Citation: R v Chief, 2025 MBCA 56
Date: 20250606
Docket: AR25-30-10167

IN THE COURT OF APPEAL OF MANITOBA

Coram: Chief Justice Marianne Rivoalen
Madam Justice Janice L. leMaistre
Mr. Justice James G. Edmond

***B E T W E E N**:*

	)	***Z. B. Kinahan** and*
	)	***K. Fonseca***
HIS MAJESTY THE KING	)	*for the Appellant*
	)	
Respondent	)	***R. Lagimodière***
	)	*for the Respondent*
- and -	)	
	)	*Appeal heard and*
WESLEY JOSEPH CHIEF	)	*Decision pronounced:*
	)	***June 3, 2025***
(Accused) Appellant	)	
	)	*Written reasons:*
	)	***June 6, 2025***

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On appeal from *R v Chief*, 2025 MBPC 1 [*sentencing decision*]

LEMAISTRE JA (for the Court):

Introduction

[1] The accused appealed his conviction for sexual assault (see *Criminal Code*, RSC 1985, c C-46, s 271 [the *Code*]) and sought leave to appeal and, if granted, appealed his sentence of seven years' incarceration.

[2] On the conviction appeal, the accused argued that the verdict was unreasonable because it was based on unreliable identification evidence. He also argued that the trial judge misapprehended the evidence, leading to a miscarriage of justice.

[3] On the sentence appeal, the accused argued that the trial judge erred in his application of the principle of parity, resulting in a demonstrably unfit sentence.

[4] After hearing the appeal, we dismissed the conviction appeal and denied leave to appeal the sentence with reasons to follow. These are those reasons.

Background

[5] At the accused's trial[1], the victim testified about the events of July 9, 2021. She said that evening she left a house party with the female co-accused. While they were walking down the road, the accused picked them up and, after giving the victim drugs, drove them to a house (the house) belonging to his friend.

[6] Inside the house, the accused and the co-accused attacked the victim. They pushed her onto a bed in a dark bedroom and pinned her down. The co-accused held the victim's legs while the accused sexually assaulted her by biting and digitally penetrating her vagina, scratching the inside of her vagina and penetrating her vagina with his penis. After the accused ejaculated inside of the victim, he gave her a shirt and told her to "wipe whatever was there."

[1] The co-accused pleaded guilty to being a party to the sexual assault.

The accused did not wear a condom during the sexual assault. Before dropping the victim off near where he picked her up, the accused warned her not to tell anyone about the attack.

[7] As a result of the sexual assault, the victim suffered scratches and bruises to her vagina and legs, as well as pain and swelling of her inner thighs. In the days after the attack, the victim was emotionally distraught. Five days later, while still traumatized and contemplating suicide, the victim disclosed the sexual assault to her family who contacted the police.

[8] When the victim spoke with the police, she identified her attackers by name.

[9] On July 14, 2021, the police arrested the accused. At the time of his arrest, he provided a statement denying his involvement in the sexual assault.

[10] At the trial, there was no dispute that the victim had been sexually assaulted. The only issue was the identity of the male attacker. The victim testified that for a period of time during the COVID-19 pandemic, the First Nation community where she resided was locked down. She said that for three months during the lockdown, she worked at "checkstops" taking names and licence plate numbers in order to track who was coming into the community. She said that this was before July 9, 2021 and that this was how she came to recognize the accused, although she said that she never knew him personally.

The Conviction Appeal

[11] Having reviewed the trial record, we see no basis for appellate intervention regarding the conviction.

The Identification Evidence

[12] First, we are not convinced that the trial judge failed to properly scrutinize the identification evidence, including by failing to consider all relevant factors.

[13] The trial judge demonstrated a clear understanding of the dangers and frailties of eyewitness identification evidence, as well as the distinction between recognition and identification evidence (see *R v Stevenson*, 2024 SKCA 40 at para 62, aff'd 2024 SCC 41). He was aware of the importance of the assessment of the reliability of the victim's identification of the accused as her attacker (see *ibid* at para 63).

[14] The trial judge carefully considered the victim's testimony regarding the extent of her prior contact with the accused and her opportunity for observation when she got into the accused's vehicle and throughout the events that followed.

[15] The trial judge recognized there were "contradictions and impossibilities" in the victim's testimony. However, he considered them in the context of the victim's personal circumstances, which included a prior brain injury and trauma resulting from the sexual assault and found that they "largely" related to "peripheral matters". He also grappled with the evidence regarding the victim's visual and auditory limitations and that she was not wearing glasses or her hearing aid, as well as her evidence that she was affected by the drug given to her by the accused.

