

Ontario Review Board

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November 12, 2009

MEMORANDUM

TO:

Jan Luedecke
File: 5364-Oct. 6, 2009

AND TO:

Hospital

Centre for Addiction and Mental Health,
1001 Queen Street West, Toronto

Counsel:

for Accused

Mr. F. Addario

for Attorney General of Ontario

Mr. M. Feindel

for Hospital

Ms. J. Buie

Enclosed are:

Disposition

Reasons for Disposition

Reasons for Adjournment

Pursuant to section 672.501(1) of the *Criminal Code of Canada* no person shall publish by any means any report of an offence in which the name of the young person or a child or young person who is a victim or witness appears or in which any information serving to identify such young person or child is disclosed.

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Ontario Review Board

Re: Jan Luedecke
(DOB: 15.05.72)

ORB File No: 5364

Hearing held on: Tuesday, October 6, 2009

Place of hearing: Centre for Addiction and Mental Health
1001 Queen Street West, Toronto

Pursuant to: Section 672.47(1) of the *Criminal Code*

Before:

Alternate Chairperson: Mr. J. Goldenberg
Members: Dr. I. Hector
Dr. G. Nexhipi
Ms. J. Leiper
Ms. D. M. Ormston

Parties Appearing:

Accused: Jan Luedecke
Counsel: Mr. F. Addario

Person in charge of the Hospital: Counsel: Ms. J. Buie
Attorney General of Ontario: Counsel: Mr. M. Feindel

REASONS FOR DISPOSITION
(Dated November 12, 2009)

Introduction

On May 26th, 2009, Jan Luedecke, was found not criminally responsible by reason of mental disorder on a charge of sexual assault, contrary to the *Criminal Code of Canada*. The Trial Judge directed that an initial disposition hearing be conducted by the Ontario Review Board.

On Tuesday, October 6, 2009, the Ontario Review Board convened a hearing at the Centre for Addiction and Mental Health (CAMH) in order to conduct Mr. Luedecke's initial disposition hearing.

History of the Criminal Charge

It is important to note the background of the charges against Mr. Luedecke.

On July 7, 2003, Mr. Luedecke was charged by the Metropolitan Toronto Police Services with one count of sexual assault arising from the events that took place on July 6, 2003. Details of the index offence will be found subsequently in these Reasons.

The Board understands that Mr. Luedecke was not detained in custody, but was released from the police station after entering an undertaking and promise to appear in court. The trial occurred before Mr. Justice Otter of the Ontario Court of Justice in the months of November, 2004, May, June, September and October 2005. Mr. Luedecke pled not guilty. The defence submitted that Mr. Luedecke's actions were involuntary and arose by reason of a sleep disorder.

The victim testified at the trial. Mr. Luedecke, his brother and mother testified for the defence. As well, Dr. Colin Shapiro testified for the defence. Dr. Shapiro was qualified as an expert in psychiatry, psychopharmacology, and in particular sleep disorders, parasomnia and automatism and the forensic application of same. Dr. Shapiro testified that the actions of the sexual assault were involuntary and arose from Mr. Luedecke's sleep disorder. Mr. Luedecke was acquitted of the charge.

The Crown appealed.

The Court of Appeal allowed the appeal and directed a new trial, but limited the new trial to one issue.

"I would make an order under Section 686(6) limiting the new trial to whether on a proper application of the principles in Stone, the respondent's automatism should result in an acquittal or an NCR-MD Verdict. I recognize that in limiting the new trial in the manner I have, there may be little independent judgement for the trial judge to exercise at the new trial. If the evidence is substantially the same as it was at the first trial, an NCR-MD Verdict is the only reasonable verdict available from the state of the current law." (R. vs. Luedecke, Paragraph 140).

The new trial occurred before Mr. Justice Nakuturu of the Ontario Court of Justice.

The Board was told by counsel that Mr. Luedecke "consented" to an NCR-MD finding. Furthermore, the judge retired for a considerable period of time and reviewed the transcripts from the original trial. The trial judge then concluded that he was satisfied that Mr. Luedecke should be found NCR-MD. The judge directed that the initial disposition hearing be conducted by the Ontario Review Board. Mr. Luedecke was again released into the community to await the initial Disposition hearing.

The matter first came before the Ontario Review Board on June 30th, 2009.

The panel sitting on this matter, on that day, recognized that there was no current risk assessment concerning Mr. Luedecke. That panel directed Mr. Luedecke to attend at CAMH “so that CAMH can conduct a complete risk assessment, including, but not limited to the issue of significant threat to public safety”. Mr. Luedecke attended at CAMH as required.

