
CANADA / JUDGMENT

R. v. Ejigu

2012 BCSC 668

COURT

Supreme Court of British Columbia

DECIDED

6 March 2012

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IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

R. v Ejigu,

2012 BCSC 668

Date: 20120306

Docket: 30285

Registry: Fort St. John

Her Majesty the Queen

v.

Ayelech Ejigu

Before: The Honourable Mr. Justice Myers

Oral Reasons for Judgment on

the Fitness of the Accused to Stand Trial

Counsel for the Crown:

Margaret Cissell

Counsel for the Accused:

Sarah J. Rauch

A. Master

Place and Date of Hearing:

Vancouver, B.C.

February 13-14, 2012

Place and Date of Judgment:

Vancouver, B.C.

March 6, 2012

[1] This is my ruling on the fitness of the accused to stand trial.

I. Background

- [2] The accused is charged with the attempted murder of her husband. The trial was partially heard from August 8-19, 2011, in Fort St. John, where the crime was alleged to have occurred. There was not sufficient time to complete the trial. The state of the trial on August 19 was that the Crown, while not having formally closed its case, had called all its witnesses. The defence had called an expert witness out of order because of logistics, and had indicated that the accused was planning on giving evidence when the trial resumed. The accused was to advance a battered wife syndrome defence.
- [3] It was impossible to obtain dates in either Fort St. John or Dawson Creek (the nearest other location for a Supreme Court courthouse) that would not have resulted in an inordinate delay. Further, the accused, her counsel and any available Amharic interpreter were residing in Vancouver. I therefore ordered that the trial continue in Vancouver on September 12.
- [4] On September 1, 2011, the accused was arrested for the murder of the woman she was staying with in Vancouver. The scheduled resumption of the Fort St. John attempted murder charge could not proceed on September 12 because, amongst other things, defence counsel advised she was unable to communicate with the accused because of her mental state.
- [5] At a pre-trial conference on October 17, 2011, defence counsel again advised she could not communicate with her client. A new trial date was set for February 13, 2012. A further pre-trial conference was held on January 16, 2012, at which defence counsel advised that she had engaged Dr. Mark Riley, a psychiatrist, to perform a fitness assessment of the accused. A further pre-trial conference was booked for January 25 in the hopes that the report would be ready.
- [6] Dr. Riley prepared a report dated January 23, 2012. I will further discuss it below. Because Dr. Riley had only limited access to the accused, at the January 25 pre-trial conference I ordered that another fitness assessment be conducted. That was done by Dr. Widajewicz who prepared a report dated February 3, 2012.
- [7] On February 13-14, I conducted a fitness hearing, at which I had the benefit of the testimony of both Dr. Riley and Dr. Widajewicz.

[8] The accused's counsel says she is not fit to stand trial. The Crown takes no position.

II. Legal Principles

[9] Section 672.22 of the Criminal Code, R.S.C. 1985, c. C-46, provides for a presumption of fitness to stand trial unless the court is satisfied, on a balance of probabilities, that the accused is unfit to stand trial. The latter phrase is defined in s. 2 of the Code:

"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

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

[10] In *R. v. Whittle*, [1994] 2 S.C.R. 914, Sopinka J. for the Court explained the test for fitness to stand trial at para. 32:

The test for fitness to stand trial is quite different from the definition of mental disorder in s. 16. It is predicated on the existence of a mental disorder and focuses on the ability to instruct counsel and conduct a defence. That test which was developed under the common law is now codified in s. 2 of the Code as follows:

It requires limited cognitive capacity to understand the process and to communicate with counsel. In *R. v. Taylor* (1992), 77 C.C.C. (3d) 551, the Ontario Court of Appeal, after reviewing the authorities, held that the trial judge erred in concluding that the accused must be capable of making rational decisions beneficial to him. At page 567, Lacourcière J.A., on behalf of the court, stated:

The "limited cognitive capacity" test strikes an effective balance between the objectives of the fitness rules and the constitutional right of the accused to choose his own defence and to have a trial within a reasonable time.

