Case Name:

R. v. Sim

Between
Her Majesty the Queen, respondent, and
Donovan Ray Sim, appellant

[2005] O.J. No. 4432
Docket: C43385
Also reported at:
78 O.R. (3d) 183

Ontario Court of Appeal
Toronto, Ontario
K.M. Weiler, M.J. Moldaver and R.J. Sharpe JJ.A.

Heard: September 28, 2005.
Judgment: October 20, 2005.
(38 paras.)

Aboriginal law — Sentencing — Criminal Code, s. 718.2(e) (consideration of circumstances of aboriginal offender) — Appeal by Sim from an Ontario Review Board decision finding him a continued substantial threat to public safety dismissed — Criminal Code, s.672.54.

Criminal law — Prisons — Rights of inmates — The Ontario Review Board had a positive duty to ensure that the unique factors associated with aboriginal accused were presented to, and considered by, the Board when applying the criteria set out in s.672.54 — Criminal Code, s.672.54.

Appeal by Sim from an Ontario Review Board (ORB) decision finding him a continued substantial threat to public safety. The appellant was found NCR after having been charged with theft. The appellant was of Cree and Irish descent and was raised in foster care after being abused by his father at the age of eleven. He had serious behavioural problems that included stealing, fighting, truancy, running away from home and challenging authority. The appellant had a lengthy criminal record dating from when he was sixteen years old. The appellant had been diagnosed with schizophrenia, polysubstance abuse, and antisocial personality disorder. He had no insight into his mental illness and rejected his diagnosis. He had absconded twice and on the last occasion, in 2003, he was charged with breaking and entering and assault while he was unlawfully at large. The appellant had been the subject of four annual ORB hearings. At his last hearing, the ORB was unanimous in finding that he remained a substantial threat to public safety. The amicus curiae on the inmate appeal submitted that the ORB was under a positive duty to ensure that the unique factors associated with aboriginal accused are presented to, and considered by, the ORB when it was applying the criteria for making dispositions pursuant to s.672.54

of the Criminal Code.

HELD: Appeal dismissed. There was no basis upon which to interfere with the ORB's determination that the appellant continued to represent a significant threat to public safety. However, there was no reason why the ORB's positive duty to search out evidence pertaining to the four factors set out in s. 672.54 should not apply to ensure that the Board had adequate information in relation to the appellant's aboriginal background where that information be relevant to its determination. The ORB's failure to elicit the information did not justify the court setting aside the disposition.

Statutes, Regulations and Rules Cited:

Criminal Code, R.S.C. 1985, c. C-46, ss. 672.54, 672.78, 672.78(a), 672.78(b), 672.78(c), 718.2(e) Part XX.1

Appeal From:

On appeal from the order of the Ontario Review Board dated December 1, 2004.

Counsel:

Deborah Krick for the respondent Attorney General of Ontario

James Hammond for the respondent person in charge of the Centre for Addiction and Mental Health

Donovan Ray Sim in person

Paul Burstein as amicus curiae

The judgment of the Court was delivered by

¶ 1 [1] **R.J. SHARPE J.A.**:— The central issue on this appeal is whether the Ontario Review Board (the "ORB") is under a positive duty to ensure that the unique factors associated with aboriginals are presented and considered when the ORB makes a disposition pursuant to Part XX.1 of the Criminal Code, R.S.C. 1985, c. C-46 relating to an accused found not criminally responsible on account of mental disorder ("NCR").

FACTS

¶ 2 [2] The appellant was found NCR in November 2000 after having been charged with theft under

$5,000. The appellant had taken the car of his former landlady, abandoned it when it ran out of gas, and returned the keys to the victim's home. The vehicle was recovered without damage.

¶ 3 [3] The appellant is of Cree and Irish descent. His parents separated when he was about two years old. His father remarried. His mother died of an apparent suicide when he was eighteen. The appellant has two sisters and a half brother who live in British Columbia. The appellant suffered physical abuse as a child at the hands of his father and was placed in foster care when he was eleven. From that age he had serious behaviourial problems that included stealing, fighting, truancy, running away from home and challenging authority. He moved to Ontario from British Columbia when he was eighteen. He has no family and little community support in Ontario.

