Citation: R v Simon, 2020 MBCA 117 Date: 20201130
Docket: AR19-30-09387

IN THE COURT OF APPEAL OF MANITOBA

Coram: Chief Justice Richard J. Chartier
Madam Justice Holly C. Beard
Madam Justice Karen I. Simonsen

B E T W E E N :

HER MAJESTY THE QUEEN	)	***L. C. Robinson***
	)	*for the Appellant*
Respondent	)	*(via videoconference)*
	)	
	)	***S. L. Thomas***
- and -	)	*for the Respondent*
	)	*(via videoconference)*
	)	
COLIN CHRISTOPHER SIMON	)	*Appeal heard and*
	)	*Decision pronounced:*
(Accused) Appellant	)	***November 24, 2020***
	)	
	)	*Written reasons:*
	)	***November 30, 2020***

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On appeal from 2019 MBQB 119

CHARTIER CJM (for the Court):

[1] The accused appealed his conviction for sexual assault and his sentence. He has since abandoned his sentence appeal. He raised three grounds on his conviction appeal. The first two are that the trial judge

unevenly scrutinised the evidence and that he also misapprehended it. His final ground was that the trial judge considered prohibited evidence when assessing credibility.

[2] At the hearing, the appeal was dismissed with reasons to follow. These are those reasons.

[3] The key issue at trial was consent and the case turned on credibility. Given that the trial judge is much better placed to make such findings, they must be accorded significant deference on appeal. As this Court explained in *R v CAM*, 2017 MBCA 70 at para 37, if a trial judge's credibility assessment can be reasonably supported by the record, it cannot be interfered with on appeal (see also *R v RP*, 2012 SCC 22 at para 10).

[4] We reject the accused's submission that the trial judge engaged in uneven scrutiny of the evidence. The essence of the accused's argument is that the trial judge failed to scrutinise the victim's testimony as rigorously as the accused's testimony. The accused's focus is in three areas of the evidence: namely, the victim's denial of the "tensor bandage incident"; the accused's lack of explanation as to why the victim "freaked out"; and the testimony of the victim's friend (the friend), that the victim told her to look at her texts.

[5] Contrary to what the accused alleges, the victim did not positively deny that her hands had been tied with a tensor bandage; she stated that she did not recall it happening. Moreover, the trial judge did consider this evidence and accepted the accused's testimony that he did tie her hands.

[6] The accused also argues that there was uneven scrutiny by the trial judge and an improper shifting of the burden of proof when he stated that the

accused "had no explanation as to why the [victim] suddenly 'freaked out'" (at para 60). In our view, when his reasons are considered in the context of the evidence and the submissions of counsel, that is not what happened here.

[7] The accused testified in direct examination that, when he had pulled down his pants, "she started like freaking out." When questioned by his lawyer as to which words she used "when [he] said [she was] freaking out," his answer was far from clear: "She just -- she was just like, What are you -- like, I guess she was like, What are you doing? Or, like I'm not too sure -- like, I don't remember exactly what was said". Still in direct, when asked what he was thinking when this happened, he answered, "Honestly, I -- I guess I didn't really know. I guess I just freaked her out by pulling down my pants, or I mean, like it was really just a frightening moment for myself." When asked by the Crown on cross-examination to clarify his testimony on why the victim freaked out, the accused said, "I cannot explain. If I were to assume something, maybe the fact that she . . . changed her mind." The trial judge then interjected, telling him that he "shouldn't assume anything."

[8] In the end, this was not a situation where there was the placing of an onus on the accused to explain why the victim would lie. We are satisfied that the trial judge's impugned comment simply meant that he found the accused's testimony in this area, in the absence of further details, to be implausible and therefore, incredible. This was a credibility finding, not uneven scrutiny of the evidence.

[9] Finally, there was no uneven scrutiny with respect to the evidence surrounding the victim's text to the friend, because only the friend, not the

victim, testified to that fact. The victim never mentioned her texts to the friend in direct examination, nor was she asked about it in cross-examination.

