

Her Majesty the Queen (respondent) v. Henryk Szostak (appellant)
(C49582; 2012 ONCA 503)

Indexed As: R. v. Szostak (H.)

Ontario Court of Appeal
Rosenberg, Cronk and LaForme, JJ.A.
July 19, 2012.

Summary:

After being convicted of criminal harassment and uttering a death threat, the accused was found not criminally responsible on account of a mental disorder (NCRMD). He appealed from the criminal harassment conviction and the NCRMD finding.

The Ontario Court of Appeal dismissed the appeal.

Barristers and Solicitors - Topic 1543

Relationship with client - Duty to client - General - Legal aid lawyers - After being convicted of criminal harassment and uttering a death threat, the accused was found not criminally responsible on account of a mental disorder (NCRMD) - He appealed from the NCRMD finding, asserting, inter alia, that he had been deprived of effective assistance by his counsel because counsel had put his mental condition into issue without instructions - The Ontario Court of Appeal dismissed the appeal - The court rejected the accused's argument that when he had applied to change counsel with Legal Aid, his defence counsel was required to apply to have himself removed from the record - Whether or not the accused would be permitted by Legal Aid to change counsel was a matter between the accused and Legal Aid - The fact that Legal Aid refused to grant the application did not prevent the accused from discharging his counsel - From defence counsel's point of view, there was no breakdown of the relationship - There was no evidence that the accused attempted to discharge defence counsel - See paragraphs 66 to 68.

Civil Rights - Topic 3137

Trials - Due process, fundamental justice and fair hearings - Criminal and quasi-criminal proceedings - Right to be present at trial - [See second **Civil Rights - Topic 3158**].

Civil Rights - Topic 3133

Trials - Due process, fundamental justice and fair hearings - Criminal and quasi-criminal proceedings - Right of accused to make full answer and defence - [See third **Civil Rights - Topic 3158**].

Civil Rights - Topic 3158

Trials - Due process, fundamental justice and fair hearings - Criminal and quasi-criminal proceedings - Right to effective assistance by counsel - After being convicted of criminal harassment and uttering a death threat, the accused was found not criminally responsible on account of a mental disorder (NCRMD) - He appealed from the NCRMD finding, asserting, inter alia, that he had been deprived of effective assistance by his counsel

because counsel had put his mental condition into issue without instructions - The Ontario Court of Appeal dismissed the appeal - The accused's submissions engaged both aspects of the test regarding ineffective assistance by counsel, i.e., that counsel's performance might have resulted in procedural unfairness and/or that the reliability of the trial's result might have been compromised - Whichever branch of the test was engaged, the accused had to show that a miscarriage of justice occurred - The appellate court had to consider, first, whether prejudice had occurred and, only then, the performance component - Here, the court had no difficulty in concluding that, in the general sense, the accused was prejudiced by the course of the proceedings - Had he been prosecuted and convicted without reference to his mental state, he would have received, at most, a penitentiary sentence of two to three years - Having been found NCRMD, the accused was subject to indefinite detention and had now been detained in hospital for five years - The consequences of an NCRMD finding could be so profound that a high degree of procedural fairness and scrupulous attention to the accused's rights were required - See paragraphs 60 to 65.

Civil Rights - Topic 3158

Trials - Due process, fundamental justice and fair hearings - Criminal and quasi-criminal proceedings - Right to effective assistance by counsel - After being convicted of criminal harassment and uttering a death threat, the accused was found not criminally responsible on account of a mental disorder (NCRMD) - He appealed from the NCRMD finding, asserting, inter alia, that he had been deprived of effective assistance by his counsel because counsel had put his mental condition into issue without instructions - The Ontario Court of Appeal dismissed the appeal - There was no question of ineffective assistance of counsel arising from the fact that defence counsel raised the question of the accused's fitness to stand trial - Where, as here, counsel had a good faith basis for doubting the client's fitness to stand trial, counsel was entitled to raise that issue with the court - While counsel should not have raised the issue until the accused was brought into court, there was no suggestion that what took place was part of the trial so as to infringe the requirement of s. 650 of the Criminal Code that an accused be present for the whole of the trial - Further, when the accused did enter the courtroom, the subsequent proceedings in his presence provided a reasonable basis for concern, sufficient for the judge to direct an assessment - The fitness inquiry had not prejudiced the accused - See paragraphs 69 to 73.

