Citation: R. v. Wong
2006 BCPC 0322

Date: 20060710
File No: B41799-2-D
Registry: Vancouver

IN THE PROVINCIAL COURT OF BRITISH COLUMBIA

REGINA

v.

LARRY WONG

REASONS FOR JUDGMENT
OF THE
HONOURABLE JUDGE C. J. BRUCE

Counsel for the Crown:	R. Fahrni
Counsel for the Defendant:	J. Bahen
Place of Hearing:	Vancouver, B.C.
Date of Hearing:	June 26, 2006
Date of Judgment:	July 10, 2006

INTRODUCTION

[1] This is an application by the defendant for a stay of proceedings pursuant to Section 672.851 of the Criminal Code in respect of a charge of attempted murder and aggravated assault arising out of events that occurred in November 1991. On December 3, 1991 the defendant was found unfit to stand trial on these charges as a result of a mental disorder and since that date has been held in the custody of the Forensic Psychiatric Institute at the pleasure of the Lieutenant Governor.

[2] Section 672.851 came into force on June 30, 2005 in response to the judgment of the Supreme Court of Canada in ***Regina v. Demers*** (2004) 185 C.C.C. (3d) 257. In that case the Court recognized the inequity of subjecting a person found to be permanently unfit to stand trial to the continued jurisdiction of the criminal justice

system where the person was no longer a significant risk to the safety of the public. In such circumstances, the Court may exercise its jurisdiction to stay the underlying charges to prevent the accused from being subjected to the prospect of a trial for an indefinite period.

[3] The case at hand arose out of a recommendation from the British Columbia Review Board pursuant to Section 672.851(1) that the Court hold an inquiry into the defendant's circumstances to determine if a stay of proceedings should be granted. Pursuant to Section 672.851(1) a recommendation to the Court may only be made where the Review Board determines the accused remains unfit to stand trial and is not likely to ever become fit, and the accused does not pose a significant threat to the safety of the public.

[4] Upon receipt of the Review Board's recommendation, Section 672.851(7) sets out the tests to be applied by the Court in determining whether a stay of proceedings is appropriate. These tests are:

a. on the basis of clear information that the accused remains unfit to stand trial and is not likely to ever become fit to stand trial;

b. the accused does not pose a significant threat to the safety of the public; and

c. that a stay is in the interests of the proper administration of justice.

[5] When assessing the final test; that is, the interests of the proper administration of justice, Section 672.851(8) dictates that the Court consider the following factors:

a. the nature and seriousness of the alleged offence;

b. the salutary and deleterious effects of the order for a stay of proceedings, including any effect on public confidence in the administration of justice;

c. the time that has elapsed since the commission of the alleged offence and whether an inquiry has been held under s.672.33 to decide whether sufficient evidence can be adduced to put the accused on trial;

d. any other factor the court considers relevant.

[6] The Crown and Defence are in agreement that the defendant is unfit to stand trial and that it is unlikely he will ever become fit to stand trial. The issues in dispute are whether the defendant represents a significant threat to the safety of the public and whether a stay of proceedings is in the interests of the proper administration of justice.

CHRONOLOGY OF EVENTS

[7] On November 7, 1991 the defendant is alleged to have tried to murder his landlord (Wai Ping Chan) by stabbing him with a knife in the neck and chest area. The defendant is also charged with aggravated assault in regard his landlady (Yet Wah Chan) by stabbing her in the upper arm with the knife. Both the complainants were cleaning the defendant's apartment in the Powell Rooms, located at 556 Powell Street in Vancouver, when they were allegedly attacked by the defendant who wielded a large cleaver. Wai Ping Chan spent about three weeks in hospital as a result of his injuries and Yet Wah Chan was in the hospital for four or five days.

[8] The defendant has always maintained the victims approached him to first rob and then kill him, and that they assaulted him with a knife. The consistent opinion of the physicians who have treated the defendant over the 15 years since the offence date is that the accused suffers from schizophrenia and, further, that as a result of the delusions produced by this disease, the defendant believed he acted in self defence and in fear for his life.

