Citation: R v RB, 2025 MBCA 79
Date: 20250912

IN THE COURT OF APPEAL OF MANITOBA

Coram: Madam Justice Jennifer A. Pfuetzner
Madam Justice Janice L. leMaistre
Madam Justice Anne M. E. Turner

B E T W E E N:

	)	***R. T. Amy***
	)	*for the Appellant*
HIS MAJESTY THE KING	)	
	)	***K. Hart***
Respondent	)	*for the Respondent*
	)	
- and -	)	*Appeal heard and*
	)	*Decision pronounced:*
R. N. J. B.	)	***September 2, 2025***
	)	
(Accused) Appellant	)	*Written reasons:*
	)	***September 12, 2025***

NOTICE OF RESTRICTION ON PUBLICATION: An order has been made in accordance with section 486.5(1) of the *Criminal Code*, RSC 1985, c C-46, directing that any information that could identify a victim or witness in this proceeding shall not be published, broadcast or transmitted in any way.

On appeal from *R v RB*, 2025 MBPC 7 [*sentencing decision*]

LEMAISTRE JA (for the Court):

Introduction

[1] The accused appealed his conviction for making intimate imagery available without the victim's consent (see *Criminal Code*, RSC 1985, c C-

46, s 162.1(1) [the *Code*]) and sought leave to appeal and, if granted, appealed his sentence of nine months' incarceration.

[2] On the conviction appeal, the accused argued, in effect, that the verdict was unreasonable because the evidence was insufficient to establish that the accused knowingly made videos depicting the victim engaged in sexual activity available to others.

[3] On the sentence appeal, the accused argued that the trial judge erred by relying on an aggravating factor that had not been proven beyond a reasonable doubt in her application of the accused's *Gladue* factors (see *R v Gladue*, 1999 CanLII 679 (SCC)), and by overemphasizing the principles of deterrence and denunciation, resulting in a demonstrably unfit sentence. He also argued that the trial judge erred by making a twenty-year order under the *Sex Offender Information Registration Act*, SC 2004, c 10 [*SOIRA*].

[4] After hearing the appeal, we dismissed the conviction appeal, granted leave to appeal the sentence and allowed the sentence appeal in part with reasons to follow. These are those reasons.

Background

[5] The accused sent the victim a text message with a link to a video on his account on Pornhub (the account). Although the victim was unable to access the video or other videos on the account, the name of the video suggested that it was a video of her engaged in sexual acts. The victim contacted the police who determined that the videos could not be accessed by the general public (they were locked). However, the police also determined that there were eighteen friends and seven subscribers on the account.

Pursuant to a production order, Pornhub provided the police with multiple videos posted on the account. The victim testified that six of the videos depicted explicit sexual activity involving her and the accused (the videos). She said that she had consented to the filming of some, but not all, of the videos and that she did not consent to the accused posting them to the account.

[6] At trial, there was no issue that the videos met the definition of "intimate image" under section 162.1(1) of the *Code* or that the accused had uploaded the videos without the victim's consent. The only issue was whether the accused had *knowingly* made the videos available (see *R v Spencer*, 2014 SCC 43 at paras 82-84, aff'g 2011 SKCA 144 at para 64). In other words, the only live issue was the *mens rea* of the offence because the *actus reus* was conceded by the accused. Although the accused did not testify, he argued that it was reasonable to infer on the evidence that he posted the videos for his own use and for safekeeping.

[7] The trial judge rejected this inference. Applying the test from *R v Villaroman*, 2016 SCC 33, she found that the only reasonable inference on the evidence was that the accused knowingly made the videos available to others. She reached this conclusion based on the fact that Pornhub's purpose is to facilitate sharing of pornographic videos and that the account had eighteen friends and seven subscribers.

[8] In the *sentencing decision*, the trial judge found that the offence was serious and the accused's moral culpability was high. She also found that there were multiple aggravating factors, including "the pronounced and crushing victim impact" (at para 16) caused by the breaches of the victim's trust and privacy, and that deterrence and denunciation were the primary sentencing

objectives. She sentenced the accused to nine months' imprisonment. She also imposed two years of supervised probation and ancillary orders, including a twenty-year *SOIRA* order.

