Citation: R. v. Storheim (S.K.W.), 2015 MBCA 14 | Date: 20150205
Docket: AR14-30-08208

IN THE COURT OF APPEAL OF MANITOBA

Coram: Mr. Justice Alan D. MacInnes
Mr. Justice Marc M. Monnin
Mr. Justice William J. Burnett

B E T W E E N :

HER MAJESTY THE QUEEN	)	***J. J. Gindin*** *and* ***K. D. Minuk*** *for the Appellant*
Respondent	)	
- and -	)	***A. Y. Kotler*** *for the Respondent*
SERAPHIM KENNETH WILLIAM STORHEIM	)	*Appeal heard:* ***October 31, 2014***
(Accused) Appellant	)	*Judgment delivered:* ***February 5, 2015***

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BURNETT J.A.

[1] Cases involving allegations of historical sexual assault frequently require judges to make difficult findings of fact and credibility. This is such a case.

[2] The accused was charged in 2010 with two counts of sexual assault. The assaults were alleged to have occurred between July 1 and August 31, 1985, and involved twin brothers (the complainants), L.A.R. and L.J.R. The complainants were 11 years old at that time.

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[3] Following a trial by judge alone, the accused was convicted of sexual assault on L.J.R. and sentenced to eight months in prison. An acquittal was entered in relation to the other count which alleged a sexual assault on L.A.R.

[4] The accused has filed a motion for fresh evidence. He appeals his conviction and seeks leave to appeal sentence.

[5] For the reasons which follow, I would dismiss the motion for fresh evidence and the conviction appeal, and I would deny leave to appeal sentence.

Background

[6] In 1982, the accused was directed to serve as a parish priest in London, Ontario. There he met the complainants and their mother, and as the parish priest, he went to their home for dinner and developed a relationship with the family. In 1983, the accused was assigned to the Holy Trinity Ukrainian Orthodox Metropolitan Cathedral in Winnipeg, Manitoba. Following his transfer to Winnipeg, arrangements were made to send each of the complainants, on separate occasions, to visit him. The purpose of the complainants' visits was to assist the accused as altar boys.

[7] It was not disputed at trial that the complainants went to Winnipeg in the summer of 1985, that L.J.R. went first and stayed for approximately two weeks, that another boy (K.S.) also visited the accused and that L.J.R.'s visit overlapped K.S.'s visit. The amount of time that L.J.R. and K.S. were together in Winnipeg was a contested fact. At some point after L.J.R.

returned to London, L.A.R. travelled to Winnipeg to visit the accused.

[8] In his reasons, the trial judge specifically found that "L.A.R. and L.J.R. came to Winnipeg only during the summer of 1985. They had no contact with the accused again."

[9] The accused denied that any sexual assault occurred.

[10] The trial judge was satisfied beyond a reasonable doubt that the following events occurred when L.J.R. visited Winnipeg during the summer of 1985: the accused was intentionally nude in the presence of L.J.R. on more than one occasion; the accused gave sexual information to L.J.R. without the knowledge or consent of his mother; on one occasion, the accused intentionally touched L.J.R. in the area of his penis; on the same occasion, the accused invited L.J.R. to touch his testicle, which L.J.R. did; and the accused took L.J.R.'s pajamas and held them up to the light to look for semen stains while they were both nude.

[11] The accused wrote a letter to the complainants' mother after both boys returned to London. In his reasons, the trial judge referred to the letter as the "apology note". The apology note no longer exists, but the trial judge believed that its existence and contents amounted to key evidence at trial.

[12] One of the Crown witnesses, Father Steven Kostoff, was the parish priest in London, Ontario, beginning in October 1985. There was evidence that the complainants disclosed wrongdoing to their mother soon after L.A.R. returned to London and that she spoke to Father Kostoff. Father Kostoff's best estimate is that the disclosure to him occurred in

January 1986, or January 1987, likely the latter. Father Kostoff said that at that time he spoke to the complainants and read the apology note. Father Kostoff testified that in the closing paragraph of the apology note, the accused acknowledged that he may have overstepped some boundaries with the boys, teaching them about "adult things". Father Kostoff confronted the accused in 2008 and was told: "The mistake I made was getting too close to that family."

[13] Nine witnesses were called at trial. According to the trial judge, the central issue in this case was credibility.

Motion to Introduce Fresh Evidence

[14] Both Crown and defence counsel agreed that the Court could review the fresh evidence prior to the appeal. Following submissions at the commencement of the hearing, a decision on the fresh evidence motion was reserved, and the appeal was fully argued.

The Fresh Evidence

[15] The proposed fresh evidence consists of two affidavits and the exhibits appended thereto (collectively the fresh evidence), namely the affidavit of Jennifer Bachynski (the Bachynski Affidavit) and the affidavit of Constance Kucharczyk (the Kucharczyk Affidavit).