¶ 4 [4] The appellant, thirty-four years old at the time of his ORB hearing, has a lengthy criminal record dating from when he was sixteen years old. His record contains some forty convictions and includes sixteen convictions for property-related offences, four convictions for narcotics and alcohol-related offences, and eight assault convictions, two of which involved serious injuries to the victims.

¶ 5 [5] The appellant has been diagnosed as suffering from schizophrenia, polysubstance abuse, and antisocial personality disorder. He continues to have a problem with substance abuse, his behaviour when institutionalized has been uneven and he suffers from delusions and auditory hallucinations. He has no insight into his mental illness and rejects his diagnosis. He has absconded twice and on the last occasion, in 2003, he was charged with breaking and entering and assault while he was unlawfully at large. The appellant's condition is improved with medication, but he does not recognize the benefits of his medication nor does he appreciate the consequences of discontinuing its use.

¶ 6 [6] The appellant has been the subject of four annual ORB hearings. He is currently held in a medium security facility. At his last hearing, the ORB was unanimous in finding that he remains a substantial threat to public safety. A majority of the Board agreed with the facility's recommendation for a detention order with a provision for discretionary community living in approved accommodation. One member of the Board dissented and would have deleted the provision for discretionary community living.

¶ 7 [7] The appellant was represented by counsel before the ORB but was denied Legal Aid for this appeal. He filed an inmate notice of appeal in which he challenges the ORB's determination that he presents a significant danger to the public. He submits that, having been held in custody for almost five years on a relatively minor offence, he should be released.

¶ 8 [8] By order of this court, Paul Burstein was appointed as amicus curiae. Mr. Burstein submits that the ORB is under a positive duty to ensure that the unique factors associated with aboriginal accused are presented to, and considered by, the ORB when it is applying the criteria for making dispositions pursuant to s. 672.54 of the Criminal Code. He submits that the ORB failed to live up to that duty in the circumstances of this case. He moves to introduce as fresh evidence on this appeal the report of a "Gladue caseworker" from Aboriginal Legal Services of Toronto, outlining the services available to

aboriginal offenders including services that would assist the appellant in maintaining his medication, and services that would provide him with housing and substance abuse counselling.

ISSUES

¶ 9

1. Did the ORB err in finding that the appellant remains a significant threat to public safety?
2. Did the ORB err by failing to ensure that it had adequate information in relation to the appellant's aboriginal background before making its decision?

ANALYSIS

1. Did the ORB err in finding that the appellant remains a significant threat to public safety?

¶ 10 [9] The ORB carefully reviewed the evidence relating to the appellant's mental illness, his lack of insight into his illness, and his failure to appreciate the danger of discontinuing his medication. The appellant continues to suffer from delusions and a substance abuse problem. The clinical team responsible for his treatment considers that he continues to pose a significant threat to public safety. His counsel at the ORB hearing more or less conceded that he posed a significant risk and asked for a conditional discharge. Pursuant to s. 672.78 of the Criminal Code, this court can only intervene where it is of the opinion that (a) the ORB's order is unreasonable or cannot be supported by the evidence; (b) the ORB's order is based upon a wrong decision on a question of law, or (c) there was a miscarriage of justice. I can see no basis upon which to interfere with the ORB's determination that the appellant continues to represent a significant threat to public safety.

¶ 11 [10] In my view, there is ample evidence to support the ORB's finding that, pursuant to s. 672.54, "the least onerous and least restrictive" disposition is an order for detention with provision for discretionary community living in approved accommodation. I see no error of law in the ORB's decision. While I can appreciate the appellant's perception that, had he pleaded guilty to the index offence, he would long since have been released from any sentence that could have been imposed, the circumstances of his NCR plea are not before us. It is well established that the purpose of Part XX.1 is not to punish the accused; rather, Part XX.1 is concerned with the treatment of the NCR accused and the protection of the public. As the findings of the ORB are reasonable, the continued detention of the appellant pursuant to Part XX.1 of the Criminal Code does not amount to a miscarriage of justice.

