

IN THE COURT OF APPEAL OF MANITOBA

Coram: Mr. Justice Marc M. Monnin
Mr. Justice James G. Edmond
Madam Justice Anne M. E. Turner

BETWEEN:

<i>HIS MAJESTY THE KING</i>	)	<i>A. R. Hodge and</i>
	)	<i>S. Bednarz</i>
<i>Respondent</i>	)	<i>for the Appellant</i>
	)	
	)	<i>A. C. Smith</i>
<i>- and -</i>	)	<i>for the Respondent</i>
	)	
	)	<i>Appeal heard:</i>
<i>ROBAIL TEKULU HINSEAB</i>	)	<i>April 27, 2026</i>
	)	
<i>(Accused) Appellant</i>	)	<i>Judgment delivered:</i>
	)	<i>August 20, 2026</i>

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

TURNER JA

Introduction

[1] The accused appeals his convictions for sexual interference, invitation to sexual touching and forcible confinement after a trial in Provincial Court (see sections 151, 152 and 279(2), respectively, of the *Criminal Code*, RSC 1985, c C-46 [the *Code*]).

[2] The accused's main argument on appeal is that the trial judge misapplied the rule in *Browne v Dunn* (1893), [1894] 6 R 67, 1893 CanLII 65 (UKHL) [*Browne v Dunn*] (the rule), by failing to draw an adverse inference with respect to the evidence of a Crown witness. The accused acknowledges that the circumstances of this case do not involve a strict application of the rule. However, he asserts that similar principles of trial fairness are engaged.

[3] The accused also asserts that the trial judge erred by (i) shifting the burden of proof to the accused; (ii) applying a stricter standard of scrutiny to the defence witness than to the Crown witnesses; and (iii) misapprehending the evidence.

[4] For the reasons that follow, I would dismiss the appeal.

The Trial

[5] The trial proceeded over four days in Provincial Court. The Crown called three witnesses: the victim, her younger brother (T.T.) and her mother (Z.T.). The accused called one witness: his younger sister (H.H.).

The Victim's Evidence

[6] The accused and the victim lived in the same apartment building with their respective families. Both were from the same ethnic community and their families were friends. The victim and H.H. were close in age and spent considerable time together, so the victim saw the accused regularly.

[7] The victim's evidence was received, in part, through a video-recorded police statement that was made when she was fourteen years old and admitted under section 715.1 of the *Code* (the video statement). She was

seventeen years old when she testified at trial. She testified the incidents were “a blur”.

[8] In the video statement, the victim could not recall the first time the accused touched her inappropriately, but she believed she was approximately nine years old. She spoke about several incidents of sexual touching over many years but said that there were too many to remember them all.

[9] When asked by police about incidents she specifically recalled, the victim described numerous sexual interactions that occurred between the time she was approximately nine and fourteen years old. The accused was between approximately twenty-six and thirty-one years old.

[10] The victim first described an incident when she was nine or ten years old. When H.H. left the room, the accused hugged the victim, who was sitting on his lap, and “moved her around on his penis”. She thought that they were playing. He then told her to go home and change her pants because there was something wet on them.

[11] When the victim was eleven years old, she visited H.H. at her apartment while their mothers were at a church service. The girls fell asleep in the mother’s bedroom. The victim awoke to the accused rubbing himself against her back. She turned around and said “stop.” He tried to get under her clothes and told her to be quiet. He touched her chest, buttocks and vagina. The victim tried to wake H.H. up but was unsuccessful before the accused left the room.

[12] When the victim was eleven years old and at the accused’s apartment, he picked her up, took her to his bedroom, put her on the bed and

locked the door. She called out for H.H., who was banging on the door. The victim said that the accused touched her “everywhere”, including her breasts, thighs and buttocks. He attempted to touch her vagina but she kicked his hands away.

[13] The victim described an incident when she was twelve years old and alone in a car with the accused. He asked if he could kiss her on the cheek. Despite her saying no, he grabbed her chin and kissed her cheek anyway. He asked for another kiss and the victim again said no. He grabbed her chin and kissed her on the cheek again, then on the lips and tried to put his tongue in her mouth. When H.H. approached the vehicle, he stopped.

[14] When the victim was twelve years old, she was at a park with the accused. While he was sitting on the ground behind her, he touched her chest and remarked that she was wearing a bra.

