In the Court of Appeal of Alberta

Citation: R v Longclaws, 2026 ABCA 222

Date: 20260702
Docket: 2503-0018A
Registry: Edmonton

Between:

His Majesty the King

Appellant

- and –

Kendal Longclaws

Respondent

Restriction on Publication

Identification Ban – See the *Criminal Code*, section 486.5.

By Court Order: (1) Information that could identify victim or witness shall not be published, broadcast, or transmitted in any way. (2) No person shall publish, broadcast, or transmit in any way the contents of the publication ban application or the evidence, information or submissions at the hearing of the application.

NOTE: Identifying information has been removed from this judgment to comply with the ban so that it may be published.

The Court:

The Honourable Justice Frans Slatter
The Honourable Justice Alice Woolley
The Honourable Justice Tamara Friesen

Memorandum of Judgment

Appeal from the Decision of
The Honourable Justice D.A. Yungwirth
Dated the 10th day of January, 2025
(2025 ABKB 16, Docket: 200598795Q1; 220444046Q1)

Memorandum of Judgment

The Court:

INTRODUCTION

[1] Kendal Longclaws was charged on two separate indictments with six counts of sexual interference and two counts of sexual assault against three separate complainants. The sexual offences against two of the complainants were alleged to have occurred between February 1, 2012 and September 7, 2016, and against the third complainant between March 1 and 30, 2021. Both indictments were filed on October 4, 2021.

[2] Mr. Longclaws is deaf and cannot speak, read, or write. He does not communicate in a recognized sign language. He lives with his parents and communicates via a few "home signs" or gestures. He was 31 years old when the charges proceeded to trial.

[3] At the start of trial, the defence brought a stay application, arguing that because Mr. Longclaws does not communicate, no interpreter could assist him with understanding the proceedings or instructing counsel. As such, the continued prosecution of the charges breached Mr. Longclaws' right to a fair trial as embodied in ss 7 and 14 of the *Canadian Charter of Rights and Freedoms*.

[4] In support of the stay application, the defence provided a witness who was qualified as an expert in assessing the communication and language skills of deaf people in relation to their ability to instruct counsel and participate in legal proceedings. The expert opined Mr. Longclaws lacked foundational language skills and could not instruct counsel or participate in proceedings. The expert further opined that Mr. Longclaws suffers from language deprivation syndrome, which occurs when children are not exposed to language during the early years crucial to language acquisition. The expert testified that the syndrome can impact mental health, as well as executive functioning, by impairing the person's ability to plan, sequence, and respond. However, the expert was unable to conclude Mr. Longclaws' executive functioning is impaired because she did not assess him for that, nor did she believe such an assessment was possible due to his limited ability to communicate.

[5] The Crown argued the stay application was premature and asked the trial judge to first order Mr. Longclaws to participate in a fitness assessment. The Crown did not argue that Mr. Longclaws' deafness and limited communication abilities were a mental disorder, or that language deprivation syndrome itself constitutes a mental disorder; rather, the Crown argued that language deprivation syndrome "can have significant impacts, or it can have impacts on the ... executive functioning of an individual's mind" which could constitute a mental disorder. On that basis, the Crown sought a fitness assessment in order to determine "the impact of that particular syndrome on Mr. Longclaws".

[6] The trial judge found Mr. Longclaws' inability to communicate meant his *Charter* rights under ss 7 and 14 could not be enforced and that therefore, the continued prosecution breached his *Charter* rights. She determined that as there was no evidence the accused had a mental disorder, there was no basis on which she could order him to participate in a fitness assessment. Referring to ***R v Isaac***, 2009 ONCJ 662 [***Isaac 2009***], the trial judge concluded: "being deaf and unable to speak is a communication disorder and not a mental illness or psychiatric disorder": ***R v Longclaws***, 2025 ABKB 16 at para 50. Based on the record before her, she found there was "no evidence" that Mr. Longclaws has a "mental disorder" within the meaning of the *Criminal Code*, RSC 1985, c C-46. Furthermore, the accused's inability to communicate meant it was impossible to assess whether the accused had a mental disorder to determine fitness to stand trial.

[7] Applying the test in ***R v Babos***, 2014 SCC 16 at paras 30-32, the trial judge determined that a stay of proceedings was the only remedy available in the circumstances.

[8] For the following reasons, the appeal is dismissed.

