Citation: R v Madder, 2024 MBCA 80
Date: 20241017
Docket: AR23-30-09879;
AR23-30-09881

IN THE COURT OF APPEAL OF MANITOBA

Coram: Chief Justice Marianne Rivoalen
Mr. Justice Marc M. Monnin
Madam Justice Lori T. Spivak

B E T W E E N :

	)	***D. N. Queau-Guzzi***
HIS MAJESTY THE KING	)	*for the Crown*
	)	
Appellant/Respondent	)	***E. J. Roitenberg, K.C.***
	)	*for the Accused*
- and -	)	
	)	*Appeals heard:*
CHRISTOPHER MADDER	)	***January 24, 2024***
	)	
(Accused) Respondent/Appellant	)	*Judgment delivered:*
	)	***October 17, 2024***

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 *Criminal Code*, RSC 1985, c C-46, s 486.4).

On appeal from *R v Madder*, 2022 MBPC 57 [*Madder*]

MONNIN JA

Introduction

[1] The accused, after a five-day trial, was convicted of sexually assaulting two victims, M.H. and S.M. He received a sentence of five years' imprisonment. The accused appeals his conviction and the Crown seeks leave to appeal and, if granted, appeals the accused's sentence.

The Conviction Appeal

[2] The accused and his wife met the victims' parents, C.H. and R.H., at a convention in August 2014. From that point in time, the H. family and the accused's family became close. They would socialize regularly and they vacationed together, sometimes at the H.'s cabin.

[3] The accused, who had an interest in providing massages as a result of sports injuries over the years, would on occasion massage his daughter and wife while visiting the victims' family. C.H. asked him to provide her with massages and then he began providing them to M.H. due to her sports injuries. This started when she was fifteen or sixteen. M.H. testified that she received massages regularly both at the family home and at the cabin and that those massages changed to a sexual nature by the time she reached seventeen, such as touching her buttocks and her vagina over her clothing. She testified that these massages continued until she concluded that they were inappropriate. She discussed it with her boyfriend, mother and sibling and then provided a statement to the RCMP.

[4] S.M., M.H.'s sibling, was cisgendered, identifying as female and known as S.H. at the time of the offences. At trial, S.M. was a transgendered male with the pronouns "he/they."

[5] S.M. testified that the massages began when he was seventeen and continued until he was twenty-one. He testified also that within a year, they changed in nature into sexual touching and involved touching his buttocks and breasts. When he moved out of the family home, the accused would pick him up and bring him back to his house for the massages to occur. He provided a

statement to the RCMP after being told of M.H.'s allegations. He provided a second statement at a later time.

[6] The accused testified on his own behalf and, while admitting that the massages took place, denied that they had a sexual nature or that they included some of the touching alleged by the victims. As well, he testified that he sought and obtained consent from the victims any time that he believed the touching could be construed as inappropriate.

[7] On January 3, 2020, M.H. told her mother that the accused had touched her inappropriately. This was followed by S.M.'s disclosure on January 9 or 10, 2020. Statements to the RCMP by all three were provided shortly thereafter.

[8] Two evidentiary issues that surfaced at trial have relevance to this appeal. The first arose during the cross-examination of the victim, M.H.

[9] Under cross-examination, M.H. admitted that once she realized that the massages had become inappropriate, she felt uncomfortable around the accused and avoided him. She believed this occurred when she was about nineteen years of age, although her answers suggested it may have been earlier. In any event, she was asked whether she had come to this realization by January 2018, and she agreed that she would have.

[10] After the accused applied under section 278.93 of the *Criminal Code*, RSC 1985, c C-46 [the *Code*], to allow cross-examination on a text message M.H. sent to the accused on January 25, 2018 (the January 2018 text message), the Crown conceded that the text was not a record and a ruling was not required. The text message was then presented to M.H. during

cross-examination. In it, she asked the accused to drop by her house for a massage. Under cross-examination, she did not remember sending that text message to the accused, but admitted that it was possible that she did.

[11] The second aspect of the evidence that is relevant to this appeal also arose as a result of cross-examination on text messages. These were sent shortly after the victims disclosed the sexual assaults. In an exchange between the victims' mother, C.H., and the accused, texts dictated by the accused were sent to C.H. In the texts, the accused states: "I often told [M.H.] if she was uncomfortable with anything she could tell me."

[12] While the texts arose as a result of the victims' mother expressing her anger towards the accused because of the allegations of sexual assault, the accused under cross-examination indicated that his use of the word "uncomfortable" in the text when he referred to his discussions during the massages was a reference to pain, as opposed to the nature of the touching. The cross-examination on that suggestion continued for some time and involved the trial judge asking a few questions of her own. It was the subject of commentary by the trial judge in her reasons to which I will refer later.

