IN THE PROVINCIAL COURT OF NOVA SCOTIA
Citation: R. v. Ducharme 2008 NSPC 75

Date: December 12, 2008
Docket: 1974149
Registry: Halifax

Between:

Her Majesty the Queen

v.

Shane Ducharme

Judge: The Honorable Judge Marc C. Chisholm

Decision: December 12, 2008

Charge: CC. 266(b)

Counsel: Susan Mackay, counsel for the Crown
John Black, counsel for the Defendant

Oral Decision:

Issue

[1] The issue before the court is whether at a bail hearing the statement made by the accused to a medical practitioner in the course of an assessment being done under s. 672.11 to determine fitness to stand trial and criminal responsibility is admissible for the purpose of establishing in whole and part the opinion of a medical practitioners as it relates to the issue of bail.

Background

[2] Pursuant to s. 672.11 of the ***Criminal Code***, on November 13 of this year, Mr. Ducharme was remanded to the East Coast Forensic Psychiatric Hospital for an assessment regarding fitness and criminal responsibility.

[3] On November the 27 of this year Mr. Ducharme returned to the court at which time an extension of the time to complete the assessment order was granted pursuant to s. 672.15. Mr. Ducharme returned to the court yesterday December 11, 2008. Mr. Ducharme having been found fit to stand trial entered a plea of not guilty.

[4] Before setting the matter down for trial, counsel address the court on the issue of bail, in particular, the issue of the admissibility of statements made by Mr. Ducharme to the medical practitioners.

[5] The crown is opposed to the release of Mr. Ducharme. The crown seeks to have the opinion of Dr. Brunet, the author of the assessment report, considered by the court on the bail hearing. The defence challenged the admissibility of the doctor's opinion for the purposes of bail and relied upon s. 672.21.

Discussion

[6] Section 672.21(1) defines protected statements. There is no question that the statements in issue here are protected statements within that definition. Section 672.21(2) provides that protected statements as defined in s. 672.21(1) are not admissible in evidence without the consent of the accused. Section 672.21(3) provides certain exceptions. A hearing to determine the issue of bail is not one of those listed exceptions in s. 672.21(3). Mr. Ducharme has not consented to the admission of his protected statements.

[7] The issue of protected statements was dealt with in the matter of ***The Queen* vs. *Palma,*** (2000) 149 CCC, (3d) 338. It is a decision of a Justice of the Ontario Supreme

Court of Justice. The Justice in that case found that, while the statements made by an individual to the psychiatrist are not admissible, substantively, as evidence for the truth and contents of the statement, or as a confession, those statements are admissible to establish the foundation for the opinion of the medical practitioner.

[8] I believe the **Palma** (supra) case is correctly decided in that the protection in s. 672.21 relates to substantive use of the statements of an individual to medical practitioners. In coming to that conclusion I reviewed the provisions that relate to the evidence on a bail hearing and the underlying principles with respect to bail hearings.

[9] Section 518 of the ***Criminal Code*** deals with the admission of evidence or information at a bail hearing. Section 518(1) paragraph (d.2) specifies that the justice shall take into consideration any evidence submitted regarding the need to ensure the safety or security of any victim of or witness to an offence. Section 518(1)(e) states that the justice may receive and base his decision on evidence considered credible or trustworthy by him in the circumstances of each case.

[10] The issue at a bail hearing is, in simple terms, an assessment of the risk if an individual is released, and determining whether or not the risk can be appropriately managed by terms restricting the actions/activities of the individual. Section 518 of

the ***Criminal Code*** permits a Justice at a bail hearing to consider evidence which has not yet been tested for admissibility at trial.

[11] A statement made by an accused person to a police officer would normally not be admissible unless it was proven to have been made freely and voluntarily made and not subject to a Charter violation. Those determinations of voluntariness and Charter admission are not required at a bail hearing. The court may consider a statement made by an accused in assessing the risk without those trial pre-requisites. Similarly, evidence by way of wiretap which may be challenged at trial to ensure that the appropriate procedures and authorizations were obtained as to the admissibility of the wiretap are admissible at a bail hearing without those proven pre-requisites and available for the court to consider as credible and trustworthy in order to assess the risk.

[12] Those safe guards are not in place at a bail hearing in order to facilitate the prompt and expeditious processing of matters on bail. However, a justice dealing with a matter of bail must always be conscious of the presumption of innocence and the right of an individual to reasonable bail.

Conclusion

[13] With all of that in mind it is my view that s. 672.21 precludes the introduction of the protected statement of Mr. Ducharme into evidence as an admission or as a statement to be considered for its truth and contents but it does not preclude the introduction of the doctor's opinion with respect to Mr. Ducharme's functioning and mental state, nor does it preclude the introduction of his statements for the purpose of establishing the basis of the doctor's opinion as it relates to the issue of bail. That is my view with respect to the issue of s. 672.21.

Decision on Second aspect of the Issue

[14] This is the court decision on a subsequent issue of judicial interim release in relation to Mr. Ducharme, who stands charged that he on the 12 of November, 2008 in Halifax, did unlawfully assault Mr. O'Connell contrary to s. 266 of the ***Criminal Code***. The Crown is opposed to the release of Mr. Ducharme on all three grounds in s. 515.10 of the ***Criminal Code***.

