
CANADA / JUDGMENT

R. v. Ferguson

2014 BCSC 2556

COURT

Supreme Court of British Columbia

DECIDED

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2014 BCSC 2556 R. v. Ferguson

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

R. v. Ferguson,

2014 BCSC 2556

Date: 20141127

Docket: 95408-2

Registry: Kamloops

Regina

v.

Craig Robert Cecil Ferguson

Before: The Honourable Justice Donegan

Oral Reasons for Judgment

on Application for Directions

Counsel for Crown:

T. A. Livingston

Counsel for Defence:

K. Tessovitch

Place and Date of Trial/Hearing:

Kamloops, B.C.

November 5, 2014

Place and Date of Judgment:

Kamloops, B.C.

November 27, 2014

INTRODUCTION

- [1] THE COURT: Craig Ferguson is to be sentenced for several serious offences set out on Indictment 95408-2.
- [2] On June 24, 2014, Mr. Justice Meiklem granted the Crown's application, opposed by Mr. Ferguson, for an assessment order pursuant to s. 752.1 of the Criminal Code of Canada, R.S.C., 1985, c. C-46. Dr. Lindsay Jack conducted this assessment and filed her written report with the court on September 23, 2014.
- [3] In this application for directions, the Crown asks the court to provide a direction to Dr. Jack to clarify her opinions. Specifically, the Crown seeks to have Dr. Jack directed to provide a clear opinion as to the level of risk Mr. Ferguson presents for future general offending, general violent offending and domestic violent offending, and what, if any, treatment options might manage those risks. Alternatively, the Crown submits that a second assessment should be ordered.
- [4] Mr. Tessovitch, counsel for Mr. Ferguson, opposes both the application for directions and the alternative application for a second assessment order.

BACKGROUND

- [5] Mr. Ferguson has been convicted of four offences against the same person, arising on the same day. The convictions are, in short, unlawful confinement, assault with a weapon, common assault and uttering threats. He has yet to be sentenced.
- [6] On June 24, 2014, Mr. Justice Meiklem was satisfied that Mr. Ferguson was convicted of a serious personal injury offence and of the existence of reasonable grounds to believe he might be found to be a dangerous or long-term offender. As a result, he ordered that Mr. Ferguson be remanded to the custody of the Director of Clinical Services, Forensic Psychiatric Services, to have an assessment performed by experts. Pursuant to this order, registered psychologist Dr. Jack completed a psychological assessment of Mr. Ferguson. Her 72-page report is filed with the court. With it, Dr. Jack appended material with which she had been provided and her curriculum vitae. She briefly described her qualifications to conduct this assessment and to be able to provide this opinion within the body of her report. The Crown does not take any issue with Dr. Jack's qualifications, her methodology or the testing instruments used.

POSITIONS OF THE PARTIES

[7] The Crown's complaint about Dr. Jack's opinions is based upon her lack of clarity in expressing those opinions. Mr. Livingston says that, while some reading between the lines is possible, Dr. Jack's opinions regarding risk are not clearly set out. This makes the Crown's decision about whether to proceed with a dangerous or long-term offender application difficult.

[8] As the court's witness, the Crown argues that inherent jurisdiction allows the court to issue directions to require Dr. Jack to more clearly and precisely set out her opinions. Such directions, Mr. Livingston argues, are necessary in order for the assessment to have value. As an example of this lack of clarity, I am directed to page 57 of the assessment report where Dr. Jack summarizes her opinion regarding testing results from a particular instrument for assessing risk of violence, the HCR-20. She writes:

In summary, in Mr. Ferguson's case, the majority of risk factors included in the HCR-20 are present. I am of the view he will require high levels of intervention and controls to attempt to manage his risk factors, although I note in the past even high levels have not been effective in managing Mr. Ferguson's risk.

[9] Another example can be found at page 64. After outlining a summary of risk issues over the previous four pages, Dr. Jack writes:

Based on available information, including the risk assessment instruments and structured professional judgment discussed previously, it is my opinion Mr. Ferguson will require high levels of intervention both while institutionalized and if in the community. Generally higher numbers of risk factors are associated with higher levels of risk, necessitating higher intensity intervention/risk management. [Emphasis in original.]