Reasons for Judgment on Conviction

[13] After setting out the evidence, the trial judge moved to an analysis under *R v W(D)*, [1991] 1 SCR 742, 1991 CanLII 93 (SCC) [*W(D)*]. Dealing with the assessment of the accused's evidence, she found that he had given it in a most straightforward fashion and was candid on many points. The accused testified that he did not know that either victim ever felt uncomfortable and that both specifically requested massages for the period of four to five years. The trial judge then reviewed the text messages the accused

sent to C.H. after M.H. had disclosed to her. The trial judge found that it was clear that the accused understood that discussions with C.H. about being uncomfortable referred to the nature of the touching being sexual. She found that the accused's refusal to acknowledge that the reference to "being uncomfortable with the massages" in the texts was a reference to the nature of the touching and not physical pain "was curious and rather nonsensical in the context of the text conversation." She continued that the accused's answers to the Crown's line of questions on the text messages seemed "designed to try to deflect from any acknowledgement that the [victims] may have been uncomfortable with the intimate touching when that is clearly what was being referenced". She found that his evidence appeared "to show an intentional attempt to avoid or deflect from the real issue" and this caused her concern as it "suggest[ed] a considered effort to suggest a different meaning to some of the evidence". In her view, this negatively affected the accused's credibility.

[14] The trial judge then turned to the evidence of the victims. As to M.H., she found her to be "a soft-spoken and articulate witness." While finding that she became emotional occasionally, she was able to give "logical and detailed explanations . . . [did not] dispute inconsistencies . . . between her trial evidence and statements that she made to the police." She did not demonstrate any "animus towards [the accused], acknowledging how close she and her family had been to him." She did not seem to exaggerate the extent of the touching and agreed with suggestions on cross-examination that she did not tell him to stop unless she did not want to be massaged. She never told him that she felt uncomfortable, none of which, in the trial judge's view, triggered "any inference about her credibility or reliability." The trial judge acknowledged certain inconsistencies between M.H.'s evidence at trial and

what she told the police in her statements. For example, she told police that there were fifteen massages of a sexual nature, but at trial, the number rose to forty. On cross-examination, M.H. was able to give a detailed description of the first time the accused touched her vagina. However, there was no suggestion of this to the police. The trial judge noted there was no evidence that M.H. was asked that by the police. M.H. admitted to speaking to her sibling before they went to the police. However, she stated that she only gave S.M. the same details as she had given her mother.

[15] As to the January 2018 text message that M.H. sent to the accused asking for a massage, the trial judge stated that she could consider how M.H. responded to questions about that text exchange in assessing her credibility. She said:

> It would be incorrect for the Court to rely on such a request for a massage to support a finding that earlier assaults did not happen and/or that she consented to any touching. This evidence goes only to the credibility of her statement that she does not think she asked him to massage her after January 1st, 2018, in the face of a text she agrees she may have sent that did make a request for a massage. It is not a case where she was adamant that she didn't make such a request. It was over four years ago. She said she did not think she had but she agreed when shown the text that she may have. I do not make any negative finding about her credibility over that.

[16] Overall, the trial judge found M.H. to be a credible witness.

[17] As to S.M., the trial judge found him a more expressive witness, but that his version of events was not "a copycat of [M.H.'s] allegations." His evidence was specific and detailed and was not really shaken on cross-examination. She found his evidence credible.

[18] The trial judge concluded with a finding that neither the accused's denials nor his evidence left her with a reasonable doubt in the context of all the evidence and there was credible evidence by the victims to the contrary. Some of M.H.'s evidence was corroborated by her mother and the trial judge accepted both M.H. and S.M.'s evidence. She was persuaded beyond a reasonable doubt that the touching that they alleged occurred did in fact happen and that the accused did not seek their affirmative consent. She was persuaded beyond a reasonable doubt that the accused knew or was reckless or wilfully blind to the fact that the victims were not consenting to the touching. She convicted him of sexual assault as to both M.H. and S.M.

Issues

[19] In his material and in arguments before us, the accused raises the following issues:

(a) That the trial judge erred by misapprehending the evidence called at trial;

(b) That the trial judge erred in her application of the law pertaining to the assessment of the credibility and reliability of the testimony of the accused; and

(c) That the trial judge erred by applying a different standard in assessing the evidence called by the defence as opposed to the evidence called by the Crown.

Misapprehension of Evidence and Misapplication of the Law

[20] On an appeal against conviction, pursuant to section 686(1) of the *Code*, this Court may allow an appeal where it is of the opinion that (i) the verdict is unreasonable or cannot be supported by the evidence, (ii) it is based on a wrong decision on a question of law, or (iii) on any ground where there was a miscarriage of justice.

[21] As I understand the accused's arguments under these two grounds of appeal, he alleges a miscarriage of justice occurred because the verdict was reached by reason of a misapprehension of the evidence by the trial judge. That misapprehension was partly as a result of a misapplication of the law relating to the use that could be made of an inconsistent statement.

[22] As noted in *R v Jovel*, 2019 MBCA 116 [*Jovel*], there are two aspects to a successful appeal on a misapprehension of evidence. The misapprehension must be a readily obvious error that goes to the substance of the material parts of the evidence rather than to the detail. As well, the error must play an essential part in the reasoning process resulting in the conviction (see *ibid* at para 31).

[23] A misapprehension of evidence is not to be confused with mere "different interpretations of the evidence" (*R v Lee*, 2010 SCC 52 at para 4). As stated in *Jovel*, "[i]t is not the function of this Court to reinterpret the accused's evidence more favourably than did the judge based on a minute study of the lifeless text of a transcript" (at para 36).

