SUPREME COURT OF YUKON

Citation: *R. v. Nehass*, 2016 YKSC 63

Date: 20161124
S.C. No. 12-01503A
Registry: Whitehorse

Between:

HER MAJESTY THE QUEEN

Applicant

And

MICHAEL DAVID ARCHIE NEHASS

Respondent

Before Mr. Justice

Appearances:

Eric Marcoux	Counsel for the Crown
Anik Morrow	Counsel for the Defence
Richard Fowler by telephone	*Amicus Curiae*

REASONS FOR JUDGMENT

INTRODUCTION

[1] BROOKER J. (Oral): On May 22, 2015, Mr. Nehass was found guilty by a jury of assault with a weapon, forcible confinement and breach of his recognizance. He remains in custody pending his sentencing. He has been in custody since he was arrested for these offences in December 2011.

[2] On September 28, 2016, the Crown applied under Part XX.1 of the *Criminal Code* to have Mr. Nehass declared a dangerous offender.

[3] By letter of November 8, 2016, Mr. Fowler, Q.C., who has been appointed as *amicus curiae* in these proceedings, advised Ms. Morrow, counsel to Mr. Nehass, of his

concerns as to Mr. Nehass' current mental health and more specifically whether he is fit to continue with these proceedings. Copies of that letter were sent to the Court and to Crown counsel.

[4] By Notice of Motion filed November 10, 2016, the Crown applied for an Order of this Court for an assessment of Mr. Nehass' fitness to participate in these judicial proceedings.

[5] Thereafter, Mr. Marcoux, Crown counsel, filed a book of materials and a book of authorities as well as several affidavits. Ms. Morrow also filed a Memorandum of Law and book of authorities.

[6] On November 22, 2016, the application commenced before me. At that time, I heard the submissions of Mr. Marcoux in support of a fitness assessment being ordered. The *amicus* added his support to the Crown's position. Ms. Morrow also made a lengthy submission outlining in particular the history of this case and the effect that segregation in the Whitehorse Correctional Centre ("WCC") has had on Mr. Nehass' mental disabilities. She pointed out, in particular, the fact that according to the mental health professionals who had worked with Mr. Nehass, the WCC was not an appropriate environment for Mr. Nehass and that segregation was contributing to his delusional beliefs.

[7] I did not understand from Ms. Morrow's submissions that she was actually opposed to a fitness assessment but that she thought it should be done in a place other than the Yukon where treatment would also be available.

MENTAL CONDITION

[8] Mr. Nehasss' mental status has been in issue for some time. The file contains many references to difficulties Mr. Nehass was having in his youth which suggested the involvement of a mental component. In 2013, in another proceeding before the Territorial Court, then Crown counsel, Ms. Kaur raised the issue of Mr. Nehass' fitness. This resulted in a referral to Dr. Lohrasbe, a psychiatrist, in 2014. Dr. Lohrasbe, in his report dated January 30th, 2014, expresses concerns with the presence of paranoid and grandiose delusions in Mr. Nehass suggestive of a major mental disorder and concludes :

> … I have strong reservations about Mr. Nehass' ability to conduct his defence, or to instruct counsel to do so. …his understanding of the nature and object of proceedings, and the possible consequences of proceedings, is framed by, and interpreted through, his delusions. He thinks he understands 'what is going on', but his lens is entirely distorted. In my opinion he cannot participate in a meaningful way in the Court process until he is no longer delusional.

[9] As noted by Dr. Lohrasbe, much of the paranoia and delusions suffered by Mr. Nehass centred around his belief that the government was involved in mind control, Nero Nano chip implants, a plan to exterminate aboriginals and that people were trying to implant or otherwise expose him to cancer.

[10] Dr. Lohrasbe subsequently was able to interview Mr. Nehass and provided a second report dated May 22, 2014, which confirmed his earlier opinion that Mr. Nehass suffered from a major mental disorder.

[11] Following Dr. Lohrasbe's reports, a fitness hearing was held before Cozens TCJ at which time Dr. Lohrasbe gave evidence. On June 10, 2014, Judge Cozens issued written reasons for his decision that Mr. Nehass was unfit to stand trial: see

R. v. Nehass, 2014 YKTC 23, for a thorough and helpful discussion on the evidence and opinions and reasons for his decision.

[12] The decision of Cozens TCJ was subsequently appealed to the Review Board which ultimately determined that Mr. Nehass was fit to stand trial. Accordingly, certain matters proceeded in the Territorial Court and these matters proceeded to trial by jury before me in May 2015.

[13] It is also worth noting that in December 2013, Dr. Heredia, the psychiatrist at the WCC, reported that he had been treating Mr. Nehass for at least three mental health disorders and that "if Mr. Nehass is to have any opportunity to improve his mental health state he needs to be transferred to a forensic mental health facility where he can be properly assessed and treated. No such facility currently exists in Yukon."

