IN THE COURT OF APPEAL OF MANITOBA

Coram: Madam Justice Barbara M. Hamilton
Madam Justice Holly C. Beard
Madam Justice Karen I. Simonsen

B E T W E E N :

HER MAJESTY THE QUEEN	)	***R. T. Amy***
	)	*for the Appellant*
	)	
Respondent	)	***D. C. Sahulka***
	)	*for the Respondent*
- and -	)	
	)	*Appeal heard and*
	)	*Decision pronounced:*
S. R. F.	)	***February 10, 2020***
	)	
	)	*Written reasons:*
(Accused) Appellant	)	***February 18, 2020***

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On appeal from 2018 MBQB 65

BEARD JA (for the Court):

I. THE ISSUE

[1] The accused appeals his convictions under section 271 of the *Criminal Code* for three counts of historical sexual assault. We granted the appeal at the hearing with brief reasons to follow. These are the reasons.

[2] While the accused raised three grounds of appeal, we granted the appeal on the following ground:

- that the trial judge misapprehended the accused's evidence as regards his employment and that the misapprehension was material to the decision to convict him.

II. THE BACKGROUND

[3] The two complainants, KC and RC, are sisters, and nieces of the accused's wife. KC, who was 24 years old at the time of the trial, testified that the accused sexually assaulted her numerous times when she was between 11 and 16 years old. RC, who was 20 years old at the time of the trial, testified that she was sexually assaulted by the accused on two occasions when she was eight years old. The complainants' mother, who was also a witness for the Crown, provided background and context information.

[4] The accused testified, denying all of the allegations. His daughter, HF, was called as a defence witness to confirm some aspects of his testimony.

[5] The trial judge recognised that the essence of the case was whether the Crown had proven beyond a reasonable doubt that the sexual assaults took place and that she was to apply the test in *R v W(D)*, [1991] 1 SCR 742 in assessing the evidence.

[6] Applying that test, she found that the evidence of the accused was not consistent, reliable or credible. She reviewed some of the inconsistencies in the complainants' evidence, but found that they were the result of the complainants testifying to events that took place when they were children and also due to the natural progression of self-disclosure over time. She stated that she was "satisfied [that] the inciden[ts] took place essentially as they both

described and were traumatic" (at para 61). She concluded that she was not left with a reasonable doubt as to the accused's guilt on all counts.

III. MISAPPREHENSION OF EVIDENCE

[7] To succeed on the ground of a misapprehension of evidence, the accused must establish a misapprehension that goes to the substance, rather than the detail, of the decision. It must be material, rather than peripheral, to the reasoning of the trial judge, and it must play an essential part in the reasoning process on conviction. A misapprehension of the evidence may involve a mistake as to the substance of the evidence, a failure to consider evidence relevant to a material issue, or a failure to give proper effect to the evidence. (See *R v Lohrer*, 2004 SCC 80 at paras 1, 3.) Misapprehension is not to be confused with a different interpretation of the evidence than the one adopted by the trial judge. (See *R v Whiteway (BDT) et al*, 2015 MBCA 24 at paras 31-32.)

[8] When reviewing a trial judge's reasons to determine whether there has been a misapprehension of the evidence, an appellate court should not "dissect, parse, or microscopically examine the reasons" (*R v Sinclair*, 2011 SCC 40 at para 54). To order a new trial, "more is needed than an 'apparent' mistake"; "[t]he plain language or the thrust of the reasons must disclose an actual mistake" and "the errors [must be] readily obvious" (at para 53).

IV. THE PARTIES' POSITIONS

[9] The accused's position is that it is clear from the reasons that the trial judge misapprehended the evidence regarding the times that he was

working during 2006 and 2007. He argues that this misapprehension was a major factor in her rejecting his evidence as being unreliable and not credible.

[10] The Crown argues that it is not for this Court to parse the trial judge's reasons when determining whether there was a misapprehension. It argues that, when read fairly, there was no misapprehension.

[11] The Crown acknowledges that, if this Court finds that the trial judge did misapprehend the evidence as alleged by the accused, that misapprehension was material to her reasoning.

V. ANALYSIS

[12] There is no dispute as to the accused's evidence regarding his employment in 2006 and 2007—that was set out by the trial judge as follows (at para 38):

> The accused outlined his various jobs, including working at Fort Alexander (Sagkeeng). He said his hours were from Monday to Friday, 8:30 a.m. to 4:30 p.m., and that he was also working at the Selkirk Healing Centre in 2006 from 5:30 p.m. to Midnight. He stated that on weekends his hours were different and that some weekends he would work from 4:00 p.m. to Midnight, and others from Midnight to 8:00 a.m. He said he left Sagkeeng in 2007 when he and his wife moved to Winnipeg.

[13] The misunderstanding comes from the following testimony by the accused in cross-examination, when he was being questioned about driving his nieces and nephew to their home following visits at his house:

> A No. His, either his mom or his dad would drop him off.
>
> Q Would drop him off and would also drive him, pick him up and take him back?