ISSUES

[9] The Crown argues on appeal that the trial judge erred in two ways: first, in finding there was no evidence Mr. Longclaws suffers from a mental disorder and second, in concluding that an assessment would be futile because of his language deficits. With respect to the first error, the Crown now contends that language deprivation syndrome meets the legal definition of mental disorder and also maintains there was *some* evidence before the trial judge that the accused suffers from additional cognitive defects and she therefore had reasonable grounds for ordering an assessment. With respect to the second error, the Crown argues that a fitness assessment is not futile as it might result in further processes that could eventually restore Mr. Longclaws' fitness, thus preserving the public interest in proceeding to a trial on the merits with respect to these serious charges of sexual violence against children.

[10] The defence argues on appeal, as they did in the first instance, that a fitness assessment is not available or appropriate in this case because language deprivation syndrome is a communication disorder, not a mental disorder. Further, even if the Crown could establish that language deprivation syndrome is a mental disorder, there is no way to conduct a fitness assessment because Mr. Longclaws lacks the necessary communication skills to participate.

DECISION

[11] It is a fundamental principle of justice that an accused person be fit to stand trial: ***R v Bharwani***, 2025 SCC 26 at para 44 [***Bharwani SCC***]. The test for fitness is not onerous; it merely requires an accused person to have a rudimentary understanding of the judicial process. An accused person does not need to be able to make decisions in their best interests or have analytical capacity; rather, "an accused needs to have the ability to understand available options, select from

those options, appreciate the basic consequences arising from those options, and intelligibly communicate their decision to either counsel or the court": ***Bharwani SCC*** at para 47.

[12] Importantly, particularly for the purposes of the present appeal, a person is presumed to be fit to stand trial unless it can be shown that they are "unable on account of mental disorder to (a) understand the nature and object of the proceedings, (b) understand the possible consequences of the proceedings, or (c) [meaningfully] communicate with counsel": ss 2 ("unfit to stand trial"), 672.22, *Criminal Code*; ***R v Bharwani***, 2023 ONCA 203 at para 29 [***Bharwani ONCA***], aff'd ***Bharwani SCC***. "Mental disorder" is further defined in the *Criminal Code* as "a disease of the mind": s 2. The legal concept of "mental disorder" is very broad but not unlimited. It "includes 'any illness, disorder or abnormal condition which impairs the human mind and its functioning', excluding 'self-induced' and 'transitory' mental states": ***Bharwani SCC*** at para 53, quoting ***Cooper v The Queen***, 1979 CanLII 63 (SCC), [1980] 1 SCR 1149.

[13] The issue of whether an accused person is fit for trial can be raised at any point during criminal proceedings by the accused, Crown, or on the court's own motion: s 672.12(1), *Criminal Code*. Once the issue is raised, the court may order a fitness assessment: s 672.11(a). The court does not need reasonable grounds to believe the accused is unfit to stand trial to order a fitness assessment; it simply needs reasonable grounds to believe the evidence gathered in an assessment of the accused's "mental condition" is necessary for it to make that determination. As this Court explained in ***R v Ledesma***, 2020 ABCA 410 at paras 38-39, the trial judge should assess the "totality of circumstances" to determine if grounds to order a fitness assessment exist: "At a minimum, the 'reasonable grounds to believe' may come from *viva voce* evidence, submissions of counsel, or behaviour of the accused during the proceeding". While the evidentiary requirements are flexible, the legal standard is nonetheless meaningful and will not be met by mere conjecture or speculation; it requires "a factually based likelihood that there are grounds ... rising above a mere suspicion": ***Ledesma*** at para 37, quoting ***R v Ha***, 2018 ABCA 233 at para 70, per Slatter JA, concurring (emphasis added in ***Ledesma***).

[14] Further, evidence that an accused person has *any* mental disorder is not enough to meet the standard: ***R v TAS***, 2017 SKQB 218 at para 8; see also ***Ledesma*** at para 36. As explained in ***R v Gray***, 2002 BCSC 1192 at para 43:

> ... the focus of an assessment under section 672.11 is never simply the existence of mental disorder but rather the effect of any mental disorder with respect to specific legal concepts. The question of whether an accused is unfit or not criminally responsible is not ultimately to be decided by the assessing physician, but to be useful to the judge deciding fitness or the trier of fact deciding criminal responsibility; a section 672.11 assessment must be directed toward those legal concepts.

The fitness assessment must focus on obtaining information about how a particular mental disorder, if diagnosed, 1) affects the accused person's understanding of the nature and object of

the criminal proceedings against them and the possible effect of those proceedings on their life; and 2) impacts on their ability to meaningfully communicate with counsel about those proceedings.

