Criminal Case Law Review

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Supreme Court of Canada Criminal Cases:

Section 1.0 | Charter

R v Reeves, 2018 SCC 56 (Docket 37676)

- Crown (Respondent) | Reeves (Appellant)
- Heard: May 17, 2018
- Judgment: December 13, 2018
- Heard by: (Majority) Karakatsanis J (Wagner CJ and Abella, Gascon, Brown, Rowe and Martin JJ concurring)
- Concurring Reasons: Moldaver J
- Concurring Reasons: Côté J
- Dissenting: N/A
- From: Court of Appeal of Ontario
- By: Leave to appeal
- Result: Appeal allowed. Acquittal restored

Themes: Search and seizure, reasonable expectation of privacy, Digital devices; exclusion of evidence.

Summary: Reeves' spouse contacted police after she and her daughters discovered what they believed to be child porn on the family computer. The attending officer did not have a warrant, but the spouse consented to police entry into the home and to seizure of the computer. Reeves argued improper seizure under s 8 and sought exclusion of the evidence on the computer under s 24(2). The trial judge excluded the evidence and entered an acquittal. The Court of Appeal admitted the evidence and ordered a new trial.

Held: Appeal allowed. Acquittal restored.

Per Karakatsanis J (Wagner CJ and Abella, Gascon, Brown, Rowe and Martin JJ concurring): Reeves maintained a reasonable expectation of privacy in the computer, and this was not nullified by his wife's consent. The warrantless search and seizure of the computer were therefore unreasonable. Application of the 24(2) test favours exclusion of the related evidence.

Per Moldaver J: Though the issue of police ability to enter a shared residence with the consent of only one party was conceded at trial, it should be addressed. Police had the authority to enter the shared residence at common law under the ancillary powers doctrine.

Per Côté J: A single cohabitant can provide consent for police to search the common areas of a shared residence without a warrant. Similarly, the accused's wife was able to unilaterally consent to the seizure of the computer, as this is indistinguishable in substance from a situation where she herself had brought the computer to the police station, which would not offend the *Charter*. However, the evidence should be excluded because the police failed to comply with ss 489.1 and 490 of the *Criminal Code* by improperly detaining the computer and the fact that the search warrant was ultimately found to be invalid.

R v Morrison, 2019 SCC 15 (Docket 37687)

- Crown (Appellant) | Morrison (Respondent, appellant on cross-appeal)
- Heard: May 24, 2018
- Judgment: March 15, 2019
- Heard by: (Majority) Moldaver J (Wagner CJ and Gascon, Côté, Brown, Rowe and Martin JJ concurring)
- Concurring reasons: Karakatsanis J
- Dissenting: Abella J
- From: Court of Appeal of Ontario

- By: Leave to appeal
- Result: Appeal allowed in part. Cross-appeal allowed in part; Conviction set aside and new trial ordered, CCC s 172.1(3) declared of no force and effect

Themes: Child luring: elements, mandatory minimum; Defences: reasonable belief; Constitutional law: *Charter* ss 7, 11(d), 12.

Summary: Morrison was arrested and charged with child luring after interacting with an officer online during a police sting operation. The officer posed as an underage girl and represented herself as such to Morrison, a representation that was reinforced by age-appropriate comments and behaviour. Over 2 months, Morrison engaged in sexualised conversations with the officer and ultimately attempted to arrange a sexual encounter. Morrison challenged the constitutionality of three subsections of the child luring provision:

> s 172.1(2) – mandatory minimum,
>
> s 172.1(3) – presumes accused believed the other person was underage if such a representation was made,
>
> s 172.1(4) – reasonable steps test to raise defense of belief they were over age.

The trial judge found sub (3) of no force and effect, (2) grossly disproportionate, but upheld (4) and convicted Morrison. The appellate court upheld all of the trial judge's rulings.

Held: Appeal allowed in part. Cross appeal allowed in part.

Per Moldaver J (Wagner CJ and Gascon, Côté, Brown, Rowe and Martin JJ concurring): The presumption under s 172.1(3) violates s 11(d) of the *Charter*. In a sting operation where there is no underage person, the Crown must prove beyond a reasonable doubt that the accused believed

the other person was under the age of 16. Subsection 172.1(3) creates a presumption that proof that the other person was represented to the accused as being under 16 will stand in for proof of this essential element. The mere fact that a representation of age was made to the accused does not lead inexorably to the conclusion that the accused believed that representation, even absent evidence to the contrary. Therefore, since proof of the substituted fact does not lead necessarily to proof of the essential element in all cases, the statutory presumption offends the presumption of innocence and violates s 11(d) of the *Charter*. The presumption is not saved under s 1 because it is not minimally impairing. The appropriate remedy is for the subsection to be declared of no force and effect.

The reasonable steps requirement of s 172.1(4) does not violate s 7 of the *Charter* because the only pathway to conviction is for the Crown to prove beyond a reasonable doubt that the accused believed the other person was underage. If the Crown proves beyond a reasonable doubt that the accused did not take reasonable steps, then the trier of fact is precluded from considering the defence reasonable belief. But that does not relieve the Crown of its ultimate burden of proving beyond a reasonable doubt that the accused believed the other person was underage.

It would be unwise to rule on the constitutional validity of the mandatory minimum under s 172.1(2)(a) since the courts below proceeded on the mistaken understanding that Morrison could be convicted on the basis of his failure to take reasonable steps, and their conclusions on the issue rested in part on this mistaken understanding. Furthermore, the parties did not have the opportunity to make submissions on this matter with the benefit of a clear statement from the Court as to the *mens rea* required for a conviction.

Per Karakatsanis J: There is agreement with the Majority on the constitutionality findings but the mandatory minimum under subsection (2) is in violation of *Charter* s 12 and should be declared of no force and effect.

Per Abella J: Subsection (4) violates both ss 7 and 11(d) of the *Charter* and an acquittal should be entered.

R v Mills, 2019 SCC 22 (Docket 37518)

- Crown (Respondent) | Mills (Appellant)
- Heard: May 25, 2018
- Judgment: April 18, 2019
- Heard by: Brown J (Abella and Gascon JJ concurring)
- Concurring reasons: Karakatsanis J (Wagner CJ concurring)
- Concurring reasons: Moldaver J
- Concurring reasons: Martin J
- Dissenting: N/A
- From: Court of Appeal of Newfoundland and Labrador
- By: Leave to appeal
- Result: Appeal dismissed; conviction upheld

Themes: Search and Seizure, s 8, Reasonable expectation of privacy, electronic communications; Sexual offences: Child Luring; Constitutional law: s 8.

Summary: Mills exchanged messages online with an officer posing as an underage girl as part of a police sting operation. He was arrested upon arranging a sexual encounter at a park. Without prior authorisation, the officer created screenshots of the conversations with Mills. At trial, Mills applied for exclusion of this evidence and the trial judge found that the messages were "private communications" in which Mills had a reasonable expectation of privacy. The trial judge found a

breach of s 8 but saved the evidence under s 1 and entered a conviction. The Crown appealed and the appellate court found the trial judge had erred by finding a reasonable expectation of privacy in the messages. The issues before the Supreme Court were therefore whether police actions amounted to a search or seizure of the online communications and whether the accused had a reasonable expectation of privacy in those communications.

Held: Appeal dismissed.

Per Brown J (Abella and Gascon JJ concurring): To claim s 8's protection, an accused must show a subjectively held, and objectively reasonable, expectation of privacy in the subject matter of the search. Objective reasonableness is determined by:

> 1) Examining the subject matter of the allege search;
>
> 2) Determining whether the accused had a direct interest in the subject matter;
>
> 3) Determining whether the accused had a subjective expectation of privacy in the subject matter, and;
>
> 4) Assessing the objective reasonableness of the subjective expectation, given the totality of the circumstances.

In this case the subject matter is the electronic communications between Mills and the officer. Mills had a direct interest in the communications as a participant. Mills conduct during the communication consistently included efforts to keep it a secret, demonstrating a subjective expectation of privacy. Mills' expectation was not, however, objectively reasonable. Section 8 jurisprudence is predicated on police obtaining prior authorization before a *potential* privacy breach; but no such potential exists here because the police created the fictitious child and waited for adult strangers to message them. That distinguishes this case from *R v Wong*, [1990] 3 SCR 36, and *Marakah*, where the state was intruding upon a relationship unknown to them. No risk of

potential privacy breach, such as police sifting various communications before being able to ascertain the relationship, arose here. Therefore, the appeal should be dismissed.

Per Karakatsanis J (Wagner CJ concurring): There can be no reasonable expectation for a conversation to stay private from the person you have it with. Section 8 is therefore not engaged.

Per Martin J: Taking the screenshots was a search/seizure under s 8, and Mills had a reasonable expectation of privacy in the messages. Therefore, there was an unreasonable search/seizure, but it was rightly dismissed under s 24(2).

R v Omar, 2019 SCC 32 (Docket 38461)

- Crown (Appellant) | Omar (Respondent)
- Heard: May 22, 2019
- Judgment: May 22, 2019
- Written reasons: May 23, 2019
- Heard by: (Majority) Wagner CJC, Moldaver, Côté, Rowe JJ
- Dissenting: Karakatsanis, Brown, Martin JJ
- From: Ontario Court of Appeal
- By: Right of appeal
- Result: Appeal allowed

Themes: *Charter*, unreasonable search and seizure [s 8]; arbitrary detention or imprisonment [s 9]; arrest or detention [s 10]; right to counsel [s 10(b)], right to retain and instruct counsel without delay; *Charter* remedies [s 24(2)], exclusion of evidence.

Summary: The accused was convicted of various firearm offences and possession of cocaine for the purpose of trafficking, after the police stopped him while walking.

The trial judge found that the stop amounted to a violation of the accused's s 9 right under the *Canadian Charter of Rights and Freedoms*, that the search violated the s 8 *Charter* right to be secure against unreasonable search and seizure and that the accused was denied his s 10(b) *Charter* right to be informed of his right to counsel without delay. However, the evidence was not excluded on the ground that the police acted in good faith and did not believe they had detained the accused. The accused appealed.

The majority of the appellate court held that the trial judge erred in principle in her assessment of the seriousness of the police's *Charter*-infringing conduct. They were of the view that she gave unwarranted weight to the subjective good faith of the officers. It should have been apparent to a properly trained and legally informed police officer that the accused was detained without lawful justification. According to the majority, the trial judge's ultimate balancing of the relevant factors was therefore owed no deference. The seriousness of the *Charter*-infringing state conduct and the impact of the breach on the accused favoured the exclusion of the evidence. It was true that society's interest in an adjudication on the merits favoured admission, but this was insufficient to tip the balance in favour of admissibility. Accordingly, the majority allowed the appeal, excluded the evidence and entered acquittals on all counts.

The dissenting judge of the appellate court held that the trial judge's key finding was that the conduct of the police would not fall on the more serious end of the spectrum. When the trial judge's reasons were read as a whole, that key finding did not amount to reversible legal error sufficient to set aside her s 24(2) analysis. The trial judge did not err in concluding that the police had a subjective belief they were not detaining the accused, that their conduct was not abusive and that the *Charter* breach was not deliberate. Those findings were entitled to deference.

Accordingly, there was no justification for appellate interference and the appeal should be dismissed.

The Crown appealed.

Held: The appeal was allowed.

Per Brown J (for Wagner CJC, Moldaver, Côté, Rowe JJ): Agreement was expressed with the dissenting reasons of the appellate court. The issue of availability of other remedies besides exclusion of evidence was not considered.

Per Brown J (for Karakatsanis, Brown, Martin JJ (dissenting)): Agreement was expressed with the majority opinion of the appellate court. It may be that consideration should be given to whether the police should caution persons that they stop and question that such persons need not remain or answer questions, but this should be left for another day.

R v Le, 2019 SCC 34 (Docket 37971)

- Crown (Respondent) | Le (Appellant)
- Heard: October 12, 2018
- Judgment: May 31, 2019
- Heard by: Brown and Martin JJ (Karakatsanis J concurring)
- Dissenting: Moldaver J (Wagner CJ concurring)
- From: Ontario Court of Appeal
- By: Right of appeal
- Result: Appeal allowed; Acquittals entered

Themes: *Charter*, arbitrary detention or imprisonment [s 9].

Summary: The accused, a young Asian man, was in the backyard of a townhouse with four other men. The yard was small and enclosed by a waist-high fence. Two officers entered the yard, without warrant or consent, and began to question the men and demand documentary proof of identity. A third officer patrolled the perimeter of the property and then entered the yard. The officer questioning the accused demanded identification, and when the accused stated he did not have any, the officer asked what he was carrying in his satchel. The accused fled, was pursued and arrested, and found to be in possession of a firearm, drugs and cash.

At trial, the accused unsuccessfully sought to have this evidence excluded on the basis that the police had infringed his constitutional right to be free from arbitrary detention, contrary to s 9 of the *Canadian Charter of Rights and Freedoms*. The trial judge held that, while the accused was detained when he was asked about the contents of his satchel, the detention was not arbitrary as the police had reasonable grounds to suspect he was armed. The majority at the Court of Appeal agreed, finding that if it had found breaches of the *Charter*, it would not have excluded the evidence as any breach would have been "technical, inadvertent, and made in good faith". The accused appealed.

Held: The appeal was allowed.

Per Brown, Martin JJ (Karakatsanis J concurring): In determining when the detention started for the purposes of ss 9 and 10 of the *Charter*, all circumstances of the police encounter had to be considered. Each of the three factors in this analysis supported the conclusion that the accused's detention began the moment the police entered the yard and made contact with the men. First, the circumstances giving rise to the encounter as reasonably perceived by the individual, supported a finding that the detention arose prior to questioning the accused about the contents of his satchel.

The police conduct exceeded the norms of community policing, no obvious cause existed for any police presence in the yard, the police did not communicate to the men why they were there, and the height of the fence permitted interaction with the men without entry to the yard. Second, the nature of the police conduct also supported the same conclusion. The actions of the police and the language used showed they were exerting dominion over the men from the time they entered the yard. There was a tactical element to the encounter that would be seen as coercive and intimidating by a reasonable person. Third, the accused's particular characteristics and circumstances led to the conclusion that the detention occurred upon entry to the yard. The reasonable person in the shoes of the accused is presumed to be aware of racial context, and like all social context evidence, race relations evidence can be proven by direct evidence, admissions, or by taking of judicial notice. The focus was not on the motivation of the police, but rather on how the combination of a racialized context and minority status would affect the perceptions of a reasonable person.

Since no statutory or common law power authorized the accused's detention when the officers entered the yard and made contact, it was an arbitrary detention for two reasons. First, the police were trespassing, and the implied licence doctrine did not apply because communication did not necessitate their entry onto private property. Second, the police had no legal authority, statutory or common law, to detain the accused.

The police here did not act in good faith, and this serious misconduct weighed in favour of excluding the evidence. The discovery of the evidence was only possible due to the infringement of the accused's *Charter* rights. Since the admission of evidence in this case would bring the administration of justice into disrepute, the evidence was excluded.

Per Moldaver J (dissenting) (Wagner CJC concurring): The police entry into the yard was unlawful, and the implied licence doctrine did not apply since the police could have easily made contact from outside the property. The trial judge clearly found that the police had valid investigatory purposes for entering the yard, and this finding was not open to appellate review. It was also not open to an appellate court to recharacterize the police conduct based on its own view of the evidence. The arbitrary detention of the accused was momentary as the police quickly developed reasonable grounds to suspect the accused was armed.

Since the trial judge found that the officers were not engaged in racial profiling nor were the police abusing their powers, any breach of the accused's *Charter* rights was technical and inadvertent, and there was no finding of bad faith. The breach was not egregious. The impact of the infringement should be considered in light of the fact that no evidence was obtained during the momentary arbitrary detention. Society's interest in having this case adjudicated on its merits was very high, and the evidence should be admitted.

R v Stillman, 2019 SCC 40 (Docket 37701, 38308)

- Crown (Respondent) | Stillman (Appellant)
- Heard: March 26, 2019
- Judgment: July 26, 2019
- Heard by: (Majority) Moldaver and Brown JJ (Wagner CJ and Abella and Côté JJ concurring)
- Dissenting: Karakatsanis and Rowe JJ
- From: Court Martial Appeal Court of Canada
- By: Leave to appeal
- Result: Appeal dismissed.

Themes: Constitutional Law: s 11(f) (right to trial by jury); military offences

Summary: All of the accused were service personnel charged under s 130(1)(a) of the *National Defence Act*. Canadian military members are governed by a parallel justice system. All members who are subject to the *Code of Service Discipline* fall under the jurisdiction of the military justice system. This system does not allow for jury trials. Pursuant to s 130(1)(a), any "act or omission that takes place in Canada and is punishable under...the *Criminal Code* or any other Act of Parliament" constitutes a service offence. Thus, the accused all challenged s 130(1)(a) on the basis that it brought them under the military legal jurisdiction and that the military exception to *Charter* s 11(f) did not apply in their circumstances, causing an infringement of their s 11(f) right to trial by jury.

Held: Appeal dismissed.

Per Moldaver and Brown JJ (Wagner CJ and Abella and Côté JJ concurring): The Court has ruled on s 130(1)(a) in the past, and this jurisprudence establishes that it was validly enacted and is not overbroad under s 7 of the *Charter*, even where there is no direct link between the circumstances of an alleged offence and military duties. A purposive reading of the military exception defined in s 11(f), focused on finding the common meaning between French and English versions, indicates that the exception applies to "an offence under military law". There are several indicators that "military law" has consistently been understood as a broad concept, encompassing the conduct of members during war and peace, and at home as well as abroad. It is much more likely that the military exception in s 11(f) was meant to uphold this understanding, rather than reverse it. Therefore, the purpose of the exception is to recognize and affirm the

existence of a separate military justice system, and to preserve the historical reality that jury trials in cases governed by military law have never existed in Canada. The appellants' argument that the exception only applies to uniquely military offences is not persuasive, as this narrow interpretation was rejected in past case law, is not supported by the wording of the s 11(f), and the reliance of the appellants on the *Mutiny Act* of 1689 as standing for a right to jury trial for military members is a misinterpretation.

Equally, past jurisprudence has also rejected the incorporation of a military nexus, finding that the accused's membership in the military is sufficient, as there remains a strong connection to the objective of maintaining discipline, efficiency and morale. There are also other faults with this proposal including internal inconsistency of application, practical concerns stemming from the American experience that suggest such a requirement would complicate the military court process. Civilian courts might not account for all of the relevant factors at sentencing, missing aspects of seriousness arising in light of discipline, efficiency and morale impacts. Finally, just because military prosecutors can decline to exercise jurisdiction, does not mean that they lack it.

Per Karakatsanis and Rowe JJ: A military connection requirement should be read into s 130(1)(a) in order to bring it into alignment with the requirements of s 11(f).

R v Poulin, 2019 SCC 47 (Docket 37994)

- Crown (Appellant) | Poulin (Respondent)
- Heard: March 25, 2019
- Judgment: October 11, 2019
- Heard by: Martin J (Wagner CJ and Moldaver and Côté JJ concurring):
- Dissenting: Karakatsanis J (Abella and Brown JJ concurring):

- From: Québec Court of Appeal (Cour d'appel du Québec)
- By: Leave to appeal
- Result: Appeal allowed*

Themes: *Charter*, s 11(i), right to lesser punishment.

* *Decision was moot, as Poulin had passed away prior to the hearing. The court held, however, that it should still allow arguments as the legal question was socially important*

Summary: Section 11(i) of the *Charter* sets out what happens when the punishment for a crime changes between the time a person commits the crime and the time they are sentenced for it. It says the person has the right "to the benefit of the lesser punishment" in that case. Mr. Poulin committed sexual crimes between 1979 and 1987. He was charged in 2014, convicted in 2016, and sentenced in 2017. He was old and in poor health, so he asked for a conditional sentence. The sentencing judge agreed.

The Crown said the judge was wrong to give Mr. Poulin the conditional sentence. It said this wasn't an option either when Mr. Poulin committed his crimes, or when he was sentenced. It said that the judge could only look at those two points in time when deciding on the "lesser" punishment. Mr. Poulin said section 11(i) meant the judge also had to look at all the points in between. There was a period of time when the law made a conditional sentence an option. The majority of the Supreme Court said Mr. Poulin's interpretation of section 11(i) was wrong. It said the sentencing judge should only look at the time the crime was committed, and the time Mr. Poulin was sentenced when deciding the lesser punishment. The majority said section 11(i) wasn't meant to give a person the right to comb through the past to find the most favourable

punishment ever available. In dissent, Justice Andromache Karakatsanis said the Court shouldn't have heard the case because Mr. Poulin had died but would have dismissed the appeal because courts' consistent interpretation that a person had a right to the lowest punishment available over the whole time was fair and supported by the *Charter* wording. Abella and Brown agreed.

Section 2.0 | Defences

R v Gagnon, 2018 SCC 41 (Docket: 37972)

- Crown (Appellant) | Gagnon (Respondent)
- Heard: October 16, 2018
- Judgment: October 16, 2018
- Heard by: Wagner CJ and Abella, Moldaver, Karakatsanis, Gascon, Côté, Brown, Rowe and Martin JJ
- Dissenting: N/A
- From: Court Martial Appeal Court of Canada
- By: As of right
- Result: Appeal dismissed

Themes: Criminal law, Sexual assault, Defences, Honest but mistaken belief in consent.

Summary: The accused was a warrant officer who was charged with having committed a sexual assault. The Chief Military Judge submitted to the court martial panel a defence of honest belief in consent. A not guilty verdict was rendered by the General Court Martial. The Crown appealed. On appeal, the majority decided the Chief Military Judge could not submit the defence to the panel before considering, at law, the statutory limitations set out in s 273.2 of the *Criminal Code*. The appeal was allowed, and a new trial was ordered. The dissenting judge found that it was for the committee to determine whether the accused was guilty beyond a reasonable doubt.

According to the dissenting judge, the Chief Justice correctly put to the committee the defence of honest but mistaken belief in consent.

The accused appealed before the Supreme Court of Canada.

Held: The appeal was dismissed.

Per Wagner CJC (Abella, Moldaver, Karakatsanis, Gascon, Côté, Brown, Rowe, Martin JJ concurring): There was no evidence from which a trier of fact could find that the accused had taken reasonable steps to ascertain that the complainant was consenting. Therefore, the defence of honest but mistaken belief should not have been put to the panel.

R v Blanchard, 2019 SCC 9 (Docket 38258)

- Crown (Respondent) | Blanchard (Appellant)
- Heard: February 13, 2019
- Judgment: February 13, 2019
- Heard by: Brown J (Wagner CJ and Abella, Moldaver, Karakatsanis, Gascon, Côté, Rowe and Martin JJ concurring)
- Dissenting: N/A
- From: Court of Appeal of Quebec
- By: Right of Appeal
- Result: Appeal allowed; acquittal restored

Themes: Defences: Automatism, extreme intoxication.

Summary: Blanchard was charged with failing to provide a breath sample. At both of the courts below, the Crown conceded the availability of extreme intoxication akin to automatism as a defence.

Held: Appeal allowed.

Per Brown J (Wagner CJ and Abella, Moldaver, Karakatsanis, Gascon, Côté, Rowe and Martin JJ concurring): In light of this concession, the majority at the Court of Appeal erred in raising and deciding the availability of that defence. The trial judge made no legal error in understanding or applying the automatism defence, and in this unusual case it is in the interests of justice to restore the acquittal. The Court expressly refrains however, from deciding the availability of this defence outside of the present case.

Section 3.0 | Evidence

R v Normore, 2018 SCC 42 (Docket: 37993)

- Crown (Appellant) | Normore (Respondent)
- Heard: October 17, 2018
- Judgment: October 17, 2018
- Heard by: Wagner CJC (Abella, Côté, Rowe and Martin JJ Concurring)
- Dissenting: N/A
- From: Court of Appeal for Newfoundland and Labrador
- By: As of right
- Result: Appeal allowed, and convictions restored

Themes: trial, contempt of court, witness refusing to answer defence counsel's question, trial judge not taking further steps to elicit evidence and not citing witness for contempt.

Summary: The accused was convicted of attempted murder, uttering death threats, and break and enter while committing attempted murder of Mr. Thomas. At Mr. Normore's trial, defence counsel called Mr. Thomas as a witness. He refused to answer one of the questions. Although the

trial judge advised Mr. Thomas that he could be found in contempt, the trial judge did not take any further steps to elicit an answer from Mr. Thomas, since in his view, the answer to the question would not have had much bearing on the trial. On appeal, the court found that the trial judge erred in law by not taking further steps to address the complainant's refusal to answer the question. The court held that the error was not harmless nor minor and could have affected the weight given to the second note, thus possibly affecting the trial judge's findings of guilt. Since it could not be determined whether a conviction would follow if the complainant had answered the question and the defence had been able to pursue that line of questioning, the court held that the curative proviso in s 686(1)(b)(iii) of the *Criminal Code* did not apply. The court allowed the accused's appeal, quashed the convictions and ordered a new trial.

The Crown appealed.

Held: The appeal was allowed.

Per Wagner CJC (Abella, Côté, Rowe and Martin JJ concurring): The trial judge did not err in how he addressed the complainant's refusal to answer the defence counsel's question. While it was open to the trial judge to take further steps to elicit a response, it was a proper exercise of the trial judge's discretion to continue with the main proceedings and leave the potential contempt issue for a later time. Even if it was assumed that the trial judge erred in how he handled the complainant's refusal, any such error did not result in a substantial wrong or miscarriage of justice. The question put to the complainant was an attempt to raise doubt about who wrote the two notes found in the accused's apartment, and the judge relied on those notes as well as other evidence to convict the accused. Based on all the circumstances, including the fact that the accused admitted to writing the more incriminating note, the trial judge's failure to take steps to

compel the complainant to answer could not have affected the verdict. The convictions were restored.

R v Gubbins, 2018 SCC 44 (Dockets: 37395, 37403)*

- Crown (Respondent) | Gubbins (Appellant) **R v Vallentgoed*
- Heard: February 6, 2018
- Judgment: October 26, 2018
- Heard by: (Majority) Rowe J (Wagner CJ and Abella, Moldaver, Karakatsanis, Gascon, Brown, and Martin JJ in agreement)
- Dissenting: Côté J
- From: Court of Appeal of Alberta
- By: Leave to appeal
- Result: Appeals Dismissed; majority upheld Mr. Vallentgoed's conviction and sent Mr. Gubbins' case for a new trial

Themes: Evidence, disclosure, breathalyzer maintenance records (access to).

Summary: Breathalyzer maintenance records don't have to be disclosed unless an accused person can show they are likely relevant to his or her defence, the Supreme Court has ruled. Mr. Vallentgoed's and Mr. Gubbins' appeals were heard together before the Court of Appeal because they dealt with the same issue: what records an accused person has a right to when defending a criminal charge. The Court of Appeal agreed with the Crown. It restored Mr. Vallentgoed's conviction and sent Mr. Gubbins' case back for trial. It said the breathalyzer maintenance records were "third-party" records and didn't have to be disclosed.

This case turned on the difference between "first-party" and "third-party" records in a criminal case. The breathalyzer maintenance records are subject to the rules applicable to the disclosure of

third-party records. As such, in order to obtain disclosure of the records, V and G were required to show that the records were likely relevant in this case, which they failed to do.

R v Ajise, 2018 SCC 51 (Docket 38149)

- Crown (Respondent) | Ajise (Appellant)
- Heard: November 16, 2018
- Judgment: November 16, 2018
- Heard by: Rowe J (Abella, Karakatsanis, Côté and Brown JJ concurring)
- Dissenting: N/A
- From: Court of Appeal of Ontario
- By: Right of appeal
- Result: Appeal dismissed; conviction upheld

Themes: Evidence, admission, opinion evidence.

Summary: Ajise was convicted of fraud in relation to donation claims. Ajise appealed the conviction on the basis that the trial judge erroneously allowed opinion evidence to be admitted without conducting a *voir dire* and that this resulted in a miscarriage of justice.

Held: Appeal dismissed.

Per Rowe J (Abella, Karakatsanis, Côté and Brown JJ concurring): The court adopts the reasons of Sharpe J in the Court of Appeal below, essentially finding that the admission of the impugned evidence led to no substantial wrong or miscarriage of justice.

