Citation: R v Gauthier, 2026 MBCA 5
Date: 20260122
Docket: AR24-30-10149

# IN THE COURT OF APPEAL OF MANITOBA

*Coram:* Madam Justice Karen I. Simonsen
Mr. Justice James G. Edmond
Mr. Justice David J. Kroft

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

| | | |
|---|---|---|
| | ) | ***M. T. Gould** and* |
| | ) | ***A. S. Anderson*** |
| ***HIS MAJESTY THE KING*** | ) | *for the Appellant* |
| | ) | |
| *Respondent* | ) | ***A. C. Smith** and* |
| | ) | ***B. Wickstrom*** |
| *- and -* | ) | *for the Respondent* |
| | ) | |
| ***MARCEL RAOUL GAUTHIER*** | ) | *Appeal heard:* |
| | ) | ***June 11, 2025*** |
| *(Accused) Appellant* | ) | |
| | ) | *Judgment delivered:* |
| | ) | ***January 22, 2026*** |

## KROFT JA

### Introduction

[1] The accused was convicted of the offences of sexual assault and sexual exploitation for historical incidents involving the victim starting from when she was fourteen years old. The trial judge imposed a custodial sentence of six and a half years for the sexual assault and conditionally stayed the sexual exploitation conviction pursuant to *Kienapple v R*, 1974 CanLII 14 (SCC). The accused appeals the conviction for sexual assault. (He also contends the trial judge erred in concluding that he was guilty of sexual

exploitation, advancing the same arguments as he does with respect to sexual assault to the extent they are relevant to sexual exploitation).

[2] At trial, the victim conceded she consented to the sexual activity, but notwithstanding, the trial judge found the consent was vitiated under section 273.1(2)(c) of the *Criminal Code*, RSC 1985, c C-46 [the *Code*], for being induced by the accused's abuse of a position of trust in relation to the victim. Although the accused has raised several issues in these proceedings, perhaps most central is whether the trial judge erred in respect of his vitiation finding.

[3] For the following reasons, I conclude the trial judge did not err in respect of vitiation or any other grounds raised by the accused and would dismiss the appeal.

Background

[4] When the victim was thirteen to eighteen years old, she lived mostly in foster care due to violence and instability in her own home (the home). Throughout that same period, the accused was married, a father and in his early to mid-forties.

[5] As a result of her friendship with the accused's daughter (the daughter), the victim's first foster placement was with the accused and his family between December 20, 2000 and September 10, 2001. The charges against the accused related to his conduct during that period (the in-house period) and subsequent up to 2003 (the out-of-house period). The convictions related to sexual activity that occurred during the out-of-house period.

[6] The victim turned fourteen years of age several months into the in-house period. At the time, the legal age of consent was fourteen.

[7] At trial, the victim described extensive sexual activity with the accused, including intercourse, during both the in-house period and the out-of-house period. She testified she consented to all of the sexual activity. She also acknowledged pursuing the accused during the out-of-house period.

[8] The accused, who testified, denied any sexual activity during the in-house period but admitted to some limited sexual activity during the out-of-house period, by which time the victim was fourteen years old and legally capable of providing consent. The accused maintained he should be acquitted in relation to that conduct because of that consent, which he argued was not induced by his abuse of a position of trust in relation to the victim.

Evidentiary Context

[9] In order to address the grounds of appeal that challenge the trial judge's credibility findings and his conclusion with respect to vitiation, some attention should be given to the evidence that was before him.

*Victim's Evidence*

[10] In respect of the in-house period, the victim described how her interactions with the accused evolved from playing computer games, to receiving comforting back rubs after nightmares, to sexual touching, and ultimately to oral sex and intercourse. The interactions between the accused and the victim were not just sexual—they spent many hours discussing intimate personal matters, such as how the victim's body compared to that of

the accused's wife, the maturity of the victim for her age and the victim's difficult home life. The victim came to believe she was in a close relationship with the accused that needed to be kept secret.

[11] In terms of sexual contact during the in-house period, the victim described engaging in, among other things:

a) oral sex in the winter (the victim was thirteen years old) when the other family members were out at a local skating rink;

b) oral sex in the summer (the victim was fourteen years old) after being invited by the accused to join him in a tent in the backyard; and

c) skinny-dipping, showering and sexual activity, including intercourse, during the August long weekend when the accused's wife and children were away.