[15] Ordering an accused person to submit to a fitness assessment is a significant imposition on their liberty. The person being assessed can be held for the purpose of the assessment for "no more than five days unless the accused and prosecutor agree to a longer period not exceeding 30 days"; however, an extension of an assessment can be made provided it does not exceed 30 days, and provided that the initial period plus extensions does not exceed 60 days: ss 672.14 and 672.15.

[16] Furthermore, finding an accused unfit to stand trial removes that person from the criminal justice system and places them under the jurisdiction of the Review Board: Part XX.1 of the *Criminal Code*. As noted by the Ontario Court of Appeal in ***Bharwani***, "When this occurs, the implications for an accused, including for their liberty, can be serious": ***Bharwani ONCA*** at para 145. The consequences of being found unfit to stand trial as set out in s 672.31 of the *Code* include being subjected to a hospital detention order which, while subject to review, could lead to indefinite detention by the state: ss 672.47, 672.48, 672.851; ***Bharwani ONCA*** at paras 145-149. In other words, an accused person found unfit to stand trial may face significant deprivations of personal liberty without ever having been found guilty of any offence.

[17] The fitness regime process itself is not in dispute here, and the parties properly agree on two important points. First, a fair trial is impossible where the accused cannot understand the proceedings for any reason: ***R v Roy***, 31 CR (4th) 388 at para 5, 1994 CanLII 19058 (NS PC); ***R v Desmoulin***, 1996 CanLII 10225 (ON CTPD) at para 15; ***R v BJR***, 2017 CanLII 39049 (Nfld Prov Ct) at paras 38-40; see also ***Isaac 2009*** and ***R v Isaac***, 2013 ONCJ 114 [***Isaac 2013***]. Second, deafness or an inability to communicate on its own does not constitute a mental disorder or "disease of the mind": ***Roy*** at paras 2-3; ***Desmoulin*** at para 8; ***Isaac 2009*** at para 21; ***Isaac 2013*** at paras 21-22, 25; see also ***R v Hughes***, 43 CCC (2d) 97 at 108-118, 1978 CanLII 2289 (AB SCTD).

[18] With respect to the second point, the Crown submits that an accused person who is unable to communicate may also suffer from a mental disorder which would support ordering a fitness assessment before determining whether a stay should issue. Two cases provide some support for the Crown's argument. In ***Isaac 2013*** the court found sufficient evidence of cognitive impairment to order an assessment, despite the accused's severe communication limitations: paras 21-23, 25. In ***Roy*** a fitness assessment had previously occurred, following which the court granted a stay: paras 3-4, 10-14.

[19] Defence counsel does not take issue with this assertion; rather, he argues that it simply does not matter in this case as there is no evidence Mr. Longclaws suffers from a mental disorder, and in any event, he cannot participate in a fitness assessment because he cannot communicate. His situation is different from the accused's situation in ***Isaac*** because the accused in ***Isaac*** had not been diagnosed with language deprivation syndrome, although it was suspected. He also cites ***BJR*** for the proposition that even if there are reasonable grounds to order a fitness assessment, the court

cannot make such an order without first obtaining "some reasonable assurance that [the accused] can understand and communicate in [the] court proceeding": ***BJR*** at para 53.

[20] The appeal fails on application of the standard of review. While the isolated question of what mental conditions are included in the term "disease of the mind" is a question of law, determining whether a particular condition suffered by an accused qualifies as a "disease of the mind" is a question of mixed fact and law, reviewable for palpable and overriding error: ***R v Moss***, 2025 ABCA 247 at para 42, citing ***R v Bouchard-Lebrun***, 2011 SCC 58 at para 63; ***R v Lindsay***, 2018 ABCA 194 at para 18. Generally, deference is owed to a trial judge's assessment and weighing of expert evidence: ***Moss*** at para 43; ***Lindsay*** at para 18. And deference is also owed to a trial judge's exercise of discretion to enter a stay of proceedings as a *Charter* remedy. In reviewing the decision to enter a stay, an appellate court should only intervene if a trial judge "misdirects him or herself in law, commits a reviewable error of fact, or renders a decision that is 'so clearly wrong as to amount to an injustice'": ***Babos*** at para 48.

[21] The trial judge found there was "no evidence of a mental illness or psychiatric disorder that would constitute a mental disorder as contemplated by the *Criminal Code*." The Crown argues this was an error because (1) the "ability to use language is an aspect of the functioning of the human mind, so language deprivation syndrome appears to constitute a 'disorder or abnormal condition which impairs the human mind and its functioning'" and (2) the defence expert "agreed that language deprivation syndrome is associated with limits in executive functioning". Neither of these arguments amounts to a sufficient basis on which to overturn the trial judge's finding of fact.

