

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>R. N. Malaviya</i>
)	<i>for the Respondent</i>
<i>- and -</i>)	
)	<i>Appeal adjourned:</i>
<i>MARY ELLEN THOMAS</i>)	<i>August 28, 2020</i>
)	
<i>(Accused) Appellant</i>)	<i>Written reasons:</i>
)	<i>September 11, 2020</i>

MAINELLA JA (for the Court):

Introduction

[1] It is unusual to provide lengthy written reasons for adjourning an appeal; however, nothing about this appeal is ordinary. Having considered the submissions of counsel, we adjourned the accused’s appeal; made an order that, absent a material change in circumstances, the accused appear at her appeal by videoconference; and stated that we would give our reasons for doing so in writing. We now do so.

Background

[2] It is necessary to set out the procedural history of this matter in detail.

[3] On December 6, 2011, the accused pleaded guilty to second degree murder. A sentence of life imprisonment was imposed, without parole eligibility for 10 years, based on a joint submission of counsel.

[4] On December 19, 2012, the accused, then unrepresented by counsel, filed a motion for an extension of time to appeal the conviction. On February 28, 2013, the motion was withdrawn without prejudice for her to file further material. Her motion was eventually perfected and heard by a judge of this Court on November 24, 2016.

[5] The motion court judge deciphered the accused's materials and concluded that what the accused wanted was to withdraw her guilty plea "because of ineffective assistance from counsel" (2017 MBCA 23 at para 16). It is on that basis that she was granted an extension of time to file an appeal.

[6] In the notice of appeal subsequently filed, the accused expressed the desire to be present in person at the hearing of her appeal.

[7] The appeal drifted for some more time. On September 21, 2018, an order pursuant to section 684 of the *Criminal Code* (the *Code*), assigning Mr. Mariash as counsel to act on behalf of the accused, was granted by a judge of this Court.

[8] In his factum, Mr. Mariash took the position that, "Absent [a] motion to permit fresh evidence being granted, there is no arguable merit to this appeal." The argument advanced was that, despite the fact that the accused was represented by an experienced criminal lawyer when she was sentenced, she wanted to withdraw her guilty plea to second degree murder and go to trial on the issue of her state of mind at the time of the homicide, raising the defences of lack of intention to cause death, intoxication, provocation and being in a "medical automatonlike state".

[9] The appeal was set for April 30, 2019. No motion to introduce fresh evidence was filed.

[10] The accused has a long history of mental illness aggravated by abuse of alcohol and crack cocaine. According to the psychiatric report filed at the sentencing hearing, there have been several diagnoses, including substance-induced psychosis, schizophrenia, schizoaffective disorder and bipolar mood disorder. Until incarcerated, she had received little treatment for her mental illness.

[11] Prior to January 3, 2019, the accused was being held at a women's prison in Kitchener, Ontario. On January 3rd, she was admitted on an emergency basis to a psychiatric facility near Montreal, Quebec where she has remained to date.

[12] In March of 2019, the accused's psychiatrist advised the Court's registry that transfer from the Quebec facility to attend the appeal in Winnipeg would be detrimental to the accused's clinical condition and could contribute to her presenting an undue risk of violence towards herself and others. Counsel for the accused sought and, on April 30, 2019, was granted an adjournment of the appeal despite the objection of the Crown.

[13] Silence on the file then ensued until February 28, 2020, when Mr. Mariash filed a motion to withdraw as counsel. That motion was granted on March 12, 2020 by a judge of this Court and Mr. McElhoes was assigned as counsel to act on behalf of the accused pursuant to section 684 of the *Code* on April 2, 2020. Mr. McElhoes was also granted permission to file a supplementary factum and further relevant materials on the appeal by May 28, 2020 (which was later extended to June 1, 2020). While a supplementary factum was filed, a motion to introduce fresh evidence was not.

