
CANADA / JUDGMENT

R. v. Kampos

2020 BCSC 1437

COURT

Supreme Court of British Columbia

DECIDED

25 September 2020

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2020 BCSC 1437 R. v. Kampos

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

R. v. Kampos,

2020 BCSC 1437

Date: 20200925

Docket: 66368-3

Registry: Chilliwack

Regina

v.

Peter Anthony Kampos

Before: The Honourable Madam Justice Devlin

Oral Reasons for Judgment re Fitness Assessment

Counsel for Crown:

J. Lester

Counsel for Defence:

M.J. Swartz

Place and Date of Hearing:

New Westminster, B.C.

September 9, 10, 2020

Place and Date of Judgment:

New Westminster, B.C.

September 25, 2020

- [1] THE COURT: This decision was delivered in the form of Oral Reasons. The Reasons have since been edited for publication.

Introduction

- [2] The accused, Peter Anthony Kampos, is charged with three counts - one count of attempted murder of Cameron Rose, contrary to s. 239(1)(a.1) of the Criminal Code, R.S.C. 1985, c. C-46 [Code], and two counts related to the discharge of a firearm, contrary to ss. 244(1) and 244.2(1)(a) of the Code, respectively. The charges arose from an incident which occurred on March 25, 2017 near Chilliwack, BC. Mr. Kampos has remained in custody since his arrest.
- [3] These reasons deal with the issue of whether Mr. Kampos is unfit to stand trial. As set out below, this is the third occasion this Court has dealt with the issue of Mr. Kampos's fitness.
- [4] Counsel for Mr. Kampos submits he is unfit to stand trial because his mental illness renders him unable to communicate with counsel. In particular, Mr. Kampos believes his counsel is intentionally withholding evidence and is working with others to sabotage his defence. Counsel for Mr. Kampos referred to a number of cases which apply the limited cognitive capacity test for fitness set out in *R. v. Taylor* (1992), 77 C.C.C. (3d) 551 (Ont. C.A.) [Taylor]; *R. v. Iverson*, 2014 BCSC 627; *R. v. Adam*, 2013 ONSC 373 [Adam]; *R. v. Klein*, 2018 BCSC 678 and *R. v. Amey*, 2009 NSPC 29.
- [5] The Crown takes a neutral position but does acknowledge that Mr. Kampos's continuing delusional beliefs could impact his ability to communicate with counsel in a meaningful way. Crown counsel referred to *R. v. Daley*, 2019 NBCA 89 [Daley] and *R. v. R.M.P.*, 2019 ONSC 1416. As will be discussed, Daley provides a comprehensive review of authorities dealing with the issue of fitness to stand trial and the ability of an accused to "communicate with counsel".

Procedural History and Background

- [6] Mr. Kampos was arrested for the attempted murder of Mr. Rose on March 25, 2017, and has remained in custody since his arrest. The trial commenced on October 9, 2018, and after the Crown closed its case, the issue of Mr. Kampos's fitness to stand trial was raised by his counsel. On December 3 and 4, 2018, following the receipt of an assessment report pursuant to s. 672.23(1) of the Code the first trial on the issue of fitness was held. I determined Mr. Kampos was unfit to stand trial in reasons indexed at *R. v. Kampos*, 2018 BCSC 2206.

- [7] On January 30, 2019 the Review Board found that Mr. Kampos was fit to stand trial. On March 15, 2019 I conducted a second fitness hearing and heard testimony from Dr. Gharakhanian, who is Mr. Kampos's treating psychiatrist, and from Dr. Murphy, who examined Mr. Kampos at the request of the Crown. In reasons indexed at R. v. Kampos, 2019 BCSC 491, I found that Mr. Kampos was not fit to stand trial for essentially the same reasons as in my earlier decision. While there had been some improvement in Mr. Kampos's condition, I found that his delusional beliefs impaired his ability to communicate with counsel.
- [8] On May 6, 2019 the Review Board held a hearing pursuant to s. 672.47(2) of the Code to determine whether in its opinion Mr. Kampos was fit to stand trial. The Review Board determined he was unfit to stand trial and ordered that he continue to be detained in custody and reside in the Forensic Psychiatric Hospital ("FPH").
- [9] On December 4, 2019 the Review Board held a further hearing pursuant to s. 672.63 of the Code. The Board again determined Mr. Kampos was unfit to stand trial and ordered that he continue to be detained in the FPH.
- [10] On June 3, 2020 the Review Board held a hearing via closed circuit television, pursuant to s. 672.63 of the Code, to determine whether in its opinion Mr. Kampos was fit to stand trial. After hearing from Dr. Gharakhanian and Mr. Kampos, the Review Board determined Mr. Kampos was fit to stand trial and ordered that he be returned to court to try the issue of his fitness.
- [11] On September 9 and 10, 2020 a hearing to determine Mr. Kampos's fitness was conducted. Dr. Gharakhanian and Dr. Murphy testified via closed circuit television and their expert reports were filed as exhibits at the hearing.
- [12] Mr. Kampos has been diagnosed with schizophrenia, a psychotic illness. He is currently being treated with antipsychotic medications and is compliant. As will be discussed further, Mr. Kampos continues to suffer from delusions but the frequency and intensity of most of his delusions have decreased.
- [13] The parties agree the sole issue at this hearing is whether Mr. Kampos is unable, on account of his mental disorder, to communicate with counsel.

