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R. v. Peckham

Regina v. Peckham et al.

[1994] O.J. No. 1995
Action No. C14547
Also reported at:
19 O.R. (3d) 766

Court of Appeal for Ontario,
Mckinlay, Doherty and Abella JJ.A.

September 14, 1994

Counsel:

Paul Burstein, for appellant.

J.A. Ramsay, for the Crown, respondent.

Rosalyn Train and Caroline Engmann, for respondent, North Bay Psychiatric Hospital.

The judgment of the court was delivered by

DOHERTY J.A.: —

I. THE HISTORY

¶ 1 The appellant has a long criminal record which includes convictions for several crimes of violence. In 1980, he was released on parole from Millhaven Penitentiary on the condition that he attend the Queen Street Mental Health Centre as a day patient. In 1981, while on parole, he attacked and choked a stranger, rendering her unconscious. He stopped his attack only when someone else arrived on the scene. The appellant was charged with attempted murder, and was initially found unfit to stand trial. In 1983, he was declared fit and pleaded not guilty by reason of insanity. The trial judge found the appellant not guilty by reason of insanity and ordered him detained at the pleasure of the Lieutenant-Governor.

¶ 2 The appellant's status was reviewed annually. He was held at the Oakridge Division of

Penetanguishene Mental Health Centre until 1987 when he was transferred to the North Bay Psychiatric Hospital. The annual reviews continued. In November of 1991, the Lieutenant-Governor, on the recommendation of his Review Board, ordered that the appellant remain in the North Bay Psychiatric Hospital. The Lieutenant-Governor also directed that the hospital's administrator could, in his discretion, implement a program permitting the appellant to work in the community and participate in supervised social visits in the community.

¶ 3 In April 1992, the appellant escaped from the North Bay Psychiatric Hospital. He was arrested about three weeks later in Montreal and returned to the institution. The hospital then requested a further review of the appellant's status. That review took place beginning in June of 1992 before the Ontario Criminal Code Review Board (the "board"). That tribunal replaced the Lieutenant-Governor's Review Board in February of 1992 when Part XX.1 of the Criminal Code, R.S.C. 1985, c. C-46, came into force.

¶ 4 In January 1993, the board ordered that the appellant continue to be detained in the medium-security forensic unit of the North Bay Psychiatric Hospital. The board further ordered that the administrator of the hospital could, in his discretion, order the appellant transferred to the St. Thomas Psychiatric Hospital.

¶ 5 The appellant appeals from that order.

¶ 6 The court was advised at the outset of the appeal that the appellant has been transferred to St. Thomas and that a further annual review by the board will take place in the near future. The court knows nothing of the appellant's conduct or mental condition after January 1993.

II. A BRIEF OVERVIEW OF THE RELEVANT STATUTORY SCHEME

¶ 7 Under the terms of Part XX.1 of the Criminal Code, the board is charged with the responsibility, among others, of reviewing the status of persons who were found not guilty by reason of insanity and remained in custody under a Lieutenant-Governor's warrant when the new legislation came into force.

¶ 8 The review in this case was initiated pursuant to s. 672.82(1) which provides:

> 672.82(1) A Review Board may hold a hearing to review any of its dispositions at any time, at the request of the accused or any other party.

¶ 9 The request came from the hospital. Apart from the hospital's request for a review, the appellant would have been entitled to a review by the board within one year of the coming into force of Part XX.1 of the Criminal Code (see S.C. 1991, c. 43, s. 10).

¶ 10 The mandate of the board when holding a hearing pursuant to s. 672.82 is found in s. 672.83, which reads in part:

> 672.83(1) At a hearing held pursuant to . . . s. 672.82, the Review Board shall . . . review the disposition made in respect of the accused and make any other disposition that the Review Board considers to be appropriate in the circumstances.

¶ 11 The word "accused" in these sections includes persons found not guilty by reason of insanity under the predecessor legislation.

¶ 12 The board is required to make a disposition at the end of the hearing. Three types of dispositions are provided for in s. 672.54. The board may order an accused discharged absolutely; it may order an accused discharged conditionally; or it may order an accused held in custody in a hospital with or without conditions.

