IN THE SUPREME COURT OF YUKON

Citation: *H.M.Q.* v. *Waranuk*, 2008 YKSC 49

Date: 20080619
S.C. No.: 07-AP006
Registry: Whitehorse

Between:

HER MAJESTY THE QUEEN

RESPONDENT

And

TIM A. WARANUK

APPELLANT

Before: Mr. Justice L. F. Gower

Appearances:

Tim A. Waranuk	Appearing for himself
John W. Phelps	Counsel for the Respondent
Mike A. Reynolds	*Amicus Curiae*

REASONS FOR JUDGMENT

INTRODUCTION

[1] This is the summary conviction appeal of Tim Waranuk from a verdict that he is not criminally responsible, on account of mental disorder, for a common assault he committed upon Misty Buchanan on December 14, 2006. Faulkner C.J. of the Territorial Court, as he then was, conducted the trial and rendered the verdict. Mr. Waranuk represented himself both at the trial and on this appeal. However, he was assisted by counsel from Yukon Public Legal Education in the drafting of his Notice of Appeal, which specifies four grounds of appeal. With possibly one exception, Mr. Waranuk did not

pursue those grounds at the appeal hearing. Therefore, the grounds of appeal are largely not at issue before me, although I will address them briefly. Rather, Mr. Reynolds, who graciously agreed to an appointment by this Court to act as *amicus curiae* for the purposes of this appeal, has identified the real issues:

- Did the trial judge err in law by not appointing counsel for Mr. Waranuk, under s. 672.24 (1) of the *Criminal Code*, upon forming reasonable grounds to believe that Mr. Waranuk might be unfit to stand trial?
- Even though Mr. Waranuk was found fit to stand trial, did the trial judge err by failing to appoint an *amicus curiae* to ensure that Mr. Waranuk received a fair trial?
- If the trial judge erred in either of these ways, pursuant to s. 686 (1)(b)(iii) of the *Criminal Code*, is there any reasonable possibility that the ultimate verdict would have been different absent the error?

ANALYSIS

1. Do any of Mr. Waranuk's grounds of appeal have merit?

[2] The first ground of appeal is:

> "that the finding of the learned trial Judge that the accused was exempt from criminal responsibility was inappropriate and unjustified on the evidence before the learned trial Judge."

Mr. Waranuk made no further submissions and filed no materials on this ground of appeal.

[3] The standard of review in assessing the trial judge's verdict that Mr. Waranuk was not criminally responsible on account of mental disorder ("NCRMD") is whether a properly

instructed jury, acting judicially, could reasonably have rendered the same verdict: *R.* v. *Biniaris*, 2000 SCC 15, at para. 36. Of course, pursuant to s. 672.34 of the *Criminal Code*, the NCRMD verdict is premised on a prior finding by the trial judge that the accused "committed the act…that formed the basis of the offence charged", in this case, common assault.

[4] Having reviewed the transcript of the trial, which appears to be complete and accurate in all respects, notwithstanding Mr. Waranuk's submissions to the contrary, I am satisfied that there was evidence before the trial judge which could have led a properly instructed jury, acting judicially, to reasonably conclude that Mr. Waranuk committed a common assault on Misty Buchanan on December 14, 2006. While Mr. Waranuk testified that he did not commit any such assault and rather was himself the victim of an assault by both Ms. Buchanan and Jessie Stephen, in a case such as this, where credibility was the central issue, it was open to the trial judge to make the findings he did based upon the evidence presented. In other words, it is insufficient for Mr. Waranuk to simply submit that, because he testified to the contrary, the finding that he committed an assault upon Ms. Buchanan is unreasonable and incorrect.

[5] As for the NCRMD verdict, the evidence before the trial judge on that issue included Dr. Armando Heredia's expert psychiatric opinion, both in the form of a written report and by way of his testimony on October 9, 2007. Dr. Heredia was qualified as an expert in the area of forensic psychiatry and provided an opinion that at the time Mr. Waranuk committed the common assault upon Ms. Buchanan he was:

> "suffering from a mental disorder of unknown etiology that would allow for a defence of not criminally responsible by reason of mental disorder."

Dr. Heredia further opined that Mr. Waranuk was suffering from “paranoid delusions related to the legal system, the police and the government in general” and that his actions on the day of the incident were “more than likely related to his paranoia and perceived sense of danger”, causing Mr. Waranuk to act out aggressively “during a moment of rage based on the paranoid delusional belief that he was the victim of a general conspiracy against him.” Finally, Dr. Heredia concluded that, at the time, Mr. Waranuk’s ability to understand the nature and quality of his actions could have been “impaired” by his paranoid delusions.

