Citation: R v Pietz, 2025 MBCA 5
Date: 20250122
Docket: AR23-30-09878

IN THE COURT OF APPEAL OF MANITOBA

Coram: Madam Justice Jennifer A. Pfuetzner
Madam Justice Lori T. Spivak
Mr. Justice James G. Edmond

BETWEEN:

	)	***Z. M. Jones***
HIS MAJESTY THE KING	)	*for the Appellant*
	)	
Respondent	)	***D. Sahulka*** *and*
	)	***C. P. R. Murray***
- and -	)	*for the Respondent*
	)	
KYLE ALEXANDER PIETZ	)	*Appeal heard:*
	)	***September 11, 2024***
(Accused) Appellant	)	
	)	*Judgment delivered:*
	)	***January 22, 2025***

On appeal from *R v Pietz*, 2022 MBQB 93 [*decision*]

PER CURIAM

[1] After a trial by a judge and jury, the accused was convicted of manslaughter and then sentenced by the trial judge to sixteen years in prison. The accused appeals his conviction, submitting that the trial judge erred when she dismissed his application for a stay of proceedings pursuant to section 24(1) of the *Canadian Charter of Rights and Freedoms*, s 7, Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (UK), 1982, c 11 [the *Charter*]. Specifically, the accused argues that the trial judge erred in failing to find that the actions of the police officers breached his

sections 9 and 10(b) *Charter* rights. The accused requests that his conviction be vacated and a stay of proceedings be entered pursuant to section 24(1) of the *Charter*. Alternatively, the accused seeks leave to appeal and appeals his sentence, requesting a reduction of “a year or two” to serve as a message regarding the police officers’ conduct.

[2] For the reasons that follow, we dismiss the conviction appeal and grant leave to appeal the sentence but dismiss the sentence appeal.

Background

[3] Mr. Eduardo Balaquit (the victim) was last seen alive on June 4, 2018, and his body was never recovered. The victim went missing from his place of employment as a cleaner at Westcon Equipment and Rentals Ltd. (Westcon).

[4] On May 30, 2019, approximately one year after the victim disappeared, the accused was arrested, detained and questioned by police. At the time he was arrested, the police had evidence that he had previously been an employee of Westcon, his vehicle had been in the parking lot at Westcon on the evening of June 4, 2018, and he had moved the victim’s vehicle within Westcon’s parking lot. On the same evening, the accused used the victim’s bank cards and personal identification numbers to withdraw money from several bank machines. After a review of cellphone tower data, the police also had evidence that the accused had driven out to Arborg, Manitoba, on the evening of June 4, 2018. As a result of that information, the police suspected the accused had killed the victim and disposed of his body at or near that location.

[5] Prior to being questioned by police, the accused exercised his section 10(b) *Charter* right by meeting with his counsel. After doing so, the police officers interviewed him at the police headquarters beginning at approximately 11:35 a.m. on May 30, 2019, until 3:30 a.m. the next day. The portion of the interview conducted at the police headquarters was video recorded.

[6] The purpose of the police interview was to attempt to have the accused confess to the killing and to advise the police officers as to the location of the victim's body. At approximately 3:39 a.m. on May 31, 2019, the police officers took the accused on a drive around Westcon and then to Arborg (the drive). The interview during the drive (the drive interview) was audio recorded.

[7] When the accused was placed inside the police vehicle, he was handcuffed with his hands at the front of his body, and was wearing a t-shirt, sweatpants and paper booties (not shoes).

[8] Once they arrived in Arborg, in an area where the police officers believed the accused may have disposed of the body, they got out of the police vehicle and stood in that area. They removed the accused from the police vehicle and, despite cool temperatures (between four and eight degrees Celsius), he was not given a jacket, blanket or shoes. He remained outside the police vehicle for approximately eighteen minutes while the police officers tried to get him to show them where he had disposed of the victim's body.

[9] While outside the police vehicle, one of the police officers was recorded making comments including: "Your life is going to end here", "Do

you want to be left out here" and "You're looking like a retard. You're looking stupid now. You're fucking up your own life, your kids' lives."