[14] Following Mr. Nehass' conviction and before sentencing, the Crown applied for an assessment under the provisions of the *Code* dealing with dangerous offender and longer-term offender designations. In January 2016, that application was granted and Dr. Grasswick, a forensic psychiatrist, was appointed to do the assessment. She submitted a report dated May 12th, 2016, as well as an Addendum to Report dated May 19, 2016. The Addendum was prepared after Dr. Grasswick had an opportunity to review some voice mail messages left by Mr. Nehass on phones in the Crown's office.

[15] Dr. Grasswick describes Mr. Nehass' thought process as disorganized, rambling, illogical and bizarre. She identifies Mr. Nehass as suffering from psychosis, paranoia. She opines that Mr. Nehass' psychosis affects all areas of his daily thinking. His psychotic symptoms are persistent and his delusional framework is expanding over time. She states: "There appears to be a significant deterioration in his ability to

communicate in written and oral form in 2016" and "Mr. Nehass presents with untreated psychotic symptoms and that until the psychosis is treated Mr. Nehass would not be in the proper "head space" to engage in any treatment to address his risk factors. She concludes: "It is my medical opinion that the voice messages and the revised Constitutional Challenge confirm the severity of Mr. Nehass' psychosis and reflect the evolving nature of his delusional system and disorganized speech and thoughts."

[16] The Court has had the opportunity to observe Mr. Nehass over the past approximately year and a half and I have noticed marked changes in Mr. Nehass mental condition.

[17] All of this satisfies me that there are reasonable grounds to believe an assessment is warranted as to Mr. Nehass' mental fitness for the dangerous offender/long term offender proceeding.

JURISDICTION

[18] The question arises as to whether or not this Court has jurisdiction to order a fitness assessment at this stage of the proceedings --- ie. The sentencing phase of the trial.

[19] The *Criminal Code* s. 672.11(a) deals with an assessment to determine if an accused is fit to stand trial. Section 2 of the *Code* restricts "unfit to stand trial" to proceedings "before a verdict is rendered". A number of cases have considered whether or not the court has jurisdiction to order an assessment after a verdict has been rendered. See for example: *Canada (Attorney General) v. Balliram*, 2003 CanLii 64229 (ONSC*), R. v. Morrison*, 2016 SKQB 259*, R. v. Jaser,* [2015] O.J. No. 3910.

[20] In *Jaser*, Code J. observed at para 46:

> Nowhere in the *Criminal Code* is there a power to inquire into the fitness of the accused at a sentencing hearing. This is not a legislative oversight. The statutory power in the *Criminal Code* to inquire into fitness, ever since the original 1892 *Code*, has always been qualified by the language "at any time before verdict".

[21] Therefore, Code J. held that there was no statutory authority to make a s. 672.11 assessment order. He also declined to "read in" as was done in *Balliram.*

[22] In *Balliram,* the court discussed the apparent gap in the *Criminal Code* which prevented a fitness assessment being ordered during the sentencing stage after a verdict had been rendered. McWatt J. discussed the fact that that gap was discussed in a 2002 report of the Standing Committee on Justice and Human Rights which made a recommendation to fill the gap. The government responded to the Committee's recommendation saying*, inter alia*, it required more study.

[23] McWatt J. allowed the defence application for a declaration that his *Charter* rights were breached and therefore read into the *Code* provisions in s. 2 "and to be sentenced" after the words "verdict is rendered" and with respect to s. 672.23(1) reading in "or sentence imposed" after the words "verdict is rendered".

[24] In *Morrison*, Dovell J. was dealing with a *Charter* application brought by the accused. He sought a declaration that s. 2 and s. 672.23(1) of the *Code* were unconstitutional and breached his s. 7 *Charter* rights. The court had initially ordered a fitness assessment after verdict when the Crown brought a dangerous offender proceeding against the offender. That assessment was sought by the defence and not objected to by the Crown. However, after the assessment concluded that the accused was unfit, the Crown took the position that the court had no jurisdiction to order the assessment in the first place and that the dangerous offender proceeding should

proceed despite the finding of unfitness. Dovell J. found that the accused's charter rights were infringed and that the appropriate remedy was to read in provisions for fitness to be assessed post-verdict.

[25] In the case of Mr. Nehass, it is the Crown, supported by the *amicus*, who brings this application for a fitness assessment. There is no argument or reliance on a *Charter* breach. The applicants argue that the court has the power to order a fitness assessment under the common law and under its inherent jurisdiction as a superior court.

[26] For the reasons which follow, I conclude that this Court does have the jurisdiction to order a fitness assessment at the sentencing stage of the proceedings. It has that jurisdiction under both the common law and its inherent jurisdiction.

