question defence counsel about one omission that he stated amounted to a breach of the rule and resulted in him placing significantly less weight on the accused's evidence. The Alberta Court of Appeal stated that there was evidence on the record that would have enabled the defence counsel to advance an argument that there was no breach of the rule. In its view, the failure of the trial judge to raise the issue with defence counsel compromised trial fairness. It found that it could not determine what the effect the potential argument of the accused would have had on the trial judge and ordered a new trial.

[31] I agree with the accused that the appeal judge did not address his argument as it related to procedural fairness. In my view, this raises a question of law. In addition, it raises an arguable case of substance. He submits that negative inferences were drawn absent procedural fairness. It is arguable that, if he had been given an opportunity to address the concerns of the trial judge, the result may have been different.

[32] Regarding the criterion that the arguable case must be of sufficient importance to merit the attention of the court, this Court has not considered the issue of trial fairness as it relates to trial judges unilaterally applying the rule in *Browne v Dunn*.

[33] Therefore, leave to appeal the decision of the appeal judge will be granted on the following question: Did the appeal judge err in failing to consider the procedural trial fairness argument advanced by the accused regarding the application of the rule in *Browne v Dunn*?

[34] Having granted leave to appeal on this ground, I will remain circumspect and refrain from further comment in this regard.

The Sentence Appeal

[35] The accused submits that the sentence of one year's incarceration imposed was unfit. In support of his argument, he agrees that the trial judge properly considered the age difference between the accused and the complainant. However, he argues that, because the age of the complainant is a factor in the offence of sexual interference, it is an error to consider it an aggravating factor in sentence pursuant to section 718.2(a)(ii.1) of the *Code*.

[36] The appeal judge held that the same argument was rejected by the sentencing judge in *R v Locke*, 2014 MBQB 170 at paras 10, 23, leave to appeal to Man CA refused, 2015 MBCA 73. In that case, the accused's application for leave to appeal sentence was dismissed by Hamilton JA who stated the sentencing judge's "determinations of the aggravating and mitigating circumstances for sentencing and the weight to be placed on them were within his discretion and are entitled to deference" (at para 23).

[37] The accused argues the issue was not directly decided in either of the *Locke* decisions.

[38] The appeal judge did not directly address the argument as, in his view, the sentence was fit. I agree.

[39] The sexual interference consisted of the accused touching the complainant's vagina under her pants and underwear, as well as touching her breast. The accused had no criminal record at the time of the incident.

[40] That the sentence imposed in this case was within the acceptable range is evidenced by the recent review of sentences for similar offences by Steel JA in *R v JED*, 2018 MBCA 123 (at paras 54, 55):

> In *R v Bachewich*, 2007 ABCA 199, a one-year sentence was upheld for a single incident of sexual touching against a nine-year-old girl. While the victim was asleep, the accused placed his hand inside her panties and briefly stroked her vagina, waking her up. In Manitoba, *R v Klassen*, 2014 MBQB 18, is an example of one incident of sexual touching which resulted in a sentence of one year. In *R v ML*, 2016 ONSC 7082, the offender touched and squeezed the bare breasts of his daughter's 15-year-old half-sister on one occasion and a nine-month sentence was imposed. In *R v P (KW)*, 2016 MBQB 99, two instances of sexual touching over a six-month period by an offender in a position of trust attracted a sentence of 30 months.
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> In *R v Storheim*, 2014 MBQB 141, leave to appeal to Man CA refused, 2015 MBCA 14, the offender priest touched an 11-year-old altar boy around his penis area alleging he was looking for pubic hair and invited the boy to touch his testicle, which the boy did. The offender did not have a criminal record, had a low risk of recidivism and experienced vast bad publicity. The offender was sentenced to eight months' incarceration. In that case, Mainella J (as he then was), noted that in *R v R (GW)*, 2011 MBCA 62, the Manitoba Court of Appeal "cited, with approval, sentences in the range of 12-27 months for first offenders who fondled or touched the genitalia of a child on one or two occasions" (at

> para 75) and also noted that this range "included cases where there was a breach of trust" (*ibid*).

[41] In light of the above, the issue raised is not one that could have reasonably affected the outcome and does not merit the full attention of this Court.

Conclusion

[42] I would dismiss the accused's motion for leave to appeal his conviction on the ground that the appeal judge misapprehended the evidence and dismiss his motion for leave to appeal sentence. I would allow the accused's motion for leave to appeal his conviction on the ground that the appeal judge failed to deal with his procedural argument regarding the rule in *Browne v Dunn* in accordance with the question that I earlier stated in these reasons.

Cameron JA