[10] At no time during the entire drive interview did the accused make any inculpatory statements in relation to the disappearance of the victim or say anything about the location of the victim's body. He maintained his right to silence.

[11] At trial, the accused submitted that, during the time he was in police custody, his rights protected by sections 7, 9 and 10(b) of the *Charter* were violated by the conduct of the police officers (the alleged *Charter* breaches), and that the only appropriate remedy was a stay of proceedings pursuant to section 24(1) of the *Charter*.

<u>The Trial</u>

[12] A *voir dire* was held, respecting the alleged *Charter* breaches. The trial judge identified and addressed the following issues:

(1) Did the removal of the accused from police headquarters and the drive to the rural location near Arborg render his detention arbitrary pursuant to section 9 of the *Charter*?

(2) Was the failure of the police officers to provide the accused with an opportunity to contact counsel a second time prior to the drive a violation of section 10(b) of the *Charter*?

(3) Did the conduct of the police officers amount to a violation of the accused's right to remain silent, as protected by section 7 of the *Charter*?

(4) If any *Charter* violations are found, is the accused entitled to a remedy under section 24(1) of the *Charter*? (As no evidence was obtained as a result of the detention, there is no request for a remedy under section 24(2).)

[13] The trial judge carefully considered the totality of the circumstances regarding the police officers' conduct and rejected the accused's submission that his detention became arbitrary when they took him for the drive without his consent. Relying on *R v Storrey*, 1990 1 SCR 241, 1990 CanLII 125 (SCC) [*Storrey*], the trial judge found that there was legal authority for the police to take the accused from the police headquarters or interview room for the purposes of furthering the investigation if it was reasonable to do so (see *decision* at paras 39-40). She also found that the circumstances surrounding the drive did not individually or collectively render his detention arbitrary. She accepted the police officers' explanations of their comments, although she did not endorse them, concluding that they were not threats to harm the accused or to leave him in Arborg and did not render the detention arbitrary (see *ibid* at paras 54, 88).

[14] More specifically, the trial judge concluded that the purpose of the drive and the choice of destinations were reasonably connected to the purpose of the accused's lawful detention, given the information which indicated that the accused had been in the Arborg area the night of the victim's disappearance. Further, the law authorized his detention and permitted continuation of the investigation, including efforts to obtain information from the accused as to the location of the victim's body. The police officers took the accused to Arborg for that purpose, and she concluded that it was not unreasonable for them to have done so (see *ibid* at para 47).

[15] Regarding the circumstances of the drive, the trial judge acknowledged that the accused was not properly dressed to be outside and was handcuffed (with his hands to the front) throughout. She agreed with the Crown's acknowledgement that the accused should have been given shoes and that he was likely cold when taken from the police vehicle. However, she found he was out of the police vehicle for a short time and this lapse did not render the detention arbitrary.

[16] As to the accused's submission that his section 10(b) right to counsel was breached, the trial judge considered *R v Sinclair*, 2010 SCC 35 [*Sinclair*], and found that none of the three categories identified in that case as to when a second consultation with legal counsel may be necessary existed on the facts of this case (see paras 60, 73). She identified that the real issue in this case was the first category where police intend to proceed with a non-routine procedure that would not generally fall within the expectation of the advising lawyer at the time of the initial consultation.

[17] The trial judge found that the drive was not a non-routine procedure that, in the circumstances of this case, triggered a requirement for a further opportunity to consult with counsel.

[18] Regarding the alleged section 7 *Charter* breach, the trial judge found the police officers' conduct did not violate the accused's right to silence. The accused is not appealing that finding.

[19] Finally, the trial judge held that, if she was wrong in one of her conclusions regarding the alleged *Charter* breaches, a stay of proceedings pursuant to section 24(1) of the *Charter* would not be an appropriate remedy.

She applied the three-part test referenced in *R v Babos*, 2014 SCC 16 at para 32 [*Babos*], and concluded that the test had not been met by the accused.

