

A Chambers v. British Columbia (Attorney General)

Chambers v. Attorney General of British Columbia et al.

116 C.C.C. (3d) 406

British Columbia Court of Appeal
Court File No. CA022614 Vancouver Registry
Southin, Ryan and Proudfoot JJ.A.

JUNE 25, 1997

Mental illness — Review — Accused appealing from disposition of review [page407]

board refusing accused's request for discharge and ordering continued detention — Accused's mental condition stabilized — Accused also having history of drug and alcohol abuse and prostitution — Accused HIV positive — Review board detaining accused on basis that in disinhibited state caused by alcohol or drugs, accused posed risk of transmitting HIV virus to others — Review Board required to discharge accused who is not "significant threat" to safety of public — "Significant threat" must refer to criminal conduct — Although accused might pose risk to self and others if she indulged in unsafe sex or sharing needles, disinhibiting behaviour or acting on impulse when using alcohol or drugs not constituting Criminal Code offences — Accused should not be detained under Criminal Code because of physical illness — No evidence that accused would be significant threat in criminal context — Review board's decision unreasonable — Accused discharged — Cr. Code, s. 672.54.

Cases referred to

Orlowski v. British Columbia (Attorney General) (1992), 75 C.C.C. (3d) 138, 94 D.L.R. (4th) 541, 10 C.R.R. (2d) 301, 28 W.A.C. 204, 35 A.C.W.S. (3d) 257, 17 W.C.B. (2d) 64

Statutes referred to

Criminal Code, s. 672.54 [enacted 1991, c. 43, s. 4]

Health Act, R.S.B.C. 1979, c. 161, s. 7 [am. 1987, c. 55, s. 8] -- now R.S.B.C. 1996, c. 179, s. 11

Mental Health Act, R.S.B.C. 1979, c. 256, s. 20 [am. 1985, c. 12, s. 6; 1987, c. 42, ss. 66, 67, 68; 1989,

c. 48, s. 22] -- now R.S.B.C. 1996, c. 288, s. 22

APPEAL by the accused under s. 672.54 of the Criminal Code from a disposition of the review board refusing the accused's request for a discharge and ordering that she continue to be detained.

Diane J. Nielsen and Jim Pozer, for accused, appellant.

Lyle D. Hillaby, for respondent, Attorney General of British Columbia.

Mary P. Acheson, for respondent, director, Adult Forensic Psychiatric Services.

The judgment of the court was delivered by

PROUDFOOT J.A.

¶ 1 **PROUDFOOT J.A.**:— This is an appeal under s. 672.54 of the Criminal Code from a disposition of the Review Board on October 16, 1996, refusing the appellant's request for a discharge and ordering that she continue to be detained.

¶ 2 In July 1995, the appellant was charged with assault and two counts of fraudulently obtaining food. The assault occurred on July 22, 1995 when the appellant was followed out of the restaurant by the owner and an employee and started biting and scratching them when she was being restrained.

¶ 3 The appellant was 27 years of age at the time and on September 26, 1995, she was found not criminally responsible by reason of a mental disorder. She had previously been certified [page408] pursuant to the Mental Health Act, R.S.B.C. 1979, c. 256, and in August 1995 was hospitalized for protection of herself and others at the Forensic Psychiatric Institute (FPI).

¶ 4 On November 3, 1995, a first Review Board hearing was held and the appellant was conditionally discharged effective November 8, 1995 and she was released to Golden Ears Hotel in Port Coquitlam.

¶ 5 Unfortunately, freedom was not long enjoyed, as the appellant, once back in the community, returned to the use of morphine, cocaine and alcohol and was again actively engaged in prostitution.

¶ 6 Of some significance is the fact that throughout this period she was aware that she was HIV positive.

¶ 7 On November 30, 1995, the appellant was returned to the FPI from the Golden Ears Hotel upon the request of the Director as the appellant was suspected of breaching several conditions of the order. It was conceded that the appellant's use of alcohol and drugs was a breach of the order and she also missed some appointments at the Forensic Institute as she was an out-patient.

