Citation: R v McFadden, 2026 MBCA 86
Date: 20261019
Docket: AR25-30-10306

IN THE COURT OF APPEAL OF MANITOBA

Coram: Mr. Justice Christopher J. Mainella
Mr. Justice James G. Edmond
Madam Justice Anne M. E. Turner

B E T W E E N:

	)	***C. G. Gamby***
HIS MAJESTY THE KING	)	*for the Appellant*
	)	
Respondent	)	***A. C. Smith***
	)	*for the Respondent*
- and -	)	
	)	*Appeal heard and*
MICHAEL FREDERICK MCFADDEN	)	*Decision pronounced:*
	)	***October 2, 2026***
(Accused) Appellant	)	
	)	*Written reasons:*
	)	***October 19, 2026***

EDMOND JA (for the Court):

Introduction

[1] After a trial in the Provincial Court, the accused appealed his convictions for sexual assault (see *Criminal Code*, RSC 1985, c C-46, s 271 [the *Code*]) and sexual interference (see *ibid*, s 151) related to alleged events that took place between the fall of 1999, when the victim was approximately twelve years old, and 2003, when he was about sixteen. The accused also made a motion for the admission of fresh evidence (see the *Code*, s 683(1)). He has not appealed his sentence of eight years' imprisonment. A publication

ban under section 486.4 of the *Code* was removed as per the victim's request (see *ibid*, s 486.51(2)).

[2] The conviction for sexual assault was stayed pursuant to the principles of *Kienapple v R*, 1974 CanLII 14 (SCC).

[3] After the appeal hearing, we denied the motion for fresh evidence and dismissed the appeal with reasons to follow. These are those reasons.

Background

[4] The victim was the sole witness at the trial. He was thirty-eight years old when he testified and gave detailed testimony about many instances of sexual contact with the accused.

[5] In the spring of 1997, the accused began dating the victim's mother when the victim was about eleven years old. In May or June of 1999, the victim's mother and the accused purchased and jointly owned a home in the Rural Municipality of Rockwood, Manitoba (the home) and they, together with the victim, began living together.

[6] The victim testified in some detail about the first sexual assault that occurred in the fall of 1999 when the accused gave away the victim's dog. The victim was upset and the accused came into his room to comfort him but then used the occasion to masturbate the victim.

[7] The victim testified that the sexual assaults continued and he described dozens of instances of sexual abuse over a four-year period ending in 2003 when he was old enough to refuse. He described specific instances of oral sex and anal sex.

[8] The victim testified that the accused introduced him to alcohol and cocaine when he was thirteen years old. The victim continued using substances as a coping mechanism.

[9] The victim's drug and alcohol use led to him committing a number of criminal offences and amassing a significant criminal record. At the time of the trial, he was in custody for breaching conditions of a conditional sentence order.

[10] In addition to his criminal record, the victim admitted that he committed arson at the home at the accused's direction in order for the accused to make a claim on their insurance and build a new home.

[11] The victim also admitted to stealing from his grandfather and to assaulting the accused in 2017 although he was not charged with these offences.

[12] He testified that the last time he saw the accused was in April 2023. He got out of his car with a bat and struck the accused's car, knocking its mirror off. He shouted at him, stating: "You will never . . . molest another child as long as I live." He stated that the accused told him, "I am sorry."

[13] The victim's lengthy criminal record and other testimony led the trial judge to consider, and ultimately find, that the victim should be treated as a *Vetrovec* witness (see *Vetrovec v The Queen*, 1982 CanLII 20 (SCC) [*Vetrovec*]). The trial judge reviewed authorities, including *R v Fatunmbi*, 2014 MBCA 53, quoting S Casey Hill, David M Tanovich & Louis P Strezos, "McWilliams' Canadian Criminal Evidence", 5th ed (July 2026) online: (WL Can) Thomson Reuters Canada; and *R v Fitur and Maldonado*, 2011 MBQB

59, and stated that he should be skeptical in trusting the victim's testimony and decided "to look at it with caution and a suspicious eye."

[14] The trial judge addressed the victim's criminal record, as well as a number of inconsistencies in his testimony, as compared to his earlier police statement and a statement he gave to the Crown prior to the trial. The trial judge found that the victim's memory was "quite good" and his testimony was delivered in a "forthright and non-hesitant manner." Further, the trial judge stated that "[a]t no point during the course of his testimony did he appear remotely evasive." The trial judge gave examples of why he believed the victim, including the detail of some of the incidents of sexual abuse, and concluded that the victim's testimony was "compelling".

[15] As to the inconsistencies in his testimony, the trial judge accepted the victim's explanations for the differences and concluded as follows:

> Despite the treatment of [the victim] as a *Vetrovec* witness and the inherent dangers of relying on his evidence without corroborative evidence, I have, nonetheless, found his evidence to be credible, reliable, and worthy of belief. I have found that [the victim] was giving an honest and full account as best he could of the sexual abuse that he suffered . . . at the hands of [the accused].

