# COURT OF APPEAL FOR ONTARIO

CITATION: Muthulingam (Re), 2020 ONCA 680
DATE: 20201028
DOCKET: C68139

Watt, Tulloch and van Rensburg JJ.A.

IN THE MATTER OF: Ramanan Muthulingam

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

Ramanan Muthulingam, acting in person

Sarah Weinberger, *amicus curiae*

Chris Dwornikiewicz, for the Attorney General of Ontario

Heard: September 18, 2020 by videoconference

On appeal against the disposition of the Ontario Review Board, dated November 28, 2019 with reasons reported at [2019] O.R.B.D. No. 2794.

REASONS FOR DECISION

[1] On October 15, 2014, the appellant was found not criminally responsible (NCRMD) on a charge of attempted murder. Since that time, he has been under the jurisdiction of the Ontario Review Board. His current disposition is a detention order requiring that he be detained in the Forensic Program on a general unit at Ontario Shores. His conditions permit hospital and grounds privileges with indirect supervision and community passes with accompaniment.

[2] Assisted by *amicus*, he appeals from this disposition. He seeks an absolute discharge, or alternatively, a conditional discharge. The Crown and Person in Charge oppose his request.

**The Background Facts**

[3] The index offence occurred a matter of months before the finding of NCRMD. The appellant attended an appointment with his psychiatrist. When his name was called, he followed the doctor into his consulting room. There, the appellant produced a knife that he had brought with him. He reached around to the front of the doctor's neck from behind and cut the doctor's throat. The appellant then dropped the knife and said, “I will be waiting outside". True to his word, he remained outside the office where he was arrested shortly thereafter.

[4] The appellant had not seen his psychiatrist for several months prior to these events. His sister reported that he had stopped taking his medication one or two weeks earlier. He had become paranoid and suspicious.

[5] The appellant had been found NCRMD on charges of aggravated assault and assault with a weapon a decade earlier. At the initial hearing before the Review Board about two months later, the Board was not satisfied that the evidence established that the appellant was a substantial threat. He was discharged absolutely.

[6] The appellant's current diagnoses are Schizophrenia and Cannabis Use Disorder.

**The Grounds of Appeal**

[7] The appellant contends that the Board unreasonably found that he posed a significant threat to public safety. The evidence, he says, does not satisfy this onerous standard. It follows, he argues, that he should be discharged absolutely. *Amicus* advances two grounds of appeal. She submits that the Board erred:

i. in failing to apply the correct legal test to determine whether the appellant posed a significant threat to community safety; and

ii. in rendering a decision that was unreasonable and procedurally unfair because it included a portion of the reasons of the Board's decision rendered at the conclusion of the prior year's hearing.

**Discussion**

[8] As we will explain, we are satisfied that this appeal fails.

**The Significant Threat Issue**

[9] In the year under review, the appellant continued to suffer from the treatment resistant symptoms of Schizophrenia. At times, his thinking was grossly disorganized, and he was very difficult to redirect. He perseverated on his delusions which were grandiose and paranoid.

[10] The appellant was verbally aggressive with hospital staff. He used cannabis on hospital grounds. He had a physical altercation with a co-patient. On one occasion, when in the community, he threatened to kill a WSIB worker and told her that he had killed others. The worker was quite frightened by the appellant's conduct.

[11] The appellant does not appreciate the psychological harm his conduct causes others. He often refuses, or is too disruptive, to participate in any psychoeducational group programs to address his condition.

[12] The appellant's treating psychiatrist testified that the appellant has a diagnosis of Schizophrenia and Cannabis Use Disorder. He suffers from treatment resistant symptoms of his illness. He continues to lack insight into his illness, his need for treatment, and the severity of the index offence. During the year under review, he continued to make very serious threats towards both staff and community workers. He was involved in two incidents of serious physical aggression.

[13] In our view, the cumulative force of the evidence adduced at the hearing, including the Hospital Report and the testimony of the appellant's attending psychiatrist, brings this case within the ambit of significant threat as defined in s. 672.5401 of the *Criminal Code*. The Board's finding that the significant threat threshold was met is reasonable and supported by the evidence adduced at the hearing.

**The Application of the Wrong Test**

[14] The reasons of the Board on the issue of significant threat are contained in a single paragraph:

> The Board unanimously finds that Mr. Muthulingam continues to pose a significant threat to the safety of the public. We find on all the evidence there is a foreseeable and substantial risk that Mr. Muthulingam would commit a serious criminal offence if discharged absolutely as defined by the Supreme Court of Canada in *Winko*. The Board notes the issue of risk was not contested by any of the parties. The Board accepts the uncontroverted evidence of Dr. Harrigan that Mr. Muthulingam continues to pose a significant risk and as well, the Board relies on the Hospital Report and the evidence that Mr. Muthulingam suffers from a major mental illness; namely, Schizophrenia, which in the past has been compounded by medication noncompliance and substance abuse. The Board accepts that without close supervision that Mr. Muthulingam would likely become noncompliant once again with medication, and may resume substance use which could lead to a decompensation and re-emergence of behaviours similar to that of the index offence.

