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A D.H. v. British Columbia (Attorney General) (B.C.C.A.)

Re: an appeal from the British Columbia Board of Review
pursuant to s. 672(1) of the Criminal Code of Canada

Between

(D.H.), a young person, Appellant, and
Attorney General of British Columbia and Forensic Psychiatric
Services Commission, Respondents

[1994] B.C.J. No. 2011

Vancouver Registry No. CA018451

**British Columbia Court of Appeal
Vancouver, British Columbia
Cumming, Finch and Donald JJ.A.**

Heard: July 21, 1994.

Judgment: filed September 13, 1994.

(10 pp.)

Criminal law — Procedure — Verdicts, discharges and dismissals — Absolute or unconditional discharge in lieu of conviction — Verdict of not guilty by reason of insanity.

The accused appealed from a disposition of the Review Board refusing his request for an absolute discharge. When the appellant was 17 years old, he burned down a church, acting under a delusion that God had told him to do so. The appellant was now 24 years old, and had spent the last eight years in institutions. The impugned decision of the Review Board maintained an earlier conditional discharge, in order to continue work necessary to help the appellant reintegrate into society. The appellant contended that the Review Board had erred in law in deciding whether or not he was a significant threat to the public.

HELD: The appeal was allowed. The Review Board had considered whether, under section 672.54 (a), the appellant was "not a significant threat to the safety of the public", and had concluded that it could not say he did not pose such a threat. The court stated that an examination of the record would not reveal anything in the appellant's behaviour, in or out of hospital, which would constitute a significant threat to the safety of the public. While it was plain that the appellant would have difficulty reintegrating into society, the evidence did not show that he would pose a significant threat to public

safety if he was absolutely discharged. The Review Board placed an unreasonable interpretation on the words "significant threat". The phrase implied a consideration of possible future events, but the evidence had to go beyond mere speculation.

Statutes, Regulations and Rules Cited:

Canadian Charter of Rights and Freedoms, 1982, ss. 7, 12, 15. Criminal Code, s. 672(1), 672.54, 672.72(1), 672.78(1). Young Offenders Act, s. 5(3).

Counsel for the Appellant: David W. Mossop.

Counsel for the Respondent, Attorney General of British Columbia: Lyle D. Hillaby and Angela R. Westmacott.

Counsel for the Respondent, Forensic Psychiatric Services Commission: Mary Acheson.

The judgment of the Court was delivered by **Donald J.A.**

¶ 1 DONALD J.A.:-- This is an appeal under ss. 672.72(1) and 672.78(1) of the Criminal Code from a disposition of the Review Board on November 22, 1993 refusing the appellant's request for an absolute discharge.

¶ 2 At the conclusion of the hearing of this case we allowed the appeal and granted the appellant an absolute discharge, with reasons to follow. These are the reasons for that decision.

¶ 3 On November 28th, 1985 the appellant was found not guilty by reason of insanity on charges that he broke into, stole from, and burned down a church in Vernon. He was 17 years old at the time. He acted under a delusion that God told him to set fire to the church.

¶ 4 The appellant is now 24, having spent the last eight years in institutions and various community placements under the Code scheme for the mentally disordered. He is entitled to retain anonymity in proceedings related to his offense committed as a young person because of the protection accorded by s. 5(3) of the Young Offenders Act.

¶ 5 Despite the psychotic symptoms he displayed at the time of the church incident, the appellant appears not to suffer from a psychosis. The diagnosis given him at the Forensic Psychiatric Institute (FPI) is that of personality disorder with self defeating features. The latter refers to his defiant and uncooperative behaviour and his resistance to counselling and other efforts to help him return successfully to the community. FPI staff allowed him to live with his father under a conditional discharge for about a year. That was a failure. The appellant did not comply with all the conditions of his discharge and ran away from home. His father became alarmed at the appellant's behaviour which he thought resembled the way he acted before the commission of the index offence.

¶ 6 Placement in group homes met with mixed success. In one instance, the appellant had to return to

FPI from a home because he squandered his allowance causing him to fall into arrears in rent, and he refused in other ways to comply with house rules.

¶ 7 On the question of dangerousness, he has no history of assaultive behaviour. However, while acting out in a fit of frustration at FPI he caused minor damage to a number of cars in a hospital parking lot.

¶ 8 Prior to the hearing the appellant was in a community placement but had dropped out of sight. We were informed that he was in court with his brother for most of the hearing on appeal.

¶ 9 The impugned decision by the Review Board maintained an earlier conditional discharge in order to continue the work in helping the appellant reintegrate into society.

