Citation: *R.* v. *Hureau,* 2014 YKTC 36

Date: 20140725
Docket: 13-00839
13-00839A
14-00067
14-00104
14-00106
Registry: Whitehorse

IN THE TERRITORIAL COURT OF YUKON
Before: His Honour Judge Lilles

IN THE MATTER OF RAYMOND ANDREW HUREAU And
an application pursuant to s. 672.23 of the *Criminal Code*

REGINA

v.

RAYMOND ANDREW HUREAU

Appearances:
David McWhinnie — Counsel for the Crown
Robert Dick — Counsel for the Defence

RULING ON APPLICATION

[1] Mr. Hureau is facing two criminal charges arising out of an incident on March 23, 2014 as follows:

> 1. Section 430 (mischief) – that he did wilfully obstruct the enjoyment of others without legal justification or excuse and without colour of right property, to wit: Sacred Heart Cathedral;
>
> 2. Section 176(2) that he did wilfully disturb or interrupt an assemblage of persons met for a social or benevolent purpose at the Sacred Heart Cathedral.

[2] He also faces two charges dated May 22, 2014. First, a s. 175(1)(a) iii charge of causing a disturbance in or near a public place, namely the Super A Grocery Store in Whitehorse; and secondly, s. 145(3) – a breach of undertaking by causing a disturbance by impeding a woman at the Super A parking lot.

[3] He is also facing two peace bond applications pursuant to s. 810(1). The first one relates to a parent's concern that Mr. Hureau repeatedly inquired about her child between January 30 and May 23, 2014. The second results from a mother's concern that Mr. Hureau repeatedly harassed her and her child between April 4 and April 13, 2014.

[4] The purpose of the hearing under s. 672.23 of the *Criminal Code* is to determine whether Mr. Hureau is fit to stand trial. "Unfit to stand trial" is defined in s.2 of the *Code.*

> "Unfit to stand trial" means unable on account of mental disorder to conduct a defence at any stage of the proceedings before a verdict is rendered or to instruct counsel to do so, and in particular, unable on account of mental disorder to
>
> (a) understand the nature or object of the proceedings;
> (b) understand the possible consequences of the proceedings; or
> (c) communicate with counsel.

[5] Mr. Dick was appointed counsel for Mr. Hureau pursuant to s. 672.24(1) of the *Criminal Code*. In this capacity he is not acting as *amicus curiae*. The appointment is as counsel for the accused (*R. v. Adam*, 2013 ONSC 373).

[6] I have little information about the circumstances leading to the *Criminal Code* charges or the s. 810(1) peace bond applications apart from the wording of

the Informations and the assertion by counsel that no physical force or touching was involved. I have therefore inferred that the disruption and disturbances referred to were entirely or primarily verbal in nature. With respect to the peace bond application, there has been no suggestion that Mr. Hureau's interest in the children involved had any sexual overtones.

THE EVIDENCE

[7] Dr. Shabehram Lohrasbe, MBBS, FRCPC was called by the Crown and was the only witness in this hearing. He appeared by video conferencing. Dr. Lohrasbe is a qualified medical practitioner who has practiced as a forensic psychiatrist for 30 years and has testified on more than 500 occasions. Assessing psychiatric status relevant to fitness for trial and mental state at the time of an offence is a regular part of his practice. Counsel agreed and I found that he was qualified to give expert evidence with respect to the issue of whether Mr. Hureau is unfit to stand trial.

Dr. Lohrasbe's Report

[8] Dr. Lohrasbe's psychiatric assessment and report were based on a meeting with Mr. Hureau in the Whitehorse Correctional Centre, (WCC), telephone interviews with Mr. Hureau's wife, Ellen, and daughter, Laura, documents from Court Services, the results of a psychiatric consultation with Dr. Peter Lim dated February 6, 2014 and February 21, 2014, Dr. Margaret Kendrick's neuropsychological assessment dated March 26, 2014 and medical records from the WCC. These reports were not made available to the Court.

Instead, extracts from the reports that Dr. Lohrasbe considered salient were reproduced in the body of his report.