R v Cyr-Langlois, 2018 SCC 54 (Docket 37760)

- Crown (Appellant) | Cyr-Langlois (Respondent)
- Heard: October 15, 2018
- Reasons Delivered: December 6, 2018
- Heard by: (Majority) Wagner CJ (Abella, Moldaver, Karakatsanis, Gascon, Brown, Rowe and Martin JJ concurring)
- Dissenting: Côté J
- From: Court of Appeal of Quebec
- By: Leave to appeal
- Result: Appeal allowed; acquittal set aside; new trial ordered

Themes: Evidence, statutory presumption of breathalyzer accuracy, burden of proof for rebutting assumptions, driving over .08.

Summary: The accused was charged with driving while over the legal limit. Breathalyser procedure was not perfectly followed (the accused was not continuously observed for the requisite period of time before the test was administered). The accused argued that because some test-disrupting event may have occurred in the time that he was unobserved, the presumption of test accuracy is rebutted. The trial judge acquitted, finding reasonable doubt regarding test reliability. The Quebec superior court set aside the acquittal and ordered a new trial. The Court of Appeal reinstated the acquittal.

The Crown appealed.

Held: Appeal allowed.

Per Wagner CJ (Abella, Moldaver, Karakatsanis, Gascon, Brown, Rowe and Martin JJ concurring): To rebut the presumed accuracy of breathalyser results, an accused must adduce

evidence tending to show that the malfunctioning or improper operation of the approved instrument casts doubt on the reliability of the results. While theoretical evidence may be sufficient to cast doubt on the reliability of the results, in this case the accused's argument was too speculative to meet the reasonable doubt standard. The accused argued that that he might have burped while unobserved, which could have disrupted the results. However, no evidence was led that this actually occurred. Mere hypothetical possibility is insufficient to cast a reasonable doubt. Acceptance of theoretical evidence based on speculation is an error of law.

Per Côté J (dissenting): The appeal should be dismissed, and the acquittal entered by trial judge upheld. Requiring an accused to show more concrete evidence relating to the facts in issue raises the burden against the accused to something more than a reasonable doubt.

R v Quartey, 2018 SCC 59 (Docket 38026)

- Crown (Respondent) | Quartey (Appellant)
- Heard: December 14, 2018
- Judgment: December 14, 2018
- Heard by: Brown J (Moldaver, Karakatsanis, Côté, and Martin JJ concurring)
- Dissenting: N/A
- From: Court of Appeal of Alberta
- By: Right of appeal
- Result: Appeal dismissed. Conviction upheld

Themes: Evidence: credibility, burden of proof, sexual assault.

Summary: The accused was convicted at trial of sexual assault. He appealed the conviction, presumably on the basis that the trial judge provided insufficient reasons, erred in subjecting the

testimony of the accused to greater scrutiny than that of the complainant, and by applying relying on gender stereotypes and generalizations in rejecting the accused's evidence.

Held: Appeal dismissed.

Per Brown J (Moldaver, Karakatsanis, Côté, and Martin JJ concurring): The Court agrees in substance with the appellate court below. The trial judge's analysis of the evidence reveals the reasoning that led to conviction. Moreover, the trial judge did not apply a higher level of scrutiny against accused in his credibility analysis, nor did trial judge apply gender stereotypes in assessing and rejecting accused's evidence. The findings of the trial judge were specific to the accused and were not made about individuals like the accused generally.

R v Calnen, 2019 SCC 6 (Docket 37707)

- Crown (Appellant) | Calnen (Respondent)
- Heard: February 12, 2018
- Judgement: February 1, 2019
- Heard by: (Majority) Moldaver J (Gascon and Rowe JJ concurring)
- Dissenting in part: Martin J
- Dissenting: Karakatsanis J
- From: Court of Appeal of Nova Scotia
- By: Right of appeal
- Result: Appeal allowed; murder conviction restored

Themes: Evidence, admissibility, after-the-fact conduct; second-degree murder.

Summary: Mr. Calnen's partner, Ms. Jordan had been living with him for two years before going missing. Police suspected Calnen, who eventually made statements to the effect that Jordan had died accidentally during an argument, following which Calnen panicked and hid the body. He

then attempted to destroy the body and related evidence in several ways, before ultimately confessing all of this to police. Calnen was charged with second degree murder and indecent interference with human remains. He pled guilty to the interference charge and was found guilty of second-degree murder by a jury. The Court of Appeal set aside the murder conviction and ordered a new trial for manslaughter.

Held: Appeal allowed.

Per Moldaver J (Gascon and Rowe JJ concurring): There were 4 issues before the SCC:

> 1) was the after-the-fact evidence admissible as evidence of intent for second degree murder?
>
> 2) Should Calnen's application for directed verdict been granted?
>
> 3) Was the jury properly instructed?
>
> 4) was the jury verdict unreasonable?

The after-the-fact conduct evidence should be admitted as circumstantial evidence on both the issue of causation and the mental element for second degree murder, for the reasons explained by Martin J. The lack of limiting instruction against general propensity reasoning does not amount to improper jury instruction because it was a product of the defence strategy to spin the discredible conduct evidence to bolster the credibility of exculpatory statements made to police. Such an instruction would have undermined the defence strategy and was not objected to by experienced defence counsel. There is no indication of an unfair trial resulting from the application of the finality principle, as this is simply a case where the defence made a tactical decision at trial and lost. There is no need to deal with the directed verdict issue.

Per Martin J (Dissenting in part): The issue surrounding the after-the-fact evidence was whether or not Mr. Calnen's actions to destroy Ms. Jordan's body were relevant and admissible for the purpose of establishing intent to commit second degree murder. After-the-fact conduct is admissible if it is relevant to a live, material issue in the case, its admission does not offend any other exclusionary rule of evidence, and its probative value exceeds its prejudicial effects. Supreme Court jurisprudence clearly states that such evidence can be used to establish intent or level of culpability. In this case the nature of the conduct, its relationship to the evidentiary record, and the issues raised at trial indicate that the evidence was relevant, and the inferences suggested were reasonable and rational. Ultimately, however, the verdict was unreasonable because the jury could reasonably have been inflamed against the accused given the direction as a whole and a direction against general propensity reasoning was required. A new trial should be ordered.

Per Karakatsanis J: Though there is agreement on the admissibility of after-the-fact evidence in principle, the evidence should be excluded in this case.

R v JM, 2019 SCC 24 (Docket 38483)

- Crown (Appellant) | JM (Respondent)
- Heard: April 18, 2019
- Judgment: April 18, 2019
- Heard by: (Majority) Côté, Rowe and Martin JJ
- Dissenting: Abella J (Karakatsanis J concurring)
- From: Court of Appeal of Ontario
- By: Right of appeal
- Result: Appeal allowed; convictions restored

Themes: Evidence, admissibility, after-the-fact conduct.

Summary: The Court unanimously took the view that failure to attend a trial is not presumptively after-the-fact conduct, and its admissibility must be assessed on a case-by-case basis.

Held: Appeal allowed.

Per Abella J (dissenting; Karakatsanis J concurring): The majority takes the position that the appeal should be allowed, substantively for the reasons of Justice Huscroft in the appellate court. The dissent would dismiss the appeal on the reasons of Justice Nordheimer.

R v Poulin, 2019 SCC 47 (Docket 37994)

- Crown (Appellant) | Poulin (Respondent)
- Heard: March 25, 2019
- Judgment: October 11, 2019
- Heard by: (Majority) Martin J (Wagner CJ and Moldaver and Côté JJ concurring)
- Dissenting: Karakatsanis J (Abella and Brown JJ concurring)
- From: Court of Appeal of Quebec
- By: Leave to appeal
- Result: Appeal allowed. *

*Decision was moot, as Poulin had died prior to the hearing. However, the court held that it should still allow arguments as the legal question was socially important.

Themes: *Charter*: s 11(i), lesser punishment

Summary: Under s 11(i) of the *Charter,* when the punishment for a crime changes between the time a person commits the crime and the time, they are sentenced for it, that person has the right "to the benefit of the lesser punishment". Poulin committed sexual crimes between 1979 and 1987. He was charged in 2014, convicted in 2016, and sentenced in 2017. He was old and in poor health, so he asked for a conditional sentence. The sentencing judge agreed. The Crown argued that the judge was wrong to assign the conditional sentence because this was not an option either when Poulin committed the crimes, or when he was sentenced. The judge should only have looked at those two points in time when deciding on the "lesser" punishment. Poulin argued that s 11(i) meant the judge also had to look at all the points in between, where there was a period of time when the law made a conditional sentence an option.

Held: Appeal allowed.

Per Martin J (Wagner CJ and Moldaver and Côté JJ concurring): The sentencing judge should only look at the time the crime was committed, and the time Poulin was sentenced, when deciding the lesser punishment. Section 11(i) was not intended to give a person the right to comb through the past to find the most favourable punishment available.

Per Karakatsanis J (Abella and Brown JJ concurring): The Court shouldn't have heard the case because Poulin had died. Regardless, the appeal should be dismissed because courts' consistent interpretation that a person had a right to the lowest punishment available over the whole time was fair and supported by the *Charter* wording.

Section 3.1 | Evidence of Past Sexual History

R v Barton, 2019 SCC 33 (Docket 37769)

- Crown (Respondent) | Barton (Appellant)
- Heard: October 11, 2018
- Judgment: May 24, 2019
- Heard by: Moldaver J (Côté, Brown, Rowe JJ concurring)
- Dissenting (in part): Abella and Karakatsanis JJ (Wagner CJ concurring)
- From: Alberta Court of Appeal
- By: Leave to appeal
- Result: Appeal allowed in part; new trial ordered on manslaughter charge

Themes: Sexual assault, jury charges, direction on circumstantial evidence; Evidence, bad character, evidence of complainant's sexual activity; defences, honest but mistaken belief in consent, [s 276].

Summary: The accused was charged with first degree murder in the death of an Indigenous woman who was a sex worker. The accused hired the deceased for sexual activity on two consecutive nights. During the sexual activity on the second evening, the accused thrust his hand into the deceased's vagina, as he had done the night before, but more forcefully, deeply and for longer. When the accused noticed blood on his hand, he stopped, told the deceased to wash up and leave, and then fell asleep. The deceased bled to death from a large wound in her vaginal wall. When the accused discovered the deceased the next morning, he panicked, cleaned up the hotel room and left. He later returned, called 911 and fabricated various versions of a false story. The Crown's theory was that, during sexual activity and while the deceased was intoxicated, the accused cut the inside of her vagina with a sharp object with the intent to kill or seriously harm her. Alternatively, the Crown argued that the accused committed unlawful act manslaughter as

he killed the deceased during the course of a sexual assault. The accused admitted he caused the wound, but he denied using a sharp object and claimed it was an accident. He testified about his sexual activity with the deceased, but no application was made and no hearing was held to determine the admissibility of such evidence, and the jury was not instructed on the limited purposes for which such evidence could be used. The jury acquitted the accused and the Crown appealed.

The Court of Appeal found that the trial judge committed a number of errors, each of which warranted a new trial, including erroneous jury instructions on after-the-fact conduct and motive, failing to conduct a hearing pursuant to s 276 of the *Criminal Code*, and failing to define the elements of unlawful act manslaughter. In the result, the Court of Appeal allowed the Crown's appeal, set aside the accused's acquittal and ordered a new trial on the charge of first-degree murder. The accused appealed.

Held: The appeal was allowed in part; a new trial on unlawful act manslaughter was ordered.

Per Moldaver J (Côté, Brown, Rowe JJ concurring): The central error committed by the trial judge was his failure to comply with the mandatory requirements set out in s 276 of the *Criminal Code*. The Crown's failure to object to the accused's testimony about the deceased's prior sexual activity was not fatal. The ultimate responsibility for enforcing compliance with s 276 was with the trial judge, not the Crown, and the Crown did not deliberately attempt to avoid the application of the s 276 regime and gained no tactical advantage from the non-compliance. Although murder was not one of the offences listed under s 276(1), the s 276 regime applied in this case because the murder charge was premised on sexual assault with a weapon, which was an offence listed in s 276(1). As a result, the accused's evidence about the deceased's sexual

activity on the night before her death was subject to the s 276 regime. Section 276(1) of the *Code* was categorical in nature and applied no matter which party led the evidence. Section 276(2) was not displaced by the Crown's reference to the deceased as a "prostitute" or its questioning of witnesses. The trial judge's failure to comply with s 276 impaired the dignity and privacy of the deceased, the truth-seeking process and trial fairness, and impacted the instructions to the jury on the defence of honest but mistaken belief in communicated consent.

In addressing the defence of honest but mistaken belief in communicated consent, the trial judge failed to address the mistakes of law masquerading as mistakes of fact in the accused's defence, which included the accused's beliefs that the absence of signs of disagreement, the prior similar sexual activities between the accused and the deceased, the deceased's status as a sex worker, or the accused's speculation about what the deceased was thinking could be substituted for communicated consent to the sexual activity in question; a belief that the deceased could give broad advance consent to whatever the accused wanted to do to her; and the inference that the deceased's past sexual activities, by reason of their sexual nature, made it more likely that the deceased consented to the sexual activities in question. By failing to address these mistakes of law, the trial judge left the jury without the tools to conduct a proper analysis.

Motive was a relevant consideration bearing upon whether the accused intended to seriously harm or kill the deceased, which would go to the fault element for murder. Since there was neither a proven motive nor a proven absence of motive, it was within the trial judge's discretion to charge on motive. While the charge could have been clearer, it was reasonably balanced and did not place undue emphasis on the importance of establishing motive or suggest it was essential for a conviction.

As the Crown agreed at trial to the defence request to remove the language of objectively foreseeable bodily harm from the jury charge on unlawful act manslaughter, it had to live with that decision.

Procedural fairness concerns, namely the Crown's limited right to appeal and the requirements to be observed by appellant courts when raising new issues, should have prevented the Court of Appeal from ordering a new trial on the after-the-fact conduct issue. The Crown was actively involved in drafting the jury charge, vetted the final draft and did not object. In addition, the issue was raised by the court, which notified the parties it would raise new issues without specifying the nature of those issues, and the court allowed the Crown to advance arguments on after-the-fact conduct in its reply submissions without permitting the accused to make additional submissions.

The trial judge's charge on post-offence conduct adequately, although imperfectly, conveyed to the jury that they could consider the accused's post-offence conduct in assessing guilt and equipped them to do so. A new trial on unlawful act manslaughter was warranted as the failure to implement the s 276 regime created a risk that the evidence of the deceased's prior sexual activity would be used improperly and compromise the truth-seeking function of the courts. Without proper instruction, the jury was left to decide how to use the evidence on its own. The failure to implement the s 276 regime was exacerbated by, and inseparable from, the failure to caution the jury about mistakes of law masquerading as mistakes of fact when considering the defence of honest but mistaken belief in communicated consent.

The errors were serious and went to the heart of the lesser and included offence of unlawful act manslaughter. However, as the jury rejected the Crown's sharp object theory and none of the

legal errors made at trial had a material bearing on the murder charge, it would be inappropriate to re-try the accused on first degree murder.

Per Abella, Karakatsanis JJ (dissenting in part) (Wagner CJC concurring): The trial judge erred in permitting the accused to lead evidence of the deceased's prior sexual activity without following the procedure required by s 276 of the *Code* and in allowing the deceased to be referred to as "Native" and "prostitute" without warning the jury to avoid drawing prejudicial and stereotypical assumptions about Indigenous women working in the sex trade. This created an image of the deceased that was unfair and would have permeated the whole trial and the jury's deliberations on both murder and manslaughter. The trial judge failed to appreciate that the deceased's prior sexual conduct, occupation, and race required the jury to be specifically alerted to the dangers of discriminatory attitudes towards Indigenous women. He provided no specific instructions crafted to confront the social and racial biases potentially at work, which rendered the whole trial unfair.

The jury instruction on after-the-fact conduct was contradictory and confusing. In effect, the trial judge did not leave it open to the jury to consider the after-the-fact conduct evidence unless such evidence favoured an acquittal. The final instruction on after-the-fact conduct was wrong in law and effectively usurped the jury's fact-finding function. There was a strong possibility that had the jury been properly instructed, the after-the-fact conduct evidence would have had a material bearing on the jury's assessment of the accused's testimony and its verdict. The fact that the Crown did not object to this portion of the charge did not preclude the Court from dealing with the issue. While the Crown did not raise after-the-fact conduct as a ground of appeal, the Court

of Appeal identified it as a concern and gave the parties fair notice and sufficient opportunity to make submissions.

R v Goldfinch, 2019 SCC 38 (Docket 38270)

- Crown (Respondent) | Goldfinch (Appellant)
- Heard: January 16, 2019
- Judgment: June 28, 2019
- Heard by: Karakatsanis J (Abella, Gascon, Martin JJ concurring)
- Concurring reasons: Moldaver J (concurring) (Rowe J concurring)
- Dissenting: Brown J
- From: Alberta Court of Appeal
- By: Right of appeal
- Result: Appeal dismissed; new trial ordered

Themes: Evidence, character, admissibility of evidence of complainant's sexual activity / history, [s 276].

Summary: The accused and the complainant dated and lived together, after which they engaged in a "friends with benefits" relationship. The complainant went to the accused's house and alleged that after she said she did not want to have sex, the accused dragged her into his bedroom, struck her and had intercourse with her. At the accused's trial for sexual assault, the accused requested a voir dire to determine if evidence that the accused and the complainant were "friends with benefits" was admissible under s 276 of the *Criminal Code*. The trial judge found that the evidence was admissible, and the accused was found not guilty by a jury of sexual assault. The Court of Appeal allowed the Crown's appeal and ordered a new trial. The accused appealed.

Held: The appeal was dismissed.

Per Karakatsanis J (Abella, Gascon, Martin JJ concurring): The evidence that the accused sought to admit did not meet the requirements of s 276 of the *Code*. Admitting the evidence was a reversible error of law which might reasonably be thought to have had a material bearing on the acquittal, and a new trial was therefore required.

Evidence of a relationship that implies sexual activity clearly engages s 276(1) of the *Code*, and, to be admissible, must satisfy the requirements of s 276(2). In this case the evidence was barred by s 276(1) because it served no purpose other than to support the inference that because the complainant had consented in the past, she was more likely to have consented on the night in question.

The evidence also did not satisfy the conditions of admissibility under s 276(2) of the *Code*. Although the accused successfully demonstrated that the evidence was of specific instances of sexual activity, he failed to establish that the evidence was relevant to an issue at trial. While the case law provided examples of how evidence of previous sexual activity between an accused and a complainant may be relevant to an issue at trial, none of them applied in this case.

The accused's right to make full answer and defence would not have been compromised by excluding the sexual nature of his relationship with the complainant. The evidence was not relevant to an issue at trial and therefore had no probative value.

Per Moldaver J (concurring) (Rowe J concurring): The trial judge erred in admitting the "friends with benefits" evidence under s 276 of the *Code*, having particular regard to the manifest deficiencies in the accused's application to introduce this evidence. The improper admission of the evidence led to a significant and highly prejudicial broadening of the sexual activity evidence

at trial which might reasonably have had a material bearing on the accused's acquittal. The appeal should be dismissed.

The "friends with benefits" evidence could, on its face, potentially be used to support the myth that because the complainant consented to have sex with the accused in the past, she was more likely to have consented to the sexual activity forming the subject-matter of the charge. Although the accused satisfied the specificity requirement under s 276(2)(a) of the *Code*, he failed to satisfy the relevance requirement under s 276(2)(b) and the balancing exercise required by s 276(2)(c).

However, the possibility that the presiding judge at the new trial might, if presented with a properly framed s 276.1 application, admit the evidence after applying the test and weighing the factors should not be foreclosed.

Per Brown J (dissenting): The evidence that the accused sought to admit was admissible and the trial judge applied the correct legal principles in her evidentiary ruling. The appeal should be allowed, and the acquittals restored.

The "friends with benefits" evidence did not derive its relevance solely from twin-myth reasoning and therefore should have filtered through s 276(1) of the *Code*. The test for exclusion under s 276(1) is whether the evidence derives its relevance solely from twin-myth reasoning and not whether it merely engages that type of reasoning. Were engagement the test for categorical exclusion under s 276(1), it would risk exclusion of all relationship evidence, or at least all evidence of relationships which also involve sexual activity.

The evidence met the relevance test under s 276(2)(b) because it was relevant to the accused's ability to make full answer and defence. To deny the accused the ability to point to his relationship would in these circumstances disable the jury from meaningfully performing its central function of finding facts and seeking out the truth and would force the accused to tell an incomplete story.

R v RV, 2019 SCC 41 (Docket 38286)

- Crown (Appellant) | RV (Respondent)
- Heard: March 20, 2019
- Judgment: July 31, 2019
- Heard by: Karakatsanis J (Wagner CJC, Abella, Moldaver, and Martin JJ concurring)
- Dissenting: Brown, Rowe JJ
- From: Ontario Court of Appeal
- By: Leave to appeal
- Result: Appeal allowed; conviction restored

Themes: Sexual Offences; evidence, character evidence, past sexual history of complainant, admissibility.

Summary: The complainant alleged that the accused, who was her cousin, sexually assaulted her during a family camping trip over Canada Day weekend. At the time, the accused was 20 and the complainant was 15. The complainant initially did not tell anyone about the assault, but eventually told her doctor after she became pregnant. The estimated period of conception was at the end of June or beginning of July. The complainant testified that she was a virgin at the time of the incident. The accused was charged with sexual assault and sexual interference.

The Crown relied on evidence of the complainant's pregnancy. The accused applied under s 276 of the *Criminal Code* to question the complainant about her prior sexual activity during the estimated period of conception. The application was dismissed, with the application judge finding that the accused failed to point to specific instances of sexual activity. The accused could question the complainant on her understanding of the term "virgin" and the truthfulness of her statement that she was a virgin at the time of the offence.

The trial judge declined to re-litigate the s 276 application on the basis that the ruling was binding and there was no change of circumstances. The complainant's testimony that she was a virgin before the offence was accepted. The accused was convicted of sexual interference.

The Court of Appeal found that it was unfair for the Crown to rely on the complainant's pregnancy while preventing the accused from challenging that evidence. The application judge erred in requiring an evidentiary foundation for the proposed cross-examination. The impact of the errors was compounded by the trial judge's incorrect conclusion that he was bound by the initial s 276 application ruling and, therefore, a new trial was warranted. The Crown appealed.

Held: The appeal was allowed; the conviction was restored.

Per Karakatsanis J (Wagner CJC, Abella, Moldaver, and Martin JJ concurring): The application judge erred in concluding that the accused failed to identify evidence of specific instances of sexual activity. The accused specifically sought to cross-examine the complainant on the activity that caused her pregnancy, which was intended to challenge the inference that the accused caused the pregnancy.

The identified time period along with the specific nature of the activity was sufficiently specific to satisfy s 276(2)(a) of the *Criminal Code*, and the proposed questioning was relevant. The complainant denying the existence of other sexual activity could have strengthened the Crown's case and finding that other sexual activity could have occurred during the relevant time period would significantly reduce the probative value of the pregnancy.

The only way the accused could have challenged the inference that he committed sexual assault was by cross-examining the complainant with respect to other sexual activity. The scope of questioning had to be narrowed to minimize the impact on the complainant while maintaining the accused's ability to answer the charges. A correct balancing would have allowed the accused to inquire into the complainant's understanding of the types of sexual activity that were capable of causing pregnancy, and whether she engaged in any such activity at the end of June and beginning of July.

The trial judge erred in finding that he could not re-litigate the s 276 application. The evidentiary foundation for the application shifted between the ruling and the start of trial. The result was that the probative value of the pregnancy increased, and the potential prejudice to the complainant decreased. Both factors could have provided grounds for re-considering the application.

Despite the errors, the accused suffered no substantial wrong and was not prevented from making full answer and defence. The questions that the accused was permitted to ask allowed him to adequately challenge the inference that he committed sexual assault. The curative proviso could be invoked to dismiss the accused's appeal from conviction as the errors were harmless, and there was no reasonable possibility that the verdict would have been different if they had not been made.

Per Brown, Rowe JJ (dissenting): The errors made by the application judge and trial judge were not harmless. The accused was denied an entire process of questioning, which impacted all aspects of his defence at trial. The questioning that occurred at the accused's trial was not a fair substitute for what the erroneous ruling restricted.

The error in the s 276 application ruling could not be harmless when it allowed the Crown to claim the right to adduce evidence of the complainant's pregnancy as incriminatory of the accused while insisting that the accused was barred from challenging the same evidence.

The erroneous ruling had ricochet effects, including that the trial judge's error in believing that he could not revisit the ruling would likely have had an intimidating effect on defence counsel's ability to respond effectively. There were too many variables that flowed from the erroneous ruling for an appellate court to invoke the curative proviso and restore the conviction. But for the application judge's errors, the accused's entire cross-examination might have been different.

The cumulative effect of the errors was to deny the accused to engage in a process of questioning. The accused's cross-examination, which was the primary vehicle through which he could make full answer and defence, was restricted in a manner inconsistent with the purpose behind s 276 of the *Code*. The accused was denied a fair trial. The appeal should have been dismissed, and the Court of Appeal's order directing a new trial should have been affirmed.

Section 4.0 | Sentencing

R v Boudreault, 2018 SCC 58 (Dockets 37427, 37774, 37782, 37783)

- Crown (Respondent) | Boudreault (Appellant)
- Heard: April 17, 2018
- Judgment: December 14, 2018
- Heard by: (Majority) Martin J (Wagner CJ and Abella, Moldaver, Karakatsanis, Gascon and Brown JJ concurring)
- Dissenting: Côté J (Rowe J concurring)
- From: Court of Appeal of Quebec and Court of Appeal of Ontario
- By: Leave to appeal
- Result: Appeal Allowed; *Criminal Code* s 737 declared invalid with immediate effect

Themes: Sentencing, victim surcharge, Constitutional law, ss 7, 12.

Summary: The Central issue was whether the mandatory victim surcharge imposed on conviction constitutes cruel and unusual punishment contrary to s 12 of the *Charter* when imposed on impecunious offenders.

Held: Appeal allowed.

Per Martin J (Wagner CJ and Abella, Moldaver, Karakatsanis, Gascon and Brown JJ concurring): Section 737 of the *Criminal Code* constitutes a punishment based on its wording, and because the surcharge flows directly and automatically from conviction. It rises to the level of cruel and unusual because it imposes a grossly disproportionate impact and potentially indeterminate sentence that on those who are unable to pay. The test for a breach of s 12 of the *Charter* is therefore met. The state did not put forward any evidence to justify a s 12 breach in

the event that one was found, therefore it is unnecessary to perform a s 1 saving analysis. The appropriate remedy is a declaration of invalidity, with immediate effect. Consequently, it is unnecessary to address the appellants' 7 claims.

Per Côté J (Dissenting, Rowe J concurring): The surcharge does constitute punishment and would not be included in a proportionate sentence. However, the impact on impecunious offenders, while serious, does not rise to the level of cruel and unusual required by s 12. There are, in fact, a number of aspects of the victim surcharge regime which act to attenuate its impact on the impecunious. With respect to the s 7 claims, neither the evidence nor common sense support the assertion that the stress caused by the imposition of the surcharge rises to the level necessary to constitute a s 7 security of the person violation.

R v Friesen, Neutral Citation to Follow (Docket 38300)

- Crown (Appellant) | Friesen (Respondent)
- Heard: October 16, 2019
- Judgment: October 16, 2019
- Heard by: Wagner CJ (Abella, Moldaver, Karakatsanis, Côté, Brown, Rowe, Martin and Kasirer JJ concurring)
- Dissenting: N/A
- From: Manitoba Court of Appeal
- By: Leave to appeal
- Result: Appeal allowed

Themes: Sentencing, are sentencing ranges for sexual offences against children still consistent with Parliamentary and judicial recognition of the severity of these crimes.

Summary: Mr. Friesen, met the mother through an online dating website. The mother brought Mr. Friesen to her home. On the date of the offence, the mother's children were sleeping and were being cared for by the mother's friend in the mother's house. Mr. Friesen asked the mother to bring the child into the bedroom. The mother's friend was awoken by the child's screams, entered the bedroom and took the child out of the bedroom. Mr. Friesen demanded that the mother retrieve the child and threatened her if she did not comply with his demand. Mr. Friesen entered guilty pleas to sexual interference and attempted extortion.