Civil Rights - Topic 3158

Trials - Due process, fundamental justice and fair hearings - Criminal and quasi-criminal proceedings - Right to effective assistance by counsel - After being convicted of criminal harassment and uttering a death threat, the accused was found not criminally responsible on account of a mental disorder (NCRMD) - He appealed from the NCRMD finding, asserting, inter alia, that he had been deprived of effective assistance by his counsel because counsel had put his mental condition into issue without instructions - The Ontario Court of Appeal dismissed the appeal - Defence counsel's request for an assessment under s. 672.12 of the Criminal Code prejudiced the accused in that it set in motion the events that led to the NCRMD finding and indefinite detention - But for that, the accused would simply have been sentenced - The constitutional right to control one's defence prevented defence counsel from raising the NCRMD defence against the wishes of the client - For counsel to proceed with an NCRMD defence without instructions was a failure to provide

adequate advice and, hence, an adequate defence - Provided that the accused was fit to stand trial, counsel had to obtain instructions about decisions fundamental to the case, including as to whether or not to pursue an NCRMD defence - The record here was unclear as to whether defence counsel had instructions to pursue the NCRMD defence - However, it was clear that when counsel had instructions not to raise the NCRMD defence, he complied with those instructions and actively opposed the Crown's attempt to have the accused found NCRMD - See paragraphs 74 to 86.

Civil Rights - Topic 3158

Trials - Due process, fundamental justice and fair hearings - Criminal and quasi-criminal proceedings - Right to effective assistance by counsel - After being convicted of criminal harassment and uttering a death threat, the accused was found not criminally responsible on account of a mental disorder (NCRMD) - He appealed from the NCRMD finding, asserting, inter alia, that he had been deprived of effective assistance by his counsel because counsel had put his mental condition into issue without instructions - The Ontario Court of Appeal dismissed the appeal - Having found that defence counsel had not acted without instructions for the accused, the court also found that the accused was not prejudiced by counsel's performance during the NCRMD hearing - Counsel opposed the Crown's application and cross-examined the Crown's witnesses - He brought out those points that could lead to a finding that the accused was criminally responsible - See paragraphs 87 to 89.

Civil Rights - Topic 4620.1

Right to counsel - Right to effective assistance by counsel - [See all **Civil Rights - Topic 3158**].

Criminal Law - Topic 92.2

General principles - Mental disorder - General - Assessment order - After being convicted of criminal harassment and uttering a death threat, the accused was found not criminally responsible on account of a mental disorder (NCRMD) - He appealed from the NCRMD finding, asserting, inter alia, that the NCRMD hearing was fatally flawed by procedural errors - The Ontario Court of Appeal dismissed the appeal - The court rejected the accused's argument that the conditions prescribed in s. 672.11 of the Criminal Code for ordering an assessment were not made out - When he made the order for an assessment, the trial judge had the evidence of the accused and the complainant as well as transcripts of abusive and rambling voice messages left by the accused - The judge had also observed the accused's outbursts in the courtroom - Section 672.11 did not require that there be reasonable grounds to believe that the accused actually was exempt from criminal liability under s. 16 of the Code - It only required that there be reasonable grounds to believe that evidence of the accused's mental condition was necessary to determine if the accused was exempt from criminal liability - There was evidence that the accused suffered from a mental disorder - An assessment was necessary to determine if that mental disorder rendered him incapable of knowing that his acts were wrong - See paragraphs 46 to 50.

Criminal Law - Topic 92.4

General principles - Mental disorder - General - Consideration of issue where not raised by

accused - [See second and third **Civil Rights - Topic 3158**].