2. Did the ORB err by failing to ensure that it had adequate information in relation to the appellant's aboriginal background before making its decision?

¶ 12 [11] There was little evidence before the ORB as to the relevance of the appellant's aboriginal

background or as to the services in the aboriginal community that might be of assistance to the appellant. The facility in which the appellant is held has an Aboriginal Services Unit and the ORB noted that the appellant has attended native healing services. There was some evidence that the appellant had indicated a desire to be associated with a band in Saskatchewan but the details of that possibility were sketchy at best and the appellant's current plan was to remain in Toronto if released.

¶ 13 [12] In R. v. Gladue (1999), 133 C.C.C. (3d) 385, the Supreme Court of Canada reviewed the principles of sentencing in relation to aboriginal offenders and interpreted s. 718.2(e), which requires a sentencing court to take into consideration "all available sanctions other than imprisonment that are reasonable in the circumstances ... with particular attention to the circumstances of aboriginal offenders." I agree with the respondents that the ORB is not a sentencing court and that s. 718.2(e) does not apply to ORB dispositions. However, for the following reasons, I agree with Mr. Burstein's submission that the principles identified by the Supreme Court in Gladue have a bearing upon the duties and responsibilities of the ORB.

¶ 14 [13] In Gladue, the Supreme Court identified at para. 50 the "acute problem of the disproportionate incarceration of aboriginal peoples." However, the court noted at para. 61 that "the excessive imprisonment of aboriginal people is only the tip of the iceberg insofar as the estrangement of the aboriginal peoples from the Canadian criminal justice system is concerned." Part XX.1 of the Criminal Code is an integral element of the Canadian criminal justice system, and the disposition of aboriginal NCR accused should, in my view, be considered in the light of the principles articulated in Gladue.

¶ 15 [14] In Gladue and in R. v. Williams (1998), 124 C.C.C. (3d) 481 at para. 58, the Supreme Court recognized the problem of systemic bias and discrimination against aboriginals in the criminal justice system. Gladue adopted the conclusion of the Royal Commission on Aboriginal Peoples (at para. 62) and the Aboriginal Justice Inquiry of Manitoba (at para. 63) that Canada's criminal justice had failed to take into account "the substantially different cultural values and experience of aboriginal people."

¶ 16 [15] Describing the situation of disproportionate incarceration of aboriginal offenders at para. 64 as "a crisis on the Canadian criminal justice system," the court in Gladue focussed on the interpretation of s. 718.2(e) and the sentencing of aboriginal offenders, but suggested that the principles motivating its decision could have wider ramifications. The court observed at para. 65:

> It is clear that sentencing innovation by itself cannot remove the causes of aboriginal offending and the greater problem of aboriginal alienation from the criminal justice system ... There are many aspects of this sad situation which cannot be addressed in these reasons.

¶ 17 [16] I do not think that the principles underlying Gladue should be limited to the sentencing process and I can see no reason to disregard the Gladue principles when assessing the criminal justice system's treatment of NCR accused.

¶ 18 [17] The ORB is directed by s. 672.54 to take the following four criteria into consideration when making a disposition:

(i) the need to protect the public from dangerous persons,
(ii) the mental condition of the accused,
(iii) the reintegration of the accused into society, and
(iv) the other needs of the accused.

¶ 19 [18] When assessing the dangerousness or mental condition of the accused, it would no doubt be helpful for the ORB to have as full a record as possible. A full record would contain information pertaining to the accused person's background, including aboriginality. However, so far as I am aware, aboriginal status would ordinarily have little direct bearing upon the dangerousness or the mental condition of the accused. An individual will not be more or less dangerous, nor will an individual be more or less mentally ill, because of his or her aboriginal status.