[16] Ms Bachynski is the assistant to the accused's lawyer. Attached to the Bachynski Affidavit are copies of a letter dated July 20, 2014, a photocopy of a page described in that letter as "the front page of our Gospel Book", two emails from the accused to his lawyer dated August 21, 2014,

and 15 photographs. As well, there are photocopies of handwritten notations which apparently appear on the back of some of the photographs.

[17] The important averments in the Bachynski Affidavit are set out in paras. 4 and 5:

> 4. THAT I am advised and do verily believe that some of these photographs depict [L.J.R.] and [K.S.] in Winnipeg during the summer of 1985. Others depict [L.A.R.] in Winnipeg during the summer of 1986.
>
> 5. THAT I am advised and do verily believe that [the accused's lawyer] was also in receipt of a letter, signed by a number of individuals, certifying that some of the attached photographs were taken during a celebration on July 20, 1986.

[18] Ms Kucharczyk was a defence witness at trial. In her affidavit, Ms Kucharczyk deposes that she first met the accused in 1978, that they have remained friends since that time, and that she and the accused never considered marriage. In addition, Ms Kucharczyk says that she has located travel and work documents showing that she was away from Winnipeg from at least mid-July to early September 1986.

The Parties' Positions

[19] The accused submits that the fresh evidence meets the four requirements for admission set out in *Palmer et al. v. The Queen*, [1980] 1 S.C.R. 759, namely that (at p. 775):

> (1) The evidence should generally not be admitted if, by due diligence, it could have been adduced at trial provided that this general principle will not be applied as strictly in a criminal case ….
>
> (2) The evidence must be relevant in the sense that it bears upon a decisive or potentially decisive issue in the trial.
>
> (3) The evidence must be credible in the sense that it is reasonably capable of belief, and
>
> (4) It must be such that if believed it could reasonably, when taken with the other evidence adduced at trial, be expected to have affected the result.

[20] The accused’s lawyer concedes that whether the evidence establishes that L.J.R. was sexually assaulted in 1985 or in 1986, the year is of no consequence as the count could be amended. Counsel also concedes that the accused could have accessed some of the photographs prior to trial, but he says that the significance of the timing of L.A.R.’s visit was not apparent until the trial judge’s decision was delivered. According to the accused, the fresh evidence establishes that L.A.R. was in Winnipeg in 1986 (and not 1985), that L.J.R. was incorrect in his testimony that L.A.R. went to Winnipeg within a few weeks of his visit to Winnipeg in 1985, and that this would have affected the trial judge’s positive assessment of L.J.R.’s credibility and his negative assessment of Ms Kucharczyk’s credibility.

[21] The Crown contends that none of the *Palmer* criteria have been met. While the due diligence criteria is relaxed in criminal proceedings, finality of proceedings is still an important consideration. The Crown submits that all of the fresh evidence existed and was available prior to trial, and that it is not new, fresh or credible.

[22] With respect to the Bachynski Affidavit, the Crown says that the timing of L.A.R.'s visit was raised at trial, and that the accused and other defence witnesses testified that the complainants were in Winnipeg in 1985. The Crown submits that even if the fresh evidence established, which it does not, that L.A.R. was in Winnipeg in 1986, it could not reasonably be expected to affect the result.

[23] With respect to the Kucharczyk Affidavit, the Crown:

(a) concedes that there was no evidence that the accused and Ms Kucharczyk considered marriage; and

(b) points out that Ms Kucharczyk testified at trial that in 1986 she was invited to Geneva for a job interview.

In the Crown's submission, the trial judge's misapprehension concerning Ms Kucharczyk's relationship with the accused was peripheral and not central to his reasoning, and the travel and work documents simply confirm Ms Kucharczyk's evidence at trial that she would not have seen L.A.R. if he came to Winnipeg because she was out of the country after the middle of July in 1986.

Analysis

[24] This Court has recently observed that the admission of fresh evidence on appeal will only be considered in exceptional circumstances and that fresh evidence motions will be granted sparingly (*R. v. Henderson (W.E.)*, 2012 MBCA 93 at para. 29, 284 Man.R. (2d) 164, leave to appeal to S.C.C. dismissed, [2012] S.C.C.A. No. 524 (QL); and *R. v. R.C.H.*, 2013

MBCA 108 at para. 84, 303 Man.R. (2d) 39). In *Henderson*, Chartier J.A. (as he then was) confirmed that the evidence sought to be adduced must be admissible evidence, and if that prerequisite has not been met, there is no need to go further (at para. 26; and see also *Truscott, Re*, 2007 ONCA 575 at para. 92, 226 O.A.C. 200).

