

CITATION: R. v. Breitwieser, 2009 ONCA 784
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COURT OF APPEAL FOR ONTARIO

Doherty, Simmons and Lang JJ.A.

BETWEEN

Her Majesty the Queen

Respondent

and

Alf J. Breitwieser

Appellant

Alf J. Breitwieser, acting in person

Joseph Di Luca, as *amicus curie*

Stacey D. Young, for the respondent

Julie A. Zamprogna Ballès, for Regional Mental Health Care St. Thomas

Heard: November 2, 2009

On appeal from the decision of the Ontario Review Board dated December 22, 2008.

By the court:

[1] This is an appeal from a December 2008 disposition, made pursuant to s. 672.54(c) of the *Criminal Code*, in which the Ontario Review Board ordered the continued detention of the appellant, Dr. Breitwieser, who suffers from schizoaffective disorder. In ordering the appellant's detention to continue in a minimum secure facility, the Board also continued another term from its preceding annual review. That term gave discretion to the person in charge of the hospital to allow the appellant to live in the community, rather than be confined to the hospital. On appeal, *amicus curiae* for Dr. Breitwieser argues that the Board erred in its review by failing to give adequate consideration to discharging the appellant with the condition that he continue to adhere to his medication regime.

[2] Ensuing events have largely overtaken the appeal. Those events are set out in the affidavit of Dr. Ellis, a psychiatrist who treated the appellant at the hospital. In our view, the affidavit is admissible as "fresh" evidence on this appeal. Dr. Ellis's affidavit discloses that Dr. Breitwieser, pursuant to the hospital's discretion, had been living on his own in an apartment since the summer of 2008. However, at some point after the December 2008 disposition, the appellant stopped taking his medication. He began exhibiting behaviour symptomatic of his illness. Given the severity of his condition, Dr. Breitwieser was returned to the hospital on July 29, 2009 and placed in its medium secure forensic treatment unit. His return to hospital was accomplished under the auspices of a warrant of committal issued under s. 672.57 of the *Criminal Code* and pursuant to the December 2008 disposition.

[3] Following his return, the Review Board held a hearing under s. 672.81(2.1) in which it reviewed and approved the hospital's decision to restrict the appellant's liberty. At the hearing, Dr. Breitwieser's counsel supported the hospital's position. Dr. Ellis explains in his affidavit that Dr. Breitwieser remains in the hospital and continues to be mentally unstable. Dr. Breitwieser's next annual review is scheduled for December 2, 2009.

[4] Given these circumstances, *amicus* properly abandons the claim for the appellant's discharge. Instead, he seeks a new hearing, which would be subsumed in next month's annual review.

[5] No more than a brief description of the appellant's history is necessary for the disposition of this appeal. The appellant had been detained since January 29, 2004, when he was found not criminally responsible on charges of threatening bodily harm and breaching a probation order. Between 2004 and 2008, with treatment, he improved. At the December 2008 annual review, Dr. Ellis noted that there did not appear to be any "compliance issues" because the appellant had been taking his prescribed medication for the preceding two-and-a-half years. Pursuant to a term in the preceding disposition order, beginning in the summer of 2008, the hospital had allowed the appellant to live in an apartment in the community, provided that he maintained contact with an outreach program. The hospital acknowledged that the appellant was successfully obtaining and administering his own medication, although it expressed concerns about the appellant's lack of insight into his need for medication and his reclusive lifestyle.

[6] In light of the appellant's excellent progress, *amicus* argues that the December 2008 Review Board ought to have considered a conditional discharge under s. 672.54(b) of the *Criminal Code* because such a disposition was the "least onerous and least restrictive" to the appellant as required by the terms of s. 672.54.

[7] At the December 2008 review, Dr. Ellis explained that he had a concern about a conditional discharge on the basis that the appellant posed a risk for medication non-compliance. In his view, in such an event, a need might arise for early intervention "before anything untoward would happen." In this regard, Dr. Ellis was concerned that the appellant would not agree to return to the hospital if need be and that "he would become ill if the Mental Health Act had to apply." The inability to return Dr. Breitwieser expeditiously to the hospital, in his view, precluded a conditional discharge.

[8] While the Board's reasons refer to evidence that Dr. Breitwieser would not consent to returning to the hospital in the event of his decompensation, they do not discuss two important elements. First, the Board's reasons do not address whether Dr. Breitwieser would have consented to a condition requiring him to continue his medication regime. Section 672.55 provides that a disposition under s. 672.54 may include a condition regarding treatment "where the accused has consented to the condition and the court or Review Board considers the condition to be reasonable and necessary in the interests of the accused." In our view, the Board could not give adequate consideration to the disposition of a conditional discharge without knowing the appellant's position on this issue.

[9] Second, the Board's reasons do not address the most appropriate route to accomplish an involuntary return to hospital in the event of the appellant's decompensation. There are different routes available under different sections of the *Criminal Code* and under the *Mental Health Act*, R.S.O. 1990, c. M.7, as amended.

