IN THE COURT OF APPEAL OF MANITOBA

B E T W E E N :

	)	***E. A. Wach***
HER MAJESTY THE QUEEN	)	*for the Applicant*
	)	
(Respondent) Respondent	)	***J. W. Avey***
	)	*for the Respondent*
- and -	)	
	)	*Chambers motion heard:*
TOBY TSUI	)	***March 19, 2019***
	)	
(Accused) (Applicant) Applicant	)	*Decision pronounced:*
	)	***April 10, 2019***

PFUETZNER JA

[1] The accused seeks leave to appeal a decision of the summary conviction appeal (SCA) judge denying his motion for an extension of time to file an appeal.

Background

[2] In August 2017, the accused pleaded guilty to a charge of impaired driving contrary to section 253(1)(a) of the *Criminal Code* (the *Code*), as it then was, arising out of a single-vehicle accident that occurred in June 2015. He was sentenced to a fine and driving prohibition pursuant to a joint recommendation. The Crown stayed the charges of refusal of a breath demand (contrary to section 254(5) of the *Code*, as it then was) and driving while disqualified (contrary to section 225(1) of *The Highway Traffic Act*, CCSM c H60).

[3] At the time of the offence, the accused was 24 years old. He is a

citizen of China and had been living in Canada on a study permit since he was a teenager. For Canadian immigration purposes, he is considered to be a foreign national. As a result of his conviction, he was deemed inadmissible to Canada on the basis of criminality under the *Immigration and Refugee Protection Act*, SC 2001, c 27.

[4] In March 2018, the accused received a deportation order and, in April 2018, he retained immigration counsel. He applied for a renewal of his study permit and he also sought to remain in Canada on the basis of a refugee claim.

[5] In July 2018, the accused's immigration counsel referred him to criminal counsel to advise on the possibility of withdrawing his guilty plea or otherwise removing his conviction.

[6] In August 2018, the accused's refugee claim was rejected and, in September 2018, the renewal of his study permit was refused. Eight days later, the accused filed a motion in the SCA court to extend the time to file an appeal against his conviction.

[7] The ground of appeal that he sought to put forward before the SCA court was "[t]hat there has been a Miscarriage of Justice pursuant to section 686(1)(a) of the *Criminal Code*" on the basis that his guilty plea was not fully informed. The accused filed an affidavit stating that he pleaded guilty on the erroneous advice of his prior counsel who advised him that it was "only a potentiality" that his student visa could be cancelled. The accused stated that, if he had known that it was by operation of law that his student visa would be (as opposed to could be) cancelled, he would not have entered a guilty plea and proceeded to be sentenced in the manner recommended by

his counsel.

[8] The SCA judge noted that the decision whether to grant an extension of time to file an appeal is discretionary. He referred to *R v Menear* (2002), 162 CCC (3d) 233 (Ont CA); and *R v Roberge*, 2005 SCC 48, with respect to the well-established factors that he should consider in exercising his discretion.

[9] The SCA judge found that "[n]o one would expect the accused to file notice to appeal his conviction" during the 30-day appeal period and that "[i]t [was] understandable that the accused . . . would only become concerned as of March 19th, 2018 when he was notified about the deportation order." However, the SCA judge found that it was apparent that "the attempts to resolve his concerns through immigration channels were attempted and failed" and that "[i]t is only after these [attempts failed] that [the accused] turns to the criminal courts to try to address his problems." In addition, the SCA judge considered that the accused "never notified the Crown of an intention to appeal." From this evidence, he concluded that "the inference to be drawn is that he never had a bona fide intention to seek leave to appeal."

[10] The SCA judge also found that there was no satisfactory explanation for the six-month delay between receipt of the deportation order and filing the motion for an extension of time to appeal. He described the delay as "a significant amount of time in the context of this matter."

[11] The SCA judge dismissed the motion, stating:

> The ultimate question is always, whether in all of the circumstances and considering the factors I've already referred to, justice of the case requires an extension of time to be granted. And in my view, in this case, on the evidence before me and the factors

> that I have considered, it does not.

[12] The accused now seeks leave to appeal the discretionary decision of the SCA judge to this Court pursuant to section 839(1) of the *Code* which permits leave to be granted on "any ground that involves a question of law alone".

[13] The question of law on which the accused seeks leave to appeal is whether "the SCA judge failed to consider relevant evidence when determining whether it was 'in the interests of justice' to grant an extension to file an appeal and, therefore, erred in law".

Analysis

[14] As explained by Chartier JA (as he then was) in *R v Lenko*, 2010 MBCA 10 (at para 4), "the threshold for determining whether leave should be granted is very high. In addition to raising grounds involving questions of law alone, leave should only be granted if the matter raises an arguable case of substance which is of sufficient importance to merit the attention of the full court". The accused bears the onus to meet this high threshold.

