R. v. Hussein, 2004 CanLII 36057 (ON S.C.)

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COURT FILE NO.: 11655/11656
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ONTARIO

SUPERIOR COURT OF JUSTICE

B E T W E E N:	)	
	)	
HER MAJESTY THE QUEEN REPRESENTED BY OFFICE OF THE PROVINCIAL CROWN ATTORNEY, THE OTTAWA-CARLETON DETENTION CENTRE, THE MINISTRY OF HEALTH AND LONG-TERM CARE, and THE ROYAL OTTAWA HOSPITAL	)	Eric Siebermorgen and Donna Eastwood, for the Crown
	)	
	)))))))))))	Denise Dwyer, for the Ministry of Public Safety
		Diana Schell, for the Ministry of Health and Long-Term Care
		Shawn Minnis, for the Royal Ottawa Hospital
Respondents		
- and -	)	
	)	
	)	
ABDI AHMED HUSSEIN and RONALD JAMES DWORNIK	)	William F. Murray, for the Applicants
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	)	
Applicants	)	
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	)	
	)	**HEARD:** March 10, 2003

R. Desmarais J.

REASONS FOR JUDGMENT

Nature of the Proceeding

[1] This is an application for *habeas corpus ad subjjiciendun* with certiorari in aid relating to orders for psychiatric assessment pursuant to s. 672.11 of the *Criminal Code*, R.S.C. 1985 c. C-46.

Statement of Facts

[2] Both Applicants in this case were subject to an order for an assessment of their mental condition pursuant to s. 672.11 of the *Criminal Code.*

[3] The applicable portions of that section read as follows:

> 672.11 A court having jurisdiction over an accused in respect of an offence may order an assessment of the mental condition of the accused, if it has reasonable grounds to believe that such evidence is necessary to determine
>
> (a) whether the accused is unfit to stand trial;
>
> (b) whether the accused was, at the time of the commission of the alleged offence, suffering from a mental disorder so as to be exempt from criminal responsibility by virtue of subsection 16(1)…

[4] Mr. Dwornik was ordered to be assessed by a court of competent jurisdiction on January 13, 2003. He was detained at the Regional Detention Centre from that date until February 13, 2003, a period of thirty-two (32) days before the assessment actually commenced.

[5] Mr. Hussein was ordered to be assessed on December 20, 2002, and was admitted to the hospital for that purpose on January 17, 2003, a period of twenty-nine (29) days. He was detained at the Regional Detention Centre up to that time.

[6] Since both Applicants have been dealt with in accordance with the provisions of s. 672.11, the application before the court has now become moot.

[7] Counsel for the Applicants argues that given the ongoing nature of the problem, the court ought to deal with the matter notwithstanding its mootness and make a declaratory judgment relative to the procedure being used.

[8] The Respondents raise no serious objections and I intend to deal with it accordingly.

[9] On February 18, 2003, the Applicant Hussein was, as a result of the assessment being made, found not criminally responsible for the offences for which he was charged.

[10] At the root of this application is the practice of detaining accused persons in jail without being assessed pending the availability of a hospital bed. The Applicants maintain that this is contrary to the statutory provisions set out in the *Criminal Code of Canada*; is without legal foundation, and is contrary to ss. 7 and 9 of the *Charter of Rights and Freedoms*.

[11] The appropriate relief in this matter is a declaratory judgment as opposed to some kind of injunctive relief, given the myriad of options available to the government that may rectify the unconstitutionality of the current system. As indicated in *Eldridge v. British Columbia (Attorney General)*, 1997 CanLII 327 (S.C.C.), [1997] 3 S.C.R. 624, the Supreme Court of British Columbia indicated that it was not the court's role to dictate how this is to be accomplished, but it also indicated that the deference that will be accorded to the government legislating in these matters does not give them an unrestricted licence to disregard an individual's *Charter* rights.

[12] Section 24(1) of the *Charter* provides that anyone whose rights under the *Charter* have been infringed or denied may obtain "such remedy as the court considers appropriate and just in the circumstances". As indicated, the appropriate and just remedy in this case is to grant a declaration that failure to perform assessments in accordance with the *Criminal Code* provisions is unconstitutional and is contrary to the Applicants' rights not to be arbitrarily detained or imprisoned pursuant to s. 9 of the *Canadian Charter of Rights and Freedoms*.

[13] Section 672 of the *Criminal Code* provides for a comprehensive procedure to be followed when the court has reasonable grounds to believe an accused is either unfit to stand trial or that he was at the time of the commission of the offence suffering from a mental disorder so as to be exempt from criminal responsibility by virtue of subsection 16(1).