¶ 10 The psychiatrist on the panel, Dr. Peter Bunton, dissented and would have given an absolute discharge on the basis that FPI staff had exhausted all reasonable measures for reintegration and because the staff felt that further counselling and other efforts would only be counter-productive by fostering a sense of dependency.

¶ 11 The appellant alleges two errors in the decision appealed from:

1. The Review Board erred in law in deciding whether or not [D.H.] was a significant threat to the safety of the public. In the alternative, there is an unreasonable finding of fact with regard to that fact.
2. The Review Board lacked jurisdiction over [D.H.] as the capping provisions of the Mental Disorder sections of the Criminal Code are in force, at least in regard to [D.H.], and/or the Appellant's rights under ss. 7, 12, and 15 of the Charter have been violated and the Court should discharge him from the Mental Disorder provisions of the Criminal Code.

¶ 12 Since we have concluded that the appeal should succeed on the first ground it is unnecessary to deal with the Charter issue raised in the second ground.

¶ 13 Section 672.54 of the Code sets out the dispositions that the Review Board can make:

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 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. 1991, c. 43, s. 4.

¶ 14 This appeal turns on the construction placed on the words in subsection 672.54(a) by the majority of the Review Board.

¶ 15 The Review Board faced a difficult task in assessing the appellant's case at the last hearing. When it reviewed the case in June, 1993 FPI staff urged the Review Board to refuse an absolute discharge on the ground that the appellant was not ready for complete independence and that he presented some risk of harm because of the property damage incident referred to earlier. When the matter came up again in November, FPI staff had done a complete about-face and strongly recommended an absolute discharge.

¶ 16 In giving reasons for the majority the Chairman said this:

The majority of the panel namely, myself as Chairperson, and Mr. Alcock were unable to come to the opinion that [D.H.] is not a significant threat to the safety of the public. This uncertainty finds its basis in the evidence of [D.H.'s] behaviour while in his community residence, his reluctant participation in the treatment plan, as well as his non-compliance with our Order since its having been made on June the 9th, 1993. The Review Board recognized in its previous hearing that his was a case that would likely have set-backs in the future. It is of concern to have heard today that despite the fact that he suffers from no diagnosed mental illness, some very significant features of his inability to cope in society have been demonstrated. He is not on any medication for a mental condition. That was recognized when the order was made in June. The evidence from the Treatment Team today through Louanne Jessome who gave evidence is that they are of a view that they can no longer assist [D.H.] and, in fact, supervision through a conditional discharge would be counter-therapeutic. This is contrasted with the fact that he is portrayed as not having a mental disorder. This leads at least the majority of this panel to conclude that there may well be an underlying mental condition no one has diagnosed, but which we should have some regard for. The evidence concerning the behaviour by the accused since June of '93 is consistent with evidence of his routine disregard for the need to comply with our Order. There has been evidence of some current behavioural change which [S.H.] the accused's father indicates closely resembles the pattern of anger of the accused, prior to the index

offence. This includes the reversal in his sleep patterns. He sleeps for extended periods of time without leaving his room. He becomes seclusive in ways similar to the way he was prior to the index offence. He has shown an inability to attend to his daily habits, evidence of which were observed most recently by Miss Jessome when the accused was in residence in Willingdon House. He is, in our respectful view, someone who needs ongoing sensitive, supervised residence despite his rejection of the same today. He has no trained skills in respect of improving his employability. He has attempted to become employable by enrolling in a programme at Douglas College. He abandoned that programme, rationalizing his decision today by saying the programme was viewed by him as below his intellectual skills. We are concerned, however, that he has not taken anything in a positive way to replace what Douglas College might have offered him as an option towards economic survival if an absolute discharge were granted. What was said in our Reasons in June are as appropriate in explaining the majority's position today as it was in June. The Treatment Team understandably expresses frustration today in saying that they reverse their position from that taken in Exhibits 2, 3 and 4; namely, that because of his non-compliance he should be given an absolute discharge. They have said for the same reasons in these reports and their previous reports that his lack of ability to live by a regime of conditions and roles, including reporting to a clinic at periods of once a month. These would be indications that he might become a significant threat to the safety of the public, but we don't know if that is the case. Certainly, the Treatment Team felt that strongly in the past and rejected an absolute discharge. His is a troubling case and has been to the Review Board in that as a young offender he's had many opportunities that have been lost to him. His father has tried his best as a parent, a single parent to provide the kind of counselling and support perhaps [D.H.] needed as a young person, and may still need in the future. But it's clear to the majority of this panel that he needs more attention to counselling prior to the reintegration into society for successful prospects to be expected. There's no question he is not a significant threat to the safety of the public at the time of this hearing. He has displayed no psychotic behaviours either now or for some time in the past. However, his other behaviours are sufficiently concerning to us to reflect upon to question whether they are the beginnings of disturbances that resemble those that existed prior to the index offence.