The sentencing judge imposed a sentence of six years' incarceration concurrent on both charges. The Court of Appeal granted leave to appeal sentence. The Court of Appeal allowed the appeal and reduced the sentence from six to four and one-half years' incarceration for the sexual interference conviction and reduced the sentence from six years to 18 months incarceration concurrent for the attempted extortion conviction.

The appeal from the judgment of the Court of Appeal of Manitoba was heard on October 16, 2019, and the Court on that day delivered the following judgment orally: The appeal is allowed. The sentence of the sentencing judge is restored. ***Reasons to follow.***

Section 5.0 | Trial Procedure

R v Awashish, 2018 SCC 45 (Docket 37207)

- Crown (Appellant) | Awashish (Respondent)
- Heard: February 7, 2018
- Judgment: October 26, 2018
- Heard by: Rowe J (Wagner CJ and Abella, Moldaver, Karakatsanis, Gascon, Côté,

Brown and Martin JJ concurring)
- Dissenting: N/A
- From: Court of Appeal of Quebec
- By: Leave to appeal
- Result: Appeal dismissed; judgment of the Court of Appeal upheld. *Certiorari* order reversed

Themes: Procedure: *Certiorari*; disclosure; breathalyzer maintenance records (access to).

Summary: Awashish was charged with operating a vehicle with a blood alcohol level over the legal limit. She filed a motion for disclosure, accompanied by a McNeil motion, to obtain an order requiring the Crown to tell her whether the requested information existed and, if so, the identity of the persons holding that information. The Court of Québec allowed Awashish's application. The Crown filed a motion for *certiorari*, which was granted by the Superior Court. Awashish appealed, and the Quebec Court of Appeal reinstated the order of the provincial court judge on the grounds that granting *certiorari* in these circumstances would circumvent the general prohibition against interlocutory appeals in criminal matters.

The Crown appealed.

Held: Appeal dismissed.

Per Rowe J (Wagner CJ and Abella, Moldaver, Karakatsanis, Gascon, Côté, Brown and Martin JJ concurring): *Certiorari* in criminal proceedings is available to parties only for a jurisdictional error by a provincial court judge. Jurisdictional errors occur where the court fails to observe a mandatory provision of a statute or where a court acts in breach of the principles of natural

justice. The two errors alleged by the Crown in this case are legal errors, not jurisdictional ones, and therefore cannot form the basis of an order for *certiorari*. While not at issue in this case, it should however be clarified that the provincial court judge did err in law by holding that the Crown was obliged to inquire further into the existence of the breathalyser records, as Awashish did not establish a basis for the records' existence or relevance. Appeal dismissed; order of the provincial court judge restored.

R v Beaudry, 2019 SCC 2 (Docket 38308)

- Crown (Applicant) | Beaudry (Respondent)
- Heard: January 14, 2019
- Judgment: January 14, 2019
- Heard by: Gascon J (Côté, Brown, Rowe and Martin JJ concurring)
- Dissenting: N/A
- From: Court Martial Appeal Court of Canada
- By: Right of appeal
- Result: Motion dismissed; stay of declaration of invalidity denied

Themes: Motions: stay of declaration of invalidity, test; Constitutional Law: remedies, declaration of invalidity.

Summary: The Crown moved to have a declaration of invalidity made in the Court Martial Appeal Court stayed.

Per Gascon J (Côté, Brown, Rowe and Martin JJ concurring): The appropriate test for granting the stay of a declaration of invalidity is the balance of convenience test based on the factors from *Manitoba (Attorney General) v Metropolitan Stores Ltd.*, [1987] 1 SCR 110, and *RJR*

MacDonald Inc v Canada (Attorney General), [1994] 1 SCR 311. The Crown has failed to discharge its burden under this test.

R v George-Nurse, 2019 SCC 12 (Docket 38217)

- Crown (Respondent) | George-Nurse (Appellant)
- Heard: February 15, 2019
- Judgment: February 15, 2019
- Heard by: Moldaver J (Abella, Karakatsanis, Côté and Rowe JJ concurring)
- Dissenting: N/A
- From: Court of Appeal of Ontario
- By: Leave to appeal
- Result: Appeal dismissed. Conviction upheld

Themes: Unreasonable verdict.

Summary: N/A

Held: Appeal dismissed.

Per Moldaver J (Abella, Karakatsanis, Côté and Rowe JJ concurring): There is agreement with the appellate court that the Crown had established a reasonably strong case against the accused. It was therefore open to the appellate court to consider the accused's silence in determining the merit of his unreasonable verdict argument according to *R v Noble*, [1997] 1 SCR.874. The trial judge made it clear to the jury on multiple occasions that the failure of the accused to testify could not be weighed against him.

R v Snelgrove, 2019 SCC 16 (Docket 38372)

- Crown (Respondent) | Snelgrove (Appellant)
- Heard: March 22, 2019
- Judgment: March 22, 2019
- Heard by: Moldaver J (Karakatsanis, Brown, Rowe and Martin JJ concurring)
- Dissenting: N/A
- From: Court of Appeal of Newfoundland and Labrador
- By: Right of appeal
- Result: Appeal dismissed

Themes: Sexual assault, jury instruction.

Summary: The accused was charged with sexual assault. The accused was acquitted by a jury. The Court of Appeal ordered a new trial, finding that the trial judge had erred by refusing to instruct the jury regarding s 273.1(2)(c), which states that there is no consent if a position of trust, authority or power is abused to secure it.

Held: Appeal dismissed.

Per Moldaver J (Karakatsanis, Brown, Rowe and Martin JJ concurring): There is agreement with the reasons of the Majority of the appellate court. Subsection 273.1(2)(c) targets the manipulation of a victim's feelings to induce sexual activity and, given the facts of this case, it was open to the jury to conclude that this had occurred. Therefore, an instruction was warranted.

R v Myers, 2019 SCC 18 (Docket 37869)

- Crown (Respondent) | Myers (Appellant)
- Heard: October 18, 2018
- Judgment: March 28, 2019
- Heard by: Wagner CJ (Abella, Moldaver, Karakatsanis, Gascon, Côté, Brown, Rowe and Martin JJ concurring)
- Dissenting: N/A
- From: Court of Appeal of British Columbia
- By: Leave to appeal
- Result: Appeal Allowed. Test for s 525 bail reviews set out

Themes: Bail: CC s 525.

Summary: Myers was arrested and charged with several offences relating to a high-speed chase and firearms. At the time of this arrest, Myers was on bail and probation for unrelated charges, was under several firearms bans, and was the subject of an unrelated Canada-wide arrest warrant. Myers sought bail on the new charges but was denied by the application judge, given his history of disregard for court orders. A review of this decision was filed following developments with the Crown's case, however the reviewing judge denied it, finding no significant change justifying release. Myers later had the opportunity for a bail review under s 525 of the *Criminal Code*. There was uncertainty as to the appropriate process for determining such an application due to competing lines of authority. Ultimately, Myers pled guilty to various charges and stays were entered, resulting in his release before this issue came before the Court. Despite this, the Court exercises its discretion to hear and rule on the case anyway, to provide clarity.

Held: Appeal allowed.

The correct approach to a s 525 detention review is as follows. First, the jailer must apply for the detention review hearing immediately upon the expiration of 90 days after the accused was initially taken before a justice under *Criminal Code* s 503. An intervening detention order under s 520, 521 or 524 between the initial appearance of the accused and the end of the 90-day period will cause the 90-day period to begin again. Accused who have not had a full bail hearing are also entitled to a review under s 525. Upon receiving the application, the judge must fix a date and give notice for the hearing. Form letters that place the burden on the accused to pursue a s 525 hearing are inconsistent with the law and the hearing must be held at the earliest opportunity. At the hearing, the reviewing judge may refer to the transcript, exhibits and reasons from any initial bail hearing and subsequent review hearings, and should not interfere with any findings of fact made by the first-level decision maker without cause. Both parties are entitled to make submissions on the basis of any additional credible or trustworthy information which is relevant or material to the judge's analysis, and pre-existing material is subject to the criteria of due diligence and relevance.

Unreasonable delay is not a threshold for the detention of the accused to be reviewed. The overarching question is only whether the continued detention of the accused in custody is justified within the meaning of s 515(10). Continued detention may be justified where it is necessary in order to ensure the attendance of the accused in court, necessary for the protection or safety of the public, or necessary in order to maintain public confidence in the administration of justice. The reviewing judge may consider any new evidence or change in the circumstances of the accused, the impact of the passage of time and any unreasonable delay on the proportionality of the detention, and the rationale offered for the original detention order. If there was no initial bail hearing, the s 525 judge is responsible for conducting one, taking into account

the time the accused has already spent in pre-trial custody. Section 525 requires a reviewing judge to provide the accused with reasons why their continued detention is, or is not, justified. The judge should make use of the discretion under ss 525(9) and 526 to give directions for expediting the trial and related proceedings where appropriate. Directions should be given with a view to mitigating the risk of unconstitutional delay and expediting the trials of accused who are subject to lengthy pre-trial detention.

R v D'Amico, 2019 SCC 23 (Docket 38512)

- Crown (Respondent/applicant) | D'Amico (Appellant/respondent)
- Heard: April 11, 2019
- Judgment: April 11, 2019
- Heard by: N/A
- Dissenting: N/A
- From: Court of Appeal of Quebec
- By: Leave to appeal
- Result: Appeal dismissed; motion by respondent to quash appeal Notice of Appeal granted

Themes: Motions: motion to quash notice of appeal, appeal requirements.

Summary: The Crown filed a motion to quash the Notice of Appeal, which was granted. The reasons of Vauclair JA in the court below were improperly characterised as a dissent since his disagreement does not go to the result. The reasons are better characterised as a concurring opinion.

Held: Motion granted.

R v Thanabalasingham, 2019 SCC 21 (Docket 37984)

- Crown (Appellant) | Thanabalasingham (Respondent)
- Heard: April 17, 2019
- Judgment: April 17, 2019
- Heard by: Wagner CJ (Moldaver, Karakatsanis, Gascon, Côté, Brown, Rowe and Martin JJ concurring)
- Concurring reasons: Abella J
- Dissenting: N/A
- From: Court of Appeal of Quebec
- By: Right of appeal
- Result: Appeal allowed; matter remitted to Court of Appeal for consideration on the merits

Themes: Procedure: moot case, test.

Summary: N/A

Held: Appeal allowed.

Per Wagner CJ (Moldaver, Karakatsanis, Gascon, Côté, Brown, Rowe and Martin JJ concurring): The appropriate test to determine whether a case is moot is the two-part test set out in *Borowski v Canada (Attorney General)*, [1989] 1 SCR 342, and *R v Smith*, 2004 SCC 14. The first step requires a court to determine whether the case is moot in fact, while the second step asks whether the court should exercise its discretion to hear the case regardless. In this case the Majority of the Court of Appeal erred in finding the case moot. The deportation of an individual to a country with which Canada does not have an extradition treaty does not render a case moot, because the underlying basis for the criminal proceedings has not disappeared and there remains a live controversy even if the accused's return to Canada is unlikely.

Per Abella J (concurring in the result): The appeal is moot in fact, but the Court of Appeal should have exercised its discretion to decide the merits in this case.

R v MRH, 2019 SCC 46 (Docket: 38547)

- Crown (Appellant) | MRH (Respondent)
- Heard: October 9, 2019
- Judgment: October 9, 2019
- Heard by: Karakatsanis J (Côté, Brown, Martin and Kasirer JJ concurring)
- Dissenting: N/A
- From: Court of Appeal of British Columbia
- By: Right of appeal
- Result: Appeal allowed. Conviction for sexual assault restored. Judicial stay for sexual interference restored.

Themes: Jury charge: limiting instructions, general propensity reasoning, prior consistent statements; sexual offences: sexual assault, sexual interference

Summary: M.R.H., was convicted of sexual interference and sexual assault in relation to two discrete incidents involving his niece. The indictment set out two counts and each count encompassed the entire time period in which the two distinct events were alleged to have occurred. A majority of the Court of Appeal allowed the appeal and ordered a new trial. In its view, the trial judge erred in three respects. First, his charge to the jury was confusing in relation to the way in which the indictment was written. Second, in responding to a question posed by the jury, he engaged in a confusing colloquy with the foreperson and did not clearly answer the question. Third, the trial judge failed to provide further instructions on credibility, which was the main issue at trial, given that the jury's question raised the issue of whether it could reject the

complainant's evidence about one of the incidents but accept her evidence about the other. Savage J.A., dissenting, would have dismissed the appeal.

Held: Appeal allowed.

Per Karakatsanis J (Côté, Brown, Martin and Kasirer JJ concurring): The Court agrees in substance with the dissent of Justice Savage in the courts below. No limiting instructions were required on the issue of character evidence, as there was no real risk of propensity reasoning. No limiting instruction was necessary regarding prior consistent statements either, because the statements were elicited early in the trial, were relied upon by the defence and not by the Crown, and there was no real risk in the circumstances that they would be used as self-corroboration. Finally, with respect to the interpretation of the phrase "single transaction", the Crown practice of drafting a single count of an indictment to capture multiple distinct incidents creates the risk that the accused may be convicted without the jurors' unanimous agreement on any one underlying incident. However, it is left for another day whether the law supports such a practice and whether jury unanimity is required in such circumstances.

R v Kernaz, 2019 SCC 48 (Docket 38642)

- Crown (Respondent) | Kernaz (Appellant)
- Heard: October 18, 2019
- Judgment: October 18, 2019
- Heard by: Abella J (Moldaver, Rowe, Martin and Kasirer JJ concurring)
- Dissenting: N/A
- From: Court of Appeal of Saskatchewan
- By: Right of appeal
- Result: Appeal dismissed.

Themes: Appeals: Right of Attorney General to appeal, question of law alone; Drug offences: Possession of a controlled substance for the purpose of trafficking, definition of "traffic" in s 2(1) of the *Controlled Drugs and Substances Act.*

Summary: The appellant was arrested after parking a borrowed vehicle outside a house in Regina. The police found methamphetamine on the appellant and methamphetamine, cocaine, pipes, cash, marijuana, cell phones, scales, baggies, three guns and ammunition in the vehicle. He was charged with possession of methamphetamine and cocaine for the purpose of trafficking and possession of the proceeds of crime over $5,000. At trial, the appellant admitted he possessed the methamphetamine found in his pocket, a pipe and some of the cocaine in the vehicle and stated that he intended to share the drugs with a woman residing in the house in front of which he had parked the vehicle. The appellant also maintained that he did not expect money for sharing the drugs. The trial judge convicted the appellant of simple possession, the lesser included offence. The Crown appealed the acquittal on the possession for the purpose of trafficking charge, arguing that the trial judge either applied the wrong test for the offence or did not correctly apply the right one to the facts. The Crown noted that the definition of trafficking includes "giving" and that the jurisprudence has held that if an accused admits to intending to share with others drugs in his or her possession, then he or she possesses it for the purpose of trafficking. The appellant argued that the Crown was barred from appealing the acquittal because its ground for appeal did not raise a question of law. The Court of Appeal allowed the appeal, set aside the acquittal and entered a conviction on the possession for the purpose of trafficking charge.

Held: Appeal dismissed.

Per: Abella J (Moldaver, Rowe, Martin and Kasirer JJ concurring): The appeal is dismissed substantially for the reasons of the Court of Appeal.

Section 6.0 | Post-Trial Procedure / Prison Law

R v Bird, 2019 SCC 7 (Docket 37596)

- Crown (Respondent) | Bird (Appellant)
- Heard: March 16, 2018
- Judgment: February 8, 2019
- Heard by: Moldaver J (Wagner CJ and Abella, Côté, Brown and Rowe JJ concurring)
- Concurring Reasons: Martin J (Karakatsanis and Gascon JJ concurring)
- From: Court of Appeal of Saskatchewan
- By: Right of appeal
- Result: Appeal Dismissed. Conviction upheld

Themes: Parole: conditions, breach, *Corrections and Conditional Release Act*, S.C. 1992, c. 20, s 134.1(2); *Charter* s 7.

Summary: Bird was found to be a long-term offender. As a result, the parole board put a residency condition on his release. After a month, Bird breached this condition and remained in breach until apprehended. At trial, Bird argued that the condition was outside the statutory authority of the parole board to order, and that it violated his s 7 rights. On appeal to the SCC, Bird also made novel claims of ss 9 and 11(h) violations. The central issue before the Court was whether it was open to Bird to launch a collateral attack on the residency condition.

Held: Appeal dismissed.

Per Moldaver J (Wagner CJ and Abella, Côté, Brown and Rowe JJ concurring): The framework set in *R v Consolidated Maybrun Mines Ltd*, [1998] 1 SCR 706 applies in determining whether to permit a collateral attack on an administrative decision. This framework determines whether parliament intended for such attacks by considering:

1) The wording of the statute under the authority of which the order was issued;

2) the purpose of the legislation;

3) the existence of a right of appeal;

4) the kind of collateral attack in light of the expertise or purpose of the administrative appeal tribunal, and;

5) the penalty on a conviction for failing to comply with the order.

Applying these factors to the facts, only the last factor suggests intent to permit a collateral attack. A balancing of the factors demonstrates that Bird's collateral attack on the residency requirement of his parole should not be allowed. Consequently, there is no need to consider the *Charter* issues raised.

Per Martin J (Karakatsanis and Gascon JJ concurring): The availability of administrative appeal and consequences of breach factors overwhelmingly suggest that a collateral attack should be allowed. However, the *Charter* claim alleged fails as the imposition of a condition requiring Bird to reside at a penitentiary is not arbitrary but is linked to the controlled or supervised aspect of the community re-integration objective. Bird's further, original *Charter* claims should not be heard.

R v Penunsi, 2019 SCC 39 (Docket 38004)

- Crown (Appellant) | Penunsi (Respondent)
- Heard: February 21, 2019
- Judgment: July 5, 2019
- Heard by: Rowe J (Wagner CJ and Abella, Moldaver, Karakatsanis, Gascon, Côté, Brown and Martin JJ concurring)
- Dissenting: N/A
- From: Newfoundland and Labrador Court of Appeal
- By: Leave to appeal
- Result: Appeal Allowed; Appellate Court order quashed, JIR provisions applicable to peace bonds with modification

Themes: Judicial interim release, bail, whether the judicial interim release provisions contained in s 515 of the *Criminal Code* apply to recognizances to keep the peace set out in ss 810, 810.01, 810.1 and 810.2 of the *Criminal Code* - Whether s 810.2(2) of the *Criminal Code* empowers a judge to issue a warrant of arrest in order to cause a defendant to a s 810.2.

Summary: Penunsi was nearing the end of a prison sentence when an RCMP officer attempted to bring a peace bond against him, swearing that there were reasonable grounds to fear he would commit a serious personal injury offence upon release. The date of the hearing that was set as a result was after Penunsi's release. Consequently, the Crown sought to have Penunsi detained or subjected to conditions in the interim pursuant to part XVI of the *Criminal Code* (JIR provisions).

The provincial court judge found that JIR provisions do not apply to peace bonds. The NLSC overturned the decision of the provincial court judge, before being themselves overturned by the Court of Appeal.

The Court found that judges "may cause the parties to appear before a provincial court judge" under s. 810.2(1). Parliament makes clear its intent to rely on CC Part XVI for this through its silence on an alternative procedure and a series of incorporating provisions. The JIR provisions in Part XVI are therefore applicable to peace bonds, with modification, taking into account "the policy objectives of timely and effective justice, and minimal impairment of liberty."

Section 7.0 | Miscellaneous

R v Youssef, 2018 SCC 49 (Docket 38036)

- Crown (Respondent) | Youssef (Appellant)
- Heard: November 9, 2018
- Judgment: November 9, 2018
- Heard by: Côté J (Moldaver, Brown, Rowe and Martin JJ concurring)
- Dissenting: N/A
- From: Court of Appeal of Ontario
- By: As of right
- Result: Appeal dismissed. Conviction upheld

Themes: Unreasonable verdict, reasonable alternatives to guilt.

Summary: Youssef was convicted in relation to a bank robbery.

Held: Appeal dismissed.

Per Côté J (Moldaver, Brown, Rowe and Martin JJ concurring): It was not unreasonable for the trial judge to conclude that the evidence excluded all reasonable alternatives to guilt, given the presence of the accused's DNA at the scene and on the getaway vehicle. A full reading of the

trial judge's reasons, taken in the context of the arguments and evidence presented at trial, does not indicate that the trial judge ignored other possible explanations than the guilt of the accused.

R v Vice Media, 2018 SCC 53 (Docket 37574)

- Crown (Respondent) | Vice Media Canada Inc and Ben Makuch (Appellants)
- Heard: May 23, 2018
- Judgment: November 30, 2018
- Heard by: (Majority) Moldaver J (Gascon, Côté, Brown and Rowe JJ concurring)
- Concurring reasons: Abella J (Wagner CJ and Karakatsanis and Martin JJ concurring)
- Dissenting: N/A
- From: Court of Appeal of Ontario
- By: Leave of appeal
- Result: Appeal dismissed. Production order upheld, *ex parte* production order against media test refined

Themes: Production orders against media: ex parte, notice, standard of review.

Summary: Vice Media produced a series of articles based on interviews with a Canadian man suspected of joining a terrorist organisation. Content of the interviews potentially provided strong evidence of terrorism offences committed by the interviewee. RCMP brought a successful *ex parte* production order against Vice Media to hand over screenshots of the messages exchanged between the reporter and the source. Vice applied to have order quashed but was refused by the reviewing judge and Court of Appeal.

Vice appealed.

Held: Appeal dismissed.

Per Moldaver J (Gascon, Côté, Brown and Rowe JJ concurring): The order was properly issued and should be upheld. The *Lessard* framework for granting of production orders against media is reorganised into a 4-part test and prior partial publication becomes a factor whose impact is assessed on a case-by-case basis. The traditional *Garofoli* test for standard of review of *ex parte* orders against media is displaced by a modified *Garfoli* test where media is entitled to a *de novo* review if the media points to information not before the authorizing judge that, in the reviewing judge's opinion, could reasonably have affected the authorizing judge's decision to issue the order. Application of the revised tests in this case supports upholding the production order.

Per Abella J (Wagner CJ and Karakatsanis and Martin JJ concurring): The Court ought to take this opportunity to recognise a distinct press rights guarantee under *Charter* s 2(b). When production orders are made against media s 2(b) and s 8 of the *Charter* are implicated, and an appropriate framework to address these concerns would be a harmonised approach. Such an approach would consider the media's reasonable expectation of privacy; whether there is a need to target the press at all, whether the evidence is available from any other source, and if so, whether reasonable steps were taken to obtain it, and whether the proposed order is narrowly tailored to interfere with the media's rights no more than necessary. Consequently, the traditional *Garfoli* approach is not appropriate for application to a s 2(b) issue. Where the press has not had a chance to appear before the authorizing judge, it is entitled to a *de novo* balancing on the review. Application of this framework to the present facts, however, still leads to the conclusion that the production order should be upheld.

R v Culotta, 2018 SCC 57 (Docket 38213)

- Crown (Respondent) | Culotta (Appellant)
- Heard: December 13, 2018
- Judgment: December 14, 2018
- Heard by: (Majority) Moldaver J (Rowe J and Wagner CJ concurring)
- Dissenting: Abella and Martin JJ
- From: Court of Appeal of Ontario
- By: Right of appeal
- Result: Appeal Dismissed.

Themes: N/A

Summary: The majority dismissed the appeal, adopting the reasons of Justice Nordheimer in the courts below. The dissent would allow appeal on the basis of the reasons of Justice Pardu.

R v Fedyck, 2019 SCC 3 (Docket 38214)

- Crown (Respondent) | Fedyck (Appellant)
- Heard: January 15, 2019
- Judgment: January 15, 2019
- Heard by: Abella, Moldaver, Karakatsanis, Gascon and Côté JJ
- Dissenting: N/A
- From: Court of Appeal of Manitoba
- By: Right of appeal
- Result: Appeal dismissed

Themes: Unreasonable verdict, theft under $5 k, misapprehension of certain evidence.

Summary: The Court adopted the reasons of the majority of the Court of Appeal without giving further reasons.

Held: Appeal dismissed.

R v CJ, 2019 SCC 8 (Docket 38220)

- Crown (Appellant) | CJ (Respondent)
- Heard: February 12, 2019
- Judgment: February 12, 2019
- Heard by: Wagner CJ and Abella, Moldaver, Karakatsanis and Brown JJ
- Dissenting: N/A
- From: Court of Appeal of Manitoba
- By: Right of appeal
- Result: Appeal Allowed. Convictions restored

Themes: Unreasonable verdict.

Summary: The Court unanimously agrees with the reasons of Justice Pfuetzner, dissenting in the Court of Appeal below, that the trial judge did not misapprehend the evidence or draw inferences unavailable on the evidence, nor did he err in his credibility findings.

Held: Appeal allowed.

R v Jarvis, 2019 SCC 10 (Docket 37833)

- Crown (Appellant) | Jarvis (Respondent)
- Heard: April 20, 2018
- Judgment: February 14, 2019

- Heard by: Wagner CJ (Abella, Moldaver, Karakatsanis, Gascon and Martin JJ concurring)
- Concurring reasons: Rowe J (Côté and Brown JJ concurring)
- Dissenting: N/A
- From: Court of Appeal of Ontario
- By: Right of appeal
- Result: Appeal allowed; conviction entered

Themes: Voyeurism, reasonable expectation of privacy (public, school).

Summary: Jarvis was caught creating surreptitious recordings of female staff and students at the school where he worked using a camera pen. While the targets of the recording were fully clothed, the recordings focussed primarily on their cleavage. Some of the students recorded were under 18. Jarvis was charged with voyeurism. The only issues at trial were whether the recording was done for a sexual purpose, and if the subjects had a reasonable expectation of privacy. The trial judge acquitted, finding that there was a reasonable expectation of privacy, but that sexual purpose was not proven beyond a reasonable doubt. The Court of appeal upheld the acquittal but reversed the trial judge on both issues. The only issue before the SCC is whether a reasonable expectation of privacy existed at the time of the recordings.

Held: Appeal allowed.

Per Wagner CJ (Abella, Moldaver, Karakatsanis, Gascon and Martin JJ concurring):
Circumstances that give rise to a reasonable expectation of privacy for the purposes of s 162(1) of the *Criminal Code* are circumstances in which a person would reasonably expect not to be the subject of the type of observation or recording that in fact occurred. The list of factors used to

determine whether a there is a reasonable expectation of privacy in a given circumstance is not closed, and may include:

1) The nature of the impugned conduct;

2) awareness or consent of the person who was observed or recorded;

3) the manner in which the observation or recording was done;

4) subject matter or content of the observation or recording;

5) any rules, regulations or policies that governed the observation or recording in question;

6) the relationship between the parties;

7) the purpose for which the observation or recording was done, and;

8) personal attributes of the person who was observed or recorded.

In the present case, these factors clearly indicate that the students recorded by Jarvis were in circumstances where they could reasonably expect not to be the subjects of such recordings, and *a fortiori* not to be recorded for a sexual purpose by a teacher. In all cases, the above test is to be applied contextually with regard to the totality of the circumstances.

Per Rowe J (Côté and Brown JJ concurring): It was inappropriate for the Majority to rely on s 8 *Charter* jurisprudence in interpreting the concept of reasonable expectation of privacy as an element of a *Criminal Code* provision. Courts should not expand criminal liability by reference to *Charter* jurisprudence. A two-part normative test is more appropriate. If both the following two related questions are answered in the affirmative, then an observation or recording occurred in circumstances that gave rise to a reasonable expectation of privacy under s 162(1): Did the surreptitious observation or recording diminish the subject's ability to maintain control over their image, and; if so, did this type of observation or recording infringe the sexual integrity of the

subject? Applied to the present facts, this test indicates that the students did hold a reasonable expectation of privacy at the time of the recordings.

