SUPREME COURT OF NOVA SCOTIA
Citation: *R. v. Melvin*, 2019 NSSC 306

Date: 20190919
Docket: 447189
Registry: Halifax

Between:

Her Majesty the Queen

v.

James Bernard Melvin

Decision on Counsel's Motion for Permission to Withdraw and an Adjournment of the Dangerous Offender Application Hearing

Judge:	The Honourable Justice Peter P. Rosinski
Heard:	September 19, 2019, in Halifax, Nova Scotia
Counsel:	Christine Driscoll, Q.C., and Sean McCarroll for the Plaintiff Patrick Atherton and Michelle James for the Defendant

Prologue:

[1] Mr. Melvin was convicted by a jury on October 5, 2017 of the attempted murder and conspiracy to commit the murder of Terry Marriott Jr. on December 2, 2008. His present counsels have been acting for Mr. Melvin on this Dangerous Offender Application since March 22, 2018. His Dangerous Offender Hearing was set to commence September 23, 2019. On September 17, 2019 his counsel advised the Court that as of September 16, 2019 they became aware that Mr. Melvin was seeking new counsel for this matter.

By the Court[1]:

[2] Well, I certainly am of the view that present counsel, defence counsel, legitimately have come to the conclusion that, in good conscience and according to ethical principles, they could not continue to represent Mr. Melvin, and that being the case it is appropriate to allow them to be removed as counsel of record.

[3] Secondly, insofar as Ms. James and Mr. Atherton are concerned, I appreciate the difficult position they would be in if they were attempting to act in an *amicus curiae* role – friend of the court. I don't think it is, in the present circumstances,

[1] I gave an oral decision immediately after submissions by Counsel, which I have herein edited for grammar and clarity without effecting changes to the substance of what I said.

appropriate certainly for them to be considered for that position, should it even be considered as a possibility here.

[4] The difficulty we have is, insofar as the adjournment is concerned, which there hasn't been a formal request for that, but in effect, it falls somewhat into place naturally here *unless* the court comes to the conclusion that Mr. Melvin should represent himself. In the circumstances here, the Crown suggests that should not be the case and fairly points out that a Dangerous Offender Application, [especially] if successful [such] designation has significant consequences for a person, an indeterminate sentence (potentially). Of course I realize this is all subject to appeals, but for the moment I will focus on the trial level here.

[5] The difficulty in some respects I am having here, is that I am well aware of the decision I rendered in 2017 NSSC 273; and in that decision I specifically found that Mr. Melvin's firing of Mr. MacEwen as his trial counsel basically [near] the end of the Crown's case, was entirely *purposeful*, in order to have a re-trial because he reasonably thought, I concluded, that the trial, the Crown evidence, did not go well for him. Hence I appointed as *amicus curiae* , Mr. Peter Kidston, to continue the trial in light of that and other findings. And now with that history here in place, I am sitting three days before the Dangerous Offender Hearing and 18 months after his counsel were retained, and actually have retained an expert,

forensic psychiatrist Dr. Klassen to interview him [Mr. Melvin] so Dr. Klassen could testify on December 16-18, 2019, on behalf of the defence. Everything has been marshalled. The Crown has probably spent weeks, I am sure, interviewing the people that they intend to call over the period September 23 to October 18, in pursuit of the Application. Dr. Lohrasbe [the Crown forensic psychiatrist who was to begin testifying on September 23, 2019] has purchased airline tickets. I can imagine how many other people have put their calendars on hold in order to make sure they are available to testify, given the numbers that I anticipate would be testifying. *I am very concerned that a pattern is emerging here, that when things are going to go badly, he hits the emergency exit button and sabotages the process*. However, though *I am firmly convinced that this is the situation here,* [regarding] the reference to the [so-called] "break down" of the relationship that has been ongoing for 18 months, [it] has come *now* - Mr. Melvin himself says it is [due to] essentially a lack of communication and so on. But basically, there has been no reference to the skill level of his counsel [as deficient herein] - certainly they have a vast amount of experience in criminal law [and by all accounts otherwise were ready to proceed on September 23, 2019]. All those things cause me concern, but ultimately I cannot proceed with a hearing if there is a [real] risk that it will not be a fair hearing. In order to obtain a fair hearing, in these circumstances, I am satisfied that Mr. Melvin requires counsel, because this is a nuanced legal matter

and it is going to be ongoing for a while, and the outcome can result in a pretty serious consequence, certainly by any standard. So my inclination is to have to, at some point, I don't know if this is the exact point at which to, declare an adjournment of the hearing - because much will depend on the available dates of the witnesses, any new counsel and so on.

[6] Nevertheless, as the trial judge I am seized with the matter, and so much will depend on my own calendar as well, and that [all] means it could be difficult reconciling dates for this hearing to resume with the number of days it [requires], and given the Crown counsels and the witnesses involved, *it could be one year before this thing gets off the ground again*, and I am saying for the record what I have, because *I attribute this delay to Mr. Melvin in a manner that under the Jordan Cody framework should be attributable to him alone*[2].

Rosinski, J.

[2] I am particularly concerned since s. 720(1) *Criminal Code* requires: "A court shall, as soon as practicable after an offender has been found guilty, conduct proceedings to determine the appropriate sentence to be imposed"; and it has been suggested that: "Post-verdict delay, for the purposes of applying a presumptive ceiling, should be assessed separately from pre-verdict delay and should be subject to its own presumptive ceiling at five months." – *R. v. Charley*, 2019 ONCA 726 at para. 3.