[14] In the supplementary factum, Mr. McElhoes advises that, in order to give effect to the accused's application to withdraw her guilty plea, she is "asking to bring fresh evidence explaining the circumstances of the guilty plea." Later in the supplementary factum, he underscores that "[f]resh evidence is required in this case to explain the surrounding circumstances and the reasons for the guilty plea in order to assess whether or not there has been a miscarriage of justice." In his oral submissions to us, he indicated that the issues in the appeal are wider than the ineffective assistance of counsel allegation.

[15] The appeal was set for August 28, 2020. No motion to introduce fresh evidence was filed.

[16] In mid July of 2020, the accused's psychiatrist contacted the Court's registry and advised that it still remained too medically unsafe to transport the accused from Quebec to Winnipeg; however, she said that it would be acceptable for the accused to appear at her appeal by a video appearance.

[17] Sections 688(1)-688(2.1) of the *Code* read as follows:

Right of appellant to attend

688(1) Subject to subsection (2), an appellant who is in custody is entitled, if he desires, to be present at the hearing of the appeal.

Appellant represented by counsel

688(2) An appellant who is in custody and who is represented by counsel is not entitled to be present

(a) at the hearing of the appeal, where the appeal is on a ground involving a question of law alone,

(b) on an application for leave to appeal, or

(c) on any proceedings that are preliminary or incidental to an appeal,

unless rules of court provide that he is entitled to be present or the court of appeal or a judge thereof gives him leave to be present.

Manner of appearance

688(2.1) In the case of an appellant who is in custody and who is entitled to be present at any proceedings on an appeal, the court may order that, instead of the appellant personally appearing,

(a) at an application for leave to appeal or at any proceedings that are preliminary or incidental to an appeal, the appellant appear by audioconference or videoconference, if the technological means is satisfactory to the court; and

(b) at the hearing of the appeal, if the appellant has access to legal advice, they appear by closed-circuit television or videoconference.

[18] In the affidavit filed in support of the adjournment, it is stated that the accused would like to be present for the appeal in person because: (1) she disagrees with her psychiatrist's assessment of her present condition; (2) she has family supports in Winnipeg; (3) her ability to hear and comprehend the proceedings will be diminished; (4) she has the right to be physically present; (5) she has been accommodated in the past; and (6) she has been transported outside of Manitoba against her will.

[19] In the affidavit, mention is also made of Mr. McElhoes's intention to bring a motion to transport the accused from the psychiatric facility in Quebec to Winnipeg for her appeal despite the opinion of her psychiatrist. However, in his submissions to us, he conceded that he may not pursue physical transport of the accused based on inquires yet to be done.

[20] On August 21, 2020, the Crown asked the registrar to exercise his discretion pursuant to section 685 of the *Code* to refer the appeal to the Court for summary dismissal as being frivolous. The Crown says the appeal cannot succeed without a motion to introduce fresh evidence and, despite more than

three years passing since the extension of time was granted on the basis of ineffective assistance from counsel, there is still no motion to introduce fresh evidence to establish that claim.

[21] There is nothing in the record before us as to what inquiries have been made of counsel who represented the accused at the sentencing hearing; whether there has been a waiver of privilege by the accused; or what the factual foundation to the allegation of ineffective assistance of counsel is (outside the transcript) (see *R v Le (TD)*, 2011 MBCA 83 at paras 178-79). It is also not clear whether counsel, who represented the accused at the sentencing hearing in 2011, is even aware of the allegation of ineffective assistance of counsel made against her as is required by the practice direction of this Court (see Manitoba, Court of Appeal, “Practice Direction: Re: Directive Regarding Appeal Proceedings Involving Allegations of Ineffective Counsel in First Instance” (15 January 2016), online (pdf): *Manitoba Courts* www.manitobacourts.mb.ca/site/assets/files/1139/notice_re_ineffective_counsel.pdf (date accessed 3 September 2020)).

