On appeal from a summary conviction on July 20, 2023 and sentence on January 11, 2024 in the Provincial Court.

Date: 20250114
Docket: CR 24-01-39934
(Winnipeg Centre)
Indexed as: R. v. McKay
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COURT OF KING'S BENCH OF MANITOBA

B E T W E E N:

HIS MAJESTY THE KING,	)	Manoja Moorthy
	)	for the Crown
-and-	)	
	)	
RONNIE JOE GREGORY McKAY,	)	Adam R. Hodge
	)	for the accused
accused.	)	
	)	
	)	Judgment Pronounced:
	)	January 10, 2025
	)	Judgment Delivered:
	)	January 14, 2025

REMPEL J.

BACKGROUND

[1] This is an appeal by Ronnie Joe Gregory McKay (the "Appellant") following a short trial before a learned provincial court judge (the "Trial Judge") in which the Crown called no evidence other than the testimony of the complainant. The Appellant declined his right to call evidence at trial.

[2] After trial the Appellant was convicted on charges of assault with a weapon and uttering threats. Thereafter the Trial Judge imposed a jail sentence of 18 months.

[3] The Appellant brings this appeal pursuant to ss. 813 and 822 of the ***Criminal Code*** (the "***Code***"). It is common ground between counsel that the standard of review with respect to questions of law in criminal trials is correctness and that appeals as to sentence warrant appellate intervention only if the sentence is demonstrably unfit or if the sentencing judge made an error in principle that had an impact on the sentence. (See ***R. v. Asante***, 2024 MBCA 101, at para. 20, citing ***R. v. Friesen***, 2020 SCC 9, at paras. 25-29.)

ISSUES

[4] The following issues were argued at the appeal:

a) Reasonable apprehension of bias arising from the fact that the Trial Judge served as a prosecutor in a case against the Appellant prior to his elevation to the Bench;

b) An error of law as to the exercise of discretion by the Trial Judge under s. 486 of the ***Code*** to exclude certain members of the public from the courtroom;

c) The admission of bad character evidence at trial;

d) A failure to follow the ruling of the Supreme Court of Canada in ***Vetrovec v. The Queen***, 1982 CanLII 20 (SCC), [1982] 1 S.C.R. 811;

e) Entering a conviction as to the wrong offence;

f) A failure to follow the ruling of the Supreme Court of Canada in ***R. v. Villaroman***, 2016 SCC 33; and

g) The sentence was demonstrably unfit and in particular that the Trial Judge failed to apply the ruling of the Supreme Court of Canada in ***R. v. Gladue***, 1999 CanLII 679 (SCC), [1999] 1 S.C.R. 688.

FACTS AND ANALYSIS

Reasonable Apprehension of Bias

[5] The Crown consented to the Appellant's application to admit fresh evidence on appeal. The evidence in question pertained to a prosecution of the Appellant in 2007 on a charge of attempted murder, in which the Trial Judge served as Crown counsel. At the preliminary inquiry in that case two key witnesses recanted their testimony, and the Crown subsequently stayed the charge. The decision to stay the charge attracted some media interest and at least one article about the case was printed in the Winnipeg Free Press.

[6] Counsel for the Appellant at trial (different from counsel on appeal) was unaware of this apparent conflict and there is no evidence as to whether the Appellant himself was even aware of the conflict during the course of the trial. The matter was only raised by counsel for the Appellant after the appeal was filed and it was not brought to the attention of the Crown prior to that date.

[7] Given these unique circumstances, no recusal motion was brought before the Trial Judge, and I believe I am safe in assuming that the Trial Judge had no

recollection of the prosecution of the Appellant that he was responsible for some 14 years earlier because he made no reference to this during the trial or in his reasons.

[8] On the facts before me, the Appellant raises arguments as to both actual bias and the reasonable apprehension of bias.

[9] The leading authority as to recusal for actual bias or the reasonable apprehension of bias is set out in ***R. v. S. (R.D.)***, 1997 CanLII 324 (SCC), [1997] 3 S.C.R. 484. ***S. (R.D.)*** teaches that an essential feature of a fair trial includes decision makers that "*must be and appear to be unbiased*" (emphasis in the original) (at para. 92).

[10] The "*state of mind*" of a decision maker, according to ***S. (R.D.)***, includes a degree of impartiality that makes them disinterested in the final outcome and leaves them "*open to persuasion by the evidence and the submissions*" (at para. 104).

[11] ***S. (R.D.)*** also adopts some American jurisprudence that teaches that bias or prejudice could arise from "*wrongful or inappropriate*" opinions obtained by a decision-maker that they should not possess. By way of example the American jurisprudence points to a hypothetical juror who has been biased or prejudiced by the receipt of inadmissible evidence of prior convictions or a juror who is inflamed against an accused person as a result of properly admitted evidence of prior criminal conduct (at para. 105).

[12] The legal test as to recusal was restated by the Supreme Court of Canada in ***Wewaykum Indian Band v. Canada***, 2003 SCC 45 (CanLII), [2003] 2 S.C.R. 259, at para. 60:

> 60 In Canadian law, one standard has now emerged as the criterion for disqualification. The criterion, as expressed by de Grandpré J. in *Committee for Justice and Liberty v. National Energy Board*, *supra*, at p. 394, is the reasonable apprehension of bias:
>
> > . . . the apprehension of bias must be a reasonable one, held by reasonable and right minded persons, applying themselves to the question and obtaining thereon the required information. In the words of the Court of Appeal, that test is "what would an informed person, viewing the matter realistically and practically — and having thought the matter through — conclude. Would he think that it is more likely than not that [the decision-maker], whether consciously or unconsciously, would not decide fairly."

