SUPREME COURT OF NOVA SCOTIA
Citation: R. v. Eisnor, 2013 NSSC 263

Date: 20130816
Docket: CRBW 409597
Registry: Bridgewater

Between:

Her Majesty the Queen

v.

Wayne Paul Eisnor

Judge: The Honourable Justice Glen G. McDougall

Heard: July 29, 2013, in Bridgewater, Nova Scotia

Oral Decision: August 16, 2013

Written Decision: August 21, 2013

Counsel: Mark Heerema and Rick Hartlen, (and Lloyd Tancock), for the respondent
Roger Burrill, for the applicant

By the Court [Orally]:

[1] The **Criminal Code of Canada**, R.S.C. 1985, C-46 (as amended) presumes an accused is fit to stand trial, "unless the court is satisfied on the balance of probabilities that the accused is unfit to stand trial." (Reference s. 672.22 of the **Criminal Code**.) The party bringing the application has the burden of proving that the accused is unfit to stand trial. (Reference s. 672.23(2) of the **Criminal Code**.) Where the accused is to be tried before a judge and jury, and the judge directs a trial of the issue of fitness to stand trial before the accused is given in charge to the jury, a jury will be sworn to try the issue. (Reference s. 672.26(a) of the **Criminal Code**.)

[2] The test for fitness to stand trial is set out at s. 2 of the **Criminal Code**, where the phrase "unfit to stand trial" is defined in the following terms:

> "unfit to stand trial" means 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
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> (a) understand the nature or object of the proceedings;
>
> (b) understand the possible consequences of the proceedings, or
>
> (c) communicate with counsel...

[3] Section 2 defines "mental disorder" to mean "a disease of the mind."

[4] The 'limited cognitive capacity' test for unfitness, originally formulated by the Ontario Court of Appeal in **R.** v. **Taylor** (1992), 77 C.C.C. (3d) 551, requires only a relatively "rudimentary understanding of the judicial process" sufficient, essentially, to enable the accused to conduct a defence and to instruct counsel in that regard. It is in that sense that the accused must be able 'to communicate with counsel' and relate the facts concerning the offence.

[5] In this case, the applicant asserts that he cannot answer the charge against him.

[6] The accused seeks a preliminary determination on the issue of whether his fitness to stand trial should be put before a jury pursuant to s. 672.26 of the **Criminal Code**. As a prerequisite, however, the Court must determine whether there are reasonable grounds to believe the accused is unfit to stand trial such that the issue should be tried. Section 672.23 provides:

> Court may direct issue to be tried
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> 672.23 (1) Where the court has reasonable grounds, at any stage of the proceedings before a verdict is rendered, to believe that the accused is unfit to stand trial, the court may direct, of its own motion or on application of the accused or the prosecutor, that the issue of fitness of the accused be tried.
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> Burden of proof

> (2) An accused or a prosecutor who makes an application under subsection (1) has the burden of proof that the accused is unfit to stand trial.

[7] Mr. Eisnor suffers from severe retrograde amnesia. The evidence indicates that this condition deprives him of memory going back about six months prior to the events leading to the death of Mrs. Eisnor. In an earlier ruling (**R.** v **Eisnor**, 2013 NSSC 241) this Court allowed a preliminary motion by the Crown dismissing Mr. Eisnor's claim that the nature of his amnesia created a situation in which the existing test for fitness to stand trial would violate s. 7 of the *Charter of Rights and Freedoms*. Specifically, he asked the court to supplement the language of s. 2 of the **Criminal Code** to incorporate a requirement that the accused be capable of "meaningful participation" in his trial.

[8] The accused submits that the question of his fitness to stand trial should be put to a jury. He notes that the issue was put to the jury in **R.** v. **Morrissey**, 2007 ONCA 770. He suggests, that having followed **Morrissey** on the preliminary issue, the Court should continue to do so. The Crown argues, that in view of the determination that amnesia alone does not constitute unfitness, there is nothing to put to the jury. Acting as gatekeeper, the Court should find that there are no reasonable grounds to find unfitness.

[9] In this case, the accused, for all intents and purposes, rests his unfitness claim entirely on his amnesia. The medical evidence on the record indicates certain additional cognitive deficits arising from the brain injury. A review of Dr. Stephen Porter's forensic psychological assessment report of 12 April 2013 shows a primary concern with amnesia. Dr. Porter's mandate was mainly "to evaluate whether Mr. Eisnor's reported amnesia is genuine or exaggerated/malingered." He concluded that the accused's amnesia was genuine and not malingered.