We believe that the conditional discharge that was in place in June should continue. We are not of a view that an early review is necessary at this time.

¶ 17 An examination of the record will not reveal anything in the appellant's behaviour, in or out of hospital, which would constitute a significant threat to the safety of the public. Mr. Hillaby fairly conceded in argument that that phrase must refer to a threat of harm to the person and not property damage and that such a qualification is implicit in what this court said in *Orlowski v. British Columbia (A.G.)*, (1992) 10 C.R.R. (2d) 301. At p. 310 of that case McEachern C.J.B.C. said, in the context of explaining why review boards should give reasons for decision, the following:

Second, there is a distinction between a threat to public safety and a "significant" threat under s. 672.54(a), and the right of an accused to an absolute discharge cannot be foreclosed just because he may be a threat to public safety. Instead, the section grants this entitlement even if the board has the opinion that he is a threat to public safety but is not a significant threat. This distinction is a most important one to accused and may arise for consideration in many cases. As the liberty of a subject may well depend upon the subsidiary decision a board must make on subs. (a) before it proceeds to subs. (b) and (c), it seems to me, with respect, that fairness requires the accused to be given a specific finding with explanatory reasons on this most important question.

Reasons explaining why the appellants in these cases were not given absolute discharge were particularly necessary. This is because the evidence raises a serious question about their dangerousness, and because the attention of the board seems to have been diverted away from the question of significant threat as a result of the board's obvious concern for how these appellants would cope with the outside world.

¶ 18 That case held that the Review Board was justified in refusing an absolute discharge to persons who were stabilized on medication at the time of hearing but who might present a future danger if, when released without control, they stopped taking their medication. The learned Chief Justice said at p.312:

To put it another way, it is my opinion that if, after considering the preamble factors in s. 672.54, the board is undecided (i.e., it does not have the requisite opinion) on whether the accused is a significant threat, then it may properly decline to order an absolute discharge, and it may proceed to decide what other disposition it should make, always taking the preamble factors into consideration.

¶ 19 This approach explains the Chairman's use of the double- negative expression in his reasons in the instant case:

[We] were unable to come to the opinion that [D.H.] is not a significant threat to the safety of the public.

¶ 20 The evidence at the hearing below made it plain that the appellant will have difficulty reintegrating into society. What it did not show was that he posed a significant threat to public safety if he was absolutely discharged. The opening part of s. 672.54 is awkwardly worded and one has to struggle to understand how the four factors in that part relate to the dangerousness criterion in subsection (a). In my view public safety is the central question, remembering that the restraint on the liberty of the subject arises from criminal proceedings and is governed by a penal statute.

¶ 21 With respect, I think the Review Board placed an unreasonable interpretation on the words "significant threat". The phrase implies a consideration of possible future events, but the evidence must take the Board beyond mere speculation. In Orłowski, supra, the risk of harm was obvious.

¶ 22 The Board's interpretation here places an impossible burden on a person in the appellant's position: he must negate any future possibility that he may become a significant threat, no matter how remote that possibility may be. That ascribes to "significant threat" a meaning that the words cannot reasonably bear and amounts to a reversible error in law.

¶ 23 Parliament intended that review boards adopt a caring and compassionate approach towards the mentally disordered, especially in the often difficult transition from hospital to community. The decision under appeal reflects that attitude and is worthy of respect. However, the evidence was overwhelming that nothing more could be done to ease the appellant back into society; he had been in various forms of custody for eight years; he suffered from no major mental illness; and, apart from the index offence, he presented no signs of serious danger to others.

¶ 24 I think it will be rare that this court interfere with the Review Board's decisions. Difficult and delicate questions of judgment have been assigned to the Board and it has been constituted with the expertise to discharge its duty in the public interest. It is entitled to curial difference: *Pezim v. British Columbia (Superintendent of Brokers)* (23 June, 1994) File nos. 23107, 23113 (S.C.C.). Nevertheless, the superintending function of this court must be exercised when a decision proceeds on an unreasonable construction of the constituent statute or is unsupported by the evidence. The decision under appeal fails both administrative review tests.

DONALD J.A.

CUMMING J.A.:-- I Agree.

FINCH J.A.:-- I Agree.

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