The Board received two reports from CAMH. The first report was from Dr. Lisa Ramshaw, a forensic psychiatrist at CAMH. The second report was from Dr. Percy Wright, a forensic psychologist at CAMH.

As indicated, the matter proceeded before the Ontario Review Board on October 6, 2009.

Position of the Parties

At the outset of the hearing, the parties were canvassed as to the position they would be recommending to the Review Board.

CAMH became a party to this hearing by reason of the fact that risk assessments were conducted at CAMH. Ms. Buie, counsel to CAMH, advised that in CAMH’s opinion, Mr. Luedecke no longer represented a significant threat to public safety, and that accordingly, he was entitled to an Absolute Discharge from the Ontario Review Board.

Mr. Michael Feindel appeared as counsel to the Attorney General. Mr. Feindel’s position was that Mr. Luedecke remained a significant threat to public safety, and if the Board so found, the least onerous and least restrictive disposition was that Mr. Luedecke be discharged into the community, but subject to certain specific conditions.

Mr. Luedecke was represented by counsel, Mr. Frank Addario. Mr. Addario indicated his position that Mr. Luedecke was not a significant threat to public safety, and that accordingly his client is entitled to an Absolute Discharge.

Evidence at Hearing

The Board admitted a number of documents into evidence.

The Board admitted reports from Dr. Ramshaw and Dr. Wright.

In addition, the Board had transcripts of most of the evidence taken in the trial before Mr. Justice Otter, including transcripts of the evidence of the victim, Mr. Luedecke, and the examination in chief and cross-examination of Dr. Shapiro, together with Dr. Shapiro’s original report. As well, the Board had the Reasons from the Ontario Court of Appeal in Mr. Luedecke’s case.

The report of Dr. Ramshaw provides the following information of the events surrounding the index offence.

“According to file information, Mr. Luedecke had been to a cottage, had been jumping into the water from cliffs and using mushrooms with friends. He drove back to Toronto early in the morning without having slept. He attended a croquet party in the Beach in the evening. There he consumed upward of 16 drinks. He reportedly went to sleep at about 2 to 3 a.m. on an L-shaped couch at the party. A woman was sleeping on the other side of the couch. She woke up to find him having sexual intercourse with her. Her underpants had been removed and he had a condom on. She pushed him off and asked him who he was. He responded “Jan”. According to the victim’s statement to the police he was “very incoherent ... it was almost like he didn’t know what he was doing”. He left and went to his parents’ house where he went to sleep. He awoke to urinate and found he was wearing a condom. He later called the house where the party had been and was told there was a police investigation. He called the police, attended the station and told them that it was he was the perpetrator. The victim attended hospital and underwent an assessment of sexual assault. She has reported that she has developed a fear of going to sleep, with sleep problems and nightmares, and has difficulty trusting strangers, and does not feel safe when she is alone.”

In addition to the documentary evidence, the Board also heard from Dr. Ramshaw. It should be noted that Ms. Buie, counsel to CAMH, advised the Board that she had no questions to ask of Dr. Ramshaw, but that she was making Dr. Ramshaw available to be questioned by the other parties and by Board members. Mr. Feindel then cross-examined Dr. Ramshaw. In Dr. Ramshaw’s report, she reached a conclusion, as follows:

“Mr. Luedecke’s overall risk of recidivism is low. Neither actuarial nor clinical assessment of risk indicated that Mr. Luedecke meets the threshold for significant threat to the safety of the public.

While there are concerns, given the lack of psychiatric clarity regarding his motivation for the offence, his evasiveness at times, his apparent pattern of sexual behaviour while asleep, and the potential for him to use alcohol again or to sleep in a public place, he has developed a solid awareness of the appropriate precautions to prevent another sexual assault, and he appears motivated and able to implement those precautions.

It is the joint recommendation of both persons who had assessed Mr. Luedecke that he receive an Absolute Discharge.

He has been residing in the community since his arrest of 2003. He has no other history of aggression, he has no history of antisocial personality or non-compliance of court orders and he has developed appropriate risk management strategies.”

Mr. Feindel asked Dr. Ramshaw if she could amplify her conclusion that Mr. Luedecke is not a significant threat to public safety. Dr. Ramshaw noted that Mr. Luedecke does not have any form of personality disorder, no history of substance abuse and no paraphilia. In addition, Mr. Luedecke has no prior history of violence. Mr. Luedecke has numerous pro-social characteristics. He has the ability to empathize and he has remorse. Mr. Luedecke’s actuarial

scores are all in the low range, and finally Mr. Luedecke has the appropriate risk management strategies in place.