R v Demedeiros, 2019 SCC 11 (Docket 38269)

- Crown (Respondent) | Demedeiros (Appellant)
- Heard: February 14, 2019
- Judgment: February 14, 2019
- Heard by: Moldaver J (Gascon, Brown, Rowe and Martin JJ concurring)
- Dissenting: N/A
- From: Court of Appeal of Alberta
- By: Right of appeal
- Result: Appeal Dismissed

Themes: N/A.

Summary: The Court agrees in substance with the majority of the Court of Appeal.

Held: Appeal dismissed.

R v Kelsie, 2019 SCC 17 (Docket 38129)

- Crown (Appellant) | Kelsie (Respondent)
- Heard: March 27, 2019
- Judgment: March 27, 2019
- Heard by: Karakatsanis J (Wagner CJ and Abella, Moldaver, Côté, Rowe and Martin JJ concurring)
- Dissenting: N/A
- From: Court of Appeal of Nova Scotia
- By: Right of appeal
- Result: Appeal allowed in part. Conspiracy conviction restored; second degree

murder conviction entered

Themes: Jury instruction; evidence: conspiracy, hearsay, admissibility; second-degree murder; manslaughter, conspiracy.

Summary: N/A

Held: Appeal allowed in part.

Per Karakatsanis J (Wagner CJ and Abella, Moldaver, Côté, Rowe and Martin JJ concurring): There is agreement with the appellate court that the trial judge erred in instructions on party liability for first degree murder. However, the trial judge was not required to charge the jury on manslaughter and did not err in the evidence he left before the jury regarding admissibility of co-conspirator hearsay. Given the Court's findings, the parties agreed that the first-degree murder conviction should be substituted for second degree. The conspiracy conviction should be restored.

R v Larue, 2019 SCC 25 (Docket 38224)

- Crown (Respondent) | Larue (Appellant)
- Heard: April 23, 2019
- Judgment: April 23, 2019
- Heard by: (Majority) Abella J (Moldaver and Côté JJ concurring)
- Dissenting: Karakatsanis and Brown JJ
- From: Court of Appeal of Yukon
- By: Right of Appeal
- Result: Appeal dismissed

Themes: N/A.

Summary: N/A

Held: Appeal dismissed.

Per Abella J (Moldaver and Côté JJ concurring): Application of *R v Bradshaw*, 2017 SCC 35, results largely in agreement with Dickson JA in the courts below, indicating that the appeal should be dismissed. The dissent would allow the appeal, substantially for the reasons of Bennett JA.

R v Wakefield, 2019 SCC 26 (Docket 38425)

- Crown (Respondent) | Wakefield (Appellant)
- Heard: April 25, 2019
- Judgment: April 25, 2019
- Heard by: Abella, Moldaver, Karakatsanis, Rowe and Martin JJ
- Dissenting: N/A
- From: Court of Appeal of Alberta
- By: Right of Appeal
- Result: Appeal dismissed; verdict of manslaughter entered. Mater remitted for sentencing

Themes: Standard of review: findings of fact; second-degree murder: essential elements.

Summary: The accused was charged with second-degree murder over a stabbing. Wakefield was convicted. In order to uphold the conviction, the majority in the Court of Appeal had to be

satisfied that the trial judge found that the appellant himself had stabbed the victim. However, the trial judge expressly refrained from making that finding. The Court of appeal found though that this conclusion was amply supported on the evidence and upheld the conviction on that basis.

Held: Appeal dismissed.

Per the Court: The Court of Appeal erred when it made a finding of fact that the trial judge had specifically declined to make. The appellate court also erred in finding that the elements of second-degree murder had been made out because it was unclear whether the trial judge had engaged with the subjective *mens rea* element. As both the appellant and respondent advised the Court that they were content with the substitution of a verdict of manslaughter instead of ordering a new trial, the verdict is substituted, and the matter remitted for sentencing.

R v WLS, 2019 SCC 27 (Docket 38427)

- Crown (Respondent) | W.L.S. (Appellant)
- Heard: April 26, 2019
- Judgment: April 26, 2019
- Written Judgement: May 7, 2019
- Heard by: Martin J (Moldaver, Côté, Brown, Rowe JJ concurring)
- Dissenting: N/A
- From: Court of Appeal of Alberta
- By: Right of appeal
- Result: Appeal dismissed

Themes: Sexual assault; appeals, appeal from conviction or acquittal, grounds, error of law.

Summary: The accused was charged with sexual assault and unlawful confinement. The accused's 11-year-old son testified at trial that on the evening in question he witnessed the accused drag the complainant from her bedroom to the living room where he undressed her and violated her sexually more than once. The son testified that "her eyes were closed" and that she "wasn't really doing nothing". He also stated that she had been drinking and consuming pills, possibly forcefully. The trial judge accepted the son's evidence on the core issues relative to the sexual activity, stating that his evidence was "clear and compelling" as well as "truthful and reliable". Notwithstanding those findings, the trial judge acquitted the accused as she was not satisfied beyond a reasonable doubt regarding the absence of subjective consent.

The Crown appealed the acquittal. The appeal court held that while the trial judge's reasons were not expansive, it could be inferred that she acquitted the accused because she did not find that "unconsciousness" was the only reasonable inference available on the evidence. The appeal court inferred from that finding that the trial judge believed that nothing short of unconsciousness was sufficient to establish statutory incapacity, which was an error in law. The sexual assault acquittal was set aside.

The accused appealed.

Held: The appeal was dismissed.

Per Martin J (Moldaver, Côté, Brown, Rowe JJ concurring): The trial judge's errors of law were apparent on the face of the reasons. The act of dragging the complainant while asleep and drugged was inconsistent with any sort of consent. There was no evidence, or absence of evidence, to support any reasonable inference other than non-consent, and no alternative inference was posited in submissions. The trial judge misapplied the law of circumstantial

evidence to the evidence of the witness and misapplied the law on consent. The complainant was statutorily incapable of giving consent.

Fleming v Ontario, 2019 SCC 45 (Docket 38087)

- Crown (Respondent) | Fleming (Appellant)
- Heard: March 21, 2019
- Judgment: October 4, 2019
- Heard by: Côté J (Wagner CJ and Abella, Moldaver, Brown, Rowe, and Martin JJ concurring)
- Dissenting: N/A
- From: Court of Appeal for Ontario
- By: Leave to appeal
- Result: Appeal allowed; purported police power not recognised, orders of trial judge for costs and damages restored

Themes: Police ancillary powers, power to arrest to prevent an apprehended breach of the peace.

Note: Though this case is a civil action against the Ontario government and several named officers, the Court uses it to decide an ancillary police powers issue. It is therefore primarily a decision of criminal law.

Summary: On the day of a planned rally to protest Indigenous occupation of Crown land, the accused was arrested while walking in the area of the protest with a flag. Due to a history of violent clashes related to the occupation, the police had developed an operational plan to deal with the protest. When the accused stepped onto occupied property, protesters moved towards him. An officer told the accused he was under arrest to prevent a breach of the peace. When the accused did not comply, he was arrested. The accused brought an action against the province and

the police. The trial judge awarded the accused damages for assault and battery, wrongful arrest, unlawful imprisonment, and battery due to the use of excessive force, as well as breaches of his rights under the *Canadian Charter of Rights and Freedoms*.

A majority of the Court of Appeal set aside the trial judge's award, concluding that the police had authority at common law to arrest the accused for an anticipated breach of peace. A new trial was ordered solely on the issue of excessive force. The accused appealed to the Supreme Court of Canada.

Held: The appeal was allowed.

Per Côté J (Wagner CJC, Abella, Moldaver, Brown, Rowe, and Martin JJ concurring): The accused's arrest was not authorized by law. The ancillary powers doctrine does not give police power to arrest someone who is acting lawfully in order to prevent an apprehended breach of peace by others. Such a drastic power involving substantial interference with the liberty of law-abiding individuals would not be reasonably necessary for the fulfillment of the police duties of preserving the peace, preventing crime, and protecting life and property, particularly as less intrusive powers are already available to the police to prevent breaches of the peace from occurring.

To determine whether a police action that interferes with individual liberty is authorized at common law, the court applies the ancillary powers doctrine. The basis of the ancillary powers doctrine is that police actions that interfere with individual liberty are permitted at common law if they are ancillary to the fulfillment of recognized police duties.

At the preliminary step of the analysis, the court must clearly define the police power being asserted and the liberty interests at stake. The ancillary powers doctrine comes into play where the power in issue involves prima facie interference with liberty. Once the police power and the liberty interests involved have been defined, the court asks if the police action at issue falls within the general scope of a statutory or common law police duty, and if the action involves a justifiable exercise of police powers associated with that duty. The second stage then requires the court to ask whether the police action is reasonably necessary for the fulfillment of the duty.

An act can be considered a breach of the peace only if it involves some level of violence and a risk of harm. It is only in the face of such a serious danger that the state's ability to lawfully interfere with individual liberty comes into play. Behaviour that is merely disruptive, annoying or unruly is not a breach of the peace.

The purported police power to arrest someone who is acting lawfully in order to prevent an apprehended breach of the peace by others would involve substantial prima facie interference with significant liberty interests. The purported power fell within the general scope of the police duties of preserving the peace, preventing crime and protecting life and property, recognized at common law. Preventing breaches of the peace, which entail violence and a risk of harm, is plainly related to those duties.

However, the purported police power was not reasonably necessary for the fulfillment of those relevant duties. A statutory power of arrest already exists that can be exercised should an individual resist or obstruct an officer taking other, less intrusive measures. It was not reasonably necessary to recognize another common law power of arrest in the circumstances. If police can reasonably attain the same result by taking action that intrudes less on liberty, a more intrusive

measure will not be reasonably necessary no matter how effective it may be. An intrusion on liberty should be a measure of last resort.

As there is no common law power to arrest someone who is acting lawfully in order to prevent an apprehended breach of the peace by others, the police had no lawful authority to arrest the accused. In light of that conclusion, a new trial on the issue of excessive force was not necessary. Because the police were not authorized at common law to arrest the accused, no amount of force would have been justified for the purpose of accomplishing that task.

R. v Kernaz, 2019 SCC 48 (Docket 38642)

- Crown (Respondent) | Kernaz (Appellant)
- Heard: October 18, 2019
- Judgment: October 18, 2019
- Heard by: Abella J (Moldaver, Rowe, Martin and Kasirer JJ concurring)
- Dissenting: N/A
- From: Court of Appeal for Saskatchewan
- By: Right of appeal
- Result: Appeal dismissed

Themes: Appeals, right of Attorney General to appeal; question of law alone, possession of a controlled substance for the purpose of trafficking, definition of "traffic" in s 2(1) of the *Controlled Drugs and Substances Act*.

Summary: The accused was convicted of possession of methamphetamine and cocaine and was acquitted of possession for the purpose of trafficking.

The trial judge found that a statement by the accused that there was a possibility of sharing drugs socially with other persons meant that the intent to traffic was not made out. The Crown's appeal

was allowed, the acquittal was overturned, and a verdict of guilt was imposed on the trafficking charge. The Court of Appeal found the trial judge erred in law by finding that intent to share drugs did not make out the offence of trafficking. The accused appealed to the Supreme Court of Canada.

Held: The appeal was dismissed.

Per Abella J (Moldaver, Rowe, Martin, Kasirer JJ concurring): The Supreme Court expressed agreement with the reasons of the Court of Appeal.

Manitoba Court of Appeal Criminal Cases:

Section 1.0 | Charter

R v Tummillo, 2018 MBCA 95 (Docket AR17-30-08891)

- Crown (Respondent) | Tummillo (Appellant)
- Heard: May 7, 2018
- Judgment: October 4, 2018
- Heard by: Cameron JA (Chartier CJM and leMaistre JA concurring)
- Dissenting: N/A
- From: The Manitoba Court of Queen's Bench
- Result: Appeal dismissed. Convictions upheld.

Themes: *Charter*: 11(b), delay, application of *Jordan* framework, s 7, s 8, s 9; Impaired driving: over .80

Summary: The appellant caused a crash by running a red light. Prior to trial, the appellant moved to have his case stayed due to delay under s 11(b) of the *Charter*. The trial judge dismissed the motion attributing a significant degree of the delay to the defence. On a *voir dire*, the appellant

claimed seven *Charter* violations. The accused was convicted and appealed, arguing that the trial judge erred in dismissing his s 11(b) motion, as well as by dismissing his claims under ss 7, 8 and 9.

Held: Appeal dismissed.

Per Cameron JA (Chartier CJM and leMaistre JA concurring): The trial judge carefully considered the appellant's arguments and provided detailed reasons supporting her conclusions. This was a transitional case under the *Jordan* framework and the trial judge correctly carried out a *Morin* analysis with regard to the all factors. She was uniquely situated to decide issues such as the degree to which delay was attributable to the defence and these judgements are entitled to a high degree of deference. The accused failed to demonstrate any error in the trial judge's s 11(b) analysis. The remaining *Charter* claims can be dealt with summarily. The accused argued that the failure of police to offer him medical attention at the scene implicated his right to security of the person under s 7. The trial judge did not err in finding no factual foundation for this claim, given the accused's capacity to move, ability to answer questions and lack of complaint at the scene. The second s 7 claim advanced by the accused was that his rights were violated when police failed to record the entirety of their interactions with them, despite having the necessary equipment to do so. The trial judge rightly dismissed this claim pursuant to the decision in *R v Ducharme*, 2004 MBCA 29. Given scene to which police arrived and statements made by both the accused and other first responders to police, the accused's detention at the scene was not arbitrary in contravention of s 9. Nor did the breath demand that followed constitute an unreasonable search or seizure, for the same reasons.

R v S (WEQ), 2018 MBCA 106 (Docket AY18-30-09045)

- Crown (Respondent) | WEQS (Appellant)
- Heard: May 17, 2018
- Judgment: October 18, 2018
- Heard by: Steel JA
- Dissenting: N/A
- From: The Manitoba Court of Queen's Bench
- Result: Motion dismissed. Leave to appeal denied

Themes: *Charter*: s 9, warrantless arrest: reasonably held belief; Notice of reason for arrest; s 8; weapons offences: definition of a weapon, carrying a concealed weapon, possession of a prohibited weapon; young offender.

Summary: A motion for leave to appeal for a second-level appeal by youth accused. The accused was arrested, convicted and sentenced of a number of offences relating to the possession of several weapons. Police responded to a 911 call reporting that a youth matching the accused's description was seen in a park area playing with a knife. The accused was arrested by police when they arrived at the location. A search of his person and backpack turned up a number of weapons, including the one described in the call. During a *voir dire*, the accused argued that his s 8 and 9 *Charter* rights were violated when the officers searched his person and his backpack. The trial judge held that the warrantless search was subjectively and objectively reasonable and did not offend the youth's *Charter* rights. On appeal, the accused argued the same grounds, but also argued that the trial judge erred in finding that the knives, brass knuckles, baton and air pellet handguns were weapons within the meaning of s 2 of the *Criminal Code*. He also appealed his sentence, arguing that a period of probation was harsh and excessive.

Held: Motion dismissed.

Per Steel JA: Officers are not required to articulate a specific offence when arresting someone on reasonable grounds, as long as the substance of the offence is communicated to the accused and the offence contemplated by the officer falls into the category of a hybrid or indictable offence. The trial judge's findings that the knife found on the accused constituted a weapon and that his possession of it in a concealed manner constituted an element of at least one offence were reasonable, given the circumstances at the time and the information available to police.

R v KGK, 2019 MBCA 9 (Docket AR17-30-08881)

- Crown (Respondent) | KGK (Appellant)
- Heard: June 13, 2018
- Judgment: February 7, 2019
- Heard by: Cameron JJA
- Concurring: Monnin JA (concurring in the result)
- Dissenting: Hamilton JA
- Result: Appeal dismissed.

Themes: Delay: *Charter* s 11(b), *Jordan* framework, time taken by judge to render decision.

Summary: The accused's stepdaughter alleged that the accused had sexually violated her in a number of ways and on many occasions between 2002 and 2013, when she disclosed the abuse. The accused was charged with sexual interference and invitation to sexual touching, and the charges were broken down into two periods. The trial judge found reasonable doubt as to the accused's guilt in the earlier period but convicted him on the charges in the latter period, largely due to inculpatory statements made by the accused. The accused was sentenced to a total of 5

years imprisonment on the two charges of which he was found guilty. The accused then filed a delay motion, successfully moved to have the trial judge recuse himself, and had the delay motion heard before the motion judge. The motion judge refused to grant the stay; central to this decision was that the nine months taken by the trial judge to render a decision does not factor into the Jordan framework.

The accused appeals on 5 grounds: that the motion judge erred in not granting a stay for delay; that the trial judge erred by admitting the accused's statements; that the trial judge erred in scrutinizing the evidence of the accused more than that of the complainant; that the trial judge provided insufficient reasons, and; that the sentence is harsh and excessive.

Held: Appeal dismissed; convictions upheld, stay not granted, leave to appeal sentence denied.

Per Cameron JA: The time it takes a judge to render a decision is subject to s 11(b) of the *Charter* but not to the 18- and 30-month ceilings of Jordan. On all other grounds, the accused failed to show an error and the appeal should be dismissed. Leave to appeal the sentence should also be denied.

Monnin JA (Concurring in the result): The time it takes a judge to render a decision is subject to s 11(b) of the *Charter* but not to the 18- and 30-month ceilings of Jordan. However, the motion judge applied the incorrect test. A contextual approach examining a number of factors should be taken. Cameron JA was correct in her reasoning at paras 229-245 that the delay in the present case was not unreasonable. There is agreement with Cameron JA on all other grounds.

Hamilton JA (dissenting): A judge's decision-making time should count toward total delay under the Jordan framework. Consequently, the accused was entitled to a stay under Jordan and the other grounds would have been moot.

R v Culligan, 2019 MBCA 33 (Docket AR17-30-08935)

- Crown (Respondent) | Culligan (Appellant)
- Heard: January 11, 2019
- Judgment: April 1, 2019
- Heard by: Simonsen JA (Hamilton and Pfuetzner JJA concurring)
- Dissenting: N/A
- Result: Appeal dismissed. Convictions upheld

Themes: Detention: test, physical, psychological; offences: resisting a peace officer, possession (cocaine).

Summary: A plain-clothes officer in a bar recognised the accused from previous dealings. Having received prior information that the accused was on pending criminal charges and had been released on conditions, the plainclothes officer requested that two uniformed officers approach the accused to confirm his identity and determine if and conditions breaches were occurring. When approached the accused was uncooperative, refused to produce ID, began swearing at the officers, and approached the plainclothes officer, yelling and also disclosing his identity as an officer. The accused was then arrested, though he resisted. Upon searching his person, officers found cocaine in his possession. These events led to a number of charges, including possession of cocaine, resisting a peace officer and failing to comply with an undertaking by failing to keep the peace. The accused was convicted at trial on the first two charges but acquitted of the third. The issue before the Court was whether the accused had been

unlawfully detained by the officers prior to arrest. If so, the accused argues that this should cause acquittals to be entered on all counts.

Held: Appeal dismissed.

Per JA (Hamilton and Pfuetzner JJA concurring): The appeal turns on whether the accused was detained when first approached by police. The accused's belligerence and his movement away from the uniformed officers towards the plainclothes one demonstrates that he did not believe he had been deprived of choice, as he made the choices not to cooperate and to move away. A reasonable person would also not have concluded that they were being deprived of liberty simply because officers approached them and asked for ID. Finally, there is acceptance of the findings of the trial judge that the accused was only physically detained after advancing on the plainclothes officer, and that this detention was properly made and separate from the parties' initial interaction.

R v Giesbrecht, 2019 MBCA 35 (Docket AR17-30-08912)

- Crown (Respondent) | Giesbrecht (Appellant)
- Heard: December 12, 2018
- Judgment: April 2, 2019
- Heard by: Mainella JA (Marc Monnin and Pfuetzner JJA concurring)
- Dissenting: N/A
- Result: Appeal allowed in part. Conviction upheld; sentence varied.

Themes: Evidence: Character, Similar fact evidence, Admissibility; *Charter*: Right to be tried within reasonable time [s.11(b)]; sentencing

Summary: The accused was convicted of 6 counts of concealing the dead body of a child and sentenced to 8.5 years' incarceration. The accused concealed each pregnancy from her family, delivered in secret, and stored the remains of each near or full-tern child inside a storage locker before they were discovered. The accused appealed both her conviction and sentence, on several grounds. Regarding her conviction, the accused argued that she was denied the chance to have a representative observe the autopsies, that the judge erred in characterising her actions as disposal of the bodies rather than storage or preservation, that evidence of fetus viability was treated as similar fact evidence without an application, that the verdicts were unreasonable and that the judge summarily dismissed her unreasonable delay motion and then improperly issued additional reasons after her appeal was filed. She also seeks leave to appeal her sentence as demonstrably unfit due to material errors made by the judge at the sentencing stage.

Held: Appeal allowed in part.

Per Mainella JA (Marc Monnin and Pfuetzner JJA concurring): The accused's assertion regarding the autopsies must fail, as there is no right of appeal from the application process which decided the matter. Notwithstanding errors in the trial judge's *actus reus* analysis, the accused's act of storing the bodies was functionally same as abandoning them, satisfying s 243 of the *Criminal Code*. The record also supports the trial judge's findings that the only reasonable conclusion available on totality of evidence was that each of fetuses was "child", and that accused had requisite awareness. On the issue of admission of similar fact evidence without an application, the similar fact evidence rule is not engaged in this case. The impugned evidence was not led to establish foul play on the part of the accused in the death of the fetuses; rather, it was led to establish that the fetuses met the definition of "child" contained in the *actus reus* of

the offence. In dealing with the reasonableness of the verdicts, the standard of review is deferential. Given the deferential standard, there is nothing on the record indicating that the trial judge erred to a degree that would justify appellate intervention; the inferences and findings made were reasonably available on the record. Finally, there is no merit to the accused's arguments regarding delay and the judge's issuance of further reasons. It is common practice for judges to issue reasons to follow and the case law rejects the consideration of initial and to follow reasons in isolation. This was a complex case in which the delay and the issuance of further reasons were both justified. At the sentencing stage, however, the judge made two material errors, rendering the sentence imposed unfit. First, the judge double-counted counts two through six by finding that moral blameworthiness escalated with each new count and increasing the sentence by two to four times what was imposed for count one. The judge also mischaracterised the offence in his analysis of the principle of denunciation, putting it on the same level as more serious offences against children. This error is material as it was offered as a reason for the severity of the sentence. A fresh analysis of the relevant factors and principles indicates the appropriate sentence to be 6 months consecutive for each count, with ancillary orders remaining unchanged except for the victim surcharge.

R v Omeasoo et al, 2019 MBCA 43 (Docket AR17-30-08898; AR17-30-08899)

- Crown (Appellant) | Omeasoo (Respondent)
- Heard: September 7, 2018
- Judgement: April 12, 2019
- Heard by: leMaistre JA (Steel JA and Beard JA concurring)
- Dissenting: N/A
- Result: Appeal allowed

Themes: Evidence, *Charter*, s 8, unreasonable search and seizure, s 24 *Charter* remedies, exclusion of evidence.

Summary: Police officers received information that a road rage incident involving two males and firearms had occurred in a specific area and went to search the area. They saw a red truck parked at Tim Horton's. Truck had two male occupants, one of whom went to washroom and police officers approached truck to investigate whether the occupants of the truck were involved in an accident, and eventually police told them they were free to go. One officer went to the washroom and found a bullet in urinal, after which officers determined they had reasonable grounds to believe the accused had been involved in the incident. They arrested the accused and advised them of their *Charter* rights. Police found crack cocaine on the accused and along with firearms, ammunition and more illegal drugs in the truck. The accused were charged with possession of cocaine, methamphetamine and ecstasy for purpose of trafficking and one accused was also charged with firearms offences. The trial judge found that police had breached ss 8, 9 and 10(b) of the *Charter* and excluded the evidence. The Crown appealed.

Held: Appeal allowed.

Per leMaistre JA (Steel JA and Beard JA concurring): The trial judge failed to assess the totality of the circumstances when considering the reasonableness of the officers' belief that there were grounds to arrest. The trial judge's characterization of the discovery of the bullet as a "red herring" was a failure to recognize the connection between the bullet and the firearms incident under investigation. The officers' belief that the males in the truck had been involved in a

firearms incident 26 minutes prior to their arrest was objectively reasonable in light of the constellation of factors known to them at the time of arrest. Additionally, with respect to s 24(2), the seriousness of the *Charter*-infringing state conduct did not favour exclusion of evidence.

R v Gebru, 2019 MBCA 73 (Docket AR17-30-08971)

- Crown (Respondent) | Gebru (Appellant)
- Heard: February 1, 2019
- Judgment: June 20, 2019
- Heard by: Simonsen JA (leMaistre and Mainella JJA concurring)
- Dissenting: N/A
- Result: Appeal dismissed. Conviction upheld

Themes: *Charter*: s 14, right to interpreter, test, need, obligation of judges to inquire, swearing of interpreter.

Summary: The accused was convicted at trial of counselling to commit robbery and counselling to commit murder. The accused entered into a business partnership with the complainant in order to secure a loan. The relationship deteriorated, mediation was unsuccessful, and the accused attempted to convince a customer to first rob, then murder, his partner. The customer told the complainant, who in turn told police. He then acted as a police agent, recording conversations with the accused. The accused appeals his convictions under s 14 of the *Charter*, claiming that he did not receive the assistance of an interpreter that he was entitled to at trial, and seeks a new trial.

Held: Appeal dismissed.

Per Simonsen JA (leMaistre and Mainella JJA concurring): The accused failed to demonstrate a s 14 breach. He was provided an interpreter on a standby basis, which his trial counsel assured the Court would be sufficient. Throughout the trial, no objection was taken by the accused to this arrangement, and he made only very isolated use of the interpreter once affirmed. The record read as a whole amply demonstrates that he understood the trial proceedings and made himself understood. Though not raised by the accused, the interpreter should have been sworn in earlier but that this is not problematic in the present case. The trial judge should have done more to address the potential of a language barrier, but this is not an issue because no such barrier existed here. Finally, the judge did not need to do more than he did when he interrupted the accused's cross examination to remind him that he should use his interpreter if needed because language issues had not presented themselves.

Section 2.0 | Defences

R v CDJM, 2019 MBCA 52 (Docket AY18-30-09118)

- Crown (Respondent) | CDJM (Appellant)
- Judgement: May 1, 2019
- Heard by: Burnett JA (Monnin JA and Pfuetzner JA concurring)
- Dissenting: N/A
- Result: Appeal dismissed

Themes: Defenses, self-defence; aggravated assault; weapons offences: possession, concealment.

Summary: The accused got into a fight with another student at school, whereupon he pulled a machete from his bag and cut the other student with it. As a result, he was convicted of

aggravated assault, possession of a weapon for a dangerous purpose and carrying a concealed weapon. The accused appeals his convictions on the basis that the trial judge did not consider the evidence in its totality, that the judge misapprehended material evidence and that the judge erred in deciding on the issue of self-defence.

Held: Appeal dismissed; convictions upheld

Per Burnett JA (for the Court): The Court found that the trial judge's finding that the accused could have stepped away from the fight was fully supported on the evidence, and that it was not incumbent upon him to review all testimony given in relation to the evidence accepted and rejected. Therefore, there was no error.

Section 3.0 | Evidence

R v JMS, 2018 MBCA 117 (Docket AR17-30-08983)

- Crown (Respondent) | JMS (Appellant)
- Heard: October 30, 2018
- Judgment: October 30, 2018
- Written reasons: November 2, 2018
- Heard by: Simonsen JA (Marc Monnin and Cameron JJA concurring)
- Dissenting: N/A
- Result: Appeal dismissed. Conviction upheld.

Themes: Evidence: adult testifying as to childhood experience; Unreasonable verdict: unequal scrutiny of testimony, contradictory reasons

Summary: JMS was convicted of sexual interference against his daughter. He appealed the conviction, arguing that the trial judge erred by misapplying the law with respect to the evidence

of an adult who is testifying about acts occurring in childhood, and that the verdict is unreasonable because the trial judge failed to properly scrutinize the complainant's evidence and made a finding of fact essential to the verdict that was contradicted by her testimony.

Held: Appeal dismissed.