The Legal Principles - Unfit to Stand Trial

- [14] Section 2 of the Code describes what is meant by "unfit to stand trial":

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 [.]

- [15] The accused is presumed to be fit to stand trial unless the court is satisfied on the balance of probabilities that the accused is not fit: s. 672.22 of the Code. The burden of proof that an accused person is unfit to stand trial is on the party making the application for such a finding: s. 672.23(2) of the Code.
- [16] Taylor establishes that the touchstone test for determining an accused's fitness to stand trial is one of "limited cognitive capacity" rather than the higher test of "analytic capacity". In Taylor the accused, who had been diagnosed with paranoid schizophrenia, was a lawyer who was found to understand the nature and object of the proceedings and the possible consequences thereof. This question of fitness arose out of a concern that Mr. Taylor would not be able to make decisions about the conduct of his defence in a manner that reflected his own best interests. The trial judge found Mr. Taylor unfit on the basis that his delusions impacted his ability to perceive his own best interests and how those interests should be addressed in the conduct of a trial. On appeal, the court found the trial judge erred in adopting the analytic capacity test for fitness to stand trial, because it establishes too high a threshold for finding the accused fit to stand trial by requiring that the accused be capable of making rational decisions beneficial to himself (Taylor, at 567). The court held that 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" (Taylor, at 567). This test assesses the accused's ability to recount the necessary facts related to his or her offence to counsel in such a manner that his or her counsel may advance a proper defence. The focus is on the accused's ability to conduct a defence, communicate and instruct counsel, and whether that ability is impaired by reason of his or her mental disorder. The inquiry is not concerned with whether the accused has an amicable or trusting relationship with his or her counsel, or whether the accused makes decisions which are ultimately in his or her own best interests (Taylor, at 564).
- [17] Additionally, the accused must be able to participate in a meaningful way in the proceedings or to meaningfully assist his or her counsel with his or her defence. (Taylor, at 566; Adam at para. 29).
- [18] Taylor has been adopted in all provinces, and was referred to with approval in obiter by the Supreme Court of Canada in R. v. Whittle, [1994] 2 S.C.R. 914, stating that the accused need only possess the limited cognitive capacity necessary to understand the process and communicate with counsel; that "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" (at 933-934).
- [19] In R. v. Morrissey, 2007 ONCA 770 [Morrissey], the Ontario Court of Appeal reaffirmed and clarified the limited cognitive capacity test established in Taylor. In Morrissey the accused was unable, on account of amnesia, to recount the events immediately preceding and

surrounding the index offence. Blair J.A., writing for the court, noted that the test for fitness described in Taylor had been imprecisely condensed in some authorities into an "inquiry into whether an accused can recount to his/her counsel the necessary facts relating to the offence in such a way that counsel can then properly present a defence" (at para. 28). In clarifying the test, the court explained that the ability to communicate with counsel for purposes of a fitness inquiry must be assessed from a purposive and functional perspective (Morrissey at para. 29). The court upheld the trial judge's jury instruction that in considering whether the accused is unable to communicate with counsel, the critical issue is whether an accused is able to "speak with counsel rationally, to understand questions and answer them in an intelligible fashion, and to make critical decisions on counsel's advice, concerning the offence with which he is charged" (Morrissey at para. 56). The Court held that "meaningful presence and meaningful participation at the trial are the touchstones of the inquiry into fitness" (Morrissey at para. 36).

- [20] In Adam at para. 29 Justice Trotter (as he then was) adopts the Morrissey approach and observes that "the three arms of the fitness test are not free-standing fitness criteria to [be] mechanically applied; instead, they are tools to assist in determining whether a mentally ill accused person is able to defend him or herself".
- [21] R. v. Eisnor, 2015 NSCA 64 [Eisnor] also provides a helpful analysis of what is required to establish an accused has the capacity to communicate with counsel. In Eisnor, the appellant had asked the trial judge to determine his fitness, arguing his amnesia left him unable to communicate with counsel about the events relevant to his charge.
- [22] Following the approach in Morrissey, the Nova Scotia Court of Appeal concluded that to be fit to stand trial did not require a specific recollection of the events relating to the charge. At para. 155, the court explained what is required to establish an ability to communicate with counsel:

In my view, "communicate with counsel" means just that - the ability to hear, understand, and respond. Of course, the ability to respond must be rational, one not beset with delusions about what is going on in the trial, but not necessarily the ability to act in his or her own best interests.

