Regina v. Taylor
[Indexed as: R. v. Taylor]

11 O.R. (3d) 323
[1992] O.J. No. 2394
Action No. C11156, C11765 and C12118

Court of Appeal for Ontario, Lacourcière,
McKinlay and Doherty JJ.A.
November 13, 1992

Criminal law -- Fitness to stand trial -- Test -- Trial judge erring in finding accused unfit to stand trial on basis of fitness test requiring accused to be capable of making rational decisions beneficial to him -- Presence of delusions not vitiating accused's fitness to stand trial unless delusions distort accused's rudimentary understanding of judicial process.

Criminal law -- Fitness to stand trial -- Procedure -- Trial judge not to determine whether accused fit to stand trial without being satisfied that Crown can make out prima facie case that accused committed offence alleged.

Criminal law -- Quash committal -- Application to quash committal to trial after indictment preferred -- No jurisdiction to quash committal.

The appellant, who suffered from paranoid schizophrenia, was charged with aggravated assault and possession of a weapon for a purpose dangerous to the public peace. The Crown led evidence that the appellant was insane and was found not guilty by reason of insanity in 1988 and was ordered detained at the pleasure of the Lieutenant-Governor. In 1991, the special verdict was set aside and a new trial was ordered on the basis of *R. v. Swain*, a recent decision of the Supreme Court of Canada. The appellant's application for judicial interim release pending the new trial was dismissed.

In February 1992, the appellant brought an application by way of habeas corpus with certiorari in aid and pursuant to ss. 10(c) and 24 of the *Canadian Charter of Rights and Freedoms* to quash his committal to stand trial. That application was dismissed.

In March 1992, the trial judge found the appellant unfit to stand trial and ordered the appellant in custody to be dealt with by the Ontario Criminal Code Review Board (OCCRB). The OCCRB also held that the appellant was unfit to stand trial and ordered that he be detained in the Oak Ridge Division of the Mental Health Centre in Penetanguishene. The appellant appealed the dismissal of the habeas corpus application, the finding of the trial judge that he was unfit to stand trial, and the disposition of the OCCRB.

Held, the appeal should be allowed.

An application to quash a committal order cannot be granted after an indictment has been preferred.

The trial judge erred in embarking on a fitness hearing without first requiring the Crown to show that it had a prima facie case against the appellant.

It was conceded that the appellant was fit pursuant to the first two criteria found in the definition of "unfit to stand trial" in s. 2 of the *Criminal Code*, as he fully understood the nature and object of the proceeding and its possible consequences. The question was whether the appellant met the third criterion, i.e., whether he had the ability to communicate with counsel. The appellant, a former lawyer, was articulate and had a thorough understanding of the judicial process. However, there was psychiatric evidence that he was extremely paranoid and delusional and that his delusional system was focused on the judicial system. Two psychiatrists testified that they believed the appellant to be unfit to stand trial because of his inability to place any trust and confidence in counsel. The trial judge agreed, stating that the appellant was not merely capable of disagreeing with counsel as to how the case should be conducted, but was "unable to perceive his own best interests and how those interests should be addressed in the conduct of a trial". The trial judge erred in adopting the "analytic capacity" test for fitness to stand trial (which requires that the accused be able to act in his own best interests). That test imposes too high a threshold and derogates from the fundamental principle that an accused is entitled to choose his own defence and to present it as he chooses. The correct test was the "limited cognitive capacity" test, under which the presence of delusions does not vitiate the accused's fitness to stand trial unless the delusion distorts the accused's rudimentary understanding of the judicial process. The OCCRB also erred in adopting a test which required the appellant to be capable of making rational decisions beneficial to him in his relationship with counsel.

APPEAL from a finding by the trial judge and by the Ontario Criminal Code Review Board of unfitness to stand trial, and from dismissal of motion to quash. (For earlier and related proceedings, see *R. v. Taylor* (1991), 1991 CanLII 7317 (ON CA), 4 O.R. (3d) 477, 7 C.R. (4th) 229 (C.A.).)

R. v. Trecroce (1980), 1980 CanLII 2854 (ON CA), 55 C.C.C. (2d) 202 (Ont. C.A.); *Reference re R. v. Gorecki (No. 1)* (1976), 1976 CanLII 833 (ON CA), 14 O.R. (2d) 212, 32 C.C.C. (2d) 129 (C.A.), consd

Other cases referred to *R. v. Chabot*, 1980 CanLII 54 (SCC), [1980] 2 S.C.R. 985, 55 C.C.C. (2d) 385, 18 C.R. (3d) 258, 22 C.R. (3d) 350, 117 D.L.R. (3d) 527, 34 N.R. 361; *R. v. Podola* (1959), 43 Cr. App. R. 220, [1960] 1 Q.B. 325, [1959] 3 All E.R. 418, [1959] 3 W.L.R. 718, 103 Sol. Jo. 856 (C.A.); *R. v. Pritchard* (1836), 7 C. & P. 303, 173 E.R. 135; *R. v. Scardino* (1991), 6 C.R. (4th) 146, 46 O.A.C. 209 (C.A.); *R. v. Steele* (1991), 1991 CanLII 3882 (QC CA), 63 C.C.C. (3d) 149, 4 C.R. (4th) 53 (Que. C.A.); *R. v. Swain*, 1991 CanLII 104 (SCC), [1991] 1 S.C.R. 933, 63 C.C.C. (3d) 481, 3 C.R.R. (2d) 1, 5 C.R. (4th) 253, 47 O.A.C. 81, 125 N.R. 1

