

IN THE COURT OF APPEAL OF MANITOBA

Coram: Madam Justice Diana M. Cameron
Mr. Justice Christopher J. Mainella
Madam Justice Jennifer A. Pfuetzner

BETWEEN:

<i>HIS MAJESTY THE KING</i>)	<i>J. D. Poettcker</i>
)	<i>for the Appellant</i>
)	
)	<i>J. M. Mann</i>
)	<i>for the Respondent</i>
- and -)	
)	<i>Appeal heard and</i>
)	<i>Decision pronounced:</i>
<i>SURJEET SINGH</i>)	<i>February 26, 2025</i>
)	
)	<i>Written reasons:</i>
<i>(Accused) Appellant</i>)	<i>March 3, 2025</i>

NOTICE OF RESTRICTION ON PUBLICATION: No one may publish, broadcast or transmit any information that could disclose the identity of the victim or a witness (see *Criminal Code*, RSC 1985, c C-46, s 486.4).

CAMERON JA (for the Court):

[1] The accused appealed his conviction of one count of sexual assault after trial in Provincial Court. He also moved for the admission of further evidence. At the conclusion of the hearing, we dismissed his motion for further evidence and his appeal with reasons to follow. These are those reasons.

[2] In April 2021, the nineteen-year-old victim travelled on a study permit from India to Winnipeg with a female acquaintance, Baljit Kaur

(Kaur). As part of their journey, they were required to quarantine in Winnipeg due to the COVID-19 pandemic. As their residence was not to be ready until May 1st, a plan was made by Kaur's husband for the two to stay at the twenty-seven-year-old accused's residence between April 26th and May 1st while he was away working as a truck driver. The victim had not previously met the accused.

[3] The victim and Kaur stayed in the accused's living quarters, which consisted of one bedroom with a king-size bed in a shared residence. The accused returned home in the early morning hours of May 1st. After talking for a couple of hours, the parties all decided to go to sleep in the accused's bed.

[4] The victim testified that she fell asleep lying between the accused and Kaur. She awoke lying on her side, facing Kaur, with the accused penetrating her vagina from behind with his penis. She said that she froze but that he continued until he ejaculated in her. She waited for approximately ten minutes, then sent a text to her boyfriend to request her cousin to contact her, which resulted in her then going downstairs and speaking on the phone with her cousin and parents. Kaur awoke and came downstairs and the two decided to contact Kaur's husband to have him confront the accused by telephone, during which the accused denied the incident. Further comments were made between the accused and the victim, which we later will discuss.

[5] In her testimony, the victim admitted that she was on medications for a sore back. She had taken the medications at 7 p.m. the night before and at 12:30 a.m. the morning of the incident. While she agreed that the medications made her sleepy, she disagreed that they made her forgetful. She

denied Kaur's assertion that there were three instances wherein the victim 1) had made breakfast one night and, having forgotten that she had done so, made it again the next day; 2) had ironed the clothes she intended to wear the next day and then forgot and wore different clothes; and 3) had discussed changing her university courses with Kaur one evening but forgot that they had had such a discussion when Kaur asked her about it the following day.

[6] The accused maintained that the sexual activity was consensual. He testified that while the three were in bed, the victim twice rubbed his feet with her feet and touched his thigh with her hand. He said that he rubbed and held her hand and that she then put his arm around her. He stated that they each took off their own underwear and had sexual intercourse, during which he ejaculated. He said that they then had sexual intercourse two further times, the second of which he again ejaculated. He stated that the third time did not last long, as he was tired. While there was no conversation between the two, the accused's position was that by her actions the victim consented to each instance of sexual intercourse. He argued that the medications may have caused her to forget that she had consented.

[7] After the accused testified, he agreed that three comments were made between himself and the victim in front of Kaur shortly following the conversation with Kaur's husband. The trial judge described them as follows:

The first being a comment made by [the accused] to the [victim] where he stated, "If you felt something, then sorry, friend." The second was made by the [victim] to [the accused], where she stated, "We[re] you not holding me that I could not say anything, I was unconscious, sleeping literally. I was half asleep and never knew what was happening to me. I only realized at the end when I felt pain."

