

Citation: *R. v. J.H.L.*, 2019 YKTC 24

Date: 20190429
Docket: 18-00509
18-00509A
18-00517
Registry: Whitehorse

IN THE TERRITORIAL COURT OF YUKON
Before Her Honour Judge Ruddy

REGINA

v.

J.H.L.

Appearances:
Paul Battin
Gregory Johannson

Counsel for the Crown
Counsel for the Defence

REASONS FOR JUDGMENT

[1] RUDDY T.C.J. (Oral): J.H.L. is before the court on three Informations. I have made findings of guilt following trial with respect to offences of uttering threats, assault, and resist arrest. J.H.L. has entered a guilty plea to one count of breaching the terms of his release by attending at the Independent Grocers, the site of the common assault.

[2] Crown has brought an application for a finding that J.H.L. is not criminally responsible by reason of a mental disorder. As the facts of the offences have bearing on the issue of criminal responsibility, I am going to briefly reiterate them for the purposes of this decision.

[3] With respect to the uttering threats, I found the following facts.

[4] During the complainant's shift as a security guard at the Chilkoot Inn on October 27, 2018, J.H.L. was sitting in the lobby of the Chilkoot Inn where he was a resident. He refused to go to his room, as he believed there was a ghost that was trying to kill him.

[5] Ms. Perron checked the room and noted nothing unusual. Ms. Perron was not sure if J.H.L. was hallucinating or on drugs, but indicated that she had noted that he had been acting strangely, making people nervous, and that he did not appear to be eating or taking care of himself.

[6] J.H.L. had cans of beer in his pockets, and Ms. Perron told him that he could not drink it in the lobby. He would have to go back to his room or outside if he wanted to drink.

[7] J.H.L. told her to "fuck off". Ms. Perron wrestled J.H.L. outside, but later let him back in because it was cold out. At some point before or after being removed from the building, J.H.L. became aggressive and looked mad.

[8] J.H.L. was swearing at Ms. Perron and took a swing at her, which she was able to block. J.H.L. told Ms. Perron that he had killed his parents and his girlfriend and that he had had sex with his girlfriend after she was dead. He went on to say that he was going to kill Ms. Perron and eat her.

[9] With respect to the common assault and resist arrest, I found the following facts.

[10] J.H.L. arrived at the Independent Grocer on October 30, 2018. He was asked to leave by Ms. Taylor, the assistant manager.

[11] J.H.L. stated repeatedly that he had found four cases of fentanyl in the store manager's car and that he could eat Ms. Taylor in a second. J.H.L. pushed Ms. Taylor with both hands to her shoulder/chest area. Ms. Taylor sprayed J.H.L. with her coffee. He then struck her on the left shoulder/neck area.

[12] J.H.L. was arrested a couple of hours later and resisted by pulling away and fighting, including grabbing hold of Cst. Lightfoot's middle finger and twisting it and bending it back. Cst. Lightfoot noted his surprise at the degree of strength exhibited by J.H.L. given his slight stature.

[13] Additional RCMP assistance was required to subdue J.H.L. During transport to the Arrest Processing Unit ("APU"), J.H.L. ranted at Cst. Lightfoot, calling him a baby killer, accusing him of selling fentanyl and of trying to steal J.H.L.'s money. J.H.L. continued to struggle and fight at the APU, requiring two police officers and three corrections officers to subdue him.

[14] With respect to the breach, J.H.L. entered a guilty plea and an Agreed Statement of Facts was filed indicating that, on November 1, 2018 J.H.L., went to the Independent Grocer contrary to his conditions. He did not appear to understand that he was not allowed to be there. He was escorted out of the store and shortly thereafter arrested without incident. No aggressive behaviour was noted.

[15] Concerns with respect to J.H.L.'s mental health have been present from the beginning of these proceedings. An assessment was ordered into the question of criminal responsibility on November 5, 2018. As J.H.L. appeared to understand the proceedings and was able to instruct counsel, no assessment was ordered with respect to fitness to stand trial at that time.

[16] J.H.L. refused to participate in the assessment. A report was filed by Dr. Lohrasbe based on collateral sources available to him at that time.