Statutes referred to *Canadian Charter of Rights and Freedoms*, ss. 7, 10(c), 24; *Criminal Code*, R.S.C. 1985, c. C-46, ss. 2 "unfit to stand trial" [enacted 1991, c. 43, s. 1], 672.11(a), 672.2(4), 672.22, 672.23, 672.24, 672.25(2)(b), 672.33(1), 672.44(1), 672.47(1), 672.48(1), 672.58, 672.72(1) [Part XX.1, Mental Disorder, ss. 672.1-672.95, enacted 1991, c. 43, s. 4], 675(3), 784(3) *Mental Health Act*, R.S.O. 1990, c. M.7 Authorities referred to Martin's Annual Criminal Code 1993, by E.L. Greenspan, Q.C. (Aurora, Ontario: Canada Law Book Inc., 1993), p. 13

D.R.M. Taylor, appellant, in person.

Alan N. Young, amicus curiae.

John A. Sutherland, for the Crown, respondent.

The judgment of the court was delivered by

LACOURCIÈRE J.A.:--The appellant in person, assisted by counsel appointed by this court as amicus curiae, appeals against two judgments of Mr. Justice Wren who dismissed the appellant's habeas corpus application to quash his committal for trial and subsequently found the appellant unfit to stand trial, and appeals as well a similar disposition of the Ontario Criminal Code Review Board (OCCRB) to the same effect.

I. PROCEDURAL HISTORY

The following chronology serves to explain the reason why, almost six years after the alleged offences, the appellant is still awaiting trial and continues to be detained in the Oak Ridge Division of the Mental Health Centre in Penetanguishene (ORDMHC).

The appellant was arrested on January 6, 1987 and later indicted on August 27, 1987 on two counts charging that he

> [O]n or about the 6th day of January in the year 1987, at the Municipality of Metropolitan Toronto in the Judicial District of York, did commit an aggravated assault on Robert Conway by wounding the said Robert Conway, contrary to the *Criminal Code*.
>
> 2. ... stands further charged that he, on or about the 6th day of January in the year 1987, at the Municipality of Metropolitan Toronto in the Judicial District of York, did have in his possession a weapon, to wit: a knife, for a purpose dangerous to the public peace, contrary to the *Criminal Code*.

Following his arrest and psychiatric assessment, the appellant was found unfit to stand trial by the Provincial Court and ordered detained in the ORDMHC. After a fitness hearing conducted by the Lieutenant-Governor's Board of Review (LGBR) in April 1987 at which he was found fit to stand trial, a preliminary inquiry was held on August 19, 1987 and the appellant was committed to stand trial. The appellant was again found unfit to stand trial at his first appearance in the District Court of Ontario on November 9, 1987, and returned to ORDMHC. In August 1988, this court dismissed an appeal against the finding of unfitness to stand trial.

In the meantime, in June 1988, the LGBR found the appellant fit to stand trial and in September, His Honour Judge Borins (as he then was), in the District Court, came to the same conclusion.

Following his trial on October 14, 1988, the appellant was found not guilty by reason of insanity with respect to both counts and ordered detained in strict custody until the pleasure of the Lieutenant-Governor of Ontario was known. On August 26, 1991 this court set aside the special verdict and ordered a new trial on the basis of *R. v. Swain*, 1991 CanLII 104 (SCC), [1991] 1 S.C.R. 933, 63 C.C.C. (3d) 481, holding that it is a reversible error to permit the Crown to introduce evidence of the appellant's insanity.

The appellant's application for judicial interim release was dismissed, and the dismissal was confirmed on review by the Chief Justice of Ontario in December 1991.

On February 12, 1992, the appellant brought an application before Mr. Justice Wren by way of habeas corpus with certiorari in aid, and pursuant to ss. 10(c) and 24 of the *Canadian Charter of Rights and Freedoms*. The application sought to quash the appellant's committal to stand trial and to quash the

certificate of involuntary admission under the *Mental Health Act*, R.S.O. 1990, c. M.7. On February 12, 1992, Wren J. dismissed the habeas corpus application.

On March 24, 1992, Wren J. found the appellant unfit to stand trial and ordered the appellant in custody to be dealt with by the OCCRB. Further, Wren J. dismissed the Crown's application pursuant to s. 672.58 of the *Criminal Code*, R.S.C. 1985, c. C- 46, for an order directing that the appellant undertake treatment. On May 7, 1992, the OCCRB also held that the appellant was unfit to stand trial and that he be detained in the ORDMHC.

II. THE ISSUES

The appellant appeals the following

> (a) the dismissal of the habeas corpus ad subjiciendum application pursuant to s. 784(3) of the *Criminal Code*;
>
> (b) the finding of Mr. Justice Wren that the appellant is unfit to stand trial pursuant to s. 675(3) of the *Criminal Code*.
>
> (c) the disposition of the OCCRB pursuant to s. 672.72(1) of the *Criminal Code*.