[25] In my view, the Bachynski Affidavit is not admissible evidence. The affidavit has numerous deficiencies: paras. 4 and 5 are clearly hearsay, the identity of the persons shown in the photographs has not been proven and the photographs have not been authenticated in any fashion. The admissibility of a photograph depends, *inter alia*, upon whether it accurately reflects the facts and is verified on oath by a person capable of doing so (see *R. v. J.S.C.*, 2013 ABCA 157 at para. 18, 553 A.R. 81). In addition:

1. the source of the deponent’s belief as to the matters set out in paras. 4 and 5 of her affidavit is not identified;

2. the letter dated July 20, 2014, signed by five individuals and forming part of Exhibit “A”, initially provided that “<u>some</u> of the attached photographs were taken … on July 22, 1986” (emphasis added), but someone has altered the date to July 20, 1986. There is no indication as to which photographs were taken on July 20 or 22, 1986;

3. the photographs which accompanied the letter dated July 20, 2014, apparently identify “a boy not from here,” but there is no evidence that the boy is L.A.R.;

4. there is no evidence as to who took the photographs attached to the letter, who found the photographs or when they were found;

5. there is no evidence as to the significance of the page from the Gospel Book, although it may be inferred that "a boy not from here" attended the service on July 20, 1986; and

6. with respect to the photographs which apparently accompanied the accused's emails to his lawyer, there is no evidence as to who is depicted aside from the handwritten notations on the back of the photographs. Moreover, there is no evidence as to who took the photographs, who made the handwritten notations (although the accused's lawyer advised at the hearing that the accused's handwriting appears on the back of some of the photographs) or when the notations were made.

[26] Even if I was persuaded that the content of the Bachynski Affidavit was or could be admissible evidence, I am not at all convinced that it would meet any of the *Palmer* criteria. Appreciating, as I do, that the due diligence requirement is relaxed in criminal cases, it is still a factor to be considered. As the Crown points out, the timing of L.A.R.'s visit was raised at trial, the accused testified that L.A.R. came two or three weeks after L.J.R., and there is no explanation offered as to why the accused could not produce the photographs at trial. In *R. v. Hay*, 2013 SCC 61, [2013] 3 S.C.R. 694, Rothstein J. observed (at para. 64):

> The due diligence criterion exists to ensure finality and order — values essential to the integrity of the criminal process: *R. v.*

> *G.D.B.*, 2000 SCC 22, [2000] 1 S.C.R. 520, at para. 19 (citing *R. v. M. (P.S.)* (1992), 77 C.C.C. (3d) 402 (Ont. C.A.), *per* Doherty J.A., at p. 411). The due diligence requirement calls for an appellate court to consider the reason why the evidence was not presented at trial: *G.D.B.*, at para. 20. However, this Court has recognized that "due diligence is not an essential requirement of the fresh evidence test, particularly in criminal cases" and that the "criterion must yield where its rigid application might lead to a miscarriage of justice" (para. 19). Nonetheless, it is an important factor to be considered in the totality of the circumstances (*ibid.*).

[27] While the proposed evidence may be relevant as it arguably pertains to the credibility of both L.J.R. and Ms Kucharczyk, it was never suggested at trial that the complainants were in Winnipeg in 1986, nor does the fresh evidence establish that L.A.R. was not in Winnipeg in 1985.

[28] As to the requirement that the fresh evidence must be reasonably capable of belief, I have previously observed that it contradicts the accused's own evidence and, as presented, it does not prove that L.A.R. was in Winnipeg in 1986.

[29] And finally, I am not convinced that even if the fresh evidence in the Bachynski Affidavit was believed, that it could reasonably be expected to have affected the result. The accused says that the fresh evidence establishes that L.A.R. was in Winnipeg in 1986 and that this evidence could have affected the trial judge's credibility assessments in relation to L.J.R. and Ms Kucharczyk. As I will explain, even if L.A.R. was in Winnipeg in 1986, I am of the view that that would have no impact on L.J.R.'s credibility.

[30] L.J.R. did not testify that the offence occurred in 1985 or that he was in Winnipeg in 1985 or 1986, and he could not remember the timeframe between his return to London and L.A.R.'s departure for Winnipeg. The trial judge provided extensive reasons to support his finding that L.J.R. was a credible witness, and as he observed, the Supreme Court of Canada has said that when an adult testifies to events that occurred in childhood, inconsistencies on peripheral matters such as time and location should be considered in the context of the age of the witness at the time of the events to which he is testifying (*R. v. W. (R.)*, [1992] 2 S.C.R. 122 at 134-35).

[31] In his ruling at the *voir dire* on the admissibility of similar fact evidence, the trial judge made the following important observation with respect to the time of the commission of the offence:

> The fact that LAR is confused about how long he was in Winnipeg or whether he went first or not as opposed to his brother are factors to weigh in the context that these events occurred when he was a child. They are not material issues in this case for any witness. The school year of the two boys and the fact the accused had moved to Winnipeg creates the time parameters for the alleged sexual assaults with necessary precision.

[32] Moreover, since the time of the commission of the sexual assault is generally not an essential element of the offence, it being a crime no matter when it is committed, there is no need to establish beyond a reasonable doubt the exact time of commission. The information or the indictment can simply be amended as it would not cause irreparable harm to the accused (see *R. v. B. (G.)*, [1990] 2 S.C.R. 3; and *R. v. G.C.* (1996), 144 Nfld. & P.E.I.R. 204 (C.A.)).

