Citation: R v Maytwayashing, 2024 MBCA 19
Date: 20240304
Docket: AR21-30-09713

IN THE COURT OF APPEAL OF MANITOBA

Coram: Mr. Justice Christopher J. Mainella
Madam Justice Jennifer A. Pfuetzner
Madam Justice Janice L. leMaistre

B E T W E E N:

	)	***M. S. Bhangu*** *and*
HIS MAJESTY THE KING	)	***F. Aiello***
	)	*for the Appellant*
Respondent	)	
	)	***A. Y. Kotler*** *and*
	)	*the late* ***D. A. Slough***
- and -	)	*for the Respondent*
	)	
	)	*Appeal heard:*
FABIAN CLAYBREN MAYTWAYASHING	)	***October 16, 2023***
	)	
(Accused) Appellant	)	*Judgment delivered:*
	)	***March 4, 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).

LEMAISTRE JA

Introduction

[1] The accused appeals his convictions for sexual assault and choking to overcome resistance. He asserts that the trial was unfair and that the verdict was unreasonable.

[2] The accused also appeals his dangerous offender designation and his indeterminate sentence. He argues that both were unreasonable.

[3] For the reasons that follow, I would dismiss both the conviction appeal and the sentence appeal.

Background

[4] At the trial, the victim testified that she was walking home alone shortly before midnight when she was approached by a stranger, the accused. At that time, the victim was 23 years old and weighed approximately 90 pounds. The accused tried to engage her in conversation. She said she kept walking but he followed her, asking her questions. One of the questions he asked was whether she had a boyfriend. She said she did and asked him to leave her alone.

[5] The victim testified that suddenly, the accused grabbed her by the neck from behind, lifted her off the ground, rendering her unconscious, and dragged her to a dark area nearby. When she regained consciousness, she was lying on her back on the ground. She said the accused was kneeling next to her and had her shoulder pinned to the ground with his forearm. He was about to get on top of her. Screaming, she fought him off and he fled.

[6] The victim explained that, before leaving the area, she grabbed items that were on the ground near her, including her glasses. One of the items she picked up turned out to be the accused's cell phone. As the victim ran home, she used the phone to call the police. She said she told the police that the screen saver on the phone was a photo of the person who had attacked her.

[7] As a result of the attack, the victim suffered injuries to her face and neck, as well as headache, throat pain and dizziness. She also suffered ongoing emotional trauma, ongoing back problems and difficulty breathing through her nose.

[8] The accused testified to a different version of events. He said that while walking home, he encountered the victim and engaged her in a conversation during which she asked to use his phone. After he gave her his phone, she refused to return it and he tried to get it back from her. He said he put her in a headlock and they struggled, falling to the ground with him landing on top of her. When the victim screamed, he ran off because he did not want to go "to jail over a phone." He conceded at trial that the phone picked up by the victim at the crime scene was his.

[9] The accused said that he was on probation with a 12:00 a.m. curfew and, after fleeing the scene, he went home for his curfew check. When his community corrections worker arrived, he told her that he had broken his cell phone by sitting on it. The next day, his probation officer told him to bring his phone to his appointment scheduled for later that day. He claimed that he had already dropped it off for repairs. The accused was arrested later that day.

[10] The accused admitted that he had lied to his community corrections worker and his probation officer about why he did not have his phone because he did not want to be charged with breaching his probation order. He also admitted that he was curious about the victim and that he found her attractive. However, the accused denied that his actions were motivated by sexual gratification or that he had a sexual interest in the victim.

[11] At the trial, Ashley Smith (Smith) was qualified as an expert witness in forensic sexual assault examinations. She testified that the victim's injuries and symptoms were consistent with strangulation. The accused did not contest Smith's qualifications as an expert or the admissibility of her evidence.

[12] A police officer testified that the police used the screen saver photograph on the accused's phone to identify him and that he was arrested by the high risk sex offender unit.

[13] The accused has a lengthy record of prior convictions, including for sexual assault with a weapon in 2001 for which he was sentenced to five years' incarceration (the prior sexual assault conviction). However, he did not bring an application to prohibit cross-examination on his criminal record—a *Corbett* application (see *R v Corbett*, 1988 CanLII 80 (SCC))—and the Crown put the entirety of his record to him on cross-examination.

[14] The main issues at trial were credibility and whether the assault was for a sexual purpose. The parties agreed that, if the elements of the sexual assault offence were established, a conviction on the offence of choking to overcome resistance would follow.

