NOVA SCOTIA COURT OF APPEAL
Citation: ***R. v. K.A.S.***, 2007 NSCA 119

Date: 20071207
Docket: CAC 282622
Registry: Halifax

Between:

K.A.S.

Appellant

v.

Her Majesty the Queen

Respondent

Judges:	MacDonald, C.J.N.S.; Bateman and Saunders, JJ.A.
Appeal Heard:	November 14, 2007, in Halifax, Nova Scotia
Held:	Appeal dismissed per reasons for judgment of Bateman, J.A.; MacDonald, C.J.N.S. and Saunders, J.A. concurring.
Counsel:	Malcolm Jeffcock, Q.C. for the appellant Peter Rosinski, for the respondent

Reasons for judgment:

[1] This is an appeal from a June 25, 2007 Order of the Nova Scotia Review Board continuing the conditional discharge of K.A.S. pursuant to s. 672.54(b) of the **Criminal Code of Canada**, R.S.C. 1985, c. C-46.

BACKGROUND:

[2] On February 25, 2004, K.A.S., then 38 years old, was found to be "not criminally responsible" ("NCR") by reason of mental disorder in relation to two charges of communication for purposes of prostitution (s. 213(1)(c) of the **Criminal Code**).

[3] Dr. R. Kronfli, who conducted a psychiatric assessment for the Court, concluded that she suffers from chronic schizophrenia, paranoid sub type. K.A.S. had been diagnosed with that illness for more than a decade. K.A.S. reported to Dr. Kronfli that at the time of the offences she was working as an undercover volunteer for the R.C.M.P. to clear Gottingen Street of "johns". She believed she had been hypnotized to work as a prostitute and that a million dollars worth of condoms had been placed in her uterus so that she does not have to use protection against sexually transmitted disease. She believed that she had plastic and lubricant in her mouth which also protected her from disease. K.A.S. is HIV positive. Other charges before the court at that time included uttering threats, assault and failure to comply with undertakings.

[4] In a March 29, 2004 report, Dr. Kronfli described K.A.S.'s past psychiatric history as "overwhelming" with more than 20 admissions to inpatient acute psychiatric units. Most recently she had been receiving biweekly medication by injection at the Abbie J. Lane outpatient clinic but was not consistent in attending to be medicated.

[5] As a result of the verdict that she was not criminally responsible due to a mental disorder, K.A.S. has fallen under the jurisdiction of the Nova Scotia Review Board (**Criminal Code** Part XX.1). The Board's initial Disposition Order on April 9, 2004, required that she be detained at the East Coast Forensic Psychiatric Hospital.

[6] K.A.S. went absent without leave (“AWOL”) from that detention on June 3, July 24 and November 12, 2004 and again on April 8, 2005. On each occasion she was located and returned to the hospital. She tested positive for cocaine use after her June 3 and November 12, 2004 absences.

[7] Since that time there have been several Review Board hearings and dispositions, generally increasing K.A.S.'s community privileges. In each case the disposition has been a "conditional discharge" with terms requiring K.A.S. to reside in premises approved by the hospital and to comply with recommended treatment. Unauthorized absences continued, coinciding with repeated cocaine use.

[8] In a Disposition Order dated June 25, 2007 the Review Board again granted a conditional discharge, requiring K.A.S. to reside in hospital approved premises, continue with recommended treatment and abstain from alcohol and illicit drug use. K.A.S.'s diagnosis of chronic schizophrenia remains unchanged although her psychosis is controlled with medication.

[9] K.A.S. appeals the June 25 Disposition, saying that she is entitled to be absolutely discharged.

ISSUES:

[10] It is K.A.S.’s position that she should no longer be under the jurisdiction of the Review Board. She says the restrictions on her liberty are now intended to address her drug addiction and HIV status which are community health issues and not properly the subject of continuing proceedings under Part XX.1 of the **Criminal Code**. She submits that the Review Board erred in its interpretation of s. 672.54 of the **Code**.

STANDARD OF REVIEW:

[11] An appeal on a question or law or fact lies to this Court from a disposition made by the Review Board (s. 672.72 **Criminal Code**). Pursuant to s. 672.78(1) we may allow the appeal where:

(a) it is unreasonable or cannot be supported by the evidence;

(b) it is wrong on a question of law; or
(c) there was a miscarriage of justice.

