Citation: R v JMB, 2019 MBCA 14 Date: 20190214
Docket: AR18-30-09005

IN THE COURT OF APPEAL OF MANITOBA

Coram: Mr. Justice Christopher J. Mainella
Madam Justice Jennifer A. Pfuetzner
Madam Justice Karen I. Simonsen

B E T W E E N :

	)	***S. A. Inness***
HER MAJESTY THE QUEEN	)	*for the Appellant*
	)	
Respondent	)	***S. L. Thomas***
	)	*for the Respondent*
- and -	)	
	)	*Appeal heard:*
J. M. B.	)	***November 29, 2018***
	)	
(Accused) Appellant	)	*Judgment delivered:*
	)	***February 14, 2019***

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SIMONSEN JA

[1] The accused was charged on a four-count indictment with voyeurism on April 13, 2013 (Count 1), making child pornography on April 13, 2013 (Count 2) and two counts of possession of printed and digital images of child pornography (Count 3 on April 13, 2013 and Count 4 on April 14, 2013). Following a trial by judge alone, he was acquitted of the first two counts and convicted of both counts of possession of child pornography.

[2] Counts 1 and 2 arose from a video camera found in the accused's residence which allegedly contained videos of one of his foster daughters.

The accused was said to have installed the camera and video recorded his foster daughter in the shower. Counts 3 and 4 stem from images of child pornography located by the police upon the execution of a search warrant at the accused's garage. Specifically, Count 3 relates to ripped-up hard copy images found in an oil pan and Count 4 relates to digital images found on a laptop computer (the laptop).

[3] On this appeal of both convictions, the accused asserts that the trial judge erred in law by:

a) failing to sever Count 4;

b) failing to deal with the evidence on each count separately; and

c) concluding that the accused's knowledge of the child pornography found on the laptop was the only reasonable inference to be drawn from the circumstantial evidence.

The Issues at Trial

[4] With respect to Counts 3 and 4, the issue at trial was whether the Crown had proven that the accused was in possession of the images of child pornography.

[5] "Possession" is defined in section 4(3) of the *Criminal Code* to include personal, constructive and joint possession. Only personal and constructive possession were relevant in this case. In order to prove either, the Crown was required to establish beyond a reasonable doubt that the

accused had knowledge of the presence of the images and some measure of control over them (see *Beaver v The Queen*, [1957] SCR 531; and *R v Jenner*, 2005 MBCA 44).

[6] As for the digital images on the laptop, the issue was constructive possession. As outlined by the Supreme Court of Canada in *R v Morelli*, 2010 SCC 8 (at para 17):

> Constructive possession is thus complete where the accused: (1) has knowledge of the character of the object, (2) knowingly puts or keeps the object in a particular place, whether or not that place belongs to him, and (3) intends to have the object in the particular place for his "use or benefit" or that of another person.

[7] Possession of an image in a computer means possession of the underlying data file, not its mere visual depiction (see *Morelli* at para 19).

[8] At trial, the accused asserted an innocent explanation for having the hard copy images in that he retained them only to turn them over to the police. Defence counsel (not the same lawyer as on appeal) argued the applicability of a line of authority which provides that a person who exercises control over contraband with the requisite knowledge does not bear criminal liability if the item was possessed solely to destroy it or deliver it to the police (see *R v Loukas*, 2006 ONCJ 219 at paras 12-14; *R v Chalk*, 2007 ONCA 815 at paras 23-26; and *Canada (Attorney General) v PHS Community Services Society*, 2011 SCC 44 at para 96).

[9] The accused acknowledged having control of the laptop, but denied knowledge of the digital images of child pornography that were found on it.

The Evidence

[10] Although the accused was acquitted of Counts 1 and 2, I will review the trial evidence with respect to all counts as it is necessary to provide context for my analysis.

[11] The accused was a self-employed mechanic who worked out of the detached garage behind his residence.

[12] As a result of a search warrant executed on April 14, 2013, images of child pornography were found in the garage, in both an oil pan and on the laptop. The search warrant had been obtained for the purpose of searching for evidence related to a report by the accused's 13-year-old foster daughter (older foster daughter) on April 13, 2013 that a video camera was set up in the downstairs bathroom of the residence which contained videos of her 12-year-old sister, who was also a foster daughter of the accused (younger foster daughter).

