
CANADA / JUDGMENT

R. v. Cooper

2002 BCCA 527

COURT

British Columbia Court of Appeal

DECIDED

20 September 2002

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R. v. Cooper

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Docket:

CA028070

COURT OF APPEAL FOR BRITISH COLUMBIA

BETWEEN:

REGINA

RESPONDENT

AND:

MORGAN JAMES COOPER

APPELLANT

Before:

The Honourable Madam Justice Newbury

The Honourable Madam Justice Huddart

The Honourable Mr. Justice Mackenzie

M.L. Hillford

Counsel for the Appellant

W. Dawson and

J. Gordon

Counsel for the Respondent

Place and Date of Hearing:

Vancouver, British Columbia

13 June 2002

Place and Date of Judgment:

Vancouver, British Columbia

20 September 2002

Written Reasons by:

The Honourable Madam Justice Huddart

Concurred in by:

The Honourable Madam Justice Newbury

The Honourable Mr. Justice Mackenzie

Reasons for Judgment of the Honourable Madam Justice Huddart:

- [1] The ultimate issue on this appeal is whether a dangerous offender designation was reasonably made on the evidence of treatability before the sentencing judge. The appellant does not dispute that the predicate offence and two other offences with sexual aspects to them bring him within s. 753(b) of the Criminal Code as it was in August and September 1993 when the offences took place. Nor does he dispute that he suffers from sexual deviancy. The question is whether the evidence revealed a reasonable possibility his condition can be controlled within the community within the limits of a sentence as a long-term offender under s. 753.1(1) of the amended provisions of the Code. If there is such a reasonable possibility, the appellant cannot have a condition that is "substantially or pathologically intractable." This is the test laid down in *R v. Lyons*, [1987] 2 S.C.R. 309 to preserve the constitutionality of the dangerous offender provisions as they were in 1993.
- [2] Although the sentencing judge did not have the benefit of this Court's reasons in *R v. Johnson* (2001), 158 C.C.C. (3d) 155, leave granted [2002] S.C.C.A. 650 (Q.L.), his analysis of the effect of the amendments foreshadowed that decision. At para.104, Madam Justice Ryan explained:
3. Under the new provisions, if an offender is likely to be cured of his or her condition within the parameters of the appropriate determinate sentence, the condition cannot be said to be intractable and he or she ought not to be declared a dangerous offender. If the offender may not be cured, but may be controlled in the community within the limits defined by a long-

term offender sentence, the offender should not be declared a dangerous offender, but a long-term offender instead. The long-term offender provisions of Part XXIV of the Code are thus more beneficial to an offender than the former provisions. An offender who has been convicted prior to the amendments but is being sentenced after the amendments ought to have the benefit of the long-term offender provisions if appropriate.

- [3] After considering the long-term offender provisions, the sentencing judge found "no reasonable likelihood that [the accused] will cease committing sexual crimes of violence once he returns to the community, even with such preventative treatment and support measures as are available." The question on this appeal is whether that finding of intractability, and thus the dangerous offender designation, was reasonable.
- [4] The appellant considers the trial judge erred by giving any credence to the report of a clinical psychologist, Dr. David M. Lawson, who assessed him for Corrections Canada upon his being incarcerated in 1995. The appellant had pleaded guilty to breaking and entering a dwelling house, and committing the sexual assault of a sleeping 18-year old woman on September 3, 1993. In his reasons for judgment, the sentencing judge quoted extensively from a portion of that report in which Dr. Lawson summarized admissions by the appellant about the sexual aspect of that offence and other criminal conduct. He then noted Dr. Lawson's assessment of the factors which contributed to the appellant's offences, including: "his early sexualization experiences and subsequent pre-occupation with sexual activity; his attitudes towards women, men and sexual relationships; his history of manipulation and control of women in the service of his sexual needs; and his self reported history of arousal to deviant sexual stimuli, and fantasy associated with break and enters." In conclusion, he noted Dr. Lawson's assessment of the risk the appellant posed to women:

... Mr. Cooper in the future as in the past is highly likely to experience a high degree of stress when his efforts to manipulate and control women [sic] are less than successful. Under these circumstances, it would seem highly likely that he would eventually resort to desperate measures of control including violence and aggression if not toward his romantic partner, to an unsuspecting woman asleep in her home.

