

IN THE COURT OF APPEAL OF MANITOBA

Coram: Chief Justice Marianne Rivoalen
Mr. Justice James G. Edmond
Madam Justice Anne M. E. Turner

BETWEEN:

<i>HIS MAJESTY THE KING</i>	)	<i>C. R. Savage</i>
	)	<i>for the Appellant</i>
)	
	)	<i>B. J. Gladstone</i>
<i>Appellant</i>	)	<i>for the Respondent</i>
)	
<i>- and -</i>	)	<i>Appeal under r 45 of the</i>
	)	<i>Manitoba Criminal Appeal</i>
	)	<i>Rules and rr 37.3, 38 of the</i>
<i>ZACKARY JOSEPH MYRON ROULETTE</i>	)	<i>MB, Court of Appeal Rules</i>
	)	<i>(Civil)</i>
<i>(Accused) Respondent</i>)	
	)	<i>Judgment delivered:</i>
	)	<i>March 21, 2024</i>

RIVOALEN CJM (for the Court):

[1] The Crown seeks leave to appeal the accused’s sentence and, if granted, appeals the accused’s credit for pre-sentence custody. The accused agrees that he should not have received credit for his pre-sentence custody and is consenting to the appeal. With the consent of both parties, the appeal proceeded on written materials alone, pursuant to the MB, *Court of Appeal Rules (Civil)*, Man Reg 555/88R, r 37.3 [the *Rules*].

[2] The facts relevant to this appeal can be summarized as follows.

[3] On July 24, 2020, the accused received a total sentence of 1,085 days' incarceration. He was released on parole on July 15, 2022. On August 3, 2022, a warrant was issued because the accused was unlawfully at large, and his custody sentence was suspended until the warrant was executed. The warrant was executed forty-nine days later, on September 21, 2022.

[4] On March 13, 2023, the accused was sentenced to four months' incarceration for being unlawfully at large, to be served consecutively to his prior sentence.

[5] As such, the accused's warrant expiry date was on December 31, 2023. That is:

July 24, 2020 + 1,085 days = July 13, 2023

July 13, 2023 + 49 days = August 31, 2023

August 31, 2023 + 4 months = December 31, 2023.

[6] On March 31, 2023, the accused pled guilty to two counts of robbery with a firearm and one count of breaching a court order prohibiting him from possessing a firearm. On June 19, 2023, the sentencing judge heard sentencing submissions. During submissions, the accused agreed with the Crown that he was currently serving an unrelated incarceration sentence, which would expire on December 31, 2023.

[7] The Crown recommended ten years' incarceration, that being the five-year mandatory minimum sentence for each robbery (to be served consecutively to each other) plus a one-year concurrent incarceration sentence for the breach of the firearms prohibition.

[8] Counsel for the accused recommended a total sentence of seven and one-half years' incarceration: seven years to be served concurrently for both robbery offences and six months to be served consecutively for the breach of the firearms prohibition.

[9] At the time of submissions, both the Crown and counsel for the accused agreed that the accused should not receive any credit for pre-sentence custody because he was serving an unrelated sentence.

[10] The sentencing judge reserved his decision until July 25, 2023. On that date, an exchange occurred between the sentencing judge and counsel for the accused wherein the sentencing judge asked whether the accused should be given a total of 370 days as credit for pre-sentence custody. Counsel for the accused agreed with the reduction of the sentence by 370 days, and the Crown (not the same Crown who provided sentencing submissions) did not catch the error.

[11] The sentencing judge sentenced the accused to nine years' incarceration—concurrent sentences of eight years' incarceration for each robbery, plus one year consecutive for the breach of the firearms prohibition. The sentencing judge then credited the accused 370 days for pre-sentence custody.

[12] The Crown only appeals the improper credit for pre-sentence custody. The Crown does not contend that the sentence is demonstrably unfit.

[13] The standard of review on a sentence appeal is well established. Appellate courts must show great deference when reviewing sentencing decisions. Appellate intervention is only justified in cases where a material

error has an impact on the sentence or when the sentence is demonstrably unfit. A material error includes an error in principle, a failure to consider a relevant factor or an erroneous consideration of an aggravating or mitigating factor. It also includes an overemphasis of the appropriate factors (see *R v Johnson*, 2020 MBCA 10 at para 9, citing *R v Lacasse*, 2015 SCC 64 at paras 41, 43-44, 51).

[14] It is an error in principle to improperly give credit for pre-sentence custody and this error can be corrected on appeal, even if the sentence itself is not being challenged (see *R v Biever*, 2023 ABCA 138 at para 28, citing *R v Marshall*, 2021 ONCA 344).

[15] Here, there is no connection between the pre-sentence custody time that the accused had accumulated and the charges upon which he was sentenced. Therefore, there is no principled reason to allow any credit for that time (see *R v Keepness*, 2014 SKCA 110 at paras 75-78; *R v Farrah (D)*, 2011 MBCA 49 at para 60). In fact, there was an agreement that the accused was not entitled to any credit for pre-sentence custody. The accused himself gave the exact date his unrelated jail sentence would end.

[16] It was an error in principle to grant any credit for pre-sentence custody in relation to other charges unrelated to the charges upon which he was sentenced. Appellate intervention is warranted in the interests of justice. The 370-day credit for pre-sentence custody should be removed.

[17] Accordingly, leave to appeal the sentence is granted and the sentence appeal is allowed. The credit of 370 days for pre-sentence custody is removed.

Rivoalen CJM

Edmond JA

Turner JA