Per Simonsen JA (Monnin and Cameron JJA concurring): The trial judge correctly summarised that the complainant's evidence should be assessed according to criteria applicable to her as an adult witness, but that evidence regarding events that occurred in childhood, particularly any inconsistencies about peripheral matters such as time and location, should be considered in the context of her age at the time of the events. There was no misapplication of the law in regard to testimony. He acknowledged the discrepancies in the testimony raised by the defence, but found that the essentials were internally consistent, coherent and plausible. The record does not support that the trial judge failed to properly scrutinise the complainant's evidence. Many of the discrepancies highlighted by the defence were minor and entitled to discounting by the judge, while the evidence does not necessarily support the conclusions the defence argues the judge had to draw. Careful analysis of the evidence also reveals no necessary contradiction between the findings of the trial judge and the verdict.

R v Beaulieu, 2018 MBCA 120 (Docket AR17-30-08802)

- Crown (Respondent) | Beaulieu (Appellant)
- Heard: September 11, 2018
- Judgment: September 11, 2018
- Written reasons: November 14, 2018
- Heard by: Beard JA (Pfuetzner and leMaistre JJA concurring)

- Dissenting: N/A
- Result: Appeal dismissed. Conviction upheld.

Themes: Evidence: hearsay, spontaneous utterances, evidence of mental condition, principled exception; defences: provocation, elements; jury instruction

Summary: The accused was in a common-law relationship with the victim. They had 4 children together. The accused stabbed the victim in the presence of the victim's cousin, following a lengthy argument about the victim intending to leave the accused. Upon arrest, the accused made statements to the officer that she had acted in self-defence. A *voir dire* was held to determine the admissibility of these statements at trial, with the judge concluding that the statement would only be admissible if the accused took the stand and underwent cross-examination. The accused did not testify. She admitted to stabbing the victim, but asserted it was in self-defence. She appealed her jury conviction for second-degree murder pursuant to s 235(1). She argues that the judge erred by refusing her motion to admit as spontaneous utterance statements she made upon arrest, and by not explaining in sufficient detail in the jury charge the evidence that supported wrongful act or insult in relation to provocation.

Held: Appeal dismissed.

Per Beard JA (Pfuetzner and leMaistre JJA concurring): Concerning the first ground, the accused advances the position that the Court adopt the English case *R v McCarthy* (1980), 71 Cr App R 142, allowing for statements made to police at the time of arrest admissible without the accused having to testify, a requirement in Canadian common law under *R v Edgar*, 2010 ONCA 529. The court in *Edgar* considered this English case and given the large body of Canadian law on the

matter, it is inappropriate to overturn *Edgar* in this case. Part of the English rule also conflicts with the *Canada Evidence Act*. The statements are not admissible as spontaneous utterances because they were made in response to the officer stating the charge to the accused, and they occurred well after the alleged act. The trial judge was also correct to conclude that admitting the statements as evidence of mental condition would be inappropriate as they spoke to a defence more than a mental state and the probative value did not outweigh the prejudicial effect. Finally, the assertion that the statements should have been admitted under the principled exception is in contradiction with their characterisation by the accused throughout the proceedings.

On the second ground, when considered as a whole, the charge given by the judge was sufficiently detailed. Many of the objections raised by the accused to the charge are insufficiently grounded in the evidence that was before the jury.

R v Hall, 2018 MBCA 122 (Docket AR16-30-08641)

- Crown (Respondent) | Hall (Appellant)
- Heard: January 15, 2018
- Judgment: November 19, 2018
- Heard by: Mainella JA (Hamilton and Cameron JJA concurring)
- Dissenting: N/A
- Result: Appeal dismissed. Convictions upheld

Themes: Evidence: hearsay, admissibility, statements by a witness who has since died, spontaneous utterance; jury instruction: adequacy of charge on DNA evidence; unreasonable verdict; first-degree murder; attempting to cause bodily harm.

Summary: The accused was convicted at trial by a jury for the shooting death of the victim at a diner. The primary issue at trial was identity. The case against the accused was entirely circumstantial and relied on DNA evidence, a description of the shooter and his getaway vehicle from a surveillance video and eyewitnesses, and business records associating the accused to a rental vehicle fitting the description of the getaway vehicle. The defense raised 12 grounds of appeal; however, the Court took the view that most were repetitive or of no merit. Therefore, the appeal was reduced to three issues: that the hearsay evidence from a deceased witness should not have been admitted; jury instruction regarding DNA evidence was inadequate; and the verdict was unreasonable.

Held: Appeal dismissed.

Per Mainella JA (Hamilton and Cameron JJA concurring): On the issue of admissibility, the Court was not persuaded by the accused's assertions that the trial judge erred in admitting the impugned statements as spontaneous utterances. The test for this exception to the hearsay rule is contextual, and consideration of the full context surrounding the statements does not suggest fabrication or motive to lie. Consequently, the statements are presumably admissible under the principled approach to hearsay because they meet the criteria of this traditional exception. The accused has also not demonstrated that this is one of the rare cases in which admissibility should be questioned under the principled approach. The death of the witness prior to trial suggests necessity favouring admissibility. Despite the concerns raised by the defence, there are no real reliability concerns arising from motive to lie or innocent collusion, and there is some corroborative evidence. Though the judge did not have the benefit of the decision in *R v Bradshaw,* 2017 SCC 35, that case has little relevance. There is also no reason to interfere with

the trial judge's refusal to exercise his residual discretion to exclude the evidence. Regarding the second ground, a functional approach to the jury instructions looked at in their entirety and in the context of the trial indicates that the jury was properly and fairly instructed on the DNA evidence. The final ground concerns a shirt and gloves that can be conclusively linked to the crime, and on which the DNA of several people, including the accused, was found. The central question is whether the jury could come to the conclusion that the only reasonable inference was that the accused handled the gloves and shirt while committing the crime, and not innocently before or after. Taking into account the factual matrix of the case viewed through the lens of judicial experience, the jury was entitled to draw such a conclusion.

R v Mohamed, 2018 MBCA 130 (Docket AR17-30-08835)

- Crown (Respondent) | Mohamed (Appellant)
- Heard: November27, 2018
- Judgment: November 27, 2018
- Heard by: leMaistre JA (Cameron and Burnett JJA concurring)
- Dissenting: N/A
- Result: Appeal dismissed. Convictions upheld.

Themes: Evidence: admissibility, eyewitness identification expert evidence; Jury instruction: inferences; offences: First-degree murder, attempted murder

Summary: The accused was convicted at trial by a jury of second-degree murder and attempted murder in the stabbing of two men at a house party. At trial, the accused attempted to call an eyewitness identification expert; however, the evidence was found to be inadmissible on a *voir dire*. The accused appeals on the basis that the trial judge erred in excluding the expert evidence,

allowing the jury to decide whether the accused had adopted the statement of a witness, and in failing to instruct the jury regarding a particular inference relating to *mens rea*.

Held: Appeal dismissed.

Per leMaistre JA (Cameron and Burnett JJA concurring): The trial judge's ruling on *voir dire* was discretionary and is entitled to deference. The judge properly considered and applied the law, finding the expert evidence to be unnecessary. His instructions on eyewitness testimony were also clear, detailed and addressed many of the concerns that the expert would have raised. Regarding the second issue, the judge followed the proper procedure and followed the test in *R v Scott*, 2013 MBCA 7. The Court is not persuaded that he erred. There is no merit to the third ground of appeal.

R v Mason, 2018 MBCA 138 (Docket AR18-30-08996)

- Crown (Respondent) | Mason (Appellant)
- Heard: December 11, 2018
- Judgment: December 11, 2018
- Heard by: Janice L. leMaistre JA (Monnin JA and Mainella JA concurring)
- Dissenting: N/A
- Result: Appeal dismissed.

Themes: evidence, eyewitness identification; unreasonable verdict

Summary: The accused was convicted at trial of trafficking crack cocaine to an undercover police officer. The accused appealed the conviction on the basis that the trial judge erred in law in her application of eyewitness identification and that the verdict was unreasonable.

Held: Appeal Dismissed; conviction upheld.

Per leMaistre JA (for the Court): The trial judge correctly identified existing deficiencies in the eyewitness evidence presented and assigned appropriate weight. Given that the evidence was properly interpreted by the trial judge, the verdict was not unreasonable.

R v Atkinson et al, 2018 MBCA 136 (Docket AR17-30-08871; AR18-30-09031)

- Crown (Respondent) | Atkinson (Appellant)
- Heard: September 21, 2018
- Judgment: December 17, 2018
- Heard by: Cameron JA (Steel JA and Burnett JJA concurring)
- Dissenting: N/A
- Result: Appeal dismissed. Conviction upheld

Themes: Evidence: admissibility, hearsay exceptions, refusal to testify, s 715(1), principled approach; unreasonable verdict, weapons offences, breaking and entering, assault.

Summary: Atkinson and his father, Kirton, were tried by judge alone on a joint indictment in relation to an armed robbery. Both were convicted on all charges, including breaking and entering, assault, and several weapons charges relating to a handgun. They were accused of breaking into the apartment of Atkinson's cousin, assaulting two victims within and stealing money and drugs from them. The accused asserted that they were invited into the apartment to remove two unwanted individuals, and that there were no assaults. The only evidence as to what actually happened in the apartment was statements made by one of the victims at preliminary inquiry. The victim later failed to attend, despite being subpoenaed, and could not be located. On appeal, the accused argue that the trial judge improperly admitted the preliminary inquiry

statements, and that the verdict is unreasonable because they had reasonable grounds to be in the apartment.

Held: Appeal dismissed; convictions upheld.

Per Cameron JA (Steel and Burnett JJA concurring): The Court of Appeal found that the evidence was properly admitted under both s 715(1) of the *Criminal Code* and the principled approach. Given the totality of the evidence, the trial judge also did not draw any unreasonable inferences in finding the accused guilty of breaking and entering.

R v RCRT, 2018 MBCA 139 (Docket AR17-30-08889)

- Crown (Respondent) | RCRT (Appellant)
- Heard: December 14, 2018
- Judgment: December 21, 2018
- Heard by: Cameron JA (Monnin JA and Pfuetzner JA concurring)
- Dissenting: N/A
- Result: Appeal dismissed. Convictions upheld.

Themes: Evidence, credibility, *W(D)* instructions.

Summary: The accused was convicted at trial of sexual interference and assault with a weapon. Complainant was the accused's daughter. She claimed that he sexually violated her when she was 8 and that he attempted to retrain her hands with a belt. Accused appealed the convictions on the basis that the trial judge provided insufficient reasons for disbelieving his testimony and that the judge erred in her application of the principles set out in *W(D)*.

Held: Appeal dismissed; conviction upheld.

Per Cameron JA (for the Court): The Court of Appeal found that the accused had failed to demonstrate and palpable and overriding error on the part of the trial judge.

R v Loonfoot, 2018 MBCA 140 (Docket AR17-30-08956)

- Crown (Respondent) | Loonfoot (Appellant)
- Heard: December 6, 2018
- Judgment: December 27, 2018
- Heard by: Simonsen JA (Monnin JA and Beard JA concurring)
- Dissenting: N/A
- Result: Appeal dismissed. Convictions upheld.

Themes: Evidence: testimony of co-accused, witnesses of questionable character/motivation to lie.

Summary: The accused was convicted of several charges relating to the theft of a Jeep and a subsequent flight from officers in it. The accused appeals his convictions on two charges; dangerous operation of a motor vehicle and flight from a police officer, arguing that it was not proven beyond a reasonable doubt that he, rather than a co-accused, was the driver. Specifically, the accused argues that the trial judge failed to consider the principles from Vetrovec and what constitutes confirmatory evidence in assessing the testimony of the co-accused; that the trial judge erred in credibility and reliability findings, and; that the trial judge provided insufficient reasons.

Held: Appeal dismissed; conviction upheld.

Per Simonsen JA (for the Court): The Court of Appeal found that though the trial judge did not specifically mention Vetrovec, she was aware of the principles contained therein and assessed

the evidence accordingly, and she made no error in finding other evidence confirmatory. The inferences the trial judge made regarding reliability and credibility were reasonable and should not be overturned on appellate review. Consideration of the trial judge's reasons indicated that they were clear and cogent in explaining her decisions.

R v JMB, 2019 MBCA 14 (Docket AR18-30-09005)

- Crown (Respondent) | JMB (Appellant)
- Heard: November 29, 2018
- Judgment: February 14, 2019
- Heard by: Simonsen JA (Mainella JA and Pfuetzner JA concurring)
- Result: Appeal dismissed

Themes: Possession of child pornography; procedure: severance; unfair verdict.

Summary: A 4-count indictment was brought against the accused for voyeurism and child pornography. At trial, the accused was acquitted of voyeurism and making child pornography but convicted of two counts of possessing child pornography. The accused appeals his convictions on the basis that the trial judge erred in not severing the 4th count (possession), failing to consider the evidence on each count separately and by concluding that the only reasonable inference from the evidence was that the accused was aware of the pornographic images found on his laptop.

Held: Appeal dismissed; convictions upheld.

Simonsen JA (for the Court): The Court found that the trial judge was correct in not severing the 4th charge from the others, given the nature of the defence raised, the evidence provided by the

Crown and the factual nexus between the counts. The trial judge was also entitled to accept all, none or part of the accused's testimony and was very careful and deliberate in assessing the evidence in support of each count separately. Lastly, it was open to the trial judge to conclude that there were no plausible alternative theories to the accused having knowledge of the images found on the laptop, given the internal inconsistencies of the accused's testimony, testimony from other witnesses and the forensic evidence.

R v Merkl, 2019 MBCA 15 (Docket AR17-30-08975)

- Crown (Respondent) | Merkl (Appellant)
- Heard: February 11, 2019
- Judgment: February 11, 2019
- Written reasons: February 14, 2019
- Heard by: Pfuetzner JA (Hamilton JA, William JA, and Burnett JA concurring)
- Result: Appeal dismissed

Themes: Sexual offences against minors: interference, invitation to touching, showing explicit material, exposure; evidence: child testimony, credibility assessment.

Summary: The accused was convicted at trial of several sexual offences against two young sisters whom he was babysitting. He was then sentenced to 44 months' imprisonment. The accused appeals the convictions, arguing that inadmissible evidence was put before the trial judge which caused a prejudicial effect in her credibility findings.

Held: Appeal dismissed, application for leave dismissed; convictions upheld.

Pfuetzner JA (Hamilton JA, William JA, and Burnett JA concurring): The Court found no prejudice resulted. The Trial judge explicitly acknowledged and dealt with many of the issues raised by the accused on appeal and did so appropriately. She also properly instructed herself on the treatment of child witnesses and it was open to her to find the testimony of the accused not to be credible given the many inconsistencies and other issues that emerged.

R v Houle, 2019 MBCA 17 (Docket AR18-30-09035)

- Crown (Respondent) | Houle (Appellant)
- Heard: February 12, 2019
- Judgment: February 12, 2019
- Written reasons: February 15, 2019
- Heard by: leMaistre JA (Beard and Pfuetzner JJA concurring)
- Dissenting: N/A
- Result: Appeal dismissed. Conviction upheld.

Themes: Evidence: assessing credibility and reliability, shifting onus onto the accused; Offences against minors: sexual interference

Summary: The accused was convicted at trial of sexual interference. He appeals the conviction on the basis that the Crown was allowed to improperly shift the onus onto him during cross examination and that the trial judge erred in assessment of the complainant's credibility and reliability.

Held: Appeal dismissed.

Per leMaistre JA (Beard and Pfuetzner JJA concurring): The Court found there was no reverse onus. The Crown asked a single inappropriate question which was not objected to and was not

relied upon by the judge in her reasons. Though the word “reliability” was never used by the judge, it is clear from her reasons that she engaged with the issue, and her findings of credibility were grounded in the evidence before her.

R v Cleveland, 2019 MBCA 49 (Docket AR18-30-09025)

- Crown (Respondent) | Cleveland (Appellant)
- Judgement: April 29, 2019
- Heard by: leMaistre JA (Monnin JA and Burnett JA concurring)
- Dissenting: N/A
- Result: Appeal dismissed

Themes: evidence; offences: assault

Summary: Accused threatened to apply force to the complainants by confronting them while in possession of a knife and chasing them as they fled. Accused was convicted of assault and appealed. Held: Appeal dismissed.

Per leMaistre JA (for the Court): Accused did not establish that trial judge was mistaken as to substance of evidence, failed to consider relevant evidence or failed to give proper effect to evidence. Trial judge carefully considered evidence first when determining motion for directed verdict and second time when deciding whether there was proof beyond reasonable doubt of guilt. Evidence supported trial judge's findings of fact and inferences. Trial judge did not err in application of law. Not shown that counsel was ineffective.

R v Williams, 2019 MBCA 55 (Docket AR18-30-09145)

- Crown (Respondent) | Williams (Appellant)
- Judgement: May 3, 2019
- Heard by: Chartier JA (Steel JA and Simonsen JA concurring)
- Dissenting: N/A
- Result: Appeal dismissed

Themes: Evidence: eye-witness identification; attempted robbery; breach of probation.

Summary: The accused was convicted of attempted robbery and breaching probation. The offence took place outside a Manitoba Housing building, where an employee was aggressively approached three times by an individual who demanded his keys. The employee was unable to give a more helpful description than to note a face tattoo; however, there was CCTV footage of the incident. A detective recognised the individual in the footage as an inmate that he had extensive contact with during his time as a corrections officer. This led to the naming, identification and charges against the accused. The accused appealed his convictions on the basis that the trial judge erred in assessing the eye-witness identification evidence.

Held: Appeal dismissed; convictions upheld.

Per Simonsen JA (for the Court): The Court found no error; the reasons of the trial judge show that she was alive to the issues relating to eye-witness identification and that she engaged with these issues, applying the proper legal principles.

R v Green, 2019 MBCA 53 (Docket AR17-30-08852)

- Crown (Respondent) | Green (Appellant)
- Heard: February 15, 2019
- Judgment: May 7, 2019
- Heard by: Hamilton JA (leMaistre and Mainella JJA concurring)
- Dissenting: N/A
- Result: Appeal dismissed. Conviction upheld.

Themes: Second-degree murder: mens rea; Jury instruction: character evidence, Vetrovec caution, hearsay evidence; unreasonable verdict: circumstantial evidence, mens rea

Summary: The accused was convicted by a jury of second-degree murder relating to a fatal stabbing. The accused, the deceased and several others had spent the night partying, which included the consumption of alcohol and cocaine. Early in the morning they returned to a trailer park where several of the parties lived. Later in the morning, the body of the deceased was found nearby to where the others had parked. The deceased had died from a knife wound to the neck. Video shows the group parking, then later the deceased is seen fleeing from the van they came in, while the accused runs after him with a knife in hand, accompanied by another individual who stops short. After a short period of time, the accused re-enters the shot alone. A trail of blood was found from nearby the van to the body of the accused. The Crown theory was that the accused stabbed the victim in the van, after which the victim fled and bled to death. The accused argues that one of the other parties present stabbed the victim in the van. The evidence of who carried out the stabbing is circumstantial. The accused appeals his conviction, arguing that the

trial judge erred by not providing the jury with limiting instructions regarding certain evidence and that the verdict is unreasonable.

Held: Appeal dismissed.

Per Hamilton JA (leMaistre and Mainella JJA concurring): On the issue of jury instruction, the accused argued that the jury was cautioned on the use of character evidence that had arisen in the narrative regarding the person he said did the stabbing, but not on the use of similar evidence relating to the accused himself. However, the instruction was approved by counsel, and reflected a tactical decision. The accused also objected to the lack of instruction regarding multiple pieces of hearsay evidence, but all of these were either properly dealt with, or harmless in terms of prejudice. The accused also asserted that the finding that he was the stabber was unreasonable, or alternatively that the finding he possessed the requisite *mens rea* was. It was open to the jury to conclude that the accused committed the stabbing based on the evidence, given consistencies between witness testimony and the video, and the fact that the weapon used was never found and its exact dimensions were a live issue. Similarly, despite the evidence of the witnesses which pointed to the accused being highly intoxicated from drugs and alcohol, there was evidence to support that the requisite *mens rea* for second-degree murder could be met. Thus, it was open to the jury to conclude that the accused had the necessary intent.

R v Chief, 2019 MBCA 59 (Docket AR18-30-09097)

- Crown (Respondent) | Chief (Appellant)
- Heard: May 8, 2019
- Judgment: May 8, 2019

- Written reasons: May 24, 2019
- Heard by: Mainella JA (Cameron and Simonsen JJA concurring)
- Dissenting: N/A
- Result: Appeal dismissed. Conviction upheld.

Themes: Unreasonable verdict: manslaughter, actus reus, causation, Thin Skull Rule; Evidence: expert medical evidence, weight

Summary: The accused was convicted of manslaughter in the death of a man he robbed of a case of beer. In the course of the robbery, the accused threw the victim to the ground, causing him to hit his head on the pavement, fall unconscious and die. The accused appeals the conviction as unreasonable on the basis that because the victim had been assaulted in an earlier unrelated incident, the possibility exists that the victim died solely from another cause. The victim was assaulted 3 times in total: twice by a woman following an argument inside the hotel where all of this occurred, and once by the accused as described. Only after the third assault did the victim lose consciousness. Two experts testified on the nature of the victim's injuries. Both stated that it could not be determined which of the assaults led to which injuries and the victim's death. One expert said he could not rule out that the first two assaults alone caused death, though he thought the accused's assault to have meaningfully contributed. The other expert testified more firmly that all three assaults contributed.

Held: Appeal dismissed.

Per Mainella JA (Cameron and Simonsen JJA concurring): It was open to the judge to find causation. Though the medical evidence was cautious, both experts testified on direct examination that they believed the accused's actions contributed to the victim's death.

Furthermore, there was other compelling evidence before the judge, namely security camera footage, which shows a marked difference in the victim before and after the accused's assault. The evidence as a whole can sustain the trial judge's conclusions. Furthermore, the alternative inference that the victim was already a "dead man walking" by the time the accused intervened falls afoul of the thin skull principle.

R v Dowd, 2019 MBCA 80 (Docket AR19-30-09312)

- Crown (Respondent) | Dowd (Appellant)
- Heard: July 18, 2019
- Judgment: July 19, 2019
- Written reasons: July 30, 2019
- Heard by: Cameron JA
- Dissenting: N/A
- Result: Application granted in part. Leave to appeal conviction on one ground granted, leave to appeal sentence denied.

Themes: Offences against minors: sexual assault; evidence: rule in *Browne v Dunn*, unfair trial; sentencing: aggravating factors, age of complainant

Summary: The accused was convicted and sentenced for sexually assaulting a 9-year-old girl in the trailer at his campsite. The accused appealed his conviction, and now appeals the decision of the appeal judge, arguing that the appeal judge misapprehended the accused's evidence and that he erred in his application of the rule in *Browne v Dunn*. The accused also seeks leave to appeal his sentence.

Held: Application allowed in part.

Per Cameron JA: On the first ground, the accused merely demonstrated a difference of interpretation with the trial judge, and neither of the courts below were incorrect in their interpretation of the evidence before them. The statements that the accused points to as demonstrating misunderstanding make sense in their proper context. On the second issue, the appeal judge failed to address the accused's argument when rephrasing the *Browne v Dunn* issue as being one of weight ascribed. This raises an arguable case of substance and appeal on this ground should be allowed. The issue raised regarding the sentence is that age should not have been an aggravating factor as it is a factor in the offence itself. It is unnecessary to deal with this issue since the sentence was fit regardless.

R v Pendl, 2019 MBCA 89 (Docket AR18-30-09059)

- Crown (Respondent) | Pendl (Appellant)
- Heard: August 28, 2019
- Judgment: August 28, 2019
- Written reasons: September 4, 2019
- Heard by: Cameron JA (Mainella JA and Spivak JA concurring)
- Dissenting: N/A
- Result: Appeal dismissed.

Themes: Home invasion; evidence: testimony of co-accused, alibi, Vetrovec; unreasonable verdict.

Summary: The accused appeals both his convictions and sentence related to a violent home invasion. The only evidence against the accused was the testimony of his co-accused, procured through a deal with the Crown. The two accused planned the robbery in advance and had a third person act as a driver. The two accused broke into the victim's house, choked him into

unconsciousness, restrained him and ransacked the house. The accused awoke and was freed by the two accused; however, they cut his phone line and slashed his tires. Several items were stolen including a collection of hunting knives. The co-accused and driver were identifiable on trail-cam footage outside the victim's home, but the third person was not. The accused provided an alibi that he was with his girlfriend, but the girlfriend provided significant evidence to the contrary. The accused appeals, arguing that failed to provide adequate reasons, failed to provide a *Vetrovec* caution to herself regarding the testimony of the co-accused and girlfriend, that the trial judge misapprehended the evidence, that she failed to apply a *W(D)* analysis and that the verdict was unreasonable.

Held: Appeal dismissed; convictions upheld, leave to appeal sentence denied.

Cameron JA (for the Court): The Court disagreed with the accused's assertions. The judge was alive to the issues with the testimony of the co-accused and girlfriend but found both to be credible and found that their stories were corroborated by the evidence. The judge provided sufficient reasons to evidence that the accused had failed to raise a reasonable doubt. The test in *W(D)* was not required. The reasons of the judge also clearly demonstrate that she did not misapprehend the evidence. Leave to appeal the sentence is also denied as there is no arguable case that the sentence is unfit.

R v AJS, 2019 MBCA 93 (Docket AR18-30-09184)

- Crown (Respondent) | AJS (Appellant)
- Heard: September 3, 2019
- Judgment: September 3, 2019

- Written reasons: September 9, 2019
- Heard by: Hamilton JA (Burnett JA and Simonsen JA concurring)
- Dissenting: N/A
- Result: Appeal dismissed.

Themes: Sexual offences against a minor: interference, invitation to touching, making available explicit materials; evidence: admitting a new witness after close of submissions, using lack of embellishment to assess credibility.

Summary: The accused was convicted of sexual interference, invitation to sexual touching and making available sexually explicit material to a person under 16 years of age against his 11-year-old granddaughter. A main issue at trail was whether there was opportunity for the accused to be alone with the victim at the alleged times. One of the occupants of the house at that time, the girlfriend of the complainant's father, was present throughout proceedings and indicated after the close of submissions that she wished to testify. The accused appeals his convictions, arguing that the trial judge erred by not allowing another witness to testify after the close of submissions and by misapprehending the evidence through relying on the complainant's lack of embellishment as bolstering her credibility.

Held: Appeal dismissed; conviction upheld.

Hamilton JA (for the Court): The Court found that the judge's failure to apply the test for late admission of a witness as set out in *Heyward* did not constitute an error in law. The circumstances in *Heyward* were different in several significant ways and the judge properly recognised and assessed the issues related to allowing the girlfriend to testify at that stage of proceedings. Over emphasis of lack of embellishment in a credibility assessment will be an error

in principle where it is key to finding a witness credible. In this case, lack of embellishment was referenced in the context of other important findings and was not itself a key factor in determining the credibility of the complainant.

Section 3.1 | Evidence of Past Sexual History

R v Catellier, 2018 MBCA 107 (Docket AR17-30-08966)

- Crown (Respondent) | Catellier (Appellant)
- Heard: October 17, 2018
- Judgment: October 17, 2018
- Heard by: Cameron JA (Chartier CJM and Monnin JA concurring)
- Dissenting: N/A
- Result: Appeal dismissed. convictions upheld.

Themes: Evidence: admissibility, past sexual history; sexual offences: sexual assault; Offences against the person: assault, uttering threats

Summary: The accused was convicted by a jury of sexual assault, assault and uttering threats. He appeals on the basis that the trial judge erred in denying his application to cross examine on past sexual history. The accused argues that cross examination was necessary to impeach the complainant's credibility, give context to their relationship, to establish an honest but mistaken belief in consent and to prove that the complainant had a motive to fabricate.

Held: Appeal dismissed.

Per Cameron JA (for the Court): The trial judge correctly stated and applied the relevant legal principles. She was aware that the case turned on credibility. The appellant was allowed to cross-examine on some aspects of the complainant's sexual history and, for those where cross-

examination was not allowed, appropriate reasons were given. The trial judge did an adequate job of balancing the interests of the accused and the complainant pursuant to s 276 of the *Criminal Code*. Intervention is unwarranted.

