

IN THE COURT OF APPEAL OF MANITOBA

Coram: Chief Justice Richard J. Chartier
Mr. Justice William J. Burnett
Madam Justice Jennifer A. Pfuetzner

BETWEEN:

<i>HER MAJESTY THE QUEEN</i>)	<i>E. Wishnowski</i>
)	<i>for the Appellant</i>
)	
<i>Respondent</i>)	
)	<i>R. D. Lagimodière</i>
<i>- and -</i>)	<i>for the Respondent</i>
)	
<i>F. C. W.</i>)	<i>Appeal heard and</i>
)	<i>Decision pronounced:</i>
<i>(Accused) Appellant</i>)	<i>February 27, 2019</i>

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*).

BURNETT JA (for the Court):

[1] The accused appeals his convictions for aggravated assault, sexual assault, forcible confinement and point firearm. In addition, he seeks leave to appeal the eight-year global sentence resulting from those convictions.

[2] By way of background, the trial judge found that the accused forced the complainant to go to his home; upon arrival, he kicked and broke the complainant’s ankle; he continued to physically assault the complainant; he sexually assaulted the complainant with a cucumber; he refused to take the complainant to a hospital; and he put a rifle to the complainant’s head stating that if she did not shut up, he would kill her. Significantly, a DNA report was filed by consent.

[3] With respect to the conviction appeal, the accused submits that the verdict was unreasonable. In particular, he says that the absence of the complainant's DNA on the cucumber required explanation, that it was the Crown's onus to provide that explanation, and that the failure to provide an explanation should have raised a reasonable doubt in relation to the complainant's credibility. The accused also says that the lack of bruising to the complainant's face and head and the lack of medical evidence of a sexual assault raised further doubt as to the complainant's credibility.

[4] The trial judge addressed these arguments in his reasons for conviction:

[The accused's] DNA is found on the cucumber. [The complainant's] DNA is not. Counsel for [the accused] suggests that this should cause me to doubt her version of events. Perhaps it is surprising her DNA is not there but I did not have any expert testimony and based on the evidence I do have before me I am convinced it was used in the fashion described by W.W.

In a similar vein, counsel suggested there should've been more injuries to her vagina, speculating that the circumstances of the attack as described by W.W. should've led to perhaps tearing. Again, there's no medical evidence before me. The medical report has a very cryptic reference to a vaginal injury, and while there is no tearing I'm not persuaded the lack of evidence should raise a doubt about W.W.'s credibility.

[5] The fundamental rule, for the purposes of appellate review, is that if a trial judge's credibility assessment can be reasonably supported by the record, it cannot be interfered with on appeal (see *R v CAM*, 2017 MBCA 70 at para 37, citing *R v RP*, 2012 SCC 22 at para 10; and *R v Merkl*, 2019 MBCA 15 at para 14).

[6] The verdict in this case turned on credibility. DNA evidence, or, for that matter, any corroborating evidence was not required to validate the complainant's testimony (see *R v Khela*, 2009 SCC 4 at para 2). Nonetheless, the trial judge found supporting evidence that was in line with her testimony: the cucumber found in the laundry basket; the baby oil found in the accused's home; the rifle found in the closet; the complainant's torn t-shirt; and the injuries to her arms and legs including a broken ankle. In our view, the trial judge's credibility findings are well supported on a reasonable view of the record. The conviction appeal is therefore dismissed.

[7] With respect to the sentence appeal, the accused submits that the trial judge erred by failing to consider the principle of totality after imposing consecutive sentences.

[8] We agree with the Crown that there is no merit to this submission. It is clear from the trial judge's reasons that he first decided whether each offence warranted a consecutive or concurrent period of incarceration. It was his initial view that the point firearm offence was a distinct offence that, "subject to the totality principle, warrants a consecutive period of incarceration" of 18 months. Having made that determination, the trial judge concluded that a global sentence exceeding eight years would not be proportionate. For that reason, he decided that the 18-month sentence for the point firearm offence would be concurrent, rather than consecutive, to the sentences for aggravated assault, sexual assault and forcible confinement. In these circumstances, it cannot be said that he failed to apply the totality principle, nor can it be said that, in the circumstances of these offences and this offender, the sentences are outside the appropriate range.

[9] Accordingly, while leave to appeal sentence is granted, the sentence appeal is also dismissed.

[10] For these reasons, the conviction appeal is dismissed, leave to appeal sentence is granted, but the sentence appeal is also dismissed.

Burnett JA

Chartier CJM

Pfuetzner JA