[13] Joyal J. (as he then was) in ***Kalo v. Manitoba (Human Rights Commission)***, 2008 MBQB 92, cites ***Wewaykum*** in confirming that there is a "*strong presumption in favour of judicial impartiality*" and a party seeking recusal must advance serious and convincing grounds in support of its position (at para. 20). The ***Kalo*** decision goes on to state that recusal motions are "*highly fact-specific*" and there are no "*textbook*" examples of bias.

[14] At para. 21 of ***Kalo***, specific mention is made of the fact that a litigant or party must do more than merely point to a past link between a litigant and a judge. The existence of such links cannot constitute a "*shortcut*" to a finding of bias. Further elaboration of this impermissible shortcut follows in ***Kalo***, at paras. 22-24:

> [22] One of the shortcuts that the courts have identified and rejected is that shortcut which flows from the proposition that apprehended bias will inexorably follow from a judge's prior involvement in proceedings involving the same litigant. In *R. v. Werner*, 2005 NWTCA 5, 205 C.C.C. (3d) 556, the Northwest Territories Court of Appeal stated:
>
> > 18 As many cases have noted, therefore, the mere fact that a judge had previously decided adversely a case involving an accused does not create a reasonable apprehension of bias: see, for example, *R. v. Novak*, 1995 CanLII 2024 (BC CA), [1995] B.C.J. No. 1127 (QL), 27 W.C.B. (2d) 295 (C.A.); *R. v. Teskey*, [1995] A.J. No. 311 (QL), 26 W.C.B. (2d) 550 (Q.B.); *R. v. James* (2000), 2000 BCCA 616 (CanLII), 149 C.C.C. (3d) 534 …; *R. v. Kochan*, 2001 ABQB 346 (CanLII), [2001] A.J. No. 555 (QL), 50 W.C.B. (2d) 18 (Q.B.). The presumption of judicial impartiality prevails in the absence of cogent evidence to the contrary.
>
> See also *West v. Wilbur*, 2002 NBQB 376 (CanLII), [2002] N.B.J. No. 430 (C.A.) (QL); *R. v. Tremblay*, 2004 ABCA 102, [2004] A.J. No. 323 (C.A.) (QL).
>
> [23] Although justice must be seen to be done, it is equally important that judicial officers discharge their duty to sit and that they not too readily or scrupulously cede to unjustifiable suggestions respecting the appearance of bias.
>
> [24] In *Committee for Justice and Liberty et al. v. National Energy Board et al.*, 1976 CanLII 2 (SCC), [1978] 1 S.C.R. 369 at 395, [1976] S.C.J. No. 118 (QL), de Grandpré J. discussed the reasonable apprehension standard with the accompanying reminder:
>
> > … The grounds for this apprehension must, however, be substantial and I entirely agree with the Federal Court of Appeal which refused to accept the suggestion that the test be related to the "very sensitive or scrupulous conscience".
> >
> > [Emphasis added in original]

[15] I cannot agree with the Appellant that the Trial Judge crossed a bright line in this case due to his prior involvement in a prosecution of the Appellant. To state the obvious, the issue of recusal was not raised before the Trial Judge and it is not safe to assume, as the Appellant suggests, that the Trial Judge must have remembered who the accused was. There is nothing in the name "Ronnie" or

"McKay" that would strike a reasonable person as so unusual or peculiar that it must have rung a bell for the Trial Judge as the Appellant suggests or should have prompted him to raise the recusal issue for counsel to consider at trial.

[16] A reasonable person, fully informed as to the facts, would know that prosecutors in this province can be responsible for hundreds of prosecutions or maybe thousands depending on the length of their professional careers. Contrary to what the Appellant suggests, persons charged with violent crimes such as attempted murder would not necessarily stand out in the mind of a prosecutor many years after the fact. In my view, the same can be said about he fact that the charge against the Appellant was stayed. Events such as these do not occur infrequently.

[17] Further, there is nothing notable about the fact that the charge against the Appellant in 2007 was attempted murder or that a headline attracting decision was made to ultimately stay the charge when the key witnesses retracted their testimony. These facts do not make this more than a mere run-of-the-mill case as the Appellant suggests, which would made it more memorable in the mind of the Trial Judge than a traffic violation for example.

[18] All of the arguments raised by the Appellant are based on the assumption that the Trial Judge must have or should have remembered the Appellant and the charge he was facing back in 2007 and that this constitutes a reasonable apprehension of bias. These kinds of assumptions cannot satisfy the high burden resting on a party seeking an order of recusal.

[19] The key message of ***S. (R.D.)*** is that Canadian law supports a strong presumption that judges will honor their solemn oaths or affirmations that they will render justice impartially and strive to overcome whatever personal biases they may have in order to assure all persons who appear before them will receive a fair hearing (at para. 116).

[20] ***R. v. Goodpipe***, 2018 SKQB 189, confirms that the threshold to establish a reasonable apprehension of bias is a high one and must be based on "cogent evidence" rather than mere assertions or suspicions, at para. 10:

> [10] In order to have any legal effect, an apprehension of bias must be reasonable, and the grounds must be serious and substantial. Real likelihood or probability of bias is necessary; a mere suspicion is not enough: *Aalbers v Aalbers*, 2013 SKCA 64, 417 Sask R 69. Judges are presumed to be faithful to their oath. It takes cogent evidence to displace that presumption and show that the judge has done something to create a reasonable informed apprehension of bias: *S.(R.D.)*.; *Boardwalk Reit LLP v Edmonton (City)*, 2008 ABCA 176, at paras 29-30, [2008] 8 WWR 251. The test for disqualification is not satisfied unless it is proved that the informed, reasonable and right-minded person would think that it is more likely than not that the judge, whether consciously or unconsciously, would not decide fairly: *Taylor Ventures Ltd. (Trustee of) v Taylor*, 2005 BCCA 350, 49 BCLR (4th) 134.

