Citation: R v AAK, 2023 MBCA 8
Date: 20230127
Docket: AR20-30-09406

IN THE COURT OF APPEAL OF MANITOBA

Coram: Madam Justice Jennifer A. Pfuetzner
Madam Justice Karen I. Simonsen
Madam Justice Lori T. Spivak

B E T W E E N :

	)	***S. B. Simmonds K.C.*** *and*
	)	***K. D. Minuk***
HIS MAJESTY THE KING	)	*for the Appellant*
	)	
	)	***R. N. Malaviya*** *and*
Respondent	)	***C. G. Reimer***
	)	*for the Respondent*
	)	
- and -	)	***S. A. Inness***
	)	*on a watching brief*
	)	*for trial counsel*
A. A. K.	)	
	)	*Appeal heard:*
	)	***August 31, 2022***
(Accused) Appellant	)	
	)	*Judgment delivered:*
	)	***January 27, 2023***

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*).

SIMONSEN JA

[1] The accused appeals his convictions for multiple offences committed against his wife (A.A.) and their four children over a period of approximately two years. The trial judge found that the accused had

repeatedly assaulted A.A. and the children, with and without weapons, and forcibly confined and threatened them—and that he had violently raped A.A. The accused also seeks leave to appeal and, if granted, appeals his total sentence of 13 years' imprisonment.

[2] Three grounds of appeal are raised: there was a miscarriage of justice due to the ineffective assistance of counsel who represented the accused at the trial (trial counsel); the trial judge erred in denying the accused's request for an adjournment of the sentencing hearing to allow him to obtain new counsel; and the sentence was harsh and excessive.

[3] In support of both his conviction and sentence appeals, the accused has brought a motion for the admission of fresh evidence, which includes medical records and reports that offer diagnoses for him of unspecified psychotic disorder and delusional disorder.

The Trial

[4] At trial, the Crown led evidence that, for approximately two years starting in August 2016, the accused had engaged in repeated violent behaviour against A.A. and their children. There was also evidence that the accused had begun using illegal substances and had become paranoid in his belief that A.A. was having an affair and that the children were complicit in that. He expressed fears that the children were recording him and hacking his phone, his family and strangers were trying to kill him, and messages were being passed through objects in the home.

[5] The accused did not testify. He did, however, call as witnesses his brother and the brother's wife who, while acknowledging that the accused demonstrated controlling and strange behaviour, testified that they did not see any assaults or injuries.

[6] No expert evidence was led by the Crown or the defence regarding the accused's mental status.

[7] In closing submissions, trial counsel identified inconsistencies in A.A.'s evidence and argued that the children's evidence was problematic in various ways.

[8] The trial judge rejected the testimony of the defence witnesses and found the Crown's evidence to be credible and consistent. He concluded that the accused was guilty of all offences charged except one count each of uttering threats, assault with a weapon and forcible confinement.

The Positions of the Parties

[9] The conviction appeal is based solely on a claim of ineffective assistance of counsel. The accused contends that trial counsel provided ineffective assistance because he did not exercise reasonable professional judgment in dealing with medical evidence and the accused's failure to testify; cross-examining the victims; and allowing the Crown to adduce hearsay and prejudicial and inadmissible evidence.

[10] The thrust of the accused's position is that trial counsel failed to explore and advance a defence of not criminally responsible (NCR) under section 16 of the *Criminal Code* (the *Code*). More specifically, the accused says that trial counsel failed to tender medical evidence regarding his mental

status at the time of the offences that would have supported an NCR defence. As a consequence, the verdicts are unreliable and, thus, a miscarriage of justice has occurred.

[11] Section 16 of the *Code* provides:

> **Defence of mental disorder**
> **16(1)** No person is criminally responsible for an act committed or an omission made while suffering from a mental disorder that rendered the person incapable of appreciating the nature and quality of the act or omission or of knowing that it was wrong.
>
> **Presumption**
> **(2)** Every person is presumed not to suffer from a mental disorder so as to be exempt from criminal responsibility by virtue of subsection (1), until the contrary is proved on the balance of probabilities.
>
> **Burden of proof**
> **(3)** The burden of proof that an accused was suffering from a mental disorder so as to be exempt from criminal responsibility is on the party that raises the issue.

