

Citation: *R. v. Pang*, 2020 YKTC 34

Date: 20201123
Docket: 19-00945
Registry: Whitehorse

IN THE TERRITORIAL COURT OF YUKON
Before His Honour Chief Judge Chisholm

REGINA

v.

SHI YU PANG

Appearances:
Noel Sinclair
Gregory Johannson

Counsel for the Crown
Counsel for the Defence

RULING ON APPLICATION

[1] CHISHOLM C.J.T.C. (Oral): The Crown applies for an assessment order with respect to Shi Yu Pang's fitness to stand trial. Ms. Pang opposes the application.

[2] Ms. Pang is charged with a number of *Criminal Code* offences, namely, assault causing bodily harm, assault, uttering threats with respect to two individuals, and mischief. She is self-represented, although counsel was appointed by the Court to represent her on this application.

Background

[3] Ms. Pang is 49 years of age and does not have a criminal record.

[4] The Crown alleges that on March 13, 2020, Ms. Pang was at the Whitehorse Multicultural Centre watching a movie when there was an internet disruption. She went to the front desk and spoke to a staff member, Ms. Doerksen, about the issue. When Ms. Doerksen told Ms. Pang about the source of the problem, she accused Ms. Doerksen of lying and trying to extort money from the government. Ms. Pang became more upset and aggressive with Ms. Doerksen who requested that she leave the building. Ms. Pang threw computer screens on the floor and objects at staff members while yelling at them. While Ms. Doerksen attempted to escort Ms. Pang out of the premises, Ms. Pang began kicking and punching her. She grabbed the necklace on Ms. Doerksen's neck and bit Ms. Doerksen's arm, drawing blood, when she tried to stop Ms. Pang.

[5] The owner of the business, Rory MacDonald, heard the commotion and came downstairs. Ms. Pang allegedly threatened to return to the premises and kill everyone. While Mr. MacDonald tried to restrain her, Ms. Pang is alleged to have kicked, bit, and scratched him.

[6] The police arrived on scene, and while being arrested, it is alleged that Ms. Pang screamed at the arresting officer throughout the process. The officer did not note any signs of impairment or smell of alcohol in dealing with Ms. Pang.

[7] Ms. Pang subsequently appeared in court on a number of occasions before her trial date was set. During those various appearances, Ms. Pang exhibited behaviour that may be described as disruptive, deviant, uncooperative, and inappropriate.

Relevant Provisions of the *Criminal Code*

[8] The legal test for fitness to stand trial is found in s. 2 of the *Criminal Code*, which states:

“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;

[9] Section 672.22 sets out the general presumption that an accused is fit to stand trial.

[10] In terms of assessment orders, s. 672.11 reads:

A court having jurisdiction over an accused in respect of an offence may order an assessment of the mental condition of the accused, if it has reasonable grounds to believe that such evidence is necessary to determine

- (a) whether the accused is unfit to stand trial;

...

[11] When the Crown seeks an assessment order regarding fitness, s. 672.12(2)(b) applies. It states:

Where the prosecutor applies for an assessment in order to determine whether the accused is unfit to stand trial for an offence that is prosecuted by way of summary conviction, the court may only order the assessment if

...

- (b) the prosecutor satisfies the court that there are reasonable grounds to doubt that the accused is fit to stand trial.

Evidence on the Application

[12] The Crown has filed transcripts of some of Ms. Pang's court appearances. The Crown also seeks to rely on the allegations summarized above that bring Ms. Pang before the Court. Mr. Sinclair argues that hearsay evidence is admissible on an application of this nature. Mr. Johannson, counsel for Ms. Pang, takes no issue with the admission of hearsay, but opposes Mr. Sinclair providing this evidence.

[13] Counsel did not fully argue this issue before me, as it came to light during the hearing. As such, the law has not been fully canvassed. In *R. v. Muschke* (1997), 121 C.C.C. (3d) 51 (B.C.S.C.), on judicial review, the Court found that there was no evidence before the application judge from which he could have concluded that he had reasonable grounds to doubt the accused's mental capacity, such that an assessment was necessary. In that case, the Crown tendered no affidavit or viva voce evidence, but reported the facts upon which the Crown was relying.

[14] The Court held, at para. 40:

In the ordinary course, evidence on an application before a court is provided by way of affidavit and, occasionally, by oral testimony. Notwithstanding that the practice on applications in criminal matters may be more flexible than that in civil matters, I see no reason why reasonable grounds for doubt, as required by s. 672.12, should be derived from the statements of counsel alone without affidavit or viva voce evidence and satisfactory medical opinion.

