COURT OF APPEAL FOR ONTARIO

CITATION: Davies (Re), 2019 ONCA 738
DATE: 20190923
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Watt, Tulloch and Lauwers JJ.A.

IN THE MATTER OF: Jacqueline Davies

AN APPEAL UNDER PART XX.1 OF THE *CODE*

Anita Szigeti, for the appellant Jacqueline Davies

Gavin MacDonald, for the respondent Her Majesty the Queen

Heard: June 25, 2019

On appeal of the disposition of the Ontario Review Board dated September 10, 2018, with reasons released on October 9, 2018.

Lauwers J.A:

[1] On July 3, 2007, the appellant was found not criminally responsible on account of mental disorder on charges of assault with a weapon, and aggravated assault. She has been under the Ontario Review Board's jurisdiction under Part XX.1 of the *Criminal Code* since 2007. Her current diagnoses are schizophrenia, polysubstance abuse (cannabis, alcohol, opioids), and borderline personality disorder.

[2] The Board imposed detention orders on the appellant annually until 2016, when she was conditionally discharged. She was conditionally discharged again on September 19, 2017. The conditions required her to live at Mathias Place (a group home), to report to the hospital at regular intervals, and to abstain from the non-medical use of alcohol or any other non-prescribed drugs.

[3] In the October 2018 disposition under appeal, the Board did not renew the conditional discharge but instead made a detention order, which gave the person in charge of the hospital discretion to permit the appellant to "live in the community in accommodation approved by the person in charge."

[4] As the Board noted in its reasons, the appellant did not challenge the determination that she posed a significant threat to the safety of the public within the meaning of s. 672.54 of the *Code*.

[5] The appellant argues that the Board's decision to impose a detention order on her in place of the conditional discharge was not necessary and appropriate, and was not the least onerous and least restrictive disposition, and must be set aside. The court was recently advised that the appellant's 2019 review was heard by the Board on September 12, 2019. Accordingly, the appeal is not quite moot. Having heard full argument, in my view the issues raised merit disposition nonetheless.

[6] For the reasons set out below I would dismiss the appeal.

A. THE FACTUAL CONTEXT

[7] The appellant absconded from the group home, Mathias Place on July 3, 2018, when she was under the September 2017 conditional discharge. Six days later, police apprehended her at a shelter in Toronto and returned her to the hospital. She was admitted to the hospital on a Form 1 under the *Mental Health Act*, R.S.O. 1990, c. M.7. This changed eventually to a Form 3 and then to a Form 4. She remained voluntarily until the detention order was made.

[8] Staff of Mathias Place did not adequately supervise the appellant. She was able to gull staff and to elude drug abuse detection through drug tests. The appellant admitted using opioids and cannabis, and drinking alcohol during her elopement. Personnel found empty absinthe bottles and drug paraphernalia in her room at Mathias Place. The appellant admitted that during the previous reporting year she had been using substances, contrary to the conditions of her discharge. She admitted using “flushes” to avoid detection. She said she wanted to test out the effects of cessation of her medication.

[9] The appellant told the Board that she wanted cannabis use included in her disposition because she believes that it helps her. She explained that she left Mathias Place because she did not like the effects of the long-acting injected medication; her new prescribed medications sedated her extremely when mixed with marijuana, which she was intent on using. The appellant admitted to consuming alcohol in her room at Mathias Place. She said that while she was

absent without leave from the residence, she used opioids to control tremors in her hands caused by withdrawal from the prescribed medications. Since her return to hospital, there have been incidents that suggest a decline in her mental state, such as increased irritability, and aggressive and threatening behaviour on two occasions.

[10] Dr. Alatishe, the appellant's primary psychiatrist, testified that her failure to take the prescribed medications and her substance abuse during her elopement, increased her risk profile respecting public safety. She had lost insight into her illness. It was therefore essential for the hospital to approve her accommodation in the community and to have the ability to return her to hospital in a timely manner. He said this could be more quickly and reliably accomplished under a detention order than under the provisions of the *Mental Health Act*.