[21] The jurisprudence on reasonable apprehension of bias is clear that prior involvement between a judge and an accused person in a court proceeding alone is not enough to satisfy the reasonable apprehension of bias test. ***R. v. Baldovi et al.***, 2018 MBCA 64, teaches that "*[t]he jurisprudence is rife with examples where trial judges who have had previous conduct of a prosecution of an accused person later preside over a trial of that person in another matter and no bias has been found*" (at para. 59).

[22] I would also add that it is not uncommon during pre-trial motions or trials for judges to receive information, like a confession, which is ultimately excluded from the evidentiary record. The receipt of this information does not taint the trial process or give rise to a reasonable apprehension of bias. Mere knowledge of the criminal history of an accused person does not automatically disqualify a judge and the public trusts that such information will play no part in the decision-making process. (See ***R. v. Rathgeber***, 2010 SKCA 58, at para. 16.)

[23] I am satisfied a reasonable and informed member of the public, who was aware of the fact that the Trial Judge had prosecuted and then stayed a charge against the Appellant some 14 years earlier and without any evidence that the Trial Judge even remembered those events, would not have a reasonable apprehension of bias after thinking the matter through on a realistic and practical basis.

The Exercise of Discretion by the Trial Judge under s. 486 of the *Code*

[24] Counsel for the Appellant concedes that the exercise of judicial discretion is entitled to deference on appeal. As noted in ***R. v. Mulligan***, 1997 CanLII 995 (ON CA), 115 C.C.C. (3d) 559 (Ont. C.A.), "*unless the trial judge committed an error in principle or failed to give proper weight to relevant considerations[,] an appellate court should not interfere*" (citations omitted)(at p. 1004).

[25] As noted in ***R. v. Li***, 2012 ONCA 291, rulings as to procedural and evidentiary matters are described as "*the bread and butter of a trial judge's work in the conduct of a trial, and such rulings are one of the areas where a trial judge*

exercises significant judicial discretion, based on the principles of order and fairness" (at para. 40).

[26] In this case the Crown made an application prior to the start of trial pursuant to s. 486 of the ***Code*** to have five individuals excluded from the courtroom. The Crown called no evidence, but submitted to the Trial Judge that the Appellant and others had made threats against the complainant that were effectively obstructing justice and this necessitated an order of exclusion. Defence counsel at trial did not contest the submissions of the Crown or demand that the Crown call evidence in support of its application, but still opposed it.

[27] In the main, the Appellant argues that the order of exclusion violated the open courts principle and that the discretion to make exclusion orders under s. 486 of the ***Code*** is not an unfettered one. In this case the Appellant argues that the Trial Judge made no effort to identify the members in the public gallery and he did not make any inquiries of them. Further it is argued that the Trial Judge did not consider increasing security measures in the courtroom by calling in more sheriff's officers or taking other steps that would lessen the impact of an exclusion order against these five individuals.

[28] The Appellant highlights the comments of the Trial Judge that "*any individual that attempts to come in here and subvert the course of justice should know that it rarely has the intended effect in the circumstances that it wishes and in fact has the opposite effect from time to time*".

[29] This submission of the Appellant is that this statement could only be interpreted as an inference that the Appellant was likely guilty and engaging in an effort to subvert the course of justice. The inference of these words, according to the Appellant, is that efforts of intimidation result in conviction.

[30] I agree with the Crown's position that a comprehensive reading of the transcript shows that the impugned statement of the Trial Judge came in response to the Crown's confirmation that after the five excluded individuals left the courtroom, they should not be replaced with five other supporters of the Appellant who might make an effort to intimidate the complainant.

[31] I am satisfied that it is reasonable to draw this inference from the comments of the Trial Judge that he was merely indicating that any effort to intimidate the complainant would not be tolerated and this was not a collateral attack on the presumption of innocence the Appellant is entitled to under law. A full reading of the transcript shows that the Trial Judge was alive to the fact that the open court principle is a key feature of our criminal justice system and that the least restrictive limitations possible should be applied in the circumstances.

[32] It is also clear that the unchallenged submissions of the Crown did not lead to an effort to clear the public gallery. The spouse of the Appellant and some other unidentified individuals were permitted to stay in the gallery and the doors of the courtroom were left open for other individuals to attend. This was not the most draconian option available to the Trial Judge, as the Appellant contends.

[33] The Trial Judge specifically commented that there was a legitimate concern that the complainant might be deprived of the opportunity to give a full and candid account of his version of events and that the complainant should be provided some degree of protection in the circumstances. I am satisfied that the Trial Judge took the measure that he did to protect the integrity of the truth-seeking function of the court and this exercise of discretion does not warrant appellate intervention.

The Admission of Bad Character Evidence at Trial

[34] The Appellant argues that the ruling of the Trial Judge under s. 486 of the ***Code*** was only the tip of the iceberg of the inadmissible bad character evidence considered by the Trial Judge. It was argued that further inadmissible bad character evidence was also part of the evidence of the complainant.

[35] The Trial Judge made a point of stating as part of his ruling under s. 486 that no adverse inferences could be drawn against the Appellant on account of the Crown's unchallenged submissions that efforts were being made to intimidate the complainant. This is consistent with the positions of s. 486(4). There is nothing in the trial record to suggest that that the Trial Judge ignored the factors justifying an exclusion order under s. 486(2) either.

[36] Apart from the Appellant's statement, in which he admitted that the threatening text messages the complainant identified were sent from his phone number, the Crown's only evidence at trial came from the complainant. The evidence of the complainant was that after opening the door to his house one evening he saw the Appellant and his brother at his doorstep, and he invited them

in to drink coffee. Rather than accept this invitation, the complainant testified that the brother of the Appellant punched him several times in the head and then beat him with a mini bat. During the course of this assault the Appellant remained silent and calmly sat down at a kitchen chair and began smoking from a vape pen while observing the assault.

