

CANADA / JUDGMENT

R. v. Clayton

2023 BCCA 33

COURT

British Columbia Court of Appeal

DECIDED

25 January 2023

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2023 BCCA 33 R. v. Clayton

COURT OF APPEAL FOR BRITISH COLUMBIA

Citation:

R. v. Clayton,

2023 BCCA 33

Date: 20230125

Docket: CA45683

Between:

Rex

Respondent

And

Larry Daniel Clayton

Appellant

Before:

The Honourable Chief Justice Bauman

The Honourable Mr. Justice Harris

The Honourable Mr. Justice Willcock

On appeal from: An order of the Supreme Court of British Columbia, dated

September 27, 2018 (sentence) (R. v. Clayton, 2018 BCSC 1671,

New Westminster Docket X078546).

Counsel for the Appellant:

T.B. Magder

Counsel for the Respondent:

C.E. Tomusiak

Place and Date of Hearing:

Vancouver, British Columbia

December 13, 2022

Place and Date of Judgment:

Vancouver, British Columbia

January 25, 2023

Written Reasons by:

The Honourable Mr. Justice Willcock

Concurred in by:

The Honourable Chief Justice Bauman

The Honourable Mr. Justice Harris

Summary:

The appellant was designated a dangerous offender and was sentenced to an indeterminate sentence pursuant to Part XXIV of the Criminal Code. He appeals the designation and sentence on the ground the sentencing judge erred in law by placing weight upon his failure to participate in an interview conducted as part of a court-ordered assessment by a psychiatrist, and a psychological assessment conducted for Crown Counsel. Held: Appeal dismissed. It was an error to consider the appellant's refusal to answer questions on the assessments to be evidence of mistrust of persons in authority. However, the error did not result in a miscarriage of justice because there was ample evidence in the record of the appellant's anti-authority attitudes.

Reasons for Judgment of the Honourable Mr. Justice Willcock:

Introduction

- [1] On September 27, 2018, the appellant was designated a dangerous offender under s. 753(1)(a) of the Criminal Code, R.S.C. 1985, c. C-46, and was sentenced to an indeterminate sentence pursuant to Part XXIV of the Code.

- [2] He appeals the dangerous offender designation and sentence on the grounds that the sentencing judge erred in law by placing weight upon his failure to participate in an interview conducted as part of a court-ordered assessment by Dr. Shabehram Lohrasbe, a psychiatrist, (described in a report dated May 4, 2017), and an assessment for Crown Counsel by Dr. Barry Cooper, a psychologist, (described in a report dated November 30, 2017).
- [3] The judge described the refusal to be interviewed as follows:
- [39] Other than the report and testimony of Dr. Riar, Mr. Clayton provided no evidence other than a brief statement made through his counsel. Also of significance in the evidence is the refusal of Mr. Clayton to be interviewed by the two expert witnesses qualified by the Crown, i.e. Dr. Lohrasbe and Dr. Cooper. [Emphasis added.]
- [4] He considered the lack of cooperation to be evidence of a mistrust of experts:
- [58] In evidence at this hearing were expert reports filed by the Crown and written by Dr. Lohrasbe and Dr. Cooper. Dr. Lohrasbe and Dr. Cooper also testified and were cross-examined by counsel for Mr. Clayton. Mr. Clayton declined to be interviewed by both Dr. Lohrasbe and Dr. Cooper which reflects the long-standing mistrust exhibited by Mr. Clayton towards authority and those who have attempted to work with him in attempting to understand his motivations, attitudes and most significantly, his likelihood of re-offending in a violent manner. As a result, the reports of these two psychiatrists were limited to extensive reviews of Mr. Clayton's criminal records, the Correctional Records, prior psychological records, reasons for judgment, transcripts from trials and sentencing hearings and other documents previously listed in these reasons and included in Exhibit 1. [Emphasis added.]
- [5] He noted that the opinions of the experts with whom the appellant had not spoken were "qualified" by the accused's refusal to participate:
- [68] The opinions of Dr. Cooper regarding the risk of Mr. Clayton re-offending in a violent manner, especially with women, and treatability are very similar to Dr. Lohrasbe's opinions. Dr. Cooper testified at length, and also referenced in his report of November 30, 2017, the several assessment tools available to assist and support psychologists in evaluations of risks and treatability, all qualified to some degree by the refusal of Mr. Clayton to be interviewed for the assessment. Dr. Cooper has had extensive experience in the field of clinical and forensic psychology as a clinical instructor, a private clinical-forensic practitioner and contract psychologist with the CSC. [Emphasis added.]
- [6] Finally, after making the designation and when addressing the imposition of an appropriate penalty, the judge placed some weight upon the fact the appellant had declined to be interviewed by Drs. Lohrasbe and Cooper:

