
CANADA / JUDGMENT

R. v. D.J.S.

2015 BCCA 111

COURT

British Columbia Court of Appeal

DECIDED

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2015 BCCA 111 R. v. D.J.S.

COURT OF APPEAL FOR BRITISH COLUMBIA

Citation:

R. v. D.J.S.,

2015 BCCA 111

Date: 20150317

Docket: CA041809

Between:

Regina

Appellant

And

D.J.S.

Respondent

Restriction on Publication: A publication ban has been mandatorily imposed under s. 486.4 of the Criminal Code restricting the publication, broadcasting or transmission in any way of evidence that could identify a complainant or a witness. This publication ban applies indefinitely unless otherwise ordered.

Corrected Judgment: The text of the judgment was corrected at paragraph 35 on March 17, 2015.

Before:

The Honourable Madam Justice Newbury

The Honourable Madam Justice Saunders

The Honourable Mr. Justice Willcock

On appeal from: An order of the Supreme Court of British Columbia, dated April 16, 2014 (R. v. D.J.S., 2014 BCSC 819, Smithers Docket No. 21387-2 and 21835-2).

Counsel for the Appellant:

M.J. Brundrett

Counsel for the Respondent:

L. Helps

Place and Date of Hearing:

Vancouver, British Columbia

February 20, 2015

Place and Date of Judgment:

Vancouver, British Columbia

March 17, 2015

Written Reasons by:

The Honourable Madam Justice Newbury

Concurred in by:

The Honourable Madam Justice Saunders

The Honourable Mr. Justice Willcock

Summary:

Respondent, age 69, was convicted on two charges of sexual assault, which followed a lengthy history of sex crimes, many involving sexual assaults of young girls, spanning most of his life. He was diagnosed with pedophilic disorder, alcohol use disorder and antisocial and narcissistic traits, inter alia. After reviewing the evidence of two expert witnesses - Dr. P for Crown and Dr. M for Respondent - sentencing judge designated Respondent a dangerous offender pursuant to s. 753 of the Code. This finding was not challenged on appeal. After allowing appropriate credits for time spent in pre-hearing custody, he received a "net" global sentence of 19.5 months in custody and a ten-year LTSO. Sentencing judge did not impose an indeterminate sentence as she was satisfied Respondent had established a "reasonable expectation" that the global sentence followed by an LTSO would adequately protect the public, as required by s. 753(1.4). Crown submits sentencing judge erred in law in failing to impose an indeterminate sentence.

Held: Appeal allowed. Sentencing judge overstated the level of supervision that would be available to the Respondent in the community upon his release and misapprehended the evidence of Dr. M, who testified it would be impossible to predict the Respondent's risk of reoffending at the time he would be released from custody. More generally, sentencing judge erred in law in basing an expectation of Respondent's risk of reoffending based on what could at best be characterized as an expression of hope rather than a finding based on the evidence, particularly given the statutory presumption in s. 753(1.4) of the Code. An indeterminate sentence was therefore imposed.

Reasons for Judgment of the Honourable Madam Justice Newbury:

- [1] For reasons indexed as 2014 BCSC 819, Madam Justice Koenigsberg in the court below found the respondent D.J.S. to be a dangerous offender and sentenced him in April 2014 on two charges of sexual assault, one committed in 2008 and the other in 2010. Having been "persuaded that his risk to reoffend can be sufficiently lowered under existing resources, such that there is a reasonable expectation the public will be protected by a determinate jail sentence and a [long term supervision order ("LTSO")]", she found that determinate sentences were appropriate. (Para. 88.) In respect of the 2008 offence, she found that a sentence of 48 months and on the other, a consecutive sentence of 36 months would be appropriate. Since D.J.S. had served 40.5 months prior to sentencing and received a credit on a 2:1 basis, he was sentenced in fact to time served plus an LTSO of ten years on the first offence. On the second, D.J.S. received 1:1 credit and was sentenced in fact to 19.5 months in custody. The Crown appeals the imposition of a determinate, as opposed to indeterminate, sentence.

Factual Background

- [2] D.J.S. was 69 years old at the time of sentencing. His personal history was described by the trial judge at paras. 5-21, and was taken from her review of probation and psychological assessments of D.J.S. that were before the Court. D.J.S. is an Aboriginal who grew up in small remote communities in northern British Columbia. His mother was a chronic alcoholic and his father was rarely at home. The father was convicted of murder at one point and served a five-year custodial sentence. When D.J.S. was 10 years of age, he was sent to a tuberculosis sanatorium near Prince Rupert and spent four years there, mostly in bed. When he was returned home, his family had resettled in another community and D.J.S. attended school at Grassy Plains for a short time before leaving school.
- [3] D.J.S. had five sisters, two of whom reported receiving extensive abuse at his hands and witnessing several assaults on two other sisters. (Para. 11.) The trial judge recounted that:

In his interview with Dr. Piché, in February 2011, D.J.S. admitted to having intercourse with all four of his sisters, but interestingly also stated that had his father not been incarcerated for so long, this would have been when D.J.S. was between 15 and 21 years of age, he might not have assaulted his sisters or, as he put it, made those decisions because his dad would have said it was wrong.

R. reports that during their childhood the family led a very isolated life and said nobody would help if they talked about what was happening to them. She says that it was only after she moved out of B.C. that she felt safe enough to talk openly about the abuse by her brother. R. and M. said that whenever they did not obey D.J.S. he would beat them brutally with a belt or whatever was available. Each woman also describes incidents when they watched D.J.S. force himself on another sister and they felt helpless to do anything.