[24] An appellate court should not "dissect, parse, or microscopically examine the reasons of a trial judge" (*R v CLY*, 2008 SCC 2 at para 11). In

order "to not usurp the function of a trial judge, an appellate court cannot characterise a trial judge's interpretation of evidence as a misapprehension simply because it does not agree with it, it raises some unease or concern, or it may be a mistake" (*Jovel* at para 35; see also *R v CJ*, 2019 SCC 8, adopting dissent of Pfuetzner JA 2018 MBCA 65 at paras 67-68; *R v Sinclair*, 2011 SCC 40 at para 53 [*Sinclair*]).

[25] Further, it is insufficient that the trial judge *may have* misapprehended the evidence: "more is needed than an 'apparent' mistake . . . A court of appeal should not, in applying the *Lohrer* test, order a new trial unless the trial judge has made a real error; its decision cannot be speculative" (*Sinclair* at para 53). As further explained in *Sinclair*: "When such errors are in fact committed, appellate courts have no difficulty in explaining why they caused the trial judge's reasoning process to be fatally flawed and where they may be found in the reasons. In such situations, the errors are readily obvious" (at para 53).

[26] The case law provides additional words of caution regarding appellate review of a trial judge's credibility assessments. The credibility of a witness is a question of fact, determined by an "assessment of the witness and on consideration of how an individual's evidence fits into the general picture revealed on a consideration of the whole of the case" (*R v Béland,* 1987 CanLII 27 at para 20 (SCC); see also *Jovel* at para 28). The trial judge's findings of fact are owed significant deference, especially with regard to credibility findings "because assessing credibility is not a science and, given the many factors that go into such decisions, it is not always amenable to precise articulation by a trial judge" (*ibid* at para 35; see also para 29; *R v REM*, 2008 SCC 51 at para 49). Further, "[i]t is very difficult for a trial

judge to articulate with precision the complex intermingling of impressions that emerge after watching and listening to witnesses and attempting to reconcile the various versions of events" (*R v Gagnon*, 2006 SCC 17 at para 20). Therefore, in the absence of palpable and overriding error, the perceptions of the trial judge "should be respected" (*ibid*).

[27] Appellate courts have recently been warned against parsing a trial judge's reasons, especially in the context of credibility findings and sexual assault trials (see *R v GF*, 2021 SCC 20 at para 76 [*GF*]). The Supreme Court of Canada has stated that "[w]here ambiguities in a trial judge's reasons are open to multiple interpretations, those that are consistent with the presumption of correct application must be preferred over those that suggest error" (*ibid* at para 79).

Analysis

[28] The accused's first contention is that the trial judge misapprehended his evidence with respect to the use of the word "uncomfortable" as used in the testimony relating to the 2020 text messages exchanged immediately after the disclosure. The trial judge concluded that in those messages, it referred to the nature of the touching in a sexual or intimate way and that the accused shared this understanding of the word "uncomfortable". She found that the accused was "adamant" that in the text messages he was referring to physical pain and refused to acknowledge that it was a reference to the nature of the touching. She concluded that the responses were "an intentional attempt to avoid or deflect" or "designed to try to deflect" from any acknowledgment that the victims were uncomfortable with the nature of the touching. As a result, the trial judge concluded that the accused's evidence constituted a

considered effort to suggest a different meaning to some of the evidence when the real meaning was clear. The accused argues that the trial judge misinterpreted his responses to questions during cross-examination such that she ascribed negative connotations that his evidence could not bear.

[29] I do not agree. The conclusion drawn by the trial judge that the accused used the term "uncomfortable" in the texts with reference to the sexual allegations is consistent with the timing and nature of the messages. They were a response to the victims' mother expressing anger as a result of the allegations. The use by the accused of the words "[i]t's made everything I've done seem dirty" suggests that he was aware of the nature of the allegations and how it was being used in that context.

[30] The accused's counsel suggests that the word "uncomfortable" was used by the accused in two different ways during the course of his testimony. In the first case, it was a reference to the sexual nature of the allegations, but in the other, it was with respect to discussions about pain the victims may have experienced during the course of the massages.

[31] In my view, it was available to the trial judge on the evidence before her to conclude that the accused was attempting to suggest a different meaning for the 2020 text messages, which was designed to deflect from the real issue. The position advanced by the accused's counsel would require this Court to re-weigh the evidence and substitute our conclusions for those of the trial judge. The meaning given by the trial judge to the accused's use of the term and motivation is not a "readily obvious" misapprehension of the evidence.

[32] The accused's next point of contention is the trial judge's use of the inconsistency raised between M.H.'s evidence under cross-examination and

the wording of the January 2018 text message whereby she requested a massage from the accused, contrary to her statement that she was avoiding him.