[15] The trial judge rejected most of the accused's evidence although she accepted his admissions that he found the victim attractive, was curious about the victim and wanted to see where things would lead. She also accepted the accused's evidence when it confirmed the victim's version of events.

[16] The trial judge accepted the victim's evidence that the assault occurred in the way she described. In doing so, the trial judge considered the

manner in which the victim testified, as well as the coherence and consistency of her evidence, which the trial judge found to be "compelling." The trial judge noted that "[m]uch of the [victim's] version of events was confirmed by the accused."

[17] Next, the trial judge considered whether the assault was for a sexual purpose. Applying an objective test, she concluded that "[t]he only logical inference is that the accused had a sexual intent when he assaulted the [victim]." She also concluded that "the sexual or carnal nature of the assault would be visible to a reasonable observer." Finally, the trial judge concluded that the only reasonable inference was that the accused choked the victim to render "her incapable of resistance and to facilitate a sexual assault."

The Conviction Appeal

[18] On the conviction appeal, the accused raises two issues: (1) trial fairness, and (2) the reasonableness of the verdict.

(1) Was the Trial Unfair?

[19] The accused asserts that the Crown led certain evidence that was prejudicial and that the trial judge did not fulfill her expected gate-keeping responsibility (see *White Burgess Langille Inman v Abbott and Haliburton Co*, 2015 SCC 23 at paras 14-24; see also *R v Herntier*, 2020 MBCA 95 at paras 221-22). He says that irregularities in the trial rendered it unfair or gave it the appearance of unfairness.

[20] An accused person is entitled to a fair trial. The standard of review for issues relating to trial fairness is correctness (see *R v Dowd*, 2020 MBCA 23 at para 22).

[21] As stated in *R v Schneider*, 2022 SCC 34: "A trial judge's determination that the probative value of evidence outweighs its prejudicial effect is discretionary and should be reviewed with deference" (at para 62). Absent a misdirection in law or a reviewable error of fact, an appellate court should not interfere with a judge's exercise of discretion unless the decision is so clearly wrong as to amount to an injustice (see *R v Ramos*, 2020 MBCA 111 at para 136; *R v Babos*, 2014 SCC 16 at para 48; *R v Regan*, 2002 SCC 12 at para 117).

[22] The accused points to four issues that he says contributed to an unfair trial. First, he argues that the evidence that he was arrested by a member of the high risk sex offender unit was highly prejudicial and ought to have been disregarded. He says that the trial judge gave no indication that she was disregarding this testimony and that it was improper for her to rely on it to convict the accused.

[23] The Crown agrees that this evidence was "unnecessary" and should not have been led at trial. However, it argues that this evidence had no apparent impact on the trial. I agree.

[24] The Crown did not rely on this evidence. The accused's counsel (trial counsel) (different than counsel at the sentencing hearing and on the appeal) did not object to it, nor did he refer to it at any point. Importantly, the trial judge made no mention of this evidence in her reasons and the accused

has not pointed to anything that indicates that she was influenced by it in her decision making.

[25] It is not uncommon for judges "to disabuse their minds of evidence which they have heard but which, as a matter of law, is not admissible" (*R v Krawczyk*, 2009 BCCA 250 at para 14). I am not persuaded that the trial judge was required to state that she was disregarding this evidence or that the record reflects that it affected trial fairness.

[26] Next, the accused argues that the admission of Smith's evidence contributed to an unfair trial for three reasons. First, he says that the trial judge failed to conduct a "*Mohan* inquiry" prior to qualifying Smith as an expert and admitting her testimony (see *R v Mohan*, 1994 CanLII 80 (SCC)). Second, he says that Smith's evidence did not differ from the testimony that could have been given by a "regular" nurse. Finally, he says that the evidence was more prejudicial than probative.

[27] As the Alberta Court of Appeal explained in *R v Soni*, 2016 ABCA 231 at para 16:

> . . . ***White Burgess*** does not compel a trial judge to perform any independent analysis about the admissibility of expert evidence when the parties concede that it is admissible. The trial judge likely has an overriding ability to exclude the evidence notwithstanding the admission, but failing to do so or to perform the analysis is not an error. The resulting concession by counsel that the expert evidence was admissible should prevail on appeal: ***R. v Lomage*** (1991), 2 OR (3d) 621 at paras. 17-8, 44 OAC 131 (CA); ***R. v Webster***, 2016 BCCA 218 at paras. 33-6.
>
> [emphasis in original]

[28] See also *R v McLean*, 2022 MBCA 60 [*McLean*], in which Mainella JA stated, "reasonable tactical choices of counsel at trial as to the admissibility of evidence will not be second guessed lightly on appeal (see *R v JF*, 2013 SCC 12 at para 68; and *R v Waite*, 2014 SCC 17 at para 5)" (at para 27).