¶ 13 Any disposition made by the board under s. 672.83 is appealable to this court (see s. 672.83(2) and s. 672.72). The powers of the court on such appeals are virtually identical to the powers available on appeals from conviction (see s. 672.78).

III. THE GROUNDS OF APPEAL

¶ 14 Mr. Burstein advanced several grounds of appeal on behalf of the appellant. I propose to refer only to those on which we required submissions from the respondents. They are:

- -- Did the board err in its interpretation of s. 672.54?
- -- Was the disposition made by the Board unreasonable within the meaning of s. 672.78(1)(a) of the Criminal Code?

¶ 15 The appellant does not challenge the constitutionality of any provision in Part XX.1 and I will not express any opinion on that issue.

A. The interpretation of s. 672.54

¶ 16 Section 672.54 states:

> 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.

¶ 17 This section has direct application to the initial disposition made by the board after an accused is found not criminally responsible on account of mental disorder. [See Note 1 at end of document.] A literal reading of s. 672.83 does not indicate that s. 672.54 has application to subsequent dispositions made by the board under s. 672.83. Unlike other sections in Part XX.1, s. 672.54 is not incorporated in the review process by s. 672.83(2). The language of s. 672.83 suggests that the board may make any disposition which is "appropriate in the circumstances". All counsel, however, take the position that the appropriateness of any disposition made under s. 672.83 must be determined by reference to the criteria and scheme created by s. 672.54. It is the position of all counsel that the section is therefore applicable to dispositions made under s. 672.83. This interpretation is a sensible one, and as it is the interpretation which is most favourable to the appellant, I am prepared to assume that s. 672.54 governs determinations made by the board pursuant to s. 672.83.

¶ 18 Mr. Burstein's submissions with respect to s. 672.54 raise two issues. The first involves the burden and onus of proof, if any, applicable to the assessment mandated by s. 672.54. The second submission concerns the meaning of the phrase "the mental condition of the accused" as found in s. 672.54.

(i) The burden and onus of proof

¶ 19 Mr. Burstein submits that s. 672.54 should be read in the following manner. The board must first determine whether the accused comes within s. 672.54(a). In doing so, the board must, having regard to the criteria set out in s. 672.54, decide whether in its opinion, "the accused is not a significant threat to the safety of the public". If the board is of that opinion, it must absolutely discharge the accused. If the board is not of that opinion, it must consider the dispositions provided for in s. 672.54(b) and (c). This interpretation is consistent with the case law: Orlowski v. British Columbia (Attorney General) (1992), 75 C.C.C. (3d) 138 at p. 146, 10 C.R.R. (2d) 301 (B.C.C.A.); R. v. Jones, a decision released January 7, 1994 (Ont. C.A.) [now reported 17 O.R. (3d) 26, 87 C.C.C. (3d) 350] at p. 21 [p. 36]. Mr. Burstein argues that the burden of proving that the accused is not a significant threat falls on the party or parties taking that position before the board. He does not attempt to quantify that burden.

¶ 20 Mr. Burstein next argues that if the board is not of the opinion that the accused does not pose a significant threat, then the board must consider the dispositions referred to in paras. (b) and (c). In doing so, it must consider the criteria set out in s. 672.54 and the requirement that any disposition made be the

"least onerous and least restrictive to the accused". He submits that if the state (that is the Crown or the hospital) seeks an order under para. (c) it must establish beyond a reasonable doubt that an order under that section, as opposed to an order under para. (b), is required by the criteria set out in s. 672.54. He goes a step further and argues that, as dispositions under para. (c) contemplate various levels of custody, the state must prove beyond a reasonable doubt that the level of custody it seeks is required upon a consideration of the criteria set out in s. 672.54. Put in the context of this case, Mr. Burstein submits that it was incumbent on the state to prove beyond a reasonable doubt that confinement of the appellant in a medium-security psychiatric hospital unit was the least onerous and least restrictive disposition available under the criteria found in s. 672.54.