[12] Furthermore, the accused says that trial counsel dissuaded him from testifying to explain his mental illness—or to deny his involvement. The accused maintains that, even if, as the Crown suggests, the defence strategy was to attempt to impeach the Crown's witnesses and create an atmosphere of collusion, he still would have had to testify. In all, he asserts that no bona fide defence was put forward on his behalf.

[13] The Crown acknowledges that the accused has a mental illness, which resulted in paranoid behaviour. However, the Crown takes the position that some of the fresh evidence is not admissible under the rules of evidence and, in any event, none of it should be admitted as it could not reasonably

have affected the outcome of the trial. The Crown says that the claim of ineffective assistance must fail.

[14] With respect to the sentence appeal, the accused argues that the trial judge erred by not allowing an adjournment of the hearing, which would have allowed him to obtain and present medical information about his mental illness that could have been used to attenuate his moral culpability. He further appeals on the basis that, in light of the fresh evidence, the sentence imposed was demonstrably unfit.

[15] The Crown submits that there is no basis for interference with the trial judge's discretionary decision regarding the adjournment, and that the fresh evidence is also not admissible on the sentence appeal because it could not reasonably have affected the outcome. In the Crown's submission, the sentence was fit given the egregious circumstances of the offences and the accused's high degree of moral blameworthiness, as well as the need to protect the accused's family from him.

The Conviction Appeal

Ineffective Assistance of Counsel

[16] The jurisprudence recognizes that there is a strong presumption in favour of competence of counsel (see *R v Rhodes* (*KHC*), 2015 MBCA 100 at para 18).

[17] Briefly, in order to succeed with a claim of ineffective assistance, three components must be established: (1) an appellant must establish a factual foundation for the claim (the factual component); (2) if the factual foundation has been made out, incompetence is assumed and an appellant

must show that the assumed incompetence resulted in a miscarriage of justice (the prejudice component); and (3) an appellant must show that counsel's performance was actually incompetent (the performance component) (see *R v Le* (*TD*), 2011 MBCA 83 at para 189; *R v Owens*, 2018 MBCA 94 at para 49; and *R v Mazhari-Ravesh*, 2022 MBCA 63 at para 26).

[18] There are three routes to a miscarriage of justice due to ineffective assistance provided by a trial lawyer. As stated by this Court in *Mazhari-Ravesh* (at para 21):

> There are three routes to a miscarriage of justice due to ineffective representation by a trial lawyer (although there may be some overlap), being ineffective representation that affected the reliability of the verdict, or that affected the fairness of the trial process (see *Joanisse* [*R v Joanisse* (1995), 102 CCC (3d) 35 (OntCA)] at pp 55-64), or that undermined the fairness of the trial or the appearance of trial fairness (see *R v Mehl*, 2021 BCCA 264 at paras 140-44.) The remedy for a miscarriage of justice is at least a new trial (see *Joanisse* at p 57; and *DGM* at para 4).

[19] I would characterize the accused's focus as being on a claim that the ineffective assistance of trial counsel affected the reliability of the verdicts.

Reliability of the Verdicts

The Trial Record

[20] A review of the record reveals no factual foundation for the accused's allegations of ineffective assistance based on a failure to effectively cross-examine the Crown's witnesses, and allowing the Crown to adduce prejudicial and inadmissible evidence without objection.

[21] While the accused generally says that the cross-examination was inadequate, he has provided no specifics as to how trial counsel should have done more or questioned witnesses differently, except to say that, if the defence was collusion, he should have been more focused on that. In my assessment, trial counsel, confronted with consistent and corroborative evidence of A.A. and the three children who testified, as well as ambiguities in the accused's police statement, faced a challenging task in questioning the Crown's witnesses. During final argument, he attempted to provide the trial judge with details that would result in the rejection of their testimony. In the circumstances, ineffective assistance has not been established on the basis of inadequate cross-examination.