[12] At the end of the August long weekend of the in-house period, the accused's wife returned to find the victim's bra in the marital bed. She confronted the victim and, in September, the victim was removed from the accused's residence. She returned to the home, where she remained until May 29, 2002, by which time the victim, then fifteen years old, had endured more violence and was placed with a family in another town (the other town).

[13] Communications and contact (sexual and otherwise) between the accused and the victim continued throughout the out-of-house period, which included the accused purchasing gifts for the victim and, on one occasion, executing a consent form so that the underage victim could get a tattoo. They

had lengthy discussions about their life together once the victim turned eighteen years of age, how they would acquire a house and how they would respond to people's concerns about their age difference. In terms of sexual contact during the out-of-house period, the victim described, among other things, advising the accused she would be alone on New Year's Eve 2001, inviting him to come to the home, engaging in sexual intercourse in the home and having an intimate conversation in the accused's truck. She detailed other instances of sexual intercourse on "several occasions" in the accused's trailer and once at a commercial property owned by the accused.

[14] The victim's interactions with the accused continued into late 2003.

[15] In January 2017, the victim filed a statement of claim against the accused alleging sexual abuse. Examinations for discovery took place in January 2018 (the discovery). She made a police report in February 2020.

[16] Over the course of direct and cross-examination at trial, the victim acknowledged that, in October 2002, after the accused received a caution letter from Child and Family Services (CFS) and attempted to sever contact with her, she was upset and threatened to report the accused to CFS if he acted on the letter. The accused continued interacting. She also acknowledged arranging, but not following through with, a meeting in 2013 with the accused for the purpose of having and recording a discussion about their past and then sharing the recording with the accused's wife. Finally, the victim acknowledged that the accused did not threaten her and that she pursued him.

*Accused's Evidence*

[17] On direct examination at trial, the accused testified he was not consulted prior to the victim's arrival and simply found out one day when he came home from work. Day to day, he was rarely around his family given his lengthy work hours; it was his wife's responsibility to manage finances, groceries, meals and all child-related matters, including discipline. The accused would speak to the victim like he spoke to his other children. He engaged in "normal conversation" with the victim, though she would follow him around as if she wanted to "hang out."

[18] In respect of the in-house period, the accused denied any sexual contact with the victim but recalled one occasion in August 2001 when he and the victim sat in the tent chatting about their respective days. He described one instance when, in the living room and in the presence of his wife, he accidentally touched the victim's breast while giving the victim a back massage.

[19] The accused attributed the victim's departure from his home in September to her being "a handful", not listening and his wife's disapproval of the victim's clothing choices.

[20] The accused continued interacting with the victim throughout the out-of-house period both after the victim returned to the home and after she relocated to the other town in May 2002. The interactions included the 2001 New Year's Eve visit initiated by the victim. According to the accused, that visit entailed the victim and the accused talking in his truck for about an hour but no sexual contact. Their discussions ended when the victim's mother and

her partner returned to the home, grabbed the accused's keys and called the police.

[21] The accused admitted that sometime after the victim moved to the other town, he interacted with her sexually. Specifically, the accused testified that he and the victim kissed on three or four occasions and that once, while driving the victim to the other town, she touched the accused's leg and penis over his clothes. At some point during 2002, the accused separated from his wife, reuniting in February 2003.

[22] On cross-examination, the accused offered the following additional testimony:

a) At the time the victim came to his home, he was aware she did not get along with her parents and experienced violence at the home.

b) The victim was treated as part of his family and he and his wife were prepared to assume a parenting role.

c) During the in-house period, the accused might have engaged in one or two evening conversations alone with the victim on the back deck.

d) The accused could not recall if he talked to the victim about his sex life with his wife but might have told her his wife's body was stretched out.

e) He did not give presents to the victim after the in-house period.

[23] Also on cross-examination, certain answers to questions posed to the accused differed from answers provided during the discovery.

