Citation: R v JH, 2025 MBCA 88
Date: 20250929

IN THE COURT OF APPEAL OF MANITOBA

Coram: Chief Justice Marianne Rivoalen
Madam Justice Jennifer A. Pfuetzner
Madam Justice Karen I. Simonsen

B E T W E E N:

	)	***E. G. Murphy***
HIS MAJESTY THE KING	)	*for the Appellant*
	)	
Respondent	)	***K. E. Hart***
	)	*for the Respondent*
- and -	)	
	)	*Appeal heard and*
J. B. H.	)	*Decision pronounced:*
	)	***September 23, 2025***
(Accused) Appellant	)	
	)	*Written reasons:*
	)	***September 29, 2025***

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).

SIMONSEN JA (for the Court):

[1] The accused appealed his conviction for sexual interference against his then girlfriend's (the girlfriend) eight-year-old niece (the victim).

[2] The offence involved multiple instances of vaginal touching as the victim slept on the living room couch during some of her frequent weekend visits at the residence of her grandmother (the grandmother), where the accused and the girlfriend were staying.

[3] On appeal, the accused asserted that the trial judge misapprehended the evidence in relation to her findings that the accused was alone with the victim and her younger brother (the children) at the grandmother's residence and that the nature of the touching was the same in each instance.

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

[5] A misapprehension of evidence 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. The error must be readily obvious. As well, the error must be material rather than peripheral to the reasoning of a trial judge. It must play an essential part not just in the narrative of the judgment but also in the reasoning process resulting in a conviction (see *R v Whiteway (BDT)*, 2015 MBCA 24 at paras 31-32).

[6] The case law provides additional caution regarding appellate review of a trial judge's credibility assessments. The credibility of a witness is a finding of fact that is owed significant deference on appeal. The applicable standard of review is palpable and overriding error (see *R v CAM*, 2017 MBCA 70 at para 32).

[7] The trial judge found that the accused's evidence "was at times evasive and inconsistent with the record" and she rejected his denials of sexual touching.

[8] The accused testified that he was never alone with the children. He argues that the trial judge misapprehended the evidence, and thereby erred by rejecting his testimony without there being any evidence that contradicted

him. He notes that the grandmother was not certain whether he babysat the children alone or with the girlfriend.

[9] The trial judge found that the accused was alone with the children at various times, including while at the firepit on the grandmother's property. She noted that, despite the accused saying that other adults could always see him and the children when they were near the firepit, he admitted, when pressed on cross-examination, that others were not always within eyesight when he was with the children around the firepit. The trial judge was entitled to find the accused's evidence in this area "evasive" and that it "appeared tailored to avoid admitting he was sometimes alone with the children."

[10] In our view, there was no misapprehension of the evidence. The trial judge explained that her concern arose from the testimony of the accused himself.

[11] Next, the accused argues that the trial judge misapprehended the evidence about him never babysitting the children alone because there was no evidence inconsistent with his testimony that there was an incident in which his refusal to babysit the children on his own led to an argument and the grandmother's partner (the partner) having to stay home. The accused notes that the Crown did not call the partner to rebut his evidence on this point and that the grandmother did not deny the incident occurred.

[12] The trial judge was well aware of the evidence and stated that the inconsistency between the accused and the grandmother arose from the grandmother's evidence "that she asked [the accused] to babysit and he did not refuse or express a concern about it" and that she did not recall any incident where the accused's refusal to babysit on his own resulted in the

partner having to stay home. Again, we are not persuaded that the accused has met the stringent test for establishing a misapprehension of the evidence.

[13] Furthermore, even if there was a misapprehension, we agree with the Crown that it was not central to the trial judge's reasoning. Her rejection of the accused's testimony did not hinge on his evidence about never being alone with the children, as she referred to other instances where his testimony was inconsistent with the record as well as instances where he refused to make reasonable concessions.

[14] The accused also contends that the trial judge misapprehended the evidence of the victim when she stated that "[t]he manner of touching was not complex and the same for every alleged incident." The accused says that the incidents were not, in fact, the same and that there were variations in the way in which they occurred.

[15] We see no misapprehension. All of the incidents involved vaginal touching that occurred as the victim slept on the living room couch. The *manner* of touching was essentially the same. However, as the victim testified, the circumstances surrounding the touching "kind of varied" because when the victim woke up to the accused touching her, sometimes he would leave and sometimes he would stay.

[16] Regardless, we fail to see how any misapprehension was material to the trial judge's decision. She clearly understood the nature of the touching when she noted that the victim had described "all of the multiple incidents of touching [as] the same, meaning the nature of the touching and the surrounding circumstances were substantially the same for all of the alleged incidents."

[17] In our view, the trial judge's findings are reasonably supported by the record. No palpable and overriding error has been demonstrated. The accused is simply asking this Court to interpret the evidence differently than the trial judge did. That is not our role. There is no basis for appellate intervention.

[18] For the foregoing reasons, we dismissed the appeal.

Simonsen JA

Rivoalen CJM

Pfuetzner JA