Citation: R v WDT, 2017 MBCA 94 Date: 20170926
Dockets: AR17-30-08737;
AR17-30-08811

IN THE COURT OF APPEAL OF MANITOBA

Coram: Madam Justice Barbara M. Hamilton
Mr. Justice Alan D. MacInnes
Madam Justice Janice L. leMaistre

B E T W E E N :	)	
	)	***J. M. Mann***
HER MAJESTY THE QUEEN	)	*for the Crown*
	)	
Appellant/Respondent	)	***L. C. Robinson***
	)	*for the Accused*
- and -	)	
	)	*Appeal heard and*
W. D. T.	)	*Decision pronounced:*
	)	***September 26, 2017***
(Accused) Respondent/Appellant	)	

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*).

LEMAISTRE JA (for the Court):

[1] The accused appealed his convictions on two counts of sexual interference, two counts of assault with a weapon and one count of assault. The Crown appealed a finding of not guilty on counts of sexual assault and assault and a judicial stay on a count of sexual assault entered pursuant to *Kienapple v R*, [1975] 1 SCR 729. The accused also sought leave to appeal his sentence. At the appeal hearing, we allowed the appeals regarding the

convictions, the findings of not guilty and the judicial stay with reasons to follow. These are those reasons.

[2] The parties jointly asserted that the inadequacy of the reasons given by the trial judge throughout the trial and the sentencing precluded the parties from seeking meaningful appellate review and that trial fairness and the administration of justice were adversely impacted. They also asserted that two of the verdicts were inconsistent and that a new trial was necessary on all counts.

[3] Insufficient reasons are an error of law when the reasons prevent appellate review. See *R v Sheppard*, 2002 SCC 26 at para 28.

[4] The accused was married to the mother of two of the victims, KMF and KJF, at the time of the offences. The third victim, ST, was their biological child.

[5] At trial, the Crown led evidence during the course of a *voir dire* from five police officers regarding a statement made by the accused to the police upon his arrest. In his statement, the accused admitted hitting KMF and KJF with a slipper. He said he did not remember choking KJF as alleged, but admitted it was possible. He also eventually admitted inappropriate sexual touching of KMF and KJF.

[6] The Crown called KMF, KJF and their mother as witnesses at the trial. KJF testified about sexual acts that were significantly more serious than inappropriate sexual touching. The accused testified in his defence. During his testimony, the accused admitted hitting KMF and KJF with a slipper causing bruises and slapping ST. He said that he only remembered

choking KJF while they were play wrestling. He denied sexually assaulting KMF and KJF notwithstanding the admission in his statement to police.

[7] Without reviewing the evidence or making any credibility findings or findings of fact, the trial judge stated that he accepted the submissions of the Crown "and the particular reasons stated in relation" to counts one through four. He convicted the accused of those four counts (two counts sexual interference involving KMF and KJF; and two counts of assault with a weapon involving KMF and KJF) and one count of assault involving ST. The trial judge initially dismissed the two counts of sexual assault involving KMF and KJF. When the Crown sought clarification of the verdicts and indicated that it was seeking a judicial stay regarding the two counts of sexual assault pursuant to the principle in *Kienapple*, the trial judge directed a stay on the charge of sexual assault involving KMF and an acquittal on the charge of sexual assault involving KJF. Finally, the trial judge acquitted the accused of the assault (the choking) involving KJF.

[8] When the parties reconvened for the sentencing hearing, the trial judge attempted to clarify his decision. Responding to questions from the Crown, the trial judge indicated that the conviction for sexual interference encompassed only the incidents of sexual touching admitted to by the accused in his statement to the police and that he did not accept that the more serious sexual acts involving KJF had been proven.

[9] The trial judge fell into the same error as the trial judge in *Sheppard*. In *R v REM*, 2008 SCC 51, McLachlin CJC summarized the problem with the reasons in *Sheppard* (at para 23):

> The reasons said nothing about the facts. They said nothing about the credibility of the witnesses. And they said nothing about the law on the offence. They repeated stock phrases of what a trial judge is expected to do, but did not show that he had done it. There was nothing in the reasons to tell the accused why the trial judge was convicting him. There was nothing to tell the public why the conviction had been entered. And there was nothing to tell the Court of Appeal whether the trial judge's findings and reasoning were sound. The reasons were clearly inadequate from a functional perspective.

[10] The trial judge's reasons for admitting the accused's statement to police into evidence and his reasons for his findings at trial on each of the charges when considered in light of the evidence, the submissions of counsel and the issues at trial, are wholly inadequate. The reasons do not inform the parties of the basis for the verdict, provide public accountability or permit meaningful appellate review. As such, the trial judge erred in law and a new trial is required.

[11] Moreover, there is a further legal error: it is unclear on what basis the trial judge convicted the accused of sexual interference involving KJF and acquitted him of sexual assault. If the facts underpinning the incidents of sexual touching admitted to by the accused are sufficient to found a conviction for the offence of sexual interference, then those same facts are sufficient to found a conviction for the offence of sexual assault. In *R v Pittiman*, 2006 SCC 9, Charron J explained the test for determining whether a verdict is unreasonable due to inconsistency (at para 10): "Are the verdicts irreconcilable such that no reasonable jury, properly instructed, could possibly have rendered them on the evidence?" In our view, the verdicts regarding these two charges cannot be reconciled and raise questions regarding the reasonableness of the verdict.

[12] In conclusion, we found that the trial judge's reasons in this case constituted an error of law and that the inconsistent verdicts were unreasonable. Both appeals were allowed and a new trial was ordered. In the circumstances, we did not deal with the sentence appeal.

[13] The accused did not seek judicial interim release pursuant to section 679(7.1) of the *Criminal Code* pending his first appearance in the trial court and therefore, he was remanded back to the Provincial Court in custody to set a new trial date.

leMaistre JA

Hamilton JA

MacInnes JA