- [119] The imposition of an indefinite sentence of imprisonment in this case is proportionate to the circumstances of Mr. Clayton considering his offending history, the strong likelihood that he cannot or will not change his conduct in the future and the protection of society.
- [120] In the case before the Court, Mr. Clayton clearly has a deep mistrust of those in authority as is evidenced by his conduct with correctional personnel and his refusal to even consent to being interviewed by psychiatrists and other professionals. [Emphasis added.]
- [7] It appears that the only evidence before the trial judge of the appellant refusing to being interviewed by a psychiatrist was his refusal to be interviewed by Dr. Lohrasbe.
- [8] The appellant, relying on *R. v. Brown* (1999), 70 C.R.R. (2d) 170, 1999 CanLII 15180 (B.C.S.C.), and *R. v. Funk*, 2014 BCSC 383, contends that it is an error to draw an adverse inference from an offender's refusal to be interviewed and that the sentencing judge erred by relying on the appellant's refusal to participate in the assessments to draw an adverse inference regarding his future treatability.
- [9] For reasons set out below, I am of the view the judge erred in placing weight upon the appellant's failure to participate in interviews. However, the error was immaterial because uncontradicted evidence strongly supported the only conclusion affected by the error: that the appellant has a deep mistrust of persons in authority.

The Evidence of Non-Cooperation was Used Improperly

- [10] The passages from paras. 58, 68 and 120 of the sentencing judge's reasons that I have emphasized above show that the judge considered the appellant's non-cooperation with the examining experts for two purposes:
- a) First, appropriately, in order to ensure that the opinions of Dr. Lohrasbe and Dr. Cooper were sufficiently qualified (as reflected in para. 68).
 - b) Second, and problematically, for the purpose of drawing a conclusion with respect to the appellant's character (at paras. 58 and 120). The reference, in para. 120, in particular, to the appellant's refusal to be interviewed by a psychiatrist must be a reference to the refusal to be interviewed for the s. 752.1 assessment by Dr. Lohrasbe. In my opinion, it was an error to place weight upon the appellant's non-cooperation with Dr. Lohrasbe.
- [11] In *Funk*, Justice Davies wrote:
- [236] Although an order made under s. 752.1 remands the offender into the custody of the assessor or the assessor's expert for the purpose of the completion of an assessment within a prescribed period of time, it does not require the offender to participate in the assessment and more specifically does not require the offender to be subjected to any interview process or testing.

- [237] Why that is so was explained by D. Smith J. (as she then was) in *R. v. Brown* (1999), 70 C.R.R. (2d) 170 (B.C.S.C.) at para. 34 as follows:
- [34] The s. 7 residual right against self-incrimination, does not entirely disappear post-conviction. While an offender may be compelled to attend for an assessment, which necessarily involves some participation by the offender with the procedure employed by the assessor, an offender cannot be forced to communicate with the assessor if he chooses not to. In other words, while he may be compelled to attend the assessment, incriminating evidence cannot be conscripted from him if he chooses not to participate. The offender cannot be punished for not fully participating in the assessment, nor can the court make an adverse inference with respect to his or her refusal to participate: *R. v. Small aka Pizzey* (29 July 1998), Fort St. John 10243 (B.C.S.C.).
- [238] See also *R. v. Kim*, 2000 BCSC 1506 at para. 43.
- [12] There are circumstances in which some weight may properly be placed upon an accused's refusal to speak to an examining physician.
- [13] In *R. v. Charlebois*, the trial judge permitted the Crown to ask the accused in cross-examination whether he would submit to an examination by a Crown psychiatrist. A conviction appeal (reported at 135 C.C.C. (3d) 414, 1999 CanLII 13682 (Q.C. C.A.)) founded on the contention the jury charge was faulty, was dismissed because the defects in the charge were not material to the outcome and could be answered by the curative proviso. Fish J.A.(as he was), dissenting, would have allowed the appeal. He concluded that the errors in the charge were material but also found the judge had erred by permitting the Crown to ask the accused whether he would agree to participate in a psychiatric assessment. That error, in his view, could not be cured. He noted that the circumstances in which it is appropriate to introduce evidence of the accused's refusal to speak to a Crown psychiatrist are limited:

