

CANADA / JUDGMENT

R. v. Faire

2020 BCCA 110

COURT

British Columbia Court of Appeal

DECIDED

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2020 BCCA 110 R. v. Faire

COURT OF APPEAL FOR BRITISH COLUMBIA

Citation:

R. v. Faire,

2020 BCCA 110

Date: 20200414

Docket: CA45624

Between:

Regina

Respondent

And

Ryan Michael Faire

Appellant

Before:

The Honourable Madam Justice Newbury

The Honourable Mr. Justice Butler

The Honourable Mr. Justice Abrioux

On appeal from: An order of the Provincial Court of British Columbia, dated
April 26, 2018 (R. v. Faire, Vancouver Docket 240705-2-C).

Counsel for the Appellant:

E. Purtzki

Counsel for the Respondent:

J.R.W. Caldwell

Place and Date of Hearing:

Vancouver, British Columbia

November 22, 2019

Place and Date of Judgment:

Vancouver, British Columbia

April 14, 2020

Written Reasons by:

The Honourable Mr. Justice Butler

Concurred in by:

The Honourable Madam Justice Newbury

The Honourable Mr. Justice Abrioux

Summary:

The appellant was found not criminally responsible by reason of mental disorder (NCRMD) for aggravated assault. He appeals that verdict alleging that the trial judge erred in ordering an assessment of his mental condition pursuant to s. 672.11(b) and entertained the Crown application to have him found NCRMD prior to determining his guilt. Held: Appeal allowed. The judge erred in considering whether the appellant was NCRMD prior to rendering a verdict and without determining whether the appellant's defence had put his capacity for criminal intent in issue. Proceeding in this way resulted in a serious breach of the appellant's s. 7 Charter right to control his own defence and amounted to a miscarriage of justice. The curative proviso could not be applied in these circumstances.

Reasons for Judgment of the Honourable Mr. Justice Butler:

- [1] Following a trial in the British Columbia Provincial Court, the appellant, Ryan Faire, was found not criminally responsible by reason of mental disorder (NCRMD) for aggravated assault. Mr. Faire appeals that verdict on the basis that the trial judge improperly ordered an assessment of the appellant's mental condition under s. 672.11(b) of the Criminal Code, R.S.C. 1985, c. C-46 and improperly entertained a Crown application to have the appellant found NCRMD before the defence case was closed and without any determination as to guilt. The appellant argues that these errors resulted in a serious breach of his s. 7 Charter right to control his own defence and amounted to a miscarriage of justice. In addition, the appellant says the trial judge, in rendering a verdict of NCRMD, erred in law by treating as evidence

unsworn submissions made by the appellant to the court while representing himself. The appellant says the appropriate remedy for the errors made by the trial judge is to order a new trial.

- [2] The Crown argues that the trial judge did not err in ordering the assessment of the appellant because the appellant's own testimony put his mental capacity for criminal intent into question. Accordingly, pursuant to s. 672.11(b), the court properly ordered the assessment to assist in the consideration whether the appellant was suffering from a mental disorder at the time of commission of the offence. Further, the Crown says the judge did not err in determining that the appellant was NCRMD once the assessment was provided to the court and the parties. In the alternative, the Crown argues that if the judge erred, the curative proviso should be applied as the appellant suffered only minimal prejudice and the result would have been the same if the assessment was ordered and the application for a finding of NCRMD was made after a finding of guilt.
- [3] The Crown also says the trial judge was entitled to rely on the appellant's submissions to the court in finding that the appellant was NCRMD. The appellant repeated in evidence the same statements that he made in his submissions to the court. Accordingly, the statements were properly before the court and the judge did not err by relying on them. In the alternative, the Crown submits that if the trial judge erred in this respect, the curative proviso should be applied to uphold the verdict.
- [4] For the reasons that follow, I am of the view that the judge erred in considering whether the appellant was NCRMD prior to rendering a verdict and without determining whether the appellant's defence had put his capacity for criminal intent in issue. While the appellant's defence of self-defence appeared to the trial judge to have little merit, the appellant's ability to control his own defence was significantly impaired when the judge ordered the assessment and determined if the appellant was NCRMD prior to reaching a verdict. This was a serious breach of the appellant's s. 7 Charter right. Having arrived at this conclusion, I need not deal with the second ground of appeal. I would allow the appeal and order a new trial.

The Trial

- [5] The appellant and Helen Xu did not know each other well, but on the morning of October 10, 2015, in the communal kitchen area of a rooming house where they both resided, the appellant angrily confronted her. As she walked away from him, he took a knife out of his pocket and stabbed her repeatedly. He was charged with one count of the attempted murder of Ms. Xu

- [6] The trial began on January 16, 2017, and was scheduled for 21 days. On the first day of trial, the appellant spoke to the court about the background leading to the events of October 10, 2015 and outlined the basis for his defence. The appellant did not deny stabbing Ms. Xu but said that he did so in self-defence. He referred to an international conspiracy and a long-term plot against him and others and said he had received a death threat.
- [7] At the start of the trial, the court appointed an amicus curiae who was present throughout the proceedings. For a variety of reasons, the trial was delayed and a number of continuation dates were scheduled. Over the next several months the Crown presented evidence including the testimony of Ms. Xu. Part-way through the trial, the Crown agreed that there was insufficient evidence to support a charge of attempted murder and proceeded on a charge of aggravated assault. The appellant was self-represented for much of the trial.
- [8] The Crown closed its case on July 20, 2017. The appellant indicated that he wanted to testify. The trial was adjourned to October 12, 2017 and the appellant gave evidence at that time. He maintained that he had been acting under an immediate threat of physical harm from Ms. Xu. He believed that she was part of a corrupt international conspiracy that was hostile to him. He believed that the conspiracy started in the 1920s or 1930s and that Ms. Xu was coordinating or working for people who were involved in a long-standing scheme to steal from him and others in China. His testimony was concluded in one day, at the end of which the appellant said he wanted to call further evidence. He indicated to the court, as he had done before, that there was documentary and other evidence available that would support his position but that he could not obtain that evidence while in custody. The following exchange between the appellant and judge is representative of their discussions:

THE COURT: Mr. Faire, amicus counsel, Mr. Anderson, has suggested that I try and determine at this point if you wish to call any further evidence. The problem you have already identified, is that you feel there is very important evidence, but it's not available to you because you're in custody. The difficulty that you are going to have to weigh, and you don't have to make this decision on the snap right now, you can think about this overnight, is that if you want to call other evidence that's not available, I'll have to adjourn your trial again, to see what the outcome of your bail application is, and whether or not the court decides to release you. If they don't decide to release you, then you won't be any better off, in terms of tracking down what you say are important witnesses or important sources of evidence, whether it's a person or -- or a thing, I don't know.

