Citation: R v DJSC, 2024 MBCA 1
Date: 20240104
Docket: AR23-30-09883

IN THE COURT OF APPEAL OF MANITOBA

B E T W E E N :

	)	***M. P. Cook***
HIS MAJESTY THE KING	)	*for the Appellant*
	)	
Respondent	)	***D. N. Queau-Guzzi***
	)	*for the Respondent*
- and -	)	
	)	*Chambers motion heard:*
D. J. S. C.	)	***November 9, 2023***
	)	
(Accused) Appellant	)	*Decision pronounced:*
	)	***January 4, 2024***

NOTICE OF RESTRICTION ON PUBLICATION: An order prohibiting disclosure of a witness's identity has been made in this proceeding pursuant to section 486.31(1) of the *Criminal Code* and shall continue.

NOTICE OF RESTRICTION ON PUBLICATION: No one may publish, broadcast or transmit any information that could disclose the identity of the complainant(s) or witness(es) (see section 486.4 of the *Criminal Code*).

BEARD JA

[1] This is a motion by the accused to extend the time to file a motion to admit new evidence on the appeal; that is, evidence of events that occurred after the trial (see *Barendregt v Grebliunas*, 2022 SCC 22 at paras 47-48, 54 [*Barendregt*]).

[2] The Crown argues that the new evidence, if admitted, would not affect the result and is not capable of convincing the Court to allow the appeal.

[3] The test for extending time to institute a proceeding or to take a step in a proceeding that has already been commenced is the well-known test that was explained by this Court in *R v DBR*, 2005 MBCA 21, as follows (at para 6):

> An order to extend time is a discretionary order, with the overriding objective that justice be done in the circumstances. The criteria that are normally considered on such an application are:
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> 1. there was a continuous intention to appeal from a time within the period when the appeal should have been commenced;
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> 2. there [was] a reasonable explanation for the delay; and
>
> 3. there are arguable grounds of appeal.
>
> [citations omitted]

[4] As was explained in *DBR*, "[t]he arguable grounds test is to be distinguished from the test of 'probably succeed.' . . . In other words, it is a low threshold and is meant to ensure that the appeal is not frivolous" (at para 7). (See also *R v Desrochers*, 2018 MBCA 55 at paras 5-6; *R v Fraser*, 2016 MBCA 9 at para 10 [*Fraser*]; and *R v Giesbrecht (EH)*, 2007 MBCA 112 at para 11.)

[5] While the application in *DBR* related to an application to extend the time to file a notice of appeal, that same three-step test has been applied to an application to extend the time to reinstate an abandoned notice of motion for an extension of time to file a conviction appeal (see *Fraser* at paras 10-11) and a motion to extend the time to file an appeal book and factum (see *Correct Building Corporation v Lehman*, 2022 ONCA 723 at para 9; and *Singh v*

Pierpont, 2015 MBCA 18 at para 40). I find that the same test applies in this case, keeping in mind that the overriding objective is that justice be done in the circumstances.

[6] The Crown is not taking the position that the accused has not met the first two criteria of the test. It argues that the accused has not met the third criterion of showing that there are arguable grounds of appeal.

[7] The test for admitting fresh evidence on an appeal is the four-step test in *Palmer v R*, [1980] 1 SCR 759 at 775 (see *Barendregt* at para 29). The Crown argues that the proposed evidence does not meet the last two steps, which require that the evidence must be credible in the sense that it is reasonably capable of belief and that, if believed, it could have affected the result at trial.

[8] As was explained in *Barendregt*, the fourth step "will be satisfied if the evidence, assuming it was presented to the trier of fact and believed, possesses such strength or probative force that it might, taken with the other evidence adduced, have affected the result" (at para 64).

[9] The accused was convicted under the *Criminal Code* of making sexually explicit material under section 171.1(1)(b), luring a person under 16 years of age pursuant to section 172.1(1)(b) and indecent exposure under section 173(2). He has appealed his convictions and, as already stated, is applying to admit new evidence of events that occurred after his conviction. That motion was not filed within the required time, so he is applying to extend the time to file. Importantly, this is not the motion to determine whether the new evidence will be received, although that is a factor to be considered.