*Daughter's Evidence (Accused's Witness)*

[24] The daughter did not witness anything sexual between the accused and the victim, and the victim did not communicate to the daughter that she had an interest in the accused. The focus of the daughter's testimony was her recollection of the bedrooms in which the victim stayed during the in-house period, whether the victim ever stayed home while the other children went skating and whether the accused ever used the backyard pool. There were some inconsistencies between the daughter's recollections and those of the victim.

Trial Judge's Reasons

[25] The trial judge found the accused guilty of the offences only in respect to his conduct during the out-of-house period concluding that a reasonable doubt was raised with respect to his conduct during the in-house period because of inconsistencies between the evidence of the victim and the daughter regarding that time frame.

[26] In arriving at his decision, the trial judge assessed the credibility and reliability of each witness. He found that the accused was in a position of trust during the out-of-house period when he was no longer the victim's foster parent and that the victim's consent to the sexual conduct was vitiated.

[27] In terms of credibility, the trial judge did not believe the accused's evidence that his sexual interactions with the victim were limited to kissing

and one instance of her touching his penis over his pants. He also was of the view the accused attempted to minimize his knowledge about, and involvement with, the victim throughout both the in-house period and the out-of-house period.

[28] In contrast, the trial judge found that the victim and the daughter were credible witnesses. It is clear from the trial judge's reasons (the reasons) that his credibility assessments included, among other things, consideration of the passage of time and the principles applicable to assessing the evidence of complainants in childhood sexual assault cases (see *R v W (R)*, [1992] 2 SCR 122 at 134, 1992 CanLII 56 (SCC)).

[29] The trial judge's finding that the accused was in a position of trust followed his review of the evidence and relevant considerations identified in the case law (which considerations the accused does not dispute), including:

a) the age difference between the accused and the complainant;

b) the evolution of the relationship;

c) the vulnerability of the complainant;

d) the expectations of the parties;

e) not all trust relationships are the same—there is a spectrum; trust speaks to the subjective bond between the accused and the complainant, including faith the adult would not act contrary to the complainant's interests; and

f) a former foster parent is not necessarily in a trust relationship indefinitely.

[30] Lastly, in terms of vitiation of consent, the trial judge observed that section 273.1(2)(c) of the *Code* requires more from the Crown than establishing a position of trust. It must prove that, subjectively, the complainant was *induced* into the sexual activity *because* the accused abused the relationship; the focus is on *why* the complainant engaged.

[31] The trial judge concluded the accused's position of trust was used to induce the victim to engage in sexual activity. In doing so, he relied on, among other things, the accused's own evidence about:

a) lengthy telephone calls, including having a home and a life together once the victim turned eighteen years of age;

b) the accused and the victim holding hands and kissing when together;

c) gifts being given by the accused to the victim; and

d) the victim believing she and the accused were in love.

Issues

[32] The issues raised on this appeal are as follows:

a) Did the trial judge misapprehend evidence bearing on the assessment of the accused's credibility and rely on this misapprehension in rejecting the accused's evidence?

b) Did the trial judge err by applying a different level of scrutiny to the assessment of credibility and reliability of the accused's evidence than that of the victim?

c) Did the trial judge misapply the principles in *W(D)* (see *R v W(D)*, [1991] 1 SCR 742, 1991 CanLII 93 (SCC) [*W(D)*]) by effectively reversing the burden of proof?

d) Did the trial judge err in law by misapplying the legal test for a position of trust under section 153 of the *Code* by finding the accused remained in a position of trust during the out-of-house period?

e) Did the trial judge misapply the legal test for vitiation of consent under section 273.1(2)(c) of the *Code*?

f) Did the trial judge's decision to convict on sexual assault under section 273.1(2)(c) amount to an unreasonable verdict?

Decision

[33] Regarding the first three grounds of appeal (misapprehension of evidence, uneven scrutiny and reversal of burden), at their core, each speaks to the trial judge's credibility findings. Having carefully considered the evidence and the position of the accused, as I will explain, these grounds of appeal can be dismissed.

*Issue 1: Misapprehension of Evidence*

[34] The accused submits the trial judge misapprehended evidence bearing on his assessment of the accused's credibility which, in turn, led him to disbelieve the accused's evidence.