[33] The accused argues that the trial judge wrongfully applied the law when she failed to use the inconsistent statement to assess the overall credibility of the victim, M.H. He relies on the trial judge's comment in her reasons, where she says:

> It would be incorrect for the Court to rely on such a request for a massage to support a finding that earlier assaults did not happen and/or that she consented to any touching. This evidence goes *only* to the credibility of her statement that she does not think she asked him to massage her after January 1st, 2018, in the face of a text she agrees she may have sent that did make a request for a massage. . . . I do not make any negative finding about her credibility over that.
>
> [emphasis added]

[34] It is necessary to read that portion of the reasons together with the previous comment on where she stated:

> *The Court may consider how [M.H.] responded to questioning about that text exchange in assessing her credibility.* When it was put to her she said she may have sent it but she didn't remember. She did become quite agitated when questioned about it. Defence counsel argues that this impugns her credibility because she says she never asked for a massage after she realized the massages were inappropriate around January 1st, of 2018, and these texts would mean that wasn't true. But, in fact, what she initially said when asked if she ever asked him for a massage after that time was, "I don't think so". When asked if she recalled asking him on January 25th, 2018, if he could come around and give her a massage she said, "I do not". She didn't say she hadn't done so. All of the evidence about this comes down to the fact she agreed she may have asked [the accused] to come and give her a massage

> in January of 2018, which was after the time she had realized the massages were inappropriate, and she was avoiding him, and didn't want to be around him.
>
> [emphasis added]

[35] As well, the trial judge stated:

> It is not a case where she was adamant that she didn't make such a request. It was over four years ago. She said she did not think she had but she agreed when shown the text that she may have. I do not make any negative finding about her credibility over that.

[36] I do not read the trial judge's reasons as suggesting that she did not consider the inconsistency in her assessment of the overall credibility of the victims. Her comments were correct if they meant that the mere fact that M.H. requested a massage could not be used as an indication that her evidence with respect to the assaults occurring could not be truthful or reliable. The use of the word "only" in the next sentence to me indicates that the trial judge was not going to be drawn into making an improper use of the evidence to make an inference, which went against the prohibited myth that a sexual victim would necessarily avoid a perpetrator (see *R v ARD*, 2017 ABCA 237, aff'd *R v ARJD*, 2018 SCC 6).

[37] She then explained why, in her view, the alleged inconsistency, having occurred four years ago and being inconclusive, did not affect her overall view of M.H.'s credibility. The trial judge was entitled to reach this conclusion as part of her role in assessing the evidence before her. It is not clear that it led her to make an inappropriate conclusion on the validity of the

evidence of one of the victims. It is not an obvious error that would lead to appellate interference.

[38] The next point raised by the accused relates to the trial judge's interpretation of the evidence of the accused on the issue of consent and her conclusion that she did not believe his evidence on that point.

[39] In her reasons, the trial judge stated:

> He said all the touching was with their permission, but [the accused] agreed that he put the onus on them to tell him if they were uncomfortable with the touching.
> . . .
> Given the [victims'] evidence that he did not ask, the circumstances in which the touching happened, and his own evidence that he put the onus on them to tell him when they were uncomfortable, I do not accept his evidence that he asked and obtained consent, at least not every time he touched the areas above their breasts, or any of the touching of the buttocks, nor does it leave me with reasonable doubt, and I do accept the evidence of the [victims] that he did not ask for, nor did they give, consent for that touching to occur.

[40] These excerpts are part of the trial judge's reasons leading to her statement that she did not believe the accused's evidence nor did it leave her with reasonable doubt. She then added: "[B]ecause when I consider his evidence, his outright denials, in the context of all the evidence, there is credible evidence of [M.H.] and [S.M.] to the contrary."

[41] The accused's position is that the trial judge misapprehended the evidence with respect to consent. In his submission, the accused's evidence with respect to asking the victims to advise him if they were uncomfortable with the touching related to his evidence concerning the direction he gave

each of them that if they were experiencing pain or awkwardness, they should let him know. It was not, as described by the trial judge, placing the onus on the victims to indicate their non-consent.

[42] The accused's counsel argues that it was concerning that the trial judge relied upon the evidence of the victims in coming to the conclusion that the accused's evidence did not leave her with a reasonable doubt. In his submission, to conclude that she accepted the victims' evidence before assessing that of the accused was possibly contrary to the requirements of the assessment mandated by *W(D)*.

[43] I have carefully reviewed the reasons of the trial judge in respect of the accused's evidence on consent. I find no error or misapprehension. It was open to her, based upon the accused's evidence of the steps he took before and during the massages to inquire about the victims' agreement to the touching, to conclude that she was not left with a reasonable doubt based upon his evidence. The trial judge was entitled and, in fact, as this Court has said, was required to look at the other evidence before her in assessing whether she accepted the accused's evidence on this issue.

[44] In my view, the trial judge did not misdirect herself in the manner in which she conducted her *W(D)* assessment. There was ample evidence for her to conclude that the victims' evidence persuaded her beyond a reasonable doubt that the accused knew or was reckless or wilfully blind to the fact that they were not consenting to the touching of a sexual nature.

[45] The accused raises two further arguments on the trial judge's misapprehension of the evidence. He suggests that the trial judge erred in

finding that neither victim exhibited any animus towards him or that there was no collusion between them in preparing their statements to the police.

