Citation: R v GS, 2022 MBCA 35
Date: 20220421
Dockets: AR21-30-09584;
AR21-30-09602

IN THE COURT OF APPEAL OF MANITOBA

Coram: Madam Justice Diana M. Cameron
Madam Justice Janice L. leMaistre
Madam Justice Karen I. Simonsen

B E T W E E N :

	)	***S. B. Simmonds, Q.C.*** *and*
HER MAJESTY THE QUEEN	)	***J. S. Brar***
	)	*for the Accused*
	)	
Respondent/Appellant	)	***R. N. Malaviya***
	)	*for the Crown*
- and -	)	
	)	*Appeals heard and*
G. S.	)	*Decision pronounced:*
	)	***April 1, 2022***
	)	
(Accused) Appellant/Respondent	)	*Written reasons:*
	)	***April 21, 2022***

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*).

On appeal from 2020 MBQB 82; and 2021 MBQB 48

LEMAISTRE JA (for the Court):

[1] The accused was convicted after trial by judge alone of sexual assault with a weapon, choking to overcome resistance and uttering threats. He was sentenced to four years' imprisonment for sexual assault with a weapon, 18 months concurrent for choking to overcome resistance and 12 months concurrent for uttering threats. The accused appeals his

convictions and seeks to admit further evidence on his appeal. The Crown seeks leave to appeal and, if granted, appeals the sentence.

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

[3] At the trial, the victim testified that her husband, the accused, held a knife to her neck, threatened to kill her, choked her and sexually assaulted her. She said that, because she was afraid of the accused, she had been recording their interactions on her iPhone using an audio recording application. The Crown tendered the audio recording of the attack (the recording). The accused testified and, while he admitted that his voice could be heard during part of the recording immediately prior to the attack, he said that the voice which could be heard during the attack was not his. He also said that this other voice was not speaking Iraqi Arabic, which is the dialect that he and the victim had been speaking. He asserted that the recording had been altered. He did not dispute that the recording confirmed the victim's allegation that she was attacked.

[4] The trial judge rejected the accused's evidence for reasons other than the recording and, relying on the victim's evidence and the recording, found the accused guilty of the offences.

The Accused's Conviction Appeal

[5] The accused raises two issues on the appeal: (1) whether the trial judge erred by relying on the recording, and (2) whether he incorrectly applied the rule in *Browne v Dunn* (1893), [1894] 6 R 67 (HL (Eng)), by ordering the

victim to be recalled. The accused maintains his position that the recording was altered and says that the trial judge's application of *R v W(D)*, [1991] 1 SCR 742, and weighing of the evidence, was affected by his reliance on the recording, resulting in a miscarriage of justice.

[6] In support of his first ground of appeal, the accused seeks to tender as further evidence the opinion of an expert, Michael Plaxton (Plaxton), that the recording was not continuous and that it was deliberately manipulated. In reaching his conclusion that the recording was altered, Plaxton makes a number of observations and states the following opinions:

> . . .
>
> 1. That the . . . recording in question is not a continuous, uninterrupted recording having been paused, most likely by an alarm at approximately 6:00AM 13 Feb 2018. This does not necessarily negate the presence of other alterations to the recording;
>
> 2. Given the results of the tests conducted, the only explanation for the 64 minutes differential between the encoded and tagged dates is a deliberate manipulation of the audio file in question.

[7] The encoded date/time is the point at which the recording was ended and the audio recording application began saving the file. The tagged date/time is the point at which the saving process was complete.

[8] The Crown does not dispute that the recording was not continuous. Relying on the trial transcript, evidence provided by its own expert and its cross-examination of Plaxton, the Crown asserts that the victim started the recording on the night before the attack when she went to bed; that the

recording was automatically paused the next morning when her alarm went off; and that the victim resumed the recording when the accused arrived home just prior to the attack.

[9] The Crown argues that Plaxton's opinion—that following the pause in the recording it could not be restarted simply by touching the red button (as the victim testified)—was based on testing he performed using an entirely different operating system than the one being used by the victim's iPhone at the time of the attack, and that his opinion is clearly contradicted by its expert. In the Crown's view, Plaxton's opinion is not reliable or credible and could not reasonably be expected to have affected the result at trial. The Crown points out that Plaxton's report contains errors and his opinions were based on incomplete testing and "constantly changed".

[10] We are not persuaded that it is in the interests of justice to admit the further evidence (see *Palmer v The Queen*, [1980] 1 SCR 759).

[11] First, we have serious concerns about whether the due diligence criterion is met in this case. In his affidavit, the accused says that his lawyer raised with him the need to obtain expert evidence prior to the preliminary hearing and, again, prior to the trial, but that he could not afford to do so. He contends that, as a result of the trial judge's decision, he now understands the importance of expert evidence to his case. He has provided no evidence to support his assertion that he could not afford an expert or any explanation as to how his financial circumstances changed after his convictions so that he could retain his proposed expert.