[6] While Mr. Waranuk cross-examined Dr. Heredia at some length on October 9, 2007, there was nothing in any of the answers provided which would have prevented a properly instructed jury, acting judicially, from reasonably concluding that Mr. Waranuk was not criminally responsible on account of mental disorder. Mr. Waranuk stressed in his cross-examination that the doctor’s reference to the mental disorder being “of unknown etiology” meant that Dr. Heredia was really saying that Mr. Waranuk was suffering from an “unknown mental illness.”[1] However, what Dr. Heredia actually testified to on this point was that he was clearly of the opinion that Mr. Waranuk was suffering from a mental disorder and that what he meant by “unknown etiology” was that the *cause* of the mental disorder needs to be determined.[2] Dr. Heredia did not express an opinion that Mr. Waranuk was suffering from an unknown mental illness.

[7] Accordingly, the first ground of appeal must fail.

[8] The second ground of appeal is:

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[1] Transcript, October 9/07, p. 12
[2] Transcript, October 9/07, p. 5

> "that the trial was unfair and limited the ability of the accused to provide full answer and defence to the said charge and to the application to find the accused exempt from criminal responsibility in that the accused was prevented from conducting a full and complete cross examination of the witnesses, including, without limiting the generality of the foregoing, the psychiatrist Dr. Armando Heredia"

[9] This was the only ground of appeal which Mr. Waranuk made any attempt to pursue in his submissions at the hearing of the appeal. Here, I agree with the submission of the *amicus curiae* that an accused's right to cross-examine is a full opportunity, complete and unlimited, except by applicable legal norms and rules: *R.* v. *Mirabi*, [2008] O.J. No. 867, at para. 41. Further, a trial judge may impose proper limitations or restrictions upon the right of cross-examination. As stated by R.E. Salhany, in *The Criminal Trial Handbook*, Vol. 1, looseleaf (Scarborough, ON: Carswell, 1992), at p. 6-18, a trial judge has a duty to ensure that a witness is being treated fairly during cross-examination. That may require the trial judge to intervene where suggestions are made by the questioner to the witness which are not in accordance with the evidence. Ultimately, the trial judge has a duty to stop any cross-examination that is irrelevant, prolix or insulting.

[10] In the case at bar, the trial judge gave significant latitude to Mr. Waranuk in his cross-examination of Dr. Heredia. Indeed, that cross-examination continued over some 37 pages of the transcript and speaks for itself. The only restriction placed on Mr. Waranuk was that he was prevented from asking and receiving answers to inappropriate and improper questions which were irrelevant, repetitive, argumentative, and insulting. Further, the trial judge repeatedly warned Mr. Waranuk not to ask such questions. As I read the transcript, it was only after the third time Mr. Waranuk had referred to Dr. Heredia, either expressly or implicitly, as a "witch doctor", that the trial judge put an end

to the cross-examination. Such repeated insults were indicative of the general tone of the cross-examination throughout. Accordingly, I am satisfied that the trial judge properly fulfilled his obligation to stop the cross-examination, as it was becoming irrelevant, tediously long and insulting. Thus, this ground of appeal must also fail.

[11] The third ground of appeal is:

> "that the accused did not receive complete and timely disclosure of the evidence intended to be led in the trial of the accused on the charge of assault contrary to section 266 of the Criminal Code of Canada and on the issue of whether the accused was exempt from criminal responsibility, including, without limiting the generality of the foregoing, the disclosure of the accused of the psychiatric opinion of the psychiatrist of Dr. Armando Heredia."

[12] Mr. Waranuk has not provided any further submissions or evidence in support of this allegation. The record does not reveal any issue about him not receiving full and timely disclosure of the evidence the Crown intended to call on the assault charge. Nor does the record reflect any issue with the timing of the disclosure of Dr. Heredia's written psychiatric report. The report was filed with the trial court on July 18, 2007 and it is apparent from the transcript of the NCRMD hearing on October 9, 2007 that Mr. Waranuk had a copy in his possession.[3] There is even a suggestion that Mr. Waranuk had the psychiatric report as early as the hearing on September 11, 2007. [4]

[13] Accordingly, this ground of appeal must also fail.

[14] The fourth and final ground of appeal is:

> "that the accused was prevented from calling evidence to contradict the evidence of Dr. Armando Heredia. As a result, the learned trial Judge did not have before him all of the relevant evidence on the issue of the accused's criminal responsibility. The

[3] Transcript, October 9/07, p. 5
[4] Transcript, September 11/07, pp. 8 and 9

> decision made by the learned trial Judge was, therefore, unjustified and in error in all of the circumstances."

[15] Once again, Mr. Waranuk has failed to provide any argument or evidence in support of this allegation. Nor is there any suggestion from the record that he was prevented from calling evidence to contradict the evidence of Dr. Heredia. On the contrary, Mr. Waranuk was expressly given the opportunity to present evidence. [5] At the NCRMD hearing on October 9, 2007, Mr. Waranuk was allowed to call four witnesses and closed by informing the Court that he had no further witnesses he wished to call. [6] Thus, the record shows that there were no restrictions placed upon Mr. Waranuk from calling evidence to contradict the evidence of Dr. Heredia and this ground of appeal must also fail.