[10] The criticism, as I understand it, is that Dr. Jack does not clearly provide an opinion as to the level of risk posed by Mr. Ferguson in terms of "high, moderate or low", or some other descriptive measure. To contrast, Mr. Livingston points to an opinion expressed by another expert in *R. v. Jeurissen*, 2014 BCSC 1718. In that case, Madam Justice Ker set out certain portions of the opinions of Dr. Hervé at paras. 295 and 296. A highlight from para. 295 demonstrates the manner in which Dr. Hervé expresses his opinions. He wrote that Mr. Jeurissen was, among other things:

- i. at a "High Risk for general offending, including committing crimes to support his substance abuse and lifestyle (e.g., selling drugs, thefts) and offences for violating criminal justice sanctions (e.g., breaches, fail to attend). As long as Mr. Jeurissen continues to abuse substances, his risk for general offending is likely to remain High."
- ii. at a "High Risk to engage in general violence "
- iii. at "a High Risk to engage in domestic violence towards future intimate partners "

- [11] When compared one against the other in this fashion, one can certainly see a distinct difference in the manner of expression and writing styles of these two experts.
- [12] Mr. Ferguson opposes the Crown's application for directions or a second assessment. Mr. Tessovitch submits that Dr. Jack's report is very comprehensive and her opinions with respect to risk and risk management are sufficiently clear to serve their purpose. Mr. Tessovitch stresses that different experts articulate their opinions in different ways, but in any event, the ultimate determination of Mr. Ferguson's risk and its management or not, (his future dangerousness) are for the court to determine, not the expert. He submits that it would be inappropriate for the court to interfere with the opinion of an expert witness and/or order a second assessment in this case.
- [13] No case authorities were provided or referred to by either counsel.

SECTION 752.1 OF THE CODE

- [14] Before turning to Dr. Jack's report, a review of the applicable legislation, its purpose, and the role of the assessor is necessary. Section 752.1 provides:

752.1 (1) On application by the prosecutor, if the court is of the opinion that there are reasonable grounds to believe that an offender who is convicted of a serious personal injury offence or an offence referred to in paragraph 753.1(2)(a) might be found to be a dangerous offender under section 753 or a long-term offender under section 753.1, the court shall, by order in writing, before sentence is imposed, remand the offender, for a period not exceeding 60 days, to the custody of a person designated by the court who can perform an assessment or have an assessment performed by experts for use as evidence in an application under section 753 or 753.1.

- [15] Several authorities have discussed the purpose of s. 752.1. Recently, in *R. v. McDonald*, 2014 BCSC 2131, Mr. Justice Finch considered an application to extend the time for filing a 752.1 report. In summarizing the purpose of s. 752.1, he wrote at paras 15 and 16:
- [15] Section 752.1 of the Criminal Code forms part of a legislative scheme designed to protect the public from offenders who may pose a significant risk to the community: *R. v. K.R.S.*, 2000 BCCA 433 at para.19.
- [16] The section sets out a detailed scheme for obtaining a post-conviction forensic assessment addressing an offender's future dangerousness
- [16] At paras. 18 through 20 he continued:
- [18] Section 752.1 serves the goal of ensuring that the sentencing court be given access to the widest possible range of information in order to determine whether an offender poses an unacceptable risk to public safety: *R. v. Jones*, [1994] 2 S.C.R. 229 at para. 124.

- [19] Joseph A. Neuberger notes that the role of s. 752.1(1) in the overall regime of Part XXIV is "crucial": *Assessing Dangerousness: A Guide to the Dangerous Offender Application Process* (Toronto: Carswell, 2011) at p. 3-20. Section 752.1 permits the Crown to obtain a forensic assessment of the offender, focusing on his or her propensity for future dangerousness. An assessment completed under s. 752.1(1) may be used as evidence in a dangerous or long-term offender application. The British Columbia Court of Appeal explained in *K.R.S.* that the purpose of s. 752.1 is to "permit the court to have access to the opinion of at least one expert who will have had a reasonable amount of time to assess the risk of danger the offender presents to public safety" (at para. 20). Similarly, the Saskatchewan Court of Appeal noted in *R. v. C.B.H.*, 2002 SKQB 440, aff'd 2004 SKCA 39, leave to appeal refused [2004] SCCA No. 237, that "the underlying principle of s. 752.1 is to be sure that the trial judge has all the information necessary on which to decide the dangerous offender designation." (at para. 14).
- [20] In addition, the report mandated by s. 752.1(2) is an important component of a scheme designed to achieve proportionality in sentencing by targeting for dangerous and/or long-term offender applications only those offenders about whom it can be said there exists an evidence-based reason for believing they may pose an ongoing threat to the life, safety or physical or mental well-being of other persons.
- [17] The Alberta Court of Appeal described the purpose and role of this type of psychiatric or psychological expert evidence in *R. v. Neve*, 1999 ABCA 206. At para. 182, the court wrote:
- The purpose of the psychiatric evidence is to provide the judge with an expert opinion on the interpretation of past conduct and the likely future conduct of the offender based on his or her past behaviour. The court using it must then determine what future danger the offender presents to society. All the requirements of the dangerous offender legislation are carefully designed to ensure a proper balance between public safety and personal liberty. However, predicting future behaviour based on past conduct is an inexact science. It is precisely because this finding must rest at least in part on predictions of human behaviour - and often conflicting ones at that - that all safeguards of the Code must be adhered to: see *R. v. Parkes*, [1956] S.C.R. 768.
- [18] In the context of discussing the psychiatric evidence and its frailties in that case, the Alberta Court of Appeal recognized that even though this expert evidence comes with no guarantee, it represents but one of the tools available to the court in assessing whether someone should be found to be a dangerous offender. The court confirmed its particularly onerous responsibility to measure the quality and strength of the expert evidence for the purpose of determining which evidence, if any, it will accept. The court summarized the evaluation and treatment of this type of expert evidence at paras. 199 - 200 as follows:
- [199] What this reduces to is the following. First, at all times the responsibility remains with the sentencing judge to assess and weigh the opinion evidence, to determine whether the behavioural thresholds have been met, and whether based on that past behaviour someone is a threat and if so, should be designated a dangerous offender: *Jones* (S.C.C.), *supra*; *Young*, *supra*. The experts do not become the judges and the expert opinion is not the