[9] After a hearing into the matter, the defendant was found unfit to stand trial on these charges on December 3, 1991 and was ordered detained in the custody of the Forensic Psychiatric Institute. The Review Board conducted annual reviews of the defendant's mental health and concluded each year that he remained unfit to stand trial. In 1997, however, the Review Board found the defendant could possibly be found fit and referred the matter to the court for disposition. On April 23, 1997 the court again found the defendant to be unfit to stand trial and returned him to the Review Board's jurisdiction.

[10] In 1998 the Review Board noted an improvement in the defendant's mental health due to a new medication and allowed him to visit an outside community health facility known as Victory House with a view to eventually becoming a resident of this licensed facility. On May 17, 2000 the Review Board found the defendant remained unfit to stand trial, but discharged him conditionally to reside in the closely supervised mental health setting of Victory House.

[11] On March 20, 2003 the defendant again appeared before the Review Board and a finding was made that he could be found fit to stand trial. The Review Board referred the issue to the court ; however, on September 24, 2003 the defendant was again found unfit to stand trial. The defendant returned to Victory House and has been a resident of this facility until the present date.

[12] At the annual review on September 29, 2005 the defendant's counsel asked the Review Board to order an assessment under Section 672.121(a) of the Code for the purpose of making a recommendation to the Court for a stay of proceedings. After entertaining submissions from the defendant's counsel, the Director of Psychiatric Services (Director), and the Ministry of the Attorney General, on October 11, 2005 the Review Board issued an Assessment Order which directed the Director to provide an opinion of the defendant's fitness to stand trial and the likelihood of his ever becoming fit to stand trial, as well as a forensic analysis of any threat he might pose to the safety of the community.

[13] As a consequence of the Assessment Order, Dr. Dilli, M.D., F.R.C.P.(C.), who has been the defendant's psychiatrist since 2000, wrote a report dated November 2, 2005 on behalf of the Forensic Psychiatric Services Commission. Dr. Dilli's November 2nd report, his past reports with respect to the defendant, and the report of Ms. Gummerson who is a Psychiatric Nurse, formed the basis for the Review Board's inquiry under Section 672.851(1). In addition, the Review Board heard oral evidence from Dr. Dilli, Ms. Gummerson, and the defendant.

[14] The Review Board concluded that the defendant was unfit to stand trial and was unlikely to ever become fit to stand trial. In regard to any threat posed by the defendant to the safety of the public, the Review Board found the defendant did not pose the type of threat that would justify ongoing jurisdiction over him applying the test set out in ***Winko v. British Columbia (Forensic Psychiatric Institute) et al*** [1999] 2 S.C.R. 625. As the Review Board says:

> … while we acknowledge that Mr. Wong has a distant history of violent behaviour while ill, we do take into account that he has been manifestly stable and non-aggressive for more than 14 years now. We also consider that despite his lack of insight, the public is currently protected by his all-encompassing and enveloping, professionally staffed and supervised residential environment. In such an environment, Mr. Wong will continue to be treated and fastidiously supervised and monitored. He will be linked with the necessary community mental health services whose task it will be to maintain an ongoing watch on his mental state. We also take into account that in his current environment his medications are administered to him to the extent that if he misses even one dose of his prescribed formulations that event will not only come to attention but be responded to.
>
> Finally, we take into account that Mr. Wong, by virtue of aging and physical afflictions, is becoming more frail and indeed more dependent, such that the likelihood of his precipitously deciding to relocate to independent accommodation is becoming somewhat remote. ...

THE DEFENDANT'S CIRCUMSTANCES

[15] The defendant is now 72 years old. He was born in China and immigrated to Canada in 1946. He married in 1955 and has four children. The defendant separated from his wife in the 1960's coincident with his hospitalizations and diagnosis as a schizophrenic.

