

CANADA / JUDGMENT

R. v. Alexcee

2003 BCCA 376

COURT

British Columbia Court of Appeal

DECIDED

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2003BCCA0376 COURT OF APPEAL FOR BRITISH COLUMBIA Citation: R. v. Alexcee, 2003 BCCA 376 Date: 20030626 Docket: CA29329 Between: Regina Respondent And Arnold Patrick Alexcee Appellant Before: The Honourable Mr. Justice Esson The Honourable Mr. Justice Hall The Honourable Mr. Justice Low J.J. Blazina Counsel for the Appellant W.L. Rubin Counsel for the Respondent Place and Date of Hearing: Vancouver, British Columbia June 10, 2003 Place and Date of Judgment: Vancouver, British Columbia June 26, 2003 Written Reasons by: The Honourable Mr. Justice Esson Concurring in by: The Honourable Mr. Justice Hall The Honourable Mr. Justice Low Reasons for Judgment of the Honourable Mr. Justice Esson:

- [1] Mr. Alexcee appeals from a decision of Mr. Justice Parrett pronounced on December 7, 2001 pronouncing him to be a dangerous offender within the meaning of Criminal Code ("Code") s.753 and imposing an indeterminate sentence. The ground of appeal is that the sentencing judge erred in law in his consideration of the question whether the appellant should be designated a long-term offender within the meaning of Part XXIV of the Code.
- [2] The appellant was 49 years of age at the time of the decision under appeal. He is a native Indian who was born on and grew up on a reservation at Port Simpson on the northern coast of British Columbia.
- [3] He pled guilty to the predicate offence after being convicted of sexual assaults on his younger sisters which took place in the 1970s. The offences to which he pled guilty were assault causing bodily harm, uttering a threat to cause death or bodily harm, and wilfully obstructing peace officers in the execution of their duty. The circumstances of those offences were described thus by the sentencing judge:
- [10] The three offences for which Mr. Alexcee is now before the court took place on March 12, 1999. Shortly after midnight on that date, Constables Clark and Smart were dispatched and attended at a basement suite located on Third Avenue in the City of Prince George in the Province of British Columbia.
- [11] As they waited at the door to the basement suite they heard the sound of a female crying and a male voice shouting "I'll fucking kill you!" The police officers entered and found blood and hair on the floor of the entry way. They followed a trail of blood to the livingroom where

they found the accused standing over the complainant, J.D., who was seated in a chair. Ms. D. had serious facial injuries and was removed from the basement suite and transported by ambulance to hospital. The accused was placed under arrest and became abusive and violent. During the course of a protracted struggle, Mr. Alexcee was pepper sprayed and eventually handcuffed. As he was removed from the residence, Mr. Alexcee continued to struggle and was verbally abusive and threatening.

- [12] Alexcee had been staying in Ms. D.'s basement suite for a couple of days. She had known him for some six or seven months. Over the course of the days preceding this incident he had been carving an ornamental wooden box. Mr. Alexcee is by all accounts an accomplished First Nation's artist. Having unsuccessfully attempted to sell the box on March 11, 1999, he and Ms. D. pawned her television set for \$50 and purchased a quantity of beer which they consumed at Ms. D.'s residence.
- [13] After Mr. Alexcee apparently fell asleep, Ms. D. decided to go out and visit a friend. As she was preparing to leave, Alexcee awakened; asked her where she was going and became enraged.
- [14] Alexcee dragged the complainant to the livingroom by one arm and after berating her for some time he began to punch her in the face. During the course of the ordeal, Ms. D. suffered a cracked rib, a concussion, a cut over her right eye and severe bruising to her face which resulted in both eyes being swollen shut. Mr. Alexcee's attack on Ms. D. was interrupted when a neighbour summoned the police.
- [15] Two things are apparent from this summary of events. Firstly, there was no apparent reason for Mr. Alexcee's sudden and violent rage; and, secondly, Mr. Alexcee's attack on Ms. D., if it had not been interrupted by the arrival of the police, could well have been even more serious.
- [4] Those events were the most recent, although not the most extreme, of a succession of violent and senseless attacks carried out by the appellant, usually against friends or relatives, while in a state of intoxication. The earliest recorded ones are those against his sisters from the time they were, in the case of the elder, 11, and in the case of the younger, 13. His conviction for rape committed on the younger sister resulted from an incident when she was home with her mother and sisters and younger brother when they heard the appellant, who was then in his teens, coming home in an angry state. The mother instructed everyone in the house to hide from the appellant, but B.A. was not able to get away from him. He took off her clothes, raped her and raped her a number of times thereafter until she left home to go to school. It was on those facts that on 24 June 1999, decades later, he was convicted of rape and sentenced to five years imprisonment. As the sentencing judge in this case noted in ¶16, his criminal record includes the following: 1972-09-08 PRINCE RUPERT BC BE & THEFT SEC 306(1)(B) CC SUSP SENT FOR 18 MOS WITH PROBATION 1974-12-05 PRINCE RUPERT BC