(a) The habeas corpus application -- February 12, 199

The appellant, who appeared in person on his application for a writ of habeas corpus, submitted that his committal for trial should be quashed by reason of jurisdictional errors and a denial of natural justice. As he did in person before this court, he submitted that psychiatrists and a justice of this court had previously admitted that he did not suffer from mental illness and that he was maliciously prosecuted and falsely imprisoned. He sought further to quash the certificate of involuntary admission even though the order for involuntary admission had expired by the time the proceedings came before Wren J. The appellant contends that a psychiatrist had allegedly recommended that all charges be withdrawn shortly before the expiry of the certificates. Wren J. held that the appellant was properly detained, and referred to the denial of the appellant's application for judicial interim release for medical reasons.

I agree with Wren J. that an application to quash a committal order cannot be granted after an indictment has been preferred. Dickson J. in *R. v. Chabot*, 1980 CanLII 54 (SCC), [1980] 2 S.C.R. 985 at p. 990, 55 C.C.C. (2d) 385 at p. 389, stated:

> . . . the indictment becomes the operative document in the criminal process. At that point, the indictment provides a "fresh starting point". The indictment in effect becomes the foundation upon which the further proceedings are built. After presentment of the indictment, the accused is free to move to quash the indictment by motion made in the trial Court but he can no longer attack the regularity of the committal for trial by certiorari.

I also agree that the validity of the expired certificate of involuntary admission was not reviewable on the habeas corpus application.

(b) The fitness hearing -- March 24, 1992

Before the fitness hearing, the present legislation replacing the *Criminal Code*'s procedure for determining the fitness to stand trial issue was enacted by Parliament in December 1991. Appendix "A" hereto contains the text of the new sections to which reference will be made [see p. 340, post]. On February 12, 1992, pursuant to s. 672.23, the prosecution applied to the court for a direction that the issue of the fitness of the accused be tried, and then assumed the burden of proof pursuant to s. 672.23(2). Wren J. appointed counsel (not Mr. Young) pursuant to s. 672.24 of the new provisions for the purposes of the fitness hearing and, at counsel's request, ordered a 30-day psychiatric assessment of the accused's mental condition pursuant to s. 672.11(a).

At the resumption of the hearing, on March 24, 1992, the appellant repudiated counsel appointed by the court as an incompetent fraud and did not cooperate with him. The appellant was arraigned and did not have to plead. The hearing proceeded after the accused had been given a copy of the psychiatric reports pursuant to s. 672.2(4)

Dr. Cameron, currently staff psychiatrist and clinical director at the ORDMHC, and Dr. Angus McDonald, a staff psychiatrist at the Metropolitan Toronto Forensic Service of the Clarke Institute (METFORS) were, along with the appellant, the only witnesses who testified on the fitness issue. The evidence of these expert witnesses was accurately summarized by Mr. Young in the factum of the amicus curiae and accepted as correct by the respondent. I adopt this summary as varied by me in minor respects for narrative purposes.

Dr. Cameron testified that the appellant was housed in his unit and has been under his care from the summer of 1990 until January of 1992. He recalled that the appellant has had three admissions to this hospital commencing in 1987 or 1988. He was in complete agreement with the conclusions reached in a letter of October 30, 1991 written by Dr. Jones who is the Director of the Social Management Unit where the appellant has been hospitalized. Dr. Jones' opinion letter stated:

> Mr. Taylor suffers from a chronic mental illness, namely paranoid schizophrenia. He is evidently delusional, extremely paranoid and easily agitated and behaves in a most threatening manner, and in our view represents a danger to other persons and would not be able to provide for himself in the event he were not an involuntary patient in hospital.

Dr. Cameron believed that the appellant was unfit to stand trial when he examined him a number of months earlier. Notwithstanding the absence of any recent assessment, the witness testified that he "would be surprised if his mental state had changed", and that his observations of, and brief discussion with, the appellant during the lunch recess at court confirmed his earlier opinion. He also believed the appellant would be unable to properly instruct counsel as a result of suffering from delusions. He expressed his agreement with the following conclusions of other psychiatrists:

Dr. Jones, October 30, 1991:

> He believes the hospital, the courts and the witnesses to the courts have routinely conspired against him, have altered or rescinded their testimony or documentation and that the court is withdrawing all charges against him. His delusional system is focused on the judicial system and participants in it. As such, in my view, he would be unable to participate meaningfully in the

> proceedings as his delusional thinking would preclude accurate perception of the events occurring before him.

Dr. McDonald, March 10, 1992:

> I do not believe he is fit to stand trial. He cannot be dealt with rationally. He refuses examination by his defence psychiatrist and remains convinced that he is perfectly well and only a victim of conspiracy. It would hardly be surprising if he is uncooperative with the lawyer assigned to represent him and I do not believe by any stretch of the imagination he could effectively represent himself.

In cross-examination, Dr. Cameron conceded that the appellant was "technically fit" in the sense that he is "cognizantly aware of the charges against him, the officers of the court, the possible pleas available to him, all the technicalities of the court". In addition, he noted that the appellant was articulate, was aware of the possible consequences of his trial, and was aware of the nature of an oath and meaning of perjury.