[Emphasis added.]

- [23] More recently in Daley, the New Brunswick Court of Appeal provided a comprehensive review of cases that considered the requirements to establish that one has the ability to communicate with counsel under the limited cognitive capacity test developed in Taylor. In Daley, the Court addressed the conflict in the approaches that had arisen between the Saskatchewan Court of Appeal in R. v. Jobb, 2008 SKCA 156 [Jobb] and Morrissey and the body of cases following Morrissey. In Jobb, the Saskatchewan Court of Appeal adopted a narrow interpretation of Taylor that the limited cognitive capacity test only requires that an accused "be able to recount the facts of the offences with which he is charged to his counsel" (at para. 43). That approach had been rejected earlier by the Ontario Court of Appeal in Morrissey. In Morrissey, the Ontario Court of Appeal affirmed its reasons in

Taylor; specifically, that the limited cognitive capacity test sets a low threshold, requiring only "a relatively rudimentary understanding of the judicial process - sufficient, essentially to enable the accused to conduct a defence and instruct counsel in that regard" (at para. 27). However, the court in *Morrissey* then effectively broadened the test by stating that this standard is not met if the accused can only communicate the basic facts immediately connected to the charge. Rather, their communication abilities must permit them to seek and receive effective legal advice - that their ability to meaningfully be present and participate in the trial should be considered (*Morrissey* at paras. 29 and 36). In *Daley*, the court adopts the analysis in *Eisnor* with respect to this divergence in the law, and concludes that the *Morrissey* interpretation of the limited cognitive capacity test is the preferred approach (at para. 43).

- [24] The decisions of *Taylor*, *Daley* and *Morrissey* establish that fundamental to the concept of fitness in s. 2 of the Code are the basic notions of fairness. As Blair J. A. writing for the Court in *Morrissey* stated, "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" (*Morrissey* at para. 36).
- [25] With this legal framework in mind, I turn now to a review of the evidence.

Evidence at the Fitness Hearing

- [26] At the fitness hearing I heard from two forensic psychiatrists, Dr. Gharakhanian, Mr. Kampos's treating psychiatrist, and Dr. Murphy, who provided a second opinion at the request of the Crown. Their reports were filed as exhibits at the hearing. In many respects, the two psychiatrists' opinions align. They agree Mr. Kampos suffers from paranoid schizophrenia. They also agree he has benefitted from treatment he has received at FPH but remains psychotic. While he continues to suffer from delusions, the intensity and relevance of many of those delusions have been reduced. His auditory hallucinations have decreased in intensity and no longer trouble Mr. Kampos. They also agree that his delusions do not impact his ability to understand the nature and object of the proceedings and that he understands the possible consequences of the proceedings. Dr. Gharakhanian agreed with Dr. Murphy's assessment of Mr. Kampos as "marginally fit" and they both expect to see further improvements over time. However, they differ in their opinion regarding the impact of Mr. Kampos's delusions on his ability to communicate with counsel.
- [27] Dr. Gharakhanian testified that Mr. Kampos continues to have delusional beliefs about the justice system, including that the justice system and its participants are influenced by the military and will work together to secure his conviction. While these delusions will never disappear he explained the medication has reduced the strength and relevance of these delusions. However, he acknowledges there has been no improvement in Mr. Kampos's delusional belief that his counsel has held back evidence which would benefit his case. Despite these delusional beliefs, Mr. Kampos told Dr. Gharakhanian that he is prepared to discuss the "big points" with his counsel, which was understood by Dr. Gharakhanian to be a

reference to Mr. Kampos being the victim and his counsel withholding documents. Dr. Gharakhanian acknowledged Mr. Kampos will have difficulty communicating with his counsel because he does not trust him, but opines "I believe he has the capacity to establish effective communication with counsel and recount the necessary information relating to the offence in such a way that counsel could then properly present the defence".

- [28] Dr. Murphy opined that Mr. Kampos's paranoid belief will impair his ability to have a fair trial. Dr. Murphy characterized Mr. Kampos as marginally fit, explaining that Mr. Kampos's continued delusional beliefs regarding his counsel and his counsel's role in ensuring a conviction may impair Mr. Kampos's ability to meaningfully communicate with counsel. Dr. Murphy opined that, given Mr. Kampos's ongoing mistrust of his counsel and his paranoia with respect to the entire justice system, it is possible that these persistent delusional beliefs might impair Mr. Kampos's ability to communicate with counsel. In addition, Dr. Murphy cautioned that Mr. Kampos's mental fitness could be impacted negatively by various stressors during the trial.