[37] The complainant further testified that the beating continued with a mini bat across his legs and hand. The complainant testified that it looked like the brother of the Appellant had a firearm tucked into his waistband and that he brandished a knife while threatening the complainant's dog. Eventually the Appellant directed his brother to stop the assault and according to the complainant the brother of the Appellant complied with this request.

[38] The unwelcome visit by the Appellant and his brother flowed from the $10,000 loan the complainant was unable to repay to the Appellant in a timely manner. During the course of the complainant's testimony, the Crown tendered numerous text messages and call logs exchanged between the complainant and the Appellant which included violent threats sent from the Appellant's phone with respect to the failure of the complainant to repay the debt that he owed by the upcoming Friday.

[39] During the course of his testimony the complainant also made reference to his participation in a kidnapping plot to placate the Appellant as part of his effort

to settle his debt. Out of his abject fear of the Appellant, the complainant also testified he told the Appellant he would be willing to sell his firearm and vehicle to settle his debt.

[40] In cross-examination the complainant confirmed that he had visible injuries following the assault including bruises and swelling for which he did not seek medical treatment. The complainant alleged that his leg was injured, and his hand was broken during the assault, but he did not take photographs or video to confirm the extent of his injuries.

[41] After completing his analysis of the complainant's evidence, which included a ***Vetrovec*** caution to himself about the complainant's evidence, the Trial Judge found the complainant to be a forthright and honest witness whose fear of the Appellant was genuine. In particular, the Trial Judge noted that the text messages and call logs tendered by the Crown confirmed the complainant's evidence as to the assault committed at the direction of the Appellant's brother. The Trial Judge also declined to draw any adverse inference towards the complainant's credibility arising from the Crown's decision not to call witnesses or other evidence to support the injuries as alleged by the complainant.

[42] The Appellant argues that that there was no explicit corroborating evidence with respect to the injuries themselves that would prove an assault causing bodily harm at law and the Trial Judge did not assess whether the use of a weapon was specifically corroborated by way of independent evidence.

[43] The ***Vetrovec*** analysis completed by the Trial Judge is detailed and extensive. Read in the context, the ***Vetrovec*** analysis of the Trial Judge noted that the criminal activity admitted to by the complainant, such as his offer to traffic weapons for the Appellant and his admitted participation in the kidnapping plot were admissions against interest. The Trial Judge concluded that the complainant had no real motive to lie about his criminal activity.

[44] In reaching this conclusion about the complainant, the Trial Judge reminded himself that he was required by the ***Vetrovec*** principle to assess the evidence of the Complainant "with suspicion and (a) jaundiced eye" and he found the text messages and call logs from the Appellant's telephone number were corroborating evidence that supported the complainant's testimony. The Trial Judge also specifically found that the complainant was frightened and intimidated by the court process and the Appellant in particular.

[45] All of these findings of fact and credibility by the Trial Judge were made in the context of his ***Vetrovec*** analysis and they pertained to whether he could attach sufficient weight to the testimony offered by the complainant to assess if the Crown's case reached the standard of proof beyond a reasonable doubt. The Trial Judge explicitly pointed out in his reasons that the complainant's admission to participate in a kidnapping plot could not be used to draw negative inferences as to bad character or the propensities of the Appellant.

[46] I am satisfied that a full reading of the transcript shows that no prejudice arose against the Appellant through the ***Vetrovec*** analysis completed by the Trial

Judge. The Trial Judge was careful in giving himself a ***Vetrovec*** caution as to the risks of accepting the evidence of the complainant without corroboration and that the criminality admitted to by the complainant must be limited to the ***Vetrovec*** analysis. There is nothing in the language used by the Trial Judge to suggest that he was allowing the ***Vetrovec*** analysis to spill over into findings of fact or conclusions that the Appellant had criminal propensities or had engaged in other criminal activity that was not shown on the indictment, which in turn must mean he was guilty of the offences as charged.

[47] ***R. v. Loonfoot***, 2018 MBCA 140, teaches that appellate intervention is not warranted when a proper cautionary instruction has been issued and it has served its intended purpose, as stated in para. 12:

> [12] … That purpose is to warn the fact finder of the danger of relying on the impugned witness's testimony without being comforted, by some other evidence, that the witness is telling the truth about the accused's involvement in the crime.

[48] At para. 16 ***Loonfoot*** speaks explicitly to the fact that there is no need for "*[i]ndividual items of confirmatory evidence*" to implicate an accused person. The confirmatory evidence need only provide comfort to the trier of fact in general terms to reach the conclusion that the evidence is credible and reliable. In this case, the Trial Judge explicitly found the text messages and call logs sufficed to justify his belief in the veracity of the complainant's evidence. The Trial Judge was particularly struck by the following text messages sent from the Appellant's phone, which imposed a Friday deadline for full repayment:

> I've given you long enough. That's all you keep saying. I am, I am, bro. Well, you've got 'til Friday and that's it.
>
> . . . .
>
> "As of Friday it's out of my hands and my bro will handle the way he wants. You're bringing this upon yourself, hope you realize that."
>
> . . .
>
> "If you think I'm playing, I'm giving you my word that it will be handled by noon if it ain't squared up by noon."
>
> (Page T12, Lines 22-34, Transcript, Reasons for Judgment)

[49] Findings of credibility as to any witness, including a witness under a ***Vetrovec*** caution, are subject to significant deference given that triers of fact have the overwhelming advantage of seeing and hearing the witnesses at trial, instead of reading their words transcribed on the printed page after the fact. (See ***R. v. N.S.***, 2012 SCC 72, at para. 25.)