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- (1) CAUSE BODILY HARM WITH INTENT TO WOUND
- (2) FAIL TO COMPLY WITH CONDITIONS OF UNDERTAKING
- (1) 6 MOS DEF & 6 MOS INDEF
- (2) 1 MONTH CONC 1975-07-31 PRINCE RUPERT BC THEFT UNDER \$200 SEC 294(B) CC \$250 I-D
10 DAYS & 1 YR PROBATION 1975-10-24 PRINCE RUPERT BC ASSAULT CBH 30 DAYS
1975-12-02 PRINCE RUPERT BC
- (1) ASSAULT PEACE OFFICER SEC 246 CC (2 CHGS)
- (2) BREACH OF UNDERTAKING SEC 133(3) CC (1-2) 14 DAYS ON EACH CHG CONC 1976-03-23
PRINCE RUPERT BC ATTEMPT TO COMMIT RAPE SEC 145 CC 3 YRS 1978-04-13 RELEASED
ON MANDATORY SUPERVISION 1978-05-23 MANDATORY SUPERVISION VIOLATOR
RECOMMITTED 1979-01-02 PRINCE RUPERT BC ASSAULT CBH (2 CHGS) 3 YRS & 6 MOS ON
EACH CHG CONC 1980-12-11 RELEASED ON MANDATORY SUPERVISION 1980-12-17
CHILLIWACK BC
- (1) POSS OF A NARCOTIC SEC 3(1) NC ACT
- (2) ASSAULT PEACE OFFICER (1-2) 10 DAYS ON EACH CHG CONC BUT CONSEC TO SENTENCE
SERVING 1981-04-30 MANDATORY SUPERVISION VIOLATOR RECOMMITTED 1982-01-08
VANCOUVER BC MANSLAUGHTER 8 YEARS 1990-10-15 PRINCE RUPERT BC POSS OF
NARCOTIC SEC 3(1) NC ACT (RCMP PRINCE RUPERT 90-08288) SUSP SENT & PROBATION 6
MOS 1991-05-06 PRINCE RUPERT BC POSS OF NARCOTIC SEC 3(1) NC ACT (RCMP PRINCE
RUPERT 90-10106) SUSP SENT & PROBATION 1 YR 1993-06-18 PRINCE RUPERT BC
- (1) ASSAULT WITH A WEAPON SEC 267(1)(A) CC
- (2) AGGRAVATED ASSAULT (RCMP PRINCE RUPERT 91-11588) (1-2) 5 YRS ON EACH CHG CONC
& PROHIBITED FIREARMS, AMMUNITION OR EXPLOSIVE SUBSTANCES FOR LIFE
1999-06-24 PRINCE RUPERT BC
- (1) RAPE SEC 144 CC
- (2) INDECENT ASSAULT ON FEMALE SEC 149 CC
- (3) INDECENT ASSAULT ON FEMALE SEC 149 CC (INST MATSQUI ABBOTSFORD 1002)
- (1) 5 YRS
- (2) 1 YR CONC
- (3) 3 YRS CONC
- [5] Having set out that record, the sentencing judge in this case went on to say:
- [17] A number of things are apparent from the bare details of this criminal record - -

- (a) Excluding the present offence, this record includes 14 violent offences ranging from assaulting a peace officer to manslaughter;
- (b) His record includes two convictions for breaching the terms of an undertaking;
- (c) He was recommitted for committing offences while on mandatory supervision on at least two occasions; and,
- (d) Mr. Alexcee has spent the bulk of the last twenty years in prison.