[46] I find no merit in those arguments. The evidence upon which the accused relies to suggest animus is inconclusive at best and lacks any sense of being readily obvious. As to the issue of collusion, it was fully argued before the trial judge. She found that there was no suggestion that the victims' versions of what occurred were copycat versions. As she stated, the victims alleged "different touching, different things that were said, and that the conduct continued when [the accused] would pick [S.M.] up and take him to his own residence for massages."

[47] The accused has failed to convince me that the argument of misapprehension of evidence by the trial judge should succeed.

Uneven Scrutiny

[48] This Court's jurisprudence has recognized that applying a stricter standard of scrutiny to the evidence of the accused and less to assess the evidence of the Crown witnesses may be an error of law that could undermine the fairness of the trial, giving rise to a miscarriage of justice (see *R v Glays*, 2015 MBCA 76 at paras 13-14; *R v Neves*, 2005 MBCA 112 at paras 60, 74-93, 192, 196; *R v Owen*, 2001 CanLII 3367 at para 3 (ONCA)).

[49] As noted by this Court in *R v Buboire*, 2024 MBCA 7 [*Buboire*] and *R v Silaphet*, 2024 MBCA 58 [*Silaphet*], the Supreme Court has raised the appropriateness of using this ground of appeal as a stand-alone ground of appeal or separate and distinct error of law (see *GF* at paras 100-101; *R v Mehari*, 2020 SCC 40). As stated in *Silaphet*: "Rather, 'the focus must

always be on whether there is reversible error in the trial judge's credibility findings' (*GF* at para 100). A trial judge's evaluation of credibility may only be interfered with where it cannot be supported on any reasonable view of the evidence (see *Jovel* at para 38)" (at para 24).

[50] In *Buboire* at para 13, Mainella JA, relying on *R v CAM*, 2017 MBCA 70, set out the relevant principles on a claim of uneven scrutiny:

> First, the role of an appellate court when a claim of uneven scrutiny is advanced is not to retry the case; it is only to review for material error (see para 36). Second, the heavy burden on an appellant advancing a claim of uneven scrutiny requires them to be able to point to something significant in the trial judge's reasons or the record that clearly establishes faulty methodology was employed in the assessment of credibility (see para 34). Third, the mere fact credibility could have been assessed differently on the trial record does not suggest, let alone establish, that uneven scrutiny has occurred; much more is required for an uneven scrutiny argument to succeed (see para 35). Fourth, the fundamental rule for the 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" (at para 37; see also *R v EGC*, 2023 MBCA 74 at para 8; *R v Tamana*, 2022 MBCA 26 at para 6; *R v Markwick*, 2022 MBCA 20 at para 5; *R v TPR*, 2022 MBCA 14 at para 6; *R v Simon*, 2020 MBCA 117 at para 3; *R v Singh*, 2020 MBCA 61 at paras 32-33; *R v Pelletier*, 2019 MBCA 126 at para 8; *R v Jovel*, 2019 MBCA 116 at para 8 [*Jovel*]; *R v Merkl*, 2019 MBCA 15 at para 14; *R v Bourget*, 2019 MBCA 10 at para 4; *R v Volden*, 2018 MBCA 91 at para 7; *R v BGG*, 2018 MBCA 31 at paras 6-7).

Analysis

[51] As part of his argument on this issue, the accused raises the inconsistency between M.H. asking him for a massage on January 25, 2018, when she testified that she sought to avoid him, beginning January 1, 2018.

He also raises the inconsistency between the number of incidents described by M.H. to the police and her testimony at trial. He notes that the trial judge acknowledged the inconsistency yet determined that M.H. was internally consistent. He also raises credibility concerns as to the course of conduct of both victims, who provided, according to him, "internally incompatible explanations", which were not reconciled by the trial judge.

[52] The accused also notes the manner in which the trial judge limited the use of the contradiction between the January 2018 text message requesting a massage and M.H.'s overall credibility. He also raises the failure of the trial judge to find an animus between the victims and the accused, noting that the evidence clearly shows, at least for S.M., the animus in question. Finally, he argues that the failure to find collusion shows that the trial judge did not properly consider the evidence of the three witnesses for the Crown.

[53] The accused contrasts that assessment to the credibility assessment performed of his testimony, particularly the failure to consider the text messages between him and the victims' mother in their entirety in drawing a negative inference against him. In the accused's submission, it was unreasonable for the trial judge to find that the only available interpretation was that he knew that the references were in regard to the nature of the touching.

[54] I do not propose to repeat the reasons why I found the accused's arguments lacking with respect to the trial judge's reasoning on these issues when dealing with the misapprehension of evidence argument, but will say that to the extent that they are applicable to this issue as well, I would adopt them. As I stated previously, in my view, there was no error on the part of the

trial judge in her reasoning with respect to the use she could make of the inconsistency in M.H.'s evidence concerning the January 2018 text message. Similarly, there was no compelling evidence before the trial judge to support findings of animus on the part of the victims towards the accused nor of collusion between the Crown's witnesses.