Standard of Review

[20] The applicable standard of review is not in dispute. This Court reviews a *Charter* decision to ensure the correct legal principles were stated and there was no misdirection in their application. The standard of review is correctness. Deference is applied to the evidentiary foundation forming the basis of the trial judge's decision. Absent palpable and overriding error, the facts as found by the trial judge should not be disturbed. This Court "will also examine the application of the legal principles to the facts of the case to see if the facts, as found by the judge, satisfy the correct legal test. In the criminal law context, this is a question of law and the standard of review is correctness" (*R v Farrah (D)*, 2011 MBCA 49 at para 7(c); see also *R v Richard (DR)*, 2013 MBCA 105 at para 48).

[21] The standard of review on a sentence appeal is deferential. An appellate court can only intervene with a sentence that is demonstrably unfit or where there is an error in principle that had an impact on the sentence (see *R v Friesen*, 2020 SCC 9 at paras 25-29).

Analysis—Arbitrary Detention

Issue 1: Did the Removal of the Accused from Police Headquarters and the Drive Render His Detention Arbitrary Pursuant to Section 9 of the Charter?

[22] The accused submits that the trial judge erred in finding that his detention (i.e., the drive) was lawful. He submits that the trial judge erred in

her application of the legal principles to the facts and that the facts do not satisfy the correct legal test. More particularly, he maintains that the detention was not carried out by the police officers in a reasonable manner, rendering it arbitrary. He asserts that it was unreasonable for the police officers to (1) remove him from the police headquarters in the middle of the night to take him on a lengthy drive without his consent; (2) use abusive language towards him; (3) not provide him with shoes, a jacket or a blanket while outside; and (4) keep him in handcuffs during the drive.

[23] The Crown submits that it was not unreasonable for the police officers to have continued the investigation by driving the accused to Arborg and that their conduct during the drive was not so egregious as to render the detention arbitrary. The Crown contends that the trial judge identified the correct legal test and there was no error in the application of the legal principles to the facts of the case that justifies this Court interfering with her findings.

[24] In our view, the trial judge correctly identified the test under section 9 of the *Charter*: “detention must be authorized by law, the authorizing law itself must not be arbitrary and the manner in which the detention is carried out must be reasonable” (*decision* at para 38, citing *R v Le*, 2019 SCC 34 at para 124). The trial judge properly found that there is authority to support the legality of the police actions in taking a detainee from a police station or interview room for the purposes of furthering the investigation, as long as it is reasonable to do so (see *Storrey* at 254).

[25] In *Storrey*, the Supreme Court of Canada has made it clear that the essential role of police is to investigate crimes, and that role and function can and should continue after police have made a lawful arrest (see *ibid*).

[26] Further, the trial judge correctly stated: "To put it another way, an otherwise lawful detention may be rendered arbitrary where the conditions of the detention are unrelated to or inconsistent with its lawful purpose" (*decision* at para 41, citing *R v Steadman*, 2021 ABCA 332 at para 64).

[27] We are satisfied that the trial judge articulated the correct legal principles to determine whether there had been a breach of section 9 of the *Charter* and applied the principles correctly.

[28] The trial judge's findings are amply supported by a review of the evidence. She found that the conditions of detention were not unrelated to or inconsistent with its lawful purpose. In this case, the drive was part of the ongoing investigation to attempt to have the accused confess and admit that he moved the victim's body to the Arborg area. It was not unreasonable for the police officers to take him to that location to attempt to elicit a reaction or a confession.

[29] As for the circumstances of the drive, the trial judge found, and we agree, that the police officers' conduct was "not flawless" (*decision* at para 56). The accused was not provided with shoes, a jacket, a blanket or anything to stay warm when he was taken out of the police vehicle. As well, the police officers used offensive and profane language. However, the trial judge was not satisfied that their conduct was so egregious as to render the detention arbitrary. While the police officers' conduct should not be condoned, their conduct can be contrasted with the conduct of the officer in

R v Z (MJ), 2022 MBCA 61 at paras 37, 39, 64-65, where the officer used denigrating language and implied threats, which was found to exceed permissible boundaries.