So do you know if you -- if you're -- do you have a position now, have you decided you don't need to call any further evidence, for example, or what?

THE ACCUSED: No, I would definitely call further evidence, if I can get -

THE COURT: Okay, so -

THE ACCUSED: Yeah, definitely I would.

[9] The proceedings were adjourned for the day and another judge heard the appellant's bail application the following morning. That application was dismissed. When the trial resumed, the judge again asked the appellant if he wanted to proceed based on the evidence that had already been tendered. The appellant said he was not prepared to proceed without the additional evidence he wanted to present. A discussion ensued about a possible bail review application but that would have required an application to Legal Services for funding for counsel to assist in preparing that application. That issue was not pursued and the following discussion took place between the court and the appellant:

THE COURT: But what I am telling you today is you are going to have to be the one who decides at what point you deal with the reality that you are in custody --

THE ACCUSED: Yeah.

THE COURT: -- and denied bail, and the fact that that limits your ability to obtain what you believe, I am sure you honestly believe this, is other evidence in the community. You are not going to be able to obtain it while you are in custody. You told me that and I accept what you are telling me. So, soon, make the decision, perhaps with Ms. Dorin's advice, about proceeding with your trial and telling me that if you don't have any other evidence, then you would have to tell me that you've completed your case and you're not going to be obtaining any other evidence, and then I can go on from there to try and decide your case.

THE ACCUSED: Okay.

THE COURT: Okay? You're not comfortable making that decision, I'm guessing.

THE ACCUSED: No.

[10] Following that discussion, the judge raised with counsel the issue of ordering an assessment of the appellant under s. 672.11 of the Code for the purpose of determining whether or not he should be considered NCRMD. The judge expressed "a concern that it might be premature for me to order an assessment when the position taken by the self represented accused is there is other crucial evidence out there that should be considered by the trial judge before reaching any conclusion." The judge addressed the following question to amicus and Crown counsel:

So I don't have an answer right now, but I am looking for one about this issue of at what point can a trial judge conclude that there has been a prima facie case demonstrated by the Crown with regard to the charged offence, in this case now aggravated assault, and proceed from that finding to either on the -- on the court's own motion ask for an assessment to be prepared, or hearing applications from -- from Crown that the Crown seeks an assessment under s. 672 of the Code? Do you see my problem? And I'm just wondering at what stage it would be regarded as being premature and at what stage it's being -- it would be regarded as having the necessary evidentiary foundation, the concern always being that no one wants an NCRMD verdict to be imposed in the case where there is some doubt as to proof of the offence.

[11] The judge then heard submissions from the amicus who submitted that a prima facie case of the appellant's guilt was made out. Further, he argued that the appellant's evidence was sufficient to establish reasonable grounds to believe that the appellant may be suffering from a mental disorder such that he may be exempt from criminal responsibility. He concluded by stating:

I think it's open to the court to make the order now of its own motion. I don't know if the Crown intends to ask the court to -- to order an assessment at this point.

[12] Crown counsel also made submissions. She argued that s. 672.12 permits an assessment order to be made at any stage of the proceedings. Referring to the decision in *R. v. Swain*, [1991] 1 S.C.R. 933, she stated:

MS. GILL: And referring now to the Practitioner's Criminal Code by Alan Gold, in the annotations, any stage of the proceedings can arise at two junctures as set out in *Swain* it states. So that's when either -- in this case, let's say Mr. Faire put his own mental capacity for the criminal intent into question or once Your Honour has made a finding of guilt. Now pursuant to 672.12(3)(b), the Crown is respectfully putting the application forward and that is that:

the prosecutor [has to satisfy] the court that there are reasonable grounds to doubt that the accused is criminally responsible for the alleged defence, on [the] account of mental disorder.

And so, in the Crown's respectful submission, that assessment order can be ordered at this stage.

[Emphasis added.]

Assessment Ruling

[13] Immediately following these submissions, the judge ordered the assessment (the "Order") and gave brief reasons for doing so. He commenced his ruling by noting that the appellant sincerely believed there were banking records and documents that could assist his defence. However, the judge concluded, at para. 6, on the basis of the appellant's evidence and submissions, that there "is not a realistic prospect that such records, if they existed, would have any relevance to the central issue at trial." He described the central issue as whether the defence of self-defence has been established on the evidence at trial. He noted that the appellant admitted to stabbing the complainant in order to defend himself from what he perceived to be a potentially fatal attack. The judge concluded, at para. 8:

[8] So when I consider the trial evidence in that fashion and the trial issue as being as narrow as [amicus] has defined it, and I agree with his narrowing of the issues, it seems to me that when I balance the interests of fairness at trial, in particular the component of avoiding unreasonable delay in the trial process which has been emphasized so dramatically in recent months by the Supreme Court of Canada's decisions in *Jordan* and *Cody*, I feel that it is appropriate for me to conclude at this stage that a prima facie case has been established for the offence of aggravated assault. In making that finding, I feel I am now in a position to consider the Crown's application under 672.12(3)(b). The Crown asks that I conclude that the

Crown has presented material that would satisfy me that there are reasonable grounds to doubt that the accused is criminally responsible for the alleged defence on account of mental disorder. There are those grounds for that view in my view and the court would be assisted by an assessment at this stage under 672 by a qualified forensic psychiatrist on the issue of whether or not Mr. Faire is a person to whom the provisions of s. 16 of the Criminal Code apply.

- [14] After making the Order, the judge directed that a portion of the transcript be given to the assessing psychiatrist. The judge had copied the transcript and gave it to counsel. He stated:

This statement from Mr. Faire was during the course of the first day at trial. It is not evidence. It is not under oath, but in my view, an assessing psychiatrist is not limited strictly to evidence under oath. It would be more I think procedurally difficult if Mr. Faire had never testified, but he has now testified and that transcript is being prepared and will be available soon. The reason I am suggesting that this material go to the assessing psychiatrist is not so that it becomes available for the psychiatrist to rely upon for the truth of its contents but in my view would be an important guide for the psychiatrist to ask questions of Mr. Faire. I believe from my prior experience that this type of transcript, which was a 45-minute statement by Mr. Faire in court on the record about his concerns about background events that he felt were very relevant in the events that led to the stabbing, that that detailed description by Mr. Faire should be before the assessing psychiatrist which would guide him or her in focusing their questions to Mr. Faire on some of his beliefs that are clearly set out in this transcript material.