[10] If the Board's disposition provides for detention, as was imposed in this case, the appellant could be returned to the hospital through a warrant of committal issued by the Review Board pursuant to s. 672.57 of the *Criminal Code* in Form 49. That warrant directs peace officers to convey the appellant to the hospital, where he would be subject to the conditions imposed in his last disposition order. In such a case, the appellant could be returned to hospital at the request of staff without the need to detain him in jail or to obtain a court order. In this way, the appellant could be properly placed, not a jail, but in an appropriate secure setting, which would make it possible to resume his treatment expeditiously and avoid any further decompensation that could result from a prolonged delay.

[11] If the Board had ordered a conditional discharge instead, and the appellant had breached a condition, a warrant under s. 672.57 would not have been available because Parliament has provided that such warrants are only available for dispositions of detention under s. 672.54(c) and not for conditional discharges granted under s. 672.54(b).

[12] Instead, s. 672.91 would apply. It provides for the arrest of “an accused without a warrant ... if the peace officer has reasonable grounds to believe the accused has contravened or wilfully failed to comply with the assessment order or disposition or any condition of it, or is about to do so.”

[13] After making an arrest under s. 672.91, unless the peace officer decides to release the accused pursuant to s. 672.92(1)¹, the accused must be brought before a justice of the peace pursuant to s. 672.93. The justice of the peace may order the accused’s return “to a place specified in the disposition or assessment order” if “the justice is satisfied that there are reasonable grounds to believe the accused has contravened or failed to comply with a disposition or an assessment order.”

[14] In other words, an accused under a conditional discharge, who decompensates and whose conduct raises public interest concerns, will not be returned immediately to the hospital. Instead, given reasonable grounds for a breach of condition, he will be arrested. The accused will then be brought before a justice of the peace who, upon being satisfied there are reasonable grounds, may order the accused’s return to the hospital if that return is specified as a term of the discharge disposition.

[15] If an accused is apprehended pursuant to these provisions of the *Criminal Code*, there may be a delay between apprehension and a return to hospital. During that delay,

¹ Section 672.92(1) allows a peace officer who arrests an accused on a conditional discharge under s. 672.91 to release the accused on a summons or appearance notice and deliver the accused to a place specified in a disposition or assessment order if the officer does not believe it is necessary in the public interest to detain the accused in custody. If a peace officer believes detention is necessary, then the accused must be brought in front of a justice of the peace officer pursuant to s. 672.92(2) and (3).

an accused will be detained in the inappropriate setting of a jail with a concomitant delay in receiving medication or other treatment and a potential further deterioration in his or her condition.

[16] An accused can also be brought to hospital through the provisions of the *Mental Health Act*, if there is reasonable cause to believe that the accused is suffering from a mental disorder that is likely to cause serious bodily harm to the accused or another person, or is likely to prevent the accused from looking after him or herself. Section 16 allows a justice of the peace to order that such a person be brought into custody to be examined by a physician based on sworn information that the person has behaved in a threatening, violent or incompetent manner, or that the person has benefited in the past from treatment to which the person is incapable of consenting. Section 17 permits a police officer to take the person directly into custody to be examined, but only if the person has acted in a disorderly manner, and it would be “dangerous to proceed under section 16.” Depending on the conditions in a conditional discharge disposition, these provisions may establish a higher threshold than the provisions of s. 672.91 of the *Criminal Code*.

[17] In this case, although the Board referred to Dr. Ellis’s evidence indicating detention was necessary to ensure timely intervention if the appellant decompensated, Dr. Ellis’s opinion was premised on the *Mental Health Act* and did not address the *Criminal Code* and *Mental Health Act* options to apprehend the appellant if he became medication

non-compliant while conditionally discharged. The Board also did not address whether the appellant would consent to appropriate conditions of discharge.

[18] In our view, in any case where the primary issue is compliance with conditions, and there is an air of reality to the claim that a conditional discharge would be an appropriate disposition, the Board must address these two elements. First, the Board must canvass whether the accused will consent to appropriate conditions under s. 672.55. Second, it must address the potential mechanisms for the accused's return to the hospital in the event of non-compliance, and determine whether the patient is likely to agree to return or whether a combination of s. 672.55 and either s. 672.92 or s. 672.93(2) or another route of return would be sufficient in the circumstances. The Board must consider these elements in light of the legislative scheme and the requirement of s. 672.54 that, after taking into consideration the designated factors, the Board must make the disposition "that is the least onerous and least restrictive to the accused". This consideration is in keeping with the direction of the Supreme Court in *R. v. Winko* [1999] 2 S.C.R. 625 at para. 43 that the "offender is to be treated with dignity and accorded the maximum liberty compatible with Part XX.1's goals of public protection and fairness to the NCR accused."

[19] In our view, the Board did not do so in this case. As a result, we would have allowed the appeal and remitted the matter for the Review Board for a rehearing to consider a conditional discharge pursuant to s. 672.78(3). However, in light of the fresh

evidence of the appellant's ongoing decompensation, his current status in medium security, and the pending annual review on December 2, 2009, the appeal is dismissed.

RELEASED: November 9, 2009
"DD"

"Doherty J.A."
"Janet Simmons J.A."
"S.E. Lang J.A."