Dr. Cameron identified two concerns he had with respect to the fitness of the appellant. He was concerned that the appellant would misconstrue the evidence given by witnesses at his trial and that he would be unable to instruct counsel in a manner that would be in his best interests. However, he conceded that the appellant's psychiatric disorder would wax and wane over time and that on some days he would be fit and on others he would not.

Dr. McDonald testified that the appellant suffers from a disease of the mind known as "paranoid schizophrenia", and that despite his thorough understanding of judicial process he is unable to distinguish reality from fantasy. The witness characterized the appellant's condition in the following terms:

> His thinking and rambling is disjointed and times thoroughly irrational. He is sufficiently distrustful of other people that he has not been able to obtain legal representation at any time that has been satisfactory to him. He believes that everyone has been conspiring against him and every lawyer he has been involved with has tried to make things worse for him rather than better. Unfortunately his paranoid condition has not been treated and not improved and he is not likely in the foreseeable future to be able to deal with a lawyer in any reasonable way.

In Dr. McDonald's opinion the appellant has not been fit to stand trial for the past five years. In these past five years, the appellant has failed to recognize that he suffers from a mental disorder, and he has resisted all attempts to provide treatment. Not only has he resisted attempts to provide psychiatric treatment but he has also refused treatment for his serious dental problems. Dr. McDonald indicated that the reason why the appellant is unfit to stand trial relates to his inability to place any trust and confidence in his legal representative. He characterized the problem in the following manner:

> The problem is that he feels that the only person he can trust is himself, and therefore he does not wish to cooperate with anyone who attempts to help him because of his conviction that they are in fact trying to hurt him. He told me, for example with respect to his current legal counsel, that he was told by that individual that some lawyer was going to sell him down the river, so it might as well be him, and I believe he really does think that this is happening in his

> own mind. This is -- I don't see how he is ever going to be able to make use of a lawyer effectively.

In cross-examination, Dr. McDonald indicated that the appellant is "technically fit" in the sense that he is articulate and bright and that he understands the judicial process and the role of the various players in the process. However, he would not be able to instruct counsel in a manner that would be in his best interests and that he would, in fact, resist the assistance of counsel altogether.

Counsel appointed to assist the appellant indicated to the court that he believed it was not necessary or appropriate for the appellant to testify on the fitness hearing. Despite this recommendation the appellant elected to give evidence at this hearing.

The appellant's evidence was that he had spoken to counsel of his choice and that this individual was ready, willing and able to represent the appellant. Further, he testified that he was quite willing to accept the advice of this counsel and that he and the lawyer were in agreement as to the manner of the proposed defence. He also stated that he did not believe that this lawyer, nor any other lawyer, was part of a conspiracy to "frame" him, but that he was concerned about the fairness of his upcoming trial in light of having been through one "travesty" of justice in the past.

In cross-examination, the appellant noted that he has filed numerous criminal charges against various public officials and he claimed that the Crown Attorney who conducted his first trial had "maliciously prosecuted" him. Further, the appellant testified that he has refused medical treatment for his dental condition because the medication aggravated his ulcers, and not because he has claimed that the medication being supplied is poisonous.

Following submissions by counsel, Wren J. ruled that the appellant was unfit to stand trial. After reviewing the psychiatric evidence, he stated:

> The accused's background as a lawyer is well known, and it is everyone's consensus that given his basic reasonably high level of intelligence, and his experienced background in law, that he is capable of understanding the nature of the proceedings and of the functions of the persons involved in them. He has an understanding of the issues and the possible outcome of the proceedings although he is in a clear and pronounced fashion most often misrepresenting and misunderstanding the proceedings and the outcome.

He concluded, after distinguishing *R. v. Trecroce* (1980), 1980 CanLII 2854 (ON CA), 55 C.C.C. (2d) 202 (Ont. C.A.), that the accused:

> . . . can communicate with counsel to the extent that he can speak to counsel, and do so in an articulate manner, however, it is abundantly clear from the opinion of the psychiatrists before me and from the conduct of the accused person during various appearances that have led up to this hearing and at this hearing, and in his evidence given before me, that his delusions are so pervasive and irrational that he is, unlike the accused in R. v. Trecroce not merely capable of disagreeing with counsel whom he might instruct as to how the case should be conducted, but unable to perceive his own best interests and how those interests should be addressed in the conduct of a trial.

QUOTE?? In this case I must distinguish it from the judgment I have just referred to in that I am content that the accused person in this case is not capable to rationally instruct counsel, or rationally conduct a case or rationally communicate with counsel because of this mental disorder.

Wren J. declined to order treatment pursuant to s. 672.58 on the basis that he was not satisfied that the administration of the treatment programme would render the accused fit to stand trial within the next 60 days.

(c) The Ontario Criminal Code Review Board

Subsequently, the OCCRB on May 6, 1992, held a disposition hearing pursuant to ss. 672.47(1) and 672.48(1) and heard the same psychiatrists. In cross-examination, Dr. Cameron agreed that the appellant has the intellectual ability and the necessary comprehension to instruct counsel should he desire to retain a lawyer. However, he noted that the appellant "lacks certain abstractions" and is "unable to reason on higher cognitive levels". As a result, he remains locked in his delusional system and thus "he will inevitably act in a way that's counterproductive or not in his best interest".