[35] The standard of review applicable to a finding of fact, including a trial judge's assessment of credibility and reliability, is palpable and overriding error (see *R v Kruk*, 2024 SCC 7 at para 82). The fundamental rule, for purposes of appellate review, is that, if a trial judge's credibility assessment can be reasonably supported by the record, it cannot be interfered with on appeal (see *R v CAM*, 2017 MBCA 70 at para 37 [*CAM*]).

[36] A misapprehension may refer to a mistake as to the substance of evidence, a failure to consider evidence relevant to a material issue or a failure to give proper effect to evidence (see *R v Whiteway (BDT) et al*, 2015 MBCA 24 at para 32). An appellate court must be cautious not to characterize a trial judge's interpretation of evidence as a misapprehension simply because the court does not agree with the interpretation or the interpretation raises some unease. This is especially so when the interpretation in question relates to credibility.

[37] To succeed on appeal on the basis of misapprehension of evidence, the accused must first establish the misapprehension is readily obvious going to the substance of material parts of the evidence, not mere detail. Second, the accused must show the error played an essential part in the reasoning giving rise to the trial judge's conviction. In other words, if the error were struck, the verdict would be on shaky ground (see *R v Jovel*, 2019 MBCA 116 at para 31 [*Jovel*]).

[38] The reasons in this case enumerate at least five inconsistencies between the accused's evidence at trial and evidence given during the discovery and note that the matters the accused could not recall were part of his efforts to minimize his role in connection with the victim and in his home. These inconsistencies related to:

a) the accused's testimony about the degree of knowledge he had about CFS involvement and the victim's circumstances;

b) the number of one-on-one conversations the accused had with the victim;

c) the accused's perception of the victim's level of maturity;

d) the circumstances triggering the victim's removal from the accused's residence in September 2001; and

e) the status of his relationship with his wife and what he might have told the victim in regard to his marriage.

[39] The accused submits the inconsistencies were mischaracterized as such, suggesting, for example, the Crown failed to pose sufficient follow-up questions; the fact the accused remembered events at the time of the discovery and not at trial was not an inconsistency; the trial judge failed to consider certain related evidence of the accused; and, in respect of the accused testifying at trial that he could not remember thinking the victim was mature for her age, when, during the discovery, he had agreed that she was mature, the trial judge failed to consider that "one's position, understanding and definition of 'maturity' may change over time (in this case, decades)."

[40] After careful review, in my view, the evidentiary record before the trial judge reasonably supported his findings that the accused provided material prior inconsistent statements during the discovery. It would not be appropriate for this Court to reweigh that evidence.

[41] I also am of the view the accused's evidence was not rejected simply because inconsistencies existed. It was the cumulative effect and nature of the inconsistencies that impacted the accused's credibility, including as they related to testimony tending to minimize his role both at home and in relation to the victim.

[42] Ultimately, I am not persuaded the accused has identified any readily obvious misapprehensions of evidence or that any such error played an essential part in the reasoning giving rise to the conviction. To hold otherwise, based on the inconsistencies identified by the accused, would amount to usurping the role of the trial judge in terms of weighing the credibility of the witnesses he heard and observed.

[43] For these reasons, I would not accede to this ground of appeal.

*Issue 2: Uneven Scrutiny in Assessing Credibility and Reliability*

[44] The accused submits the trial judge erred in law by applying a stricter level of scrutiny to the assessment of his evidence than that of the victim.

[45] Although the Supreme Court of Canada has queried, but not yet resolved, whether uneven scrutiny is an appropriate analytical tool to demonstrate error in credibility findings, this Court has accepted a claim for

uneven scrutiny can be an independent ground of appeal, cautioning such a claim is difficult to establish (see *R v GF*, 2021 SCC 20 at paras 100-01 [*GF*]; *R v Mehari*, 2020 SCC 40 at para 1). The governing principles are succinctly set out in *R v Buboire*, 2024 MBCA 7 at para 13, citing with approval *CAM*:

a) The appellate court's role is not to retry the case; it is to review for error.

b) Because of the heavy burden, the party advancing the uneven scrutiny claim must be able to point to something significant in the trial judge's reasons or the record that clearly establishes faulty methodology was used to assess credibility.

c) It is not enough that credibility could have been assessed differently by the trial judge on the record. Much more is required for an uneven scrutiny claim to succeed.

d) The fundamental rule for appellate review is that if the trial judge's credibility assessment can be reasonably supported by the record, it should be left to stand.