[29] Trial counsel did not take issue with Smith's qualifications as an expert. Despite the lack of objection, the Crown led evidence of Smith's expertise as a forensic sexual assault nurse examiner. After hearing this evidence, the trial judge qualified Smith as an expert in forensic sexual assault examinations.

[30] Smith testified that she conducted a forensic examination of the victim and took photographs of her injuries. She said that the victim had injuries to her face, neck and ribs, and reported symptoms consistent with strangulation, including throat pain, occipital headache and dizziness.

[31] The accused's assertion that Smith's evidence could have been given by a "regular" nurse has no foundation in the record. Smith testified that she was the coordinator of the Sexual Assault Nurse Examiner Program in Winnipeg. She described the training she received in order to be certified as a sexual assault nurse examiner by the International Association of Forensic Nurses. She also said that she has specialized training and has done research in assessing and treating strangulation and that she regularly provides training on strangulation assessments. There is no evidence as to what training and experience a "regular" nurse has or whether a nurse without Smith's expertise would be qualified to perform a forensic examination.

[32] Furthermore, the accused has not persuaded me that Smith's evidence was overly prejudicial when compared with its probative value. It did not usurp the fact-finding function nor suggest that the assault was sexually motivated. Rather, Smith's evidence corroborated the victim's testimony that she was assaulted and strangled to unconsciousness. In my view, the accused has not established any error warranting appellate intervention with the trial judge's decisions to qualify Smith as an expert and to admit her testimony. Nor am I persuaded that Smith's evidence created any unfairness.

[33] The accused's third argument is that the introduction of the prior sexual assault conviction was highly prejudicial because it created a risk of propensity reasoning.

[34] During final submissions, the trial judge made clear that she was aware that she could not use the prior sexual assault conviction as evidence of guilt. She stated: "I'm very aware about forbidden reasoning." The trial judge "gave a correct self-instruction" on forbidden reasoning and there is no reason to believe she did not follow her self-instruction (*McLean* at para 48).

[35] In my view, the introduction of the prior sexual assault conviction into evidence did not affect trial fairness.

[36] Finally, the accused argues that the trial judge erred by using the accused's admission that he found the victim attractive to assess his credibility. Relying on *R v Moose*, 2004 MBCA 176 [*Moose*], he says that this type of questioning by the Crown was irrelevant and unfairly prejudicial.

[37] In *Moose*, the Court found that the trial judge erred by relying on the accused's evasive responses in cross-examination as to whether he found the complainant attractive. In that case, the question had no basis in the evidence. The Court stated: "It does not follow that when a man finds a woman attractive, a sexual assault is likely to occur" (at para 22). The Court held that for this reason, the evidence was not probative and was unfairly prejudicial.

[38] Here, as I will explain, the questions were relevant to and probative of the accused's credibility and his purpose for assaulting the victim.

[39] In direct examination, the accused testified that he had been visiting a friend and left at approximately 11:10 p.m. so that he would have enough time to walk home for his 12:00 a.m. curfew. When he was on the Salter Street Bridge, he observed the victim walking towards him. He stopped and asked her for a light for his cigarette. She indicated she did not have one. He then asked her a series of questions and began walking with her in the opposite direction of his home. The questions he asked her included her name, her age, where she was from, what brought her to Winnipeg, whether she had a phone number, whether she wanted his phone number, where she was going and whether she had a boyfriend. The accused's evidence was that, when he engaged in a struggle with the victim, his only intention was to retrieve his phone.

[40] On cross-examination, the Crown suggested that the questions the accused asked the victim indicated that he had developed "some interest" in her. He replied, "I was curious." The cross-examination continued as follows:

. . .
Q You certainly were thinking about having further contact with this young lady?

A If the opportunity arised (sic), yes.

Q So at that point you had developed an interest in her?

A Like I said, I was curious. She was attractive.
. . .
Q . . . And you wanted to see where this interaction with her might lead?

