Citation: R v JGC, 2023 MBCA 5
Date: 20230119
Docket: AR22-30-09783

IN THE COURT OF APPEAL OF MANITOBA

Coram: Madam Justice Freda M. Steel
Madam Justice Janice L. leMaistre
Madam Justice Karen I. Simonsen

BETWEEN:

	)	***J. F. Rogala***
HIS MAJESTY THE KING	)	*for the Appellant*
	)	
Respondent	)	***M. E. Carlson***
	)	*for the Respondent*
	)	
- and -	)	*Appeal heard and*
	)	*Decision pronounced:*
J. G. C.	)	***January 9, 2023***
	)	
(Accused) Appellant	)	*Written reasons:*
	)	***January 19, 2023***

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 2021 MBQB 221

SIMONSEN JA (for the Court):

[1] The accused appeals his convictions for assault of his common law partner, C.D., and two of her children, S. and C., as well as sexual interference against C.D.'s youngest child, K. He contends that the trial judge erred by applying a stricter standard of scrutiny to the defence evidence than to the evidence of the Crown's witnesses; and that the verdicts are unreasonable

because the trial judge's assessments of credibility and reliability of the witnesses are not supported by a reasonable review of the evidence.

[2] Following the hearing, we dismissed the appeal with reasons to follow. These are those reasons.

[3] At trial, C.D. and her children testified to multiple instances of assault committed by the accused in the family home. K. further described the accused sexually abusing her, both repeatedly in the family home, and, on June 12, 2018, in the barn on the rural property on which the home was situate. She said that, in the barn, the accused made her lick his penis and kissed her. K. also testified that, following the June 12, 2018 incident, she went from the barn to her bedroom and was crying, at which point she made disclosure to her mother. C.D. essentially confirmed that these were the circumstances of the disclosure. Immediately thereafter, C.D. fled the home with her children, and she and K. went to make a report to the police.

[4] The accused testified, attempting to paint himself as a disciplinarian and authority figure, and denying the offences against S., C. and C.D. He also denied any sexual abuse of K.

[5] The trial judge rejected the accused's denials and accepted the core evidence of the Crown's witnesses, except S. (about whom he had reliability concerns). He convicted the accused of all counts in the indictment except in relation to one alleged assault and one count of uttering threats, both against S.

[6] A trial judge's credibility findings are owed great deference and may only be interfered with where they cannot be supported on any reasonable view of the evidence (see *R v Wright*, 2013 MBCA 109 at para 53).

[7] As emphasized by this Court in *R v Jovel*, 2019 MBCA 116, "A claim of uneven scrutiny is easily made, but seldom successful" (at para 38). It is a difficult argument to make because "[i]t must be clear from the trial judge's reasons, or the record, that different standards were applied" (*ibid*) (see also *R v Bunn*, 2022 MBCA 34 at para 16). The mere fact that a trial judge accepts a complainant's version of events despite contradictory evidence from other witnesses, including the accused, does not establish uneven scrutiny, even if another judge may have assessed credibility differently (see *Jovel* at para 41). The Supreme Court of Canada has questioned whether uneven scrutiny can constitute a stand-alone ground of appeal or a separate and distinct error of law (see *R v Mehari*, 2020 SCC 40 at para 1; and *R v GF*, 2021 SCC 20 at paras 99-101). Rather, "the focus must always be on whether there is reversible error in the trial judge's credibility findings" (*GF* at para 100).

[8] The standard of review applicable to a claim of unreasonable verdict requires an appellant to establish that the verdict is one that a properly instructed trier of fact, acting judicially, could not reasonably have rendered; or the trial judge has drawn an inference or made a finding of fact essential to the verdict that: (1) is plainly contradicted by the evidence relied upon for that purpose by the trial judge; or (2) is shown to be incompatible with evidence that has not otherwise been contradicted or rejected by the trial judge (see *Jovel* at para 51).

[9] With respect to the offences alleged to have been committed against C.D., S. and C., the trial judge explained why he rejected the accused's testimony and was satisfied, based on the evidence called by the Crown, of the accused's guilt of each of the offences for which convictions were entered.

In our view, he carefully and evenly assessed all of the evidence, including inconsistencies, related to these offences.

[10] As for the sexual offending said to have occurred against K. in the family home, the trial judge did not believe the accused's denials but concluded that "there [were] simply too many inconsistencies in the evidence for [him] to conclude that the Crown [had] met its onus" (at para 92).

[11] However, it was a different matter with respect to the June 12, 2018 incident. Again, the trial judge did not believe the accused's evidence or find that it raised a reasonable doubt as to his guilt. However, he went on to note that, although there were "slight variations" (at para 94) in K.'s evidence, she was consistent about the key event of the accused making her lick his penis that evening. The trial judge found that discrepancies in her testimony "[were] not material having regard to her age and the lapse of time since the assault took place" (*ibid*). The trial judge also stated, "Moreover, and while it is not required of victims of sexual assault in order for their evidence to be given weight by the court, she immediately reported what happened to her mother and was visibly upset" (*ibid*). Thus, the trial judge found significant support for K.'s credibility in the circumstances of her disclosure. As we will explain, he was entitled to do so.

[12] Prior consistent statements are presumptively inadmissible, and the contents of a prior consistent statement cannot be used to support the prohibited inference that consistency enhances credibility, or that the simple making of a prior consistent statement corroborates in-court testimony (see *R v Khan*, 2017 ONCA 114 at para 41; and *R v Stirling*, 2008 SCC 10 at para 7). However, the rule against admission of prior consistent statements is subject to a number of exceptions, one being the narrative as circumstantial

evidence exception (recently recognized by this Court in *Beaulieu et al v Winnipeg (City of) et al*, 2022 MBCA 81 at para 42).

[13] Admissibility on the basis of this exception does not hinge on the mere repetition of the same information. As explained in *Khan*, “A prior consistent statement can be used not to corroborate the evidence of [a] witness, but to provide the surrounding circumstances and context to evaluate the credibility and reliability of the witness’s in-court testimony” (at para 39; see also *R v DK*, 2020 ONCA 79 at paras 35, 38, leave to appeal to SCC refused 39107 (2 July 2020). In *Bright v R*, 2020 NBCA 79, the Court aptly described this exception as permitting the use of prior consistent statements to assess credibility, but only to the extent a logical inference of reliability can be drawn from the manner in which the statement was made and/or its timing (see para 30).

[14] Therefore, despite the paucity of reasons as to why the trial judge disbelieved the accused in connection with the June 12, 2018 incident and found that his evidence in that regard failed to raise a reasonable doubt as to his guilt of sexual interference, we are not persuaded that he made any palpable and overriding error of fact, or any error of law, in his credibility analysis. The context and timing of K.’s disclosure, immediately after the June 12, 2018 incident, distinguished her evidence about that matter from her evidence about the accused’s other sexual offending.

[15] In our view, the trial judge reasonably assessed all of the evidence. The claim of uneven scrutiny has not been established.

[16] Finally, we are not persuaded that any of the verdicts are unreasonable. The record reasonably supports all of the conclusions the trial

judge reached, and he did not draw any inference or make any finding of fact essential to the verdicts that was tainted by reviewable error.

[17] For the foregoing reasons, the appeal was dismissed.

Simonsen JA

I agree: Steel JA

I agree: leMaistre JA