Date: 19981005
Docket: CA024514
Registry: Vancouver

COURT OF APPEAL FOR BRITISH COLUMBIA

An appeal from the British Columbia Review Board
pursuant to s. 672.72(1) of the Criminal Code of Canada

In the Matter of MARTIN LAWRENCE HUTCHINSON

AND:

THE DIRECTOR OF ADULT FORENSIC PSYCHIATRIC SERVICES

RESPONDENT

AND:

ATTORNEY GENERAL OF BRITISH COLUMBIA

RESPONDENT

Before: The Honourable Chief Justice McEachern
The Honourable Madam Justice Huddart
The Honourable Mr. Justice Hall

D.J. Nielsen & J.W. Pozer — Counsel for the Appellant

M.P. Acheson — Counsel for the Respondent, The Director of Adult Forensic Psychiatric Services

L. Hillaby — Counsel for the Respondent, Attorney General of British Columbia

Place and Date of Hearing — Vancouver, British Columbia

10 September l998

Place and Date of Judgment Vancouver, British Columbia
5 October l998

Written Reasons by:
The Honourable Mr. Justice Hall

Concurred in by:
The Honourable Madam Justice Huddart

Concurring Reasons by:
The Honourable Chief Justice McEachern (Page 13, para. 18)

Reasons for Judgment of the Honourable Mr. Justice Hall:

[1] The appellant, who is now 31 years of age, has had a relatively troubled background and a history of involvement with the criminal law since 1983. The offences that caused him to be imprisoned on the present occasion were serious ones involving violence. I think it can fairly be said that his prognosis for future avoidance of difficulty with the law must remain rather guarded in view of his past history. During the term of an earlier sentence of imprisonment, it was recommended that he receive treatment in a personality disorder program.

[2] On April 2, 1993, the appellant was sentenced by Singh J. to a total of five and a half years imprisonment upon conviction for the offences of theft of an auto and sexual assault, which offences had occurred during the last week of September and the first week of October 1992. His warrant expiry date on these sentences is October 1, 1998. On the same date as the sentencing, he was found not guilty, by reason of mental disorder, of the offence of aggravated assault, which offence occurred concurrently with the auto theft of September 28, 1992. It was found by the learned trial judge that concerning this particular offence the appellant was in a state of insane automatism at the time and this resulted in the finding of not guilty by reason of mental disorder. This assault offence was one that involved a very considerable amount of violence and resulted in life threatening injuries to the complainant.

[3] At a disposition hearing held in June of 1993, a Review Board ordered that the appellant should be detained in custody at what was then the Matsqui Regional Psychiatric Centre, now known as the Matsqui Regional Health Centre. Various reviews of this disposition were held up to and including July of 1996. It was noted on that occasion that there should be another review of the appellant's case prior to the end of November 1996. On November 28, 1996, a Review Board decided that the appellant should remain at the Regional Health Centre pending a placement hearing which was expected to be held in January of 1997.

[4] On January 23, 1997, a hearing was held and it was decided that effective January 29, 1997, the appellant ought to be transferred to serve his sentences on the crimes for which he stood convicted at Mountain Institution or at some other appropriate institution. Thereafter, he was transferred to William Head Institution on Vancouver Island. The Review Board concluded that he should continue to have a custodial status which would in effect be "in abeyance" while he was in prison serving his sentence. On January 28, 1998, after another hearing, the Board ordered his continued detention. The appellant will revert to a custodial status after the warrant expiry date on the basis of the offence for which he was found not guilty by reason of mental disorder.

[5] Because he was both convicted of offences and found not guilty by reason of mental disorder of another offence in April of 1993, he took on the status of what is described in the Criminal Code as a dual status offender. Since his last dealings with a Review Board were in January of 1998 his situation presumably will be reviewed no later than January of 1999.

[6] After the hearing held in November of 1996, the disposition was recited to be effective until November of 1997. It was, of course, then contemplated that there would be a placement hearing relating to the appellant within approximately two months. Such a hearing was held and as I noted above, this resulted in his transfer to an institution where he has been serving the sentences for the offences of which he was found guilty on April 2, 1993. Those sentences

aggregated in total five and one half years.

[7] It was argued in this court on behalf of the appellant that the Review Board lost jurisdiction over this appellant because of an alleged failure by the Review Board to comply with the provisions of Code s. 672.81(1) which are as follows:

> A Review Board shall hold a hearing not later than twelve months after making a disposition and every twelve months thereafter for as long as the disposition remains in force, to review any disposition that it has made in respect of an accused, other than an absolute discharge under paragraph 672.54(a).

