Citation: R v Loonfoot, 2018 MBCA 140 | Date: 20181227
Docket: AR17-30-08956

IN THE COURT OF APPEAL OF MANITOBA

Coram: Mr. Justice Michel A. Monnin
Madam Justice Holly C. Beard
Madam Justice Karen I. Simonsen

BETWEEN:

HER MAJESTY THE QUEEN	)	***J. F. Rogala*** *for the Appellant*
Respondent	)	***N. M. Cutler*** *for the Respondent*
- and -	)	*Appeal heard and Decision pronounced:* ***December 6, 2018***
CODY CHAD LOONFOOT	)	
(Accused) Appellant	)	*Written reasons:* ***December 27, 2018***

SIMONSEN JA (for the Court):

[1] The accused was convicted after a trial by judge alone of dangerous operation of a motor vehicle (section 249(1) of the *Criminal Code* (the *Code*)), flight from peace officer in a motor vehicle (section 249.1(1) of the *Code*), possession of property obtained by crime over $5,000 (motor vehicle) (section 354(1)(a) of the *Code*), failure to comply with a recognizance (section 145(3) of the *Code*) and failure to comply with a probation order (section 733.1(1) of the *Code*). He appeals only the convictions for dangerous operation of a motor vehicle and flight from peace officer.

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

[3] Although the accused argues that the verdicts are unreasonable, the following issues are raised on this appeal:

a) whether the trial judge erred in law by failing to scrutinize the testimony of a youth co-accused (the youth) in accordance with the principles in *Vetrovec v The Queen*, [1982] 1 SCR 811, and further erred in her determination of what constituted confirmatory evidence;

b) whether the trial judge erred in her assessment of the reliability of the testimony of Constable Jason Ulrich and the credibility of the evidence of the youth; and

c) whether the trial judge's reasons for decision are insufficient to support the convictions.

The Trial

[4] The sole issue at trial was identification, namely, whether the Crown had proven beyond a reasonable doubt that the accused was the driver of a stolen Jeep that had been pursued by the police.

[5] Both Cst. Ulrich and the youth, one of the three occupants of the vehicle, testified that the accused was the driver. The defence did not call evidence. Defence counsel took the position that the two charges that are the subject of this appeal were not proven beyond a reasonable doubt, particularly because, on the evidence presented, either the accused or the youth could have been the driver.

[6] In terms of the circumstances of the offences, on January 25, 2017, the Jeep was stolen from outside a Tim Horton's restaurant on Inkster Boulevard and Sheppard Street, in Winnipeg. Constable Ulrich and his partner received a dispatch call about the theft. As they were travelling northbound on McPhillips Street, he saw the Jeep, with three male occupants, travelling southbound. The officers made a U-turn and attempted to conduct a traffic stop. The driver of the Jeep sped up and a high-speed chase ensued eastbound on Manitoba Avenue. The chase ended when the Jeep crashed into a concrete barrier and became immobilized. The occupants fled on foot eastbound on Manitoba Avenue, but were apprehended by the police.

[7] Constable Ulrich testified that he observed the driver to be the tallest occupant of the Jeep. After it crashed, he saw the driver exit first, through the driver's door, wearing a red sweater. The smallest occupant, who was in the rear, exited from the passenger's side and the third occupant exited from the front passenger's door. Constable Ulrich could not say which of these two got out of the vehicle first.

[8] Constable Ulrich further testified that, in chasing the three suspects on foot, he never lost sight of the driver until the driver turned southbound at the intersection of Manitoba Avenue and Artillery Street. At that point, another police unit continued the pursuit and apprehended him. He was identified as the accused. The other two occupants of the vehicle were apprehended outside of 932 Manitoba Avenue, nearer the crash site. The person whom Cst. Ulrich identified as the front passenger was arrested in the front yard. The person he believed to be the rear passenger ran into the back

yard, where he too was arrested. He was identified as the youth and was wearing a red sweater.

[9] The chase was observed by Cst. Noel Matyas, a tactical flight officer in the Winnipeg Police Service Air 1 helicopter, and was recorded on video by the helicopter's camera. The video, which was key evidence, was taken from a height that did not reveal the identity of the occupants. It did, however, show one person some distance in front of the Jeep, another at the front corner of the driver's side and a third exit from the passenger side. All three ran down Manitoba Avenue. The person who was already some distance from the vehicle was ahead of the other two throughout and was chased down Manitoba Avenue onto Artillery Street. The other two were arrested in a yard on Manitoba Avenue.