Section 3.2 | Search and Seizure

R v Pilbeam, 2018 MBCA 128 (Docket AR17-30-08942)

- Crown (Respondent) | Pilbeam (Appellant)
- Heard: October 22, 2018
- Judgment: December 6, 2018
- Heard by: Mainella JA (Burnett and Marc Monnin JJA concurring)
- Dissenting: N/A
- Result: Appeal dismissed. Conviction upheld.

Themes: Search and seizure: search warrant, information to obtain based on confidential informant; Drug offences: possession for the purposes of trafficking

Summary: The accused was convicted at trial to possession of cocaine for the purposes of trafficking. Drugs and trafficking paraphernalia were recovered from the accused's residence following the execution of a search warrant. The Information to Obtain the warrant (ITO) was based entirely on information provided to police by a confidential informant. The accused challenged the warrant at trial under s 8 of the *Charter*, disputing whether an objective assessment of the grounds relied on by the officer in the ITO justified the issuance of the search warrant. The trial judge ultimately found that the authorising justice could have found reasonable grounds on the totality of the circumstances, and the accused's *Charter* argument failed. The accused appeals, arguing that on its face, the ITO failed to disclose sufficient information to

establish reasonable grounds necessary to issue the search warrant, and that deficiencies in the officer's drafting of the ITO undermined the weight that should have been given to the informant's information.

Held: Appeal dismissed.

Per Mainella JA (Burnett and Marc Monnin JJA concurring): The trial judge applied the correct deferential standard to reviewing the sufficiency of the ITO, and he properly directed himself on the relevant factors in assessing the informant's reliability. It was open to the judge to find the informant's information credible given the specificity of the tip, its basis in recent, first-hand experience, the informant's past record of reliability and the corroborative evidence that police assembled following the tip. As to the drafting of the ITO, it was clearly imperfect but none of the flaws raised by the accused mean that, as it was drafted, it failed to provide sufficient reasonable grounds to issue the search warrant when it is read as whole. There is no evidence on the record establishing that any of the omitted information complained of was consequential to the statutory preconditions to issuance. The trial judge also did not abdicate his responsibility to undertake a meaningful review of ITO by accepting officer's claim of informant privilege over some information in tip and CI's criminal background. The Court is not entitled, therefore, to intervene in this case.

R v Land, 2018 MBCA 132 (Docket AR18-30-09038)

- Crown (Appellant) | Land (Respondent)
- Heard: November 21, 2018
- Judgment: November 21, 2018

- Written reasons: December 10, 2018
- Heard by: Pfuetzner JA (Beard and Steel JJA concurring)
- Dissenting: N/A
- Result: Appeal allowed. New trial ordered.

Themes: Search and seizure: admissibility, search incident to arrest, reasonable expectation of privacy; *Charter*: ss 8, 24(2); offences: possession of proceeds of crime, possession for the purpose of trafficking, possession of a weapon for a purpose dangerous to the public peace.

Summary: The accused was acquitted at trial for a number of offences relating to weapons, drugs and proceeds of crime. Police were called by a store clerk after a man with a knife came into his store and refused to leave. Police found the accused in the store next door. He matched the description provided and responded in the affirmative when asked if he had a knife on him. Police detained the accused and removed him from the store for a more thorough weapons search. While exiting, they noticed a strong smell of marijuana coming from the accused. The accused admitted to having a gram of marijuana. He was arrested. A search of his backpack yielded 200 grams of marijuana divided into smaller packages. Police searched the accused wallet on the basis that the volume of marijuana suggested trafficking. They found $885.35 which was seized as the proceeds of crime. A *voir dire* was held at trial to determine the admissibility of the evidence. The trial judge found it inadmissible and the accused was acquitted. The Crown appeals, arguing that the trial judge erred in law by failing to consider if the searches of the backpack and wallet and seizure of the cash were reasonable as being incidental to arrest during his s 8 analysis, and by improperly inflating the seriousness of the officers' conduct and the impact of the breaches in the s 24(2) analysis.

Held: Appeal allowed.

Per Pfuetzner JA (Beard and Steel JJA concurring): The trial judge failed to consider the correct legal principles in determining whether the searches violated. He erred initially by failing to consider whether the accused's arrest for possession of marihuana based on the odour alone was lawful, then again by failing to consider whether the search of the backpack was a lawful search incidental to that arrest and whether the subsequent search of the accused's wallet and seizure of cash were lawful as incidental to his arrest for possession of marihuana for the purposes of trafficking. A reading of the trial judge's ruling as a whole indicates that he did not consider the fact that, at the time of each search and the seizure of the cash, the accused was under arrest for marihuana offences. This, combined with the Crown's concession that a s 10(b) breach occurred, occasions a fresh trial where all *Charter* issues can be considered properly.

R v Penner, 2019 MBCA 8 (Docket AR 18-30-09077)

- Crown (Respondent) | Penner (Appellant)
- Heard: January 30, 2019
- Judgment: January 30, 2019
- Heard by: Mainella JA (Monnin JA and Cameron JA concurring)
- Dissenting: N/A
- Result: Appeal dismissed

Themes: investigation and arrest, arrest without warrant, when power may be exercised.

Summary: The accused was convicted of possession for the purpose of trafficking and possessing proceeds of crime. A confidential informant, who had provided information

numerous times in the past, tipped off police that the accused and another individual were planning to sell cocaine that evening, and later that they were in the process of doing so. Police set up surveillance on the accused and saw him and his partner engage in three brief meetings. They made an arrest and warrantless search following the latter tip. Drugs and money were seized. The accused appeals his conviction on the basis that the trial judge erred in finding that the warrantless arrest and search of his vehicle did not violate the *Charter*. The only issue before the Court was the objective reasonableness of the arrest based on the informant's tip. The accused argued a constellation of errors in the trial judge's assessment of the credibility and reliability of the informant.

Held: Appeal Dismissed; conviction upheld.

Per Mainella JA (Monnin JA and Cameron JA concurring): The Court found no error. Though corroboration was relatively weak, the tip was compelling, and the informant had demonstrated reliability in the past. On the whole of the circumstances it was open to the trial judge to reach the conclusion that he did.

R v Okemow, 2019 MBCA 37 (Docket AR 17-30-08857)

- Crown (Respondent) | Okemow (Appellant)
- Heard: December 3, 2018
- Judgment: April 5, 2019
- Heard by: Cameron JA (Pfuetzner JA and Simonsen JA concurring)
- Dissenting: N/A
- Result: Appeal dismissed.

Themes: *Charter*: unreasonable search and seizure [s 8], reasonable expectation of

privacy, authorized by law; evidence: right to cross-examine, hearsay.

Summary: Accused got into verbal confrontation with person who was with his friends, and as group walked away, shots were fired at them, which killed deceased and injured complainant. Police received calls relating to male being sighted with gun. Police observed accused entering residence and accused was acting suspiciously, as he appeared to be trying to hide something behind his back, and as result of further police investigation, accused was detained and residence searched. Police located live bullet and rifle, and expert firearms evidence showed that casing seized from across street from where deceased was shot matched rifle. Prior to commencement of trial before jury, voir dire was held to determine admissibility of evidence seized at residence, and trial judge found that accused did not have standing to assert a s 8 of *Charter* breach. Accused was convicted by jury of second-degree murder and attempted murder. Accused appealed and claimed that:

1. The appellant had a reasonable expectation of privacy in the residence.
2. The trial judge erred in failing to find that the police were negligent in deciding to attempt to speak with him, as the male described in second call was black while accused was Aboriginal.
3. The trial judge erred in declaring a witness as hostile on voir dire. Doing so allowed the Crown to cross examine and enter the witnesses' police statement into evidence.
4. The trial judge erred in considering the substantive reliability of the witness statement.

Held: Appeal dismissed.

Per Cameron JA: While accused had established a subjective reasonable expectation of privacy, there were factors which negated objective reasonableness of accused's expectation of privacy, as he was not owner of residence, did not lease residence and was not listed on lease as person who was permitted to reside there. The court also dismissed the second ground as, based on all of factual circumstances surrounding search, it was found reasonable for police to have approached residence and ask to speak to accused who was acting suspiciously.

With respect to the claim that the trial judge erred in declaring a witness as hostile on voir dire. The MBCA dismissed this ground. Trial judge did not err in her review of law and finding that there was difference between adverse witness pursuant to s 9(1) of *Canada Evidence Act*. Trial judge acknowledged that witness was not aggressive or angry in his manner of giving evidence, however, she also found that accused had attempted to thwart Crown's case. Finally, the defence claim that the TJ erred in considering the substantive reliability of the witness statement was also dismissed as substantive reliability was not required to be shown because of significant indicia of procedural reliability in this case, including ability of accused to cross-examine witness.

R v Plante, 2019 MBCA 39 (Docket AR18-30-09175)

- Crown (Respondent) | Plante (Appellant)
- Heard: April 5, 2019
- Judgment: April 5, 2019
- Heard by: Pfuetzner JA (Monnin JA and Mainella JA concurring)
- Dissenting: N/A
- Result: Appeal dismissed.

Themes: Constitutional; *Charter*, s 8, search and seizure; firearms and other

weapons: use of imitation firearm in commission of offence.

Summary: Accused convicted of use of imitation firearm, CO2 air pistol, in commission of offence. The sole ground of appeal alleged that the trial judge erred in concluding that section 8 of the *Charter* had not been violated by the police conducting a warrantless search of the accused's residence incident to an arrest because of exceptional circumstances.

Held: Appeal dismissed.

Per Pfuetzner JA (for the Court): Even if imitation firearm was excluded, there was sufficient evidence to uphold conviction at trial. Trial judge properly interpreted *Charter* issue.

Section 4.0 | Trial Procedure

R v Van Wissen, 2018 MBCA 100 (Docket AR16-30-08579)

- Crown (Respondent) | Van Wissen (Appellant)
- Heard: September 20, 2018
- Judgment: September 20, 2018
- Written reasons: October 4, 2018
- Heard by: Michel A Monnin JA
- Dissenting: N/A
- Result: Motion denied. Recusal refused.

Themes: Procedure: reasonable apprehension of bias, motion to recuse, grounds for recusal.

Summary: The appellant moved to have Monnin JA recuse himself from the panel determining the appellant's appeal on his conviction for first-degree murder. The appellant asserted that a reasonable apprehension of bias against counsel existed following an exchange that occurred between Monnin JA and defence counsel during submissions that interference by the trial judge prevented a fair hearing. Specifically, Monnin JA told counsel that he is difficult to deal with at trial and that the ground he was advancing at the time did not constitute a ground for appeal on his view.

Held: Motion dismissed.

Per Monnin JA: A review of the case law indicates that the motion could be dismissed for delay, however, it is necessary to comment on the bias issue. Appeal courts are different from trial courts in that appellate judges are expected to take a more active role in challenging counsel and the validity of counsel's arguments. The comments made were merely an indication to counsel, based on the law, that this particular ground appeared weak. Though the exchange was pointed, it is not unusual or outside the bounds of normal conduct in an appellate court. Taken in its full context, the impugned conduct falls short of the threshold for establishing reasonable apprehension of bias.

R v Ostrowski, 2018 MBCA 125 (Docket AR14-30-08288)

- Crown (Respondent) | Ostrowski (Appellant)
- Heard: May 28, 2018
- Judgment: November 27, 2018
- Heard by: Beard JA (Burnett and Pfuetzner JJA concurring)
- Dissenting: N/A

- Result: Appeal allowed in part. First motion to admit new evidence granted, second dismissed. New trial ordered. Stay entered.

Themes: Miscarriage of Justice; non-disclosure of Crown evidence; full answer and defence.

Summary: The accused appeals his conviction for first-degree murder. The appeal comes before the Court by way of a reference from the Minister of Justice pursuant to ss 696.1 and 696.3(3)(a)(ii) of the *Criminal Code*. Two pieces of Crown disclosure were not given to the defence, affecting the accused's' ability to make full answer and defence at trial. On appeal, the Crown agrees that the conviction should be set aside, and no new trial should go forward due to elapsed time since the conviction (23 years). The only issue on appeal is whether a new trial should be ordered, and a stay entered, or the accused should be acquitted. Additionally, the accused made 2 motions to admit fresh evidence on this appeal.

Held: Appeal allowed in part.

Per Beard JA (Burnett and Pfuetzner JJA concurring): The failure to disclose clearly impacted the accused's ability to make full answer and defense. It would have allowed for overall credibility challenges and specific credibility challenges of certain witnesses. However, the new evidence is neither exculpatory as regards the charge against the accused, nor does it clearly render certain testimony unreliable. A jury would still have to consider the impugned testimony in the context of all of the other evidence, to determine whether it was reliable and credible. There is a significant amount of corroborative evidence that supports the impugned testimony, such that it would remain open to a jury to find it credible and reliable even in light of the new

evidence. A properly instructed jury could still reasonably find the accused guilty, and it is not clearly more probable than not that the accused would be acquitted at a hypothetical new trial. Therefore, the appropriate remedy is for a new trial to be ordered and a judicial stay to be entered, due to the time that has passed. As regards the motions for new evidence, the first motion proceeded by consent and saw witnesses testify before the Court. The second was for information regarding one of the witnesses. This evidence was not relevant to proceedings as it spoke to Crown misconduct, which was already conceded.

R v Herntier, 2019 MBCA 25 (Docket AR16-30-08636)

- Crown (Respondent) | Herntier (Appellant)
- Heard: October 15, 2018
- Judgment: March 15, 2019
- Heard by: Michel Monnin JA
- Dissenting: N/A
- Result: Motion dismissed. Recusal refused

Themes: procedure, trial fairness: reasonable apprehension of bias: recusal, grounds.

Summary: The accused moved to have Michel Monnin JA recuse himself prior to the hearing of a second-degree murder conviction. The accused argues that counsel previously appealed another case on the ground that the trial judge unduly interfered with counsel's conduct of the trial. The accused seeks to advance the same ground on appeal. Monnin JA refused to recuse in that case and the appeal was ultimately denied. Therefore, there is reasonable apprehension that Monnin JA will be biased against counsel, and by extension the accused.

Held: Motion dismissed.

Per Monnin JA: There is no reason for recusal now when the same motion was denied in the previous case. The witness to the last appeal called by the accused in support of this motion was not reliable, given subjectivity and lack of information on the witness. The motion is dismissed and there will be no recusal.

R v Ewanochko, 2019 MBCA 45 (Docket AR19-30-09250)

- Crown (Respondent) | Ewanochko (Appellant)
- Judgement: April 25, 2019
- Heard by: Monnin JA (Chartier JA and Simonsen JA concurring)
- Dissenting: N/A
- Result: Appeal allowed – new trial ordered

Themes: Disclosure, fresh evidence, warrantless search. Firearms and other weapons: contravention of storage regulations.

Summary: Accused pleaded guilty to one count of careless storage of firearm and received conditional sentence and probation. After trial, it was disclosed that warrantless search had occurred regarding son, against whom charges were dropped. Accused appealed.

Held: Appeal allowed; new sentence ordered.

Per Monnin JA (for the Court): Plea quashed, and new trial ordered. Fresh evidence should be admitted as its failure to be disclosed in timely fashion affected fairness of trial. It would be miscarriage of justice to uphold guilty plea.

R v Grant, 2019 MBCA 51 (Docket AR18-30-09190)

- Crown (Respondent) | Grant (Appellant)
- Heard: April 4, 2019
- Judgment: May 6, 2019
- Heard by: Michel Monnin JA
- Dissenting: N/A
- Result: Application dismissed. Leave to appeal refused, conviction upheld.

Themes: Procedure: MBPC Practice directives, time to file motions; traffic offences: speeding, photo-radar

Summary: The accused was issued a photo-radar ticket for speeding, which she then attempted to fight. During closing submissions at trial, she brought a motion to have the information against her quashed on the basis that the special constable signing lacked jurisdiction. She also moved to stay the charge due to prosecutorial delay pursuant to s 11(b) of the *Charter.* The JPP dismissed the motion to quash, as it violated Manitoba Provincial Court Rules because such motions are required to be submitted prior to the hearing date. The motion to stay was dismissed because by that time the accused was already found guilty. The accused appealed to a summary conviction appeals judge, who dismissed her claims. She now seeks leave to appeal the decision of the appeal judge.

Held: Application dismissed.

Per Monnin JA: The applicant has not actually raised any error on the part of the appeal judge. Instead, she simply reasserts the same arguments made before the courts below. Accordingly, she has identified no reviewable errors on the part of the appeal judge. Furthermore, even if she had,

her arguments have no merit. Her application was originally dismissed because it was in breach of the provincial court practice directives, and this remains the case.

R v Froese, 2019 MBCA 56 (Docket AR19-30-09270)

- Crown (Respondent) | Froese (Appellant)
- Heard: May 2, 2019
- Judgment: May 13, 2019
- Heard by: Hamilton JA
- Dissenting: N/A
- Result: Application dismissed. Order upheld

Themes: Procedure: s 680(1), review of decision.

Summary: The accused was convicted of driving over .08 and was given a one-year driving prohibition. The accused then filed an appeal to the Court of Queen's Bench and applied for a stay of the driving prohibition pending the hearing. The stay was denied and the accused now applies for review of that decision pursuant to s 680(1) of the *Criminal Code*.

Held: Application dismissed.

Per Hamilton JA: The substantive issues went unexamined as the Court found that it lacked jurisdiction. Section 680(1) only confers jurisdiction to review a decision under s 320.25 if it is made by a Court of Appeal judge.

R v Woroniuk, 2019 MBCA 77 (Docket AR18-30-09201)

- Crown (Respondent) | Woroniuk (Appellant)
- Heard: June 12, 2019
- Judgment: June 12, 2019
- Heard by: Michel Monnin JA (Cameron and Pfuetzner JJA concurring)
- Dissenting: N/A
- Result: Leave to appeal granted, appeal allowed. Sentence varied

Themes: Weapons offences: possession; procedure: judicial conduct, eliciting of outside information by judge, lack of judicial notice.

Summary: The accused was sentenced in relation to a number of convictions including: possession of a prohibited weapon, possession of a weapon dangerous to the public peace and failing to comply with a recognizance. Part of the sentence imposed was a curfew. The accused appeals for variation to remove the curfew, with Crown consent. At sentencing, the judge adjourned and made a private call to the creator of the pre-sentence report, which led directly to the curfew condition.

Held: Leave to appeal granted, appeal allowed.

Per Michel Monnin JA (Cameron and Pfuetzner JJA concurring): The sentencing judge openly acknowledged his mistake during proceedings. While well intentioned this is a violation of a basic principle of judicial conduct and led to an unnecessary appeal and waste of court resources.

R v Asselin, 2019 MBCA 94 (Docket AR18-30-09049)

- Crown (Respondent) | Asselin (Appellant)
- Heard: April 26, 2019
- Judgment: September 19, 2019
- Heard by: Cameron JA (Mainella JA and Simonsen JJA concurring)
- Dissenting: N/A
- Result: Appeal dismissed.

Themes: contempt: common law power; procedure: material evidence requirement for warrant, relationship between warrant and contempt proceedings.

Summary: The accused was convicted of contempt of court at common law. Accused was subpoenaed as a witness in a second-degree murder trial. In a series of emails, he refused to cooperate with the Crown and to appear to testify. As a result, a warrant was issued for his arrest and he was taken into custody. The accused appeals, arguing that the MBQB had no jurisdiction over him as there was insufficient evidence before the judge who issued the material witness warrant for his arrest which ultimately resulted in him being brought before the Court for contempt, because his initial detention was unlawful. He also argues that the Court should have proceeded with the contempt hearing pursuant to *Criminal Code* s 708 instead of its common law power preserved in s 9. If successful, he appeals his sentence of 9 months' imprisonment.

Held: Appeal dismissed; conviction upheld; sentence upheld.

Per Cameron JA: The Court found no merit to the accused's assertions. The accused challenged the warrant on the basis that it did not indicate that he was to give material evidence. While the words were not used, it is clear from the affidavit and the warrant itself that material evidence

was expected. Additionally, the warrant was separate from the contempt proceedings themselves, which relate to a subpoena that the accused never actually challenged. The accused was lawfully detained on contempt. While it would have been better if a formal notice of motion or indictment was made, this was not fatal. Jurisprudence clearly demonstrates that the provisions of the *Criminal Code* dealing with contempt do not oust the common law power of the superior court to deal with contempt under s 9. The sentencing judge properly considered all factors and the sentence was not demonstrably unfit.

Section 5.0 | Post-Trial Procedure / Prison Law

R v Devaloo, 2018 MBCA 108 (Docket AR18-30-09129)

- Crown (Respondent) | Devaloo (Appellant)
- Heard: September 13, 2018
- Judgment: October 23, 2018
- Heard by: Michel Monnin JA
- Dissenting: N/A
- Result: Application denied. Bail denied.

Themes: Judicial interim release: test, factors

Summary: Devaloo was convicted at trial of conspiracy to traffic cocaine and sentenced to 10 years imprisonment. He was on bail until the time of sentencing, and now seeks bail again pending determination of an appeal.

Held: Application dismissed.

Per Monnin JA: Following a summary of the relevant tests and factors to be considered, Monnin JA found that the accused was found guilty of serious crimes and subjected to a significant sentence, that delay had been substantially reduced and that the accused's appeal was a weak one. These factors favoured denial of bail.

R v Dignard, 2019 MBCA 6 (Docket AR18-30-09110)

- Crown (Respondent) | Dignard (Appellant)
- Heard: August 16, 2018
- Judgment: January 29, 2019
- Heard by: Beard JA (in Chambers)
- Dissenting: N/A
- Result: Motion denied

Themes: Appeal from conviction or acquittal, procedure, time to appeal, extension of time to appeal.

Summary: The accused was convicted at trial for attempting to smuggle morphine into a prison while visiting her husband. Counsel had advised her that if convicted, he would challenge the mandatory minimum sentence under the *Charter*. The accused was convicted, however no challenge was filed, as counsel by then faced drug and impaired driving charges. The accused then tried to file an appeal of the sentence and for bail but was denied. The accused now attempts to file for an extension of time to appeal the conviction. The accused argued that she received ineffective assistance from counsel due to his conflict of interest in representing her husband and calling him as a witness, use of illegal drugs at the time of sentencing and the decision not to file a *Charter* challenge against her instructions and without informing her. The accused therefore seeks a new trial.

Held: Motion for extension of time to file an appeal denied.

Per Beard JA (in Chambers): There was no conflict of interest as the accused's husband was not a co-accused or Crown witness, and the accused had already admitted that she was not under duress. There was also no evidence that counsel's drug use occurred at the time of the trial. Finally, the Court does not have jurisdiction to deal with the sentencing portion of the trial on a conviction appeal. Therefore, there is no arguable ground.

R v Moslehi, 2019 MBCA 79 (Docket AR19-30-09208)

- Crown (Respondent) | Moslehi (Appellant)
- Heard: June 4, 2019
- Judgment: June 4, 2019
- Written reasons: July 8, 2019
- Heard by: Michel Monnin JA (Burnett and Spivak JJA concurring)
- Dissenting: N/A
- Result: Application denied. Appeal denied.

Themes: Procedure: adducing new evidence on appeal; Sexual offences, offences against minors: sexual interference, invitation to sexual touching, obtaining sexual services for consideration

Summary: The accused was sentenced to 4 years' imprisonment for charges of sexual interference, invitation to sexual touching and obtaining sexual services for consideration in relation to two minors. He appeals the sentence, arguing the presence of an existing brain injury which reduces his moral blameworthiness significantly. He now moves to adduce new evidence. This evidence is an assessment by a forensic psychologist that is claimed to show a new link

between the injury and the accused's actions. The accused conceded that without this evidence his appeal has no merit.

Held: Application dismissed. Appeal denied.

Per Michel Monnin JA (Burnett and Spivak JJA concurring): The new material added nothing new to the proceedings that was not before the sentencing judge. Accordingly, the application is denied, and the appeal has no merit.

Section 6.0 | Sentencing

R v Ndlovu, 2018 MBCA 113 (Docket AR17-30-08955)

- Crown (Respondent) | Ndlovu (Appellant)
- Heard: October 26, 2018
- Judgment: October 26, 2018
- Heard by: Cameron JA (Hamilton and Monnin JJA concurring)
- Dissenting: N/A
- Result: Appeal dismissed. Sentence upheld

Themes: Sentencing: *Gladue* factors, weight; manslaughter.

Summary: Ndlovu was a high-ranking gang member who had an associate assault an individual with a firearm procured by an underling. Shots were fired during the assault and a bystander was killed. Ndlovu was convicted of manslaughter for his role in causing the attack to take place and sentenced to 9 years imprisonment. He appeals the sentence on the basis that the trial judge did not give sufficient weight to his background and *Gladue* factors.

Held: Appeal dismissed.

Per Cameron JA (Hamilton and Monnin JJA concurring): When the record as a whole is considered it is clear that the judge properly considered and weighed the necessary factors, including *Gladue* factors and the accused's difficult upbringing.

R v Candy, 2018 MBCA 112 (Docket AR18-30-09117)

- Crown (Respondent) | Candy (Appellant)
- Heard: October 22, 2018
- Judgment: October 29, 2018
- Heard by: Chartier CJM (Burnett and Pfuetzner JJA concurring)
- Dissenting: N/A
- Result: Appeal allowed. Sentence varied.

Themes: sentencing: credit for time served

Summary: The accused received a six-month custodial sentence followed by two years of probation after pleading guilty to assault with a weapon and knowingly offering sexual services for consideration. The accused spent time in custody before the hearing but was not credited for it, as no submissions were made to the sentencing judge on the matter. He now seeks to have the sentenced varied to account for time served.

Held: Appeal allowed.

Per Chartier CJM (Burnett and Pfuetzner JJA concurring): The Crown and defense are in agreement on this issue and have filed a joint factum and consent to this appeal. The accused should receive credit for the 5 days spent in pre-sentence custody. Credit of eight days for time served is to be applied to the accused's existing custodial sentence.

R v Yare, 2018 MBCA 114 (Docket AR18-30-09033)

- Crown (Appellant) | Yare (Respondent)
- Heard: October 23, 2018
- Judgment: October 23, 2018
- Written reasons: October 31, 2018
- Heard by: leMaistre JA (Burnett and Simonsen JJA concurring)
- Dissenting: N/A
- Result: Appeal allowed. Sentence varied

Themes: Sentencing: collateral immigration factors, weight

Summary: The accused pled guilty to flight from police by motor vehicle, uttering threats (two counts) and failing to comply with a recognizance under the *Criminal Code*. He was also a permanent resident subject to the *Immigration and Refugee Protection Act*, under which he could face deportation if sentenced to six months imprisonment or more. The sentencing judge found that the offences warranted about a year of imprisonment but reduced the sentence so that the accused could avoid deportation under the *Act*. The Crown appealed the sentence, arguing that undue weight was placed on collateral immigration factors.

Held: Appeal allowed.

Per leMaistre JA (Burnett and Simonsen JJA concurring): Immigration consequences are a relevant factor for consideration in sentencing. However, here the sentencing judge erred in principle by overemphasising the collateral consequences. He imposed an artificial sentence in order to circumvent Parliament's will. By reducing the sentence by more than 6 months from

what he found to be appropriate, the sentencing judge also rendered the sentence disproportionate to the serious circumstances and high moral culpability of the accused.

R v Dalkeith-Mackie, 2018 MBCA 118 (Docket AR17-30-08939)

- Crown (Appellant) | Dalkeith-Mackie (Respondent)
- Heard: June 12, 2018
- Judgment: November 8, 2018
- Heard by: (Majority) leMaistre JA (Beard JA concurring)
- Dissenting: Monnin JA
- Result: Appeal Allowed. Sentence varied.

Themes: Sentencing: principles, exceptionality; armed robbery; wearing a disguise with intent

Summary: The accused pled guilty to armed robbery and wearing a disguise with intent, though he minimised his role. He and another individual, who was armed with a knife, entered a convenience store with their faces covered and attempted to rob it. While the co-accused struggled with the clerk, the accused stole cigarettes and attempted to flee. The accused had a significant prior record and struggled with addiction, but had shown great improvement following his last release, including a very positive report on his participation in rehabilitative programming. The trial judge ultimately imposed a sentence that would allow him to avoid imprisonment and remain in the community, finding exceptional circumstances. The Crown appealed on the grounds that circumstances were not exceptional, the sentence did not reflect the relevant principles and it was demonstrably unfit.