Accordingly, provided the accused possesses this limited capacity, it is not a prerequisite that he or she be capable of exercising analytical reasoning in making a choice to accept the advice of counsel or in coming to a decision that best serves her interests.

III. The psychiatric evidence

[11] Dr. Riley met with Ms. Ejigu three times at the Surrey Pre-Trial Centre. On the first two occasions he spoke to her through a segregation cell door, which he did not consider a proper assessment. On the third occasion, on January 18, 2002, he met with Ms. Ejigu for about an hour, which he felt was reasonable but not ideal for an assessment. On one occasion Dr. Riley went the Centre but could not meet with Ms. Ejigu.

- [12] Dr. Riley also reviewed Ms. Ejigu's records from her detention for the period from December 7, 2011 to January 3, 2012. The records reflect a consistent fear of being taken away and killed, but without reference to any specific individuals. She reported to the prison staff that the other inmates were telling her that she was going to be killed. These concerns were worse when she was in segregation which Dr. Riley noted was unusual, given that in segregation one would have drastically diminished contact with any other prisoners.
- [13] From November 8 to November 18, Ms. Ejigu was certified under the Mental Health Act, R.S.B.C. 1996, c. 288, and sent to the Forensic Psychiatric Hospital. Dr. Riley noted from the records that her condition there improved. I will return to that when I review Dr. Widajewicz's evidence, since he treated her there.
- [14] When Dr. Riley met with Ms. Ejigu on January 18, she was again preoccupied with being taken away and killed.
- [15] In his report, Dr. Riley says:

I also attempted to assess Ms. Ejigu's fitness to stand trial. She seems to understand the gravity of the offences she is charged with but she seems to have only a very limited understanding of the nature of the court proceedings and the possible outcomes. She understands that the judge is the person that makes the decisions in court, and that her counsel is there to "protect" her, but she also thought it possible that the judge could have her executed and that the voices had told her that her lawyer may be the person who will kill her. Her capacity to communicate is seriously impaired, and not simply because of her inability to express herself in English. Ms. Ejigu appears unable to adequately understand what is occurring around her, what people are saying to her (even with an interpreter) and to respond appropriately. Her tendency to misinterpret the actions of others has led to her being physically resistive, for example while she was being escorted to our assessment interview. [p.3, para.1]

Ms. Ejigu's mental disorder also impacts her understanding of her current legal situation, and she seems to believe that she will be executed and that the Court has the power to make this happen. However, her fitness to stand trial is perhaps more impacted by her inability to effectively understand her surroundings and communicate with others, including her defence counsel. I am unable to see how Ms. Ejigu could provide anything more than the most rudimentary instructions to counsel, and she would be incapable of testifying on anything more than establishing her lack of fitness to stand trial.

It is my clinical opinion that Ms. Ejigu cannot be presumed fit to stand trial. Given the limited nature of the current assessment the Court may be reluctant to reach a verdict of unfit to stand trial, but if that were the decision I would respectfully suggest that disposition be deferred to the BC Review Board and that until then, Ms. Ejigu should be remanded to the Forensic Psychiatric Hospital. Alternatively the Court could order a more thorough assessment of her fitness to stand trial under Section 672.11 of the Criminal Code. [p.3, last 2 paras]

- [16] In his evidence at the hearing, Dr. Riley said that Ms. Ejigu seemed to understand the role of defence counsel but she also expressed fear that her counsel would be the agent of her death. He said that he was not sure about Ms. Ejigu's capacity to instruct counsel but her capacity to communicate was severely impaired.
- [17] Dr. Widajewicz is a full-time treating psychiatrist at the Forensic Psychiatric Hospital. He was Ms. Ejigu's psychiatrist when she was there. He met with her four times with the assistance of an interpreter and two times without an interpreter. One of these times was shortly before the hearing and after he had submitted his report. He said she spoke in broken English and could communicate at a basic minimal level regarding her day to day functioning.
- [18] Dr. Widajewicz noted that Ms. Ejigu's condition improved when she was in the hospital compared to the correctional institution. He said that within days of her admittance to the hospital, her suspiciousness abated in response to treatment and the change of environment. She became more relaxed and comfortable around the nursing staff than she had been in the correctional facility. He noted that while she still had fears, she said she felt safer in the hospital. Further, she identified the source of the potential threats as someone from the victim's family, or someone hired by them.
- [19] In his report, he said at para 15:

When asked about the function of a Judge, she stated that he would condemn her to death because she killed someone and tried to kill her husband. I had to redirect her to talk about the assault of her husband but she stated that it was a minor thing and a long time ago. She tended to divert the attention to her murder charge. Nevertheless, she has demonstrated to me that she knows why she is going to Court and wished to talk to her lawyer. She understood the counsel would try to help her. She has some difficulties trusting the legal system as she remains fearful about her life. She does not care too much about trial as she does not expect to live long enough to get into trial. When she talked about a defense lawyer, she indicated that it was a lady who was nice and helpful. She was not sure about the function of a prosecutor but knew that it would be someone from the police telling her husband's side of the story. Ms. Ejigu understands that because she plans to plead guilty to the charges, she will be sentenced. As I mentioned before, she expects to be condemned to death. Ms. Ejigu is capable of explaining how a non-violent person like her ended up committing the crime. Ms. Ejigu also understands that instead of being in jail, she may spend extensive time in hospital.

- [20] In his evidence at the hearing, Dr. Widajewicz said that Ms. Ejigu did not mention that her counsel was part of a plot to kill her or might be the instrument of her death. Rather, she said she found her counsel helpful. She did, however, fear that her counsel might be less willing to represent her in view of the new murder charge.

- [21] Dr. Widajewicz concluded in his report that Ms. Ejigu was not suffering from any other mental illness other than stress-induced anxiety and mood disorder. Because she is acutely stressed and reacts at times with violence towards her jail guards, she will remain certified under the Mental Health Act. His view was that she was fit to stand trial.
- [22] The session he had with Ms. Ejigu after the preparation of his report confirmed his assessment. In fact, he thought she was weighing her legal options quite well. She understood the basis of the court process, although she did lump both charges together.
- [23] In cross-examination Dr. Widajewicz was asked whether he discussed with Ms. Ejigu the meaning of being guilty or not guilty at his last meeting with her. He said they did discuss it, and she said she did not plan on denying what she had done in this (the attempted-murder charge) matter. He said they discussed the possible results of a verdict in terms of a prison term or being remanded to hospital. While Ms. Ejigu still feared death, it was no longer as a result of a death sentence from a judge, but rather from the Ethiopian community.

IV. Conclusion

- [24] Although Dr. Widajewicz and Dr. Riley reached different conclusions, they were based on observations of Ms. Ejigu at different times and in different circumstances. I therefore do not consider them to be in direct conflict.
- [25] It is clear that Ms. Ejigu functions better and feels safer in the hospital than the prison. If she does proceed to trial, Dr. Widajewicz recommended that she remain there through to the trial and has said a bed is available for her. As I have said above, she remains certified under the Mental Health Act.
- [26] On a balance of probabilities, I conclude that Ms. Ejigu is fit to stand trial. She understands the nature of the proceedings. Her reference to not denying what she had done is consistent with the position advanced by her counsel at trial: namely, that without admitting the actus reus of the offence, her main defence would be battered wife's syndrome. That, of course, is based on the actus reus having been committed.
- [27] While it seems she is pessimistic of an acquittal, Ms. Ejigu appears to understand the consequences of the proceedings - a term in prison or (on the basis of a possible change in plea) committal to a mental institution.
- [28] There is no evidence that she is unable to communicate with counsel if the meetings take place at the forensic hospital rather than a correctional institute.
- [29] On the evidence before me, I cannot find that Ms. Ejigu is unable to make the decision as to whether to give evidence when the trial resumes.
- [30] Ms. Ejigu, therefore, does not meet the criteria set out in the definition of "unfit to stand trial" in the Code.

[31] Under s. 672.29 of the Code, I do order that Ms. Ejigu be kept in a hospital until the completion of the trial.

"E.M. MYERS, J."

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