Citation: R v CPR, 2024 MBCA 22
Date: 20240227
Docket: AR22-30-09787

IN THE COURT OF APPEAL OF MANITOBA

Coram: Madam Justice Diana M. Cameron
Madam Justice Karen I. Simonsen
Madam Justice Anne M. E. Turner

B E T W E E N :

	)	***C. L Antila*** *and*
HIS MAJESTY THE KING	)	***C. A. D. Olson***
	)	*for the Appellant*
Respondent	)	
	)	***A. Y. Kotler*** *and*
- and -	)	***D. N. Queau-Guzzi***
	)	*for the Respondent*
C. P. R.	)	
	)	*Appeal heard and*
(Accused) Appellant	)	*Decision pronounced:*
	)	***February 27, 2024***

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 the *Criminal Code*, RSC 1985, c C-46, s 486.4).

On appeal from: 2021 MBQB 108 [the conviction decision];
2022 MBQB 71 [the sentence decision]

TURNER JA (for the Court):

[1] After a judge-alone trial, the fifty-six-year-old accused was convicted of several offences related to multiple occasions during which he had sexual intercourse with T.S., a young person in the care of Child and Family Services (CFS). (T.S.'s pronouns are they/them.)

[2] The accused appealed his conviction for sexual interference, asserting that the verdict was unreasonable because the trial judge erred in concluding that the Crown had proven, beyond a reasonable doubt, that he failed to take all reasonable steps to ascertain T.S.'s age as required by s 150.1(4) of the *Criminal Code*, RSC 1985, c C-46 [the *Code*].

[3] The accused did not appeal the ten-year custodial sentence imposed; however, he sought leave to appeal, and if granted, appealed the ancillary order, made pursuant to s 161(1)(a) of the *Code*, that he not attend any public park or public swimming area where persons under the age of sixteen years are present or can reasonably be expected to be present, or a daycare centre, schoolground, playground or community centre.

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

Facts

[5] When T.S. was fifteen years old, they posted an advertisement for sexual services on an adult escort service website. The advertisement indicated that they were twenty years old. The accused saw the advertisement and contacted T.S. through the website. He testified that in his message, he would have asked T.S. to confirm that they were twenty years old, and that T.S. "would have said yes."

[6] The accused further testified that, when he took T.S. to his apartment, he asked them whether they were twenty years old as advertised. He stated that they "would have said yes."

[7] At the accused's apartment, and thereafter on several occasions, the accused and T.S. had sexual intercourse in exchange for money.

[8] During a later encounter, the accused took T.S. to a restaurant for dinner and T.S.'s foster father called the police. Consequently, police attended the restaurant. They told the accused that T.S. was fifteen years old, in the care of CFS, at high risk for sexual exploitation and that he should stay away from them. The accused was allowed to leave and the officers took T.S. home.

[9] After this, the accused testified that he and T.S. stopped having sexual intercourse but continued to communicate in phone calls, text messages and in person. The accused continued to give T.S. money and gifts.

[10] When T.S. turned sixteen years old, the accused and T.S. resumed having sexual intercourse in exchange for money. Three months later, T.S. went to police and provided a video statement. The accused was subsequently arrested.

Analysis

Was the Verdict Unreasonable?

[11] The accused has framed the issue on the conviction appeal as one of unreasonable verdict. The focus of the standard of review in this case is not whether the verdict the trial judge reached was based on an illogical or irrational reasoning process but, rather, whether it was one that a properly instructed trier of fact, acting judicially, could reasonably have rendered (see the *Code*, s 686(1)(a)(i); *R v McDonald*, 2020 MBCA 92 at paras 6-7; *R v Sinclair*, 2011 SCC 40 at para 69; *R v Yebes*, 1987 CanLII 17 at paras 23-25 (SCC)).

[12] Some of the accused's submissions regarding unreasonable verdict rest on alleged errors in the trial judge's assessment of the evidence. A trial judge's assessment of evidence is afforded significant deference and can only be set aside if it is unreasonable. Credibility assessments and factual findings are reviewed on a standard of palpable and overriding error (see *Housen v Nikolaisen*, 2002 SCC 33 at paras 24-25).