NCRMD Decision

- [15] Pursuant to the Order, Dr. George Wiehahn was appointed to assess the appellant's mental condition. He prepared a report dated November 2, 2017 in which he opined that there was no information to support a plea of NCRMD relating to the appellant. After preparing that report, Dr. Wiehahn was given the transcript of the appellant's trial testimony as well as Ms. Xu's trial testimony. Following receipt of that evidence, the doctor conducted another interview of the appellant, having already met with the appellant a number of times. He produced a second report dated November 6, 2017 and came to the opposite conclusion. In the second report, he opined that the appellant was likely suffering from an "emerging psychotic illness, namely schizophrenia which drew him out of character and interfered with his ability to reason to the extent that in his mind it made absolute sense to attack the victim under the circumstances that he did as he deemed her extremely dangerous."
- [16] After the Order was made, counsel was appointed to assist the appellant with an application for a stay of proceedings due to unreasonable delay pursuant to s. 11(b) of the Charter. That application was heard on November 22, 2017 and dismissed on December 7, 2017. Defence counsel continued to represent the appellant and on February 13, 2018, advised the court that the appellant would not be calling further evidence. On that day, the Crown applied for and the court granted orders that a report prepared for the Forensic Psychiatric Services Commission dated January 17, 2018 and a Mental Health Review Board decision of January

18, 2018 be disclosed to Crown counsel. The court further ordered that all medical records and reports held by the Forensic Psychiatric Services Commission pertaining to the appellant be produced to Crown counsel.

- [17] The trial resumed on February 22, 2018 and Dr. Wiehahn was called as a witness. The court embarked on a consideration of whether the appellant was NCRMD. Dr. Wiehahn's two reports were entered in evidence and the doctor explained his findings and conclusions. Defence counsel cross-examined the doctor on his assessment of the appellant's mental condition. On April 26, 2018, the parties made their final submissions. The defence argued that the appellant should not be declared to be NCRMD. Counsel emphasized the minor difference in the evidence available to Dr. Wiehahn when he prepared the two conflicting reports. The defence position was that the expert evidence, and in particular the conflicting reports, did not support a finding of NCRMD. The Crown submitted that the NCRMD verdict was appropriate on the evidence before the court.
- [18] The judge delivered his judgment on April 26, 2018. He found that the appellant was suffering from a mental disorder or disease of the mind that met the criteria in s.16 of the Code. In arriving at that conclusion the judge referred to the submissions made by the appellant at the start of trial:
- [13] Mr. Faire was permitted by the court to make long statements from the prisoner's dock. He was not under oath at the time. This is not evidence, but in my view it was a very important portion of the trial and allowed myself as the judge not to purport to make a medical assessment but to assess the degree to which Mr. Faire had an understanding of the events around his offence, the occurrence of this stabbing in the hotel's communal kitchen.
- [14] In my view, after listening to Mr. Faire and observing him, his statements in court as a self-represented accused are an important basis to allow me to make a finding, a finding that Mr. Faire has expressed in the course of this trial even before he took the witness stand and then continuing as a witness at trial, that he has beliefs, Mr. Faire has beliefs that, in my view and in my conclusion, are not beliefs that can be based on any objective form of reality.
- [15] I found that his beliefs are delusional beliefs. I do not use that word delusional beliefs in the medical technical sense; I use it more and the layperson's definition of beliefs which stem from an internal source internal to Mr. Faire that are not verifiable by any external objectively accessible reality. I believe that Mr. Faire honestly holds these beliefs.
- [19] The judge then considered the two branches of the s. 16 test: first, whether the appellant was unable to appreciate the nature and quality of the physical acts involved in the offence; and second, whether he was incapable of knowing that his actions were wrong. The judge rejected the Crown argument that the appellant was incapable of appreciating the nature and quality of the act of stabbing Ms. Xu. He concluded that the appellant knew he was using a knife and that he was doing so to cause injury: at para. 19. However, on the second branch of the s. 16 test, he concluded that the appellant was incapable of knowing that what he did was wrong: at para. 20. In doing so, he relied on the evidence at trial as well as the

appellant's statements at the opening of the trial:

- [22] I have concluded from the evidence that I have heard from the civilian witnesses who were present in the hotel, from the evidence of Mr. Faire, and also from inferences I drew from his statements as a self represented accused before he had the benefit of counsel in the later stages and from considering the contents of Dr. Wiehahn's reports, both the first report and the second report, that Mr. Faire is a person who was incapable of knowing that his actions in stabbing Ms. Xu were wrong.

The judge found the appellant to be NCRMD.

Did the Judge Err in Allowing the Crown to Raise the Issue of NCRMD over the Appellant's Objections before his Guilt had been Determined?

Standard of Review

- [20] At issue is whether the judge properly ordered an assessment under s. 672.11(b) and whether he erred in considering if the appellant was NCRMD prior to rendering a verdict and without determining whether the appellant's defence had put his capacity for criminal intent in issue. These questions require considering whether the judge properly applied the principles from Swain, which is a question of law. The applicable standard of review is correctness: Housen v. Nikolaisen, 2002 SCC 33 at para. 8.

Code Provisions and Legal Principles

- [21] Section 16 of the Code codifies the NCRMD defence:

16 (1) No person is criminally responsible for an act committed or an omission made while suffering from a mental disorder that rendered the person incapable of appreciating the nature and quality of the act or omission or of knowing that it was wrong.

- (2) Every person is presumed not to suffer from a mental disorder so as to be exempt from personal responsibility by virtue of subsection (1), until the contrary is proved on the balance of probabilities.

- (3) The burden of proof that an accused was suffering from a mental disorder so as to be exempt from criminal responsibility is on the party that raises the issue.

- [22] Prior to 1992, the provisions of the Code that dealt with mental disorders were based on the Criminal Lunatics Act, 1800 (U.K.) c. 94. Pursuant to those provisions, the Lieutenant Governor could issue a warrant to keep an "insane" offender in a forensic hospital indefinitely. While the appropriate terminology is now "mental disorder", I use the term "insanity" in relation to the historical ruling in Swain. In Swain, the Court struck down the provisions that permitted the automatic detention of someone found not guilty by reason of insanity. The Court also found that the common law rule permitting the Crown to adduce evidence of insanity over the objections of the accused violated s. 7 of the Canadian Charter of Rights and Freedoms as it violated an accused person's right to control their own defence.

