IN THE PROVINCIAL COURT OF NOVA SCOTIA

Citation: R. v. Denny, 2009 NSPC 59

Date: 20091025
Docket: 2323351 - 353/
2083504/2087308
Registry: Sydney

Between:

Her Majesty the Queen

v.

Andrew Noel Denny

DECISION ON FITNESS
S. 672.27 Criminal Code of Canada

Judge: The Honourable Judge A.Peter Ross

Heard: October 15, 2009

Written decision: October 25, 2009

Charge: 129(a), 145(3), 733.1, 445(1)(a) CCC

Counsel: Darcy MacPherson, for the Crown
Ann Marie MacInnes, for the Defence

By the Court:

[1] Andre Noel Denny is charged with a number of offences at Eskasoni, Cape Breton, Nova Scotia on September 1st and 2nd, 2009. These include causing unnecessary injury to a dog, possession of stolen property, uttering threats and breach of probation.

[2] Upon arrest he was taken to the mental health unit of the Cape Breton Regional Hospital. The Crown wished an opportunity to show cause why he should not be released pending arraignment. As his mental state made it impracticable to bring him before a justice or judge at the courthouse in Sydney, I saw him at the hospital on September 3rd, 2009 and ordered him remanded into custody for a bail hearing.

[3] The following day he was accompanied to court by a letter from the attending psychiatrist, Dr. Foley, which stated, in part :

"I am unable to establish from him why he is here and what has been happening recently . . . He is clearly inconsistent in his responses . . . Mr. Denny appears grossly psychotic. He has a history of aggressiveness, impulsivity, and unpredictability.. . . Adherence to treatment has been an

issue, as has his substance usage . . . he continues to make threats at this time directed towards the RCMP and also some people in the community including family. “

[4] This certainly accords with his presentation to me during the few minutes I saw him at the hospital.

[5] Rather than conduct a bail hearing, a forensic assessment was ordered into fitness and criminal responsibility. Mr. Denny was returned to court on September 25th for an extension. The assessment report, authored by Dr. Kronfli of the East Coast Forensic Psychiatric Hospital (ECFPH) and dated October 9th, 2009 stated that Mr. Denny was, by then, fit to stand trial, although not criminally responsible for his actions. This report was filed with the court on October 13th.

[6] Defence took the position that Mr. Denny was not fit to stand trial, despite the report. The matter thus came on for a contested fitness hearing on October 15th. Testifying were Dr. Kronfli, Mr. Denny, and defence counsel Allan Nicholson who was questioned, for the purposes of the fitness

hearing, by fellow staff lawyer Anne Marie MacInnes. I adjourned for decision to today's date, October 23, 2009 and undertook to supply written reasons.

[7] Views differ on whether this accused is presently fit to stand trial, but there is no doubt in anyone's mind that his mental state is fragile. Dr. Kronfli indicates that Mr. Denny remains actively psychotic, although marked improvement was noted in his level of organization during recent weeks at the ECFPH. He is presently incapable of consenting to treatment. His parents, present in court during every appearance, have given consent on his behalf. There is a well-documented history of abusing street drugs and prescription medication. It seems clear that to maintain whatever level of fitness he has requires that he continue to be medicated on a strict regimen and otherwise cared for in a secure hospital setting, at least for the time being.

[8] The touchstone case for "fitness to stand trial" is the Ontario Court of Appeal decision in R. v. Taylor (1992) 77 C.C.C. (3d) 351. Some have

voiced concerns about whether it sets too low a threshold, or gives too narrow a scope to the statutory definition.

[9] In a somewhat dated case, R. v. MacPherson [1998] N.S.J. No. 241 at par [12], I suggested that the “particulars” set out in the statutory definition of “unfit to stand trial” (s.2 Criminal Code) were not meant to be exhaustive; that such things as ability to enunciate a version of events, and the ability to maintain a courtroom demeanor, could be relevant considerations.

[10] In a recent decision in R. v. Amey [2009] N.S.J. No. 279 I discussed the test for fitness in the following terms:

> 47 The Criminal Code provides a definition of "unfit to stand trial" as follows:
>
> > "unfit to stand trial" means unable on account of mental disorder to conduct a defense 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

48 In R. v. Taylor (1992), 77 C.C.C. (3d) 551 the Ontario Court of Appeal considered how to interpret the mental ability and understanding contemplated by the definition. It formulated a "limited cognitive capacity test" which seems to have gained wide acceptance in Canadian courts. It is now generally acknowledged that an accused seeking to satisfy a court of his fitness for trial has a low threshold to cross.

