IN THE COURT OF APPEAL OF MANITOBA

Coram: Mr. Justice Michel A. Monnin
Madam Justice Diana M. Cameron
Madam Justice Jennifer A. Pfuetzner

B E T W E E N :

HER MAJESTY THE QUEEN	)	***D. I. Anber***
	)	*for the Appellant*
	)	
Respondent	)	***S. L. Thomas***
	)	*for the Respondent*
- and -	)	
	)	*Appeal heard and*
	)	*Decision pronounced:*
R. C. R. T.	)	***December 14, 2018***
	)	
	)	*Written reasons:*
(Accused) Appellant	)	***December 21, 2018***

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*).

On appeal from 2016 MBQB 2

CAMERON JA (for the Court):

[1] The accused appeals his convictions for sexual interference (section 151 of the *Criminal Code*) and assault with a weapon (section 267(a)). After hearing submissions from counsel for the accused and the Crown, we dismissed the appeal with reasons to follow. These are those reasons.

[2] The complainant is the accused's biological daughter. He was convicted of committing a serious sexual violation against her that culminated

in him placing his penis in her vagina when she was eight years old. The charge of assault with a weapon involved him tying her wrists with a belt. She was able to fend him off on that occasion. The incidents occurred during a time when the accused was living with his parents and exercising overnight and weekend periods of care and control over the complainant and her sister C. The complainant did not disclose the incidents until she was 13 years old.

[3] The evidence at the trial consisted of the testimony of the complainant, C, the complainant's mother and a friend to whom the complainant disclosed shortly after the incident, M. It also consisted of the expert testimony of Dr. Lindsay, the director of the Child Protection Center at the Winnipeg Health Sciences Center. She conducted an examination of the complainant after the complainant disclosed the abuse.

[4] The accused testified at his trial. He denied that any of the incidents occurred. He also called his parents to testify that they were unaware of any incidents and to confirm that, in their view, the accused and the complainant had a normal father/daughter relationship.

[5] The accused's first ground of appeal is that the trial judge erred in giving insufficient reasons in support of her finding that the accused's evidence could not be believed, nor did it raise a reasonable doubt. In this regard, he relies on the fact that the trial judge stated that, if she were considering the accused's evidence in isolation, she would have no reason to disbelieve him. Further, even if disbelieved, he claims that the trial judge did not explain why his evidence did not raise a reasonable doubt.

[6] In *R v REM*, 2008 SCC 51, the Court explained that appellate courts should consider the reasons of a trial judge in the context of the record as a

whole and determine whether the court is able to discern the foundation of the conviction, including essential findings of credibility and the resolution of critical issues of law. It is only where the substance of the critical issues of the case were not dealt with by the trial judge that a deficiency of reasons can constitute an error of law (see para 57).

[7] We would not accede to this ground of appeal. After commenting on the accused's testimony, the trial judge correctly stated that she was required to consider the evidence of the accused in the context of the evidence as a whole (see *R v Hoohing*, 2007 ONCA 577 at para 15; *R v Menow*, 2013 MBCA 72 at paras 21-23; and *R v OM*, 2014 ONCA 503 at para 45). In this regard, she made many favourable findings concerning the credibility and reliability of the complainant. She further found that the evidence of the complainant was confirmed by other evidence called by the Crown, as well as by evidence of the accused's mother. It is clear that she accepted this evidence to the extent that it led her to disbelieve the accused's denials and find that they did not raise a reasonable doubt.

[8] As to the accused's assertion that the trial judge did not explain why the second stage of the *W(D)* analysis (see *R v W(D)*, [1991] 1 SCR 742), was not met in that the trial judge did not state why she did not find that the evidence, even if disbelieved, did not raise a reasonable doubt, I would simply note that, in *REM*, McLachlin CJC stated that, "the convictions themselves raise a reasonable inference that the accused's denial of the charges failed to raise a reasonable doubt" (at para 66; see also *R v Vuradin*, 2013 SCC 38 at para 27). In this case, the trial judge stated the test in *W(D)*. She later stated that, when she considered the accused's denials in the context of all of the

other evidence, she did not have a doubt that the incidents described by the complainant occurred. In our view, her reasons were sufficient.

[9] Next, the accused argues that the trial judge erred in her application of the principles of *W(D)* by not engaging in a considered and reasoned acceptance of the complainant's evidence in using it to reject the accused's denial.

[10] The manner in which evidence can be considered in the application of the test in *W(D)* is a question of law, reviewable on the correctness standard (see *Menow* at para 20). On the other hand, the credibility findings are entitled to deference subject to review on palpable and overriding error (see *Vuradin* at para 11).

[11] In our view, the accused has not shown any palpable or overriding error in the manner in which the trial judge made her credibility findings. A review of the record shows that each of the arguments that the accused makes in this appeal were made before the trial judge. She carefully considered and weighed the evidence. She either disagreed with the alleged contradictions asserted by the accused or did not find them to be material. Based on the evidence, she refused to make the negative inferences suggested by the accused. The trial judge found evidence confirmatory of that of the complainant. That was her prerogative and her conclusions in that regard are also entitled to deference. In our view, the accused has not shown any error.

[12] We would also reject the accused's assertion that the trial judge misused the evidence of M. There is no question that, at the trial, the accused was arguing recent fabrication and placing significance on the fact that the complainant had failed to disclose to her mother for a number of years. The

trial judge specifically stated that M's evidence refuted any allegation of recent fabrication. It was clearly admissible and credible for that purpose.

[13] Therefore, for the above reasons, the appeal was dismissed.

Cameron JA

Monnin JA

Pfuetzner JA