[50] The standard of review as to findings of credibility are established in ***R. v. D.N.S.***, 2016 MBCA 27, as follows:

> [33] In this case, the trial judge's finding of guilt was determined by his findings of credibility. Absent an underlying error of law, findings of credibility are findings of fact, and they are reviewed on the deferential standard of palpable and overriding error. This standard was explained by the Supreme Court of Canada in *Housen v Nikolaisen*, 2002 SCC 33 at paras 10-18 …
>
> [Further citations omitted]

[51] I am satisfied that no errors of law can be identified with respect to the findings of fact and credibility made by the Trial Judge and that no palpable and

overriding errors were made by the Trial Judge with respect to these findings. No appellate intervention is warranted in the circumstances.

Entering a Conviction as to the Wrong Offence and the Adverse Inference

[52] The argument as to the flawed ***Vetrovec*** caution also bridges over to the analysis of the reasons of the Trial Judge as a whole according to the Appellant, who argues that the complainant could not point to evidence in support of his allegations as to injuries other than an audible clicking sound with his hand during his testimony, which he described as an ongoing result of the injuries he sustained.

[53] It is argued the Trial Judge committed an error of law in focusing on the offence of assault causing bodily harm in his analysis, rather than the actual offence charged which was assault with a weapon. According to the Appellant this explains why the Trial Judge was in error when he failed to seek confirmation via other independent evidence that a mini bat was used during the course of the assault as alleged by the complainant.

[54] The correct response to these arguments can in part be found by repeating two foundational principles of the law of criminal evidence. The first foundational principle is that finders of fact can convict an accused person in cases where the Crown calls only one witness. The second foundational principle is that a finder of fact can accept all, some or none of the evidence of any particular witness and ascribe the weight it may deserve in context with all of the other evidence proffered at trial.

[55] In this case, after giving himself a turbo charged ***Vetrovec*** caution about the complainant's evidence, the Trial Judge was persuaded about the veracity of the testimony offered by the complainant by looking at the corroborating evidence provided by the text messages and call logs from the phone number that was admittedly that of the Appellant. In his analysis, the Trial Judge was unquestionably alive to the dangers of relying exclusively on the evidence of the complainant in reaching his conclusion that the Crown had satisfied it burden of proving guilt to the standard of proof beyond a reasonable doubt.

[56] The fact that in the main the Trial Judge assessed the evidence on the basis of assault causing bodily harm instead of assault with a weapon was due to an error on the court docket that was identified to the Trial Judge during sentencing submissions. The error was corrected, and nothing turns on it given the specific findings of the Trial Judge in accepting the evidence of the complainant that he was in fact beaten with a mini bat during the course of the assault.

[57] The Trial Judge was entitled to accept the evidence of the complainant alone that the Appellant directed his brother to punch the complainant and beat him with a mini bat to such an extent that he suffered injuries before he instructed his brother to stop the assault. It was not an error in law for the Trial Judge to arrive at this conclusion without independent corroborating evidence explicitly proving that a weapon was used or that injuries were sustained, and the Appellant has been unable to persuade me that the Trial Judge made a palpable and overriding error in arriving at the conclusions he did.

[58] The fact that the Trial Judge rejected the admonition of defence counsel at trial to draw an adverse inference against the Crown for not calling witnesses to explicitly confirm the details of the complainant's evidence as to a weapon or injures is not a palpable and overriding error. The Trial Judge noted that the defence at trial invited him to draw an adverse inference based on the authority of ***R. v. Jolivet***, 2000 SCC 29 (CanLII), [2000] 1 S.C.R. 751, and he declined to do so.

[59] In support of this conclusion, the Trial Judge noted that no evidence was presented by either side at trial about other eyewitnesses who might be able or willing to testify about the assault.

[60] It bears noting that ***Jolivet*** involved a fact scenario where the Crown mentioned in its opening statement to the jury that it intended to call a particular witness at trial, but then declined to do so before closing its case. In a nutshell, ***Jolivet*** defines the adverse inference principle as follows, at para. 24:

> 24 Neither the defence nor the Crown have suggested that Bourgade would in fact have offered exculpatory evidence. The "adverse inference" principle is derived from ordinary logic and experience, and is not intended to punish a party *who exercises its right not to call the witness* by imposing an "adverse inference" which a trial judge in possession of the explanation for the decision considers to be wholly unjustified.
>
> [Emphasis in the original]

[61] ***Jolivet*** teaches that the jurisprudence as to the adverse inference rule developed before ***R. v. Stinchcombe***, 1991 CanLII 45 (SCC), [1991] 3 S.C.R. 326, imposed an enhanced obligation on the Crown to disclose all exculpatory evidence to an accused person. The adverse inference rule was not

intended to apply to "*evidence which offers only the potential for raising inconsistencies among witnesses who have only inculpatory evidence to offer. In general, witnesses should be called by the party that wants their evidence*" (at para. 15).

[62] In ***Jolivet*** the Supreme Court of Canada also noted that the Crown "*is under no obligation to call a witness it considers unnecessary to the prosecution's case*" (at para. 14) and this remained the case regardless of the truthfulness or desire of such a witness to testify or further what the ultimate effect of the evidence of the witness might be on the trial (at para. 16).

[63] It is not the role of a judge on appeal to simply reach a different conclusion on the facts as found by a judge at first instance. ***R. v. Biniaris***, 2000 SCC 15 (CanLII), [2000] 1 S.C.R. 381, teaches that, at para. 24:

> 24 Triers of fact, whether juries or judges, have considerable leeway in their appreciation of the evidence and the proper inferences to be drawn therefrom, in their assessment of the credibility of witnesses, and in their ultimate assessment of whether the Crown's case is made out, overall, beyond a reasonable doubt. Any judicial system must tolerate reasonable differences of opinion on factual issues. Consequently, all factual findings are open to the trier of fact, except unreasonable ones embodied in a legally binding conviction. Although reasonable people may disagree about their appreciation of the facts, a conviction, which conveys legality, authority and finality, is not something about which reasonable people may disagree. A conviction cannot be unreasonable, except as a matter of law, in which case it must be overturned.

