Citation: R v Hot, 2026 MBCA 24
Date: 20260316

IN THE COURT OF APPEAL OF MANITOBA

Coram: Mr. Justice Christopher J. Mainella
Mr. Justice James G. Edmond
Mr. Justice David J. Kroft

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

	)	***K. L. Jones** and*
	)	***H. S. K. Allardyce***
HIS MAJESTY THE KING	)	*for the Appellant*
	)	
Respondent	)	***R. Lagimodière***
	)	*for the Respondent*
- and -	)	
	)	*Appeal heard and*
MERIS HOT	)	*Decision pronounced:*
	)	***March 9, 2026***
(Accused) Appellant	)	
	)	*Written reasons:*
	)	***March 16, 2026***

NOTICE OF RESTRICTION ON PUBLICATION: No one may publish, broadcast or transmit any information that could disclose the identity of the victim or a witness (see *Criminal Code*, RSC 1985, c C-46, s 486.4).

EDMOND 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*]).

[2] In the early morning of April 29, 2020, the victim was sexually assaulted. The primary issue at trial was the identity of the assailant. Identity

was proven in part through a match of the accused's DNA from swabs taken from the victim's breasts shortly after the assault.

[3] On a pre-trial motion, the accused challenged the admissibility of the DNA results based on a breach of the implementational duties of a peace officer pursuant to section 10(b) of the *Charter* (see *Canadian Charter of Rights and Freedoms*, s 7, Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (UK), 1982, c 11 [the *Charter*]).

[4] Prior to the trial, the motion judge (not the trial judge) determined that the accused's section 10(b) *Charter* right to retain and instruct counsel was violated when a DNA warrant was executed. The motion judge also determined that the DNA results should not be excluded from the evidence pursuant to section 24(2) of the *Charter*.

[5] The accused advanced three grounds of appeal:

(1) The motion judge erred by concluding there was no evidence of a systemic pattern of right to counsel being administered without privacy, which led to the admission of the DNA results and thus, an error in law.

(2) The trial judge erred by rendering an unreasonable verdict that was not supported by the evidence.

(3) The trial judge engaged in speculative reasoning that did not logically flow from established facts and this was integral to her reasoning and conviction.

[6] After hearing the appeal, we dismissed it with reasons to follow. These are those reasons.

Background

[7] The evidence at trial included an agreed statement of facts (see the *Code*, s 655). It was an agreed fact that shortly after the assault, three swabs were taken from the victim, one from each breast and an oral swab. It was also an agreed fact that all three swabs were sent for forensic analysis, which concluded that no male DNA was detected on the oral swab, but male DNA identified as Male 1 was found on the swabs taken from the victim's right and left breasts. A blood sample taken from the accused pursuant to a DNA warrant matched the DNA of Male 1.

[8] The victim and Detective Prestayko (Det. Prestayko) testified at the trial. The victim testified that she and her boyfriend were staying at the Capri Motel on Pembina Highway in Winnipeg and consumed MDMA around 10:00 p.m. She called 911 because her boyfriend had overdosed and an ambulance took him to the St. Boniface Hospital (the hospital). The victim was not permitted to see her boyfriend because of COVID-19 restrictions. The police would not allow her to return to the Capri Motel because they were investigating the matter and, as a result, they dropped her off at The Salvation Army just off Main Street.

[9] The Salvation Army was full and the victim walked down Main Street towards downtown in the early morning hours and tried to get into another hotel. She did not have a credit card and hotel staff would not give her a room. The victim was scared and alone and sat at the front door of the hotel. She described a newer, black car pulling up to the entrance and the

driver asking her if she needed a ride. She described the driver as a "bigger" male with "short, dark hair." She had never seen the driver before and thought he would help her out and give her a ride back to the hospital. Once inside the car, the driver asked if she wanted to smoke some weed and she replied, yes.

[10] The driver drove over the Provencher Bridge and into the neighbourhood of St. Boniface, and instead of taking her to the hospital, he parked his car at the end of a street off Provencher Boulevard. The victim believed they had parked to smoke some weed. Instead, the driver told her to take her clothes off, and she refused, but she did take off her jacket. The driver then forced her head down to perform fellatio on him. The victim cried and asked him to stop but he continued to force her until he ejaculated in her mouth.

[11] The victim testified that the driver threatened to leave her there and took her phone. After he ejaculated in her mouth, the victim said he drove her towards the hospital and dropped her off on the side of the road. He gave her phone back and she left walking to the hospital. Once she arrived at the hospital, she reported the sexual assault and she was transported to the Health Sciences Centre, where forensic specimen swabs were taken from her mouth and both breasts.

