

IN THE COURT OF APPEAL OF MANITOBA

Coram: Madam Justice Holly C. Beard
Mr. Justice William J. Burnett
Madam Justice Jennifer A. Pfuetzner

<i>IN THE MATTER OF THE REFERENCE</i>)	
<i>BY THE MINISTER OF JUSTICE WITH</i>)	
<i>RESPECT TO THE CONVICTION OF</i>)	
<i>STANLEY FRANK OSTROWSKI TO THE</i>	)	<i>J. Lockyer and</i>
<i>MANITOBA COURT OF APPEAL;</i>	)	<i>A. M. Libman</i>
	)	<i>for the Appellant</i>
<i>AND IN THE MATTER OF AN</i>)	
<i>APPLICATION UNDER SECTION 700(2)</i>	)	<i>J. Speyer and</i>
<i>OF THE CRIMINAL CODE OF CANADA</i>	)	<i>H. Freeman</i>
	)	<i>for the Respondent</i>
<i>BETWEEN:</i>)	
	)	<i>Motion heard and</i>
<i>HER MAJESTY THE QUEEN</i>	)	<i>Decision pronounced:</i>
	)	<i>June 1, 2017</i>
<i>Respondent</i>)	
	)	<i>Written reasons:</i>
<i>- and -</i>	)	<i>August 29, 2017</i>
)	
<i>STANLEY FRANK OSTROWSKI</i>)	
)	
<i>(Accused) Appellant</i>)	

NOTICE OF RESTRICTION ON PUBLICATION: No one may publish, broadcast or transmit any information that could disclose the identity of the complainant(s) or witness(es) (see section 486.4 of the *Criminal Code*).

BEARD JA (for the Court):

[1] A key witness in this reference under section 696.3(3)(a)(ii) of the *Criminal Code* has applied under section 700(2) to be excused from testifying on compassionate grounds, on the bases that his physical health makes it

dangerous for him to travel and that his deteriorating mental and cognitive condition prevents him from testifying. As an alternative, he has suggested that his testimony be taken by way of video link. Both applications are opposed by both the accused and the Crown. The motion was dismissed at the hearing.

[2] Regarding the duty to testify, see this Court's decision in *R v Abdullah (G) et al*, 2010 MBCA 79 at para 34. The principles to be applied in determining whether to excuse a witness on the basis of ill health were set out in *W Bryant Shears Ltd v Sharmat Services Inc*, 2012 NLCA 17 at para 6. See also *R v Sood*, 1997 CarswellOnt 5035 (Ct J (Gen Div)); *Rumble v Canada Permanent Trust Co*, 1999 CarswellMan 385 (QB); *Toronto Dominion Bank v E Goldberger Holdings Ltd*, 1999 CarswellOnt 4660 (Sup Ct J); and *R v Kralik*, 2006 BCSC 1347.

[3] On the issue of excusing the witness from testifying, we are of the view that the medical evidence that was provided does not support a finding that he cannot testify. The doctor's report was not made under oath and the doctor has not been made available for cross-examination. Further, the doctor's report is not supported by the medical records that were filed, which indicate that the witness is fit to testify and to travel. Thus, we are dismissing the motion to excuse the witness from testifying.

[4] On the issue of the witness testifying by way of video link, we are not satisfied that this is an acceptable alternative to having the witness testify in person. The witness's evidence is key to the determination of the issues arising in this appeal. As such, it should be presented and subjected to cross-examination in the most effective manner. We are not convinced that that will occur if he participates by way of video link.

[5] If other accommodations are required to assist the witness and input from the Court is needed, counsel can either make submissions in writing with notice to all parties or contact the registrar to arrange an appearance.

[6] For these reasons, we are dismissing the witness's motion to be excused from testifying and his request, in the alternative, that he be allowed to testify by video link. Costs were not requested, so there will be no order in that regard.

Beard JA

Burnett JA

Pfuetzner JA