[33] Turning to the Kucharczyk Affidavit, while the content of that affidavit is arguably admissible, I am similarly unconvinced that this evidence is sufficiently cogent to potentially affect the verdict (*Truscott* at paras. 92-93). The trial judge was mistaken when he said that “the accused decided not to marry her,” but there was other evidence at trial to support the trial judge’s conclusion that her relationship with the accused undermined the reliability of her evidence. The accused and Ms Kucharczyk met in New York in the fall of 1978, and both acknowledged that they have remained friends since that time. I am, therefore, of the view that the trial judge’s misapprehension of the evidence concerning marriage played an insignificant role in his analysis of her credibility. Irrespective of the nature of their relationship, the material fact remained that they had been close acquaintances for a lengthy period of the time.

Conclusion

[34] The decision to admit fresh evidence is a contextual analysis which requires an assessment of “‘the totality of circumstances and a balancing of factors’ to determine whether it is in the interests of justice to admit the fresh evidence” (*R. v. Smith (J.)* (2001), 154 O.A.C. 51 at para. 71). For the reasons previously articulated, I am not persuaded that it would be in the interests of justice to admit the fresh evidence. Accordingly, the fresh evidence motion is dismissed.

The Conviction Appeal

[35] The accused submits that the trial judge made four principal errors:

1. he misinterpreted the evidence;
2. he held the accused's evidence to a higher degree of scrutiny than the Crown's evidence;
3. he misapplied the test in *R. v. W. (D.)*, [1991] 1 S.C.R. 742; and
4. he shifted the burden onto the accused to provide a motive as to why L.J.R. would lie.

[36] The fourth alleged error can be dealt with summarily. In his reasons, the trial judge stated that:

> L.J.R. was a credible witness. He seemed honest and was believable in his evidence. <u>There is no reason for him to not tell the truth.</u> L.J.R. was also a reliable witness. He was a precise and fair witness. He had a good memory for details, despite the passage of time in material events. I am satisfied that his evidence is accurate on material aspects of this case. He was able to recall and recount key matters in his observations of those events.
>
> . . . . .
>
> <u>L.J.R. has no motive to shade his evidence.</u> He has no financial or other interests at stake. This was a chapter of his life that he closed in 2004 when he got married. But for Father Kostoff contacting him in 2008 to seek forgiveness, these events would never have been exposed. <u>There is no reason why he would not be telling the truth. There is nothing about L.J.R.'s motives which cause me a concern.</u> ….
>
> [emphasis added]

[37] The accused argues that the trial judge placed an unfair expectation on him to provide an explanation as to L.J.R.'s motives and why L.J.R.

would give the testimony which he gave. In so doing, the accused says that the trial judge shifted the burden onto him to explain away the Crown's case.

[38] I am satisfied that the trial judge made no such error. I agree with the Crown's submission that the cases relied upon by the accused refer to situations where the accused (or his/her counsel) was directly called upon to provide a reason why a witness would have lied. It is that act of requiring the accused to explain the actions of another that is inappropriate, not the consideration of whether the evidence suggests a motive on the part of the witness to lie. It is well established that a witness's credibility may be assessed by asking whether he or she had a reason to embellish or fabricate evidence. This does not constitute a reversal of the burden of proof, but is simply part of the assessment of credibility necessary when conflicting evidence must be resolved.

The Parties' Positions on the Remaining Issues

[39] The accused addressed the three remaining issues/alleged errors together, arguing that they were interrelated and should be considered individually and collectively. In the accused's submission, the trial judge took an unbalanced approach: he made numerous findings and inferences that were not supported by the evidence; he subjected the defence evidence to a higher degree of scrutiny than the Crown evidence; where an inference was required, the trial judge favoured the interpretation most favourable to the Crown; and he failed to properly apply the principles in *W. (D.)*.

[40] In its submission, the Crown says that apart from the trial judge's misapprehension concerning the accused's decision not to marry, the trial

judge did not make any palpable and overriding error in relation to his findings of fact or credibility or in relation to inferences which he drew from the evidence. According to the Crown, all of the accused's complaints relate to matters of weight, and a review of the decision reveals that the trial judge accepted and rejected some evidence of both Crown and defence witnesses, that he did not hold the accused's evidence to a higher standard than that of the Crown witnesses, and that he correctly applied the principles in *W. (D.)*.