[23] While concluding that the common law rule breached s. 7 of the Charter, Chief Justice Lamer, writing for the majority in Swain, explained at 975-976, that an accused's right to conduct his or her own defence is not absolute:

In my view, the ability of the Crown to raise evidence of insanity over and above the accused's wishes, under the existing common law rule, does interfere with the accused's control over the conduct of his or her defence. However, this is not to say that if an accused chooses to raise evidence which tends to put his or her mental capacity for criminal intent into question but falls short of raising the defence of insanity (within s. 16), the Crown will be unable to raise its own evidence of insanity. In circumstances where the accused's own evidence tends to put his or her mental capacity for criminal intent into question, the Crown will be entitled to put forward its own evidence of insanity and the trial judge will be entitled to charge the jury on s. 16. Whether the accused's evidence does, in fact, put mental capacity for criminal intent in issue will be a matter for the trial judge to determine in the particular circumstances of each case.

Thus, although it is a principle of fundamental justice that an accused has the right to control his or her own defence, this is not an "absolute" right. If an accused chooses to conduct his or her defence in such a way that that accused's mental capacity for criminal intent is somehow put into question, then the Crown will be entitled to "complete the picture" by raising its own evidence of insanity and the trial judge will be entitled to charge the jury on s. 16.

[Emphasis added.]

[24] At 987-988, the Court fashioned a new common law rule that would protect an accused's rights. The rule allows the Crown to lead evidence of insanity in two instances:

Under the new common law rule, there will only be two instances in which the Crown will be entitled to lead evidence of insanity. First, the Crown may raise evidence of insanity after the trier of fact has concluded that the accused is otherwise guilty of the offence charged. In these circumstances the Crown's ability to raise evidence of insanity cannot interfere with the conduct of the accused's defence because the Crown's ability to do so will not be triggered until after the accused has concluded his or her defence. Second, the Crown may raise evidence of insanity if the accused's own defence has (in the view of the trial judge) put the accused's capacity for criminal intent in issue. In these circumstances the Crown's ability to raise evidence of insanity is not inconsistent with the accused's right to control the conduct of his or her defence because the very issue has been raised by the accused's conduct of his or her defence. Furthermore, as was stated above, the Crown's ability to raise evidence of insanity only after an accused has put his or her mental capacity for criminal intent in issue does not raise the problem of the Crown's being able to place an accused in a position where inconsistent defences must be advanced.

[Emphasis added.]

[25] Extensive amendments to the Code were introduced on February 4, 1992, following the Court's decision in Swain. The amendments relevant to this appeal include:

672.11 A court having jurisdiction over an accused in respect of an offence may order an assessment of the mental condition of the accused, if it has reasonable grounds to believe that such evidence is necessary to determine

- (a) whether the accused is unfit to stand trial;
- (b) whether the accused was, at the time of the commission of the alleged offence, suffering from a mental disorder so as to be exempt from criminal responsibility by virtue of subsection 16(1);

672.12 (1) The court may make an assessment order at any stage of proceedings against the accused of its own motion, on application of the accused or, subject to subsections (2) and (3), on application of the prosecutor.

- (3) Where the prosecutor applies for an assessment in order to determine whether the accused was suffering from a mental disorder at the time of the offence so as to be exempt from criminal responsibility, the court may only order the assessment if
 - (a) the accused puts his or her mental capacity for criminal intent into issue; or
 - (b) the prosecutor satisfies the court that there are reasonable grounds to doubt that the accused is criminally responsible for the alleged offence, on account of mental disorder.

672.2 (1) An assessment order may require the person who makes the assessment to submit in writing an assessment report on the mental condition of the accused.

- (2) An assessment report shall be filed with the court
- (4) [C]opies of any report filed with the court under subsection (2) shall be provided without delay to the prosecutor, the accused and any counsel representing the accused.

672.21 (1) In this section, "protected statement" means a statement made by the accused during the course and for the purposes of an assessment or treatment directed by a disposition, to the person specified in the assessment order or the disposition, or to anyone acting under that person's direction.

- (2) No protected statement or reference to a protected statement made by an accused is admissible in evidence, without the consent of the accused, in any proceeding before a court, tribunal, body or person with jurisdiction to compel the production of evidence.
- (3) Notwithstanding subsection (2), evidence of a protected statement is admissible for the purpose of
- (e) determining whether the accused was, at the time of the commission of an alleged offence, suffering from automatism or a mental disorder so as to be exempt from criminal responsibility by virtue of subsection 16(1), if the accused puts his or her mental capacity for criminal intent into issue, or if the prosecutor raises the issue after verdict;

[Emphasis added.]

- [26] As this Court observed in *R. v. Langlois*, 2005 BCCA 162, the amendments to the Code adopted the procedure established in *Swain* regarding the ability of the Crown to adduce evidence as to the accused's mental capacity for criminal intent. This is effected, in part, by the provisions of s. 672.21. Evidence of statements made by the accused in the course of and for the purpose of an assessment under s. 672.11(b) are inadmissible in evidence without the consent of the accused, subject to the provisions of s. 672.21(3)(e) which preserve the ability of the Crown to lead evidence in those circumstances specified in *Swain*.
- [27] Other courts have found that *Swain* continues to govern the Crown's ability to raise the issue of an accused's mental capacity. In *R. v. Piette*, 2005 BCSC 1724, at para. 52, Justice Wedge found that the rule established in *Swain* continued to apply under the new Code provisions:
- [52] In my view, the rules contemplated by the Court in *Swain* remain in place. If an accused does not put mental capacity into issue, the Crown must meet the ordinary burden of proof. That is, the Crown must prove *actus reus* and *mens rea* beyond a reasonable doubt. If the Crown fails to meet its burden, the accused must be acquitted. If the Crown meets its burden, then after a guilty verdict is rendered, but before a conviction is entered, the Crown may raise the issue of mental capacity. Under s. 16(3), the Crown assumes the burden of proving mental incapacity on a balance of probabilities. If the Crown meets this burden, a verdict of NCRMD is entered and the case moves to the process contemplated by Part XX.1. If not, a conviction is entered and the case proceeds to sentencing.
- [28] In *R. v. Wells*, 2004 ABCA 371, at para. 10, the court acknowledged that *Swain* is the governing authority. Similarly, in *R. v. Pietrangelo*, 2008 ONCA 449, at para. 49, the court explained that the Crown is only permitted to raise NCRMD against the wishes of the accused in the two situations set out in *Swain*:
- [49] [T]he court held that the s. 7 right would be minimally impaired if the common law rule were altered to permit the Crown to raise NCRMD in two situations. First, when the accused puts his or her mental capacity for criminal intent into question, the Crown is entitled to lead evidence of insanity to provide the trier of fact with a complete picture. Second, once the trier of fact has made a finding of guilt, but before a conviction is entered, the Crown may lead evidence to show that the appellant should be found NCRMD. Postponing the introduction of the NCRMD issue until after there has been a finding of guilt preserves the s. 7 right of the accused to make fundamental decisions about the conduct of his or her defence against a criminal charge. However, once there has been a finding of guilt, the Supreme Court held that it is a reasonable limitation on the rights of the accused to permit the Crown to introduce the issue of NCRMD to satisfy the dual objectives of preventing the justice system from labelling the insane as criminals, and protecting the public from individuals who pose a risk to society and who require treatment.

