

Citation: *R. v. McGinty*, 2021 YKTC 3

Date: 20210125
Docket: 20-00116
Registry: Whitehorse

IN THE TERRITORIAL COURT OF YUKON
Before His Honour Judge Cozens

REGINA

v.

DESMOND DELMAR McGINTY

Appearances:
Ludovic Gouaillier
Christiana Lavidas

Counsel for the Crown
Counsel for the Defence

RULING ON APPLICATION

[1] COZENS T.C.J. (Oral): Desmond McGinty is before the Court on an application to have him declared not criminally responsible on account of mental disorder. It is the Crown's application and it is opposed by Mr. McGinty.

[2] Mr. McGinty has entered guilty pleas to having committed offences contrary to ss. 264.1(1)(a) and 88 of the *Criminal Code*.

[3] An Agreed Statement of Facts was filed. It reads:

1. On May 25, 2020, Desmond McGinty was a resident of the residential resource home located at 49 Green Crescent in Whitehorse, Yukon.
2. On that date, Mr. McGinty appeared to be dealing with the effects of what the staff of the residence believed to be a substance-induced

psychosis. Staff members had heard Mr. McGinty express his belief that his roommates were trying to kill him, and make hostile comments directed at them throughout the day, saying more particularly that he was going to kill them.

3. At some point during that day, Mr. McGinty went to a cupboard in the kitchen and took a steak knife. He then went to the bedroom of one of his roommates, David Malcolm. Seeing this happening, staff member Krista Winsor yelled at Mr. McGinty "Desmond, no!"
4. Mr. McGinty then put the knife back in the kitchen and told Ms. Winsor "Fine, when you go home I will do it". Ms. Winsor immediately called 911 and police attended shortly thereafter and arrested Mr. McGinty at the scene.

Psychiatric Assessment

[4] Dr. Shabehram Lohrasbe conducted a psychiatric assessment (the "Assessment") of Mr. McGinty, pursuant to an order made June 2, 2020. The purpose of the Assessment was to provide expert opinion evidence as to whether Mr. McGinty, on May 25, 2020, was suffering from a mental disorder such that he should be found not criminally responsible by virtue of s.16(1) of the *Code*.

[5] In order to provide his opinion, Dr. Lohrasbe interviewed Mr. McGinty on June 10, 2020, by video. He also had telephone interviews on June 11, 2020, with Pierre Allard, who was Mr. McGinty's social worker, and Krista Winsor, the manager of Max's Place, where Mr. McGinty was residing on May 25, 2020.

[6] Dr. Lohrasbe also considered the following documentation:

- Information 20-00116;
- Occurrence summary regarding incident on April 27, 2020;
- Occurrence summary regarding incident on May 25, 2020;

- Criminal record;
- Supplementary criminal record;
- Psychoeducational assessment dated January 29, 2013, by Deborah Hinds-Nunziata, Psychologist; and an
- FAS Evaluation dated January 29, 2013, authored by Dr. Harris Yee, Deborah Hinds-Nunziata, Shandy Tilly, and Suzanne Johnson.

[7] Dr. Lohrasbe concludes the Assessment by stating that he found the available information to be compelling to the extent that his opinion is supportive of a legal consideration that Mr. McGinty was suffering from a mental disorder at the time of the offences, such that he could be exempt from criminal liability, stating:

1. With his established history of Intellectual Disability and FASD Mr. McGinty's capacities for realistic appraisal of the significance of his actions or of their moral wrongfulness are permanently and significantly compromised.
2. With the added layering of psychotic symptoms that persist even when he is not acutely under the influence of cannabis, cocaine, or alcohol, his pre existing incapacities resulting from brain disorders would be further degraded, especially in the realms of perception, information processing, and behavioral self control.
3. Paranoia is often accompanied by grandiosity. The combination of paranoia, grandiosity, ideas of reference, and command hallucinations is an especially potent prelude to violence.
4. By Mr. McGinty's account, and those of others, his psychotic symptoms are directly connected to his aggressive actions.

[8] In cross-examination, Dr. Lohrasbe provided explanations for the conclusion that he reached. He stated that if he had been able to interview Mr. McGinty for longer than the half hour that he did, he would have been able to flesh out the links between Mr. McGinty's various incapacities and his actions on May 25, 2020. He also agreed

that he was unable to gain access to other materials that would have been useful in helping him in his assessment of Mr. McGinty's mental state on May 25, 2020.