[13] Forensic testing on the laptop was conducted by the police, filtering to include only data with a user name consistent with the first name of the accused. The testing determined that the laptop contained 361 accessible images of child pornography and 932 images of child pornography that were inaccessible either because they had been deleted or were otherwise not accessible without the use of forensic tools. The total of 1,293 images was comprised of 859 unique images and 434 duplicates. There were also three child pornography videos; two were accessible and one was not. A total of 1,945 bookmarked webpages were identified, 37 of which included words commonly found in child pornography. As well, when the police searched

the laptop with key words commonly found in child pornography investigations, hundreds of URL's were identified, many of which contained child pornography or links to other child pornography websites.

[14] The laptop also contained 30,396 images (18,544 unique plus duplicates) of adult pornography. In addition, there were 1,613 images of child collateral material, which the police described as images of children under the age of 18 where the poses are similar to those in child pornography, but genitalia is not shown. It was also determined that the laptop had been used every few days over a period of three years.

[15] The accused testified and acknowledged having the hard copy child pornography images and being aware of their subject matter. However, he explained how they had innocently come into his possession in 2008, when he found them in a vehicle that he had purchased through auction from Manitoba Public Insurance. He then put them in a drawer in his garage. He testified that he had reported the images to the police on two occasions, without a response. He then also reported them to a friend who was a police officer (now deceased), who said that he would deal with the matter but did not.

[16] When the accused's older foster daughter reported the video camera, the accused brought provocative photographs of his younger foster daughter (that he had printed and kept but which she herself had taken) to the garage drawer. As a result, he found the earlier images of child pornography from the vehicle and decided to destroy all of the images by ripping them into small pieces and soaking them in oil to burn them. Before he could burn them, he

was interrupted by the older foster daughter who had his wife on the telephone.

[17] During his testimony, the accused also acknowledged that the laptop belonged to and was used regularly by him, but denied having any knowledge of the digital images of child pornography or how they came to be on the laptop. He explained that the garage was usually not locked. It was a busy place, with a "barber shop" atmosphere. He frequently attended vehicle auctions and would return to the garage with friends who would drink beer and use the laptop to look at adult pornography. He further testified that he allowed anyone to use the laptop, which was not password-protected, and did not supervise its use by others. He said that he is computer-illiterate.

The Trial Judge's Decision

[18] The trial judge largely rejected the accused's evidence on all counts. She nonetheless found that the Crown had not proven Counts 1 and 2 because she had a reasonable doubt as to what images were on the video camera and how the video camera was positioned in the bathroom.

[19] With respect to Count 3, the trial judge rejected the accused's explanation as to how he had come to have the hard copy images and found that he had deliberately attempted to destroy them. She concluded that he had them in his possession for his own use and benefit and, therefore, convicted him.

[20] With respect to Count 4, the trial judge was satisfied, on the totality of the evidence, that the only reasonable conclusion was that the accused had

knowledge of the digital images of child pornography and she, therefore, also convicted him of that count.

Analysis and Decision

Severance—Count 4

[21] Deference is to be afforded to a trial judge's ruling on severance to the extent that he or she acts judicially and the ruling does not result in an injustice (see *R v Last*, 2009 SCC 45 at para 14). The accused does not assert that the trial judge acted unjudicially in rendering her decision. However, he contends that, given how the subject matter of each of the counts in the indictment changed during the course of the proceedings, her decision resulted in an injustice. In determining this issue, it is necessary to consider the entire trial and the potential prejudicial effect of the severance ruling on the accused (see *Last*; and *R v Figliola*, 2011 ONCA 457 at para 96, quoting *R v Rose*, 1997 CarswellOnt 1595 at para 17 (CA)).

[22] At the conclusion of the preliminary inquiry in November 2015, defence counsel inquired about the Crown amending Counts 3 and 4 into one count, and Crown counsel indicated that Count 3 related to the bathroom (that is, the video allegedly of the accused's younger foster daughter in the shower) and Count 4 pertained to all of the images found in the garage, both in the oil pan and on the computer. Defence counsel agreed and a committal was ordered accordingly. On this same understanding of the counts, the accused brought a pre-trial motion for severance of Count 4. He took the position that Counts 1-3 were dependent on the credibility of his older foster daughter,

which he intended to counter by testifying. However, he did not intend to testify with respect to the items found in the garage. That motion was heard on May 20, 2016 and dismissed on June 22, 2016.

