

**IN THE COURT OF APPEAL OF MANITOBA**

*Coram:* Madam Justice Diana M. Cameron  
Mr. Justice Christopher J. Mainella  
Madam Justice Janice L. leMaistre

***BETWEEN:***

<b><i>HIS MAJESTY THE KING</i></b>	)	<b><i>A. E. Beddome</i></b>
	)	<b><i>for the Appellant</i></b>
	)	
	)	<b><i>D. N. Queau-Guzzi</i></b>
<b><i>- and -</i></b>	)	<b><i>for the Respondent</i></b>
	)	
<b><i>KATHERINE LAUREL AUDY</i></b>	)	<b><i>Appeal adjourned:</i></b>
	)	<b><i>February 16, 2024</i></b>
<b><i>(Accused) Appellant</i></b>	)	

**PER CURIAM**

Introduction

[1] This is one of those unusual situations where written reasons are given for adjourning an appeal. We adjourned the appeal after considering the irregularities preceding the sentencing of the accused in this matter and the basis on which she filed her conviction appeal, including a motion for fresh evidence, as well as her application for leave to appeal and, if granted, appeal of sentence. The adjournment will allow her lawyer (counsel) to consider whether he will continue to represent the accused. At the hearing, we indicated that we would give our reasons for adjourning the hearing in writing. These are those reasons.

[2] In addition, the panel has recognized the length of time it has taken for this matter to proceed and the potential uncertainty of when it may eventually proceed again. As such, the panel seized itself of the matter to ensure expediency and directed that, should the accused make an application for judicial interim release pending appeal, it be brought before us.

### Background

[3] To understand the Court's concerns raised, it is necessary to understand the history of this matter as it proceeded in the Provincial Court.

[4] The accused is a notorious shoplifter in the small rural community where she resides. On March 14, 2023, she pleaded guilty to two counts of theft under \$5,000, three counts of failing to comply with a probation order and one count of robbery with violence. The Crown (not the same as on this appeal) stayed several other charges and the Court ordered a pre-sentence report.

[5] The matter appeared for sentencing on April 25, 2023. At that time, the Crown and counsel (the same as on appeal) provided the Court with a joint recommendation. The sentencing judge did not object to the portion of the recommendation totalling seven months' imprisonment for the thefts and failing to comply charges. However, regarding the robbery charge, he said that he was concerned that the recommendation of four months' imprisonment, to be reduced to two months based on the totality principle, was unreasonably low. He granted counsel's request for an adjournment to allow the parties to provide case law and additional submissions. When the matter returned before the sentencing judge on May 11, 2023, counsel and the

Crown increased the joint recommendation for the robbery charge to nine months' imprisonment.

[6] After hearing submissions, the sentencing judge indicated that he was not inclined to impose the sentence jointly recommended for the robbery charge. He gave counsel the opportunity to request a recess to consider whether the accused wished to make an application to withdraw her guilty plea. Initially, counsel responded in the negative. However, the Crown interjected by stating that the Court should take a break to allow her to speak with counsel, which the sentencing judge allowed (the recess).

[7] After the recess, counsel requested an adjournment to make an application to withdraw the accused's guilty plea to the charge of robbery, to which the Crown consented. The sentencing judge denied the adjournment request and dismissed the accused's subsequent application to withdraw her guilty plea.

[8] After giving reasons, the sentencing judge imposed a sentence of three years' imprisonment consecutive to the seven months for the theft and failing to comply offences. He reduced the total sentence by 141 days to account for pre-sentence custody, leaving a go-forward sentence of three years and 69 days' imprisonment.

#### Proceedings in this Court

[9] The accused filed a motion for fresh evidence in support of her conviction appeal. The proposed evidence consists of an affidavit sworn by the accused. It recites the events that occurred during the sentencing proceedings. It also details what options she would have chosen had she

known that the sentencing judge would not agree with the way the Crown and counsel characterized the robbery (as a shoplifting gone bad) or with the joint sentence recommendation.

[10] On the other hand, the affidavit details confidential discussions that occurred between the accused and counsel, which are protected by solicitor and client privilege. There is no acknowledgment in the affidavit that she was aware of the privileged nature of her discussions with counsel or that she intended to waive her solicitor and client privilege. The affidavit was prepared by counsel.

[11] Also of concern, the affidavit asserts that during the recess, the Crown suggested a plan, with which counsel agreed, that would have effectively undermined the decision of the sentencing judge. That is, the Crown would consent to the accused withdrawing her guilty plea to the robbery charge and would instead proceed on one count of theft and one count of assault. It was for this reason that the accused applied for an adjournment to make an application to withdraw her guilty plea to the charge of robbery. At the appeal hearing, the Crown confirmed that, after conducting internal inquiries, it accepted the substance of the accused's account in the affidavit of what had happened after the sentencing judge advised for a second time that he was not prepared to accept the joint recommendation as to a sentence on the robbery charge.

[12] The day before the appeal hearing, we advised the parties of our concerns regarding the nature of the affidavit and the appropriateness of counsel continuing to act for the accused. Shortly thereafter, counsel wrote to the Court, advising that the accused intended to abandon her conviction appeal

and her motion for fresh evidence. At the hearing, counsel said that this decision was taken to expedite the appeal and because the accused had a stronger argument on her sentence appeal than on her conviction appeal.

[13] Given all of the irregularities surrounding the sentencing of the accused and what has been disclosed in the course of her appeal, we thought it would be in the interests of justice to adjourn the hearing to allow counsel to consider the matter and advise the registrar (as soon as possible) if he intends to continue to act.

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Cameron JA

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Mainella JA

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leMaistre JA