IN THE COURT OF APPEAL OF MANITOBA

B E T W E E N :

	)	***S. M. Ehrmantraut***
HER MAJESTY THE QUEEN	)	*for the Applicant*
	)	
Respondent	)	***A. Y. Kotler***
	)	*for the Respondent*
- and -	)	
	)	*Chambers motion heard:*
CANDIDA JUNE STAR BARKER	)	***August 8, 2019***
	)	
(Accused) Applicant	)	*Decision pronounced:*
	)	***August 22, 2019***

PFUETZNER JA

[1] The accused applies for leave to appeal sentence and, if leave is granted, for judicial interim release pending the appeal.

[2] The accused pleaded guilty to one count of armed robbery and one count of failing to comply with a probation order by failing to report as directed.

[3] On the armed robbery charge, the accused was sentenced to two years' custody, less a day, followed by two years' probation. The accused was sentenced to one day's custody concurrent on the breach of probation charge, noting 58 days of pre-trial custody.

[4] The facts underlying the armed robbery are as follows. The accused and a male accomplice entered the lobby of a hotel in Portage la Prairie in the

early morning while a female night clerk was working alone. The pair had their faces covered. The male was armed with a knife and the accused was armed with bear spray. The male demanded that the victim open the cash drawer, which she did. Despite there being no indication that the victim was in any way resisting, the accused sprayed her in the face with bear spray. The male removed approximately $1,800 from the drawer and took the victim's car keys. The victim recognised the accused as the same woman who had entered the hotel lobby about 30 minutes earlier to enquire about the price of a room. When the police arrived at the hotel, the victim was crying and unable to open her eyes. She was transported to the hospital to be decontaminated.

[5] In order to be granted leave to appeal sentence, the accused must demonstrate that she has an arguable case that the sentence was demonstrably unfit or that it was arrived at as a result of an error in principle. In other words, she must show that there is an arguable case that the sentencing judge committed an error in principle, failed to consider a relevant factor, overemphasised one or more relevant factors, or imposed an unfit sentence (being one outside of an acceptable range).

[6] An arguable case is one with some merit or some realistic chance of success. The determination of whether there is an arguable case must be made bearing in mind the highly deferential standard of review applicable on sentence appeals.

[7] The first proposed ground of appeal is that the sentencing judge erred in law in his application of the principles of "exceptional circumstances". The accused argues that the sentencing judge "erred by not adequately considering the circumstances of the offence, the circumstances of

the offender, the clear turn around in the [accused's] life and consideration as to whether a custodial or non-custodial sentence would be appropriate for the [accused]".

[8] In his lengthy reasons, the sentencing judge thoroughly reviewed the circumstances of the offence and of the accused. He considered the accused's prior history of relapsing after seeking treatment for her addictions and the fact that she had previously received a suspended sentence for trafficking cocaine as a result of a finding of exceptional circumstances—a sentence that the accused breached by committing the subject offences. The sentencing judge recognised that the accused had "excelled" in residential treatment at the Behavioural Health Foundation while on bail pending the sentencing. However, he concluded that "there is, simply put, an insufficient basis to ground a finding of exceptional circumstances on the record before me."

[9] A finding relating to exceptional circumstances is entitled to "great deference" on appeal (*R v Burnett*, 2017 MBCA 122 at para 31). In light of this and the fact that the sentencing judge carefully applied the principles relating to exceptional circumstances recently described by this Court in *Burnett* and in *R v McIvor*, 2019 MBCA 34, there is no realistic chance that a panel of this Court would interfere with the sentencing judge's finding.

[10] The second proposed ground of appeal is closely related to the final proposed ground and will be dealt with later.

[11] The third proposed ground of appeal is that the sentencing judge erred in law by "failing to give proper weight and analysis to the principles of *Gladue*" (see *R v Gladue*, [1999] 1 SCR 688).

[12] The sentencing judge was well aware of the accused's *Gladue* factors and took these into account in imposing a period of custody at the low end of the sentence range for armed robbery. He stated:

> I recognize significant *Gladue* factors, which were a component consideration in the previous finding of exceptional circumstances that continue to be present and despite the fact that I have declined to make a finding of exceptional circumstances, these considerations are sympathetic as the *Gladue* factors decrease the culpability of [the accused].

[13] In my view, there is no arguable case that the sentencing judge's treatment of the accused's *Gladue* factors was so inadequate as to amount to an error in principle.

[14] The fourth proposed ground of appeal is that the sentencing judge erred in law by overemphasising a prior conviction. The accused argues that the sentencing judge erred by placing too much significance on her prior conviction for trafficking cocaine for which she received a suspended sentence on the basis of exceptional circumstances.

[15] The sentencing judge carefully considered the circumstances of the prior offence and the basis for the sentence she received as part of his duty to take into account the accused's circumstances. In addition, as the accused was asking for a finding of exceptional circumstances based on her rehabilitation, the sentencing judge properly had regard to her past ability to maintain sobriety and to comply with court supervision in the community. There is no merit to the accused's argument that the sentencing judge effectively re-sentenced her for the prior offence.

[16] The fifth and final proposed ground of appeal is that the sentence is

harsh and excessive. Closely related to this ground is the second proposed ground of appeal—that the sentencing judge erred in law by failing to apply residual sentencing discretion outside of a finding of exceptional circumstances.

[17] These grounds of appeal have no realistic chance of success. The sentence imposed is at the very low end of the sentence range of two to four years for armed robbery of a vulnerable victim set out in cases such as *R v Charlette (JJ)*, 2015 MBCA 32. Taking into account the aggravating factor of the gratuitous violence used by the accused in dousing the complying victim with bear spray, there is no merit to the argument that the sentence is harsh and excessive. Indeed, the sentencing judge aptly described the sentence as being "at the very lowest end of the range of what would be appropriate in these circumstances."

[18] In summary, for the reasons set out above, I see no realistic chance that the sentence would be disturbed on appeal if leave to appeal were granted.

[19] Leave to appeal sentence is denied. As a result, the application for judicial interim release is moot.

Pfuetzner JA