A Possibly, yes.
. . .

[41] Despite these admissions, the accused denied having any sexual interest in the victim. The trial judge rejected his denial. She stated: "He seemed defensive and reluctant to acknowledge his interest in the [victim], at first indicating he was curious. He then admitted he wanted to see where things would lead with the [victim], found her attractive, and asked if she had a boyfriend."

[42] I am not persuaded that the trial judge erred when she used the accused's admission that he found the victim attractive to assess his credibility. The impugned questions posed by the Crown were neither ambiguous nor unfair (see *R v MF*, 2009 ONCA 617 at paras 19-24). They were grounded in the accused's testimony regarding the questions he asked the victim and his stated purpose for asking these questions. The questions themselves suggested that the accused was interested in the victim. Then, when the Crown asked him about this, he volunteered that he found the victim attractive; he was the first to raise this issue.

[43] Furthermore, the trial judge's finding that the accused was "reluctant to acknowledge his interest in the [victim]" was only one example of several reasons she found that he was not credible and had "tailored his evidence to suit his purposes."

[44] The accused was entitled to "a trial that appears fair, both from the perspective of the accused and the perspective of the community" (*R v Harrer*, 1995 CanLII 70 at para 45 (SCC)). He was not entitled to a perfect trial (see *R v Khan*, 2001 SCC 86 at para 72). I have not been persuaded that (1) the reference to the accused's arrest, (2) the evidence of Smith, (3) the evidence of the prior sexual assault conviction or (4) the accused's testimony that he found the victim attractive tainted the accused's trial by rendering it unfair or by giving it the appearance of unfairness. I have also not been persuaded that the evidence of the prior sexual assault conviction created an unfair trial by causing the trial judge to engage in propensity reasoning. I will discuss in further detail below whether the evidence that the accused found the victim attractive invited prohibited reasoning.

[45] I would dismiss this ground of appeal.

(2) Was the Verdict Unreasonable?

[46] Having concluded that the accused's trial was fair, I will now consider his other arguments regarding the reasonableness of the verdict.

[47] The accused argues that the trial judge's conclusion that the assault was for a sexual purpose was unreasonable. To support his argument, he says that:

> . . .
> . . . [T]he part of the body touched was not inherently sexual, the nature of the contact was not of a sexual nature, there were no words or utterances accompanying the act indicating a sexual purpose, and the [victim's] own testimony leaves one with the impression that her sexual integrity had not been violated.
> . . .

[48] The accused also argues that the trial judge erred by relying on his testimony that he was attracted to the victim because this led to prohibited reasoning; namely, that the assault must have been for a sexual purpose because the accused found the victim to be attractive.

[49] The standard of review for an 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 (see *R v Sinclair*, 2011 SCC 40 at paras 4, 16; *R v Biniaris*, 2000 SCC 15 at para 36). An appellate court may also find a verdict unreasonable where a trial judge has drawn an inference or made a finding of fact essential to the verdict that is plainly contradicted by the evidence relied on by the trial judge in support of that inference or finding, or is incompatible with evidence that has not otherwise been contradicted or rejected by the trial judge (see *R v RP*, 2012 SCC 22 at para 9 [*RP*]).

[50] In *R v Villaroman*, 2016 SCC 33 at paras 55-56, Cromwell J explained the application of the standard in the following way:

> . . . Applying this standard requires the appellate court to re-examine and to some extent reweigh and consider the effect of the evidence: *R. v. Yebes*, [1987] 2 S.C.R. 168 at p. 186. 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 [citations omitted].
>
> The governing principle was nicely summarized by the Alberta Court of Appeal in *Dipnarine* [*R v Dipnarine*, 2014 ABCA 328], at para. 22. The court noted that "[c]ircumstantial evidence does not have to totally exclude other conceivable inferences" and that a verdict is not unreasonable simply because "the alternatives do not raise a doubt" in the jury's mind. Most importantly, "[i]t is still fundamentally for the trier [of] fact to decide if any proposed alternative way of looking at the case is reasonable enough to raise a doubt."

[51] When reviewing the reasonableness of a verdict, an appellate court must show deference to the trial judge's credibility assessments (see *R v W (R)*, 1992 CanLII 56 at 131-32 (SCC)). Credibility assessments cannot be interfered with unless they "cannot be supported on any reasonable view of the evidence" (*RP* at para 10; see also *R v Jovel*, 2019 MBCA 116 at paras 26-30; *R v Walker*, 2015 MBCA 69 at para 15).