[30] The accused submits that it was an error for the trial judge to state: "In some cases, this kind of conduct may render inadmissible any resulting statement given by a detainee. It cannot, in this case, lead to a finding that [the accused's] detention was arbitrary" (*decision* at para 54). The accused submits that once there is a breach of section 9, it should not matter whether the accused provided any statement.

[31] In our view, the trial judge correctly recognized that the voluntariness analysis in connection with a statement does not circumscribe the section 9 *Charter* right. The section 9 analysis is distinct from the voluntariness analysis. That said, in this case, the accused maintained his right to silence throughout the entire investigation, including during the drive. As a result, there was no statement, and no voluntariness inquiry was required.

[32] We are satisfied that the trial judge made no error in law in her analysis. She articulated the correct legal test and applied it properly to the facts as she found them. She reviewed the relevant evidence, including the evidence of the police officers, which she found to be credible. She made no palpable and overriding errors in her findings of fact. Applying the law to the facts, she correctly concluded that the detention was not arbitrary.

[33] As a result, we dismiss this ground of appeal.

Analysis—Right to Counsel

Issue 2: Was the Failure of the Police Officers to Provide the Accused with an Opportunity to Contact Counsel a Second Time Prior to the Drive a Violation of His Right Under Section 10(b) of the Charter?

[34] We start our analysis with what the Supreme Court has clearly identified as the purpose of section 10(b) of the *Charter*.

[35] In *R v Lafrance*, 2022 SCC 32 [*Lafrance*], Brown J stated that the purpose of section 10(b) is to "provide a detainee with an opportunity to obtain legal advice relevant to his legal situation" (at para 70, quoting *Sinclair* at para 24). This entails allowing "the detainee not only to be informed of his rights and obligations under the law but, equally if not more important, to obtain advice as to how to exercise those rights" (*Lafrance* at para 70, quoting *Sinclair* at para 26; see also *R v Manninen*, [1987] 1 SCR 1233 at 1242-43, 1987 CanLII 67 (SCC)). In the context of a custodial interrogation, section 10(b) "seeks 'to support the detainee's right to choose whether to cooperate with the police investigation or not, by giving him access to legal advice on the situation [they are] facing'" (*Lafrance* at para 70, quoting *Sinclair* at para 32).

[36] In *R v Dussault*, 2022 SCC 16, the Supreme Court endorsed Doherty JA's description of the right to counsel as a "'lifeline' through which detained persons obtain legal advice and 'the sense that they are not entirely at the mercy of the police while detained'" (at para 56, quoting *R v Rover*, 2018 ONCA 745 at para 45). Similarly, in *R v Brunelle*, 2024 SCC 3, O'Bonsawin J, for a unanimous Court on this point, wrote that the purpose of

section 10(b) "is to protect any person whose detention puts them in a situation of vulnerability relative to the state" (at para 81).

[37] In *Sinclair*, the Supreme Court suggested that, absent a change in circumstances, section 10(b) is satisfied by an initial warning coupled with a reasonable opportunity to consult counsel. However, sometimes, an accused is entitled to a second consultation with counsel. *Sinclair* at para 65 described the general principle as follows:

> What is required is a change in circumstances that suggests that the choice faced by the accused has been significantly altered, requiring further advice on the new situation, in order to fulfill the purpose of s. 10(*b*) of providing the accused with legal advice relevant to the choice of whether to cooperate with the police investigation or not.

[38] Further, the Court stated that "[t]he failure to provide an additional opportunity to consult counsel will constitute a breach of s. 10(*b*) only when it becomes clear, as a result of changed circumstances or new developments, that the initial advice, viewed contextually, is no longer sufficient or correct" (*ibid* at para 57).

[39] The constitutional right to a second consultation with counsel will generally only arise where there has been "a material change in the detainee's situation after the initial consultation" (*ibid* at para 43). *Sinclair* identified three categories of such circumstances, noting that the categories are not closed (see paras 2, 49).

