IN THE COURT OF APPEAL OF MANITOBA

Coram: Madam Justice Barbara M. Hamilton
Mr. Justice William J. Burnett
Madam Justice Jennifer A. Pfuetzner

B E T W E E N :

	)	***L. C. Robinson***
HER MAJESTY THE QUEEN	)	*for the Appellant*
	)	
	)	***J. M. Mann*** *and*
Respondent	)	***A. C. Bergen***
	)	*for the Respondent*
- and -	)	
	)	*Appeal heard and*
JAMES ROGER MERKL	)	*Decision pronounced:*
	)	***February 11, 2019***
	)	
(Accused) Appellant	)	*Written reasons:*
	)	***February 14, 2019***

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*).

On appeal from 2017 MBQB 129; and 2017 MBQB 197

PFUETZNER JA (for the Court):

[1] The accused appeals his convictions for sexual offences against two young sisters and seeks leave to appeal and, if granted, appeals his sentence of 44 months' incarceration. At the hearing of the appeal, we dismissed the conviction appeal and denied leave to appeal sentence with reasons to follow. These are those reasons.

[2] The offences occurred while the accused was babysitting the sisters, A, who was then age six and O, who was then age four. He showed A a pornographic video and suggested to her that children could do what was being depicted in the video. Just after this, O approached the accused, pulled his penis from his pants and masturbated him in the presence of A. Later that day, A reported what happened to her mother. Both girls made video-recorded statements to police which were entered as evidence at the trial.

[3] The accused makes three primary arguments in support of his conviction appeal. We will deal with each in turn.

[4] First, he maintains that he did not receive a fair trial because: the trial judge heard information in respect of a charge relating to a third complainant that was eventually stayed by the Crown; the trial judge heard information that was improperly accessed by the Crown pertaining to the accused's youth record in respect of a similar fact application relating to a fourth complainant that was abandoned by the Crown; and the word "lying" was improperly handwritten by the Crown over an inaudible word reference in a copy of the transcript of A's police statement that was given to the trial judge by the Crown.

[5] In essence, the accused argues that the trial judge heard inadmissible evidence that was prejudicial in that it had the potential to negatively affect her assessment of his credibility. The accused asserts that the trial judge's reasons are insufficient as they are completely silent on what use, if any, she made of this information.

[6] Trial judges are trained to decide cases based only on evidence that is properly admissible. They are routinely required to make rulings on the

admissibility of evidence and having heard evidence that is ruled inadmissible, disregard it in deciding the case. As Moldaver J wrote in *R v Sekhon*, 2014 SCC 15, "Judges . . . are accustomed to disabusing their minds of inadmissible evidence" (at para 48). Trial judges are presumed to know the law (see *R v Burns*, [1994] 1 SCR 656 at 664; and *R v Abbott*, 2018 MBCA 84 at para 9).

[7] There is nothing in the record or in the trial judge's reasons indicating that she took into account the information regarding the other two complainants. The information was never tendered into evidence at the trial. We are not persuaded that the trial judge was required to specifically state in her reasons that she had heard this information, but was not relying on it. This was simply not a live issue at the trial as illustrated by the fact that it was not raised by trial counsel in their submissions.

[8] As to the handwritten notation on the transcript of A's police statement, it was the trial judge that questioned the appropriateness of the altered copy. During discussion with trial counsel, the trial judge emphasised that she intended to listen to the video-recorded statement to determine what was actually said, stating, "I will go back and listen . . . and watch the video because . . . obviously that's critical". There is no basis to conclude that the trial judge failed to do what she expressly stated she would do, nor is there any evidence that the trial judge simply relied on the Crown's interpretation that the inaudible word was "lying".

[9] The accused's second argument is that the trial judge improperly used the prior consistent statement that A made to her mother.

[10] As indicated in *R v Starr*, 2000 SCC 40, "hearsay evidence is defined not by the nature of the evidence *per se*, but by the use to which the evidence is sought to be put: namely, to prove that what is asserted is true" (at para 162). When an out-of-court statement is used solely as narrative, it is not inadmissible as hearsay.

[11] The evidence of A's prior consistent statement was entered by the Crown at trial, without objection by the accused, for the purpose of narrative. The trial judge made a single reference to the statement in the section of her reasons for conviction entitled "**BACKGROUND**" in which she described the series of events that led to the allegations being made against the accused.

[12] There is nothing in the record or the reasons of the trial judge to indicate that she used the evidence of A's prior consistent statement for an improper purpose, that is, for the truth of its contents in convicting the accused.

[13] The accused's final argument on his conviction appeal is that the trial judge erred in law by applying a higher degree of scrutiny to his evidence compared to the evidence led by the Crown. The accused submits that the trial judge failed to give effect to inconsistencies in the evidence of A and O, and to the lack of any evidence of pornography on the laptop seized by the police.

[14] In making the uneven scrutiny argument, the accused challenges the credibility assessments made by the trial judge. This Court has recently addressed the proper approach to such an argument in *R v CAM*, 2017 MBCA 70 (at paras 35, 37):

> An appellant's burden to demonstrate the uneven scrutiny error is a heavy one. . . .
>
> The fundamental rule, for 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 RP*, 2012 SCC 22 at para 10; and *Gagnon* [*R v Gagnon*, 2006 SCC 17] at paras 10, 20).

[15] The trial judge carefully reviewed all of the evidence. She explained why she did not believe the accused's evidence, stating (2017 MBQB 129 at para 51):

> The accused, on the other hand was simply not credible. As noted previously, there were many issues with his testimony: it was externally and internally inconsistent; his telling of events changed over time in ways that matter; some parts lacked logic; he was evasive and not responsive when inconsistencies were put to him in cross-examination.

[16] The trial judge properly instructed herself on the manner in which the testimony of young children should be assessed, stating (2017 MBQB 129 at para 40):

> Children's testimony must be approached on a common sense basis, having regard to their age, intelligence and development. The law has long been that flaws or contradictions in a child's testimony should not have the same effect as that of an adult.

[17] It is the domain of the trial judge to assign weight to the evidence or the lack of evidence in making credibility assessments. We can see no reversible error in the trial judge's treatment of the evidence, including her approach to the laptop.

[18] The trial judge carefully examined the evidence led by the Crown, including the police statements of A and O and their testimony at trial. She considered the inconsistencies and other difficulties in their evidence, but was satisfied that these could be explained by the ages of A and O and by the gap in time between the events and the trial. She highlighted the issues relating to ownership of the laptop and the evidence that the existence of the pornographic videos could have been erased. Ultimately, the trial judge was satisfied that both A and O were "credible, and their evidence compelling" (2017 MBQB 129 at para 54).

[19] Simply put, the trial judge thoroughly considered all of the evidence and there is no basis to conclude that she subjected the accused's evidence to a higher level of scrutiny. We are satisfied that the trial judge's credibility assessments can be reasonably supported by the record.

[20] The accused seeks leave to appeal and, if granted, appeals his sentence on the basis that the trial judge imposed a sentence that was harsh and unfit. The accused received a total sentence of 44 months, imposed as follows:

- Sexual interference—28 months.
- Invitation to sexual touching—14 months concurrent.
- Showing sexually explicit material to a child—12 months consecutive.
- Sexual exposure—four months consecutive.

[21] There is no merit to the accused's arguments that the trial judge overemphasised the accused's risk to reoffend and improperly failed to reduce the cumulative sentence for totality. Accordingly, we would deny leave to appeal sentence.

[22] In the result, we dismissed the accused's conviction appeal and denied the accused leave to appeal his sentence.

Pfuetzner JA

Hamilton JA

Burnett JA