COURT OF APPEAL FOR ONTARIO

CITATION: Gibson (Re), 2022 ONCA 527
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Lauwers, Roberts and Trotter JJ.A.

IN THE MATTER OF: Matthew Gibson

AN APPEAL UNDER PART XX.1 OF THE *CRIMINAL CODE*

Anita Szigeti and Maya Kotob, for the appellant

Catherine Weiler, for the respondent, Attorney General of Ontario

No one appearing for the respondent, Person in Charge of St. Joseph's Healthcare Hamilton

Heard: May 13, 2022

On appeal from the disposition of the Ontario Review Board dated November 29, 2021, with reasons dated December 17, 2021.

Lauwers J.A.:

(1) Introduction

[1] The appellant appeals from the November 29, 2021 disposition of the Ontario Review Board ordering that he remain subject to a conditional discharge. He argues that the Board erred in finding that he remains a significant threat to

public safety and seeks an absolute discharge. I agree that the Board's decision is unreasonable. I would allow the appeal, and pursuant to s. 672.78(3)(a) of the *Criminal Code*, R.S.C., 1985, c. C-46, grant the appellant an absolute discharge.

(2) Background

[2] The appellant is 52 years old and has been under the Board's jurisdiction since January 31, 2006, when he was found not criminally responsible of breach of recognizance and criminal harassment.

[3] The appellant was involved in a serious motorcycle incident in 1984, which left him in a three-and-a-half-week coma. The appellant's mental health issues escalated. His present diagnoses are Schizophrenia, Undifferentiated Type, Closed Head Injury, Minor Sequelae, and Cannabis Use Disorder.

(3) The Index Offences

[4] On June 1, 2005, the appellant entered into a probation order for assault with a weapon and criminal harassment. He had taped a note to a neighbour's vehicle addressed to the owner's daughter for the second time in a two-month period. The neighbour confronted the appellant, who then pointed an eleven-inch steak knife at the neighbour and stated, "don't fuck with me". The neighbour called the police. Next, on June 16, 2005, while subject to the June 1 probation order, the appellant attended at another neighbour's residence and asked the resident to deliver a plastic bag containing clippings of photographs of the former

homeowner's family to that homeowner. The resident delivered the package on June 17, 2005. That same day the appellant repeated the request with a second package. This time the former homeowner called the police and provided a video to them, showing the appellant on the lawn yelling at the family. He was arrested and charged with failing to comply with his probation order.

(4) Prior Board Dispositions

[5] There is no need to list the Board's many dispositions over the last 15 years. The appellant has limited insight into his illness, his need for treatment, and his susceptibility to the effects of high-THC street cannabis, which triggers his psychotic symptoms.

(5) Does the Appellant Pose a Significant Threat to the Safety of the Public?

(a) The Governing Principles

[6] Part XX.1 of the *Criminal Code* establishes the legislative regime for mental disorders and dealing with NCR accused. As Bastarache J. observed in *Mazzei v. British Columbia (Director of Adult Forensic Psychiatric Services)*, 2006 SCC 7, [2006] 1 S.C.R. 326, at para. 32: "the primary purpose of the legislative scheme is to protect the public while minimizing any restrictions on the NCR accused's liberty interests". The Board is charged with the responsibility of determining the necessary and appropriate disposition, meaning the least onerous

and least restrictive disposition necessary to protect the public: *Winko v. British Columbia (Forensic Psychiatric Institute)*, [1999] 2 S.C.R. 625, at para. 47.

[7] This court noted in *Pellett (Re)*, 2017 ONCA 753, 139 O.R. (3d) 651, at para. 21, that when "this element [of public safety] is absent, the *Criminal Code* ceases to have a role". The court held, at para. 22, "[i]f the individual is 'not a significant threat to the safety of the public', the Board *shall* order that the person be discharged absolutely". The court drew on the words of McLachlin J. (as she then was) in *Winko*, at para. 57:

> To engage these provisions of the *Criminal Code*, the threat posed must be more than speculative in nature; it must be supported by 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 minuscule 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. In short, Part XX.1 can only maintain its authority over an NCR accused where the court or Review Board concludes that the individual poses a significant risk of committing a serious criminal offence. If that finding of significant risk cannot be made, there is no power in Part XX.1 to maintain restraints on the NCR accused's liberty. [Citations omitted and emphasis added.]