2. Did the trial judge err by failing to appoint counsel for Mr. Waranuk under s. 672.24 (1) of the *Criminal Code*?

[16] In my view, this is the critical issue on this appeal. The record reflects that, at the close of the Crown's case on May 24, 2007, the trial judge clearly had concerns about Mr. Waranuk's fitness to stand trial, stating: "I am probably forced to consider whether or not to make an order under s. 672.12." [7] And later, in addressing Mr. Waranuk directly, the trial judge said:

> "It seems to me that there is an issue as to whether you are able to conduct your own defence, or indeed to understand the nature of these proceedings to a sufficient degree, and there may also be an issue as to whether you are criminally responsible for the allegations against you. And for that reason, I am going to order an assessment to be made. …" [8]

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[5] Transcript, September 11/07, pp. 1-3 and 12
[6] Transcript, October 9/07, p. 51
[7] Transcript, May 24/07, p. 56
[8] Transcript, May 24/07, p. 57

The “assessment” referred to by the trial judge was an assessment of the mental condition of the accused. In this case, the application for the assessment was expressly made by the Crown under s. 672.12(2) of the *Criminal Code*.[9]

[17] Sub-section 672.12(2)reads as follows:

> “(2) 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
>
> (a) the accused raised the issue of fitness; or
>
> (b) the prosecutor satisfies the court that there are reasonable grounds to doubt that the accused is fit to stand trial.”

As the accused had not raised the issue of fitness, and as the trial judge ordered the assessment, he must have been satisfied that there were “reasonable grounds to doubt” that Mr. Waranuk was fit to stand trial.

[18] Section 672.24 (1) reads:

> “Where the court has reasonable grounds to believe that an accused is unfit to stand trial and the accused is not represented by counsel, the court ***shall*** order that the accused be represented by counsel.” (my emphasis).

[19] Crown counsel on the appeal argued that the difference in wording between s. 672.12 (2)(b), “reasonable grounds to doubt”, and s. 672.24 (1), “reasonable grounds to believe”, is significant and indicates that the intention of Parliament was that there is a lower standard of proof in s. 672.12 (2) than there is under s. 672.24(1) of the *Criminal Code*. I disagree.

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[9] Actually, the Crown inadvertently referred to s. 672.11(2), but that was obviously in error, as s.672.11 does not have a subsection 2, whereas 672.12 does, and refers to the prosecutor’s application for an assessment of fitness.

[20] Part XX.1 of the *Criminal Code* includes the mental disorder provisions in ss. 672.1 through 672.95. After the "interpretation" provisions in s. 672.1 is the general provision respecting assessment orders, s.672.11. It provides:

> "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;
>
> (*b*) whether the accused was, at the time of the commission of the alleged offence, suffering from a mental disorder so as to be exempt from criminal responsibility by virtue of subsection 16(1)…"[10]

An "assessment" is defined in s. 672.1(1) as "…an assessment of the mental condition of the accused under an assessment order made under s. 672.11…". Under s. 672.11, the court may only order an assessment if it has "reasonable grounds to believe", in the context of this appeal, that the accused is either unfit to stand trial or might be not criminally responsible by reason of mental disorder. Therefore, the assessment ordered under s. 672.12 (2)(b) is actually an assessment under s. 672.11, which can only be ordered if the trial judge has "reasonable grounds to believe" in either of the two criteria just stated (again, in the context of this appeal). Therefore, I conclude that the expression "reasonable grounds to doubt", in s. 672.12(2)(b) is effectively the inverse of the expression "reasonable grounds to believe" in s. 672.24(1), and that both mean the same thing. Put another way, it would be illogical to conclude that assessment order could be made under s. 672.12(2)(b) on a lower standard of proof than "reasonable

[10] I have omitted reference to paras. (c) through (e) in these reasons, as they are not relevant to the case under appeal.

grounds to believe", when that is precisely the standard required under the very definition of an "assessment", which is one ordered under s. 672.11 of the *Code*.

[21] Accordingly, at the time trial judge made the order for the assessment in this case, he had to have had "reasonable grounds to believe" that Mr. Waranuk was unfit to stand trial. He also was aware that Mr. Waranuk was not represented by counsel. Therefore, this should have triggered the application of s. 672.24(1). Indeed, the trial judge expressly confirmed that he had this section in mind when he subsequently addressed the accused on May 30, 2007:

> "Well, as I said, we should have dealt with this last time and didn't get to that point, but I think clearly this is a case where I should make an order under s. 672.24 and direct that counsel be provided for Mr. Waranuk…" [11]

Yet, the trial judge declined to appoint counsel under s. 672.24, apparently because Mr. Waranuk had expressed an intention to hire his own counsel at that stage of the trial, notwithstanding that he made no mention of requiring or even desiring counsel at the outset of the trial.

