

**IN THE COURT OF APPEAL OF MANITOBA**

*Coram:* Mr. Justice Marc M. Monnin  
Madam Justice Diana M. Cameron  
Madam Justice Karen I. Simonsen

***BETWEEN:***

<b><i>HER MAJESTY THE QUEEN</i></b>	)	<b><i>A. R. Hodge</i></b>
	)	<i>for the Appellant</i>
	)	
	)	<b><i>S. L. Thomas</i></b>
<i>Respondent</i>	)	<i>for the Respondent</i>
	)	
<i>- and -</i>	)	<i>Appeal heard and</i>
	)	<i>Decision pronounced:</i>
<b><i>J. M. S.</i></b>	)	<b><i>October 30, 2018</i></b>
	)	
	)	<i>Written reasons:</i>
<i>(Accused) Appellant</i>	)	<b><i>November 2, 2018</i></b>

**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*).**

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

[1] The accused appeals his conviction for historical sexual interference on his daughter.

[2] The trial judge convicted the accused on the strength of the complainant’s evidence, and the thrust of his appeal is that her testimony was insufficient to ground the conviction. The accused raises two central issues. He alleges that the trial judge erred by misapplying the law with respect to the evidence of an adult who is testifying about acts occurring in childhood. He also argues that the verdict is unreasonable because the trial judge failed to

properly scrutinize the complainant's evidence and made a finding of fact essential to the verdict that was contradicted by her testimony.

[3] After hearing the appeal, we dismissed it with reasons to follow. These are those reasons.

[4] The complainant, who was 20 years of age at the time of the trial, testified that, when she was seven or eight years old, her parents were separated and she would spend time with her father on weekends. On one occasion when she was at his residence, he kissed her and touched her vaginal area under her clothes. According to the complainant, the accused advised her that, if she told her mother, she would no longer be able to see him. Sometime thereafter, the complainant lived with the accused for approximately three months. During that period, he touched her two or three times in the same manner as the first incident. The complainant's mother also testified for the Crown. There was no defence evidence called.

#### Standard of Review

[5] As stated by this Court in *R v Farrah (D)*, 2011 MBCA 49, the standard of review on whether legal principles were properly applied is correctness (see para 7).

[6] The standard of review applicable to an appeal where unreasonable verdict is alleged was reiterated in *R v WAW*, 2016 MBCA 26 (at para 15):

In *RP [R v RP]*, 2012 SCC 22, Deschamps J concisely described the principles of review applicable when considering the issue of unreasonable verdict in a trial conducted by judge alone (at paras 9-10):

To decide whether a verdict is unreasonable, an appellate court must, as this Court held in *R. v. Yeves*, [1987] 2 S.C.R. 168, and *R. v. Biniaris*, 2000 SCC 15, [2000] 1 S.C.R. 381, at para. 36, determine whether the verdict is one that a properly instructed jury or a judge could reasonably have rendered. The appellate court may also find a verdict unreasonable if the trial judge has drawn an inference or made a finding of fact essential to the verdict that (1) is plainly contradicted by the evidence relied on by the trial judge in support of that inference or finding, or (2) is shown to be incompatible with evidence that has not otherwise been contradicted or rejected by the trial judge (*R. v. Sinclair*, 2011 SCC 40, [2011] 3 S.C.R. 3, at paras. 4, 16 and 19-21; *R. v. Beaudry*, 2007 SCC 5, [2007] 1 S.C.R. 190).

Whereas the question whether a verdict is reasonable is one of law, whether a witness is credible is a question of fact. A court of appeal that reviews a trial court's assessments of credibility in order to determine, for example, whether the verdict is reasonable cannot interfere with those assessments unless it is established that they "cannot be supported on any reasonable view of the evidence" (*R. v. Burke*, [1996] 1 S.C.R. 474, at para. 7).

### Misapplication of Law

[7] The accused accepts that the trial judge outlined the governing jurisprudence applicable to the evidence of an adult testifying about events occurring in childhood when, in addressing the complainant's testimony, he cited from *R v W (R)*, [1992] 2 SCR 122 and noted the decision of this Court in *R v RMK*, 2016 MBCA 63. The trial judge correctly reminded himself that the complainant's evidence should be assessed according to criteria applicable to her as an adult witness, but that evidence regarding events that occurred in childhood, particularly any inconsistencies about peripheral matters such as time and location, should be considered in the context of her age at the time of the events to which she testified.

[8] The accused argues that, despite properly stating the law, the trial judge misapplied it and relied on it as a method to forgive inconsistencies and frailties in the complainant's evidence. Furthermore, he submits that the trial judge erred in treating the evidence of the complainant's mother about peripheral matters as confirmatory.