[6] Crown counsel in her factum concisely summed up the particulars of the major offences in that record: 1974 Assault Causing Bodily Harm: On June 29, 1974 while still on probation for previous offences, the Appellant struck Rudy Hill from behind with a piece of lumber. Mr. Hill described the Appellant as a good friend of his at the time of this offence. Mr. Hill lost his teeth and had the left side of his face and his eardrum "busted" from the assault. 1978 Assault Causing Bodily Harm: On April 13, 1978, the Appellant was released on parole after serving a sentence for the attempt rape conviction in March 1976. Two weeks later, in an intoxicated state the Appellant attacked two men in his mother's house. One of the men was his uncle Lloyd Ryan who was sleeping in the Appellant's bed. The Appellant kicked Mr. Ryan in the head a number of times and jumped onto his chest and head from a cupboard shelf rendering Mr. Ryan unconscious. His mother's boyfriend William Gray was in the house at the time of the assault on Mr. Ryan and was running down the stairway to get away from the Appellant. The Appellant got a butcher knife from the kitchen and stabbed Mr. Gray in the back three times as he was attempting to escape. 1981 Manslaughter: Some three months after his release from jail on mandatory supervision in January 1981, the Appellant was involved in an incident outside his sister's trailer that resulted in the Appellant killing one man and badly injuring another. His brother-in-law kicked him out of the trailer because he was intoxicated and obnoxious. What ensued is summarized by the sentencing judge as follows: When another guest in the home, a Mr. D., went to leave he was attacked and beaten over the head with a pipe by [the Appellant]. When Mr. G. [the brother-in-law] attempted to intervene and stop the attack, he was set upon, escaping from an attack by the same pipe by crawling under a parked vehicle Mr. D., at this point, had the misfortune to emit a groan. The [Appellant] returned to his first victim and "finished him off". [He] then attempted to locate and continue his assault on Mr. G. who was badly injured, while [the Appellant's] pregnant sister, holding a small child, tried to protect him. The further development of this incident was interrupted by the arrival of the police. The Appellant's sister testified that when the police arrived the Appellant was on his way to the bedroom armed with a sledge hammer threatening to "finish off" his brother in law. 1991 Aggravated Assault and Assault with a Weapon: The Appellant served the eight year manslaughter sentence through to warrant expiry in January 1990. On December 20, 1991 he attacked a female drinking companion when she refused to give him a blow job. In response to her plea that he not hurt her, he threatened to kill her. He punched and kicked her, pulled her hair out of her head and stabbed her in the back as she was escaping from the residence. She suffered a collapsed lung as a result of this incident. 1999 Assault Causing Bodily Harm:

the Predicate Offence: After serving the full five year sentence imposed on June 18, 1993 for the above offences, the Appellant was released on June 18, 1998. While awaiting trial for the charges of sexually assaulting his sisters, the Appellant committed an assault on a female acquaintance, Janice Dyck, on March 12, 1999. The attack was interrupted by the arrival of the police in response to a call from a neighbour. The Appellant was standing over the badly beaten complainant threatening to kill her. Her face was extremely swollen, her eyes were swollen shut and there was blood coming from her mouth and nose. A police officer on the scene testified that the complainant appeared to have been beaten almost into unconsciousness.

- [7] As stated earlier, after the appellant pleaded guilty to the assault on Janice Dyck, the Crown applied to have him declared a dangerous offender. Because that offence occurred after the coming into effect of the long-term offender provisions enacted in 1997, the case does not raise the troublesome issues which arose in respect of offences committed before the amendments which brought the long-term offender provisions into effect. The Crown's application for a dangerous offender designation occupied some 15 days beginning on March 26, 2001 and concluding, after an adjournment of several months, on October 19, 2001. During the period of the adjournment, the decision of this Court in *R. v. Johnson* (2001), 158 C.C.C. (3d) 155 (B.C.C.A.) was delivered on October 4, 2001 and, thus, was available to the sentencing judge during final submissions. The sentencing judge did not refer to that decision in his reasons and, thus, in the appellant's submission, was led into error.
- [8] In so submitting, he points to this passage in the reasons of Ryan J.A. for the majority in *Johnson* at p.187: I am of the view that to ensure compliance with the Charter, the last point in the analysis under the new provisions must be whether the offender is likely to be cured within the length of a determinate sentence, or whether the offender will eventually be controllable under a long-term offender sentence. If the sentencing judge concludes that it is a reasonable possibility that a cure or control would be effected within either of those time frames, it cannot be said that the offender's pattern of conduct is substantially or pathologically intractable. The sentencing judge should decline to make the dangerous offender designation and go on under s.753(5) to sentence the offender to a fixed sentence, find the offender to be a long-term offender, or hold a hearing to determine whether the offender is a long-term offender.
- [9] That analysis was, in later cases, refined to establish the rule that, as it was put by Huddart J.A. in *R. v. Laboucan* (2002), 166 C.C.C. (3d) 280 (B.C.C.A.) at ¶33: the onus is on the Crown to establish beyond a reasonable doubt the elements necessary to constitute the offender a "dangerous offender" under s.753(1). This Court's decision in *Johnson*, supra, establishes as one of those elements that the offender's condition is substantially intractable, that is, without reasonable possibility of control in the community within a determinate sentence, a 10-year supervision order, and an extension of supervision under s. 810.2 of the Code. [underlining added] In this case, without the benefit of that analysis, the sentencing judge

stated the issue before him as being:

[123] The issues to be considered are:

- 1) Mr. Alexcee's risk of re-offending,
- 2) Mr. Alexcee's treatability ie. the likelihood of future harm, and
- 3) the possibility of eventual control and management of Mr. Alexcee's risk in the community.

[10] After reviewing the evidence, the sentencing judge said:

[140] In my view, the likelihood of his failing to control his behaviour in the future is a virtual certainty that flows from his resistance to treatment and counselling, his failure to recognize and deal with his addiction to alcohol and an anti-social personality which seems wholly unable to feel empathy on any level for the individuals whose lives he has so tragically affected.

[11] Crown counsel in conceding that the sentencing judge erred in law in his approach to long-term offender designation said this in her factum:

39. In the wake of this court's decision in *R. v. Johnson*, a sentencing judge can only designate a person a dangerous offender under Part XXIV after finding that the offender's condition is substantially or pathologically intractable and ruling out the applicability of the long term offender provisions. This Court has subsequently stated that there is a burden on the Crown in dangerous offender proceedings to establish beyond a reasonable doubt that the offender's condition is such that there is no reasonable possibility that the risk it presents can be controlled in the community within the time frame of a long term offender sentence. *R. v. Johnson* (2001), 158 C.C.C. (3d) 155 (B.C.C.A.) *R. v. Laboucan* (2002), 166 C.C.C. (3d) 280 (B.C.C.A.), para. 33 *R. v. B.R.B.* (2002), 174 B.C.A.C. 243, para. 13
40. The sentencing judge in this case did not explicitly address the relationship between the dangerous offender ("DO") and long term offender ("LTO") provisions. He did not follow the order stipulated by *R. v. Johnson* of first considering the LTO provisions and only moving on to the DO provisions after determining that a long term offender designation was not available. The burden on the Crown to which he referred only related to the statutory criteria set out in s.753(1). Nor did he use the word "intractable" in the course of his Reasons or make a determination couched in the language of s.753.1(c) regarding the reasonable possibility of eventual control within the community of the risk of reoffending.
41. But this was not a case where the sentencing judge failed to take into account the availability of the LTO option and the criteria for its applicability in reaching his conclusion that the Appellant was a dangerous offender. Nor was it a case where the hearing proceeded on the footing that the long term offender provisions were inapplicable so that neither the evidence nor the submissions canvassed the issues of manageability within the community. On the contrary, the issue of LTO status was squarely raised by defence counsel in argument and was addressed in the evidence of the many experts who testified. And from the Reasons for

Sentence it is apparent that the sentencing judge was cognizant that a determination on the issue of the possibility of the control and management of the Appellant's risk in the community was part of the process of deciding whether the Crown had proven beyond a reasonable doubt that the Appellant was a dangerous offender.

