

IN THE COURT OF APPEAL OF MANITOBA

Coram: Mr. Justice Michel A. Monnin
Madam Justice Diana M. Cameron
Madam Justice Jennifer A. Pfuetzner

BETWEEN:

<i>HER MAJESTY THE QUEEN</i>)	<i>K. D. Morgan</i>
)	<i>for the Appellant</i>
<i>Respondent</i>)	
)	<i>N. M. Cutler</i>
<i>- and -</i>)	<i>for the Respondent</i>
)	
<i>NICHOLAS DONALD WORONIUK</i>)	<i>Appeal heard and</i>
)	<i>Decision pronounced:</i>
<i>(Accused) Appellant</i>)	<i>June 12, 2019</i>

MONNIN JA (for the Court):

[1] The accused seeks leave to appeal and appeals the imposition of a curfew as part of a probation order that was an element of a sentence imposed on charges of possession of a prohibited weapon, possession of a weapon dangerous to the public peace and failing to comply with the conditions of a recognizance. The accused also appealed a sentence of time in custody but has now abandoned that appeal.

[2] The Crown appropriately consented to the variation being sought and we readily granted leave and varied the sentence to remove the curfew condition which should never have been imposed as it was imposed following a flagrant error in law committed by Corrin PJ, the sentencing judge.

[3] During the course of sentencing submissions, the sentencing judge adjourned the proceedings in order to place a private call, outside of the

courtroom, to the person who had prepared the pre-sentence report in respect of this accused that had been filed as an exhibit. He was unable to speak to that person but instead spoke to her supervisor. That telephone call led to the imposition of the curfew, as the sentencing judge himself stated, and was a course of conduct which he acknowledged as being without any legal basis. He said:

THE COURT: Now I, I want to say that I, in clarifying off the record there's a legal problem as we all know. So that presents us with a whole bundle of trouble which actually could be rectified by way of an appeal intervention from either side or by both. You know, that I, that I paid attention to somebody who I didn't, I didn't adhere just to what was in the report that was before the court. I spoke to somebody, the author of the report off the record on the telephone then came back and reported myself on what was said which isn't of course part of our court record. Hearsay at that point. I reported hearsay and did something that was illegal in so doing as a judge that was beyond my, my capacity as a judge and which had no legal basis. I acknowledge that. I acknowledge that any conversation I have in our system would lead to that.

[emphasis added]

[4] It is clear from those comments that the sentencing judge was aware that what he had done was not appropriate and infringed on the basic principle that judges only rely on facts or evidence put before them in open court unless it is a matter where judicial notice can be taken. This is not such a case. The sentencing judge's action was a blatant disregard of a basic principle of justice. Judges are not to speak to or seek independent information from witnesses unless done in open court.

[5] The sentencing judge might have been well intentioned but his actions cannot be countenanced and must be denounced.

[6] Because of his conduct, the sentencing judge caused an appeal to be brought when none should have been required and caused judicial resources to be expended to correct an error that the sentencing judge knew full well he was committing.

Monnin JA

Cameron JA

Pfuetzner JA