[12] As Binnie, J. wrote for the Court in **R. v. Owen** [2003] 1 S.C.R. 779, the **Code** prescribes the standard of review to be applied on an appeal from a Disposition by the Review Board. The standard under s.672.78(1)(a) is reasonableness *simpliciter*:

> 33 The first branch of the test corresponds with what the courts call the standard of review of reasonableness *simpliciter*, i.e., the Court of Appeal should ask itself whether the Board's risk assessment and disposition order was unreasonable in the sense of not being supported by reasons that can bear even a somewhat probing examination: *Canada (Director of Investigation and Research) v. Southam Inc.*, [1997] 1 S.C.R. 748, at para. 56, *Law Society of New Brunswick v. Ryan*, [2003] 1 S.C.R. 247, 2003 SCC 20, and *Dr. Q v. College of Physicians and Surgeons of British Columbia*, [2003] 1 S.C.R. 226, 2003 SCC 19. If the Board's decision is such that it could reasonably be the subject of disagreement among Board members properly informed of the facts and instructed on the applicable law, the court should in general decline to intervene.

[13] As was discussed at some length by Binnie, J. (at paras. 29 through 37), this reasonableness standard recognizes the expert composition of the Review Boards and the substantial expertise required to assess whether an accused person's mental condition renders him or her a significant threat to the safety of the public. The **Code** requires that the chairperson be a federally appointed judge, or someone qualified for such an appointment. At least one of the minimum of five members must be a qualified psychiatrist. If only one member is so qualified, at least one other member must "have training and experience in the field of mental health", and be entitled to practise medicine or psychology (ss. 672.39 and 672.40).

[14] The Board's decision need not be unanimous. It is the decision of the majority of the present and voting members of the Board that governs (s.672.42). The Board's medical expertise, specialized knowledge and its advantage in observing witnesses are factors which command deference (**Owen**, **supra**, para. 37).

[15] The Court in **Owen** rejected the Crown's submission that the test should be that of "unreasonable verdict" as applied in criminal cases:

> 34 . . . An NCR disposition order is not punitive: *Winko, supra*, at paras. 41 and 71. It arises out of a process that is inquisitional, not adversarial, that takes place before an administrative board, not a court. To the extent the Crown seeks to raise the bar of judicial review higher than reasonableness *simpliciter*, I think the attempt should be resisted. An NCR disposition order is to be reviewed on the basis of administrative law principles. Resort must therefore be taken to the jurisprudence governing judicial review on a standard of reasonableness *simpliciter*, as most recently discussed in *Dr. Q, supra*, at para. 39, and *Ryan, supra*, at para. 47.

[16] Thus, in reviewing the Board's decision under s. 672.78(1)(a), our task is to review the evidence and ask ourselves whether the Board's risk assessment and disposition order was unreasonable in the sense of not being supported by reasons that can bear even a somewhat probing examination (**Owen**, **supra** at para. 33 and **Beauchamp v. Penetanguishene Mental Health Centre (Administrator)** (1999), 138 C.C.C. (3d) 172 (Ont. C.A.), at p. 180).

ANALYSIS:

(i) The NCR Scheme:

[17] In order to provide context it is helpful to consider the nature of an NCR designation. In **Winko v. British Columbia (Forensic Psychiatric Institute)**, [1999] 2 S.C.R. 625, the constitutionality of the NCR provisions of the **Criminal Code** were challenged. McLachlin, J., as she then was, writing for the majority of the Court, explained the difference between confinement under the NCR provisions and confinement for the purpose of punishment:

> 93 The appellants also emphasize the "infinite" potential of supervision of an NCR accused. As alluded to earlier, this argument overlooks the fundamental distinction between the State's treatment of an NCR accused and its treatment of a convicted person. One purpose of incarcerating a convicted offender is punishment. The convicted offender is morally responsible for his or her criminal act and is told what punishment society demands for the crime. The sentence is thus finite (even if not fixed, i.e., a "life" sentence). By contrast, it has been determined that the NCR offender is not morally responsible for his or her criminal act. Punishment is morally inappropriate and ineffective in such a case because the NCR accused was incapable of making the meaningful choice upon which the punishment model is premised. Because the NCR accused's liberty is not restricted for the purpose of punishment, there is no corresponding reason for finitude. The purposes of any restriction on his or her liberty are to protect society

> and to allow the NCR accused to seek treatment. This requires a flexible approach that treats the length of the restriction as a function of these dual aims, and renders a mechanistic comparison of the duration of confinement inapposite.

