



BRITISH COLUMBIA REVIEW BOARD

IN THE MATTER OF PART XX.1 (Mental Disorder) OF THE *CRIMINAL CODE*
R.S.C. 1991 c. 43, as amended S.C. 2005 c. 22, S.C. 2014 c. 6

REASONS FOR DISPOSITION IN THE MATTER OF

BHANA BHAI MYSURIA

HELD BY: Video
February 28, 2022

BEFORE: CHAIRPERSON: I. Friesen
MEMBERS: Dr. J. Smith, psychiatrist
P. Cayley

APPEARANCES: ACCUSED/PATIENT: n/a
ACCUSED/PATIENT COUNSEL: N. Prevolos
DIRECTOR AFPS: Dr. M. Levy, E. Laprise
ATTORNEY GENERAL: G. Nelson

*Pursuant to s. 672.501(1) of the *Criminal Code*, the British Columbia Review Board hereby prohibits the publication, broadcasting, or other transmission of any information that could identify a victim or a witness under 18 years of age in this matter. Failure to comply with this order is an offence.

**Pursuant to s. 672.851 of the *Criminal Code*, the Review Board hereby recommends that the court conduct an inquiry to determine whether to order a stay of proceedings in this matter.

INTRODUCTION AND BACKGROUND

[1] On February 28, 2022, the BC Review Board held a hearing to determine whether in its opinion Bhana Bhai Mysuria, an 89-year-old man, is fit to stand trial, and to make a disposition. Prior to the hearing, counsel for the accused sought permission to excuse the accused from the hearing. That request was granted. Counsel for the accused also asked the Board to make a recommendation to the Vancouver Provincial Court, to hold an inquiry to consider a stay of proceedings under s. 672.851 of the *Criminal Code of Canada*. The Board considered this request at the hearing and made the recommendation to the Provincial Court pursuant to s. 672.851. The Board went on to make a conditional discharge disposition for a period of one year. These are the reasons.

[2] Mr. Mysuria is charged with sexual assault, sexual interference with a person under age 14 and sexual interference with a person under age 16. The allegations are of historical sexual assaults on a young girl between 2006 and 2012. The complainant is now a young adult and made a statement to the police in June 2018. The allegations involved digital and oral sexual acts.

[3] Mr. Mysuria has been diagnosed with progressive Alzheimer's disease and his mental and physical health have declined significantly over the last two years. On January 25, 2021, a Provincial Court judge in Vancouver concluded that Mr. Mysuria was unfit to stand trial and referred him to the Review Board for a review of the decision and to make a disposition.

[4] On March 1, 2021, Mr. Mysuria came before the Review Board for his initial hearing. The Board heard that Mr. Mysuria is housebound and only leaves the home when accompanied by family members. The house is secured, and the accused is not able to leave his residence or go downstairs to the tenant's suite. Dr. Levy opined that the accused is unfit to stand trial, and that he would never become fit to stand trial. He opined that Mr. Mysuria's risk to the public is low. The Review Board panel concluded that the accused was unfit to stand trial and made a conditional discharge for a period of a year.

EVIDENCE AT THE HEARING

[5] Dr. Levy testified that Mr. Mysuria has become progressively more frail and less mobile. He is barely able to walk a few steps. He is severely limited both physically and mentally and is entirely dependent upon family members to care for him. Dr. Levy told the Board that while patients with Alzheimer's may occasionally lash out when irritated, Mr.

Mysuria has not acted in such a way. Dr. Levy observed that if Mr. Mysuria did lash out, he would lack the strength to cause harm to others. At the present time, Mr. Mysuria is cared for by his wife and his son. His son is presently working from home. If caring for Mr. Mysuria becomes too difficult, the family will consider bringing in home care.

[6] At the hearing, Dr. Levy confirmed his previous opinion that Mr. Mysuria is unfit to stand trial and will never become fit to stand trial. Dr. Levy opined that Mr. Mysuria is at a very low risk of harm to the public or to his family members.

APPLICATION TO EXCUSE THE ACCUSED FROM THE HEARING

[7] Prior to the hearing, counsel for the defence made an application to excuse the accused from the hearing on the basis that he suffers from advanced dementia and is not able to participate in the proceedings. Counsel for the Crown and counsel for the Director agreed to the request.