B. THE DECISION UNDER APPEAL

[11] The Board accepted Dr. Alatishe's statement that a detention order was necessary and that continuation of the conditional discharge would be insufficient to manage the appellant's newly increased risk. While the Board was positive about the appellant's expressed willingness to re-engage in relapse prevention regarding alcohol and opioids, it also noted that she must address her cannabis use disorder.

[12] The Board concluded that the appellant would not be able to achieve her goals to live independently and to avoid receiving medication by injection until she

gains further insight into the harmful impact of cannabis on her mental health. She was refusing to take the long-acting injectable medication, and this refusal would shorten her time to decompensation. Accordingly, the Board found that a detention order was the necessary and appropriate disposition required to manage the appellant's threat to the public while still meeting her needs.

[13] It appears that Mathias Place is recognized as an excellent facility and the hospital wants to return the appellant there once she has stabilized, with the understanding that staff there would be more rigorous in her supervision.

C. THE ISSUES

[14] The appellant seeks a conditional discharge in the same terms as the 2017 conditional discharge. The argument set against her is that her breaches of the conditional discharge and her decompensation justified the Board's imposition of a detention order.

D. THE GOVERNING PRINCIPLES

[15] Part XX.1 of the *Criminal Code* establishes the legislative regime for NCR accused. The Board is charged with the responsibility for determining the "necessary and appropriate" disposition for the NCR accused under s. 672.54, meaning the least onerous and least restrictive disposition necessary to protect the public: *R. v. Winko*, [1999] 2 S.C.R. 625, at para. 47. Despite a legislative amendment in 2014 that changed the language used in s. 672.54, "the Board and the courts have considered that the new language did not change the applicable

test, still commonly expressed as: ‘the least onerous and least restrictive' disposition necessary to protect the public”: *Esgin (Re)*, 2019 ONCA 155, at para. 16.

[16] It is accepted that "the primary purpose of the legislative scheme is to protect the public while minimizing any restrictions on the NCR accused's liberty interests": *Mazzei v. British Columbia (Director of Adult Forensic Psychiatric Services)*, 2006 SCC 7, [2006] 1 S.C.R. 326, at para 32, per Bastarache J. The corollary is that, “[c]onsistent with the Board's need to safeguard liberty as much as possible, the conditions included in Board dispositions must also conform to the least onerous and least restrictive standard”: *Campbell (Re)*, 2018 ONCA 140, 139 O.R. (3d) 401, at para. 54, per Fairburn J.A.

[17] The court owes deference to the Board because it is a specialized, expert body: *R. v. Owen*, 2003 SCC 33, [2003] 1 S.C.R. 779, at para. 37. Appellate courts are "'not to be too quick to overturn' a review board's 'expert opinion' on how best to manage a patient's risk to the public": *R. v. Conway*, 2010 SCC 22, [2010] 1 S.C.R. 765, at para. 95. See also *Owen*, at para. 69.

[18] The issue is whether the Board's decision to impose a detention order on the appellant rather than continue the conditional discharge fell within a range of reasonable outcomes: *Owen*, at para. 33. A decision will be considered unreasonable when the reasons do not "bear even a somewhat probing

examination": *Saikaley (Re)*, 2012 ONCA 92, 109 O.R. (3d) 262, at para. 35; *Mazzei,* at para. 17.

[19] This court has consistently held that, when the hospital is required to approve housing, a detention order is the appropriate disposition: *Boucher (Re)*, 2015 ONCA 135, at para. 6; *Runnalls (Re)*, 2012 ONCA 295, at para. 12; *R. v. Simpson*, 2010 ONCA 302, at para. 4; *Runnalls (Re)*, 2009 ONCA 504, 251 O.A.C. 284, at para. 15; *Munezero (Re)*, 2017 ONCA 585, at para. 9; *Ly (Re)*, 2015 ONCA 141, at para. 22.

[20] However, a conditional discharge can contain a provision that obliges an NCR accused to reside in a specific place. For example, the 2017 conditional discharge required the appellant to “reside at Mathias Place, 369 Main Street West, Hamilton, Ontario”.

E. THE ARGUMENT

[21] Appellant’s counsel asserts that the Board’s imposition of a detention order on the appellant was unreasonable on the evidence, given that the appellant had stable, supervised housing in the community and there was no proposal to change it. She submits that the Board did not meaningfully consider continuing the appellant on a conditional discharge. The carefully crafted conditions in the previous conditional discharge mitigated sufficiently any risk to public safety posed by the appellant living in the community.