Pius Jack, now chief of the Nee-Tahi-Buhn Band, lived with the S. family for a time after his parents died. He confirms that what R. and M. describe is in fact the true picture of what life was like in the S. home. He adds that everyone in the community knew what was going on but were more concerned about protecting their own from D.J.S. than in helping his siblings. [At paras. 12-14.]

[4] D.J.S. married M.A.K. in 1970 and the couple had eight children. His wife described a life of "fear and total submission" to her husband and reported that when she was not sexually co-operative with him, he would beat her and force her to say she loved him. (Para. 16.) Alcohol played a large part in D.J.S.'s life and he often abused the children as well as his wife. She and her children left him in 1984 after finding "a safe place to hide." D.J.S. had a second relationship with a woman which lasted approximately three years. The couple had one daughter.

[5] In 1992, D.J.S. was convicted of ten sexual assaults. The trial judge described these and the resulting sentence thus:

He has a lengthy criminal record beginning at about age 19. Most notably D.J.S. was convicted February 13, 1992 for 10 sexual assaults, all of which were committed against his relatives, sisters and nieces and a daughter. Most of these were against these persons when they were between the ages of eight and 11. Some only ended when the sister left home at age 19. He had full vaginal or anal intercourse with his eight-year-old daughter at least three times between 1983 and 1985. All of these assaults took place between 1961 and 1985, and most involved the use of brutal force and intimidation.

D.J.S. began his sexual rampage through his family at about age 16 and the last at ages 38 to 40 which were the incidents with his daughter. Direct force was not used against his daughter to gain her compliance unlike what had been used against his sisters earlier in his life.

He was sentenced to five and a half years and paroled in October 1995 to a halfway house. During a travel pass to his community, D.J.S. attempted to sexually assault a teenager in 1997, and his parole was suspended. In August of 1997 his warrant expired and he returned to his reserve.

[At paras. 32-4.]

(D.J.S. was not charged with the 1997 assault, but during an interview with Dr. Piché, an expert witness at trial, admitted committing it as well as two other attempted sexual assaults in 1996. They occurred while he was supposedly under community supervision.)

[6] In 2005, D.J.S. was convicted of another sexual assault against a female relative, age 14, and received a suspended sentence and two years' probation. (The sentence may be explained by the fact that his criminal record was not brought to the attention of the Court.) In 2008, he committed the first predicate offence with which we are concerned in this appeal, against an adult female. In 2010, at age 65, he committed the second sexual assault against a 15-year-old girl. At the time he was on bail awaiting a trial on the first predicate offence. The two offences were described by the trial judge at paras. 22-28 of her reasons. Both involved victims who were intoxicated and who had passed out, only to wake and find D.J.S. assaulting them sexually. On November 23, 2010, D.J.S. was barred from residing on his reserve by resolution of his band council.

[7] Around this time, the following also occurred:

Shortly after his being detained on November 23 a family member attended his home to turn off the water after being advised that he had been detained, perhaps for a long time. When she went into the home she discovered a Barbie-type doll with an eight-year-old girl's face pasted on the doll's face and markings on the genitalia and the legs pinned open. As well, a pair of girl's underpants with his daughter's photo attached to them, were also in sight. After consultation with family who lived nearby, the items were reported to the RCMP and eventually the family took the items and brought them to the RCMP. [At para. 31.]

D.J.S. admitted to Dr. Piché that he had been "admiring" the eight-year-old girl for the previous two years, leading him to fantasize about children.

Expert Evidence

[8] The trial judge reviewed the expert evidence of Dr. Piché, a psychologist, whose evidence was proffered by the Crown, and Dr. Morgan, a psychiatrist, whose evidence was proffered by the defence. Dr. Morgan's report was prepared some three years after Dr. Piché's and both experts conducted lengthy interviews with D.J.S. and carried out several "assessment" tests. As noted by the trial judge, the experts agreed that D.J.S. fits the DSM-V diagnostic criteria for pedophilic disorder; alcohol use disorder; and "an unspecified personality disorder, antisocial and narcissistic traits", as well as diabetes. (Para. 40.) The judge noted that there were only "small differences" between the two reports, but that the discrepancies related to "the more significant and specific information and opinion of Dr. Morgan relating to management of D.J.S.'s risk in the community."

- [9] The trial judge reproduced lengthy excerpts from the experts' reports, and I refer the reader to the excerpt from Dr. Piché's assessment at para. 44 and to the excerpts from Dr. Morgan's assessment which begin at para. 48. It will, I hope, be sufficient to set out below a few of the conclusory paragraphs from Dr. Piché's report as follows:

Despite these ongoing sexual concerns, [D.J.S.] presented with very little insight into his behaviors. He was unmotivated to attempt to engage in further correctional treatment. While acknowledging a problem with alcohol abuse, [D.J.S.] did not believe that his sexuality was a concern. [D.J.S.] believed that his age precluded him from being a threat to the community. [D.J.S.] had no plans to change his lifestyle with the exception that he hoped to attend Church. [D.J.S.] did not acknowledge his expulsion from the [S.T.] Band and planned to return to his home if released from incarceration.

[D.J.S.] presented with multiple risk factors including deviant sexual interests, sexual preoccupation, using sex to cope with negative emotions, thinking errors, negative attitudes towards women, hostility and aggression within interpersonal interactions, poor problem solving skills, attitudes that support sexual contact with minors, poor future plans, continued alcohol use, identification of a child in his community who is a focus of his sexual fantasies, lack of housing-residence, lack of insight, past offenses while on community supervision, intimacy deficits, poor attitude towards intervention, and seeking power and control over others.