[64] The decision of the Trial Judge not to draw an adverse inference against the Crown for not calling other potential corroborating witnesses is entitled to deference and does not constitute a palpable and overriding error. Appellate intervention is not warranted.

Failure to follow *R. v. Villaroman*

[65] The Appellant's argument with respect to a failure by the Trial Judge to follow the principles of ***Villaroman*** is tied to the fact that the complainant only testified that the Appellant successfully directed his brother to stop the assault and he said nothing about who directed the Appellant's brother to start the assault in the first place. Given these facts, the Appellant argues that the Trial Judge failed to consider reasonable alternative inferences, including that:

- The brother of the Appellant started the assault unbeknownst to the Appellant, who was simply in the wrong place at the wrong time; or
- The Appellant knew an assault was about to begin, but he had to idea his brother would escalate the assault to include the use of a weapon or to inflict injuries.

[66] The test articulated in ***Villaroman*** is "*whether the circumstantial evidence, viewed logically and in light of human experience, is reasonably capable of supporting an inference other than that the accused is guilty*" (at para. 38).

[67] ***Villaroman*** also teaches that alternate theories of guilt advanced by an accused person cannot be dismissed as speculative merely because they arise from a lack of evidence. The Supreme Court of Canada in ***Villaroman*** states at paras. 36-37:

> [36] … A certain gap in the evidence may result in inferences other than guilt. But those inferences must be reasonable given the evidence and the absence of evidence, assessed logically, and in light of human experience and common sense.

> [37] When assessing circumstantial evidence, the trier of fact should consider "other plausible theor[ies]" and "other reasonable possibilities" which are inconsistent with guilt: *R. v. Comba*, 1938 CanLII 14 (ON CA), [1938] O.R. 200 (C.A.), at pp. 205 and 211, per Middleton J.A., aff'd 1938 CanLII 7 (SCC), [1938] S.C.R. 396; *R. v. Baigent*, 2013 BCCA 28, 335 B.C.A.C. 11, at para. 20; *R. v. Mitchell*, [2008] QCA 394 (AustLII), at para. 35. I agree with the appellant that the Crown thus may need to negative these *reasonable* possibilities, but certainly does not need to "negative every possible conjecture, no matter how irrational or fanciful, which might be consistent with the innocence of the accused": *R. v. Bagshaw*, 1971 CanLII 13 (SCC), [1972] S.C.R. 2, at p. 8. "Other plausible theories" or "other reasonable possibilities" must be based on logic and experience applied to the evidence or the absence of evidence, not on speculation.

[68] The reasons of the Trial Judge make it clear that the alternative inference is or theories suggested by the Appellant do not amount to more than conjecture or fanciful thinking. The evidence of the complainant and the corroborating evidence led the Trial Judge to a firm conclusion that the Appellant was the guiding force behind the assault and that his essential role in the assault was corroborated by the text messages in which specific threats of violence were sent to the complainant from the Appellant's phone both before and after the assault.

[69] It was never put into question that the complainant was indebted to the Appellant rather than his brother and there is no evidence that the Appellant expressed concern about the assault through his words or actions until he finally gave an order to his brother to stop the assault, which was then obeyed. The text messages from the phone of the Appellant also contained direct threats to the complainant prior to the assault and comments after-the-fact to the effect that "you think last time was bad?" and that there would be "no stopping" when the complainant was caught the next time.

[70] The evidence of motive was never challenged by the Appellant and the text messages gave the Trial Judge the necessary comfort to conclude that the Appellant was the guiding force behind the assaults. Viewed logically and in light of human experience I am satisfied it would be irrational or fanciful to conclude on all of the evidence before the Trial Judge that there were reasonable inferences at play that could have been inconsistent with the guilt of the Appellant. This is not a case where the Appellant can point to gaps in the evidence and expect the Crown to disprove every possible conjecture.

[71] The Manitoba Court of Appeal has confirmed in several cases that an accused person assumes a risk in remaining silent in cases where the Crown's evidence reaches a tipping point that "*cries out for an explanation*". (See ***R. v. Oddleifson (J.N.)***, 2010 MCBA 44, at para. 27.) The decision in ***Oddleifson*** then continues:

> 27 The preceding paragraphs explain the use that can be made of the accused's failure to testify when the Crown's case cries out for an explanation. On appeal, the accused's failure to testify can also be used to assess the claim of an unreasonable verdict (see *R. v. Noble,* 1997 CanLII 388 (SCC), [1997] 1 S.C.R. 874 at para. 103; *R. v. Dell* (2005), 2005 CanLII 5667 (ON CA), 194 C.C.C. (3d) 321 (Ont. C.A.) at para. 35; *R. v. Klyne (C.L.G.)*, 2007 MBCA 100, 220 Man.R. (2d) 35 at para. 30; and *R. v. Munif*, 2009 BCCA 451). That use must be considered in the context of appellate review, which reviews for error. Unlike at trial, where the burden rests on the Crown to prove guilt, on appeal the accused is guilty and will remain so unless the accused demonstrates an error at the trial level (see *Noble*, at paras. 108-9). As a result, although the accused's failure to testify cannot be considered as a factor to infer or confirm guilt at the trial level, this failure, or more specifically, the absence of an innocent explanation, can be considered at the appellate level as a factor in assessing the reasonableness of the guilty verdict.