[46] In his factum, the accused asserts that his "every word was scrutinized to an extreme degree and any inconsistency was characterized as non-trivial. Yet, inconsistencies within the [victim's] own evidence, as well as contradictory evidence from another witness was characterized as not detrimental and seen as trivial or 'expected' given the passage of time." More specifically, the accused argues:

a) The trial judge gave the victim the benefit of the passage of time since events occurred but offered no similar leniency to the accused. This is exemplified by the trial judge discounting the accused's credibility based significantly on the aforementioned inconsistencies between his trial and the discovery evidence but not rejecting the victim's testimony despite inconsistencies between her testimony and that of the daughter.

b) Whereas the trial judge found the accused's lack of recall about the degree of his involvement at his home and with the victim was a credibility concern, inconsistencies in the victim's evidence about precisely how many times she was alone, or met, with the accused had no similar impact on her credibility or reliability and again were attributed to the passage of time.

c) Apart from inconsistencies, the trial judge appears to have attributed disproportionately little weight to admissions by the victim in respect of her blackmailing the accused so he would not leave her, recanting assertions about her parents' behaviour so CFS would permit her to remain in proximity to the accused, and including in the statement of claim filed in the civil action a characterization of the accused's conduct not advanced in the criminal trial.

[47] In addition, the accused submits the trial judge excused blatant contradictions between the victim's and the daughter's evidence by saying the contradictions only applied to assessing the victim's credibility for the in-house period. I do not agree.

[48] When the reasons are considered as a whole, it is clear the trial judge did not parse the victim's evidence as suggested by the accused. He considered the victim's evidence, including her inconsistencies (and some personally difficult admissions) and determined the weight he would ascribe to it overall. Deciding to acquit the accused of the in-house period offences was a recognition that the daughter provided credible evidence that required a cautious approach and created reasonable doubt in respect to that time period.

[49] The accused's suggestion that the trial judge's determination that inconsistencies between the victim's and the daughter's evidence resulted in an acquittal for the in-house period and not the out-of-house period is indicative of uneven scrutiny is not supported by the record. In the reasons, the trial judge observes that, in respect of the out-of-house period, there was no inconsistent *credible* evidence and that, in several instances, the accused's own evidence about the progression of his contact with the victim actually corroborated the victim's evidence.

[50] After carefully considering all of the accused's arguments, I am not satisfied the accused has pointed to something significant in the record establishing a faulty methodology was used to assess the witnesses' testimony. The trial judge's findings are reasonably supported by the record. The accused is simply asking this Court to reweigh the evidence. That is not our role.

[51] I would dismiss the uneven scrutiny ground of appeal.

*Issue 3: Misapplied W(D) and Reversal of Onus*

[52] The accused acknowledges the trial judge correctly articulated the *W(D)* test and its purpose but submits he erred in law by misapplying it, thereby transferring the onus of proof from the Crown to the accused. He asserts the trial judge effectively conducted two separate *W(D)* analyses, one for the in-house period and the other for the out-of-house period.

[53] More specifically, the accused says, "a careful analysis of [the reasons] reveals that convictions resulted for the 'out-of-the-house' period because of a lack of evidence put forward by the defence, as opposed to the prosecution's case meeting the necessary burden of proof." The "lack of evidence" reference is in relation to the trial judge finding the daughter's evidence regarding the in-house period created reasonable doubt about events for that period but not for the out-of-house period (about which she had no knowledge). Additionally, the accused states: "The absence of [the daughter's] evidence relating to the 'out-of-the-house' period did not improve the credibility or reliability of the [victim's] evidence, it merely resulted in the removal of a tool exposing those weaknesses." Further, he suggests that the trial judge recognized there was less contradictory evidence presented by the accused for the out-of-house period but failed to adequately explain how the victim's evidence improved from one stage of his analysis to the next.

[54] The accused has framed the reversal of onus issue as an error in law, reviewable on a correctness standard. However, in my view, the accused's complaint is, in essence, about the trial judge's credibility assessments, which, as noted earlier, are owed deference if reasonably supported by the record. In

my opinion, the accused's arguments fail irrespective of how they are characterized.