¶ 21 The board did not specifically address the onus and burden of proof in its reasons. Nor does it appear that the issue was argued before the board. It did say:

> Considering all of the evidence and the submissions of counsel, the board is satisfied that the accused presents a significant risk to the public and he is dangerous and unreliable and that therefore he requires detention in a medium-secure psychiatric facility.

¶ 22 It would appear from this passage that the board did not apply a reasonable doubt standard. If Mr. Burstein's submissions are correct, the board erred in failing to apply that standard.

¶ 23 I cannot, however, accept his submissions. I find myself in general agreement with the approach taken by Goldie J.A. in Davidson v. British Columbia (Attorney General) (1993), 87 C.C.C. (3d) 269 (B.C.C.A.). The hearing before the board is not strictly adversarial in the same sense that a criminal or civil trial is adversarial. The proceedings do not commence by way of an allegation made by one party against the other and the board does not serve solely as the passive arbiter of conflicting evidence adduced by the parties. The provisions of Part XX.1 referable to the constitution of the board, the designation of parties to the proceedings and the procedures to be followed during the hearing all indicate that the hearing is more in the nature of an inquiry into the factors set out in s. 672.54. In so concluding, I do not suggest that a particular hearing may not be very contentious, or that the accused's liberty interest should not engage a high level of procedural protection. I mean only to indicate that the nature of the process does not suggest the assignment of a burden of proof to one or more parties to that proceeding.

¶ 24 Nor do I regard the task assigned to the board under s. 672.54 as susceptible to a quantifiable standard of proof. In determining the appropriate disposition, the board is exercising a judgment upon a consideration of the factors set out in s. 672.54. That section requires the court to craft a disposition which gives proper consideration to those factors and is "the least onerous and least restrictive to the accused". Judgments predicated on the blending of factors like the protection of the public, the mental condition and needs of the accused, and the reintegration of the accused into society do not admit of proof to, or beyond a predetermined standard. In this regard, I adopt, as Goldie J.A. did in Davidson, at pp. 280-81, the comments of McLachlin J. in R. v. M. (S.H.), [1989] 2 S.C.R. 446 at pp. 462-64, 50 C.C.

C. (3d) 503 at pp. 546-48. There, in the course of interpreting the transfer provisions of the Young Offenders Act, R.S.C. 1985, c. Y-1, she said at p. 464 S.C.R., pp. 547-48 C.C.C.:

> Nor do I find it helpful to cast the issue in terms of a civil or criminal standard of proof. Those concepts are typically concerned with establishing whether something took place. It makes sense to speak of negligence being established "on a balance of probabilities", or to talk of the commission of a crime being proved "beyond a reasonable doubt". But it is less helpful to ask oneself whether a young person should be tried in ordinary court "on a balance of probabilities". One is not talking about something which is probable or improbable when one enters into the exercise of balancing the factors and considerations set out in s. 16(1) and (2) of the Young Offenders Act. The question rather is whether one is satisfied, after weighing and balancing all the relevant considerations, that the case should be transferred to ordinary court.

¶ 25 In my opinion, while the hearing before the board is not comparable to a sentencing hearing, the ultimate function of the board is analogous to that of a judge passing sentence. He or she must consider and balance the principles of sentencing and impose a sentence which best reflects those principles. In fixing sentence, the judge does not decide whether the Crown has proved beyond a reasonable doubt that a particular type or quantum of sentence is called for by the applicable principles, but rather decides what, in his or her opinion, is a fit sentence. Similarly, the board must decide what, in its opinion, is a fit disposition having regard to the language of s. 672.54.

¶ 26 If a party to the hearing chooses to advocate a particular disposition, that party will bear the forensic burden of adducing evidence in support of that disposition and the burden of convincing the board that the order it seeks is the appropriate order under s. 672.54. In making its disposition, the board will be guided by the language of the section. It will decide first if it is of the opinion that the accused is not a significant threat to the safety of the public. If it reaches that conclusion, it will direct that the accused be absolutely discharged. If the board is unable to reach that conclusion, it will proceed to consider the dispositions available under paras. (b) and (c) and will impose the disposition which, in its opinion, reflects a proper consideration of the factors set out in s. 672.54 and which is, in the opinion of the board, the least onerous and least restrictive disposition available. In exercising that function, the board does not place a legal burden on any party. Nor need it subject its opinion to the criminal or civil standard of proof.