[40] On the facts of the present case, only the first category is relevant: "a non-routine procedure that would not generally fall within the expectation of the advising lawyer at the time of the initial consultation" (*decision* at

para 60). For completeness, we note that the second category is where there is a change in jeopardy, such as where an investigation takes a new and more serious turn, which may arise where the detainee is arrested for one charge and, as the investigation continues, it is determined that he is a suspect in a more serious charge (see *ibid* at para 61). The third category is where there is a reason to question the detainee's understanding of his right to counsel. The trial judge correctly concluded that there was no change in jeopardy to the accused following his arrest, and she made no error in dismissing the accused's contention that he did not understand his right to counsel.

[41] *Sinclair* provides guidance as to what is considered a non-routine procedure. The Supreme Court stated (*ibid* at para 50):

> Non-routine procedures, like participation in a line-up or submitting to a polygraph, will not generally fall within the expectation of the advising lawyer at the time of the initial consultation. It follows that to fulfill the purpose of s. 10(*b*) of providing the detainee with the information necessary to making a meaningful choice about whether to cooperate in these new procedures, further advice from counsel is necessary . . ..

[42] In *R v Briscoe*, 2015 ABCA 2 [*Briscoe*], the Alberta Court of Appeal provided additional commentary on what is a non-routine procedure. Justice Watson stated that a second consultation is required in "some special form of evidence gathering situation which significantly differs from what counsel could be reasonably expected to have told the detainee about" (*ibid* at para 48). He also stated (*ibid* at paras 45, 48):

> It would really depend on the facts whether in a particular situation the investigative step is "new".

> Such new procedures would not be aspects of the predictable police questioning, but would be matters for which the detainee's participation is essential and for which the detainee would have a right to decline participation or at least a right to understand what is involved before participating.

[43] Generally, courts have been hesitant to expand the recognition of non-routine procedures. In addition to the polygraph tests and police line-ups mentioned in *Sinclair*, other cases have identified the following as non-routine: a penile swab search for DNA of a complainant in a sexual assault allegation (see *R v Johnson*, 2016 ONSC 3947 at para 168), and a request for an accused's cellphone password (see *R v Azonwanna*, 2020 ONSC 5416 at para 156). As described in *Briscoe* at para 48, these are techniques that seek evidence beyond simply a statement from an accused and which require their consent or participation.

[44] On the other hand, many post-arrest or detention police procedures are considered to be routine and do not trigger the right to a second consultation with counsel. These include interrogation, performing a pat-down or safety search, photographing a detainee, swabbing their fingers, asking to see their hands, seizing evidence found on their person, including their clothing, and participating in a re-enactment (see Davin Michael Garg & Anil Kapoor, *Criminal Law Series: Detention, Arrest, and the Right to Counsel*, ed by Brian H Greenspan & Vincenzo Rondinelli, vol 17 (Toronto: Emond Montgomery, 2025); *R v Madison*, 2022 ONSC 1749 at para 84; *Renaud c R*, 2022 QCCS 767 at para 63; *R v Ashmore*, 2011 BCCA 18 [*Ashmore*]).

[45] There is a limited body of jurisprudence that has considered the police action at issue here—the drive around of a detainee to a location believed to be connected to an alleged offence. We will review the relevant cases that bear on this issue and were considered by the trial judge.

[46] In *Ashmore*, the accused was arrested and detained for a murder investigation. While being interrogated in the police station, he confessed to the murder after being confronted with video evidence of him telling an undercover officer that he had killed the victim. The police requested that he participate in a re-enactment of the murder, and he agreed. The police drove him to different locations for the re-enactment, including to a different police station, to the scene of the murder and then to the site where the body was disposed of.

[47] The accused argued that the police should have ensured that he received legal advice prior to taking part in the re-enactment. The British Columbia Court of Appeal found that he was offered a further consultation with counsel, which he effectively waived. However, Frankel JA went on to conclude that the re-enactment was, in any event, not a "new (non-routine) procedure that falls outside of the expectations of counsel advising a detainee" as it was "nothing more than a statement by conduct" that merely "involves a person demonstrating, rather than simply recounting, how events unfolded" (*ibid* at para 70).