[10] The youth testified that he was in the rear passenger seat of the Jeep, that the accused was the driver and that the third occupant was in the front passenger seat. When the vehicle crashed, he chose to exit through the driver's door because the back door would not open. On cross-examination, he acknowledged knowing how to unlock the door, but claimed he did not have time to unlock it, so he climbed onto the console between the front seats and exited through the driver's door. According to the youth, the third occupant (who did not testify) exited from the front passenger's side door.

[11] On April 27, 2017, the youth pleaded guilty to joyriding with respect to this incident, along with theft of a motor vehicle arising from a separate incident on the same day as this one.

Lack of or Inadequate *Vetrovec* Warning and Lack of Confirmatory Evidence with Respect to the Evidence of the Youth

Standard of Review

[12] The standard of review applicable to an appeal alleging an error related to a *Vetrovec* warning was summarised in *R v Fatunmbi*, 2014 MBCA 53 (at paras 15-17). The decision of a trial judge about whether to give a *Vetrovec* warning, and the nature and extent of the warning, is discretionary and therefore entitled to deference. A discretionary decision should be interfered with only "if the trial judge misdirects himself or if his decision is so clearly wrong as to amount to an injustice" (*Fatunmbi* at para 15, quoting *R v Regan*, 2002 SCC 12 at para 117). Intervention on appeal will not be warranted unless a cautionary instruction should have been given but was not, or the cautionary instruction that was given failed to serve its intended purpose. That purpose is to warn the fact finder of the danger of relying on the impugned witness's testimony without being comforted, by some other evidence, that the witness is telling the truth about the accused's involvement in the crime.

[13] The standard of review with respect to the evidence that can be considered confirmatory of a *Vetrovec* witness was outlined in *R v Chartrand*, 2014 MBCA 87 (see paras 24-27). Whether evidence is capable of being confirmatory is a question of law for which the standard of review is correctness. Where there is evidence that is legally capable of being confirmatory, an appeal court must give deference to the trial judge's decision to treat the evidence as such and should not interfere unless the trial judge has

misdirected herself or her decision is so clearly wrong as to amount to an injustice.

Analysis

[14] The accused alleges that the trial judge failed to adequately instruct herself as to the need to approach the youth's evidence with caution. In deciding whether a *Vetrovec* warning is needed, or the exact nature and wording of the warning, the trial judge must assess the trustworthiness of the witness and the importance of the witness's evidence to the Crown's case. The more important the evidence, the greater the need to give the caution (see *Vetrovec* at p 822; *R v Richard (DR) et al*, 2013 MBCA 105; and *Fatunmbi*).

[15] Although the trial judge did not specifically mention *Vetrovec* in connection with the testimony of the youth, there is no specific or single formula required for a *Vetrovec* warning (see *R v Khela*, 2009 SCC 4 at para 38). Her reasons for decision reveal that she was aware of the governing principles and the caution to be exercised in considering his evidence. She recognised the importance of his testimony to the Crown's case. She also understood the need to give it careful scrutiny, particularly because he was "aware that there would be more significant penalties if he were the one arrested as the driver." Although she found that this was tempered by the fact that he had already pleaded guilty to joyriding arising from this incident, she appreciated that "potentially there could be motive to lie". She also considered whether there was independent confirmatory evidence.

[16] Individual items of confirmatory evidence need not implicate the accused. Confirmatory evidence only has to provide comfort to the trier of

fact that the witness can be trusted in his assertion that the accused is the person who committed the offence (see *Khela* at paras 39-43).

[17] The trial judge found that the video "to some extent" confirmed that the youth exited the vehicle through the driver's door. The video seems to depict the person second in line at the front driver's side of the vehicle, consistent with the youth exiting from the driver's door. The trial judge also noted that the youth's evidence that the accused was wearing a red sweater upon arrest was confirmed by both Cst. Ulrich and the arresting officer, Cst. John Martin.

[18] This is clearly evidence that was capable of being confirmatory. We are of the view that the trial judge committed no error of law with respect to the confirmatory evidence.

