Pinet v. The Queen in right of Ontario;

100 C.C.C. (3d) 343

Ontario Court of Appeal
Court File Nos. C15686; C15812
Morden A.C.J.O., McKinlay and Osborne JJ.A.

APRIL 13, 1995

Judgment received July 24, 1995.

Mental illness — Detention — On annual review of disposition, Ontario Criminal Code Review Board finding that accused could be transferred from maximum security unit to medium security unit yet ordering accused to be detained in maximum security facility and giving administrator of that facility discretion to transfer accused to medium security facility — No requirement that board impose least onerous and least restrictive conditions in making disposition, but once determination made as to appropriate type of facility in which to detain accused, board must make disposition in conformity with that determination — Disposition in error in ordering detention of accused in maximum security facility — Delegation of authority to administrator to transfer accused to medium security facility also inconsistent with finding as accused left in inappropriate facility according to board's own findings — Disposition set aside — Cr. Code, ss. 672.54, 672.56, 672.81.

The accused had been found not guilty by reason of insanity on four counts of murder in 1976, and was detained at the pleasure of the Lieutenant-Governor. He appealed from a disposition order of the Ontario Criminal Code Review Board released following his annual hearing before the board. Having determined at the review hearing and stated in its reasons that the accused should be detained in a medium security facility, the board named a maximum security facility as the ***[page344]*** place where the accused should continue to be detained but delegated to the administrator of the maximum security facility the power to transfer the accused to a medium security facility.

On appeal by the accused from the disposition order of the Ontario Criminal Code Review Board, held, the disposition should be set aside and the matter referred back to the board for a rehearing.

The order in question was made following the mandatory annual review of the previous disposition made by the review board, as required by the provisions of s. 672.81(1) of the Criminal Code, where the previous disposition ordered is other than an absolute discharge. Any disposition made under this section must be made applying the criteria and scheme created by s. 672.54 of the Criminal Code which requires

that the review board, in making its disposition, take into consideration protection of the public, the mental condition of the accused, the reintegration into society of the accused, and other needs of the accused. The section requires that the board, having taken into account the various factors, make the disposition which is least onerous and least restrictive to the accused. The correct reading of s. 672.54 was that only three dispositions were possible, and that consideration of the least onerous and least restrictive disposition is required only with respect to a determination as to whether the accused should be absolutely discharged, discharged subject to conditions, or detained in a hospital subject to conditions. Once that determination was made, it was not necessary that the board, in imposing conditions, consider whether the type of hospital or the conditions contemplated would be the least onerous and least restrictive. However, once the board determined the appropriate type of facility in which to detain an accused, it must make a disposition in conformity with that determination. The board did not do so in this case, and to that extent this disposition was in error.

The accused also argued that the board improperly delegated to the administrator of the maximum security facility the power to transfer him to the medium security facility. While a delegation of authority to transfer to a facility of a different security category was in the terms of s. 672.56(2), the board's disposition must be consistent with its findings. Had the finding of the board in this case been that continued detention in a maximum security facility was appropriate for the accused at the time of the disposition, with a delegation of authority to decrease restrictions on the liberty of the accused, including transfer to a medium security facility, then the delegation would have been in accord with the provisions of s. 672.56(1). However, the disposition of the board was not consistent with its findings and that error tainted the whole disposition, since it left the accused in a facility which, according to the board's findings was inappropriate for him, until such time as its administrator decided that he should be transferred. The disposition should be set aside and the matter referred back to the board for a rehearing.

Cases referred to:

R. v. Swain (1991), 63 C.C.C. (3d) 481, [1991] 1 S.C.R. 933, 5 C.R. (4th) 253, 3 C.R.R. (2d) 1, 47 O.A. C. 81, 125 N.R. 1, 12 W.C.B. (2d) 582; Peckham v. Ontario (Attorney General) (1994), 93 C.C.C. (3d) 443, 19 O.R. (3d) 766, 34 C.R. (4th) 227, 74 O.A.C. 121, sub nom. R. v. Peckham [leave to appeal to S. C.C. refused 94 C.C.C. (3d) vi, 37 C.R. (4th) 399n]

Statutes referred to:

Canadian Charter of Rights and Freedoms, s. 7 Criminal Code, ss. 672.54, 672.56, 672.78(1)(b), (3)(b), (c), 672.81(1), 672.83(1) [all enacted 1991, c. 43, s. 4]

Appeal by the accused from a disposition order of the Ontario Criminal Code Review Board.

R. Macklin, for accused, appellant.

David Butt, for the Crown, respondent.

Caroline Engmann, for respondents, Administrators of the North Bay Psychiatric Hospital and of the Penetanguishene Mental Health Centre.