- [5] This appeal focuses on the evidence of Dr. Lawson at the dangerous offender hearing held in October 1999. That hearing followed the appellant's conviction on September 10, 1999 by a jury for breaking and entering a dwelling house and committing a sexual assault on August 23, 1993. That predicate offence came to light as a result of an admission the appellant made during a voluntary intensive sexual offender treatment programme he undertook at the Regional Health Centre following his earlier incarceration and the availability of more sensitive DNA testing methods. Those methods also led to the sentencing judge's finding at the dangerous offender hearing that the appellant had committed a further breaking and entering a dwelling house and a sexual assault on August 4, 1993.

- [6] For the purpose of these reasons, all that needs to be known about these offences is that the appellant in each case entered a home in the evening, threatened the young female complainant with a knife or screwdriver and sexually assaulted her. On August 4, 1993, the assault included forced sexual intercourse. On August 23, the appellant fled when the complainant fought back as he tried to touch her, after forcing her to undress. On September 3, he touched the complainant's breast after he forced her to undress. He then masturbated and left, saying he would kill her if she told anyone. At the time of all these offences, the appellant was 23 years of age.
- [7] This appeal arises primarily from admissions Dr. Lawson made during cross-examination at the dangerous offender hearing about weaknesses in his 1995 report he acknowledged he had dictated, but not proof-read or signed. He acknowledged that he had no independent recollection of the appellant, that the interview was not tape recorded, that his notes had been destroyed, and that his report did not contain complete questions and answers of the appellant.
- [8] Dr. Lawson acknowledged that his report contained contradictions. At p. 3, he described the appellant as polite, co-operative and deferential, while later on the same page he stated that the appellant was manipulative during the interview. On p. 11, he stated the appellant had "volunteered no regret or remorse" toward the victim of the August 23rd attack he admitted to Dr. Lawson, while earlier he had noted the appellant's face and eyes reddened during a discussion of his then current charges including that of September 3 and two others, theft of photographs of young women and underwear, during break and enters in July and August 1993.
- [9] Dr. Lawson acknowledged other flaws. At p. 7, he described the appellant's casual sex with groupies while a member of a rock and roll band as "predatory sexual behaviour." Under cross-examination, he withdrew the word "predatory" and replaced it with "opportunistic." At p. 12, he commented that the appellant would likely attempt to seduce a female married friend whose house he intended to live in upon release from jail. Under cross-examination, Dr. Lawson withdrew that comment as "unprofessional." Lastly, he acknowledged his information about the age of the victim of the September 3rd attack had been wrong. He had read in the Report to Crown Counsel in 1995 that she was 15 years old. However, Crown counsel had advised him before he testified that the victim was 18 years old.
- [10] I am not persuaded the admitted contradictions are so significant that the trial judge should not have given any weight to Dr. Lawson's report. The evidence is consistent that the appellant is a highly complex individual who is capable of expressing a range of contradictory emotions and behaviours to his best advantage. At p. 3 of his report, Dr. Lawson described the appellant as polite, co-operative, and manipulative. He also noted that, "... [the appellant] projects as much as possible a highly positive image of himself, that his memory is very highly selective, and that he was less than fully disclosive during our interviews." He went on to characterize the appellant as highly intelligent, "in a range far above average."

- [11] Like Dr. Lawson's characterization of the appellant's behaviour as "predatory" as opposed to "opportunistic," the error as to the victim's age is of little significance when the report is read as a whole and considered with the other expert evidence. Dr. Lawson's comment about the likelihood the appellant would attempt to seduce a female married friend must be considered in the context of his explanation that his remark was an "overgeneralization" derived from "how he seems consistently to behave in ways that undermine the social network of support that he has, especially with his romantic partners."
- [12] The flaws in Dr. Lawson's report would be significant had the sentencing judge relied on his opinion without regard to other evidence, including the facts of the offences the appellant had committed of which Dr. Lawson was not aware. He did not fall into that error. After his lengthy quote from Dr. Lawson's report, he concluded at para. 47: "In my view, Dr. Lawson's foregoing observations are well supported by the evidence. I agree with them."
- [13] The sentencing judge had before him evidence of a number of experts who observed and assessed the appellant over more than ten years. All were consistent in describing the appellant as someone with a tendency to commit violent acts, an aversion to authority, a tendency to recidivism, and a lack of willingness to reform himself. As the sentencing judge noted, Steven Sigmund, a registered psychologist who interviewed the appellant in 1986 when he was 16 years old, described him as "in the superior range of overall intellectual ability," yet "aggressive," "rebellious," and "anti-authoritarian." Members of a multi-disciplinary team that ran the Intensive Treatment Program for Sexual Offenders the appellant attended at the Regional Health Centre from July 1996 to February 1997, described him as "inferior, seeking power over women," and as failing to "come to terms with his sexual deviance and acting out." They described his need for money, power, and sex, and his skill in manipulating others to meet that need. They also noted his self-reported deviant behaviour, including fantasizing about combined rape and break-and-enter scenarios.
- [14] Dr. Elisabeth Zoffmann, a court-appointed forensic psychiatrist, documented the appellant's frequent property offences and early onset of antisocial and criminal behaviour. She noted the appellant's pattern of ritualistic behaviour, seeking dominance over his female victims, drug abuse, voyeurism, escalation from voyeurism to actually perpetrating sexual assaults, and deviant sexual arousal patterns. She described the appellant, in the light of the third offence, as being in a "moderate to high" risk category for future sexual offending.
- [15] The evidence of these experts supports Dr. Lawson's findings and his diagnosis of anti-social personality disorder, sexual voyeurism and propensity to commit sexual offences, and substance abuse. Thus, I am not persuaded the sentencing judge erred in giving weight to Dr. Lawson's report despite its admitted flaws and the potential for bias it reflected.
- [16] It follows I would not accede to the appellant's submission that the sentencing judge's reasons for judgment are inadequate because they make no express reference to "important parts of the cross-examination of Dr. Lawson" and to the "inadequacies" of his report. This is because the reasons permit meaningful appellate review to determine the correctness of the