49 Subsequently, In R. v. Morrissey (2007), 54 C.R. (6th) 313 Blair J.A., speaking for the same court, said, at para. 27, "it requires only a relatively rudimentary understanding of the judicial process -- sufficient, essentially, to enable the accused to conduct a defense and to instruct counsel in that regard." However he cautioned against overly simplistic interpretations of the Taylor test. The court took the opportunity to elaborate somewhat on Taylor and to clarify the distinction between fitness to stand trial and testimonial competence.

50 We know something about Mr. Morrissey's mental condition from paras. 16 to 19 of the decision. He had a self-inflicted brain injury which rendered him incapable of remembering events minutes before and during an alleged homicide. It was possible he had islands of memory, but consistent with demented individuals he confabulated, unconsciously filling in the gaps. He thus was incapable of taking the stand and giving reliable information about the critical events. His injury was permanent. He showed significant decline in intellectual functioning, had virtually lost his ability to comprehend written material, but had adequate verbal abilities including language comprehension, recall of information and the ability to reason with words. He could have a conversation with his counsel, though unable to recount the critical events. He had poor Judgment.

51 The court distinguished "communicating the evidence" from "communicating with counsel." They are related concepts but founded on different rationales. It said that testimonial competence was not a condition precedent to being fit to stand

trial. It held that being able to communicate with counsel does not necessarily entail the ability to testify about the critical events and relate them to one's lawyer. At para. 27 Blair, J.A. criticized any reading of Taylor which reduced the test to a simple inquiry into whether the accused "could recount the necessary facts relating to the offence in such a way that counsel can properly present a defense." At para. 9(b) however, the court seemed to allow that amnesia of the immediate events "could be a factor in a finding of unfitness."

52 At para. 31 of Morrissey the court points out that the issue in Taylor was whether the delusional accused was unfit because he was incapable of giving instructions that were in his best interests. The court dispensed with any such requirement for fitness and set out the well-known "limited cognitive capacity" test. At para.32 of Morrissey the court traces a clear line through Taylor to an early English case (Pritchard) which annunciated what was to become the common law test for fitness. Importantly this included, "whether he is of sufficient intellect to comprehend the course of the proceedings in the trial so as to make a proper defense ... and to comprehend the details of the evidence, which in a case of this nature must constitute a minute investigation."

53 In Morrissey at para. 33 the court referred to another of its previous decisions wherein the accused was found fit in that "he was able to follow the evidence generally, although he might misinterpret it ... and might not act with good judgment." Returning again to Taylor, at para. 35, the court affirmed the rationale underpinning the fitness for trial concept as follows:

> “In order to ensure that the process of determining guilt is as accurate as possible, that the accused can participate in the proceedings or assist counsel in his/her defence, that the dignity of the trial process is maintained, and that, if necessary, the determination of a fit sentence is made possible, the accused must have sufficient mental fitness to participate in the proceedings in a meaningful way.”

> 54 Blair, J.A. concludes this portion of the Morrissey Judgment by saying at para.36 that "meaningful presence and meaningful participation at the trial, therefore, are the touchstones of the inquiry into fitness."
> ...
> 65 My reading of Taylor and Morrissey is that an accused, to be considered fit, must possess the ability to engage with the trial process in a meaningful way. A fit accused would not be impervious to incriminating evidence; rather, he would be able to grasp its possible significance, able to appreciate that it might be accepted by the trier of fact. The trial process itself should make some impression on the accused.

[11] In a case such as Amey, who suffered from alcohol-induced dementia, the mental state, and hence the fitness, has a more static quality. Here, as in MacPherson (another accused with delusionally disordered thinking), fitness is a dynamic state of affairs dependent upon changes in mental condition, the effectiveness of medications, etc. The issue can arise at any stage of the proceedings prior to a verdict.

[12] The statutory definition begins by saying that “unfit to stand trial means unable . . . to conduct a defence . . . or to instruct counsel to do so. . .” I am not aware of a case where the difference between ability to “self-represent” and the ability to instruct counsel to represent has been considered. It is

obvious that conducting a defence on one's own - choosing witnesses, defining areas for questioning, engaging in cross-examination, appreciation of relevancy and admissibility, tactical decisions such as whether to testify - is a more difficult proposition that giving instructions which would allow a criminal law practitioner to do them on one's behalf. It would seem that Mr. Denny could more readily convey his position, recollections, suggestions, etc. to counsel in a private setting, on his own terms, in a non-threatening environment, without the stresses and stimuli that a trial brings. A lawyer thus instructed, with the benefit of disclosure, could then interview potential witnesses, conduct questioning, and so forth.