The judgment of the court was delivered by

McKinlay J.A.: This is an appeal by Michael Roger Pinet, from a disposition order of the Ontario Criminal Code Review Board released on May 27, 1993, following his annual hearing before the board on May 10, 1993. An appeal by the administrators of the North Bay Psychiatric Hospital and the Penetanguishene Mental Health Centre was abandoned prior to the hearing before this court. Both the appellant and the respondent administrators object to paras. 1 and 2 of the order, which read:

1. It is Ordered that the accused continue to be detained in the Oak Ridge Division of the Mental Health Centre, Penetanguishene.

2. It is Further Ordered that the Administrator of the Mental Health Centre, Penetanguishene, propound and implement a program for the safe custody and rehabilitation of the accused within the Oak Ridge Division of the Mental Health Centre, Penetanguishene in which the Administrator, in his discretion, subject to the mental condition and needs of the accused, may:

(a) transfer the accused to the North Bay Psychiatric Hospital.

Michael Roger Pinet, on December 9, 1976, was found not guilty by reason of insanity of four counts of murder, and was detained at the pleasure of the Lieutenant-Governor. With the exception of a one- and three-quarter-year period when he was a patient at the St. Thomas Psychiatric Hospital, Mr. Pinet has been at Oak Ridge continuously since May 27, 1977. Part XX.1 of the Criminal Code, the portion of the Code dealing with "Mental Disorder", came into force on February 4, 1992. Persons in a position such as Mr. Pinet's are referred to in that Part as "accused".

The relatively new regime which we must consider in this appeal is one which replaces a regime which was historically purely discretionary. Concern about breaches of s. 7 of the Canadian Charter of Rights and Freedoms, precipitated by the

decision of the Supreme Court of Canada in R. v. Swain (1991), 63 C.C.C. (3d) 481, [1991] 1 S.C.R. 933, 5 C.R. (4th) 253, was the prime motivating force behind the enactment of the new provisions of the Code. Previously, health care professionals were the advisors to the Lieutenant-Governor in the exercise of his discretion to continue detention or to release individuals detained under his warrant. Now, in addition to those professionals, we have the intervention of lawyers, judges, and the rights claimant himself or herself in determining his or her fate. It is important to keep in mind, in interpreting the various new statutory provisions, that health care professionals are the ones who have the day-to-day

responsibility for the care and treatment of the individuals involved, and undue interference with that responsibility may not be in the interests of society or of the accused.

The order in question was made following the mandatory annual review of the previous disposition made by the review board, as required by the provisions of s. 672.81(1) of Code, where the previous disposition ordered other than an absolute discharge. As a review of the original disposition, s. 672.83(1) requires that the review board must make a disposition on the review which it considers appropriate in the circumstances. Although not specifically stated in the Code, it was accepted by this court in Peckham v. Ontario (Attorney General) (1994), 93 C.C.C. (3d) 443 at p. 448, 19 O.R. (3d) 766, 34 C.R. (4th) 227 sub nom. R. v. Peckham, that any disposition made under s. 672.83 must be made applying the criteria and scheme created by s. 672.54. I see no other rational way to interpret the provisions of Part XX.1.

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 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.

There is no suggestion in this case that the Review Board did not, in making its disposition, take into consideration protection of the public, the mental condition of the accused, the reintegration into society of the accused, and other needs of the accused, as required by s. 672.54. Section 672.54 allows three possible dispositions on a review -- absolute discharge, discharge subject to conditions, and detention in custody in a hospital subject to conditions. The section states that the board shall, having taken into consideration the factors stated above, make the disposition which is least onerous and leastrestrictive to the accused.

I have considered two main issues bringing into question the correctness of the disposition of the board:

(i) Having determined at the review hearing, and stated in its reasons, that the accused should be

detained in a medium security facility, the board named the Oak Ridge Division of the Penetanguishene Mental Health Centre, a maximum security facility, as the place where the accused should continue to be detained. In so doing, did the board act contrary to the requirements of s. 672.54 of the Code that the disposition of the board should be the "least onerous and least restrictive to the accused"?

(ii) Did the board improperly delegate to the administrator of the Penetanguishene Mental Health Centre, the power to transfer the accused to the North Bay Psychiatric Hospital?

(i) Requirement of s. 672.54 that the disposition of the board should be the "least onerous and least restrictive to the accused"

As background, we were informed by counsel that at the present time there are two provinces -- British Columbia and Ontario -- which have classified hospitals which treat persons such as the accused and others, as high, medium, and low security facilities. Other provinces have not so classified their hospitals. It is common ground among counsel that Oak Ridge is a maximum security facility and North Bay a medium security facility.

