SUPREME COURT OF YUKON

Citation: *R. v. Nehass*, 2017 YKSC 13

Date: 20170215
Docket: 12-01503A
Registry: Whitehorse

Between:

HER MAJESTY THE QUEEN

And

MICHAEL DAVID ARCHIE NEHASS

Publication of information that could disclose the identity of the complainant or witness has been prohibited by court order pursuant to s. 486.4 of the *Criminal Code*.

Before Mr. Justice C.S. Brooker (by videoconference)

Appearances:

Eric Marcoux	Counsel for the Crown
C. Anik Morrow (by videoconference)	Counsel for the Defence
Richard S. Fowler (by videoconference)	Appearing as *Amicus Curiae*

RULING ON APPLICATION

[1] BROOKER J. (Oral): There are two applications before the Court.

[2] The first is an application by the Crown for an order requiring Mr. Nehass to undergo treatment for 60 days for a psychiatric condition in order to make him fit for the dangerous offender proceedings which the Crown has commenced against him. Such treatment would take place at the Ontario Shores facility, where Mr. Nehass presently is.

[3] The second application is that of the defence for a declaration of a mistrial.

FACTS

[4] In May 2015, Mr. Nehass was tried by a judge and jury, and found guilty on May 22, 2015, of a number of counts, including unlawful confinement and assault with a weapon. Mr. Nehass represented himself at trial.

[5] In June 2015, the Crown gave notice that it was proceeding with a dangerous offender application.

[6] Thereafter, there were various issues dealt with such as a *Rowbotham* application, efforts by Mr. Nehass to obtain or retain counsel acceptable to him, change of defence counsel, commencement of a *Charter* application, the application for assessment for the dangerous offender application and change of counsel for Mr. Nehass.

[7] On November 3, 2015, Mr. Fowler, who had been appointed *Amicus Curiae*, sent a letter to defence counsel, Crown counsel, and the Court raising concerns as to Mr. Nehass' current mental health and his fitness to participate in the proceedings.

[8] Thereafter, the Crown, on November 10, 2016, filed an application before this Court for an order for assessment of Mr. Nehass' fitness to participate in the proceedings. That application was heard by me on November 22, 2016. It was not opposed.

[9] The application for a fitness hearing was somewhat unique in that, given the issue of fitness was being raised after conviction and before sentencing, such an application was not provided for under Part XX.1 or, indeed, any other part of the *Criminal Code*.

[10] On November 24, 2016, I found that this Court had the jurisdiction to order the fitness assessment under both the common law and the inherent jurisdiction of a superior court. (see *R. v. Nehass*, 2016 YKSC 63)

[11] An order for assessment was made and Mr. Nehass was sent to the Ontario Shores facility in Ontario for assessment. Thereafter, Mr. Nehass' fitness was assessed and the matter set down for a fitness hearing on January 24th.

[12] At the fitness hearing on January 24, 2017, two psychiatric reports were put in evidence, one from Dr. Wong, which included an addendum, and one from Dr. Pallandi. Both reports concluded that Mr. Nehass was mentally unfit to participate in the dangerous offender proceedings. As well, Dr. Pallandi testified by video conference, at which time he expanded on his opinion.

[13] In addition, Ms. Tricia Ratel, Yukon's Director of Corrections, and Dr. Heredia, a psychiatrist who does contract work for the Whitehorse Correctional Centre, testified at the fitness hearing.

[14] At the conclusion of the fitness hearing, I found that Mr. Nehass was mentally unfit at that time to participate in the dangerous offender proceedings. (see *R. v. Nehass*, 2017 YKSC 4)

[15] Two points particularly germane to the present applications arise.

[16] First, both Dr. Wong and Dr. Pallandi are of the opinion that if Mr. Nehass underwent medical treatment, specifically through the administration of anti-psychotic drugs, he would become fit within 60 days of such treatment. Such treatment can only suitably be administered at a forensic mental health hospital, such as Ontario Shores.

Absent such treatment, Mr. Nehass will likely remain unfit. There is no forensic mental health hospital in the Yukon.

[17] Second, if Mr. Nehass becomes fit and is returned to a detention centre, such as the Whitehorse Correctional Centre, it would be detrimental to his mental health. In other words, given Mr. Nehass' lengthy history at the Whitehorse Correctional Centre and the unique stressors there, there is a real concern that if he is deemed fit and then returned to the Whitehorse Correctional Centre, his mental state will deteriorate and his psychosis aggravate. He may very well become unfit again.

[18] Ms. Ratel, the Director of Corrections in the Yukon and the person with oversight at the Whitehorse Correctional Centre, candidly admitted in her testimony that the Whitehorse Correctional Centre is, in fact, a jail, not a hospital, and it simply does not have adequate facilities to meet Mr. Nehass' mental health needs.