[15] The evidence in support of the Crown's position is two-fold. First the Crown Attorney has through submissions given the court a summary of the anticipated evidence provided to the Crown through the police report. The Crown anticipates that at trial there would be a witness from the Salvation Army men's shelter, who described viewing what he considered to be an assault by Mr. Ducharme on another

person who was staying there, Mr. O'Connell. He intervened and had conversation with Mr. Ducharme. The police attended and there was conversation between the police and Mr. Ducharme. Those statements made by Mr. Ducharme to the shelter worker and the police tend to suggest that he had delusional thinking with respect to Mr. O'Connell, and that he Mr. Ducharme, felt justified in attacking Mr. O'Connell and that his intention was to kill Mr. O'Connell. "It was his day to die."

[16] The evidence will suggest as I understand it, that Mr. O'Connell was a person essentially completely unknown, a stranger, to Mr. Ducharme.

[17] The Crown is not alleging any prior criminal convictions with respect to Mr. Ducharme.

[18] The second aspect of the Crown evidence is that of Dr. Aileen Brunet who completed an assessment pursuant to s. 672 of the ***Criminal Code*** over a period of approximately one month. Dr. Brunet had contact during that period of time with Mr. Ducharme for purposes of completing an assessment on fitness and criminal responsibility.

[19] The court previously ruled that the opinion of Dr. Brunet regarding the

accused's mental health, and the reasons for that opinion were admissible on a bail hearing dealing with the issue of judicial interim release.

[20] At the bail hearing, Dr. Brunet, identified her report, which is before the court as Exhibit 1. Dr. Brunet testified and gave her opinion with respect to Mr. Ducharme's fitness to stand trial and his mental functioning at the time of the incident in question. The Crown also asked Dr. Brunet her opinion with respect to the risk that he may pose to the complainant or other members of the community should he be released. That was not specifically an issue that was addressed by the court in its earlier decision with respect to the admissibility of Dr. Brunet's evidence. Mr. Black has, on behalf of Mr. Ducharme, objected to admission of that further opinion.

[21] In cross examination it was brought out that, Dr. Brunet's opinion with respect to the risk Mr. Ducharme may pose, if released, is based, in large part, on statements made to her by Mr. Ducharme while he was on remand, pursuant to the order made under s. 672.11.

[22] The question is whether or not her opinion respecting the risk of him re-offending is admissible at the bail hearing, or, as the defence argues, it is inadmissible in that it would violate s. 672.21 protected statements. The defence argues that the

doctor is assuming the statements are truthful and is using the statements made to her by Mr. Ducharme for the truth of those statements, and indirectly using them as an admission of having committed the offence, which the defence argues would be inconsistent with the decision in the ***R.* v. *Palma*** (supra) case.

[23] I do not view the evidence of Dr. Brunet regarding Mr. Ducharme's risk to re-offend as a violation of s. 672.21. I do not view her reliance on the statements made to her by Mr. Ducharme as a violation of that provision. I view her reliance on the statements and assumption they are true as a presumption for her opinion. The court must, in assessing the weight of an opinion, assess the presumptions that were made by the expert in coming to the opinion.

[24] In my view, the opinion with respect to the risk that Mr. Ducharme poses is relevant to the matter of release and is not precluded by the provisions of s. 672.21. The weight to be given to her opinion is to be determined, as it would for any expert opinion, based upon the foundation for the opinion and the presumptions on which it is based. In assessing the weight to be given to the opinion I considered the other evidence that is before the court that could be introduced on this matter, and I am speaking of the salvation army employee and the police evidence which appears to be entirely consistent with the foundation upon which Dr. Brunet relied for her opinion,

with respect to risk. For that reason it is my view that the opinion of Dr. Brunet is entitled to considerable weight with respect to the issue of Judicial Interim release in this case.

[25] Mr. Black is entirely correct. Mr. Ducharme is before the court without any criminal record, charged with an offence which, in the over all scheme of criminal matters, would be viewed as a relatively minor offence of common assault. He is entitled to be presumed innocent of the offence. He is entitled to reasonable bail.

[26] In the vast majority of such cases there would be a release by way of an undertaking with conditions similar to those if not the same as those recommended by the defence counsel. What makes this case very different is the mental health of Mr. Ducharme. I accept: that Mr. Ducharme is at the present time mentally ill; that his illness is currently untreated; that as a result of his illness Mr. Ducharme is subject to delusions; and as a result of those delusions, Mr. Ducharme may be inclined to act out in violent manner as he is alleged to have done in relation to this charge.

[27] While this matter is charged as an assault, in the overall circumstances the court has reason to believe that Mr. Ducharme's intention may have been to cause significant harm to the person. That person was a stranger to Mr. Ducharme which

causes significant concern with respect to Mr. Ducharme, in a delusional state, viewing any other member of the community as someone for whom it is there day to die, or for whatever reason, his delusions may cause him to believe.

[28] For those reasons, in relation to s. 515(10)(b). I have come to the conclusion that there is a substantial likelihood that if released from custody Mr. Ducharme would commit a further offence. I have considered whether or not conditions such as those recommended by counsel for Mr. Ducharme would address those concerns. Again, in this unique situation, given his current mental state and the opinion of Dr. Brunet that if released into the community without any support, and there is no evidence before the court of any support in the community, without any stable housing as he was then staying at the Salvation Army and there is no information as to what his accommodations may be other than living on the streets, it is likely that Mr. Ducharme will continue to deteriorate in terms of his mental health, and if he does, the risk to the community and all members there of would increase as his situation deteriorates. It is highly unusual for the person with no convictions to be denied bail but in these circumstances I find that it is necessary to deny bail on the secondary ground in order to ensure the protection and safety of the public.