¶ 8 On January 24, 1996, at a second hearing, the Review Board made a custody order allowing the appellant unsupervised access to the community, including a visit leave of a maximum of a four-week duration to a supervised residence, the choice of the residence being at the discretion of the Director.

¶ 9 On February 2, 1996, the appellant left the FPI without authorization. She was returned by the police on February 3, 1996.

¶ 10 A third Review Board hearing was held on April 17, 1996. The custody order remained the same with the same conditions as the previous disposition of January 1996.

¶ 11 A fourth hearing of the Review Board was held on October 16, 1996. This hearing coincided with the appellant's annual review date. It is the disposition then made which is being appealed.

¶ 12 I will quote extensively from the reasons of the chairperson, as follows:

In your case we believe that you need ongoing residential care in the Forensic Psychiatric Institute under a custodial order. We accept the evidence of improvements in your mental condition. The other area of concern however which require us to consider custodial care are your inability to withhold from the use of hallucinogens, which we will say more about in the reasons. In addition, until you have had the benefit of a long period of sobriety followed by a treatment program, it is not likely that you will become eligible for residence in a supervised boarding home placement. In our view, for the short-term and foreseeable future, a reintegration plan has most chances of success. *[page409]*

It is our opinion that living alone with your legacy of addiction and noncompliance with rules imposed under authority of the law, would result in your becoming a risk to yourself and also to others.

¶ 13 The chairperson then refers to the use of drugs as well as alcohol and the difficulty of the appellant being involved in prostitution. The chairperson then makes these comments:

Unfortunately, the accused is HIV positive and with this history, presents as a danger to the community, in the event that she uses a needle and then shares this needle with others. The record should reflect that she is possessed of sufficient intellectual capacity to know the danger she poses in this context, as well as the dangers associated with her having sex with others. She advises us that she knows that condoms do not provide assurance against transmitting HIV virus to others. Nevertheless, she confirms that when having sex with others, she says she does use a condom. These two understandings on her part, notwithstanding, we have a doubt that she is not a significant risk to the safety of the public.

.....

Alcohol in itself has not appeared to have featured largely in her posing a risk, but our concern is, that it is a disinhibiting substance. In this disinhibited state, we are concerned that she would pose a realistic risk of passing HIV virus to others, particularly as she was a prostitute and returns to that practice when

in the community. She had demonstrated her lack of insight about the risk in the community as recently as the end of August. She is intelligent, but unfortunately has chosen to be dictated by her own impulses.

.....

Her reintegration into the community requires some very deliberate measures. Clearly, the custodial circumstances of this hospital have assisted in improving her mental condition. There have been no psychotic episodes since early January, so far as we are able to determine. There have been no assaultive behaviours since last fall, when she was clearly understood to be disorganized, delusional, and suffering from either the effects of mental illness or a combination of that with cocaine. Her risk to people, if she were to forget to use a condom or ignore that precaution, and similarly with sharing a needle is real. We accept her assurances today, but in other circumstances, we cannot. We are not speculating about the prospect of her being a risk to others. When she is high on cocaine, alcohol, or otherwise, she is a clear walking risk to life. Her sobriety is what keeps her safe, and her sobriety can only be ensured at the current level of understanding through custodial care.

.....

Our duty is to assess risk, and to make sure that you are not a risk to yourself or others that you come into contact with.

..... *[page 410]*

We also appreciate that until there has been some clear indication of your developing insight and attending at programs, the likelihood of your being accepted there is diminished. But that shouldn't in any event prevent a recommendation and we are making that known in our order as that will likely promote your treatment, reintegration into society and hopefully recovery sufficient to live in supportive circumstances in the community. [Emphasis added.]