[48] It is noteworthy that in *Ashmore*, the fact that the re-enactment involved a drive around by police was not raised as an issue. The accused's assertion that his section 10(b) right was violated was based only on the argument that the re-enactment, not the drive around, was a non-routine

procedure. In our view, the facts in *Ashmore* are analogous to those in the present case, as the accused in *Ashmore* was driven by police to different locations connected to the murder for the purpose of his providing statements (albeit by conduct) to the police.

[49] In *R v MacPhail*, 2011 ONCJ 184 [*MacPhail*], it was the accused who suggested a drive around to show police several houses that he had broken into and he was well aware that if he disclosed additional offences, he would face further jeopardy. Police advised the accused of his right to counsel and attempted to put him in touch with a lawyer to no avail. Despite this, he wished to confess to his offences. The accused did not argue, nor did the Court find, that the drive around constituted a non-routine procedure. Rather, he argued that, although he had waived his right to counsel initially, he should have been given a second warning when the investigation "escalated" upon him suggesting a drive around (*ibid* at paras 91, 101).

[50] This was rejected by the trial judge in *MacPhail* at para 101, who found that:

> Although there was every prospect it would be an escalation of the number of charges, Mr. MacPhail clearly understood that and his position with respect to counsel previously prevailed throughout his continuing contact and interaction with the police officers once they had left the station and took part in the ride around.

[51] In other words, the trial judge in *MacPhail* found that none of the circumstances of the drive around presented a material change in the accused's situation to warrant a second consultation with counsel (see *ibid* at paras 91-102).

[52] In *R v Downey*, 2019 ABQB 376 [*Downey*], the accused argued that he was entitled to a second right to consult counsel prior to going out on a drive around after he agreed to take police to the location of a missing child whom he had been accused of kidnapping. He asserted that "a drive out procedure was a non-routine procedure" (*ibid* at para 110). Justice Hughes considered *Sinclair*, *Ashmore* and *Briscoe*, concluding, "I agree with the reasoning in *Ashmore* that the drive out procedure was a statement by conduct. It was not a non-routine procedure that triggered a right to re-consult" (*Downey* at para 118).

[53] Finally, the trial judge in the present case considered *R v Quindipan*, 2015 BCSC 1178 [*Quindipan*], which was relied on by the accused. We agree with the trial judge's assessment that it is of limited assistance. *Quindipan* dealt with the implementation of section 10(b) in the context of three different procedures: a polygraph, the execution of a DNA warrant, and the accused offering to take the police to the scene of the alleged offence. As pointed out by the trial judge, the real issue in that case was that the accused was not satisfied with the initial advice he received following his arrest, as he lacked confidence in the lawyer with whom he had consulted. The Court in *Quindipan* concluded that the police were obligated to provide him with a second opportunity to consult counsel because the advice the accused had received prior to the interview was inadequate—not because the drive out to the location of the offence was a non-routine procedure.

[54] In the present case, the accused submits that the police were required to give him a further opportunity to consult with counsel prior to taking him for the drive. He argues that his circumstances materially changed when the police officers decided to remove him from the interview room and go on the

drive such that the initial advice was no longer sufficient. He asserts that the drive changed his jeopardy as there was the potential for him to implicate himself, not only by words but by conduct, if he gestured to something along the route.

[55] As for the application of the relevant law to the facts found by the trial judge, it is helpful to revisit the general principle articulated in *Sinclair*. The failure to provide an additional opportunity to consult counsel will constitute a breach of section 10(b) only when it becomes clear, as a result of changed circumstances or new developments, that the initial advice, viewed contextually, is no longer sufficient or correct.

[56] Here, it was the police officers who decided to take the accused on the drive as part of their investigation to see if it would elicit a reaction or a confession from him, rather than it being suggested by him. The accused was not given a choice on whether to go with them. He did not object or ask to speak to counsel again but simply asked, “Is this standard protocol?” We agree with the trial judge that nothing turns on whether it was the accused or the police officers who raised the idea of the drive—the same legal principles apply.