[8] Section 672.5(1) of the *Criminal Code* provides as follows:

(9) Subject to subsection (10), the accused has the right to be present during the whole of the hearing.

(10) The court or the chairperson of the Review Board may

(a) permit the accused to be absent during the whole or any part of the hearing on such conditions as the court or chairperson considers proper; or

(b) cause the accused to be removed and barred from re-entry for the whole or any part of the hearing

(i) where the accused interrupts the hearing so that to continue in the presence of the accused would not be feasible,

(ii) on being satisfied that failure to do so would likely endanger the life or safety of another person or would seriously impair the treatment or recovery of the accused, or

(iii) in order to hear, in the absence of the accused, evidence, oral or written submissions, or the cross-examination of any witness concerning whether grounds exist for removing the accused pursuant to subparagraph (ii).

[9] The accused suffers from advanced dementia as a result of his Alzheimer's diagnosis. He attended the last hearing by video but did not appear to be following the proceedings. The Board concluded that the accused would not be able to meaningfully

participate in the February 28, 2022, hearing. There is no realistic prospect that he would be able to understand the proceedings or contribute in any way. There is no reason for his attendance. The Board therefore acceded to the defence request to excuse the accused from the hearing.

APPLICATION TO THE REVIEW BOARD TO MAKE A RECOMMENDATION TO THE COURT

[10] Counsel for the accused made an application asking the Review Board to make a recommendation to the court under section 672.851. The section stipulates as follows:

672.851 (1) The Review Board may, of its own motion, make a recommendation to the court that has jurisdiction in respect of the offence charged against an accused found unfit to stand trial to hold an inquiry to determine whether a stay of proceedings should be ordered if

(a) the Review Board has held a hearing under section 672.81 or 672.82 in respect of the accused; and

(b) on the basis of any relevant information, including disposition information within the meaning of subsection 672.51(1) and an assessment report made under an assessment ordered under paragraph 672.121(a), the Review Board is of the opinion that

(i) the accused remains unfit to stand trial and is not likely to ever become fit to stand trial, and

(ii) the accused does not pose a significant threat to the safety of the public.

[11] In consideration of whether to make a recommendation under section 672.851, the Board must conclude that the following preconditions are satisfied:

- a) That the accused has had a hearing under section 672.81 or 672.82,
- b) That the accused remains unfit to stand trial and is not likely to ever become fit to stand trial, and
- c) That the accused does not pose a significant threat to the safety of the public.

POSITIONS OF THE PARTIES

[12] Counsel for the defence asked the Review Board to make the recommendation under section 672.851. Counsel for the Attorney General opposed the application on the basis that the Board should defer to the discretion of the trial Crown to enter a stay of

proceedings if appropriate. The trial Crown has declined to stay the proceedings against Mr. Mysuria.

[13] All of the parties agreed that a further assessment under section 672.851(1)(b) is not required.

ANALYSIS

[14] The Board considered the application and the positions of the parties. With regard to the procedural necessities of the section: the accused had an initial mandatory hearing on March 1, 2021, and the Board commenced a further disposition hearing under s. 672.81 on February 28, 2022. Also on February 28, 2022, pursuant to s. 672.82(1), the Board agreed to consider the accused's request to review the hearing in order to consider s. 672.851. The Board therefore concluded that s. 672.851(1)(a) has been met.

[15] Historically, the Review Board has ordered a new assessment prior to considering whether to make a recommendation under subsection 672.851(1). This panel concluded that the provision is permissive and not obligatory. When read together with section 672.121, section 672.851 allows the Board to order a further assessment *if it is necessary*. The relevant subsection of 672.121 reads as follows:

672.121 The Review Board that has jurisdiction over an accused found not criminally responsible on account of mental disorder or unfit to stand trial may order an assessment of the mental condition of the accused of its own motion or on application of the prosecutor or the accused, if it *has reasonable grounds to believe that such evidence is necessary to*

(a) make a recommendation to the court under subsection 672.851(1);

(emphasis added)

[16] The Board concluded that a further assessment is unnecessary given Dr. Levy's opinions regarding the accused's fitness to stand trial and the risk he poses to the community.