[16] Moreover, the victim's testimony that she recognized the accused as her attacker because she became acquainted with him while she was working at the checkstops was unchallenged.

[17] In our view, the trial judge's factual determination that the victim's recognition evidence was reliable is entitled to deference.

[18] We are not persuaded that the trial judge's reasoning leading to the verdict was flawed. He was aware of and applied the correct legal principles and made no palpable and overriding error in his assessment of the identification evidence and findings of fact. We are satisfied that the verdict is one that a judge could reasonably have rendered (see *R v RP*, 2012 SCC 22 at paras 9-10).

The Alleged Misapprehensions of Evidence

[19] Second, we are not persuaded that the trial judge misapprehended the accused's testimony in a manner that was material or that played an essential part in his reasoning process (see *R v Asante*, 2024 MBCA 101 at para 16).

[20] As stated in *R v Jovel*, 2019 MBCA 116 at para 35:

> [A]n appellate court cannot characterise a trial judge's interpretation of evidence as a misapprehension simply because it does not agree with it, it raises some unease or concern, or it may be a mistake (see *R v CJ*, 2019 SCC 8, adopting 2018 MBCA 65 at paras 67-68; and *Sinclair* at para 53). This is particularly the case when the interpretation of evidence is based on a credibility assessment, because assessing credibility is not a science and, given the many factors that go into such decisions, it is not always amenable to precise articulation by a trial judge (see *Gagnon* at para 20; and *R v REM*, 2008 SCC 51 at para 49).

[21] The accused argues that the trial judge misapprehended his evidence that he was not at the house in July and about who he was with on the evening of July 9, 2021. He also argues that the trial judge failed to give proper effect to his evidence about it being too hot to go out that day, even though he admitted going to the garden and the lake. Finally, the accused argues that the trial judge erred by relying on information about when the checkstops occurred that was not before him.

[22] We agree that the accused admitted he was at the house cutting the grass in the weeks leading up to July 9, 2021. However, this was but one of a number of reasons the trial judge gave for his negative credibility assessment of the accused and the accused did deny being at the house on the day of the offence.

[23] We are also of the view that the trial judge was entitled to find, on the evidence, that the accused's testimony contradicted his police statement about it being too hot to go out and who he was with on July 9, 2021. It is not our role to interpret the evidence differently (see *R v Pelletier*, 2019 MBCA 126 at para 7).

[24] In our view, the basis for the trial judge's findings regarding the accused's credibility are amply supported by the record.

[25] Finally, the victim's evidence that she worked at the checkstops before July 9, 2021 was not challenged and it was open to the trial judge to accept that evidence.

The Sentence Appeal

[26] The accused's sole argument on the sentence appeal is that the trial judge erred in principle in his application of the principle of parity and that this error resulted in a demonstrably unfit sentence. He relies on the twenty-month sentence imposed on the co-accused and says that the disparity between the two sentences for offenders involved in a common venture is not justifiable.

[27] To obtain leave to appeal the sentence, the accused must demonstrate an arguable case, bearing in mind the highly deferential standard of review that an appellate court must afford to a sentencing judge (see *R v Catcheway*, 2017 MBCA 87 at paras 2-3; *R v Amin*, 2010 MBCA 15 at paras 9-10; see also *R v Friesen*, 2020 SCC 9 at para 26).

[28] We are not persuaded that the accused's argument on the sentence appeal has some realistic chance of success.

[29] The trial judge properly considered the differences between the accused and co-accused and their respective involvement in the offence. In particular, he noted that, in the case of the co-accused, "her moral blameworthiness was significantly diminished because her offending was motivated out of her fear of [the accused]" (*sentencing decision* at para 21). The trial judge also noted that the co-accused's "diminished culpability reflected that she was not the principal assailant and that after the incident she immediately experienced a mental health crisis resulting in her hospitalization, that she was addicted to and under the influence of cocaine and alcohol at the time of her offending" (*ibid*).

[30] The trial judge found that the offence was serious, the accused's degree of responsibility was high and the victim impact was significant.

[31] Moreover, the seven-year sentence is in keeping with this Court's direction in *R v Bunn*, 2022 MBCA 34, that "[s]entencing judges must feel free to . . . impose sentences that reflect society's and the courts' deepened understanding of the harm caused . . . by increasing sentences where appropriate" (at para 122).

[32] The application for leave to appeal the sentence was denied.

Conclusion

[33] In the result, the conviction appeal was dismissed and leave to appeal the sentence was denied.

leMaistre JA

Rivoalen CJM

Edmond JA