

IN THE COURT OF APPEAL OF MANITOBA

Coram: Mr. Justice William J. Burnett
Mr. Justice Christopher J. Mainella
Madam Justice Karen I. Simonsen

BETWEEN:

	)	<i>S. A. Inness and</i>
	)	<i>H. S. K. Allardyce</i>
HER MAJESTY THE QUEEN	)	<i>for the Appellant</i>
)	
<i>Respondent</i>	)	<i>M. S. Bright</i>
	)	<i>for the Respondent</i>
<i>- and -</i>)	
	)	<i>Appeal heard and</i>
DEREK ALBERT JOSEPH LARIVIERE	)	<i>Decision pronounced:</i>
	)	<i>September 8, 2021</i>
<i>(Accused) Appellant</i>)	
	)	<i>Written reasons:</i>
	)	<i>September 15, 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*).

Corrected Judgment: A corrigendum was issued on October 1, 2021; the corrections have been made to the text and the corrigendum is appended to this judgment.

MAINELLA JA (for the Court):

Introduction

[1] This appeal turns on the standard as to appellate review of a trial judge’s reasons in relation to findings of credibility. The guiding principles are well-known (see *R v Ramos*, 2020 MBCA 111 at paras 49-55, aff’d 2021 SCC 15; and *R v GF*, 2021 SCC 20 at paras 68-82).

[2] The accused was convicted of sexual assault, making child pornography and extortion after a trial in the Provincial Court. At the conclusion of the hearing, we dismissed his appeal with reasons to follow. We now provide our reasons.

Background

[3] It was alleged that, on May 6, 2017, the accused, then age 29, engaged in fellatio and sexual intercourse with the 16-year-old victim at an apartment when she was incapable of consenting to the activity because she was “grossly impaired.” At one point, the accused stopped the intercourse, said, “Wait, one sec”, and retrieved a mobile phone. He then recommenced the intercourse and ejaculated inside her vagina. He pointed the mobile phone at her vagina and told her, “Don’t move”, as he recorded semen leakage. After the incident, he repeatedly contacted the victim to have sex again. When she declined, he threatened to post the video he took of her on the internet unless she agreed.

[4] The live issue at trial was identity. The victim’s testimony that she was so impaired that she could not have consented to sexual intercourse was not challenged.

[5] There were frailties with the victim identifying the accused due to having only brief contact on two occasions when, in both cases, she was intoxicated to the point of frequently blacking out. Similar identification difficulties related to the victim’s foster sister, who was present on the one other occasion the victim said she was with the accused, but no sex occurred.

[6] This weakness with the case against the accused was offset by social media evidence. According to that evidence, the victim and the accused

contacted one another before and after the alleged sexual assault. Later, the accused attempted to extort the victim through the social networking site, Facebook.

[7] The accused advanced a defence of him being the victim of an imposter. He testified that the Facebook account, which was in his name and contained photos of him, was a fake; an unknown fraudster, posing as him, set up the account and used it to have communications with the victim and her foster sister. He said he first learned of the fake Facebook account from his former girlfriend in July 2016. He said he did not contact Facebook to report the fraud because he believed he could not as he didn't have an account; rather, he said he asked his former girlfriend to report the fraud to Facebook, which he claimed she did. The former girlfriend did not testify.

[8] According to the accused's imposter defence, his impersonator was the one who sexually assaulted and blackmailed the victim. He testified he had never met the victim or her foster sister.

[9] The trial judge "rejected the testimony of the accused about the fictitious nature of the Facebook account" and then went on to convict him, principally on the basis of the victim's evidence, as corroborated by the social media evidence and evidence from her foster sister.

Discussion

[10] In fairness to the trial judge, some of the grounds of appeal relate to issues that were not raised before him. In any event, the only ground of appeal with sufficient merit to warrant comment is the submission that the trial judge improperly drew an adverse inference against the accused because the accused

failed to pursue or call corroborative evidence establishing the Facebook account was indeed fake.

[11] The complaint relates to the following portion of the trial judge's reasons:

...

I recognize that the accused is not required to prove anything, and the burden lies with the Crown at all times. However, where evidence has been called by the accused advancing a specific position, the fact that he failed to pursue potential corroborative evidence through an independent third-party source is a relevant consideration in assessing the credibility of that evidence, in my view.

...

[12] We are content to leave aside, and undecided, the question of whether it was permissible to draw an adverse inference in this case. Based on a functional and contextual reading of the trial judge's reasons (see *GF* at paras 5, 76), we are not persuaded from these ambiguous comments that the trial judge did draw an adverse inference. In our view, he was simply observing that there were holes in the accused's imposter defence relevant to the assessment of credibility (see *R v Menow*, 2013 MBCA 72 at para 51).

[13] As this Court noted in *Interlake Reserves Tribal Council Inc et al v Government of Manitoba*, 2021 MBCA 17, leave to appeal to SCC refused, 39602 (8 July 2021): "Ambiguities in reasons should be resolved by an appellate court in a manner consistent with the judge's presumed knowledge of the law as opposed to one suggesting error" (at para 17).

[14] Our role is not to "finely parse the trial judge's reasons in a search for error", but to consider whether there is an intelligent pathway to the

credibility finding when the reasons are read in context and as a whole, and in light of the live issues and the parties' key arguments (*GF* at para 69; see also *Ramos* at paras 47, 55).

[15] In comprehensive and balanced reasons, the trial judge made clear that, although, according to one of the investigating officers, impersonation of someone else using a Facebook account is possible, he did not accept or have a reasonable doubt that is what occurred in relation to the accused. In our view, that conclusion was reasonably open to him on the record. We see no palpable and overriding error (*ibid* at para 53). We would not accede to this ground of appeal.

[16] We are not persuaded that there is any basis for appellate intervention in relation to the balance of the grounds raised by the accused.

Disposition

[17] In the result, the appeal is dismissed.

Mainella JA

Burnett JA

Simonsen JA



COURT OF APPEAL
PROVINCE OF MANITOBA
WINNIPEG
R3C 0P9

CORRIGENDUM

October 1, 2021

TO WHOM IT MAY CONCERN:

Re: *R v Lariviere*
2021 MBCA 76
Docket No. AR21-30-09566
Released: September 15, 2021

The attached decision replaces the previous decision which was released September 15, 2021. Paras 17 and 18 in the previous decision are to be replaced with the following:

[17] In the result, the appeal is dismissed.