[12] Moreover, in our view, the other three *Palmer* criteria are not sufficiently strong in this case to overcome the accused's failure to satisfy the due diligence requirement (see *R v McAnespie*, [1993] 4 SCR 501). We agree with the Crown's submission, including its assertion that Plaxton resiled from some of his observations during cross-examination. We are also of the view that some of his observations were only marginally relevant and others were subjective and would have been apparent to the trial judge who listened to the recording at the trial.

[13] During cross-examination, Plaxton also resiled from his opinion that the only explanation for the 64-minute differential between the encoded date/time and the tagged date/time was deliberate manipulation of the recording. In addition, he admitted that he had no way of knowing what the victim was doing with her iPhone which might have increased the differential, and that this was outside of his area of expertise.

[14] In our view, the further evidence is not compelling or cogent, does not diminish the strength of the victim's testimony and could not reasonably be expected to have affected the result.

[15] Despite the accused's testimony that the voice on the recording during the attack was not his and spoke a different Arabic dialect, he has provided no expert evidence of voice identification or Arabic dialects.

[16] This is one of those cases where "finality concerns with respect to the trial process and concerns that justice should be done" must result in the motion for further evidence being dismissed (*R v Henderson (WE)*, 2012 MBCA 93 at para 28). Without the further evidence, the accused's first ground of appeal fails.

[17] Regarding the trial judge's application of the rule in *Browne v Dunn*, we are satisfied that he exercised his discretion appropriately when he ordered the victim be recalled. Despite the victim being asked general questions about whether she had edited the recording (which she denied), the accused's counsel (not the same counsel as on the appeals) did not put to her the accused's evidence that, at a certain point in the recording, the voice was no longer his and was speaking a different Arabic dialect. Furthermore, the accused's counsel did not object to the victim being recalled. At the hearing of the appeals, the accused conceded that, if the further evidence was not admitted, he would not pursue this second ground of appeal.

The Crown's Sentence Appeal

[18] When imposing the sentence, the trial judge relied on *R v GGS*, 2016 MBCA 109, and concluded that the three-year starting point for sexual assault in *R v Sandercock*, 1985 ABCA 218 applied in this case. However, he acknowledged the Supreme Court of Canada's comments in *R v Friesen*, 2020 SCC 9 at para 118 quoting *R v Goldfinch*, 2019 SCC 38 that, "[a]s time passes, our understanding of the profound impact sexual violence can have on a victim's physical and mental health only deepens" (at para 37).

[19] In his reasons for sentence (see 2021 MBQB 48), the trial judge weighed the aggravating and mitigating factors, including section 718.2(a)(ii) of the *Criminal Code* (the *Code*), which deems the abuse of spouses to be aggravating, and drew the following conclusion regarding the appropriate sentence for the sexual assault with a weapon (at para 28):

> In this case, but for the steps that the [accused] has taken to mitigate his conduct, the use of a weapon and the choking of the

> [victim] in order to enable himself to commit the sexual assault, would in my opinion, attract a period of five or more years' incarceration. In view of the mitigating factors raised by counsel and the low risk of the [accused] to reoffend in any similar manner satisfies me that four years' imprisonment is fit and proper and I so order.

[20] The trial judge imposed concurrent sentences of 18 months for choking to overcome resistance and 12 months for uttering threats.

[21] The Crown argues that the trial judge erred in his assessment of the gravity of the offences and his approach to sentencing for multiple offences, and that the sentence was demonstrably unfit. Relying on *Friesen*, it asserts that the three-year starting point in *Sandercock* is dated, and that sentences involving sexual assault where the victim is an adult should be increased to give effect to legislative amendments and society's increased understanding of the harm caused by sexual violence. The legislative amendments referred to by the Crown are found in sections 718.04, 718.2(a)(ii) and 718.2(a)(iii.1) of the *Code*.

[22] These issues were thoroughly canvassed by this Court in the recent decision of *R v Bunn*, 2022 MBCA 34. In *Bunn*, this Court did not provide quantitative guidance regarding a starting point or range, but did give "non-quantitative guidance regarding the nature of harm caused by sexual assault to adult victims and the intent of the legislative changes", and concluded that sentencing judges must feel free to "impose sentences that reflect society's and the courts' deepened understanding of the harm caused" in light of relevant legislative amendments "by increasing sentences where appropriate" (at para 122).

[23] The trial judge, while guided by the three-year starting point, was "very mindful" (at para 23) of society's deepened understanding of the harm caused by sexual offending. He also appropriately described the attack as "brutal and chilling" (at para 22), and he recognized that the use of a weapon and violence warranted an increase in sentence. His reasons also demonstrate that he was aware of the need to consider the effect of the additional offences of choking to overcome resistance and uttering threats on the overall sentence.

[24] While the overall four-year sentence is low for sexual assault with a weapon in the circumstances of this case, we are not convinced that the sentence was the result of a material error or was "clearly unreasonable" (*R v Lacasse*, 2015 SCC 64 at para 52; see also *Friesen* at para 26). Therefore, the trial judge's decision is entitled to deference (see *R v Murphy (MP)*, 2011 MBCA 84 at para 20).

Conclusion

[25] For these reasons, we dismissed the conviction appeal and granted leave to appeal the sentence, but dismissed the sentence appeal.

leMaistre JA

Cameron JA

Simonsen JA