[13] The trial judge found that the accused demonstrated an air of reality that he honestly believed T.S. was at least sixteen years old. Therefore, to convict the accused, the Crown was required to prove beyond a reasonable doubt either that the accused did not honestly believe T.S. was at least sixteen years old (the subjective element), or that the accused did not take "all reasonable steps" to ascertain T.S.'s age (the objective element) (the conviction decision at para 26; see also *R v George*, 2017 SCC 38 at para 8 [*George*]).

[14] In *George*, the Supreme Court of Canada addressed the contextual aspect of the objective element (at para 9):

> Determining what raises a reasonable doubt in respect of the objective element is a highly contextual, fact-specific exercise . . .. In some cases, it may be reasonable to ask a partner's age. It would be an error, however, to insist that a reasonable person would ask a partner's age in every case . . .. Conversely, it would be an error to assert that a reasonable person would do no more than ask a partner's age in every case, given the commonly recognized motivation for young people to misrepresent their age . . .. Such narrow approaches would contradict the open-ended language of the reasonable steps provision. That said, at least one general rule may be recognized: the more reasonable an accused's perception of the complainant's age, the fewer steps reasonably required of them. This follows inevitably from the phrasing of the provision ("all *reasonable* steps") and reflects the jurisprudence . . .. [citations omitted]
>
> [emphasis in original]

[15] The accused says that the trial judge made a palpable and overriding error in rejecting his evidence that he asked T.S. about their age. This is clearly a credibility issue. The trial judge heard the accused testify and did not believe him. In particular, the trial judge noted that the accused provided a direct and unequivocal answer to the police that he learned T.S.'s age from the advertisement, and not by asking T.S. themself. In contrast, the accused's testimony that he "would have" asked T.S. to confirm their age in their initial website messages and when they first met in person was found to be equivocal and "vague and speculative at best" (the conviction decision at para 29-30).

[16] Appellate courts have repeatedly said that a trial judge is in the best position to determine matters of fact, especially when a case turns on credibility (see *R v REM*, 2008 SCC 51 at para 54; *R v Dinardo*, 2008 SCC 24 at paras 31-32). In *R v Rocha*, 2009 MBCA 26, this Court stated that "[r]arely will deficiencies in a trial judge's credibility analysis warrant appellate intervention" (at para 35).

[17] It was open to the trial judge to disbelieve the accused on whether he asked T.S. to confirm their age. The accused has not demonstrated any palpable and overriding error in this regard.

[18] Beyond making the alleged inquiries, the accused submits that he took additional steps to ascertain T.S.'s age and that the trial judge erred by not concluding that those steps were reasonable. He points to the fact that T.S.'s advertisement was posted on an adults-only website and their age was listed as twenty years old. The accused also relies on his testimony that he observed that T.S. had a tattoo on their left hip and thought that someone had to be eighteen years old to get a tattoo, he thought that their manner of speech

was very articulate, they wore nice clothes, their makeup was done and their hair was tied back well.

[19] The trial judge specifically referred to all those facts in his decision. He concluded that, even if he had accepted the accused's evidence that the accused asked T.S. about their age, taking into account the other facts, it would not have been enough to constitute "all reasonable steps" (the conviction decision at para 35). He found that there were "red flags" (*ibid* at para 36) that would have led a reasonable person to take further steps to confirm T.S.'s age. First, the trial judge stated that the thirty-six-year age gap[1] between the accused and T.S. created a greater onus on the accused to make inquiries. Second, the photos and videos of T.S. tendered at trial showed that they had a diminutive appearance, and their extreme youth was apparent. Finally, the evidence of T.S.'s extremely youthful appearance was supported by the testimony of the witnesses from the restaurant, who described T.S. as appearing to be thirteen to fifteen years old.

[20] We see no reviewable error in the trial judge's conclusion that "the red flags were overwhelming and [the accused] was obliged to make further inquiries to confirm [T.S's] age" (the conviction decision at para 41). The verdict was one that a properly instructed trier of fact could reasonably have rendered.

Was the Section 161(1)(a) Prohibition Harsh and Excessive?

