

PROVINCIAL COURT OF NOVA SCOTIA

Citation: *R. v. Ward*, 2021 NSPC 43

Date: 20210729

Docket: 8477717, 8477718, 8497192, 8497193

Registry: Dartmouth

Between:

Her Majesty the Queen

v.

Francis Constantine Ward

Judge:	The Honourable Chief Judge Pamela S. Williams
Heard:	July 22, 2021, in Dartmouth, Nova Scotia
Decision	July 29, 2021 in Dartmouth, Nova Scotia
Charge:	Section 264.1(1)(a) x 2 of the <i>Criminal Code of Canada</i> Section 267(b) of the <i>Criminal Code of Canada</i> Section 145(4)(a) of the <i>Criminal Code of Canada</i>
Counsel:	Aileen McGinty, for the Crown Kelly Rowlett, for the Defence

Overview:

[1] Mr. Ward has applied for admission to the Dartmouth Wellness Court on two sets of charges from November 2019 and October 2020. Fitness and criminal responsibility assessment reports suggest Mr. Ward is fit and criminally responsible. The defence argues Mr. Ward is unfit to stand trial. The Crown takes no position. A hearing was held on July 22, 2021. For the reasons which follow I find Mr. Ward unfit to stand trial.

Background:

[2] Mr. Ward is charged with uttering threats to cause bodily harm to a nurse at the psychiatric facility where he lived in November 2019. In October 2020 he was charged with assault causing bodily harm on the same nurse and breaching a condition not to have contact with her.

[3] An outpatient NCR report dated April 20, 2021 (related to the November 2019 offences) provides the opinion Mr. Ward does not meet the criteria for exemption from criminal responsibility.

[4] Counsel for Mr. Ward has not been able to get instructions. I appointed Ms. Rowlett as counsel pursuant to section 672.24(1) of the *Criminal Code* on May 27,

2021. On that day and at her request, I re-ordered an inpatient fitness and NCR assessment related to the October 2020 charges.

[5] A very short report dated June 30, 2021 provides the opinion that Mr. Ward is fit to stand trial. A longer report dated July 21, 2021 suggests Mr. Ward is fit to stand trial and is criminally responsible for the alleged offences of both November 2019 and October 2020.

Issue:

[6] Is Mr. Ward fit to stand trial?

Law:

[7] An accused is presumed fit to stand trial unless the Court is satisfied on the balance of probabilities that they are unfit to stand trial: *section 672.22 Criminal Code of Canada.*

[8] The question of fitness is fluid; that is, fitness may need to be assessed at any stage of the proceedings as a person's mental state can fluctuate.

[9] The burden of proof is on the party raising the issue, in this case, the defence.

[10] The meaning of ‘unfit to stand trial’ is set out in section 2. of the *Criminal Code of Canada*. A person is unfit to stand trial if they are:

...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

- (a) understand the nature or object of the proceedings,
- (b) understand the possible consequences of the proceedings, or
- (c) communicate with counsel;

[11] The test to be applied is one of limited cognitive ability.

[12] Does Mr. Ward understand the nature of and object of the proceedings, understand the possible consequences and can recount to counsel the necessary facts relating to the offence in such a way that counsel can then properly present a defence?

[13] Can Mr. Ward distinguish between the respective roles of the judge and counsel?

[14] Is he able to communicate with counsel rationally or make critical decisions?

[15] Is he able to take the stand to testify if necessary?

[16] That said, Mr. Ward is not required to meet a higher test of analytic capacity or capacity to make rational decisions beneficial to himself: *R. v. Taylor (1992) 77 CCC (3d) 551*.

[17] And to be clear, testimonial competence is not a condition precedent to fitness to stand trial: *R. v. Morrissey, 2007 ONCA 770, 227 CCC (3d) 1*. As stated at para. 36:

[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.

[18] The test is straightforward, but its application can be complicated, depending on the circumstances.

Analysis:

Psychiatric Disorder and Expert Opinion

[19] According to the April 20, 2021 report, Mr. Ward, 52 years of age, has had more than 30 admissions, over many years, to psychiatric facilities. He has treatment resistant schizophrenia, in the context of an acquired brain injury and seizure disorder.