[16] Even in 1991 the defendant had a well established psychiatric history. He had been admitted to psychiatric and forensic psychiatric facilities numerous times and had been consistently diagnosed as a paranoid schizophrenic. In 1966 he was admitted to Riverview Hospital after being picked up by police for carrying a weapon. In 1968 he was again admitted to Riverview Hospital while awaiting a trial on a charge of assault causing bodily harm. After a third admission to Riverview Hospital in 1975, the defendant was followed up by the Strathcona Community Care team who reported a history of non-compliance and lack of insight into his illness.

[17] The defendant has a criminal record that pre-dates the 1991 charges. In 1969 he was convicted of assault causing bodily harm and possession of a weapon. The assault involved an attack on a young girl in a park.

[18] The defendant's current mental and physical state are discussed by the Review Board in their December 1, 2005 recommendation to the Court. First, the members observe that the defendant has failed to demonstrate any insight into the fact that he suffers from a mental illness or that he requires any treatment or medication to manage the symptoms of this illness. Second, the defendant continues to believe that he acted in self defence against the victims of the 1991 assault and has never shown any insight into his involvement in the offence. Third, he constantly asks his caregivers to discontinue his medication but never refuses to take medication when asked to do so. Fourth, neurological testing of the defendant conducted in 2004 showed that he was experiencing short term memory impairment and a significant decline in cognitive functioning such that he is now performing at borderline IQ level. Finally, the defendant has developed facial tics and involuntary movements from the medication he is taking, but refuses to take a drug which will alleviate these symptoms.

[19] Dr. Dilli testified before the Court and his viva voce evidence, as well as his reports dated September 14, 2005, November 2, 2005, and June 21, 2006 shed considerable light on the defendant's current mental and physical health. Dr. Dilli's June 21, 2006 updated report describes the defendant's current mental and physical health as follows:

> … It is evident that there has been no change in Mr. Wong's psychiatric condition over the past fifteen years of his involvements with the Forensic Psychiatric Services. He has been suffering from a chronic schizophrenic illness for four decades. His psychiatric disorder over the past number of years has been compounded with some deterioration in his cognitive capacity. He is partially disorientated and has had difficulties in concentrating. His intelligence quotient is gauged as being in the range of borderline retardation. His mental state has essentially stagnated over the past several decades. No further improvement is expected, however, if he goes off his medication regimen, most likely he will decompensate with more pronounced features of his original serious mental illness. …
>
> … Mr. Wong continues being unable to understand the nature or object of the charges that have been filed against him. He continues lacking in ability to understand the arrest process and nature and severity of his outstanding alleged offences.

[20] It is Dr. Dilli's considered opinion that the defendant is unfit for trial and will unlikely ever be fit to stand trial. Further, it is Dr. Dilli's opinion that the defendant would meet the requirements for an absolute discharge by the Review Board but for the outstanding charge against him. Dr. Dilli acknowledges the defendant would likely decompensate, and possibly become violent with provocation, if for any reason his current medication was discontinued; however, he also believes this is a remote possibility. The defendant is currently in a well supervised facility where his medication is appropriately managed. While the defendant may choose to leave this facility once the Review Board ends its responsibility for his care, there is little likelihood that this will happen. The defendant is very content with his present living situation; he has resided at Victory House for a number of years and has never expressed any desire to leave. As the defendant gets older the chances of him making such a drastic change in his

living arrangements becomes even more remote. Although the defendant has been reluctant to take medication in the past, he has always complied with some coaxing by staff. The exception was medication designed to help the defendant with facial tics.

[21] Dr. Dilli also testified that if the defendant left Victory House, and was living in an unsupervised environment, his activities would still be monitored by mental health professionals such as the Strathcona Mental Health team. Moreover, should his mental state deteriorate because of a failure to take prescribed mediation, consideration would be given to certifying the defendant under the ***Mental Health Act***.

