Citation: R v Buboire, 2024 MBCA 7
Date: 20240117
Docket: AR22-30-09863

# IN THE COURT OF APPEAL OF MANITOBA

*Coram:* Madam Justice Holly C. Beard
Mr. Justice Christopher J. Mainella
Mr. Justice David J. Kroft

***B E T W E E N :***

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| ***HIS MAJESTY THE KING*** | ) | ***M. P. Cook*** |
| | ) | *for the Appellant* |
| *Respondent* | ) | |
| | ) | ***A. Y. Kotler*** *and* |
| *- and -* | ) | ***D. N. Queau-Guzzi*** |
| | ) | *for the Respondent* |
| ***RYAN JUSTIN BUBOIRE*** | ) | |
| | ) | *Appeal heard and* |
| *(Accused) Appellant* | ) | *Decision pronounced:* |
| | ) | ***January 17, 2024*** |

**NOTICE OF RESTRICTION ON PUBLICATION: No one may publish, broadcast or transmit any information that could disclose the identity of the victim(s) or witness(es) (see section 486.4 of the *Criminal Code*).**

**MAINELLA JA** (for the Court):

Introduction

[1] This is a case about intimate partner violence.

[2] After a trial in the Provincial Court, the accused was convicted of six offences: sexual assault; two counts of assault; assault by choking, suffocation or strangulation; uttering threats; and mischief under $5,000. His sentence, after adjustment for totality, is one of seven years' imprisonment—broken down as five and one-half years for sexual assault and 18 months on

the remaining offences, concurrent to one another, but consecutive to the sexual assault sentence.

[3] The accused appealed his convictions and sought leave to appeal his sentence, and, if granted, appealed his sentence. After hearing submissions, we granted leave to appeal sentence, but dismissed the appeals with reasons to follow. These are those reasons.

Background

[4] The accused lived in Winnipeg with the victim and her then nine-year-old daughter from April to October 2020. The domestic relationship was tumultuous; the judge described it as one of "possession and domination."

[5] The victim testified that the accused was highly possessive of her; he controlled her movements and frequently falsely accused her of infidelity. The couple argued constantly. The victim said the accused ignored her sexual autonomy and frequently forced vaginal intercourse on her; often she awoke to the accused penetrating her with his penis. She estimated forced vaginal intercourse to have occurred on 10 to 15 occasions during their relationship. She said she eventually stopped resisting the sexual touching and quietly submitted to "keep the peace" and to shield her daughter from conflict.

[6] After one sexual encounter on June 6, 2020, an argument arose in which the accused assaulted the victim by grabbing her and throwing her onto the kitchen floor, resulting in her injuring her toe. The victim's daughter was in the home and was exposed to the violence.

[7] Matters culminated on October 26, 2020. The victim and her daughter came home to find the accused upset and intoxicated. He called

them “bitches” and began to berate the victim in a jealous and incomprehensible rage. He eventually attacked her with a chair, damaging the microwave. He grabbed her by the hair, dragged her into the living room and tossed her onto a couch. He interrogated her about her social media contacts. During the struggle, he pinned the victim on the floor and suffocated her by covering her nose and mouth with his hands, causing her to gasp for air and eventually blackout. When she woke up, the accused was yelling at her, saying he knew how to hide a body. The couple’s neighbours called the police. When the police arrived, the accused threw the victim on the floor and whispered into her ear that he loved her and that if he caught her cheating, he would “hurt [her] more” if she ever left him. He also threatened that there would be flowers growing off the side of her head in the backyard. Again, the victim’s daughter was in the home and was exposed to the violence.

[8] Three witnesses testified at the trial: the attending police officer, the victim and the accused. The case turned on the credibility of the victim and the accused. The judge referenced and applied the three-step instruction set out in *R v W(D)*, 1991 CanLII 93 (SCC) at 757-58. She rejected the accused’s rosier characterization of the relationship and his denials of the physical and sexual assaults. She considered concerns raised regarding the credibility and reliability of the victim, but accepted her evidence. Ultimately, she was satisfied, based on the evidence she accepted, that all six offences had been proven beyond a reasonable doubt.

Conviction Appeal

[9] The sole ground of the conviction appeal is a claim of uneven scrutiny of the evidence by the judge in assessing the credibility of the accused and the victim.