[8] Under s. 672.5401 "significant threat to the safety of the public" means "a risk of serious physical or psychological harm to members of the public – including

any victim of or witness to the offence, or any person under the age of 18 years – resulting from conduct that is criminal in nature but not necessarily violent".

[9] Huscroft J.A. said in *Carrick (Re)*, 2015 ONCA 866, 128 O.R. (3d) 209, at para. 17, that "the 'significant threat' standard is an onerous one". He added that "[t]he board must be satisfied as to both the existence and gravity of the risk of physical or psychological harm posed by the appellant in order to deny him an absolute discharge". Mere speculation is insufficient. See also, *Sim (Re)*, 2020 ONCA 563, at paras. 63-65, *per* Strathy C.J.O., *Marmolejo (Re)*, 2021 ONCA 130, 155 O.R. (3d) 185, *per* Tulloch J.A., at paras. 33-37.

[10] The Board is a specialized, expert body and its decisions are owed a significant degree of deference: *R. v. Owen*, 2003 SCC 33, [2003] 1 S.C.R. 779, at paras. 29, 37. Appellate courts are "'not [to] be too quick to overturn' a review board's 'expert opinion' on how best to manage a patient's risk to the public": *R. v. Conway,* 2010 SCC 22, [2010] 1 S.C.R. 765, at para. 95. The Board's decision must be internally coherent, demonstrate a rational chain of analysis, and be justified on the facts and the law: *Canada (Minister of Citizenship and Immigration) v. Vavilov*, 2019 SCC 65, 441 D.L.R. (4th) 1, at para. 85. The Board's reasons must be able to withstand a "somewhat probing examination" to determine whether the decision is justifiable, transparent, and intelligible: *Owen*, at para. 33; *Sim*, at paras. 66-68.

(b) The Board's Reasons

[11] The appellant's insight into his mental illness and need for medication remains limited. He does not believe he has schizophrenia, though he has remained adherent to his medications.

[12] The hospital report includes a psychological risk assessment, which concludes that the appellant's risk for future violence is moderate while under the Board's jurisdiction and would be high otherwise. The report states that the appellant will likely discontinue his treatment without the Board's oversight, making it "highly likely" that he will engage in acts of physical or psychological violence. The appellant's attending physician and co-author of the hospital report, Dr. Y. Naidoo, testified at the hearing. While adopting the report's contents, Dr. Naidoo's ultimate assessment was that the appellant's risk to public safety was moderate-to-high, not high, as posited by the report. Dr. Naidoo testified about the deleterious effects of the appellant's consumption of high-THC street cannabis. He expressed his concern that if the appellant were absolutely discharged, he would not be eligible for admission to a forensic hospital if he decompensated, and the hospital support system he uses now would no longer be available to him.

[13] The report notes that although the appellant's present disposition requires that he be seen at least twice per month, he has had five weekly contacts with his professional supports while residing in the community. He uses cannabis daily and

reports that it helps him alleviate his chronic pain, and he is unwilling to abstain. The appellant has consistently tested positive for cannabis in the reporting period. He requires a high degree of monitoring, because he has a history of psychosis when using cannabis. His mental status fluctuates and is said to be highly affected by his cannabis use, particularly when he uses street cannabis with high-THC content. The appellant has been prescribed medical cannabis which does not trigger psychosis and is mostly adherent to its use, though when he runs out he occasionally uses high-THC street cannabis.

[14] The Board noted that the appellant required readmission into the hospital three times in the past year, his housing was unstable, and his threat to public safety is moderate-to-high absent the oversight of the forensic system. On this basis he was to continue to be discharged on conditions, with the amendments suggested by the hospital.