[21] As noted earlier, the accused seeks leave to appeal and, if granted, appeals the order made pursuant to s 161(1)(a) of the *Code*, that he not attend

[1] The age gap would have been thirty-six years if T.S. was actually twenty years old at the time. Given that T.S. was fifteen years old, the real age gap was forty-one years.

any public park or public swimming area where persons under the age of sixteen years are present or can reasonably be expected to be present, or a daycare centre, schoolground, playground or community centre, for a period of ten years. The accused says that the order was made without evidentiary foundation and that it places unreasonable restrictions on his liberty. He notes the pre-sentence report, which indicated that he was assessed as a low risk to reoffend generally and a very low risk for sexual recidivism.

[22] The standard of review on a sentence appeal is highly deferential. An appellate court may only intervene if the sentencing judge made an error in principle that had an impact on the sentence or the sentence is demonstrably unfit (see *R v Friesen*, 2020 SCC 9 at para 26). This standard applies to s 161 orders (see *R v RKA*, 2006 ABCA 82 at para 4 [*RKA*]).

[23] The purpose of s 161 prohibition orders is to protect children from sexual violence. Such orders are discretionary. The section provides flexibility to sentencing judges so that the conditions can be tailored to the circumstances of a particular offender and offence (see *R v KRJ*, 2016 SCC 31 at paras 45-47 [*KRJ*]).

[24] The imposition of an order under s 161 does not require an offender to have committed the offence in the circumstances contemplated by the order (*R v JB*, 2022 ONCA 214 at para 56 [*JB*]). Nor does an assessment finding that an offender is a low risk to reoffend preclude a sentencing judge from exercising their discretion and imposing a s 161 order because "risk assessments are not given to exact measurement" (*R v Miller*, 2017 NLCA 22 at para 20). However, there must be "an evidentiary basis upon which to conclude that the particular offender poses a serious risk to young children

and be satisfied that the terms of the order are a reasonable attempt to minimize it" (*JB* at para 56; see also *KRJ* at para 48).

[25] In *RKA*, the Alberta Court of Appeal set out the factors to be considered in determining whether a s 161 order should be made and crafting its terms (at para 21):

> Many of the factors which indicate incarceration as a sentence are also factors favouring a s. 161 order, such as the nature of the offence, the circumstances in which it was committed, prior related record and risk of re-offending. They similarly inform its terms. The age and vulnerability of the victim(s), and the specifics of the offence, in particular, its severity, its duration, the number of victims and its impact on the victim(s) are all relevant to the inquiry . . .. Where any of those factors are more extreme, onerous, lengthy restrictions are imposed . . .. [citations omitted]

[26] When the trial judge's sentencing reasons are read as a whole, we are satisfied that he addressed these factors. Despite the accused not having a prior criminal record and being assessed as a low risk to reoffend, he engaged in persistent predatory behaviour that began in the public domain of the internet and, to some extent, continued in public places. The trial judge noted the "duration and frequency of the violence" (the sentence decision at para 31). He also found the persistent nature of the exploitative relationship and its impact on T.S. to be an aggravating factor when he stated (*ibid* at para 28):

> In my view, [the accused's] conduct in nurturing the relationship and then resuming sex with T.S. when they turned 16 years-of-age, after being unequivocally advised as to their vulnerability, is extremely aggravating. The risks of fostering this dependence were on full display when, on more than one occasion, T.S. threatened self-harm when the accused was not immediately available to them.

[27] Also of relevance is that, when the accused was convicted of sexual interference, sexual assault and sexual exploitation, he was also convicted of possessing child pornography and making child pornography. He was found to have a collection of pornographic images and videos of himself and T.S. on his cellphone, including videos he took of them engaging in sexual acts.

[28] Ultimately, the imposition of the order under s 161(1)(a) was a discretionary decision that is entitled to substantial deference on appeal. The sentencing judge did not make a material error in principle and we are not persuaded that the order was demonstrably unfit.

[29] For the foregoing reasons, we dismissed the conviction appeal, granted leave to appeal the sentence, but also dismissed the sentence appeal.

Turner JA

Cameron JA

Simonsen JA