In response to questions from Mr. Feindel, Dr. Ramshaw agreed that Mr. Luedecke's low actuarial scores, in and by itself, does not necessarily equate to be a low risk of public safety. Dr. Ramshaw noted that there is a history of parasomnia in Mr. Luedecke's family. Both his mother and brother have experienced parasomnic events.

Dr. Ramshaw was asked by Mr. Feindel about potential risk factors. Dr. Ramshaw outlined three potential risk factors; namely, excessive use of alcohol, fatigue and stress. Dr. Ramshaw agreed that it would be appropriate for Mr. Luedecke to limit his consumption of alcohol. Dr. Ramshaw also noted that Mr. Luedecke was aware of the fact that fatigue and stress were potential risk factors, and according to Dr. Ramshaw, Mr. Luedecke had developed techniques to deal with those potential triggers.

Dr. Ramshaw acknowledged that after seeing Dr. Shapiro, Mr. Luedecke began taking a drug known as Clonazepam. The Board was advised that the use of this drug prevents deep sleep. The Board was advised that parasomnic events occurred during the deep sleep cycle. Dr. Ramshaw stated that the drug reduced, but did not eliminate completely the deep sleep cycle. It appears that Mr. Luedecke began taking his medication in 2005.

Mr. Feindel pointed out and Dr. Ramshaw acknowledged that Mr. Luedecke had stopped taking the Clonazepam, and furthermore Mr. Luedecke made that decision without consulting any clinician.

Dr. Ramshaw went on to state Clonazepam, however, causes fatigue and she could understand why Mr. Luedecke would want to avoid fatigue, given that fatigue is a triggering factor to parasomnic conduct.

Dr. Ramshaw acknowledged that it was somewhat "concerning" that Mr. Luedecke made that decision unilaterally, but repeated her view that it was understandable given the side effects of that medication. Dr. Ramshaw noted that Mr. Luedecke has in fact developed a whole range of strategies to prevent reoccurrence of events similar to the event of the index offence.

In response to questions from defence counsel, Dr. Ramshaw agreed that Mr. Luedecke has been off Clonazepam medication for approximately four years and during that time there has been no further parasomnic events.

Dr. Ramshaw also acknowledged to Mr. Addario that the results of the phallometric testing had been interpreted by Dr. Klassen. Dr. Klassen's interpretation simply is that Mr. Luedecke did not show any preference for coerced sexual activities.

Mr. Addario drew Dr. Ramshaw's attention to statements made by Mr. Luedecke at his trial indicating that he is extremely remorseful about the index offence. Dr. Ramshaw gave her

opinion that she has no doubt about the sincerity of Mr. Luedecke's answers in that regard. Dr. Ramshaw repeated that Mr. Luedecke has developed an appropriate relapse prevention strategy.

She referred to the following paragraph in her report:

"When asked about his understanding of this risk of repeating the index offence behaviour, he stated that he did not believe he was a risk with his precautions. He stated "I understand that it can be a problem and I have taken steps to ensure my sleep is under control. I am in a controlled environment, make partners aware of the situation, don't sleep where I could be at risk, don't drink or take drugs, and avoid triggering factors".

Dr. Ramshaw acknowledged that Mr. Luedecke has experienced considerable shame and embarrassment about the index offence. Dr. Ramshaw noted that a person who is remorseful and empathetic is less likely to repeat the behaviour. Dr. Ramshaw acknowledged that Mr. Luedecke has no present tendency to abuse alcohol.

In response to questions from members of the Board, Dr. Ramshaw repeated that Clonazepam does have a side effect of excessive sedation. Dr. Ramshaw did acknowledge that there were other drugs that could have been considered, had Mr. Luedecke consulted with a clinician, rather than unilaterally stopping medication.

In response to questions from another member of the Board, Dr. Ramshaw acknowledged that, as is the practice at CAMH, another senior clinician reviewed the opinion and findings of Dr. Wright and Dr. Ramshaw and that doctor agreed with the opinion.

In response to further questions from another member of the Panel, Dr. Ramshaw acknowledged that a considerable portion of her work is conducting risk assessments. Similarly, a considerable portion of the work done by Dr. Wright is conducting risk assessments.

No evidence was called on behalf of the Attorney General, although Mr. Feindel indicated that the victim was present at the hearing and that she wished to read her Victim Impact Statement to the Board.

No evidence was called on behalf of Mr. Luedecke.