[20] The two-paragraph report of June 30, 2021 states there is no evidence that Mr. Ward's fitness is affected by his disorder, even though his disorder is not well controlled. Dr. Kronfli, the forensic psychiatrist and author of the report, is of the view that Mr. Ward 'chooses not to cooperate but can if he wishes'. At paragraph two the doctor states:

He knows the charges, knows the circumstances of those charges and the context of the situation that led to those charges. He can provide basic instruction to his counsel if he chooses and knows the court process and role of the different functionaries. He could be disruptive if he goes on the stand, he will simply repeat what he told us. He knows the meaning of any oath and what perjury is but that doesn't mean that he would respect that.

[21] The July 21, 2021 report states Mr. Ward continues to be fit to stand trial.

The doctor repeats his previous opinion - there is no evidence that fitness has been affected by his psychiatric illness. At page four the doctor states:

Mr. Ward knew all the details regarding Wellness Court and Mental Health Court. He knew the roles of different court functionaries. He knew the meaning of an oath and perjury and he can communicate and instruct his lawyer regarding the outcome that he wishes to achieve... There is nothing from a psychiatric point of view or cognitive point of view that would prevent Mr. Ward from attending court and to meet the criteria for fitness to stand trial.

[22] The issue is a psycho-legal one. Courts are asked to rule on these issues with the assistance of psychiatric opinions. Unfortunately, in this case, there is little information to assist me in understanding how the doctor arrives at his opinion.

[23] Dr. Kronfli testifies during the hearing; however, he provides little additional information to assist. He says Mr. Ward has a schizoaffective disorder and a traumatic brain injury with cognitive issues. Mr. Ward is not able to make treatment decisions. He has had a substitute decision maker (SDM) for many years. His cognitive limitations are mild to moderate. The doctor believes that cognition has no impact on fitness.

[24] In conducting his assessments, the doctor has not spoken with the SDM or Mr. Ward's longstanding treating psychiatrist. He has not reviewed the evidence in the Crown disclosure with Mr. Ward, but 'spoke to him about the charges', the details of which were not shared with the Court. When asked the date he last met with Mr. Ward, Dr. Kronfli was unable to provide specifics; he "probably met with Mr. Ward this week – if he didn't he [Mr. Ward] might have refused". The doctor states he met with Mr. Ward within the last two weeks. According to the doctor, "If he was fit two weeks ago and there has been no of change in his status, he is still fit". He seems to base this on 24/7 observation by nursing staff.

[25] When asked how the doctor conducts fitness assessments, he admits he does not use a checklist and does not do a modified fitness assessment for cognitive delay. In conclusion he provides the opinion that he is "very confident" Mr. Ward is fit. "He can be cantankerous, but he is fit".

Cognitive Limitations

[26] The defence, during cross-examination of the doctor, introduces an email from the SDM, Mr. Ward's sister, dated July 21, 2021. The Crown does not require the SDM to attend the hearing to confirm the information or authenticate the email. Dr. Kronfli states he spoke with the SDM the day previous and much of the same information was provided by her.

[27] The sister confirms her brother comes from an upper middle-class background. At the age of 19 Mr. Ward suffered a "cataclysmic head injury brought on by a ruptured aneurism" resulting in a seizure disorder, cognitive impairment, and vision impairment. In addition, he suffers from mental illness. Mr. Ward has always been in supported living accommodations. For many years the sister has been his primary advocate and substitute decision maker. She has not been consulted by staff regarding her brother's treatment since being remanded for assessment.

Mr. Ward's testimony

Oath

[28] Mr. Ward testifies during the hearing. When asked what it means to tell the truth, he responds "I am here to be released". He says he spoke with his lawyer a

week ago and saw her in May. When asked if he remembered speaking with her the previous afternoon, he said No, and then said yes. Asked if he remembers meeting with his lawyer before last week, he says “No”. However, at another point in the hearing he says he met with his lawyer 4-5 times. It is unclear how often or when he spoke with his lawyer.