[13] Presently, at least, Mr. Denny is represented by counsel and my decision is given in that context. Whether his mental status changes, or whether he continues to be represented (given counsel's concern that he cannot receive instructions), and how that might impact on the ongoing issue of fitness - there are matters which may have to be considered in future.

[14] My discussion of the evidence will be discursive and rather brief. It will draw some comparisons with the MacPherson and Amey cases. This

seems appropriate given the common involvement of judge, counsel and some expert witnesses. At the same time I am acquainted with other accused who have been before me on this issue, and other cases from other courts where the issue has been considered.

[15] In a nutshell, Dr. Kronfli says that Mr. Denny is presently fit in that he understands the role of judge and counsel, knows the function of the court and possible outcomes, knows the events behind the charges and is capable of relating them to counsel, and is able to follow the proceedings and maintain a courtroom demeanor. Mr. Denny, who desperately wants out of the ECFPH, wholeheartedly agrees.

[16] Dr. Kronfli describes how he broached the charges with Mr. Denny by quoting an extract from the Crown file, or summarizing one of the allegations, and asking open-endedly for a response. He says that in time Mr. Denny was able to give (not merely repeat) details of the events and to discuss such matters with him in the way an accused would with counsel. He suggests that Mr. Denny not only gained the capacity to do this, but overcame reluctance to do so.

[17] In contrast Mr. Nicholson, his counsel, says that he is unable to obtain instructions. He finds Mr. Denny to be disorganized in his thinking, preoccupied with his delusions, unable to focus on the contents of the Crown file, unable to have a conversation with counsel about the events and thus unable to communicate with counsel.

[18] Dr Kronfli acknowledges that Mr. Denny was sometimes uncooperative. However he is of the opinion that Mr. Denny now has the ability to communicate with counsel, though he may choose not to do so on a given occasion.

[19] Dr. Kronfli has had direct contact with Mr. Denny more than 10 times, engaging in interviews of varying duration. He has also had access to staff observations, reports and other information. Mr. Nicholson saw Mr. Denny briefly in the cells at the Sydney courthouse during his first appearance, when he was grossly psychotic, and a second time the very day of the hearing. With Mr. Denny in the hospital in Halifax, access is a difficult matter for counsel. There was no conversation over the telephone in between

these meetings. Mr. Nicholson says he was awaiting the forensic report, which only appeared on October 13th.

[20] The relationships between doctor and accused, and counsel and accused, are clearly different, both as to who is “in charge”, so to speak, and also in the sense that Mr. Denny has become increasingly fearful of Dr. Kronfli as someone who may keep him in a place he does not want to be. Mr. Nicholson has represented Mr. Denny on various occasions in the past and has his trust. Mr. Denny was diagnosed with schizophrenia in 1997; nevertheless Mr. Nicholson indicates that he was always able to discuss the charges and obtain instructions, until now. Dr. Kronfli said that Mr. Denny was unfit when first seen at the ECFPH, but improved afterwards in behaviour and organization. Mr. Nicholson suggests that Mr. Denny presented to him on October 15th as he did initially to Dr. Kronfli, i.e. engaging in a monologue about his delusions and not relating to the “facts” as they appear on the Crown sheet.

[21] Dr. Kronfli says that Mr. Denny, having conversed with other patients at the hospital, came to understand the implications of being found NCR -

that his fate would be in the hands of doctors rather than the court. I note that during his brief appearance on September 25th to have the assessment order extended Mr. Denny exhorted me to remand him to the correctional center, or to the local hospital, saying that I was the judge and that the doctors could not tell me what to do. Mr. Nicholson agreed that he seemed to understand the NCR issue. In this and in other respects Mr. Denny shows an ability to understand.

[22] In Amey I said at Par [62]

> The first statement of "unfit" in the statutory definition is "unable on account of mental disorder to conduct a defense or to instruct counsel to do so." Communication with counsel must be informed, at least on a basic level, by an awareness of the proceedings as they unfold. Memory of the impugned conduct, as well as the ability to absorb and retain memory of things which unfold at trial are both important to giving instructions. The instructions need not display analytical thinking and do not have to be in the client's best interests. However, presence and participation suggest that the accused be more than a bystander.

