Citation: R v OCFG (No 1), 2025 MBCA 27
Date: 20250402
Docket: AR23-30-09964

IN THE COURT OF APPEAL OF MANITOBA

Coram: Mr. Justice Christopher J. Mainella
Madam Justice Jennifer A. Pfuetzner
Mr. Justice James G. Edmond

B E T W E E N:

	)	***R. N. Malaviya, K.C.***
HIS MAJESTY THE KING	)	*for the Appellant*
	)	
Appellant	)	***K. D. Morgan***
	)	*for the Respondent*
- and -	)	
	)	*Appeal heard:*
O. C. F. G. (aka J. H.)	)	***October 25, 2024***
	)	
(Accused) Respondent	)	*Judgment delivered:*
	)	***April 2, 2025***

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).

MAINELLA JA

Introduction

[1] The challenging question this Crown sentence appeal raises is when is it appropriate for an appellate court to make a fresh assessment of the evidence on the record of a jury trial for the purpose of considering the fitness of a sentence (see the *Criminal Code*, RSC 1985, c C-46, s 687(1) [the *Code*])?

[2] The backdrop is a situation of intimate partner abuse during a marriage involving the accused and his then wife (the victim). The abuse occurred in the family home that the couple shared with their two young children. The historic allegations came to the attention of the police after the couple separated and family law proceedings had already commenced.

[3] The accused was tried by a judge and jury on a three-count indictment alleging sexual assault, assault and uttering threats to cause bodily harm.

[4] The three counts encompassed multiple incidents: four in relation to sexual assault over the period of March 1, 2016 to April 25, 2020; three in association with assault from April 28, 2019 to November 19, 2019; and four in connection with uttering threats to cause bodily harm from June 9, 2018 to May 15, 2019. No objection was taken to the indictment being framed without particulars in each of the counts other than the offence alleged, the identity of the victim and the time periods.

[5] The key evidence at the trial was the testimony of the victim and the accused and electronic text messages they exchanged. The jury convicted the accused of sexual assault and assault and acquitted him of uttering threats to cause bodily harm.

[6] Before sentencing the accused, the trial judge determined the facts upon which to base the sentence (see the *Code*, s 724(2)). He concluded that only one of the four allegations of sexual assault and two of the three allegations of assault were proven beyond a reasonable doubt.

[7] Based on this finding, the trial judge sentenced the accused to a four-month conditional sentence order on the sexual assault count, to be followed by a two-month conditional sentence order on the assault count, to then be followed by six months of supervised probation.

[8] The accused's sentence was not suspended and now is completed save for ancillary orders (see the *Code*, s 683(5)).

[9] The Crown seeks leave to appeal and, if granted, appeals the sentence imposed. It says that the trial judge's determination of the material facts following the jury's verdict pursuant to section 724(2) of the *Code* is not entitled to deference as it was materially affected by errors in principle (see *R v Osborne*, 2022 MBCA 96 at para 25 [*Osborne*]). It argues that the fitness of the accused's sentence be assessed on a fresh assessment of the evidence on the record by this Court.

[10] For the following reasons, I would grant leave to appeal and allow the Crown's appeal in part. In my view, the trial judge made material legal errors in assessing the credibility of the victim and the accused in determining the facts for sentencing. The parties shall be permitted to make further written and oral submissions as to the fitness of the accused's sentence in light of the fresh assessment of the evidence on the record by this Court, as set out in these reasons, as well as the appropriate remedy should this Court determine the accused's sentence to be unfit.

Background

[11] The accused and the victim met in January 2016 and began living together in February 2016. They married on April 2, 2016 and separated on

August 10, 2020. They have two children together: a daughter born on December 10, 2016 and a son born on December 10, 2019.

[12] The couple had a tumultuous relationship. They argued constantly. The accused often made vulgar statements to the victim or comments to her suggesting he would use violence against her. He often said he would leave the victim unless she conformed to his demands

[13] The uttering threats to cause bodily harm count against the accused was based on text messages he sent to the victim during the marriage that were violent on their face. The accused raised the "jest" defence (*R v Clemente*, [1994] 2 SCR 758 at 763, 1994 CanLII 49 (SCC)), namely, that he lacked the *mens rea* for the offence as the text messages were spoken in jest or in such a manner that they could not be taken seriously.

[14] In his evidence, the accused explained that the text messages, which included him talking about "punching" the victim "in the ovaries", giving her a "donkey kick . . . in the baby maker" to give her a "Chinese abortion", not arguing with him unless she wanted him "to slap [the] shit out of [her] . . . pimpin (phonetic) bible verse 4:3", and not making him "get violent", were examples of his vulgar humour drawn from popular culture as opposed to him actually intending the words conveyed to be intimidating or taken seriously. The jury either accepted the accused's explanation or had a reasonable doubt because of it as they acquitted him of the count of uttering threats to cause bodily harm.

[15] The victim said she eventually became "desensitized" by the accused's frequent verbal abuse. The relationship was further strained because the accused was a problem gambler. Given the couple's tight finances, the

accused's gambling problem was a constant source of tension. Noteworthy is that, in addition to gambling with the couple's wages during the time they lived together, the accused also gambled away approximately $100,000 that the victim's mother had advanced to the couple for necessities.

Four Allegations of Sexual Assault

[16] In his evidence, the accused made a general denial of non-consensual sex with the victim; he said that "[n]ever" occurred. He said they were married and had a healthy sex life.

[17] The first incident of sexual assault involves an allegation of anal intercourse (the anal intercourse incident).

[18] The victim testified that, around the time of their marriage in 2016, the accused asked her to participate in anal sex. The couple had not tried this before. The victim agreed. When the anal intercourse began in the couple's bedroom, the victim said it started to hurt "a lot" and she told him, more than once, to "[s]low down" and eventually to "stop". The accused ignored the victim and she began to cry. He eventually stopped the sexual touching after ejaculating inside the victim.

[19] The victim continued to cry after the anal intercourse ended. The accused said to her: "Jesus Christ, are you trying to make me feel like I raped you?" The accused was angry with the victim and then said: "It's okay if you don't like anal sex. I'll find someone else to do it with." The victim testified that she felt "[b]roken" by the anal intercourse incident and said she was confused by the accused being angry with her.

[20] In his evidence, the accused denied that the anal intercourse incident occurred.

[21] The second incident of sexual assault involves an allegation of ejaculation on the victim's face while she was sleeping (the facial ejaculation incident).

[22] The victim testified that, on May 4, 2016, she woke up in the bedroom to find semen on her face. She was confused as to what had happened. The accused was nearby and was laughing. On May 5, 2016, the accused texted the victim a picture of her on her bed with her eyes closed with semen on her face (the picture).

[23] The victim testified that the sexual touching was non-consensual.

[24] The accused gave evidence that he and the victim engaged in consensual oral sex until he ejaculated on her face. He said he left the bedroom to go to the bathroom and to get a wet towel and then took the picture when he came back to the bedroom. He said she woke up while he was cleaning it off her; he then helped her clean up and they laughed about the incident.

[25] The third incident of sexual assault involves an allegation of vaginal intercourse while the victim was breastfeeding the couple's daughter (the breastfeeding incident).

[26] The victim testified that, in the spring of 2019, she and the accused were having consensual vaginal intercourse in their bedroom. While they were having sex, the couple's two-and-one-half-year-old daughter woke up, crawled into the bed and began to breastfeed on the victim. While she was

nursing their daughter, the victim told the accused to stop the intercourse because their daughter was awake. She repeated this on more than one occasion. The accused ignored the victim and continued to vaginally penetrate her faster with his penis until he ejaculated. The victim felt violated and asked the accused, "Why did you do that?" He said nothing.

[27] The accused did not testify specifically about the breastfeeding incident in his evidence.

[28] The fourth incident of sexual assault involves an allegation of vaginal intercourse when the victim was suffering from a vaginal tear (the vaginal tear incident).

[29] It was not disputed at the trial that the victim delivered the couple's eleven-pound son in the family residence without medical assistance. Due to this birth, the victim suffered a second-degree vaginal tear that she was still recovering from in the spring of 2020.

[30] The victim gave evidence that, on April 24, 2020, the accused asked her to have sex; they were in the living room. She said "no" as she was still healing from the vaginal tear and was not using birth control. He asked her again a second time and she said she did not want to. The accused then pulled down her pants and underwear and began to penetrate her vagina with his penis. The couple's children were sleeping nearby. The victim said, "What are you doing?" The accused ignored the victim and continued with the vaginal intercourse for about five minutes until he ejaculated inside her. The accused was not wearing a condom.

[31] The victim testified she was concerned about becoming pregnant from the intercourse and decided to obtain the emergency contraceptive pill, Plan B, at a local health clinic, the St. Boniface Access Centre. She and the accused engaged in the following conversation between 3:11 p.m. and 3:14 p.m. on April 25, 2020 (April 25th text conversation):

> **Victim**: I might go to access centre if I can
>
> **Accused**: Dirty whore
>
> **Victim**: You
>
> **Accused**: Let future [redacted] live lol
>
> **Victim**: Animal lol
>
> **Victim**: For real?
>
> **Victim**: That would be too much
>
> **Accused**: [three emojis (face with hand over mouth); (eyes emoji); and (tears of joy emoji)] animal? Lol I'm just a man that's been waiting too long [emoji (man tipping left hand)]
>
> **Victim**: I know
>
> **Accused**: We can get plan B [emoji (man tipping left hand)]
>
> **Victim**: You want a 3rd baby right now?

[32] The victim testified that she used the term LOL (laugh out loud) after calling the accused an "Animal" to not trigger a "bad reaction" from the accused. She did not find the vaginal tear incident humorous; she described feeling completely disrespected by the accused.

[33] The next day, April 26, 2020, the couple had an argument that culminated in an exchange of text conversations between 8:23 p.m. and 8:25 p.m. (April 26th text conversation):

> **Victim**: You could have chose to just be quiet instead of blowing up and making excuses to leave and run away from the problems
>
> **Accused**: Ok
>
> **Victim**: That's what you always tell me, to be quiet
>
> **Accused**: You're right, I'm no good So stop complaining and be happy we are done [emoji (man tipping left hand)]
>
> **Victim**: Do you suddenly have my dysfunctions now
>
> **Accused**: No more [redacted]
>
> **Victim**: You did it and in the same breath you took sex and came inside me yesterday when I asked [you] not to
>
> **Accused**: Plan b

[34] The accused testified that he and the victim had not had sex in a long time because, in April 2020, she was still recovering from the birth of their son. He acknowledged that he and the victim had a discussion in the April 25th and April 26th text conversations about birth control. He denied knowing what the victim was saying when she sent the text: "You did it and in the same breath you took sex and came inside me yesterday when I asked [you] not to".

[35] The accused denied that sexual activity in relation to the vaginal tear incident was without the victim's consent.

Three Allegations of Non-Sexual Assault

[36] In his evidence, the accused said he never made any threats to the victim. He said he never wanted to harm her. He said he adored her and would "never" hurt her. He denied ever assaulting the victim.

