PROVINCIAL COURT OF NOVA SCOTIA

Citation: *R v M*, 2019 NSPC 30

Date: 2019-04-19
Docket: 8333576-8
Registry: Pictou

Between:

Her Majesty the Queen

v

RJM

ASSESSMENT ORDER DECISION

Judge:	The Honourable Judge Del W Atwood
Heard and bench decision rendered:	2019: 17 April in Pictou, Nova Scotia
Written decision released:	2019: 19 August 2019
Charge:	Paragraph 334(b), subsections 145(3) and 733.1 *Criminal Code of Canada*
Counsel:	T William Gorman for the Nova Scotia Public Prosecution Service Douglas Lloy QC for RJM

By the Court:

Synopsis

[1] This decision builds on insightful reasons rendered in *R v MPC*, 2001 NSFC 7.

[2] RJM is a 31-year-old male charged with theft, breach of undertaking, and breach of probation (case numbers 8333576-8).

[3] The prosecution is opposed to RJM's release, and applies for an in-custody assessment order pursuant to § 672.11, 672.12 and 672.16 of the *Criminal Code,* in order to address fitness and s 16 mental-disorder-defence issues.

[4] Based on the submissions which I have heard, an assessment order would be amply warranted; further, this is one of those rare cases when an in-custody assessment is justifiable. Defence counsel supports the application.

[5] The prosecution has asked that this order be worded as what has become known as a dual-status or dual-remand order, so that RJM would be detained either in hospital or at a provincial correctional facility. The objective in wording the order this way is to allow RJM to be held in custody at the East Coast Forensic Hospital when actually being assessed there, and to allow him to be transferred to a remand facility when not being assessed—usually the

Central Nova Scotia Correctional Facility—so as to free up space at the hospital.

[6] Although the form generated by the Justice Enterprise Information Network system comprehends the making of these sorts of orders, the simple fact is that it is the law that should drive JEIN, not *vice versa.*

[7] For the reasons that follow, I find that the court must order that RJM be detained in hospital only, as a dual-status order would not be authorized by statute.

[8] These are my reasons.

Part XX.1 of the Code

[9] The *Criminal Code* was amended substantially by SC 1991, c 43, § 4, in force 4 Feb1992 by SI/92-9, (1992) Can Gaz II 569, to include a new Part XX.1 dealing with "mental disorder"; this was a legislative effort to remedy what was held in *R v Swain*, [1991] 1 SCR 933 to be manifold constitutional inadequacies in the *Code* regarding mentally-ill persons.

[10] In *Winko v British Columbia (Forensic Psychiatric Institute)* [1999] 2 S.C.R. 625 at ¶ 20, the majority opinion of the Court referred to Part XX.1 in these terms:

> [A]n entirely new approach to the problem of the mentally ill offender, based on a growing appreciation that treating mentally ill offenders like other offenders failed to address properly the interests of either the offenders or the public. *The mentally ill offender who is imprisoned and denied treatment is ill-served by being punished for an offence for which he or she should not in fairness be held morally responsible.*
>
> [Emphasis added.]

[11] The amendments included a complete overhauling of the criteria to be applied and the procedures to be followed in ordering fitness and criminal-responsibility assessments. The new criteria and procedures have been referred to as a "complete code governing the making of assessment orders": *R v Snow*, [1992] OJ No 1792 (Gen Div).

[12] Sections 672.11-672.15 deal with the making of assessment orders, their contents and duration. Section 672.16 deals with criteria applicable to in-custody assessments:

> 672.16 (1) Subject to subsection (3), an accused shall not be detained in custody under an assessment order of a court unless
>
> > (a) the court is satisfied that on the evidence custody is necessary to assess the accused, or that on the evidence of a medical practitioner custody is desirable to assess the accused and the accused consents to custody;
> >
> > (b) custody of the accused is required in respect of any other matter or by virtue of any other provision of this Act; or
> >
> > (c) the prosecutor, having been given a reasonable opportunity to do so, shows that detention of the accused in custody is justified on either of the grounds set out in subsection 515(10).