[55] In short, given the high degree of deference that must be granted to the trial judge's findings and credibility assessments, I cannot find, as suggested by the accused, that the trial judge has applied a different standard in assessing the evidence of the different witnesses. It is not our role to retry the case, as the trial judge was entitled to reject the accused's evidence and accept that of the victims. The trial judge has sufficiently articulated the reasons for her findings and this ground of appeal fails as well.

Conclusion on the Conviction Appeal

[56] For the above reasons, I would dismiss the appeal from conviction.

The Sentence Appeal

[57] The Crown argues that the trial judge fixated on the age of the victims to the point that she overemphasized its importance in her determination of a fit and proper sentence.

[58] In her summary of the facts, the trial judge noted that while the victim, M.H., started receiving massages from the accused when she was fifteen, the sexual touching during massages began when she was sixteen and continued until she was nineteen. As to S.M., the sexual touching started when he was seventeen, intensified when he was eighteen and continued until he

was twenty-one. During that time, the accused was between forty-one and forty-five years of age.

[59] At the sentencing hearing, the Crown submitted that sentences of seven years for the sexual assaults on M.H. and eight years for those on S.M. were fit and appropriate. It recommended a reduction for totality for a global sentence of thirteen years, specifically, six years for the offences against M.H. and seven years for S.M.

[60] The accused's position was that a global sentence for both offences of five and one-half years was a fit sentence, arguing for a reduction for totality to three and one-half years.

[61] The trial judge received a pre-sentence report that noted, while the circumstances of the offences were not directly discussed, the accused did not take responsibility for the offences but expressed feelings of victimization and demonstrated little if any empathy towards the victims and "[did] not recognize any cognitive, emotional, or situational precursors that may have been contributing factors." Nevertheless, the pre-sentence report assessed the accused at a low risk to reoffend and at a below-average risk to reoffend using a different assessment tool.

[62] In her reasons for sentence, the trial judge, after reviewing the nature of the offences against each victim, then reviewed the mitigating factors. She noted that the accused did not have a prior criminal record. She considered the fact that he had not been involved in any criminal activity after being charged with the offences. He had been on strict release conditions, including conditions limiting contact with his children, which prevented his family from living together since January 2020. He had not breached his release conditions

and had many community supports. While the accused's counsel argued that the collateral consequences to the accused indicated that he had suffered as a result of charges and convictions, the trial judge was of the view that, since the consequences were linked to the nature of the offences, their effect on mitigation was low. As well, given the nature of the offences, evidence of good character was to be given minimal weight.

[63] As to aggravating factors, she listed a number, the first being the age of the victims. The fact that each was below the age of eighteen for a substantial period of the offending was statutorily aggravating, as was the significant age difference, which created a power imbalance. As well, the trial judge noted the significant degree of physical interference with both victims and the frequency and length of time during which the offences occurred. The offences occurred in the family home and the family cabin; places where the victims were entitled to feel safe. She found that the accused was in a "clear position of trust in relation to both victims" (*Madder* at para 46) given the closeness of the families, which was statutorily aggravating as well. The accused groomed both the victims and their parents. Finally, she noted that the impact on the victims and their parents had been tremendous.

[64] The trial judge noted that the offences committed against both victims were serious and there was nothing that reduced the accused's blameworthiness, which was high. She indicated that the primary sentencing considerations were deterrence and denunciation, with the aim to deter others from sexually offending against young persons, including young adults and to express society's condemnation of the conduct. In her view, specific deterrence would be addressed by a jail sentence and was likely already achieved given the consequences of the arrest and limitations imposed by the

bail conditions under which he had operated. Even though the accused denied the offending, which he was entitled to do, rehabilitation was relevant. The principle of restraint was also relevant given his lack of record, low risk and otherwise pro-social life.

[65] She recognized the importance of the directions provided by the Supreme Court in *R v Friesen*, 2020 SCC 9 [*Friesen*], including the factors to be considered to determine a fit sentence. She then reviewed a number of cases involving sentences for sexual interference and sexual assault since this Court's decision in *R v Sidwell (KA)*, 2015 MBCA 56 [*Sidwell*], which established a four to five years starting point for the major sexual assault of a child by a person of good character, in a position of trust with no prior criminal record. She noted that *Friesen* discouraged attempting to distinguish between major or minor sexual assaults but looked more to the effect on the victims. She also noted that *Friesen* endorsed the factors set out in *Sidwell* as relevant considerations in sentencing; namely, (a) the relative ages of the children and offender, (b) the nature of the position of trust involved, (c) the nature of the offending conduct, (d) the length of time in which the offending took place and the frequency of the offending, (e) whether there was physical violence, threats or manipulation, and (f) the impact on the victim. She noted that *Friesen* confirmed that *Sidwell* could be used as a starting point applied in a "contextually sensitive and appropriate manner, in view of the particular circumstances of the case" (*Madder* at para 75).

[66] The trial judge noted that, according to *Friesen*, sexual offences against children should be punished more severely than against adults and sentencing ranges and starting points should be higher for sexual offences against children than against adults. She was not aware of any post-*Friesen*

cases that dealt with sentencing for sexual offences against victims who were under eighteen when the offending started and continued to be victimized as young adults.