[8] The custodial disposition that was in force in November of 1996 continued to be effective up to the date of the placement hearing in January 1997. The Review Board specified in its placement order the following:

> NOW THEREFORE THE REVIEW BOARD ORDERS AND DIRECTS that the accused be detained in custody as a dual status offender in Mountain Institution at Agassiz, British Columbia, or in such other prison institution as may be determined from time to time by Correctional Services Canada.
>
> THIS PLACEMENT DECISION COMES INTO FORCE on January 29, 1997 and remains in force until January 28, 1998 unless in the interim it is superseded by another placement decision or by the accused ceasing to be a dual status offender.

[9] It was argued at the hearing in January of 1998 that his status should be altered from custodial to a form of discharge. Section 672.54 provides for various dispositions that may be made by a court or a Review Board:

> 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 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.

[10] However, the Review Board was not of the opinion, in January of 1998, that it ought to change the custodial status of the appellant and ordered that he continue to have that status. Therefore, the result is that after the expiry of the warrants in early October of 1998 he will revert to custodial status at the Regional Health Centre.

[11] What must not be lost sight of here is that this appellant is a dual status offender. It is clear from the terms of provisions such as 672.69 and 672.7 that this status envisages a situation where both the prison authorities and a Review Board will have access to the dual status offender to assess what is best by way of disposition or placement. I would draw the inference from the provisions of 672.67(1) and 672.71(2), providing in the first instance for precedence to be taken by a sentence of imprisonment over an existing custodial order and in the second instance for precedence to be taken by a custodial disposition over a probation order, that the intention of Parliament was to ensure that individuals who are potentially dangerous will not be allowed at liberty until their cases are appropriately reviewed. It appears to me that it is clearly envisaged by the legislation that where a person

such as the appellant is in the category of a dual status offender, then that individual is subject to review and direction both by the prison authorities and by a Review Board. For instance, s. 672.7(1) reads as follows:

> Each day of detention of a dual status offender pursuant to a placement decision or a custodial disposition shall be treated as a day of service of the term of imprisonment, and the accused shall be deemed, for all purposes, to be lawfully confined in a prison.

[12] What happened in the instant case is that from shortly after his sentencing on April 2, 1993 until January of 1997, the appellant was under the control and direction of the Review Board and pursuant to the legislation it was obliged during that time to hold yearly reviews to decide upon an appropriate disposition. But as a result of the placement decision made in late January of 1997, the appellant passed from the immediate direction and custody of the Review Board to the custody of the authorities at the relevant federal prison, in this case, the William Head Institution. Although, pursuant to the terms of the legislation, the Review Board continued to have access to the appellant and was entitled to be notified of any proposed change in his custodial status, the Review Board had no particular active role to play in the ongoing custody of the appellant. That responsibility then rested with the prison authorities and although consultation undoubtedly could and in many cases should take place relating to any program to be followed with respect to the offender relating to potential terms of release and the like, the function of the Review Board was in this case, greatly attenuated. In the circumstances disclosed here, it would clearly have been only an academic exercise for the Review Board to continue to hold annual disposition hearings concerning this appellant. I think it would not be an improper use of language to describe the disposition functions of the Review Board at that stage as being held in abeyance unless and until the appellant came back within their sphere of governance.

[13] It was argued that the Board was bound under the legislation to hold a further disposition hearing not later than November of 1997, (one year after the November 1996

hearing), and that in not holding a disposition hearing prior to January of 1998, the Board lost jurisdiction over the person of the appellant. I would not accede to this argument. There was a hearing relating to the disposition of the appellant in November of 1996 and there was another hearing relating to his placement in January of 1997. At this time, the Review Board contemplated that there would be another review of the situation of the appellant in January of 1998. There was a hearing in January of 1998 and the Review Board at that time elected to continue the custodial status of the appellant. As I see it, the legislation is crafted to ensure that persons such as the appellant are to be monitored on an ongoing basis and usually hearings relating to disposition for a person found not guilty by reason of mental disorder would be held yearly. That situation may, however, be somewhat altered with respect to dual status offenders. When a dual status offender comes as in this case to be incarcerated for the offences on which he has been found guilty, the Review Board ceases to have prime responsibility for his custody. That is what happened here in early 1997 after the placement hearing.

[14] A Review Board will wish to be kept advised of the situation of a dual status offender while he is in custody of the prison authorities but I see no reason for rigid adherence to any particular schedule of hearings relating to this disposition. While he remains subject to the direction of the prison authorities, there is no necessity to hold annual disposition hearings. When, and if, it is contemplated that the offender's case may require re-examination, for instance, if parole is to be considered, or if warrants are scheduled to expire, then a hearing may become requisite. In my opinion, there has been no failure by the Board to comply with the operative legislation and I see no loss of jurisdiction. In the circumstances disclosed here, I consider that there was no error committed by the Review Board and, in my view, it cannot be successfully argued that there has been any loss of jurisdiction over this appellant by the Review Board. I would not give effect to this head of argument on this appeal.

