SUPREME COURT OF NOVA SCOTIA
Citation: *R. v. Denny* 2014 NSSC 334

Date: 20140902
Docket: CRH No. 417612
Registry: Halifax

Between:

Her Majesty the Queen

v.

Andre Noel Denny

Judge:	The Honourable Justice Peter P. Rosinski
Heard:	September 2, 2014, in Halifax Nova Scotia
Written Release of Oral Decision:	September 17, 2014 **(Orally: September 2, 2014)**
Counsel:	Darrell Martin and James Giacomantonio, Crown Donald C. Murray, Q.C., Defence

By the Court:

Introduction

[1] On April 18, 2012, Mr. Denny was charged on an information that he did commit second-degree murder by unlawfully causing the death of Raymond Taavel on April 17, 2012. Mr. Denny was in downtown Halifax and absent without leave from the East Coast forensic hospital at the time of the incident. He has been detained at the East Coast forensic hospital in order to maintain his fitness to stand trial since that time.

[2] On April 18, 2012, Judge William Digby of the Provincial Court ordered an assessment pursuant to section 672.11 of the *Criminal Code of Canada* regarding Mr. Denny's fitness to stand trial and regarding whether he may have been not criminally responsible at the time of the incident for any criminal acts.

[3] By report letter dated November 23, 2012, Dr. Hy Bloom provided his opinion regarding Mr. Denny's fitness to stand trial and whether he might have been not criminally responsible at the time of the incident.

Psychiatric Opinion

[4] In that report Dr. Bloom concluded: "I have reviewed Mr. Denny's fitness in Section XV above. There is nothing to suggest that Mr. Denny does not meet the criteria for fitness to stand trial".

[5] Within his report Dr. Bloom outlines Mr. Denny's diagnostic picture according to the DSM IV – TR as follows:

> Axis I – one – schizophrenia – persecutory subtype with grandiose features
> Two – polysubstance abuse – in remission due to circumstances
> Three – rule out schizoaffective disorder
> Axis II – antisocial, narcissistic, and borderline personality traits – rule out antisocial personality disorder
> Axis III –nil contributory
> Axis IV– stress of unresolved and serious criminal proceedings; hospital confinement and curtailment of liberty
> Axis V – GAF score of 60

Chronology in Court

[6] Mr. Donald Murray QC has appeared on behalf of Mr. Denny since August 8, 2012. On February 19, 2013 Mr. Denny sought new counsel on the record. On March 19, 2013, Mr. Murray remained confirmed as counsel of record.

[7] The preliminary inquiry stretched over three days: July 8, 9, and 10, 2013. Mr. Denny was committed to stand trial according to his election as charged: Judge and Jury.

[8] On July 18, 2013, he appeared in Supreme Court, and a pretrial conference was ordered and conducted on August 30, 2013. On September 5, 2013, trial dates were set for September 2 – October 24, 2014.

[9] A further pretrial conference was heard in court, by me as the assigned trial judge, on March 7, 2014. Defence made a motion for translation/interpretive services pursuant to section 14 of the *Charter of Rights*. That hearing was set for July 4, 2014 and proceeded as scheduled. Consequently the Court ordered that Mr. Denny's section 14 *Charter of Rights* protection would be violated if he did not have the assistance of an interpreter from the English to Mi'kmaw language and vice versa [Ronald John Paul]; as well as the assistance of a court services worker fluent in the English/Mi'kmaw languages [Barry Bernard].

[10] Mr. Denny's mother passed away. Her funeral was set for July 22, 2014 in Cape Breton. Pursuant to a hearing, Chief Justice Kennedy of this Court recommended that he be permitted to attend the funeral on an escorted basis.

When the breakdown of the lawyer/client relationship came to the court's attention

[11] Next, on August 22, 2014 a letter was received from Mr. Murray indicating there had been problems in the lawyer client relationship with Mr. Denny since

approximately August 18, 2014. It appears that similar problems had arisen shortly before the preliminary inquiry.

[12] On August 26, 2014, another letter was received from Mr. Murray indicating in response to the Court's August 25, 2014 letter, that the breakdown in the relationship between the two was not attributable to "a linguistic nor court services issue."

[13] On August 26, 2014, Crown counsel forwarded to the court a faxed copy of a signed letter addressed to Crown counsel from Mr. Denny which read as follows:

> "I, Andre Denny, will no longer require the service; brought graciously by Donald Murray; as he no longer represents my current issues in dealing with this case that I am currently dealing within regards; to my plea; as I have never made a plea."