- [12] I have some doubt that those passages identify an error of law on the part of the sentencing judge, but I find it unnecessary to decide that question. What is clear on the present law is that the sentencing judge was required to determine whether the Crown had proved beyond a reasonable doubt that there was no reasonable possibility of the risk of offending being controlled within the community by a sentence within the terms of the long-term offender provisions. Reading his reasons as a whole, he did that although he did not use those words.
- [13] Relevant to that issue were the numerous pre-sentence reports and assessments by psychiatrists and psychologists which had been made over the 25-year period before the hearing in this proceeding. All of that material was part of the evidence. The sentencing judge paid particular regard to these assessments which he listed in ¶79 of his reasons: 1 May 21, 1976 Diagnostic Test Report 2 June 1, 1985 Dr. Smiley 3 November 9, 1986 Dr. Noone 4 September 21, 1987 Dr. Ley 5 July 14, 1988 Dr. Ley 6 November 1, 1993 Dr. Lawson 7 October 24, 1994 Dr. Noone 8 July 15, 1996 Dr. LaTorre 9 March 23, 2000 Dr. Fairweather 10 September 22, 2000 Dr. Reimer 11 April 13, 2001 Dr. Haymond
- [14] All of that evidence, except for that of Dr. Haymond, was introduced by the Crown, and all of it was carefully analyzed by the judge. What emerges from the evidence introduced by the Crown is a remarkable consensus that the appellant's inability to control his violent tendencies when intoxicated makes it a virtual certainty that were he to be released, he would cause further harm to others.
- [15] I do not propose to refer to the detailed contents of all those reports which are discussed at length in ¶¶79-104 of the judge's reasons. I will refer only to the assessments of Dr. Reimer and Dr. Noone.
- [16] I refer first to the assessment of Dr. Reimer because, being the assessment ordered for this case under Code s.752.1, it is the most recent in time. As was the case in some earlier instances, the accused refused to take part in the assessment, but the report is of value because Dr. Reimer reviewed all of the earlier reports. He summed up by saying: Mr. Alexcee has a repetitive pattern of sexual and non-sexual violence that is at times instrumental in nature and sometimes reactive. He is non-discriminating regarding his assaultive behaviour. He has a high level of psychopathic traits and a calloused disregard for the feelings or rights of others. He is highly treatment resistant and perpetually fails in the community even while supervised. He is a poor candidate for treatment and without extensive treatment for at least a five year period with significant intensive follow-up there after he is unlikely to make any significant changes. The likelihood of him engaging in treatment is almost nil. Mr. Alexcee continues to pose a very high level of risk to re-offend in a sexually violent, and non-sexually violent manner.

- [17] At other points in the report, Dr. Reimer expressed the view that there was no prospect for the appellant's successful release into the community. He noted that some of the most brutal assaults had been committed while the appellant was under supervision while on parole or otherwise subject to control. He concluded his report by saying that, even if Mr. Alexcee achieved a complete dedication to change, which is unlikely: his risk to re-offend will remain extremely high and there will not be any risk management measures apart from incarceration that will prevent Mr. Alexcee from continuing with his sadistic destructive pattern of behavior.
- [18] Dr. Noone, a psychiatrist of high reputation and long experience, had the advantage of having assessed the appellant on two occasions eight years apart. I adopt this passage from the Crown's factum as fairly summarizing his very extensive evidence:
12. In 1986 Dr. Noone provided an independent psychiatric opinion to the National Parole Board regarding the Appellant's suitability for parole release. He concluded that since the Appellant remained untreated for his violent propensities and their precipitation by alcohol, he presented "an extremely high risk" for repeated injury to others if released. If he were ever intoxicated again, he was highly likely to engage in "high levels of violence".
 13. Although he had expressed an intention to abstain from alcohol, the Appellant's history demonstrated an inability to control his drinking behaviour and an almost automatic disinhibition to severe violence when intoxicated. Nor had he internalized the need for treatment or shown any interest in taking any effective treatment for his alcohol abuse. It was Dr. Noone's opinion that the risk of violence in the community was unacceptably high and that [the] Appellant was not suitable for any form of release.
 14. In 1994 Dr. Noone again assessed the Appellant and saw no progress on his part in dealing with these issues and no lessening of the risk of violent recidivism. In terms of his propensity to commit violent offences, Dr. Noone put the Appellant at the very high end of the one thousand or so federal offenders he had assessed.
 15. Because the violence was a "knee jerk response to intoxication", it was Dr. Noone's opinion that burnout was unlikely and that the Appellant when intoxicated would continue to hurt people for as long as he was physically able. Even though the Appellant recognized the need to quit drinking, he would remain unable to control his drinking and subject to the almost automatic behavioural disinhibition that resulted from his intoxication unless there were to be substantial involvement in alcohol counselling and in intensive violent offender programming prior to his community release. [emphasis added]
- [19] The sentencing judge described Dr. Haymond's assessment as "unique". The appellant, having refused to participate in the assessment ordered by the court, and having elected not to testify at the hearing, did speak with Dr. Haymond who included in his report much of what was said by the appellant.