[22] In addition to Dr. Dilli's evidence, the court had the benefit of a letter from Rada Kosic, R.N. who is a resident care supervisor at Victory House. Her letter of September 27, 2005 indicates that the staff at Victory House do not regard the defendant as a threat to them; he is not aggressive with them or other residents. While the defendant regularly asks the doctors to discontinue his medications, he accepts their explanation that he needs the medication due to his health condition. Nurse Kosic also says that the defendant is doing well at Victory House and over the past five years has never expressed a desire to leave.

[23] Finally, Paula Gummerson's report dated September 14, 2005, as well as her viva voce evidence, was considered by the court. Ms. Gummerson is a community mental health nurse who supervises the defendant's care. She confirms that the defendant still fails to understand that he has a mental illness and, despite repeated explanations, is never clear why he is taking medication. Ms. Gummerson is satisfied with the defendant's care at Victory House and reports that the defendant is very happy living there and will stay on even if he is discharged by the Review Board. The defendant also tells Ms. Gummerson that if he is discharged he will stop taking his medications because he feels they do not help him and only make him feel worse. In her viva voce evidence, Ms. Gummerson testified that even if the defendant remains under the supervision of the Review Board, he cannot be forced to take medication against his will.

[24] If the Court enters a stay, Ms. Gummerson says there will be no financial impediment to his continued residence at Victory House. Without a detention order, however, the defendant cannot be forced to reside there. If the defendant continues to reside at Victory House and refuses medication any deterioration in his mental state can be addressed quickly under the ***Mental Health Act***. Once outside of this supervised environment, the defendant's mental health could not be monitored in the same quick time frame.

[25] Finally, it is Ms. Gummerson's opinion that the defendant cannot support himself in an independent living situation. Any confidence in the defendant's mental stability must depend upon his continued residence in a highly supervised environment such as Victory House.

ARGUMENT

[26] The defence relies upon ***Regina v. Kearly*** [2005] O.J. No. 5394 (Ont. Ct. Justice).

[27] The defence argues that for the past 15 years it has not been the authority of the Review Board that has kept the defendant compliant and passively supervised. His mental illness is such that the defendant has no finely tuned understanding of the Review Board's authority and role in his care and supervision. Instead, the defence maintains it is the defendant's relationship with the staff at Victory House that has caused him to be compliant. Given his advanced age, his limited intellectual capacity, and the severity of his mental illness, the defence argues it is highly unlikely the defendant will choose to leave Victory House. He has become set in his life pattern and is unlikely to pose any risk to the public due to the high level of supervision he receives at Victory House.

[28] The defence also maintains that it is in the interests of justice to stay the charges, even though they are serious, because the defendant is going to remain unfit to stand trial and his risk for re-offending has been resolved.

[29] Finally, the defence says that if the defendant chose to leave Victory House, the public will still be protected by the provisions of the ***Mental Health Act***.

[30] The Crown relies upon ***Winko v. British Columbia (Forensic Psychiatric Institute)*** [1999] S.C.J. No. 31 and ***Regina v. Demers*** [2004] 2 S.C.R. 489.

[31] Essentially, the Crown's argument is based upon the risk posed by the defendant should he decide to leave the protective environment of Victory House. Because of the defendant's reluctance to take medication, it can be assumed that he would soon decompensate if he left this residence. Further, the Crown says intellectual deterioration may make him a greater risk for violence because the defendant is less able to deal with stressful situations. Given his violent nature when not medicated, the risk of harm to the public is too great.

[32] The Crown also argues it is not in the interests of justice to stay the charges against the defendant because they are the only guarantee that the defendant will be appropriately supervised. The provisions of the ***Mental Health Act*** may allow him to be certified, but enforcement of this power may come too late if the defendant is living on his own and deteriorates quickly.

[33] Finally, the Crown emphasizes the violent nature of the offences committed by the defendant, his failure to acknowledge responsibility, and the lack of improvement in his mental health as factors to consider in determining whether to grant a stay of proceedings.