...

The last being a verbal exchange between [the accused] and the [victim] where she asked him, “You want me to remain silent?” And he answered, “Please.”

[8] The trial judge rejected the accused’s evidence and said that it did not raise a reasonable doubt. He accepted the victim’s evidence and concluded that it convinced him beyond a reasonable doubt of the accused’s guilt.

[9] While the accused lists five grounds of appeal, his real argument is that the trial judge erred in his credibility and reliability assessments of the accused and the victim and in his consideration of *R v W(D)*, [1991] 1 SCR 742, 1991 CanLII 93 (SCC) [*W(D)*].

[10] Also regarding *W(D)*, the accused in his factum argued that the trial judge did not properly assess the evidence of Kaur in the third prong of his analysis. That position was not stressed at the hearing. In our view, when the reasons of the trial judge are considered as a whole, no error is evidenced.

[11] To start, we disagree that, after considering the accused’s evidence and rejecting it, the trial judge erred by not conducting a further analysis in finding that it did not raise a reasonable doubt. As stated in *R v Vuradin*, 2013 SCC 38, wherein the *W(D)* analysis the trial judge rejects the testimony of an accused, “it can generally be concluded that the testimony failed to raise a reasonable doubt” (at para 27).

[12] The trial judge’s concerns with the accused’s testimony were supported by the record. They included that 1) the accused’s description of the number of times sexual intercourse occurred with the victim and of their actions after each event was irreconcilable and inconsistent with Kaur’s

testimony that she was a light sleeper, yet slept throughout the entire event; 2) the accused *denied* asking the victim to remain silent and *could not recall* the victim telling him that he held her and that she felt pain despite the accused having later admitted both as agreed facts; and 3) the accused was inconsistent in his evidence about his reaction to being confronted by the victim about what had occurred. Specifically, he first denied it and then said he felt the victim wanted to keep it a secret.

[13] Furthermore, we are not convinced that the trial judge made inferences that amounted to a misapprehension of evidence. His comments that the accused did not have a girlfriend, spent significant time by himself and that he had conversed with Kaur about whether the victim had a boyfriend were not directed to the issue of credibility (as was admitted by the accused at the hearing). The errors alleged do not amount to material misapprehensions and certainly would not have affected the outcome (see *R v Forbister*, 2024 MBCA 53 at paras 12-14).

[14] Finally, we are not convinced that the trial judge erred in subjecting the accused's evidence to greater scrutiny than the victim's evidence or in his analysis of her evidence. In our view, his analysis was reasonably supported by the record (see *R v Buboire*, 2024 MBCA 7 at para 13).

[15] The trial judge considered the accused's position regarding the victim's denial of Kaur's evidence that the victim had forgotten things that she had done or said. He found that the frequent memory loss described by Kaur was inconsistent with the victim's testimony, her day-to-day life and her travel from India, none of which he held "speaks to a person who struggles with memory loss issues." Further, he held that even if she had forgotten the

things mentioned by Kaur, it was “difficult to compare these two types of activities which [he] view[ed] as daily household chores to forgetting to having consented to unprotected sexual intercourse three times with a complete stranger while only inches away from her friend.”

[16] Finally, we did not admit the further evidence aimed at impugning the victim’s memory/reliability. The evidence consisted of an email from a doctor containing an opinion regarding the potential side effects of the victim’s medications, as well as a printout from a web page and a journal article.

[17] In our view, the evidence did not meet the test in *Palmer v R*, 1979 CanLII 8 (SCC). The accused was aware of the medications the victim had been taking and the possible effects they could have. This evidence could have been proffered at the trial. In addition, we note that the accused did not comply with the MB, *Court of Appeal Rules (Civil)*, Man Reg 555/88R, r 21(2)(a)(iii), which indicates that the affidavit accompanying the motion must explain why the further evidence was not introduced at the proceeding appealed from. More importantly, the evidence would not have affected the outcome of the trial judge’s assessment of the victim’s evidence.

[18] In the result, the appeal was dismissed.

Cameron JA

Mainella JA

Pfuetzner JA