[22] The accused has also provided no specific examples of trial counsel allowing the Crown to adduce prejudicial and inadmissible evidence without objection. This argument can be readily dismissed.

The Fresh Evidence Motion

[23] The accused's other allegations of ineffective assistance hinge on his motion to adduce the fresh evidence, which is comprised of:

(1) the affidavits of the accused and A.A. (now his ex-wife) about him having symptoms of mental illness during the time of the domestic violence;

(2) an arrest report dated May 6, 2018 and a police narrative dated October 16, 2018, related to the accused's arrests on each of those dates, in which police officers mention mental health concerns regarding the accused;

(3) the following medical records and reports (the medical fresh evidence) outlining the accused's mental health issues:

(a) Dr. Robert Kosier's application for involuntary psychiatric assessment dated June 8, 2018 and Dr. Ken Zimmer's discharge summary dated June 29, 2018, in connection with the accused's hospital admission in June 2018;

(b) the reports of Drs. Daniel Globerman and Frank Vattheuer, forensic psychiatrists, who saw the accused while he was in remand custody;

(c) the report of Dr. Jeffrey Waldman, a forensic psychiatrist, who saw the accused while in custody post-conviction and prior to the sentencing; and

(d) the report of Dr. Mansfield Mela, a forensic psychiatrist who assessed the accused at the request of his appellate counsel.

[24] In the accused's affidavit, he also indicates that he advised trial counsel of his significant mental health issues and that he wanted to use, at his trial (and sentencing), information that could be obtained from Drs. Globerman and Vattheuer. The accused swears that he attempted to explain to trial counsel that his actions were "all predicated on delusional paranoid beliefs about [his] family", but trial counsel did not obtain or tender medical evidence regarding his mental status. The accused further swears that trial counsel pressured him not to testify. He says that, as a consequence of his failure to testify, the trial judge was deprived of his evidence as to a potential defence based on his mental illness.

[25] The jurisdiction to admit fresh evidence on appeal is set out in section 683(1) of the *Code*, which makes the evidence admissible if it is "in the interests of justice" to do so. The usual criteria governing the admissibility of fresh evidence under section 683(1) were set out in *Palmer v The Queen*, [1980] 1 SCR 759, being that: (1) the evidence should not generally be admitted if, by due diligence, it could have been adduced at trial, although this is not applied as strictly in a criminal case; (2) the evidence must be relevant in the sense that it bears upon a decisive or potentially decisive issue at trial; (3) the evidence must be credible in that it is reasonably capable of belief; and (4) the evidence must be such that, if believed, it could reasonably, when considered with the other evidence, be expected to have affected the result (see p 775).

[26] Where fresh evidence is sought to be admitted in support of an allegation of ineffective assistance said to have rendered a verdict unreliable, the test in *Palmer* is modified, recognizing, in particular, that a different approach is necessary with respect to the criterion of due diligence.

[27] In *R v Zamrykut*, 2017 MBCA 24, this Court adopted the test set out in *R v Aulakh*, 2012 BCCA 340 for the admission of fresh evidence in support of an allegation that the ineffective assistance of counsel affected the reliability of the verdict. This test requires that: (1) the fresh evidence must be admissible pursuant to the rules of evidence; (2) even if admissible, the fresh evidence will not be admitted if it could not reasonably have affected the result; (3) if this is not apparent and the fresh evidence is relevant and credible, it should be admitted for the limited purpose of determining the issue of ineffective assistance; (4) the court must then determine whether, in light of the fresh evidence, the performance component of the test for ineffective

assistance has been established; and (5) if the performance component is met, the accused must establish the prejudice component. If the final component is met, the fresh evidence is admitted and the appeal allowed. If not, the fresh evidence motion should be dismissed (see *Zamrykut* at para 3; see also *R v Dyck*, 2019 MBCA 81 at para 54; and *Mazhari-Ravesh* at para 28).