[18] An NCR designation is subject to regular review. The Board must hold a hearing inquiring into the NCR accused's status whenever requested by the accused; whenever a greater restriction on his/her liberty is imposed; and, in any event, annually. Additionally, the Board may convene a hearing at any time on its own initiative (s. 672.81).

[19] At the conclusion of a Review Hearing three disposition options are available to the Board:

> **672.54** Where a court or Review Board makes a disposition under subsection 672.45(2) or section 672.47 or 672.83, it shall, taking into consideration the need to protect the public from dangerous persons, the mental condition of the accused, the reintegration of the accused into society and the other needs of the accused, make one of the following dispositions that is the least onerous and least restrictive to the accused:
>
> > (a) where a verdict of not criminally responsible on account of mental disorder has been rendered in respect of the accused and, in the opinion of the court or Review Board, the accused is not a significant threat to the safety of the public, by order, direct that the accused be discharged absolutely;
> >
> > (b) by order, direct that the accused be discharged subject to such conditions as the court or Review Board considers appropriate; or
> >
> > (c) by order, direct that the accused be detained in custody in a hospital, subject to such conditions as the court or Review Board considers appropriate.

[20] The Board may order an absolute discharge only if, in its opinion, the NCR accused is not a "significant threat to the safety of the public". The hearing process is inquisitorial not adversarial. There is no presumption that an NCR person is dangerous. While there is no evidentiary or legal burden on an NCR person to prove lack of dangerousness, if the evidence supports the conclusion that the NCR accused is a significant risk, it may be in the NCR person's interest to adduce additional evidence (**Winko**, **supra**, para. 53).

[21] The Board's finding that an NCR accused is a significant threat to the safety of the public must be based upon evidence before it, not mere speculation or conjecture (**Winko**, **supra**, para. 49). However, the finding necessarily involves an element of prediction.

[22] The behaviour that will constitute the significant threat must be criminal in nature. There must be a real risk of serious physical or psychological harm to a member of the community. Neither a high risk of inconsequential harm nor a minuscule risk of significant harm will suffice (**Winko**, **supra**, para. 57).

[23] Acknowledging the difficulty in predicting the risk of future offence by an NCR accused McLachlin, J. said (**Winko**, **supra**):

> 57 To assist with this difficult task, and to protect the constitutional rights of the NCR accused, Parliament in Part XX.1 has given "dangerousness" a specific, restricted meaning. Section 672.54 provides that an NCR accused shall be discharged absolutely if he or she is not a "significant threat to the safety of the public". . . .
>
> 58 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. . . .
>
> 59 It may be surmised that it is precisely because of this difficulty and context-specificity that Parliament has seen fit to replace the categorical common law approach to the mentally ill accused with a flexible scheme that is capable of taking into account the specific circumstances of the individual NCR accused. Moreover, although it has allowed courts to make an initial determination, Parliament has created a system of specialized Review Boards charged with sensitively evaluating all the relevant factors on an ongoing basis and making, as best it can, an assessment of whether the NCR accused poses a significant threat to the safety of the public. This assessment is not a guarantee, but it is unrealistic to expect absolute certainty from a regime charged with evaluating the impact of individual, human factors on future events. . . .
>
> . . .
>
> 61 . . . [The Review Board] will closely examine a range of evidence, including but not limited to the circumstances of the original offence, the past and expected course of the NCR accused's treatment if any, the present state of the NCR

> accused's medical condition, the NCR accused's own plans for the future, the support services existing for the NCR accused in the community and, perhaps most importantly, the recommendations provided by experts who have examined the NCR accused. . . . Appellate courts reviewing the dispositions made by a court or Review Board should bear in mind the broad range of these inquiries, the familiarity with the situation of the specific NCR accused that the lower tribunals possess, and the difficulty of assessing whether a given individual poses a "significant threat" to public safety.
>
> (Emphasis added)

[24] To similar effect, Binnie, J. wrote in **Owen**, **supra**:

> ¶ 28 . . . How the respondent would behave if state supervision were removed by an absolute discharge necessarily involves an element of prediction. The Board is required to focus on his present mental state, but the appropriateness of its assessment in practice will, to some extent, depend on future events. . . .