[9] Mr. Hureau is a 74-year-old man who does not have a criminal record. He has an accomplished 46-year career in the mining industry. At one point he was the Chief Mine Geologist and then the Consulting Geologist in Yukon. He is obviously an educated man. Psychometric testing indicated that Mr. Hureau was oriented and his overall intelligence was in the superior range at the 93rd percentile. He has long-held rigid and strong views on a number of issues related to his Catholic religious faith. He is pro-life and has particular concerns about abortion and gay marriage. He holds very conservative positions on social issues such as feminism and the Green agenda. He considers it his Christian duty to challenge the recent modernization and secularization of the Catholic Church in every way possible, by writing letters to public bodies, government agencies, the Church and the RCMP and by speaking out and verbally challenging individuals in a position of authority. His interventions have not been well received. He believes there is a conspiracy to put him in jail.

[10] Dr. Lohrasbe's interview with Mr. Hureau was unsatisfactory from a clinical perspective. Mr. Hureau held forth on matters such as the secularization of Catholic teachings and practice and the rise of evil in society. He did not allow Dr. Lohrasbe to ask questions. He did not allow Dr. Lohrasbe to take notes. Dr. Lohrasbe described Mr. Hureau's speech as "repetitive and ruminative", and noted that "[h]e is circumstantial, tangential, disorganized, illogical and grossly thought disordered." Dr. Lohrasbe stated that Mr. Hureau was impossible to

interrupt. As a result, Dr. Lohrasbe, while able to make observations of Mr. Hureau's behaviour, was unable to pose and receive answers to substantive questions. In the result, his report had to rely significantly on collateral sources for information. The factual basis of this collateral information could not be easily tested in Court.

[11] While always rigid and conservative in his religious beliefs, his family members unequivocally assert that Mr. Hureau has not been violent and "doesn't have a criminal bone in his body but he's just gotten out of touch with reality". They have observed a decline in his mental state that began approximately five years ago when he was "gassed" at a work site and lost consciousness for fifteen minutes. Tests indicate Mr. Hureau displays abnormal brain activity in the temporal lobe area, possibly as a result of this accident. The etiology, however, is uncertain. The label "organic brain syndrome" is not specific and describes a collection of symptoms, but in this case is appropriate because, as Dr. Lohrasbe puts it, "we don't know what is going on". Dr. Lohrasbe speculates that a pre-existing injury can deteriorate faster as the subject ages, and if that is the case here, the deterioration will be progressive. But he is unable to conclude that this is in fact Mr. Hureau's condition. He also notes that pre-existing personality characteristics are magnified and distorted with abnormalities in the brain, however caused.

[12] Both Dr. Lim and Dr. Lohrasbe appear to agree that Mr. Hureau shows *"No evidence of psychosis including a Paranoid Delusional Disorder".* Dr. Lim further states *"…I am not convinced that he has a psychotic disorde*r".

[13] Dr. Lohrasbe states:

> However there is little doubt that his perceptions are grossly distorted such that there is a broad mismatch between consensual social reality and how Mr. Hureau perceives that reality. … He believes that it is time for him to act to stop the slide into moral decay.

In this statement he is referring to the Catholic Church.

[14] Dr. Lohrasbe concludes as follows:

> I am mindful that the criteria for fitness are legally defined.
>
> From a psychiatric perspective, it is difficult to see how Mr. Hureau can meaningfully participate in the legal process. He certainly has the intellectual capacity to grasp 'what is going on' in the concrete sense, but his views are grossly distorted and he sees himself as being persecuted by Church, police, his family, and now the Courts, whose authority he does not recognize.
>
> …
>
> In addition to disordered thinking and fixated, uncompromising views about the process and his role in it, Mr. Hureau does not have the emotional stability of the behavioural self-control required to cooperate with his counsel, or with the Court process in general.
>
> This psychiatric opinion that he is unlikely to be able to participate meaningfully in the legal process is not exclusively based on my interview with Mr. Hureau, which would run the risk of having been formulated only on the basis of Mr. Hureau having 'a bad day'. The totality of the information available suggests that the intrusion of his mental disorders on his capacity to participate meaningfully is an ongoing issue, with relatively little fluctuation from day to day.

THE HEARING

[15] This fitness hearing lasted for one hour and forty-five minutes. I observed Mr. Hureau as being attentive to what was taking place in the courtroom and

occasionally whispering to his counsel. There was nothing disruptive or objectionable in his behaviour. He did not verbally interrupt Crown counsel or his own counsel during their submissions. It is probable that he received instructions from his counsel as to how he should conduct himself and he acted on those instructions. His counsel did not advise the Court that his client was unable to give him instructions.