[D.J.S.] presented with significant risk factors. He was uninterested in personal change and did not wish to participate in treatment programs. While he would likely submit to participating in a treatment program within a correctional facility, given his longstanding resistance to treatment programs, it is unlikely that he would maintain these treatment gains when returned to the community.

Overall, it is my opinion that [D.J.S.] presents with a moderate-high risk to reoffend. This opinion takes into consideration his age and likely physical health deterioration over time. In situations of elevated risk, it is my opinion that [D.J.S.] presents with a high risk of reoffending. Situations of elevated risk include being in a position of authority or power over a vulnerable female (child, youth or intoxicated female), being alone with a female, using alcohol, engaging in sexual fantasies and-or masturbating to fantasies involving vulnerable females (child, youth or intoxicated female). [D.J.S.] has attempted to engage in sexual contact with vulnerable female victims (children, youth, intoxicated females) for many years. In situations where he is approaching young females for sexual contact, [D.J.S.]'s risk of engaging in unwanted sexual contact is very high.

[D.J.S.] took very little responsibility for his behaviors, life problems or current incarceration. Given his expressed lack of desire for further treatment, [D.J.S.] would be a poor treatment candidate. In my opinion, efforts to supervise [D.J.S.] in the community will require external monitoring and supervision. [D.J.S.] did not present with the psychological insight and motivation to be able to affect change or manage his own behaviors.

Should [D.J.S.] have access to correctional programs and consent to participate in these programs, it is recommended that he participate in an intensive Sex Offender Treatment program. [D.J.S.] would also benefit from a drug and alcohol treatment program as well as an intensive respectful relationships program. Given his number of treatment needs, [D.J.S.] would also require participation in follow up or maintenance programs to evaluate his application of the program concepts to his life. It should be noted that, at this time, [D.J.S.] did not express a motivation to complete such programming.

Additional efforts are required to protect [D.J.S.] from being in contact with children, including any female under the age of 18 years. He should not be allowed in environments where alcohol is available, he should abstain from intoxicants as well as avoid any contact with a female who is intoxicated.

Given his isolated residence and desire to return to his reserve despite his expulsion, it is likely that community supervision will be hazardous. Conditions are required to monitor [D.J.S.]'s housing choices and community integration on a long term basis. Any allegations of inappropriate or harmful behaviors towards women or children should be taken extremely seriously by his community supervision team. [At para. 44; emphasis by underlining added.]

[10] Dr. Piché also suggested at trial that situations of elevated risk of sexual offending by D.J.S. are related more to "the situation than the environmental location" and that if he has authority or power over a vulnerable female, it does not matter where he is located - on or off the reserve. She also testified to D.J.S.'s "thinking errors" - e.g., his belief that treatment for his sexual offending would not be helpful and that he did not require treatment for his alcohol use, and his failure to take responsibility for his sexual offences.

[11] Like Dr. Piché, Dr. Morgan also found that D.J.S. was "at high risk of committing future offences involving sexual violence" and agreed with Dr. Piché that he posed a "significantly elevated risk of future sexual recidivism, and that in certain situations his risk of reoffending is high." (Para. 48.) He suggested, however, that following his federal sentence, D.J.S.'s offending pattern had been "qualitatively different" in that the more recent offences appeared to be characterized by his being intoxicated and not to have involved his having 'engineered' situations by which he could secure unfettered access to a victim. Rather, they were more 'opportunistic'. Further, Dr. Morgan reported that the later offences:

do not appear to have involved anything like the same level of implied or explicit physical aggression or violence; in fact, it appears that whereas previously [D.J.S.] would be able to easily overcome any physical resistance offered by a victim, in his more recent offences this does not appear to be the case and victims have been able to physically resist him. This may be the result of [D.J.S.]'s physical strength lessening over time.

The most likely drivers for [D.J.S.]'s sexual offending appear to me to be (i) his underlying sexual deviance, (ii) his entrenched attitudes that predispose him to offending and (iii) that his sex drive remains elevated, despite his increasing age. Further, his risk of future offending more recently appears to be maximal when (iv) he is unsupervised and living in an isolated community, and (v) actively abusing alcohol. [At para. 50.]

[12] With respect to "possible options" for sentencing, Dr. Morgan noted that in the past, efforts to reduce D.J.S.'s risk of reoffending had "focused exclusively on attempting to provide him with skills to improve his internal controls. These appear to have had limited, if any success." Accordingly, he proposed to comment on "what external controls would be available in the community to mitigate [D.J.S.'s] risk of future sexual offending." Some of the external controls he suggested were impractical or unavailable - medications to lower the respondent's serum testosterone level, and alcohol abuse medications, for example. (See paras. 55 and 56.) Anti-depressants and regular blood tests to ensure abstinence from alcohol were also suggested. More importantly for our purposes, however, Dr. Morgan said this:

With regard to (iv) the situational contexts in which [D.J.S.]'s previous offences were committed, it appears to me that the offences were committed wholly on reserve, which was geographically remote and socially isolated. The information available to me suggests that when under close supervision in an urban setting [D.J.S.]'s risk has been adequately managed; whilst subject to federal parole and residing at Activators, there were no reported incidents of sexually inappropriate behavior. The allegations of sexual impropriety during this time related to periods [D.J.S.] spent on his home reserve, where the supervision he was subject to was commensurately reduced. It therefore appears to me that [D.J.S.]'s risk of reoffending can be significantly ameliorated by his being subject to tight supervision in an urban setting, where the likelihood [of] his gaining unfettered access to victims can be greatly reduced. [D.J.S.] will need to be "closely monitored by a supervising officer, and will need to reside in a highly structured environment, such as Activators. It is important that the supervising officer understand [D.J.S.]'s previous history of being unreliable and devious." [At para. 55; emphasis added.]

