IN THE COURT OF APPEAL OF MANITOBA

Coram: Mr. Justice William J. Burnett
Madam Justice Jennifer A. Pfuetzner
Madam Justice Janice L. leMaistre

B E T W E E N :

HER MAJESTY THE QUEEN	)	***Z. M. Jones***
	)	*for the Appellant*
Respondent	)	
	)	***M. A. Bodner*** *and*
- and -	)	***A. C. Bergen***
	)	*for the Respondent*
JASON HYRA	)	
	)	*Appeal heard and*
(*Accused) Appellant*	)	*Decision pronounced:*
	)	***April 3, 2019***

BURNETT JA (for the Court):

[1] The accused appeals his conviction for one count of criminal harassment contrary to section 264(1) of the *Criminal Code*, following a trial by judge and jury. He has abandoned his sentence appeal.

[2] This appeal was originally set down for hearing in April 2018, but was adjourned at the accused's request on four occasions. On October 31, 2018, counsel appeared for the accused, and the appeal was set down for hearing on April 3, 2019. On February 28, 2019, a consent order was granted permitting the accused to amend his notice of appeal. Thereafter, a factum and fresh evidence motion prepared by the accused were withdrawn, and a new factum prepared by his counsel was filed to address the grounds raised in the amended notice of appeal.

[3] It is important to note at the outset that, while the accused was self-represented for a portion of the pre-trial period, he retained experienced counsel (not counsel on appeal) nearly one year prior to the trial and was represented before and at trial by such counsel. There has been no allegation of ineffective assistance of counsel.

[4] At trial, the accused did not deny that he repeatedly communicated with the complainant over a period of more than three years. The issues at trial were whether the accused's actions harassed the complainant, whether the accused was aware that his conduct harassed the complainant, and whether the complainant reasonably feared for her safety as a result of the accused's actions.

[5] In the amended notice of appeal, the accused lists four grounds of appeal, which may be summarised as follows:

1. the trial judge erred when she found that there was not an unreasonable delay in bringing this matter to trial contrary to section 11(*b*) of the *Canadian Charter of Rights and Freedoms* (the *Charter*);

2. the trial judge failed to provide the accused with sufficient assistance during the pre-trial process, specifically by failing to advise him of the correct procedure to bring a motion alleging unreasonable delay; and

3. the trial was unfair because:

a) the trial judge discouraged the accused from calling witnesses who lived at a distance to testify by video conference while allowing the Crown to call a witness who lived at a distance to testify in that fashion;

b) the trial judge failed to intervene during the testimony of a Crown witness to curtail remarks that were hostile and demeaning towards the accused and his counsel and failed to caution the jury about what it could and could not conclude with respect to that witness's testimony; and

c) information prejudicial to the accused was presented to the jury. In particular, the trial judge failed to ensure that the accused's police statement and the trial exhibits were edited so as to remove references to the accused's prior involvement in criminal proceedings and his criminal record.

[6] With respect to the issue of unreasonable delay, the accused submits that he "raised the issue of pre-trial delay in one of his pre-trial motions alleging abuse of process". However, the trial judge found that a motion for unreasonable delay was not "properly before the court", and she did not decide whether there had been an unreasonable delay.

[7] We agree with the Crown's submission that the accused failed to bring a proper motion for delay and that, in the absence of a proper motion, the evidentiary record necessary to decide the issue was, and remains, incomplete.

[8] As a general rule, this Court will not entertain new issues on appeal, and we have not been persuaded that this is an exceptional case "where the interests of justice require it and the court has a sufficient evidentiary record and findings of fact to resolve the issue" (*R v Beaulieu*, 2015 MBCA 90 at para 66; see also paras 64-65).

[9] With respect to the trial judge's duty to assist the accused as a self-represented litigant, there is, in our view, no basis for complaint. The trial judge did provide the accused with assistance (during that portion of the pre-trial period when he was self-represented) concerning the requirements for a *Charter* motion. When the accused was subsequently represented by counsel, he did not bring a motion for delay. No explanation has been provided for the failure to bring a delay motion and, as noted previously, there is no suggestion of ineffective assistance of counsel. In the circumstances of this case, we are satisfied that the accused received a sufficient level of assistance from the trial judge to ensure a fair trial (see *R v Tran* (2001), 156 CCC (3d) 1 at para 31 (Ont CA)).

[10] We are also of the view that the issues raised concerning trial fairness are without merit.

[11] As to the accused's suggestion that the trial was unfair because the Crown was permitted to have a witness testify by way of video conference but he was not, we note that the accused inquired at a pre-trial conference on February 6, 2015, "if [he was] allowed to present a video statement or a video recording to the courts." He was told that he could not. Shortly thereafter, the accused retained counsel. That counsel specifically agreed that the Crown witness could testify by video conference. Significantly, there is no evidence

that the accused attempted to call a witness at trial but was prevented from doing so, whether by video conference or otherwise.

[12] We are equally unpersuaded that the accused was prejudiced by the trial judge's failure to intervene or to caution the jury in relation to a Crown witness's demeanour. The trial judge did speak to the witness during the course of his testimony, and the Crown concedes that the witness was "a rather rude and belligerent witness." The Crown says that, if anything, the witness's demeanour would have reflected badly upon the Crown who called him, rather than the accused. Defence counsel did not ask that the jury be cautioned "not to judge the [accused] by [the witness]'s demeanour." Once again, the issue of ineffective assistance of counsel was not raised and, in the absence of explanation, appellate interference is not warranted.

[13] Finally, there is no basis for the accused's complaints concerning any reference at trial to his criminal record and other proceedings. Counsel agreed that the accused's police statement should be edited, and the statement and other exhibits were jointly redacted by Crown and defence counsel. Importantly, no objection was taken at trial as to the admissibility of the impugned evidence (which was specifically identified this morning by counsel for the accused). In the circumstances of this case, such evidence was properly before the jury.

[14] We are all of the view that there is no basis for appellate intervention.

[15] The appeal is therefore dismissed.

Burnett JA

Pfuetzner JA

leMaistre JA