> A No and then I guess [L.] would probably take him home. I don't know because I was working in the evening.
>
> Q But you were only working the evening in, when you were working at the Behavioural Health Foundation in Selkirk from 2006 and 2007?
>
> A Correct.
>
> Q And [N.] would come to visit not just in, in that timeframe?
>
> A I, I wouldn't know because I wasn't around.
>
> THE COURT: Sorry, I'm, I'm a little bit confused. You were working at the Behavioural Health Foundation when?
>
> THE WITNESS: 2006 till 2007.
>
> THE COURT: And that was just evenings?
>
> THE WITNESS: Yeah. Yes.

[14] The parts of the trial judge's reasons that give rise to this ground of appeal are as follows (at paras 49, 57):

> Perhaps most startling was what came out in cross-examination about the accused's working hours. Having carefully painted a picture of working virtually all of the time between 2002 and 2007, from 8:30 a.m. to 4:30 p.m. in Fort Alexander (Sagkeeng), and in 2006 working from 5:30 p.m. to Midnight plus weekend shifts, and specifically saying he was working two jobs in 2006, in cross-examination it came out that from April 2006 to around September 2007, he was only working evenings at Fort Alexander (Sagkeeng) [*sic*]. This is significant because it directly contradicts the accused's own evidence that he was never at home; that he did not know anything about the relationships between the children; that he had no opportunity for involvement with his children or his nieces; and, in my view, seriously impairs his overall credibility. Overall I found his evidence to be self-serving and unreliable.
>
> As already indicated, the accused's own evidence was inconsistent and self-serving, particularly on the issue of his hours

> of employment and whether he would have had any opportunity to be alone with the complainants. Clearly in 2006 and 2007 he was home much more than he wished the court to believe, which was also confirmed by H.F.'s evidence that her father was home when she got home from school in the afternoons. . . .
>
> [emphasis added]

[15] The accused argues that the only way to read these findings is that the trial judge was of the view that the accused was only working evenings in 2006 and 2007 (see para 49), and that he was at home when his daughter got home from school in 2006 and 2007 (see para 57) because he was not working during the day.

[16] The Crown argues that the trial judge does not say that the accused was only working at one job in 2006 and 2007; rather, its position is that her finding was that his second job was only during the evenings and not on weekends. It argues that paras 49 and 57 of the reasons are addressing different issues and should not be read together.

[17] We are of the view that the reasons are to be read together and as a whole, to understand the thrust of the reasoning (see *Sinclair* at para 54). In this case, paras 49 and 57 are not addressing different issues; rather, both are addressing the accused's credibility in relation to his testimony regarding his employment in 2006 and 2007 and, from that, his overall credibility.

[18] We are also of the view that the only way to read the trial judge's reasons leads to the conclusion that she found that the accused admitted, in cross-examination, that he was working only at the evening job in 2006 and 2007. This is the only way that she could conclude that the accused was home when H.F. got home from school in 2006 and 2007. If he was working both

jobs, he left his day job in Fort Alexander at 4:30 p.m. and then would have had to drive some distance to Selkirk to start his evening job at 5:30 p.m., leaving him no time to be at home when H.F. got home from school during those years.

[19] Further, H.F.'s evidence does not confirm that the accused "was home much more than he wished the court to believe" in 2006 and 2007 (at para 57). A review of H.F.'s testimony makes it clear that she was not saying that the accused was home after school in 2006 and 2007; in fact, it does not relate to any specific years. Rather, H.F. was asked a general question, in cross-examination, about whether both of her parents were "involved in [her] life when [she was] a kid", to which she answered yes. She was then asked whether "when you would come home from school there, your dad would often be there and would hang out with you or do things with you in the evening", to which she said yes. This was not related to any specific years and, clearly, does not relate to the 2006-2007 years because the trial judge accepted that the accused was working in the evening during those years (see para 49), so he could not have been at home to hang out with her in the evening.

[20] Further, H.F. confirmed that the accused was working at the Fort Alexander job and "he would also work nights" at the job in Selkirk, although she was not sure of the hours.

[21] For these reasons, we are of the view that the trial judge misapprehended the accused's evidence when she found that "from April 2006 to around September 2007, he was only working evenings at Fort Alexander (Sagkeeng) [*sic*]" (at para 49), that "in 2006 and 2007 he was home

much more than he wished the court to believe," and that he "was home when [H.F.] got home from school in the afternoons" (at para 57).

[22] The trial judge described this evidence as "startling" and "significant" (at para 49), and it clearly was an important part of her finding that the accused's testimony was not credible. The Crown has conceded that this evidence was a material element of the trial judge's reasoning, and we agree.

VI. DECISION

[23] We are of the view that the trial judge's finding regarding the accused's employment in 2006 and 2007 was the result of a material misapprehension of the evidence that played an essential part in her reasoning process on conviction and goes to the substance of the decision. Therefore, it constitutes a miscarriage of justice, and a conviction that is the product of a miscarriage of justice cannot stand, even if there is otherwise sufficient evidence on which to found a conviction. (See *R v Morrissey* (1995), 97 CCC (3d) 193 at 219, 221 (Ont CA); and *Lohrer* at paras 2-3.)

[24] For these reasons, we granted the appeal, set aside the convictions and ordered a new trial.

Beard JA

Hamilton JA

Simonsen JA