[22] At the close of the Crown's case on May 24th, the trial judge inquired of Mr. Waranuk whether he wished to call any witnesses or give evidence himself.[12] What followed was an exchange between Mr. Waranuk and the trial judge where Mr. Waranuk indicated that he had previously talked to Chris Cleaveley and Mary Foos, who were lawyers with whom Mr. Waranuk had apparently had previous dealings. There was no further discussion about the appointment of counsel for Mr. Waranuk at that stage of the trial. Rather, the Crown indicated that it would require an adjournment for a few days to

[11] Transcript, May 30/07, p. 2
[12] Transcript, May 24/07, p. 54

determine who could perform the assessment of the mental condition of Mr. Waranuk. Therefore, the trial was adjourned to May 30, 2007.

[23] On May 30th, the trial resumed and the Crown indicated that Dr. Heredia was a qualified psychiatrist available to conduct the assessment. The trial judge informed Mr. Waranuk that he must see Dr. Heredia for that purpose.[13] Mr. Waranuk responded "I'd like to get some legal counsel on this first", and later, "…I will get some legal advice on this here, for sure", as well as, "I'd like to see counsel on this, see what sections I'm charged with."[14] Further, when the trial judge indicated that he thought this was a case where he should make an order under s. 672.24 directing that counsel be appointed for Mr. Waranuk, the following exchange occurred:

> "The Accused: I wanna talk to my own counsel, please.
> The Court: You don't want to - -
> The Accused: Not been provided by this here, they're all part of this here system and this is what I'm challenging. I'm challenging the legality of what they've done to me…
> The Court: So you say you're going to get your own lawyer?
> The Accused: Pardon me?
> The Court: You don't want me to appoint counsel?
> The Accused: Well I'm going to talk to another lawyer that maybe I can trust. The one I tried to phone from the police station…
> The Court: Who is the lawyer you are wanting to talk to about it?
> The Accused: Chris Cleaveley or Mary Foos.
> The Court: I'm sorry?
> The Accused: Chris Cleaveley or Mary Foos, so I asked them to phone and they - -
> The Court: Now, this lawyer, where does he practise?
> The Accused: Well he used to practise in Fort St. John…
> The Court: I'm going to grant the order. So that means you will need to go to this appointment on the first of June at 4 o'clock…

[13] Transcript, May 30/07, p. 1
[14] Transcript, May 30/07, p. 2.

> The Accused: What happens if I do not comply with that?
> The Court: Pardon me?
> The Accused: If I do not need to comply and what happens if I don't comply with that?
> The Court: I can have you arrested…"[15]

[24] Once the court has the necessary reasonable and probable grounds to believe that an accused is unfit to stand trial and is not represented by counsel, the court *must* order that the accused be represented by counsel. In *Canada (Attorney General)* v. *Savard*, [1996] Y.J. No. 4, (C.A.), Rowles J.A., speaking for the majority of the Yukon Court of Appeal stated that, at para. 114:

> "…in order to meet the standard of procedural fairness required by the *Charter*, an accused who is or may be unfit to stand trial ***must be represented by counsel***. An order made under s. 672.24 is consistent with achieving that constitutional standard…" (my emphasis).

A similar comment was made by Wood, J.A., in dissent, at para. 45:

> "***A person*** who is unfit to stand trial by reason of mental disorder, or ***whose fitness is uncertain, cannot possibly be guaranteed a constitutionally sufficient standard of procedural fairness without the assistance of counsel.*** Thus, I am of the view that, when it employed the expression "shall order that the accused be represented by counsel, s. 672.24, Parliament did so with the express intention of ensuring that such persons would be guaranteed the assistance of counsel…" (my emphasis).

[25] Joan Barrett and Riun Shandler, in their text, *Mental Disorder in Canadian Criminal Law*, looseleaf (Scarborough, ON: Carswell, 2006), are also of the view that the appointment of counsel is mandatory if s. 672.24(1) is engaged. At p. 3-20, they stated:

> "***Having made the determination on reasonable grounds that the accused is likely unfit to stand trial, it is not surprising that the Code demands that the accused be represented by***

[15] Transcript, May 30/07, pp. 2 and 3.

> ***counsel at a fitness hearing. If the accused is not represented, the court shall order counsel to represent them.*** A person who is unfit to stand trial, or whose fitness is uncertain, cannot be guaranteed a constitutionally sufficient standard of procedural fairness without the assistance of counsel.
>
> Difficult as this situation can be for defence counsel who are ordered to represent an accused over the accused's express wishes, the overriding obligation for fairness in the proceedings dictates that counsel must be appointed for the fitness hearing regardless of the stage of the proceedings…" (my emphasis).

[26] The annotations in both *Martin's Annual Criminal Code* (2006) and *Tremeear's Criminal Code* (2008) also indicate that, once s. 672.24(1) is engaged, the court *must* appoint counsel for the accused.