[52] There are three elements that must be proven in order to establish the *actus reus* of the offence of sexual assault: "(i) touching, (ii) the sexual nature of the contact, and (iii) the absence of consent" (*R v Ewanchuk*, 1999 CanLII 711 at para 25 (SCC)). Whether the touching is of a sexual nature engages an objective test: "Viewed in the light of all the circumstances, is the sexual or carnal context of the assault visible to a reasonable observer?" (*R v Chase*, 1987 CanLII 23 at para 6 (SCC) [*Chase*]). In *Chase*, the Supreme Court of Canada explained the factors relevant to this determination. Writing for the Court, McIntyre J stated (at para 11):

> . . . The part of the body touched, the nature of the contact, the situation in which it occurred, the words and gestures accompanying the act, and all other circumstances surrounding the conduct, including threats which may or may not be accompanied by force, will be relevant (see S. J. Usprich, "A New Crime in Old Battles: Definitional Problems with Sexual Assault" (1987), 29 *Crim. L.Q.* 200, at p. 204.) The intent or purpose of the person committing the act, to the extent that this may appear from the evidence, may also be a factor in considering whether the conduct is sexual. If the motive of the accused is sexual gratification, to the extent that this may appear from the evidence, it may be a factor in determining whether the conduct is sexual. It must be emphasized, however, that the existence of such a motive is simply one of many factors to be considered, the importance of which will vary depending on the circumstances.

[53] At the trial, the Crown argued that the only reasonable inference was that the accused committed the assault for a sexual purpose. As previously mentioned, the accused's position was that he assaulted the victim to get his phone back. If the accused's testimony on this point was rejected, trial counsel suggested that there could be another non-sexual purpose for the assault, even on the victim's testimony, without specifying what that purpose might be.

[54] The trial judge rejected the accused's evidence that his only intention in attacking the victim was to retrieve his phone. She found that the only logical conclusion on the evidence she did accept was "that the accused had a sexual intent when he assaulted the [victim]." In doing so, she relied on "all the circumstances". She stated:

> . . .
> In this case, the accused approached the [victim], a stranger, at night, and it is evident from their conversation before the assault that he had an interest in her. He kept following her despite her trying to minimize their contact. He admits that he found her

> attractive and he wanted to see where the interaction would lead. He asks for her phone number and whether she has a boyfriend. When she tells him that she has a boyfriend and to leave her alone, he responds, That's too bad. It is after that point that the [victim] is picked up from behind in a headlock sufficient to render her unconscious and carried to a dark area and placed on the ground on her back. She awoke to find the accused about to go on top of her. . . .
> . . .

[55] At the appeal hearing, counsel for the accused conceded that the accused's actions amounted to an assault but argued that the evidence did not establish a sexual purpose. He suggested the evidence supported the inference that the accused committed the assault to facilitate kidnapping the victim.

[56] As the Crown points out, there was no evidence that the accused tried to take the victim's property such that the assault was committed with the intention to steal, that he intended to beat the victim up, or that he intended to remove her from the area, other than to take her to a dark area nearby, to kidnap her.

[57] I am not persuaded that the trial judge erred when she drew the inference that the assault was for a sexual purpose. It was neither contrary to nor incompatible with the victim's testimony. The victim described being dragged off the street at night, being rendered unconscious and awakening on her back on the ground with the accused about to get on top of her. When these facts are considered in the context of the evidence that the accused changed directions to follow the victim and asked her personal questions, it clearly demonstrates that the accused had a sexual interest in the victim. Moreover, as already stated, he admitted that he found her attractive and wanted to see where the interaction would lead.

[58] The trial judge drew the inference that "the sexual or carnal nature of the assault would be visible to a reasonable observer" based on the totality of the circumstances, including the "circumstances surrounding the conduct" (*Chase* at para 11). I am not persuaded that the evidence that the accused found the victim attractive invited prohibited reasoning.

[59] Further, I do not agree with the accused that this case is similar to *R v PLRL*, 2010 MBQB 220, where "there were no overt physical acts that might give rise to the belief that a sexual assault had occurred" (at para 24) or *R v Hodgson*, 2016 ONSC 5149, where the suggestion that the assault was sexual in nature was "mere 'conjecture and speculation'" (at para 14). In those cases, unlike here, there were insufficient surrounding circumstances to ground a conclusion that the assaults were for a sexual purpose.