Grounds of Appeal and Motion for Fresh Evidence

[16] The accused advanced two grounds of appeal:

(1) the trial judge erred in the application of the *Vetrovec* warning; and

(2) the verdict was unreasonable.

The Motion for Fresh Evidence

[17] The accused seeks to admit copies of the victim's release orders that were granted months after the trial. These orders contain a number of conditions, including a condition requiring that he reside at the home.

[18] At the time of the trial, the victim was serving a sentence for different offences and testified that he was not going to be living at the home upon his release from custody. The accused submits that the fresh evidence supports his allegation that the victim wanted to get rid of him so the victim could return home and, therefore, supports that the victim had a motive to lie about the incidents that gave rise to the charges.

[19] We are not persuaded that the fresh evidence satisfies the *Palmer* test (see *Palmer v The Queen*, 1979 CanLII 8 (SCC)). While we agree that the fresh evidence could not have been adduced at trial and may have been relevant to the issue of the victim's credibility, we are not satisfied that the fresh evidence bears on a decisive or potentially decisive issue in the trial or that it could reasonably, when taken with the rest of the victim's testimony, be expected to affect the result.

[20] The fresh evidence merely confirms that, when the victim was released on bail, the plan was for him to live at the home. We are all of the view that the fresh evidence bears on a collateral issue, not a decisive one.

[21] Therefore, we dismissed the fresh evidence motion.

The Vetrovec Warning

[22] As for the first ground of appeal, the accused submits that the trial judge erred in his application of the *Vetrovec* warning and, specifically, with regard to his assessment of the impact of the victim's criminal record.

[23] The Crown submits that the accused's argument is misguided as there is no requirement that a trial judge, sitting alone, must deliver a self-instructed *Vetrovec* warning. It says that judges are presumed to understand the testimonial dangers associated with the category of witnesses contemplated in *Vetrovec* and, relying on *R v Chevers*, 2011 ONCA 570 at para 4 and *R v Abbott*, 2018 MBCA 84 at para 9, the Crown argues that requiring recitation of a warning in reasons for decision would be "pure formalism." The Crown submits that the focus should be whether the trial judge grappled with specific reliability and credibility concerns that should be attributable to a witness in a meaningful way.

[24] In *R v Musa*, 2026 MBCA 72 [*Musa*], this Court explained that, while a formal *Vetrovec* warning is not required in a non-jury trial, where a case turns on a witness who is unsavoury for some objective reason, a trial judge must be "alive to the frailties of such evidence" (at para 53).

[25] While we agree that the trial judge downplayed the victim's criminal record by stating that the offences did not involve dishonesty, the trial judge was alive to the frailties of the victim's testimony and did reference his involvement as a youth in an arson for the purposes of fraud and the thefts from his grandfather. The trial judge did this in the context of deciding whether he should approach the victim as a true *Vetrovec* witness.

[26] Once the trial judge determined that he would treat the victim as a *Vetrovec* witness, he approached the victim's evidence with caution and a suspicious eye. The trial judge conducted a detailed credibility and reliability assessment and, in our view, he committed no palpable and overriding error in doing so.

[27] As to the victim's alleged motive to fabricate his evidence, the accused advanced this argument at trial and it was rejected by the trial judge. The accused submits that the trial judge misunderstood or mischaracterized the victim's motive to fabricate his allegations based on a financial interest in the home.

[28] The trial judge considered the accused's argument that there was motive for the victim to come forward with false allegations against the accused and stated:

> [The defence counsel] cross-examined [the victim] suggesting that if [the accused] was in jail, that owing to a separation between [the victim's] mother and [the accused], that it would somehow get him out of the way, that it would be easier for [the victim] or his mother to seize the house or get possession of the house [the accused] was residing in.
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> [The victim] did not agree with this proposition and stated he had no real understanding about the legal status of the house, nor did he wish to go back to this house once he was released from prison in March of 2024. There was no further evidence the Court was able to rely on to demonstrate any connection between this financial motive offered by [the defence counsel]. This simply was viewed by the Court as a suggestion to the [victim] that was denied outright.

[29] We are not satisfied that the trial judge mischaracterized the victim's evidence. He considered the evidence and determined that he was unable to

conclude that there was any direct or inferential relation to a motive that would have motivated the victim to come forward in a way that the accused suggested.

[30] The trial judge's findings were open to him on a review of all the evidence. The accused's disagreement with the weight afforded to the victim's testimony does not amount to an error that justifies appellate intervention. Absent palpable and overriding error, findings of credibility should be respected (see *R v LFB*, 2026 MBCA 23 at para 7 [*LFB*]; *R v NS*, 2012 SCC 72 at para 25). As noted by this Court in *R v Jovel*, 2019 MBCA 116, it is important to recall that appellate courts do not retry cases but, rather, review for error (see para 25; see also *LFB* at para 7). Therefore, this ground of appeal was dismissed.

