SUPREME COURT OF YUKON

Citation: *R. v. Nehass*, 2017 YKSC 4

Date: 20170125
S.C. No. 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

Appearances:

Eric Marcoux	Counsel for the Crown
C. Anik Morrow	Counsel for the Defence
Richard S. Fowler, Q.C.	Appearing as *Amicus Curae*

REASONS FOR JUDGMENT

INTRODUCTION

[1] BROOKER J. (Oral): At the conclusion of yesterday's fitness hearing, I found that Mr. Nehass was unfit to participate in the dangerous offender proceedings and that I would give short reasons for my decision thereafter. These are those reasons.

[2] On November 24, 2016, I made an order directing a fitness assessment of Mr. Nehass to determine his fitness to participate in the dangerous offender proceedings which had been brought by the Crown.

[3] Pursuant to that order, Mr. Nehass was taken to and assessed at the Ontario Shores Centre for Mental Health Sciences at Whitby, Ontario. He remains there at the present time.

[4] Two fitness assessments were done there. The first was done by Dr. Wong and his report is found at Tab 3 of Exhibit 3. Dr. Wong's Addendum is found at Tab 4 of Exhibit 3.

[5] The second assessment was done by Dr. Pallandi and his report is found at Tab 1 of Exhibit 3. Dr. Pallandi also testified via video link.

[6] Both Dr. Wong and Dr. Pallandi were of the opinion that Mr. Nehass was mentally unfit to participate in the dangerous offender proceedings.

[7] There are two issues for me to determine. The first is whether I have the jurisdiction to make a declaration that Mr. Nehass is unfit. The second is whether, in fact, he is unfit.

[8] As to the first issue, it seems to me that it is answered by my decision to order the fitness assessment in the first place. In that decision, I discussed the court's power to consider mental fitness after a verdict of guilt and before the passing of sentence as well as the basis for that. I will not repeat it.

[9] It follows logically from that decision that if the court has the power to order a fitness assessment, it has the power to make a finding of fact as to whether or not the offender is fit to participate in the sentencing process. And that jurisdiction is justifiable on the same basis.

[10] As to the second issue, my analysis is as follows: an accused (or offender) must be mentally fit to be tried (or sentenced). That is rooted in the right to be present at

one's trial, the right to make full answer and defence and the other aspects of the requirement for fairness in criminal proceedings: see *R. v. Steele*, [1991] A.Q. No. 240, at para 97.

[11] The common law test for fitness to stand trial has been codified into s. 2 of the *Criminal Code*: R*. v. Whittle*, [1994] 2 S.C.R. 914, at p. 13.

[12] The burden of proof on fitness is one of reasonable probability.

[13] The correct test for determining fitness is that of "limited cognitive capacity": See *R. v. Taylor*, [1992] O.J. No. 2394 (C.A.). Under that test, according to *Taylor*, "the presence of delusions does not vitiate the accused's fitness to stand trial unless the delusion distorts the accused's rudimentary understanding of the judicial process."

[14] I apply that test in this proceeding.

[15] Meaningful presence and meaningful participation at the trial are the touchstones of the inquiry into fitness: *R. v. Morrissey* (2007), 87 O.R. 481 (C.A.), at para. 36.

[16] In his Report, Exhibit 3, Tab 1, Dr. Pallandi states:

> Based on my review of the available materials and examination of Mr. Nehass, I would principally concur with most of Dr. Wong's opinions although would also wish to consider the possibility that Mr. Nehass suffers from Schizoaffective Disorder of the Bipolar subtype. This diagnosis is comprised of the core symptoms of schizophrenia as well as the mood disturbances that are observed in Bipolar Disorder.
>
> Regardless, Mr. Nehass is clearly mentally ill and has been for a number of years. Particular during the last several years, there has been an evolving and intensifying component of psychosis which is critically important to the issue of his fitness.
>
> …
>
> While Mr. Nehass was and has been able to our articulate [*sic*] some of the core elements of fitness including knowing his charges, the pleas available to him as well is [*sic*] the roles of

> court participants – even within this limited domain of fitness evaluation there was a profound intrusion of psychotic symptoms requiring significant redirection to the core issues of the evaluation.
>
> Whether he is able to truly (and through a non-psychotic lens) appreciate the nature and object of proceedings is of great concern. As has been noted, he elaborates a vast, all-encompassing conspiracy of a persecutory nature which includes (most importantly) justice system officials and Your Honour. All of this speaks to his perception of an unfair process.
>
> Further, his ability to communicate with counsel is quite likely compromised for the same reasons described above.
>
> …
>
> For all of the above reasons, from a clinical perspective, I am of the opinion that Mr. Nehass fails to meet the standard of fitness to proceed with his sentencing. 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.