In its reasons, the board carefully considered the type of facility which would be most appropriate for the accused. It stated:

> The Board is of opinion that the accused is still a significant threat to the safety of the public should he enter the community, but he can be transferred to a medium secure unit and that this would be the least onerous and least restrictive to the accused at this time.

Having expressed that opinion, the board proceeded to order that Mr. Pinet continue to be detained in the Oak Ridge Division of the

Penetanguishene Mental Health Centre, a maximum security facility.

Counsel for Mr. Pinet and counsel for the respondent Crown agree that the board, in its disposition, should have reflected the opinion expressed in its reasons by ordering that Mr. Pinet be detained in a medium security facility. Whether the board erred in not doing so depends on an interpretation of the requirements of s. 672.54.

In my view, the correct reading of s. 672.54 is that only three dispositions are possible -- (a) absolute discharge, (b) discharge subject to conditions, and (c) detention in a hospital subject to conditions -- and that the criteria set out in the preceding portion of the section are relevant only to a choice between dispositions (a), (b), or (c). Thus, consideration of the least onerous and least restrictive disposition is required only with respect to a determination as to whether the accused should be absolutely discharged, discharged subject to conditions, or detained in a hospital subject to conditions. That determination having been made, and the requirements in the first part of s. 672.54 having been satisfied, it is not necessary that the board, in imposing conditions under (b) or (c), consider whether the type of hospital

or the conditions contemplated under (b) or (c) would be the least onerous and least restrictive.

There is obvious logic and obvious benefit in such an interpretation of s. 672.54. As to the logic, all of the factors which the board must consider, except one, are contained in the portion of the section prior to the portion involving a choice of disposition. The relevant words are, "make one of the following dispositions which is the least onerous and least restrictive to the accused". Obviously, if the board chooses to discharge the accused absolutely, that disposition is the least onerous and restrictive of (a), (b) or (c). However, it may be that (b) or (c) is the least onerous which the board could order, given the considerations in the sections prior to the above-quoted portion.

In addition, when Parliament wished to apply a specific consideration to a particular disposition (in this case (a)), it did so within the disposition portion of the section. An absolute discharge, (a), can only be given where a court or the board is of the opinion that the accused "is not a significant threat to the safety of the public". Thus, the considerations in the first portion of the section should only be applied in choosing between the three alternative dispositions in (a), (b), and (c).

Such an interpretation also has the practical benefit of leaving unfettered the discretion of the board when deciding what conditions, if any, it considers appropriate to impose on a disposition under (b) or (c). The board is not required by s. 672.54(b) and (c) to impose detailed custodial conditions. Indeed, it would likely be appropriate in most situations to leave details of detention up to the professional care-givers. However, the board would not be acting outside its jurisdiction in imposing detailed conditions, or in naming a specific institution in which the accused should be detained, as it did in this case.

Having determined that the board need not, in all aspects of its disposition, make the least onerous and least restrictive choices, it becomes necessary to decide whether the disposition of the board in this case was appropriate. No one complains that the board did not take into account all of the relevant facts, and no one complains that it was in error in deciding that a medium security facility would be appropriate for Mr. Pinet at the time of the disposition. The complaint is that, having decided (although it was not required to do so) that a medium security facility was appropriate to Mr. Pinet's needs, it proceeded to order detention of the accused in a maximum security facility.

I am of the view that once the board determines the appropriate type of facility in which to detain an accused, it must make a disposition in conformity with that determination. The board did not do so in this case, and to that extent its disposition was in error.

Counsel for Mr. Pinet and counsel for the respondent Crown were both of the view that it would be correct for the board to order that the accused was entitled to be detained in a medium security facility without specifying a particular facility. Counsel for the North Bay Psychiatric Hospital argued that the disposition was not in error, that it was correct to maintain detention in Oak Ridge, and delegate to the administrator of the Penetanguishene Mental Health Centre the authority to transfer the accused to the North Bay Psychiatric Hospital. This brings us to the issue of delegation.

(ii) Delegation of authority to transfer accused to another facility

In its disposition the board ordered

that the Administrator of the Mental Health Centre, Penetanguishene, propound and implement a program for the safe custody and rehabilitation of

the accused within the Oak Ridge Division of the Mental Health Centre, Penetanguishene, in which the Administrator, in his discretion, subject to the mental condition and needs of the accused, may:

(a) transfer the accused to the North Bay Psychiatric

It was the position of counsel for the administrators that the disposition of the board was correct, since there was not sufficient evidence before it that there was a medium security facility where there would be space, appropriate facilities, and appropriate treatment available to meet the needs of the accused. Until information was available on these matters, she argued, it was correct to maintain detention at Oak Ridge and delegate to the Penetanguishene administrator the authority to make a transfer in accordance with the mental condition and needs of the accused.