[28] Applying the test in *Zamrykut*, I turn to a consideration of the admissibility of the fresh evidence proffered in this case in support of the accused's argument that the ineffective assistance of trial counsel affected the reliability of the verdicts. With respect to the accused's affidavit (as it relates to his medical status), the affidavit of A.A., as well as the arrest report, police narrative and the medical fresh evidence, I have concerns as to relevancy, as required under the first part of the test for admission, because they do not speak directly to matters relevant to conviction. In any event, as I will explain, they fail the second part of the *Zamrykut* test as they could not reasonably have affected the verdicts.

[29] These documents, although detailing issues about the accused's behaviour and mental health, do not support a finding that he was NCR for the offences charged due to mental illness—that is, that he was suffering from a mental disorder that rendered him incapable of appreciating the nature and quality of his actions or knowing that they were wrong (see the *Code at* section 16(1)), and certainly no proof of that on a balance of probabilities (see section 16(2)). Even Dr. Mela, in his report, does no more than opine that the effects of the accused's mental disorder "could have impacted his potential defences to the charges" (emphasis added).

[30] Moreover, an NCR defence was seemingly not viable in that the accused, in his police statement, denied any assault of A.A. or the children.

He also told Dr. Mela, when asked whether his hallucinations and delusions could have caused him to threaten his family or to commit sexual assault and assault, that "there was no way those happened in the first place." While the accused argues that his denials were also the result of his delusions, there is no medical support for that position.

[31] As for the part of the accused's affidavit which states that he made the choice not to testify because he was pressured by trial counsel, the Crown concedes that it should be admitted for the limited purpose of assessing the accused's assertion that trial counsel's representation was ineffective.

[32] In his affidavit, the accused swears that there were a number of discussions between him and trial counsel about whether he should testify and that he signed a written instruction indicating his desire to testify. Attached to the affidavit filed in support of the fresh evidence is an undated, signed instruction that appellate counsel for the accused obtained from trial counsel, in which the accused states his choice to testify despite advice from trial counsel not to do so. The accused says that this instruction was signed less than a week prior to the trial. He further explains that, at the close of the Crown's case, he felt pressured by trial counsel not to testify, so he "changed [his] mind at the last minute" and "agreed not to testify".

[33] The part of the accused's affidavit that deals with his choice not to testify also fails the preliminary assessment of prejudice to be made at the second part of the *Zamrykut* test. He has not shared exactly what his evidence would have been had he taken the stand. In his affidavit, he states that he wanted to testify to "explain [his] state of mind at the time", and speak to "all the paranoid thoughts and beliefs [he] held during the relevant time". However, as I have already outlined, there was evidence before the Court

about the accused's irrational and paranoid behaviour. Nothing in the accused's proposed evidence addresses the specific criteria of an NCR defence. Furthermore, as also noted, any such defence would have been compromised by the fact that the accused maintains that he also wanted to testify in order to deny his involvement in the alleged offences. And, he would have done so in the face of what the trial judge found to be consistent allegations made by A.A. and the children.

[34] Although not necessary given the above analysis, I add this with respect to the fourth (performance) part of the *Zamrykut* test. Clearly, there had been extensive discussions between trial counsel and the accused as to whether he should testify; his decision was not uninformed (see *R v DA*, 2020 ONCA 738 at paras 32-33). The accused has provided no details of the pressure allegedly exerted by trial counsel. Ultimately, it was the accused who made the decision not to testify.

[35] Therefore, I would dismiss the fresh evidence motion as it relates to a challenge to the reliability of the verdicts based on a claim of ineffective assistance.

[36] Considering the conclusions I have reached based on a review of the trial record and given the dismissal of the fresh evidence motion, I would dismiss the accused's claim that the ineffective assistance of trial counsel affected the reliability of the verdicts, resulting in a miscarriage of justice.

