

IN THE COURT OF APPEAL OF MANITOBA

Coram: Chief Justice Richard J. Chartier
Madam Justice Jennifer A. Pfuetzner
Madam Justice Karen I. Simonsen

BETWEEN:

HER MAJESTY THE QUEEN)	T. L. Kerrhs
)	<i>on her own behalf</i>
)	
<i>Respondent</i>)	D. C. Sahulka
)	<i>for the Respondent</i>
- and -)	
)	<i>Appeal heard and</i>
ANNETTE AKERHOR ONAKPOYA also)	<i>Decision pronounced:</i>
known as TRACY LIBERTY KERRHS)	September 2, 2021
)	
<i>(Accused) Appellant</i>)	<i>Written reasons:</i>
)	September 10, 2021

SIMONSEN JA (for the Court):

[1] The accused is directly indicted on a charge of aggravated assault.

[2] Some time in advance of the trial, the accused brought a motion to quash the direct indictment and to have the proceedings dismissed or remitted back to the Provincial Court for a preliminary inquiry. A motion judge (the judge) dismissed the motion, and the accused has filed a notice of appeal of that decision.

[3] The Crown has applied to quash the notice of appeal on the basis that this Court has no jurisdiction to hear the appeal because it is from an interlocutory decision.

[4] Following the hearing, we allowed the Crown's motion and quashed the notice of appeal with brief reasons to follow. These are those reasons.

[5] This Court and others have long held that sections 674 and 675(1) of the *Criminal Code* (the *Code*) give a right to appeal a conviction of an indictable offence, but no right to appeal before there has been a conviction.

[6] In *R v Teerhuis-Moar (S)*, 2008 MBCA 85, Chartier JA (as he then was) wrote for this Court (at para 5):

This court stated in *R. v. Deschamps (M.B.)*, 2003 MBCA 116, 177 Man.R. (2d) 301 at paras. 27-29, that because the right to appeal is statutorily created and the *Criminal Code* (the *Code*) does not provide for interlocutory appeals in criminal matters, we have no jurisdiction to hear such appeals. The policy reason against interlocutory appeals in criminal matters is the danger of delay in the trial process. See also ss. 674 and 675 of the *Code*.

See also *R v Duvell*, 1992 CarswellMan 448 at para 2 (CA); *R v Hyra*, 2015 MBCA 17 at para 5; and *R v Scott*, 2015 MBCA 80 at para 4.

[7] That being said, in *R v Douglas*, 2016 MBCA 81, this Court confirmed that, under 784(1) of the *Code*, there is an exception to the general prohibition against interlocutory appeals in criminal matters in that there is a right to appeal an interlocutory decision that grants or refuses a prerogative remedy (see paras 37, 54; see also *R v Awashish*, 2018 SCC 45 at para 10).

[8] As we will explain, we do not agree with the accused's assertion that this is an appeal of a decision in proceedings by way of the prerogative remedy of *certiorari*, which is available to parties who seek to quash decisions based on jurisdictional error (see *Awashish*).

[9] The accused says that this is a case involving *certiorari* because she sought to quash the direct indictment on the basis of jurisdictional error stemming from a breach of the rules of natural justice. However, the record does not support her assertion. Her notice of motion sought relief, in essence, on the basis of alleged abuse of process on the part of the Crown; she argued the motion on that basis; the judge decided the matter accordingly, concluding that the accused's evidence of abuse of process was "both speculative and weak" (at para 13); and the notice of appeal alleges that the judge erred by misinterpreting the evidence and by failing to find an abuse of process. The accused's notice of motion does not mention a prerogative remedy or jurisdictional error, nor do the judge's reasons or the notice of appeal.

[10] Furthermore, as the judge recognised, settled jurisprudence indicates that an Attorney General's decision to prefer a direct indictment is an exercise of prosecutorial discretion reviewable only for abuse of process (see *R v Anderson*, 2014 SCC 41 at para 51; see also *R v Power*, [1994] 1 SCR 601 at 629; *Krieger v Law Society of Alberta*, 2002 SCC 65 at paras 31-32; and *R v Nixon*, 2011 SCC 34 at para 31). Because the prerogative remedy of *certiorari* seeks to quash decisions on the grounds of lack of jurisdiction as opposed to abuse of process, it follows that an accused cannot seek to quash an Attorney General's decision to prefer a direct indictment by way of *certiorari*.

[11] The accused's appeal is clearly from a decision that is interlocutory in nature in that it did not finally dispose of the ultimate issue between the Crown and her, which is the aggravated assault charge. Moreover, the appeal does not come within the exception provided by section 784(1) of the *Code*. Therefore, we are without jurisdiction to entertain it.

[12] For the foregoing reasons, the Crown's motion was allowed and the notice of appeal was quashed.

Simonsen JA

Chartier CJM

Pfuetzner JA