[16] This observed behaviour is inconsistent with Dr. Lohrasbe's experience in attempting to interview Mr. Hureau. It is also inconsistent with his conclusion that Mr. Hureau is not able to and would not cooperate with the Court or with counsel.

[17] Nevertheless, Dr. Lohrasbe stated that although Mr. Hureau has been placid today, this would not undermine his overall concerns. He opined that if engaged, Mr. Hureau can be calm for a period of time. I note that in Dr. Lohrasbe's report there is no underlying factual basis for this conclusion. He also stated that Mr. Hureau can restrain himself but not meaningfully participate. This statement also appears to be inconsistent with my observations of Mr. Hureau during the hearing.

THE LAW

[18] Section 672.22 of the *Criminal Code* enunciates the starting point for determining fitness to stand trial: an accused is presumed fit to stand trial unless the court is satisfied on the balance of probabilities that the accused is unfit to stand trial.

[19] As set out earlier in this decision, s. 2 of the *Criminal Code* sets out a definition of “Unfit to stand trial” with three criteria. This is not an exhaustive list in the sense that caselaw has interpreted this definition and generated a refined understanding of the requirements for a finding of unfit to stand trial. Nevertheless these three are the most important or threshold criteria.

[20] The definition requires the unfitness to result from a “mental disorder”, which is a legal term, not a medical one. I am satisfied that Mr. Hureau suffers from a mental disorder as defined by the Supreme Court of Canada in *R. v. Cooper*, [1993] 1 S.C.R. 146. .

[21] The accused must understand the nature and object of the proceeding. According to *R. v. Taylor* (1992), 11 O.R. (3d) 323(C.A.), the accused only needs to know what is happening to him in the criminal process. It is a low level test. While Mr. Hureau may reject the court process and has strong religious beliefs that demand that he challenge the status quo, there is no evidence that suggests that he does not understand the nature and object of the proceedings.

[22] Similarly, understanding the possible consequences of the proceedings is also a low level test: his understanding of the possible consequences need only amount to a basic understanding of the potential outcomes in a criminal trial. He has been in custody since May 22, 2014. The charges are simple, essentially amounting to a nuisance for which the maximum penalty is six months in custody.

[23] It is a requirement of "fitness" that Mr. Hureau be able to communicate with counsel. This inquiry is limited to whether an accused can recount to counsel the necessary facts relating to the offence in such a way that counsel can then properly present a defence. Whether the accused and counsel have a trusting relationship is irrelevant, as is whether the accused has been co-operating with counsel. The accused is entitled in his dealings with counsel to make decisions that are not in his best interests.

[24] *Regina v. Taylor* is a leading case for the test for fitness. In *Taylor,* at para. 44 (QL), the Court adopted the following version of the "limited cognitive capacity" test:

> Under the "limited cognitive capacity" test propounded by the *amicus curiae*, the presence of delusions do not vitiate the accused's fitness to stand trial unless the delusion distorts the accused's rudimentary understanding of the judicial process. It is submitted that under this test, a court's assessment of an accused's ability to conduct a defence and to communicate and instruct counsel is limited to an inquiry into whether an accused can recount to his/her counsel the necessary facts relating to the offence in such a way that counsel can then properly present a defence. It is not relevant to the fitness determination to consider whether the accused and counsel have an amicable and trusting relationship, whether the accused has been cooperating with counsel, or whether the accused ultimately makes decisions that are in his/her best interests. …

[25] The Crown in *Taylor* had argued that the test be altered by raising the standard to include "capable of following the evidence", "communicating rationally with counsel" or "giving evidence which is responsible to the case from the Crown".

[26] This position was rejected by the Court (para. 50 (QL)):

> … In order to ensure that the process of determining guilt is as accurate as possible, that the accused can participate in the proceedings or assist counsel in his/her defence, that the dignity of the trial process is maintained, and that, if necessary, the determination of a fit sentence is made possible, the accused must have sufficient mental fitness to participate in the proceedings in a meaningful way. At the same time, one must consider that principles of fundamental justice require that a trial come to a final determination without undue delay. The adoption of too high a threshold for fitness will result in an increased number of cases in which the accused will be found unfit to stand trial even though the accused is capable of understanding the process and anxious for it to come to completion.