Held: Appeal allowed.

Per leMaistre JA (Beard JA concurring): The accused did not meet the exceptional threshold; his actions were within the range of expected behaviour of an addicted person committing criminal acts. The sentencing judge over-emphasised the rehabilitation principle at the expense of the dominant principles of deterrence and denunciation. The sentenced should be increased and include a significant incarceration period.

Per Monnin JA: There was no error in principle, the sentence was fit, and the circumstances met the definition of exceptional. Appeal should be dismissed.

R v Safaye, 2018 MBCA 121 (Docket AR18-30-08992)

- Crown (Respondent) | Safaye (Appellant)
- Heard: November 8, 2018
- Judgment: November 14, 2018
- Heard by: Chartier CJM (Cameron and leMaistre JJA concurring)
- Dissenting: N/A
- Result: Appeal allowed. Sentence varied

Themes: Sentencing; credit for time served while on remand (pre-sentence custody).

Summary: The sentencing judge credited the accused for time served in remand at a ratio of 1:1, rather than 1.5:1, however the Court of Appeal found in a previous case that the relevant statutory exemptions to enhanced credit were unconstitutional. The accused therefore appeals his sentence, seeking to have credit for time served increased to reflect the enhanced amount. The Crown and defence filed a joint factum and consent to the hearing.

Held: Appeal allowed.

Per Chartier CJM (Cameron and leMaistre JJA concurring): The accused should receive enhanced credit for time served in remand. The sentence is varied to reflect credit at the enhanced rate.

R v JED, 2018 MBCA 123 (Docket AR17-30-08926)

- Crown (Appellant) | JED (Respondent)
- Heard: April 18, 2018
- Judgment: November 22, 2018
- Heard by: (Majority) Mainella and leMaistre JJA
- Dissenting in part: Steel JA
- Result: Appeal allowed in part. Sentence varied.

Themes: Sentencing: factors, weight, mental illness as a mitigating factor, deterrence principle; Constitutionality: mandatory minimum; sexual offences against minors: sexual interference

Summary: The accused was convicted of two counts of sexual interference on his two nieces spanning two years. The accused suffers from cognitive and physical disability, including Autism Spectrum Disorder (ASD). At trial, the Crown proceeded against the accused by way of indictment, making him subject to a one-year mandatory minimum sentence for each count. The sentencing judge held that s 151(a) of the *Criminal Code*, prescribing the mandatory minimum sentence, infringed ss 9 and 12 of the *Charter* and could not be saved, causing him to declare it unconstitutional. The sentencing judge imposed a total sentence to 3 months incarceration, allowing the accused to serve his sentence intermittently. Key amongst his findings was that the accused's mental disability constituted a significant mitigating factor. The Crown appealed on 7 grounds:

1. The sentencing judge misapprehended the evidence regarding the accused's cognitive deficits;
2. he overemphasised the role of rehabilitation;
3. he understated the harm inflicted on the victims;
4. he wrongly assessed the appropriate range of sentence;
5. he misapplied the totality principle;
6. the sentence imposed was demonstrably unfit; and
7. the sentencing judge erred in finding *Charter* violations.

Held: Appeal allowed in part.

Per Steel JA (dissenting in part): There is agreement with the majority on almost all points, except for the re-incarceration of the accused. On the first ground, the sentencing judge was correct in finding that the accused's ASD constituted a mitigating factor, however he erred in finding that it "impelled" the offences. The evidence before him established that the accused knew his actions were wrong but proceeded anyway. The expert evidence regarding ASD was clear that that there was no causal link between the disorder and this type of offending. The sentencing judge also erred in his application of the totality principle by using it as an opportunity to "double-count" the mitigating factors and reduce both sentences. The totality principle is meant to be a final look at the total sentence to ensure it is not disproportionate as a whole. The sentence imposed here was not proportionate. The sentencing judge placed excessive weight on the accused's condition, while underemphasizing the aggravating factors. Adding to the demonstrably unfit sentence was the range of sentence arrived at by the sentencing judge, which was more appropriate to a situation of minimal sexual touching than to the conduct present here. All of this led to a sentence that is demonstrably unfit given the number of incidents, the length of time, the position of trust and the ages of the two victims involved. A more appropriate total sentence would be for 22 months, less credit for time already served, and preserving the ancillary and probation orders already made.

On the issue of *Charter* violations, this is an appropriate case for the Court to exercise its discretion to hear the issue, despite it being moot due to the revised sentence imposed. The reasons provided by courts in other provinces in finding this mandatory minimum unconstitutional are compelling, and the section captures a very wide range of conduct of varying seriousness. Therefore, it is grossly disproportionate and violates s 12. The Crown made no submissions regarding justification under s 1; the section cannot be justified. Given this finding, there is no need to proceed with a s 9 analysis. The final issue is whether the accused should be reincarcerated. Given the accused's disability and the submissions of treating experts that incarceration could actually increase the risk of reoffending, a stay should be entered.

Per Mainella and leMaistre JJA: The record does not reasonably support the reasons of Steel JA regarding reincarceration of the accused, though there is agreement with her other conclusions. In this case, ASD should be treated as a consideration under totality rather than as a major mitigating factor. The accused's sentence is inadequate if a stay is granted as this would not lend sufficient weight to the objective of denunciation. The dramatic increase in sentence and past precedent both support reincarceration. There are also resources in provincial jails for persons with special needs, and programming to allow the accused to continue his treatment. Therefore, the sentence as set out by Steel JA should be imposed, but not the stay.

R v PES, 2018 MBCA 124 (Docket AR17-30-08895)

- Crown (Respondent) | PES (Appellant)
- Heard: June 4, 2018
- Judgment: November 22, 2018
- Heard by: Steel JA (Marc Monnin and Mainella JJA concurring)

- Dissenting: N/A
- Result: Appeal dismissed. Sentence upheld.

Themes: Sentencing; demonstrably unfit, aggravating factors; sexual offences: sexual exploitation

Summary: The accused was convicted of sexual exploitation following a guilty plea for entering into a sexual relationship with 16-year-old employee. At trial, the Crown argued for a 3.5-year sentence, while defence argued for 6-9 months because the sexual conduct was mutually consensual and that the complainant was old enough to consent. The accused, (61 years at time of incident, 66 years at time of sentence) was given a sentence of 3.5 years, as he was found by the sentencing judge to have engaged in grooming behaviours and to have been in a position of authority. On appeal, defence disputed that a number of the facts relied on by the sentencing judge, including that the accused was in a position of authority, that grooming behaviour occurred and that the accused was aware his actions were illegal. The defence also argues that the sentencing judge ignored the agreement between counsel that there was no abuse of authority or link to employment. Finally, the accused submits that the judge erred in characterising the acts as a major sexual assault for sentencing purposes and that the sentence was unfit.

Held: Appeal dismissed.

Per Steel JA (Marc Monnin and Mainella JJA concurring): The accused's submissions that the impugned acts should be treated less seriously at sentencing because of the consent of the victim are concerning and are emphatically rejected. Consent is irrelevant; sex between a person under 18 and a person in a position of trust, authority or in a relationship of dependency or exploitation

is criminal. To suggest otherwise is not only contrary to the jurisprudence of this Court, it also fails to recognise the insidious nature of an exploitive relationship. The accused's arguments that the sentencing judge misapprehended certain facts are a mischaracterisation. The inferences drawn by the judge regarding grooming behaviour, the existence of a relationship of trust and authority, the abuse of that relationship, significant harm to the victim and the accused's awareness of wrongdoing all find support in the evidentiary record. The sentencing judge did err in adopting a rigid test from the dissent of an Alberta case; however, this error did not materially impact the sentence. A review of comparable cases indicates that the assigned sentence is on the high end, but it is not demonstrably unfit or outside of the range. Therefore, the Court should not intervene.

R v DARK, 2018 MBCA 133 (Docket AR17-30-08911)

- Crown (Respondent) | DARK (Appellant)
- Heard: September 17, 2018
- Judgment: December 10, 2018
- Heard by: Burnett JA (Monnin JA and Steel JA concurring)
- Dissenting: N/A
- Result: Appeal allowed in-part

Themes: Sentencing, totality principle, sexual interference, sexual assault, evidence.

Summary: Appellant convicted of abusing live-in girlfriend's children (aged 7 and 10). Trial judge sentenced the accused to a combined sentence of 14 years' incarceration, which she reduced to 11 years after considering the principle of totality. On appeal, the accused raised four issues, namely that: (1) the trial judge erred in applying greater scrutiny to the evidence of the

accused than the evidence called by the Crown; (2) the trial judge erred in her assessment of the girl's credibility; (3) the verdict was unreasonable; and (4) the trial judge erred in imposing a sentence that was harsh and excessive.

Held: Appeal allowed in-part (conviction appeal dismissed; sentence reduced).

Per Burnett JA (Monnin JA and Steel JA concurring): The court was not persuaded by the defence arguments with respect to grounds 1 or 2 and showed deference to the trial judge. As such, the conviction appeal was dismissed. Defence submitted that the three-year reduction for totality was not enough to avoid a crushing sentence. The MBCA agreed that the trial judge erred in calculating the totality principle and reduced the sentence from 11 to 9 years.

R v Fehr, 2018 MBCA 131 (Docket AR17-30-08909)

- Crown (Respondent) | Fehr (Appellant)
- Heard: May 29, 2018
- Judgment: December 13, 2018
- Heard by: Monnin JA (Cameron JA and leMaistre JA concurring)
- Dissenting: N/A
- Result: Appeal Dismissed; sentence upheld.

Themes: Sentencing, CCC 725(1)(c), aggravating factors; counselling to commit obstruction of justice

Summary: Accused solicited one of her former employees to procure a hitman to kill her husband's son from a prior relationship in order to avoid paying child support. The employee reported to police and subsequently aided them in building a case against the accused. Accused was charged with counselling to commit murder but pled guilty to the lesser included charge of

counselling to obstruct justice in a deal with the Crown. The sentencing judge relied on s 725(1)(c) to impose a sentence significantly longer than the established range for counselling obstruction. The accused appeals her sentence on the basis that the sentencing judge assigned inadequate weight to her rehabilitative efforts and mental health issues, and that he erred in relying on s 725(1)(c).

Held: Appeal dismissed; sentence upheld.

Per Monnin JA (Cameron JA and leMaistre JA): The Court of Appeal found that the trial judge did err in relying on s 725(1)(c), as jurisprudence establishes that this section cannot be applied to consider the facts of charges laid and pled out. However, the court took the view that the sentencing judge was correct in considering the underlying facts as aggravating. The Court also found that the judge properly considered the mitigating factors. Given the totality of the reasons and circumstances, the Court found that the sentence was not demonstrably unfit.

R v Bourget, 2019 MBCA 10 (Docket AR17-30-08750)

- Crown (Respondent) | Bourget (Appellant)
- Heard: February 4, 2019
- Judgment: February 4, 2019
- Heard by: Mainella JA (Cameron JA and Burnett JA concurring)
- Dissenting: N/A
- Result: Appeal dismissed

Themes: Second degree murder: burden; unfair verdict; uneven scrutiny: standard of proof.

Summary: Accused was convicted of second-degree murder. The victim came to the accused's apartment, where the two consumed drugs and had sex. Early in the morning they got into an argument, which ended in the accused stabbing the victim in the neck repeatedly, after which he shoved her into a hockey bag and left her to bleed to death in the trunk of his vehicle. The accused appeals the conviction on the basis of unreasonable verdict, uneven scrutiny of the evidence and misapplication of *R v W(D).*

Held: Appeal Dismissed; conviction upheld.

Per Mainella JA (Cameron JA and Burnett JA concurring): In response to the unfair verdict ground, the Court found that it was open to the trial judge to conclude that the accused was the aggressor and had the requisite mens rea, given the totality of the evidence. Uneven scrutiny has a high standard of proof, which the accused failed to meet; the trial judge rejected the accused's evidence due to numerous inconsistencies and improbabilities. Finally, after taking into account the whole of the reasons, the Court was satisfied that the correct burden and standard of proof set out in *W(D)* were applied.

R v Provinciano, 2019 MBCA 16 (Docket AR 18-30-09051)

- Crown (Respondent) | Provinciano (Appellant)
- Heard: February 13, 2019
- Judgment: February 13, 2019
- Heard by: Mainella JA (Beard JA and Burnett JA concurring)
- Result: Appeal dismissed

Themes: sentencing, unreasonable verdict, *Gladue* factors, weight; assault with a

weapon; possession of a weapon for a dangerous purpose.

Summary: The accused was convicted by the trial judge of assault with a weapon and possession of a weapon for a dangerous purpose but was acquitted of assault and breaking and entering. The accused appeals his convictions on the basis that the verdict was unreasonable and seeks leave to appeal his sentence. If leave is granted, then the accused argues that insufficient weight was given to *Gladue* factors.

Held: Appeal dismissed; convictions and sentence upheld.

Mainella JA (for the Court): The Court found that the verdict was reasonable as the trial judge explained clearly why he disbelieved the claims of the accused despite deficiencies in the Crown evidence. Though the judge made erroneous comments regarding *Gladue* factors in this case, this did not materially affect the sentence and it remained open to the judge to give these factors little weight, given the high moral blameworthiness of the accused.

R v Houle, 2019 MBCA 20 (Docket AR18-30-09153)

- Crown (Respondent) | Houle (Appellant)
- Joint written submissions filed: February 19, 2019
- Judgment: March 8, 2019
- Heard by: Chartier CJM (Burnett and Simonsen JJA concurring)
- Dissenting: N/A
- Result: Appeal allowed; motion granted. Fresh evidence admitted, sentence varied.

Themes: Sentencing: pre-trial custody credit, plea deals

Summary: The accused was found guilty of several offences related to break and enters and weapons. The accused pled guilty and was sentenced. However, at sentencing the issue of pre-trial custody was not raised before the judge and so was not considered. The accused appeals the sentence to correct this oversight and moves to be permitted to admit fresh evidence on appeal, namely an affidavit explaining that pre-trial custody credit was agreed to be the Crown as part of a deal, and that the issue was not raised before the sentencing judge as a result of counsel oversight.

Held: Appeal allowed. Motion granted.

Per Chartier CJM (Burnett and Simonsen JJA concurring): The Crown did not oppose the appeal and adopted the accused's factum in its entirety. Both the motion to admit and the appeal should be allowed. The accused's sentence is altered to reflect pre-sentence custody at a rate of 1.5:1.

R v JHS, 2019 MBCA 24 (Docket AY18-30-09168)

- Crown (Respondent) | JHS (Appellant)
- Heard: January 9, 2019
- Judgment: March 19, 2019
- Heard by: Michel Monnin JA (Beard and Mainella JJA concurring)
- Dissenting: N/A
- Result: Leave to appeal granted, appeal dismissed. Sentence upheld.

Themes: Sentencing: excessive sentence; appellate review: threshold for review;

offences: robbery, robbery with an imitation firearm; young offender

Summary: The accused is a young person who pled guilty to one count of robbery and one count of robbery with an imitation firearm. Accused appeals his sentence on the basis that the sentencing judge misconstrued the facts of the case and overemphasised certain principles such that the resulting sentence is harsh and excessive. The accused also argues that these errors may not be sufficient, in and of themselves, to warrant appellate interference but they amount to an error on the part of the sentencing judge if considered cumulatively.

Held: Leave to appeal granted. Appeal dismissed.

Per Michel Monnin JA (Beard and Mainella JJA concurring): There is no basis in law for the argument that non-reviewable errors can become reviewable in aggregate. Regardless, an error has not been demonstrated. A review of the record in light of the submissions made by counsel demonstrates that the sentencing judge properly considered all the facts. Even if there had been an error, the Court would not intervene in this case, as the sentence imposed was fit and proper.

R v McIvor, 2019 MBCA 34 (Docket AR18-30-09089)

- Crown (Respondent) | McIvor (Appellant)
- Heard: December 7, 2018
- Judgment: April 4, 2019
- Heard by: leMaistre JA (Pfuetzner JA concurring)
- Dissenting: Simonsen JA
- Result: Appeal dismissed.

Themes: Sentencing procedure and principles, mitigating factors, deterrence, sentencing for multiple convictions [totality principle], consecutive or concurrent sentences.

Summary: Indigenous male with dated criminal record, significant *Gladue* factors and addiction issues committed two robberies 8 hours apart on same day. Accused plead guilty. Accused made significant progress in residential treatment prior to sentencing. Sentencing judge concluded criteria for exceptional circumstances had not been met and imposed sentence of 24 months' incarceration for 1st robbery, and 18 months' incarceration consecutive for 2nd robbery, for total sentence of 42 months. The accused appealed the sentence claiming that it was unfit; Held: Appeal dismissed.

Per leMaistre JA (Pfuetzner JA concurring): Sentence was not unfit. Sentencing judge imposed proportionate sentence and considered mitigating factors including *Gladue*, etc. Appellant also claimed SJ erred by imposing consecutive sentences on the basis of the "spree" principle. Sentencing judge did err, but error did not impact sentence in more than incidental way. Additionally, it was claimed that the sentencing judge erred by considering totality prior to assessing accused's moral blameworthiness, however, this ground too was dismissed as the MBCA found that moral blameworthiness was central consideration throughout the sentencing hearing. The MBCA further dismissed the appellant's allegations that the sentencing judge erred in favouring the principle of deterrence over appellant's rehabilitation as well as the allegation that the SJ erred in giving adequate weight to the appellant's mitigating factors.

Per Simonsen JA (dissenting): The appeal should be allowed. The sentencing judge made errors in principle that led him to impose unfit sentences. Given the *Gladue* factors that played a significant role throughout the accused's life and his extraordinary rehabilitative progress since his arrest, a fit sentence was one that did not involve a go-forward period of incarceration.

R v Rose, 2019 MBCA 40 (Docket AR17-30-08969)

- Crown (Respondent) | Rose (Appellant)
- Heard and judgement: March 25, 2019
- Written reasons: April 10, 2019
- Heard by: Burnett JA (Beard JA and Steel JA concurring)
- Dissenting: N/A
- Result: Appeal dismissed.

Themes: Sentencing, procedure and principles, unfit sentence.

Summary: Accused pleaded guilty to 19 offences, including making child pornography, voyeurism, luring, procuring, and breach offences. While subject to order under s 161(1) of *Criminal Code*, accused used computer to befriend and foster sexual activity with young, highly vulnerable teenage girls. Accused gave girls drugs, alcohol, and money, facilitated their participation in sex trade, and video-recorded sexual activities in which they were involved while at his residence. Accused was in his mid-40s and had prior record. Total sentence in relation to each victim was made consecutive to total sentence for each of other victims. Sentencing judge imposed combined sentence of 25 years imprisonment for offences, which was reduced to 21 years after taking into account totality principle. Accused appealed sentence of 21 years' imprisonment for 19 sexual offences.

Held: Leave to appeal sentence was granted but the appeal was dismissed.

Per Burnett JA (for the Court): While sentence imposed for most serious offence was one factor to consider, number and gravity of offences involved and fact that there were at least five young, vulnerable victims were other important considerations. No evidence was presented that accused had any prospect for rehabilitation. Over long period of time and on numerous occasions accused had deliberately contravened court orders, and he committed offence of procuring while incarcerated. As accused acknowledged that there was no other sentencing errors, judge's decision regarding appropriate reduction for totality was entitled to considerable deference. While 21-year sentence was rare, sexual exploitation of young, vulnerable teenagers was problem of longstanding concern that required denunciation by Court and community. In unique circumstances, sentence was not demonstrably unfit.

R v Gardiner, 2019 MBCA 63 (Docket AR17-30-08957)

- Crown (Respondent) | Gardiner (Appellant)
- Heard: January 8, 2019
- Judgment: May 31, 2019
- Heard by: Marc Monnin JA (Pfuetzner and Simonsen JJA concurring)
- Dissenting: N/A
- Result: Leave to appeal granted, appeal dismissed. Sentence upheld.

Themes: Child pornography: possession; Sentencing: collateral consequences, ability to enter the US

Summary: A dozen short video clips of child pornography were discovered on the accused's computer. The videos were added at a time when two other roommates had access to the

computer. Evidence showed that the accused had accessed one of the videos, but the accused said he closed it about 10 seconds in. The accused pled guilty. The sentencing judge noted that the case against the accused was weak but accepted the plea given that the accused wanted to deal with the matter and was advised by experienced defense counsel. Counsel sought a discharge for the accused in the hopes that this would increase his chances of crossing the US border to visit his grandparents. The sentencing judge ordered a conditional discharge, partially on the basis that it would be less likely to interfere with border crossing. Despite this, the accused was denied entry into the US, and a waiver of the denial was not granted. The accused now appeals the sentence and seeks an absolute discharge, arguing that the sentence imposed was inadvertently disproportionate because it failed to have the effect the judge had intended (to not interfere with the accused's access to the US).

Held: Leave to appeal granted, appeal dismissed.

Per Marc Monnin JA (Pfuetzner and Simonsen JJA concurring): The evidence advanced by the accused is inadequate to support the appeal. There is no solid evidence that an absolute discharge would be treated differently now or at the time of sentencing and altering the sentence now might prove irrelevant as the accused is now subject to other grounds of refusal based on his actions when he first attempted to cross the border. Furthermore, the sentencing judge clearly thought conditions were necessary and there is no evidence that they would not have been imposed had the judge known of the consequences of a conditional discharge. Finally, the conditional discharge is not itself an unfit sentence.

R v Sadowy, 2019 MBCA 66 (Docket AR 18-30-09155)

- Crown (Respondent) | Sadowy (Appellant)
- Heard: June 4, 2019
- Judgment: June 4, 2019
- Heard by: Chartier CJM (Burnett JA and Spivak JJA concurring)
- Dissenting: N/A
- Result: Leave to appeal granted, appeal dismissed. Sentence upheld.

Themes: Sentencing: parity: consecutive sentences; prostitution offences: exploitation, *Protection of Communities and Exploited Persons Act*, SC 2014, c 25

Summary: The accused was sentenced to a total of 30 months' imprisonment for five prostitution related offences involving a 16-year-old, and two 19-year-old girls. He appeals on the basis that the sentencing judge did not adequately consider the parity principle, and that the sentencing judge erred by considering the harm generally caused by these offences when none of the girls involved considered themselves to have been harmed or victimised.

Held: Leave to appeal granted, appeal dismissed.

Per Chartier CJM (Burnett and Spivak JJA concurring): There is no merit to the appeal. Parity was properly considered as there were multiple complainants and offences committed at separate times, justifying consecutive sentences. Exploitation is inherent in prostitution offences under the legislation.

R v Catcheway, 2019 MBCA 75 (Docket AR18-30-09092)

- Crown (Respondent) | Catcheway (Appellant)
- Heard: June 5, 2019
- Judgment: July 3, 2019
- Heard by: Beard JA (Hamilton and Simonsen JJA concurring)
- Dissenting: N/A
- Result: Application allowed. Appeal dismissed. Fresh evidence admitted, sentence upheld.

Themes: Procedure: admission of novel evidence on appeal; sentencing: mental disability, moral culpability

Summary: The accused was assigned a global sentence of 3 years' imprisonment for uttering threats and a several charges relating to his possession of a firearm while under a prohibition order. At sentencing, counsel waived the *Gladue* report and addressed many of those factors in oral submissions. He also advised the judge that the accused had been diagnosed with ADHD and FASD. The accused appeals based on fresh evidence he seeks to admit. The evidence relates to the accused's FASD, which he argues reduces his moral culpability.

Held: Application allowed. Appeal dismissed.

Per Beard JA (Hamilton and Simonsen JJA concurring): The sentencing judge found that he lacked sufficient evidence to determine the extent to which the accused's FASD affected his behaviour and rejected this as a mitigating factor. The accused argues that the FASD should reduce his moral culpability and the sentencing judge would have found this if he had access to the fresh evidence submitted on appeal. The fresh evidence would have addressed the judge's concerns in rejecting the accused's FASD arguments due to lack of information on his condition,

and it goes beyond simply adding detail. Reports detailing the accused's FASD should therefore be admitted. As a result, it is necessary to re-determine the appropriate sentence. However, after reviewing all of the evidence, including the new submissions, the Court finds that the original sentence was still within the appropriate range.

R v CCC, 2019 MBCA 76 (Docket AR18-30-09087)

- Crown (Respondent) | CCC (Appellant)
- Heard: May 7, 2019
- Judgment: July 4, 2019
- Heard by: Beard JA (leMaistre and Marc Monnin JJA concurring)
- Dissenting: N/A
- Result: Leave to appeal granted, appeal dismissed. Sentence upheld

Themes: Sexual assault; Sentencing: collateral factors (vigilantism), aggravating factors (risk assessments).

Summary: The accused was convicted of sexual assault and sentenced to 3.5 years imprisonment. The accused was friends with the complainant's partner, JB, and by extension the complainant. Following a barbeque at the residence of JB and the complainant, the accused was invited to stay to avoid drinking and driving. The accused was interested in the complainant and thought her and JB were having problems. He woke up in the night and entered the couple's master bedroom. The trial judge accepted the complainant's version of events: that she awoke to someone having sex with her and thought it was JB until she opened her eyes and saw the accused, who immediately stopped and left. The complainant woke JB and told him what happened, leading to JB violently assaulting the accused outside the house. The accused suffered a number of significant external and internal injuries but refused to complain or testify against

JB, who was not charged as a result. On appeal, the accused argues that the sentencing judge erred in not considering the injuries inflicted by JB as a sentencing factor, and in treating the results of the pre-sentence risk assessment as an aggravating factor.

Held: Leave to appeal granted, appeal dismissed.

Per Beard JA (leMaistre and Marc Monnin JJA concurring): The sentencing judge did err in refusing to consider JB's assault as a collateral factor (vigilante justice), however the error was not significant enough to warrant a reduction in what was an otherwise fit sentence. It was also open to the judge, based on the evidence, to use the risk assessment as an aggravating factor. Even if that was erroneous, the reasons suggest that very little weight was ascribed to it.

R v Fisher, 2019 MBCA 82 (Docket AR19-30-09214)

- Crown (Respondent) | Fisher (Appellant)
- Heard: July 30, 2019
- Judgment: July 30, 2019
- Written decision: August 2, 2019
- Heard by: Hamilton JA (Marc Monnin and Steel JJA concurring)
- Dissenting: N/A
- Result: Appeal allowed. Sentence varied

Themes: Sentencing: collateral consequences, harsh and excessive; *Criminal Code* s 743.5(1).

Summary: The accused was 20 years old and serving a youth sentence. He was convicted and sentenced of being at large without lawful excuse, causing the remainder of his youth sentence to be converted to an adult custodial sentence under s 743.5(1) of the *Criminal Code*. The result

was a total sentence of 4 years, 2 months and 2 days total imprisonment, which the accused appeals as harsh and excessive. The accused argues s 743.5(1) to be a collateral consequence that the sentencing judge failed to consider.

Held: Appeal allowed. Sentence varied.

Per Hamilton JA (Marc Monnin and Steel JJA concurring): The Crown conceded that s 743.5(1) was not considered at sentencing and should have been, leaving the only issue on appeal whether the sentence is harsh and excessive. The collateral consequence was a material personal factor but was not considered. There were a number of factors indicating that the accused was making rehabilitative progress during the non-custodial portion of his sentence and pre-sentence custody was not taken into account. Therefore, the sentence is harsh and excessive. The additional 2 years 2 months is substituted for a two-month suspended sentence with unsupervised probation, subject to the compulsory conditions under the *Code*, with the expectation that the accused will be immediately returned to the Youth Centre.

R v Reilly, 2019 MBCA 84 (Docket AR18-30-09158)

- Crown (Respondent) | Reilly (Appellant)
- Heard: June 12, 2019
- Judgment: August 13, 2019
- Heard by: Pfuetzner JA (Cameron and Michel Monnin JJA concurring)
- Dissenting: N/A
- Result: Appeal allowed in part. Sentence varied

Themes: Home invasion: appropriate range; sentencing: aggravating and mitigating factors, harsh and excessive.