[15] The victim described an incident that occurred at a neighbour’s apartment when she was approximately fourteen years old. Her recollection was that this incident “was the last thing [the accused] did, [she was] pretty sure. Or the second last thing he did.”

[16] T.T. was ten years old at the time and was at a neighbour’s apartment playing video games. The accused was also at the apartment. The victim went to tell T.T. that Z.T. said he needed to go home to do his homework. T.T. asked for time to finish his game.

[17] The victim sat in one of the bedrooms while she waited for T.T. The accused came into the bedroom and asked the victim to look at something on his phone and pulled her close to him. He said that he had a “little problem

down [there]” and said if she helped him, he would buy her a dress. She protested, but he took her by the arm and made her touch his penis over his clothing. The accused pulled the victim on to his lap and made her “move on his lap”. He rubbed his penis against her. At one point, he tried to take his penis out from the bottom of his shorts. The victim described the accused’s penis as “hard” before seeing “white stuff” or a “white substance” come out of his penis and on his hand when he was done.

[18] During this time, T.T. was in the living room of the apartment playing video games on the television. When the accused went to the bathroom, the victim left the apartment.

[19] The victim testified that she thought that this incident at the neighbour’s apartment was the last time she saw the accused.

[20] The victim also described an incident on the way to and at a beach when she was fourteen years old, the summer just before providing the video statement. On the drive to the beach, the accused put his hand under the victim’s thigh and tried to touch her buttocks. She asked H.H. to tell him to stop, which she did. T.T. also told him to stop.

[21] Later that day, while they were in the water at the beach, the victim said that the accused came up behind her and “[put her] on his penis.” She threatened to shout at one point, and at another told him that people would be able to see him, but he said that they were under the water and no one would see. The victim also thought that perhaps this could have been the last time she saw the accused.

[22] At an unspecified date, the victim told friends, including a classmate (the classmate), what had been happening with the accused. The classmate subsequently told the victim's mother, Z.T. As described further below, Z.T. confronted the victim and subsequently confronted the accused. When Z.T. asked the victim why she did not tell her sooner, the victim said that she thought the accused would stop.

T.T.'s Evidence

[23] T.T. provided a statement to the police when he was ten years old. His evidence was admitted through his video police statement (pursuant to section 715.1 of the *Code*) and *viva voce* testimony at trial.

[24] In his video statement, T.T. said that he understood he was there to talk about the victim and the accused, who he saw touching the victim while they were in the car or in the field. He said: "[The accused] would touch like everywhere. Like I don't want to say it, but a lot of private stuff."

[25] T.T. went on to describe that he saw the accused touch the victim's "bum", "boobs" and "where you pee from" more than once.

[26] He remembered a particular incident from the summer prior to his video statement when he was in the car with the accused, H.H. and the victim going to McDonald's and the beach. He said that the accused touched the victim "over [where she peed from], her bum [and] her boobs" while he was driving. He described that H.H. told the accused to stop but the accused did not listen. On cross-examination, he agreed that from where he was sitting in the backseat, he could not see the accused touch in the area of the victim's lap.

[27] T.T. described a time when the accused got them food at KFC and they went to eat at a field. During that time, he saw the accused touch the victim, “he would touch her. Like her boobs, bum, [where she peed] and stuff.”

[28] On cross-examination, T.T. agreed that he never saw the accused touch the victim at his family’s apartment, at the accused’s apartment or any other apartment in their building. He also agreed that there was never a situation when the accused and the victim were in a bedroom and where the victim yelled out for T.T. to help her, or a situation when he, the accused and the victim were at a neighbour’s apartment and the accused and the victim went to a bedroom. However, T.T. did testify that he had played video games at the neighbour’s apartment.

Z.T.’s Evidence

[29] Z.T. testified that she had a close relationship with the accused’s family, particularly his mother, as they would attend church together. The victim and H.H. were close, often spending time together at church and at each other’s apartments. Prior to July 2021, Z.T. did not have any concerns or suspicions about the accused.

[30] In July 2021, the classmate told Z.T. about the allegations that the accused had been assaulting the victim. The next day, Z.T. spoke to the victim, who said she blamed herself for not disclosing sooner. Z.T. went through the victim’s phone and took screenshots of several text messages between the victim and the accused from May and June 2021. As detailed further below, the screenshots were provided to the police and were filed as exhibits at trial.