Presumption against custody - Review Board

(1.1) If the Review Board makes an order for an assessment of an accused under section 672.121, the accused shall not be detained in custody under the order unless

(a) the accused is currently subject to a disposition made under paragraph 672.54(c);

(b) the Review Board is satisfied on the evidence that custody is necessary to assess the accused, or that on the evidence of a medical practitioner custody is desirable to assess the accused and the accused consents to custody; or

(c) custody of the accused is required in respect of any other matter or by virtue of any other provision of this Act.

Residency as a condition of disposition

(1.2) Subject to paragraphs (1.1)(b) and (c), if the accused is subject to a disposition made under paragraph 672.54(b) that requires the accused to reside at a specified place, an assessment ordered under section 672.121 shall require the accused to reside at the same place.

Report of medical practitioner

(2) For the purposes of paragraphs (1)(a) and (1.1)(b), if the prosecutor and the accused agree, the evidence of a medical practitioner may be received in the form of a report in writing.

Presumption of custody in certain circumstances

(3) An assessment order made in respect of an accused who is detained under subsection 515(6) or 522(2) shall order that the accused be detained in custody under the same circumstances referred to in that subsection, unless the accused shows that custody is not justified under the terms of that subsection.

[13] As is evident in the language of the statute, § 672.16(1) creates a rebuttable presumption against holding in custody someone who is ordered assessed; the

section goes on to describe the evidence that may be admitted in a hearing to decide whether to order an in-custody assessment, and the legal test to be applied in making a judicial determination whether a person to be assessed ought to be detained for that purpose.

[14] Part XX.1 includes an interpretation section. Significantly, § 672.1(1) sets out a purposive definition "hospital" as:

> a place in a province that is designated by the Minister of Health for the province for the *custody, treatment or assessment* of an accused in respect of whom an assessment order, a disposition or a placement decision is made;
>
> (Emphasis added.)

[15] Furthermore, while ¶ 672.16(1)(c) requires that an application by the prosecution to detain a person for an assessment be governed by the detention criteria applicable to bail, § 672.17 goes on to state:

> During the period that an assessment order made by a court in respect of an accused charged with an offence is in force, no order for the interim release or detention of the accused may be made by virtue of Part XVI or section 679 in respect of that offence or an included offence.

[16] It is also of moment that § 672.16(3) provides that, only when a person is already bail-denied under § 515(6) or 522(2) "shall [that person] be detained in custody under the same circumstances referred to in that subsection, unless the accused shows that custody is not justified under the terms of that subsection."

Subsection 672.16(3) is worded to make clear that detention of persons whose mental status is in issue under conditions applicable to bail-denied cases—that is to say, in a provincial correctional institution or remand centre—is the exception, not the rule.

[17] Part XX.1 does refer to the term “dual status”, but it does so, not in the sense of “dual remand” as is the focus feature of this case, but in the context of the legal classification of the “dual status offender”, defined in § 672.1(1) as:

> an offender who is subject to a sentence of imprisonment in respect of one offence and a custodial disposition under paragraph 672.54(c) in respect of another offence;

[18] Section 682.67 of the *Code* proceeds then to deal with the sentence administration of dual-status offenders:

> 672.67 (1) Where a court imposes a sentence of imprisonment on an offender who is, or thereby becomes, a dual status offender, that sentence takes precedence over any prior custodial disposition, pending any placement decision by the Review Board.
>
> (2) Where a court imposes a custodial disposition on an accused who is, or thereby becomes, a dual status offender, the disposition takes precedence over any prior sentence of imprisonment pending any placement decision by the Review Board.

[19] Under this provision, it would appear that a person who is ordered to serve a custodial sentence in a prison or penitentiary, and who is subject concurrently to a review-board disposition of detention in hospital, is to be held in prison or in a penitentiary, subject to a placement decision under § 672.68. Again, this

placement in prison or penitentiary of persons whose mental status is in issue is treated in Part XX.1 as the exception to the rule that the place of custody be a hospital as defined in § 672.1.