Offences

[29] As for the charges, Mr. Ward says he has one or two charges, “I think one”. He has no recollection of the alleged incidents. It is not even clear he knows he is facing two sets of charges from two distinct encounters with the nurse. He states, at least on a couple of occasions, “I wouldn’t harm a fly. I am a beautiful, caring man. She doesn’t like me. She watched me undress”. Mr. Ward rambles on and must be redirected.

Role of the lawyers and judge

[30] When asked about the role of his lawyer he says she is there to “clarify things in court and get me released – come up with a proper defence, fight for my rights and convey what really happened”.

[31] He does not remember having seen the Crown on previous appearances in Wellness Court. When asked about the role of the Crown, he says she is “a Page”

who brings details to the Judge. The Judge clarifies the facts, listens to the pros and cons and makes a decision. When asked about the kinds of decisions the Judge can make, he says the options are to go back to his family or to the Abbie Lane hospital

Perjury

[32] On the issue of perjury Mr. Ward is asked what can happen if he lies. His response, “I would have to find a witness to what happened”.

Limited Cognition Test

[33] The legal threshold for fitness to stand trial is low.

[34] The test to be applied is one of limited cognitive ability, that is, whether Mr. Ward understands the nature of and object of the proceedings, understands the possible consequences and can recount to counsel the necessary facts relating to the offence in such a way that counsel can then properly present a defence.

[35] As mentioned, the application of the test can be complicated in the face of both a psychiatric illness and cognitive limitations where language adaptation may mask the level of understanding. The psychiatric illness is treatment resistant and has some delusional aspects. Mr. Ward has no insight that he has an illness or that

he needs treatment. The cognitive issues affect both his memory and understanding.

[36] From his evidence it is clear Mr. Ward has issues with his memory, regarding both the alleged offences and more recent events. He does not remember having spoken with his lawyer in the previous 24 hours. Does he recall what, if any instructions, he has provided to his lawyer? Does he recall what advice he has received from his lawyer? If so, does he understand the advice he has received?

[37] On a rudimentary level Mr. Ward knows his lawyer is there “to help him get released”, “to fight for him” and “to convey what really happened”. He states she is “to come up with a proper defence” but it is unclear if he understands what this means in the context of a trial. He never mentions trial. He relates it all in the context of being released. Even his perception of the decision-making role of the judge is in the context of deciding whether he ‘gets out of prison’ and either goes to live with family or goes to the Abbie Lane hospital. He does not explain the role of the judge is, in the context of a trial.

[38] There is no question; Mr. Ward can respond to questions asked of him. But is he able to answer the questions in a way that shows he understands the nature

and object of the proceedings, and the possible consequences? Mr. Ward has a good grasp of the English language. Defence suggests he has had 30 years to adapt to his circumstances. But he answers the questions in only a very general way – his lawyer and the judge are there to “clarify things” – but what things and how? His lawyer is to present a “proper defence” – what is a proper defence?

[39] Fitness involves more than merely being able to answer questions. There must be a basic understanding of the trial process and the ability to process information in a way that enables an accused to instruct counsel. Trial fairness is predicated on the ability to engage in meaningful participation.

[40] In making a legal determination on fitness, I must consider all the evidence before me, including the medical opinion, Mr. Ward’s testimony and the background information provided by Mr. Ward’s sister.

[41] Mr. Ward’s presentation and testimony is not in keeping with the doctor’s opinion. Mr. Ward does not appear to understand important features of the court process, such as the purpose and nature of a trial. Nor does he appear to understand the unique role of the Crown or the judge in the trial process. I am not satisfied that he understands the nature of an oath or the implications of perjury. Aside from that, there are serious concerns about Mr. Ward’s ability to recall, even

very recent events, such as discussions with his lawyer about the trial process, the defences available and any instructions he may provide at any given moment.

Conclusion

[42] For these reasons I am persuaded, on the balance of probabilities, that Mr. Ward is unfit to stand trial at this time. Pursuant to section 672.45 of the *Criminal Code of Canada* this matter will be referred to the *Criminal Code* Review Board along with a transcript of the proceedings and all documents filed in relation to this matter.

Pamela S. Williams, JPC