Citation: R v Hebert, 2020 MBCA 16 Date: 20200210
Docket: AR19-30-09242

IN THE COURT OF APPEAL OF MANITOBA

Coram: Madam Justice Diana M. Cameron
Mr. Justice Christopher J. Mainella
Madam Justice Karen I. Simonsen

B E T W E E N :

HER MAJESTY THE QUEEN	)	***D. N. Booy***
	)	*for the Appellant*
	)	
Respondent	)	***B. M. Passler*** *and*
	)	***S. L. Thomas***
	)	*for the Respondent*
- and -	)	
	)	*Appeal heard and*
	)	*Decision pronounced:*
DANIEL JAMES HEBERT	)	***January 31, 2020***
	)	
	)	*Written reasons:*
(Accused) Appellant	)	***February 10, 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*).

CAMERON JA (for the Court):

[1] The accused appeals his conviction for one count of sexual assault (section 271 of the *Criminal Code* (the *Code*)) after trial by judge and jury on the basis that the trial judge failed to properly instruct the jury about comments made by Crown counsel during closing arguments. At the hearing of the matter, we dismissed his appeal with reasons to follow. These are those reasons.

[2] Prior to the commencement of the evidence before the jury, the accused applied to cross-examine the complainant pursuant to section 276 of the *Code* regarding previous sexual activity that he claimed to have had with her. That application was dismissed.

[3] The accused was previously involved in a romantic relationship with the complainant's sister. When that relationship ended, the accused continued to be friends with the complainant and her mother. The complainant testified that, on the night of the incident, she had been consuming alcohol. She contacted the accused and asked him to drive her to get more liquor. She said that she was very intoxicated, to the point that the accused had to pull over the vehicle he was driving so that she could get out to vomit. She stated that she passed out due to her alcohol consumption. She testified that, prior to dropping her off at home after they had obtained some more liquor, the accused parked the vehicle. She said she woke up to the accused pulling her out of the passenger seat of the vehicle and then sexually assaulting her.

[4] The accused testified. He maintained that he and the complainant had consensual sexual intercourse on the evening in question. In direct examination, he agreed that, when they saw each other, she would tell him her problems, he would "put [his] arm around her" and that he thought their relationship was "a little bit more than just friends."

[5] The theory of the Crown was that, had the accused been as fond of the complainant as he testified, he would have tried to contact her at some point after the spontaneous sexual encounter that he said they had. In closing argument, Crown counsel said to the jury, "This is a man who has had sex

finally with a woman that he really, really likes and has wanted. And he's not going to follow up?"

[6] The accused argues that the above comments suggested that he and the complainant had never had sexual relations when there was no evidence in this regard given the section 276 ruling. Indeed, at the pre-charge conference, trial counsel for the accused (not the same as on appeal) raised her concern about the above comment with the trial judge. While the trial judge did not specifically recall the comment, he acknowledged that, "it shouldn't say finally." He then referred to his draft charge to the jury, noting that he did not think it made reference to the word "finally." The final charge to the jury did not include the comments made by the Crown in this regard.

[7] The accused does not assert that the Crown intentionally tried to mislead the jury. However, he argues that the terminology used by the Crown suggested that he and the complainant had never before had sexual relations when there was no evidence regarding the issue and he had been prevented from cross-examining her to the contrary. He argues that the trial judge did not correct the prejudicial comment by advising the jury that there was no evidence either way regarding any prior sexual relationship between the two of them. In his view, the comments by the Crown rendered the trial unfair, thereby resulting in a miscarriage of justice.

[8] We disagree. In the context of the trial, including the totality of the evidence and the argument advanced by the Crown, we are not satisfied that the comments caused the prejudice of which the accused complained. The accused's evidence was that he "really liked" the complainant "for a long time", that he had previously cuddled with her, that he had "been hoping [the

complainant] would one day look at [him] and notice [him]" and that he had sex with her on the date of the offence. His evidence was capable of supporting the argument that he had a sexual interest in her that had been in existence for a period of time.

[9] Even if the comments could be considered to be prejudicial, we are not convinced that the trial judge erred in law by failing to caution the jury in the manner suggested by the accused. The critical question is whether the comments made by the Crown deprived the accused of a fair trial. The determination of the issue involves a consideration of the context of the entire trial (see *R v Romeo*, [1991] 1 SCR 86 at 95; and *R v Manasseri*, 2016 ONCA 703). In this case, a review of the evidence called in the trial, the thorough cross-examination of the complainant conducted by the accused, the theories of the parties, and the final instructions from the trial judge—who cautioned the jury that what counsel said in their submissions did not constitute evidence—does not persuade us that the comments complained of rendered the trial unfair. As well, while not determinative, defence counsel twice, when asked, indicated to the trial judge that she had no concerns with the final instructions.

[10] In any event, even if there was an error, we are satisfied that it was harmless (see *R v Khan*, 2001 SCC 86 at paras 26, 29-31).

[11] In his second, related ground of appeal, the accused submitted that there was no evidence to support the Crown's theory that he committed the sexual assault out of frustration. In our view, this ground has no merit. The complainant testified that, after the accused finished sexually assaulting her, he stated, "That's what you get for falling asleep." If the jury accepted the

testimony of the complainant in this regard, it certainly could be interpreted as evidencing frustration.

[12] Therefore, for the above reasons, the appeal was dismissed.

Cameron JA

Mainella JA

Simonsen JA