¶ 20 [19] On the other hand, proper consideration of appropriate placement of the accused, reintegration into society and the other needs of the accused will call, where the circumstances warrant, for the ORB to advert to the unique circumstances and background of aboriginal NCR accused. Accordingly, the Gladue principles should be applied to compliment the analysis that s. 672.54 requires.

¶ 21 [20] In Gladue, at para. 67, the court identified systemic and background factors which have led to a disproportionate representation of aboriginal people in the criminal justice system:

> Years of dislocation and economic development have translated, for many aboriginal peoples, into low incomes, high unemployment, lack of opportunities and options, lack or irrelevance of education, substance abuse, loneliness, and community fragmentation. These and other factors contribute to a higher incidence of crime and incarceration.

¶ 22 [21] Regrettably, the circumstances of the appellant fit this pattern. While systemic and background factors also play a role in the criminality of non-aboriginals, the court in Gladue pointed out at para. 68 that

> [T]he circumstances of aboriginal offenders differ from those of the majority because many aboriginal people are victims of systemic and direct discrimination, many suffer the legacy of dislocation, and many are substantially affected by poor social and economic conditions. Moreover, as has been emphasized repeatedly in studies and commission reports, aboriginal offenders are, as a result of these unique systemic and background factors, more adversely affected by incarceration and less likely to be "rehabilitated" thereby, because the internment milieu is often culturally inappropriate and regrettably discrimination towards them is so often rampant in penal institutions.

¶ 23 [22] This consideration is also relevant to aboriginal NCR accused, particularly in light of the rehabilitative purpose of the NCR regime and the objective of ensuring reintegration of NCR accused into society as soon as is consistent with the protection of the public. Another of "the unique circumstances of aboriginal offenders" identified in Gladue, at para. 74, is the relevance of restorative justice and community-based sanctions to many of these offenders:

> It is often the case that neither aboriginal offenders nor their communities are well served by incarcerating offenders, particularly for less serious or non-violent offences. Where these sanctions are reasonable in the circumstances, they should be implemented. In all instances, it is appropriate to attempt to craft the sentencing process and the sanctions imposed in accordance with the aboriginal perspective.

Again, to the extent that reintegration of the NCR is a live issue in the particular case, the statutory objective of reintegration of NCR accused makes this factor relevant in ORB hearings.

¶ 24 [23] How can the issue of "reintegration of the accused into society" be assessed if the ORB has no information about the society into which the accused is to be reintegrated? Gladue recognized the need to consider the aboriginal community's distinctive treatment of those who offend its norms. Surely the aboriginal community's substantively different cultural values and experiences should also be considered when it comes to the reintegration of an NCR accused into aboriginal society. Failure to advert to the unique circumstances of aboriginal offenders when making decisions relating to their reintegration into the community falls squarely within the category of systemic problems identified in Gladue as contributing to the failure of the criminal justice system to respond to the particular circumstances and needs of aboriginal peoples.

¶ 25 [24] The same holds true with respect to "the other needs" of an aboriginal accused. To the extent they are relevant, how can the ORB assess "the other needs" of an aboriginal accused if the ORB lacks information regarding the particular circumstances of the accused that arise from the fact of his or her aboriginality? Without actual evidence directing the mind of the decision-maker to the aboriginal circumstances of the accused, there is a serious risk that the decision-maker will simply assume that the needs of the aboriginal accused are the same as those of the non-aboriginal accused. This, it seems to me, is the very sort of systemic discrimination that Gladue seeks to eliminate.