[60] Although the accused denied that his interest was sexual in nature, in my view, that conclusion was reasonably open to the trial judge on the whole of the evidence. There is no basis for appellate intervention.

[61] I would dismiss this ground of appeal.

The Sentence Appeal

[62] The sentencing judge (a different judge than the trial judge) designated the accused a dangerous offender and sentenced him to an indeterminate penitentiary sentence pursuant to the *Criminal Code*, RSC 1985, c C-46, s 753 [the *Code*].

[63] The accused argues that the finding that he is likely to commit another serious personal injury offence was not reasonable. This argument is

based primarily on what he says is a gap in his record for serious personal injury offences. The accused also argues that the sentencing judge placed too much weight on the fact that an indeterminate sentence was necessary to motivate him to attempt treatment while ignoring evidence that he asked to be placed at the Assiniboine Treatment Centre for sexual offenders and that he had completed sex offender programming in the past. He says that the sentencing judge failed to use the least restrictive sanction available to ensure the safety of the public, placed inadequate weight on his *Gladue* factors (see *R v Gladue*, 1999 CanLII 679 (SCC) [*Gladue*]) and erred in finding he was intractable because, in his opinion, he had recently internalized what he had learned in treatment and was amenable to ongoing treatment.

[64] Appellate review of a dangerous offender designation is somewhat more robust than regular appellate review of a sentence (see *R v Sipos*, 2014 SCC 47 at para 26). Nonetheless, the appellate court must give some deference to the findings of the sentencing judge. In sum, errors of law will be reviewed on a correctness standard, while errors of fact will be reviewed on a reasonableness standard (see Joseph A Neuberger, *Assessing Dangerousness: Guide to the Dangerous Offender Application Process* (Toronto: Thomson Reuters, 2023) (loose-leaf updated 2023, release 2), ch 9 at 9-2; see also *R v Boutilier*, 2017 SCC 64 at para 81).

[65] Having completed the required robust review, in my view, the sentencing judge's finding that the accused is a dangerous offender and his imposition of an indeterminate penitentiary sentence are reasonable; they are amply supported by the record.

[66] During the sentencing hearing, the sentencing judge received extensive evidence in the form of both documentary and *viva voce* evidence. That evidence detailed the accused's extensive criminal record and his time in custody and on community supervision. It also provided information about the accused's background, including a psychological assessment and risk assessments.

[67] The accused's record contains convictions for more than 60 criminal offences. Although at the time of sentencing it had been several years since he was last convicted of a serious personal injury offence, importantly, his offending conduct demonstrated a pattern of repetitive, persistent aggressive behaviour, likely to cause injury, as well as an inability to control his sexual impulses.

[68] The accused lacked insight into his offending behaviour and had few supports in the community. He suffered from anti-social personality disorders, was classified as psychopathic, and was found to pose a high risk for future violent recidivism and a moderate to high risk for sexual recidivism.

[69] Despite numerous attempts at treatment, programming and community supervision, the accused "has never internalized, [nor] applied the content assiduously over the long-term" nor "fully committed to meaningful long-term and pro-social change". Instead, he reoffended after receiving treatment. He was described as "extremely difficult to supervise" and his behaviour could not be managed in custody.

[70] The sentencing judge was aware of the requirement to consider the accused's "compelling" *Gladue* factors and the relevant principles of sentencing in the *Code* (see *Gladue*; see also *R v Osborne (CG)*, 2014 MBCA

73 at paras 90-99). The sentencing judge considered "a massive amount of information about [the accused's] background", including two pre-sentence *Gladue* reports and an adoption social history. He also considered the availability of culturally appropriate programming in provincial and federal institutions and in the community.

[71] The sentencing judge carefully considered each of the requirements in s 753 of the *Code*, weighed the evidence and provided detailed reasons for his decisions. In my view, his findings were reasonably open to him and there is no basis for this Court to intervene.

[72] I would dismiss the sentence appeal.

Conclusion

[73] The accused has not persuaded me that the trial was unfair or that the conviction was unreasonable. He has also not persuaded me that the dangerous offender designation and indeterminate sentence were unreasonable.

[74] In the result, I would dismiss both the conviction appeal and sentence appeal.

leMaistre JA

I agree: Mainella JA

I agree: Pfuetzner JA