[12] During her testimony, she recalled that they swabbed in her mouth. When she was asked whether she remembered being swabbed anywhere else, she responded, "That's it."

[13] On July 18, 2023, a civilian member of the Winnipeg Police Service and DNA coordinator (Mr. Braz) executed a DNA warrant (see the *Code*, s 487.05) on the accused at Headingley Correctional Centre (HCC).

[14] The accused was taken to a room by a correctional officer where Mr. Braz was present. Prior to taking a sample, Mr. Braz provided the accused with his section 10(b) *Charter* right to counsel. The accused indicated that he wished to speak to legal counsel and a phone on the wall was used to make the call.

[15] Legal aid counsel spoke with the accused and testified during the *voir dire*. Her evidence was that she asked to speak to Mr. Braz and requested that the accused be permitted to speak to her in private. Staff at HCC indicated that it was not possible to do so. Legal aid counsel also asked Mr. Braz to leave the room, but he said, "I can't do it in this situation." He explained that he had other private documentation and equipment to process warrants in the room and he needed to protect that information.

[16] Thus, the accused was left to speak with the legal aid counsel in the presence of Mr. Braz and the correctional officer. The door to the room remained open. Legal aid counsel advised the accused not to say anything. She also advised him to provide a sample because there was a warrant.

[17] The motion judge delivered two separate reasons for decisions. The first decision found that the accused's section 10(b) *Charter* right was violated because he was denied a private phone call with a lawyer. The second addressed whether the evidence obtained by the warrant should be excluded under section 24(2) of the *Charter*. In her section 24(2) analysis, the motion judge concluded that the breach was not part of a pattern of breaches, which would have increased the seriousness of it under the first prong of the *Grant* test (see *R v Grant*, 2009 SCC 32 [*Grant*]). She found that Mr. Braz's actions did not amount to a "wilful or flagrant violation" of the *Charter*.

[18] As to the impact of the breach on the accused's *Charter*-protected interest, the motion judge found that the violation was significant as it had the potential to interfere with the accused's ability to make an informed decision about whether to comply with the DNA warrant. The motion judge noted that the accused did not testify, so there was no evidence about whether there was any additional information that he wanted to discuss with legal counsel, but was unable to as a result of not having the call in private. The advice he received was that if he did not comply with the DNA warrant, he could be forced to do so.

[19] The motion judge found that the impact on the accused was tempered because Mr. Braz did not attempt to collect anything other than the DNA evidence. As well, there were limitations on the advice that counsel could provide.

[20] Finally, the motion judge considered the importance of the case on its merits. She admitted the DNA evidence on the basis that doing so would not undermine public confidence in the administration of justice.

[21] At trial, Det. Prestayko testified about the route that the victim described from downtown to the area where the assault occurred. The detective also testified about attending at the accused's residence in Winnipeg to arrest him and "noticed a black Volkswagen under a tarp".

[22] Further, Det. Prestayko gave evidence about a photo lineup interview she conducted with the victim. The victim identified three of the ten photos that were shown to her as possible matches from what she could remember and selected a photo as the one that looked most like her assailant.

That photo was not of the accused, although one of the three photos she identified as possible was of the accused.

[23] The victim was asked if she had ever seen the assailant before the assault and she said no. She was also asked if she had ever known someone by the name of the accused and she answered no. The victim was not asked if the person in the prisoner's box at the trial was the assailant or if she had ever seen the person in the prisoner's box before.

[24] Trial counsel chose not to cross-examine the victim. At the close of the Crown's case, the accused made a motion for a directed verdict, arguing there was an absence of any evidence connecting him to the assailant.

[25] The trial judge dismissed the motion, explaining, among other things: "Given the evidence that the accused was at all times a stranger to the [victim] with his DNA on not one but two parts of her body, I am satisfied that there is some evidence to meet the test."

[26] The trial judge convicted the accused of sexual assault, finding it was not possible that the victim would come into contact with the accused's DNA on her breasts in any way other than by sexual assault.

[27] After rejecting a number of speculative inferences suggested by the accused, the trial judge concluded that "[t]he only reasonable inference . . . [was] that the accused picked up the [victim] at the Humphrey Inn and Suites, drove her to a location by the river, and forced her to perform fellatio on him." Therefore, she convicted him of sexual assault.