Summary: The accused was sentenced to 13 years imprisonment for a home invasion robbery. The accused entered the apartment of another person in his building, who was familiar with him, and attempted to take her purse at knife point. When the victim fled to the bathroom with the purse, the complainant burst in and assaulted her, causing serious bruising and a minor knife wound. The complainant recognised the accused and he was later arrested and the purse returned intact, except for the cash that had been in it. The complainant was deeply affected by the incident. The sentencing judge found a number of aggravating factors and no mitigating factors, though some factors were neutral. The accused appeals the sentence as harsh and excessive. First, the accused argues that insufficient weight was given to his highly troubled background and brain injury, while the severity of the assault was over-emphasised. Second, the accused argues that the sentence is demonstrably unfit as it exceeds the established range of 3 years for home invasions.

Held: Appeal allowed in part.

Per Pfuetzner JA (Cameron and Michel Monnin JJA concurring): The sentencing judge fully considered the accused's past and refused to interfere with the finding that the brain injury had no bearing on the commission of the offences. The nature of the assault on the complainant was also properly characterised. However, the sentence imposed exceeds the sentencing range significantly, and the cases at the top of the established range involve significantly more serious and injurious assaults on the victims than the case at bar. Therefore, the sentence is demonstrably unfit. A sentence of seven years is more appropriate.

R v Barker, 2019 MBCA 86 (Docket AR19-30-09314)

- Crown (Respondent) | Barker (Appellant)
- Heard: August 8, 2019
- Judgment: August 22, 2019
- Heard by: Pfuetzner JA
- Dissenting: N/A
- Result: Appeal dismissed

Themes: Armed robbery; sentencing: harsh and excessive, weighing of factors, *Gladue*; procedure: leave to appeal, no realistic chance of success.

Summary: The accused participated in the robbery of a hotel lobby cash register with a male accomplice. Despite the cooperation of the woman working the desk, the accused sprayed her in the face with bear mace for no apparent reason. She was sentenced to 2 years less a day in custody, followed by 2 years' probation. She seeks leave to appeal her sentence, and if granted seeks interim judicial release. The accused argues that the sentencing judge erred in not adequately considering the full circumstances in the case, by failing to give proper weight to Gladue factors, by over-emphasising a prior conviction, by failing to apply residual discretion and by imposing a harsh and excessive sentence.

Held: Appeal dismissed. Leave to appeal sentence denied, bail application moot.

Per Pfuetzner JA: The Court found no merit to any of the grounds raised. There was no realistic chance of success. The sentence is, in fact, at the low end of the range for such offences, especially considering the gratuitous violence against a vulnerable person.

R v Knott, 2019 MBCA 97 (Docket AR19-30-09220)

- Crown (Respondent) | Knott (Appellant)
- Heard: September 17, 2019
- Judgment: September 17, 2019
- Written reasons: October 1, 2019
- Heard by: Spivak JA (Monnin JA and Hamilton JA concurring)
- Dissenting: N/A
- Result: Appeal dismissed

Themes: Constitutional; unreasonable search and seizure [s 8], reasonable grounds; witnesses' credibility, duty of judge in assessing; sentencing procedure and principles, sentencing for multiple convictions [totality principle].

Summary: Accused was convicted of multiple drug and weapons-related offences, including possession of prohibited firearms and sentenced to 11 years globally, with 9 years for substantive offences and 2 years for breach of probation. Accused appealed from both conviction and sentence. Claimed that the trial judge erred in finding that the search of accused's vehicle was reasonable. Defence also claimed that the trial judge erred in his assessment of the credibility of the defence Witness. Final ground of appeal claimed that the trial judge did not correctly apply the totality principle.

Held: Appeal dismissed; the conviction appeal and the application for leave to appeal sentence are dismissed.

Spivak JA (for the Court): The search of accused's vehicle was reasonable; police had reason to believe that offence was being committed involving vehicle, which was supported by results of search. With respect to the claim that the trial judge erred in his assessment of the credibility

of the defence Witness, the MBCA did not agree and found that the trial judge used proper inferences, to determine that accused's witness was not credible. Trial judge found inconsistencies between recorded statement and testimony. Finally, the MBCA found that the trial judge did not err in his application of the totality principle. The totality principle was properly followed by trial judge. Sentence accounted for seriousness of offences and accused's lengthy criminal record, without being crushing.

R v Norris, 2019 MBCA 101 (Docket AR19-30-09244)

- Crown (Respondent) | Norris (Appellant)
- Heard: October 1, 2019
- Judgment: October 1, 2019
- Heard by: leMaistre JA (Burnett JA and Simonsen JA concurring)
- Dissenting: N/A
- Result: Appeal allowed.

Themes: sentencing, immigration consequences, IRPA.

Summary: The accused seeks leave to appeal and, if granted, appeals his combined sentence of imprisonment of two years less a day for five counts of sexual assault. He also seeks to admit fresh evidence on the appeal. During submissions, sentencing judge was told that accused would likely face removal order upon being sentenced to two years less day and that she could do nothing to affect this consequence, but was not told that right of appeal would be preserved if she imposed consecutive sentences less than six months, regardless of total combined sentence. The six-month sentence on one count took away his right to appeal from a finding of inadmissibility of *Immigration and Refugee Protection Act*. On appeal, the accused did not dispute the total

sentence imposed, but sought to reduce his sentence on the 6 month count by one day to six months less a day, and increase sentence on previous count by one day, making it four months, in order to preserve his right of appeal.

Held: Appeal allowed. Sentence amended.

leMaistre JA (for the Court): Appellate intervention was justified because collateral immigration consequences of sentence were not fully explained to sentencing judge and, therefore, she decided fitness of the sentence without considering relevant factor.

R v Hebrada-Walters, 2019 MBCA 102 (Docket AR18-30-09060)

- Crown (Respondent) | Hebrada-Walters (Appellant)
- Heard: October 7, 2019
- Judgment: October 7, 2019
- Heard by: Pfuetzner JA (Hamilton JA and Spivak JA concurring)
- Dissenting: N/A
- Result: Appeal dismissed

Themes: Appeal of conviction; sentence appeal (demonstrably unfit).

Summary: The accused appeals his convictions for several firearm offences. If the conviction appeal is dismissed, the accused seeks leave to appeal sentence. In considering the firearm, the trial judge considered *R v Villaroman*, and concluded that there was "no reasonable inference other than guilt on the basis of the evidence here, and the Crown's evidence meets the standard of proof beyond a reasonable doubt." The accused says that the trial judge rendered an unreasonable verdict as there was no direct evidence of possession and the circumstantial evidence was equally consistent with innocence as with guilt.

Held: The conviction appeal is dismissed. Leave to appeal sentence is denied.

Pfuetzner JA (for the Court): The MBCA was satisfied that "the inferences drawn by the trial judge, having regard to the standard of proof, were reasonably open to him" (*Villaroman* at para 67) and that the trial judge's decision "is one that a properly instructed jury or a judge could reasonably have rendered" on the whole of the evidence. The defence also argued that the sentence was demonstrably unfit and pointed to *R v Nur* to support their argument. The MBCA noted differences between the accused in *Nur* and the appellant's criminal record. They were not persuaded that the sentence imposed by the trial judge in the circumstances of the case were demonstrably unfit.

R v Todoruk, 2019 MBCA 100 (Docket AR19-30-09325)

- Crown (Respondent) | Todoruk (Appellant)
- Heard: September 19, 2019
- Judgment: October 8, 2019
- Heard by: Cameron JA (in Chambers)
- Dissenting: N/A
- Result: Appeal dismissed

Themes: Motion; appeal from sentence; time to appeal.

Summary: Accused had come from party, was driving with several passengers in car and refused to stop for police officer, hit tree and kept driving, and when his vehicle got stuck accused fled his vehicle with one of passengers. Accused pleaded guilty for offence of flight from peace officer and was sentenced to four-month conditional sentence. Summary conviction appeal judge

dismissed appeal of sentence. Accused brought motion for extension of time to file application for leave to appeal sentence.

Held: Motion granted; application for leave to appeal granted; leave to appeal denied.

Per Cameron JA (in Chambers): All parties agreed that reason deadline was missed was that accused's counsel inadvertently attempted to file appeal of his sentence on final date for filing rather than application for leave to appeal. Sentencing judge did consider five-year automatic driving suspension that accused would receive as per *Manitoba Highway Traffic Act*. Summary conviction appeal judge was clearly alive to criteria to be applied in consideration of whether or not court should impose conditional discharge. There was nothing exceptional about issues raised by accused which would warrant second appeal hearing in this case.

R v Siwicki, 2019 MBCA 104 (Docket AR18-30-09115)

- Crown (Appellant) | Siwicki (Respondent)
- Heard: May 7, 2019
- Judgment: October 17, 2019
- Heard by: leMaistre JA (Beard JA concurring)
- Dissenting: Monnin JA
- Result: Appeal allowed in part

Themes: Sentencing; principles of denunciation and deterrence; aggravating and mitigating factors; vulnerable class of victim.

Summary: The accused pled guilty to criminal negligence causing death pursuant to section 219 of the *Criminal Code* (the *Code*) for causing his mother's death by failing to provide her with the care she required. The sentencing judge sentenced him to three months' incarceration. The

Crown seeks leave to appeal and to appeal the accused's sentence on the basis that the sentencing judge committed errors which resulted in an unfit sentence. It further argued that the principle of denunciation was not adequately recognized. The majority granted leave to appeal, allowed the appeal, and imposed a sentence of 2 years' incarceration and credit the accused for 30 days of pre-sentence custody (20 days credited at a rate of 1.5:1). They would also credit him for the two months of time served after sentencing, for a total sentence going forward of 21 months and they would not stay the sentence. At trial, the Crown argued that the accused had a high moral blameworthiness, having regard to the circumstances of the offence and the aggravating factors. The Crown's grounds of appeal were that the sentencing judge overlooked the substantial aggravating factors; that she focussed exclusively on the accused's personal circumstances when the focus ought to have been on the offence because deterrence and denunciation were the primary sentencing principles; and that, by relying on cases involving the offence of failing to provide the necessaries of life, the sentencing judge failed to acknowledge the higher blameworthiness for the offence of criminal negligence causing death. While the sentencing judge mentioned only the one aggravating factor, the parties addressed the relevant aggravating factors in their submissions and as such, the relevant factors were squarely before the sentencing judge. The majority dismiss this ground of appeal. The majority found that the sentencing judge erred by focussing on the personal circumstances of the accused when deterrence and denunciation were the primary sentencing principles and by imposing a sentence that is not proportionate to the gravity of the offence and the degree of responsibility of the accused. These errors affected the sentence in more than an incidental way and resulted in a sentence that was demonstrably unfit.

Held: Appeal allowed in part.

Per leMaistre JA: The MBCA found that a sentence of two years' incarceration was appropriate. At the appeal hearing, the accused argued that, if the Crown's appeal was granted, the execution of any sentence of imprisonment should be permanently stayed; however, the court found that, given the seriousness of the offence, the length of sentence remaining to be served and the importance of denunciation require reincarceration. Monnin JA dissented, stating that they did not agree that the sentencing judge erred by focussing on the personal circumstances of the accused when deterrence and denunciation were the primary sentencing principles to be followed, and that the sentence imposed was demonstrably unfit. Monnin was satisfied that when the history of the relationship between the accused and his mother is given due consideration, the sentence imposed was fit and proper and would have dismissed the Crown's appeal.

R v Singh, 2019 MBCA 105 (Docket AR18-30-09024)

- Crown (Appellant) | Singh (Respondent)
- Heard: October 9, 2019
- Judgment: October 21, 2019
- Heard by: Cameron JA (Mainella JA and Pfuetzner JJA concurring)
- Dissenting: N/A
- Result: Appeal allowed

Themes: sentencing, guilty plea, immigration consequences.

Summary: The accused pled guilty to a charge of care and control of a vehicle while over .08. He applied to a summary conviction appeals judge (SCA judge) to withdraw his plea upon finding out that it would result in him being subject to deportation without appeal. The SCA judge denied the application and the accused now appeals this decision.

Held: Appeal allowed; conviction quashed, guilty plea withdrawn, matter remitted for trial.

Cameron JA (for the Court): Leave was granted to appeal on the issue of whether the SCA judge erred in his application of the test to withdraw a guilty plea set out in *R. v. Wong,* 2018 SCC 25. The Court found that the SCA judge made three errors: First, he applied the test in *Palmer v the Quee*n, [1980] 1 SCR 759 when refusing to admit the accused's affidavit in the proceeding to withdraw his guilty plea, and refused to admit that affidavit and the affidavit of counsel which spoke to the accused's ignorance of the legal consequences of his plea. Second, the SCA judge erroneously placed significant weight on the fact that the accused did not attempt to introduce fresh evidence that would have demonstrated a defence to the charge, which is not a requirement and is discouraged under *Wong*. Finally, the SCA judge erred in disregarding evidence that the accused was objectively uninformed of the legal consequences of his guilty plea. The Court found that the test in *Wong* is met on the record established at the courts below.

Section 7.0 | Miscellaneous

R v Van Wissen, 2018 MBCA 110 (Docket AR16-30-08579)

- Crown (Respondent) | Van Wissen (Appellant)
- Heard: March 14, 2018
- Judgment: October 24, 2018
- Heard by: leMaistre JA (Steel and Monnin JJA concurring)
- Dissenting: N/A
- Result: Appeal dismissed. Conviction upheld

Themes: Murder; evidence: admissibility, DNA, expert testimony, exclusion of evidence; jury instruction; defences: alibi, air of reality; trial fairness: judicial

intervention.

Summary: The accused was convicted by a jury of first-degree murder contrary to section 231(5)(b) of the *Criminal Code* for sexually assaulting and stabbing the victim to death in her home. The accused sought to have the conviction quashed and either an acquittal or a new trial ordered, or a conviction for second-degree murder entered. Originally, 24 grounds for appeal were advanced; however, the Court of Appeal reduced these to four issues: was the DNA evidence properly admitted; did the trial judge err in jury instruction; was the verdict unreasonable, and; did the behaviour of the trial judge render the trial unfair.

Held: Appeal dismissed.

Per leMaistre JA (Steel and Monnin JJA concurring): There was no fault in the reasoning of the trial judge regarding the appellant's claims under ss 8, 9 and 10 of the *Charter*, and so exclusion of evidence was not warranted. There was no error in the jury instruction of the trial judge. It was also found that there was ample evidence on which the jury could reasonably have arrived at the conclusion that it did. Finally, the Court disagreed that any unfairness resulted from the trial judge's interventions.

NOTE: Only the briefest summary is provided here on this case, as it engaged minimally with the actual law surrounding the issues raised. Though lengthy, the Court's reasons are mostly taken up with rejecting the assertions of the defence as inaccurate and unsupported on the record. Overall, there is a sense that the Court saw little merit to any of the claims.

R v Gowenlock, 2019 MBCA 5 (Docket AR17-30-08834)

- Crown (Respondent) | Gowenlock (Appellant)
- Heard: October 5, 2018
- Judgment: January 29, 2019
- Heard by: Chartier CJM (Steel JA and Hamilton JJA concurring)
- Dissenting: N/A
- Result: Appeal allowed.

Themes: trial, costs, miscellaneous.

Summary: Appellant is counsel for the accused, against whom the pre-trial judge ordered personal payment of costs due to missed court deadlines. Four issues were before the court of Appeal: can a court make rules of this sort; if so what standard of conduct must be shown for personal costs to be ordered; what principles and procedures apply, and; should costs have been ordered in this case?

Held: Appeal Allowed; order for costs overturned. Costs paid to be returned to counsel without delay.

Per Chartier CJM (Steel JA and Hamilton JJA concurring): The Court of Appeal found that it is within the power of courts to create rules allowing personal costs to be ordered against counsel for failing to meet filing deadlines, as this rule is essentially procedural rather than substantial. The standard of conduct to be applied depends on the reason for the costs award. In this case, the standard should be the "reasonable excuse" standard found in rule 2.03(1). The Court essentially adopts the principles for costs awards from Jodoin and sets out the applicable procedures for such orders. In this case, the pre-trial judge improperly considered certain facts and did not give

counsel adequate time to prepare or adduce evidence. Sending the case back to the judge for reconsideration under the clarified rules would not be useful, therefore the appeal is granted.

Klippenstein v R, 2019 MBCA 13 (Docket AR18-30-09096)

- Crown (Respondent) | Klippenstein (Appellant)
- Heard: February 5, 2019
- Written reasons: February 11, 2019
- Heard by: Hamilton JA (Pfuetzner JA and Simonsen JA concurring)
- Result: Appeal dismissed.

Themes: private prosecutions, Crown intervention, stay of proceedings; reasonable apprehension of bias, miscellaneous.

Summary: The applicant commenced 20 private prosecutions against various political figures and members of the judiciary. Proceedings were stayed by the Crown and Klippenstein's application to "void" these stays was summarily dismissed by the application judge. The applicant now appeals the application judge's ruling.

Held: Appeal dismissed; stay of proceedings upheld.

Per Hamilton JA (for the Court): The Court found no error. The application judge did not misinterpret s 579 of the *Criminal Code* and there was no reasonable apprehension of bias on the part of that judge.

R v FCW, 2019 MBCA 19 (Docket AR18-30-09093)

- Crown (Respondent) | FCW (Appellant)
- Heard: February 27, 2019
- Judgment: February 27, 2019
- Heard by: Burnett JA (Chartier CJM and Pfuetzner JA concurring)
- Dissenting: N/A
- Result: Appeal dismissed. Convictions upheld. Leave to appeal sentence granted but appeal dismissed

Themes: Offences, sexual assault, aggravated assault, firearms offences, forcible confinement; sentencing: totality principle; unreasonable verdict.

Summary: The accused was convicted at trial for aggravated assault, sexual assault, forcible confinement and point firearm. He received a global sentence of 8 years imprisonment. He appeals the convictions as unreasonable, arguing that a number of inconsistencies in the evidence before the trial judge should have raised a reasonable doubt. He also seeks leave to appeal the sentence on the basis that the judge failed to consider the principle of totality after imposing consecutive sentences.

Held: Appeal dismissed. Leave to appeal sentence granted. Sentence appeal dismissed.

Per Burnett JA (Chartier CJM and Pfuetzner JA concurring): The Court found that the trial judge engaged with the evidentiary inconsistencies raised by the accused during the trial. Given the evidentiary body, it was open to the judge to reach the conclusions that he did. As regards the sentence, the judge explicitly engaged with and applied the principle of totality in his reasons for sentence.

R v Ewert, 2019 MBCA 29 (Docket AR18-30-09084)

- Crown (Respondent) | Ewert (Appellant)
- Heard: March 12, 2019
- Judgment: March 12, 2019
- Written reasons: March 25, 2019
- Heard by: leMaistre JA (Burnett and Michel Monnin JJA concurring)
- Dissenting: N/A
- Result: Appeal dismissed. Convictions upheld. Sentence upheld.

Themes: Unreasonable verdict; attempted murder: intent; burden of proof: threshold

Summary: Officers arrived at the residence of the accused to arrest him, following a report by his partner that he had assaulted her and her friend. The accused threatened to shoot the officers upon their arrival, ran into his house and armed himself with a shotgun. He then discharged two shots at the officers, both of which hit one of them. The officer survived. The accused was charged with a number of offences, including attempted murder for shooting the officer. The accused was convicted of all charges to which he did not plead guilty, including attempted murder. He appeals the attempted murder charge, arguing that the trial judge erred by reducing the burden on the Crown to less than reasonable doubt, by rejecting expert evidence based on re-enactment regarding the intended target of the shots, by not applying the proper law on specific intent and by imposing an unreasonable verdict.

Held: Appeal dismissed

Per leMaistre JA (Burnett and Michel Monnin JJA concurring): The record offers no indication of a reduced burden, and the trial judge properly instructed himself. The judge considered the

experts' opinions and found them credible and reliable; however, it was open to the judge to find that a reasonable doubt was not raised given other evidence, such as an admission by the accused that he had shot at the officer. Similarly, there was no indication that the judge had improperly applied the law on intent, or that the verdict was unreasonable.

R v Chan, 2019 MBCA 38 (Docket AR18-30-09094)

- Crown (Respondent) | Chan (Appellant)
- Heard: April 2, 2019
- Judgment: April 2, 2019
- Heard by: Simonsen JA (Mainella and Steel JA concurring)
- Dissenting: N/A
- Result: Appeal dismissed. Convictions upheld

Themes: Unreasonable verdict; offences: breaking and entering with intent to commit and indictable offence, mischief over $5000.

Summary: The accused landlord entered into a rental residence, removed the tenants' belongings and scattered them on the lawn. The accused was convicted at trial of breaking and entering with intent to commit indictable offence and mischief over $5,000. Accused appealed, alleging verdicts were unreasonable.

Held: Appeal dismissed.

Per Simonsen JA (Mainella and Steel JA concurring): The accused's arguments all related to the trial judge's credibility assessments, findings of fact and inferences drawn, which are entitled to deference absent palpable and overriding error. There was no such error in present case; the trier

of fact, properly instructed, could reasonably have found accused guilty of break and enter with intent to commit indictable offence and mischief given the record.

R v Hyra, 2019 MBCA 42 (Docket AR16-30-08674)

- Crown (Respondent) | Hyra (Appellant)
- Heard: April 3, 2019
- Judgment: April 3, 2019
- Heard by: Burnett JA (leMaistre and Pfuetzner JJA concurring)
- Dissenting: N/A
- Result: Appeal dismissed. Conviction upheld

Themes: Unreasonable verdict; Constitutional law: s 11(b) delay; self-represented accused: insufficient assistance of court; unfair trial.

Summary: The accused was convicted of criminal harassment following trial by judge and jury. He contends that the trial judge erred when she found no unreasonable delay in bringing matter to trial, that the trial judge failed to provide him with sufficient assistance during the pre-trial process, and that trial was unfair due to several occurrences at trial.

Held: Appeal dismissed.

Per Burnett JA (leMaistre and Pfuetzner JJA concurring): There is no merit in any of the appellant's claims. The accused failed to bring a proper motion for delay, there was no basis for complaint based on the trial judge's duty to assist self-represented accused, and issues concerning trial fairness were without merit.

R v Tsui, 2019 MBCA 41 (Docket AR18-30-09192)

- Crown (Respondent) | Tsui (Appellant)
- Chambers motions heard: March 19, 2019
- Judgement: April 10, 2019
- Heard by: Pfuetzner JA (in Chambers)
- Dissenting: N/A
- Result: Appeal dismissed

Themes: Appeal from conviction or acquittal: right of appeal of accused: immigration consequences of criminal record, deportation.

Summary: Accused pleaded guilty to impaired driving. Accused was Chinese citizen and had been living in Canada on study permit since he was teenager. For Canadian immigration purposes, accused was considered to be foreign national. Accused was deemed to be inadmissible to Canada on basis of criminality and received deportation order. Accused applied for renewal of study permit and he made refugee claim. Refugee claim was rejected, and permit was not renewed. Accused brought application to summary conviction appeal ("SCA") judge extend time to file appeal against his conviction. Application was denied. Accused applied for leave to appeal. Application dismissed. Accused did not raise arguable matter of substance and there was no merit to any of arguments that he raised.

Held: Accused's motion for leave to appeal is dismissed

Per Pfuetzner JA (in Chambers): Appellate courts were reluctant to intervene in exercise of judicial discretion by lower court judges. SCA judge considered appropriate factors and it was open to him to exercise his discretion in manner that he did.

R v Hominuk, 2019 MBCA 64 (Docket AR18-30-09182)

- Crown (Respondent) | Hominuk (Appellant)
- Heard: May 31, 2019
- Judgment: May 31, 2019
- Heard by: Cameron JA (Burnett and Mainella JJA concurring)
- Dissenting: N/A
- Result: Appeal dismissed. Conviction upheld

Themes: Assaulting a peace officer; unreasonable verdict: contradictory findings, irrational or inconsistent reasons.

Summary: The accused was an inmate at the Women's Correctional Center. Correctional officers caught her trying to choke herself and attempted to restrain her. She resisted to the extent that they felt it necessary to put her in a restraint chair. While doing this she spit on officers. The event was caught on camera. The accused was convicted of assaulting a peace officer. She appeals, submitting that the trial judge erred by failing to apply the correct test for *mens rea* to the evidence and because the facts accepted were incompatible with a finding of guilt.

Held: Appeal dismissed.

Per Cameron JA (Burnett and Mainella JJA concurring): The accused's argument is based on the trial judge's findings that: the accused was hysterical and out of control at the time of the offence; her state of mind at the time indicated she could not have known what was going on, and; she was unable to apply reason to her thoughts and actions at the time. These findings, while poorly worded, were comments on the accused's reliability and credibility as a witness.

Taken in the full context, the judge's reasons are poorly laid out but not unreasonable. This is not one of the rare cases that the trial judge's reasons are so irrational as to vitiate the verdict.

R v Dyck, 2019 MBCA 81 (Docket AR18-30-09102)

- Crown (Respondent) | Dyck (Appellant)
- Heard: February 25, 2019
- Judgment: July 30, 2019
- Heard by: Cameron JA (leMaistre and Pfuetzner JJA concurring)
- Dissenting: N/A
- Result: Appeal dismissed; conviction upheld. Leave to appeal granted, appeal dismissed, sentence upheld

Themes: Sexual Exploitation; unfair trial: ineffective assistance of counsel; sentencing: range for sexual exploitation, position of power.

Summary: Accused was an educational assistant tasked with monitoring the complainant; a troubled youth with a criminal past at the high school she worked at. The complainant's sister became concerned that the accused and the complainant were in a sexual relationship. This led to investigation, yielding accusations that the accused had performed numerous sexual acts on the complainant, as well as supplying him with drugs, alcohol and pornography. The accused was convicted of sexual exploitation and sentenced to 3.5 years' imprisonment. She seeks leave to appeal her conviction on the basis of ineffectual assistance of counsel and of her sentence on the basis that the trial judge erred in refusing to consider her s 12 claim, and in assessment of aggravating and mitigating factors.

Held: Appeal dismissed.

Per: Cameron JA (leMaistre and Pfuetzner JJA concurring): The Court considered in detail the accused's many assertions of ineffectual assistance, finding all to either be untrue as reflected by the record or merely reflections of differences in opinion on trial strategy. On the issue of sentence, the Court found that the aggravating and mitigating factors were properly considered and that the judge had made an extensive review of similar case, arriving at a sentence that was not demonstrably unfit. The Court declined to rule on the constitutional issue.

R v Ponace, 2019 MBCA 99 (Docket AR18-30-08995)

- Crown (Respondent) | Ponace (Appellant)
- Heard: May 29, 2019
- Judgment: October 7, 2019
- Heard by: leMaistre JA (Beard JA and Cameron JA concurring)
- Dissenting: N/A
- Result: Appeal dismissed

Themes: appeal of conviction, jury, miscellaneous.

Summary: The accused appeals her conviction for second degree murder and arson. The deceased was found dead by firefighters who were responding to an alarm triggered by a fire burning in his apartment. He had been beaten, stabbed and strangled to death. The accused and the co-accused were jointly charged and convicted with second degree murder and arson. At the time of her arrest, the co-accused made a statement admitting that she killed the deceased. At the trial, the co-accused pled guilty to manslaughter but denied that she was guilty of second-degree murder and arson. The case against the accused was circumstantial and relied on after-the-fact conduct. In light of the co-accused's admission that she killed the deceased, a key issue at the

trial was whether the accused participated in the killing while knowing that the co-accused intended to kill. The defence argued three grounds on appeal. (1) the convictions were against the law, the evidence and the weight of the evidence; (2) the trial judge erred in law in dismissing the accused's motion for a directed verdict; and (3) the trial judge erred in law when instructing the jury. The MBCA dismissed the appeal in full.

Held: Appeal dismissed.

Per leMaistre JA (Beard JA and Cameron JA concurring): The jury was entitled to conclude on the evidence that the accused participated in both the arson and the murder, and the verdict was not unreasonable. What's more, they were not persuaded that the trial judge erred by dismissing the motion for a directed verdict or that the accused was prejudiced by the timing of the trial judge's reasons. Finally, the trial judge's instructions to the jury, when considered in their entirety and in the context of the trial, resulted in a jury that was properly and fairly instructed.