Victim Impact Statement

The victim read her impact statement to the Board.

It was obvious to all members of the Board that the victim is still experiencing tremendous difficulties arising from the events of the index offence. The Board feels the victim should be commended for having the courage to attend at this hearing and the courage to read her statement to the Board.

Final Submissions

Mr. Feindel, on behalf of the Attorney General, submitted the Board should find that Mr. Luedecke is a significant threat to public safety, and if the Board so found, the least onerous and least restrictive disposition is a Conditional Discharge. Mr. Feindel stated the Board should consider "moderate" conditions. When pressed by the Board, Mr. Feindel indicated he would recommend a no contact with the victim provision, a requirement to meet with an attending psychiatrist, perhaps monthly or perhaps as little as two times per year, and finally a condition that would limit alcohol abuse to no more than one drink per day, although Mr. Feindel indicated the difficulty of enforcing such a provision.

Mr. Feindel noted the concept of "continuing danger". Mr. Feindel urged the Board to find that "continuing danger is a social concern". Mr. Feindel noted that we are still all learning more about this particular sleep disorder.

Mr. Addario, on behalf of his client, submitted that the Board should accept the evidence and opinions given by Dr. Wright and Dr. Ramshaw in their reports. In this regard, I note that Dr. Wright's report was entered as an exhibit in the hearing.

Ms. Buie, counsel to CAMH, advised that Dr. Wright was available to be cross-examined by any parties who wish to do so. No party requested the opportunity to cross-examine Dr. Wright.

We note the following statement by Dr. Wright:

"Although Mr. Luedecke stated that he believed that his parasomnic sexual behaviour had no negative consequences for any woman other than the victim, he stated that he is very motivated to prevent a recurrence due to the negative impact the charge has had on his life. When asked about his prevention strategies where he was able to provide a well thought through relapse prevention plan, he stated that he had effectively reduced his stress, cutting down his alcohol consumption to two drinks a week or less, to sleep "safely" with no access to females who are not his significant partner and to inform anyone who may be forced to sleep near him of his history of parasomnic sexual behaviour prior to making bedtime arrangements, so preventative arrangements can be made. He stated that he has also approved his sleep hygiene, getting eight hours a night, not staying up late, not going to parties late, and falling asleep in that same situation, always remembering the consequences of another event like the index offence. He stated that he has not had a parasomnic sexual event with his present cohabitant partner".

Finally, Dr. Wright notes "regardless of motivation for the prevention of further instances, it appears very high and his relapse prevention approach, if actually utilized, is difficult to fault".

Mr. Addario stressed the comments made by Dr. Wright and the conclusion in the report from Dr. Wright and Dr. Ramshaw.

Mr. Addario asked the Board to find that Mr. Luedecke does have an effective relapse prevention program in place. Mr. Addario noted that for at least four years, since Mr. Luedecke stopped medication, there has not been any reoccurrence of the index offence behaviour.

Mr. Feindel had suggested that the terms of Mr. Luedecke's bail recognizance were responsible for Mr. Luedecke's behaviour over the last number of years. Mr. Feindel had argued that to a large degree, Mr. Luedecke's good behaviour was by reason of the terms of the bail recognizance.

Mr. Addario pointed out however, that Mr. Luedecke's original bail recognizance terminated with his acquittal on November 25, 2005. Mr. Luedecke did enter into a voluntary peace bond for one year, but the sole term of that peace bond was to have no contact with the victim. Mr. Addario pointed out that Mr. Luedecke has accordingly, for a number of years, without any obligation from an external party, successfully adopted a relapse prevention plan, and more importantly had carried out the relapse prevention plan.

Mr. Addario reminded the Board that there was no obligation on his client to prove that he is not a significant threat to the public safety. Mr. Addario urged the Board to consider all of the evidence and conclude that his client is indeed entitled to an Absolute Discharge.

Ms. Buie, counsel to CAMH, in her final submission, noted that Mr. Luedecke's relapse prevention plan is, in fact, in place and that the Board should have every expectation that a relapse prevention plan will continue.

Ms. Buie directed the Board's attention to paragraph 61 of the Decision in the Supreme Court of Canada in *Winko v. British Columbia (Forensic Psychiatric Institute)* 135 C.C.C. (3rd)129.

"It follows that the inquiries conducted by the Court or Review Board are necessarily broad. They will closely examine a range of evidence, including but not limited to the circumstances of the original offence, the past and expected course of the NCR accused's treatment, if any, the present state of the NCR accused's medical condition, the NCR accused's own plans for the future, the support services existing for the NCR accused in the community and, perhaps most importantly, the recommendations provided by experts who had examined the NCR accused."

