Citation: R v DJSC, 2024 MBCA 21
Date: 20240226
Docket: AR23-30-09883

IN THE COURT OF APPEAL OF MANITOBA

Coram: Madam Justice Karen I. Simonsen
Mr. Justice James G. Edmond
Mr. Justice David J. Kroft

B E T W E E N:

HIS MAJESTY THE KING	)	***M. P. Cook***
	)	*for the Appellant*
Respondent	)	
	)	***C. R. Savage***
- and -	)	*for the Respondent*
	)	
D. J. S. C.	)	*Appeal heard and*
	)	*Decision pronounced:*
(Accused) Appellant	)	***February 26, 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 *Criminal Code*, RSC 1985, c C-46, s 486.4).

SIMONSEN JA (for the Court):

[1] The accused appealed his convictions for making sexually explicit material available to a person under the age of sixteen (*Criminal Code*, RSC 1985, c C-46, s 171.1(1)(b) [the *Code*]), luring a person under the age of sixteen (the *Code*, s 172.1(1)(b)), and indecent exposure (the *Code*, s 173(2)). He also sought leave to appeal and, if granted, appealed his total sentence of four and one-half years' incarceration (less a credit for pre-sentencing custody).

[2] On the conviction appeal, the accused alleged that the verdicts were unreasonable, and he sought to tender fresh evidence in support of that position. On the sentence appeal, he argued that the trial judge erred in principle by not placing reasonable weight on his *Gladue* factors (see *R v Gladue*, 1999 CanLII 679 (SCC) [*Gladue*]). He also asserted that the sentence was demonstrably unfit.

[3] At the hearing, we dismissed the fresh evidence motion and the conviction appeal, and granted leave to appeal sentence but dismissed the sentence appeal with reasons to follow. These are those reasons.

[4] The offences arise from an incident in which the victim, who was the fifteen-year-old niece of the accused's girlfriend (the girlfriend), received messages with sexually explicit images and videos through Facebook Messenger. The issue at trial was whether the Crown had proven beyond a reasonable doubt that it was the accused who sent the messages.

[5] The victim testified that, on April 22, 2021, at approximately 1:00 a.m., she received messages, first from the girlfriend's Facebook Messenger account, and then when the victim blocked her, about ten minutes later, from the accused's Facebook Messenger account. The messages from the accused's account contained sexually explicit images and videos, including a photograph of an erect penis; the messages from his account also commented on, and asked to see, the victim's breasts and requested that she "come over." The victim testified that she knew the photograph of the penis depicted the accused's penis because the male was sitting on a red leather sofa that she recognized from the girlfriend's house, which was about a two-minute walk away from her own residence.

[6] During his testimony, the accused confirmed that the images sent to the victim using his account were screenshots he had previously taken from online pornography sites. He also confirmed that the photograph of the penis was a photograph of his penis he had taken himself. However, he denied sending any of the messages to the victim. He said that his account had been hacked in the fall of 2020, following which he was locked out of it and the girlfriend received messages through his account from people other than him. The accused then created a second Facebook account.

[7] The girlfriend (who was engaged to the accused by the time of the trial) testified, denying sending any messages to the victim at the time of the incident. She also said that she and the accused had their own residences but would sometimes stay at each other's places; he slept over at her residence on April 22, 2021, the day the victim received the sexually explicit messages.

[8] The trial judge rejected the accused's denials and accepted the victim's evidence (received by way of a statement admitted under s 715.1(1) of the *Code* and, during the trial, primarily by cross-examination). The trial judge recognized that the victim could not positively identify the accused as the person sending her the messages. However, he concluded: "It was not plausible that [the accused's] Facebook account was hacked that night and that [the girlfriend's] Facebook account was also hacked and that the person would have known that [the victim] was close by and was at home."

[9] The accused seeks to tender fresh evidence in support of his contention that his account had been hacked at the time the sexually explicit messages were sent. The fresh evidence is an affidavit from the girlfriend stating that, after the accused was sentenced on these charges, she received

messages from his account, which shows that someone other than him had access to it because he was in custody without access to his cellphone. Screenshots of these messages are attached to her affidavit.

[10] The test for admitting fresh evidence on an appeal is the four-step test in *Palmer v R*, 1979 CanLII 8 at 775 (SCC). The Crown argues that the proposed evidence does not meet the last two steps, which require that the evidence be credible in the sense that it is reasonably capable of belief, and that, if believed, it could reasonably be expected to have affected the result at trial (*ibid* at 775).