There is precedent, pre- and post-Charter, for the proposition that the Crown, in appropriate circumstances, can introduce evidence of the accused's refusal to speak to a Crown psychiatrist. [Sweeney (No. 2) (1977), 35 C.C.C. (2d) 245 (Ont. C.A.); Stevenson (1990), 58 C.C.C. (3d) 464 (Ont. C.A.); Worth (1995), 98 C.C.C. (3d) 133 (Ont. C.A.)] This has generally been justified as a necessary exception to the accused's right of silence in cases where the defence calls psychiatric evidence. If only the defence expert has had access to the accused - the very person whose mental state or condition is in issue - the weight of the Crown's evidence might otherwise be unfairly diminished by the fact that its experts have been denied a similar opportunity. [Emphasis added.]

- [14] Because the Crown had not adduced psychiatric evidence Fish J.A. concluded the Sweeney exception was inapplicable:

Unlike Sweeney (No. 2), *supra*, and the other decisions I have mentioned, there was thus no risk in this case that the jury might depreciate the evidence of a Crown psychiatrist because he failed to examine the accused. The "Sweeney exception" therefore did not apply here.

- [15] The appeal as of right to the Supreme Court of Canada was dismissed at 2000 SCC 53. Justice Bastarache, for the majority, described the "Sweeney" exception:
- [37] [A]llowing the evidence of the refusal is justified as a necessary exception to the accused's right of silence where the defence has called psychiatric evidence. The exception recognizes that the weight of the Crown's evidence might be unfairly diminished by the fact that its experts have been denied access to the accused when the ultimate issue in question is the accused's mental state or condition. In *Worth*, the Ontario Court of Appeal found (at pp. 140-41):

Having put his sanity in issue, we do not think the appellant could preclude the jury from drawing an adverse inference from his refusal to speak to the Crown psychiatrist. An accused's right to silence is not absolute. It is protected in the terms of s. 7, that is, an accused cannot be deprived of his right to silence except in accordance with the principles of fundamental justice. Since the appellant put his sanity in issue and had the burden of proving his mental disorder, we do not think that the trial judge's comments contravened the principles of fundamental justice. In *R. v. Stevenson Morden J.A.* specifically approved *Sweeney* notwithstanding s. 7 of the Charter. He wrote at p. 495:

I appreciate that the right to remain silent under s. 7 in all its manifestations does not necessarily have the identical content and scope of the common law right. In the context of a case such as this, however, I can think of no reason why the general approach in *Sweeney* should not be followed. In that case, *Zuber J.A.*, for this court, noted at p. 251 that the rule relating to the right to remain silent was "not so rigid nor so pervasive that it admits no exceptions nor limit".

...

- [38] In sum, the Crown had the right to counter the expert evidence used to support the accused's theory that he killed in self-defence, and thus the Crown was entitled to ask the accused whether he would undergo an assessment. The trial judge did not err in law by instructing the jury that the refusal was relevant to the probative value of the defence expert's evidence. Even if this were not the case, this is a situation where s. 686(1)(b)(iii) could be applied to rectify an error since there would have been little prejudice caused to the accused.
- [16] The exception to the right to silence is intended to preclude the accused from adducing evidence to which the Crown is unable to respond effectively. In *R v. Madood*, 2015 ABQB 611 at para. 106, the court held that the exception arises where the accused has called psychiatric evidence in his defence and Crown's experts do not have the opportunity to do a complete assessment, noting: "In such cases, it is open to the Court to treat the defence expert opinion with skepticism".
- [17] Such an adverse inference was drawn in *R. v. Aday*, 2008 BCSC 397; *R. v. G.C.Z.*, 2015 BCSC 1596; and *R. v. So*, 2021 BCSC 672. In *So* the court observed:

[161] The weight of the Crown's evidence would be unfairly diminished if its experts have been denied access to the accused when the ultimate issue is the accused's mental state. In fact, the refusal may be relevant to the probative value of the defence's expert evidence.

[18] The line of authority reflected in Sweeney and Charlebois and followed in Aday, establishing an exception to the general rule, does not appear to have been referred to or considered in Funk or Brown.