ANALYSIS

[27] The common law has, since early times, recognized that the court has the power to consider the mental fitness of an offender after a verdict of guilty has been rendered. This is illustrated in *R. v. Dyson* (1831), 7 Car. & P. 303-305, at p. 306-7, where the court. stated:

> If a man in his sound memory commits a capital offence, and before his arraignment he becomes absolutely mad, he ought not by law, to be arraigned during his frensy, but be remitted to prison until that incapacity be removed; the reason is because he cannot advisedly plead to the indictment. … And if such person, after his plea, and before his trial, become of non-sane memory, he shall not be tried; or, if after his trial he becomes of non-sane memory, he shall not receive judgment; or, if after judgment he becomes of non-sane memory, his execution shall be spared; for, were he of sound memory, he might allege somewhat in stay of judgment or execution.

[28] Thus, under the common law of England, post-verdict fitness was a matter of concern for the court at least as far back as 1836.

[29] The common law of England, as it existed in 1870, was incorporated into Yukon by virtue of *The North-West Territories Act*, 60-61 Vic., c. 28 and by virtue of s. 48 of that same *Act*, this court has "... all such powers and authorities as by the law of England are incidental to a superior court of civil and criminal jurisdiction … as the same were on the fifteenth day of July, one thousand eight hundred and seventy …."

[30] In 1910, the Ontario Court of Appeal in *R. v. Leys* (1910), 17 C.C.C.198, stated that "No person can be rightly tried, sentenced, or executed while insane."

[31] Thus, there is good authority for the proposition that under the common law, a court is entitled and indeed bound to be concerned with the mental fitness of an accused during the sentencing phase of his trial.

[32] As noted by Richard Schneider in his article "Fitness to Be sentenced" (1999), 41 Crim. L. Q. 261, at page 2:

> So long as there are no inconsistencies, the fact that Parliament has for the past 100 years formally provided for "unfitness to stand trial" would not disturb any common law provision dealing with "unfitness" at any other juncture that may have existed prior to the legislation or developed after the legislation.

[33] I see no inconsistency between the provisions of the *Code* dealing with fitness matters leading up to verdict, and the common law dealing with fitness matters post-verdict.

[34] I therefore find that under the common law, this Court has the jurisdiction to order a fitness assessment at this stage of the dangerous offender proceedings.

[35] I am also satisfied that the court can order such an assessment at this stage of the proceedings under its inherent jurisdiction as a superior court.

[36] As stated in *R. v. Cunningham,* [2010] S.C.J. No. 10, at para. 18 (citations omitted):

> 18. Superior courts possess inherent jurisdiction to ensure they can function as courts of law and fulfil their mandate to administer justice. Inherent jurisdiction includes the authority to control the process of the court, prevent abuses of process, and ensure the machinery of the court functions in an orderly and effective manner. …

[37] I am cognizant that a court should exercise its inherent jurisdiction cautiously. I am mindful of the caution set out in *R. v. Caron,* [2011] S.C.J. No. 5, "the very plenitude of this inherent jurisdiction requires that it be exercised sparingly and with caution."

[38] In this case, the Crown seeks to have Mr. Nehass declared a dangerous offender or in the alternative a long term offender. Such a proceeding is no "cookie-cutter" sentence as Justice Dovell noted in *Morrison*. It has the potential to result in a *de facto* life sentence for the offender. The stakes are very high. The proceedings are likely to be long, complicated and detailed. Mr. Nehass will have to be an active participant in these proceedings in order to instruct his counsel in a meaningfully way.

[39] The fundamental obligation of a court is to ensure fairness in the proceedings. It must be alive to preventing miscarriages of justice. It is perhaps trite but worth repeating that justice must not only be done, it must be seen to be done. As Trotter J. observed in *R. v. Adams*, 2013 ONSC 373, at para 35:

> On a more fundamental level, trial judges must always be concerned with preventing miscarriages of justice. A miscarriage of justice does not always involve actual prejudice to an accused person. Public confidence in the administration of justice may also be shaken and undermined by the *appearance* of unfairness … (emphasis already added)

[40] In this case, to proceed with a dangerous offender hearing if Mr. Nehass is unfit would be, and would be seen to be, fundamentally unfair and a miscarriage of justice. This Court is duty bound to guard against such an injustice and has the inherent jurisdiction to do so.

DECISION

[41] Accordingly, I exercise my jurisdiction under the common law as well as this Court's inherent jurisdiction and direct that a fitness assessment be done on Mr. Nehass to determine his fitness to participate in the dangerous offender proceedings.

[42] Counsel have all agreed that the appropriate place for this assessment to take place is at the Ontario Shores for Mental Health Sciences in Whitby, Ontario. I understand that the appropriate arrangements have been made between that institution and the Yukon Government to facilitate that. Counsel have also prepared and approved a form of order to implement this decision. I am signing that order now.

[43] In closing, I want to express the Court's appreciation to counsel for their professionalism in the handling of this matter.

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BROOKER J.