[Emphasis added.]

- [29] It is clear from these decisions that the 1992 amendments to the Code have not expanded the circumstances under which the Crown can lead evidence of the accused's mental capacity for criminal intent over the objections of the accused. The Crown can only lead such evidence after the accused has been found guilty of the offence or where the accused has put his or her capacity for criminal intent into question.
- [30] The decision in Swain thus contemplates three ways in which the NCRMD defence can be raised at trial:
- a) The accused can raise the defence of NCRMD either during the trial or post-verdict. If the accused chooses the former approach, he or she can do so by proactively asserting an NCRMD defence during the course of the trial;
 - b) The Crown can raise the defence of NCRMD post-verdict; and
 - c) The Crown can raise the defence of NCRMD during the course of the trial if the accused has put his or her mental capacity in issue by virtue of the way in which the defence is conducted.
- [31] While the 1992 amendments did not expand the circumstances under which the defence of NCRMD can be raised, the amendments established the process for a court to order the assessment of the mental condition of the accused to determine whether, at the time of the offence, the accused was NCRMD. As I will explain below, I am of the view that the judge conflated the ordering of the assessment of the appellant's mental condition with the consideration of the defence of NCRMD. Having made the order for the assessment and received the reports of Dr. Wiehahn, the judge embarked erroneously upon a consideration of whether the accused was NCRMD without first rendering a verdict or considering whether the appellant had conducted his defence in a way that put his mental capacity in issue.

Analysis

Did the Judge Apply the Wrong Test when Considering the Crown Application for an Assessment?

- [32] It is clear that the Crown applied for an assessment to consider the appellant's mental capacity. When the judge expressed concern as to whether it was appropriate to have the appellant's mental condition assessed at that stage of the trial, he heard submissions from amicus and the Crown. Both argued that the appellant's evidence had put his mental capacity for criminal intent into issue and Crown counsel stated that, "pursuant to 672.12 (3) (b), the Crown is respectfully putting the application forward". The judge properly treated the application as having been brought by the Crown.
- [33] As the appellant argues, it is important to highlight the circumstances before the court when the application was made. First, the appellant's fitness to stand trial had not been questioned. Accordingly, no assessment could have been ordered for that purpose and the appellant was competent to conduct his own defence. Second, the defence case had not

been closed when the application was made. The appellant stressed, and the judge acknowledged, that the appellant wanted to obtain and present further evidence to the court. The appellant was in charge of his own defence and had not closed his case. The judge could not, at that stage of the trial, embark on a consideration of whether the appellant was NCRMD. Indeed, that is not what the Crown was seeking.

[34] In these circumstances, the judge was required to consider the provisions of s. 672.12(3) to determine whether he should grant the Crown's application for an assessment. In other words, the judge had to consider whether: (a) the accused had put his mental capacity for criminal intent in issue; or (b) whether the Crown had satisfied the court that there were reasonable grounds to doubt that the accused was criminally responsible for the offence. Instead of considering whether to order an assessment on one of those two grounds, the judge balanced "the interests of fairness of trial, in particular the component of avoiding unreasonable delay" and concluded that "a prima facie case has been established for the offence of aggravated assault". Having arrived at that conclusion, he felt that he was in a position "to consider the Crown's application under s. 672.12(3)(b)".

[35] The appellant argues, and I agree, that there is no support in the authorities for the proposition that the Crown may apply for an order for an assessment when only a prima facie case of guilt has been established. Neither Swain nor the Code provisions suggest that the establishment of a prima facie case is a prerequisite to making an assessment order. By approaching the question of whether to order an assessment in this way, the judge conflated ordering an assessment with entering into a determination of whether the appellant was NCRMD.

[36] While I am of the view that the judge erred by applying the wrong test to decide whether to grant the order for an assessment, I am also of the view that his error in doing so led to additional errors in considering whether the appellant was NCRMD. The way in which the trial proceeded had a serious impact on the appellant's right to control his own defence. I will highlight those additional errors by considering three issues raised in this case. First, the appellant's argument that the judge erred by ordering an assessment prior to a verdict. The appellant argues that the court can only entertain an application from the Crown for an assessment under s. 672.11(b) once guilt is established. Second, the respondent's argument that the appellant put his capacity for criminal intent in issue. Third, whether delay is a relevant factor to be considered by the court when making an assessment order.

Did the Judge Err by Ordering an Assessment Prior to Rendering a Guilty Verdict?

[37] The appellant argues that if the Crown applies for an assessment order under s. 672.11(b) and the order is made pursuant to s. 672.12(3)(b), it is raising the issue of NCRMD prior to verdict contrary to the principle established in Swain. In making that argument, he relies on the decision in *R. v. Vassell*, 2013 ONCJ 333. In Vassell, the accused faced charges of uttering death threats and breaches of probation. Prior to trial, the accused was assessed pursuant to s. 672.11(a) to consider his fitness to stand trial. The doctor who performed that assessment

recommended that the accused also be assessed regarding his criminal responsibility pursuant to s. 16(1). Accordingly, before the trial commenced, the Crown brought an application pursuant to s. 672.11(b) to have the accused's mental condition assessed to determine if he was suffering from a mental disorder so as to be exempt from criminal responsibility at the time of the alleged offences. The court considered whether the Code provisions permitted the Crown to apply for an assessment of whether the accused was NCRMD "at any stage of the proceedings". The judge concluded that s. 672.12 had to be interpreted in accordance with Swain such that the Crown was limited to seeking an assessment of the accused's mental capacity only in two situations: after verdict; or where the accused's own defence puts the accused's capacity for criminal intent in issue. At paras. 26-27, the judge concluded:

26 It is my view that the court or the accused can raise the issue of NCRMD at any stage of the proceedings. Section 672.12 (1) and 672.11 (b) work together to govern both those scenarios. When the Crown attempts to raise the NCRMD issue section 672. 12 (3) governs.