[9] Despite any of these limitations, Dr. Lohrasbe's testimony did not in any way undermine the opinion he expressed in the Assessment as to Mr. McGinty's mental state at the time that he committed the offences with which he was charged.

[10] Mr. McGinty testified. He is 34 years old. He comes from the Community of Pelly Crossing. He stated that he was raised in group homes for most of his life.

[11] Mr. McGinty stated that he went to the Whitehorse General Hospital four times before the events of May 25, 2020. He stated that he went to the hospital because he wanted some help. He thought that his roommates were after him and that it was important that he get help so as not to be in danger.

[12] He testified that when he went to the hospital on one of these occasions, he spoke to Dr. Elwell. He said that Dr. Elwell did not give him the "OK" to kill anyone and that Dr. Elwell told him it was safe for him to go home because no one was "out to get him".

[13] Mr. McGinty stated that he knew he had a choice. He said that he knew at the time that he had the knife it was wrong, and that when Ms. Winsor confronted him, he thought about it and put the knife away. When asked by his counsel why Mr. McGinty thought that what he was doing was wrong, Mr. McGinty replied:

Cause I wasn't, cause I knew I was doing wrong at my mental state, so I was trying tuh go to Pelly Crossing and but ummm things just got flared up there that day.

[14] Then asked:

But what is it that that's wrong about what you were doing? Why do you think it was...

[15] And then Mr. McGinty replied:

I knew it was not, not to, I knew it was wrong to hurt people, and not right to hurt people.

[16] When asked what other options Mr. McGinty thought he had open to him at that time, Mr. McGinty responded:

Ummm, I was, ummm, I was trying to get a ride to Pelly Crossing that day.

[17] Counsel in seeking to clarify to what other options Mr. McGinty thought he had at time that he picked up the knife, Mr. McGinty further replied:

Ummm, I just never really thought it through, and cause I was ummm, at the time, and I really never thought it through when I picked up the knife.

[18] When Mr. McGinty was asked what he was thinking when he said, "Fine, I'll do it when you're gone", he stated that:

Cause I wasn't thinking when I said it; I was just, I just blurted it out.

[19] Mr. McGinty stated that he regrets what he did and wishes he had not done it.

He said that he knows it is against the law to hurt and threaten other people.

[20] In cross-examination, Mr. McGinty agreed that at the time he went to the hospital before the incident on May 25, 2020, he thought that his roommates were going to kill

him. He said that he was going through a cocaine psychosis then. While he realizes now that his roommates were not going to kill him, at the time his mind was not working right, and he did not know that his roommates did not plan to kill him. That is why he went to the hospital, because he knew he needed medical help.

[21] Mr. McGinty agreed that at that time that he grabbed the knife, it was because he believed he was acting in self-defence against his roommates.

[22] Mr. McGinty stated that at the time he testified he was taking additional medications that were helping him with his psychosis. He agreed that while he now knows his actions were wrong on May 25, 2020, on that date he did not know it was wrong because he thought that he was acting in self-defence.

Analysis

[23] A recent summary of the law was provided in **R. v. Coyle**, 2020 BCSC 1094, at paras. 8 to 10:

8 I will begin by reviewing the applicable law. These principles were usefully summarized by Murray J in *R. v. Dillon*, 2017 BCSC 1184, where the accused was found not criminally responsible by reason of a mental disorder for the stabbing death of a woman in Fort Nelson:

[6] Section 16 of the *Criminal Code*, R.S.C. 1985, c. C-46 reads as follows:

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.

- (3) 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.

[7] "Mental disorder" is defined in s. 2 of the *Criminal Code* as "a disease of the mind".

[8] "Disease of the mind" has been defined by the Supreme Court of Canada as follows:

In summary, one might say that in a legal sense "disease of the mind" embraces any illness, disorder or abnormal condition which impairs the human mind and its functioning, excluding however, self-induced states caused by alcohol or drugs, as well as transitory mental states such as hysteria or concussion. **In order to support a defence of insanity the disease must, of course, be of such intensity as to render the accused incapable of appreciating the nature and quality of the violent act or of knowing that it is wrong.** [*R. v. Cooper*, 1980 1 SCR 1149, at page 8.] [Emphasis added.]

[9] If it is proven on a balance of probabilities that at the time of the murder [the accused] was suffering from a disease of the mind, there are two bases upon which he may be found not criminally responsible:

- (1) that he was incapable of appreciating the nature and quality of the act; and
- (2) that he was incapable of knowing that the act was wrong.