The Conviction Appeal

[9] The test for an unreasonable verdict on appeal was recently explained by Simonsen JA in *R v Ballantyne*, 2023 MBCA 38 at paras 6, 11:

> The test for an unreasonable verdict is whether the verdict is one that a properly instructed jury, acting judicially, could reasonably have rendered (see *R v Biniaris*, 2000 SCC 15). When the conviction is based upon circumstantial evidence, "the question becomes whether the trier of fact, acting judicially, could reasonably be satisfied that the accused's guilt was the only reasonable conclusion available on the totality of the evidence" (*Villaroman* at para 55). The standard of review for findings of fact and factual inferences, including findings made with respect to video-recorded evidence, is palpable and overriding error (see *Housen v Nikolaisen*, 2002 SCC 33 at paras 10, 23, 25; *R v WEB*, 2012 MBCA 23 at para 13; and *R v Atkinson et al*, 2018 MBCA 136 at para 92).
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> [A] verdict is not unreasonable just because another judge might have drawn different inferences from the evidence. Provided that the inferences drawn by the trial judge are reasonably supported by the evidence, this Court cannot reweigh the evidence and substitute a different inference. Having drawn the inferences she did, without any palpable and overriding error, the trial judge reasonably concluded that the guilt of the co-accused was the only reasonable conclusion.

[10] We are not persuaded that the verdict is unreasonable.

[11] The evidence established that Pornhub is a public website owned and controlled by someone other than the accused that permits users to post pornographic videos for others to view. Account holders can designate friends

and subscribers. Friends and subscribers are generally permitted to access content posted on an account. In addition to being able to access content posted on an account, subscribers also receive a notification when new content is posted. The accused did not testify as to his intention in setting up the account and posting the videos nor did he explain his privacy settings or his designation of friends and subscribers (see *R v Banayos*, 2018 MBCA 86 at para 40).

[12] The trial judge found that "[t]here [was] not a reasonable inference inconsistent with guilt available on the existing or absent evidence." She specifically considered whether the inference asserted by the accused was a reasonable inference and found that it was not. She stated:

> The inference proposed by defence is not a reasonable one on the evidence even bearing in mind the gaps in the evidence. It is not an inference that stands up to the filters of human experience and common sense. It is not a logically sound inference. Uploading imagery to a website that aims to facilitate users sharing pornographic videos for safekeeping and personal use only, stretches the imagination. Asserting the accused sincerely assumed there was no risk or chance anyone at Pornhub would ever access the imagery is dubious. Add to that the evidence of 7 subscribers and 18 friends and the proffered inference defies logic, human experience, and common sense. The suggestion that the accused might reasonably have -- have friended his own account from 18 sources is unbelievable. Even more implausible is the notion of subscribing to his own account 7 times. What need would a person who purportedly uploaded imagery for private viewing only, have to be updated whenever a new photo or video is added to the account? The suggested inference is not a reasonable one.

[13] The trial judge's task was "to draw the line between speculative and reasonable inferences" (*R v Hall*, 2018 MBCA 122 at para 200). We are of

the view that the trial judge's conclusions that the accused's asserted inference was not reasonable and that the accused knowingly made the videos available were reasonably supported by the evidence. Had the accused intended to simply store his videos for his personal use, he had various options for cloud-based storage (see *R v Thibodeau*, 2021 BCPC 98 at paras 45, 97). However, he created the account, uploaded the videos, and added friends and subscribers. We agree with the trial judge that the presence of friends and subscribers is evidence of file sharing and that this evidence reasonably leads to the inference that he intended to make the videos available to others.

[14] Accordingly, the conviction appeal was dismissed.

The Sentence Appeal

[15] The standard of review on a sentence appeal is highly deferential (see *R v Friesen*, 2020 SCC 9 at para 26).

[16] We are not convinced that the trial judge relied on an aggravating factor that was disputed and not proven beyond a reasonable doubt by the Crown (see *R v PES*, 2018 MBCA 124 at para 42).

[17] At the sentencing hearing, a pre-sentence report was filed by consent. Attached to the pre-sentence report was an investigator's report (the report). The report contained an analysis of the videos, including the number of times each video had been viewed. Relying on the report, the Crown submitted that the number of views did not necessarily coincide with the number of people viewing the videos. It pointed out that the uncertainty regarding the number of people who viewed the videos impacted the victim's sexual integrity, privacy and dignity.

[18] In the *sentencing decision* at para 16, the trial judge addressed the Crown's submission. After finding that the posting of the videos was a breach of the victim's trust and privacy rights (see para 13), she stated:

> The videos were viewed. There is no evidence as to how many distinct persons viewed the videos but at the time of the investigation, the website showed over 1,200 views of one video, 250 views of the video wherein the victim's face is visible and identifiable, and over 280 views of a third video. There is no way of knowing how many people were watching during each viewing. There is no way of knowing whether people viewing the videos also screen-recorded or otherwise duplicated and further disseminated the videos. *Those factors contribute to a further aggravating factor which is the pronounced and crushing victim impact.*
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> [emphasis added]

[19] First, we are not convinced that the accused disputed the facts in the report. He did not object when the pre-sentence report to which it was attached was filed and his lawyer (different than counsel on the appeal) stated during submissions, "I think the Court can definitely take under advisement and say that it's concerned that there have been multiple hundreds of views without identifying how or why or who those people may have been."

