

IN THE COURT OF APPEAL OF MANITOBA

Coram: Chief Justice Richard J. Chartier
Madam Justice Holly C. Beard
Mr. Justice Christopher J. Mainella

BETWEEN:

<i>HER MAJESTY THE QUEEN</i>)	<i>J. M. Mann and</i>
)	<i>M. E. Carlson</i>
)	<i>for the Appellant</i>
)	
<i>- and -</i>)	<i>S. A. Inness</i>
)	<i>for the Respondent</i>
<i>D. A. B.</i>)	
)	<i>Appeal heard and</i>
<i>(Accused) Respondent</i>)	<i>Decision pronounced:</i>
)	<i>May 6, 2022</i>

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 2021 MBQB 185

CHARTIER CJM (for the Court):

[1] The accused was acquitted of sexual assault causing bodily harm and choking to overcome resistance. The Crown appeals, arguing that the judge erred in law when she:

- (1) admitted evidence of other sexual activity pursuant to section 276 of the *Criminal Code* (the *Code*);
- (2) misapprehended the evidence; and

(3) assessed the evidence based on myths and stereotypes.

[2] At the beginning of the hearing, counsel for the accused applied to withdraw as counsel for the accused because she was of the view that continuing to act for him put her in violation of her professional responsibilities. We denied her request to withdraw. In our view, the breakdown in the relationship and communication arose because of non-payment of legal fees and allowing counsel to withdraw at this late point in the appeal proceedings would harm the administration of justice (see *R v Cunningham*, 2010 SCC 10 at paras 48-50).

[3] We did not call on counsel for the accused to respond to the Crown's submissions because we are all of the view that the high threshold required to overturn an acquittal has not been met in this case.

[4] The Crown's right to appeal an acquittal is limited. Its right of appeal is restricted to questions of law alone (see section 676(1)(a) of the *Code*). A legal error generally turns on its character, not its severity. Even where the Crown can demonstrate that a trial judge made a true legal error, before overturning an acquittal, there must be a reasonable degree of certainty that the alleged error was material to the trial judge's verdict (see *R v George*, 2017 SCC 38 at paras 17, 27).

[5] The first issue is whether the judge erred in her decision related to section 276. Assuming, without deciding, that the judge did err in her decision to admit the section 276 evidence, we are all of the view that it did not impact the result: she made clear that she was not relying on that evidence to reach her decision.

[6] We now turn to the second and third issues, which relate to the judge’s “concerns about the complainant’s evidence” (at para 38). The restrictive language found in section 676(1) prevents the Crown from appealing against acquittals on the basis of purported factual errors (see *R v Koczab (A)*, 2013 MBCA 43 at paras 7, 9-10, 16(b), rev’d 2014 SCC 9, but not on this issue). The test for a misapprehension of evidence sets a very high standard. We are all of the view that the judge was careful and thorough in her findings and we have not been persuaded that she committed any reviewable errors, much less material misapprehensions. The judge correctly explained the law regarding myths and stereotypes and we have not been persuaded that she made any impermissible findings or drew any forbidden stereotypical inferences in her application of that law. It is important to note that the judge found the accused to be a credible witness in his narrative that the sexual contact with the complainant was consensual. No part of the Crown’s submissions on the second and third issues challenges that finding.

[7] In the end, we are of the view that the Crown was challenging the reasonableness of the verdict. As it knows, while an accused can appeal an unreasonable verdict, there is no basis in law for the Crown to appeal an unreasonable acquittal (see *R v Biniaris*, 2000 SCC 15 at paras 32-33).

[8] For these reasons, the appeal is dismissed.

Chartier CJM

Beard JA

Mainella JA