(ii) The Evidence Before the Board:

[25] The Board had before it a report dated April 11, 2007 prepared by the medical team involved with K.A.S.'s care. That group included psychiatrist R. Pottle, a clinical social worker, a psychologist, a registered nurse and two additional care professionals. According to the report, K.A.S. has HIV and hepatitis C infections which are treated with antiviral medication. Her psychotic symptoms are controlled with medication. She is compliant with medication when in the hospital or group homes, except when AWOL. Since September of 2006 drug abuse has been a serious problem. After her discharge from the hospital to a small options home in late August of that year, K.A.S. immediately began going AWOL, using cocaine during these absences. Due to repeated AWOL's, positive drug screens, her failure to keep appointments with her family physician and her psychiatric management team, K.A.S. was returned to the hospital for a period of time.

[26] Upon subsequent discharge to a transitional group home, the pattern of AWOLs, drug use and missed appointments resumed. She skipped doses of both her antiviral and psychiatric medication. She was returned to the inpatient unit. In April 2007 she again went AWOL and was located on Barrington Street in Halifax. Upon being returned by the police, she tested positive for cocaine and admitted

using crack cocaine. At that point her liberty was restricted, which triggered the Review Hearing that is the subject of this appeal.

[27] Reports indicate that K.A.S. is without informal community support and is unable to work effectively with the formal community supports which are in place. While she is at low risk to violently offend, the risk that she will cause harm to others through unprotected sex is significant. She minimizes the seriousness of going AWOL and of failing to take her medications and does not recognize that she has an addiction problem.

[28] In a letter of May 17, 2007 to the Review Board, Dr. Pottle summarized K.A.S.'s condition:

> ... She was unable to abstain from cocaine abuse. Despite multiple incidents of cocaine use since the summer of 2006 she does not accept that she has a cocaine addiction or that it is a potentially dangerous problem for her and others ...
>
> The opinion of the treatment team is that Ms. [S.] does not currently pose a significant risk to the community due to violent recidivism. However, the public health risk is potentially serious and could have fatal consequences, given that Ms. [S.] has not been able to refrain from cocaine use or from association with her acquaintances in the drug sub culture, has potentially fatal infectious diseases, a history of prostitution and of failure to take measures to prevent the spread of sexually transmitted diseases.

[29] Dr. Pottle testified at the hearing on June 4, 2007:

> At this time, my concerns about the public health risk are so high that I'm not willing to write her a pass to go outside the hospital due to fear that she will elope and potentially transmit her viral illnesses to members of the public.
>
> . . .
>
> And I think that if she was at liberty to access the cocaine source you would see an acceleration of use and as it's happened before, she would gradually fail to comply with medication follow-up treatment, and she would eventually become psychotic again with all of the associated risks.
>
> (Emphasis added)

[30] It was Dr. Pottle's opinion, expressed in answer to a question posed by a Board member, that the risk that K.A.S. will fail to take precautions against the spread of HIV is a function of both her psychosis and her cocaine use. The cocaine use not only causes her to be sexually irresponsible, it could itself trigger the psychosis or cause her to cease her psychiatric medication, with the danger that the delusion that she cannot transmit disease would return.

[31] In his oral remarks, Chairman Peter Lederman summarized the Board's unanimous conclusion from the evidence:

> The Board stands by its position that it's always taken in the last number of hearings we've met with Ms. [S.], is that we find she is a significant risk to the safety of the public, because as Dr. Pottle, has indicated, if she's out in the community, starts using cocaine, it's likely that she will become not compliant with her medication, and then she could be right back where she was at the time of the index offences which is having unprotected sex with people who are unaware of her medical problems. So we're not saying that Ms. [S.], has to stay here because she's HIV positive, we are saying she has to stay here under our jurisdiction because she is likely to engage in criminal activity that's dangerous to the public, if she is given an absolute discharge.

(iii) K.A.S.'s position:

[32] K.A.S. says her circumstances are virtually identical to those of the appellant in **Chambers v. British Columbia (Attorney General)** (1997), 116 C.C.C. (3d) 406 (B.C.C.A.), at p. 413.