[31] Three days after the disclosure, Z.T. called five members of her church, including the church pastor, to organize a meeting for the following morning. She did not initially tell them why she wanted the meeting. She just told them that she needed help.

[32] Four of the church members went to Z.T.'s apartment the next morning, as well as the accused's mother and brother (the fifth church member arrived late). They all went to the apartment where the accused was staying (the first meeting). Z.T. confronted the accused and said that she knew he had been abusing the victim for the last three years. The accused initially denied the allegations.

[33] Z.T. told the accused that she had text messages he sent to the victim and that she was going to go to the police. The accused then bent down, cried and said he was sorry that "[y]es" he had "done that".

[34] In direct examination, Z.T. testified about a meeting the following day (the second meeting). This was the first time Z.T. disclosed information regarding the second meeting. On cross-examination, Z.T. testified that she did not tell the police everything. She said, "[she] didn't done everything because [she] was emotional. [She] was crying. Yes, [she] didn't do -- [she] didn't say everything." She also explained that she had trouble during her statement because English is not her first language and she did not have an interpreter.

[35] During the second meeting, the church's pastor met with the accused, the victim and Z.T. Z.T. recounted that the pastor said:

Yes, you done that to you but as -- as the Bible said, we have to forgive. So do you -- are you willing to forgive [the accused], he said to her. She said to him -- and then [the accused], he said to her -- he said to her how sorry. He's bending his knee. But [the victim], she said, Never. I will not forgive him, she said.

[36] Counsel for the accused cross-examined Z.T. extensively about the second meeting:

Q . . . on the break I reviewed your statement because I had never heard that before. You didn't tell --

A That --

Q You didn't tell the police about this.

A Yeah, but that is the truth, yeah.

Q Okay. But you didn't tell the police about that, correct?

A I didn't say everything because I told you I was emotional, I was crying. I don't have enough English that time. So, yes, I did -- I talked to them what I can --

Q Yes.

A -- but I remember everything. I will never out from my brain. Yes, that is the truth. Yes, I didn't say that, yes.

Q Okay.

A I didn't say in the video too, I didn't, yes.

Q Yeah. But you agree that you didn't tell the police that he had a meeting with [the victim] and the pastor where he apologized.

A Okay, no.

Q You didn't tell the police, right?

A No.

. . .

Q Yeah.

A So but I didn't say that. Maybe it was too much for me. I was emotional. Yeah, that's it. Okay. Yes.

Q I'm going to suggest -- sorry, didn't mean to interrupt you. I'm going to suggest to you, ma'am, that you didn't tell the police that that -- about that meeting with [the accused] and [the victim] because that meeting never happened.

A Never happened?

Q Never happened.

A It happened.

Q Okay. And then you said --

THE COURT: She was just -- she was about to say something.

[COUNSEL FOR THE ACCUSED]: Oh, I apologize.

A It just happen. I have witness, the pastor. I'm not only one was with [the accused].

Q Yeah.

A I have witness. It has happened. I was -- I'm the one see by my eye. I see by my ear, I hear. So I am the one with that time. So and then I have witness too.

Q Okay. So the pastor is a witness, right?

A Yes.

Q But [the victim] was also a witness because she was there, right?

A Yes, she was there, yeah.

Q Yeah. So she could tell the Court that that happened, as well, correct?

A Yes. She can --

The Text Messages

[37] As noted above, screenshots of several text messages between the accused and the victim were provided to the police and filed at trial.

[38] The text messages show the accused reaching out to the victim several times and persistently asking the victim to meet with him. When the

victim ignored the accused or refused to meet with him, the accused would ask why. Some of the text messages are unclear; however, others clearly show the accused telling the victim that he misses her, he needs her and he loves her.

[39] At one point, the victim raised the issue of age, pointing out that she was fourteen years old and he was over eighteen years old. The accused responded, in part, that he was not going to “do sex”.

[40] In another exchange of text messages, the victim confronted the accused about kissing her when she was twelve years old. Although at first the accused claimed not to remember, he then acknowledged it and wrote: “That’s was my first kiss and I don’t want u feel bad”.

H.H. ’s Evidence

[41] H.H. was the only witness called by the defence.