[72] The ***Oddleifson*** decision was cited in ***R. v. Banayos and Banayos***, 2018 MBCA 86, where it was held that the failure of an accused person to testify impacted what reasonable inferences were left available for the finder of fact to consider, at para. 24:

> [24] An accused is under no obligation to present an evidentiary foundation to raise a reasonable doubt or to prove their alternative inferences. An accused may choose to present evidence or not. However, when an accused chooses not to testify or to call evidence, that decision carries the risk of not providing the trial judge with the necessary evidentiary foundation which, if accepted, could have precluded the impugned inferences from being drawn (see *R v Oddleifson (JN)*, 2010 MBCA 44 at para 25, leave to appeal to SCC refused, 33756 (28 October 2010)).

[73] I am satisfied that the failure of the Appellant to testify in these circumstances makes all of the suggested inferences put forward by the Appellant, irrational and fanciful. The Crown is not obliged to negate every conceivable alternative suggested by the Appellant. This ground of appeal has no merit in the circumstances.

CONCLUSION AS TO THE CONVICTION APPEAL

[74] During oral argument the Crown suggested I could consider comments made by the accused during the sentencing hearing that were inculpatory and I invited counsel to file further briefs on point. The brief of the Appellant indicated that the court sitting on appeal had no jurisdiction to consider comments made during the sentencing hearing with respect to the conviction appeal. The Crown conceded this position was correct and as such I find that these comments are

immaterial to this appeal and I cannot consider them in reaching my decision as to the conviction appeal.

[75] I am satisfied for all of these reasons that appellate intervention is not warranted on the conviction appeal.

WAS THE SENTENCE DEMONSTRABLY UNFIT?

THE SENTENCE IMPOSED

[76] At the sentencing hearing the Crown sought a sentence of 18 to 24 months' incarceration plus probation. Defence counsel at trial argued that a conditional sentence order was appropriate, failing which it was recommended that a 90-day sentence, to be served intermittently, should be imposed.

THE SENTENCING HEARING

[77] The criminal record of the Appellant was put into evidence at the sentencing. The Appellant had no record for violence, but did have three convictions for possession of a controlled substance for the purposes of trafficking between 2003 and 2009. The assault in question occurred in October of 2021.

[78] The sentence imposed by the trial judge was 18 months' incarceration followed by one year of probation. The trial judge indicated this was on the low end of the scale. The sentence was comprised of consecutive sentences of 12 months for the charge of assault with a weapon and six months on the charge of uttering threats.

[79] The trial judge gave significant weight to the ***Gladue*** factors in this case, noting that this was not merely an "*incredibly important sentencing feature*" but

rather "*the lens in which I view the entirety of the sentencing and a fundamental foundational part of how an eventual assessment and sentence is ultimately calibrated*".

[80] The aggravating factors the Trial Judge reviewed included:

- The false pretenses under which the Appellant entered the home of the complainant;
- That the complainant was badly injured over the course of an extended assault;
- That the injuries to the complainant were both physical and emotional;
- That the child of the complainant was in the house when the assault occurred;
- That a weapon was used to effect this assault, which was described as "highly aggravating";
- The deliberate planning of the assault;
- The seriousness of the threats against the complainant; and
- The criminal record of the Appellant, although it was dated, did not involve acts of violence.

[81] The mitigating factors highlighted by the Trial Judge included:

- The attempts of the Appellant to lead a pro social lifestyle since this last conviction;
- The commitments the Appellant made to support his wife and five children;

- The Appellant's success in growing his construction business to support his family; and
- The remorse the Appellant offered at the sentencing hearing.

POSITION OF THE APPELLANT

[82] Counsel on appeal contends that although the judge did consider ***Gladue*** factors, given the Indigenous heritage of the Appellant, he did not explicitly tie the dysfunctional upbringing of the Appellant to his criminal behavior or consider how to "effectively" deter the Appellant in sentencing him in the manner that he did.

[83] It was also submitted that the Trial Judge also overlooked or failed to give due consideration to the following:

- The fact that the addiction of the Appellant to painkillers arose after he was prescribed opioids following an accidental injury, rather than from a "party lifestyle";
- The positive lifestyle changes made by the Appellant over the course of some 12 years since his last criminal conviction;
- No independent proof of injuries was offered; and
- The rehabilitation efforts of the Appellant were not considered as a mitigating factor.

[84] I am satisfied that the Appellant is correct in stating that the Trial Judge was in error when he indicated that although the efforts of the Appellant to successfully deal with his serious addiction issues were "a very positive development" they did not actually constitute a mitigating factor because society

expects individuals with addiction to overcome them. Although it was not argued on appeal, I am also satisfied the Trial Judge made an error by concluding that an element of the offence (assault with a weapon) was a highly aggravating factor.

FIRST PRINCIPLES ON SENTENCING APPEALS

[85] ***R. v. M. (C.A.)***, 1996 CanLII 230 (SCC), [1996] 1 S.C.R. 500, teaches, at para. 90, that:

> 90 Put simply, absent an error in principle, failure to consider a relevant factor, or an overemphasis of the appropriate factors, a court of appeal should only intervene to vary a sentence imposed at trial if the sentence is demonstrably unfit. …

[86] ***R. v. Shropshire***, 1995 CanLII 47 (SCC), [1995] 4 S.C.R. 227, states:

> XLVI. The question, then, is whether a consideration of the "fitness" of a sentence incorporates the very interventionist appellate review propounded by Lambert J.A. With respect, I find that it does not. An appellate court should not be given free reign to modify a sentencing order simply because it feels that a different order ought to have been made. The formulation of a sentencing order is a profoundly subjective process; the trial judge has the advantage of having seen and heard all of the witnesses whereas the appellate court can only base itself upon a written record. A variation in the sentence should only be made if the court of appeal is convinced it is not fit. That is to say, that it has found the sentence to be clearly unreasonable.