[10] Briefly, the complainant testified that she had received sexually explicit material from the accused via Facebook Messenger and that the material came from his Facebook account, with his picture. On cross-examination, she testified that the accused had never sent any pictures before, that the accused never identified himself as being D.C. and there were no details that would identify the sender as being the accused.

[11] The accused agreed that the pictures that were sent were on his Facebook account, but he said that he had taken them earlier for a previous use. He denied that he sent them to the complainant and said that his account had been hacked. He said that he had been locked out of his account in 2020, and that, as a result of that hacking, his fiancée, C.J., started getting pictures from strangers using his former Facebook account, asking her if she wanted to make money. The accused said that he reported the hacking to Facebook, but did not get a response.

[12] C.J. testified and confirmed the accused's evidence regarding the messages that she received on Facebook Messenger from the accused's account. She said that she received a call from two East Indian men who did not speak proper English. When she hung up, they messaged her through Facebook and asked if she wanted to make money. She said that her phone indicated that the call was coming from the accused, but the accused was not on the phone.

[13] The trial judge did not reject C.J.'s testimony about the previous hacking; he found that, in the context of the events on the night in question, he did not accept that the accused's Facebook account had been hacked that night.

[14] The proposed new evidence is from C.J. In her affidavit, she says that, after she received the messages from the accused's Facebook account in 2020, she deactivated that account, but when she checked later, that account showed as still being active. Subsequent to the accused's conviction and sentence, she received further messages that "bore the name and picture of [the accused]." She attached to her affidavit a screenshot of the Facebook message that shows the accused's picture and name. She states that the accused was in Stony Mountain Institution at the time and that he was not allowed to have a cellphone in the institution. Finally, she attached further screenshots of other messages that appear to come from the accused, sent while he was incarcerated and had no access to a cellphone so, in her view, it was impossible for him to have sent them.

[15] The main issue at trial was the credibility of the evidence that the accused's account had been hacked and the messages were sent by someone other than the accused. The new evidence is additional evidence that, if believed, supports the trial evidence that someone else was using the accused's account. It clearly goes to the core issue of the credibility of the accused's defence.

[16] The Crown argues, first, that is it not credible evidence. In my view, there is sufficient support for C.J.'s evidence such that it should not be rejected at this stage on the basis that it is not credible. If the motion to admit the evidence is allowed to proceed, the Crown will be able to cross-examine C.J. and/or to present its own evidence to challenge the credibility of the screenshots and her testimony. The panel hearing the appeal will then be in a better position to determine whether C.J.'s evidence is sufficiently credible to be admitted.

[17] The Crown also argues that the new evidence could not reasonably, when taken with the other evidence adduced at trial, be expected to have affected the result. I do not agree. The finding that the accused's account had not been hacked was a conclusion or inference drawn from the evidence. The new evidence, if admitted, is evidence of further hacking and misuse of the accused's account that could, when considered with all of the evidence, lead to a finding of reasonable doubt as to who sent the messages to the complainant.

[18] At this preliminary stage, without any definitive determination of the credibility of the new evidence, it would not be appropriate to make a definitive finding on this step, save to say that, in my view, the evidence, if accepted, might, when taken with the other evidence adduced, have affected the result at trial.

[19] Regarding the motion before me to extend the time to file the motion to admit new evidence, the only issue is whether there are arguable grounds of appeal. As previously noted, the test "is a low threshold and is meant to ensure that the appeal is not frivolous" (*DBR* at para 7). In my view, the grounds cannot be said to be frivolous, particularly in the event that the new evidence is admitted. As a result, I find that the accused has met this criterion.

[20] Further, this evidence goes to the core of the accused's defence. Even if the other steps are not met, I would find that the overriding objective that justice be done requires that this motion be granted, given the importance of this evidence to the defence.

[21] For these reasons, I am allowing the accused's motion to extend the time to file his motion to admit new evidence in the appeal.

[22] The parties raised the issue of whether the effect of the new evidence should be incorporated by amending and refiling the existing facta or by filing supplementary facta. This is a matter better addressed by counsel, who know their case and their existing documents better than I. If they are not able to resolve the issue, they can advise me of their positions in writing and I will resolve the issue.

Beard JA