- [20] The sentencing judge was sharply critical of his evidence. He summed his view of it as follows:
- [121] While I find Dr. Haymond's observations and generalizations interesting, the court has, in dangerous offender proceedings, a very specific task. That task is not assisted by reports which so fundamentally fail to consider significant features and elements of the evidence.
- [122] With the greatest of respect to Dr. Haymond, I find his conclusions to be a triumph of optimism over experience. He has achieved these results by ignoring significant portions of the evidence.
- [21] The sentencing judge gave detailed reasons for his adverse view of Dr. Haymond's evidence. After quoting passages from the report which seemed to express the opinion that the appellant could be treated in the community, the judge went on to say:
- [111] The underlying principles on which this passage rests include the following:
- (a) Mr. Alexcee has been a good inmate, free from acts of violence in the prison environment;
 - (b) Mr. Alexcee has (i) completed a nine month sexual offenders treatment program at R.P.C.; (ii) engaged in personal counselling with Dr. Smiley, and (iii) has sought assistance with his alcohol problem;
 - (c) began carving in 1982 which Dr. Haymond views as his most important positive initiative.
- [112] I make the following observations:
- (a) Mr. Alexcee began carving 19 years ago. Since that time he has continued to commit violent offences when he has been in the community and has done so while abusing both alcohol and drugs; and
 - (b) Mr. Alexcee did not "complete" a nine month sexual offender's program at R.P.C. He was returned to Mountain Institution when he refused to participate part way through the four month program. Mr. Alexcee's counselling with Dr. Smiley consisted of something on the order of eight sessions over roughly four months. Dr. Haymond's opinion completely ignores the way in which those sessions were terminated and Dr. Smiley's report of the sessions and Mr. Alexcee's continued denial that he had a problem.
- [22] Nothing would be gained by examining Dr. Haymond's evidence, and the judge's critique of it, at greater length. Clearly, the judge was justified in treating that evidence as incapable of supporting a reasonable possibility of eventual control within the community of the risk of reoffending.
- [23] In ¶11 above I quoted passages from the Crown's factum discussing the question whether the sentencing judge erred in law. In my view, if there was any error of law in the judge's approach, it was in form and not in substance.
- [24] After his lengthy review of the evidence, he stated the issues thus:

- 1) Mr. Alexcee's risk of re-offending,
- 2) Mr. Alexcee's treatability ie, the likelihood of future harm, and
- 3) the possibility of eventual control and management of Mr. Alexcee's risk in the community.

[25] After further discussion of the evidence and issues, the judge said:

[140] In my view, the likelihood of his failing to control his behaviour in the future is a virtual certainty that flows from his resistance to treatment and counselling, his failure to recognize and deal with his addiction to alcohol and an anti-social personality which seems wholly unable to feel empathy on any level for the individuals whose lives he has so tragically affected.

[26] The only error in the first of those passages was, in my view, in omitting the word "reasonable" before "possibility" and was favourable to the accused. The conclusion stated in ¶140 does not employ the words "no reasonable possibility of eventual control and management", but it is in clear language an emphatic declaration that no such possibility exists. The principal error attributed to the analysis by appellant's counsel is the absence of specific reference at this point to long-term offender status and in going directly to the question whether the Crown had proved beyond a reasonable doubt the criteria necessary for a dangerous offender designation. That was expressed thus in the reasons:

[127] For the purposes of this hearing, in order to designate Mr. Alexcee a dangerous offender pursuant to s.753(1) of the Criminal Code, the Crown must prove beyond a reasonable doubt the following criteria:

- 1) Mr. Alexcee has been convicted of a serious personal injury offence that threatens the safety or physical or mental well-being of other persons. (s.753(1)(a))
- 2) Mr. Alexcee, by his past conduct, including the predicate offences, has shown a likelihood of failure in the future to restrain his behaviour and a likelihood thereby that he will cause injury or death to other persons.
- 3) There is a likelihood that Mr. Alexcee will cause injury, or death, to other persons through the failure in the future to restrain his behaviour.

[27] That is, again in the context of this case, a matter of form rather than substance. The judge made clear earlier in his reasons that he was required to take into account the availability of the long-term offender option and the criteria for its applicability. In stating the conclusion that the appellant was a dangerous offender, he was stating by necessary implication that the appellant could not qualify for the long-term offender designation.

- [28] If the imperfections in the language of the judge's analysis constitute error in law, I would apply the reasoning of Madam Justice Prowse in *R. v. Mitchell* (2002), 161 C.C.C. (3d) 508 (B.C.C.A.) holding in ¶¶66 to 68 that the court has power on an appeal of this kind to dismiss an appeal where the error is of a trivial nature or where the court is satisfied that the result of the proceedings would have been the same in spite of the errors. See also *R. v. Schwartz* (2002), 169 C.C.C. (3d) 461 (B.C.C.A.).
- [29] It follows that I would dismiss the appeal. "The Honourable Mr. Justice Esson" I Agree: "The Honourable Mr. Justice Hall" I Agree: "The Honourable Mr. Justice Low"

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