[10] The Crown properly points out that there is divergence in the jurisprudence from various provincial courts of appeal as to whether uneven scrutiny of the evidence by a trial judge in assessing credibility is a separate and distinct ground of appeal. The issue of the appropriateness of this ground of appeal as an analytical tool to demonstrate error in credibility findings has been identified by the Supreme Court of Canada, but not yet conclusively resolved by it (see *R v GF*, 2021 SCC 20 at paras 100-101; *R v Mehari*, 2020 SCC 40 at para 1).

[11] It is noteworthy that, when this appeal was scheduled, the Court was not asked to sit as a panel of five judges in order to reconsider our jurisprudence on uneven scrutiny. Until such time as this Court is invited, in the appropriate way, to revisit our prior decisions in this area or the Supreme Court decides the question head on, the principle of *stare decisis* requires this Court to follow the prevailing local jurisprudence on a claim of uneven scrutiny of the evidence by a trial judge in assessing credibility (see *R v Neves*, 2005 MBCA 112 at paras 60, 74-93, 192-96).

[12] In *R v Glays*, 2015 MBCA 76 at paras 13-15, this Court accepted that a claim of uneven scrutiny is an independent ground of appeal, but it is a difficult argument to make successfully (see also *R v Abbasi*, 2020 MBCA 119 at para 20; *R v KGK*, 2019 MBCA 9 at para 261; *R v JJGL*, 2017 MBCA 19 at para 19; *R v ERC*, 2016 MBCA 74 at para 22).

[13] In *R v CAM*, 2017 MBCA 70 [*CAM*], this Court discussed the relevant principles on a claim of uneven scrutiny. First, the role of an appellate court when a claim of uneven scrutiny is advanced is not to retry the case; it is only to review for material error (see para 36). Second, the heavy burden on an appellant advancing a claim of uneven scrutiny requires them to

be able to point to something significant in the trial judge's reasons or the record that clearly establishes faulty methodology was employed in the assessment of credibility (see para 34). Third, the mere fact credibility could have been assessed differently on the trial record does not suggest, let alone establish, that uneven scrutiny has occurred; much more is required for an uneven scrutiny argument to succeed (see para 35). Fourth, the fundamental rule for the 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" (at para 37; see also *R v EGC*, 2023 MBCA 74 at para 8; *R v Tamana*, 2022 MBCA 26 at para 6; *R v Markwick*, 2022 MBCA 20 at para 5; *R v TPR*, 2022 MBCA 14 at para 6; *R v Simon*, 2020 MBCA 117 at para 3; *R v Singh*, 2020 MBCA 61 at paras 32-33; *R v Pelletier*, 2019 MBCA 126 at para 8; *R v Jovel*, 2019 MBCA 116 at para 38 [*Jovel*]; *R v Merkl*, 2019 MBCA 15 at para 14; *R v Bourget*, 2019 MBCA 10 at para 4; *R v Volden*, 2018 MBCA 91 at para 7; *R v BGG*, 2018 MBCA 31 at paras 6-7).

[14] The accused's uneven scrutiny argument focuses on the judge's reasons for rejecting his denials and accepting the testimony of the victim—despite her incremental disclosure of the allegations and a lack of corroboration for her allegations.

[15] In his submissions, the accused properly concedes the judge gave "thorough Reasons for [judgment]. She discussed the evidentiary weaknesses in both the [accused] and [the victim's] testimonies." When the judge's reasons are read as a whole, in context, we are satisfied she reasonably addressed and resolved the material disputes at the trial. The accused suggested different factual findings the judge could have reached on the evidence that would have been more favourable to him in the result. However,

that is an invitation to retry the case, which we must decline given the standard of review (see *Jovel* at para 25). As was explained in *Jovel*, for several reasons, "[a]bsent legal error, there is a narrow focus to appellate review of a trial judge's evaluation of testimony" (at para 29).

[16] We see nothing in the judge's reasons or the record that clearly establishes she took an incongruent approach in the assessment of the credibility of the witnesses on a material point. She identified and assessed frailties in the evidence of both the accused and the victim that appear to us to have been reasonably open to her. Given the accused's concerns about a lack of corroboration of the victim's narrative and her incremental disclosure of the allegations, we highlight two areas of her decision.

