Citation: *R.* v. *Blackjack*, 2010 YKTC 117

Date: 20101028
Docket: 09-00783
Registry: Whitehorse

IN THE TERRITORIAL COURT OF YUKON
Before: Her Honour Chief Judge Ruddy

REGINA

v.

DION MELVIN BLACKJACK

Appearances:
David McWhinnie — Counsel for the Crown
Robert Dick — Appearing as *amicus curiae*

REASONS FOR JUDGMENT

[1] RUDDY T.C.J. (Oral): In January, Dion Blackjack was charged with arson causing damage to property in Carmacks, Yukon. Given Mr. Blackjack's long involvement with both the criminal justice and mental health systems, concerns were raised at an early stage regarding both fitness and criminal responsibility. It is Mr. Blackjack's fitness to stand trial which is the subject of this decision.

[2] Evidence at the hearing consisted of two court-ordered psychiatric assessments prepared by Dr. Shabehram Lohrasbe, dated March 16, 2010, and August 30, 2010. In addition to the two written assessments, Dr. Lohrasbe provided *viva voce* evidence by way of video conferencing. Finally, Mr. Blackjack provided evidence and responded to questions from Dr. Lohrasbe.

[3] Dr. Lohrasbe testified that Mr. Blackjack suffers from a progressive brain deterioration or dementia, likely caused by a combination of chronic alcohol consumption and severe overdoses of methyl alcohol. There is no doubt, from Dr. Lohrasbe's evidence and from his reports, that Mr. Blackjack suffers from a mental disorder and that his cognitive functioning is profoundly impaired. The question to be answered is whether or not, on a balance of probabilities, his dementia effectively renders him unfit to stand trial.

[4] Section 2 of the *Criminal Code* defines unfit to stand trial as meaning:

> … 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;

[5] In his preliminary report, Dr. Lohrasbe addressed the issue of fitness as follows:

> Despite his many limitations, Mr. Blackjack appears to have the basic cognitive capacity that is my understanding of the requirement to consider him fit for trial. However, much may depend on Mr. Blackjack's mood and level of cooperation on any given day. To put it another way, his fitness likely fluctuates considerably. At his 'best', he is quite fit, at his 'worst', he may not be. Such individuals are sometimes referred to as 'fit but fragile'. His fitness level is unlikely to improve with time or treatment, but it will change from day to day.

[6] Subsequent to completion of this report, Mr. Blackjack discharged his counsel and adamantly refused to deal with other counsel. This coincided with growing

concerns about Mr. Blackjack's fitness. As a result, a reassessment of fitness was ordered, and Mr. Dick was appointed as *amicus*.

[7] Dr. Lohrasbe's reassessment of Mr. Blackjack's fitness to stand trial is necessarily limited by Mr. Blackjack's refusal to be re-interviewed. As a result, Dr. Lohrasbe could not speak to the degree to which Mr. Blackjack's mental disorder impacted on his ability to understand the nature, object, or potential consequences of the legal proceedings he is facing. However, as a result of information from collateral sources, he was able to speak to the impact of Mr. Blackjack's mental disorders on his ability to communicate with counsel.

> However, I have substantial information regarding whether his mental disorders *currently* pose a significant impediment to his ability to meaningfully discuss relevant issues with his counsel (communication).
>
> Importantly, his lack of cooperation does not appear to be specific to me or to the days I attempted to interview him. Rather, his fluctuations in mood, attitudes, and behaviour (and subsequent levels of cooperation) have been noted by a number of professionals, and over an extended period of time. He had intermittently and unpredictably been hostile and uncooperative with correctional staff, health care staff and other inmates.
>
> At times his demeanour has suggested simple miscommunication or misunderstandings, at other times, extreme fearfulness and possibly paranoia, at other times, situation-based interpersonal conflict and hostility. It is noteworthy that correctional and healthcare staffs have often had difficulty communicating with him or gaining his cooperation on relatively simple and concrete matters.
>
> Hence, given the complexity and seriousness of the charges against him and their possible consequences of going to trial, my opinion is that he is currently unfit for trial. However, on any given day, the input of defense counsel would be invaluable for the Court, as his 'unfitness' is closely

> associated with his (then) *current* ability to meaningfully communicate discuss with his counsel. That ability will fluctuate.