[17] The Board went on to consider whether the accused is unfit and unlikely to ever become fit per s. 672.851(1)(b)(i). Dr. Levy has opined that Mr. Mysuria is unfit to stand trial and will never become fit to stand trial. Mr. Mysuria has advanced dementia which has progressed to the point that he is not physically or mentally capable of participating in a hearing. Mr. Mysuria meets the definition of unfit to stand trial under s. 2 of the *Criminal Code*. He does not understand the nature or object of the proceedings, he does not

understand the possible consequences of the proceedings, and he is unable to communicate with counsel. None of the parties disputed that Mr. Mysuria is unfit to stand trial or that he is unlikely to ever become fit. The Board concluded that Mr. Mysuria is unfit to stand trial and is not likely to become fit to stand trial.

[18] The Board then considered whether the accused poses a significant threat to the safety of the public per s. 672.851(1)(b)(ii). Mr. Mysuria's physical condition has deteriorated to the point where he is not able to take more than a few steps. He is completely dependent on his family who act as caregivers for him. Mr. Mysuria has shown no propensity to lash out at others. But even if he were so inclined, he lacks the ability to harm others. All of the parties agreed that Mr. Mysuria poses a low level of risk to the public. The Board concluded that Mr. Mysuria does not pose a significant threat to the safety of the public.

[19] The Board went on to consider Crown counsel's submission that the Review Board ought to decline to make the s. 672.851 recommendation and should instead leave a stay of proceedings decision to the discretion of the trial Crown. The Crown submitted that it is the duty of the trial prosecutor under charge approval policy to continue to assess the evidentiary viability of the trial and the public interest. The Crown must bring the matter before the court every two years to confirm that there continues to be sufficient evidence to prove its case pursuant s. 672.33 of the *Criminal Code*. In the Crown's submission, the Board should be reassured that the Crown will appropriately exercise its discretion and should therefore decline to make the recommendation.

[20] The Board concluded that the Crown's submissions fail to address the proper grounds for the exercise of the Review Board's discretion under s. 672.851. The Review Board's discretion is confined to the factors in the section: is the accused unfit to stand trial and unlikely to ever become fit, and is the accused no longer a significant threat to the safety of the public. These factors do not include a consideration of the exercise of Crown's discretion.

[21] The Board notes that the reason behind the enactment of s. 672.851 was to provide for the possibility of an end to court proceedings for a permanently unfit accused. Prior to 2005, the unfit accused who was unlikely to ever become fit, and who was not a danger to the public, remained under the Review Board's jurisdiction indefinitely (subject to the Crown's responsibility to show that a *prima facie* case continued to exist every two years under s. 672.33). The legislative scheme in place at that time did not provide for an

end of the prosecution. In 2004, the majority of the Supreme Court of Canada in *R. v. Demers* [2004] 2 SCR 489 concluded that the legislative scheme was overbroad, that it infringed the accused's s. 7 liberty rights and that it could not be saved by s. 1 of the Charter. The Court suspended its declaration of invalidity for a period of 12 months to allow Parliament to amend the legislation.

[22] In response to *Demers*, Parliament enacted s. 672.851. The section clearly provides a route by which a permanently unfit accused may be granted a stay of proceedings, regardless of a *prima facie* Crown's case and independent of the Crown's discretion. The recommendation of the Board is the first step in the process. The ultimate decision whether to enter a stay of proceedings under s. 672.851 rests with the court after conducting an inquiry and considering the factors outlined in s. 672.851(7) and (8).

[23] The Board concluded that a consideration of the Crown's exercise of discretion has no part in its deliberations under s. 672.851. The Board concluded that the factors it must consider in s. 672.851(1) have been met: that Mr. Mysuria has had a hearing, that he is unfit to stand trial and is not likely to ever become fit to stand trial, and that he does not pose a significant threat to the safety of the public. **The Board recommends that the court hold an inquiry, as soon as practicable, to determine whether a stay of proceedings is appropriate under s. 672.851 of the *Criminal Code of Canada*.**

DISPOSITION

[24] The Board went on to consider the appropriate disposition. Mr. Mysuria has been living at home on a conditional discharge since his initial hearing. His needs are well met by his family, and he poses no risk to the public. Mr. Mysuria is not required to be hospitalized and he can be cared for at his home under the general supervision of the community forensic team. The Board concluded that the appropriate disposition is a further conditional discharge, on the same terms as the previous order.

[25] Subject to any decision made by the court to enter a stay of proceedings, this matter will be reviewed in the next 12 months.

Reasons written by I. Friesen with Dr. J. Smith and P. Cayley concurring.

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