[20] In addition, the Crown did not argue that the number of times the videos were viewed was aggravating. Anticipating that the accused might argue the fact that the account was locked should be considered a mitigating factor, the Crown pointed out that the number of views did not necessarily reflect the number of people who had viewed the videos; there was no evidence as to that number. The Crown argued that the victim had no idea as to the extent to which her privacy interests had been violated.

[21] Finally, when the trial judge's reasons are considered in the context of the record, she found it was the victim impact associated with not knowing how many people viewed the videos that was aggravating. Although the trial judge did rely on the number of views in doing so, in the circumstances, we see no error on the record.

[22] We are also not convinced that the trial judge failed to properly consider the accused's *Gladue* factors and overemphasized deterrence and denunciation.

[23] The accused's unique background and systemic factors were squarely before the trial judge in the pre-sentence report. Her conclusion that the accused's *Gladue* factors did not "diminish the accused's level of moral culpability" (*sentencing decision* at para 22) was reasonable on the evidence, particularly where the pre-sentence report established that he grew up in a loving and supportive family, was knowledgeable about and connected to his Indigenous culture, and was educated and operated a business (see para 8; see also *R v Ipeelee*, 2012 SCC 13 at para 73).

[24] The trial judge correctly determined that deterrence and denunciation were the paramount sentencing objectives (see *R v McFarlane*, 2018 MBCA 48 at para 24). As this Court has previously stated, when deterrence and denunciation are the paramount principles of sentencing, circumstances personal to the accused take on a lesser role in sentencing (see *R v McMillan (BW)*, 2016 MBCA 12 at para 12).

[25] In our view, the trial judge's weighing of the relevant factors was reasonable and it is not our role to reweigh them (see *R v Sinclair*, 2022

MBCA 65 at para 18). Furthermore, we are not persuaded that the sentence is demonstrably unfit.

[26] We now turn to the accused's arguments regarding the *SOIRA* order. A *SOIRA* order can only be interfered with on appeal when there is an error in principle, a failure to consider a relevant factor, an overemphasis of relevant factors or a clearly unreasonable decision (see *R v Wiens*, 2025 BCCA 162 at paras 49-57 [*Wiens*]; *R v Eldon*, 2025 ONCA 348 at para 21 [*Eldon*]).

[27] In his written argument, the accused asserted that making intimate imagery available without consent under section 162.1(1) of the *Code* was not a designated offence at the time the offence was committed; in other words, there was no authority to make the *SOIRA* order.

[28] The accused did not pursue this submission at the hearing of the appeal. However, we would briefly note that, in October 2023, the *Code* was amended so that section 162.1(1) was made a designated *Code* offence for the purposes of making a *SOIRA* order (see *An Act to amend the Criminal Code, the Sex Offender Information Registration Act and the International Transfer of Offenders Act*, SC 2023, c 28, ss 6(2)-(3)). In addition, a *SOIRA* order is not punishment for the purposes of section 11(i) of the *Canadian Charter of Rights and Freedoms*, s 7, Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (UK), 1982, c 11 (see *R v Poulin*, 2019 SCC 47 at para 38; see also *R v Cross*, 2006 NSCA 30 at para 84). Accordingly, the applicable *SOIRA* regime is the regime in existence at the time a court imposes sentence for a designated offence (see the *Code*, ss 490.012(1)-(3)).

[29] Second, the accused submits that the trial judge erred when making the *SOIRA* order because she did not consider whether one of the exceptions for making the order under section 490.012(3) applied and did not provide adequate reasons for making the order.

[30] We do not agree. A *SOIRA* order is presumptive and must be imposed unless the offender establishes that an exception under section 490.012(3) applies (see *Wiens* at para 11; *Eldon* at para 52). The accused did not contest the *SOIRA* order; rather, he advocated for the minimum duration. He also did not lead any evidence regarding the impact of an order as required under section 490.012(3)(b). In that context, in our view, the trial judge made no error and her reasons are sufficient (see *DK v R*, 2009 QCCA 987 at paras 20-24).

[31] Finally, he says that the *SOIRA* order made under section 490.012(3) ends ten years after it was made pursuant to section 490.013(2)(a) because the offence is punishable by a maximum term of imprisonment of five years. The Crown concedes this point, and we agree. As a result, we amended the *SOIRA* order pursuant to section 490.014(b).

Conclusion

[32] In the result, the conviction appeal was dismissed, leave to appeal the sentence was granted and the sentence appeal was allowed in part.

leMaistre JA

Pfuetzner JA

Turner JA