[10] At earlier stages of the proceeding, it appears that the accused's cognitive deficits were more serious. For instance, Dr. Aileen Brunet's report of 14 September 2010 indicated that the accused appeared to believe that his wife was still alive. In opining that he was unfit to stand trial, she specified that it was not the specific lack of recollection of the event that underlay her opinion "but the fact that Mr. Eisnor cannot remember, on an ongoing, day to day basis, significant and important details about his current situation." That said, Dr. Brunet found him fit to stand trial two

months later, stating that "[t]he cognitive impairments have improved significantly over time and may continue to do so", while acknowledging that "amnesia will prevent him from being able to discuss any particulars of the alleged offence."

[11] In a further opinion in December 2010, Dr. Brunet took the view that the accused's cognitive issues in themselves did not necessarily render him unfit, noting that he had "a level of rudimentary knowledge that has been deemed sufficient in other accused individuals, including those with greater cognitive impairments." This comment would be consistent with **Morrissey** which confirmed that amnesia alone does not lead to a finding of unfitness.

[12] In **Morrissey** Blair, JA, put it this way:

> 29 First, the concept that the accused must be able to recount "the necessary facts relating to the offence in such a way that counsel can then properly present a defence" must be interpreted in a purposive and functional manner, in my view. It is intended to refer more broadly to the accused person's ability to recount the facts generally relating to the offence or offences with which he or she has been charged. It is not intended to narrow the inquiry solely to the ability to relate the immediate facts pertaining to the particular incident giving rise to the crime (e.g., the immediate events surrounding the actual shooting in this case). This makes sense, since *the thrust of the concept of unfitness to stand trial is that the accused is unable to conduct a defence or to instruct counsel to do so. The ability to communicate with counsel in the context of a fitness inquiry speaks to the ability to seek and receive legal advice. An inability to recount the facts immediately connected with the event giving rise to the charges is not the same as an inability to communicate with counsel in a way that permits an accused to seek and receive effective legal advice.* Moreover, there are instances where an accused may wish to - or may be able to do nothing but - formulate a defence based on the contention that he or she is unable to remember the events in question. **[Emphasis added.]**

[13] In any event, Blair, JA, said: "even if the reference to the accused person's ability to recount the facts relating to the offence is to be interpreted narrowly in the sense of the ability to recount the events surrounding the criminal incident itself, then in my view **Taylor** is misconceived as standing for that proposition." The question of whether fitness required the accused to be able to "relate the immediate events surrounding the actual crime" had not been before the court in **Taylor**. It was, however, the question to be decided in **Morrissey**. On this point, Blair, JA, pointed out the differing requirements of testimonial competence versus fitness to stand trial:

> 36 An accused must be mentally fit to stand trial in order to ensure that the trial meets minimum standards of fairness and accords with principles of fundamental justice such as the right to be present at one's own trial and the right to make full answer and defence... Meaningful presence and meaningful participation at the trial, therefore, are the touchstones of the inquiry into fitness.
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> 37 Minimum standards of reliability and trustworthiness, on the other hand, are the principal underpinnings of testimonial competency concerns. These are different goals than those underlying the requirement of fitness for trial. As McLachlin J. (as she then was) noted with respect to testimonial competency, in *Marquard*, supra, at p. 219, "[t]he goal is not to ensure that the evidence is credible, but only to assure that it meets the minimum threshold of being receivable."
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> 38 There is no need, therefore, to collapse the notion of testimonial competence into the notion of fitness for trial in order to meet the objectives of either concept…

[14] In the case that is before me, the Review Board found the accused fit to stand trial in July 2011. By 27 February 2012 Dr. Brunet was able to report that "[o]ther than the impact of his hearing difficulties on conversation Mr. Eisnor does not have any difficulties communicating; he demonstrates clear evidence of being able to understand others (within his own intellectual limitations) and make himself understood." She noted that he became "anxious and fidgety" and worried about giving incorrect responses to questions.

[15] Subsequent to this, Judge Gregory Lenehan of the Provincial Court of Nova Scotia found the accused fit to stand trial on April 3, 2012.

