[2015] QCA 59

COURT OF APPEAL

HOLMES JA

CA No 10371 of 2014
SC No 79 of 2013

VICTOR VINCENT BERG **Applicant**

v

DIRECTOR OF PUBLIC PROSECUTIONS (QLD) **Respondent**

BRISBANE

FRIDAY, 17 APRIL 2015

JUDGMENT

HOLMES JA: The applicant applies pursuant to r 761(2) of the *Uniform Civil Procedure Rules* for what is described as an order to stay the enforcement of the whole of the Mental Health Court decision under appeal. The decision in question was a decision of that court made on 17 October 2014, by which it was found that the applicant was fit for trial. In his notice of appeal, the applicant complained of the presiding judge's construction of the term "fit for trial," as used in the *Mental Health Act* 2000, of her manner of conducting the hearing and of her apparent indifference to his complaints of her to the CMC and the Chief Justice. The applicant was represented here by his son whom, for convenience, I will refer to as Mr Berg Junior.

The applicant has already made an application for a stay of the decision. It was heard and refused by Muir JA in November 2014 on the basis that the applicant's prospects of success in

having the Mental Health Court's finding set aside were not good. Even if the presiding judge's construction of the Act were wrong, her findings, which turned on a rejection of the evidence of a psychiatrist on whom the applicant relied, would remain unaffected. And the balance of convenience was against the applicant. There was a public interest in having the charges against him, which date from 2000, heard as soon as possible, while at any committal, the applicant would have the assistance of Mr Berg Junior. Mr Berg Junior advised from the bar table today that that, in fact, is not necessarily so. He may not be available to assist at the committal because of his own employment and other commitments, so at best what assistance would be available to the applicant remains unknown.

The applicant here said, through Mr Berg Junior, that matters had changed since Muir JA's hearing because a committal hearing has been set down for May 4 and his desire to have the charges dealt with one by one has not been met. He also asserts that the High Court's decision in *Hunter and New England Local Health v McKenna* (2014) 314 ALR 505 has improved his prospects of success on appeal, because it is said to support his argument that the trial judge erred in having regard to the common law in construing the *Mental Health Act*.

But I am unable to accept that submission. In that case, the court concluded that to impose a duty of care in negligence in respect of the release of a mentally ill patient would be inconsistent with obligations imposed on a hospital by the *Mental Health Act*. It has no relevance to whether the common law can inform statutory construction. And in any case, to the extent that the *Mental Health Court* judge had regard to the common law in construing the statutory definition, by doing so, she arrived at a more expansive view of what "fit to plead" meant than the words taken literally would indicate, which could only have been to the applicant's advantage.

I understand that there are other arguments made by the applicant about her Honour's construction, but so far as her application of the common law is concerned, as I have indicated, I do not think that *McKenna* assists his case and I do not consider that the result was any more limited a construction of the definition than would otherwise have been the case.

The fact that the applicant's committal is not to be conducted charge by charge adds nothing new. At no stage has there been any suggestion that it would be, and neither the original finding of fitness nor Muir JA's decision in any way turned on the conception that it would be.

The applicant's submissions in dealing with the balance of convenience largely attempt to re-argue the fitness finding, relying on the 2013 psychiatric evidence from Dr Ziukelis which was specifically rejected by the Mental Health Court. There was also an argument made in written submissions that the applicant lacks the expertise necessary to argue questions of admissibility of foreign evidence. Here, Mr Berg Junior argues that there are difficulties in the applicant appearing unrepresented, of the kind discussed by the High Court in *Dietrich*. All of that can be accepted, but it has no particular bearing on questions of fitness under the *Mental Health Act*.

The reasons given by Muir JA for refusing a stay remain valid. The applicant's prospects of success on appeal are poor. The age of the charges is a very powerful consideration. He is undoubtedly disadvantaged as an unrepresented person facing committal, but in that regard he is in no different position from any others simply on that score, and the only professional evidence of unfitness is that which was specifically found unacceptable by the court below.

The appeal, contrary to submission, would not be rendered nugatory should it succeed because the result would remain relevant to whether and how the applicant stood his trial. I should also point out that even if it were possible in some way to stay the finding of fitness, to do so would not produce the opposite finding, that the applicant was unfit for trial, nor would it somehow render the reference to the Mental Health Court undecided so as to reinstate the statutory suspension of the proceedings against the applicant.

There is a vague suggestion in the material that some other form of relief might be granted. Firstly, there is no party before the court who could be restrained from continuing with the committal proceedings, even if I were minded to make such an order. And secondly, for the

reasons I have already outlined in relation to the stay application, the prospects of success and balance of convenience would weigh heavily against any such relief.

The application for a stay is dismissed.