Standard of Review

[41] The standard of review for findings of fact is well established. An appellate court will only interfere with such findings where there is palpable and overriding error. On issues of credibility, great deference must be shown to the trier of fact given his/her advantage in seeing and hearing the witnesses' evidence (*R. v. W. (R.)*, [1992] 2 S.C.R. 122 at 131-32; *R. v. N.S.*, 2012 SCC 72 at para. 25, [2012] 3 S.C.R. 726; and *R. v. W.H.*, 2013 SCC 22 at paras. 30, 33-34, [2013] 2 S.C.R. 180). This deferential approach was described by Bastarache and Abella JJ. in *R. v. Gagnon*, 2006 SCC 17, [2006] 1 S.C.R. 621 (at para. 10):

> There is general agreement on the test applicable to a review of a finding of credibility by a trial judge: the appeal court must defer to the conclusions of the trial judge unless a palpable or overriding error can be shown. It is not enough that there is a difference of opinion with the trial judge (*Schwartz v. Canada*, [1996] 1 S.C.R. 254, at paras. 32-33; *H.L. v. Canada (Attorney General)*, [2005] 1 S.C.R. 401, 2005 SCC 25, at para. 74). A succinct description of the overall approach appears in *R. v. Burke*, [1996] 1 S.C.R. 474, at para. 4, where this Court stated that "it is only where the Court has considered all of the evidence before the trier of fact and determined that a conviction cannot be reasonably supported by that evidence that the court can . . .

> overturn the trial court's verdict". With respect to the credibility of witnesses, the same standard applies. In *Lavoie v. R.*, [2003] Q.J. No. 1474 (QL), at para. 37, Nuss J.A. of the Quebec Court of Appeal stated that a trial judge's assessment of the credibility of witnesses "will not be disturbed unless it can be demonstrated that he committed a palpable and overriding error" (citing *Housen v. Nikolaisen*, [2002] 2 S.C.R. 235, 2002 SCC 33).

[42] Here the accused says that the trial judge made numerous erroneous findings of fact and credibility. But not all misapprehensions constitute reversible error or necessitate appellate intervention. In *R. v. Lohrer*, 2004 SCC 80, [2004] 3 S.C.R. 732, the Supreme Court of Canada described the test for appellate intervention in the following terms (at para. 2):

> *Morrissey* [(1995), 80 O.A.C. 161], it should be emphasized, describes a stringent standard. The misapprehension of the evidence must go to the substance rather than to the detail. It must be material rather than peripheral to the reasoning of the trial judge. Once those hurdles are surmounted, there is the further hurdle (the test is expressed as conjunctive rather than disjunctive) that the errors thus identified must play an essential part not just in the narrative of the judgment but "in the reasoning process resulting in a conviction".

[43] Further clarification of the *Lohrer* test can be found in *R. v. Sinclair*, 2011 SCC 40, [2011] 3 S.C.R. 3, where LeBel J. reminded appellate courts of the "cautionary rule" applicable to appeals such as the present appeal (at paras. 53-54):

> When reasons are reviewed on appeal, silence should not be taken to mean acceptance (*R. v. O'Brien*, 2011 SCC 29, [2011] 2 S.C.R. 485, at para. 16). <u>In my opinion, for an appellate court to decide to order a new trial on the basis of a miscarriage of justice</u>

> resulting from a misapprehension of the evidence, more is needed than an "apparent" mistake (e.g., an error that the trial judge *may* have committed) in the reasons. A court of appeal should not, in applying the *Lohrer* test, order a new trial unless the trial judge has made a real error; its decision cannot be speculative. The plain language or the thrust of the reasons must disclose an actual mistake. When such errors are in fact committed, appellate courts have no difficulty in explaining why they caused the trial judge's reasoning process to be fatally flawed and where they may be found in the reasons. In such situations, the errors are readily obvious.
>
> In *R. v. C.L.Y.*, 2008 SCC 2, [2008] 1 S.C.R. 5, Abella J. observed that in the oft-cited decision in *R. v. Morrissey* (1995), 97 C.C.C. (3d) 193 (Ont. C.A.), on which the *Lohrer* test is based, Doherty J.A. had rightly "caution[ed] appellate judges not to dissect, parse, or microscopically examine the reasons of a trial judge" (para. 11). With respect, the Court of Appeal's reasoning in the case at bar, which my colleague Fish J. endorses, disregards this cautionary rule. The order for a new trial results from an overly critical reading of the trial judge's reasons and is not faithful to the thrust of her reasoning. ….
>
> [emphasis added]

[44] The accused also submits that the trial judge applied different standards in assessing the credibility of the witnesses. In *R. v. J.S.W.*, 2013 ONCA 593, 311 O.A.C. 80, the Ontario Court of Appeal concluded that it would be an error of law to subject the evidence of the accused to a different and stricter level of scrutiny than that of the Crown.

[45] And finally, where credibility is a central issue and the question is whether the trial judge properly applied the principles articulated in *W. (D.)*, the Supreme Court of Canada in *R. v. R.E.M.*, 2008 SCC 51, [2008] 3 S.C.R. 3, has said that deference is in order and that appellate intervention will be

rare (at paras. 31-32):

> More recently, in *R. v. Dinardo*, [2008] 1 S.C.R. 788, 2008 SCC 24, the Court, *per* Charron J., rejected a formalistic approach. The case turned on credibility. The trial judge's reasons failed to articulate the alternatives to be considered in determining reasonable doubt as set out in *R. v. W. (D.)*, [1991] 1 S.C.R. 742. Charron J. stated that only the substance, not the form, of *W. (D.)* need be captured by the trial judge, then went on to say:
>
>> In a case that turns on credibility, such as this one, the trial judge must direct his or her mind to the decisive question of whether the accused's evidence, considered in the context of the evidence as a whole, raises a reasonable doubt as to his guilt. [para. 23]
>
> Charron J. went on to state that where credibility is a determinative issue, deference is in order and intervention will be rare (para. 26). While the reasons must explain why the evidence raised no reasonable doubt, "there is no general requirement that reasons be so detailed that they allow an appeal court to retry the entire case on appeal. There is no need to prove that the trial judge was alive to and considered all of the evidence, or answer each and every argument of counsel" (para. 30).