[15] As previously explained, a decision to grant or deny an extension of time to appeal is a matter of discretion. In *Perth Services Ltd v Quinton et al*, 2009 MBCA 81, Freedman JA described the nature of a discretionary decision and the manner in which appellate courts should approach reviewing such a decision (at paras 24-26):

> Finally, and in this case significantly, the judge made decisions involving the exercise of his discretion . . .. Each of those two decisions required the judge to apply his judicial experience and expertise to all the relevant facts and applicable law and then to make a judgment as to whether the required burden of proof had

> been met.
>
> A discretionary decision such as described above is reviewed on appeal according to a highly deferential standard, often described in this way; see *Elsom v. Elsom*, [1989] 1 S.C.R. 1367 (at p. 1375):
>
> > … [A]n appellate court will be justified in intervening in a trial judge's exercise of his discretion only if the trial judge misdirects himself or if his decision is so clearly wrong as to amount to an injustice. ….
>
> The standard described in *Elsom* is universally applicable.

[16] If the accused were successful on both this motion for leave to appeal and on his appeal before a full panel of this Court, the result would be that the SCA judge's decision denying an extension of time to appeal would be reversed and the accused would be entitled to proceed with his appeal before the SCA court.

Position of the Accused

[17] The accused argues that, although the SCA judge correctly stated the law applicable to determining whether to extend the time to file an appeal, he erred in law by ignoring relevant evidence in making his decision. First, by finding that the accused did not have a bona fide intention to appeal, the accused submits that the SCA judge ignored the accused's affidavit evidence that he retained counsel in July 2018 to pursue an appeal. Second, the accused maintains that the SCA judge failed to consider the prejudice faced by the accused, that is, the inevitability of deportation. The accused submits that the question of sufficient importance that merits the attention of a full panel of this Court is "the nature and extent to which an accused [must] be informed of immigration consequences in order for his guilty plea to be informed." I note that this is not the ground of appeal on which he seeks leave. Rather, it

is the issue that the accused would have argued before the SCA court if he had been granted an extension of time to file his appeal.

Position of the Crown

[18] The Crown submits that there is no merit to the accused's argument that the SCA judge erred in law by failing to consider relevant evidence. The Crown argues that his reasons must be read in the context of the entire record. The Crown maintains that the question that the accused argues merits the attention of the full Court is not of sufficient importance. The Crown says that the law regarding the level of knowledge of potential immigration consequences required to ground a valid guilty plea has been considered in detail by appellate courts in other provinces and no further guidance is necessary (see *R v Tyler*, 2007 BCCA 142; *R v Shiwprashad*, 2015 ONCA 577; *R v Coffey*, 2017 BCCA 359; and *R v Girn*, 2019 ONCA 202).

Discussion

[19] The accused has framed the ground of appeal on which he seeks leave as a question of law. For the purposes of deciding this motion, I have assumed, without deciding, that this ground of appeal raises a question of law alone. However, for the reasons that follow, I am not persuaded that it raises an arguable matter of substance.

[20] In my view, there is no merit to the argument that the SCA judge erred in law in drawing the inference that the accused did not have a bona fide intention to appeal until after his attempts to deal with his problem through immigration channels had failed. First, the drawing of inferences is an exercise in fact-finding that generally raises questions of fact—not law. Second, the inference drawn by the SCA judge was clearly open to him on the

record and he was entitled to discount the weight to be given to the accused's statement in his affidavit that he "retained [counsel] for the purposes of determining whether I could seek to have my guilty pleas withdrawn or to seek some similar legal remedy to remove my conviction".

[21] In addition, in my view, there is no merit to the argument that the SCA judge failed to consider the prejudice faced by the accused. The accused's arguments before the SCA judge focussed on the merits of his position that his guilty plea was not informed and on the severity of the collateral immigration consequences. A review of the SCA judge's reasons and the record shows that he was keenly aware of what was at stake for the accused. In his reasons, the SCA judge makes no less than eight references to the deportation order received by the accused. In addition, the SCA judge noted, "At one point [counsel for the accused] really captured the essence of his client's position when he remarked: That fairness requires a second chance for his client."

[22] As explained, appellate courts are reluctant to intervene in the exercise of judicial discretion by lower court judges. In my view, the SCA judge considered the appropriate factors and it was open to him to exercise his discretion in the manner that he did. I am not persuaded that the accused has raised an arguable case of substance.

[23] For these reasons, the accused's motion for leave to appeal is dismissed.

Pfuetzner JA