[16] At this first stage of the fitness inquiry, the question is whether there are "reasonable grounds … to believe that the accused is unfit to stand trial," as stated in s. 672.23. The authors of Mental Disorder in Canadian Criminal Law comment that, at this gatekeeping stage, "[i]f there is no basis for the request, the court can decline to hold a fitness inquiry. However, if there is a reason to doubt the fitness of the accused, the issue should be tried." (See § 3.3) Notwithstanding the presumption of fitness, they argue, once the issue is raised, "a fitness hearing should be mandatory other than in circumstances where there is no real possibility that the accused is unfit." (See § 3.3) The authors add the salutary warning that "[w]hile the appellate courts may defer to the trier of fact's verdict on fitness following a fitness hearing, if there is a possibility that the accused was unfit and no hearing was held, they are much more likely to order a new trial." (See § 3.3)

[17] The latter was the case in **R.** v **Pietrangelo** (2001), 152 CCC (3d) 475, [2001] O.J. No 868 (Ont CA). In that case, the appellant had been convicted of attempted murder and assault with a weapon. The appellant, who represented himself, announced "his intention to call the 'entire body of the City of Niagara Falls' as witnesses. When told he could not do so the appellant demanded to be taken back to jail so he could 'take this matter under the ground'." He then refused to participate unless issues relating to his father's Will were litigated. At the end of the evidence-in-chief of the first prosecution witness, the Crown requested a fitness hearing. In response, the trial judge asked the appellant "whether he was fit to stand trial. When the appellant answered affirmatively, the trial judge simply indicated that the trial would proceed, but would not be thwarted by any tactic such as the appellant's refusal to cross-examine because his witnesses were not there." To that the Court of Appeal said at para. 14 of **Pietrangelo**:

> 14 In our view, the trial judge erred in proceeding in this way. There was ample evidence before him by this stage to provide reasonable grounds to believe that the appellant was unfit to stand trial and particularly that he did not understand the nature or object of the proceedings. The trial judge should have directed that the issue of the appellant's fitness be tried… In these circumstances, since the trial proceeded with the real risk that the appellant was unable to understand the nature of the proceedings on account of mental disorder, the resulting conviction must be set aside.

[18] The Court of Appeal went on to find the appellant unfit to stand trial on the strength of a psychiatric report tendered by the Crown and left disposition to the Review Board.

[19] The Nova Scotia Court of Appeal considered a trial judge's determination that a fitness inquiry should not be ordered in **R.** v **Bain** (1994), 130 NSR (2d) 332, [1994] NSJ No 194. In that case, defence counsel raised the issue of fitness to stand trial on the basis that the accused was unable to understand the court process and instruct counsel. In substance, "the application rested on the assertion that he was unable, because of mental disorder to communicate with counsel." Counsel represented to the court that answers given by the accused on the stand were "inconsistent with what I have been informed about in preparation for this trial," adding that "I question whether or not Mr. Bain remembers anything or whether or not he remembers what other people have said or what are conclusions that must be drawn because of the other facts that are known." Pugsley, JA, for the Court of

Appeal cited the case of **R.** v **Steele** (1991), 63 CCC (3d) 149, 1991 CarswellQue 9, where Fish, JA (as he then was) said:

> … Where there is reason to doubt the fitness of the accused, the trial Judge has no discretion: he or she *must* direct the trial of a special issue, even if neither the prosecution nor the defence applies for it…
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> … In deciding whether to direct the trial of a special issue, the Judge's function is to see if there is *doubt* as to accused's fitness. The Judge, at this stage, does not determine whether the accused is fit or not. That question is answered by the verdict concluding the trial of the special issue. **[Emphasis in original.]**

[20] The trial judge in **Bain** could not find "any basis" on which to direct that the issue of fitness to stand trial should go to the jury. Justice Pugsley held the test applied by the trial judge to be "entirely consistent" with the test set out in **Steele**. He went on to review the evidence that was before the trial judge, which included previous assessments finding the accused fit to stand trial at earlier stages. He noted that the trial judge had been able to observe the accused's demeanour and behaviour in court. He also took the view that there were various potential explanations for the accused's strange answers on direct examination that were consistent with his fitness, adding that "[e]vidence that an accused does not act in his best interest … or fails to act with good judgment … is not by itself sufficient to warrant a finding of unfitness." While the Crown acknowledged that a representation by defence counsel that a client was unable to instruct counsel was to be taken seriously, ultimately, "the only support for the motion to refer the assessment of fitness to the jury, was the representation by counsel." The Court of Appeal found that it was open to the trial judge to decline to put the issue before the jury and there was no basis to interfere.