[27] More recently, in *R. v. Adam, supra,* at para. 27, the Court stated with respect to the *Taylor* test:

> But more recently, in *R. v. Morrissey* (2007), 227 C.C.C. (3d) (Ont. C.A.) the Court of Appeal addressed the issue of fitness again, in a manner that might allay some of the concerns about the implications of *R. v. Taylor, supra.* The precise issue in that case concerned the relationship between testimonial capacity and fitness. Writing for the Court, Blair J.A. recognized the concern among some in the legal and psychiatric communities about the adequacy of the limited cognitive capacity test, as discussed above. Nevertheless, he reaffirmed the authoritative value of *R. v. Taylor, supra.* As Blair J.A. wrote of the "limited cognitive capacity" test (at p. 14):
>
> > It requires only a relatively rudimentary understanding of the judicial process – sufficient, essentially, to enable the accused to conduct a defence and to instruct counsel in that regard. It is in the sense that the accused must be able "to communicate with counsel" and relate the facts concerning the offence.
>
> He subsequently encapsulated the test in the following way at p. 15:

> …and *Taylor* stands for the propositions that (a) the "limited cognitive capacity" test governs the determination of fitness to stand trial, and (b) that this test does not require the accused person to be capable of giving instructions to counsel that are in his or her best interests.

[28] The right of an accused to conduct his own defence is a long-standing principle in our legal system: see *R. v. Woodward* [1984] 1 All E.R. 159 and *R. v. Vescio* [1949] S.C.R. 139.

[29] In *R. v. Swain,* [1991] 1 S.C.R. 933, referring to the decision in *Faretta v. California,* 422 U.S. 806 (1975), Lamer J. stated: "… If at any time before verdict there is a question as to the accused's ability to conduct his or her defence, the trial judge may direct that the issue of fitness to stand trial be tried … Thus, an accused who has not been found unit to stand trial must be considered capable of conducting his or her own defence."

[30] In *R. v. Peepeetch,* 2003 SKCA 76, the Saskatchewan Court of Appeal reviewed the development of Canadian law on "fitness". It is evident that the evolution of Canadian law in relation to fitness to stand trial has relied significantly on developments in American jurisprudence.

[31] The United States Supreme Court decision in *Indiana v. Edwards*, 554 U.S. 164 (2008) represents a significant development in the evolution of the fitness standard in that country. At trial the Court held that Edwards, who suffered from schizophrenia, was competent to stand trial, but was not competent to represent himself at trial. It noted that previous decisions had not considered

the relationship of the fitness to stand trial standard to the self-representation right. While the starting point is that an accused has a basic right to defend himself if he truly wants to, the right to self-representation is not absolute.

[32] *Edwards* notes a number of exceptions to the self-representation right: no right to abuse the dignity of the courtroom; no right to avoid compliance with relevant rules of procedural and substantive law; and no right to engage in serious and obstructionist misconduct. These exceptions also apply to Canadian law.

[33] The Court noted that previous decisions had held that the competence required to waive his right to counsel did not address the competence to represent himself. As in Canada, a primary focus of the American test for fitness is the ability to instruct and consult with counsel and to assist counsel in preparing the case. The Court stated, at page 9:

> … These standards assume representation by counsel and emphasize the importance of counsel. They thus suggest (though do not hold) that an instance in which a defendant who would choose to forgo counsel at trial presents a very different set of circumstances, which in our view, calls for a different standard.

[34] The American Psychiatric Association filed an *amicus* brief in *Edwards* as an intervener, noting that "disorganized thinking, deficits in sustaining attention and concentration, impaired expressive abilities, anxiety and other common symptoms of severe mental illness can impair the defendant's ability to play the expanded role required by self-representation."

[35] The Court in *Edwards* agreed, stating (at p. 10):

> Second, the nature of the problem before us cautions against the use of a single mental competency standard for deciding both (1) whether a defendant who is represented by counsel can proceed to trial and (2) whether a defendant who goes to trial must be permitted to represent himself. Mental illness itself is not a unitary concept. It varies in degree. It can vary over time. It interferes with an individual's functioning at different times in different ways. The history of this case … illustrates the complexity of the problem. In certain instances an individual may well be able to satisfy *Dusky's* mental competence standard, for he will be able to work with counsel at trial, yet at the same time he may be unable to carry out the basic tasks needed to present his own defence without the help of counsel. See, *e.g.,* N. Poythress, R. Bonnie, J. Monahan, R. Otto, & S. Hoge, Adjudicative Competence: The MacArthur Studies 103 (2002) ("Within each domain of adjudicative competence (competence to assist counsel; decisional competence) the data indicate that understanding, reasoning, and appreciation [of the charges against a defendant] are separable and somewhat independent aspects of functional legal ability"). See also *McKaskle*, 465 U.S., at 174 (describing trial tasks as including organization of defense, making motions, arguing points of law, participating in *voir dire*, questioning witnesses, and addressing the court and jury).