Unreasonable Verdict

[31] The second ground of appeal is that the verdict was unreasonable. A verdict is reasonable if it is one that a properly instructed jury acting judicially could reasonably have rendered. In assessing this ground of appeal, an appellate court conducts a limited weighing of the evidence on appeal in light of the standard of proof (see *R v Villaroman*, 2016 SCC 33 at para 55).

[32] Further, in *R v Hominuk*, 2019 MBCA 64, this Court emphasized that, in judge-alone trials, a verdict may be found to be unreasonable in the exceedingly rare situation where a trial judge made a finding of fact that was directly contradicted by other evidence relied on in support of that finding or was incompatible with the evidence not otherwise contradicted or rejected by the trial judge (see para 4).

[33] The accused submits that the trial judge downplayed or did not fully appreciate the nature and extent of the dishonest conduct of the victim and that resulted in an unreasonable verdict. For the same reasons as articulated above, this submission has no merit. We are satisfied the trial judge conducted an appropriate credibility and reliability analysis. The victim's testimony, together with the absence of evidence offered by the accused, leads to the conclusion that the verdict was one a properly instructed trier of fact could reasonably have rendered (see *R v RP*, 2012 SCC 22 at para 9).

Additional Issue Raised by the Crown on Appeal

[34] One final issue deserves comment. The Crown raised a new issue on appeal, questioning whether the use of a *Vetrovec* warning is appropriate in cases involving sexual violence. The Crown seeks guidance from this Court on this issue, arguing that it is incompatible with section 274 of the *Code*, which provides as follows:

Corroboration not required **274** If an accused is charged with an offence under section 151, 152, 153, 153.1, 155, 160, 170, 171, 172, 173, 271, 272, 273, 286.1, 286.2 or 286.3, no corroboration is required for a conviction and the judge shall not instruct the jury that it is unsafe to find the accused guilty in the absence of corroboration.	**Non-exigibilité de la corroboration** **274** La corroboration n'est pas nécessaire pour déclarer coupable une personne accusée d'une infraction prévue aux articles 151, 152, 153, 153.1, 155, 160, 170, 171, 172, 173, 271, 272, 273, 286.1, 286.2 ou 286.3. Le juge ne peut dès lors informer le jury qu'il n'est pas prudent de déclarer l'accusé coupable en l'absence de corroboration.

[35] In our view, it is unnecessary to decide this issue for three reasons. First, this was not a ground of appeal that was before us. The issue of whether a *Vetrovec* warning should be provided was raised by the trial judge and both parties accepted it was applicable. As we have explained, as was decided in *Musa*, the issue in a case such as this is not whether the formalism of a *Vetrovec* warning was followed, but whether the trial judge was alive to the frailties related to a key witness and addressed them in their credibility assessment.

[36] Second, this issue, including whether the principles in *Vetrovec* run contrary to section 274 of the *Code*, was raised for the first time on appeal. The general rule is that new arguments on appeal will be permitted only in exceptional circumstances (see *R v EGM*, 2004 MBCA 43 at para 11 [*EGM*]). In *EGM* at para 12, this Court quoted L'Heureux-Dubé J in *R v Brown*, 1993 CanLII 114 (SCC), summarizing the prerequisites that must be present when raising a new issue:

> L'Heureux-Dubé J. went on to review the exceptional cases in which courts have entertained issues on appeal for the first time. She summarized the prerequisites that must be present when the raising of a new issue, including a *Charter* challenge, is permitted on appeal (at p. 927):
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> > First, there must be a sufficient evidentiary record to resolve the issue. Second, it must not be an instance in which the accused for tactical reasons failed to raise the issue at trial. Third, the court must be satisfied that no miscarriage of justice will result from the refusal to raise such new issue on appeal.
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> [footnote omitted]

[37] Since we are all of the view that the appeal should be dismissed, clearly, no miscarriage of justice will result from the refusal to permit the Crown to raise the new issue on appeal.

[38] Third, this issue is not decisive in this case as the victim's credibility was assessed and decided by the trial judge. This is not a case where a decision on this issue will determine the appeal.

[39] That said, like the Alberta Court of Appeal in *R v KRR*, 2020 ABCA 475 at para 39, we question whether a *Vetrovec* warning—a judge-made evidentiary rule—has application to any of the sexual offences listed in section 274 of the *Code* (see also *R v DSL*, 2017 ABCA 161 at para 16). However, we are of the view that this issue is best left for another day.

Conclusion

[40] In the result, the motion for fresh evidence was denied and the appeal was dismissed.

Edmond JA

Mainella JA

Turner JA