[14] Voir dires were set to begin on September 2, 2014, until September 12, 2014. Jury selection was set for September 15, 2014. The Court ordered that this "counsel issue" be dealt with on September 2, 2014.

[15] On September 2, 2014, Mr. Denny remained adamant that he does not wish Mr. Murray to be his trial counsel.

[16] Mr. Murray is agreeable to taking part in an in-camera hearing process, to the extent that the law and ethical standards permit.

[17] The Crown wages caution upon the Court – it is concerned that this process on its own could lead to a Court of Appeal finding reversible legal error on my part which may require the entire trial to be repeated at a later date.

Why an in-camera hearing is appropriate here

[18] Mr. Denny has had the legal services of Mr. Murray since August 2012. Those services have been provided by Mr. Murray pursuant to an arrangement with Nova Scotia Legal Aid. Mr. Murray is a very senior and experienced criminal lawyer.

[19] There are two aspects at play here: Mr. Denny seeks to have a change of counsel; Mr. Murray asserts that their lawyer/client relationship has irretrievably broken down.

[20] On the first aspect, Mr. Denny does have the right to counsel of choice; however, before the Court will adjourn his case to a new date for trial, the Court must be satisfied that his communicated decision to discharge his existing counsel, which is in essence a form of waiver of his right to have his trial heard now as opposed to later, is the product of at least the limited cognitive capacity required for fitness to stand trial. "Fitness to stand trial" requires that Mr. Denny must be capable of communicating with his counsel to instruct counsel, and understand the

function of counsel. He can dispense with counsel even if this is not in his best interests – *R. v. Whittle* [1994] 2 SCR 914. The Court must then assess whether the trial ought to proceed with Mr. Denny self-represented – his adjournment request must be reasonable if it is to be granted in the interests of justice.

[21] In order to delve into this further, I am of the view that the court should hear from Mr. Denny, in an *in-camera* hearing, from which the public will be excluded, as will the Crown, leaving only Mr. Denny and Mr. Murray and court staff [including Barry Bernard and Ronald John Paul, and Lawrence Paul, Mr. Denny's father] present.

[22] On the second aspect, as to whether the lawyer client relationship has irretrievably broken down, I am of the view that it is appropriate for the Court to similarly hear from Mr. Murray within an *in-camera* hearing, more precisely the circumstances of the breakdown in the relationship and any prospects for its being restored. The *in-camera* procedure will best guarantee that there is no public violation of solicitor client privilege as between Mr. Denny and Mr. Murray. If Mr. Denny speaks on his own behalf, he may let slip matters which are otherwise subject to solicitor client privilege.

[23] I bear in mind that the Supreme Court of Canada in *R. v. Cunningham* 2010 SCC 10 has commented upon when courts have the authority to require counsel to continue to represent the accused persons.

[24] At paragraphs 46 – 54 and 59, the Court dealt with the principles regarding when courts may refuse counsel's request to withdraw as counsel of record:

> D. *Refusing Withdrawal*
>
> **46** The court's exercise of discretion to decide counsel's application for withdrawal should be guided by the following principles.
>
> **47** If counsel seeks to withdraw far enough in advance of any scheduled proceedings and an adjournment will not be necessary, then the court should allow the withdrawal. In this situation, there is no need for the court to enquire into counsel's reasons for seeking to withdraw or require counsel to continue to act.
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> **48 Assuming that timing is an issue, the court is entitled to enquire further.** Counsel may reveal that he or she seeks to withdraw for ethical reasons, non-payment of fees, or another specific reason (e.g. workload of counsel) if solicitor-client privilege is not engaged. **Counsel seeking to withdraw for ethical reasons means that an issue has arisen in the solicitor-client relationship where it is now impossible for counsel to continue in good conscience to represent the accused.** Counsel may cite "ethical reasons" as the reason for withdrawal if, for example, the accused is requesting that counsel act in violation of his or her professional obligations (see, e.g., Law Society of Upper Canada, r. 2.09(7)(b), (d); Law Society of Alberta, c. 14, r. 2; Law Society of British Columbia, c. 10, r. 1), or if the accused refuses to accept counsel's advice on an important trial issue (see, e.g., Law Society of Upper Canada, r. 2.09(2); Law Society of Alberta, c. 14, r. 1; Law Society of British Columbia, c. 10, r. 2). If the real reason for withdrawal is non-payment of legal fees, then counsel cannot represent to the court that he or she seeks to withdraw for "ethical reasons". However, **in either the case of ethical reasons or non-payment of fees, the court must accept counsel's answer at face value and not enquire further so as to avoid trenching on potential issues of solicitor-client privilege.**
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> **49 If withdrawal is sought for an ethical reason, then the court must grant withdrawal** (see *C. (D.D.)*, at p. 328, and *Deschamps*, at para. 23). Where an ethical issue has arisen in the relationship, counsel may be *required* to withdraw in order to comply with his or her professional obligations. It would be