Analysis

[46] The accused takes issue with many of the findings and inferences made by the trial judge. By way of example, he submits that the trial judge misapprehended or mischaracterized the evidence in relation to whether the accused testified that he did nothing inappropriate with the children during their separate visits, whether and to what extent K.S.'s visit overlapped with L.J.R.'s visit, whether the accused's answer was nonsensical when he said that the mother took her children to Serbia, whether an un-air conditioned church would be a busy place in the dead of a hot Winnipeg summer,

whether Constable Webb's notes should be believed when she says that Father Kostoff did not read the apology note, whether the note was in fact an apology note, who paid for the boys trips and how they came to be in Winnipeg, and whether the accused was surprised at the mother's reaction/telephone call.

[47] I have reviewed the evidence and submissions in relation to each of the disputed findings and inferences, and with the exception of four "findings" (discussed below), I am not persuaded that the trial judge made any palpable or overriding error, or that he misapprehended, or may have misapprehended, the evidence on a matter of substance. For the most part, the accused's complaints are not about an error or misapprehension of the evidence, but: (a) relate to an interpretation or inference drawn by the trial judge from the evidence or the weight to be ascribed to the evidence; or (b) result from the type of forbidden analysis referred to by Doherty J.A. in *R. v. Morrissey (R.J.)* (1995), 80 O.A.C. 161, namely a dissection, parsing or microscopic examination of the trial judge's reasons. To be clear, to the extent that the trial judge may have misapprehended the evidence, I am of the view that such misapprehensions, considered in isolation and cumulatively, related to detail and were peripheral to his decision to convict the accused. They did not play an essential part and were not a central element in his reasoning process (*Sinclair* at para. 56).

[48] The first finding which merits further comment is the trial judge's finding that the accused decided not to marry Ms Kucharczyk. In direct examination, the accused testified as follows:

> Q Okay. And while there you met someone by the name of Connie Kucharczyk?
>
> A Kucharczyk correctly.
>
> . . . . .
>
> Q And was it at this time that you had to make some decisions about marriage or, or not? About whether you would be getting married or …
>
> A In that first year I had to make a decision because by 1979 it was -- I was expected to be ordained, so I had to decide yes or no.
>
> Q Okay. And your decision of course was no?
>
> A Yes.
>
> Q Realizing that you --
>
> A Yes, it was no.
>
> Q Yeah. And you realized of course you wouldn't be able to get married once you were ordained?
>
> A Yes.

There is no other evidence concerning the accused's decision not to marry, but the evidence quoted provides some indication as to why the trial judge could have reached an erroneous conclusion. While it is clear that the accused did not say that he decided not to marry Ms Kucharczyk, for the reasons previously given, I am of the view that the error was peripheral to the trial judge's reasoning and that deference is owed to his ultimate credibility finding in relation to Ms Kucharczyk.

[49] The second and third findings which require comment were made by the trial judge in his reasons for decision on the Crown's motion to admit similar fact evidence (the similar fact evidence decision).

[50] In the similar fact evidence decision, the trial judge said:

> …. … LAR has limitations as a witness due to his mental health issues, alcoholism and a personality which has some oddities to it.
>
> <u>That said it is obvious that as confused a person as LAR is, he suffered great trauma of a lasting sort due to his visit in Winnipeg in 1985.</u> LJR is a thoughtful, careful witness. LAR was a visceral one. You don't get much detail instead you get few details expressed with sincere emotions. To give one example, when LAR testified he was soft spoken and very uncomfortable in the witness box. When Crown counsel asked LAR about why he was disgusted and uncomfortable being with the accused in Winnipeg, LAR was a different and better witness. He didn't say much about the accused pulling up the foreskin of his penis and asking LAR to, to touch it but watching him and listening to him testify close up, one is struck that the event is a vivid memory to him. He said till this day the thought of the accused walking around naked still bothers him.
>
> [emphasis added]

And later, in the same decision, the trial judge said:

> The evidence of the complainants' mother is important. The idea of LJR and LAR coming to Winnipeg was solely that of the accused. He suggested it to the mother and he arranged for the boys' travels. The mother of LJR and LAR was a single woman of modest means raising three children by herself as her ex-husband was totally out of the family's life. According to the mother the purpose of these trips was for LJR and LAR to be altar boys. ….

