

IN THE COURT OF APPEAL OF MANITOBA

Coram: Madam Justice Diana M. Cameron
Mr. Justice William J. Burnett
Madam Justice Lori T. Spivak

BETWEEN:

<i>HER MAJESTY THE QUEEN</i>)	<i>J. F. Rogala and</i>
)	<i>M. A. J. Kruse</i>
<i>Respondent</i>)	<i>for the Appellant</i>
)	
<i>- and -</i>)	<i>A. Y. Kotler</i>
)	<i>for the Respondent</i>
<i>K. G. P.</i>)	
)	<i>Appeal heard and</i>
<i>(Accused) Appellant</i>)	<i>Decision pronounced:</i>
)	<i>September 17, 2021</i>

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*).

On appeal from 2020 MBQB 138

SPIVAK JA (for the Court):

[1] The accused appeals his conviction for sexual assault.

[2] The accused had vaginal and anal sex with the victim while she was in a dissociative state. The victim has significant mental health issues, which include a dissociative identity disorder. The accused was aware of her condition and was aware she had been suffering what he termed as a seizure at the time of the sexual encounter.

[3] The trial judge was satisfied that the victim did not consent to the sexual activity and did not have the capacity to consent. She rejected the accused's defence of an honest but mistaken belief in consent, and found that he did not take reasonable steps to ascertain consent and exploited the victim's vulnerability.

[4] The accused appeals on the grounds that the trial judge erred by failing to apply the correct legal test for capacity and consent; misapprehending the expert evidence of the psychiatrist, Dr. William Fleisher (Dr. Fleisher), and the victim; and improperly relying upon evidence adduced by the Crown on an application pursuant to section 276 of the *Criminal Code*.

[5] We are of the view that there is no basis for appellate intervention.

[6] The trial judge applied the correct test for capacity and consent. She recognized that there is no consent if the victim lacks capacity, which requires an operating mind (see *R v GF*, 2021 SCC 20 at paras 55-57). Her conclusion that the victim was incapable of consenting to sexual activity at the time of the alleged assault is without error. It is supported by the evidence, which included the victim's evidence that she did not want to have sex with the accused and was unable to control what was happening; Dr. Fleisher's opinion that the victim was in a dissociative state during the incident, and not fully integrated and properly functioning as a result; and an audio recording of the incident made by the accused that showed the victim obviously mentally unwell.

[7] As for the claim of a misapprehension of the evidence, we are not persuaded that the trial judge made a readily obvious error that goes to the substance of material parts of the evidence or that any such error played an

essential part in the reasoning process leading to the conviction (see *R v Jovel*, 2019 MBCA 116 at para 31). A different interpretation of the evidence does not amount to a misapprehension of the evidence (see *Jovel* at para 34). It was open to the trial judge to find that Dr. Fleisher's evidence supported the victim's testimony, and deference is owed to her assessment of the victim's credibility in the absence of palpable and overriding error (see *R v Whiteway (BDT) et al*, 2015 MBCA 24 at para 61).

[8] Finally, we do not accept that the trial judge improperly relied on the evidence adduced in the Crown's section 276 application; in particular, that the victim had previously advised the accused she did not want to engage in anal intercourse. Any reliance on this evidence related to whether the accused took reasonable steps to ascertain consent and not whether the victim had consented. Moreover, the trial judge stated that the victim's prior refusal was one relatively insignificant factor which informed whether the accused took reasonable steps to ascertain whether the victim was communicating consent.

[9] For these reasons, the appeal is dismissed.

Spivak JA

Cameron JA

Burnett JA