[55] When the reasons are read in context and as a whole in light of the issues at trial, I am not persuaded he performed two separate *W(D)* analyses (see *GF* at para 69). As noted earlier, the trial judge acquitted the accused in relation to the in-house period due to conflicting credible evidence relating directly to that time. While he identified the daughter's evidence as contradictory, he never rejected the evidence of the victim. His decision to acquit the accused of the in-house period offences demonstrates an understanding of the Crown's burden of proof.

[56] The trial judge conducted his analysis considering the whole of the evidence, as he was required to do under *W(D)*. As for the accused's argument that the trial judge treated the absence of contradictory evidence from the daughter about the out-of-house period as an opportunity to breathe credibility into evidence of the victim that was not otherwise there, there never was a finding that the victim was not credible in respect of material points.

[57] I would reject this ground of appeal.

[58] Despite their separate identification in the accused's factum, the next three grounds of appeal (position of trust, vitiation of consent and unreasonable verdict) relate to the issue of vitiation of consent. Where, in a sexual assault case, a complainant consented to the sexual activity at issue (the present situation), section 273.1(2)(c) of the *Code* provides the consent may be vitiated where "the accused induces the complainant to engage in the activity by abusing a position of trust, power or authority".

*Issues 4 and 5: Position of Trust and Vitiation of Consent*

[59] Regarding the applicable standard of review, the *Code* provides that the question of whether no consent is obtained is a question of law (see s 273.1(1.2)). That said, "there are important factual elements to the enquiry" (*R v FM*, 2021 BCSC 2365 at para 137), rendering the standard of review somewhat nuanced.

[60] A better understanding of the standard of review can be gleaned from the following cases.

[61] A failure to identify and apply the applicable law is an error of law reviewable on a standard of correctness. In *R v Lutoslawski*, 2010 ONCA 207 [*Lutoslawski*], the Court found the trial judge erred in law by not applying section 273.1(2)(c) of the *Code* to the facts concerning the sexual activity and that: "Had he considered [section 273.1(2)(c)], he may have concluded that [the complainant]'s apparent consent to the sexual activity was, as a matter of law, no consent at all" (at para 15). Similarly, in *R v Alsadi*, 2012 BCCA 183 [*Alsadi*], the Court found the trial judge erred in principle (a legal error) by focusing on whether the complainant misapprehended her right to refuse the accused's advances, feared reprisals, or did not understand she could say no, rather than on whether the accused induced or incited the complainant to participate in the sexual activity by abusing his position of trust, power or authority (see para 24).

[62] The legal questions illustrated by *Lutoslawski* and *Alsadi* may be contrasted with factual questions of whether the accused was in a position of trust, whether he abused his position of trust and whether the victim was

induced to engage in sexual activity, which the jurisprudence has treated as factual findings reviewable on a standard of palpable and overriding error.

[63] In *R v Frost*, 2017 MBCA 43, though not a section 273.1(2)(c) case, this Court commented that a finding of whether a relationship is a position of "trust is largely a factual finding which is owed deference and which cannot be interfered with unless there is palpable and overriding error" (at para 3).

[64] In *R v Snelgrove*, 2018 NLCA 59 at para 27 [*Snelgrove*], aff'd 2019 SCC 16, the Court noted there must be a sufficient evidentiary basis (including circumstantial evidence) to find the accused abused their position of trust or authority, thereby inducing the complainant to consent to sexual activity.

[65] Again, in *R v Emerson*, 2022 BCCA 5, the Court held the question of whether the appellant induced the complainant to engage in the sexual activity by abusing his position "was a fact-driven finding to which deference is owed on appeal" (at para 46, citing with approval *Alsadi* at paras 27, 34; see also *R v Blanco*, 2025 ONSC 297).

[66] To summarize, questions about whether the vitiation sections apply, whether the proper questions were asked (see next paragraphs) or the broad question of whether there was no consent and what that means are questions of law pursuant to section 273.1(1.2) of the *Code* and subject to review on a correctness standard. On the other hand, findings regarding whether an accused stood in a position of trust, whether they abused that position and whether the complainant was induced by the abuse are findings of fact, subject to review on a standard of palpable and overriding error.

