

IN THE COURT OF APPEAL OF MANITOBA

Coram: Chief Justice Richard J. Chartier
Madam Justice Diana M. Cameron
Madam Justice Jennifer A. Pfuetzner

BETWEEN:

<i>HER MAJESTY THE QUEEN</i>	)	<i>Z. M. Jones</i>
	)	<i>for the Appellant</i>
)	
<i>Respondent</i>	)	<i>J. W. Avey</i>
	)	<i>for the Respondent</i>
)	
<i>- and -</i>	)	<i>Joint written submissions filed:</i>
	)	<i>November 13, 2020</i>
)	
	)	<i>Appeal under r 45 of MB,</i>
	)	<i>Criminal Appeal Rules and</i>
<i>GARY ROBERT WESLEY RICHARDS</i>	)	<i>r 37.3 of MB, Court of Appeal</i>
	)	<i>Rules</i>
<i>(Accused) Appellant</i>)	
	)	<i>Judgment delivered:</i>
	)	<i>December 9, 2020</i>

CHARTIER CJM (for the Court):

[1] This is a sentence appeal.

[2] The accused received a six-month custodial sentence after pleading guilty to one count of break and enter a dwelling house with intent to commit an indictable offence. While the 53-year-old accused is a permanent resident of Canada, having come to this country when he was approximately six years old, he is not a citizen. At the sentencing hearing, the judge was not made aware that a six-month sentence would make him subject to a removal order from Canada (see section 36(1)(a) of the *Immigration and Refugee Protection Act*, SC 2001,

c 27 (the *Act*)), whereas a sentence of six months less a day would give him the right to appeal the removal order (see sections 64(1)-64(2) of the *Act*).

[3] The accused now asks that the sentence be reduced by one day to preserve his right of appeal with regard to the immigration consequences of his sentence. The Crown consents to the appeal and both parties agree that this appeal may be determined on the basis of written materials filed, without an oral hearing being held (see r 37.3 of the MB, *Court of Appeal Rules*, MR 555/88R).

[4] This Court has previously held that the effect of a person’s immigration status on a criminal conviction is a relevant factor to be considered in imposing a sentence and that counsel is expected to provide the Court with this background information (see *R v Ali*, 2015 MBCA 64 at para 12). Unfortunately, that was not done in this case. This failure caused the judge to remain in the dark with respect to the accused’s deportation jeopardy despite having resided in Canada for over 45 years. Appellate intervention is warranted (see *R v Dhaliwal*, 2020 MBCA 65 at paras 10-11).

[5] After reviewing the evidentiary record, we are satisfied that the jointly recommended one-day reduction in sentence would be fit in the circumstances.

[6] Accordingly, leave to appeal sentence is granted and the appeal is allowed. The sentence is varied from one of six months’ custody to one of six months less a day. All other aspects of the sentence remain the same.

“Chartier CJM”

“Cameron JA”

“Pfuetzner JA”