[33] Ms. Chambers was arrested for assault and fraudulently obtaining food but found to be not criminally responsible due to a mental disorder. She was hospitalized. Upon release from the hospital, she abused alcohol and drugs and engaged in prostitution. She was returned to custody because of these breaches of her release order conditions. A Review Board continued the custody order against her concluding that she needed ongoing residential care. The Board found that her sexual habits, HIV and substance abuse posed a threat to the community.

[34] Ms. Chambers appealed that disposition on the basis that the Review Board's decision was unreasonable and not supported by the evidence. In allowing the appeal, the British Columbia Court of Appeal found that the Board had erred by not restricting its consideration of whether she posed a "significant threat to the

safety of the public" to the risk of criminal conduct by Ms. Chambers. The Court concluded that the risk to the public health identified by the Board arose from her drug abuse and did not involve potential criminal conduct. Proudfoot, J.A. wrote, for the Court:

> [22] I am persuaded that "significant threat" must refer to criminal conduct or activity as the review procedure is part of the *Criminal Code*. In my opinion, Parliament never intended to deal with (detain) persons with physical (health) problems which are neither mental conditions nor mental disorders within these sections of the *Criminal Code*.
>
> [23] The appellant's mental condition (Schizophrenia) has been stabilized and that has been noted by the Review Board in the decision. She has a problem when alcohol or drugs are abused. The Review Board stated she becomes "disinhibited" and acts on "impulse" and that because she is HIV positive she poses a risk to the community.
>
> [24] I can hardly disagree that this appellant might well pose a risk not only to herself and but also to others if she indulges again in unsafe sex or in sharing needles. However, disinhibiting behaviour or acting on impulse when using alcohol or drugs are not in and of themselves offences under the *Criminal Code*.
>
> [25] The respondent argues the Review Board has broad powers to assess danger. I do not disagree with that proposition. He states the words "significant threat to the safety of the public" does not necessarily need to be a threat of a criminal offence and that the threat of spreading a disease, i.e., AIDS, is sufficient for the Board to deny a discharge. He conceded that the appellant was being detained because she is HIV Positive.
>
> (Emphasis added)

[35] There are, in my respectful view, material differences between the findings of the Board in **Chambers** and those of the Review Board here. Firstly, in **Chambers** the risk identified by the Board arose not from the concern that Ms. Chambers' mental illness would reoccur, but was attributable solely to her drug and alcohol abuse. Here, in contrast, the evidence before the Board is that K.A.S.'s cocaine use may directly or indirectly cause her to become psychotic. When psychotic she believes she is a state agent required to work as a prostitute, which causes her to have sexual relations with "johns". She believes she is protected from transmitting the HIV. Thus the "significant danger" results from her mental disorder.

[36] Secondly, the Review Board had described Ms. Chambers as possessed of sufficient intellectual capacity to know the danger she poses in sharing needles or having unprotected sex with others (**Chambers**, **supra**, para 13). On the other hand, according to the most recent report prepared for the Review Board, K.A.S. does not acknowledge that she has an addiction problem and minimizes the risks associated with her going AWOL and failing to take her psychiatric and antiviral medications.

[37] Finally, the Board in **Chambers** did not require that the conduct posing the significant threat be criminal in nature. On appeal, the Crown urged that criminal conduct was not a requirement. The Court in **Chambers** inferentially accepts that conduct which risks infecting a sexual partner with HIV is not within the criminal sphere. As I will discuss below, that was the law at the time Ms. Chambers was before the British Columbia Court of Appeal but is no longer good authority.

[38] The Court of Appeal judgment in **Chambers** was pronounced June 25, 1997. On November 15, 1996 the British Columbia Court of Appeal had delivered its judgment in **R. v. Cuerrier** (1996), 111 C.C.C. (3d) 261. The accused, Cuerrier, had been charged with two counts of aggravated assault as a result of non-disclosure of his HIV status to his sexual partners. Verdicts of acquittal were directed at trial on the basis that his conduct in not disclosing his HIV status did not vitiate the victims' consent to intercourse. In upholding the acquittals, the appeal court rejected the Crown's position that such conduct can fall under the assault provisions of the **Criminal Code**. This is the background for the Court's conclusion in **Chambers** that the risk presented by Ms. Chamber's conduct was not criminal.