[15] It was argued alternately that the Review Board erred in law or reached an unreasonable conclusion by concluding that the appellant could be a significant threat to the safety of the public based on his mental condition in the absence of a

finding that he continued to be affected by a mental disorder. It was suggested that since the circumstances that led to the finding of not guilty by reason of mental disorder were rather in the nature of a "one off" or transitory situation, it was inappropriate to treat the appellant in 1998 as a person requiring further custodial treatment based on the continuing existence of a mental disorder. Counsel submitted that since the appellant does not now apparently suffer from the mental disorder, namely, insane automatism, that led to the finding in 1993 of not guilty by reason of mental disorder, that the Board should have ordered a different disposition. However, I think it cannot be overlooked that, by reason of his mental status and personality makeup, the appellant remains to a degree susceptible to the sort of situation that led to the finding in 1993 and so, the Board, which must have regard to the safety of the public in any disposition it makes, was entitled to order the disposition that it most recently did. I believe the comments found in the following passage from the case of Peckham v. Attorney General of Ontario (1994), 93 C.C.C. (3d) 443 (Ont. C.A.), leave to appeal refused (1995), 37 C.R. (4th) 399 (S.C.C.), at 452 are apposite here:

> Section 672.54 addresses the accused's mental condition at the time of the hearing. That hearing may occur many years after the initial finding of not criminally responsible on account of mental disorder. Nothing in the language of the section suggests that the Board must first decide whether the label attached to the accused's mental condition for the purposes of determining whether he could be held criminally responsible for his acts remains the operative diagnosis. Instead, the section contemplates a consideration of the accused's mental condition at the time he or she is before the Board. The original diagnosis along with the psychiatric information referable to the accused's mental state since the finding of not criminally responsible on account of mental disorder must be considered in arriving at a conclusion with respect to the present mental condition of the accused. That conclusion in turn plays a central role in the Board's determination of the appropriate order.
>
> Furthermore, the section speaks to the accused's

mental condition and not to the existence of a mental disorder. The latter is defined in s. 2 of the Criminal Code as meaning a disease of the mind, and is clearly a more restrictive phrase than the phrase "the mental condition of the accused". [sic] By using the broader phrase, Parliament must have intended the Board to address the overall mental state of the accused without limiting itself to a determination of whether that condition, or at least some aspect of it, continued to fit within the confines of the legal concept of a mental disorder.

Finally, the section as worded by Parliament mandates absolute release only where the Board is of the opinion that the accused is not a significant threat to the safety of the public. It must follow that the section contemplates, in all other cases, further restraints on the liberty of an accused either by way of conditions attached to a release order or further confinement in a hospital. The nature and extent of that deprivation does not depend on the continued existence of the mental disorder which led to the finding of not criminally responsible on account of mental disorder, but must be determined using the approach dictated by s. 672.54.

[16] In my view, the Review Board was entitled to and indeed obliged to consider the extant mental condition of the offender in making a disposition. It had before it the submissions of counsel that there should be a change in disposition but it did not accept those submissions. In my opinion, it was open to the Board to reach the conclusion it did on this issue and I do not perceive that it erred in its approach to the question nor am I prepared to Say that the conclusion of the Board was unreasonable. Accordingly, I would not accede to these arguments advanced on behalf of the appellant.

[17] In the result, as we advised counsel at the conclusion of the hearing of the appeal, this appeal ought to be dismissed and these are the reasons for that dismissal.

"The Honourable Mr. Justice Hall"

I AGREE: "The Honourable Madam Justice Huddart"

Reasons for Judgment of the Honourable Chief Justice McEachern:

[18] I agree with the Reasons of Mr. Justice Hall and I would add that it would only be in the most unusual circumstances that an administrative failure to hold a hearing of the kind required in this case would result in a loss of jurisdiction, particularly in a case such as this one where public safety is involved.

[19] While the statutory direction for periodic hearings are mandatory for the protection of the person in custody and for the integrity of the scheme established by Parliament, the person in custody can insist, or the court may order, that these hearings be conducted if, for any reason, they are delayed without very good reason. Jurisdiction over the person in almost all these circumstances, however, would rarely be lost by reason of a failure to hold hearings strictly as required.

"The Honourable Chief Justice McEachern"