decision. That is the functional test recently enunciated by Binnie J. for the majority in *R v. Sheppard*, 2002 SCC 26. In that case, the Supreme Court affirmed that the absence or inadequacy of reasons is not a stand-alone ground of appeal. An appellate court may not intervene "simply because it thinks the trial court did a poor job of expressing itself."

- [17] The failure to address expressly the weaknesses of Dr. Lawson's report is not in itself sufficient ground to set aside the dangerous offender designation. The evidence as a whole establishes an inability, and unwillingness, on the part of the appellant to control his deviant sexual criminal behaviour. That is the evil for which the dangerous offender provisions are designed. The finding of intractability is supported by the evidence; it is not unreasonable. That is the ground, absent of error of law, on which an appellate court may intervene as is apparent from this passage from the reasons of the Chief Justice in *R. v. Currie*, [1997] 2 S.C.R. 260:
- [17] It is the stated opinion of this Court that Robert Currie was properly designated a dangerous offender and correctly sentenced to an indeterminate period of incarceration. That opinion is grounded in two basic legal propositions both of which I develop and apply below. Those propositions are: first, given the nature and structure of s. 753(b) of the Criminal Code, a presiding trial judge need not focus on the objective seriousness of a predicate offence in order to conclude that a dangerous offender designation is warranted. Second, a finding of dangerousness by a trial judge is a finding of fact, frequently based upon the competing credibility of experts, and as long as it is reasonable, it is a finding which should not be lightly overturned.

...

- [33] In this respect, the role of an appellate court is to determine if the dangerous offender designation was reasonable. This standard of reasonableness is similar to the traditional standard employed by appellate courts in their review of verdicts under s. 686(1)(a)(i) of the Criminal Code. Reasonableness is the appropriate standard of review in this case because, as much as dangerous offender status is a part of the post-conviction process, the application of general standards of sentence review is not warranted given the broad language of s. 759. Section 759(1) provides:

759. (1) A person who is sentenced to detention in a penitentiary for an indeterminate period under this Part may appeal to the court of appeal against that sentence on any ground of law or fact or mixed law and fact. [Emphasis added.]

Given this provision, I do not find the "manifestly wrong" or "demonstrably unfit" general sentencing standards developed and applied in cases such as *R. v. Shropshire*, [1995] 4 S.C.R. 227, *R. v. M. (C.A.)*, [1996] 1 S.C.R. 500, or *R. v. McDonnell*, [1997] 1 S.C.R. 948, to be applicable to this situation. However, it is equally true that s. 759 cannot be interpreted as calling for the equivalent of a trial *de novo* on the dangerous offender application. Some deference to the findings of a trial judge is warranted. After all, credibility should be assessed and findings of fact should be made by the trier of fact. The trier of fact is present when the testimony is being given and has the

contemporaneous ability to assess each witness.