[37] The victim was pregnant with the couple's son when each of the three alleged instances of non-sexual assault occurred in 2019.

[38] The first non-sexual assault is alleged to have occurred on April 28, 2019. The victim and the accused were arguing and things escalated. The accused grabbed the victim's face and side of her neck "quickly and aggressively" with his hands during the argument. The victim eventually moved away from the accused (the face-squeezing incident).

[39] The victim testified that she was "shock[ed]" by the face-squeezing incident and felt sore afterwards.

[40] After the face-squeezing incident, the accused and the victim had the following text conversation between 11:52 a.m. and 1:42 p.m. on April 28, 2019 (April 28th text conversation):

> **Victim**: I told you I didn't feel good and keep it simple and you know what you like but being so indecisive
>
> **Victim**: Sorry for pushing you past your limit [redacted] I'm not calling the cops or would want to see you go to prison. I've been super mean lately. I don't wanna push you to that again
>
> **Accused**: It's time for us to be honest and stop this madness. I'm sorry that I got that mad but this is what I've been trying to explain and warn and prevent. [redacted] I know I need to help get us out of the rut I caused and I will. Pretty much from where I stand it's a divorce after that. I don't care how stressed you are, it doesn't

> excuse what's going on. [redacted] regardless of what you say about not calling the cops...I doubt that if I really did hurt you you would just leave it between us but even if you did.....we have neighbors! I don't want to have to get that far anyway. I'm stressed too...I'm sick too in my ways (physically) and although I'm in these storms I wouldn't excuse being mean to you.
>
> **Accused**: Im just picking up juniors and then tums (got DQ as an emotional impulse but couldn't really eat it) I'll go to the bedroom and eat or if you need the bedroom (actually need the bedroom!!!) then I'll stay in the living room
>
> **Victim**: I'm not excusing it, it's wrong and I acknowledge it and yes I know we have neighbors but it won't happen but if I had I wouldn't be calling the cops and it would stay between us anyway. [redacted] if you hit me it's only because I pushed you way past what you warned me. But that won't happen.
>
> **Victim**: And I'm not in the business or keeping you away from [daughter's name] or alienating you from her or brainwashing her into thinking you aren't good. And I'm not physically gone throw things and knives and almost hit [daughter's name] etc.
>
> **Victim**: [redacted] I pushed you too hard and was disrespectful and you squeezed my face. I got the message
>
> **Victim**: I have to make way more effort, I've just let the currently situation give me an excuse to not make any effort
>
> **Victim**: I'm more mentally weak that way but it's not an excuse
>
> **Victim**: I've definitely been negatively focused on all the bad and the past things and thinking "what if's" or grieving situations that are too late now (example: getting house from my mom, having the SUV again, having all the money etc) and it's unhealthy and made me resentful. Not been focusing on present or big picture

[41] In his evidence, the accused denied that the face-squeezing incident occurred.

[42] The second non-sexual assault is alleged to have occurred on May 20, 2019. The victim testified that she and the accused had an argument in their residence. This argument was about money and gambling. During the argument, the accused pushed the victim down on her right shoulder, causing her to fall to her knees. The couple's daughter was present, playing with her toys when this occurred. When the victim was down on the ground, the accused bent down and said to her: "This is what you want, huh? This is what you want?" (the first pushing incident).

[43] After the first pushing incident, the victim sent the accused five text messages between 11:23 a.m. and 11:50 a.m. on May 20, 2019 (May 20th text conversation):

> **Victim**: You're right I'm a huge hypocrite and I'm run my mouth too much
>
> **Victim**: If I paused and breathe I'd save lots of situations
>
> **Victim**: I take full responsibility for causing this and every other outburst and sorry I put you in that position. I understand how dangerous it is from our perspective
>
> **Victim**: Mom wasn't available
>
> **Victim**: Please let me talk to you later once time has gone and figure it out. I was out of line

[44] The victim explained in her evidence that she often blamed herself for the arguments to attempt to calm the situation with the accused. The victim was sore after the first pushing incident but not injured.

[45] Other than his general denial of ever assaulting the victim, the accused did not discuss the first pushing incident in his evidence.

[46] The third non-sexual assault is alleged to have occurred on July 13, 2019. The couple had an argument in an exchange of text messages and the victim told the accused not to come home so that he could cool down.

[47] The victim testified that the accused returned to the family residence and confronted her. She said, when he arrived, he was “pretty angry”. The couple argued for ten to fifteen minutes. The accused then came at the victim, put his hands on her neck and pushed her back onto their bed. The victim fell backwards and her head struck the wall (the second pushing incident).

[48] The victim said there was a loud sound when her head hit the wall and that she yelled. The victim was down on the bed and the accused had his knee on her and his hands on her neck. She tried to push him away but could not. She yelled at him that he was going to give her a concussion. She was worried about the contact as she was four months’ pregnant. The accused eventually released her. He packed his clothes and left to stay with a friend.

[49] The accused had a different version of the second pushing incident. He said he and the victim got into an argument about family finances. He said he tried to leave because their daughter was awake and he didn’t want her to hear that he was a bad father and that he had a gambling addiction. He stated that the victim impeded his departure and pushed him first; he pushed her back and she fell onto the bed.

[50] After the second pushing incident, the accused and the victim had a text conversation from 10:23 a.m. to 12:15 p.m. on July 13, 2019 (the July 13th text conversation):

[Text Message Redacted]

Victim: You should have gotten over yourself and your selfishness and not come home cause you knew it was better not to. So this wouldn't have happened and we can talk and figure out a plan once things cool down and plan the cut off for after I'm done with the clients I have

[Text Message Redacted]

Victim: Let's hope I don't pass out or black out from a concussion

[Text Message Redacted]

Accused: Ok

Accused: Doesn't change the fact that you want me to go to jail....

Victim: I don't want for you to go to jail! I made a huge mistake in how I pushed you and how I ran my mouth after. I'm happy that she isn't home because I realize how close it could have come to that

Victim: I know you don't want to believe me but that's the last thing I want to happen and it's a turning point. I really don't want that to happen again or get close to that. I can't do this and I see the consequences and how real it is

Accused: You don't mean that. You'll just continue to disrespect me and take your mom's side. I can't let myself be in the position I was in today.....ever again!

Victim: No I'm not taking my moms side and I do mean it

Victim: I'd like to work out a plan to cut her off but planned

Accused: That's not good enough

Accused: She is disrespecting our family and that includes [daughter's name] and [son's name]

Accused: Police there?

Victim: No!

Victim: No police

Accused: Why you lying?

Victim: What are you talking about?

Accused: Trying to set me up hey!?

Victim: Wow not at all how evil do you think I am

Victim: [picture of family living room]

Victim: I'm just cleaning

Accused: I'll come home for a talk if you agree that if we can't agree. We divorce

Victim: Ok what do you mean?

Victim: If I agree what?

Accused: Oh and by the way!...the job site was locked down for the weekend

Victim: Wow

Reporting of Intimate Partner Abuse

[51] The victim testified that she did not immediately contact the police about the sexual and non-sexual assaults and the accused's threatening comments and text messages because she did not want to break up the marriage and she felt ashamed. She also assumed, as she did not have injuries, that she would not be believed. She said she often blamed herself for the accused's conduct "to keep the peace." She said, looking back, that she felt "sad for who [she] was back then."

[52] The couple discussed separation in November 2019. The accused promised he would stop gambling and the victim agreed to continue to live together. She testified that "[she] felt stuck." She said she had another child on the way, she was married and she wanted to be a family. She also explained she felt "isolated from support, like family and friends" and felt like she "just had to keep working at it."

[53] In July 2020, the victim learned the accused was gambling again and lied to her about relapsing. She testified that was "[her] line" for the end of the marriage.

[54] In August 2020, she separated from the accused and told him of her intention to divorce him. The accused was upset about the victim's decision and kept asking her to "focus on the kids." In a text message the accused sent the victim on August 7, 2020, he asked her to ". . . reconsider what [she was] doing for the sake of [their] babies [emoji (red heart)]".

[55] The victim was uncertain about the process of separating. She made an appointment to speak to a lawyer and eventually contacted the police non-emergency line seeking advice about how to deal with the accused's behaviour. The victim described this call as "safety planning" as she "wasn't sure what to do". The police dispatcher offered to send someone out. The victim declined as she was afraid of the accused's reaction. The victim testified that, in this contact with the police, she made no "allegations" against the accused.

[56] On August 10, 2020, the accused contacted the police. According to the victim, the accused claimed that the victim was "doing things . . . to both him and [their] daughter." The accused had a different version of events. He

testified that he called the police as he had "concerns" about the victim's "safety" because she was refusing to talk to him. His plan was to call the police to "help [them] talk it out".

[57] In her evidence, the victim explained that she advised the police that she was in the process of separating from the accused. When the police came to the residence, they spoke to both the victim and the accused and then asked the accused to leave the residence, which he did. The victim did not disclose any of the details of intimate partner abuse to the attending officers. She said she felt "stressed" and didn't feel "comfortable" sharing details with the officers at the time. She told them the separation was "a long time coming".

[58] On August 12, 2020, the victim applied for a protection order against the accused (see *The Domestic Violence and Stalking Act*, CCSM c D93). In her written application, the victim said the accused had made "[m]ultiple threats over time, a lot during 2019", including: "Keep running your mouth and I'll put your head through a wall."

[59] At the protection order hearing, the magistrate told the victim that it was important that she "tell the truth" and tell the magistrate "everything." It was explained to the victim that not making full disclosure could be reason to have the protection order cancelled later by a judge.

[60] The victim advised the magistrate about the anal intercourse incident and the second pushing incident. She did not disclose the other three allegations of sexual assault or the other two incidents of non-sexual assault.

[61] The magistrate asked the victim if there were any "other incidents." The victim replied: "Like I was speaking to my family. I just told them about

some of my experiences and then they -- multiple people told me like how if I communicate and say no or that I don't want something, that it's, you know, it's sexual assault. I know that at that time I was very newly in the relationship, you know, honeymoon".

[62] The victim testified that she understood that "no means no" on the topic of consent to sexual touching "but in the moment" with the accused "it was confusing" and she "didn't talk to anyone about it" when the sexual assaults happened. She explained she wasn't "confused" about the topic of consent; rather, she didn't know what to do when the accused engaged in sexual touching with her contrary to her wishes because the accused's view of sex was that he could just do it when "he want[ed]."

[63] The magistrate granted a protection order against the accused, prohibiting him from contacting the victim. The magistrate refused the victim's request to prohibit the accused from contacting the couple's children.

[64] The victim explained the non-disclosure of the other incidents of intimate partner abuse to the magistrate in her evidence at the accused's trial by saying that she thought she required the text messages to support an accusation. She said, at the time of the protection order, she had not retrieved all the relevant text messages from her Apple iPhone because she did not have a way to pay for the computer software (iMazing) to retrieve historic messages (over 10,000). It was only in February 2021 that the victim retrieved all of her historic text messages with the accused via iMazing.