Discussion

[22] While we are of the view that it is in the interests of justice to adjourn this appeal, we have three concerns that, in our view, necessitate that the adjournment be for a short duration as opposed to the indefinite period that Mr. McElhoes has requested.

[23] The first concern is that the current unsatisfactory state of the record undermines any likelihood of success. A finding of ineffective assistance of counsel has a factual component, a prejudice component and a performance component (see *Le* at para 189). It is only in the rarest of cases where the transcript “reveals everything about the allegation” of ineffective assistance

of counsel (*ibid* at para 178). In *Le* (see paragraphs 167-79), a detailed road map was laid out as to the type of inquiries and evidence this Court will normally require to properly adjudicate a claim of ineffective assistance of counsel.

[24] The accused has had counsel on this appeal for almost two years. Despite that, she has not provided an affidavit to support her claim of ineffective assistance or on any broader issues. While some delays are understandable due to her being out of province and undergoing psychiatric treatment, no realistic plan to secure an affidavit from her has been put before the Court. Also, we have no assurance that the necessary inquiries have been made with the accused's original counsel to ensure that her motivations for her conduct are properly before the Court.

[25] The second concern is the manner of the accused's appearance at the appeal which is an issue unrelated to the merits of the appeal. Section 688 of the *Code* confirms that an accused's right to be present at the hearing of his or her appeal is subject to certain limitations, particularly when he or she is represented by counsel. We reject the submission that the accused has the absolute right to be "physically" present at her appeal.

[26] Section 688(2.1)(b) of the *Code* gives this Court a discretion to order that the manner in which an accused, who is in custody and is entitled to be present at the hearing of the appeal, appears be by a technologically assisted remote appearance as opposed to a personal one. Where section 688(2.1) is complied with, jurisdiction over an accused is not lost by reason of the failure of the accused to appear personally (see section 485(1.1) of the *Code*).

[27] Like any discretion, the power pursuant section 688(2.1) to order a technologically assisted remote appearance, as opposed to a personal one,

must be exercised judicially in light of the given circumstances and the affected interests (see *R v Flynn*, 2018 NLCA 51 at paras 16-18).

[28] There is no issue here as to the existence of the necessary technology required by section 688(2.1)(b). The Court's registry has confirmed that a videoconference can occur between the courtroom in Winnipeg and the psychiatric facility in Quebec. If counsel wishes to speak to the accused in private during a recess, that is possible either by videoconference or the dedicated telephone line in the courtroom. During the Covid-19 pandemic, this Court has used videoconferencing successfully for several months to conduct criminal appeals without complaint or difficulty to an accused's interests. Due process is possible in the digital world; courts should not assume that is not the case.

[29] As is in the case of a trial, an accused is entitled to receive a fair appeal, not a perfect one. In our view, there is no reason for the accused to appear personally at her appeal at this time. The psychiatrist's opinion is unchallenged that a prisoner transfer from Quebec to Winnipeg would not be in the accused's best interests in terms of her health and safety. We have no reason to believe her condition will improve in the near future. The videoconferencing technology will allow her to witness the appeal and have access to legal advice and medical support in a safe location. There is no reason for a lengthy delay of the appeal simply because the accused is being held in a psychiatric facility outside of Manitoba.

[30] The third concern is overall delay. Finality is of particular importance in the appeal process. We are now almost nine years removed from the sentencing hearing with little done on an appeal that multiple counsel have candidly admitted faces significant challenges without fresh evidence.

[31] Given our decision, it is not necessary to address the Crown's request pursuant to section 685 of the *Code* at this time.

Disposition

[32] In the result, the appeal is adjourned to a date later in the fall term, to be fixed by the registrar (at least 60 days after August 31, 2020). Absent a material change in circumstances, the accused will appear at her appeal by videoconference pursuant to section 688(2.1)(b) of the *Code*.

"Mainella JA"

"Pfuetzner JA"

"Simonsen JA"