[67] The trial judge noted that neither M.H. nor S.M. were a young child or a young teen when the offending started, which differentiated them from young child victims dependent on adults and extremely vulnerable (as described in the cases relied on by the Crown). She concluded that the principles in *Friesen* were relevant in considering sentences during the entire period of the offending, given the grooming and consequent vulnerability to continued offending. However, the ages of the victims did, to some extent, distinguish the situation from those cases involving very young victims and the length of sentences in cases involving very young victims in a state of total dependence and vulnerability were longer than what a fit sentence in this case should be.

[68] The trial judge concluded that the sentence recommended by the Crown was significantly too high, but that a substantial jail sentence was required to address general deterrence and denunciation. She determined that a fit and proportioned sentence for the sexual assaults against each victim would be three and one-half years, which must be consecutive as the offending was against two separate victims, giving a total combined sentence of seven years.

[69] The trial judge then took into consideration the principle of totality and using the factors set out in *R v GJM*, 2015 MBCA 103 at para 10; *R v Hutchings*, 2012 NLCA 2 at para 84 [*Hutchings*]. She concluded that a seven-year sentence for the accused, "given his otherwise unblemished record

and good prospects, would be crushing" (*Madder* at para 95). She therefore imposed a total sentence of five years' imprisonment by reducing the sentence for each victim to two and one-half years consecutive.

[70] The Crown raises the following grounds of appeal:

(a) the trial judge erred in failing to appreciate the harm to the victims and the continuity of harm;

(b) the trial judge erred in imposing demonstrably unfit sentences; and

(c) the trial judge erred in her approach to totality.

Failure to Appreciate Harm and Continuity of Harm

[71] The Crown has set out as a separate ground of appeal that the trial judge erred in failing to appreciate the harm to the victims and the continuity of that harm. As noted by the accused's counsel, for this ground of appeal to be successful on its own, it would need to amount to an error in principle (see *Friesen* at para 26).

[72] The focus of the Crown's position on this ground of appeal is that the trial judge focussed solely on the fact that the victims were older children when the offences started to occur and drew "a bright line differentiating offending which commenced in childhood and progressed into early adulthood compared to offending against 'very young children'".

[73] In its submissions, the Crown argues that, as directed by the Supreme Court, the trial judge should focus on (a) the power imbalance

between the offender and the victim, (b) the dependency of the victims on the offender, (c) the degree of harm that was suffered by the victim, and (d) the gravity of the offence and the degree of responsibility of the offender (see *Friesen* at paras 121, 134-36).

[74] I find that the trial judge did give consideration to the factors suggested by the Supreme Court in *Friesen*. She was acutely aware of the power imbalance between the victims and the accused, the gravity of the offences and the accused's moral culpability. She reviewed in detail the victim impact statements and the degree of harm suffered by the victims in this case. She set out the factors that she also took into consideration, including that neither M.H. nor S.M. were young children or young teens when the offending started, which differentiated them from the young child victims in the cases relied on by the Crown, who were in a state of total dependence and extremely vulnerable. She recognized nevertheless that the age of both victims was a statutorily aggravating factor for most or part of the offending and that *Friesen* applied. She also recognized that the relationship between the accused and the victims, where he became a person in a position of trust and in which he groomed them, started when they were under eighteen and enabled the continuation of the offences into their adulthood (see *Madder* at para 88).

[75] It should be noted that *Friesen* recognizes a spectrum of a trust relationship where the greater the dependency, the more serious the harm (see *Friesen* at para 125).

[76] The trial judge concluded (*Madder* at para 89):

> I am of the view that the ages of the victims in this case do to some extent, distinguish this case from the cases involving very young

> victims, and that the length of sentences in the cases involving very young victims in a state of total dependence and vulnerability are longer than what fit sentences in this case should be.

[77] *Friesen* recognized that the moral blameworthiness of the offender is enhanced when the victim is particularly young (see para 135). These were relevant considerations for the trial judge to have in mind and I do not see an error in principle in her doing so.

Did the Trial Judge Err in Imposing Demonstrably Unfit Sentences?

[78] The Crown's position is that the trial judge failed to give effect to the sentencing objectives of deterrence and denunciation and to follow the dictates of *Friesen* that sentences for sexual offences against children had to increase because she focussed on the age of the victims at the time of the offences. She paid lip service to the inherent harm and seriousness of the offences. The sentences she imposed were insufficient to reflect the gravity of the sexual violence against the victims. While she recognized that the accused's moral culpability was significant, she gave disproportionate weight to mitigating factors, which were, at best, collateral consequences of his offending and did not offset the seriousness of his conduct in a significant fashion.

[79] The Crown acknowledges that the trial judge's reliance on *Sidwell* as a starting point was not incorrect, but argues that her decision to impose sentences that were lower than the starting point was. Taking into account the frequency of the events, the relative age of the victims, as opposed to the accused's, the breach of trust and the harm and trauma imposed on the victims, the Crown's position was that sentences at a much higher level were required.

[80] The trial judge did take into account that not all of the offending conduct was against the victims when they were children. However, she was cognizant of the fact that the accused groomed the victims and the touching when they were under eighteen enabled continuation of the offences into adulthood. While there is no doubt that the offending conduct commenced at a time when the victims were sixteen and seventeen years of age, she was of the view that there was a distinction between offences against children sixteen or over and vulnerable young child victims. I do not see an error in that conclusion.