Analysis

- [29] The evidence has established there is no issue with respect to the first two criteria under the test for fitness to stand trial set out in s. 2 of the Code. Specifically, Mr. Kampos understands the nature or object of the proceedings and he also understands the possible consequences of the proceedings. Indeed, he has expressed a desire to proceed with the trial and the possibility of pursuing an NCRMD defence. I am satisfied that Mr. Kampos is physically, intellectually, and linguistically present, but the question remains whether he is able to communicate with counsel.
- [30] My primary concern is whether Mr. Kampos's paranoid schizophrenia renders him unable to communicate with counsel in a manner that gives him meaningful presence and participation at the trial; in other words, to have a fair trial. Despite the medical treatment Mr. Kampos has received and the progress he has made while at FPH, he continues to hold delusional beliefs that the justice system, which includes his own counsel, is working together to obtain a conviction. While I appreciate Mr. Kampos had told Dr. Gharakhanian he is prepared to speak to his counsel and provide him with the "big points", that does not equate with an ability to communicate with counsel as contemplated in s. 2 of the Code, as discussed in the authorities, including Taylor, Morrissey and Daley.
- [31] Dr. Murphy stated that, given Mr. Kampos's paranoid beliefs, it would be difficult for him to communicate meaningfully with the person he believes is acting contrary to his interest, namely, his defence counsel. I remain concerned that Mr. Kampos's persecutory delusions render him incapable of communicating with counsel in a meaningful way because the delusions would impair his ability to seek and receive legal advice. The following comments by Blair J.A. at para. 36 of Morrissey inform my assessment:

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: see *R. v. Steele* (1991), 1991 CanLII 3882 (QC CA), 63 C.C.C. (3d) 149 (Que. C.A.) at pp. 172-173 and 181; *R. v. Roberts* (1975), 1975 CanLII 1394 (BC CA), 24 C.C.C. (2d) 539 (B.C.C.A.). Meaningful presence and meaningful participation at the trial, therefore, are the touchstones of the inquiry into fitness.

[Emphasis added.]

(See also *Adam* at para. 28.)

[32] I note that Dr. Gharakhanian states about Mr. Kampos in his September 2020 report that "he is able to communicate with counsel and recount the necessary information relating to the offence". While Mr. Kampos may be able to communicate with counsel as to what he believes occurred on the day in question, as per the Morrissey analysis, as affirmed in *Daley*, that does not end the inquiry. As stated in *Eisnor*, "the ability to respond must be rational, one not beset with delusions about what is going on in the trial, but not necessarily the ability to act in his or her own best interests" (*Eisnor*, at para. 155). Both Dr. Gharakhanian and Dr. Murphy agree Mr. Kampos continues to suffer from delusions about what is going on at trial and, in particular, about the actions of his counsel. While his other delusions have diminished in both intensity and frequency, his paranoid beliefs about the justice system and the role of defence counsel in ensuring his conviction have not. Indeed, the evidence establishes that Mr. Kampos continues to be "beset with delusions about what is going on" and that these delusions impair his ability to communicate with counsel in the manner contemplated in the authorities.

[33] As stated earlier, Dr. Gharakhanian and Dr. Murphy agree Mr. Kampos is "marginally fit". In my view, that assessment does not meet the low threshold of limited cognitive capacity contemplated in *Taylor*, as applied in subsequent authorities. While Mr. Kampos need not possess an analytical ability to understand the proceedings, I must be satisfied on a balance of probabilities that Mr. Kampos has the capacity to conduct a defence and instruct counsel. I find Mr. Kampos's continued delusions cast doubt on his capacity to meaningfully participate in the proceedings. I note that this is a borderline case. I expect that with further treatment and the passage of a little time that Mr. Kampos's delusions may subside to the point where he is able to rationally communicate with counsel. However, to force Mr. Kampos to continue with his trial in his present state would violate trial fairness, which underlies the fitness rules.

Conclusion

[34] Having considered all of the evidence, I am satisfied on a balance of probabilities that counsel for Mr. Kampos has established that Mr. Kampos is unfit to stand trial on account of a mental disorder, pursuant to s. 672.22 of the Code, and I refer Mr. Kampos' matter back to the Review Board pursuant to s. 672.45(1.1) of the Code for disposition. I further order that the Review Board hold a hearing within 90 days from the date of this decision pursuant to 672.47(2) of the Code.

"Devlin J."

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Prepared on 25 October 2026 · Esheria