[65] After the separation, the victim offered to allow the accused to have contact with their children if their pickup occurred through a third party. The accused did not have contact with their children during this time.

[66] On November 4, 2020, the victim commenced family law proceedings against the accused by petitioning for divorce.

[67] On December 3, 2020, the family court issued an interim order regarding a parenting arrangement for the children of the accused and the victim. The accused was allowed to have the children three times a week, unsupervised, after picking them up from a third party. The accused began to see their children again as of December 5, 2020.

[68] As the family law proceedings began, the victim became concerned that she would not be believed if she did not disclose all of the intimate partner abuse. She spoke to Victim Services who told her that it was not too late to report the abuse to the police.

[69] On March 7, 2021, the victim contacted the police to report the four incidents of sexual assault and three incidents of non-sexual assault. By this point in time, she had the historic text conversations between her and the accused via iMazing. She was interviewed by police and they commenced a criminal investigation. She told the police that she advised the accused they were separating because of his "relapsed gambling."

[70] In April 2021, the victim raised some concerns with Child and Family Services as to the accused's parenting of the children. The child welfare authorities investigated the matter but took no action.

[71] On May 4, 2021, the victim refused to allow the accused to see their children despite the interim order. The victim testified that she did so because she was "concerned" about the residence in which the accused was staying because there was no supervision by an independent third party.

[72] Family law litigation ensued over the victim's refusal to allow the accused access to the children that ultimately led to the family court refusing the victim's request for a variation of the interim order and the victim being found in contempt of that order on November 5, 2021. She was sentenced to three days in custody if she continued to refuse access. The victim allowed the accused access and the warrant of committal for contempt was cancelled on January 21, 2022 after the victim purged her contempt.

Section 724(2) Decision of the Trial Judge

[73] After hearing submissions, the trial judge made findings of fact for the purpose of sentencing the accused that he said he had "drawn from the evidence" and were "consistent with the jury's verdict."

[74] The trial judge said the credibility of the victim and the accused was the central issue in the case.

[75] The trial judge said he did "not accept" much of the victim's evidence in relation to the allegations of sexual assault and, therefore, had a reasonable doubt with respect to three of the four allegations. He also said he had a reasonable doubt in relation to one of the three allegations of non-sexual assault.

[76] The trial judge cited three features of the victim's evidence that he said negatively affected her credibility.

[77] First, he highlighted that the protection order was sought by the victim in August 2020 as part of "separation planning" in furtherance of her decision to divorce the accused and not because of an imminent concern of

domestic violence. Additionally, he said the credibility of the victim was negatively impacted because her depiction of the intimate partner abuse was different between what she told the magistrate at the protection order proceeding in August 2020 and what she told the police in March 2021.

[78] The trial judge said "[t]he fact that additional allegations were made later and not referred to in seeking the protection order in August of 2020, also undermine[d] the [victim's] evidence in relation to the allegations."

[79] Second, he said the victim gave inconsistent evidence at the trial as to why she decided to end the marriage. He said that, during cross-examination, she acknowledged that she told the police in March 2021 that she wanted to end the marriage because of the accused's gambling. However, the trial judge said that, during the trial, she gave a different account, which was that she decided to end the marriage "both" because of the accused's gambling and the intimate partner abuse she suffered.

[80] The trial judge stated that "the [victim] changed her evidence at trial on a significant point in relation to why she decided to separate from the accused from being because of the relapse of his gambling addiction to both the gambling addiction and the accused's abuse towards her."

[81] Third, the trial judge highlighted that the criminal allegations "were brought in the midst of highly contentious and charged family proceedings". The trial judge said that, because of the family law litigation and, in particular, the victim being found in contempt for denying the accused access to the children, he needed to "approach the [victim's] evidence with much caution."

[82] The trial judge said that, because of his concerns with the victim's credibility, "it would be unsafe to convict in relation to any of the allegations unless the [victim's] evidence in regard to the sexual assaults and assaults [was] corroborated by some evidence."

[83] The trial judge also had "some concerns" regarding the credibility of the accused. He noted there were some contradictions with his evidence but they were not "significant." He said the accused gave "plausible evidence" as to his intention regarding the allegations of uttering threats and that he was not cross-examined on either the anal intercourse incident or the breastfeeding incident, both of which he denied having occurred.

[84] The trial judge said that, but for the facial ejaculation incident, the face-squeezing incident and the second pushing incident, he had a reasonable doubt based on the accused's evidence in relation to the other three allegations of sexual assault and the other allegation of non-sexual assault (the first pushing incident).

[85] The trial judge accepted the victim's evidence about the facial ejaculation incident based on the picture and "the evidence contained in the text messages." He also noted that the accused gave two different versions as to when the victim was sleeping during the incident.

[86] In terms of the vaginal tear incident, the trial judge found that the accused and the victim had "sexual relations" on the day in question but he had a reasonable doubt as to whether it was a sexual assault.

[87] The trial judge said the "nature" of the April 25th and April 26th text conversations was "ambiguous" to the question of consent on the vaginal

tear incident. The trial judge said the "focus" of the text communications was about "birth control" and not about "non-consensual sexual activity." The trial judge also noted these text communications arose in the context of an argument where the accused claimed "their relationship [was] over."

[88] The trial judge said it was significant that the vaginal tear incident was not disclosed during the protection order process and was complained of by the victim in her statement to police only after contentious family law proceedings commenced. Based on the "timing of the reporting" and "the accused's evidence", the trial judge said he was left with a reasonable doubt about the vaginal tear incident.

[89] In terms of the face-squeezing incident, the trial judge "accept[ed]" the victim's evidence and "reject[ed]" the accused's evidence. He noted that the nature of the April 28th text conversation "refer[red] to an incident having occurred" where the details of the assault were discussed by the parties.

[90] The trial judge had a reasonable doubt in relation to the first pushing incident because there was no confirmatory evidence from the victim.

[91] As for the second pushing incident, the trial judge accepted the victim's "version of [the] event". He cited the content of the July 13th text conversation as "consistent" with the victim's narrative of the altercation in her testimony. The trial judge rejected the accused's evidence that the victim pushed him first.

Discussion

Standard of Review

[92] Section 687(1) of the *Code* sets out an appellate court's powers against a sentence:

Powers of court on appeal against sentence **687(1)** Where an appeal is taken against sentence, the court of appeal shall, unless the sentence is one fixed by law, consider the fitness of the sentence appealed against, and may on such evidence, if any, as it thinks fit to require or to receive, **(a)** vary the sentence within the limits prescribed by law for the offence of which the accused was convicted; or **(b)** dismiss the appeal.	**Pouvoirs de la cour concernant un appel d'une sentence** **687(1)** S'il est interjeté appel d'une sentence, la cour d'appel considère, à moins que la sentence n'en soit une que détermine la loi, la justesse de la sentence dont appel est interjeté et peut, d'après la preuve, le cas échéant, qu'elle croit utile d'exiger ou de recevoir: **a)** soit modifier la sentence dans les limites prescrites par la loi pour l'infraction dont l'accusé a été déclaré coupable; **b)** soit rejeter l'appel.

[93] An appellate court cannot "lightly" interfere with a sentencing decision; such decisions are entitled to a high level of deference on appeal (see *R v Parranto*, 2021 SCC 46 at para 29; see also *R v Hills*, 2023 SCC 2 at para 172).

[94] An appellate court can only intervene to vary a sentence under section 687(1) of the *Code* when it is demonstrably unfit or the sentencing

judge made an error in principle that had an impact on the sentence (see *R v Friesen*, 2020 SCC 9 at para 26 [*Friesen*]). When an error in principle is immaterial as it had no impact on the sentence imposed, appellate intervention may only occur where the sentence is demonstrably unfit (see *ibid*).

[95] As was explained in *Friesen*, errors in principle "include an error of law, a failure to consider a relevant factor, or erroneous consideration of an aggravating or mitigating factor" (*ibid*). However, the weighing or balancing of factors will only form an error in principle where the sentencing judge's exercise of their discretion is unreasonable; a sentence appeal is not an opportunity to merely weigh relevant sentencing factors differently (see *R v St Paul*, 2021 MBCA 31 at para 6).

[96] Generally, a credibility assessment is to be afforded deference on appeal. Absent a recognized error of law, such findings cannot be disturbed unless a palpable and overriding error is demonstrated (see *R v Kruk*, 2024 SCC 7 at para 82 [*Kruk*]). Accordingly, a credibility assessment will not be disturbed by an appellate court save where it cannot be supported on any reasonable view of the evidence (see *R v Jovel*, 2019 MBCA 116 at paras 26-30, 38; *R v CAM*, 2017 MBCA 70 at para 37 [*CAM*]).

Interpreting a Jury's Verdict—The Relevant Principles

[97] Interpreting a jury's verdict is often a conundrum for a sentencing judge because juries do not give reasons for decision. In particular, in situations of alternative bases of liability or multiple incidents over an extended period, a bare verdict of guilty is often ambiguous for sentencing purposes (see *R v Braun* (1995), 95 CCC (3d) 443 at 451-53, 1995 CanLII 16075 (MBCA)).

[98] Section 724(2) of the *Code* sets out the relevant procedure for interpreting a jury's verdict for sentencing purposes:

Jury **724(2)** Where the court is composed of a judge and jury, the court	**Jury** **724(2)** Le tribunal composé d'un juge et d'un jury:
(a) shall accept as proven all facts, express or implied, that are essential to the jury's verdict of guilty; and	**a)** considère comme prouvés tous les faits, exprès ou implicites, essentiels au verdict de culpabilité qu'a rendu le jury;
(b) may find any other relevant fact that was disclosed by evidence at the trial to be proven, or hear evidence presented by either party with respect to that fact.	**b)** à l'égard des autres faits pertinents qui ont été révélés lors du procès, peut les accepter comme prouvés ou permettre aux parties d'en faire la preuve.

[99] Interpreting a jury's verdict for the purpose of sentencing under section 724(2) of the *Code* is a two-stage process (see *Osborne* at para 28).

[100] Relevant considerations for the sentencing judge's analysis will be the "issues before the jury" and its "verdict" (*R v Ferguson*, 2008 SCC 6 at para 16 [*Ferguson*]; see also *R v Woodard*, 2009 MBCA 42 at para 68 [*Woodard*]).

[101] The language of section 724(2)(a) of the *Code* confirms that, in the first stage, the sentencing judge must accept as proven all facts, express or implied, essential to the jury's guilty verdict. This restriction on the sentencing judge's fact-finding power is limited to situations where the jury must have unanimously made a particular factual finding (see *Ferguson* at para 17). The

focus of section 724(2)(a) is a fact or facts that "the jury must have relied on to convict the accused" (*R v Punko*, 2012 SCC 39 at para 12 [*Punko*]).