[22] Although the appellant breached her discharge disposition terms by absconding, failing to report as required, and consuming illicit substances, the police were able to readily apprehend her and return her to the hospital. Once she was transported there, the provisions of the *Mental Health Act* were used to manage her detention adequately and to address any potential concern for public safety.

[23] The appellant's counsel thus presented as positive what the Board saw as negative. She argued that the evidence the Board relied on to justify a detention order actually shows that the conditional discharge functioned adequately and should have been retained. The additional reduction in the appellant's liberty was therefore not necessary and appropriate.

[24] Accordingly, counsel for the appellant urged this court to return this matter to the Board for re-hearing on the issue of whether appropriately crafted conditions of a discharge disposition could safeguard the public, similar to this court's approach in *Tolias (Re)*, 2018 ONCA 215, at para. 20, and *Collins (Re)*, 2018 ONCA 563, at paras. 39-50.

[25] The hospital's position, as adopted by the Board, is that a detention order was necessary to manage the appellant's newly increased risk because she could more be quickly be returned to the hospital and admitted under a detention order than under a conditional discharge utilising the provisions of the *Mental Health Act*, so that continuation of the conditional discharge would not be appropriate. The

mechanics of the quicker return under a detention order were explained by Doherty J.A. in *Centre for Addiction and Mental Health v. Young*, 2011 ONCA 432, 278 O.A.C. 274, at para. 26. The hospital also emphasized the need for the person in charge of the hospital to have the ability to approve the appellant's accommodation in order to properly manage her risk.

F. THE PRINCIPLES APPLIED

[26] On the facts of this case, I would not give effect to the appellant's argument, for two reasons. First, on the date of the hearing, the Board considered that the appellant was not yet ready to be released conditionally. She needed to be in the hospital until the person in charge determined that she was ready to be placed in the community in an approved residence. This disposition could only be imposed under a detention order, as noted earlier.

[27] Second, although the *Mental Health Act* was able to play a useful role in this instance, at the date of the hearing the appellant was not ready to be released, and was not yet ready to be returned to Mathias Place on a conditional discharge.

[28] Given the concession that the appellant poses a significant threat and risk to public safety, the Board focused its decision on whether a conditional discharge or a detention order was the appropriate disposition in light of the twin goals of public safety and treatment. The Board explicitly addressed the appellant's submission that a conditional discharge was the appropriate disposition and rejected it. The appellant ceased taking prescribed medications and actively used

substances in breach of the terms of her previous conditional discharge during her elopement. She also demonstrated diminished insight into her illness and an ongoing need for treatment. These factors led the Board to find that the appellant's risk profile with regard to the safety of the public had increased. This justified the need for a detention order.

[29] The Board underlined the need for the hospital to be able to return the appellant to hospital in a timely manner, and relied on Dr. Alatishe's evidence about the change in the appellant's risk profile and the inadequacy of the *Mental Health Act* regime to ensure readmission in the event of decompensation.

[30] The approach taken by the Board in this case is not unusual. For example, in *Valdez (Re)*, 2018 ONCA 657, this court noted, at para. 21, the limits to relying on ease of readmission to hospital to justify a detention order:

> [W]e have difficulty with the majority's cursory consideration of whether Mr. Valdez's risk to the public could be managed under a conditional discharge. The majority reasoned that "it is substantially easier to bring about a return to the hospital for individuals who are under a Detention Order" and that a warrant will always be acted upon to bring a person back to the hospital if necessary. However, this would always be true and could always be used to justify the refusal of a conditional discharge. But, given the least onerous and least restrictive test, something more is required than mere convenience to the hospital.

[31] The mere fact of convenience and expediency is not enough to justify a detention order. However, in determining that a detention order was the

appropriate disposition in this case, the Board reasonably accepted Dr. Alatishe's evidence that the appellant's risk profile had increased. The need for the hospital to have the flexibility provided by a detention order was justified by the appellant's actions during the reporting year: her substance use leading to her pronounced failure of insight, elopement, and decompensation.