[27] Given the mandatory nature of this provision, I am respectfully of the view that the trial judge ought to have canvassed the issue of the appointment of counsel for Mr. Waranuk in greater detail at the close of the proceedings on May 24, 2007, when he first acknowledged his concern about whether Mr. Waranuk was fit to stand trial. At that time he indicated he was "going to order an assessment to be made", but the matter was adjourned to May 30th in order to allow the Crown to make inquiries as to who would conduct the assessment and when. Further, when the proceedings reconvened on May 30th, it was very clear that Mr. Waranuk was desirous of obtaining legal advice in relation to the order that he see a psychiatrist. When the trial judge offered to appoint a lawyer for him, Mr. Waranuk said that he wanted to talk to his own counsel of choice and specifically mentioned either Mr. Cleaveley or Ms. Foos. At that point, the trial judge proceeded to grant the order for the assessment, which required Mr. Waranuk to attend before Dr. Heredia the day after next to commence the assessment. Mr. Waranuk

responded “I’m going to speak to a lawyer and see if this here -- if I have to comply, then you might have to arrest me to …”[16]

[28] It seems that the trial judge was satisfied with Mr. Waranuk’s expressed intention of retaining his own lawyer to obtain legal advice about his obligation to undergo the assessment, and possibly even through the assessment process and the fitness hearing, and thus felt it was unnecessary to appoint counsel for Mr. Waranuk for that reason. However, with respect, I have two concerns about this apparent conclusion.

[29] My first concern has to do with the reasonableness of the evident assumption that Mr. Waranuk would *actually* consult and/or retain counsel to represent him in relation to the assessment order. Mr. Waranuk initially mentioned the names of his prospective counsel at the close of the proceedings on May 24th, however at that time he referred to Mr. Cleaveley as being a “judge” and said that he had “talked to Mary Foos”[17]. On the other hand, when he referred to Mr. Cleaveley and Ms. Foos during the proceedings on May 30th, as quoted above, Mr. Waranuk said that Mr. Cleaveley was no longer a judge, but was back practising law and had been doing so at the time of his arrest. Further, he clarified that although he asked to talk to both Mr. Cleaveley and Ms. Foos, the police never actually facilitated a direct conversation with either individual. A quick check would have confirmed that Chris Cleaveley was a provincial court judge in British Columbia both at the time of Mr. Waranuk’s arrest in March 2007 and at the time of the trial. Therefore, he could not have assisted Mr. Waranuk. Finally, the fact that Mr. Waranuk apparently had taken no steps to retain Ms. Foos prior to the trial should have raised concerns with the trial judge about his ability to actually do so at that stage

[16] Transcript, May 30/07, p. 3.
[17] Transcript, May 24/07, p. 55.

of the trial, particularly keeping in mind the trial judge's observations of Mr. Waranuk throughout the conduct of the Crown's case.

[30] My second concern is that, notwithstanding Mr. Waranuk's expressed intentions of retaining his own counsel at some point in the future, the fact remains that he was not represented by counsel at the stage where the trial judge formed reasonable grounds to believe that he was unfit to stand trial. In my view, it was mandatory that the Court order Mr. Waranuk be represented by counsel before proceeding further with the assessment process. Should Mr. Waranuk have subsequently satisfied the trial judge that he had indeed retained his own counsel, then any counsel ordered to represent him under s. 672.24(1) could have been discharged. However, the important point is that Mr. Waranuk should have had legal advice and representation before proceeding any further through the assessment process. This was especially critical given the timing of the assessment, which was arranged to take place on June 1, 2007, merely one full day after the assessment order was made.

[31] Crown counsel on this appeal argued that the reference in *Mental Disorder in Canadian Criminal Law*, cited above, to the necessity of the accused being represented by counsel at or for "the fitness hearing" is significant, because in this case, once Dr. Heredia's psychiatric report was filed with the Court, expressing his expert opinion that Mr. Waranuk was fit to stand trial, there was no need to proceed with a fitness hearing. Thus, counsel argued that, since there was no fitness hearing, there was no obligation to appoint counsel for Mr. Waranuk. I disagree with this argument for two reasons.

[32] First, there was a form of fitness hearing before the trial judge on August 10, 2007. Although it was extremely summary in nature, and there was no additional

evidence beyond the psychiatric report, nor any particular submissions, it was a hearing nevertheless. Sections 672.27 and 672.28 of the *Criminal Code* deal with the trial of the fitness issue and the continuation of the trial where the verdict is that the accused is fit to stand trial. The trial judge made a clear determination that Mr. Waranuk was "indeed fit to stand trial" and that the trial should proceed.[18] In order to render that verdict on fitness, the trial judge had to consider the evidence before him in the form of Dr. Heredia's report. While there was no application to cross-examine Dr. Heredia, or any other application to adduce further evidence, and while the submissions by the Crown on the issue were nominal ("The fitness seems to be settled in the report… It's a non issue for us at this time"), there was nevertheless a notional hearing on the fitness issue at that point in the trial.[19] Indeed, the very section which authorizes the court to render a verdict on the issue of fitness (s. 672.27) presupposes that the court shall try the issue of fitness, and I find that is what occurred.