[102] As was explained in *Ferguson*, the threshold for section 724(2)(a) to bind a sentencing judge is a high one. The sentencing judge is not to "attempt to reconstruct the logical process of the jury" (*Ferguson* at para 21) or "accept as fact any evidence consistent only with a verdict rejected by the jury" (*ibid* at para 17). Nor should the sentencing judge make factual findings beyond those necessary to deal with the issues in dispute at the sentencing (see *ibid* at paras 18, 21).

[103] As Spivak JA explained in *Osborne*, where a jury's determination(s) are ambiguous, the second stage of section 724(2)—section 724(2)(b)—governs. As she put it, "where it is necessary in order to sentence an offender to determine facts that were not expressed or necessarily implicit in the jury verdict, the sentencing judge should engage in their own independent fact-finding exercise with the limitation that any disputed aggravating fact must be proved beyond a reasonable doubt" (*Osborne* at para 28; see also *Ferguson* at para 18).

Leave to Appeal

[104] Section 676(1)(d) of the *Code* requires the Crown being granted leave to appeal the sentence passed against the accused. This standard necessitates demonstration of an arguable case of substance regarding variation of the sentence, mindful of the deferential standard of review that applies to a sentence appeal (see *R v Peters*, 2024 MBCA 68 at para 2 [*Peters*]).

[105] The accused argues that leave to appeal should be denied, as was the case in *Peters*, because the custodial aspect of his sentence has expired and the Crown's appeal turns on the trial judge's credibility assessment during the section 724(2) process that he says is entitled to great deference.

[106] The Crown says that the section 724(2) process was fundamentally flawed here by material errors of the trial judge. It asserts this impacted the sentence imposed as the accused received a relatively short period of incarceration in the community instead of a lengthy penitentiary sentence, which normally is to be expected in cases of serious intimate partner abuse.

[107] In my view, the *Peters* decision is readily distinguishable. In *Peters*, the Court was satisfied that it was highly unlikely that the sentence would be varied if the Crown's sentence appeal was determined on its merits. *Peters* was a case where, in my respectful view, the Crown sentence appeal would have taken the Court into "the trap" of an appellate court contemplating "tinkering with a sentence" (*R v King* (1990), 66 Man R (2d) 130 at para 52, 1990 CanLII 11107 (MBCA)) by increasing it by only one year and one day where the accused was of previous good character, the offence arose from an isolated incident, it was debatable that the sentence was arrived at by material error or was demonstrably unfit, the accused would likely be eligible for parole almost immediately if his sentence was increased, and it was undisputed that varying the sentence would impose a substantial hardship in the unique circumstances. None of these hesitations to granting leave to appeal are present in this appeal.

[108] The accused also submitted that leave to appeal should be denied because he says, on a sentence appeal, the Crown cannot appeal findings of

fact or mixed fact and law, such as a credibility assessment. This argument is premised on the assertion that the trial judge found there had been a reasonable doubt as to more than one incident occurring.

[109] I reject the accused's position.

[110] To begin, this is not a case like *R v Sheppard*, 2023 ABCA 381, leave to appeal to SCC granted, 41126 (8 August 2024) [*Sheppard*] or *R v Englehart*, 1998 CanLII 17950 (NBCA) [*Englehart*], where, in the case of *Sheppard*, a majority of the Court and, in the case of *Englehart*, all of the Court, concluded that the sentencing judge abdicated their responsibility to interpret the jury's verdict.

[111] The wording of section 724(2) of the *Code* and authorities such as *R v Brown*, [1991] 2 SCR 518, 1991 CanLII 73 (SCC), *Ferguson* and *Punko* confirm that clear findings underpinning a jury's verdict must be respected by the sentencing judge but, in the absence of such clarity, necessary sentencing findings must be made by the Court mindful of the burden of proof for disputed facts set out in section 724(3).

[112] The record here readily allows effective appellate review. The trial judge examined each of the four allegations of sexual assault and three allegations of assault separately and provided adequate reasons for his decision in relation to each of the seven incidents. However, as I will explain, in his analysis, he made errors in law that materially impacted the sentence.

[113] Next, leaving aside the fact that the trial judge's material errors were legal errors, the accused's submission as to the Crown's limited right of appeal in this case is contrary to the architecture of the *Code*.

[114] While it is accurate to say that Parliament has circumscribed the Crown's right of appeal in relation to a "verdict" of acquittal in section 676(1)(a) of the *Code* to "a question of law alone," this is a Crown sentence appeal and, thus, the permitted circumstances of such an appeal are governed by the language of section 676(1)(d) of the *Code* as opposed to section 676(1)(a) (see *R v Magoon*, 2018 SCC 14 at para 53). Crown sentence appeals pursuant to section 676(1)(d) are not limited to questions of law alone.

[115] The accused's suggestion that the trial judge's decision under section 724(2) is tantamount to a "verdict" of acquittal of the accused on certain allegations of sexual assault and assault is not persuasive.

[116] The core of this appeal is about what the trial judge did during that sentencing process when he interpreted the jury's verdicts pursuant to section 724(2) and sentenced the accused; there is no "verdict" of acquittal in terms of sexual assault or assault.

[117] In this case, by operation of law, the relevant decision maker tasked to render a "verdict" on the formal allegations of sexual assault, assault and uttering threats to cause bodily harm was the jury, not the trial judge. The trial judge's responsibility was "to accept the verdict" of the jury and "cause it to become a part of the record of the court" (*Head v R*, 1986 CanLII 8 at para 4 (SCC) [*Head*]).

[118] Once the jury's verdicts were rendered and recorded and the jury was discharged, the sentencing process began and the trial judge was legally tasked to "proceed with the appropriate sentencing procedures in order to complete the disposition of the case" (*Head* at para 4).

[119] During the sentencing process, the issue for the trial judge was not whether the accused was guilty or not guilty of sexual assault and assault. Those factual questions had already been decided by the jury. The trial judge's task was only to interpret the jury's verdicts, make necessary findings and pass sentence.

[120] Finally, it should be noted that this Court has accepted that material misapprehensions of the evidence that impact a sentence can provide a basis for the Crown to seek leave to appeal and, if granted, appeal a sentence pursuant to section 676(1)(d) of the *Code* (see *R v JED*, 2018 MBCA 123 at para 44). That view is shared by other appellate courts (see *R v Badiru*, 2012 ONCA 124 at para 31).

[121] In my view, mindful of the deferential standard of review that applies to a sentence appeal, the Crown has demonstrated an arguable case of substance as to the possibility of the accused's sentence being varied to warrant leave to appeal being granted.

Application of Section 724(2)(a) of the Code

[122] I would start with the Crown's submission that the trial judge's findings of fact were "not consistent with the jury's verdict." A failure to respect the express and implied factual implications of the jury's verdict is an error in principle (see *Ferguson* at para 17).

[123] The position of the accused at the trial was that he *never* had non-consensual sex with the victim and that he also *never* committed a non-sexual assault against her. That theory was put to the jury both in closing argument and in the trial judge's final instructions to the jury.

[124] The trial judge correctly instructed the jury in accordance with *R v W(D)*, [1991] 1 SCR 742, 1991 CanLII 93 (SCC) [*W(D)*] as to how they should assess the testimony of the accused. If the jury had accepted or had a reasonable doubt based on these general denials of the accused, they would have been obligated to acquit the accused of sexual assault and/or assault.

[125] After being properly instructed in accordance with *W(D)*, it is clear from the jury's guilty verdicts to the counts of sexual assault and assault that they rejected the accused's general denial of never having non-consensual sex with the victim and never committing a non-sexual assault against her. On the evidence they did not reject, the jury was satisfied beyond a reasonable doubt that two forms of intimate partner abuse had been proven.

[126] Because of section 724(2)(a) of the *Code*, the guilty verdicts of the jury had to be taken by the trial judge as the jury being satisfied beyond a reasonable doubt that, despite frailties raised with the victim's evidence, it was a fact on which to base sentence that the accused had engaged in intimate partner abuse by both non-consensual sexual touching and non-sexual assaultive behaviour.

[127] Unfortunately, when the trial judge considered the credibility of the accused and the victim, he approached that task with a clean slate based on his view of the evidence as opposed to looking at the case through the lens of conclusions the jury had to have reached to find the accused guilty of sexual assault and assault.

[128] The first difficulty is with how the trial judge dealt with the accused's credibility. He overlooked the impact of the jury rejecting the accused's denials of being an intimate partner abuser in two different ways.

The fact that the accused made such a dramatic claim under oath and the jury clearly rejected it negatively affected the accused's credibility significantly.

[129] The other aspect to the jury's guilty verdicts relates to the credibility of the victim. The alleged frailties with the victim's evidence stemming from her changing her evidence about separation (a topic I will comment on shortly), the incremental disclosure of the nature of the intimate partner abuse and the contentious nature of the parties' family law litigation were all issues that were canvassed in closing submissions and the trial judge's final jury instructions.

[130] None of these issues gave the jury reason to acquit the accused on the counts of sexual assault and assault. That is not to say the jury could have believed only some of the victim's evidence, as opposed to all of it, but, at a minimum, the trial judge needed to respect the jury's verdict in his section 724(2) analysis that the accused was an intimate partner abuser in two different ways, exactly as the victim claimed. In my respectful view, the trial judge failed to consider that important implication of the jury's verdicts in his credibility assessment of the victim.

[131] In summary, I am satisfied that the trial judge erred in principle by misdirecting himself on the application of section 724(2)(a) of the *Code* on an issue that bears materially on his credibility assessment of both the victim and the accused.

Trial Judge's Approach to Corroboration

[132] The trial judge effectively treated the victim as a *Vetrovec* witness by concluding in the section 724(2) process that "it would be unsafe to convict

in relation to any of the allegations" absent corroboration of the victim (see *Vetrovec v R*, 1982 CanLII 20 (SCC) [*Vetrovec*]).

[133] Leaving aside the contentious legal issue of whether the common law rule in *Vetrovec* can be applied in situations of intimate partner abuse where the allegation is one of sexual assault due to section 274 of the *Code*, a point which is unnecessary to comment on to decide this case, I am persuaded that the trial judge misdirected himself in law in how he approached corroboration of the victim in two material ways.

[134] The first error with the trial judge's approach to corroboration is that his self-direction that he would not believe an allegation of the victim unless her allegation was corroborated is completely contrary to his jury instructions on the same issue.

[135] As was explained in *Woodard*, the section 724(2) process is "guided by the trial judge's instruction to the jury" (at para 60; see also *R v Derksen*, 2022 MBQB 118 at paras 6-7). Given the interests of finality, the section 724(2) process cannot become a retrial of the allegations by another trier of fact applying different rules. Making an independent determination of the facts is not a licence "to find facts inconsistent with the jury's verdict or the evidence" (*Ferguson* at para 21) through the application of a legal standard different than the jury used in reaching their verdict(s).