[17] In his *viva voce* evidence Dr. Pallandi opined that Mr. Nehass cannot interpret the judicial proceeding properly because of his psychosis. Dr. Pallandi was concerned that Mr. Nehass cannot instruct counsel without the intrusion of these psychotic delusions. He explained that psychosis is a symptom of losing contact with reality and that delusions and disordered speech are common symptoms of psychosis.

[18] Dr. Wong was also of the opinion that Mr. Nehass was mentally unfit due to a mental disorder. In his Report, Exhibit 3, Tab 3 he states:

> Mr. Nehass appears to suffer from **Schizophrenia (Paranoid Subtype), Substance Abuse Disorders (Alcohol, Cannabis, and Cocaine), Antisocial Personality Disorder,** and **Conduct Disorder**. I would also note a history of "**possible ADHS" (Attention Deficit Hyperactivity Disorder)** diagnosed in his youth and which has been treated [a]t various times with stimulant medications over the years. Finally, there is historical

> diagnosis of **Bipolar I Disorder;** however, based on the information available to me, I was unable to come to a similar opinion. [emphasis already added]
>
> …

[19] He also goes on to state at p. 12 of his Report:

> It is my understanding that when assessing an individual's fitness, the courts have applied a "limited cognitive capacity" test (*R. v. Taylor)* wherein an individual is deemed to be unfit if they are unable on account of a mental disorder to 1) understand that nature and object of the proceedings, 2) understand the possible consequences of the proceedings, or 3) communicate with counsel. It is also my understanding that underlying these three branches is whether an individual can meaningfully participate in the court proceedings. Finally, although the court system accepts that individuals are free to make tactical decisions, both for and against their self-interest, that this is predicated on the assumption that the individual is "unfettered" by any sort of disability (*R. v. Adam 2013).*
>
> In my assessment, I do not have any concerns that Mr. Nehass passes the first 2 branches of the fitness test; however, I do have concerns about the third branch of the test … whether he could meaningfully participate in a potentially long and complex Dangerous Offender application.
>
> With respect to Mr. Nehass' ability to meaningfully participate in the court proceedings, I would have concerns that his behaviours, decisions and perceptions of the court proceedings have been strongly influenced by his underlying psychosis. At the core of this is his delusional belief that there is a conspiracy between the crown and/or the court system to find him a Dangerous Offender and/or mentally ill so as to "shut [him] up" regarding his delusional beliefs that, broadly, involve the trafficking/killing of Aboriginal women (amongst many other paranoid delusions). …
>
> Further, I would also have concerns about Mr. Nehass' ability to focus on the court proceedings in an organized and meaningful way. Based on my clinical interactions with him, and observations of his interactions with other health care, law enforcement officers, and court officers, it is apparent

> that he remains psychotically preoccupied and singularly driven to recall the entirety of his concerns in an effort to seek (legal) help in his court proceedings and/or investigate his paranoid delusions. …

[20] I have also noted the affidavit information filed in this matter as Exhibits 4 and 5

[21] And finally, I have had the opportunity of observing and listening to Mr. Nehass over a protracted period of time as well as reading his Charter breach motions in their various iterations.

[22] Based on all of this evidence and my observations, I have no doubt that Mr. Nehass suffers from a mental disorder and that this has resulted in severe psychosis the result of which is that at the present time the delusions arising from his psychosis are distorting Mr. Nehass' basic understanding of the judicial system and these proceedings. In the result, Mr. Nehass cannot participate in these dangerous offender proceedings in a meaningful way. In other words, the psychosis which Mr. Nehass is currently suffering prevents his meaningful presence and meaningful participation in the dangerous offender proceedings.

[23] To proceed with the dangerous offender hearing while Mr. Nehass is in this mental state would be fundamentally unfair and would offend the dignity of the judicial process.

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BROOKER J.