[23] I had the benefit of observing Mr. Denny during the proceedings. I also heard him testify. The medical finding that he does not suffer any cognitive deficits seems borne out. When asked, he was able to articulate

the roles of judge and counsel. He appears to be able to string together and follow a line of thought, although delusional thinking is apt to insinuate itself at almost any point, causing him to go off on a tangent. Nevertheless, he could be brought back to topic by questioning on the stand, and was able to relate some factual background concerning the charges. He offered rationales for some of his alleged behaviour - that he was on drugs when supposedly fleeing police or being somewhere he was not supposed to be. He corrected the surname of a complainant as it appeared on the Information. He gave some detail concerning his actions and the actions of the dogs (his own and the one he supposedly harmed) and the place where the events occurred. When asked about the threats towards police he retorted that they were still alive and well, as if to downplay the significance of any words.

[24] Defence contends that this case is more akin to MacPherson than Amey, and I agree. However there are also significant differences.

[25] During the fitness hearing, at least, Mr. Denny was able to observe the decorum of the court. While he became somewhat animated on the stand,

especially when expounding on his various delusions, he seemed to have the ability to follow the evidence. He took issue with Dr. Kronfli's assertion, given earlier in the hearing, that they had met 10 times, suggesting that it was 4 or 5 at most. While I prefer Dr. Kronfli's count to that of the accused, it does show that he was paying attention and wished to put forward something that might undermine the evidence of the previous witness. He did not fidget or act out. He did not interrupt the proceedings. While there is no doubt that Mr. Denny may be somewhat impulsive or obstreperous on occasion, he appeared to do fairly well in the courtroom setting. He also showed marked improvement from his earlier, albeit very brief appearances.

[26] As noted, Mr. Denny's testimony was sprinkled with delusions about one thing or another, as Dr. Kronfli believed it would be. As an example, he seemed to think that his glasses had a camera which allowed his mother to "see" Dr. Kronfli. He believed they had a relationship. However it did not seem to me that these delusions intruded on his thinking to the same degree as in MacPherson, where it appeared the accused was completely overwhelmed. Mr. MacPherson also displayed a distrust of counsel, unlike Mr. Denny.

[27] Dr. Kronfli thought that Mr. Denny would say he was guilty in an attempt to avoid a possible finding of NCR and to get himself into a correctional center instead of the hospital. Mr. Denny did the opposite - he professed to be not guilty of all the charges except one - a breach of probation charge. While Dr. Kronfli's prediction proved incorrect, I note that this does show some ability to discriminate amongst the charges. It suggests some level of thinking about them.

[28] It has been said that an accused should "know what is happening to him in the criminal process" (see Taylor). Defence points out that Mr. Denny believed he was being taken back to court for the actual trial of the charges. It also points to the apparent contradiction between Mr. Denny's wish to get on with the trial and the fact that by being uncommunicative he was actually prolonging the process. I note that according to the Taylor test the accused is not expected to be able to make decisions which are in his or her best interests. As well, Dr. Kronfli suggests that there may be things Mr. Denny needs to be told "in a concrete manner." For his part, Mr. Denny testifies that he is able and willing to talk to Mr. Nicholson.

[29] In cross examination, Mr. Nicholson was asked whether Mr. Denny's testimony was "what you experienced downstairs". As the question was framed I understood the answer to be a clear agreement with the suggestion that Mr. Denny seemed much more compliant and organized on the stand than when being interviewed in the cells before court. I am concerned about predicating a finding of unfit primarily on one pre-court interview.

[30] One should not underestimate the difficulties associated with representing a mentally ill accused, nor the challenges posed by having Mr. Denny housed so far from the court where he will be tried and the location of his counsel. However I think one should not conflate these practical exigencies with the issue of fitness *per se*. Whether Mr. Denny can obtain the most effective representation in such circumstances is an open question, but not quite the same question as whether he is fit to stand trial.

[31] I find on the evidence before me that the presumption of fitness for trial has not been displaced. Mr. Denny has been remanded to the ECFPH to

maintain his fitness. He is scheduled back in court on October 29th, at which time an effort should be made to obtain an early trial date.

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JUDGE A. PETER ROSS

Sydney Justice Center
October 25th, 2009