[15] These reasons are an exact duplicate of the reasons of the Board delivered by the same chairperson one year earlier with one exception: the name of the

psychiatrist who testified. They erroneously record that “the issue of risk was not contested by any of the parties". In the 2018 hearing, the issue of significant threat was not contested. In the 2019 hearing, with which we are concerned, significant threat was contested: the appellant sought an absolute discharge.

[16] *Amicus* fastens upon the sentence:

> The Board accepts that without close supervision that Mr. Muthulingam would likely become noncompliant once again with medication, and may resume substance use which could lead to a decompensation and re-emergence of behaviours similar to that of the index offence.

[17] This*, amicus* says, is an incorrect application of the “significant threat" standard as defined by s. 672.5401. What is required is a determination of the real risk of physical or psychological harm occurring as a result of the appellant engaging in serious criminal conduct if granted an absolute discharge.

[18] The language used by the Board is similar to that found in *Sheikh (Re)*, 2019 ONCA 692, 157 W.C.B. (2d) 527, a decision released about three months before the decision of the Board in this case. The court in *Sheikh* concluded that the Board had applied the wrong test. The test is *not* whether the appellant’s behaviour *could* lead to decompensation and therefore the risk of serious harm. The test is whether there is evidence to support a positive finding that there *is* a significant threat to public safety: *Sheikh*, at para. 10.

[19] Read in isolation, the excerpted passage reflects a mistake in the legal standard to be applied in assessing whether the appellant was a significant threat to the safety of the public. Said otherwise, an error of law.

[20] It is well settled that in determining whether reasons reflect legal error, appellate courts are required to read those reasons as a whole, in the context of the evidence adduced in the proceeding. Not every legal error is fatal, including those that cause no substantial wrong or miscarriage of justice: *Criminal Code*, s. 672.78(2)(b).

[21] In this case, unlike in *Sheikh*, there is substantial evidence to satisfy the significant threat standard. A review of the reasons, taken as a whole, reveals that the Board had a firm grasp of the evidence adduced at the hearing and accepted those aspects of the evidence critical to satisfy the significant threat threshold.

[22] The appellant continued to experience ongoing treatment resistant symptoms of his illness, including but not only, grandiose religious and somatic delusions. In the year under review, he was involved in an incident of serious physical aggression against a co-patient and threatened a staff member and a community worker. He displayed affective instability and a poor tolerance for frustration. He lacked insight into the symptoms of his illness, the index offence he committed, and his risk for re-offence. He continues to be unable and/or unwilling to meaningfully participate in essential group therapy. The prospect of

decompensation due to cannabis use or noncompliance with medication, while relevant, were subordinate to the other more pressing and obvious concerns.

**The Copying Ground**

[23] The final ground of appeal advanced by *amicus* targets the origin of the single paragraph of the Board's reasons explaining why it found that the appellant was a significant threat to the safety of the public. We have already rejected the claim that the finding was unreasonable and based upon a legally incorrect application of the statutory standard.

[24] *Amicus* says that the Board erred when it recycled several paragraphs of its reasons from the previous year to explain its conclusion at the hearing under review. The failure to provide reasons responsive to the issues raised and reflective of the evidence adduced at the hearing is at once unreasonable and procedurally unfair. While the Board was not obligated to accept the appellant's position about the level of risk he posed, it was required to assess the issue on the basis of the evidence and submissions it heard on the hearing conducted in 2019, not 2018. Reasons responsive to what occurred at a hearing in one year cannot be substituted for what happened in another.

[25] Apart from the Review Board context, reasons are sufficient if they are responsive to a case's live issues and the parties' key arguments: *R. v. Walker*, 2008 SCC 34, [2008] 2 S.C.R. 245, at para. 20. The basis of a conclusion must be

intelligible. In other words, there must be a logical connection between the conclusion and the basis for that conclusion. To determine whether this logical connection is established, we look to the evidence, the submissions of the parties, and the history of the proceedings to determine the issues as they emerged: *R. v. M. (R.E.)*, 2008 SCC 51, [2008] 3 S.C.R. 3, para. 35.

[26] As a general rule, good judicial practice requires a judge to set out the contending positions of the parties on the facts and the law and to explain, in the judge's own words, their conclusions on those positions. Judicial copying is a long-standing and accepted practice, but it can create problems. In some cases, at least, it can cause a judgment to be set aside. This occurs when the incorporation of the material of others would lead a reasonable person, taking all relevant circumstances into account, to conclude that the decision-making process was fundamentally unfair, in the sense that the judge did not put their mind to the facts, the arguments, and the issues, and decide them impartially and independently: *Cojocaru (Guardian ad litem of) v. British Columbia Women's Hospital and Healthcare*, 2013 SCC 30, [2013] 2 S.C.R. 357, at para. 13.

[27] These principles, while not directly applicable to a Review Board, provide a valuable *vade mecum* for Review Board decision-makers. Reasons must be responsive to this year's evidence, not to last year's. To this year's issues, not to last year’s. To this year's positions, not to last year’s.

[28] In this case, despite the ill-advised and unnecessary copying by the chairperson of portions of her previous year's reasons, we are not persuaded that it warrants a new hearing.

**DISPOSITION**

[29] For these reasons, the appeal is dismissed.

"David Watt J.A."
"M. Tulloch J.A."
K. van Rensburg J.A."