[39] However, on September 3, 1998, after the appeal court's decision in **Chambers**, the Supreme Court of Canada allowed the appeal in **R. v. Cuerrier**, [1998] 2 S.C.R. 371. The Court found that an accused's failure to disclose his or her HIV positive status is a type of fraud which may vitiate consent to sexual intercourse. Thus the conduct may fall within the aggravated assault provisions of the **Code**.

[40] For the above reasons I would reject K.A.S.'s submission that this Court should follow the decision in **Chambers, supra**.

[41] In his submission to the Board K.A.S.'s counsel suggested, without specifics, that the provincial **Health Protection Act**, S.N.S. 2004, c. 4 or the **Involuntary Psychiatric Treatment** Act, S.N.S. 2005, c. 42, which latter legislation was to become law within a month of the hearing, would provide adequate tools to manage any health risk posed by K.A.S. This argument is premised upon K.A.S.'s submission that any danger she presents is purely a public health risk. In this regard the Board said:

> We disagree with Mr. Jeffcock's assertion that the risk to the public posed by Ms. [S.] is not within the purview of the Board. The fact that she might be dealt with as a public health risk under the *Health Protection Act* does not preclude our involvement to protect the public from what by any estimation is a 'significant risk'. Ms. [S.] has never been known to commit an assault by using physical force against anyone. Based on the evidence of Dr. Pottle, she is likely to commit an assault by engaging in sexual acts without divulging her health status to her partners, and that certainly constitutes a criminal offence in and of itself. That was the danger that led to her being detained by the Board over three years ago, and it is still the danger that concerns us today ...
>
> Dr. Pottle states that her continued cocaine use will likely cause her to cease taking her medication. She would then become ill again. When ill previously, she expressed the belief that she was invulnerable to sexually transmitted diseases, and that it was unnecessary to take any precautions to prevent transmission.

((Emphasis added)

[42] As is evident from the Chairman's remarks, while the risk that K.A.S. will infect another with HIV is a public health risk, it is the Board's finding that she presents a significant threat to the safety of the public because she may commit an assault on a member of the public due to her failure to disclose her HIV status, driven by a delusional belief that she cannot infect her sexual partners. This is evidence-based, predicted criminal conduct which is squarely within the jurisdiction of the Review Board.

[43] There was no evidence before the Board that the **Health Protection Act** would be adequate to protect the public from the danger posed by K.A.S. The mechanisms which would be available under the **Involuntary Psychiatric Treatment Act** were not yet known to the Board. Board Chairman and Dr. Pottle resolved, on the record, to contact the provincial Department of Health to

determine what tools are or will be available under those **Acts**. Such an inquiry is consistent with the inquisitorial nature of the Review Board's mandate. The Board must inform itself about alternative and less intrusive tools which may be available to manage the risk presented by those under its jurisdiction. Such alternatives are relevant to the determination of whether an NCR accused continues to pose a significant risk to the safety of the public.

[44] Should the Review Board determine from its inquiries that the new **Involuntary Treatment Act** contains measures which would adequately protect the public from the significant threat posed by K.A.S., then it is incumbent upon the Board to convene a new hearing so as to reconsider K.A.S.'s status. Alternatively, K.A.S. may, at any time, request another hearing.

[45] At the time of the hearing there was no evidence before the Board that K.A.S.'s dangerous behaviour could be controlled using the current provincial legislation. In **R. v. Cuerrier**, **supra**, Cory, J. affirmed the legitimate role of the criminal law in protecting the public from HIV infected individuals in the face of ineffective provincial public health schemes (at paras. 140 to 142).

[46] Finally, K.A.S. argues that the Board failed to impose the "least onerous and least restrictive disposition" of the three options available to it under s. 672.54. K.A.S. says she should have received an absolute discharge. An absolute discharge was not available, the Board having reasonably found that K.A.S. continued to present a significant threat to the safety of the public. In view of K.A.S.'s frequent absences from care and her drug use, the conditional discharge was the least onerous disposition available.

CONCLUSION:

[47] I would find that the Board's risk assessment and disposition order is not unreasonable in the sense of not being supported by reasons that can bear even a somewhat probing examination and would dismiss the appeal.

Bateman, J.A.

Concurred in:

MacDonald, C.J.N.S.
Saunders, J.A.