COURT OF APPEAL FOR ONTARIO

CITATION: Ahmadzai (Re), 2020 ONCA 819
DATE: 20201216
DOCKET: C68455

Fairburn A.C.J.O., Watt and Zarnett JJ.A.

IN THE MATTER OF: Meladul Ahmadzai

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

Meaghan Shea Thomas, for the appellant

Emily Marrocco, for the respondent, Attorney General of Ontario

Marie-Pierre Pilon, for the respondent, the Person in Charge for Royal Ottawa Mental Health Centre

Heard: December 8, 2020 by videoconference

On appeal against the disposition of the Ontario Review Board, dated May 22, 2020, with reasons dated June 10, 2020.

REASONS FOR DECISION

[1] On April 11, 2018, the appellant was found NCRMD on charges of assault with a weapon, robbery, and possession of a weapon for a purpose dangerous to the public peace.

[2] The charges arose out of a single event. Sometime after 8 o'clock one evening, the appellant entered a Money Mart. He approached the counter. A female cashier was working alone in the store. The appellant brandished a paring knife with a four-inch blade. He demanded cash. The cashier retreated to the rear of the store. There, she activated a distress alarm. The appellant remained at the counter.

[3] Shortly after the alarm had been activated, the police arrived. The appellant remained standing at the counter, the knife in front of him on the surface of the counter. He had made no effort to leave the store during the five minutes that elapsed between the sounding of the distress alarm and the arrival of the police. He did not obtain any cash despite his demand.

[4] The appellant was 27 years old when he was found NCRMD on the predicate offences. He had previous convictions, both as a youth and as an adult. None were offences of violence. Some were for failures to comply with the terms of release orders.

[5] During his tenure under the supervision of the Ontario Review Board, the appellant has generally been bound by detention orders subject to various

conditions. However, for the most part, he has resided with his parents at their home in accordance with the terms of those dispositions.

[6] The appellant's current diagnoses are Schizophrenia, First Episode, currently in partial remission, and probable Major Depressive Disorder (moderate). He is presently subject to a conditional discharge that, among other things, permits him to reside with his parents.

The Grounds of Appeal

[7] In this court, the appellant seeks a new hearing before the Board on two grounds. He says that in reaching its conclusion that he should be conditionally discharged, the Board made two errors:

i. it failed to recognize and fulfill its inquisitorial role; and

ii. it shifted the burden of proof to the appellant.

[8] In our view, whether the grounds of appeal are considered individually or cumulatively, they fail.

Ground #1: The Inquisitorial Function

[9] The inquisitorial function of the Board and its related powers and responsibilities are beyond dispute. The Board is tasked with the responsibility of gathering and reviewing all available evidence about the four factors listed in s. 672.54 of the *Criminal Code*. But this duty only arises when, in the Board's expert

view, additional information is necessary for the Board to discharge its mandate: *Kassa (Re)*, 2020 ONCA 543, at paras. 33-34.

[10] As a general rule, this court defers to a Board decision about whether it had sufficient evidence before it to make a decision about significant threat, thus disposition. It is all the more so, where, as here, the Board applies its collective and experienced mind to that decision. Deference will give way where the complaining party can demonstrate a "realistic possibility" that the missing material would have affected the Board's decision. Provided the Board has not acted unreasonably or proceeded on some improper principle, we do not interfere: *Baker (Re),* 2001 CanLII 4894, at para. 5.

[11] In our assessment of this ground of appeal, a relevant factor of which to take account is whether any party suggested at the hearing that the material before the Board was inadequate and would not permit an informed assessment of the significant threshold: *Baker*, at para. 3.

[12] In our view, it simply cannot be said that the Board lacked evidence essential or necessary to an informed decision about significant threat. None of the parties suggested otherwise. Indeed, all agreed to an expedited hearing in full knowledge of the state of the evidentiary record. Some of the factors were unknown and would only materialize in the fullness of time.

[13] It is also worthy of mention that the appellant does not challenge as unreasonable the significant threat finding. That decision was firmly rooted in a substantial evidentiary predicate not seriously challenged here. A serious mental illness of an ongoing nature. Limited insight. A predicate offence of threatened violence. A prior history of assaultive behaviour with family members. Guarded symptom disclosure to treating physicians. And a deficit of information about current or future residential arrangements.

Ground #2: Shift in the Burden of Proof

[14] The appellant also alleges that the Board erred in shifting the burden of proof to the appellant. In effect, the appellant says, the Board required *him* to show that he was *not* a significant threat, rather than requiring the parties opposite to demonstrate that he was such a threat. In our view, reading the reasons of the Board, as a whole, as we must, nothing said, left unsaid or implied from either of these sources can sustain the conclusion the appellant asks us to draw.

[15] That the Board had concerns about the appellant's stability and potential decompensation in light of his proposed life changes does not amount to a shift in the burden of proof. Their concerns were amply supported by the evidence of the appellant's treating psychiatrist. There was a robust history of involvement with mental health professionals. The predicate offence was committed while the appellant was on medication and compliant with it. There was a history of violence

against close family members, of suicidal thoughts, of homicidal thoughts, and of paranoia. This amply supported the finding of “significant threat” and the disposition made.

Conclusion

[16] For these reasons the appeal was dismissed.

“Fairburn A.C.J.O.”
“David Watt J.A.”
“B. Zarnett J.A.”