[23] The trial commenced in January 2017 and continued from time to time thereafter, with considerable gaps. Throughout, the matter proceeded on the same understanding of the charges as at the preliminary inquiry and severance application. Then, at the outset of final addresses on April 28, 2017, defence counsel submitted that there was an understanding with Crown counsel that Counts 1 and 2 related to the video camera in the bathroom, Count 3 dealt with the images of child pornography in the oil pan (despite Count 3 in the indictment referring to April 13, 2013 and those images being found on April 14, 2013) and Count 4 related to the images on the laptop. The matter proceeded on that basis, including in the trial judge's reasons for decision on conviction.

[24] The accused asserts that the change in understanding about the subject matter of Counts 3 and 4 led to the severance decision resulting in an injustice because it did not allow him to remain silent with respect to the laptop (Count 4). Had Count 4 been severed, his intention would have been not to testify. Furthermore, in the submission of the defence, the failure to sever Count 4 led to evidence of Count 3 being used improperly to convict the accused of Count 4.

[25] It is noteworthy that it was defence counsel who chose to clarify the counts at the beginning of final submissions, but he nonetheless did not object to completing the trial on that basis nor did he make a further severance application—as he would have been entitled to do under section 591(4) of the

Criminal Code. In any event, I question whether such an application would have been successful, given that the factual nexus between all four counts, in particular between Counts 3 and 4, remained. This was acknowledged, albeit in a different context, by defence counsel during sentencing submissions when he asked the Court to consider the principle in *Kienapple v R*, [1975] 1 SCR 729 or order concurrent sentences for those offences (concurrent sentences were imposed). Furthermore, the concerns that the trial judge had expressed in her reasons for decision on severance about witnesses having to testify at both trials and the possibility of inconsistent credibility findings would likely have remained.

[26] Even if Count 4 had been severed, it is difficult to see how the accused would not reasonably have been required to testify to explain the child pornography images found on his laptop. This is particularly so because the Crown led evidence negating possible theories or reasonable possibilities other than his knowledge and control (see *R v Mavros*, 2017 BCCA 435 at paras 27-28). Specifically, the Crown called as witnesses the accused's wife as well as his friend and co-worker, GL. Both had keys to the garage, but both denied using the laptop and specifically denied ever using it to access child pornography.

[27] Furthermore, the accused's suggestion that the dismissal of the severance application led to evidence regarding Count 3 being used improperly to convict him of Count 4 was not borne out. Defence counsel says that, in convicting the accused of Count 4, the trial judge relied on evidence that one of the images found in the oil pan was the same as a digital image on the laptop. Although the trial judge did mention this evidence in her reasons, it was a passing comment only and she did not refer to or rely on it

in her analysis with respect to Count 4. In addition, the hard copy image was dated 2007 and there was evidence that the laptop was not manufactured until 2009 or 2010. During final submissions, defence counsel argued that the match was inconsequential and Crown counsel said that there were numerous explanations, all speculative, as to why one of the hard copy images matched one of the digital ones. The trial judge's reasons are to be read in the context of these submissions.

[28] In my view, when the trial is examined as a whole, with particular reference to the approach that was taken by defence counsel, I am not persuaded that the trial judge's ruling on severance resulted in an injustice.

Dealing With Evidence on Each Count Separately

[29] Related to his argument on severance, the accused asserts that the trial judge failed to consider the evidence on each count separately and used negative credibility findings about his evidence in relation to counts that were the subject of an acquittal in order to convict him of the other counts, particularly Count 4. He contends that the trial judge thereby engaged in the forbidden chain of reasoning of inferring guilt from general disposition or propensity. He argues that this was an error of law that is to be reviewed on a standard of correctness (see *R v Nikkel*, 2006 MBCA 40).

[30] The Crown counters that, on this ground of appeal, the accused is in fact taking issue with the trial judge's credibility findings such that the applicable standard of review is extremely deferential and there should be appellate intervention only in cases of palpable and overriding error (see *Housen v Nikolaisen*, 2002 SCC 33 at paras 10-25).