judgment. Second, it is the sentencing judge - not the psychiatrists, or the Crown, or the defence - who decides what the key elements of the pattern of conduct are: Dow, supra. Third, in assessing the existence of a pattern, psychiatric opinion evidence, admissible under s. 755, must be used cautiously. Clearly, psychiatrists can opine on the interpretation of what is alleged to constitute a pattern of conduct, on whether that pattern of conduct is pathologically or substantially intractable and of course, on the issue of future dangerousness. But, quite apart from any other use of psychiatric evidence in dangerous offender hearings, while the psychiatrists may review past criminal conduct and then give an opinion on whether it forms a pattern, it is in the final analysis the court's responsibility and not the psychiatrists' to make the determination whether the evidence establishes the proscribed patterns. [Emphasis in original.]

3. TREATMENT OF PSYCHIATRIC EVIDENCE

[200] Given the number of psychiatrists, their range of qualifications and experience, the volume of potential information, the differences in actual information each had, the variations as to what each relied upon in coming to an opinion, the subjective nature of clinical psychiatric assessment (as noted by the sentencing judge at A.B. 2023 of his judgment), and the challenge presented by the problem of semantics referred to earlier, the sentencing judge was faced, in weighing the final psychiatric opinion evidence, with an onerous task of analysing the basis for each opinion, and the strengths and weaknesses in the information relied upon.

[19] Two other authorities are instructive. Mr. Justice Taylor had occasion to discuss the purpose and role of an expert in the context of these assessments in *R. v. Rindero*, 2004 BCSC 735. In that case, the court was asked to place restrictions upon the Forensic Psychiatric Commission in its selection of an expert to prepare the assessment (in the context of a re-hearing on a dangerous offender application). In the course of determining that the court had no jurisdiction to make an order prohibiting the Commission's appointment of a particular expert, the court held at paras. 37 and 38:

[37] In my opinion, the simple answer is that the expert preparing the assessment is not a trier of fact to which the law relating to bias or apprehension of bias applies but rather is simply a witness, albeit an expert witness.

[38] Such an author of a report under s. 752.1 stands at no greater an elevation than any other expert or witness not so appointed. Such experts provide evidence; they do not make judgments no matter how persuasive their opinions may be.

[20] Mr. Justice Taylor concluded there was no basis in law for the court to make any orders limiting the manner in which the Commission appoints experts. At para. 44 he noted:

Such experts are witnesses not triers of fact even though the report they prepare is a result of a court order

- [21] In R. v. Mavros, 2014 BCSC 701, Mr. Justice Ehrcke was asked by the defence to direct the person preparing the s. 752.1 assessment report, to prepare the report in compliance with the Supreme Court Civil Rules, B.C. Reg. 168/2009. In declining to do so, Mr. Justice Ehrcke held at paras. 16 - 17:
- [16] While I understand very well the rationale for making that submission, I do not propose to accede to it. In these proceedings, I am bound by the provisions of the Criminal Code, not by the provisions of the Supreme Court Civil Rules. I can find nothing in the Criminal Code which gives me the authority to make such a direction to the person preparing the report. Moreover, were I to make such a direction, there would be the danger that when the report is finally prepared and is tendered on a dangerous offender or long-term offender hearing, that hearing may get bogged down in submissions over whether the report adequately complied with the direction that I had made.
- [17] Therefore, I will simply say this: I agree that Rule 11-6(1) sets out a number of matters which provide useful guidance to any expert who is preparing an expert report for use by the courts, and whoever prepares the report may well find that reference to that rule will be of assistance in guiding him or her in the manner in which the report is prepared. However, I am not prepared to go beyond that in making a direction, because that, in my view, would be going beyond what is set out in the Criminal Code and, as well, in my view, the experts who deal with these matters should be given the opportunity to rely on their professional expertise and judgment in deciding the best and most appropriate way of carrying out their function under s. 752.1 of the Criminal Code.