Fairness of the Trial Process

[37] The accused also argues that, regardless of the reliability of the verdicts, trial counsel's representation was ineffective because his cumulative

conduct permeated the entire trial so as to render the adjudicative process unfair.

[38] Where fresh evidence is directed at the fairness of the trial process, the *Palmer* criteria are not applicable. Rather, in determining the admissibility of fresh evidence sought to be adduced to challenge the fairness of the trial process, the appellate court must conduct "an examination of the grounds of appeal raised, the material tendered, and the remedy sought" which may include "material extraneous to the trial record" (see *R v Richard* (*DR*) *et al*, 2013 MBCA 105 at para 204). The applicability of this test has been recognized in cases involving allegations of ineffective assistance of counsel said to have rendered the adjudicative process unfair (see *R v Dunbar, Pollard, Leiding and Kravit*, 2003 BCCA 667 at para 36; *R v Yellowhead*, 2015 BCCA 389 at para 27; and *Mazhari-Ravesh* at para 30).

[39] Even admitting the fresh evidence on the basis of the test outlined in *Richard* for the purpose of the accused's challenge to the fairness of the trial process, I would not accede to his argument. Examples, in the jurisprudence, of ineffective assistance of counsel resulting in a miscarriage of justice due to an unfair trial process include counsel being impaired during a trial; counsel being in a conflict of interest; counsel failing to include the accused in a fundamental decision; counsel failing to follow the client's instructions (see *Mazhari-Ravesh* at para 23); or very significant incompetence (see *R v TB*, 2011 ONCA 404; see also *R v Hamzehali*, 2017 BCCA 290). This case is markedly different from those situations. While trial counsel's overall performance could have been better, I am not persuaded that the trial was fundamentally unfair.

[40] For the foregoing reasons, the accused has failed to establish a miscarriage of justice. I would dismiss the conviction appeal.

The Sentence Appeal

The Trial Judge's Refusal to Adjourn the Sentencing

[41] The accused asserts that, after he attempted to discharge trial counsel at the sentencing hearing, the trial judge erred by denying that request and refusing to adjourn the sentencing. The accused's stated reason for the adjournment before the trial judge was that he wanted new representation. He says that the denial of the adjournment prejudiced his ability to marshal evidence about his mental health that would have impacted the sentencing.

[42] I am not convinced that there is a basis for interference with the trial judge's highly discretionary decision to refuse the adjournment. At the time the adjournment was sought, there was no suggestion that the accused wished to obtain additional information or reports. The trial judge recognized the gravity of the offences and the passage of time since the charges were first laid, and his decision not to delay the sentencing is owed deference. Even if the refusal of the adjournment compromised the accused's ability to obtain medical information regarding his mental status, that concern is addressed by the conclusion I have reached regarding the admission of the fresh evidence on the substantive sentence appeal, as set out below.

Fitness of the Sentence

[43] An appellate court can only intervene to vary a sentence if it is demonstrably unfit or the sentencing judge made an error in principle that impacted the sentence (see *R v Friesen*, 2020 SCC 9 at para 26).

[44] The accused appeals on the ground that the sentence was demonstrably unfit. As part of this ground of appeal, he argues that the trial judge erred in the application of the principle of totality by insufficiently reducing the cumulative sentence of 14.5 years to 13 years—but his focus is clearly on the fresh evidence. He says that the fresh evidence supports a conclusion that he was mentally ill at the time of his offending, such that his moral culpability is reduced. The trial judge made no mention of the accused's mental status in his sentencing reasons, on the limited information that had been provided to him about the accused's mental health. Thus, according to the accused, he failed to take it into account, making the sentence imposed unfit.

[45] Although the accused argues that trial counsel should have tendered further evidence of his mental health issues for sentencing, he does not specifically appeal the sentence on the ground of ineffective assistance. He does, as I have previously mentioned, rely on the fresh evidence to support his sentence appeal.