[57] In the circumstances of this case, we are not persuaded that the trial judge erred in finding that removing the accused from the interview room and taking him on the drive triggered his constitutional right to be warned again and be given a second right to speak to counsel. In our view, the drive interview essentially continued along the same lines as occurred within the police headquarters. The police officers continued to ask questions and use the same techniques to attempt to have the accused confess and confirm what

they believed, namely, that he had killed the victim and disposed of the body at or near Arborg.

[58] The trial judge acknowledged that it is not common for a suspect to be taken for a drive as part of a police interview. However, she found that the purpose of the drive was similar to instances where the police show a suspect photographs, videos or recorded statements of other witnesses in order to prompt a response during an interview. She also found that it is similar to a request for a re-enactment—another technique that has been found not to give rise to a further right to consult counsel.

[59] In this case, the accused's legal position did not change, nor was there a material change in his circumstances. The police officers were questioning him, asking him to provide information and confess to the crime. He received advice from counsel prior to questioning and he chose to remain silent during the entire time he was detained. The choice faced by the accused on the drive was not "significantly altered" (*Sinclair* at para 65)—he could either answer the police officers' questions or remain silent.

[60] The interrogation of the accused by the police officers, together with confronting him with the evidence (real or otherwise), was within the expectation of the advising counsel at the time of the initial consultation. Whether this occurred at the police headquarters, in the police vehicle, or where the police officers believed to be the location of the victim's body, made no material difference. Here, the same type of evidence—a statement—was sought by the police officers at each location. The accused was advised of his right to remain silent at his initial consultation with counsel. He exercised that right and succeeded in preventing the police officers from

gathering evidence against him. He was in full control over whether he would give a statement to them. As was the case in *Briscoe*, “[t]he dealings between the police and the appellant were interviews. There was no ‘new’ procedure involved” (at para 42).

[61] We are not satisfied that the drive amounted to a change in circumstances such that the initial advice, viewed contextually, was no longer sufficient or correct. Further, we are not satisfied that the drive would fall outside the expectation of the advising counsel at the time of the initial consultation. Clearly, the advising counsel’s advice would have remained unchanged, that is, to remain silent.

[62] The drive was unlike the type of investigative procedure that existing jurisprudence has found to be non-routine. Non-routine procedures typically require an accused’s participation and necessarily create or uncover evidence (either inculpatory or exculpatory), such as eyewitness identification (i.e., a police line-up), an accused’s physiological responses to questioning (i.e., a polygraph test), DNA sample of a complainant (i.e., a penile swab), or electronic data (i.e., providing a cellphone password). Here, the accused was not conscripted to assist the police officers in uncovering evidence. He was able to control whether he gave a statement—verbal or by conduct—to the police officers at every location they took him to.

[63] To conclude, we are satisfied that the trial judge did not err in her statement of the law, her assessment of the evidence or her application of the law to the facts when she found that the accused’s section 10(b) *Charter* right was not breached. In the result, we dismiss this ground of appeal.

[64] Given that we have not been persuaded that there was a breach of the *Charter*, it is unnecessary to consider whether a stay of proceedings is an appropriate remedy. The trial judge did consider what the appropriate remedy would be if she was wrong on whether there was a breach of the *Charter*. The Supreme Court has made it clear that a stay of proceedings is a "drastic remedy" to be granted only in the "clearest of cases" (*Babos* at paras 30-31). We see no error in the trial judge's application of the three-part test outlined in *Babos* at para 32 to the facts of this case.

<u>Analysis—Sentence Appeal</u>

[65] The accused submits that the trial judge erred in principle by not considering the impropriety of the police officers' conduct as a mitigating factor in sentencing (see *R v Nasogaluak*, 2010 SCC 6 at paras 53-55 [*Nasogaluak*]).

[66] In her reasons for decision on the *voir dire*, the trial judge referenced the police officers' conduct of using profane language and not providing the accused with shoes, a jacket or a blanket when he was outside the police vehicle. At sentencing, trial counsel (not the same as appellate counsel) did not identify police misconduct as a factor to be considered by the trial judge. In her reasons for sentence, the trial judge did not reference that conduct as a mitigating factor or ostensibly take it into account in her determination of the fit sentence.