[14] The relevant *Criminal Code* provisions are as follows.

[15] Section 672.11 of the *Criminal Code* gives a court the power to order assessments.

> 672.11 A court having jurisdiction over an accused in respect of an offence may order an assessment of the mental condition of the accused, if it has reasonable grounds to believe that such evidence is necessary to determine
>
> (*a*) whether the accused is unfit to stand trial;
>
> (*b*) whether the accused was, at the time of the commission of the alleged offence, suffering from a mental disorder so as to be exempt from criminal responsibility by virtue of subsection 16(1);
>
> (*c*) whether the balance of the mind of the accused was disturbed at the time of commission of the alleged offence, where the accused is a female person charged with an offence arising out of the death of her newly-born child;
>
> (*d*) the appropriate disposition to be made, where a verdict of not criminally responsible on account of mental disorder or unfit to stand trial has been rendered in respect of the accused; or
> (*e*) whether an order should be made under subsection 747.1(1) to detain the accused in a treatment facility, where the accused has been convicted of the offence.

[16] Section 672.14 governs the timelines applicable to such orders.

> 672.14(1) An assessment order shall not be in force for more than thirty days.
>
> (2) No assessment order to determine whether the accused is unfit to stand trial shall be in force for more than five days, excluding holidays and the time required for the accused to travel to and from the place where the assessment is to be made, unless the accused and the prosecutor agree to a longer period not exceeding thirty days.
>
> (3) Notwithstanding subsections (1) and (2), a court may make an assessment order that remains in force for sixty days where the court is satisfied that compelling circumstances exist that warrant it.

[17] Section 672.15 governs extensions of an assessment order.

> 672.15(1) Subject to subsection (2), a court may extend an assessment order, of its own motion or on the application of the accused or the prosecutor made during or after the period that the order is in force, for any further period that is required, in its opinion, to complete the assessment of the accused.
>
> (2) No extension of an assessment order shall exceed thirty days, and the period of the initial order together with all extensions shall not exceed sixty days.

[18] The practice has evolved whereby an accused who is the subject matter of an assessment order under s. 672.11 is detained in jail without being assessed pending the availability of a hospital bed for an assessment of issues of fitness and criminal responsibility.

[19] This practice deprives accused persons of their liberty. This would be constitutionally permissible if it were done in accordance with the principles of fundamental justice. Instead, the accused person is detained for a purpose other than that which is provided for in law. Under the current practice, the accused person is not detained to be assessed; but rather he is detained waiting to be assessed.

[20] In the case of the Applicant Dwornik, he was detained at the Regional Detention Centre from the date of the original order made on January 13, 2003 until February 13, 2003, a period of thirty-two days. The Applicant Hussein was detained at the Regional Detention Centre from the date of the order made December 20, 2002, until he was admitted at the Royal Ottawa Hospital for an assessment on January 17, 2003, a period of twenty-nine days.

[21] It is obvious that the period of time an accused spends in the detention awaiting to be assessed is entirely dependent upon the availability of a bed in a secure area at the Royal Ottawa Hospital.

[22] In some cases, accused persons who are presumed to be innocent may be detained for longer periods of time than any potential penalty they would have received after a finding of guilt.

[23] The indications are that there are too few secure beds available to accommodate demand and, accused persons who are subject to an order under s. 672 become a number on a waiting list, which is often referred to as the priority list. The practice is for an accused to wait at the detention centre until he or she is the highest person on the priority list and a bed becomes available. In my view, this infringes on the *Charter* rights of an accused; more particularly ss. 7 and 9.

[24] Dr. John Bradford, who is Clinical Director and Deputy Head of the Integrated Forensic Program at the Royal Ottawa Hospital, offered an explanation for the insufficiency of secure beds in paragraph 8 of his affidavit filed as Exhibit number 6 in these proceedings. It reads as follows:

> 8. There are several reasons why there are insufficient beds at the ROHCG to meet demand. Firstly, the ROHCG can only provide twelve (12) beds with medium to high security as a result of funding considerations. And secondly, a number of these beds that are ear-marked for assessments are sometimes required for other patients at the ROHCG who require this level of security. These patients include those that have been deemed not criminally responsible ("NCR"), and are awaiting transfer to Brockville, as well as dangerous offenders who are awaiting assessments.