[42] H.H. testified that she and the victim were childhood friends. At the time of the trial, they were no longer friends and had not spoken for two or three years. Their friendship ended when H.H. heard about the allegations against the accused.

[43] H.H. stated that she never saw the accused touch the victim inappropriately and she denied that the victim ever told her about the assaults.

[44] H.H. remembered that she, the accused, the victim and T.T. went to a beach in the summer of 2021. They joined a group of other families who were at the beach as well. She testified that the accused drove them there and back in his vehicle, and that there were no issues during the drives.

Specifically, she testified that the accused did not touch the victim and that neither she nor T.T. told the accused to stop touching the victim during the drives. She was certain that the accused and the victim were never alone in his vehicle.

[45] H.H. agreed that at some point the accused joined everyone in the water but that the accused and the victim were never in the water together alone.

[46] In cross-examination, it was put to H.H. that, during her four-to-six-year friendship with the victim, there were times when the victim could have been alone with the accused. H.H. was certain that that was not the case. She testified that there was never a time when she left the room, for example to go to the washroom, and left the accused alone with the victim. If the three of them were together, they did everything and went everywhere together.

Closing Submissions

[47] In closing submissions, counsel for the accused argued that H.H.'s evidence should be believed or that it should raise a reasonable doubt as to the accused's guilt. Given H.H.'s evidence, the victim's version of events could not be true and was fabricated.

[48] Counsel for the accused heavily criticized Z.T.'s evidence, particularly regarding the second meeting and the fact that she had not mentioned it to the police in her statement. He argued that Z.T.'s evidence regarding the second meeting was untrue and highlighted that the first time she mentioned it was in her direct testimony. As a result of this late disclosure, he could not have cross-examined the victim on the point. In addition, he

noted that there was a lack of corroborating evidence regarding the first meeting or the second meeting. Specifically, he argued:

So when it comes to [Z.T.] in particular, [Z.T.] gave evidence about this meeting with [the victim] and a pastor and [the accused], where [the accused] was supposed to have apologized directly to [the victim]. She doesn't tell that to the police. She doesn't talk to the police about that meeting. And [the victim] doesn't confirm that that happened. [The victim] doesn't say it happened.

...

[Z.T.] never told the police that. [The victim] doesn't say that that happened. And I'm suggesting that that's simply made up. And I didn't cross-examine [the victim] on it because she didn't give it to the police, so I -- I didn't even know that she was going to say that, and she confirmed that she didn't tell that to the police. But I think the Court can find that because [the victim], not only does she not say that it happened, but she specifically tells the police, [t]he last time I saw him was at the beach, the Court can, I would say, safely come to the conclusion that that meeting with [the victim] and [the accused] and a pastor did not happen.

And so if [Z.T.] is making up the story to try to oath help [the victim], or assist the credibility of [the victim], then I think the Court should be troubled with -- with what exactly the exchange was the day before with these four church members, [the accused], and his family. And I would submit that the Court probably can't put a lot of weight on -- on this admission because this admission happen[ed] in front of other witnesses, and we [didn't] hear from them. And it's coming from a witness who, I would submit, has made up a completely separate apology, that there's no other evidence even occurred.

[49] In response, the Crown argued that Z.T.'s evidence was honest, forthright and consistent with the victim's evidence. It urged the Court to accept that the accused admitted that he had assaulted the victim when he apologized at the first meeting and the second meeting.

The Trial Decision

[50] The trial judge conducted a lengthy review of the evidence. Ultimately, she disbelieved H.H.'s evidence for a number of reasons and accepted the evidence presented by the Crown. In particular, she found that the victim's evidence as to the core of the allegations against the accused was credible and reliable. As a result, she convicted the accused on all counts.

The Rule in *Browne v Dunn*

[51] The accused acknowledges that this case does not involve a traditional argument regarding the rule. He relies on the rule's underlying principle of trial fairness.

[52] The intent of the rule is well-established and was concisely explained in *R v Dowd*, 2020 MBCA 23 at para 5:

To ensure credibility assessments are made as a result of a fair and orderly trial process, the rule requires that, where a party intends to later impeach a witness on a matter of significance to the facts in issue by contradictory evidence or in closing argument, the witness must be confronted with the contrary position during cross-examination so that he or she may have the opportunity of responding to it.

