

**IN THE COURT OF APPEAL OF MANITOBA**

***BETWEEN:***

<b><i>HER MAJESTY THE QUEEN</i></b>	)	<b><i>W. F. Armstrong</i></b>
	)	<i>on behalf of the Applicant</i>
<i>Respondent</i>	)	<i>as a friend of the Court</i>
	)	<i>(via teleconference)</i>
	)	
<i>- and -</i>	)	<b><i>J. W. Avey</i></b>
	)	<i>for the Respondent</i>
	)	<i>(via teleconference)</i>
<b><i>MARTIN ANTHONY FISHER SR.</i></b>	)	
	)	<i>Chambers motion heard:</i>
<i>(Accused) Applicant</i>	)	<b><i>July 16, 2020</i></b>
	)	
	)	<i>Decision pronounced:</i>
	)	<b><i>July 23, 2020</i></b>

**COVID-19 NOTICE: As a result of the COVID-19 pandemic and pursuant to r 37.2 of the Manitoba, *Court of Appeal Rules*, Man Reg 555/88R, all motions are heard remotely by teleconferencing until further notice.**

**LEMAISTRE JA**

[1] The accused seeks to set aside a deemed abandonment of his appeal and to extend the time to file this motion.

[2] On June 10, 2019, the accused was convicted of aggravated assault and two counts of breaching his undertaking. On August 14, 2019, after receiving credit for 141 days of pre-sentence custody, he was sentenced to four years' imprisonment for the aggravated assault and six months

concurrent for each of the breaches. The accused filed his notice of appeal of conviction and application for leave to appeal and notice of appeal of sentence on September 9, 2019. The grounds of appeal are that the verdict was unreasonable and the sentence was unfit.

[3] On February 11, 2020, the Registrar sent a letter via email to the accused's lawyers to advise that unless the appeal was perfected in accordance with the Court's rules, the appeal would be deemed abandoned on March 12, 2020 (see Manitoba, *Court of Appeal Rules*, Man Reg 555/88R (the *Rules*). When no further action was taken on the appeal, the Registrar deemed it abandoned. The accused's motion to set aside the deemed abandonment was filed on July 2, 2020.

[4] The Crown does not object to an extension of time to file the motion to set aside the deemed abandonment and is of the view that the motion ought to be determined on its merits.

[5] On a motion to set aside a deemed abandonment pursuant to r 35.1 of the *Rules*, the accused bears the onus of establishing that: (1) he had a continuous intention to pursue the appeal; (2) that there is a reasonable explanation for the delay; and (3) that there are arguable grounds of appeal. These factors are weighed to determine if it is in the interests of justice to reinstate the appeal. (see *R v Giesbrecht (EH)*, 2007 MBCA 112 at para 11; *Zadworny v Manitoba (Attorney General) et al*, 2011 MBCA 66 at para 5; and *R v Alam*, 2020 ABCA 10 at paras 6-7).

[6] The notice of application for leave to appeal and notice to appeal, was filed by the accused's trial lawyer (counsel) who has been assisting him as a friend of the court after he was denied legal aid. The accused relies on

the affidavit of his counsel to demonstrate that he had a continuous intention to appeal and that there is a reasonable explanation for the delay. The affidavit refers to difficulties obtaining legal aid funding, issues with counsel not receiving communications from the court office and delays obtaining the accused's signature on documents due to the COVID-19 pandemic.

[7] The Crown does not dispute that the accused had a continuous intention to appeal and I am satisfied with that criterion. As for the explanation for the delay, while I have some concerns about the reasons for the delay, in my view, it would not be in the interests of justice to attribute the reasons for the delay to the accused. However, I have not been persuaded that there are arguable grounds of appeal.

[8] While the accused did not file a motion brief or transcripts of the trial evidence, sentencing submissions and reasons for sentence, I appreciate that without legal aid, the accused has been unable to afford to do so. Counsel provided transcripts of the submissions on conviction and reasons for conviction and explained the grounds of appeal in oral argument.

[9] Counsel relies on the trial judge's reasons to argue that the verdict is unreasonable. He argues that the trial judge's assessment of the accused's son, Bobby Fisher (Fisher), was too narrow and that his evidence was improperly rejected. He also argues that the trial judge erred by relying on the victim's testimony.

[10] The applicable standard of review must be considered when assessing the merits of the grounds of appeal. The standard of review for an assertion of unreasonable verdict is whether the verdict was one that a properly instructed jury or a judge could reasonably have rendered (see

*R v RP*, 2012 SCC 22 at para 9). As explained by Deschamps J in *RP* (at paras 9-10):

The appellate court may also find a verdict unreasonable if the trial judge has drawn an inference or made a finding of fact essential to the verdict that (1) is plainly contradicted by the evidence relied on by the trial judge in support of that inference or finding, or (2) is shown to be incompatible with evidence that has not otherwise been contradicted or rejected by the trial judge (*R. v. Sinclair*, 2011 SCC 40, [2011] 3 S.C.R. 3, at paras. 4, 16 and 19-21; *R. v. Beaudry*, 2007 SCC 5, [2007] 1 S.C.R. 190).

Whereas the question whether a verdict is reasonable is one of law, whether a witness is credible is a question of fact. A court of appeal that reviews a trial court's assessments of credibility in order to determine, for example, whether the verdict is reasonable cannot interfere with those assessments unless it is established that they "cannot be supported on any reasonable view of the evidence" (*R. v. Burke*, [1996] 1 S.C.R. 474, at para. 7).

[11] The trial judge's reasons demonstrate that she carefully considered Fisher's testimony. Despite believing his evidence, she found it did not "add much to the inquiry" because although he said he did not hear the assault or see any injuries on the victim, it was unclear "which date he was referring to".

[12] The trial judge's reasons also demonstrate that she was aware of the reliability issues with the victim's evidence and that she did not accept aspects of the victim's testimony that were not corroborated.

[13] I see no arguable error on this ground of appeal.

[14] Regarding the sentence appeal, counsel acknowledges that the notice of appeal was filed prior to the release of *R v Kravchenko*, 2020 MBCA 30, in which this Court established a sentencing range of four to eight years

for cases involving aggravated assault where there is an unprovoked random attack on a stranger with a weapon and significant resulting consequences. While that range may not apply in this case which involves the statutorily aggravating factor of domestic violence, in my view, the sentence appeal has no arguable merit, particularly in light of the highly deferential standard of review (see *Kravchenko* at paras 29-30, 51-52; and *R v Friesen*, 2020 SCC 9 at para 26).

[15] For these reasons, the motion to set aside the deemed abandonment is dismissed.

“leMaistre JA”

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