

NOVA SCOTIA COURT OF APPEAL

Citation: *R. v. Rooney*, 2002 NSCA 154

Date: 20021120

Docket: CAC 188832

Registry: Halifax

Between:

John James Rooney

Appellant/Applicant

v.

Her Majesty The Queen

Respondent

Judge: The Honourable Justice Linda Lee Oland, In Chambers

Appeal Heard: November 20, 2002, in Halifax, Nova Scotia

Written Judgment: December 3, 2002

Held: Application granted.

Counsel: Malcolm Jeffcock, for the Appellant
Dana Giovannetti, Q.C., for the Respondent

Oland, J.A.:

- [1] The applicant, John James Rooney, applied in Chambers pursuant to s. 672.76(2)(b) of the *Criminal Code*. He sought the suspension of an interim disposition order issued by the Nova Scotia Criminal Review Board (the “Review Board”) pending the hearing of his appeal of that order. I granted the application with reasons to follow. These are those reasons.
- [2] In 1995 the applicant was found not criminally responsible of the charge of manslaughter. Following detention in hospital and treatment, the applicant improved to the extent that in 2002 he was living in the community under the terms of a conditional discharge pursuant to a disposition order which had been continued by a further disposition order made by the Review Board on April 29, 2002.
- [3] In June 2002, as a result of concern by his treating team in relation to his psychiatric condition, the applicant was re-admitted to the East Coast Forensic Psychiatric Hospital (the “Hospital”). Since the increase in restrictions on his liberty exceeded seven days, the Review Board held a hearing to review the previous disposition as required under s. 672.81(2) of the *Code*.
- [4] Following the hearing on October 9, 2002, the Review Board issued an interim disposition order ordering that the applicant continue to be detained in the Hospital. His conditional discharge was revoked and a warrant of committal issued. That order also provided that his privilege level would be “directly supervised community passes.”
- [5] The hearing of the applicant’s appeal against the interim disposition order has been set down for January 29, 2003.
- [6] The authority to suspend a disposition of the Review Board is found in s. 672.76 of the *Code* which reads in part:

672.76 (1) Any party who gives notice to each of the other parties, within the time and in the manner prescribed, may apply to a judge of the court of appeal for an order under this section respecting a disposition or placement decision that is under appeal.

(2) On receipt of an application made pursuant to subsection (1) a judge of the court of appeal may, if satisfied that the mental condition of the accused justifies it,

...

(b) by order, direct that the application of a placement decision or a disposition made under paragraph 672.54(b) or (c) be suspended pending the determination of the appeal.

- [7] In *Conway v. Brockville Psychiatric Hospital* (1994), 18 O.R. (3^d) 27 (Ont. C.A.) at p. 29, Griffiths, J.A. in Chambers provided the following guidance as to the approach to be taken in applications under s. 672.76:

Clearly, the provisions of s. 672.76 are designed to give a judge in chambers authority to relieve against a board disposition pending appeal where it is in the best interest of the accused having regard to his mental condition. I agree with Ms. Train, counsel for the respondent hospitals, that a judge should invoke this section only in extraordinary circumstances. Clearly, the onus is on the applicant under this section. In my view, that burden requires the applicant to demonstrate that there are compelling reasons to doubt the validity or soundness of the disposition made by the Review Board as it relates to the mental condition of the applicant on an application such as this.

The judge should not be restricted to the evidence put forward by the applicant, but the findings of the Review Board, to the extent they appear supportable, ought to be given careful consideration.

- [8] The materials filed in support of this application include a copy of the transcript of the Review Board hearing; two affidavits sworn by the applicant's attending physician, Dr. Emanuel P.B. Aquino, a forensic psychiatrist who is employed at the Hospital; and an affidavit by Louise Bradley, Health Services Director of that Hospital. Counsel for the applicant also filed written submissions and counsel for the Crown advised its consent to the allowance of the application.
- [9] After reviewing the application materials, I am of the view that the applicant has met the onus under s. 672.76.
- [10] According to the hearing transcript, members of the applicant's treating team advised the Review Board that the applicant was brought back to hospital following his refusal of medication, his testing positive for marijuana use and his admission to marijuana and PCP use during a weekend, and his increasing paranoia and irritability. They reported that he showed very good response to changes in his medication and had been given back some of his privileges. The team recommended that the applicant continue with the conditional discharge.

- [11] The applicant was not represented at the hearing. It appears that at that time, he may not yet have been stabilized on a new course of medication which commenced a week earlier. There was a somewhat confusing exchange between the applicant and a board member regarding his attitude towards taking medication. It seems from the transcript, particularly the Crown prosecutor's summation to the Review Board, that the Board may not have understood the applicant's statements in this regard.
- [12] The applicant and his treating team both advised the Review Board that the applicant did not have a drug problem.
- [13] The oral decision of the Review Board, rendered at the end of the hearing which lasted just under an hour, was brief. It did not include any detailed findings, for example, as to the mental condition of the applicant, his best interests, or the risk to the community if the conditional discharge was continued.
- [14] Dr. Aquino had intended to be present at the hearing but, unfortunately, he arrived after it was over. According to his affidavits, he was very surprised to hear that the Review Board had revoked the conditional discharge and had ordered detention in Hospital with a ceiling of liberty set at "directly supervised community passes." Dr. Aquino deposed that prior to his return to the Hospital to address medical concerns, the applicant had been residing in the community on a conditional discharge and was gainfully employed, and that before the conditional discharge he had enjoyed unsupervised passes into the community since 1997.
- [15] The applicant's attending physician also swore that the applicant's mental condition was much improved since his readmission to the Hospital and very much improved since the Review Board hearing, that his medication was now not taken orally but administered to him intra-muscularly every three weeks, that any failure to comply would be quickly apparent to his treating team, and that he should continue to remain stable as long as he is on his medication.
- [16] Dr. Aquino's first affidavit read in part:

That I anticipate Mr Rooney's medical condition will continue to improve and that as improvement is noted there should be an accompanying gradual increase in his level of liberty until such time as he has re-established himself in the community and is discharged from the Hospital.

That the current Disposition of the Review Board prevents this clinical progress from occurring and is far more onerous and restrictive than is required taking into account the medical condition of Mr. Rooney and the need to protect the public.

The Crown indicated that it had no evidence to contradict Dr. Aquino's opinion that the current disposition will prevent clinical process.

[17] His second affidavit included the following passage:

That there is no medical reason to believe that Mr. Rooney now poses any more risk to the general public than he did at the time that the Review Board granted his conditional discharge; in fact in view of his improved medical condition he likely presents less of a risk at the present time.

[18] A suspension of the interim disposition order would not mean that the applicant would be summarily released from the Hospital. Rather, he would remain subject to the terms and conditions of the April 29, 2002 disposition order which continued his previous conditional discharge. Moreover, according to Dr. Aquino, for treatment reasons, the applicant would not be immediately released on the terms of that conditional discharge. Instead, as his clinical condition improves, his liberty would increase over time to a level that the conditional discharge would be reinstated.

[19] In the particular circumstances of this application, I was satisfied that the mental condition of the applicant justifies the suspension of the interim disposition order pending the determination of the appeal. The application is granted.

Oland, J.A.