> <u>The only evidence before me at present is this was a premeditated plan of the accused to have the boys come to Winnipeg one at a time.</u> LJR and LAR were thus in the most vulnerable of situations: Children alone in a strange place where they knew only one person who had complete control over them. As LJR put it in his evidence, the accused was the priest. Everything what they taught was to obey him. He was an authority figure; he had absolute power over them.
>
> [emphasis added]

[51] The accused asserts that the trial judge should not have concluded that L.A.R. suffered "great trauma of a lasting sort" as a result of his visit to Winnipeg in 1985, nor should he have concluded that there was a premeditated plan.

[52] In response, the Crown says that these comments were made in a ruling following a *voir dire*, the trial judge had the benefit of seeing and hearing L.A.R., and at this point in the proceedings, the trial judge had only the Crown's evidence. It was, therefore, open to the trial judge to reach these conclusions on the basis of the evidence before him.

[53] Having reviewed the trial judge's findings in the context of the evidence and his decision at the *voir dire*, I am satisfied that there was an evidentiary basis for both comments and that the trial judge was entitled to decide on a preliminary basis (i.e., on the basis of the evidence before him "at this stage" and "at present") that L.A.R. had suffered as a result of his visit to Winnipeg and that there was a plan. As the trial judge himself observed in his ruling on the *voir dire*:

> The case is far from over. We are not yet at half-time. One must

> wait till the end of all of the evidence and the submissions of counsel before ultimate fact-finding can begin.

[54] The trial judge's reasons make it clear that the basis for his comment about L.A.R. was his observation of L.A.R.'s demeanour while testifying. Not only does the trial judge preface his statement with the words "it is obvious", but he then describes L.A.R. and the nature of his evidence. L.A.R. was described by the trial judge as a "visceral" witness in contrast to L.J.R. who was a thoughtful, careful witness. Significantly, at this point in the proceedings, the trial judge did not say that there had been an assault on L.A.R., and he ultimately acquitted the accused in relation to the count involving L.A.R.

[55] With respect to the so-called "premeditated plan" to have the boys come to Winnipeg, although the word "premeditated" has a pejorative connotation, I am also satisfied that it was not intended in that sense, but rather in the sense that it was a plan initiated by the accused. The mother testified that the accused did everything in relation to arranging the trips to Winnipeg, and the trial judge was clearly referring to his earlier findings on the basis of the evidence which he had at that time, that the idea of L.J.R. and L.A.R. coming to Winnipeg was solely that of the accused, that he suggested it to the mother and that he arranged for their travel.

[56] The fourth finding which requires some comment relates to an alleged misapprehension of the evidence given by L.J.R. and Father Kostoff. In his reasons for conviction, the trial judge says:

> The evidence of L.J.R. and Father Kostoff is consistent that Father Kostoff did not suggest details of what the accused did. ….

[57] The accused argues that this sentence misstates the evidence because there were discussions between L.J.R. and Father Kostoff. L.J.R. confirmed that he spoke to Father Kostoff concerning what Father Kostoff remembered, and Father Kostoff said that he probably told the complainants what he had been told by their mother. In fact, Father Kostoff's evidence was that their mother told him that the accused had done some terrible, horrible things to her children, but nothing was said about physical contact or about the accused actually touching the boys. (I note parenthetically that there are a number of issues as to the admissibility of this evidence.) According to the accused, evidence of those discussions (and other evidence) should have been given more weight, and all of this evidence should have left the trial judge with a reasonable doubt on the issues of potential collusion or tainting. I do not agree.

[58] The trial judge was clearly aware that discussions had taken place between Father Kostoff and the complainants. In the similar fact evidence decision, he said:

> …. Third, there is Father Kostoff. The evidence is he spoke to the complainants during the original disclosure to him in January 1987 and again later 2008, 2009. All of this defence counsel says raises the chance of collusion, albeit innocently, not as part of some, some deliberate scheme for an ulterior purpose.

And later he noted that he was alive to the risks of cross-pollination and innocent collusion in terms of the credibility of the complainants, and he said that he would instruct himself at the end of the trial on this point, which he did.

[59] At various points in his reasons for conviction the trial judge refers to the discussions among the complainants, their mother and/or Father Kostoff. While L.J.R. acknowledged that he wanted to hear what Father Kostoff remembered, L.J.R. testified that Father Kostoff's main emphasis was about L.J.R. writing a letter to the Orthodox Council. There was no evidence that Father Kostoff suggested details of what the accused did. Once again, this argument rests on a dissection, parsing or microscopic examination of what the trial judge said. The trial judge was aware of the various discussions and the potential for collusion or tainting, but he said that mere discussion did not automatically call into question a witness's evidence. In my view, the trial judge was entitled to conclude on the evidence before him that L.J.R.'s evidence was reliable despite the opportunity for collusion, corroboration or tainting, as well as the passage of almost three decades.

[60] To summarize, I am not persuaded that the trial judge misapprehended the evidence on matters of substance which were material and which played an essential part in his reasoning process. Moreover, it cannot be said that the trial judge applied a different level of scrutiny to the evidence of the accused than he applied to the evidence of the Crown, or that he applied different standards when assessing the credibility of the witnesses. A review of his reasons confirms that he carefully assessed the credibility and reliability of each witness and that he accepted evidence presented by both Crown and defence witnesses.