I pause to note that "Activators" is a community residential facility, or halfway house, located in Prince George. Another witness, Mr. Stratford, a community parole officer in Prince George, testified about this facility and I will return to his evidence in due course.

[13] In cross-examination, it became clear that Dr. Morgan's opinion regarding the manageability of D.J.S.'s risk in the community was based in part on his impression that D.J.S. had, in Dr. Morgan's words, "successfully completed his supervision in Prince George under close monitoring" because the "episodes of alleged impropriety" in 1996 occurred "when he was out [of] that environment. When asked what the risk of reoffending would be in ten years' time, he replied:

That depends firstly on whether [D.J.S.] is alive, and secondly, his physical condition. Beyond that I can't tell you. Would [D.J.S.] then be in a position to go back and live in a materially-deprived reserve? Would he be able to fend for himself? Would he be able to attend to his basic needs? The question is impossible to answer. [Emphasis added.]

[14] In addition to Drs. Piché and Morgan, the Court also heard evidence from Mr. Mater, who was D.J.S.'s parole officer when he was in federal custody between 1993 and 1995. The Corrections records reviewed by Mr. Mater indicated that D.J.S. had been found to be in "clear need [of] intensive treatment" and had "very little insight" as to why he had offended. D.J.S.'s file recorded his saying he "offended against his sisters because 'everyone did in the area that he lived in at the time'". He had withdrawn from the only intensive sex offender program available, apparently in order to carry on with his education while in custody. The record showed that during his supervision, he had frequently travelled to nearby reserves on travel permits and that following his statutory release in October 1995 he had taken a "community relapse prevention program" at the Activators halfway house.

[15] Mr. Stratford, a Prince George parole officer, testified about supervision in the Prince George community. With respect to Activators in particular, he testified that there was staffing on site 24 hours a day. He described an offender's daily routine as follows:

And offenders will report in, in the morning to sign out through the staff desk. They'll have a sign-out card with a - they have to use the time card or punch card system. And there's mandated check-in times, noon, five and evening curfew. Evening curfew is typically up to midnight.

Medications are kept in the staff office, secured and provided on a daily or as needed basis.

He said that offenders are required to advise "where they are going" when they leave the facility and that at some point during an offender's stay, a parole officer would normally review the offender's participation in treatment and counselling.

[16] Ultimately, the trial judge summarized the evidence regarding D.J.S.'s risk of reoffending as follows:

It is Dr. Morgan's opinion that D.J.S.'s risk to offend can be managed to an acceptable level in the community, whether he takes medication to lower his sex drive and/or his alcohol abuse. This opinion hinges on two factors: first, that a combination of his age relating to a decrease in physical strength and declining health means that his opportunity to successfully engage in a sexual assault is significantly lessened; and, that because all of his offending has been on a remote reserve where supervision is difficult and essentially sporadic, if at all, if he is removed from such an environment, lives in an urban setting under close supervision, and alcohol intake can be monitored, his opportunity to offend is very minimal.

As Crown counsel rightly pointed out, there is a population of very vulnerable young girls and women, often First Nations and often seeking money for drugs, in and around downtown Prince George. These young women would present an opportunity to offend if and when D.J.S. is allowed unsupervised hours outside any halfway house in the Prince George area. One cannot ignore the

reality of parts of many urban centres, including Vancouver, and no expert evidence is necessary for the court to acknowledge that such a state of affairs is known to exist in downtown Prince George within walking distance of some halfway houses.

Further, if any family with teenagers or young children were allowed to visit for any length of time with D.J.S. while he resided in such a halfway house, there is real danger that drinking, wherever the family is staying, may take place. I note D.J.S.'s comments to Dr. Piché that trouble comes to him; that is, that it is the family's fault if he is drinking. So there is a real danger that wherever the family is staying, drinking may take place and children may be inadequately supervised and D.J.S.'s opportunity to offend is greatly increased beyond acceptable levels. Thus, any close supervision would have to restrict where and for how long family members could visit. This of course would include restrictions on D.J.S. being in proximity to any females under the age of 16.

Ultimately, Dr. Morgan and Dr. Piché agreed that for external controls to be effective to "manage" D.J.S.'s risk in the community, very close supervision would be required. Such supervision was the subject of evidence of a few witnesses, but specifically the evidence of Bracey Stratford, which I will summarize later in these reasons.

Ultimately it was Dr. Morgan's opinion that under close supervision, without medications to address D.J.S.'s elevated sex drive and alcohol abuse tendencies, his risk to reoffend is manageable in the community. If he agreed to take medication to reduce his sex drive or his use of alcohol, then his risk to reoffend would correspondingly be even lower and would require less close supervision. [Paras. 58-62; emphasis added.]

Trial Judge's Analysis of the Law

[17] Both counsel at trial agreed that D.J.S. met the criteria of a dangerous offender in ss. 753(1)(a) (i) and 753(1)(b) of the Code. (Para. 63.) The trial judge then turned to the applicable law regarding sentencing. She reproduced ss. 753(1)(a)(i), 753(1)(b), 753(4) and 753(4.1), of the Code, noting that under the amendments made in 2008, an indeterminate sentence must be imposed unless the requirements of s. 753(4.1) are satisfied. That provision states:

The court shall impose a sentence of detention in a penitentiary for an indeterminate period unless it is satisfied by the evidence adduced during the hearing of the application that there is a reasonable expectation that a lesser measure under paragraph (4)(b) or (c) will adequately protect the public against the commission by the offender of murder or a serious personal injury offence. [Emphasis added.]