[19] The offender does not appear to have adduced any psychiatric evidence in his defence in Brown. The trial judge in that case cited the observation of Iacobucci J. in *R. v. White* (1999), 135 C.C.C. (3d) 257, 1999 CanLII 689 (S.C.C), at para. 45, that "[t]he residual protections provided by the principle against self-incrimination as contained in s. 7 are specific, and contextually-sensitive", as well as the following passage, which in my view is apt in the case at bar:

... The principle against self-incrimination demands different things at different times, with the task in every case being to determine exactly what the principle demands, if anything, within the particular context at issue.

[20] In Funk, the accused had participated in an independent interview and sought to rely upon the opinion of his own expert, despite his non-cooperation with the Crown's expert. The court did not expressly consider whether, by doing so, he brought the case within the Sweeney exception.

[21] In *R. v. Kim*, 2000 BCSC 1506 Justice Dillon (at para. 43) cited *R. v. Teskey* (1996), 48 C.R. (4th) 267, 38 Alta L.R. (3d) 246, 1996 CanLII 10360 (Alta. Q.B.) for the proposition that the exception described in Sweeney is inapplicable where a dangerous offender refuses to submit to a psychiatric examination by a Crown-nominated expert.

[22] In Tesky, Nash J. wrote:

[99] Mr. Teskey refused to submit to examination by the psychiatrist nominated by the Crown. Counsel for the Crown urges upon the Court that an adverse inference should be drawn. In support, he cites the following cases:

1. *R.v. Fitzgerald* (1982), 70 C.C.C. (2d) 87 (Ont. C.A.);
2. *Chapelle v. R.* (1980), 52 C.C.C. (2d) 32 (Ont. H.C.);
3. *R. v. Sweeney* (1977), 35 C.C.C. (2d) 245 (Ont. C.A.);
4. *R. v. Worth* (1995), 98 C.C.C. (3d) 133 (Ont. C.A.).

[100] In three of the cases, *R. v. Fitzgerald*, *R. v. Sweeney* and *R. v. Worth*, the accused was charged with murder and raised the defence of insanity. The accused refused to submit to psychiatric examination by a Crown psychiatrist. The accused however, in all of the cases, called psychiatrists to support the defence of insanity. The Ontario Court of Appeal in all three cases up-held as correct the Trial Judge's direction to the jury that although the

accused was entitled to refuse to undergo psychiatric examination by the experts retained by the Crown, this was a fact from which it could be inferred that the defence of insanity was either contrived or so weak that it could not withstand scrutiny.

- [101] In my view, none of these cases support the Crown's assertion that on a dangerous offender hearing, the Judge may draw an inference adverse to the accused where the accused refuses to be examined by the psychiatrist nominated by the Crown. In the cases cited, the accused had raised the defence of insanity and placed his mental state in issue. [Emphasis added.]
- [23] It is true that on an application by the prosecutor under s. 752.1 of the Code, it is not the accused who has put his mental state in issue. Nevertheless, in my opinion, the exception in Sweeney is applicable where the accused adduces the expert opinion evidence of a psychiatrist founded upon an assessment including an interview of the accused. If the exception in Sweeney were not applicable in such circumstances, the problem considered by Bastarache J. in Charlebois would arise: the weight of the Crown's evidence might be unfairly diminished by the fact that its experts have been denied access to the accused.
- [24] Where the accused introduces evidence of statements he has made to his own expert, and has waived his right to silence to that extent, it is not contrary to the principles of fundamental justice to draw an inference from his refusal to speak to the Crown's expert. However, the inference permissible in this circumstance is a limited one: that cooperating with the Crown's expert might have been harmful to the defence case. The refusal is, in the words used in Charlebois, "relevant to the probative value of the defence expert's evidence": at para. 38. In the words of the Alberta Court of Appeal in Madood (at para. 106): "it is open to the Court to treat the defence expert opinion with skepticism".
- [25] In the case at bar, the trial judge did not use the appellant's refusal to be interviewed by Dr. Lohrasbe and Dr. Cooper as a fact that might be weighed in determining how much weight to place upon the opinion of the defence expert, Dr. Riar. Rather, the trial judge considered the refusal to be interviewed as evidence of the appellant's distrust of people in authority, particularly those who might treat him in the community. In my respectful opinion, the use of the evidence of refusal for that purpose is not contemplated by the exception in Sweeney. It amounts to drawing an adverse inference from the exercise of the constitutionally-protected right to silence and is impermissible.