[15] More particularly, the appellant was voluntarily admitted into the hospital on November 26, 2020. He was experiencing increased psychotic symptoms and expressing delusional thought content. He “presented with labile mood due to increased cannabis use and external stressors”. After his mental status stabilized, he was discharged on December 9, 2020. He was readmitted into the hospital on January 22, 2021, as a voluntary patient, after he became upset with his Flexible Assertive Community Treatment Team worker over the phone. When he was

asked about his symptoms, he said that the absence of cannabis had resulted in worse symptoms, and he expressed limited insight into how cannabis might increase his symptoms. He was discharged to his mother's home. On June 23, 2021, he was admitted for a third time when he felt he could no longer tolerate living with his mother. He asked for readmission to the hospital until he could find alternative housing.

[16] The Board accepted the hospital report's conclusions and based its disposition on them. The Board concluded that, on the evidence, the appellant continues to represent a significant threat to the safety of the public for the reasons stated in the hospital report and adopted by Dr. Naidoo in his evidence.

[17] However, the Board added an important amendment to a condition in the previous disposition: that the appellant "abstain absolutely from the non-medical use of alcohol or drugs or any other intoxicant, save and except cannabis obtained through a medical prescription…". The underlined words are new.

(c) The Principles Applied

[18] As this court pointed out in *Sim*, at para. 70: "*Winko* directs that the regime established under Part XX.1 is inquisitorial: 'It places the burden of reviewing all relevant evidence on both sides of the case on the court or Review Board' (emphasis added): *Winko*, at para. 54". The duty, as *Winko* notes, is "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…".

[19] The Board's approach did not take seriously that the "significant threat" standard is an onerous one. The Board downplayed the evidence that showed the appellant's ability to cope with his disease, instead, relying on some rote themes that this court has questioned and rejected on several occasions.

[20] There are several pieces of cogent evidence that the Board failed to take into account. First, apart from the now very dated index offences, there is no record that the appellant has made threats or been violent, even during times when he was in psychosis. There is simply no evidence to suggest that his discharge poses a real risk of serious criminality. That conclusion is no more than speculative on the evidence. Second, the appellant has lived successfully in the community for years and without incident. Third, he has complied with his medication requirements. Fourth, he voluntarily seeks assistance when he is decompensating, despite his limited insight. Fifth, the transient instability in his housing situation was explained and has been resolved. Sixth, the appellant has formed a durable relationship with a non-forensic treatment team and complies with their advice. This team will serve in place of the forensic team. Seventh, as the additional and new condition appears to recognize, the appellant has demonstrated his ability to consume medical cannabis as needed for medicinal reasons, and this has

lessened his use of street cannabis with high-THC content that can provoke psychosis. When symptoms have appeared, the appellant has voluntarily sought assistance and done nothing anti-social.

[21] The Board invokes the appellant's limited insight as one justification for continuing his conditional disposition. But this court has repeatedly said that this is not, in itself, sufficient to establish a significant threat to public safety. See especially, *Kalra (Re)*, 2018 ONCA 833, at para. 52 and *Marmolejo (Re),* at paras. 41-42. Despite his limited insight, the appellant has advised his treatment team and the Board that he will continue to take his medications after discharge. He testified that he is "schizophrenic" and "sick". The appellant self-administers his oral antipsychotic medications and is fully compliant, as confirmed by screenings. He has reminded the treatment team to renew his prescription when his supply is low. This shows that his limited insight is adequate. In any event, we note that his mother is his substitute decisionmaker for treatment.

[22] There is no doubt that the appellant has ongoing mental health issues. While these are relevant, they are not necessarily determinative of risk, as this court pointed out in *Sim*, at para. 65 and *Carrick (Re)*, 2015 ONCA 866, 128 O.R. (3d) 209, at para. 39. Further, while an absolute discharge might not be in the appellant's best interests, that does not justify his continued supervision under

Part XX.1 of the *Code*, as this court pointed out in *Sim*, at para. 65, *Pellett*, at para. 32, and *R. v. Ferguson*, 2010 ONCA 810, 264 C.C.C. (3d) 451, at para. 45.

(6) Disposition

[23] The evidence does not meet the "onerous" standard under s. 672.54 of the *Criminal Code*. The appeal is allowed. The decision of the Board is set aside. In its place, and pursuant to s. 672.78(3)(a) of the *Code*, I would order an absolute discharge.

Released: July 13, 2022 "P.L."

"P. Lauwers J.A."
"I agree. L.B. Roberts J.A."
"I agree. Gary Trotter J.A."