[31] As I have said, the accused contends that the trial judge erred in law when making her credibility assessment of the accused's testimony as she considered his evidence as a whole, resulting in a cross-pollination between counts. The trial judge may well have considered the entirety of the accused's testimony in making her assessment of his evidence. She was entitled to do so. That did not result in the kind of propensity reasoning prohibited by law. As stated by the Supreme Court of Canada in *R v PEC*, 2005 SCC 19 (at para 1):

> This appeal comes to this Court as of right on the question of whether the trial judge erred by failing to deal with the evidence on each count separately when she considered the evidence relating to other counts in assessing the credibility of the appellant in respect of a particular set of counts. In our view, the trial judge made no such error. The verdict on each count of an indictment must, of course, be based on evidence admissible with respect to that count; in assessing the credibility of each witness, including the accused, the trial judge was entitled, however, to consider the totality of the evidence given by that witness. In doing so, she did not engage in a prohibited line of reasoning contrary to the rule against similar fact evidence.

[32] In assessing the accused's testimony as a whole, the trial judge was properly exercising her function as the trier of fact and absent palpable and overriding error, her findings are entitled to deference. She was entitled to accept some, none or all of his testimony. She rejected his evidence about not visiting child pornography sites and not having knowledge of the child pornography images on his laptop.

[33] Furthermore, in her reasons, the trial judge reminded herself of the need to consider the evidence in support of each count separately and then very deliberately proceeded to do so. In convicting the accused of Count 4,

she did not rely on evidence relating to any of the other counts, including, as I have explained, Count 3.

[34] Therefore, I would dismiss this ground of appeal.

Circumstantial Evidence—Count 4

[35] The standard of review to be applied where a conviction is based on circumstantial evidence is to determine whether a properly instructed jury, acting judicially, could reasonably have concluded that the only reasonable conclusion was the guilt of the accused (see *R v MacLeod (JM) et al*, 2013 MBCA 48 at para 26; and *R v Villaroman*, 2016 SCC 33 at para 55).

[36] With respect to the accused's knowledge of the digital images, the trial judge appreciated that the laptop was not password-protected (this was confirmed by the police) and that the police could not determine whether any of the child pornography images had actually been viewed. She also accepted that she had evidence before her that other people had access to the laptop, which raised the possibility that a person other than the accused downloaded the child pornography. The accused's wife, GL, and PJ, a friend of the accused called by the defence, all testified that there had been get-togethers in the garage from time to time at which a number of individuals had been in attendance. GL said that he had once heard someone mention something about there being pornography on the laptop and PJ testified that they had watched adult pornography there. However, both GL and PJ testified that they had never used the laptop and, more specifically, had never used it to look at child pornography. Therefore, the only evidence about others having used the laptop came from the accused. Moreover, the trial judge found that even if

others had used the laptop, there was considerable evidence that she accepted which established beyond a reasonable doubt that the accused had knowledge of the digital images.

[37] In coming to this conclusion, she relied on the forensic evidence as to the sheer volume of child pornography on the laptop, the volume and nature of the bookmarks, the URL history, and the consistent and regular use of the laptop. There was also the evidence of exclusive opportunity. The forensic analysis indicated that child pornography was accessed on the laptop between 2:10 p.m. and 2:46 p.m. and again between 3:17 p.m. and 3:31 p.m. on April 12, 2013. Given the accused's testimony about being home at about that time, his wife being away for the weekend and his internal inconsistencies regarding exactly when GL left the residence, the trial judge was entitled to infer that the accused was the only person who could have accessed the child pornography on that occasion.

[38] To summarise, the trial judge considered other plausible theories or other reasonable possibilities that would be inconsistent with guilt. She recognised that they need not be based on proven facts but must be based on logic and experience applied to the evidence or absence of evidence, not on speculation (see *Villaroman* at paras 35-38). She found that there were no plausible theories or other reasonable possibilities that were not based on speculation. She concluded from all of the evidence that the only reasonable conclusion was that the accused had knowledge of, and was therefore in possession of, the child pornography found on the laptop. In my view, she could reasonably have come to this conclusion based on the evidence before her, such that there is no basis for appellate intervention.

[39] For the foregoing reasons, I would dismiss the appeal.

Simonsen JA

I agree: Mainella JA

I agree: Pfuetzner JA