SHAWN DEVIN BRIGHTON

1. Introduction

On October 13, 1999, a Panel of the Review Board (F.A.V. Falzon, Alternate Chair, Dr. G. Laws, Psychiatrist and M. Anderson, Social Worker) held a hearing to determine whether the accused was fit to stand trial. The Panel made a finding that the accused was fit to stand trial, and ordered him returned to Court.

The Panel issued its order with reasons to follow. Since the Panel's order, the Board was advised that all charges against the accused have been stayed. These reasons are nonetheless provided in somewhat abbreviated form, for the record.

2. Chronology

Mr. Brighton, who was 28 years of age at our hearing, faced a count that on April 17, 1998, he committed a sexual assault of Constable Lisa Cowden. The incident allegedly took place on a City bus where the accused sat next to her in such a way that she was pinned against the window, after which he began to rub her leg with his in an "up and down" motion. From the Report to Crown Counsel, it is apparent that the Constable was on the bus in plain clothes, having embarked on the investigation as a result of complaints from a number of other women about the same conduct by the accused.

On May 28, 1998, Her Honour Judge Chaperon found the accused unfit to stand trial, following a court ordered psychiatric assessment report dated May 11, 1998 from Dr. Miller. As Dr. Miller noted, the accused suffers from organic and permanent mild mental retardation. Dr. Hallman's report states that even at age 15, the accused's degree of retardation required that he have constant supervision to ensure that he not engage in bizarre behaviors. In 1996, when he was 25 years old, his ability to comprehend pure language was assessed at the level of a 5.5 year old. He had a history of aggressive behavior which frightened

caregivers. Based on his review in 1998, Dr. Miller concluded that the accused should be declared unfit for trial because “he would unable to sensibly instruct counsel and would be unable to follow events at trial”. Further, he stated that “he appears to have only a very limited concept of the choices open to him at trial and their consequences”.

Along with the Court’s May 28, 1998 finding of unfit to stand trial, the accused was released on a recognizance, the terms of which are set out at Exhibit 6 of our materials.

Following the Court’s May 28, 1998 finding, a new information was issued on June 12, 1998 alleging 4 separate counts of sexual assault against four other women who had complained about similar incidents while riding BC Transit buses. The incidents charged were alleged to have been committed in the period between September 1, 1997 and April 21, 1998. On application by the accused, the Review Board deferred its first fitness hearing in view of the currency of these new charges. On October 8, 1998, Judge Filmer found the accused unfit to stand trial on these charges as well.

In advance of this finding, there were two reports from Dr. Miller. The first was dated August 13, 1998, where he opined that the accused was fit for trial based on the interview of that date.

The materials suggest that between the date of Dr, Miller’s August, 1998 report and the October, 1998 court hearing, the accused experienced a number of set backs including a move from his previous caregivers and a quite negative interaction with his natural father described at Ex. 18 of the materials.

The materials also suggest that after Dr. Miller provided his August, 1998 report, counsel for the accused wrote to Dr. Miller asking for more details on the fitness question and in particular whether, in Dr. Miller’s opinion and given some of the exchanges between solicitor and client, the accused would be able to properly instruct counsel during trial when witnesses will be testifying and he will be under

cross-examination". Dr. Miller conducted two further interviews. As a result of those interviews, Dr. Miller came to the view that the accused was not fit to stand trial – that he may not truly appreciate what being charged with sexual assault means, that he has only a rudimentary understanding of the Court process, that he could not listen to the testimony of witnesses in such a way as to give meaningful instructions to his counsel and that he would be suggestible on cross-examination: ex. 22.

A number of assessment reports describing the accused's condition are included in our materials. A 1989 Assessment report from Glendale Lodge, when the accused was 17, identifies his IQ at 52 and his functioning at a 7 year old level. It was stated that his verbal abilities remain above his level of understanding and his short term memory problem persists. It was recommended that he requires constant supervision and was also recommended that medication might be in order to help him control sexual urges.

In 1996, when he was 24, he saw Dr. MacTavish following concerns that he has been "bugging people verbally or behaviorally and making them angry and upset". Sexual remarks and actions and gangster themes were noted. Dr. MacTavish noted that his level of receptive language functioning without visual cues is under 4 years, but that increases to almost 11 years with visual cues.

Mr. Nathan Ory, with the Glendale Lodge Society, conducted a psychological assessment that same year, following a referral in light of the accused's unpredictable moods and anger. Mr. Ory confirmed that from a "pure language perspective" (no visual cues) the accused functions at a 5.5 year level. However, when stories were read to him, he functioned at almost a 10 year old level, but still without the ability to process and make inferences from the information. Mr. Ory noted that the accused can absorb and reflect information, but has difficulty thinking about it. Mr. Ory was surprised at Shawn's level of self awareness and stated that it is hard to imagine that someone who can describe his circumstances is so dependent on others to give him positive direction to know

exactly what to do. Mr. Ory says Shawn is an imitator rather than a fabricator. He does not have coping skills, cannot make inferences and is vulnerable to immediate audio visual distractions, from which he requires constant protection.

Reports from 1997 noted a positive improvement with his then caregivers but as noted above, those caregivers ended that placement in late August, 1998 because of concerns about the safety of the female adult and the children arising from various frightening references made by the accused.

All of the reports confirmed that need for significant structure and support to ensure he functions properly.