ISSUES

[19] There are two issues:

1. Can/should a treatment order be made; and
2. Should a mistrial be declared?

POSITIONS OF THE PARTIES

[20] The Crown says that a treatment order should be made. It argues that the evidence is that, within 60 days of treatment, Mr. Nehass could be made fit. At that time, the Crown would decide whether or not, in the circumstances, it wished to proceed with the dangerous offender proceedings or pursue some other course of action. It seems common ground between Crown and defence that Mr. Nehass has already spent

more time in custody than he is likely to receive by way of an ordinary sentence for the offences for which the jury found him guilty.

[21] The Crown concedes that there are no provisions in the *Criminal Code* giving the Court the jurisdiction to make a treatment order at this stage, but says that the Court has inherent jurisdiction to make such an order in these unique circumstances and that I should follow or mirror, insofar as I can, the treatment order provisions under Part XX.1.

[22] While the Crown opposes the granting of a mistrial requested by the defence, it acknowledges that if a treatment order is not made, the Court has no other alternative than to grant a mistrial as, to use the Crown counsel's words, "we would be at a dead end".

[23] The defence has filed a written submission which outlines its position in detail. At the risk of over-simplification in attempting to summarize it, the defence position is that the common law does not provide for an unfit offender to be made fit. It would be inappropriate to use parts of Part XX.1 to create a mechanism that could be used to make an unfit offender fit. The Court's inherent jurisdiction is intended to protect against an abuse of its process and to ensure fairness in the proceedings. To grant a treatment order would be antithetical to that purpose. Mr. Nehass has already served more time than a fit and proper sentence would be for these crimes. The public interest has been served. He has been held accountable and has been punished. To continue to hold him in custody and force treatment on him is unfair and unjustified.

[24] The defence applies for a mistrial. It says this is necessary to avoid a miscarriage of justice. It relies on the evidence at the fitness hearing to argue that there is a reasonable basis to believe that Mr. Nehass was unfit at the time of his arraignment

and at the time of his trial. It argues that the procedure of arraignment and trial was flawed if Mr. Nehass was unfit at these stages.

[25] The defence argues that there was a miscarriage of justice and that mistrial is the only answer. As defence counsel states in her written brief:

> It is submitted that the specific collection of facts of this case, the nature of the accused, the impossibility of the court to proceed, the inability to isolate or correct the problem make this one of the clearest of cases. With all due respect, a return of fitness to Mr. Nehass makes absolutely no difference. The flaw is profound and it defies correction. There is no other suitable or available remedy.

ANALYSIS

I - The Fitness Order

[26] Clearly, I have no jurisdiction under the *Criminal Code* to order Mr. Nehass to undergo treatment to try and make him fit for a dangerous offender proceeding. Part XX.1 is a comprehensive code of procedures, rights, and safeguards dealing with an accused with a mental disorder.

[27] By virtue of s. 2 of the *Criminal Code*, unfit to stand trial only applies to proceedings up until the time a verdict is rendered. Thus, the provisions of Part XX.1 do not apply once a verdict has been rendered. Specifically, it does not apply to an offender whose fitness comes into issue at the sentencing stage of the trial.

[28] This problem was identified in the *14th Report of the Standing Committee on Justice and Human Rights*, wherein a number of recommendations were made to the federal government to deal with this, including amending s. 2 of the *Criminal Code* to include the sentencing stage in the unfitness to stand trial definition. However, the government specifically rejected this recommendation in its *Response to the 14th Report of the Standing Committee on Justice and Human Rights, November 2002*.

[29] This Response addresses a number of concerns with the Committee's recommendations, including the jurisdiction of review boards, feasibility, costs, and the rationale for the current assessment provisions. It suggests that the failure to include fitness to be sentenced in Part XX.1 and s. 2 of the *Criminal Code* was not an oversight.

[30] The Response concludes:

> In summary, the issues raised by all three parts of the Committee's recommendations related to fitness at the time of sentencing are complex and worthy of more thorough consideration.

[31] Subsequent cases have highlighted the problem. (see *R. v. Balliram*, (2003), 173 C.C.C. (3d) 547 (Ont. Sup.Ct.); *R. v. Morrison*, 2016 SKQB 259; and *R. v. Jaser*, 2015 ONSC 4729)

[32] Parliament has not seen fit to amend the legislation or move to include fitness to be sentenced in the *Criminal Code*.

[33] While I have, for the reasons given, held that this Court has the jurisdiction to order a fitness assessment and to make a declaration of unfitness at the sentencing stage under the common law and its inherent jurisdiction, the basis for those decisions was on the principles of fundamental justice and the prevention of a miscarriage of justice in relation to an offender who might be unfit to participate in proceedings brought by the state against him.