[9] In his reasons for decision, the trial judge explained why he accepted the complainant's testimony, and he did so without misapplying the governing legal principles. He identified discrepancies argued by defence counsel but nonetheless found her evidence as to the essentials of what she said the accused did to be "quite complete and detailed." He noted that it was "internally consistent, coherent and plausible," and that the complainant testified in a forthright manner. He was entitled to treat as confirmatory the testimony of the complainant's mother about peripheral details where it was consistent with that of the complainant, just as he would have been entitled to consider inconsistencies in the evidence of the mother on such matters.

### Unreasonable Verdict

[10] The accused asserts that the verdict is unreasonable because the trial judge failed to properly scrutinize the complainant's evidence. This issue concerns credibility, findings of fact and inferences drawn by the trial judge. They are entitled to deference absent palpable and overriding error (see *R v Gagnon*, 2006 SCC 17 at para 20).

[11] While the accused argues that there were several discrepancies in the complainant's testimony, many relate to minor details which the trial judge was entitled to discount. We will comment on only some of the more specific concerns raised.

[12] First, the accused contends that the trial judge presumed the complainant to be truthful and shifted the burden of proof when he stated in his reasons for decision, “I am not satisfied that [the complainant] would make up something such as this some 10 years after the events.” Although the words “not satisfied” may suggest the application of an onus on the defence, when read in the context of the entirety of the reasons for decision, they refer to there being no evidence of a motive to fabricate on the part of the complainant. In the immediately preceding sentence, the trial judge dismissed any suggestion that she had a “motive to lie” and explained that she had been candid about her negative lifestyle. A trial judge is entitled to consider lack of a motive to fabricate when assessing a witness’s evidence without it constituting a reversal of the burden of proof (see *R v Storheim (SKW)*, 2015 MBCA 14 at para 38).

[13] The accused also asserts the trial judge failed to properly scrutinize the evidence of the complainant in connection with an inconsistency between her testimony and that of her mother about when the mother first learned of the allegations. However, their evidence may not differ in this area. The complainant testified that she disclosed to a guidance counsellor and that, by the time she told her mother, her mother had already received the information from the guidance counsellor. Although the mother testified that she was shocked when the complainant revealed the allegations to her, she also testified that the guidance counsellor told her about the disclosure and that she had spoken with him about a week and a half to two weeks before the complainant disclosed to her. Even if there is an inconsistency between these two witnesses, the trial judge addressed why he preferred the evidence of the complainant by noting that, over the last several years, the mother had been

struggling with substance abuse problems. He made no palpable and overriding error.

[14] In further support of his position that the verdict is unreasonable, the accused submits that the trial judge erred in failing to draw an inference that the complainant was influenced by her mother to disclose the specific abuse alleged. He says that the evidence of animosity between the mother and the accused, as well as evidence suggesting that the complainant could only have been aware through her mother that the accused's girlfriend was a sex trade worker, should have led to such an inference. In our view, it was open to the trial judge not to draw the suggested inference. The complainant explained how she had personal knowledge of the accused's girlfriend's occupation. Furthermore, the complainant had been subject to her parents' acrimony from a very young age but did not disclose the abuse, other than to a former girlfriend, until she spoke with the guidance counsellor when she was 17 years of age.

[15] Finally, the accused alleges that the verdict is unreasonable because the trial judge made a finding of fact essential to the verdict that is incompatible with evidence not otherwise contradicted or rejected (see *R v Sinclair*, 2011 SCC 40 at paras 19, 21; and *WAW* at para 16). Specifically, the trial judge is said to have engaged in illogical or irrational reasoning when he found that the complainant did not disclose the sexual assaults to her mother because she wanted to continue a relationship with the accused. The accused submits that this finding is unsupportable because it is inconsistent with the complainant's testimony, not rejected, that she no longer wanted a relationship with her father after she moved out of his residence.

[16] The accused contends that the trial judge's finding as to why the complainant did not disclose sooner is central to the verdict because it relates to her credibility. However, the complainant's reasons for delay in disclosure are not essential to the verdict because there is no inviolable rule as to how people who are the victims of a sexual assault will behave (see *R v DD*, 2000 SCC 43 at para 65).

[17] Regardless, the trial judge's finding as to why the complainant did not disclose sooner is not, on a careful review, inconsistent with her evidence. She did testify that, after she ceased living with the accused, she had had enough of residing with him and that her relationship with him was no longer as important to her. However, she also explained that she moved out because she did not want to live in an environment like the one that existed there. She described a situation that involved both sexual assault and drug abuse on his part. In fact, she agreed that, aside from the incidents of sexual assault, she wanted the accused in her life as a father. She also said that, even after moving out of his residence, she chose to continue to visit him "sometimes." All of this suggests that she did not necessarily want to sever the relationship completely.

[18] After review of the entirety of the evidence, the verdict reached by the trial judge is not unreasonable. It is one that a trier of fact, properly instructed, could reasonably have rendered.

[19] For the foregoing reasons, the appeal was dismissed.

Simonsen JA

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Monnin JA

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Cameron JA

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