[136] Application of the wrong legal standard is an error of law subject to a correctness standard of review (*Housen v Nikolaisen*, 2002 SCC 33 at para 36). In my view, the trial judge erred in law by applying the wrong legal standard in this case in relation to the issue of corroboration in his assessment of the victim's credibility contrary to his final instructions to the jury.

[137] The other error with the trial judge's approach to corroboration is, in my respectful view, that he misdirected himself as to what evidence was capable of corroborating the victim. Such a misdirection is an error in law (see *R v Wahabi*, 2024 MBCA 70 at para 173; *R v B (G)*, [1990] 2 SCR 57 at 71, 1990 CanLII 115 (SCC)).

[138] The key legal issue in dispute in relation to the vaginal tear incident based on the evidence and the positions of the parties was a question of the proof of the *actus reus* of the sexual assault, namely, the absence of the victim's consent to the sexual touching (see the *Code*, s 273.1(1); *R v Ewanchuk*, 1999 CanLII 711 at para 26 (SCC) [*Ewanchuk*]).

[139] As was highlighted in *R v Barton*, 2019 SCC 33 [*Barton*], the focus of this aspect of the law of sexual assault is "squarely on the complainant's state of mind, and the accused's perception of that state of mind is irrelevant" (at para 89). The Supreme Court of Canada went on to impress that a complainant "need not *express* her lack of consent, or revocation of consent, for the *actus reus* to be established" (*ibid*) [emphasis in original].

[140] The trial judge concluded that the April 25th and April 26th text conversations were not capable of corroborating the victim on the vaginal tear incident as, in his view, they focused on birth control, were ambiguous and arose during the course of an argument. Put another way, the trial judge was not persuaded that the evidence in question bore on whether the victim "in her mind wanted the sexual touching to take place" (*Ewanchuk* at para 48).

[141] In *R v Kehler*, 2004 SCC 11 [*Kehler*], it was explained that confirmatory evidence is evidence that is "capable of restoring the trier's faith in relevant aspects of the witness's account" (at para 15). To be confirmatory,

evidence need not implicate an accused. A fact that is capable of being corroborative does not lose that quality because it is admitted, or admitted and explained, because it is ultimately up to the trier of fact to decide whether to accept the fact as corroborative (see *R v McNamara (No 1)* (1981), 56 CCC (2d) 193 at 277, 1981 CanLII 3120 (ONCA)).

[142] I have significant difficulty with the logic that the April 25th and April 26th text conversations proved nothing as to whether, in her mind, the victim wanted the sexual touching relating to the vaginal tear incident to occur when it did. As I will explain, these text conversations were not ambiguous and were clearly relevant to the issue of the victim's internal state of mind toward the sexual touching at the time it occurred.

[143] Noteworthy on the question of relevance is the fact that, during cross-examination of the victim, counsel for the accused asserted that the April 25th and April 26th text conversations were highly relevant to her mindset to sexual touching during the vaginal tear incident.

[144] Counsel for the accused suggested to the victim that, in these text conversations, she was admitting she never told the accused "no" before the sexual touching occurred in relation to the vaginal tear incident. The victim said that was "incorrect." It was also suggested that the only "concern" of the victim in the text conversations was "pregnan[cy]" as opposed to her saying "no" to sexual touching. The victim said that was also "incorrect." Next, it was suggested the victim's motivation for the text conversations was "regret" to the sexual touching. The victim denied that suggestion. Finally, it was suggested that the victim was admitting in these text conversations that she was "confused" about "consent" and that she didn't say "no" before the sexual

touching occurred. The victim rejected this suggestion, saying: "I was not confused about what consent meant".

[145] There are two clear themes in the April 25th and April 26th text conversations that relate to the victim's state of mind at the time the sexual touching occurred: she was worried about the risk of pregnancy and she was upset with the accused forcing sex on her despite her ill health.

[146] In terms of the first theme—the risk of pregnancy arising from the sex relating to the vaginal tear incident being unprotected—the victim proposed the use of the emergency contraception pill, Plan B. While the accused initially made a vulgar joke about the idea, he agreed to the plan. This later became his answer to the victim being upset with him about the sex occurring in the first place (i.e., the second theme of the conversations).

[147] In terms of the second theme, when the victim called the accused an "[a]nimal" for the sexual touching, he responded by stating that he was "a man [that was] waiting too long" for sex and, in any event, use of Plan B would address the risk of pregnancy. The context here is the accused admitting in his evidence he and the victim had not had sexual relations in several months due to her vaginal tear and he wanted to have sexual relations despite the victim's vaginal tear. One inference reasonably arising from this evidence is that the victim did not consent to this sexual touching, which is hardly surprising given her health at the time.

[148] Moreover, the April 25th and April 26th text conversations also assist in assessing the accused's credibility—to his detriment. The accused gave an answer during the trial that he didn't know what the victim was talking about when she accused him of "[taking] sex and [coming] inside [her the

previous day] when [she] asked [him] not to" but the truthfulness of that answer is called into question by the fact that, in the April 26th text conversation, he responded within 23 seconds (according to the records in evidence) to the victim's accusation of non-consensual sex by telling her to take the emergency contraception pill, Plan B. It is a reasonably available inference that the accused knew exactly what the victim had accused him of and was attempting to use the agreement on resorting to emergency contraception to justify him forcing sex on her.

[149] On its face, the accused's evidence at trial that he didn't understand the victim is inconsistent with the April 26th text conversation where he clearly did understand the victim and instructed her to follow the birth control plan they had previously discussed.

[150] Furthermore, consistent with *Kehler*, the April 25th and April 26th text conversations were capable of confirming the victim's narrative even if those conversations were not interpreted as implicating the accused directly.

[151] As explained in *Barton*, "if the complainant testifies that she did not consent, and the trier of fact accepts this evidence, then there was no consent — plain and simple" (at para 89). The April 25th and April 26th text conversations are capable of confirming the victim's narrative that the sexual touching occurred without her consent and that, during the course of discussing emergency contraception to address the risk of pregnancy, the accused understood she had not consented but was indifferent to that fact because they had agreed to a plan to address the risk of pregnancy.

[152] In summary, I am satisfied that the trial judge erred in law by misdirecting himself as to whether the April 25th and April 26th text conversations were capable of being corroborative.

The Alleged Inconsistency

[153] Justice Frankel explained in *R v Osinde*, 2021 BCCA 124 that "[a]n inconsistency in testimony occurs when a witness gives evidence that is not in accordance with their previous evidence in the proceedings or is at odds with what they said on a prior occasion" (at para 24).

[154] A witness giving inconsistent evidence in the witness box as to what they said on another occasion on a matter that is material and on which they are unlikely to be mistaken can be taken by the trier of fact as proof that the witness is careless with the truth (see *R v M (A)*, 2014 ONCA 769 at para 12; *R v MG*, 1994 CanLII 8733 at para 23 (ONCA) [*MG*]).

[155] In his credibility assessment of the victim, the trial judge identified as important a purported prior inconsistent statement of the victim. He said, on March 7, 2021, in her statement to police, the victim said that she decided to separate because of the accused's gambling relapse. The alleged inconsistency is, in her trial testimony in November 2022, the trial judge said the victim gave a different version of her decision, testifying that she decided to separate from the accused both because of the accused's gambling relapse and the abuse he inflicted on her.

[156] The starting point is the alleged inconsistency cannot be said to be minor on a peripheral topic or one on which the victim is likely to have been mistaken (see *MG* at para 23). If the victim made such an inconsistent

statement, it would be an appropriate reason for the jury (and the trial judge on the section 724(2) analysis) to have concern as to whether the victim was careless with the truth.

[157] The difficulty here is the alleged inconsistency is a phantom; it did not occur during the trial.

[158] In direct examination, the victim testified about her decision to separate as follows:

> Q And what had -- what had gotten you to the point that you finally decided to -- to leave, to divorce?
>
> A Back in November when I had talked about like deciding that I wanted to leave but we stayed together, I had just like with myself had made a decision that if I found out that he started gambling again or if he relapsed that that's -- that was my line, that I didn't want to go past that and just divorce.
>
> Q Okay.
>
> A So that had happened.
>
> Q And that happened? When did that happen?
>
> A It happened for sure before July, in the 20's of July, 2020, because I had just found out -- like I went on a message and I found out that he had been gambling --
>
> Q Right.
>
> A -- for I don't know how long, but I just found out that it was like he had lied about it, so that -- that was the time, but July 27th-ish.

[159] During cross-examination, the victim confirmed again that the financial issues arising from the accused's gambling "led to the breakdown of [the] marriage".

[160] Counsel for the accused then reviewed the victim's comments to the police on March 7, 2021 regarding separation. Outside the presence of the jury, the trial judge asked counsel for the accused why he was referring to the victim's police statement. He appropriately mentioned that there is a procedure to follow if the intention is to impeach a witness. In response, counsel advised that his "intent" in referring to the victim's statement to the police was merely "to clarify something" in the victim's evidence.

[161] When the jury was called back, the following question was put to the victim during cross-examination on her statement to police on March 7, 2021:

> Q Okay. It's actually I guess on your copy towards the top of page 22 at line 3, and this is you speaking. You say, June 26, 2020, we moved to Wayoata Street, and July 23rd, 2020, I announced that I'm planning to separate 'cause he relapsed gambling. So I'm -- I'm going to suggest to you that's the reason why the separation occurred, was because of the gambling. Is that correct?
>
> A Like I mentioned before, I had made a decision myself that I would leave if he relapsed gambling.

[162] Counsel for the accused then stated, "Okay. Okay, that's all for the statement for now, so you can put that aside."

[163] A careful review of the transcript confirms that at no point in the trial was it suggested to the victim, let alone was it her evidence, that her

separation from the accused was also because of intimate partner abuse in addition to his gambling relapse. The victim's consistent evidence was she did not know how to deal with the intimate partner abuse until after she had separated from the accused.

[164] Experience teaches that the appeal process often plays out like an autopsy. When the *corpus* of a trial is carefully examined in a systematic way with the benefits of time for reflection and hindsight, the cause for a material error, like a cause of death, is frequently self-evident. That is the situation here.

[165] The genesis of the phantom inconsistency of the victim's testimony was counsel's mistaken view of the evidence. The error metastasized from the trial to the sentencing when the trial judge made the same error.

[166] After counsel for the accused closed his case and prior to the closing jury addresses, the trial judge held the first pre-charge meeting with counsel. During that meeting, the trial judge asked counsel for the accused as to whether there was any "prior inconsistent statement of the [victim] that [he thought the trial judge] should weigh in on or . . . make reference to" in his jury instructions.

[167] Counsel for the accused suggested two prior inconsistencies of the victim that the trial judge may have wished to instruct the jury on. The first related to the issue of the victim's understanding of consent. Both the trial judge and the Crown attorney (not the same counsel as on appeal) were concerned about this first potential inconsistency and the appropriateness of comment on it.

