

IN THE COURT OF APPEAL OF MANITOBA

Coram: Mr. Justice Christopher J. Mainella
Madam Justice Jennifer A. Pfuetzner
Madam Justice Karen I. Simonsen

BETWEEN:

<i>HER MAJESTY THE QUEEN</i>)	<i>R. M. McElhoes</i>
)	<i>for the Appellant</i>
)	<i>(via videoconference)</i>
)	
)	<i>R. N. Malaviya</i>
)	<i>for the Respondent</i>
)	<i>(via videoconference)</i>
<i>- and -</i>)	
<i>MARY ELLEN THOMAS</i>)	
)	<i>Appeal adjourned and</i>
)	<i>Decision pronounced:</i>
<i>(Accused) Appellant</i>)	<i>November 5, 2020</i>

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, this appeal was heard remotely by videoconferencing.

MAINELLA JA (for the Court):

[1] The background and procedural history of this appeal by the accused to set aside her conviction for second degree murder are set out in the previous decision of this panel (see 2020 MBCA 84).

[2] The appeal was scheduled to proceed on November 5, 2020. This Court was previously told that a motion for fresh evidence would be filed to support the accused's arguments that she received the ineffective assistance of counsel and that her guilty plea was not voluntary. No such motion was filed.

[3] On the scheduled day of the appeal, counsel for the accused sought leave to withdraw for “ethical concerns”. Counsel candidly admitted he has had ethical concerns in representing the accused for some time, has procrastinated in his decision making and did not act decisively to withdraw until the very day of the appeal. The tenor of his submissions is that he has taken no steps to assist the accused in securing new counsel. The accused advised the Court that she wishes to proceed with her appeal based on the written submissions filed and with the assistance of duty counsel.

[4] The Crown reminded the Court that the long history of this matter is that several lawyers have either declined to act for the accused or have been granted permission to withdraw as counsel, including one previously appointed under the order which was made pursuant to section 684 of the *Criminal Code* (the *Code*). The reoccurring problem seems to be that, while repeatedly promised, no motion for fresh evidence is ever filed. A previous counsel for the accused stated in the first factum filed on behalf of the accused that, “Absent [a] motion to permit fresh evidence being granted, there is no arguable merit to this appeal.”

[5] A complicating factor in the accused obtaining new counsel is that she is being held in a psychiatric facility in Quebec (see para 11).

[6] It is well-settled that, if counsel seeks to withdraw for an ethical reason, then a court must grant the withdrawal (see *R v Cunningham*, 2010 SCC 10 at para 49). While we are of the view that the motion to withdraw should be granted, given the history of this matter, it is in the interests of justice to briefly delay formally granting that order to ensure the orderly and timely administration of justice and to protect the interests of the accused.

[7] Accordingly, we order the following:

1. The motion for counsel to withdraw is adjourned to the week of November 16, 2020 to a date and time as set by the registrar. The appearance will be conducted by videoconference. The panel remains seized.
2. Mr. McElhoes is to contact Legal Aid to advise them of his motion to withdraw as counsel and to discuss the possibility of the appointment of new counsel for the accused. The panel wishes to hear Legal Aid's position about new representation for the accused.
3. At the appearance to be arranged, the Court will consider whether to continue the appointment of counsel for the accused pursuant to section 684 of the *Code*. Mr. McElhoes agreed to discuss this issue with the accused and with Legal Aid.
4. The registrar is directed to send a copy of these reasons to the Senior Area Director of Legal Aid.
5. The accused's appeal is adjourned sine die.

[8] At this time, it is not necessary to deal with the Crown's request pursuant to section 685 of the *Code* for summary determination of the appeal.

"Mainella JA"

"Pfuetzner JA"

"Simonsen JA"