(ii) The meaning of "the mental condition of the accused"

¶ 27 It is helpful to repeat the introductory language of s. 672.54:

> 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: . . .

(Emphasis added)

¶ 28 Clearly, s. 672.54 requires the board to take the accused's mental condition into consideration in determining its disposition. Mr. Burstein submits that the section must be interpreted to require the board to address the accused's mental condition in two stages. First, the board must decide whether the accused continues to suffer from the same mental disorder which led to the finding of not criminally responsible on account of mental disorder. If the board is not satisfied that the accused continues to suffer from that mental disorder, it cannot order the accused held in custody but must, according to the terms of the statute, make an order under either s. 672.54(a) or (b). If the board is satisfied that the accused continues to suffer from the same mental disorder, it will move on to consider which of the three possible types of dispositions in s. 672.54 is mandated by the particular circumstances.

¶ 29 In arriving at this interpretation, Mr. Burstein relies on the well-recognized principle that Charter values must inform the task of statutory interpretation: R. v. Finta (1992), 73 C.C.C. (3d) 65 at p. 176, 9 C.R.R. (2d) 91 (Ont. C.A.), affirmed without reference to this point, [1994] 1 S.C.R. 701, 88 C. C.C. (3d) 417. He submits that the principles of fundamental justice dictate that a person who has been found not criminally responsible on account of mental disorder should not suffer continued incarceration through the criminal process when that mental disorder no longer operates. Mr. Burstein relies heavily on Foucha v. Louisiana, 112 S. Ct. 1780 (1992), to support the existence of this particular principle of fundamental justice.

¶ 30 The Charter-based interpretative principle relied on by the appellant can operate only where the language of the statute is capable of bearing the interpretation said to reflect Charter values: Symes v. R., [1993] 4 S.C.R. 695 at pp. 751-52, 110 D.L.R. (4th) 470 at pp. 549-50; P.W. Hogg, Constitutional Law of Canada, 3rd ed. (1992) at pp. 393-94, 906. The interpretation advanced by the appellant is simply not available on the language of the section.

¶ 31 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.

¶ 32 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". 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.

¶ 33 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.

¶ 34 To reach the position urged by the appellant, one must do much more than interpret the present language of s. 672.54 with a view to the values underlying s. 7 of the Canadian Charter of Rights and Freedoms. One must ignore the language of the statute. Whatever may be the merits of the appellant's assertion as to the meaning of the principles of fundamental justice in the present context, that assertion cannot assist the appellant where, as here, the constitutionality of the legislation has not been challenged. The court cannot, under the guise of statutory interpretation, rewrite s. 672.54 to impose a limitation on the further incarceration of an accused which Parliament did not see fit to impose. I must reject this submission.

¶ 35 Even if the appellant's submission was accepted, the record indicates that the appellant continues to suffer from the mental disorders said to exist at the time he was found not criminally responsible on account of mental disorder. The appellant has been consistently diagnosed as suffering from both paranoid schizophrenia and an anti-social personality disorder. The former was given prominence by the psychiatrist testifying at the appellant's trial, no doubt because that diagnosis offered the strongest support for the appellant's contention that he was insane at the relevant time. Since his incarceration, the appellant's paranoid schizophrenia has gone into spontaneous remission. However, he continues to suffer from that condition. His personality disorder exacerbated by substance abuse remains a serious problem. While the emphasis in the appellant's diagnosis may have shifted from paranoid schizophrenia to a personal disorder of an anti-social type, the record supports the conclusion that he continues to suffer from both mental disorders. Consequently, even if the appellant's interpretation of s. 672.54 is correct, the board could order his continued detention.