[168] Counsel for the accused then turned to the second alleged prior inconsistent statement of the victim that he wanted the trial judge to instruct the jury about:

> [Counsel]: Also her statement to police. She had testified that the relationship ended because of gambling and abuse, so then brought up her statement to the police where she said he -- a gambling relapse was why I ended the relationship. So that was the purpose there.
>
> THE COURT: Okay. Because she had said -- when did she -- what did she say, gambling and abuse? When did she say that? In the -- during the trial?
>
> [Counsel]: Yeah. In --
>
> THE COURT: Okay. During the trial and then -- but you're saying --
>
> [Counsel]: *I think I questioned her about it*, and she said abuse and gambling.
>
> THE COURT: Yeah. Okay. And then after that you put the statement from the -- from police or to the protection order? Police, the statement to police.
>
> [Counsel]: The police, yeah.
>
> THE COURT: And then she -- and there she had said it was gambling.
>
> [Counsel]: Yes.
>
> THE COURT: Okay. That seems -- okay.
>
> [emphasis added]

[169] Crown counsel did not provide her opinion on this alleged prior inconsistent statement of the victim.

[170] The conversation then returned to the first alleged prior inconsistent statement of the victim as to her understanding of the concept of consent.

[171] The trial judge then said he would "have a look at -- at both" of the alleged prior inconsistent statements of the victim and "review" his notes. His impression of the evidence was that there may have been a prior inconsistent statement of the victim as to her reason for separating from the accused. He said it was a "fair" and "good point" and that he "remember[ed] the evidence" because, as he put it: "[I]t wasn't two years ago. We just heard it this week, and I remember now that you're bringing that up." He said he would "verify" the evidence with his notes but that his "recollection appear[ed] to be" the same as counsel for the accused.

[172] Between the first pre-charge conference and the closing submissions to the jury the next day, neither counsel for the accused nor the trial judge, on their review of the evidence, caught on to the problem that the victim had never made the prior inconsistent statement in question—that she ended the relationship because of the relapsed gambling and abuse—that counsel for the accused thought she did. Counsel and the trial judge's recollection of the evidence was incorrect.

[173] During his closing jury address, counsel for the accused erroneously claimed that it was "important" for the jury to consider that the victim "changed her evidence" from "the relationship ended because of gambling, which was her version on March 7, 2021 with the Winnipeg Police, to the relationship ended because of gambling and other abuse in her evidence" that they had just heard.

[174] Counsel for the accused stated:

> [T]his inconsistency demonstrates that the [victim] has an inclination to change her story. And there is a narrative that she's a victim of domestic abuse and that narrative would be lessened if the cause of the end of the relationship was only gambling and not physical abuse, so that's why she would have an interest in changing that evidence to say that it was also abuse."

[175] In her closing address, Crown counsel made it clear that there was no inconsistency in the victim's evidence as to why the separation occurred. Crown counsel's submission was that the victim always said the separation was because of the accused's gambling relapse. As Crown counsel put it, "[t]he abuse was always there", the victim "lived" with it but, when the accused broke the "deal" to stop gambling, "[the victim] followed through" with ending the relationship.

[176] The exchange between the trial judge and Crown counsel at the second pre-charge conference about the wording of the final jury instructions is telling and should have alerted the trial judge to the mistake. Both were uncertain as to how the jury should be instructed about the alleged prior inconsistency of the victim claimed by counsel for the accused. The proposed instructions on this topic were described as "redundant" and "contradictory." Counsel for the accused said he had no position on this aspect of the final jury instructions.

[177] Unfortunately, the trial judge did not correct the accused's counsel's misstatement of the victim's evidence as he was required to do (see *R v Kociuk (RJ)*, 2011 MBCA 85 at para 64). To make matters worse, the trial judge also repeated the misstatement of the victim's evidence to the jury in the final instructions. He said that "[the victim] testified in a statement to police that

she left the marriage because of the accused's gambling. At trial she said it was both because of the accused's gambling and abuse."

[178] In fairness to the trial judge, his error was attenuated to a degree as he went on to instruct the jury that they first had to decide whether the "[the victim], in fact, gave an earlier and different version from her testimony about the same thing." He also properly instructed the jury to consider, if there was an inconsistency, they had to decide the importance of it and any explanation by the victim provided for the inconsistency.

[179] Given that the jury heard the evidence of the victim and the Crown's position that there was no inconsistency in her account of separating from the accused, it can be presumed that the jury followed the trial judge's instructions to decide first whether the victim had made a prior inconsistent statement, which she did not.

[180] At the section 724(2) hearing, which occurred two months after the jury rendered the verdicts, counsel for the accused again repeated his mistaken view of the record. He said that one reason that the victim could not be believed on the incidents in dispute was because the evidence at the trial was that she told the police a different reason for "the end of the relationship" from what she later told the jury.

[181] Unfortunately, the trial judge accepted the accused's counsel's mistaken impression of the evidence despite the Crown saying to the jury that was not what occurred. He said at the section 724(2) hearing that he did "recall" that the victim had made a prior inconsistent statement during the trial about the reason for her separating. He asked counsel for the accused to explain "exactly . . . how her evidence change[d]". Counsel for the accused

said she told the police on March 7, 2021 that, "[b]ecause [there was] a gambling relapse," she ended the relationship but, then, "in the courtroom she [said], Well, the relationship ended because of gambling and other abuse." This statement cannot be supported on any reasonable reading of the record.

[182] While the integrity of the guilty verdicts is not in doubt by the trial judge providing final instructions more favorable to the accused regarding the victim's credibility than the trial record can support, this error cannot be overlooked for the purposes of the section 724(2) proceeding. An assessment of evidence based on a misapprehension of a legal principle is an error in law (see *R v JMH*, 2011 SCC 45 at paras 29-30).

[183] This is one of those rare situations where the perceptions of the trial judge in assessing credibility cannot be respected (see *R v Gagnon*, 2006 SCC 17 at para 20 [*Gagnon*]).

[184] The trial judge made an obvious error in characterizing the victim's evidence as inconsistent between what she told the police about the reason for the marital separation and what she later told the jury. His conclusion in the section 724(2) process that the victim "changed her evidence at trial on a significant point in relation to why she decided to separate from the accused from being because of the relapse of his gambling addiction to both the gambling addiction and the accused's abuse towards her" is contrary to the record. The victim never testified to what the trial judge concluded. Therefore, he was not legally permitted to use that fact as a reason in law to have a concern about the victim's credibility.

[185] I am satisfied that this obvious error is a material one and cannot be characterized as merely a harmless legal error. The trial judge relied heavily

on the phantom inconsistency, stating it "undermine[d] her credibility in relation to the allegations before the Court."

Myths and Stereotypes

[186] The Crown also argued that the trial judge's section 724(2) determination "was premised largely on myths and stereotypes". It focused on the trial judge being critical of the victim for the incremental nature of her disclosure of intimate partner abuse (see *Kruk* at para 41; *CAM* at para 53).

[187] I am not persuaded by this aspect of the Crown's submissions.

[188] In his final instructions to the jury, the trial judge properly instructed the jury that a delay in disclosure of intimate partner abuse, standing alone, cannot give rise to an adverse inference against the credibility of the victim. However, part of the factual mosaic relevant to the timing of the disclosure of the intimate partner abuse in this case was the highly contentious marital separation and subsequent family law litigation. The trial judge followed the same reasoning in coming to his section 724(2) determination. I see no error in law in his approach.

Conclusion

[189] As is the case with a jury verdict, appellate review of a decision of a trial judge must be conducted within recognized boundaries. Here, the trial judge had the advantage of hearing the evidence of the witnesses first-hand. This privileged perch must be respected on appeal. As Doherty JA remarked in *R v Howe*, 2005 CanLII 253 (ONCA): "A lifeless transcript of the testimony cannot possibly replicate the unfolding of the narrative at trial. Nor can oral

argument and a selective review of the trial record possibly put an appellate court in as good a position as the trial judge when it comes to credibility determinations" (at para 46).

[190] However, a trial judge's credibility determinations are not immune from appellate review. As Weiler JA noted in *R v Luceno*, 2015 ONCA 759, "a legal error made in the assessment of credibility may displace the deference usually afforded to a trial judge's credibility assessment and require appellate intervention" (at para 34).

[191] In my view, the trial judge committed several identifiable and serious legal errors in his credibility assessments of the victim and the accused. Each of the errors, standing alone, is material as each calls into question the root of his section 724(2) findings that he relied on to pass sentence. Deference cannot be afforded to the trial judge's credibility assessment of the victim and the accused.

Remedy

[192] The Court invited further submissions from the parties as to the appropriate remedy where the section 724(2) process is materially flawed.

[193] The parties agree on two issues and disagree on a third.

[194] It is common ground that an appellate court lacks authority under the *Code* to remit a case back to the lower court for re-sentencing despite material errors at the original sentencing. The position of counsel reflects the traditional view of the limits of appellate authority in sentencing matters under

section 687 (see *R v Abdelrazzaq*, 2023 ONCA 231 at paras 3, 5; *R v Sipos*, 2014 SCC 47 at para 27).

[195] It was suggested in *obiter* in *R v Nahanee*, 2022 SCC 37 [*Nahanee*] that there may be "rare cases" where the record is so "incomplete" that a "fresh sentencing hearing" is necessary (at para 61).

[196] This strikes me as a case that is far removed from the scenario described in *Nahanee* if that remedy was available to this Court (a matter on which I take no position). The record is far from incomplete and the trial judge gave adequate reasons that allow for appellate review. Moreover, the added problem here is the dispute centers on interpreting the verdict of a jury. Given that the record is fixed, it would be difficult to see what would occur at a re-sentencing that is different than this Court reviewing the transcript and making its own assessment of the evidence.

[197] The parties also agree that the remedy of appointing a special commissioner to make inquiries and report back to the Court has no application in these circumstances (see the *Code*, s 683(1)(e)). The jury has been discharged and their discussions surrounding their verdicts are secret and cannot be disclosed (see *ibid*, s 649).

[198] This is not a case where some advantage would arise from appointing a special commissioner; it would amount to adding an "unnecessary" step to the process (*R v Sandhu*, 2021 MBQB 22 at para 31).

[199] I say that because this is not a matter that involves "prolonged examination" of a technical matter or one that would be inconvenient for this Court to inquire into, criteria that are necessary to satisfy the appointment of

a special commissioner (the *Code*, s 683(1)(e)). Moreover, the delays that would arise from a different judge of the Court of King's Bench being tasked to read the record, like the members of this Court have already done, and provide their views to us for review would be detrimental to the expeditious administration of justice.

[200] The position of the Crown on the appropriate remedy is that, as the errors of the trial judge go to the root of his credibility assessment, his section 724(2) findings are not entitled to any deference in considering the fitness of the accused's sentence. The Crown invites this Court to re-examine the evidence and substitute its own assessment of the evidence in order to assess the fitness of the accused's sentence.