27 Based on the authorities and text referred to above it is my view that the "or" in s. 672.12 (1) separates the words "at any stage of the proceedings" from applying to the Crown. That conclusion is consistent with the Supreme Court's ruling in Swain.

[38] The Crown says that Vassell was incorrectly decided and that making an application for an assessment pursuant to s. 672.11(b) does not raise the issue of NCRMD within the meaning of Swain. The Crown says that s. 672.12(1) clearly provides that the court can make such an order "at any stage of the proceedings".

[39] I would reject the appellant's argument that merely applying for an assessment order by the Crown in accordance with s. 672.12 has the effect of breaching his s. 7 right to control his own defence. I am of the view that the interpretation of s. 672.12(1) in Vassell is unsustainable. As the Crown argues, that subsection allows the court to order an assessment at any stage of the proceedings "of its own motion, on application of the accused, or, subject to subsections (2) and (3), on application of the prosecutor." Reading that provision plainly, the court is able to make an assessment order on application of the Crown at any stage of the proceeding so long as the Crown satisfies, in the case of an assessment of whether an accused is NCRMD, the provisions of either s. 672.12(3)(a) or (b).

[40] The court in Vassell appears to have assumed or concluded that the provisions of s. 672.12(3) (a) and (b) mirror or incorporate the two exceptions in Swain as to when the Crown can "raise evidence of insanity over and above the accused's wishes". That position is not correct. First, the Court in Swain was not considering when the Crown could apply for an assessment of the accused contrary to his or her wishes; it was considering when the Crown could lead evidence of an accused's capacity for criminal intent contrary to his or her wishes.

[41] Second, the standards for ordering an assessment set out in s. 672.12(3)(a) and (b) are different from the two exceptions outlined in Swain for when the Crown can lead evidence of mental disorder. While subsection (a) -- whether the accused puts his or her mental

capacity for criminal intent into issue -- is the same as one of the Swain exceptions, subsection (b) is quite different. It allows a court to order an assessment if it is satisfied "there are reasonable grounds to doubt that the accused is criminally responsible". That is a very different standard from that which the Crown must meet when raising "evidence of insanity after the trier of fact has concluded that the accused is otherwise guilty of the offence charged" (Swain). "Reasonable grounds to doubt", like "reasonable grounds to believe" provides for a lower standard than proof on a balance of probabilities: *R. v. Glendinning*, 2019 BCCA 365 at paras. 3-6. Further, there is nothing in the language to suggest that an assessment order s. 672.12(3) can only be sought after verdict.

- [42] More significantly, ordering an assessment does not permit the Crown to lead evidence of mental disorder over and above the wishes of the accused. Pursuant to s. 672.21, the statements of an accused that form the basis of an assessment report are inadmissible in evidence prior to verdict without the consent of the accused unless the court concludes that the appellant has put his mental capacity for criminal intent into issue. That means that a report prepared as a requirement of an order, pursuant to s. 672.2 (1), cannot be placed in evidence over the wishes of the accused, except in the two circumstances outlined in Swain.
- [43] Accordingly, I would reject the appellant's argument that ordering an assessment under s. 672.11(b) has the effect of raising the issue of NCRMD prior to verdict contrary to the principle established in Swain.

Did the Appellant's Defence Put his Mental Capacity for Criminal Intent into Question?

- [44] The Crown argues that the appellant's evidence put his mental capacity for intent into issue and that Swain specifically allows the Crown to put forward evidence of the appellant's mental capacity in these circumstances. The Crown says the appellant's testimony put forward a "delusionary" view of the circumstances of the offence. The appellant's testimony and the basis for the defence of self-defence rested entirely on what the Crown describes as the appellant's "own bizarre set of beliefs regarding the victim's connection to a malevolent international networks [sic]". His testimony emphasized the victim's "connection to a hostile and corrupt network of conspirators in Canada and China" and his belief that she possessed a handgun and intended to harm him. As there was no support for the appellant's testimony about the conspiracy or Ms. Xu's intent to harm the appellant, the Crown says his evidence squarely placed his mental capacity for criminal intent into question. The Crown says this allowed it to present evidence of the appellant's mental capacity over his objections.
- [45] The Crown relies on Swain, as well as the decisions in *R. v. Fluxgold*, 2009 ONCJ 201 and *R. v. Harvey*, 2014 BCSC 1692 in support of its position. As I will explain, I am of the view that those trial decisions do not support the Crown's position. Further, I am of the view that the judge erred in failing to consider whether the appellant had put his mental capacity into question. Accordingly, I am of the view that it is not necessary to decide if the accused did in fact put his mental capacity for criminal intent into issue. That is a question that is to be answered by the trial judge who is in a much better position to do so.

- [46] In Fluxgold, the accused was charged with sexual assault arising out of an incident in an elevator where he placed his hand on the victim's crotch and kissed her. The accused testified that the victim, whom he had never encountered before, encouraged him and consented to the sexual touching. The trial proceeded with evidence tendered by the Crown and testimony from the accused. At the conclusion of the trial, the court concluded that the Crown had proved beyond a reasonable doubt that the accused committed the act forming the basis of the alleged sexual assault: at paras. 5, 22.
- [47] During the course of the trial, the Crown was reluctant to raise the issue of whether the accused was not criminally responsible for his conduct on account of a mental disorder: at para. 3. Once the court concluded that the Crown had proved the actus reus, the court, on its own motion, ordered an assessment under s. 672.12 to address the issue of criminal responsibility: at para. 3. At para. 23, the court explained that it did so before considering mens rea because the accused's evidence raised the defence of an honest but mistaken belief as to consent. The court received the report of the psychiatrist who opined that the accused suffered from schizophrenia at the time of the assault and that he did not know that his conduct was legally and morally wrong. After receipt of the report, the Crown changed its position and directly raised the issue of whether the accused was NCRMD at the time of the offence: at para. 26.
- [48] The decision in Fluxgold arose in different circumstances. The court ordered the assessment on its own motion, not on the motion of the Crown. Pursuant to s. 672.12(1), "the court may make an assessment order at any stage of the proceedings against the accused on its own motion" without restriction. Further, the accused's defence relied on his honest but mistaken belief as to consent. That defence directly called into question the accused's capacity for criminal intent. Without the psychiatric evidence, the court would not have the "full picture" of the accused's mental condition which was necessary to determine whether he held an honest but mistaken belief as to consent.
- [49] Harvey is also of limited assistance in considering when the Crown is permitted to raise the issue of NCRMD before verdict. Like the appellant, the accused in Harvey wanted to pursue a defence of self-defence based on his apparently delusional beliefs. However, there are significant differences between the circumstances of the accused in Harvey and those of the appellant. The accused in Harvey was charged with murder, which meant the Crown had to prove specific intent as part of its case. The Crown made it clear from the start that it intended to raise the issue of NCRMD if the accused was found guilty of any criminal offence.
- [50] Following the close of the Crown's case in Harvey, both parties made submissions on whether the Crown had proved the murder charge beyond a reasonable doubt: at para. 20. The Crown indicated that it would put forward evidence to establish that the accused was NCRMD if the court was satisfied that the Crown had proved its case beyond a reasonable doubt. The defence submitted that the court should accept that he acted in self-defence and that he should be acquitted. The defence also maintained that it would be unfair to allow the

