

IN THE COURT OF APPEAL OF MANITOBA

Coram: Madam Justice Holly C. Beard
Madam Justice Jennifer A. Pfuetzner
Madam Justice Janice L. leMaistre

BETWEEN:

<i>HER MAJESTY THE QUEEN</i>	)	<i>L. C. Robinson</i>
	)	<i>for the Appellant</i>
)	
<i>Respondent</i>	)	<i>R. N. Malaviya and</i>
	)	<i>A. H. Millo</i>
	)	<i>for the Respondent</i>
<i>- and -</i>)	
<i>BLAINE WARREN HOULE</i>	)	<i>Appeal heard and</i>
	)	<i>Decision pronounced:</i>
	)	<i>February 12, 2019</i>
)	
<i>(Accused) Appellant</i>	)	<i>Written reasons:</i>
	)	<i>February 15, 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*).

LEMAISTRE JA (for the Court):

[1] The accused appealed his conviction, after a trial by judge alone, for sexual interference (section 151 of the *Criminal Code*) and sought a new trial. After hearing the appeal we dismissed it with brief reasons to follow. These are our reasons.

[2] The accused advances two grounds of appeal: 1) that the trial judge erred by shifting the burden of proof onto the accused; and 2) that the trial judge erred in her assessment of the reliability of the complainant’s testimony.

[3] The accused argues that the trial judge permitted the Crown to ask improper questions during cross-examination of the accused. He says that the effect of the impugned cross-examination was to ask the accused to account for the complainant's motive to lie about the allegations of sexual interference. He asserts that the trial judge erred in law by relying on this evidence when reaching the verdict.

[4] We are not persuaded that the trial judge incorrectly shifted the burden of proof onto the accused. The Crown asked one question during cross-examination that is relevant to this issue: "Is there any particular reason why ten years later [the complainant] would go to the RCMP about this?" The accused responded: "I have no idea cause sometimes I wasn't in the country."

[5] While it is improper to ask an accused person during cross-examination to explain why a witness would have lied, counsel for the accused (different counsel than for the appeal), did not object to the question, nor did the Crown argue that this evidence ought to be considered by the trial judge (see *R v Boyd (JC)*, 2005 MBCA 80 at para 4). Moreover, the trial judge's reasons do not suggest that she relied on this evidence in a way that indicated that the accused had any burden to prove a motive to lie.

[6] In her reasons, the trial judge found no evidence of any motive to lie by the complainant. This was "simply part of the assessment of credibility necessary when conflicting evidence must be resolved" (*R v Storheim (SKW)*, 2015 MBCA 14 at para 38). The trial judge did not make an adverse finding of credibility against the accused for his failure to account for the allegations, nor did she impose an onus on him to do so. In the circumstances, the accused has not demonstrated that the impugned question operated to his prejudice

(see *Boyd* at para 5).

[7] Regarding the second ground of appeal, the accused asserts that the trial judge committed an error in law by failing to consider the reliability, as opposed to credibility, of the complainant's testimony. He also challenges her finding that the complainant's evidence was credible. This raises a question of fact. In support of his argument, he refers to the complainant's inability to recall details of the sexual abuse and events related to the abuse; and to inconsistencies and contradictions between her statement to the police, her testimony at the preliminary inquiry and her testimony at the trial.

[8] Credibility and reliability involve different considerations. Credibility relates to the veracity or truthfulness of a witness whereas reliability concerns the accuracy of a witness's testimony (see *R v HC*, 2009 ONCA 56 at para 41; and *R v Perrone*, 2014 MBCA 74 at paras 25-27, aff'd 2015 SCC 8).

[9] We are not convinced that the trial judge did not deal with reliability of the complainant's testimony. The issues raised on appeal relating to reliability of the complainant's evidence were argued at the trial. While the trial judge did not use the word "reliability" in her analysis, neither did the parties use it in their submissions. The trial judge outlined in her reasons the areas of concern raised by the accused that relate to both reliability and credibility, demonstrating that she was alive to the issues and considered them. Her reasons address both the reliability and credibility issues. Moreover, when she found that the complainant's evidence was "compelling", she made an implicit finding of reliability (see *Perrone* at paras 38-39). Thus, she did not err by failing to consider the reliability of the

complainant's evidence.

[10] A trial judge's assessment of the credibility or reliability of a witness, which is a finding of fact, cannot be interfered with on appeal unless it cannot be supported on any reasonable view of the evidence (see *R v RP*, 2012 SCC 22 at para 10; and *R v Walker*, 2015 MBCA 69 at para 15).

[11] In reaching her decision, the trial judge properly considered that the complainant was an adult witness testifying as to events which occurred when she was a child (see *R v W (R)*, [1992] 2 SCR 122 at 134). She considered the reliability of the evidence, mindful of the inconsistencies and contradictions. Moreover, she concluded that the complainant's testimony was supported by the evidence that she was diagnosed with a sexually transmitted infection at the age of five and that the accused was the only male in the household who had the same sexually transmitted infection.

[12] We are not convinced that the trial judge erred in her assessment of the credibility and reliability of the complainant's testimony.

[13] In the result, the appeal was dismissed.

leMaistre JA

Beard JA

Pfuetzner JA