[201] In *Schwartz v Canada*, [1996] 1 SCR 254 [*Schwartz*], the Supreme Court explained that an appellate court will be justified in substituting its own assessment of the evidence for that of a trial judge in only the rarest of situations. Justice La Forest stated that "an appellate court will be justified in disturbing the trial judge's findings of fact only if a specific and identifiable error made by the trial judge convinces it that the conclusion of fact reached is unreasonable, and not one that constitutes a mere divergence of opinion" (at para 33) [emphasis in original].

[202] The high threshold for an appellate court to make a fresh assessment of the evidence set out in *Schwartz* was adopted for criminal law purposes in *Gagnon* at para 10; see also *Kruk* at para 82.

[203] In a similar vein, and specifically in relation to the law of sentencing, the Supreme Court noted in *R v Lacasse*, 2015 SCC 64 [*Lacasse*] and *R v LM*, 2008 SCC 31 [*LM*], that an appellate court is prohibited from substituting its

own assessment of the facts for that of a sentencing judge absent a "valid" reason or ground (*Lacasse* at para 16; *LM* at para 16), even where it disagrees with the determination made by the sentencing judge.

[204] The accused's position is that this Court should not entertain the Crown's position and remedy material errors of the trial judge in his section 724(2) determination by making a fresh assessment of the evidence for the purpose of considering the fitness of accused's sentence. The accused relies on the decision of Wakeling JA in *Sheppard*.

[205] I have carefully reviewed the three sets of reasons in *Sheppard*. I do not find *Sheppard* assists the accused as to an alternative remedy to the Crown's submission that this Court conduct a fresh assessment of the evidence on the record.

[206] The three sets of reasons in *Sheppard* disagree on the question of whether there was a valid reason or ground, in the particular context of *Sheppard*, for the appellate court to substitute its own assessment of the facts for that of the sentencing judge. That important threshold question is not in doubt here.

[207] In my view, the submission of the Crown should be accepted. This is a situation where the trial judge passed the accused's sentence using facts tainted by obvious and important errors in how he approached the credibility of the accused and the victim in light of the implications of the jury's verdicts. The situation here is far removed from a mere disagreement with the trial judge about the facts or their significance. This is one of those unique situations where there is a valid reason or ground for this Court to make its

own assessment of the evidence in the record for the purpose of considering the fitness of the accused's sentence.

Factual Basis for Considering the Fitness of the Accused's Sentence

[208] However, the making of a fresh assessment of the record for the purpose of considering the fitness of the accused's sentence is not an opportunity for this Court to start over as if the matter was *tabula rasa*. There are several legal parameters to ascertaining the factual basis for considering the fitness of the accused's sentence, namely:

a) the burden of proof rests on the Crown, on the criminal standard of proof beyond a reasonable doubt, for any aggravating fact, such as whether an incident occurred or the particulars of same—section 724(3)(e) of the *Code*;

b) any fact, express or implied, essential to the jury's verdict must be accepted as proven—section 724(2)(a) of the *Code*;

c) findings of fact made by the trial judge that are not affected by an error in principle must be deferred to—*Friesen* at para 28; and

d) in accordance with section 724(2)(b) of the *Code*, only necessary findings of fact, consistent with the jury's verdict, should be made—*Ferguson* at paras 17-21.

[209] It is clear from the jury's guilty verdicts they accepted that this was a situation where the accused had committed two different forms of intimate partner abuse. It must be accepted that the jury rejected the accused's categorical denials and the implication of his evidence that the jury should

accept none of the victim's evidence on the allegations (see the *Code*, s 724(2)(a)).

[210] However, what is unclear from the jury's verdicts is whether they accepted all or only some of the victim's evidence. This is a situation where, as explained in *Osborne*, an independent determination of the facts is required in relation to each of the alleged instances of sexual and non-sexual assault, mindful that aggravating facts must be proven beyond a reasonable doubt.

[211] However, in making an independent determination of the facts in accordance with section 724(2) of the *Code*, it is important to consider the implications of the jury's guilty verdicts for an assessment of credibility.

[212] In *CAM*, it was explained that, where an allegation of intimate partner abuse has substance, great care must be shown by the courts before discrediting a victim of such abuse simply because their behaviour did not conform to some idealized standard of conduct (see paras 49-52).

[213] Given the jury's guilty verdicts to two forms of intimate partner abuse, it is necessary to be sensitive to drawing negative inferences against the victim simply because of delayed disclosure of the intimate partner abuse and the fact that it occurred only after separation and the commencement of contentious family law litigation.

[214] As was explained in *R v Buboire*, 2024 MBCA 7 [*Buboire*], "[t]here is no inviolable rule as to how individuals react to trauma. The impact of incremental disclosure by a witness to their credibility depends on the facts of each case; the fact that a witness does not give an immediate and complete account does not automatically undermine their credibility" (at para 22).

[215] In terms of the anal intercourse incident, given the positions of the parties at trial, the only issue in dispute was whether it was proven beyond a reasonable doubt that the sexual touching in question occurred (see the *Code*, s 265(1)(a); *Ewanchuk* at para 25).

[216] The victim testified to a detailed account of the sexual touching relating to the anal intercourse incident. Her evidence is that, while she agreed to consensual anal sex with the accused, during the anal intercourse, she unequivocally withdrew her consent because of her discomfort but, despite communicating the withdrawal of the consent to the accused, he continued with the sexual touching for the purposes of his sexual gratification. There were no inconsistencies in her evidence or vagaries with her account of the incident.

[217] There are no text conversations that bear on the anal intercourse incident.

[218] Given the jury's guilty verdicts and the need to be sensitive to how victims of intimate partner abuse disclose such abuse, I see little reason why the victim not reporting the anal intercourse incident for several years materially impacts her credibility.

[219] Much was made at the trial of the contentious family law litigation as a motive for the victim to fabricate a claim of intimate partner abuse but care needs to be shown with that reasoning given the record.

[220] Unfortunately, in his closing address to the jury, counsel for the accused suggested that the victim had a financial motive to fabricate the allegations of intimate partner abuse. He stated:

So when we're looking at the evidence of [the victim], I submit to you that there is a significant question about her motivation in giving evidence before the Court. There is ongoing litigation in family proceedings regarding the divorce, the marital assets. It was mentioned that there is a significant debt of $100,000 that's been brought up. It was said to be attributable to [the accused] possibly, but it -- in relation to that, it was -- it was not conceded that $100,000 of gambling debts came up during the course of their relationship. So it's conceivable that [the victim] would have a claim, possibly to recover this money against [the accused].

If she could show that she was the -- the victim of domestic abuse, that might assist her with that course of action or -- or possibly there is a way that the money could be recovered in relation to her -- her mother. We -- we heard evidence that there was $100,000 that came from an inheritance, that it was taken out of her inheritance during the course of the relationship.

So perhaps there is a legal angle to this, perhaps there is a personal angle to this, but I -- I just want to make sure that you, the jury, are aware of this going on in the background of the case.

We heard evidence that there was this sum of money that was advanced by the -- [victim's] mother to the couple. That's not in doubt.

And I think you would agree with me that any person that lost $100,000 would be upset about that and would be motivated to try to recover that money through any means possible. [The victim] agreed with me that [the accused] would not have the ability to pay the sum back. I think that's reasonable on the facts that we heard to draw that inference.

So ask yourselves, what motivation would somebody have if $100,000 had been spent? At the end of the relationship looking at the -- the things that had been spent during the course of the relationship, I submit to you that it's reasonable she would take action to try to -- to restore what she had lost in the relationship.

[221] Counsel for the accused then took the jury through the details of the family law litigation relating to the parenting arrangement for the two children.

[222] Finally, counsel for the accused suggested that the victim had some sort of "agenda" here connected to the "gambling debts" and that the jury should have "a great deal of caution" over anything she said regarding the offences because "her motivation loom[ed] over every allegation and [brought] them into doubt."

[223] While evidence of a motive to lie for an ulterior purpose can be circumstantial evidence for a trier of fact to consider in a credibility assessment of a witness, motive is "always a question of fact and evidence" (*Lewis v R*, 1979 CanLII 19 at 837 (SCC) [*Lewis*]).

[224] The suggestion of the victim having a pecuniary interest to fabricate her claim of intimate partner abuse is a dangerous one as it is grounded on a stereotype that a vengeful woman would use a false claim of rape for financial gain (see Janine Benedet, Annotation, *R v M (R)*, 2012 CarswellOnt 5492 (ONSC)).

[225] The other issue is the alleged motive here is entirely speculative and actually runs contrary to the record.

[226] The starting point is that the other litigation the jury heard about involving the accused and the victim was a family law proceeding, not a civil claim about the recovery of a debt. While it is theoretically possible for monies spent during a marriage to form a basis for an unequal division of family

property at the time of separation, the particulars of that esoteric family law remedy were not before the jury in any intelligible way.

[227] Moreover, the victim testified about her financial motives and the family law litigation. She said she was "frustrated" by the loss of $100,000 from monies advanced to her by her mother due to the accused's gambling. She said that, during the family law litigation, she identified these monies as a debt she owed to her mother; she said "there was not really a time" she was putting this debt on the accused. In her view, the reality was the $100,000 was "lost" forever; as she put it, the money wasn't the "main concern" for her in the family law litigation.

[228] Given the collateral facts rule, the victim's evidence that she had no financial motive to claiming intimate partner abuse for her family law litigation had to be accepted as final absent a recognized exception to the collateral facts rule applying (see *R v Krause*, 1986 CanLII 39 at para 17 (SCC)). No such exception was put in issue at the trial.

[229] It was made clear in *Lewis* that trial judges have a "good deal of latitude" as to how questions of motive should be presented to the jury (at 837). The trial judge did not parse the victim's possible motives to fabricate the claims of intimate partner abuse in the family law litigation between a pecuniary interest and care of the children. In hindsight, it likely would have been a better course to tell the jury there was no evidentiary foundation for the victim having a pecuniary interest to fabricate the intimate partner abuse allegations.

[230] The point was made in *Kruk* that an impermissible stereotype is that "[f]alse allegations of sexual assault based on ulterior motives are more

common than false allegations of other offences" (at para 36). However, where evidence is adduced grounding a potential motive to fabricate, such evidence must be properly considered to give full effect to the presumption of innocence (see *ibid* at para 65). Family law litigation involving a parenting arrangement can, in appropriate circumstances, give rise to a motive to fabricate (see *R v WO*, 2020 ONCA 392, aff'd 2021 SCC 8).

[231] While I accept that the contentious family law litigation over the parenting arrangement of their children was a contextual factor that is relevant to the assessment of the credibility of the victim, I am not persuaded it is a factor that negatively impacts the victim's credibility to any great degree.

[232] Had the victim fabricated her claims of sexual assault and assault for an advantage in family court, it is difficult to understand why she consented to the accused having access to their children before family law litigation was commenced. Additionally, the key issue giving rise to the contempt finding in family court against the victim was not whether the accused could have contact with the children but who would be the intermediaries handling pick-ups and drop-offs of the children while they transited between their parents. Finally, there was significant evidence at the trial establishing that the victim was both unsophisticated and fearful in raising intimate details of trauma relating to her relationship with the accused with third parties.