[53] This is not a case in which counsel failed to confront a witness with a material allegation or an inconsistent version of events and then sought to have the witness' evidence rejected on that basis. Rather, the accused argues that the underlying rationales for the rule—trial fairness and the avoidance of trial by ambush—apply in the present case, particularly in relation to Z.T.'s evidence about the second meeting.

[54] There is no dispute that in the context of the police investigation and the criminal proceedings, the first time Z.T. spoke of the second meeting was during her direct examination at trial. The accused argues that the Crown should not benefit from this late and unexpected disclosure. In addition, he submits the disclosure resulted in the accused being unable to explore the issue of the second meeting in depth.

[55] With respect to reference to “disclosure,” it is important to distinguish this case from one involving a failure by the Crown to disclose known evidence to the defence. The evidence regarding the second meeting was not known to either party in advance. Instead, it arose unexpectedly during Z.T.’s testimony.

[56] As the excerpt from Z.T.’s cross-examination reproduced above demonstrates, defence counsel thoroughly questioned her about the second meeting. Counsel was not deprived of the opportunity to challenge her evidence, nor was he prevented from arguing that her testimony was incredible and unreliable.

[57] The accused’s trial fairness argument focuses on whether the accused was denied an opportunity to question the victim about the second meeting. This issue arose because Z.T. testified after the victim. As a result, neither the Crown nor defence counsel was aware of the second meeting when the victim testified. In these circumstances, it is necessary from a trial fairness perspective to consider whether there was any impediment to recalling the victim to testify about the second meeting.

[58] In *Regina v Cook* (1960), 127 CCC 287, 1960 CanLII 449 (Alta SC(AD)) [*Cook*], the Court was asked to overturn a conviction on the basis

that the accused had been denied permission to call a witness that had previously testified for the Crown. The majority held that the absolute right of the defence to call witnesses is in accordance with the principle of the accused having the right to make full answer and defence. Justice Johnson noted (*ibid* at 298):

Neither the Crown, nor the accused for that matter, have a proprietary interest in any witness called. Once he has been sworn, examined, cross-examined, re-examined, and then excused, as was the case here, there would appear to be no reason why he could not be called for the defence.

[59] While *Cook* is a dated decision, it has been cited with approval more recently. In *R v Crosby* (1994), 88 CCC (3d) 353 at 377, 1994 CanLII 7592 (NSCA), Pugsley JA wrote:

There is no doubt that counsel for the [accused] could have called the complainant as his own witness, and if circumstances were present, sought to have her declared as a hostile witness: *R v. Cook* (1960), 127 C.C.C. 287, 33.C.R. 126, 31 W.W.R. 148 (Alta. S.C.).

[60] *Cook* was considered in the summary conviction appeal decision of *R v Baiton*, 2001 SKQB 264 [*Baiton*]. At trial, the defence sought to recall the complainant in an assault case in order to tender a document that had not been discussed during the complainant's direct examination or cross-examination. The trial judge refused defence counsel's request, saying to do so "go(es) against all principles" (*ibid* at para 2). On appeal, the Court found (*ibid* at para 3):

In my respectful opinion, the learned trial judge erred in his refusal to allow the complainant to be recalled as a defence witness. Although situations where the defence seeks to recall a Crown witness as their own witness are rare, it is clear from the relevant

authorities that an accused has an absolute right to call any witness as a part of their own case, to make full answer and defence, pursuant to s. 802 of [the *Code*]. This right encompasses the calling of a witness previously called by the Crown and cross-examined by the defence: See *R v. Cook*, (1960), 31 W.W.R. 148 (Alta. S.C.A.D.).

[61] In *Sutton v R*, 2002 NBQB 49 at 2, Turnbull J wrote:

I am of the opinion that judges do have discretion on issuing order compelling attendance before their Court, but not in the instance where defence counsel wishes to call a witness who has previously testified for the Crown to be called again to testify as part of the case for the defence.

The authority for this is **R. v. Cook** (1960), 127 C.C.C. 287.

[62] Most recently, *Cook* was considered in *R v Despins*, 2025 ABKB 444, where the Court was being asked to quash subpoenas issued by the accused for several police officers. Justice Whitling wrote (*ibid* at paras 10-12):

Of course, the accused's right to call evidence is not absolute. The right does not extend to calling irrelevant evidence. It is also limited by the rules respecting sexual history evidence, hearsay, privilege, and opinion. And where a witness is not otherwise willing to testify, an accused's right to compel the attendance of a witness is limited by the requirements of s. 698.