Analysis

Section 24(2) of the Charter

[28] A judge's decision on whether to exclude evidence under section 24(2) of the *Charter* is owed considerable deference on appeal. As stated in *R v Bagherli (A)*, 2014 MBCA 105 at para 58:

> A trial judge's determination on whether to exclude evidence pursuant to s. 24(2) of the *Charter* cannot be interfered with on appeal absent an incorrect application of a legal principle or an unreasonable finding of fact (*R. v. Mian*, 2014 SCC 54 at para. 77). Appellate review of how a trial judge has balanced the relevant factors as to whether the admission of evidence would bring the administration of justice into disrepute does not allow for recharacterization of evidence absent palpable and overriding error.
>
> [citations omitted]

(See also *R v Côté*, 2011 SCC 46 at para 44; *R v Farrah (D)*, 2011 MBCA 49 at para 7).

[29] The accused does not dispute that the motion judge considered the appropriate factors in her section 24(2) assessment. The motion judge considered the factors outlined in the *Grant* test:

(1) the seriousness of the state's conduct, which infringed the *Charter*;

(2) the impact of the *Charter* breach upon the accused's interests; and

(3) the interests of society in the adjudication of the case on its merits.

[30] The accused submits that while the motion judge's findings of fact concerning the admissibility of evidence must be respected, her findings were tainted by clear and determinative error. Specifically, the accused submits that the motion judge's finding that there was no evidence of a systemic pattern of breaching the right to consult with counsel in private amounts to a palpable and overriding error.

[31] The accused also submits that the evidence of Mr. Braz establishes that the right to consult with counsel was not exercised in private and was instead facilitated by a standard procedure at the HCC, where the phone was attached to the wall and the door was left open. Mr. Braz confirmed that he had never asked for a private room for counsel calls when executing other DNA warrants prior to this one. Further, while Mr. Braz testified he did not receive specific training at the HCC, he did receive general training and followed the procedures used by others. He also testified he observed RCMP officers following the same procedure at the HCC.

[32] As a result, the accused submits that the motion judge erred in her conclusion that there was not a pattern of breaches and made unreasonable findings that were not supported by the evidence.

[33] The motion judge's factual findings are owed deference and we are not satisfied that her findings amount to palpable and overriding error. Her findings are based on her assessment of Mr. Braz's credibility. The motion judge concluded that the evidence did not establish a systemic pattern of breaching the *Charter* right to receive legal advice in private. She found that

Mr. Braz's actions were not wilful or flagrant, and on the basis of the evidence, that finding was open to her.

[34] Mr. Braz explained that he had executed similar DNA warrants at HCC about six times and there was no evidence as to how many of the detainees requested to call counsel and how the calls were facilitated. The facts here can be contrasted with the facts in *R v Rover*, 2018 ONCA 745 at paras 40-42, where the Court concluded that there was *Charter*-infringing state conduct because the police routinely and deliberately delayed giving detained persons their right to retain and instruct counsel until after a search warrant had been obtained and executed.

[35] In the present case, the motion judge considered that Mr. Braz recognized that an error had been made and took steps to ensure that future detainees would have a room to speak to counsel in private. The motion judge found that this behaviour supported that he was not wilfully or flagrantly violating the rights of detainees in executing warrants.

[36] In our view, the motion judge balanced the relevant factors based on her review of the evidence, and her findings are entitled to deference. Appellate intervention is not warranted.

Unreasonable Verdict and Speculative Reasoning

[37] Grounds 2 and 3 address whether the verdict is unreasonable and unsupported by the evidence, and whether the trial judge engaged in speculative reasoning. The standard of review respecting an unreasonable verdict is explained in *R v Villaroman*, 2016 SCC 33 at para 55 [*Villaroman*]:

> A verdict is reasonable if it is one that a properly instructed jury acting judicially could reasonably have rendered. Applying this standard requires the appellate court to re-examine and to some extent reweigh and consider the effect of the evidence. This limited weighing of the evidence on appeal must be done in light of the standard of proof in a criminal case. Where the Crown's case depends on circumstantial evidence, the question becomes whether the trier of fact, acting judicially, could reasonably be satisfied that the accused's guilt was the only reasonable conclusion available on the totality of the evidence.
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> [citations omitted]

[38] Additionally, in *R v Hominuk*, 2019 MBCA 64 at para 4, the Court held that:

> In judge-alone trials, a verdict may also be found to be unreasonable in the exceedingly rare situation where the trial judge made a finding of fact that is directly contradicted by other evidence relied on in support of that finding or it is incompatible with evidence not otherwise contradicted or rejected by the trial judge.
>
> [citations omitted]

[39] The accused submits that a guilty verdict, when considering the whole of the evidence, is not one that a properly instructed jury could reasonably have rendered. There were other reasonable inferences beyond one of guilt and the trial judge engaged in speculation such that the inferences drawn were unreasonable. The focus of the accused's submission is that the trial judge presumed that the depositor of the DNA and the assailant were one and the same person. Further, the Crown failed to prove that the DNA was semen.