The Error was Immaterial

- [26] The appellant's non-cooperation with the Crown experts was considered by the trial judge in the second phase of his analysis.
- [27] In the first phase, the judge concluded that the Crown had shown the commission of a serious personal injury offence under s. 753(1)(a) beyond a reasonable doubt. (An appeal from conviction was dismissed by this Court on January 21, 2021, for reasons indexed at 2021 BCCA 24.) The Crown had also proven beyond a reasonable doubt that there had been a pattern of repetitive behaviour and "a failure by the appellant to constrain his actions against

women". That behaviour continued over many years and involved many different women. The judge concluded there was reason to believe that if the appellant were to be in the community, he would soon re-offend against a woman in a violent manner. For that reason, he designated the appellant as a dangerous offender under s. 753(1)(a)(i) of the Code.

[28] The evidence considered by the sentencing judge included the appellant's lengthy criminal record. His convictions were not disputed and, as the judge noted at para. 44: "the circumstances of the offences were supported in most cases with transcripts of the offences which provided some detail on the events which led to his convictions or guilty pleas."

[29] The offences, particulars of which are described in the judge's reasons but need not be repeated here, included, in addition to the index offence:

- a) sexual assault in September 1985;
- b) sexual assault in January 1986;
- c) extortion, assault and procurement of two children into the sex trade in 1991;
- d) unlawful confinement in 1993 (an associated sexual assault was admitted by the defence but not charged);
- e) uttering threats and mischief in August 1997;
- f) assault, uttering threats, resisting arrest, public mischief; assault with a weapon and breach of undertaking in May and October 1999;
- g) aggravated assault; uttering threats; failure to comply; possession of a weapon in November 1999;
- h) assault in October 2008;
- i) assault causing bodily harm; uttering threats; and unlawful confinement in the summer of 2010;
- j) trespass and breach of a peace bond in 2013; and
- k) attempting to obstruct justice and breach of court order by communicating with the victim of the index offence from prison after his April 2015 arrest.

[30] Turning, then, to the penalty stage, the judge held (at para. 114) that there were many factors leading to the conclusion that the only sentence which could adequately protect the public from the commission of another serious offence would be an indeterminate sentence of imprisonment. One of the factors enumerated (at para. 115) was:

- (b) Mr. Clayton has consistently been [averse] to treatment and lacks the motivation to change and end his criminal ways. Both Drs. Lohrasbe and Riar believe there is little evidence Mr. Clayton is treatable and have found little if any motivation on his part to enter serious treatment. As stated previously, he has consistently blamed his victims for his offending, has declined treatment and when he has agreed to entering programs, has failed to follow through with treatment.
- [31] The conclusion of the judge's penalty analysis appears to incorporate the view that the appellant has a deep mistrust of those who have attempted to work with him in assessing his likelihood of re-offending in a violent manner:
- [116] For the above reasons and with reference to his lack of motivation to improve his behaviour discussed previously in these reasons, the public cannot be adequately protected from Mr. Clayton for the foreseeable future if he is released into the public arena. [Emphasis added.]
- [32] The evidence, excluding the appellant's unwillingness to be interviewed by the defence experts, amply supports the conclusion the appellant was averse to treatment and distrustful of persons in authority.
- [33] The evidence included the records of the Correctional Service of Canada, Nova Scotia Provincial Corrections and British Columbia Corrections. These detailed the appellant's behaviour and his dealings with authority during his lengthy periods in prison. The records included a report written in October 1987, following a psychological assessment authored by Dr. J. Gerry (cited at para. 49 of the reasons of the sentencing judge) that indicated the appellant was "not receptive to counselling about his offence", was "defensive and unrealistic in his self-concept", and lacked "appropriate insight" into his serious offences. The author wrote:

Perhaps he should consider marital counselling in the community, however he is not receptive to such suggestions now and basically denies he had a problem. Under these conditions he is a significant risk of similar violent recidivism.

- [34] Relying on the records, the judge noted:
- [51] After being sentenced for his second federal offence in 1993, any counselling was brief, approached with no commitment, and ended with Mr. Clayton rejecting advice and recommendations from the system.
- [35] Further:
- [53] At one point in the early 2000s he was referred to the Family Violence Program which he had previously sought, however, he was withdrawn from the program for refusing to participate. Another time, Mr. Clayton was referred to the Anger and Emotions Management Program which he had sought, but would not meet the criteria for the program. On one occasion, the PBC described Mr. Clayton as having a persistent attitude of blaming others for not taking programming that would be available to him.