B. Was the disposition made by the board unreasonable?

¶ 36 Section 672.78(1)(a) provides that the court may allow an appeal against a disposition where it

is of the opinion that the disposition is "unreasonable and cannot be supported by the evidence". The same language appears in s. 686(1)(a)(i) in relation to appeals from conviction. The case law developed under s. 686(1)(a)(i) has direct application to s. 672.78(1) (a). That case law recognizes that the section empowers an appellate court to review findings of fact made at trial. That power is, however, limited to the reasonableness standard set out in the section. An appellate court may not judge the correctness of the findings of fact made at trial or the verdict based on those findings, but can assess only the reasonableness of those findings and the consequent verdict. An appellate court may interfere only where it is satisfied, upon an independent review of the evidence, that a trier of fact, properly instructed and acting reasonably, could not have convicted: Yebes v. R., [1987] 2 S.C.R. 168, 36 C.C.C. (3d) 417.

¶ 37 When applying the reasonableness standard, the appellate court must recognize that trial courts enjoy advantages not available on appellate review. These advantages are particularly strong where the verdict turns on judgments as to credibility, some of which hinge on assessments that cannot be made in an appellate forum. When considering whether findings of fact based on credibility assessments are reasonable, an appellate court must show deference to the advantages enjoyed by the trial court: R. v. François, released July 14, 1994 (S.C.C.) at pp. 7-8; R. v. M.(S.H.), supra, at p. 465 S.C.R., p. 549 C.C. C.; R. v. Stewart (1994), 18 O.R. (3d) 509 at pp. 520-22, 90 C.C.C. (3d) 242 (C.A.).

¶ 38 Appeals based on the reasonableness of the board's dispositions raise an additional concern not present in conviction appeals. The board not only enjoys the advantage of a trial court when making credibility findings, it also has, by virtue of its constitution, a particular expertise in certain areas. In applying the reasonableness standard created by s. 672.78(1)(a), this court must be cognizant of the board's expertise and show that expertise appropriate curial deference: Bell Canada v. Canadian Radio-Television & Telecommunications Commission, [1989] 1 S.C.R. 1722 at pp. 1744-45, 60 D.L.R. (4th) 682; Pezim v. British Columbia (Superintendent of Brokers), released June 23, 1994 [now reported 114 D.L.R. (4th) 385, 92 B.C.L.R. (2d) 145 (S.C.C.)] at pp. 28-31.

¶ 39 In the present case, the board had to review extensive psychiatric material and consider somewhat conflicting psychiatric opinions. In doing so, the board was required to assess the mental condition of the accused, the dangerousness of the accused, the treatment prospects of the accused, and the treatment regime which would best fit the dictates of s. 674.54. All of these judgments called into play the board's medical expertise and its knowledge of the various facilities available within the mental health system. This court has neither that expertise nor that knowledge, and must show curial deference to those judgments in applying the reasonableness standard in s. 672.78(1)(a). That said, if after due regard to the board's advantaged position and its expertise, the court concludes that the disposition is unreasonable, it must intervene. This court did so in R. v. Jones, supra.

¶ 40 The disposition arrived at by the board is supported by the medical records produced at the hearing, the opinion taken by the hospital personnel, and the expert evidence of Dr. Doyle. Dr. McFarthing made a different assessment of the appellant and suggested a less onerous disposition. The board was entitled to reject his assessment. In doing so, it did not act unreasonably, but fulfilled its statutory obligation.

¶ 41 My judgment of Dr. McFarthing's evidence is of no consequence given that the board did not act unreasonably in rejecting his opinion. I would, however, observe that Dr. McFarthing's evidence revealed a misapprehension of some of the facts surrounding the 1981 charge of attempted murder, a misunderstanding of the ambit of the board's powers, and an incomplete knowledge of the treatment facilities available at various facilities. These shortcomings make the board's conclusion all the more supportable.

¶ 42 The board's disposition was not unreasonable.

IV. CONCLUSION

¶ 43 I would dismiss the appeal.

Appeal dismissed.

¶ 44 Note 1: While the appellant was tried under the predecessor legislation and found not guilty on account of insanity, he is treated under the new legislation as one found not criminally responsible on account of mental disorder. I will use that terminology.