[18] The judge noted that the reference in this provision to a "reasonable expectation" is new and that the phrase has been interpreted to mean a "confident belief, for good and sufficient reasons" in *R. v. Walsh* 2011 BCSC 1911, applied in *R. v. Shanoss* 2013 BCSC 2335 at para. 145. Koenigsberg J. accepted the analysis of the Court in *Shanoss*, including its discussion of "the application of resources in the community, the statutory framework provided by the Corrections and Conditional Release Act, S.C.1992, c. 20 and the role of the Parole

Board." (Para. 71.) Again, I will not reproduce the lengthy excerpt adopted by the trial judge at para. 71, except to note the comments of the Court in *R. v. Hartling* [2005] O.J. No. 545 (S.C.J.) at para. 52, which were adopted in *Shanoss*:

- [52] I appreciate that it cannot simply be a matter of imprisoning a dangerous offender indeterminately because insufficient resources may be in place to adequately supervise him. On the other hand, there are limits to how closely an offender can be supervised while in the community, to how carefully and frequently he can be screened effectively for alcohol or drug abuse, to how adequate reasonable compliance mechanisms can be, and ultimately, to how many resources it would take to reduce a serious risk to acceptable limits. Hartling's history of non-compliance with medication, of his abrupt disappearances, of his unwavering dependence on alcohol and drugs, and of his inability to settle down to any one place and lifestyle, take it beyond reality, in my view, to realistically foresee eventual control in the community of the risk he poses to re-offend violently. It would place such a tremendous reliance on the closeness of the supervision, the frequency required of urine or blood screening and the immediacy required in obtaining the results, that it defies reality in the community. So closely would his life have to be monitored, supervised and scrutinized, the concept effectively merges with confinement or imprisonment. [At para. 71; emphasis added.]
- [19] At para. 83, after acknowledging that "external controls are the only possibility" of controlling the respondent's propensity to offend, the trial judge stated that the "real issue" was whether D.J.S. had persuaded the Court that there was a reasonable expectation that a jail sentence followed by a LTSO would adequately protect the public. The onus on the accused to do so was, she noted, a persuasive rather than evidentiary one. In the central passage of her reasons, the trial judge then stated:

The court was told that close supervision orders entail assessments of how closely supervision must be relative to the assessed risk to reoffend, and options are available for very high-risk offenders at such places as Belkin House in Vancouver, referred to as an enhanced halfway house.

Other options in the Prince George area include a camp in a remote setting, which is appropriate for high-risk offenders such as pedophiles. It is a work camp affiliated with Activators, a halfway house where D.J.S. spent approximately one and a half to two years in the mid-1990s. Close supervision includes limited unsupervised hours outside the home, checking for alcohol use, monitoring medication, supervised activities on site and are all available through Activators.

Dr. Morgan, who works with offenders residing at Activators and is aware of the type of supervision available there, opined that if D.J.S. were accepted at Activators, and that is an outstanding question, and closely supervised, his risk to reoffend would be minimal. Dr. Morgan relied on the fact that for nearly two years at Activators in the mid-1990s, when D.J.S. was more physically healthy and able, that is, he was in his early fifties with a fair amount of free time to walk about in Prince George, he was never caught in breach of any conditions, including using

alcohol. When D.J.S. did offend during his time on parole, it was when he was given passes to go to his reserve in an unsupervised and isolated environment.

D.J.S. is, as pointed out by Dr. Morgan, less able to offend easily because of his age and state of health. Unlike Mr. Shanoss, D.J.S. did not get away with breaching his conditions when under the supervision of Activators.

While there is some risk to a specific population of vulnerable young girls and women in downtown areas near the halfway house in either Prince George or Vancouver, given D.J.S.'s age, deteriorating state of health, and his previous ability to live within the restrictions imposed by a place like Activators while in an urban environment, I am persuaded that his risk to reoffend can be sufficiently lowered under existing resources, such that there is a reasonable expectation the public will be protected by a determinate jail sentence and a LTSO. [At paras. 84-8; emphasis added.]

(Again, I note that in fact D.J.S. did carry out three attempted sexual assaults while on passes from the halfway house in 1996.)

[20] The trial judge also considered the effect of D.J.S.'s Aboriginal background on the sentencing task before her. She again adopted as "apt and relevant" the analysis of Bruce J. in Shanoss at paras. 161-3, including the following:

A more limited application of the Gladue factors in dangerous offender proceedings was also recognized by the Saskatchewan Court of Appeal in *R. v. Standingwater*, 2013 SKCA 78 at para. 49, due to the primary focus on protection of the public. However, Caldwell J.A. also articulated a practical application of the Gladue factors to dangerous offender proceedings. The sentencing judge should look to whether there are Aboriginal-focused programs and supervision models that will reduce the risk to re-offend posed by the particular Aboriginal offender. If these programs do exist, then it enhances the possibility of eventual control of the risk in the community in satisfaction of the test in s. 753(4.1). [At para. 74.]

[21] The trial judge noted the dysfunctional environment in which D.J.S. had been raised, although, she noted, he had been taught "respect for and skill in traditional Aboriginal practices" by his father. At para. 79 she observed that the Gladue principles were of very limited assistance in determining a fit sentence but recommended that any programming made available to D.J.S., in or out of custody, should be geared to his Aboriginal culture. (Para. 79.)