[17] Subsequently, information from the staff and doctor at Whitehorse Correctional Centre made it clear that J.H.L.'s mental health had deteriorated significantly during his incarceration. It became clear that serious questions had arisen regarding his fitness.

[18] An order was made for a fitness assessment and J.H.L. was transferred to the Forensic Psychiatric Hospital ("FPH") in Coquitlam, B.C. As he was also treated by the hospital pursuant to the *B.C. Mental Health Act*, J.H.L. was ultimately made fit, but it became clear that removal from a hospital setting and medication would soon result in deterioration to his mental health, which would again undermine his fitness.

Accordingly, J.H.L. has remained at FPH pursuant to a Keep Fit Order throughout these proceedings to ensure that he remains fit.

[19] With his consent, he has participated by video conference.

[20] An order for a second NCR assessment was made on March 27, 2019. Dr. Lohrasbe conducted the second assessment as well, but his opinion was enhanced by

a review of the evidence heard at trial, historical mental health information obtained by FPH, and J.H.L.'s willingness to engage in an interview.

[21] In addition to his written report, Dr. Lohrasbe provided *viva voce* testimony with respect to his opinion. In providing his evidence, Dr. Lohrasbe was qualified as an expert in psychiatric medicine with special knowledge in medicolegal psychiatry.

[22] As noted, based on Dr. Lohrasbe's opinion, Crown seeks a finding that J.H.L. was not criminally responsible at the time the offences were committed by reason of a mental disorder.

[23] J.H.L. is opposed to the finding. Indeed, he has remained steadfast in his position that he has no mental health problems.

[24] I am also cognizant of the fact that his mother feels strongly that J.H.L.'s problems stem from drug use and years of abuses that he has suffered, and that he has been failed by the mental health system. She does not, however, feel that J.H.L. should be sent to the Review Board.

[25] The test with respect to criminal responsibility is set out in s. 16 of the *Criminal Code* which reads:

16. (1) No person is criminally responsible for an act committed or an omission made while suffering from a mental disorder that rendered the person incapable of appreciating the nature and quality of the act or omission or of knowing that it was wrong.

(2) Every person is presumed not to suffer from a mental disorder so as to be exempt from criminal responsibility by virtue of subsection (1), until the contrary is proved on the balance of probabilities.

[26] The burden of proof that an accused was suffering from a mental disorder so as to be exempt from criminal responsibility is on the party that raises the issue. In this case, that would be the Crown.

[DISCUSSION]

[27] Based on s. 16, therefore, there are two questions to be resolved:

1. whether J.H.L. was suffering from a mental disorder at the time the offences were committed and, if so;
2. whether the mental disorder rendered J.H.L. incapable of understanding the nature and quality of his actions and knowing that they were wrong.

[28] The first of these questions is not a difficult one, in my view. Dr. Lohrasbe's expert opinion as noted in his second report is that "It can now be confidently said that Schizophrenia is the primary diagnosis applicable to J.H.L., with Cannabis Use Disorder being an additional diagnosis."

[29] He also opines that J.H.L. was actively psychotic at the time the offences were committed, basing his view on the totality of the information before him, including a number of factors he indicates are symptomatic of schizophrenia.

[30] In particular, he references the behaviour noted by the various witnesses, including J.H.L.'s preoccupation with the ghost in his room at the Chilkoot, his reference to killing his parents and girlfriend and having sex with his girlfriend's dead body, his references to eating people, comments present in both the October 27 and 30 incidents, and his persistent view of large amounts of fentanyl being found by him in numerous places around Whitehorse. In addition, Dr. Lohrasbe notes the symptoms of neglect of

health and hygiene, cognitive deficits including working memory, and abnormal thought processes.

[31] The question that seems to be concerning is not whether the behaviour observed is indicative of a psychosis, but whether the cause of the psychosis is schizophrenia or whether it is drug-induced given J.H.L.'s history of abusing substances such as crystal methamphetamine, marijuana, and alcohol.

[32] In my view, the evidence supports a finding that the psychosis is related to a mental disorder and not substance abuse, in particular given the fact that J.H.L. has spent some time institutionalized without access to substances, but many of his delusional preoccupations, such as finding fentanyl, have persisted beyond what one would expect if it related to substance abuse alone at the time of the incidents.