[8] In his evidence at the fitness hearing, Dr. Lohrasbe confirmed his overall opinion that Mr. Blackjack's mental state has deteriorated since their meetings in February. In particular, he has deteriorated in both awareness of the situation and in his willingness to cooperate, even to his own benefit. Dr. Lohrasbe noted that staff at Whitehorse Correctional Centre had observed that Mr. Blackjack erratically becomes belligerent, even when demands coincide with what he himself wants to do, a typical symptom of progressive dementia. However, Dr. Lohrasbe did opine that if the deterioration were accompanied by an increase in paranoia, there may be some potential for an increased dosage of anti-psychotic medication to render him fit but fragile once more.

[9] In his evidence before me, Mr. Blackjack was adamant that he is not crazy. He was single minded, even fixated, in his focus on getting this process over with by pleading guilty to the offence, even though he equally maintains that he is not guilty. Indeed, he indicated that he discharged his counsel, as his counsel, not surprisingly in the circumstances, would not take Mr. Blackjack's instructions to plead him guilty. From his responses to questions, it was evident that Mr. Blackjack has some understanding of the nature and object of the proceedings. He was able to articulate some understanding of the various parties in the courtroom and their respective roles, but he struggled to articulate an understanding of the potential consequences, seeming to believe that a guilty plea would necessarily result in his freedom. His answers were often disconnected and illogical, but nonetheless he exhibited at least a very basic understanding of the nature and objects of the proceedings and of the possible

consequences.

[10] Having been given the opportunity to question Mr. Blackjack in court, Dr. Lohrasbe again indicated that there is no doubt that Mr. Blackjack's mental state has deteriorated, pointing to the complete loss of any recall of the circumstances surrounding the offence, the often illogical responses, and the simplistic view of the nature and consequences of the proceedings. Dr. Lohrasbe further noted that he no longer believed that medication would have the potential to make Mr. Blackjack fit to stand trial. He could detect no overt paranoia when questioning Mr. Blackjack, and therefore, he concluded there would be little utility in attempting drug treatment with a view to making Mr. Blackjack fit.

[11] Applying the legal test for fitness in this case, even on a balance of probabilities, is no easy task, and it is a task which becomes even more complicated when one looks at some of the case law in this area, included in the Book of Authorities kindly provided by the Crown. Such an examination generally begins with the line of cases out of the Ontario Court of Appeal, beginning with *R.* v. *Taylor*, (1992), 11 O.R. 323, which articulated the oft-repeated limited cognitive capacity test, and continuing with *R.* v. *Morrissey*, 2007 ONCA 770, which held that testimonial capacity was not a prerequisite to fitness.

[12] In *R*. v. *Baufeld*, 2009 YKTC 130, my brother Judge Faulkner succinctly summarized the findings of this line of cases as follows, at paras. 5 and 6:

> ... These decisions make it clear that the factors set out in s. 2 of the *Criminal Code* constitute, in effect, a complete test.
>
> Fitness requires only a limited cognitive capacity to

> understand the process and the consequences of it, and to communicate with counsel. It is not necessary, to be fit to stand trial, that the accused be able to analyze or reason effectively, be able to make decisions that objectively are in his best interests, or that he be able to recall the events in question or to testify in his own defence....

[13] Like Mr. Blackjack, Mr. Baufeld suffered from dementia. His disorder, however, was complicated by the onset of psychotic symptoms with a range of grandiose delusions, including a belief that the legal process did not apply to him as he was above the law. Faulkner J. went on to find that the cumulative effect of Mr. Baufeld's cognitive deficits and psychosis rendered him unfit to stand trial, notwithstanding his limited understanding of the trial process.

[14] In *R.* v. *Xu* (18 April 2007), Toronto 0710000305, (Ont. C.J.), out of the Ontario Court of Justice, Schneider J. considered the "limited cognitive capacity test" and concluded that an element of rationality is required in addition to a factual understanding of the proceedings for an accused to be fit.