Crown to take the position that the accused's delusional beliefs could not be the basis of a defence of self-defence but that it could rely on them to prove intent.

- [51] These arguments placed the court in a difficult position which was ultimately resolved when the Crown took the position, following the defence submissions on the merits, that the conduct of the defence had put the accused's mental capacity into issue: at para. 27. The defence initially objected to that position but ultimately agreed with the Crown position. Specifically, the defence agreed that defence counsel's cross-examination of a psychiatrist had raised the issue of the accused's mental capacity to form criminal intent. The psychiatrist gave opinion evidence as to whether the accused had an operating mind when he made a statement to police. The psychiatrist's evidence and the accused's statement were entered in evidence following a voir dire.
- [52] As a result of the defence concession, the Crown was permitted to raise the issue of NCRMD and present evidence on that issue. The court did not have to determine what was required to meet the exception in Swain that allows the Crown to present evidence of the accused's mental capacity prior to verdict. However, at para. 17 of her reasons, Justice Humphries identified the difficulty presented where an accused who is fit to stand trial refuses to raise NCRMD:
- [17] However, where the accused refuses to raise the issue of NCRMD, a situation is created, apparently not anticipated in Swain, where an accused who is not unfit to stand trial maintains a set of obviously delusional beliefs that make an assessment of his intent in that unreal context completely artificial, but until there is a determination as to whether the Crown has proven the offence (which includes proof of intent) beyond a reasonable doubt, the Crown will not be able to raise the issue of mental capacity to form that very intent.
- [53] At paras. 29-35, Justice Humphries observed that the Court in Swain articulated in various ways the exception that permits the Crown to raise NCRMD prior to a verdict. Some of the statements in Swain contemplate the accused calling evidence to raise the issue, however, "most of the statements refer only to the conduct of the defence."
- [54] I am of the view that the exception outlined by the Court in Swain is directed at the conduct of the defence although that may include the substance of the evidence called by the defence. As the Court in Swain explained, at 986-987, the concern behind the rule is that the accused should not be placed in a position where he or she must advance inconsistent defences, or otherwise loses control over his or her defence. For convenience, I set out again the passage, at 987-988, in Swain that, in my view, establishes the parameters of the exception to the rule. As the Court emphasizes, the Crown can present evidence only where "the very issue has been raised by the accused's conduct of his or her defence":

Second, the Crown may raise evidence of insanity if the accused's own defence has (in the view of the trial judge) put the accused's capacity for criminal intent in issue. In these circumstances the Crown's ability to raise evidence of insanity is not inconsistent with the accused's right to control the conduct of his or her defence because the very issue has been raised by the accused's conduct

of his or her defence. Furthermore, as was stated above, the Crown's ability to raise evidence of insanity only after an accused has put his or her mental capacity for criminal intent in issue does not raise the problem of the Crown's being able to place an accused in a position where inconsistent defences must be advanced.

[Emphasis added.]

[55] The Crown is permitted to "raise evidence" of the accused's mental capacity in these circumstances because if it could not, there is a risk that the trier of fact could conclude that the accused lacked the mental capacity to form criminal intent without having received adequate evidence on that issue. As noted in Swain, at 975-976, the concern is to provide the "full story" to the trier of fact:

The Crown's ability to raise evidence of insanity in these circumstances is necessary because, otherwise, the jury could well be left with an incomplete picture of the accused's mental capacity. If an accused were able to raise some evidence of mental incapacity (short of an insanity defence) and, at the same time, able to preclude the Crown from raising any evidence of insanity that it may have in its possession, the possibility would arise that the accused could be acquitted by a jury which was deprived of the "full story" surrounding the accused's mental incapacity. Such a result is clearly undesirable. Furthermore, the Crown's ability to raise evidence of insanity only after an accused has put his or her mental capacity for criminal intent in issue does not raise the problem, discussed above, of the Crown's being able to place an accused in a position where inconsistent defences must be advanced.

Thus, although it is a principle of fundamental justice that an accused has the right to control his or her own defence, this is not an "absolute" right. If an accused chooses to conduct his or her defence in such a way that the accused's mental capacity for criminal intent is somehow put into question, then the Crown will be entitled to "complete the picture" by raising its own evidence of insanity and the trial judge will be entitled to charge the jury on s. 16.

[Emphasis added.]

[56] The situation contemplated in Swain -- where there is a need for evidence from the Crown to complete the picture -- is precisely the situation that faced the court in Fluxgold. In Harvey, the court did not have to rule on that question because the accused ultimately conceded that the way in which he conducted his defence did raise the issue of his mental capacity to form intent.

[57] Whether an accused puts his or her mental capacity in issue is something that the trial judge must determine. When the Crown seeks to lead evidence of an accused's mental incapacity for criminal intent prior to verdict, the court must decide if the evidence is necessary in accordance with the new common law rule set out in Swain. That decision will be made based on the way in which the accused has conducted the defence. Where the conduct of the defence directly raises the issue of incapacity that will not be a difficult decision. However, where, as here, that is not done, the court must weigh the evidence led by the accused while

considering the offence charged, the mens rea required to prove the offence, and the defences raised by the accused.