The Sentencing Hearing

[46] At the sentencing hearing, the Crown sought a total sentence of 23 years' imprisonment, reduced to 14 years for totality. Trial counsel did not take significant issue with the Crown's assessment of the sentence for each offence, but suggested that the sentence for the most serious offence, sexual assault, be not six (before totality) but three and one-half to four years—and that all of the other sentences be served concurrently. With that approach and taking into account a credit of 516 days for pre-sentence custody, he submitted that it was possible to impose a sentence of two years less a day going forward, plus three years of supervised probation.

[47] When trial counsel submitted that the pre-sentence report included some comments about the accused's mental health issues, the trial judge stated that it was "unfortunately—not enough". Trial counsel then went on to indicate that he had spoken with Dr. Vattheuer, a forensic psychiatrist who had seen the accused while on remand, and that, although he did not have a formal report and Dr. Vattheuer's comments were "fairly brief", Dr. Vattheuer had indicated that the accused experienced delusions in relation to A.A. but he "wasn't able to provide a time frame for when those started or when they might disappear, only that they [were] all retrospective."

[48] Counsel were in disagreement as to whether the accused's mental health issues should have an impact on the sentence. Trial counsel argued that the accused's delusions, which resulted from mental illness, played a part in his motivation for the offences; in trial counsel's submission, the accused's delusions were "why he does what he does" and were the "underlying cause" of his offending.

[49] The Crown took the position that the accused's mental health issues should not be taken into account, submitting:

> . . .
> . . . [W]e don't have any tie to any mental illness lowering his moral culpability to violence. We don't have that in this case. We don't have any report from any therapist or psychiatrist saying that he had some kind of mental illness that caused him to be violent or even connected to his violence. I don't think there's any way the Court can take that into account.
> . . .

[50] As already noted, the trial judge did not mention the accused's mental illness in determining a fit sentence. Given that counsel had not agreed

on its impact, I cannot assume that the trial judge, in the absence of comment, took it into account.

The Fresh Evidence Motion

[51] The admission of fresh evidence on sentencing is also governed by the well-known test in *Palmer* (see *R v Lévesque*, 2000 SCC 47 at para 16; and *R v Catcheway*, 2019 MBCA 75 at para 14).

[52] Some authorities have accepted that the criterion of due diligence under *Palmer* can be met despite concerns about the conduct of counsel. For example, in *Catcheway*, the accused appealed his three-year sentence for a number of offences, arguing that his disability due to Fetal Alcohol Syndrome Disorder (FASD) reduced his moral culpability and should have shifted the emphasis on sentencing to that of rehabilitation. As it turned out, there were several reports that predated the offence, which contained evidence of FASD that were not presented to the sentencing judge. This was the fresh evidence that the accused sought to have admitted on his sentence appeal. The appeal was not specifically framed as one of ineffective assistance of counsel. Rather, the accused's position was described as being "that the failure to obtain the fresh evidence for the sentencing hearing was an error or oversight by the sentencing lawyer that should not be determinative of the fresh evidence motion" (at para 30). The fresh evidence was admitted under the *Palmer* criteria, despite the lawyer's "apparent lack of due diligence [being a significant] concern" (at para 39), because it was in the interests of justice to do so (see also *R v AB*, 2021 SKCA 119).

[53] Regarding due diligence in this case, trial counsel was in possession of some of the fresh evidence, namely the arrest report, the police narrative

and the hospital discharge summary, all of which raised significant concerns about the accused's mental health. Several of the medical reports that are the subject of the fresh evidence motion relate to assessments conducted prior to the sentencing, which could have been obtained and tendered. As well, it would have been apparent from the evidence of lay witnesses at trial that the accused was abusing methamphetamine and was paranoid. However, no medical evidence was presented at the sentencing hearing in support of the accused's mental disorder.

