

IN THE COURT OF APPEAL OF MANITOBA

Coram: Madam Justice Freda M. Steel
Madam Justice Diana M. Cameron
Madam Justice Janice L. leMaistre

BETWEEN:

<i>HIS MAJESTY THE KING</i>)	
)	<i>E. J. Roitenberg and</i>
)	<i>L. C. Robinson</i>
)	<i>for the Appellant</i>
)	
)	<i>C. R. Savage and</i>
<i>- and -</i>)	<i>M. Cam</i>
)	<i>for the Respondent</i>
)	
<i>HABEN ABRHAM WELDEKIDAN</i>)	<i>Appeal heard and</i>
)	<i>Decision pronounced:</i>
<i>(Accused) Appellant</i>)	<i>December 12, 2022</i>
)	

On appeal from 2021 MBQB 164

STEEL JA (for the Court):

[1] The accused appeals his conviction of four counts of attempted murder as well as possession of a restricted firearm; unauthorized possession of a firearm; possession of a handgun while prohibited, and failure to comply with conditions of recognizance. A number of charges were stayed pursuant to the *Kienapple* principle, and the accused was sentenced to 18 years' incarceration (see *Kienapple v The Queen*, [1975] 1 SCR 729). The sentence is not being appealed.

[2] The key issue at trial was one of identity. There was no physical evidence implicating the accused. The four victims spoke to police and three of them identified the accused as the shooter in videotaped statements. The fourth did not identify a shooter. However, at trial, those three testified that they did not recall who shot them. They did not adopt their statements to police and did not identify the accused as the shooter. The trial judge admitted the videotaped statements, and after weighing all the evidence, including the testimony at trial and the videotaped statements, she convicted the accused.

[3] Threshold reliability was established, and all four statements were admitted into evidence. The decision to admit the statements is not being challenged on appeal. Rather, it is the trial judge's handling of the issue of ultimate reliability that is questioned.

[4] The accused submits that the trial judge erred in her handling of the law on ultimate reliability. He contends that the trial judge made three legal errors: placing the burden on the accused to establish concoction, failing to apply appropriate considerations to assessing the ultimate reliability of the videotaped statements and failing to consider alternative explanations from the circumstantial evidence. He also argues that the trial judge made two errors of mixed fact and law: failing to consider evidence that impacted the ultimate reliability of the videotaped statements and misconstruing the evidence. He contends that the trial judge failed to consider several pieces of evidence that were crucial to the determination of whether there were reasonable alternative inferences to be made.

[5] It is an error of law for a judge to fail to consider evidence that is relevant to a key issue at trial. A misapprehension of evidence will only result

in appellate intervention if it is material and there is a nexus between the misapprehension and the core elements of the judge's reasoning process resulting in a conviction.

[6] With respect to the argument on inadvertent concoction, (or rather, perhaps more accurately, the failure of the trial judge to consider that the victims were unduly influenced by information received from others, including social media communications and newspaper articles referring to the accused by name). A decision as to the reliability of a witness is a question of fact determined by an "assessment of the witness and on consideration of how an individual's evidence fits into the general picture revealed on a consideration of the whole of the case" (*R v Jovel*, 2019 MBCA 116 at para 28 quoting from *R v B eland*, [1987] 2 SCR 398 at para 20). An inference that evidence is not concocted is entitled to deference, absent a palpable and overriding error (see *R v McIvor*, 2021 MBCA 55 at para 19).

[7] It is the cumulative effect of all the evidence that matters in a criminal trial. We do not agree that the trial judge failed to consider evidence that impacted the ultimate reliability of the videotaped statements. The arguments of the accused on appeal, including reference to specific pieces of evidence, were all raised in front of the trial judge. In fact, they are repeated in her reasons where she sets out the defence position in detail. Thus, she was alive to the presence of this evidence. She was not required to mention each piece of evidence in her analysis.

[8] As well, after a review of the evidence, including the transcripts, and the reasons of the trial judge, we do not find that the trial judge misapprehended the evidence. She was entitled to take a different view of the

evidence than was urged upon us on appeal. She was entitled to draw inferences from the totality of the evidence, so long as those inferences were reasonably open to her. “[A]n appellate court cannot characterise a trial judge’s interpretation of evidence as a misapprehension simply because it does not agree with it” (*Jovel* at para 35). She did not shift the burden of proof. Rejecting a defence theory is not the same as shifting the burden of proof (see *R v Toope*, 2016 NSCA 32 at para 57).

[9] The trial judge properly assessed the ultimate reliability of each statement within the totality of all the evidence presented during the trial. She turned her mind to the necessary considerations, including the timeline and what occurred in and around the making of the statements, and noted that these considerations “must all be evaluated in the context of all of the evidence”. She found the statements were reliable and that some of the physical evidence corroborated the statements. She was aware of and acknowledged the inconsistencies in the videotaped statements. She considered the demeanour of the witnesses, the nature of the interviews and any motive or opportunity for fabrication. She balanced all these considerations in her analysis (see *R v B (KG)*, 1993 CarswellOnt 76 (SCC) at para 122).

[10] Her conclusion was not the product of an error of law or that of palpable and overriding error. The trial judge was entitled to come to the decision she did. It is not the role of this Court to reweigh and retry all the evidence. Appellate intervention is not warranted.

[11] The appeal is dismissed.

Steel JA

Cameron JA

leMaistre JA