On May 27, 1992 the Board held that, as a result of the appellant's mental disorder and his delusions with respect to the criminal justice system, he could not communicate meaningfully with counsel nor participate in his own defence. The Board found the appellant unfit to stand trial and ordered that he be placed in the ORDMHC.

III. THE APPELLANT'S ARGUMENT IN PERSON

The appellant argued his appeal in person and was allowed a limited but generous time which he exceeded with the court's permission. His submissions did not assist the court in any way. When the time exigencies of the appeal forced the court to turn to the amicus curiae, he decided that he would not return to the hearing until the court gave an undertaking that it would allow him the time needed to complete his submissions. He claimed that he had only commenced his argument on the habeas corpus appeal. The court refused to do more than promise to hear him again for a limited time at a later stage of the proceedings. The appeal continued in his absence by reason of his obstinate refusal to continue in attendance.

IV. THE ARGUMENT OF THE AMICUS CURIAE

The amicus curiae submitted that the learned trial judge erred in finding the appellant unfit to stand trial in that he applied the incorrect standard for determining fitness or, alternatively, if he applied the correct standard, he did so without a proper evidentiary foundation.

The determination of unfitness to stand trial must now be guided by the statutory criteria set out in s. 2 of the *Criminal 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;

The submission of the amicus curiae is that the statutory definition is a mere codification of the standard applied at common law dealing with the criteria of unfitness, exemplified as early as 1836 in *R. v. Pritchard* (1836), 7 C. & P. 303, 173 E.R. 135 and more recently in *R. v. Podola* (1959), 43 Cr. App. R. 220, [1960] 1 Q.B. 325 (C.A.), at p. 239 Cr. App. R., pp. 353-54 Q.B. Fish J.A., delivering the judgment of the Quebec Court of Appeal in *R. v. Steele* (1991), 1991 CanLII 3882 (QC CA), 63 C.C.C. (3d) 149 at p. 181, 4 C.R. (4th) 53 at p. 95, under the old procedures of s. 615 of the *Criminal Code* prior to the 1991 amendment, summarized the standard developed at common law in the following language:

> 5. An accused is incapable of conducting the defence within the meaning of s. 615 of the *Criminal Code*, if he or she:
>
> (a) cannot distinguish between available pleas;
>
> (b) does not understand the nature or purpose of the proceedings, including the respective roles of the judge, jury and counsel;
>
> (c) does not understand the personal import of the proceedings;
>
> (d) is unable to communicate with counsel, converse with counsel rationally or make critical decisions on counsel's advice; or
>
> (e) is unable to take the stand, if necessary.

(Footnote omitted) *R. v. Steele* was referred to by this court in *R. v. Scardino* (1991), 6 C.R. (4th) 146, 46 O.A.C. 209.

V. PROPER TIMING

Wren J. conducted the inquiry into the appellant's fitness to stand trial immediately after arraignment. He did not require the Crown to lead any evidence to demonstrate that the appellant had committed the acts alleged against him. No doubt, Wren J. was influenced by the fact that the appellant had a full trial on the merits before Borins J. where the Crown proved that the appellant had stabbed the complainant as alleged. The facts revealed at the first trial were summarized by Brooke J.A. in his reasons disposing of the appellant's appeal from the order of Borins J. (*R. v. Taylor* (1991), 1991 CanLII 7317 (ON CA), 4 O.R. (3d) 477 at pp. 478-79, 7 C.R. (4th) 329 at pp. 330-31):

> The appellant was a barrister and solicitor. Some years ago, Convocation of the Law Society found that he was unfit to practice law because of the mental illness he suffered from. He was suspended, but the suspension was subject to his right to apply for reinstatement when he could show that he was no longer unfit by reason of his mental illness.

> He applied to be reinstated. Mr. Conway was counsel to the Law Society throughout the proceedings, and had met on a number of occasions with the appellant. To support his application for reinstatement, Mr. Conway had advised the appellant to submit to an examination by a psychiatrist specified by the Law Society. The appellant did so. In an extensive and detailed report, the psychiatrist advised the Law Society that, in his opinion, the appellant suffered from a paranoid disorder and was incapable of practising law. A copy of this report was served on the appellant before the continuation of the reinstatement hearing. The appellant wanted to discuss the matter with the psychiatrist and, when he could not locate him, he went to Osgoode Hall to see Mr. Conway. There was an altercation which concluded with Mr. Conway being wounded.
>
> It was the theory of the Crown's case that the appellant assaulted Mr. Conway because the appellant was angered by the content of the report which he said was completely false. He blamed the doctor and Mr. Conway for the report. It was further contended that he stabbed Mr. Conway with a knife that he was carrying for that reason.

The amicus curiae submitted that Wren J. erred in embarking on a fitness hearing without first requiring the Crown to show that it still had a prima facie case against the appellant. He argued that the conduct of the fitness inquiry before such proof was offered by the Crown violated s. 7 of the *Charter*. Alternatively, he submitted that if Wren J. had a discretion to conduct the inquiry without first determining that the Crown had a prima facie case, that he erred in doing so in face of the appellant's denial of the allegation.