[34] Making a treatment order is a different matter. It invokes the power of a court to assist the state in proceeding against the offender. It infringes on the personal integrity of the offender by forcing him to undergo treatment and thus raises serious *Charter* issues. It raises and leaves unanswered all the issues referred to in the government's

Response to the 14th Report of the Standing Committee on Justice and Human Rights referred to earlier.

[35] There is no common law support for such jurisdiction, and I am not persuaded that the making of such a treatment order is within the inherent jurisdiction of a superior court. There being no common law, statutory or inherent jurisdiction for making the order requested, I must dismiss the Crown's application for a treatment order.

II - Mistrial Application

[36] Counsel for the defence argued that I had the power to declare a mistrial at this stage of the proceedings. Crown counsel did not argue otherwise. Indeed, as noted earlier, he acknowledged that a mistrial was the only alternative left if a treatment order was not made.

[37] I am satisfied from the decision of the Supreme Court of Canada in *R. v. Burke,* 2002 SCC 55, that this Court has the jurisdiction to order a mistrial at this late stage of the proceedings. A mistrial should be ordered if it is necessary to prevent a miscarriage of justice.

[38] There is a long history of concerns having been expressed by various authorities as to Mr. Nehass' mental state. The evidence of Ms. Ratel and Dr. Heredia outline the concerns they had over the years that Mr. Nehass was in remand at the Whitehorse Correctional Centre.

[39] A review of the court files on Mr. Nehass discloses a variety of entries raising concerns about Mr. Nehass' mental fitness, culminating in Cozens T.C.J., finding him unfit to stand trial in June 2014. (see *R. v. Nehass*, 2014 YKTC 23)

[40] The Yukon Review Board subsequently held a hearing and found on August 11, 2014, that Mr. Nehass was fit to stand trial. Interestingly, Ms. Ratel testified everyone was surprised that the Review Board had found Mr. Nehass to be fit.

[41] On November 27, 2014, Luther T.C.J. apparently retried the issue of fitness and found Nehass fit.

[42] Dr. Pallandi opined in his report dated January 15, 2017:

> It is likely that Mr. Nehass has been either on the cusp or, frankly, unfit for a lengthy period of time prior to the present evaluation.

[43] However, despite this evidence, I am not persuaded that Ms. Morrow, counsel for the defence, is correct in her submission that there is a robust basis to believe that Mr. Nehass was unfit at either the time of his arraignment or the time of his trial. Dr. Pallandi's opinion quoted above is vague. I cannot infer that it applies to the time of arraignment or the trial in May 2015. Even if I could, being "on the cusp" is not the same as being unfit. Further, neither the Crown nor the *Amicus* at trial, Mr. Vaze, raised the issue of fitness during the trial.

[44] And it should be noted that Mr. Vaze had been counsel for Mr. Nehass at one time on these charges and then dismissed, following which he was appointed as the *Amicus* by Veale J. Mr. Vaze, therefore, had interacted with Mr. Nehass for a significant period of time before the trial.

[45] While I observed, during the course of the trial, certain instances of psychotic behaviour from time to time, it appeared to be exactly the same type of behaviour as the Review Board referred to in its written decision finding Mr. Nehass fit for trial, and this behaviour did not appear to prevent Mr. Nehass from fully understanding, appreciating, participating in the trial, and conducting his own defence.

[46] Finally, I would observe that Mr. Nehass' mental condition appears to have significantly deteriorated subsequent to the trial.

[47] I am not prepared to order a mistrial simply on the basis that there is a suspicion that Mr. Nehass may not have been fit at the time of arraignment or his trial.

[48] That does not deal, however, with the quandary that presently exists, where Mr. Nehass has been found unfit to proceed with the sentencing or dangerous offender proceedings, and I have no jurisdiction to make a treatment order for him. He is in a state of limbo.

[49] He has already served more time than would be a fit sentence for the crimes for which he was convicted. He cannot be subjected to a dangerous offender proceeding while he is unfit and there is no evidence that he will ever be fit without treatment. There is no procedure to review his fitness because Parliament has not seen fit to enact amendments to the *Criminal Code* to make Part XX.1 apply to sentencing.

[50] One must ask oneself: On what basis can he now be held in custody? We are at a dead end. Mr. Nehass is left in a void. To leave him in this void would be a miscarriage of justice.

[51] Therefore, the only way to proceed and avoid a miscarriage of justice is to declare a mistrial.

[52] While that is, indeed, regrettable, it will have the practical effect of starting anew. The Crown can seek a new fitness hearing and if unfitness is found, a judge can proceed under Part XX.1 to make a treatment order and all the rights and safeguards afforded in that part will be availed to Mr. Nehass. If and when Mr. Nehass becomes fit,

perhaps in the unique circumstances of this case, Crown and defence might be able to resolve the matters without the necessity of another trial.

[53] According, I order a mistrial in this case.

_____

BROOKER J.