DECISION

[34] Addressing the first prerequisite to a stay of proceedings pursuant to Section 672.851(7), I find there is clear information before the Court that the accused remains unfit to stand trial and is not likely to become fit to stand trial at any time in the future. It is the considered opinion of the defendant's psychiatrist, Dr. Dilli, as well as the Review Board, that the defendant's current mental health renders him unfit to stand trial and, further, that his condition has remained static during the past fifteen years since the offence date.

[35] Based upon the annual assessments conducted by the Review Board, as well as Dr. Dilli's most recent interview of the defendant, I agree with their conclusion. In my view, it is highly unlikely, at the age of 72, that the defendant's mental health will ever improve to the point where he will be fit to stand trial. After fifteen years of treatment, counselling, and medication, there has been no change in the defendant's appreciation of the charges against him or of the court process. Indeed, the defendant continues to deny that there is an outstanding charge against him. It remains the defendant's belief that he was a victim in the events giving rise to the charges.

[36] Turning to the remaining prerequisites for a stay of proceedings, the Court must first determine the standard of proof required and whether there is an onus on the defendant to establish that he does not pose a significant threat to the public or that a stay is in the interests of justice. These issues were squarely addressed by the Ontario Court of Justice in ***Kearly.*** In that case, Schneider J. concluded that Section 672.851 was comparable to Section 672.54, which addresses the NCR accused. In both cases the Court found the proceedings were more in the nature of an inquiry and thus not susceptible to a quantifiable standard of proof:

> … The indicated standard of "clear information" presumably connotes a higher degree of certainty than being "satisfied", while both of these thresholds are presumably higher than the court's opinion, on the basis of any relevant information as set out in subsection (4). …I am of the view that the process set out in section 672.851 is comparable to the process set out in section 672.54(a) and that therefore, as indicated by the Ontario Court of Appeal in *R. v. Peckham* [1994] O. J. No. 1995, it is one which is not susceptible to a quantifiable standard of proof. The process is one which involves the weighing and balancing of all the relevant considerations. The process is inquisitorial in nature. (at para. 14)

[37] Section 672.54(a) addresses the Court and the Review Board's jurisdiction to discharge absolutely an accused who has been found not criminally responsible for an offence due to a mental disorder. An absolute discharge may be imposed under this section if it is the opinion of the Court or the Review Board that the accused "is not a significant threat to the safety of the public". In ***Demers*** the Supreme Court of Canada compared the legal

structure of Part XX.1 of the Code, as it related to permanently unfit accused and NCR accused, and concluded the failure to provide for an absolute discharge in the former case violated the accused's rights under Section 7 of the Charter. Implicitly, the Court concluded that the permanently unfit accused and the NCR accused should be treated equally wherever possible and set out guidelines for the process which was ultimately enacted in Section 672.851 of the Code.

[38] In ***Demers*** and ***Winko***, the Supreme Court of Canada held that the regime under Part XX.1 of the Code is inquisitorial rather than adversarial. The Court or the Review Board gathers and reviews all the available evidence relating to the protection of the public, the mental condition of the accused, the reintegration of the accused into society, and any other needs of the accused. Significantly, the Court held there was no evidentiary burden placed upon the accused. As McLachlin J. says in ***Winko***:

> The regime's departure from the traditional adversarial model underscores the distinctive role that the provisions of Part XX.1 play within the criminal justice system. … The NCR accused, while present and entitled to counsel, is assigned no burden. The system is inquisitorial. It places the burden of reviewing all relevant evidence on both sides of the case on the court or the Review Board. The court or the Review Board has a duty to not only search out and consider evidence favouring restricting the 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. … The legal and evidentiary burden of establishing that the NCR accused poses a significant threat to public safety and thereby justifying a restrictive disposition always remains with the court or the Review Board. If the court or the Review Board is uncertain, Part XX.1 provides for resolution by way of default in favour of the liberty of the individual. (at para. 54)