[20] Section 672.64 of Part XX.1 deals with high-risk accused. If ordered detained, the norm is detention in hospital: § 672.64(3).

Another interpretive aid

[21] Finally, I consider this point.

[22] Domestic statutes ought to be interpreted in a way that conforms to international law: *R v Hape*, 2007 SCC 26 at ¶53; Ruth Sullivan, *Sullivan on the Construction of Statutes,* 6th ed (Markham: LexisNexis, 2014) at ¶ 18.5-6.

[23] Canada is a state party to the *Convention on the Rights of Persons with Disabilities*, 13 December 2006, 2515 UNTS 3, Can TS 2010 No 8 (entered into force 3 May 2008, ratified with reservations by Canada 11 March 2010) (*CRPD*). The preamble to the *CRPD* recognizes that disability is an evolving concept; disabilities arise when persons who have physical or mental challenges collide with the attitudinal and environmental barriers and prejudices those persons encounter in their lives. Disabilities hinder people's full and effective participation in society on an equal basis with others. Persons who are

suffering from mental disorders—defined in s 2 of the *Code* as “a disease of the mind”—are unquestionably persons with disabilities as defined in the *CRPD*. There can be little doubt that many persons who are experiencing mental illness are being diverted into the criminal-justice system because of lack of primary clinical care and because of other public-policy inadequacies; this fact, and the negative repercussions of it, were reviewed helpfully by Professor H Archibald Kaiser in the article “Commentary: Too Good to be True: Second Thoughts on the Proliferation of Mental Health Courts” (2010) 29:2 Can J Community Mental Health 1-7. The author makes what I consider to be a highly important claim on the consciences of public decision makers—a claim based on evidence and on developing but widely accepted legal norms:

> Canada’s ratification of the *Convention on the Rights of Persons with Disabilities* signals a shift away from virtually exclusive reliance on the medical model, with its focus on illness, clinical discretion, mutability of the individual, and decisions made by others on the basis of best interests, toward a rights-based or disability paradigm. The key insight of the new international consensus is that “disability is not intrinsic, but rather extrinsic … situated not in an individual pathology, but in society’s failure to embrace diverse ways of being in the world”. Acceptance of the disability model requires society “to remove structural constraints that would enable more people to participate and gain access to social resources” . The *Convention* should encourage a frontal assault on the amplified stigma, “the largest barrier to change in every level of the system” . . . that surrounds persons with mental illness who are in conflict with the law and should foster a recognition of the “sanism” that “permeates mental disability law.”
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> [Citations and footnotes omitted.]

[24] The coercive diversion of persons with mental illness into the criminal-justice system distorts resource-allocation priorities, which ought to be focussed on primary continuing care, safe housing, and community integration. To be avoided are measures that lead to sequestration and isolation, which can have harmful consequences. These bad effects weigh mightily on vulnerable people when those with mental illnesses are confined to prisons. A person charged with a criminal offence, whose mental status is in question and who needs to be evaluated, should not be confined (in those rare cases when confinement is proven to be necessary) in conditions equivalent to penal servitude; rather, the conditions should approximate those of a public mental-health-care system that is adequately resourced. In my view, this is the only rational interpretation of Part XX.1 of the *Code* that might be rendered, which would be consistent with art 12 of the *CRPD* "Equal Recognition Before the Law, art 13 "Access to Justice", and art 14 "Liberty and Security of the Person". This interpretation fulfills Canada's obligation under art 4 to refrain from engaging in any act or practice that is inconsistent with the *CRPD*.

Conclusion

[25] All of this analysis leads me to conclude that the place of custody for persons being assessed under Part XX.1 of the *Code* is to be a hospital as defined in § 672.1(1).

[26] Accordingly, the assessment order in this case will require that RJM be detained in hospital. The text box for "provincial correctional institution" is not to be checked.

JPC