[36] Further, the Court stated at p. 11:

> Third, in our view, a right of self-representation at trial will not "affirm the dignity" of a defendant who lacks the mental capacity to conduct his defense without the assistance of counsel. … To the contrary, given the defendant's uncertain mental state, the spectacle that could well result from his self-representation at trial is at least as likely to prove humiliating as ennobling. Moreover, insofar as a defendant's lack of capacity threatens an improper conviction or sentence, self-representation in that exceptional context undercuts the most basic of the Constitution's criminal law objective, providing a fair trial. …

[37] The reasoning in *Edwards* has direct application to the case at bar. The *Charter of Rights and Freedoms*, contained in Schedule B to the *Constitution Act,*

1982, in s. 11(d) guarantees a fair and public hearing – in other words, a fair trial. The reasoning and concerns expressed in *Edwards* apply directly to the facts of this case.

[38] The Court in *Edwards* concludes at p. 12 as follows:

> We consequently conclude that the Constitution permits judges to take realistic account of the particular defendant's mental capacities by asking whether a defendant who seeks to conduct his own defense at trial is mentally competent to do so. That is to say, the Constitution permits States to insist upon representation by counsel for those competent enough to stand trial under *Dusky* but who still suffer from severe mental illness to the point whether they are not competent to conduct trial proceedings by themselves.

CONCLUSION

[39] I adopt the analysis of the United States Supreme Court in *Edwards* and find:

1) The requirements of fitness for a represented trial and an unrepresented one are significantly different.

2) The standard in s. 2 of the *Criminal Code* assumes representation by counsel and emphasizes the importance of counsel.

3) The articulation of the same standard for represented and unrepresented accused assumes that mental illness is a unitary concept – it is not. It varies in degree and in different ways.

4) The right to self-representation at trial will not affirm the dignity of a defendant who lacks the mental capacity to conduct his defence without the assistance of counsel. Instead, it will be a humiliating spectacle.

5) The accused's lack of capacity threatens an improper conviction or sentence if he is unrepresented and violates his right to a fair trial.

6) To deny an accused the right to a trial represented by counsel when he is capable of instructing counsel, understands the nature and object of the proceedings, understands the possible consequence of the proceedings and is able to communicate with counsel would expose him to indeterminate detention in a psychiatric hospital. Crown counsel advised that a placement in Brockville Ontario was being explored for Mr. Hureau. This is several thousand miles away from his family and home. This could amount to cruel and unusual treatment as prohibited by s. 12 of the *Charter of Rights and Freedoms*.

[40] I note that there is nothing in s. 2 of the *Code* that prohibits applying different standards of fitness to represented and unrepresented accused. In fact, the definition itself separates the two concepts, referring to the inability to conduct a defence **or** to instruct counsel to do so. A close reading of *R. v. Adams (supra)* suggests that Mr. Justice Trotter was proceeding on the basis

that fitness involved the separate consideration of each of these two circumstances. (See paras. 29 – 32).

[41] The facts of this case demand that I adopt the approach taken by the Supreme Court of the United States in *Edwards*, *supra*, and consider the ability of Mr. Hureau conduct a defence by instructing counsel separately from his ability to self-represent himself at trial.

[42] In these proceedings the burden of proof falls upon the Crown. I note that Mr. Hureau's conduct during the hearing was inconsistent with Dr. Lohrasbe's assessment. Dr. Lohrasbe's assessment was incomplete due to Mr. Hureau's lack of participation. During the hearing, Mr. Hureau was represented by counsel, and my observations satisfy me that he is fit to stand trial if represented by counsel. Based on Dr. Lohrasbe's report, I am, however, satisfied that he is unfit to stand trial if he is self-represented.

[43] In conclusion, I am not satisfied on the balance of probabilities that Mr. Hureau is unfit to stand trial, as defined in s. 2 and the jurisprudence related to that definition, if he is represented by counsel. On the other hand, the Crown has satisfied me on the balance of probabilities that he is not fit to stand trial if the matter goes to trial and he is unrepresented.

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LILLES T.C.J.