[39] Notwithstanding the word "satisfied" is used in Section 672.851(7), instead of in the "opinion of", which is the language used in Section 672.54(a), the parallels in these provisions are clear. The Code dictates the same test for an absolute discharge and a stay of proceedings; that is, whether the accused, "poses a significant threat to the safety of the public." Further, the nature of the inquiry under Section 672.851 remains inquisitorial because not only will any conclusions be based upon information gathered by the Review Board, but they will ultimately be based upon the same factors considered by the court or the Review Board under Section 672.54. The permanently unfit accused is also in the same position as the NCR accused in that he or she may be unable to instruct counsel or be too ill to be present at the hearing of the application. In my view the authorities cited above stand for the proposition that there is no onus on the permanently unfit accused to demonstrate that he or she does not represent a threat to the public.

[40] Uniquely, however, Section 672.851(7) also requires the Court to consider whether a stay is in the interests of the proper administration of justice and specifically directs the Court to consider certain factors during this inquiry. No similar requirement is found in the parallel authority to order an absolute discharge in Section 672.54(a). In my view, it was not Parliament's intention that the Court carry out a form of inquisition to determine this factor. The language of Sections 672.851(7) and (8) clearly directs the Court to apply the onus and standard of proof equivalent to that required for a stay under Section 24(1) of the Charter; that is, the onus rests with the accused on the balance of probabilities to satisfy the Court that a stay is in the interests of the proper administration of justice.

[41] The inquisitorial regime set out in Part XX.1 is clearly a departure from the traditional adversarial system governing our criminal justice system. It is a limited exception designed to address the needs of an accused and the public interest when the criminal justice system and the mental health regime intersect. Part XX.1 essentially sets out a procedure for transferring the care and supervision of a mentally ill accused from corrections to provincial mental health authorities. While the Court retains some supervisory jurisdiction, it is the Review Board that assumes primary responsibility for the offender.

[42] In the case of a permanently unfit offender, a determination as to whether he or she is a significant threat to the safety of the public clearly lends itself to an inquisitorial proceedings for the reasons articulated by the Supreme Court in ***Winko***. However, a decision as to whether a stay of proceedings is contrary to the proper administration of

justice is more appropriately addressed in an adversarial context because the inquiry involves a balancing of the accused's right to fairness and equity with the public interest in bringing an accused person to trial. This conclusion is supported by the Supreme Court judgment in ***Demers***. In that case the Supreme Court held that in deciding whether a stay should be granted in the case of a permanently unfit offender, the court should:

> "balance the interests that would be served by the granting of a stay of proceedings against the interests that society has in having a final decision on the merits.' This balancing recognizes that the administration of justice is best served by staying proceedings where the affront to fairness and decency is disproportionate to the societal interest in the subjection of the accused to criminal proceedings.. (at para. 64)

[43] Finally, the factors Parliament has directed the Court to consider when determining the proper administration of justice (as described in Section 672.851(8)) clearly reflect the same concerns involved in an application for a stay pursuant to Section 24(1) of the Charter. The court is specifically required to consider the impact of a stay on the public's confidence in the justice system as well as the ability of the Crown to prove the charge. These factors strictly relate to concerns relevant to the administration of justice and do not involve a consideration of the accused's circumstances per se. The risk posed by the accused is already dealt with before the Court considers the potential impact of a stay on the administration of justice. In my view, this is a separate and distinct inquiry that should be addressed in an adversarial context.

[44] Having determined the nature of the inquiry, I turn to the second prerequisite; that is, whether the defendant poses a significant risk to the safety of the public. The following passage from ***Demers*** is instructive in terms of the factors to consider:

> … a stay should be granted to a permanently unfit accused who does not pose a significant threat to the safety of the public, in order to prevent their indefinite subjection to criminal proceedings. In deciding whether or not to grant a stay, courts will have to consider such factors as the nature of the accusation, the time since the offence, later conduct, initial and current medical evaluations, whether the accused is taking medications required to eliminate the risk, … (at para. 64)