[81] Relying on our decision in *Sidwell*, which spoke of a starting point of four to five years for a major sexual assault of a child by a person of good character in a position of trust and with no prior criminal record, she imposed a sentence slightly less than the starting point in *Sidwell* for these offences. A departure to three and one-half years from the starting point does not appear to be a major divergence. Her conclusion that the ages of the victims in this case did to some extent distinguish it from the cases involving very young victims where the sentences were longer is not an error in principle.

[82] The trial judge's reasons do not suggest that she gave undue weight to any mitigating factors or failed to appreciate any of the aggravating factors she listed. While the sentence is undoubtedly low, I am not of the view that, given principles of appellate deference, it warrants appellate intervention on this ground.

Did the Trial Judge Err in Her Approach to Totality?

[83] After finding that consecutive sentences of three and one-half years for each victim were appropriate, leaving a total combined sentence of seven years, the trial judge then considered the principle of totality and took "a last look at the combined sentence to determine if it [was] fit" (*Madder* at para 93).

[84] The trial judge referred to the list of factors that this Court considered in *R v Mazhari-Ravesh*, 2022 MBCA 63 at para 200, which are:

> (a) the length of the combined sentence in relation to the normal level of sentence for the most serious of the individual offences involved;
>
> (b) the number and gravity of the offences involved;
>
> (c) the offender's criminal record;
>
> (d) the impact of the combined sentence on the offender's prospects for rehabilitation, in the sense that it may be harsh or crushing;
>
> (e) such other factors as may be appropriate to consider to ensure that the combined sentence is proportionate to the gravity of the offences and the offender's degree of responsibility.

[85] After a review of those factors, she concluded that a seven-year sentence for the accused "given his otherwise unblemished record and good prospects, would be crushing" (*Madder* at para 95). She determined that a total sentence of five years' imprisonment was a fit sentence and she thereby reduced the sentence on each count to two and one-half years consecutive for a total of a five-year sentence.

[86] The Crown argues that the trial judge erred in principle when she imposed disproportionate sentences initially and then further reduced them on the basis of double counting of the same mitigating factors that she had relied upon to arrive at the initial sentences, namely the lack of criminal record and his pro-social background.

[87] As this Court has said in *R v Rose*, 2019 MBCA 40, "the decision to reduce a sentence to reflect totality considerations is a delicate matter of judgment and discretion" (at para 29).

[88] I do not agree that it is double counting, as the factors which are to be taken into account as set out in *Hutchings* include an offender's criminal record and the impact of the combined sentence on their rehabilitation. These are proper considerations in the assessment of whether a reduction was warranted. The trial judge exercising her discretion on that basis is not an error in principle.

Conclusion on the Sentence Appeal

[89] In summary, this is not a case in which I believe appellate intervention is warranted. As noted in *Silaphet* at paras 67, 70, a case involving much more egregious facts than these:

> Post-*Friesen*, this Court has considered sentencing for sexual offences against children in a number of cases. Most involve sexual interference and, in some instances, additional offences (see *R v CPR*, 2024 MBCA 22; *R v DJSC*, 2024 MBCA 21; *R v Logan*, 2022 MBCA 97; *R v S (D)*, 2022 MBCA 94; *R v AAJT*, 2022 MBCA 47; *R v Debler*, 2022 MBCA 15; *R v JM*, 2022 MBCA 25; *Sinclair*; *R v RW*, 2021 MBCA 71; *R v JDW*, 2021 MBCA 49; *Alcorn*; *SADF*; *BAJN*; *R v Abbasi*, 2020 MBCA 119; *R v Galatas*, 2020 MBCA 108; *R v JCW*, 2020 MBCA 40). These

> cases cover an extremely wide variety of circumstances and, reflecting this, the sentences range from two years less a day to twenty-two years. None of these decisions, however, set a post-*Friesen* starting point or sentencing range for sexual interference.
>
> I appreciate that many decisions since *Friesen* impose lower sentences for sexual interference involving touching than the trial judge did in this case. However, the Supreme Court in *Friesen* made clear that the nature of the offending conduct is not to be the focus on sentencing—and that touching can be "equally or even more physically intrusive" (at para 146) than penetrative acts. Furthermore, the fact that a sentence may be higher than sentences imposed in other similar cases, or even outside an established sentencing range, does not necessarily make it demonstrably unfit (see *R v Parranto*, 2021 SCC 46 at para 29). Sentencing is clearly an individualized process.

It is also in keeping with this Court's comments in *R v Parker*, 2023 MBCA 51 and *R v Murphy (MP)*, 2011 MBCA 84.

[90] While I recognize that the overall sentence of five years at the end of the day is on the lower side, that does not make it demonstrably unfit. After giving proper consideration to the trial judge's reasons for imposing it, I am of the view that there is no basis for appellate intervention and would grant leave to appeal but dismiss the sentence appeal as well.

Monnin JA

I agree: Rivoalen CJM

I agree: Spivak JA