[22] The Crown sought an indeterminate sentence in light of D.J.S.'s high to moderate risk of reoffending, and sought "very close" supervision for 10 years under a LTSO in order to protect the public adequately. The defence on the other hand sought a determinate global sentence on the two predicate offences, followed by a 10-year LTSO.

[23] Having found that the respondent's risk to reoffend could be "sufficiently lowered under existing resources", the judge imposed the two determinate sentences I described earlier. We were told that D.J.S. will have served two-thirds of his time and will therefore be eligible for statutory release in May of this year. Since his global sentence, net of credits, was less than 24 months, he is in a provincial facility.

On Appeal

[24] In this court, the Crown asserts that the trial judge erred in the following respects:

- i) imposing a determinate sentence and LTSO in the absence of evidence supporting the respondent's treatability, rehabilitation, or potential for reduction of risk;
- ii) imposing a determinate sentence and LTSO in the absence of evidence establishing that the respondent's risk would be controlled within the time frame of a lesser sentence; and
- iii) misapplying the criteria for an indeterminate sentence in s. 753(4.1) of the Criminal Code by holding that mere geographic relocation and supervision could provide a reasonable expectation that the public will be protected.

[25] Since this is a Crown appeal, and since Ms. Helps on behalf of D.J.S. relied in this court essentially on a 'standard of review' argument in favour of deference to the trial judge, I propose to deal first with the question of what constitutes an error of law in the context of the sentencing of dangerous offenders.

Standard of Review

[26] A good starting point is the decision of this court, per Mr. Justice Esson in *R. v. J.S.M.* 2003 BCCA 66. At para. 18, he noted the following comments of Arbour J. for the Court in *R. v. Biniaris* [2000] 1 S.C.R. 381:

... As before, the Crown is barred from appealing an acquittal on the sole basis that it is unreasonable, without asserting any other error of law leading to it.

There is no anomaly in this result. The powers of the court of appeal in the case of Crown appeals on a question of law are contained in s. 686(4) of the Code. There is no reference in that section to an unreasonable verdict. This is consistent with the limited rights of appeal conferred on the Crown by s. 676(1). The absence of language granting a remedial power corresponding to s. 686(1)(a)(i), suggests that Parliament did not intend "unreasonable acquittals" to be appealable by the Crown at first instance. Further, and more importantly, as a matter of law, the concept of "unreasonable acquittal" is incompatible with the presumption of innocence and the burden which rests on the prosecution to prove its case beyond a reasonable doubt. See *Lampard*, *supra*, at pp. 380-81; *Schuldt v. The Queen*, 1985 CanLII 20 (SCC), [1985] 2 S.C.R. 592, at p. 610, 23 C.C.C. (3d) 225, 24 D.L.R. (4th) 753; *B. (G.)*, *supra*, at pp. 70-71. Since different policy considerations apply in providing the Crown with a right of appeal against acquittals, it seems to me that there is no principle of parity of appellate access in the criminal process that must inform our

interpretation of this issue. [At paras. 32-33.]

Esson J.A. then continued:

The Crown's position is that the issue raised by this appeal is about the application of a legal standard, an issue which raises a question of law. In *Biniaris*, Arbour J. said, at para. 37:

... These examples demonstrate that in trials by judge alone, the court of appeal often can and should identify the defects in the analysis that led the trier of fact to an unreasonable conclusion. The court of appeal will therefore be justified to intervene and set aside a verdict as unreasonable when the reasons of the trial judge reveal that he or she was not alive to an applicable legal principle, or entered a verdict inconsistent with the factual conclusions reached. These discernable defects are themselves sometimes akin to a separate error of law, and therefore easily sustain the conclusion that the unreasonable verdict which rests upon them also raises a question of law.

An even more recent decision touching on the point is *R. v. Araujo*, [2000] 2 S.C.R. 992, 149 C.C.C. (3d) 449. In that case, the appellants argued that the Crown's appeal to this Court on an issue relating to wiretap authorizations did not raise a question of law and that this Court therefore had had no jurisdiction to allow the appeal. With respect to that, LeBel J., for the court, said:

[18] It is clear that this argument must fail. The interpretation of a legal standard has always been recognized as a question of law: *R. v. Ewanchuk*, [1999] 1 S.C.R. 330 at para. 21, 131 C.C.C. (3d) 481, 169 D.L.R. (4th) 193. Moreover, our Court has recently recognized that if a question is about the application of a legal standard, that is enough to make it a question of law: *R. v. Biniaris*. In the case before us, the Court of Appeal examined the combined interpretation and application of the legal standard of investigative necessity. It also discussed the interpretation and application of the standard of review for a judge reviewing a wiretap authorization. There is no question that the Court of Appeal was dealing with questions of law. Thus, there was no jurisdictional bar to the Crown's appeal.

In support of its submission that its appeal raises a question of law, the Crown refers to two decisions of the Ontario Court of Appeal which have dealt with issues similar to those in the case at bar. Both cases were decided on the dangerous offender provisions of the Criminal Code as they stood prior to the 1997 amendments. In each case, the issue was whether the sentencing judge had erred in law in exercising the discretion to impose a determinate rather than an indeterminate sentence.