[40] As explained in *Villaroman*, the test to be applied is "whether the circumstantial evidence, viewed logically and in light of human experience, is reasonably capable of supporting an inference other than that the accused is guilty" (at para 38). The trial judge assessed the alternative inferences argued by the accused in light of the totality of the evidence. In our view, the inferences drawn by the trial judge were reasonable and open to her on a review of the totality of the evidence.

[41] While we agree the victim's testimony alone may not have been sufficient to identify the accused as the assailant beyond a reasonable doubt, there was other evidence, including the DNA of the accused found on the victim's breasts. Moreover, the trial judge found the victim credible, accepting her evidence that she "never saw the assailant before or after the assault, dispelling any suggestion or argument that she knew him or recognized him." This was a reasonable inference to draw based on the evidence.

[42] In arguing for an acquittal, the accused submits that the victim was not asked if she had met the accused before and she was not asked to identify the accused in court. In our view, in-court identification would not have assisted in this case. The victim was unable to definitively pick her assailant out of a photo lineup. Any in-court identification of the accused seated in the prisoner's box would have had little or no probative value. The inherent frailties of such an identification are well recognized (see *R v Clark*, 2022 SCC 49, rev'g 2022 SKCA 36 at para 80, Leurer JA, dissenting; *R v Hibbert*, 2002 SCC 39 at para 51).

[43] The accused also took issue with the fact that the victim did not remember swabs being taken from her breasts. The trial judge was entitled to

reject portions of the victim's testimony, especially in this case where more than four years had elapsed between the assault and the trial, and where some of her testimony was inconsistent with the agreed facts. The trial judge's conclusion logically flowed from the evidence.

[44] The accused submits that the trial judge engaged in speculative reasoning when she inferred that perhaps the assailant ejaculated on her sweater or that the victim wiped her mouth on her sweater as the assailant ejaculated in her mouth. The accused made submissions about how his DNA could have been a transfer from clothing, as well as other alternatives that were rejected by the trial judge as speculative.

[45] The issue of DNA transfer was addressed by this Court in *R v Hall*, 2018 MBCA 122 at paras 193-200 [*Hall*]. As explained, DNA transfer can occur in three ways: innocently before the crime, during the commission of the crime, or innocently after the crime (see *ibid* at para 194). We are not persuaded that the trial judge erred in finding that the factual matrix in the present case ruled out the reasonability of an innocent transfer before or after the crime. The accused and the victim were strangers who did not know each other; it is not contested that the assailant ejaculated in her mouth; the DNA swabs were taken shortly after the assault, thus ruling out post-offence transfer; and there was no evidence of pre-offence transfer such that the accused's DNA would get on both of the victim's breasts.

[46] Finally, it is significant to us that the accused did not testify at his trial to answer a circumstantial case that, standing alone, would support a conclusion of guilt beyond a reasonable doubt. While his silence is not evidence, it is indicative of an absence of exculpatory evidence in assessing

the claim of an unreasonable verdict (see *R v Carvajal*, 2026 MBCA 14 at para 19).

[47] As Mainella JA explained in *Hall*, "Alternative inferences can arise from the evidence or its absence but an inference must be more than possible; it must be reasonable. The Crown is not required to negate mere conjecture" (at para 196; see also *Villaroman* at paras 36-37; *R v Morin*, 2024 MBCA 85 at para 42).

[48] Ultimately, the trial judge had to determine whether the accused's DNA on the victim's breasts supported the inference that he was the assailant. She concluded that it was the only reasonable inference. Her conclusion was open to her on a review of all the evidence, was reasonable and was not based on speculation. We are also satisfied that her verdict was not based on an irrational reasoning process or was at odds with the evidence such that it vitiates the verdict.

Conclusion

[49] In the result, the conviction appeal was dismissed.

Edmond JA

Mainella JA

Kroft JA