[17] The lack of corroboration submission focuses on the evidence of the police officer. The accused argues that the police officer did not see any visible injuries on the victim when he arrived at the home on October 26, 2020, spoke to the victim and removed the accused therefrom. More particularly, the accused submits, if the assault occurred in the manner the victim claimed, the police officer would have seen visible injuries on the victim that would corroborate her allegations. He says the failure of the judge to question the veracity of the victim based on the absence of visible injuries on the victim demonstrates she scrutinized the evidence unevenly.

[18] This argument was made at the trial. In her decision, the judge rejected the lack of visible injuries submission of the accused. She said the nature of the violence described by the victim may not have resulted in immediate visible injuries. She also noted the police officer did not examine the victim for injuries as his attention was on removing the accused from the home. Finally, she noted the victim did not realize she had visible injuries on

her body until days after the assault. Some of the injuries were also in places not readily observable, such as her scalp. The judge was satisfied, based on all of these facts, that the mere fact the police officer did not see visible injuries on the victim when he came into the home briefly was not reason to disbelieve the victim's version of events.

[19] We see no reversible error in the judge's approach. Our role is not to reweigh the evidence about the significance of the victim not having visible injuries to her narrative of an assault in the absence of palpable and overriding error which, in our view, has not been demonstrated (see *CAM* at paras 40-44).

[20] The accused also submits the victim's credibility should have been undermined by her incremental disclosure of the sexual and physical violence. He focuses on the fact that, when the police arrived at the home on October 26, 2020 and the police officer asked the victim if she had been assaulted, she was curt with him and was uncertain she had been assaulted. The police officer noted that, when he first dealt with the victim, she was consoling her crying daughter. It was only later, when the victim applied for a protection order (October 27, 2020) and when she was interviewed by police formally (November 13, 2020), that she provided particulars of the alleged physical and sexual violence over the course of her relationship with the accused. Further details of the violence only came to light during the trial.

[21] This issue, as well, was argued at the trial. The judge was not convinced the victim's incremental disclosure of the physical and sexual violence undermined her credibility. She accepted the victim's evidence that she was in shock at the time the police came to the home and her focus was on having the accused removed from the home. She also accepted the victim's

evidence that, due to her suffering from post-traumatic stress disorder and the intimate nature of what had occurred, she provided details of events incrementally.

[22] There is no inviolable rule as to how individuals react to trauma. The impact of incremental disclosure by a witness to their credibility depends on the facts of each case; the fact that a witness does not give an immediate and complete account does not automatically undermine their credibility (see *R v Ramos*, 2020 MBCA 111 at paras 65-68, aff'd 2021 SCC 15).

[23] The victim's incremental disclosure of the physical and sexual violence was a live issue in the trial that was fully litigated by the parties and that the judge addressed in some detail in her decision. Again, we see no reversible error; the judge's credibility assessment of the victim can be reasonably supported on the record.

[24] In summary, we would not accede to the accused's conviction appeal.

Sentence Appeal

[25] The judge was faced with a difficult sentencing decision given that both the accused and the victim are Indigenous, the intimate partner offences were serious and the accused has real rehabilitative prospects.

[26] Given the privileged position of sentencing judges on the front line of the justice system, the law affords them great latitude and discretion to tailor sentences to the offence and the offender. The standard of review on a sentence appeal is generally deferential (see *R v Friesen*, 2020 SCC 9 at paras 26-29 [*Friesen*]). An appeal is "not the opportunity to merely weigh

relevant sentencing factors differently" (*R v St Paul*, 2021 MBCA 31 at para 6). An appellate court is required to defer to the reasonable exercise of discretion by a sentencing judge.

[27] At the time of sentencing, the accused was a 38-year-old, first-time Indigenous offender. He was assessed by Probation Services to pose an average risk for committing another sexual offence and a medium risk to reoffend generally. On this appeal, he argues his seven-year sentence is harsh and excessive. He asks that it be varied to one of five years' imprisonment. His submissions focus on the length of the sexual assault sentence.

[28] The accused submits the judge made the material error of not giving sufficient weight to mitigating factors, such as his lack of prior record, his long history of gainful employment as a forest firefighter, the support of his family and new girlfriend, and several *Gladue* factors (see *R v Gladue*, 1999 CanLII 679 (SCC) [*Gladue*]; section 718.2(e) of the *Criminal Code* [the *Code*]), which he submits reduces his moral culpability. These include a troubled childhood, loss of his mother as a teenager, disconnect with his Indigenous culture, mental health struggles and exposure to substance abuse throughout his life, all of which were fostered by intergenerational trauma arising from colonialism and residential schools.