[67] The accused relies on *Nasogaluak* at para 3, in which the Supreme Court stated:

> Where the state misconduct in question relates to the circumstances of the offence or the offender, the sentencing judge may properly take the relevant facts into account in crafting a fit sentence, without having to resort to s. 24(1) of the *Charter*. Indeed, state misconduct which does not amount to a *Charter* breach but which impacts the offender may also be a relevant factor in crafting a fit sentence.

[68] At the appeal hearing, the accused's counsel was questioned about the reduction in sentence that was being sought in the circumstances. The accused's counsel responded that she was seeking a reduction of "a year or two".

[69] The Crown stresses that this issue was not raised at the sentencing hearing and was raised for the first time on appeal. The Crown submits that the trial judge was not requested to make any findings on the police officers' misconduct on the sentencing and relies on the principle as to when a new issue will be considered on appeal, as referenced in *R v ERC*, 2016 MBCA 74: "The general rule is that a new issue may not be raised on appeal. There are exceptions; however, it should only be permitted where the interests of justice require it and the court has a sufficient evidentiary record and findings of fact to do so" (at para 18). See also *Quan v Cusson*, 2009 SCC 62 at paras 36-37.

[70] The Crown submits, in the alternative, that if this Court considers this issue, the police officers' conduct did not involve egregious acts of violence and abuse and applying the principles referenced in other sentencing decisions, the decision is not demonstrably unfit and a reduction of the sentence is not justified.

[71] In this case, there is a sufficient evidentiary record and findings of fact were made regarding the police officers' conduct, but we are not satisfied that the interests of justice require us to consider the issue.

[72] As a result of the testimony at both the *voir dire* and the trial, the trial judge was well aware of the nature of the police officers' conduct and comprehensively reviewed their actions in her reasons for decision on the *voir dire*. She determined that although not flawless, the police actions did not rise to a breach of the *Charter*. The accused did not file evidence or make any submissions regarding the police conduct being relevant to sentencing.

[73] Further, even if the test to consider a new issue on this appeal is met, we are satisfied that based on the principles outlined in the authorities regarding the application of *Nasogaluak*, appellate intervention is not warranted. We will explain.

[74] Among the cases relied on by the Crown is *R v Gorman*, 2023 NLSC 34, where the Court declined to reduce a sentence on account of verbal threats by police. The trial judge noted that the police conduct was transitory, did not involve physical abuse, and that a sentence reduction to address police misconduct was not intended to punish police, but to recognize the harm to the offender and society (see *ibid* at paras 52-53).

[75] In *Nasogaluak*, the Supreme Court explained that a sentence can be reduced in light of state misconduct even when the incidents complained of do not rise to the level of a *Charter* breach. Where the state misconduct in question relates to the circumstances of the offence or the offender, the sentencing judge may properly take the relevant facts into account in crafting a fit sentence (see *ibid* at paras 3, 53). The Court reviewed a number of cases

where a sentence reduction was warranted, many of them involving excessive force by police or other state conduct causing prejudice to an accused (see *ibid* at paras 50-54).

[76] Applying these principles to this case, the police officers' conduct, while not flawless, did not involve egregious acts of violence or abuse or other state misconduct, the nature and degree of which may have justified a reduction in sentence (see *R v Coutu*, 2020 MBCA 106 at para 26). As earlier mentioned, the trial judge did not find the police officers' comments to be threats to the accused (see *decision* at paras 21, 88). Further, there is no evidence of the impact the police officers' conduct had on the accused, who maintained his right to silence during the entire time he was detained by the police.

[77] In all of the circumstances, we are not persuaded that the sentence is demonstrably unfit or that there is an error in principle that had an impact on the sentence. There is no basis for appellate intervention.

Conclusion

[78] In the result, we dismiss the conviction appeal and grant leave to appeal sentence but dismiss the sentence appeal.

Pfuetzner JA

Spivak JA

Edmond JA