Citation: R v Soriano, 2024 MBCA 88
Date: 20241107
Docket: AR23-30-09970

IN THE COURT OF APPEAL OF MANITOBA

Coram: Chief Justice Marianne Rivoalen
Madam Justice Holly C. Beard
Madam Justice Karen I. Simonsen

B E T W E E N :

	)	***M. P. Cook***
HIS MAJESTY THE KING	)	*for the Appellant*
	)	
Respondent	)	***D. N. Queau-Guzzi***
	)	*for the Respondent*
- and -	)	
	)	*Appeal heard:*
ROMULO SORIANO	)	***September 10, 2024***
	)	
(Accused) Appellant	)	*Judgment delivered:*
	)	***November 7, 2024***

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

SIMONSEN JA

[1] The accused appeals his conviction for sexual interference (section 151 of the *Criminal Code*, RSC 1985, c C-46 [the *Code*]) against his foster daughter (the victim) when she was three and four years of age. He appeals on the grounds that (1) the trial judge erred by subjecting the evidence of the defence witnesses to a stricter level of scrutiny than that of the victim, and (2) the verdict is unreasonable because it is unsupportable on any reasonable view of the evidence.

[2] The accused also seeks leave to appeal and, if granted, appeals the sentence of eight years' imprisonment imposed for the sexual interference on the basis that it is demonstrably unfit.

The Conviction Appeal

[3] The accused and his wife (the wife) were foster parents of the victim and her brother, both of whom had suffered significant trauma and had health issues, including seizure disorders. At that time, the accused and his wife were also caring for two other foster children. The accused's parents provided assistance with all the children and, when they left the country, the accused's niece (the niece) assumed the role of respite caregiver to the children.

[4] Credibility was the overarching issue at the trial. The victim's evidence was received, in part, by way of a video statement admitted under section 715.1 of the *Code*. She indicated that, on several occasions (although she could not be precise, she thought that there were more than ten incidents), the accused, in his bedroom, had her touch his penis until he ejaculated. She described each incident as lasting at least ten minutes. She also stated that the accused threatened to hurt her if she told anyone. The accused testified, denying all the allegations. The trial judge rejected the evidence of the defence witnesses (the accused, the wife, the niece and the accused's adult daughter), accepted the testimony of the victim and convicted the accused.

[5] With respect to the accused's assertion of uneven scrutiny, such a claim "is easily made, but seldom successful" (*R v Jovel*, 2019 MBCA 116 at para 38). To succeed, "[i]t must be clear from the trial judge's reasons, or the record, that different standards were applied" (*ibid*). Moreover, "the appropriateness of this ground of appeal as an analytical tool to demonstrate

error in credibility findings has been identified by the Supreme Court of Canada, but not yet conclusively resolved by it" (*R v Buboire*, 2024 MBCA 7 at para 10 [*Buboire*]; see also *R v GF*, 2021 SCC 20 at paras 99-101 [*GF*]; *R v Mehari*, 2020 SCC 40 at para 1). Ultimately, "the focus must always be on whether there is reversible error in the trial judge's credibility findings" (*GF* at para 100). A trial judge's evaluation of credibility may only be interfered with where it cannot be supported on any reasonable view of the evidence (see *Buboire* at para 13).

[6] The accused's argument on uneven scrutiny focusses on the trial judge having made credibility findings against the defence witnesses on the basis that they testified that the accused was never alone with the children—and her accepting the testimony of the victim despite deficiencies in her evidence, in particular, the impossibility of her evidence that, when the accused ejaculated, his semen travelled as far as the ceiling.

[7] The defence witnesses testified about the accused not being alone with the children, which was intended to support his position that there was no opportunity for him to have committed the crime. In addressing this evidence, the trial judge, in her reasons for decision, stated:

> I find that their insistence on the fact that [the accused] was never alone with the children to be suspicious and causes me to question their evidence as being tailored. [The accused] was one of the individuals licensed to be a foster parent. It makes no sense why arrangements would have to be made to ensure he was not left alone with the children. He was one of the responsible adults. The assertions that [the accused] was never left alone with the [victim] causes me to disbelieve the defence evidence.

[8] The accused argues that the trial judge erred in reaching this conclusion because the defence witnesses did not in fact testify that the accused was never alone with the children. The Crown characterizes this as an allegation of misapprehension of evidence. I agree. As stated in *R v Whiteway (BDT)*, 2015 MBCA 24 at para 32:

> A misapprehension of evidence may refer to a mistake as to the substance of evidence, a failure to consider evidence relevant to a material issue or a failure to give proper effect to evidence (*R. v. Morrissey (R.J.)* (1995), 80 O.A.C. 161 at para. 83; and *R. v. Sinclair*, 2011 SCC 40 at para. 13, [2011] 3 S.C.R. 3). A misapprehension of the evidence is not to be confused with a different interpretation of the evidence than the one adopted by the trial judge (*R. v. Lee*, 2010 SCC 52 at para. 4, [2010] 3 S.C.R. 99). It is insufficient that the judge may have misapprehended the evidence; the error must be readily obvious (*Sinclair* at para. 53).