¶ 14 A formal disposition order was made with the following conditions:

WHEREAS Lisa Marie CHAMBERS ("the accused") having been charged with assault and 2 counts of fraudulently obtaining food contrary to ss. 266 and 364(1) of the Criminal Code was found not criminally responsible by reason of mental disorder in the Provincial Court of British Columbia at Maple Ridge on September 26, 1995 and ordered held in custody at the Forensic Psychiatric Institute until disposition by the British Columbia Review Board ("the Review Board");

1. THAT she be subject to the general direction and supervision of the Director, Adult Forensic Psychiatric Services ("The Director")
2. THAT she resides in such place in the wards of the hospital located at either 70 Colony Farm Road or on the grounds of the Riverview Hospital in Port Coquitlam as considered appropriate by the Director.

3. THAT she may be granted access to the community either while escorted or otherwise, subject to such conditions the Director considers appropriate having regard to the risk she then poses to herself or others, for the purpose of:

(a) assessing her suitability for a residential placement in the community

(b) facilitating visits with family or friends, and generally

(c) assisting in his reintegration into society.

4. THAT her right to unescorted access to the community include a visit leave to a residential alcohol treatment program for a stay not to exceed eight weeks;

5. THAT she keep the peace and be of good behaviour;

6. THAT she not consume alcohol or use hallucinogens;

7. THAT she not use any drugs except as approved by a medical practitioner;

8. THAT the Director may monitor her compliance with this order which may include monitoring for the use of alcohol, hallucinogens or unprescribed drugs, where there are reasonable grounds to believe that a condition of this order has been violated;

9. THAT she present herself before the Review Board when required.

¶ 15 At the hearing in October 1996, the Review Board had before it a report from Krista Field, the case management coordinator from the Forensic Psychiatric Institute. They also had a report dated October 1, 1996 from the psychiatrist, Dr. Wanis.

¶ 16 Dr. Wanis' report makes the following impressions and recommendations:

[page411] IMPRESSIONS & RECOMMENDATIONS

1. It is my impression that her psychotic symptoms currently are under control. There is no current evidence of Depressive Disorder. She continues to show signs and symptoms of disinhibition which are mainly due to her characterological makeup. She continues to show minimal insight into the fact that alcohol and drugs cause her to reenter into the Criminal Justice System. I recommend that Ms. Chambers be detained in custody of the Forensic Psychiatric Institute with conditions allowing community access. It is the treatment team's hope that this patient could be gradually reintegrated into the community. I have also been discussing with Krista Field regarding plans of possible inpatient alcohol and drug rehabilitation programs and this would be of course dependent on Ms. Chambers' motivation. It is my opinion that considering her past behaviour, that if released prematurely from this hospital she will constitute high risk for relapse with an unknown outcome.

¶ 17 In her factum, the appellant alleges three errors in the judgment:

1. Did the Review Board err in law in reaching a custody disposition based on the Appellant's alcohol and drug abuse rather than her mental condition contrary to Section 672.54?
2. If the answer to question 1 is no, did the Review Board err in reaching a custody disposition that is unreasonable or cannot be supported by the evidence?
3. In the further alternative, did the Review Board err in law in reaching a custody disposition by not considering the least onerous and least restrictive order or a conditional discharge contrary to Section 672.54?

¶ 18 In order to dispose of this appeal I propose to deal with only the second ground.

¶ 19 The appellant argues that the disposition, detaining of the appellant, is unreasonable and cannot be supported by the evidence. Counsel argues that the Review Board has no authority to confine a person because of some physical condition (some ailment). In the case at bar, the fact that the appellant is HIV Positive is not a mental disorder but a communicable disease and that the significant threat (risk) that is referred to in the case must refer to a threat to the community of doing some act which constitutes an offence under the Criminal Code. Because the appellant is HIV Positive, and because she is a prostitute, does not cause the appellant to be a significant threat within the meaning of the Criminal Code. It is not a crime to be a prostitute; neither is it a crime to be a prostitute who is HIV Positive.

Section 672.54 reads:

672.54. Where a court or Review Board makes a disposition pursuant to subsection 672.45(2) or section 672.47, it shall, taking into consideration the *[page412]* need to protect the public from dangerous persons, the mental condition of the accused, the reintegration of the accused into society and the other needs of the accused, make one of the following dispositions that is the least onerous and least restrictive to the accused:

- (a) where a verdict of not criminally responsible on account of mental disorder has been rendered in respect of the accused and, in the opinion of the court or Review Board, the accused is not a significant threat to the safety of the public, by order, direct that the accused be discharged absolutely;
- (b) by order, direct that the accused be discharged subject to such conditions as the court or Review Board considers appropriate; or
- (c) by order, direct that the accused be detained in custody in a hospital, subject to such conditions as the court or Review Board considers appropriate.