[54] Given the lack of explanation from trial counsel as to why he did not obtain any reports or more detailed information about the accused's mental status, I have significant concern about a lack of diligence. However, due diligence is only one factor under *Palmer* and, particularly in criminal cases, it should be assessed in the context of the other circumstances. That is, failure to meet the due diligence criterion should not be used to deny the admission of fresh evidence if it is compelling and in the interests of justice to admit it (see *Catcheway* at para 15, citing *Lévesque* at para 15).

[55] I will deal first with the arrest report, the police narrative and the affidavits of A.A. and the accused regarding his mental health difficulties. Assuming that they are relevant and credible, I am not persuaded that, under the fourth criterion in *Palmer*, they could reasonably be expected to have affected the result. A.A. provides further details of the accused's paranoid and erratic behaviour beyond what she testified to at trial—and the accused's affidavit confirms his mental health difficulties at the relevant time. However, the fact that all of these documents provide more detail regarding the accused's mental status and behaviour does not justify admission, given the limited role of appellate courts in sentencing and the importance of finality

(see *Lévesque* at para 34). They are somewhat redundant, and would not likely have affected the result.

[56] The medical fresh evidence, however, is a different matter. As I have stated, it consists of the reports of Drs. Globerman, Vattheuer, Waldman and Mela, as well as Dr. Kosier's application for involuntary psychiatric assessment dated June 8, 2018 and Dr. Zimmer's June 2018 discharge summary. These records and reports describe a history of significant mental disorder. They are relevant to sentencing and the Crown acknowledges their credibility and accuracy.

[57] Dr. Zimmer's discharge summary indicates that, when the accused was admitted to hospital in June 2018 on an involuntary basis for an approximately 20-day stay due to his mental health issues, he was suffering from "[n]on specified psychosis" (this admission occurred shortly after the accused's initial arrest, in May 2018, for some of the charges now before this Court).

[58] The reports of Drs. Globerman and Vattheuer regarding their assessment and treatment of the accused while on remand indicate a diagnosis of unspecified psychotic disorder. Dr. Waldman, who also saw the accused while in custody pre-sentencing, opines that the preferred diagnosis is delusional disorder (paranoid type), as does Dr. Mela, who offers a diagnosis of delusional disorder (mixed type). Despite inconsistencies regarding the timeline, there is some indication in the reports that the accused suffered from the mental disorder before starting to abuse methamphetamine. Since he ceased using that drug, his delusions have diminished, but persisted.

[59] I am of the view that the medical fresh evidence goes well beyond providing further details of the accused's paranoid behaviour than what was available to the trial judge. At the sentencing, the only information from a medical expert was trial counsel's submission about Dr. Vattheuer's advice, which could not tie the mental illness to the timeframe of the offences. The medical fresh evidence establishes that the accused suffered from a significant mental illness at the relevant time. As for the role of the accused's mental illness in his offending, Dr. Mela states:

> . . .
> During that timeline, [the accused] was under the symptoms of auditory hallucinations, persecutory delusions, delusions of reference, and poor awareness about his mental symptoms. He demonstrated impaired judgment and poor decision making in the same time period. . . .
> . . .

[60] In his report, Dr. Mela adds that, although the accused has abstained from the use of methamphetamine, has had adequate treatment with medications, and his erroneous beliefs are currently diminished, "he firmly believed the events at the time." Dr. Mela further states, "It is my opinion that [the accused] experienced symptoms of mental disorder during the commission of the offenses" and that he was "suffering from the effects of mental disorder in the form of a psychotic disorder so much so that it could have . . . reduce[d] his moral culpability."

[61] In my view, this opinion, together with all of the other evidence and what the medical professionals confirm was the subject matter of the accused's delusions, support an inference of a connection between his mental illness and the domestic violence. It must be remembered that his delusions

were that his wife was having an affair and that the children were part of a conspiracy to conceal that from him.