This issue emphasizes a potential area of conflict between the traditional care-givers of accused persons and the persons now charged with protecting their liberty rights. The administrators agree in theory with the right of the board to delegate authority to transfer, and they also agree in theory that the board has the authority under s. 672.54(c) to name a specific hospital for detention of the accused. However, their counsel argues strongly that the board, in naming a specific hospital, is now undertaking what was formerly an administrative decision, and that it should not do so without clear knowledge of the availability within that hospital of the required facilities necessary for housing, securing and treating the accused. Counsel for the administrators says that it may not have the appropriate facilities, and that the board should order specific transfers only on the basis of clear information as to the appropriateness of such a transfer.

The position of the administrators makes good sense. It would be of no assistance to anyone to have an accused arrive at a hospital where there was no room, inadequate security, and inappropriate treatment facilities to deal with him. This is the practical type of problem which can be dealt with best by co-operation developed between hospital administrators and the board. However, given my reasons in (i) above that the board's disposition should have accorded with its finding that a medium security facility was appropriate for this accused, it is necessary to deal with the correctness of the board's delegation to the administrator of the Penetanguishene Mental Health Centre of authority to transfer Mr. Pinet.

Section 672.56 of the Code permits delegation of authority to the person in charge of the hospital which has custody of the accused. It reads:

672. 56(1) A Review Board that makes a disposition in respect of an accused under paragraph 672.54(b)

or (c) may delegate to the person in charge of the hospital authority to direct that the restrictions on the liberty of the accused be increased or decreased within any limits and subject to any conditions set out in that disposition, and any direction so made is deemed for the purposes of this Act to be a disposition made by the Review Board.

(2) A person who increases the restrictions on the liberty of the accused significantly pursuant to authority delegated to the person by a Review Board shall

(a) make a record of the increased restrictions on the file of the accused; and

(b) give notice of the increase as soon as is practicable to the accused and, if the increased restrictions remain in force for a period exceeding seven days, to the Review Board.

Counsel for the administrators takes the view that a delegation such as the one in this case involves a decrease in restrictions on the liberty of the accused and, as such, is a permitted delegation under s. 672.56(1). In support of this position is the acknowledged fact that in other provinces, with the exception of British Columbia, transfers between maximum, medium and minimum security would take place within a single hospital, and authority to do that could clearly be delegated within the terms of s. 672.56 (1). In addition, the section itself allows increase or decrease of restrictions "within any limits ... set out in the disposition". It could be argued that the board, in naming the North Bay Hospital, has defined a specific limit within which restrictions on the liberty of this accused could be decreased.

Such an interpretation, counsel for the administrators argues, is a sensible one, allowing an administrator, who has knowledge of the needs of the accused, in consultation with the administrator of a hospital of a different security category, to transfer an accused to the other facility in circumstances where it was considered appropriate. I am in general agreement with that position, and I am reinforced in this by s. 672.56(2) of the Code. That provision requires that if there is a significant increase in restriction of the liberty of an accused notice must be given to the board if those restrictions remain in force for a period in excess of seven days. Thus, the Code anticipates delegation of authority to both increase and decrease restrictions on the liberty of the accused, but with special protection where there is a significant increase in restrictions.

While I am of the view that a delegation of authority to transfer to a facility of a different security category is within the terms of s. 672.56(2), I have some difficulty with it in this case. As stated

earlier, I am of the view that the board's disposition must be consistent with its findings. Had the finding of the board in this case been that continued detention in a maximum security facility was appropriate for Mr. Pinet at the time of the disposition, with a delegation of authority to decrease restrictions on the liberty of the accused, including transfer to a medium security facility (named or otherwise), then I am of the view that the delegation would have been in accord with the provisions of s. 672.56(1). However, the disposition of the board was not consistent with its findings, and I am of the view that that error taints the whole disposition, since it leaves the accused in a facility which, according to the board's

findings, is inappropriate for him until such time as its administrator decides that heshould be transferred.

Result

A court of appeal hearing an appeal from a disposition of the board may, where it is of the opinion that the disposition is based on a "wrong decision on a question of law" (see s. 672.78(1)(b)), "...refer the matter back to the ... Review Board for rehearing, in whole or in part, in accordance with any directions that the court of appeal considers appropriate" (see s. 672.78(3)(b)). It also may "make any other order that justice requires" (see s. 672.78(3) (c)).

Since I am of the view that board made an error of law in its disposition in this case, I would allow the appeal, set aside the disposition, and refer the matter to the board for a rehearing, but, under s. 672.78(3) (c), order that the accused be detained under the terms of the appealed disposition until the rehearing or until a new disposition is made following an annual hearing pursuant to s. 672.81(1). Appeal allowed; rehearing ordered.