¶ 20 In *Orlowski v. British Columbia (Attorney General)* (1992), 75 C.C.C. (3d) 138, 94 D.L.R. (4th)

541 (B.C.C.A.), the Chief Justice approached this aspect of a significant threat in these passages [at p. 146]:

In my judgment the board must, in the first instance, consider the "preamble" factors, not just in deciding whether an accused is a significant threat, but also in deciding what disposition it will make of each case.

In addition, however, the board must also struggle with other questions, and it is not possible to say that any of these factors are free-standing and independent of each other. The legislative objective is to decide what disposition should be made that is the least onerous and least restrictive upon considering the "preamble" factors and the language of s. 672.54.

.....

It seems to me, with respect, that if the board is concerned that an accused with an appropriate history is not a present significant threat and will not become one if he continues with prescribed medications, but the board also has the opinion that he may be a significant threat if he does not take his medication, then the board cannot be said to have an opinion that the accused is not a significant threat. The word "threat", in my view, has a future connotation.

¶ 21 Does the term "significant threat" refer to criminal conduct only or can it include the risk of spreading a communicable disease, i.e., AIDS? There is no doubt that the Review Board considered the words "significant threat" to extend far beyond a threat of criminal conduct.

¶ 22 I am persuaded that "significant threat" must refer to criminal conduct or activity as the review procedure is part of the Criminal Code. In my opinion, Parliament never intended to deal with (detain) persons with physical (health) problems which are neither mental conditions nor mental disorders within these sections of the Criminal Code.

¶ 23 The appellant's mental condition (Schizophrenia) has been stabilized and that has been noted by the Review Board in the [page413] decision. She has a problem when alcohol or drugs are abused. The Review Board stated she becomes "disinhibited" and acts on "impulse" and that because she is HIV Positive she poses a risk to the community.

¶ 24 I can hardly disagree that this appellant might well pose a risk not only to herself and but also to others if she indulges again in unsafe sex or in sharing needles. However, disinhibiting behaviour or acting on impulse when using alcohol or drugs are not in and of themselves offences under the Criminal Code.

¶ 25 The respondent argues the Review Board has broad powers to assess danger. I do not disagree with that proposition. He states the words "significant threat to the safety of the public" does not necessarily need to be a threat of a criminal offence and that the threat of spreading a disease, i.e., AIDS, is

sufficient for the Board to deny a discharge. He conceded that the appellant was being detained because she is HIV Positive.

¶ 26 The appellant should not be detained under the Criminal Code because she is physically ill. If a mental problem arises upon release, s. 20 of the Mental Health Act is the appropriate legislation to deal with the situation. If she is considered a menace because of her physical condition, s. 7 of the Health Act, R.S.B.C. 1979, c. 161 may be invoked. It was not the intent of Parliament that the Criminal Code be used to confine persons who may develop AIDS or for that matter any other communicable disease.

¶ 27 There is no evidence or persuasive argument that the appellant would be a significant threat in a criminal context to bring her within the scope of the legislation (Criminal Code).

¶ 28 The danger that might present itself must be assessed in relation to an individual getting involved in some criminal conduct or activity. If the respondents' argument were to succeed, as I stated earlier, there are any number of communicable diseases, i.e., Tuberculosis, sexually transmitted diseases, etc., which would be sufficient to detain an individual. I do not agree that Parliament ever intended review boards to have such sweeping powers.

¶ 29 The Review Board's decision is not supported by any evidence that the appellant was a significant threat within the context of the Criminal Code. Therefore the decision is in law, unreasonable.

¶ 30 The appeal is allowed. The appellant is entitled to a discharge.

Appeal allowed; accused discharged. *[page414]*