[32] The Board is an expert tribunal and is well aware of the mechanisms under the *Mental Health Act*, and its disposition is entitled to deference. In the circumstances, the Board's disposition appears reasonable.

G. PART XX.1 OF THE *CRIMINAL CODE* AND THE *MENTAL HEALTH ACT*

[33] The appellant's argument that the *Mental Health Act* provides a good vehicle for making conditional discharges more readily available is one this court often hears, and it merits closer consideration.

[34] There is, in my view, a troublesome lack of congruency between the *Criminal Code* and the *Mental Health Act*, which shows that the *Mental Health Act* does not offer sufficient utility in all reasonably foreseeable situations affecting the appellant or a similarly situated NCR accused. On the appellant's argument, if she had been returned to the hospital by a peace officer for breaching a condition of the conditional discharge, but she was otherwise showing no signs of psychosis, the hospital would have had no authority to detain her under the *Mental Health Act* even though she was in breach of the conditional discharge. The hospital would

have been obliged to release her outright even if her treating doctor was of the view that the breaches were the beginning of a cascade of negative effects leading to her inevitable decompensation, reviving the threat to public safety. Releasing her in such circumstances would defeat the purpose of her being under the aegis of the Board and the hospital by delegation, which is to protect both the accused and public safety. In short, while the *Mental Health Act* seems to have worked in this instance, there are situations involving an NCR accused in which it would not work.

[35] As Doherty J.A. noted in *Young*, at paras. 13, 19-21, the provisions of the *Mental Health Act* were designed for other purposes than clumsily but fortuitously reinforcing Part XX.1 of the *Criminal Code*. The *Code* itself is clumsy, as I note below, and it appears that a detention order is becoming somewhat of a default for the Board in order to avoid that clumsiness. This has the counterproductive effect under the *Code* of reducing the use of conditional discharges, which is regrettable given the hope of progressive improvement that actuates Part XX.1.

[36] Justice Doherty noted in *Young*, at para. 32:

> As with any breach of a provision of a conditional discharge, CAMH would have available to it the provisions of ss. 672.91, 672.92 and 672.93. None of those provisions gives CAMH the power to have Mr. Young arrested, brought back to CAMH against his will and confined there. While the two new terms imposed by the Review Board could properly be attached as conditions to a conditional discharge, a breach of those

> conditions triggers the breach provisions and does not give CAMH the power to detain Mr. Young.

[37] To this Doherty J.A. added that Mr. Young "could only be confined in CAMH following a breach if so ordered by a justice pursuant to s. 672.93(2)," and attached the following footnote: "Section 672.92(1)(b) allows a peace officer who has decided to release a person subject to a disposition order to deliver the person to the place specified in that order. It does not appear to me, however, that the section gives the hospital any authority to hold the person so delivered against his or her will."

[38] In my view, this framework is not particularly functional. Under s. 672.92(1), a peace officer can release an accused to the place specified in the disposition, namely the hospital cited in the conditional discharge. Yet the *Code* does not permit the hospital to do anything with the accused short of talking her into a voluntary admission or proceeding under the *Mental Health Act* should that happen to be possible. Alternatively, under s. 672.92(3), if a peace officer does not release the accused, the distressed NCR accused, who is not yet in so much distress as to be eligible to be held under the *Mental Health Act*, would need to be brought to temporary perhaps overnight incarceration while awaiting a hearing before a justice of the peace under s. 672.93. At the hearing, the justice of the peace could then order the accused detained in the hospital.

[39] From a functional perspective, it would make good sense for the accused who is in breach of a conditional discharge to be delivered to the hospital specified

in the disposition and for the hospital to have the ability to assess and treat an accused in breach without having to resort to the *Mental Health Act*. Under the current framework, as it has been interpreted, there is a serious gap in the legislation: while a peace officer is permitted to release an accused to the hospital, unless the *Mental Health Act* fortuitously intervenes, the hospital's authority to readmit, even pending a hearing before a justice of the peace, is limited. Surely Parliament can do better for people in the position of the appellant.

H. DISPOSITION

[40] I would dismiss the appeal.

RELEASED: "D.W." September 23, 2019

"P. Lauwers J.A."
"I agree. David Watt J.A."
"I agree. M. Tulloch J.A."