[22] First, the Crown's theory that language deprivation syndrome itself constitutes a mental disorder is not supported by the record. The only expert in the court below was called by the defence. Language deprivation syndrome was not the focus of her evidence; rather, she conducted a "communication assessment" of Mr. Longclaws and concluded he was unable to "instruct counsel or participate in a legal process in any way". Her report contained one paragraph touching on language deprivation syndrome, as follows:

> In our opinion, Kendal Longclaws has experienced what is known as *language deprivation syndrome* which occurs when children are not exposed to language during the early years that are crucial for language acquisition. When Deaf children are raised in families where they have access to complete sign language, for example, Deaf children with Deaf parents, the research shows that those Deaf children reach all the language milestones expected of any child and can do very well in school. Hence there are Deaf doctors, lawyers, pharmacists, engineers, teachers, and university professors, to name but a few careers. What is important is the child has access to complete language. Given Mr. Longclaws cannot hear, he did not have complete access to spoken language and nor did he have access to signed language, during the key years when language acquisition is optimal.

[23] Fairly characterized, the expert's evidence with respect to "language deprivation syndrome" simply described certain social and educational circumstances experienced by Mr. Longclaws in his childhood. The trial judge's conclusion that there was "no evidence" that Mr. Longclaws had a mental disorder within the meaning of the *Code* is consistent with this evidence. There is no basis to disturb the finding that Mr. Longclaws' experience of language deprivation syndrome did not itself amount to a mental disorder.

[24] Alternatively, the Crown points to aspects of the expert's *viva voce* testimony, in which she provided some further commentary on the potential impacts of language deprivation syndrome for individuals who have experienced it. The Crown argues these comments establish that Mr. Longclaws has "some level of cognitive impairment beyond simply an inability to communicate", and this cognitive impairment could constitute a mental disorder. When asked about the impact of language deprivation syndrome, the expert said it can "mak[e] it very difficult then to communicate one's basic needs, to be able to interact with others, to be able to learn (INDISCERNIBLE), and an impact perhaps on mental health". She also referred to a report containing research that "executive functioning ... to be able to plan, to be able to sequence, to be able to respond ... are impaired when one presents with language deprivation syndrome". However, she had not assessed Mr. Longclaws for impairment of cognitive or executive functioning, nor was she qualified to do so. To conclude there were reasonable grounds that an assessment was necessary, there must be some basis in fact putting into issue that the accused may have a mental disorder within the meaning of the *Code*. While she may have overstated her conclusion, we understand and defer to the trial judge's ultimate determination that the mere presence of language deprivation syndrome, coupled with the evidence that language deprivation syndrome can have cognitive impacts on some individuals, was not sufficient to warrant ordering a fitness assessment of Mr. Longclaws.

[25] The Crown also attacks the trial judge's acceptance of the expert's "evidence that Mr. Longclaws does not possess a sufficient (or any) communication foundation on which his executive functioning or cognitive functioning generally could be assessed": ***Longclaws*** at para 52. As a general proposition, the Crown correctly observes the court is not required to find that an accused can "participate effectively" in a fitness assessment as a prerequisite to ordering such an assessment. The standard, as discussed above, is whether there are reasonable grounds to believe an assessment is necessary to permit the trial judge to make a determination as to fitness.

[26] The trial judge's comments on this point must be viewed in the context of the procedural history and evidentiary record of the matter before her. Mr. Longclaws' *Charter* application was heard almost a year after it was filed and over three years after Mr. Longclaws was first arrested. Despite ample notice, the Crown did not furnish the Court with any evidence going to Mr. Longclaws' mental condition in support of its request for a fitness assessment. Instead, the Crown relied on the evidence of the defence's expert in legal communication to speculate that Mr. Longclaws had diminished executive or cognitive functioning amounting to a mental disorder. In this context, the expert testified that there was no practical basis on which Mr. Longclaws' executive or cognitive functioning could be helpfully assessed. The Crown has not identified any

error in the trial judge's discretionary decision to give that evidence some weight in assessing whether to order the assessment.

CONCLUSION

[27] We owe deference to the trial judge's ultimate exercise of discretion not to order a fitness assessment, and to enter a stay of proceedings. The appeal is dismissed.

Appeal heard on February 6, 2026

Memorandum filed at Edmonton, Alberta
this 2nd day of July, 2026

Slatter J.A.

Woolley J.A.

Friesen J.A.

Appearances:

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for the Respondent