The Review Board's first disposition hearing was held on October 15, 1998 in respect of both verdicts of unfitness made by the Court.

At the October 15, 1998 hearing, the Board did not issue a finding on the question of fitness but rather reserved decision, arising from a dispute about whether the Board could compel the accused to answer questions on that issue. Relying on the Court's previous finding, the Board issued a conditional discharge order, while adjourning to take submissions on the compellability issue.

The Board convened again in January, 1999. In advance of that hearing, it received two December, 1998 residential assessment reports canvassing the accused's previous placements and making recommendations for residential placement, with a requirement for 24 hour supervision [see Ex. 27, p. 2] as well as a January, 1999 report from Ms. Mills, all of which pertain to the disposition issue.

The Board also received a follow up report from Dr. Miller on the fitness issue. That report concludes that the major problem would be in giving instructions to his own counsel.

On January 8, 1999, the Board examined Mr. Miller. The Chair asked a number of questions and discussion ensued regarding whether perhaps the fitness standard being applied to this accused was not the appropriate legal standard, given that the court also regularly hears evidence, for example, from children and others with lower analytical functioning than is regarded as "normal".

The Board also heard orally from the parties on the compellability question and gave oral reasons concluding that the accused was compellable. Having issued that finding, the Board then further adjourned its inquiry into fitness upon counsel's advice that he was actively considering an appeal. The Board made a couple of minor amendments to the wording of the order.

In advance of our hearing, we have the benefit of Dr. Miller's August 25, 1999 report (Ex 31) which reported on the results of their August 17th interview. His conclusions are outlined at p. 4 of Ex 31:

> Without prompting Mr. Brighton seems to retain memory that he has been charged with sexual assault. He knows that one of the incidents relates to sexual assault of a policewoman. He knows that there are charges relating to at least one other woman and he knows that the incidents are alleged to have occurred on the bus. He knows that he has a lawyer, he knows he could go to jail if found guilty. He does not want to be found guilty. He knows that Mr. Carr will do his best to help him.
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> Past experiences indicate that Mr. Carr might, if he chose, be able to suggest to his client various facts about the case. Mr. Brighton is unlikely to be able to give Mr. Carr much more information other than that which he provided to me. The psychological test results indicate that Mr. Brighton is unlikely to be able to understand the progress of the proceedings at trial. I think that he is likely to continue to remember whilst at trial that he is on trial and that the charges relate to sexual assault.
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> If one regards the test of fitness as simply requiring the accused to know that he has been charged and to be able to give instructions to counsel limited to his desire to plead guilty or not guilty then by my examination today, Mr. Brighton might well yet again be interpreted as fit for trial. Much depends on Mr. Brighton's mood on the day, the way questions are phrased and the degree of patience with which he is listened to. Mr. Brighton's apparent understanding if questioned at a fitness trial may be different. In reaching its decision whether to return Mr. Brighton for a trial

> of fitness the Review Board might wish to consider whether the ability to follow proceedings at trial is necessary in addition to the ability to give rudimentary instructions to counsel.

3. Decision

At the hearing, counsel for the accused took the position that his client was not required to give evidence, despite this Board's previous conclusion as to compellability and given his stated intent to challenge that decision. In the circumstances, the Panel found that it was unnecessary to determine whether we ought to take steps to further compel the accused, as it was open to us to arrive at a conclusion on fitness based on the evidence of Dr. Miller who had interviewed the accused numerous times and recently.

In summary, it was the Panel's view that the accused not only understood the nature of the proceedings and their consequences, but could communicate with counsel in a fashion sufficiently meaningful to satisfy the fitness test.

While there was some concern about the accused engaging in "confabulation" of a boasting sort, there was no evidence that the accused had confabulated about the circumstances of the index offences, or that he held any false belief about those alleged offences. There is no evidence that false memories have been implanted or that he suffered any gross disorientation respecting them. Further, while there was evidence that he was suggestible, many witnesses are suggestible and there was no evidence that he was so suggestible that he would admit to a state of facts that simply were not true.

We also took into account the nature of the index offences. Those offences allege an habitual pattern, committed many times in a particular fashion. In our view, the fact that the accused has the ability to generally recall the circumstances surrounding these offences is sufficient to satisfy the fitness test. That he may not remember specific instances is not surprising as given the facts as alleged since an alleged repeat offender of average mentality might well have the same specific memory concerns in the circumstances.

We took into account that a trial on these issues would not be complex and would involve brief testimony by the complainants. Any concerns about the accused following along would in our view be amenable to reasonable accommodation by the parties and the court.

We of course weighed heavily defence counsel's position that he did not feel he could get proper instructions from the accused. In the circumstances, however, we believe that counsel's views, in the circumstances, were informed by a perspective on the standard for fitness which exceeds that required by the case law.

In view of our conclusions on this issue based on the evidence before us, we simply note for the record that the Panel did not need to consider whether, given the accused's compellability and his refusal to give evidence, it would be appropriate to draw a negative inference regarding his fitness to stand trial from his refusal to give evidence before us.

We note in closing that while our conclusion regarding fitness was contested, our conditional discharge order in this case reflects a position that was not a matter of controversy between the parties. That order was, in our view, the disposition least restrictive of the accused's liberty consistent with public protection, which latter interest would, based on the evidence before us, have been placed at significant risk if an absolute discharge order had been made.

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