[61] The accused also argues that the trial judge failed to properly apply the principles in *W. (D.)* and that the cumulative effect of the numerous misapprehensions was to improperly shift the burden of proof from the Crown. Similar arguments were made in *R. v. Rhodes*, 2011 MBCA 98. In that decision, this Court said (at paras. 3, 5):

> The accused raised three grounds of appeal, one of which was that the trial judge erred in failing to properly apply the principles articulated by the Supreme Court of Canada in *R. v. W.(D.)*, [1991] 1 S.C.R. 742. The purpose of these principles is to ensure that the Crown’s burden of proof beyond a reasonable doubt is properly applied in cases where the verdict turns on credibility, which in turn gives confidence in a criminal conviction.
>
> This was a credibility case. As we recently stated in *R. v. W.R.B.*, 2011 MBCA 17, in such cases, an appellate court will review the reasons to satisfy itself that the trial judge did not err by allowing the burden to shift away from the Crown simply because the accused was not believed (described by Binnie J. in *R. v. J.H.S.*, 2008 SCC 30 at para. 9, [2008] 2 S.C.R. 152, as the "‘credibility contest’ error"). As was explained in *J.H.S.*, "[t]he main point is that lack of credibility on the part of the accused does not equate to proof of his or her guilt beyond a reasonable doubt" (at para. 13).

[62] In his reasons for conviction, the trial judge observed:

> … [I]t is trite but important to remember that the accused enjoys the presumption of innocence throughout the trial process. The burden of proof never shifts to the accused. It lies, always, with the Crown. The accused before me has no onus to prove anything. It is only if I’m satisfied beyond a reasonable doubt on the evidence I heard in this trial of each of the elements of the offence of sexual assault, that I can find the accused guilty of sexual assault. I must also be careful to consider the admissible evidence in relation to each count separately, and return a verdict for each count, based on an individual assessment of the relevant admissible evidence to that count.

And later, the trial judge specifically refers to *W. (D.)* and the principles referred to in that decision, and he comments:

> As is the case with any witness, assessing the credibility of an accused is a contextual exercise. The accused's evidence must not be viewed in isolation, but in light of the totality of the evidence. Both internal and external consistencies and inconsistencies must be identified and weighed. What is important to always keep in mind is whether, on all the evidence, I am left with reasonable doubt as to the guilt of the accused on either of the two counts on the indictment.

[63] After reviewing the evidence, the trial judge concluded that he did not believe the accused and was not left in reasonable doubt by the accused's testimony. He provided extensive reasons for those conclusions. He then considered whether, on the evidence which he did accept, he was convinced beyond a reasonable doubt by that evidence of the accused's guilt.

[64] A review of the lengthy reasons in this case does not lead me to believe that the trial judge improperly applied *W. (D.)* or the principle of reasonable doubt, nor did he shift the burden of proof from the Crown to the accused. The trial judge clearly applied the substance of *W. (D.)* and turned his mind "to the decisive question of whether the accused's evidence, considered in the context of the evidence as a whole, raises a reasonable doubt as to his guilt" (*R. v. Dinardo*, 2008 SCC 24 at para. 23, [2008] 1 S.C.R. 788). The trial judge's treatment of the count involving L.A.R. further demonstrates his rigorous application of these principles.

[65] As was the case in *R. v. W.R.B.*, 2011 MBCA 17 at para. 5, the reasons demonstrate that the trial judge respected the substance of the

W. (D.) analysis, did not shift the burden of proof and correctly applied the principle of reasonable doubt in the context of his credibility assessment.

[66] For all of these reasons, I would dismiss the conviction appeal.

Sentence Appeal

[67] The accused argues that the trial judge erred in concluding that this was a case where grooming had been proven, that there was no evidence of genuine remorse, and that he had not suffered inordinately. In his submission, the trial judge placed too much weight on the psychological damage suffered by L.J.R., he should have imposed a conditional sentence, and the sentence imposed was harsh and excessive.

[68] In my view, it was open to the trial judge on the evidence before him to conclude that there had been grooming and that there was a lack of remorse. In his reasons for sentence the trial judge accepted that there had been some negative impact on the accused, and the weighing of factors such as the psychological impact on L.J.R. was a discretionary matter for the trial judge. Finally, I am satisfied that an eight month period of incarceration was within the appropriate range.

[69] The accused has not demonstrated that the sentence was demonstrably unfit or clearly unreasonable or that it was arrived at as a result of an error in principle. As the sentence appeal has no realistic chance of success, leave to appeal is denied. See *R. v. Gill*, 2010 MBCA 92.

Conclusion

[70] I would dismiss the motion to adduce fresh evidence and the conviction appeal, and I would deny leave to appeal sentence.

________________________________ J.A.

I agree: ________________________________ J.A.

I agree: ________________________________ J.A.