[67] In his submissions, the accused argues the trial judge erred by concluding he was in a position of trust during the out-of-house period and, if he was, by finding the victim was induced to engage in the sexual activity because he abused that position of trust.

[68] I will deal first with the position of trust.

[69] For consent to be vitiated by abuse of a position of trust, a position of trust must exist. The trial judge found that the accused was in a position of trust in relation to the victim during the out-of-house period.

[70] The accused concedes the trial judge correctly stated the considerations articulated in the case law for finding a position of trust. Those considerations are set out in paragraph 29 herein. I will not repeat them save to say that one such consideration is that a position of trust, once found, may not last forever. The accused submits the trial judge erred by failing to apply the same considerations to the out-of-house period. More precisely, the accused says the trial judge erred by simply extending the position of trust from the in-house period to the out-of-house period because there was no significant break in contact between the accused and the victim.

[71] In my view, the trial judge did apply the relevant considerations to the out-of-house period, specifically recognizing that: “The fact that the accused may have been a former foster parent to the [victim] does not place him in a *de jure* position of trust over the [victim] indefinitely.” The thrust of the accused’s position is a disagreement with the trial judge’s factual finding that he was in a position of trust in relation to the victim.

[72] The facts and circumstances relied upon by the trial judge included:

a) the significant age gap between the accused and the victim;

b) the accused's admission that during the in-house period he stood in a parent-like position;

c) the accused's own evidence about the *evolution* of his interactions (including discussions) with the victim throughout the in-house period and the out-of-house period;

d) the acceptance by the accused of the victim's invitations to meet;

e) the accused's knowledge of the victim's dysfunctional home situation; and

f) the emotional attachment between the victim and the accused.

[73] The approach taken by the trial judge was consistent with the direction given by the Supreme Court in *R v Audet*, 1996 CanLII 198 at para 38 (SCC):

> It will be up to the trial judge to determine, on the basis of all the factual circumstances relevant to the characterization of the relationship . . . whether the accused was in a position of trust or authority towards the [complainant] . . .. One of the difficulties that will undoubtedly arise in some cases concerns the determination of the times when the "position" or "relationship" in question begins and ends. It would be inappropriate to try to set out an exhaustive list of the factors to be considered by the trier of fact. The age difference between the accused and the [complainant], the evolution of their relationship, and above all the status of the accused in relation to the [complainant] will of course be relevant in many cases.

[74] In the present case, the evidence reasonably supports the trial judge's finding that a trust relationship existed between the accused and the victim. No palpable and overriding error has been established. I see no basis to interfere with this finding.

[75] I now turn to the question of whether the victim was induced to engage in the sexual activity because of the accused's abuse of the trust relationship.

[76] The accused acknowledges the trial judge correctly articulated that, when addressing the inducement component of section 273.1(2)(c), the Court is to ask why the complainant engaged in the sexual activity (see *R v MS*, 2022 BCCA 390 at paras 39-40 [*MS*], citing with approval *Alsadi* at para 25). Was it because the accused abused a position of trust? That said, the accused submits the trial judge erred in law in his application of the question. He argues the victim was induced into sexual activity by a romantic relationship with the accused, independent of and unaffected by any abuse of a position of trust. He says that, although the reasons initially stated the test correctly, when applying them, the trial judge spoke only of inducement but not inducement by abuse of a position of trust. The accused points to a number of statements in the trial judge's reasons, including:

> I conclude that there was inducement. The accused was using the [victim]'s feelings towards him, the promise of a life together, and their love for each other to influence or entice the [victim] to engage in sexual activity.

[77] In my opinion, although the trial judge failed to specify inducement by abuse of a position of trust, it is apparent from his correct statements of the

law at the outset of his analysis that his subsequent language was a form of shorthand and that he did not fail to apply the proper test.

[78] In the submissions of the Crown, with which I agree, the accused is, in effect, taking issue with the trial judge's findings of *fact* relating to whether the victim was induced to engage in the sexual activity because of abuse of the trust relationship.