[9] I see no misapprehension of evidence in this case. The thrust of the defence witnesses' evidence was as characterized by the trial judge. Counsel for the accused at trial (different than counsel on appeal) argued as much during final submissions. Indeed, the accused did testify that he was "never" alone with the victim and that the wife or the niece was "always" present to look after the children; the wife insisted that the accused would "never" look after the children on his own, despite being licensed to do so; the niece was adamant that the accused was "never" alone with the victim as he could not be "trust[ed]" to care for the children; and the daughter highlighted that the accused was often away from the home working and was only peripherally involved with the care of the children. The trial judge did not make a "readily obvious" error regarding the evidence of these witnesses (*R v Sinclair*, 2011 SCC 40 at para 53). She carefully considered it and was entitled to make the credibility findings she did.

[10] Turning to the issue of uneven scrutiny in the context of the victim's testimony, the accused places particular emphasis on the trial judge's conclusion that, "[w]hile it may have been physically impossible for the semen to travel [to the ceiling], it may have been how it seemed to a young child."

[11] In my view, although there were troubling aspects to the victim's evidence, the trial judge carefully examined it and properly took into account her age at the time of the allegations and factored that into her assessment. The trial judge identified several areas that required further examination and considered them, including the evidence about the distance travelled by the semen. In the final analysis, the trial judge found the victim's testimony to be "highly compelling." It was open to her to do so.

[12] Reading the trial judge's reasons as a whole, I am not persuaded that the high bar to be met on a claim of uneven scrutiny has been established. The fact that credibility could have been assessed differently does not mean that uneven scrutiny has occurred. It is not the role of this Court to reweigh the evidence and retry the case.

[13] The accused's position on unreasonable verdict rests largely on the same arguments outlined and addressed above, and the fact that the Crown's case was based solely on the testimony of the victim. In my view, given those arguments and the deferential standard of review, there is no basis for appellate intervention. The verdict is one that a properly instructed jury or a judge could reasonably have rendered (see *R v Wright*, 2013 MBCA 109 at para 32).

The Sentence Appeal

[14] At the time of sentencing for the sexual interference, the accused had also pled guilty to assault with a weapon in relation to another one of his foster children, a boy whom he had physically abused over a number of years. The trial judge imposed a sentence of eight years for sexual interference and a consecutive sentence of one year for assault with a weapon. After considering the principle of totality, she declined to reduce the sentences, resulting in a total sentence of nine years.

[15] The accused appeals only the sentence for sexual interference. He suggests a penitentiary sentence of five years.

[16] The standard of review on a sentence appeal is deferential. An appellate court can only interfere with a sentence that is demonstrably unfit or where there is an error in principle that had an impact on the sentence (see *R v Friesen*, 2020 SCC 9 at paras 25-29 [*Friesen*]).

[17] Although the accused does not allege that the trial judge erred in principle, he asserts that the sentence was demonstrably unfit in light of the principles of parity and restraint. He relies on *R v Merkl*, 2019 MBCA 15 [*Merkl*], where this Court upheld a total sentence of forty-four months, which included a twenty-eight-month sentence for sexual interference for an offender who was babysitting two children aged six and four, and showed the older child a pornographic video and suggested that they could do what was depicted in the video. Right after this, the younger child pulled the offender's penis from his pants and masturbated him in the presence of the older child, who then reported to her mother.

[18] The accused acknowledges that the Supreme Court of Canada, in *Friesen*, warned against downgrading the wrongfulness of the offence or the harm to a child victim because the sexual conduct does not involve penetration, fellatio or cunnilingus (see para 144). The fact that an offence involves sexual touching rather than penetration does not necessarily provide meaningful insight into the harm that the child suffered from the sexual violence (see *R v Silaphet*, 2024 MBCA 58 at para 57). The accused nonetheless maintains that, in all of the circumstances, including him being a first-time offender with a solid employment history and family support, the sentence imposed is "crushing".

[19] However, the trial judge determined that the accused's moral culpability was "exceptionally high." She stated:

> He took advantage of a 4-year-old girl and a disabled boy in circumstances where the state had entrusted them in his care. They had already suffered the trauma of removal from their birth families, and instead of nurturing them, as he was paid to do, he exploited and abused them. For both children, the abuse occurred deliberately and repeatedly.

[20] The trial judge noted that the accused did not suffer from any addictions or mental health concerns. She found that "[he] simply took advantage of a situation where vulnerable children were at his disposal. He exploited the [victim] to selfishly satisfy his sexual desires".

[21] Furthermore, the consequences of the accused's offending were profound. The victim, who was twelve years of age by the time of the sentencing, described how the sexual violence caused her to engage in self-harming behaviour and "have trust issues", particularly with men.

[22] As for parity, the accused points only to *Merkl*, which involved a single instance of sexual violence, not abuse that occurred over an extended period. In addition, *Merkl* was decided before the watershed decision in *Friesen*, which provided guidance with respect to sentencing offenders for sexual offences against children. The Court, in *Friesen*, gave clear direction to sentencing judges that the seriousness of sexual offences against children warrants sentences that accurately reflect the wrongfulness of sexual violence against children and the far-reaching and ongoing harm it causes to children, families, and society at large.

[23] The trial judge understood the guidance provided in *Friesen* and that the sentencing principles of denunciation and deterrence were paramount. The accused's offending was serious and of significant duration; it involved an egregious breach of trust. The impact on the victim is substantial. Although the sentence imposed is significant, it is, in all of the circumstances, entitled to deference.

Disposition

[24] For the foregoing reasons, I would dismiss the conviction appeal, grant leave to appeal sentence but also dismiss the sentence appeal.

Simonsen JA

I agree: Rivoalen CJM

I agree: Beard JA