[54] Reports from the Nova Scotia Correctional Authorities and British Columbia Corrections showed that he consistently denied case management, engaged in fighting, breaking institutional rules and was defiant to officials. In B.C, in 2016 he was placed on a waiting list for Respectful Relationships and Violence Prevention programming but did not apply for the same nor did he participate in any way.

[36] Most significantly, in my view, the judge also had a report and the testimony of Dr. Kulwant Riar, who had been retained by the defence. Dr. Riar had the advantage of a personal interview of the appellant and wrote a report dated April 13, 2018. At p. 12 of his report Dr. Riar wrote:

I noted that he had displayed anti-authority attitudes almost regularly whenever he was incarcerated. His own understanding is that he did not get along with the staff during his recent incarceration as his background information was disclosed to other inmates and he became the target of abuse from other inmates and staff. On the contrary, his attitudes and behaviour remained the same throughout the years, starting from his first and second incarcerations. He frequently disobeyed the staff, broke the rules of the custody facility and frequently had been disrespectful and verbally abusive towards staff.

[37] Given Dr. Riar's clear findings regarding the appellant's anti-authority attitudes and behaviours--in addition to the other evidence to this effect in the record--I am of the opinion that the error identified by the appellant occasioned no substantial wrong or miscarriage of justice.

[38] In Charlebois, Bastarache J. described the application of the curative proviso as follows:

10 Section 686(1)(b)(iii) of the Code authorizes an appeal court to dismiss an appeal, despite the presence of an error at trial, where the court believes there has been no "substantial wrong or miscarriage of justice". In *Mahoney v. The Queen*, [1982] 1 S.C.R. 834, at p. 852, McIntyre J. explained how the Court is to determine whether a substantial wrong or miscarriage of justice has occurred:

[T]he proviso may be applied only following a legal determination that errors have been made at trial, but that "no substantial wrong or miscarriage of justice has occurred", and then only according to a strict legal test. The determination of what will constitute a substantial wrong or miscarriage of justice must involve the construction of those words in the context in which they are used in the Statute, and such statutory construction has long been considered a matter of law. The Court's decision involves an analysis of the rights accorded by law to an accused and the measurement of the impact of the errors which were made at trial. Once an appellant establishes in the Court of Appeal that errors of law were made at his trial he becomes entitled to have his appeal allowed and a new trial or an acquittal, depending on the circumstances, unless the proviso is applied to annul those rights. The Court of Appeal must consider the errors against the background of the whole trial. While a reconsideration of the evidence is involved, clearly the inquiry goes far beyond the determination of matters of fact. [Emphasis added by Bastarache J.]

11 The proper application of s. 686(1)(b)(iii) was recently addressed in *R. v. Brooks*, [2000] 1 S.C.R. 237, 2000 SCC 11. Writing for the dissent, Major J. adopted his statement in *R. v. Bevan*, [1993] 2 S.C.R. 599, which precisely outlines the threshold for applying the proviso. Major J. confirmed at para. 104 that the task of the appellate court is to

determine whether there is any reasonable possibility that the verdict would have been different had the error at issue not been made.

Implicit in my reasons in *Brooks* is my acceptance of his statement as a proper explanation of the law. As conceded by the Crown, the proviso should only be applied where

the evidence is so overwhelming that a trier of fact would inevitably convict. In such circumstances, depriving the accused of a proper trial is justified on the ground that the deprivation is minimal when the invariable result would be another conviction. (*R. v. S. (P.L.)*, [1991] 1 S.C.R. 909, at p. 916)

[39] The error in this case was to draw an impermissible inference from the appellant's silence during a court-ordered assessment. This error did not result in a miscarriage of justice because there was ample evidence in the record--aside from the impermissible inference--establishing that the appellant had longstanding and deeply ingrained anti-authority attitudes. The evidence of the appellant's anti-authority attitudes was so overwhelming that there was no reasonable possibility that the sentencing judge would have arrived at a different conclusion on sentencing had the impermissible inference not been made.

[40] I would dismiss the appeal.

"The Honourable Mr. Justice Willcock"

I agree:

"The Honourable Chief Justice Bauman"

I agree:

"The Honourable Mr. Justice Harris"

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Prepared on 25 October 2026 · Esheria