Ms. Buie reminded the Board that three experts from CAMH have all opined that Mr. Luedecke is not a significant threat to public safety.

Findings of the Board

It is important to set out the legal authorities that are binding on the Board.

Ms. Buie already directed the Board's attention to the *Winko* decision in the Supreme Court of Canada, which remains the leading authority and which provides considerable direction and guidance to Review Boards. In this regard we note the following:

"It follows that if the Court or Review Board fail to positively conclude, on the evidence, that the NCR offender poses a significant threat to the safety of the public, it must grant an Absolute Discharge". (paragraph 47)

"There must be evidence of a significant risk to the public before the Court or Review Board can restrict the NCR's liberty. Nor does s.672.54 permit the Court or Review Board to refuse to grant an Absolute Discharge because it harbours doubt as to whether the NCR accused poses a significant threat to the safety of the public. Since there must be a positive finding of a significant risk to the safety of the public to engage the provisions of the Code and support restrictions on liberty, something less -- i.e., uncertainty -- cannot suffice". (paragraph 49)

"To engage these provisions of the Criminal Code, the threat posed must be more than speculative in nature; it must be supported by evidence. The threat must also be "significant" both in the sense that there must be a real risk of physical or psychological harm occurring to individuals in the community, and in the sense that this potential harm must be serious. A minuscule risk of a grave harm will not suffice. Similarly, a high risk of trivial harm will not meet the threshold." (paragraph 57)

"The Court or Review Board may have recourse to a broad range of evidence as it seeks to determine whether the NCR accused poses a significant threat to the safety of the public. Such evidence may include the past and expected course of the NCR accused's treatment, if any, the present state of the NCR accused's medical condition, the NCR accused's own plans for the future, the support services existing for the NCR accused in the community, and the assessments provided by experts who have examined the NCR accused. This list is not exhaustive." (paragraph 62, item 5)

We note the following from the Decision of the Ontario Court of Appeal concerning Mr. Luedecke:

"An NCR-MD Verdict signals that an accused cannot be held responsible for what would otherwise be his or her criminal act. At the same time, it rejects any suggestions that the accused represents an automatic danger to the public. Instead the NCR-MD Verdict triggers an individualized, careful, current assessment of the accused's condition leading to a Disposition tailored to the individual accused". (paragraph 119)

In this hearing, we have the benefit of two current assessments focusing on the potential of Mr. Luedecke's risk to public safety. The Board would acknowledge that the potential harm, if it were to reoccur, would indeed be grave and serious.

The Board considered at length, the issue of the chance of such potential harm reoccurring. We have considered the event of the index offence and the fact of four previous and one subsequent event of involuntary sexual activity by Mr. Luedecke.

We have also considered Mr. Luedecke's unilateral decision to stop medication. We note Dr. Ramshaw's evidence, however, that Mr. Luedecke had a reasonable reason for stopping medication. Of greater importance to the Board, is the fact that Mr. Luedecke has been living in a community without any difficulty whatsoever since the event of the index offence more than six years ago. Mr. Luedecke has been off medication for approximately four years without experiencing any further episodes of involuntary sexual activity. We cannot ignore that evidence.


The Board was unanimous in accepting the evidence of Dr. Wright that was not challenged, that Mr. Luedecke has a "well thought through relapse prevention plan". We accept Dr. Wright's opinion that "his relapse prevention approach, if actually utilized, is difficult to fault". The Board had the benefit of hearing the evidence and accepting the evidence that Mr. Luedecke has, in fact, utilized his relapse prevention plan. The Board accepts the opinion and evidence that Mr. Luedecke will continue to utilize the relapse prevention plan without the necessity of this Board requiring him to do so.

The Board unanimously accepts that the evidence falls far short of satisfying us that Mr. Luedecke remains a significant threat to public safety.

The Board's opinion in this regard is bolstered by the evidence given by two experienced forensic clinicians and their conclusions that Mr. Luedecke is not a significant threat to public safety. The Board has no hesitation in accepting the opinions and evidence given by Dr. Wright and Dr. Ramshaw in this regard.

Given that the evidence falls far short of satisfying that Mr. Luedecke remains a significant threat to public safety, the Board is obliged to, and hereby grants Mr. Luedecke an Absolute Discharge.

DATED this 12th day of November, 2009 at the City of Toronto, in the Toronto Region



Mr. J. Goldenberg
Alternate Chairperson