[29] We are not persuaded the judge ignored or failed to give sufficient weight to the relevant mitigating factors and *Gladue* factors. We note that while a fit sentence for an Indigenous offender must be arrived at by a proper *Gladue* analysis, that *Gladue* analysis does not automatically take priority over other sentencing objectives and principles set out in the *Code*, such as Parliament's direction to sentencing judges to give primary consideration to the objectives of denunciation and deterrence for a serious offence committed

against a vulnerable person—in this case, an Indigenous female—in the context of intimate partner abuse (see ss 718.04, 718.2(a)(i), 718.201 of the *Code*; *R v Wood*, 2022 MBCA 46 at paras 32-49; *R v Bunn*, 2022 MBCA 34 at paras 98-122 [*Bunn*]; *Friesen* at paras 104-105).

[30] In our view, the judge's reasons for sentence were thoughtful and sensitive to the *Code*'s requirement that she impose a proportionate sentence that balanced various competing punitive and restorative objectives in light of the relevant circumstances, including *Gladue* principles.

[31] There is no question the total sentence here is a stern one given the accused's personal circumstances and his real rehabilitative prospects. However, we disagree with the accused that his five-and-one-half-year sentence for sexual assault is disparate to similar sentences imposed on similar offenders committed in similar circumstances, such as in *Bunn*. In *Bunn*, the Court ordered a 28-month sentence for a mature Indigenous offender with a lengthy but dated criminal record for one incident of sexual assault.

[32] What is important here, and distinguishes situations like in *Bunn*, is that, in this case, the sexual assault involved repeated and significant sexual touching; this was not an isolated incident. The duration and frequency of this sexual violence had to be given weight in the accused's sentence by the judge as the conduct heightened his degree of moral blameworthiness (see *Friesen* at paras 131-32). As noted in *Friesen*, because this is a situation where the accused was convicted of a single charge covering multiple instances of sexual violence, it would have been an error in principle for the judge to "analogize the case to single instance cases [like *Bunn*] simply because those cases also involved only a single charge" (at para 132).

[33] Moreover, the context of this repeated sexual violence involved the abuse of an intimate relationship with a vulnerable person that has caused long-lasting harm to the victim, which magnifies the severity of the sexual assault offence (see *Friesen* at para 131). The comments in *R v Bates*, 2000 CanLII 5759 (ONCA), are apt: "Crimes involving abuse in domestic relationships are particularly heinous because they are not isolated events in the life of the victim. Rather, the victim is often subjected not only to continuing abuse, both physical and emotional, but also experiences perpetual fear of the offender" (at para 30; see also *R v AJK*, 2022 ONCA 487 at paras 73-79 [*AJK*]; *R v Wishlow*, 2013 MBCA 34 at para 6).

[34] The serious sexual assault offence was coupled with other violent assaults, including the horrific scenario on October 26, 2020, where the victim was suffocated to the point of being rendered unconscious and the accused mused about killing her, all of which occurred while her daughter was nearby and unattended.

[35] Unfortunately, domestic violence is an all-too-common problem in our society. Such crimes are disproportionally gendered offences that have long-lasting negative individual and systemic consequences. Courts have few tools to address this corrosive threat to social order; however, in clear and egregious cases such as this one, the message to offenders, victims and the public generally must be that such conduct will not be tolerated and the consequences for those who abuse their intimate partners will be significant (see *R v GGS*, 2016 MBCA 109 at paras 41-42 [*GGS*]).

[36] We have not been persuaded the judge made a material error in sentencing the accused, nor is the sentence she imposed one that unreasonably departs from the principle of proportionality given the individual

circumstances of the offences and the accused and the acceptable range for similar offences committed in similar circumstances (see *AJK* at paras 77-79; *R v Houle*, 2016 MBCA 121 at para 11; *GGS* at paras 32-42, 54-55). Accordingly, we see no basis to disturb the accused's sentence.

Disposition

[37] In the result, while leave to appeal sentence was granted, the conviction and sentence appeals were both dismissed.

Mainella JA

Beard JA

Kroft JA