[33] In addition, I note the fact Dr. Lohrasbe observed ongoing symptoms of psychosis while interviewing J.H.L., even after treatment at FPH, to be indicative of a mental disorder origin rather than a drug-induced one.

[34] Accordingly, I am satisfied, on a balance of probabilities, that J.H.L. was suffering from a mental disorder at the time of the offences.

[35] The more difficult question in this case relates to whether J.H.L.'s mental disorder was operating at the time of the offences such that it rendered him incapable of appreciating the nature and quality of his actions and of knowing that they were wrong. The reason this question is more difficult relates to the evidence linking the behaviour with the mental disorder.

[36] As noted by Dr. Lohrasbe, to make this link with absolute certainty one must know what was in the mind of J.H.L. at the time the offences were committed.

Unfortunately, while J.H.L. agreed to be interviewed, Dr. Lohrasbe concluded that J.H.L. was unable to provide the doctor with accurate and reliable information with respect to his mindset at the time of the offences. His reasons for so concluding are set out in detail in his report.

[37] The dilemma, however, is whether, in the absence of reliable subjective information clearly establishing the nexus between the mental disorder and the behaviour, the evidence is sufficient to make the finding, on a balance of probabilities, that J.H.L. was not criminally responsible at the time of the offences.

[38] Defence counsel argues that the evidence falls short of satisfying the test. As he points out, this would require me to find that every action would have to be attributable to the mental disorder and notes Dr. Lohrasbe's evidence that it is possible for someone to be quietly psychotic with a particular delusion which impacts only one realm of the person's life, and yet be fully functioning in other realms.

[39] In light of this, defence argues that to conclude that every decision or action of a person with an active psychosis would necessarily be attributable to that psychosis would not be sound from a policy perspective.

[40] However, I do not think such a finding would be supported on the evidence in circumstances where the psychosis is clearly impacting only on a portion of a person's life and decision-making. What is different in this case, in Dr. Lohrasbe's opinion, is the number of realms of J.H.L.'s life that are impacted by his mental disorder, including

issues with his cognitive functioning, particularly his working memory, the deterioration in his attention to health and personal hygiene, and the fact that J.H.L. has remained delusional even after care at FPH.

[41] I would also note the fact that J.H.L.'s preoccupations with fentanyl and with eating people in particular coming out in so many of his interactions with no prompting or any relationship to the circumstances are indicative of how pervasive such preoccupations are in his mind and in how he perceives the world around him.

[42] As noted by Dr. Lohrasbe:

Severe and acutely active mental disorder is incompatible with exercising of one's capacities in anything approaching one's normal potentials, including cognitive, affective and moral capacities. ...

The experience of J.H.L. when in the throes of acute and severe psychosis was grossly at odds with the experience of a 'normal' person. His perceptions, beliefs and morality were likely experienced through the unreal lens of psychotic symptoms. What he appreciated was not what a person who was not mentally disordered may have appreciated; and his words and actions in response to his delusional beliefs were actions that - insofar as he was able to attend to them at all - were likely to have a nature and quality that were unreal. Insofar as he was able to attend to moral issues, his knowledge of moral wrongfulness was anchored in psychotic 'morality'.

[43] I am satisfied, based on all of the information before me and on the opinion of Dr. Lohrasbe, that the evidence is sufficient to establish on a balance of probabilities that J.H.L. was actively psychotic at the time the offences were committed and that his mental disorder compromised his perceptions of the world and of his own actions to the extent that he was incapable of appreciating, in any rational manner, the nature and consequences of his actions and knowing that they were wrong.

[44] In so concluding, I am aware that this is not the finding that J.H.L. had hoped that I would make. I am also aware that there will be impacts on J.H.L.'s life that flow from his eventual involvement with the Yukon Review Board. However, I am also very mindful of the fact that the criminal system is a highly punitive one.

[45] As noted by former Chief Justice McLachlin, such punishment should be reserved where it is morally justified for persons who have the capacity to consciously choose to do wrong. For individuals such as J.H.L., the Review Board system is intended to be one which is focused on the question of his mental health rather than on punishment.

[46] While I do not control what the Review Board does or will do, it is certainly my hope that J.H.L. will receive the care and the supports that he needs within that system.

RUDDY T.C.J.