[15] In *R. v. Sammut*, 2017 ONCJ 302, the Court held, at para. 35:

While no particular evidence is required, a court must be satisfied a "credibly based probability" exists to believe an assessment is necessary for one of the enumerated purposes: *R. v. Goudreau*, 2015 ONSC 6758. This can come in the form of medical evidence, evidence of police officers or even firsthand observations of the court. Whether there are sufficient grounds will depend on the circumstances and evidence in each particular case. An important point as referenced in the text *Mental Disorder in Canadian Criminal Law* by Joan Barrett and Justice Ruin Sandler (Thomson Carswell) is that the scope and nature of the evidence adduced in support of a request for an assessment order is likely to depend on whether the assessment is on consent or contested.

[16] The decision in *R. v. Isaac*, 2009 ONCJ 662, takes a somewhat different approach. The Court points out, at para. 3, that while the *Criminal Code* is silent as to the meaning of "reasonable grounds to believe, it is clear that no particular evidence is necessary", so long as the basis for the belief is "clear" and plainly appears "on the record of the proceedings".

[17] In this jurisdiction, it may be tempting to compare the procedural practice for judicial interim release hearings, where allegations of offences are read into the record, to applications for assessment orders. However, the bail hearing provisions of the *Code* allow for this informal practice. Section 518(1)(e) reads: "the justice may receive and base his decision on evidence considered credible or trustworthy by him in the circumstance of each case".

[18] It would seem that the preferable practice in contested applications for assessment orders would be for the calling of viva voce evidence or the tendering of affidavits, however, based on my conclusion below, I find that I need not make a final determination on that issue in this case.

Analysis

[19] The Crown's application for seeking an assessment is understandable. Ms. Pang is self-represented and so far during her court appearances, she has displayed a level of obstructiveness. For example, on June 24, 2020, after the presiding justice chastised Ms. Pang for her tone in court, she indicated that she did not want to speak in English, and instead wanted a French-speaking justice. When presented with a French-speaking judge, it became apparent that Ms. Pang does not speak French. Nonetheless, at that appearance and at the following appearance she pursued, without success, her desire for proceedings in French. When asked why she asked for a French-speaking judge, she replied that the Court was giving her trouble in English, so she decided to ask to proceed in French.

[20] In terms of language, Ms. Pang speaks Mandarin. Although she speaks some English, the depth of her understanding of and ability to communicate in English appears somewhat limited.

[21] A Mandarin speaking interpreter has been present to translate the proceedings for Ms. Pang for all appearances since June 26, 2020. The presence of an interpreter did not initially assist in bringing order to Ms. Pang's appearances in court. However, since Mr. Johansson was appointed to represent Ms. Pang for the Crown's assessment order application, she is no longer displaying obstinate and disrespectful behaviour. For the last two appearances, Ms. Pang has allowed her counsel on this application to speak to the Court and she has not spoken.

[22] The Crown submits that the reasonable grounds to doubt standard is a relatively low threshold.

[23] It is without question that the reasonable grounds standard is less than the civil standard of proof. In *R. v. Hanareh*, 2017 BCCA 7, the Court stated at para. 39:

The reasonable grounds standard requires something more than mere suspicion, but something less than the standard applicable in civil matters of proof on the balance of probabilities: *Mugesera v. Canada (Minister of Citizenship & Immigration)*, 2005 SCC 40 at para. 114. The appropriate standard is one of reasonable probability: *R. v. Debot*, [1989] 2 S.C.R. 1140 at 116. ...

See also *R. v. Jir*, 2010 BCCA 497 at para. 27.

[24] At the same time, it must be remembered, as Trotter J. stated in *R. v. John Doe*, 2011 ONSC 92, at para. 35 that:

...an assessment under Part XX.1 is an entrance into a socially protective regime, one that is accompanied by significant deprivations of liberty. Accordingly, one must proceed with restraint when applying these provisions. ...

[25] Also, even if I were to find that the reasonable grounds standard had been met regarding the presence of a mental disorder, that is not the end point. As Wong J. noted in *R. v. Gray*, 2002 BCSC 1192, at para. 43, "... the focus of an assessment under section 672.11 is never simply the existence of mental disorder but rather the effect of any mental disorder with respect to specific legal concepts."

[26] In the matter before me, even if I were to consider the allegations of the offences, in addition to the transcripts of earlier court proceedings, in my view, there is insufficient

evidence to establish that there are reasonable grounds to doubt that Ms. Pang is fit to stand trial.

[27] In coming to that conclusion, I also take into account the fact that Mr. Johansson has indicated that Ms. Pang has been capable of instructing him on this application and that as an officer of the court, he has observed nothing that would call into question her fitness.

[28] Although the earlier behaviour of Ms. Pang in court has been troublesome, I am unable to find that the pre-conditions for an assessment order under s. 672.12(2)(b) have been met.

[29] As a result, the application for an assessment order is dismissed.

CHISHOLM C.J.T.C.