- [58] In this case, the judge did not consider whether the accused had conducted his defence in a way that put his mental capacity into issue in the manner contemplated in Swain. I am of the view that the judge erred by failing to consider that question.
- [59] It is evident from the circumstances before the court that arguments could have been made both for and against that proposition. The appellant could have argued that he did not put forward any psychiatric or other evidence to suggest that he suffered from a mental disorder. At no time did he assert that he lacked the capacity to form the criminal intent for the offence of aggravated assault. Indeed, his position was that he intended to harm Ms. Xu. The issue the appellant raised at trial was not a lack of mental capacity but rather, whether the Crown could disprove that he acted in self-defence. He could argue that the issues his testimony raised did not concern his intent, but rather, whether he should be acquitted because he acted in self-defence.
- [60] On the other hand, the Crown could have argued that by making an apparently delusional self-defence claim that was unsupported by evidence, the appellant was indirectly raising the issue of whether the Crown had proved mens rea beyond a reasonable doubt.
- [61] In my view, it is not necessary to decide whether the appellant conducted his defence in a way that put his mental capacity for intent into question to dispose of the appeal. As highlighted in Swain, at 975, whether the accused's conduct of his or her defence does, in fact, put mental capacity for criminal intent in issue "will be a matter for the trial judge to determine in the particular circumstances of each case." Here, the judge's failure to consider the issue while also failing to rule on whether the Crown had proved the offence beyond a reasonable doubt led the court to enter into a consideration of whether the appellant was NCRMD without determining if either of the exceptions outlined in Swain had been satisfied.
- [62] As noted in Swain, the principle in question is one of fundamental justice; pursuant to s. 7 of the Charter, an accused has the right to control his or her own defence. Here, given the way the trial proceeded, the appellant lost control of his defence because the court proceeded to consider whether he was NCRMD prior to rendering a verdict and prior to considering whether the evidence of the appellant's mental condition (obtained through the assessment by Dr. Wiehahn) was necessary to provide the "complete picture" or the "full story" of the accused's mental capacity.

Is Potential Delay a Relevant Factor?

- [63] As I have noted, one of the reasons the judge made the Order was to avoid unreasonable delay in the trial process. In doing so, at para. 8, he referred to the decisions in *R. v. Jordan*, 2016 SCC 27 and *R. v. Cody*, 2017 SCC 31. The Crown argues that the court's concern about delay was a proper consideration. It says that where reasonable grounds exist to doubt an

accused's mental capacity at the time of the offence, it would be contrary to the interests of justice to delay the making of an assessment order. It argues that, "[p]rocedural rules should be the servants and not the masters of the justice system."

- [64] I would not give effect to this argument. Delay is not a factor to be taken into account by a trial judge when deciding whether to consider a Crown application under s. 672.12(3)(b). So long as the Crown can satisfy one of the two requirements of s. 672.12(3), the court can make the assessment order.
- [65] To put this another way, as s. 672.12 permits the court to make an order for assessment of the accused's mental capacity under s. 672.11(b) at any stage of the proceedings, there is no need to consider delay because the court does not have to wait until it has rendered a verdict to grant the order. So long as the Crown has satisfied the court that the conduct of the defence has put the accused's mental capacity into issue, or that there are "reasonable grounds to doubt" that the accused is criminally responsible on account of mental disorder, the assessment order can be made. Delay is irrelevant to that analysis.
- [66] To summarize, I am of the view that the judge erred by applying the wrong test for ordering an assessment of the appellant's mental condition on the Crown's application. The error was compounded when the judge failed to determine whether the appellant conducted his defence in a way that put his mental capacity into issue. As a result of these errors, the judge moved to consider whether the appellant was NCRMD without actually deciding either guilt, or whether he had put his mental capacity into issue. While the appellant's defence of self-defence appeared to the trial judge to have little merit, the appellant's ability to control his own defence was significantly impaired when the judge ordered the assessment and entered into a hearing to determine if the appellant was NCRMD prior to verdict. This was a serious breach of the appellant's s. 7 Charter right.

Should the Curative Proviso Be Applied?

- [67] As I have concluded, the judge erred in making the Order, the Crown says this is an appropriate case in which to uphold the conviction pursuant to s. 686(1)(b)(iii) of the Code on the basis that no substantial wrong or miscarriage of justice occurred. The Crown argues that the error made in ordering the assessment prior to verdict and prior to considering whether the conduct of the defence put his mental capacity for intent into issue caused minimal prejudice. The Crown says if the judge had proceeded in accordance with Swain, the result would have been exactly the same. It says that the evidence was overwhelming especially having regard to the lower standard of proof -- the balance of probabilities -- that applies for an NCRMD verdict.
- [68] A court of appeal can apply the curative proviso from s. 686(1)(b)(iii) where a trial judge commits an error that is harmless on its face or in its effect or where a trial judge commits an error that, while not minor, had no impact on the verdict because the case against the accused was overwhelming: *R. v. White*, 2011 SCC 13 at paras. 91-94. The first category of errors which merit application of the proviso, minor or harmless errors, clearly does not

apply here. In my view, the errors committed by the trial judge breached the appellant's Charter right to conduct his own defence. That right is a principle of fundamental justice. Errors in the first category need to be "irrelevant to the ultimate issue in the trial" or "clearly non-prejudicial" for the proviso to be applied: *R. v. Van*, 2009 SCC 22 at para. 35. A breach of an appellant's right to conduct his own defence is both relevant to the ultimate issue in the trial and clearly prejudicial.

[69] Under the second category of errors, a court of appeal can apply the proviso "in the event of an error that was not minor and that cannot be said to have caused no prejudice to the accused, if the case against the accused was so overwhelming that a reasonable and properly instructed jury would inevitably have convicted": *Van* at para. 36. In this case, the appellant had not closed his defence when the judge granted the Order without considering whether the Crown had met the requirements of s. 672.12(3). That error was compounded when the judge entered into a consideration of whether the accused was NCRMD without rendering a verdict. It cannot be said that the case against the appellant was overwhelming when the errors disrupted the trial such that the process was unfair.

[70] In summary, I am of the view that this is not an appropriate case for application of the proviso.

Did the Judge Err in Relying on the Appellant's Non-Evidentiary Submissions to the Court in Finding that he was NCRMD?

[71] Given my conclusion on the first ground of appeal, I need not consider this ground.

Disposition

[72] I would allow the appeal, set aside the NCRMD verdict and order a new trial.

"The Honourable Mr. Justice Butler"

I AGREE:

"The Honourable Madam Justice Newbury"

I AGREE:

"The Honourable Mr. Justice Abrioux"

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