But there is no such limitation in respect of witnesses who have previously been called as part of the Crown's case and previously cross-examined by the accused. The leading case on this subject is ***R v Cook*** (1960), 127 CCC 287 (ASCAD), where the Court of Appeal (3-2) overturned a murder conviction on the basis that the accused had been denied permission to call a witness that had previously been called by the Crown.

...

Cook is now 65 years old, and it has been considered in relatively few cases over that time. On the other hand, its rationale has been strengthened by the enactment of ss. 7 and 11(d) of the *Charter*, and it continues to be cited in the annotations contained in Canada's leading secondary authorities on criminal law and procedure. As stated in M. Heinen and M. Gurlay, Martin's *Annual Criminal Code* 2025, s. 650: "The accused has an absolute right to call any Crown witness who has previously testified and been cross-examined by him, as a defence witness."

[63] In the case at bar, if counsel for the accused wanted to question the victim regarding the second meeting, there was no legal or procedural impediment that stopped him from calling her as a witness. While there may have been limitations on the way questions could be phrased on a direct examination, there were options available to the accused if the circumstances warranted, such as asking that she be declared a hostile witness.

[64] In my view, what occurred at trial was a deliberate strategic decision by the defence to attack Z.T.'s credibility, rather than requesting that the victim be recalled, which may have given her the opportunity to address the second meeting.

[65] Criminal trials are dynamic and it is often necessary to change strategies in real time. As stated in *R v Rose (AW)* (1993), 88 Man R (2d) 135, 1993 CanLII 15010 (MBCA): "Counsel must always be ready to change tactics on the basis of changed circumstances" (at para 6).

[66] This Court made similar comments in *R v Desjarlais (DG)*, 2016 MBCA 69 at paras 18 and 24, in the context of a case where the Crown had sought to recall a complainant at trial:

A criminal proceeding is a dynamic process. No two trials are the same. Sometimes a witness does not testify as expected, which sometimes requires counsel to change tactics. Such are the vagaries of trials. Appellate courts must consider the context of how the trial developed when reviewing the manner in which a trial judge decided to conduct it (see *R v Rockey*, [1996] 3 SCR 829).

. . . Trials are fluid and counsel are expected to deal with matters that may not have been anticipated.

[67] Z.T.'s evidence was certainly unanticipated by both the Crown and the accused. There was no obligation on the Crown, however, to recall the victim, as it has prosecutorial discretion, absent malice or an oblique motive, as to how it presents its case.

[68] As for the defence, there was no injustice or unfairness to the accused when he had the right to recall the victim and strategically chose not to do so. Defence counsel was in the best position to assess the potential risks and rewards of recalling the victim. I can well understand why the decision not to recall her was made—it allowed defence counsel to argue, as set out above, that Z.T.'s evidence regarding the second meeting was untrue and was fabricated to bolster the victim's credibility. Moreover, had defence counsel elected to recall the victim regarding the second meeting, he may well have risked violating the classic trial rule: never ask a question to which you do not already know the answer.

[69] In summary, in the circumstances of this case, the trial fairness concerns and risk of trial by ambush that underlie the rule are not engaged. The evidence concerning the second meeting was not withheld from the defence; it arose unexpectedly during the trial. Defence counsel had a full

opportunity to cross-examine Z.T. regarding that evidence and was not legally prevented from recalling the victim if further inquiry was considered necessary. Having elected instead to attack Z.T.'s credibility, the accused cannot now claim that he was deprived of a fair opportunity to address the issue. Accordingly, this ground of appeal must fail.

The Burden of Proof, Uneven Scrutiny and Misapprehension of Evidence

[70] The remaining grounds of appeal present similar arguments and can be dealt with together.

[71] The accused argues that the trial judge misapplied the test set out in *R v W(D)*, [1991] 1 SCR 742, 1991 CanLII 93 (SCC) [*W(D)*], and applied a different level of scrutiny to H.H.'s evidence in comparison to the scrutiny she applied to the evidence presented by the Crown. In addition, he says that the trial judge misapprehended evidence by failing to adequately consider material inconsistencies.