[21] In preparing my decision I have had the benefit of reviewing the trial judge's charge to the Jury in **R.** v. **Morrissey**. In her charge on the fitness application, Justice Fuerst reviewed the presumption of fitness and the burden of proof (including the meaning of "balance of probabilities") before moving on to the substantive content of the phrase "unfit to stand trial." She then reviewed the issue of mental disorder ("disease of the mind"). This involved a detailed review of the medical evidence respecting the brain injury that Mr. Morrissey had suffered.

[22] Justice Fuerst then moved on to the three branches of the analysis for fitness to stand trial. Her treatment of the third branch - the "limited cognitive capacity" test

for ability to communicate with counsel - included the specific caution that "[a]mnesia for the events underlying the criminal charge will *not*, by itself, render an accused 'unable to communicate with counsel'." The issue of communication with counsel had to be considered in that context. This led to a detailed review of the accused's psychological testing including discussion of the evidence respecting amnesia.

[23] The analysis in **Morrissey** included certain deficits in addition to amnesia such as problems with comprehension of written or visual information. There was also evidence of confabulation which seems to have been a relatively significant consideration. Dr. Hy Bloom, who was called as an expert in the **Morrissey** case, expressed concern about the accused's "memory problems, attention problems, and inability to prevent himself from saying the wrong things." Dr. Bloom reviewed his conduct of the Fitness Interview Test, which applies a "low threshold of rudimentary understanding of relevant matters." Among the categories of information considered was the accused's capacity to communicate facts to his lawyer. Dr. Bloom was of the view that the accused had "the capacity to communicate whatever facts he does have, and he is ready to collaborate with his lawyer." Dr. Bloom pointed out that "this does not reflect the *quality* of the information he has to give to his lawyer." He concluded that the accused's "ability to testify relevantly is an unknown", due to memory loss and confabulation. Nevertheless, Dr. Bloom's opinion was that he was fit to stand trial. With respect to the amnesia, Justice Fuerst pointed out to the jury that the experts agreed about the accused's amnesia respecting events of the day in question, but that Dr. Bloom had pointed out that:

> ...inability to recall does not, in and of itself, render him unfit to stand trial. He expressed the opinion that an ability to give an account of the critical events is not part of the requirement that an accused person be able to communicate with counsel, because this would mean that amnestic people would not be fit to stand trial. He said that he suspects an inability to remember critical events does factor into the decision of whether or not an accused person will testify at his or her trial. He accepts that Mr. Morrissey confabulates, but he cannot determine to what extent. He agrees that nothing can be done to try to maximize Mr. Morrissey's memory for the critical events.

[24] After an extensive review of Dr. Bloom's evidence respecting memory, confabulation, and fitness to stand trial, Justice Fuerst dealt with the remaining element of the fitness analysis, causation. She then reviewed the positions of the parties. The Crown accepted the fact of amnesia but emphasized the limited cognitive

capacity test and pointed out that other indicators such as cognitive ability suggested fitness. It appears that the defence focussed primarily on the amnesia, but also pointed to other behavioural issues arising from the brain injury.

[25] The results of the jury's decision is known to counsel in that the jury decided that Mr. Morrissey was, indeed, fit to stand trial and the trial then proceeded before Justice Fuerst sitting alone.

[26] In the case that is before me, the only real issue respecting Mr. Eisnor's level of fitness to stand trial that could be put to a jury is his inability to remember the events immediately surrounding the alleged events and for the six month period preceding it and also for a much shorter period in its aftermath. No one is challenging that the accused has retrograde amnesia which prevents him from communicating to his counsel his version of the events that has led to the charge that is now before the Court.

[27] It is clear from my reading of **Morrissey** that this fact, **in and of itself** [emphasis added], is not sufficient to render the accused unfit to stand trial.

[28] I am therefore not satisfied on the balance of probabilities that there are reasonable and probable grounds to believe that the accused is unfit to stand trial. Consequently the issue of fitness will not be put to the jury unless subsequent circumstances lead me to believe that Mr. Eisnor's condition has deteriorated or is compounded by other factors not now known.

McDougall, J.