ANALYSIS

[87] Turning first to the rehabilitation issue, I note that rehabilitative steps taken by an accused person have been considered mitigating circumstances by the Supreme Court of Canada. (See ***R. v. Bertrand Marchand***, 2023 SCC 26, at para. 72.)

[88] The jurisprudence also indicates that although society can expect persons with addictions who engage in crime to overcome them, it is still a mitigating factor

nonetheless when it comes to sentencing. The Manitoba Court of Appeal found that although rehabilitative steps were not exceptionally mitigating, they were still significantly mitigating on the facts in ***R. v. Dalkeith-Mackie***, 2018 MBCA 118, at para. 29:

> [29] There is no question that the accused had taken positive steps towards rehabilitation at the time of sentencing—he was employed, had made progress in addressing his drug and alcohol addictions and was working towards obtaining custody of his daughter. In my view, the accused's circumstances were sympathetic and significantly mitigated what would otherwise have been an appropriate sentence, but they did not meet the high threshold required in order to be exceptional (*Burnett* at paras 27-33). What he had done is what is expected of individuals with addictions who engage in criminal acts.

[89] The ***Asante*** decision noted that the sentencing judge "*appropriately recognized that, although rehabilitation remained a relevant consideration, it had to "take a back seat to denunciation and deterrence given the seriousness of [the accused's] offending behaviour*" (at para. 26). Similar comments about rehabilitation efforts constituting a mitigating factor were also noted in ***R. v. Ryall***, 2024 MBCA 105 (at para 34).

[90] The second issue of describing an included feature of the offence as an aggravating factor was reviewed in ***R. v. Lacasse***, 2015 SCC 64. In ***Lacasse*** the majority qualified the threshold for the standard of appellate intervention described in ***M. (C.A.)*** by concluding, at para. 44, that:

> [44] … an error in principle, the failure to consider a relevant factor or the erroneous consideration of an aggravating or mitigating factor will justify appellate intervention only where it appears from the trial judge's decision that such an error had an impact on the sentence.

[91] By way of illustration of this principle ***Lacasse*** notes, at para. 45:

> [45] For example, in *R. v. Gavin*, 2009 QCCA 1, the Quebec Court of Appeal found, first, that the trial judge had erred in considering a lack of remorse and the manner in which the defence had been conducted as aggravating circumstances (para. 29 (CanLII)). However, it then considered the impact of that error on the sentence and stated the following, at para. 35 :
>
> > [TRANSLATION] I find that the lack of remorse was a secondary factor in the trial judge's assessment. This is apparent in the wording of the judgment. The judge referred to and considered all of the relevant sentencing factors, and the issue of lack of remorse was nothing more than incidental. . . . Consequently, unless the Court finds that the sentence imposed was harsher because the judge erroneously determined that the defence's conduct (as in *R. v. Beauchamp*, supra) and the lack of remorse were aggravating circumstances, this error in principle had no real effect on the sentence. Essentially, therefore, our task now is to ensure that the sentence is not clearly unreasonable . . . .
>
> Thus, the Court of Appeal, finding that the error in principle made by the trial judge was not determinative and had had no effect on the sentence, rightly concluded that the error in question could not on its own justify the court's intervention. This ultimately led the court to inquire into whether the sentence was clearly unreasonable having regard to the circumstances.

[92] ***Lacasse*** teaches that the question arising from an error in principle on sentencing or a failure to consider relevant factors or erroneous consideration of aggravating or mitigating factors is not merely whether they occurred, but if they impacted the ultimate sentence imposed. In other words, would the sentence have changed but for the mistake. Appellate intervention is only warranted if an appellate court cannot determine to what degree the sentence was impacted by the mistake (at para. 47).

[93] The policy reasons supporting this kind of analysis is that mistakes that become apparent in sentencing do not necessarily overcome the deference

appellate courts must show to trial courts and that the threshold for appellate intervention cannot be met merely because the appellate court would have weighed the relevant factors differently (***Lacasse***, at paras. 48 and 49).

[94] I am not satisfied that the mistakes apparent on the record resulted in a more severe sentence. The Trial Judge made a point of noting that 18 months' incarceration was on the low end of the range, but that it could be justified due to the mitigating circumstances at play, including the ***Gladue*** factors. Further, the Trial Judge imposed the minimum sentence recommended by the Crown, namely 18 months, after rejecting the recommendations of the defence for a conditional sentence order or an intermittent sentence of 90 days. The following comments of the Trial Judge support this conclusion:

> … this sentence could have easily been for a lengthier period of time. But balancing all of the factors in this matter including the very present Gladue factors, I'm content that while on the low side, 18 months of incarceration is the appropriate sentence.

[95] In addition, the Trial Judge made specific reference to the mitigating nature of the positive effects the pro-social behaviour and legitimate business activity of the Appellant benefited his wife and children, which in turn played a key factor in his rehabilitation efforts.

[96] The trial judge then went on to note, appropriately in my view, that denunciation and general and specific deterrence had to be the primary focus of this sentence. By necessity, the Trial Judge noted that this kind of focus meant that the personal circumstances of the Appellant had to carry less weight than his

criminal conduct and his level of moral blameworthiness. As noted in ***Asante***, rehabilitation has to take a back seat to denunciation and deterrence in serious cases. This also meant that a conditional sentence order or an intermittent 90-day sentence was contrary to the public interest.

CONCLUSION AS TO SENTENCE APPEAL

[97] In my view the Trial Judge's findings a fact on the record were reasonable and his weighing of the relevant factors was also reasonable. I am satisfied that the mistakes as noted did not cause the Trial Judge to increase the sentence from what it otherwise would have been. I am also satisfied that the sentence is not demonstrably unfit, considering the seriousness of the offences, the degree of the moral blameworthiness and the balancing of the aggravating and mitigating factors.

[98] The appeal as to sentence is dismissed.

_____J.