> In *Taylor* the court, in respect of the issue of an accused's ability to communicate with counsel, articulated at a 'limited cognitive capacity test'. At the risk of over-simplification, a distillation of the decision is that in order to be fit to stand trial an accused need only have a rudimentary factual understanding of his/her legal predicament. It is not necessary that the accused have a 'rational' understanding of his legal predicament or be able to act in his 'own best interests'.
>
> The court in *Taylor* felt that this standard struck 'an effective balance' between the objectives of the fitness rules and the right of the accused to choose his own defence and have a trial within a reasonable time. While expediency must be considered in setting the fitness standard, it may be the case that the 'right to choose' is a rather empty right where the accused does not have a rational understanding of his legal predicament; where choice is not rational choice.... (paras. 8

> and 9)

He went on to say, para. 10:

> ... Ms. Xu's pervasive paranoid delusional thinking has very clearly rendered her irrational. Ms. Xu becomes fixated upon irrelevancies that are a direct product of her mental illness. And, while she has a rudimentary factual understanding of her legal predicament and therefore against the 'limited cognitive capacity test' would be fit to stand trial, she is not able to proceed. She is not able to conduct her own defence. She is not governable by the Court. She is motivated by her mental disorder to behave within the process in a manner that is not consistent with its objectives. At the same time she is unable to instruct counsel to act on her behalf [because she wishes to speak for herself] in order to demonstrate her sanity. She is in my view, as a result of her mental disorder, not able to adequately respond to the state's prosecution and should be protected from that process by the fitness rules....

This approach was adopted by the B.C. Supreme Court in *R.* v. *Evers* (19 September, 2008), Courtenay 33878-2, (B.C. S.C.).

[15] The *Taylor* case was considered in an earlier Yukon decision out of this Court, *R.* v. *T.J.* [1998] Y.J. No. 124, which dealt with an offender with profound cognitive impairments. Lilles J. found that while *T.J.* had a "superficial" understanding of the court process, such as being able to recognize that he could be sent to jail if found guilty and would be free if found not guilty, he was unfit to stand trial as he was incapable of participating in his own defence in any meaningful way. In addressing *Taylor*, Lilles J. Held at para. 16:

> While the "limited cognitive capacity" test is a low threshold, it is not satisfied by merely demonstrating consciousness. *Taylor*, supra, is most useful for the proposition that it is not necessary that the accused be able to act in his or her own best interest in order to instruct counsel. The issue in the

> case at bar is not whether the accused is capable of protecting his own best interests, but whether he functions at a cognitive level that will allow him to participate adequately in his own defence.

Lilles J. Concluded at para. 18:

> While he is able to communicate with counsel, his lack of appreciation of the process and the roles of the major participants, including his own lawyer, severely limits his ability or capacity to instruct his counsel and to make key decisions regarding his defence. In my view, it is not sufficient for an accused to merely understand and communicate the fact that he does not want to go to jail. That alone does not amount to instructing counsel ....

[16] In reviewing the case law, it becomes evident that the application of the limited cognitive capacity test enunciated in *Taylor* cannot be a simplistic exercise. It is not simply a matter of determining whether an accused demonstrates a rudimentary understanding of legal proceedings. That in and of itself is not enough. The level of understanding, while not required to be comprehensive or nuanced, must be sufficient to enable the accused to participate in his or her defence in a meaningful way.

[17] In applying these principles to the case at bar, it is my conclusion, on a balance of probabilities, that Mr. Blackjack is not fit to stand trial. While he does demonstrate some understanding of the proceedings, like *T.J*., it is, at best, a superficial and overly simplistic understanding, which is insufficient to allow him to participate in the proceedings in any meaningful way. His fixation with getting the proceedings over with by pleading guilty, and his expectation that this will result in his freedom, makes it clear to me that he has no real appreciation of the nature and consequences of the proceedings as required by s. 2 of the *Criminal Code*.

[18] In addition, I have serious concerns with respect to Mr. Blackjack's ability to adequately communicate with and instruct counsel, firstly, as his ability to do so is necessarily hampered by his limited understanding of the proceedings. Secondly, as was noted by Dr. Lohrasbe, the progression of Mr. Blackjack's dementia can be seen in his increasing lack of cooperation, even where in his best interests or in accord with his own wishes. The increasing presentation of this symptom of his dementia, in my view, compromises his ability to communicate with counsel, or be even willing to do so, which he clearly is not. In effect, while unusual, I am of the view that his unwillingness to engage with counsel in this case is itself a symptom of his progressive dementia.

[19] For these reasons I am satisfied, on a balance of probabilities, that Mr. Blackjack is currently unfit to stand trial. Given the progressive nature of his mental disorder, and, indeed, the deterioration in his mental state observed by Dr. Lohrasbe between February and October, he is not likely to be made fit at any time in the future.

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RUDDY T.C.J.