[33] Second, s. 672.24 does not state that the order for the accused to be represented by counsel should be made just prior to or exclusively for the purpose of the fitness hearing, but rather that the mandatory requirement of counsel arises "where the court has reasonable grounds to believe that an accused is unfit to stand trial", which logically precedes both the assessment process itself and the fitness hearing.

[34] Therefore, in my respectful view, the trial judge committed an error of law by failing to order that Mr. Waranuk be represented by counsel upon forming the requisite grounds under s. 672.24(1) of the *Criminal Code*.

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[18] Transcript, August 10/07, p. 1.
[19] Transcript, August 10/07, p. 1.

3. Should the trial judge have appointed an *amicus curiae* to ensure trial fairness?

[35] Mr. Waranuk appeared at the outset of the trial without counsel and the record reflects that no reference was made to his having any issue in that regard. On the contrary, he indicated to the Court that he was prepared to proceed to trial. [20] In other words, neither Mr. Waranuk, Crown counsel, nor the trial judge said anything to suggest that Mr. Waranuk was desirous of being represented by counsel or that the trial should be adjourned for that purpose. Therefore, it was reasonable for the trial judge to conclude that Mr. Waranuk was choosing to represent himself, which was his right: *R.* v. *Mirabi*, cited above, at para. 42; and *R.* v. *Peepeetch*, 2003 SKCA 76, at para. 66.

[36] However, the *amicus curiae* on this appeal submits that, even where an accused decides to represent himself, there is an "overriding and overarching principle that the accused is entitled to a fair trial" (*R.* v. *Peepeetch*, cited above, at para. 69) and that a trial judge has a duty to assist a self-represented litigant to ensure procedural fairness (*R.* v. *Mirabi*, cited above, at para. 43). Further, the *amicus* suggests that it is apparent from the record that a number of legal issues and concepts were beyond Mr. Waranuk's knowledge or experience, such as:

- The trial process itself, including the NCRMD hearing;
- Proper cross-examination and questioning techniques;
- The difference between giving evidence and making submissions;
- What constituted relevant evidence; and
- The alleged *Charter* issues.

[20] Transcript, May 24/07, p. 1

On the other hand, the *amicus* concedes that the trial judge repeatedly reviewed these legal issues and concepts with Mr. Waranuk as they arose and attempted to assist him in the presentation of his case.

[37] On my review of the transcript, at least to the close of the Crown's case, while Mr. Waranuk was obviously having some difficulties and was trying the patience of the trial judge, I would not conclude that he was having significantly greater difficulty than the average self-represented litigant. Therefore, there was nothing through the presentation of the Crown's case which suggests to me that an *amicus* had to be appointed in order to ensure trial fairness.

[38] However, for reasons discussed above, at the close of the Crown's case the trial judge must have been satisfied that there were reasonable grounds to believe that Mr. Waranuk was unfit to stand trial. What impact should this determination have had on the issue of trial fairness and the appointment of an *amicus curiae*? Even if the trial judge had properly appointed counsel for Mr. Waranuk for the purpose of the assessment process and the fitness hearing, had the trial judge nevertheless ruled that Mr. Waranuk was fit to stand trial, then presumably the appointed counsel would have been discharged at that stage. However, the question remains whether the trial judge should then have considered the appointment of an *amicus curiae* to assist the Court and to ensure fairness throughout the balance of the trial.

[39] According to *R.* v. *Swain*, [1991] 1 S.C.R. 933, an accused who has not been found unfit to stand trial must be considered capable of conducting his or her own defence (at pp. 936-937). Indeed, an accused who has been found fit to stand trial must be permitted to conduct his own defence, even if that means that he may act to his own

detriment in doing so. The autonomy of the accused in the adversarial system requires that the accused should be able to make such fundamental decisions and assume the risks involved: *R.* v. *Taylor*, [1992] O.J. No. 2394, (C.A.) at para. 51.

[40] Pitted against the accused's right to represent him or herself is the "overriding and overarching principle" that an accused is entitled to a fair trial. As stated, the issue here is whether that principle required the trial judge to consider appointing an *amicus* during the presentation of the case for the defence and/or through NCRMD hearing. The *amicus* on this appeal, Mr. Reynolds, argued that the difficulties confronting Mr. Waranuk through the presentation of the Crown's case, which I referred to above, were also present through the balance of the trial.