[72] To establish that a trial judge unevenly scrutinized evidence, the accused must point to something significant in the reasons or the record demonstrating that the trial judge adopted a flawed methodology in assessing credibility (see *R v Buboire*, 2024 MBCA 7 at para 13 [*Buboire*]; *R v CAM*, 2017 MBCA 70 at para 34). Appellate intervention is only warranted where the trial judge's credibility assessment cannot be supported on any reasonable view of the evidence (see *Buboire* at para 13). As the Supreme Court of Canada explained in *R v GF*, 2021 SCC 20, "the focus must always be on whether there is reversible error in the trial judge's credibility findings" (at para 100).

[73] A misapprehension of evidence may consist of a mistake as to the substance of the evidence, a failure to consider evidence relevant to a material issue, or a failure to give proper effect to the evidence (see *R v Whiteway (BDT) et al*, 2015 MBCA 24 at para 32; *R v Sinclair*, 2011 SCC 40 at para 13). To constitute a reviewable error, the misapprehension must relate to the substance of the evidence, not a mere detail; it must be material to the trial judge's reasoning; and it must play an essential role in the reasoning process that resulted in the conviction (see *R v Lohrer*, 2004 SCC 80 at para 2).

[74] The trial judge clearly articulated why she had concerns regarding H.H.'s testimony. She found aspects of H.H.'s evidence to be illogical, incredible and rehearsed. She grounded her findings, in part, in the fact that H.H. denied any possibility that the victim and the accused were ever alone together over the course of many years.

[75] The trial judge clearly appreciated the principles enunciated in *W(D)*, when she said:

[H.H.]'s testimony considered as a whole and with regard for the entire record raised a real concern for the court about a motive to fabricate her evidence to benefit her brother. Her absolute certainty in nonsensical circumstances and repeated refusal to make plainly reasonable concessions raised a significant credibility concern. I do not believe [H.H.] that she did not witness certain events alleged by [the victim]. Her denials were not credible. For the same reasons, her evidence did not leave the court in reasonable doubt about the accused's guilt.

[76] After a review of H.H.'s evidence, the trial judge turned to consider the evidence presented by the Crown and whether it proved the accused's guilt beyond a reasonable doubt.

[77] The trial judge carefully reviewed the arguments raised by the accused regarding inconsistencies in the victim's evidence and T.T.'s evidence. She thoroughly assessed the evidence of each incident described. In conclusion, she stated:

While I have considered all the inconsistencies identified between the [victim] and [T.T.'s] evidence, after assessing their evidence as whole and in context, the inconsistencies identified did not substantially undermine the credibility of the [victim]'s core allegation.

[78] In assessing Z.T.'s evidence, the trial judge considered the accused's submission that her evidence was unreliable because she failed to reference the second meeting in her police statement. The trial judge accepted Z.T.'s explanation that she was emotional when speaking to police and had trouble communicating in English, which accounted for the omission. Having accepted those explanations, the trial judge found no basis to reject Z.T.'s evidence, concluding that she "presented as a concerned mother" and that there was "no credible basis to infer a motive to fabricate" her account.

[79] After a thorough review of all the evidence, the trial judge concluded:

In the final analysis, while I have considered all of the issues raised by defence with respect to the [victim]'s evidence, after assessing it as a whole and in the context of the entire record, I found her evidence credible . . . In the end, I believed the [victim]. Her evidence convinces the court to the high threshold of beyond a reasonable doubt of the accused's guilt.

[80] I am not persuaded that the accused has established that the trial judge unevenly scrutinized or misapprehended the evidence. She identified

and considered the frailties in the evidence of each witness. She gave clear and cogent reasons for rejecting H.H.'s evidence and accepting the evidence presented by the Crown.

[81] I do not see anything in her reasons that shows she took an uneven approach in her assessment of the credibility of the witnesses. In addition, it is clear from her reasons that she did not shift the burden of proof to the accused—she found that she believed the victim's evidence as to the core of the allegations and that the evidence satisfied her of the accused's guilt beyond a reasonable doubt.

[82] I see no reversible error in the trial judge's approach. The accused's submissions invite this Court to re-weigh the evidence and reach a different conclusion. That is not the role of an appellate court absent a palpable and overriding error, which has not been established in this case.

Disposition

[83] For the above-noted reasons, I would dismiss the appeal.

Turner JA

I agree: _____
Monnin JA

I agree: _____
Edmond JA