[25] When the court orders that an assessment be made pursuant to s. 672.11 of the *Criminal Code*, then such assessment should be commenced within the time parameters that are found in s. 672.14 of the *Code*; more particularly an individual who is subject to such an order should not be detained indefinitely in the detention centre pending an assessment. It is well documented that persons waiting on the priority list often suffer hardships at the detention centre. Affidavit evidence would indicate the potential of the following:

(a) Physical violence or the threat of physical violence;
(b) Stress from their mental illness, combined with fear, confusion and uncertainty;
(c) Difficulty in assessing proper treatment;
(d) Increase in the severity of psychiatric problems;
(e) Isolation and lack of appropriate activities and care.

[26] In short, I find the current practice of putting accused persons, who are subject to an assessment order on a waiting list, also called a priority list, is not in keeping with the explicit provisions of the *Criminal Code*.

[27] The *Code* contemplates that the assessment take place upon an order for assessment being made by a court of competent jurisdiction. This is easily understood by the clear, unambiguous and, in places, mandatory language of the relevant provisions of the *Code*. It is also in my view obvious from a reading of these sections of the *Code* that the intent and purpose of the detention is for assessment and that the legislation placed clear time restraints for these assessments to be performed.

[28] The current practice ignores the provisions of the *Code* when they conflict with the shortage of bed space in a hospital to conduct assessments. The amount of time spent incarcerated in jail in order to be assessed is dependent on availability of space and not on the time required for the assessment of the individual, or on the framework provided for by statute. The *Code* does not allow for a period of time, which is undefined and undeterminable in advance, waiting in jail without beginning the assessment which was ordered.

[29] The current practice deprives accused persons of their liberty for a period of time in excess of that which is provided for in the *Code*. The period of time, which it actually takes to be assessed is, at the outset, unknown to the accused person or to the court. In my view, the period of time of imprisonment prior to assessment is not related to considerations of fundamental justice. I am of the view, that the rights guaranteed by ss. 7 and 9 of the *Canadian Charter of Rights and Freedoms* have been breached by this current practice. In effect, the accused person is detained for a purpose other than that which is provided for in law; he is not detained for purposes of being assessed, but rather is detained waiting to be assessed.

[30] The current practice is not in keeping with the relevant provisions of the *Code* and accused persons who are ordered to be assessed in custody should promptly be afforded appropriate forensic assessment accommodations.

[31] It is acknowledged that the number of persons who are ordered assessed at any time is not a constant and accommodations must be made in a reasonable time for whatever that number may happen to be, i.e., the number of persons being assessed in an appropriate hospital setting should be dependent upon the number of persons who require assessment pursuant to the *Code*, rather than an arbitrary number based on other factors.

[32] The determination whether a person should be assessed for their fitness to stand trial or criminal responsibility, should not be dependent upon the length of the “priority list”.

[33] In conclusion, I find that the practice of jailing accused persons without assessment while awaiting for in-custody forensic assessment accommodation, is contrary to the relevant provisions of the *Criminal Code of Canada* and offends ss. 7 and 9 of the *Canadian Charter of Rights and Freedoms*.

[34] As stated in the *Eldridge v. British Columbia (Attorney General)* case, “a declaration, as opposed to some kind of injunctive relief, is the appropriate remedy in this case because there are myriad options available to the government that may rectify the unconstitutionality of the current system. It is not this court’s role to dictate how this is to be accomplished. Although it is to be assumed that the government will move swiftly to correct the unconstitutionality of the present scheme and comply with this court’s directive, it is appropriate to suspend the effectiveness of the declaration for six months to enable the government to explore its options and formulate an appropriate response.”

[35] In the context of this case, it would be appropriate for the Respondents to ensure that there are a sufficient number of secure beds available in order to comply with the provisions of the *Criminal Code*.

[36] The agreed statement of facts filed as Exhibit number 1 states in paragraph 6 thereof that the Royal Ottawa Hospital is in the process of rebuilding itself into a completely new facility. This facility is expected to have twenty-two (22) secure forensic beds, and is expected to be ready for use in or around January of 2005.

[37] Dr. Bradford indicated in paragraph 7 of his affidavit, that at the time it was sworn (March 11, 2003) that the waiting list for beds had declined significantly over the past year, from a high of over twenty (20) people, to zero (0) as of February 18, 2003.

[38] As in *Eldridge*, I would assume that the government will move swiftly to correct the unconstitutionality of the present practice and comply with the court's directive within the next six (6) months.

R. Desmarais J.

Released: November 10, 2004

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Respondents

- **and –**

ABDI AHMED HUSSEIN and RONALD JAMES DWORNIK

Applicants

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