[41] In my view, the issues at trial were not particularly complex. It was almost entirely a credibility case, with Mr. Waranuk's evidence contradicting that of the two lay witnesses, Ms. Buchanan and Ms. Stephen. As for any potential *Charter* issues, it is important to remember that Mr. Waranuk only raised the *Charter* at the trial in relation to an alleged breach of his right to counsel following his arrest in March 2007. He alleged that he asked for the opportunity to contact either Chris Cleaveley or Mary Foos and was effectively denied that opportunity. However, even if Mr. Waranuk had satisfied the trial judge that there was a breach of his *Charter* right to counsel, that could not have had an impact upon the fairness of the trial because there was no remedy available to him which would have assisted his defence in any way. Normally, an accused asserts a breach of his or her *Charter* rights in the expectation of seeking the remedy of exclusion of evidence under s. 24(2) of the *Charter*. There was no evidence obtained by the police in the course of, or following, Mr. Waranuk's arrest which was used against him at

the trial. Rather, the evidence tendered by the Crown at the trial was from the two lay witnesses, Ms. Buchanan and Ms. Stephen. Therefore, there was no issue of trial fairness in relation to Mr. Waranuk's theoretical *Charter* arguments which might have prompted the Court to consider the appointment of an *amicus* during the presentation of the defence case.

[42] As for the other aspects of the trial which the *amicus* says Mr. Waranuk likely had difficulty with, I repeat that, while these matters may have been challenging for Mr. Waranuk, the record does not reflect that he was at significantly greater disadvantage than the average self-represented litigant. I acknowledge here that if Mr. Waranuk suffered from paranoid delusions related to the legal system and the government, as Dr. Heredia opined, this may well have caused Mr. Waranuk to go on somewhat longer and more readily stray from the point in his direct examination and cross-examination, but in the end, there is not much more that an *amicus* could have brought into evidence.

[43] I also acknowledge here that the procedural rights guaranteed to an accused at trial, including the right to counsel, continue to apply during a court's consideration of the NCRMD issue: *R.* v. *Langlois*, 2005 BCCA 162, at paras. 21 and 22. However, the record reflects that Mr. Waranuk had apparently chosen not to be represented by counsel at the NCRMD hearing. Despite his submissions on this appeal to the contrary, there is no evidence at the trial that: (1) he took steps to retain counsel; (2) that he could not afford counsel; or (3) that he was declined counsel by legal aid. Also, Mr. Waranuk had been deemed fit for trial, and therefore was presumed in law to be capable of conducting his own defence: *R.* v. *Swain*, cited above.

[44] Lastly, I disagree with Mr. Reynold's submission that an *amicus* might have engaged in the examination and cross-examination of witnesses on Mr. Waranuk's behalf. The Ontario Court of Appeal, in *R.* v. *Samra* (1998), 129 C.C.C. (3^{d}) 144 at para. 22 held that the role of an *amicus curiae* is very circumscribed:

> "…*amicus* curiae is not a party to the action but a friend of the court. [The *amicus* curiae] was not to simply adopt or parrot the submissions of the appellant or his advisors.
>
> Moreover, [the *amicus* curiae's] role was limited. He was to advise or make suggestions. ***He would not be cross examining or examining any witnesses…*** it was expected that he could provide the trial judge with legal submissions that would be of assistance." (my emphasis).

R. v. *Chemama*, 2008 ONCJ 31, applied *Samra* and stressed that an *amicus* does not act for or take instructions from an accused and is not a servant of the accused. Further, whether an accused chooses to consult with an *amicus* or follow his or her advice is entirely up to the accused (at para. 36).

[45] However, an interesting question arises as to the potential effect of Dr. Heredia's psychiatric report upon the trial judge's assessment of Mr. Waranuk's credibility, as it was received before a finding of guilt was made against him. The report contained details of Mr. Waranuk's version of the alleged offence, details of the clinical interview (including some limited information on Mr. Waranuk's past psychiatric history), an assessment of Mr. Waranuk's criminal responsibility and a mental status examination.

[46] The trial judge said in his reasons, at paras. 29 and 30:

> "Mr. Waranuk's version is, in contrast to the Crown's evidence, that it was he, Mr. Waranuk, who was assaulted and that he did nothing other than to defend himself. In my view, it is simply impossible to believe the defendants version of the events, that these two women attacked him, as he claims. It is obvious that

> Mr. Waranuk, as has been demonstrated often throughout the trial, gets extremely agitated and frustrated, to the point that ***his perception of events is***, in my mind, ***obviously coloured, not only by his upset, but by his feelings of persecution and paranoia.***
>
> In short, I find that the accused did commit the acts that form the basis of the offence charged." (see *R.* v. *Waranuk*, 2007 YKTC 75) (my emphasis).

In fairness, I understand the trial judge to have made the above comment with reference to Mr. Waranuk's behaviour throughout the trial to that point, and not with reference to Dr. Heredia's psychiatric report.