¶ 26 [25] This brings me to the question of whether the ORB has a positive legal duty to ensure that evidence as to the aboriginal circumstances of the accused is made available. Ordinarily, our system of criminal justice operates on the adversarial principle and it is for the parties, not the court or tribunal, to ferret out and present the relevant evidence. The court or tribunal assumes a passive role and decides the case strictly on the basis of the evidence the parties themselves have been able to uncover and have chosen to present. However, Gladue holds at para. 84 that the special situation of aboriginal accused requires the criminal justice system to alter its procedure and adopt a more inquisitorial approach when sentencing an aboriginal offender. A court sentencing an aboriginal offender cannot simply impose the sentence on the basis of the information presented by the parties: "it is incumbent upon the sentencing

judge to attempt to acquire information regarding the circumstances of the offender as an aboriginal person."

¶ 27 [26] While the ORB does not operate under the sentencing regime imposed by s. 718.2(e), it does exercise inquisitorial powers and has a general duty to ensure that it has before it the information necessary to apply the criteria of s. 672.54. This duty was articulated in Winko v. British Columbia (Forensic Psychiatric Institute), [1999] 2 S.C.R. 625. Writing for the majority at para. 54, McLachlin J. described the Part XX.1 regime as a "*departure* from the traditional adversarial model" [emphasis in original]. As she noted at paras. 54 and 55, the Crown is often not present at the hearing and there is no burden imposed upon the NCR accused:

> The system is inquisitorial. It places the burden of reviewing *all* relevant evidence on both sides of the case on the court or Review Board. The court or Review Board has a duty not only to search out and consider evidence favouring restricting NCR accused, but also to search out and consider evidence favouring his or her absolute discharge or release subject to the minimal necessary restraints, regardless of whether the NCR accused is even present ...
> As a practical matter, it is up to the court or Review Board to gather and review all available evidence pertaining to the four factors set out in s. 672.54 ... The court and the Review Board have the ability to do this. They can cause records and witnesses to be subpoenaed, including experts to study the case and provide the information they require. [italics in original; underlining added].

¶ 28 [27] I can see no reason why the ORB's positive duty "to search out" evidence pertaining to the four factors set out in s. 672.54 should not apply to ensure that the Board has adequate information in relation to the appellant's aboriginal background where that information would be relevant to its determination.

¶ 29 [28] I note here that in at least one of its decisions, Re J.R., [2001] O.R.B.D. No. 1485, the ORB appears to have accepted the application of Gladue principles to its proceedings. In Re Alexis, [2003] B.C.R.B.D. No. 1, at para. 80, the British Columbia Review Board explicitly embraced Gladue and applied the Winko duty with an eye to Gladue in order to ensure that the aboriginality of an NCR accused was properly considered:

> I also consider that in order to satisfy Winko's requirement to undertake highly individualized and broadly based evaluation and assessment, for this particular accused, it is not only entirely appropriate, but indeed necessary to include in the analysis the unique, historic, cultural, political, and systemic components of his aboriginal heritage and traditions: see R. v. Gladue ... Mr. Alexis' circumstances are unique and different from those of other NCRMD accused.

¶ 30 [29] Accordingly, where factors (iii) and (iv) of s. 672.54 are live issues, I conclude that the

ORB should always consider the unique circumstances of aboriginal NCR accused and ensure that it has adequate information in relation to the aboriginal background of an NCR accused to enable the ORB to assess the reintegration of the accused into society and the accused's other needs pursuant to s. 672.54. While I am not prepared to lay down a rigid rule to the effect that the ORB must always obtain a "Gladue report" or other similar evidence as to the particular circumstances of aboriginal NCR accused, I am prepared to say that the ORB has a legal duty to obtain such information where it would be pertinent and relevant to the disposition it is asked to make. Failure to do so would, in my view, amount to a legal error.

¶ 31 [30] In the circumstances of the present case, I do not think that the ORB's failure to elicit more information relating to the appellant's aboriginality amounted to an error of law justifying this court in setting aside the ORB's disposition. I arrive at that conclusion for the following four reasons.