[79] The accused argues the trial judge found the victim's consent was induced by the accused's breach of trust without any evidence in support. He points to the fact the victim was enthusiastic about the relationship and initiated the ongoing contact. He relies upon cases where no such inducement was found, such as *R v LR*, 2023 ONSC 3911 at paras 240-44 and *R v Ringrose*, 2017 MBPC 34 at para 134.

[80] In my view, the trial judge's findings are owed deference. His conclusions the accused was using the victim's feelings towards him, a promise of a life together and their love for each other to influence or entice the victim to engage in the sexual activity were not made in a vacuum. It was made against a backdrop of there being a position of trust and a history of him being her foster parent, and then, after she returned to the home in September 2001, engaging in lengthy telephone calls, including about them having a home and life together once the victim turned eighteen years of age, gifts being given by the accused to the victim and the victim believing she and the accused were in love. That background also includes evidence of the victim's vulnerability and dysfunctional upbringing.

[81] As recognized by the Ontario Court of Appeal in *Lutoslawski*, a person "in a position of trust over another may use the personal feelings and

confidence engendered by that relationship to secure an apparent consent to sexual activity" (at para 12). Direct evidence from a complainant is not necessary for the Court to determine whether consent was induced by abuse of a position of trust. Circumstantial evidence can suffice. Overt words of persuasion are not required (see *MS* at para 51; *Snelgrove* at paras 22-25).

[82] I am mindful the accused relies on testimony of the victim not referenced by the trial judge in which she stated that she did not engage in the sexual activity with him because he was her foster father. However, I agree with the Crown that, despite such evidence, it nevertheless was open to the trial judge to find the victim's consent to sexual activity was induced by the accused's breach of trust. Consent was not necessarily secured because he was her foster father. The situation evolved to something more than that and his inducements were more subtle. Indeed, the Crown points to evidence of the victim, again not referred to by the trial judge, where she adopted part of her police statement in which she said: "I didn't ever feel that I was . . . [a]gainst my will forced. Okay. I -- I feel like -- and this is my own interpretation -- that I was emotionally manipulated." The Crown, understandably, says that this evidence supports its position and the findings of the trial judge.

[83] Although the reasons regarding vitiation of consent are not lengthy, I am satisfied he applied the correct law and his finding that consent was vitiated was reasonable based on the record. There is no basis for appellate intervention.

*Issue 6: Unreasonable Verdict*

[84] The accused submits the conviction of sexual assault was unreasonable. The focus of this submission is, once again, the trial judge's finding that consent was vitiated.

[85] An allegation of an unreasonable verdict requires the Court to decide (*Jovel* at para 51):

> (1) whether the verdict is one that a properly instructed trier of fact, acting judicially, could reasonably have rendered; and (2) whether the trial judge has drawn an inference or made a finding of fact essential to the verdict that: (i) is plainly contradicted by the evidence relied on by the trial judge in support of that inference or finding; or (ii) is shown to be incompatible with evidence that has not otherwise been contradicted or rejected by the trial judge.
>
> [citation omitted]

[86] In support of his argument that the verdict was unreasonable, the accused submits when addressing vitiation, the trial judge failed to give adequate weight to, or mention, admissions by the victim that she felt she was in a relationship that she enjoyed, pursued the accused, initiated much of the contact, tried to blackmail the accused to continue the relationship and did not feel coerced or threatened by the accused. The accused also argues there was a lack of evidence explaining what led up to the sexual encounters between the victim and the accused. The accused invites this Court to conclude the trial judge essentially *presumed* the accused "counselled, incited or induced, or abused his position of trust" simply because he was in a position of trust.

[87] I am not persuaded by the accused's argument.

[88] As I have already concluded, the finding that consent was vitiated is reasonably supported by the record. The admissions of the victim and the quality of her testimony were considered by the trial judge in the course of the reasons along with the other evidence, including that of the accused. It was open to the trial judge to find: "The accused was using the [victim]'s feelings towards him, the promise of a life together, and their love for each other to influence or entice the [victim] to engage in sexual activity."

[89] The accused has not established the sexual assault verdict was unreasonable. Nor, for the reasons outlined, did the trial judge err in concluding that he was guilty of sexual exploitation.

Conclusion

[90] For the foregoing reasons, I would dismiss the appeal.

Kroft JA

I agree: Simonsen JA

I agree: Edmond JA