[34] I should also point out that I am sympathetic to the submission of the respondent and the conclusion of the Ontario Court of Appeal below that, given their s. 759 jurisdiction to review the propriety of an indeterminate sentence, appellate courts are necessarily entitled to consider whether the finding of dangerousness itself was justified. In other words, as much as *R. v. Langevin* (1984), 11 C.C.C. (3d) 336 (Ont. C.A.), and *R. v. Sullivan* (1987), 37 C.C.C. (3d) 143 (Ont. C.A.), correctly held that s. 759 does not give appellate courts an explicit jurisdiction to overturn a dangerous offender designation, the facts upon which a dangerousness finding are based are necessarily relevant to determining whether an indeterminate sentence should be quashed. Hence the finding of dangerousness is properly before an appellate court.

[35] Accordingly, absent an error of law (which I discuss below), the crucial question on appeal is whether the trial judge's findings were reasonable.

[Emphasis added.]

[18] There was no error in the sentencing judge's analysis. He looked at each element of the test set out in s.753 of the Code and found, "considering all the evidence" that the appellant had, in the commission of three similar sexual assaults, shown a "failure to control his sexual impulses." In deciding whether to give the benefit of the long-term offender designation to the appellant, the trial judge noted that, "upon a full consideration of the facts," it was not a "reasonable possibility" that "the risk he possesses may eventually be controlled."

[19] A final word must be said with regard to the appellant's contention that the trial judge gave too much weight to the appellant's horrendous record of non-violent criminal conduct in assessing the risk he posed to women. The appellant has a record of over 150 criminal offences, stretching back to his early adolescence. Of those, 94 are breaking and entering, 7 are being unlawfully in a dwelling-house, and 2 are trespasses at night. The appellant alleges it was erroneous for the trial judge to have "referred repeatedly throughout his reasons for judgment to the habitual criminal behaviour of the appellant," when that habitual criminal behaviour does not include physical or sexual violence. The point his counsel makes is that the risk the sentencing judge was called upon to assess for the purposes of s. 753.1(1), and thus the dangerous offender designation, is that set down in s. 753.1(2), the "likelihood of causing injury, pain or other evil to other persons in the future through similar offence," not the risk of further non-violent property crimes.

[20] The sentencing judge concluded the phrase "or other evil" includes "the degradation" the appellant inflicted on the "three women by breaking into their homes at night and by subjecting them to his sexual will." After considering all the evidence, including the appellant's past history of breaking and entering and trespass, he found, "there is a strong likelihood of [the appellant] causing injury, pain or other evil to women in the future by his failure to control his impulses."

- [21] I can find no error in the sentencing judge's approach in this case. The appellant's life of crime escalated from non-violent theft to breaking and entering and trespass at night to sexual assault with weapons and death threats. His self-reported progression from night-time break-and-enters, to watching people sleeping, actively seeking out peeping or voyeuristic experiences while masturbating, to playing out those scenarios with his common-law partner, to actually perpetrating sexual assaults on victims during break and enters, establish a pattern of increasing sexual arousal, moving from the imagined to the acted out.
- [22] It is this link between the appellant's desire to break and enter and his sexual fantasies and assaults that makes the appellant's history of criminal conduct relevant to the assessment of the appellant's risk for future sexual violence. Dr. Zoffman considered highly material whether the appellant's sexual offences were "serendipitous" or the "main goals in the break and enters." She noted that if it was the latter, "the problem is much more serious and a risk for future sexual violence is significantly higher."
- [23] The sentencing judge determined on all the evidence that it was the latter. Thus, the link was established between the appellant's lengthy criminal record and his likelihood to re-offend sexually. Having considered all of the evidence, the trial judge was entitled to find the appellant posed a danger to the safety of women in the community and that there was little possibility he could be treated or controlled if released.
- [24] In summary, the sentencing judge's reasons permit meaningful appellate review of the correctness of his designation of the appellant as a dangerous offender. No error of law was established. The designation of the appellant as a dangerous offender is justified by the evidence. The finding the appellant's condition was intractable was reasonable on the evidence. The sentencing judge was obliged to consider all the evidence and to accept or reject whatever portions of that evidence he considered appropriate. He was entitled to disregard the purported "flaws" in Dr. Lawson's report, in light of its probative value when considered in relation to the other evidence. He was entitled to discount the evidence of Dr. Zoffman's "cautious optimism" in respect of the appellant's rehabilitation in light of his finding that the sexual aspect of the appellant's offences was deliberate, not serendipitous.
- [25] It follows I would dismiss the appeal.
- "The Honourable Madam Justice Huddart"
- I AGREE:
- "The Honourable Madam Justice Newbury"
- I AGREE:
- "The Honourable Mr. Justice Mackenzie"

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