¶ 32 [31] Firstly, the fresh evidence offered by amicus curiae regarding community aboriginal services available to the accused would likely not have affected the Board's disposition, had it been available at the hearing. As I have already indicated, amicus curiae has presented us with the report of a "Gladue caseworker" employed by Aboriginal Legal Services of Toronto outlining some of the services that might be helpful to the appellant should he be permitted to live in the community. This report could be helpful to the ORB if the appellant's placement in the community were a realistic possibility. However, the ORB found that, in view of the need to protect the public from the danger he posed and in view of his mental condition, the appellant had not progressed to the point where the ORB could order a community placement, although it did leave that possibility to the discretion of the institution. In view of the evidence of the appellant's mental condition and the danger he continues to pose, this was the best result the appellant could hope for. Had this been a closer case, a report indicating that the aboriginal community could assist the appellant in maintaining his medication and could provide appropriately supervised housing might have been helpful and perhaps even decisive. In those circumstances, the Board would err in failing to procure such a report. However, it is my opinion that even if the Board had that information, it would not have arrived at a different disposition.

¶ 33 [32] The test for the admission of fresh evidence on appeal is set out in R. v. Palmer, [1980] 1 S. C.R. 759 at 775:

> (1) The evidence should generally not be admitted if, by due diligence, it could have been adduced at trial provided that this general principle will not be applied as strictly in a criminal case as in civil cases [citation omitted].
> (2) The evidence must be relevant in the sense that it bears upon a decisive or potentially decisive issue in the trial.
> (3) The evidence must be credible in the sense that it is reasonably capable of belief, and
> (4) It must be such that if believed it could reasonably, when taken with the other evidence adduced at trial, be expected to have affected the result.

¶ 34 [33] Assuming, for present purposes, that, as this is not strictly an adversarial proceeding, the fresh evidence tendered in this case meets the first criteria, and that the second and third criteria are met as well, I would not admit it, as I do not think that it could have affected the result.

¶ 35 [34] My second reason for concluding that the ORB did not err in the present case is that the appellant's aboriginal background has not been entirely ignored. The institution in which he is held does have an Aboriginal Services Unit and the appellant has made use of its facilities. In the circumstances of this case, I am not persuaded that the failure of the ORB to gather more information about the appellant's aboriginal background prevented it from fairly assessing the appellant's "other needs" pursuant to s. 672.54.

¶ 36 [35] Third, the appellant himself neither advanced nor embraced the argument advanced by amicus curiae in relation to the ORB's failure to obtain information as to his aboriginal circumstances. I note that in Gladue, the Supreme Court held at para. 83 that "[w]here a particular offender does not wish such evidence to be adduced, the right to have particular attention paid to his or her circumstances as an aboriginal offender may be waived." I do not suggest that the appellant positively waived the right to have attention paid to his aboriginality, nor do I think that undue emphasis should be placed on the fact that he has distanced himself from this submission. The appellant has from time to time expressed an interest in living with a native band in Saskatchewan. On the other hand, he does not appear to have any links with that band, and at the time of the ORB hearing his plan was to remain in Toronto, to live in his own apartment, and to work for an acquaintance in the landscaping and snow removal business. Where an aboriginal NCR accused has limited interest in reintegrating with the aboriginal community, this will have a bearing upon the need to obtain more information about his or her aboriginality in order to arrive at an appropriate disposition.

¶ 37 [36] Fourth, I would not be prepared to make an order changing the terms of the appellant's disposition on this record. The best the appellant could hope for would be a new hearing before the ORB. As a practical matter, this would achieve nothing. The appellant's next review is scheduled to take place in less than two months and there is no reason to believe that, should we send the matter back, his case would be dealt with more quickly.

CONCLUSION

¶ 38 [37] Accordingly, I would dismiss the appeal. I do so, however, with the expectation that the ORB will live up to its legal duty to ensure that it has before it adequate information pertaining to the particular circumstances of aboriginal NCR accused when such information is relevant to the ORB's disposition pursuant to s. 672.54.

R.J. SHARPE J.A.
K.M. WEILER J.A. -- I agree.
M.J. MOLDAVER J.A. -- I agree.

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