Section 672.25(2)(b) of the *Code* gives the trial judge a discretion as to the timing of the inquiry and permits him or her to postpone that inquiry until the Crown has completed its case, or on the application of the accused until some later time in the proceedings. The section implies that the trial judge can conduct the inquiry at any point, including before any evidence is called by the prosecution.

I need not decide whether s. 7 of the *Charter* requires that s. 672.25(2)(b) of the *Code* be interpreted so as to require that the Crown establish a prima facie case before the fitness inquiry is held. I am satisfied, however, that in exercising his or her discretion under s. 672.25(2)(b) of the *Code*, a trial judge must consider whether there is any dispute as to the Crown's ability to demonstrate that the accused committed the act or acts alleged in the indictment. If there is a dispute, the trial judge should not decide the question of fitness without being satisfied that the Crown is in a position to establish that the accused committed the act or acts alleged. The trial judge may proceed with the trial proper and postpone the fitness inquiry, or he or she may require the Crown to demonstrate at the outset of the fitness hearing that it is in a position to establish that the accused committed the act or acts alleged in the indictment. In either case, a finding that an accused is not fit to stand trial should not be made in the absence of any basis to put that accused on trial.

In the present case, the appellant did not concede that he had assaulted the complainant. In fact, he alleged that the complainant had exculpated him by "a voluntary confession". I take this to be an allegation that the complainant had recanted. In light of the position taken by the appellant, the trial judge should have either delayed the holding of the fitness inquiry until the Crown had demonstrated

that it could still prove the allegation or the trial judge should have required the Crown, as part of the fitness hearing, to show that it was in a position to prove the allegation made against the appellant.

I would add, given the basis on which the Crown contended that the appellant was unfit to stand trial, that had the trial judge required the Crown to demonstrate that it could still prove the appellant committed the act alleged, the conduct of the appellant during that inquiry may have provided valuable insight into his fitness to stand trial.

VI. TEST OF FITNESS TO STAND TRIAL

As stated above, s. 2 of the *Criminal Code* now sets out three statutory criteria for determining the fitness of an accused to stand trial. The annotation of the learned editor of Martin's Annual Criminal Code 1993, in my opinion, aptly sums up the effect of the new definition (at p. 13):

> "unfit to stand trial" -- The definition of "unfit to stand trial" statutorily entrenches the extensive case-law in the area. Any individual who is unable to understand either the nature or object of the proceedings, the possible consequences or to communicate with counsel as a result of a mental disorder is rendered "unfit to stand trial". The terminology provides clarification of the conflicting case- law by requiring the issue of fitness to be raised solely in the context of a mental disorder and at any stage in the proceedings prior to the rendering of a verdict.

It is conceded by the respondent that the appellant meets the first two criteria found in paras. (a) and (b) of the definition in that he fully understands the nature and object of the proceedings and its possible consequences. In other words, the appellant knows what is happening to him in the criminal process. However, the parties disagree over whether the accused has the ability to communicate with counsel, the third factor in determining the accused's fitness for trial.

This raises the question of the proper test to be applied in determining the accused's ability to communicate with counsel. The respondent submits that the accused's mental disorder is so serious and pervasive as to render him unable to conduct a defence or instruct counsel to do so. The amicus curiae suggests that despite his delusions arising from his mental disorder, the appellant is capable of conducting his defence because he has the capacity to understand that he will be tried in a court of law, that he may be subject to punishment and will understand the gist of the testimony adduced at his trial.

The amicus curiae submits that Dr. Cameron's main concern at the trial of the issue of fitness to stand trial was that the appellant does not know what his own best interests are, and therefore would have difficulty instructing counsel. Before the OCCRB in May 1992, Dr. Cameron in cross-examination referred to the appellant's inability "to reason on higher cognitive levels" because of his "lack of abstraction" because of being "locked in [his] delusional system".

Under the "limited cognitive capacity" test propounded by the amicus curiae, the presence of delusions do not vitiate the accused's fitness to stand trial unless the delusion distorts the accused's rudimentary understanding of the judicial process. It is submitted that under this test, a court's assessment of an accused's ability to conduct a defence and to communicate and instruct counsel is limited to 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. It is not relevant to the fitness

determination to consider whether the accused and counsel have an amicable and trusting relationship, whether the accused has been cooperating with counsel, or whether the accused ultimately makes decisions that are in his/her best interests. The amicus curiae relies on this court's decision in *Reference re R. v. Gorecki (No. 1)* (1976), 1976 CanLII 833 (ON CA), 14 O.R. (2d) 212, 32 C.C.C. (2d) 129, and *R. v. Trecroce*, supra.

In his factum and oral presentation, counsel for the respondent concurs with the amicus curiae, in the following respects:

> (a) The fact that an accused person suffers from a delusion does not, of itself, render him or her unfit to stand trial, even if that delusion relates to the subject matter of the trial.
>
> (b) The fact that a person suffers from a mental disorder which may cause him or her to conduct a defence in a manner which the court considers to be contrary to his or her best interests does not, of itself, lead to the conclusion that the person is unfit to stand trial.
>
> (c) The fact that an accused person's mental disorder may produce behaviour which will disrupt the orderly flow of a trial does not render that person unfit to stand trial.
>
> (d) The fact that a person's mental disorder prevents him or her from having an amicable, trusting relationship with counsel does not mean that the person is unfit to stand trial.