[10] With respect to the first basis, the phrase, "appreciating the nature and consequences of the act" have been defined as understanding the physical consequences of the act: *R. v. Chalk*, [1990] 3 S.C.R. 1303 and *R. v. Landry*, [1991] 1 S.C.R. 99.

[11] With respect to the second basis, the Supreme Court of Canada in *R. v. Oommen*, [1994] 2 S.C.R. 507, made it clear that knowledge that an act is wrong does not simply mean an abstract knowledge that an act, such as killing, is regarded as wrong by society. The provision requires a consideration of the accused's knowledge that the particular act, in the particular circumstances, was wrong. Madam Justice McLachlin, as she then was, explained it as follows:

The crux of the inquiry is whether the accused lacks the capacity to rationally decide whether the act is right or wrong and hence to make a rational choice about whether to do it or not. The inability to make a rational choice may result from a variety of mental disfunctions; as the following passages indicate these include at a minimum the states to which the psychiatrists testified in this case -- delusions which make the accused perceive an act which is wrong as right or justifiable, and a disordered condition of the mind which deprives the accused of the ability to rationally evaluate what he is doing.

[24] Back to **Coyle**, the Court stated:

9 Section 16(1) sets out two conditions that will exempt an accused from criminal responsibility:

- a) that he was incapable of appreciating the nature and quality of the act; and
- b) that he was incapable of knowing that the act was wrong.

10 It is not necessary that both conditions apply. Proof of either one of those conditions will establish the defence of not criminally responsible by reason of a mental disorder.

[25] In this case, it is the Crown that bears the onus for establishing that Mr. McGinty was suffering from a mental disorder on May 25, 2020, when he committed these offences.

[26] I appreciate that the Assessment is based on some hearsay evidence and that Dr. Lohrasbe did not have certain additional materials that may have assisted him in assessing Mr. McGinty's mental condition at the time of the May 25, 2020 incident. I also appreciate that Dr. Lohrasbe spent only approximately 30 minutes face-to-face with Mr. McGinty, so to speak.

[27] Dr. Lohrasbe's qualifications to provide this opinion are not questioned. He acknowledges that finding a "perfect fit" between the psychiatric diagnoses and dysfunctions in the legal criteria for a s. 16(1) diagnosis in the case of Mr. McGinty is difficult, but stated his opinion that the circumstances here are "as close as he's ever seen" must be given considerable reflection.

[28] I appreciate that Mr. McGinty's current view of what occurred on that day is rational and demonstrates an understanding of what he did and what was wrong with his actions. However, that is today looking back, and Mr. McGinty is not in the same state of mind now as he was then. He is engaged in a different medication regime at present. I somehow doubt that Mr. McGinty would conduct himself in the same way today as he did on the day of the incident.

[29] I am making a determination as to Mr. McGinty's mental state of May 25, 2020, as to whether he, at that time, then fit into the criteria for finding that he not be criminally responsible for his actions as a result of a mental disorder, not as to whether his current mental condition would justify such a finding looking back. I appreciate that many of the issues that Dr. Lohrasbe identified as impacting Mr. McGinty are static and will always exist. To that extent, Mr. McGinty will always find himself somewhat limited and fragile.

He is still, however, at most times able to appreciate the nature and quality of his actions and to know that an act is wrong.

[30] I also do not find the circumstances such that there was any immediate impairment by cocaine in a transitory state, such as would be the cause of his actions at that time. I find it to be more of a prolonged state in addition to the mental disabilities that he struggles with.

[31] I am satisfied that it was not the case on May 25, 2020, that Mr. McGinty was able to appreciate the nature and quality of his actions and to know that his actions were wrong. I therefore find that Mr. McGinty was not criminally responsible for his actions.

[32] As per s. 672.34 of the *Code*, I render a verdict that Mr. McGinty committed the offences on May 25, 2020, with which he is charged, but he is not criminally responsible on account of mental disorder.

[33] I have two options on a finding of not criminally responsible on account of mental disorder: I can send Mr. McGinty to the Review Board or I can choose not to do so and dispose of the matter myself.

[DISCUSSIONS]

[34] In these circumstances, and noting the agreement of counsel, I refer this matter to the Review Board, pursuant to s. 672.45 – 47.

[DISCUSSIONS]

[35] I certainly have no issue putting on the record my review of clause 9 on Mr. McGinty's release order that requires him to participate in assessments. It would be my very strong recommendation that a psychiatric risk assessment be conducted as soon as possible so that when the matter gets to the Review Board, matters are not delayed any further.

COZENS T.C.J.