[45] Further, the following passages from ***Winko***, albeit in reference to the NCR offender, also provide some guidance to the Court in regard to the meaning of "significant threat" as it applies to the permanently unfit offender:

> … To engage these provisions of the Criminal Code, the threat posed must be more than speculative in nature; it must be supported by the evidence… The threat must also be "significant", both in the sense that there must be a real risk of physical or psychological harm occurring to individuals in the community and in the sense that this potential harm must be serious. A miniscule risk of a grave harm will not suffice. Similarly a high risk of trivial harm will not meet the threshold. Finally, the conduct or activity creating the harm must be criminal in nature …
>
> …Even with the benefit of this somewhat restricted definition of dangerousness, it may be extremely difficult even for experts to predict whether a person will offend in the future… The documented tendency to overestimate dangerousness must also be acknowledged and resisted… (at para. 57-58)
>
> A past offence committed while the NCR accused suffered from a mental illness is not, by itself, evidence that the NCR accused poses a significant risk to the safety of the public. However, the fact that the NCR accused committed a criminal act in the past may be considered together with other circumstances where it is relevant to identifying a pattern of behaviour, … (at para. 62)

[46] Turning to the circumstances of the defendant, I find there are a number of important risk factors present. The

defendant has never acknowledged responsibility for the violence inflicted upon the victims. As the Review Board concluded, the defendant "has consistently clung to the apparently delusional belief that he was in fact the victim of the index offence and acting in self-defence." In addition, after fifteen years of psychiatric treatment, the defendant is still unable to appreciate that he suffers from a mental illness or that he requires any form of medical intervention to manage the symptoms of such an illness. Indeed, the defendant has never understood why he has been required to be in court or appear before the Review Board. Significantly, the defendant's understanding of his illness has not improved with medication.

[47] It is because the defendant is so profoundly mentally ill that he requires constant care and supervision. If he were to leave Victory House to live unsupervised in the community, the defendant would likely decompensate and the pronounced features of his mental illness would reappear. In this state, there is a risk the defendant may commit an act of violence if he felt threatened. Compounding this risk is the fact that the defendant is unlikely to continue taking his prescribed medication on a voluntary basis. Because the defendant has no insight into his mental illness or his need for medication, he is constantly asking his caregivers to discontinue his treatment. Although the defendant has always been persuaded by his caregivers, and has never refused medication outright, there is no doubt that he needs a high level of supervision to ensure the appropriate medication is taken. This kind of supervision will not be available to the defendant if he chooses to live independently.

[48] The defendant's mental illness has also caused his memory and his cognitive functioning to decline over the past fifteen years. He is borderline IQ level and is demonstrating short term memory loss. He can become easily confused and disoriented. These factors increase the risk for violence if the defendant discontinues his medication.

[49] Lastly, the defendant's past history shows a pattern of violence associated with his mental illness. He has a long history of psychiatric treatment that predates the offences before the Court and has a criminal record which includes assault causing bodily harm and possession of a weapon. The 1991 offences involved an extremely violent attack on the two victims. Dr. Dilli candidly acknowledged that if the defendant were to discontinue his medication he may become violent again should he misperceive the events around him as threatening.

[50] On the other hand, there are many factors that reduce the risk posed by the defendant to the safety of the community. The defendant is now an elderly man who is frail and physically infirm. It is unlikely that in his current state the defendant could do much harm to anyone he mistakenly felt was threatening his personal safety. The defendant has been living quietly in Victory House for six years and has never exhibited any aggressive behaviour toward staff or other residents. Further, while on medication for the past fifteen years, the violent symptoms of the defendant's illness have been well managed and he has been manifestly stable and non-aggressive during this entire period.