I have considered this court's decisions in *Reference re R. v. Gorecki (No. 1)* and *R. v. Trecroce*, relied upon by both counsel. In my opinion, these cases set out the appropriate test at common law for unfitness.

In *Reference re R. v. Gorecki (No. 1)*, in a reference by the Minister of Justice to this court pursuant to s. 617(c) of the *Criminal Code*, following the conviction of the accused on a charge of murder and an unsuccessful appeal, a five-judge panel of this court in which I participated rejected the test to determine the fitness of an accused to stand trial based on whether or not the accused is able to act in his own best interests. The court concluded that Dr. Gorecki was not unfit to stand trial for the following reasons at p. 217 O.R., pp. 133-34 C.C.C.:

> The real issue on this Reference is whether Dr. Gorecki's inability to accept any blame made him unfit to stand trial. Was an emotional unwillingness to accept a psychiatric defence sufficient to render him unfit to instruct counsel. All of the doctors agreed that the other prerequisites to fitness were met.
>
> In the matter of *R. v. Robertson* (1968), 52 Cr. App. R. 690, the English Court of Appeal (Criminal Division) considered whether the incapability of a defendant to act in his own best interests was a proper test on the issue of fitness to stand trial. The Court came to the conclusion that it was not a proper test, and referred to the traditional test at p. 694:
>
> > The test which is always referred to in these cases and which has been confirmed and followed over and over again is to be found in *Pritchard* (1836) 7 C. & P.R. 303 in which Alderson B., in dealing with a deaf-mute said this to the jury: "There are three points to be inquired into:

> -- first, whether the prisoner is mute of malice or not; secondly, whether he can plead to the indictment or not; thirdly, whether he is of sufficient intellect to comprehend the course of the proceedings in the trial, so as to make a proper defence -- to know that he might challenge any of you to whom he may object -- and to comprehend the details of the evidence, which in a case of this nature must constitute a minute investigation."

The court concluded that Dr. Gorecki, on the above test, was not incapable of conducting his defence.

In *R. v. Trecroce*, during an appeal against a conviction for second degree murder, the accused discharged his counsel and the question arose whether the appellant was competent to do so and to appoint other counsel. Martin J.A., delivering the judgment of the court, stated at p. 216:

> On the resumption of the hearing both Dr. Fleming and Dr. Coulthard gave evidence on the issue of the appellant's fitness to instruct counsel. They were in general agreement that the appellant suffers from a mental disorder. They were of the opinion, however, that he understood the nature of the proceedings and the functions of the persons involved in them. He knew what the issues were and the possible outcome of the proceedings. The appellant, in their opinion, was able to follow the evidence generally, although he might misinterpret it. They were of the opinion that the appellant was capable of instructing counsel although he might disagree with counsel as to how the case should be conducted, and might not act with good judgment. The appellant did not want to be seen as mentally ill, and was opposed to the issue of insanity being considered by the Court. We concluded on the basis of the evidence of Dr. Fleming and Dr. Coulthard that the appellant was competent to instruct counsel: see *Reference Re R. v. Gorecki (No. 1)* (1976), 1976 CanLII 833 (ON CA), 32 C.C.C. (2d) 129, 14 O.R. (2d) 212.

The respondent concedes that the "limited cognitive capacity" test is correct in Canadian criminal law. However, the respondent submits that the law should make allowances for cases such as the present where the accused's mental disorder is so potent and extensive that it cannot be said that the person is capable of following the evidence, communicating rationally with counsel, or giving evidence which is responsive to the case for the Crown. Therefore, the respondent submits that the trial judge was correct in distinguishing *R. v. Trecroce* on the basis that the accused in the case at bar suffered from delusions so pervasive and irrational that he was "unable to perceive his own best interests and how those interests should be addressed in the course of a trial".

To determine whether the test should be modified as suggested by the respondent, one must remain cognizant of the rationale for the fitness rules in the first place. In order to ensure that the process of determining guilt is as accurate as possible, that the accused can participate in the proceedings or assist counsel in his/her defence, that the dignity of the trial process is maintained, and that, if necessary, the determination of a fit sentence is made possible, the accused must have sufficient mental fitness to participate in the proceedings in a meaningful way. At the same time, one must consider that principles of fundamental justice require that a trial come to a final determination without undue delay. The adoption of too high a threshold for fitness will result in an increased number of cases in which the accused will be found unfit to stand trial even though the accused is capable of understanding the process and anxious for it to come to completion.

In addition, adopting a high threshold of fitness, including a "best interests" component, derogates from the fundamental principle that an accused is entitled to choose his own defence and to present it as he

chooses. In *R. v. Swain*, *supra*, at p. 970 S.C.R., p. 504 C.C.C., Lamer C.J.C., for the majority, stressed the importance of the accused's s. 7 right to liberty which allows him to control his own defence. An accused who has not been found unfit to stand trial must be permitted to conduct his own defence, even if this means that the accused may act to his own detriment in doing so. The autonomy of the accused in the adversarial system requires that the accused should be able to make such fundamental decisions and assume the risks involved.