[47] The trial judge is presumed to know the law. Section 672.21 of the *Criminal Code* generally prohibits the admissibility, at the trial, of statements made by the accused during an assessment. Also, s. 672.28 provides that where an accused is deemed fit to stand trial, the trial "shall continue as if the issue of fitness…had never arisen." Thus, the evidence taken on the fitness hearing cannot be considered at trial without consent or the pertinent witnesses being recalled (see also *R.* v. *Curran* (1974), 21 C.C.C. (2d) 23 (N.B.C.A.)). Had the trial judge relied upon information from the psychiatric report to make a determination about Mr. Waranuk's credibility, that would have brought trial fairness into question. To that point in the trial, Dr. Heredia had not been called as a Crown witness and Mr. Waranuk had not been given the opportunity to cross-examine him. However, I assume that the trial judge treated the presentation of the psychiatric report in mid-trial in the same way as he might have dealt with disputed evidence on a *voir dire* which is ultimately ruled to be inadmissible, that is, to ignore it.

[48] In summary, I remain unpersuaded that the failure to appoint an *amicus curiae* during the trial significantly compromised the Court's duty to ensure trial fairness. While

such an appointment might have been helpful, it does not raise this issue to a sustainable ground of appeal.

4. Is there any reasonable possibility that the ultimate verdict would have been different, absent the error under s. 672.24?

[49] Even if the trial judge erred by failing to order that Mr. Waranuk be represented by counsel under s. 672.24(1) of the *Criminal Code*, I must nevertheless consider the potential application of s. 686(1)(b)(iii) of the *Code*, often called the "curative proviso", and ask myself whether there is any reasonable possibility that the verdict would have been different without the error: see *R.* v. *Charlebois*, 2000 SCC 53, at para. 28. The appeal must be allowed if the error led to a denial of a fair trial and therefore a "miscarriage of justice", however, the curative proviso can be applied if the appeal court is satisfied that the evidence is so overwhelming that a trier of fact would inevitably come to the same verdict: see *R.* v. *Khan*, 2001 SCC 86, at paras. 27, 28 and 31.

[50] In my view, it is possible that Mr. Waranuk was prejudiced by not having the benefit of legal advice prior to and throughout the assessment process with Dr. Heredia. Such advice *could* have had an impact upon Mr. Waranuk's performance during the assessment and *could* have ultimately affected the outcome of the assessment. Mr. Waranuk does not have to establish that this error would *likely* have affected the outcome.

[51] In particular, on the three occasions when he met with Dr. Heredia, Mr. Waranuk refused to provide his written consent for the release of any of his past medical records. Further, Dr. Heredia stated in a letter to the Court dated June 14, 2007 that it would be "important to have all pertinent medical information in order to provide a well informed

opinion for the court." Conceivably, a lawyer might have persuaded Mr. Waranuk to consent to the release of his medical history to Dr. Heredia and that, in turn, could well have influenced Dr. Heredia's opinion. Also, after Dr. Heredia's psychiatric report of July 16, 2007 was completed, filed with the Court and provided to the parties, at the continuation of the proceedings on August 10, 2007, there was no application by Mr. Waranuk to cross-examine Dr. Heredia on the report. Had Mr. Waranuk been represented, his counsel could have applied for an opportunity for such cross-examination, notwithstanding Dr. Heredia's initial conclusion that Mr. Waranuk was fit to stand trial. The trial judge himself acknowledged that the report could still be useful "at the end of the day" on the issue of criminal responsibility for the alleged assault.[21] Therefore, counsel might have wished to strategically cross-examine Dr. Heredia at that stage of the proceedings, in anticipation of obtaining admissions, or with a view to impacting Dr. Heredia's credibility, for purposes of argument at a later stage in the proceedings. Indeed, it is not inconceivable that counsel could have advised Mr. Waranuk that it was in his best interest to challenge Dr. Heredia's initial opinion that he was fit to stand trial. Finally, appointed counsel may well have also provided legal advice to Mr. Waranuk on how to conduct his defence throughout the balance of the trial, e.g. putting his character at issue in defending the assault allegations.

[52] The ultimate verdict of the trial court was that Mr. Waranuk was, pursuant to s.672.34, not criminally responsible for the assault on account of mental disorder. In my view, had Mr. Waranuk been represented by counsel through the assessment process and the fitness hearing, this verdict *might* have been different. The test under s.

[21] Transcript, August 10/07, p. 1.

686(1)(b)(iii) is whether the trier of fact would have “inevitably” come to the same verdict, or, putting it another way, whether any other verdict would have been “impossible”: see *R.* v. *Khan*, at para. 31. I am not satisfied to that extent.

CONCLUSION

[53] I conclude that the trial judge erred in law by not ordering that Mr. Waranuk be represented by counsel upon determining that he had reasonable grounds, under s. 672.24 of the *Criminal Code*, to believe that he might be unfit to stand trial. Further, this error is not subject to the application of the curative proviso in s. 686(1)(b)(iii) of the *Code.*

[54] Therefore, while I do so regrettably, I feel compelled to order a new trial pursuant to s. 686(2)(b) of the *Code*. I say “regrettably”, because I wish to acknowledge that in all other aspects, the trial judge’s conduct of the trial was marked with great patience, tolerance and fairness.

Gower J.