[62] I am satisfied that the medical fresh evidence establishes that the accused's mental illness undermined his capacity to restrain his urges and impulses in how he dealt with his wife and children, and compromised his understanding of the link between the punishment imposed by the court and his crimes (see *R v JMO*, 2017 MBCA 59 at para 73; and *R v JED*, 2018 MBCA 123 at paras 68-76). Thus, the medical fresh evidence establishes that the accused's mental illness played a role in his criminal conduct and, thereby, reduced his moral culpability.

[63] Therefore, had the medical fresh evidence been presented to the trial judge, it could reasonably have affected the sentence, satisfying the fourth criterion in *Palmer*.

[64] For the reasons outlined, the interests of justice call for the medical fresh evidence to be admitted on the sentence appeal. Taking that evidence into account, the sentence imposed was, in my view, demonstrably unfit. Therefore, this Court must determine a fit sentence.

A Fit Sentence

[65] In resentencing the accused, I begin with consideration of the findings and conclusions of the trial judge that are unaffected by the medical fresh evidence (see *R v Johnson*, 2020 MBCA 10 at para 11). The trial judge recognized that the circumstances of these offences are profoundly troubling. The accused is a man who, for over two years, terrorized his family. The seriousness of the offences and the number of victims and offences call for the principles of denunciation and deterrence to be given priority.

[66] The trial judge also appreciated that, although the accused has no criminal record, the pre-sentence report notes numerous instances of institutional misconduct. While the accused suffered childhood trauma and loss in Afghanistan and Iran, the pre-sentence report indicates that he has no insight into his moral culpability, the harm he has caused, or his future risk and need for rehabilitation.

[67] Nonetheless, the medical fresh evidence, namely expert evidence of the accused's mental illness at the time of the offences, attenuates his moral culpability so as to render the sentence imposed unfit. Resentencing the accused, I would conclude that a fit total sentence that reflects his reduced moral culpability due to mental disorder is 10.5 years. The sentence for each offence, using the same approach as the trial judge with respect to concurrent and consecutive sentences and, essentially, his assessment of the length of sentence for each offence in relation to the others (before totality), is set out below. Like the trial judge, I would reduce the total sentence by one and one-half years on account of the application of the principle of totality; the allocation to each offence is noted.

[68] Therefore, the total sentence is nine years.

Offences	Sentence	Sentence after totality
Assaults against the four children Counts 2-5	8.5 months consecutive on each count = 34 months	7.5 months consecutive on each count = 30 months
Assault against A.A. Count 1	17.5 months consecutive to Count 5	15.5 months consecutive to Count 5

Assault cause bodily harm against A.A. Count 16	13 months consecutive to Count 1	11 months consecutive to Count 1
Assault with weapon against A.A. Count 12	13 months concurrent to Count 6	
Assault with weapon against the child Di.K. Count 14	13 months concurrent to Count 12	
Assault with weapon against the child M.K. Count 15	13 months concurrent to Count 14	
Sexual assault against A.A. Count 6	26 months consecutive to Count 15	22 months consecutive to Count 15
Uttering threats against A.A. and three of the children Counts 7-10	8.5 months concurrent to one another, consecutive to Count 6	6.5 months concurrent to one another, consecutive to Count 6
Unlawful confinement of A.A. and three of the children Counts 17-20	17.5 months concurrent to one another, consecutive to Count 10	15.5 months concurrent to one another, consecutive to Count 10
Six breaches of recognizance	9.5 months concurrent to one another, consecutive to the other sentences	7.5 months concurrent to one another, consecutive to the other sentences
Total sentence:	126 months or 10.5 years	108 months or 9 years

Conclusion

[69] For the foregoing reasons, I would dismiss the fresh evidence motion on the conviction appeal, as well as the conviction appeal. On the sentence appeal, I would admit only the medical fresh evidence. I would allow the sentence appeal and vary the total sentence for the above offences

from 13 to nine years (before a credit for pre-sentence custody as determined in the original sentence), with the sentence for each offence as noted above. The ancillary orders remain.

Simonsen JA

I agree: Pfuetzner JA

I agree: Spivak JA