[233] Moreover, on the question of the anal intercourse incident, that particular allegation was disclosed prior to the commencement of the family law litigation. I see the contentious family law litigation over the parenting

arrangement of their children as a complete non-factor to the credibility of the victim on the anal intercourse incident.

[234] Consistent with the jury's verdict, the bare denial of the accused that the sexual touching relating to the anal intercourse incident occurred is not believable. Nor does it raise a reasonable doubt. Based on the detailed account given by the victim, I am satisfied beyond a reasonable doubt that, at about the time of the marriage in 2016, the accused and the victim agreed to engage in anal sex. However, during the course of the anal intercourse, the victim withdrew her consent to the sexual touching due to discomfort but the accused continued with it until he ejaculated. I also accept as proven beyond a reasonable doubt that the accused made the comments the victim testified to after the intercourse ended.

[235] In terms of the facial ejaculation incident, the accused does not challenge the finding of the trial judge that the allegation was proven beyond a reasonable doubt. In accordance with *Friesen*, because this finding of the trial judge is not tainted by error, it should be respected by this Court (see para 28).

[236] Like the anal intercourse incident, the issue in dispute on the breastfeeding incident is simply whether it was proven beyond a reasonable doubt that the sexual touching in question occurred (see the *Code*, s 265(1)(a); *Ewanchuk* at para 25).

[237] The victim testified to a detailed account of the sexual touching relating to the breastfeeding incident. Like the anal intercourse incident, her evidence was that consensual sex became non-consensual because of an intervening occurrence—in this case, the daughter breastfeeding. However,

despite the unequivocal withdrawal of consent, the accused continued with the sexual touching. Again, there were no inconsistencies in the victim's evidence or vagaries with it.

[238] There are no text messages that bear on the breastfeeding incident.

[239] A peculiar aspect of the breastfeeding incident is the accused never testified about the incident in either direct or cross-examination save for his general denial to ever engaging in non-consensual sex with the victim. That general denial was of course rejected by the jury and that finding must be respected for the purposes of applying section 724(2) of the *Code*. This is a situation where the failure of the accused to be challenged on a specific allegation means little given there was a rejection by the jury of his denial of never having non-consensual sex with the victim (see *R v Khuc*, 2000 BCCA 20 at paras 43-44).

[240] The breastfeeding incident is one where the issue of incremental disclosure does come into play. However, it is important to recall that, when the magistrate at the protection order hearing asked the victim whether there were other incidents of abuse, she did say that, while she understood the topic of consent to sexual touching, she was confused by the accused's conduct in the "moment", particularly as he simply took sex when he wanted it.

[241] In accordance with *CAM* and *Buboire*, it is important to understand and be sensitive to the dynamics of intimate partner abuse in assessing the victim's evidence.

[242] The magistrate asked the victim a very specific question and the victim replied with a nuanced answer that suggested there were more incidents

of intimate partner abuse that turned on the accused simply engaging in sex with her whenever he wanted it. The victim clearly described to the magistrate at the protection order hearing a power imbalance that existed in her relationship with accused; that is an important fact that had to be taken into account before saying her credibility was undermined simply because she did not disclose all of the accused's criminal conduct at the protection order hearing. The fact that the magistrate chose to not interrogate the victim further is not the issue, nor can that be reason to have a concern about the victim's credibility.

[243] The other point to bear in mind about the delayed disclosure is the victim explained in her evidence that one difference between what she told the magistrate about the intimate partner abuse in August 2020 and what she told the police about the same in March 2021 is that, by the time she went to see the police, she was able to afford to employ the iMazing software to retrieve the relevant text messages in the interim to substantiate allegations of intimate partner abuse that were the subject of text communications.

[244] While her explanation of not disclosing allegations due to not having access to underlying text communications relating to intimate partner abuse does not bear directly on the breastfeeding incident as there are no text communications for that incident, it does bear on the victim's credibility generally in the timing of her disclosure of intimate partner abuse.

[245] In summary, I am not persuaded that there is a good reason to have a concern about the victim's credibility by failing to disclose the breastfeeding incident to the magistrate at the protection order hearing given the fact that

she became involved in contentious family law litigation over the parenting arrangement for the children.

[246] Given that the jury rejected the accused's general denial to non-consensual sexual touching of the victim, the only issue on the breastfeeding incident is whether the victim's evidence establishes beyond a reasonable doubt that the sexual touching in question occurred. In my view, the victim's evidence meets the criminal standard.

[247] I am satisfied beyond a reasonable doubt that, in the spring of 2019, the accused and the victim were engaging in consensual vaginal intercourse. The victim withdrew her consent to the sexual touching due to breastfeeding the couple's daughter but the accused continued with the sexual touching until he ejaculated inside the victim. I also accept as proven beyond a reasonable doubt that the accused said nothing to the victim when she asked him for an explanation for what he had done after the intercourse ended.

[248] As mentioned earlier, the issue in dispute for the vaginal tear incident was proof of the absence of the victim's consent to the sexual touching (see the *Code*, s 273.1(1); *Ewanchuk* at para 26).

[249] The trial judge concluded that the sexual touching in relation to the vaginal tear incident occurred. The accused does not dispute that finding.

[250] The victim provided a detailed account of the vaginal tear incident. She said the sexual touching was never consensual and she had refused the accused's request for sex on two occasions before he undressed her and began to sexually touch her by penetrating her vagina with his penis.

[251] It is an undisputed fact that no birth control was used by either the accused or the victim and that, for the victim, she was still recovering from a vaginal tear as she had recently given birth.

[252] As explained earlier, the April 25th and April 26th text conversations are capable of corroborating the victim's narrative. They also cast doubt on the accused's evidence and his claim before the jury of not understanding the victim's accusation of non-consensual sex in the April 26th text conversation.

[253] For similar reasons I expressed in relation to the breastfeeding incident, I have little concern about the incremental nature of the victim's disclosure of abuse or the contentious family law litigation about their children. These factors are even less of a concern in relation to the vaginal tear incident because of the corroborative evidence in the form of the April 25th and April 26th text conversations.

[254] I have little difficulty in disbelieving the accused, nor do I have a reasonable doubt from his evidence. The idea that the victim would have consensual unprotected vaginal sex with the accused, despite her vaginal injury and concern about having another child in a troubled marriage, is difficult to accept as a starting point. A further problem for the accused is his inconsistent claim of him testifying to not understanding the accusation of non-consensual sex in the April 26th text conversation yet, at the time, according to the timing of the record, he was able to immediately tell the victim to take the emergency contraception pill, Plan B. This inconsistency in his evidence is a real and important one and casts doubt on his credibility.

[255] In terms of the other evidence on the vaginal tear incident, given the corroborative text messages that confirm the victim's narrative, I am satisfied beyond a reasonable doubt that, on April 24, 2020, the accused requested sex from the victim. She refused him on two occasions. He then forcibly undressed her and engaged in unprotected vaginal intercourse with her until ejaculation. He did so knowing she was still recovering from childbirth.

[256] The accused accepts the trial judge's findings in relation to the face-squeezing incident and the second pushing incident. Accordingly, in accordance with *Friesen*, these findings of the trial judge should be respected (see para 28).

[257] In terms of the first pushing incident, given the positions of the parties at trial, the only issue in dispute was whether it was proven beyond a reasonable doubt that the touching in question occurred (see the *Code*, s 265(1)(a)).

[258] It is noteworthy that the jury rejected the accused's general denial of never assaulting the victim. The accused's denial of this allegation is therefore not a concern for me. The issue is whether the rest of the evidence satisfies the criminal burden that the touching in question occurred.

[259] The victim provided a detailed account of a physical assault occurring on May 20, 2019 in the family residence after the couple had been arguing. No inconsistencies or vagaries were raised with the victim's accounting of what occurred or the nature of the assault.

[260] The May 20th text conversation after the first pushing incident is not corroborative of the victim's evidence. It is a prior consistent statement of the

victim. It is therefore only admissible to rebut the allegation of recent fabrication against the victim for this incident (see *R v Walker*, 2015 MBCA 69 at paras 21-27).

[261] In the May 20th text conversation, the victim said there was a verbal argument and the "outburst" led to a "dangerous" situation for the couple.

[262] In accordance with *CAM* and *Buboire* and the fact the jury accepted the accused engaged in multiple forms of intimate partner abuse, I have little concern over the failure of the victim to disclose the first pushing incident to the magistrate at the protection order hearing or the contentious family law litigation as being reason to doubt the victim's credibility that the first pushing incident occurred. Moreover, the May 20th text conversation alleviates any unease over recent fabrication of that incident. The victim made the comments about the dangerous outburst that had occurred proximate to the event in question well before the couple separated.

[263] I am satisfied on the criminal burden that the contact relating to the first pushing incident occurred: namely, on May 20, 2019, after an argument, the accused pushed the victim to the ground, as the victim described, and made aggressive comments to her in the presence of their daughter.

Summary

[264] In my view, the findings of the trial judge regarding the facial ejaculation incident, the face-squeezing incident and the second pushing incident should be respected for the purpose of assessing the fitness of the accused's sentence.

[265] When the evidence in relation to the other three incidents of sexual assault and the first pushing incident is considered individually and with due regard to the implications of the jury's guilty verdicts, I am satisfied that each of these four incidents have been proven beyond a reasonable doubt and, therefore, each of these four incidents constitute "evidence" for the purpose of assessing the fitness of the accused's sentence (see the *Code*, s 687(1)).

Fitness of the Accused's Sentence—The Next Steps

[266] At the hearing of the appeal, this Court advised counsel that it would address the sentence appeal in stages and would give an opportunity to address the issue of the fitness of the accused's sentence only after it decided the question of leave to appeal, whether the trial judge committed material error(s) during the section 724(2) process and, if so, the remedy for the material error(s).

[267] Both counsel properly advised that, even if this Court were of the view that the sentence imposed was unfit, the question of whether the appeal should be dismissed, or the varied sentence permanently stayed due to the interests of justice because of the prejudice of reincarcerating the accused, was an issue that needed to be argued by counsel before being decided by this Court.

[268] In my view, the appropriate path forward is for counsel to be given an opportunity to provide further written and oral submissions in light of this Court's reasons on the issue of the fitness of the accused's sentence and the appropriate remedy in the event that this Court is of the view the sentence is unfit.

[269] Counsel are asked to agree to a filing schedule for a further factum from each and to set a date with the registry for a further oral hearing before this panel.

Disposition

[270] In the result, I would grant leave to appeal and allow the Crown's appeal to the extent of the parties being permitted to make further written and oral submissions as to the fitness of the accused's sentence in light of these reasons, as well as the appropriate remedy should this Court determine the accused's sentence to be unfit.

[271] The accused is ordered to appear in person in this Court at the time and place for continuation of this appeal set by the registry.

Mainella JA

I agree: Pfuetzner JA

I agree: Edmond JA