In *R. v. Poutsoungas* (1989), 49 C.C.C. (3d) 388 (Ont. C.A.), the trial judge, having found the accused to be a dangerous offender, had imposed a determinate sentence. The Court of Appeal allowed the appeal on the ground that certain of the factors upon which the trial judge had relied with respect to the prospect of rehabilitation were speculative or conjectural grounds. One was that a psychiatrist and a psychologist had expressed the view that if the accused were able to appreciate and accept his personal responsibility for his terrible crimes and was genuinely remorseful and able to come to grips with his alcohol and drug addictions, treatment might well

bring about positive results which would lead to his rehabilitation. The other factor was that the same witnesses thought that the expressions of acceptance, of responsibility and remorse were genuine. At pp. 391-92, the court said:

These factors, in effect amount to a finding that the respondent might or could be rehabilitated. With respect, such a conclusion by the learned trial judge's own reasoning was dependent on so many contingencies as to be little more than an expression of hope rather than a finding from the evidence that could reasonably serve as a basis for such a serious disposition. The contingencies are: (1) if the accused accepts responsibility; (2) if he is remorseful; (3) if he is able to come to grips with alcohol and drug addiction, and (4) if he receives proper treatment. If these were satisfied there could be positive results that could lead to his rehabilitation.

The trial judge found that he was not prepared to say that the expressions of remorse and responsibility were not genuine.

However, there was no evidence that the third contingency of abstinence had been or would be fulfilled and also a considerable history to suggest otherwise.

With respect to the fourth contingency, proper care, the most optimistic view, that of Dr. Proud, required the intervention of "psychotherapy from a sophisticated therapist" and there was no evidence that the respondent would receive such care in the penitentiary where he inevitably would be.

[27] The Court also quoted from the reasons of Charron J.A. (as she then was) in *R. v. Higginbottom* (2001) 156 C.C.C. (3d) 178 (Ont. C.A.), in which a Crown appeal was allowed against the imposition of a determinate sentence for a dangerous offender. Charron J.A. observed:

In my view, the Trial Judge erred in exercising his discretion to impose a determinate sentence in the absence of any evidence specific to Mr. Higginbottom that he could be rehabilitated within a fixed period of time. In fact, the evidence relating to the treatment possibilities overwhelmingly pointed to the opposite conclusion. Just as this Court concluded in *R. v. Poutsoungas* (1989), 49 C.C.C. (3d) 388 (Ont. C.A.), it is my view that the Trial Judge's error in law in the exercise of his discretion, on the facts of this case, has resulted in a failure to give effect to the basic purpose of the dangerous offender provisions in the Criminal Code, the protection of the public. [At paras. 17-23; emphasis added.]

[28] In *J.S.M.* itself, the Court found that the sentencing judge had erred in law in failing to be "alive to an applicable legal principle" or entering a "verdict inconsistent with the factual conclusions reached", again citing *Biniaris*. Although the Court did not refer to *Housen v. Nikolaisen* 2002 SCC 33, now the seminal Canadian case on standard of review, I am not persuaded that the Court's analysis in *J.S.M.* is inconsistent with *Housen*. There it was said that the application of a legal standard to a set of facts is a question of mixed fact and law (para. 27). The majority went on, however, to observe:

Once it has been determined that a matter being reviewed involves the application of a legal standard to a set of facts, and is thus a question of mixed fact and law, then the appropriate standard of review must be determined and applied. Given the different standards of review applicable to questions of law and questions of fact, it is often difficult to determine what the applicable standard of review is. In *Southam*, supra, at para. 39, this Court illustrated how an error on a question of mixed fact and law can amount to a pure error of law subject to the correctness standard:

... if a decision-maker says that the correct test requires him or her to consider A, B, C, and D, but in fact the decision-maker considers only A, B, and C, then the outcome is as if he or she had applied a law that required consideration of only A, B, and C. If the correct test requires him or her to consider D as well, then the decision-maker has in effect applied the wrong law, and so has made an error of law.

Therefore, what appears to be a question of mixed fact and law, upon further reflection, can actually be an error of pure law. [At para. 27; emphasis added.]

Thus it appears that errors of law can arise out of 'questions' of mixed fact and law. The majority in *Housen* also expressed the view that:

Matters of mixed fact and law lie along a spectrum. Where, for instance, an error with respect to a finding of negligence can be attributed to the application of an incorrect standard, a failure to consider a required element of a legal test, or similar error in principle, such an error can be characterized as an error of law, subject to a standard of correctness. Appellate courts must be cautious, however, in finding that a trial judge erred in law in his or her determination of negligence, as it is often difficult to extricate the legal questions from the factual. It is for this reason that these matters are referred to as questions of "mixed law and fact." Where the legal principle is not readily extricable, then the matter is one of "mixed law and fact" and is subject to a more stringent standard ...

...

[A] question of mixed fact and law...is subject to a standard of palpable and overriding error unless it is clear that the trial judge made some extricable error in principle with respect to the characterization of the standard or its application, in which case the error may amount to an error of law. [At paras. 36-7; emphasis added.]

[29] In the dangerous offender context, the Alberta Court of Appeal recently found, in *R. v. Dagenais* 2003 ABCA 376, that a trial judge had erred in focusing on the "dubious prospect of rehabilitation and [failing] to consider whether public safety would be compromised by a determinate sentence." (Para. 74.) Wittmann J.A. continued at para. 75:

The sentencing judge was bound by and applied *Neve* [1999 ABCA 206], which at para. 229 described the residual judicial discretion to be exercised as requiring the sentencing judge to ask, "Does this offender fall within that relatively small group of criminals in respect of whom preventive incarceration is warranted?" His reasons for failing to designate the respondent to

dangerous offender focussed on treatment prospects. This constituted an error in law in two ways: first by creating an additional criterion, the elimination of all treatment prospects, as a prerequisite for a dangerous offender designation; and second, by requiring the treatment standard to be satisfied even when public safety would be compromised by failing to impose an indeterminate sentence.