[51] In addition, the defendant enjoys living at Victory House and has shown no sign of wanting to leave. When asked, the defendant says that he wishes to remain at this residence. Given his advanced age, his limited cognitive functioning, and his restricted mobility, it is unlikely the defendant will ever leave Victory House. While at Victory House the defendant receives twenty-four hour supervision that will protect the public from any possibility of violent behaviour. As the Review Board says in its December 1, 2005 report:

> We also consider that despite his lack of insight, the public is currently protected by his all-encompassing and enveloping, professionally staffed and supervised residential environment. In such an environment, Mr. Wong will continue to be treated and fastidiously supervised and monitored. He will be linked with the necessary community mental health services whose task it will be to maintain an ongoing watch on his mental state. … in his current environment his medications are administered to him to an extent that if he misses even one dose of his prescribed formulations that event will not only come to their attention but will be responded to.

[52] Finally, if the defendant chooses to live outside of the protected environment of Victory House, the community is protected by the authority under the ***Mental Health Act*** to certify the defendant should the symptoms of his mental

illness re-occur. While the mental health authorities cannot respond to the defendant's circumstances as quickly if he is living independently in the community, they nevertheless possess the power to act if the defendant becomes a danger to himself or to others.

[53] Taking into account the above factors, as well as the whole of the evidence before the Court, I am unable to conclude that the defendant represents a significant threat to the safety of the public. In this regard, I find there is only a remote possibility that the defendant would choose to leave Victory House. Within this protected environment there is virtually no risk that the defendant will become a danger to the safety of the public. Even without the authority of the Review Board, the mental health authorities would immediately act under the ***Mental Health Act*** to certify the defendant should the aggressive symptoms of his illness reappear.

[54] Further, despite the defendant's reluctance to take medication, his relationship with the staff at Victory House has consistently resulted in his compliance. It is not the authority of the Review Board that persuades the defendant to take his medication. The apparent severity of the defendant's mental illness precludes any clear understanding of the Review Board, why he came to Victory House, and why he continues to reside there.

[55] Even if the defendant left Victory House, the risk he would commit another violent act while in a delusional state is substantially reduced by his advanced age, his frail physical state, and his low cognitive functioning. Moreover, the provisions of the ***Mental Health Act*** authorize immediate action if the defendant becomes dangerous. These events, however, are extremely remote. In my view, this is one of those cases where, although the potential danger to the public is great, the risk of any harm actually occurring is miniscule.

[56] Turning to the final prerequisite, I must decide whether, on the balance of probabilities, a stay of proceedings is in the interests of the proper administration of justice. Addressing the factors described in Section 672.851(8), the alleged offence, aggravated assault and attempted murder, are undoubtedly extremely serious. The community has a strong interest in bringing the accused to justice and concluding a trial on the merits in any case where the offence involves substantial violence. Where no one is held criminally responsible for such a serious offence, the public, and in particular, the victims, may lose confidence in the justice system.

[57] Nevertheless, there are extenuating circumstances in this case that balance the deleterious impact of a stay on the public's confidence in the justice system. First, the offences occurred fifteen years ago and the victims are apparently fully recovered. Second, for this entire period the defendant has essentially served a jail sentence in hospital. His liberty has been suspended for fifteen years and he has at all times been subject to the authority of the Court and the Review Board. Third, had the defendant been found not criminally responsible for the offence because of his mental illness, he would now meet the criteria for an absolute discharge under Section 672.54. Fourth, the defendant is an elderly man who is only a remote risk to the safety of the community. There is no further need for the Court's involvement. The only way to prevent him from being indefinitely under the control of the criminal justice system is to grant a stay of proceedings.

[58] In my view it is an affront to the dignity and liberty of the mentally ill accused to indefinitely subject them to the threat of criminal proceedings when it is unlikely they will ever become fit to stand trial. Moreover, it is not in the best interests of the justice system to expend limited resources on the monitoring and review of the defendant's fitness to stand trial when he is never going to be fit. A stay of proceedings should be granted in this case to put an end to the criminal proceedings that hovers over the defendant. It is time that he was considered a person with a mental illness rather than an offender.

[59] The application for a stay is therefore granted.

_____

The Honourable C. J. Bruce, P.C.J.