inappropriate for a court to require counsel to continue to act when to do so would put him or her in violation of professional responsibilities.

50 If withdrawal is sought because of non-payment of legal fees, the court may exercise its discretion to refuse counsel's request. The court's order refusing counsel's request to withdraw may be enforced by the court's contempt power (*C. (D.D.)*, at p. 327). In exercising its discretion on the withdrawal request, the court should consider the following non-exhaustive list of factors:

- -

whether it is feasible for the accused to represent himself or herself;

- -

other means of obtaining representation;

- -

impact on the accused from delay in proceedings, particularly if the accused is in custody;

- -

conduct of counsel, e.g. if counsel gave reasonable notice to the accused to allow the accused to seek other means of representation, or if counsel sought leave of the court to withdraw at the earliest possible time;

- -

impact on the Crown and any co-accused;

- -

impact on complainants, witnesses and jurors;

- -

fairness to defence counsel, including consideration of the expected length and complexity of the proceedings;

- -

the history of the proceedings, e.g. if the accused has changed lawyers repeatedly.

As these factors are all independent of the solicitor-client relationship, there is no risk of violating solicitor-client privilege when engaging in this analysis. On the basis of these factors, the court must determine whether allowing withdrawal would cause serious harm to the administration of justice. If the answer is yes, withdrawal may be refused.

……

59 In sum, a court has the authority to control its own process and to supervise counsel who are officers of the court. **The Supreme Court of the Yukon Territory correctly concluded that the Territorial Court had the jurisdiction to refuse to grant counsel's request to withdraw. This jurisdiction, however, should be exercised exceedingly sparingly. It is**

> **not appropriate for the court to refuse withdrawal where an adjournment will not be necessary, nor where counsel seeks withdrawal for ethical reasons**. Where counsel seeks untimely withdrawal for non-payment of fees, the court must weigh the relevant factors and determine whether withdrawal would cause serious harm to the administration of justice.

[25] With those issues in mind, I will next examine the matter in an in camera hearing as noted above.

Conclusion

[26] The situation before the court is extraordinary. Mr. Denny is facing very serious criminal charges. His mental health issues factor into his decision-making. Possibly linguistic issues also factor into his decision-making. To the extent that there may be some deterioration of the trust relationship between Mr. Denny and Mr. Murray, it may be that the intervention of John Ronald Paul and/or Barry Bernard [interpreters and Court Services Worker] may restore that trust. The extent to which the lawyer-client relationship has broken down, and whether it can be restored to the satisfaction of Mr. Denny and Mr. Murray remains to be seen.

[27] The purpose of the *in-camera* hearing will be to encourage as much candour or openness as is possible without unduly infringing on Mr. Denny's right to not have disclosed any of the discussions between himself and Mr. Murray as a result of solicitor client privilege. That privilege exists to protect the integrity of trusting confidential relationships between lawyers and their clients. Some breakdowns in

the lawyer-client relationship may be temporary and not pose ongoing ethical bases for counsel withdrawing. I recognize that courts should be very reluctant to put lawyers in position of having to give evidence [or make representations] against their clients except in very rare cases where the proper administration of justice demands it, e.g. see *Re Kaiser* 2012 ONCA 838, paragraph 44, per Blair J.A.

Order

[28] Therefore, I order pursuant to section 486 (1) of the *Criminal* Code that the public be excluded, as I find it is necessary in the interests of the maintenance of order and proper administration of justice. I have provided media personel the opportunity to challenge my proposed order as it is a departure from the "open courts" principle. They have declined to do so: *Dagenais v. CBC* [1994] 3 S.C.R. 835; *R v. Mentuck* [2001] 2 S.C.R. 442.

Rosinski, J.