COURT OF APPEAL FOR ONTARIO

CITATION: Murphy (Re), 2012 ONCA 813
DATE: 20121123
DOCKET: C55138

Doherty, LaForme JJ.A. and Glithero J. (*ad hoc*)

IN THE MATTER OF SHAUN MURPHY AN APPEAL UNDER PART XX.1 OF THE *CODE*

BETWEEN

Her Majesty the Queen and North Bay Regional Health Centre

Respondents

and

Shaun Murphy

Appellant

Shaun Murphy, appearing in person

Paul Burstein, appearing as *amicus curiae*

Megan Stephens, for the respondent

Heard and released orally: November 15, 2012

On appeal from the disposition of the Ontario Review Board dated February 15, 2012.

ENDORSEMENT

[1] The appellant was charged with threatening his nephew. The altercation giving rise to the charge occurred against the backdrop of a longstanding family related dispute.

[2] The appellant was found NCR in December 2011. At the first hearing before the ORB in February 2012, the hospital took the position that the appellant should receive an absolute discharge. The Crown did not take issue with that position.

[3] After the hearing, the Board imposed a conditional discharge with certain terms primarily concerning the appellant's residence. The Board was, of course, obliged to make its own assessment as to the appropriate order and was not in any way bound by the opinion put forward by the hospital.

[4] *Amicus*, in his very helpful argument, contends that the Board applied the wrong legal test in determining that an absolute discharge was inappropriate and further contends that on a review of the entirety of the record, the Board's order is unreasonable. Counsel submits that the appellant should have received an absolute discharge.

[5] Crown counsel submits that while other panels of the Board may have come to a different conclusion, the determination that a conditional discharge

was appropriate was not an unreasonable one within the meaning of the test articulated in *R. v. Owen* (2003), 174 C.C.C. (3d) at 1 (S.C.C.).

[6] Counsel for *amicus* focused his submissions on the meaning of the requirement in s. 672.54(a) that the appellant "pose a significant threat to the safety of the public". As the *Criminal Code* clearly indicates, that requirement is a condition precedent to any order the Board may make apart from an absolute discharge. In other words, if the significant threat criterion is not established, the Board must grant an absolute discharge.

[7] The Board, in concluding that the significant threat threshold was crossed, said this, at p. 9 of its reasons:

> The accused suffers from a delusional disorder and the Review Board is satisfied that the duration and nature of the delusion has caused psychological stress and is likely to cause psychological stress again, particularly to the victims of the offence. It might be that the altercation with Michael Murphy was an unusually heated episode, but given the lengthy and unresolved delusion that the accused believes he is being cheated by the victim and others, it cannot be ruled out that a physical response by the accused would not take place if the context provided for this. [Emphasis added.]

[8] With respect, the above-quoted passage reveals errors by the Board in its appreciation of the "significant threat" threshold. First, "psychological stress" is not enough to satisfy that test. The stress must rise to the level of "significant harm". More importantly, the "significant" psychological harm must be the product of criminal behaviour on the part of the appellant. Conduct by an

accused that may generate significant psychological stress for others cannot justify an order restricting liberty under this part of the *Code* unless that conduct is criminal. Further, the Board's determination that a physical response by the accused could not be ruled out is far below the level of risk of substantial harm needed before the significant threat threshold is crossed.

[9] With respect to the Board, who obviously gave the matter careful consideration, it erred in its determination by applying a standard that was well below the standard demanded by the Criminal Code. When the entirety of the evidence before the Board is considered against the proper standard, no reasonable Board would determine that the significant threat standard had been met. Consequently, an absolute discharge was the only reasonable order.

[10] We indicate for the purpose of completeness that when we talk about all of the evidence, we mean the hospital records and the medical opinions based on those records, the appellant's long history of non-criminal conduct while in the community and apparently suffering from the mental disorders that he continues to suffer from at this time, the police summary of the precipitating incident and the important testimony from the appellant's former wife and daughter, both of whom offer strong support for the appellant.

[11] In the result, the appeal is allowed, the order of the Board is set aside, and an order should issue granting an absolute discharge.

"Doherty J.A."
"H.S. LaForme J.A."
"C. Stephen Glithero J.A (*ad hoc*)