[19] In all of the circumstances, the trial judge's self-instruction was adequate. In our view, she did not err in the exercise of her discretion regarding the instruction. Furthermore, her determination as to what constituted confirmatory evidence is entitled to deference, as she did not misdirect herself as to its use, nor is her decision so clearly wrong as to amount to an injustice.

Reliability and Credibility

Standard of Review

[20] The Supreme Court of Canada has consistently held that great deference must be given to a trial judge's reliability and credibility findings. An appeal court must defer to those findings unless there has been a palpable

and overriding error (see *Housen v Nikolaisen*, 2002 SCC 33 at para 10; *R v Gagnon*, 2006 SCC 17 at para 10; *R v Wright*, 2013 MBCA 109 at para 30; and *R v ERC*, 2016 MBCA 74 at paras 14-15). In this case, the accused challenges the trial judge's findings with respect to the reliability of Cst. Ulrich's testimony and the credibility of the youth's evidence (see *R v Morrissey* (1995), 97 CCC (3d) 193 at 205 (Ont CA)). Both are factual findings and, as a result, both are to be reviewed on the same standard.

Analysis

[21] Significant to the trial judge's reasons for convicting the accused was Cst. Ulrich's testimony that the person he identified as the driver was the first in line as the three occupants ran off, he was the tallest of the three and he was wearing a red sweater.

[22] The accused contends that Cst. Ulrich's evidence was not reliable for a number of reasons, most significantly because: he admitted to considerable limitations in his ability to assess heights (and testified only on cross-examination that he had observed the driver's height when the two vehicles passed on McPhillips Street); the youth was also wearing a red sweater; and the video from the helicopter camera shows two occupants exiting the vehicle on the driver's side.

[23] In our view, the trial judge was alive to the concerns identified by the accused on this appeal when she made her assessment of Cst. Ulrich's testimony. She explained that, although he might have been mistaken as to which side one of the two occupants other than the driver exited the vehicle, that was not sufficient to reject his testimony in its entirety. It is trite to say that she was entitled to accept his evidence in whole or in part (see

R v François, [1994] 2 SCR 827 at 837; and *R v R (D)*, [1996] 2 SCR 291 at para 93). In fact, the video appears to otherwise generally confirm Cst. Ulrich's description of the event, including that the accused was the first to exit the vehicle. The youth confirmed that the accused was the tallest of the occupants. Both Cst. Martin and the youth confirmed that the accused was wearing a red sweater.

[24] Similarly, the trial judge's assessment of the credibility of the youth's testimony is entitled to deference. She clearly addressed and analysed it. Overall, she found that he did not waver, was not evasive and acknowledged what he did not know.

[25] A court of appeal cannot intervene with the credibility assessment of a trial judge until it is established that it "cannot be supported on any reasonable view of the evidence" (*R v RP*, 2012 SCC 22 at para 10; see also *Wright* at para 32). For the reasons outlined, there was no such error in this case.

<u>Sufficiency of Reasons</u>

Standard of Review

[26] The standard of review governing the sufficiency of reasons was stated in *R v Oddleifson (JN)*, 2010 MBCA 44 (at para 30):

> The standard of review with respect to the insufficiency of reasons is the standard of adequacy. Reasons will not be inadequate if, when read in their entire context, they fulfill the threefold purpose of informing the parties of the basis of the verdict, providing public accountability and permitting meaningful appeal (see *R. v. R.E.M.*, 2008 SCC 51, [2008] 3 S.C.R. 3).

See also *Wright* at para 29.

Analysis

[27] The trial judge noted in her reasons that she would not review the evidence in detail because counsel had done so in their submissions—which she had just heard, given that she delivered her decision on the same day as the trial. However, her reasons must be considered in the context of the evidence and the submissions (see *R v REM*, 2008 SCC 51 at para 16). Regardless, they are clear and cogent. She applied the correct legal principles, identified the potential concerns with the evidence of both Cst. Ulrich and the youth, and explained why the Crown had, nonetheless, proven the accused's guilt beyond a reasonable doubt.

Conclusion

[28] There is no basis for appellate intervention on any of the grounds of appeal asserted. In our view, on review of the entirety of the evidence at trial, a trier of fact, properly instructed, could reasonably have come to the guilty verdicts rendered (see *RP*; and *Wright* at para 32).

[29] In the result, the appeal was dismissed.

Simonsen JA

Monnin JA

Beard JA