[10] We now turn to the second ground. The crux of the accused's submission is that the trial judge's misapprehension of the evidence in two areas resulted in adverse credibility findings: first, that he misapprehended the evidence as to the accused's intention to have sexual intercourse with the victim; and second, that he used a misapprehension of the victim's evidence to corroborate the friend's testimony.

[11] The trial judge said that the accused testified "that he never had any intention of having sexual intercourse" with the victim (at para 60). The accused says that this was a misapprehension of the evidence that led to the trial judge's rejection of his testimony. We do not accept this argument.

[12] The accused denied having sexual intercourse with the victim, but said that he had other consensual sexual activity with her, such as kissing her breasts and stimulating her genitals. His testimony with respect to his intention to have intercourse changed as he was questioned. His initial answer on intention was, "My thoughts were not necessarily straight to intercourse, but more sexual advancements perhaps if she were okay with it." When asked why he had taken off his pants, he replied, "It was just to take my pants off, yes." When asked to clarify, he said, "So I took -- my intentions weren't necessarily that we were going to have sex as I wasn't hard to have sex, so my penis was flaccid." Questioned further he said, "Because I was flaccid. I did not have intent to necessarily have sex with her", and still later he says, "I wasn't in any condition to have sex that night. As I said, I was flaccid." On the whole of the accused's evidence, it was open to the trial judge to conclude

that he had testified that he did not intend to have intercourse with the victim, and to also conclude that this was, in all of the circumstances, not credible.

[13] With respect to the second alleged misapprehension, the trial judge said that the friend testified "that when the [victim] came into the apartment bedroom naked, she was quite upset, crying, shaking and mumbling, but that she could not understand what she was saying" (at para 45). Again, the accused says this was a misapprehension of the evidence that led the trial judge to view her evidence as a corroboration of the victim's testimony. There is no merit to this argument. While the friend did state that she "wasn't waking up" when the victim first came into her room, she did eventually wake up and did state what the trial judge wrote. What he wrote was largely an accurate statement, except for a minor point on timing, which had no impact on his conclusion that the accused sexually assaulted the victim. We are satisfied that the trial judge did not misapprehend the evidence in any material way. Furthermore, any misapprehension was not material because the evidence of another person, who was in the bedroom with the friend and who was a party to the events, was the same as the evidence the trial judge attributed to the friend.

[14] The accused also submits that the trial judge considered prohibited evidence in his credibility assessment. The accused argued at trial that there was collusion between the victim and the friend. In addressing this issue, the trial judge noted the absence of an apparent motive to lie. The accused now argues that the trial judge used the absence of motive to fabricate to conclude that the witnesses were telling the truth. We disagree. A fair reading of the reasons of the trial judge shows that the absence of motive to fabricate was

only one of many factors he used in his credibility assessment. As this Court stated in *R v Storheim (SKW)*, 2015 MBCA 14 (at para 38):

> . . . It is well established that a witness's credibility may be assessed by asking whether he or she had a reason to embellish or fabricate evidence. This does not constitute a reversal of the burden of proof, but is simply part of the assessment of credibility necessary when conflicting evidence must be resolved.

[15] Finally, the accused submits that there were inconsistencies in the evidence that required further analysis. Again, we must disagree. The reasons show that the trial judge was alive to these discrepancies. He found them to be peripheral in nature and that they did not undermine the reliability of the victim's evidence viewed as a whole. We see no reason to intervene.

[16] In the end, we are all of the view that the trial judge properly instructed himself on and applied the principles enunciated in *R v W(D)*, [1991] 1 SCR 742; that his credibility assessments can be reasonably supported by the record; that he did not reverse any onus or engage in uneven scrutiny; and that he made no error as to the material parts of the evidence on the issue of consent. Furthermore, when the evidence is taken as a whole, there is nothing unreasonable regarding the trial judge's verdict.

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

"Chartier CJM"

"Beard JA"

"Simonsen JA"