This Court's decision in *Neve* indicated that future treatment prospects should be considered a factor in exercising residual discretion. But that decision did not require a sentencing judge to completely reject all prospects for treatment of the offender or find treatment to be entirely hopeless before making the designation, nor did it invite judges to disregard other sentencing principles, such as protection of the public, in exercising residual discretion. The standard the sentencing judge applied to the offender's prospects for treatment was incorrect; he in fact created a new standard, one which would require a finding that the offender had absolutely no prospect of treatment. This standard would be impossible to meet.

The sentencing judge, in considering whether there was any possibility of treatment, elevated that factor to a determining principle in the exercise of his discretion. This was an error of law analogous to the illustration in *Southam* quoted above. [At paras. 75, 78-9; emphasis added.]

[30] Of course as we have seen, since *Dagenais* was decided, the dangerous offender sentencing provisions have been amended at ss. 753(4) and (4.1) to permit an indeterminate sentence only where there is a "reasonable expectation" that a lesser measure would adequately protect the public. There is little doubt that, as stated in *R. v. B.A.R.* 2011 BCSC 1313, this imposes a higher standard than was previously the case in that an "expectation" speaks to a belief that something will happen, as opposed to the mere possibility. (See also *R. v. Osborne* 2014 MBCA 73 at paras. 70-73, with which I respectfully agree.)

[31] Finally, before leaving the question of standard of review, I note that it is well established that it is an error of law to make a finding of fact for which there is no evidence: see *R. v. J.M.H.* 2011 SCC 45 at para. 25.

The Case at Bar

[32] In my respectful view, the trial judge in the case at bar made some specific errors in her analysis of D.J.S.'s 'manageability', which errors together seem to reflect a more general error of exercising her discretion in favour of a determinate sentence when the evidence does not support an expectation - as opposed to a hope - that he can be managed "in the community" and that the public can thereby be protected in the applicable time frame.

[33] In specific terms, the trial judge appears to have misapprehended the burden of Dr. Morgan's evidence regarding the level of risk posed by D.J.S. At para. 58 of her reasons, for example, she stated in discussing Dr. Morgan's opinion that D.J.S.'s "opportunity to offend is very minimal" (my emphasis) provided he is removed from the remote reserve where supervision is difficult and lives in an urban setting under close supervision, and his alcohol intake can be monitored. As noted by the Crown in its factum, Dr. Morgan did not opine that

D.J.S. would pose a "minimal" risk or even a low risk in an urban setting. As noted earlier, he testified that it was "impossible" to predict what D.J.S.'s risk of reoffending would be in ten years' time.

[34] Nor did Dr. Morgan seem to appreciate that the Activators halfway house does not provide what one would describe as "close supervision" that would substantially reduce 'opportunities' for reoffending. The evidence is that inmates are free to come and go, provided they check in at scheduled times. Certainly the access of inmates to potential victims both in the City of Prince George and its environs does not seem to be controlled. The trial judge acknowledged the "population of very vulnerable young girls and women, often First Nations and often seeking money for drugs" in and around Prince George. (Para. 59.) This led her to conclude that "close supervision would be required"; but the evidence does not support the conclusion that such supervision would be provided at Activators in Prince George. The evidence regarding Belkin House in Vancouver was not much more encouraging.

[35] Nor was Dr. Morgan given a time frame in which to place his predictions regarding 'manageability'. The Crown referred us to the following passage from his testimony:

Q Okay, so let us return, then, to the question I was going to ask you. So we shall start. In your professional opinion what risk of reoffending does [D.J.S.] present if he is placed in a highly structured, highly supervised urban environment such as a halfway house, such as Activators, but not given the anti-androgen treatments or the anti-alcohol treatments?

A Okay. So even considering for the risk assessment, the evidence that I have to consider is what happened previously, and [D.J.S.] successfully completed his supervision in Prince George under close monitoring. The episodes of alleged impropriety occurred when he was out with that environment.

Q And thus your conclusion?

A My conclusion is that the risk can be managed. I can't quantify it. I can't give you a number. [Emphasis added.]

[36] It is unclear whether the psychiatrist was anticipating anything like a determinate global sentence of 19.5 months (or two-thirds thereof) when he opined that D.J.S.'s risk of re-offending "could" be reduced by placing him in a highly structured environment and in an urban setting where he would supposedly be unable to gain easy access to young girls and women. The trial judge herself acknowledged earlier in her reasons that vulnerable young girls and women, many of them Aboriginal, may be found on the streets of Prince George. She proffered no explanation as to why D.J.S. would not follow his previous practices of preying on such persons, except for the distinction between an urban environment and D.J.S.'s reserve.

[37] In more general terms, I am persuaded with respect that the trial judge fell into an error of law much like that described in Poutsoungas, supra - basing an "expectation" on "so many contingencies as to be little more than an expression of hope rather than a finding from the evidence that could reasonably serve as a basis for such a serious disposition." This is an even more serious error here, given the statutory presumption that an indeterminate sentence is to be imposed unless the court is persuaded there is a reasonable expectation a lesser measure will adequately protect the public. It is simply not possible to stretch Dr. Morgan's opinion so far as to justify such an expectation in this case. Further, as in Higginbottom, supra, there was no evidence to show that D.J.S. could be rehabilitated within a fixed period of time. To the contrary, both expert witnesses found it impossible to endorse any such projection.

[38] With thanks to both counsel, I would allow the appeal, set aside the determinate sentences, and impose a sentence of detention in a penitentiary for an indeterminate period.

"The Honourable Madam Justice Newbury"

I AGREE:

"The Honourable Madam Justice Saunders"

I AGREE:

"The Honourable Mr. Justice Willcock"

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