[11] We are not satisfied that the fresh evidence meets the test for admission. Credibility concerns are raised for a number of reasons. The girlfriend is the accused's fiancée and admitted at trial that she wants him out of jail. There is no evidence from the accused himself denying that he sent the messages referred to in the girlfriend's affidavit. The attached screenshots themselves are of no evidentiary value. Furthermore, the fresh evidence could not reasonably have affected the result. At the trial, the girlfriend gave evidence suggesting that the accused had been the subject of hacking. She said that, in the fall of 2020, she received a phone call in which his name and photograph appeared at the top of her screen but, when she answered, the call turned out to be from other unknown people. She then received messages from those unknown individuals through Facebook Messenger. The girlfriend further testified that, after the accused was arrested, she deactivated his Facebook Messenger account but, thereafter, it was suddenly reactivated in the summer of 2021 by an unknown person. What the girlfriend sets out in the fresh evidence varies only slightly from what she said at trial, which was clearly rejected by the trial judge.

[12] Regarding the accused's assertion that the verdicts were unreasonable, the focus here, for the purpose of the standard of review, is not whether the verdicts the trial judge reached were based on an illogical or irrational reasoning process but, rather, whether they were ones that a properly instructed trier of fact, acting judicially, could reasonably have rendered (see the *Code*, s 686(1)(a)(i); *R v McDonald*, 2020 MBCA 92 at paras 6-7; *R v Sinclair*, 2011 SCC 40 at para 69; *R v Yebes*, 1987 CanLII 17 at para 23 (SCC)).

[13] The trial judge addressed the alleged hacking of the accused's account and concluded, "I find the accused was not credible relating his testimony that his Facebook account had been previously hacked and in particular as to how he reacted to this hacking." The trial judge found the accused's evidence about changing his password following that alleged hacking to be "needlessly complicated." Overall, the trial judge found that the accused's evidence was implausible given the context of communication first from the girlfriend's account and then his account.

[14] A trial judge's credibility assessment can only be interfered with on appeal if it cannot be reasonably supported by the record (see *R v CAM*, 2017 MBCA 70 at para 37). In our view, the trial judge's conclusion that the accused was not credible is well supported in the record and his reasons. Although the accused argues that there were reasonable factual inferences available on the evidence other than those drawn by the trial judge, that is not a basis for appellate intervention. He has not identified any palpable and overriding error in the factual inferences drawn (see *R v Perswain*, 2023 MBCA 33 at para 11). On the basis of those inferences, the trial judge was entitled to conclude that the evidence as a whole excluded all reasonable

alternatives to guilt and that the Crown had proven beyond a reasonable doubt that the accused was guilty of the offences charged. Therefore, his verdicts were not unreasonable.

[15] With respect to the sentence appeal, the standard of review is highly deferential. Appellate intervention is justified only where the sentencing judge committed an error in principle that had an impact on the sentence, or imposed a sentence that was demonstrably unfit (see *R v Friesen*, 2020 SCC 9 at para 26 [*Friesen*]; *R v Lacasse*, 2015 SCC 64 at para 11).

[16] At the sentencing hearing, the Crown sought a five-year sentence for child luring whereas the accused suggested a sentence of three years (as he does on appeal). The trial judge sentenced the accused to four and one-half years for that offence, and accepted counsel's agreement that two-year concurrent sentences be imposed for each of the two other offences.

[17] The Supreme Court of Canada has emphasized the wrongfulness and harmfulness of sexual offences against children, and has made clear that such offences are deserving of significant sanction (see *Friesen*). Considering the direction provided in *Friesen*, this Court has referenced Ontario authorities that identified a sentencing range of three to five years for child luring (see *R v Sinclair*, 2022 MBCA 65 at paras 60, 62; see also *R v MV*, 2023 ONCA 724 at para 87).

[18] As noted earlier, the accused contends that the trial judge erred in principle by unreasonably giving insufficient weight to his *Gladue* factors. We disagree. The trial judge considered the significant *Gladue* factors described in the pre-sentence report. He also, understandably, took into account the accused's serious criminal record with related convictions, which

bears on his risk to reoffend. In 2010, the accused received a four-year sentence for sexually assaulting a sixteen-year-old cousin of his then-girlfriend who was sleeping on a couch. In 2013, he was sentenced to six months' custody in addition to eleven months of pre-sentence custody for a sexual offence against a twenty-one year old. The pre-sentence report indicates that the accused was assessed as a very high risk to reoffend generally and a well above average risk for sexual recidivism. The pre-sentence report also notes twenty-two instances of institutional misconduct.

[19] Furthermore, in order to avoid a "free ride" for the two offences that were the subject of concurrent sentences, the trial judge could impose a more severe sentence for child luring (*R v Wozny*, 2010 MBCA 115 at para 65; see also *ibid* at para 64; *R v SCC*, 2021 MBCA 1 at para 30).

[20] In our view, the accused is simply asking this Court to reweigh the factors taken into account by the trial judge. That is not the role of an appellate court. While we agree with the Crown's acknowledgement that the four and one-half year sentence is high, the trial judge's decision is owed deference. In all of the circumstances, we are not persuaded the sentence was demonstrably unfit.

[21] For these reasons, the conviction appeal was dismissed and leave was granted to appeal sentence, but the sentence appeal was also dismissed.

Simonsen JA

I agree: Edmond JA

I agree: Kroft JA