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.

In asking the court to require that the accused be able to act in his own best interests, the respondent is asking this court to adopt the higher threshold "analytic capacity" test for determining the accused's fitness to stand trial. This test has clearly been rejected by the courts.

Having rejected a higher threshold for determining the accused's ability to instruct counsel, the real question to be determined in this case is whether the learned trial judge erred in holding that, although the appellant

> . . . can communicate with counsel to the extent that he can speak to counsel, and do so in an articulate manner, however ... his delusions are so pervasive and irrational that he is ... not merely capable of disagreeing with counsel with whom he might instruct as to how the case should be conducted, but unable to perceive his own best interests and how those interests should be addressed in the conduct of a trial.

In my opinion, the learned trial judge erred in adopting the "analytic capacity" test which 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 him.

VII. DISPOSITION

Section 672.22 entrenches a general presumption of fitness. Where the Crown raises the issue of unfitness to stand trial, it has the onus to satisfy the burden of proving unfitness on a balance of probabilities. The appellant testified before Wren J. that he was prepared to cooperate with counsel of his choice at trial whose name he provided to the court. Nevertheless, as with any counsel, the possibility exists of disruption of the trial process by misbehaviour or outbursts of the accused due to his paranoia. The accused's difficulty in maintaining a collaborative relationship with counsel in his best interest may continue; indeed his paranoid distrust of counsel, his inability to understand and abide by the rulings of the court, are all matters which raise concerns in the expeditious conduct of the trial. However, we agree with the amicus curiae that these concerns do not affect the application of the proper test to determine whether the accused is capable of communicating with counsel for the purpose of conducting his defence.

In my opinion, both the learned trial judge and the OCCRB erred in adopting a test which required the accused to be capable of making rational decisions beneficial to him in his relationship with counsel. I should note that the fitness of the accused can always be reviewed at any point during the trial. In the

event of a finding of unfitness, the Crown has an obligation to demonstrate every two years that there is sufficient evidence at that time to put the accused on trial: s. 672.33(1).

I express no opinion on the effect of the lengthy passage of time since the alleged offences as the question of a judicial stay of proceedings has not been argued before us and may be raised with the trial judge.

On behalf of the court I wish to express our appreciation for the able assistance provided by Mr. Alan N. Young as amicus curiae in a very difficult appeal. In the result, I would allow the appeal, quash the disposition of the Ontario Criminal Court Review Board as well as the finding of unfitness made by Wren J., and direct a new trial.

Appeal allowed in part.

APPENDIX "A"

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; . . . . .

672.2(4) Subject to subsection 672.51(3), copies of any report filed with a court pursuant to subsection (2) shall be provided without delay to the prosecutor, the accused and any counsel representing the accused. . . . . .

672.22 An accused is presumed fit to stand trial unless the court is satisfied on the balance of probabilities that the accused is unfit to stand trial.

672.23(1) Where the court has reasonable grounds, at any stage of the proceedings before a verdict is rendered, to believe that the accused is unfit to stand trial, the court may direct, of its own motion or on application of the accused or the prosecutor, that the issue of fitness of the accused be tried.

(2) An accused or a prosecutor who makes an application under subsection (1) has the burden of proof that the accused is unfit to stand trial.

672.24 Where the court has reasonable grounds to believe that an accused is unfit to stand trial and the accused is not represented by counsel, the court shall order that the accused be represented by counsel. . . . . .

672.25(2) The court may postpone directing the trial of the issue of fitness of an accused

> (a) where the issue arises before the close of the case for the prosecution at a preliminary inquiry, until a time that is not later than the time the accused is called on to answer to the charge; or

(b) where the issue arises before the close of the case for the prosecution at trial, until a time not later than the opening of the case for the defence or, on motion of the accused, any later time that the court may direct. . . . . .

672.33(1) The court that has jurisdiction in respect of the offence charged against an accused who is found unfit to stand trial shall hold an inquiry, not later than two years after the verdict is rendered and every two years thereafter until the accused is acquitted pursuant to subsection (6) or tried, to decide whether sufficient evidence can be adduced at that time to put the accused on trial. . . . . .

672.44(1) A Review Board may, subject to the approval of the lieutenant governor in council of the province, make rules providing for the practice and procedure before the Review Board. . . . . .

672.48(1) Where a Review Board holds a hearing to make or review a disposition in respect of an accused who has been found unfit to stand trial, it shall determine whether in its opinion the accused is fit to stand trial at the time of the hearing. . . . . .

672.58 Where a verdict of unfit to stand trial is rendered and the court has not made a disposition under section 672.54 in respect of an accused, the court may, on application by the prosecutor, by order, direct that treatment of the accused be carried out for a specified period not exceeding sixty days, subject to such conditions as the court considers appropriate and, where the accused is not detained in custody, direct that the accused submit to that treatment by the person or at the hospital specified. . . . .

672.72(1) Any party may appeal against a disposition or placement decision made by a court or Review Board to the court of appeal of the province where the disposition or placement decision was made on any ground of appeal that raises a question of law or fact alone or of mixed law and fact.