Criminal Law - Topic 97

General principles - Mental disorder - Insanity, automatism, etc. - What constitutes "insanity" (incl. "not criminally responsible due to mental disorder") - The accused and the complainant had a son - The accused believed that the son was in danger of harm from the complainant's new partner, Sevelka - After being convicted of criminal harassment and uttering a death threat, the accused was found not criminally responsible on account of a mental disorder (NCRMD) - He appealed from the NCRMD finding, asserting, inter alia, that the NCRMD finding was unreasonable in light of fresh evidence regarding Sevelka's guilty plea to several charges, including an assault on the complainant - The Ontario Court of Appeal refused to admit the fresh evidence regarding Sevelka - The guilty plea proceedings concerned events that took place over one year after the events for which the accused was on trial - The evidence could not have affected the result nor did it undermine the trial judge's finding that the accused suffered from a paranoid delusion that caused him to wrongly believe that his son was at risk - The accused did have a general understanding of the difference between right and wrong and even appreciated that his actions were illegal - However, he also felt compelled to threaten and harass the complainant to protect their son and he believed that he was justified in this course of action - The accused was deprived of rational perception and, therefore, rational choice about the rightness or wrongness of his acts - The finding of NCRMD was reasonable - See paragraphs 51 to 59.

Criminal Law - Topic 108

General principles - Mental disorder - Insanity, automatism, etc. - Procedure - [See first and second **Civil Rights - Topic 3158**].

Criminal Law - Topic 127

General principles - Rights of accused - Right to be present at trial - [See second **Civil Rights - Topic 3158**].

Criminal Law - Topic 128

General principles - Rights of accused - Right to make full answer and defence - [See third **Civil Rights - Topic 3158**].

Criminal Law - Topic 1595

Offences against person and reputation - Criminal harassment - Evidence and proof - The accused was convicted of criminal harassment - He appealed, asserting that the conviction was unreasonable because there was no evidence that the complainant feared for her safety - The Ontario Court of Appeal dismissed the appeal - The element of fear was made out by the circumstantial evidence, notwithstanding the lack of an express statement by the complainant that she was afraid or in fear of the accused - See paragraphs 43 to 45.

Criminal Law - Topic 4488

Procedure - Trial - Representation of accused - [See all **Civil Rights - Topic 3158**].

Criminal Law - Topic 4970

Appeals - Indictable offences - Powers of Court of Appeal - Receiving fresh evidence - General - [See **Criminal Law - Topic 97**].

Practice - Topic 9031

Appeals - Evidence on appeal - Admission of "new evidence" or "fresh evidence" - [See **Criminal Law - Topic 97**].

Cases Noticed:

- R. v. Swain, [1991] 1 S.C.R. 933; 125 N.R. 1; 47 O.A.C. 81, refd to. [para. 50].
- R. v. J.A., [2011] 1 S.C.R. 628; 413 N.R. 1; 275 O.A.C. 6; 2011 SCC 17, refd to. [para. 52].
- R. v. Oommen (M.), [1994] 2 S.C.R. 507; 168 N.R. 200; 155 A.R. 190; 73 W.A.C. 190, refd to. [para. 56].
- R. v. Chaulk and Morrisette, [1990] 3 S.C.R. 1303; 119 N.R. 161; 69 Man.R.(2d) 161, refd to. [para. 58].
- R. v. G.D.B., [2000] 1 S.C.R. 520; 253 N.R. 201; 261 A.R. 1; 225 W.A.C. 1; 2000 SCC 22, refd to. [para. 62].
- R. v. Steele (R.) (1991), 36 Q.A.C. 47; 63 C.C.C.(3d) 149 (C.A.), refd to. [para. 70].
- R. v. Snow (1992), 10 O.R.(3d) 109 (Gen. Div.), refd to. [para. 75].
- R. v. Taylor (D.R.M.) (1992), 59 O.A.C. 43; 11 O.R.(3d) 323 (C.A.), refd to. [para. 78].

Statutes Noticed:

Criminal Code, R.S.C. 1985, c. C-46, sect. 672.11 [para. 19].

Authors and Works Noticed:

Proulx, Michel, and Layton, David, *Ethics and Canadian Criminal Law* (2001), pp. 155 [para. 69]; 158 [para. 78].

Counsel:

Brian Snell, for the appellant;
Joanne Stuart, for the respondent.

This appeal was heard on February 7, 2012, by Rosenberg, Cronk and LaForme, J.J.A., of the Ontario Court of Appeal. On July 19, 2012, Rosenberg, J.A., delivered the following reasons for judgment for the court.

Appeal dismissed.

Editor: Sharon McCartney