DR. JACK'S ASSESSMENT REPORT

- [22] I have reviewed Dr. Jack's report in light of the purpose of the legislation and the role of the expert conducting the assessment that I have just canvassed. It is an extremely lengthy report. I have reviewed it in its entirety. I do not propose to go through each page, but certain things must be highlighted.
- [23] From an organizational perspective, Dr. Jack's report was somewhat challenging to read. It is lengthy and contains many headings and sub-headings that are not numbered. No table of contents exists to allow the reader to easily discern how the headings containing the information, the test results and the opinions are organized. However, upon very careful review of the report, one can gain that comprehension.
- [24] The first section contains the facts; the second contains a chronology of Mr. Ferguson's criminal history and history of supervision; the third contains a very lengthy recitation of Mr. Ferguson's documented behaviour while on remand in provincial custody currently; and the fourth section contains what Dr. Jack entitles, a Current Assessment. Found within this Current Assessment are nine unnumbered sub-headings. They are as follows:
- 1) clinical impressions;

- 2) clinical interviews;
- 3) collateral contacts;
- 4) summary of file interview information;
- 5) psychological testing;
- 6) risk assessment instruments;
- 7) conclusions: mental health personality functioning;
- 8) conclusions: risk issues; and
- 9) risk management.

[25] I intend to highlight only certain portions of the report. With respect to the sub-heading entitled psychological testing, Dr. Jack outlined in some detail Mr. Ferguson's testing results with respect to two separate measures; the Personality Assessment Inventory and the Psychopathy Checklist Revised (2nd Edition) (the "PCL-R"). There is no suggestion that these instruments are not accepted testing methods. With respect to the PCL-R, Dr. Jack expressed this opinion, at page 50:

In Mr. Ferguson's case it is my view the following aspects of the psychopathy construct are most salient: Behaviourally, Mr. Ferguson is impulsive, has poor self-regulation, and does not use adaptive strategies to cope. Cognitively, he is distractible, intolerant and suspicious. He has difficulties regulating his emotional states such that he is highly reactive; his mood states often change quickly and unpredictably. It is my opinion, these and other aspects of Mr. Ferguson's personality functioning are risk relevant and result in significant and ongoing impairment.

[26] Dr. Jack then moves on to a subsection entitled Risk Assessment Instruments where she opines as to Mr. Ferguson's future risk of violence. Dr. Jack used a particular instrument that focuses on factors associated with risk for violence, the HCR-20, Version 3. Again, there is no suggestion before me that this instrument is not appropriate or accepted for this type of assessment.

[27] In discussing the results of this testing, Dr. Jack outlines a number of historical, clinical, and risk management factors pertinent to Mr. Ferguson. This outline occurs over the course of many pages.

[28] Dr. Jack sets out her conclusions regarding Mr. Ferguson's mental health and personality function at pages 57 through 60. She describes Mr. Ferguson as having a complicated clinical picture and ultimately opined at page 60:

I am of the view Mr. Ferguson's personality functioning (and associated symptoms including distorted / delusional thinking) are highly risk relevant. I will discuss those issues further in subsequent sections of this report.

[29] Dr. Jack then, at pages 60 - 65, goes on then to discuss her conclusions with respect to risk issues. After listing seven risk factors specific to Mr. Ferguson, she opines at page 64:

Based on available information, including the risk assessment instruments and structured professional judgment discussed previously, it is my opinion Mr. Ferguson will require high levels of intervention both while institutionalized and if in the community. Generally higher numbers of risk factors are associated with higher levels of risk, necessitating higher intensity intervention / risk management.

[30] To put this opinion in context, one must remember that Dr. Jack dedicated a large portion of her report up to this point outlining the high number of risk factors possessed by Mr. Ferguson.

[31] Dr. Jack then goes on to provide opinions about risk management. She first discusses risk management through correctional programs and ultimately opines those programs would not be optimal and not sufficient to address Mr. Ferguson's needs or risk factors. She then goes on to discuss risk management through monitoring and supervision, noting that both of those tools have not been successful in managing Mr. Ferguson's risk in the community in the past. She then discusses victim safety planning and opines this particular risk management tool would not be helpful in terms of managing future risk of spousal violence. Dr. Jack then moves on to discuss other treatment in the form of medication and psychological treatment. She opines that medication in and of itself would not be sufficient to manage Mr. Ferguson's risk, and offers that she would not be optimistic about psychological treatment in that either it would not occur or, as an intervention standing alone it would be insufficient to address Mr. Ferguson's risk.

ANALYSIS

[32] The question for me to decide is whether Dr. Jack's assessment report contains evidence and opinions that serve the purpose of assisting the court with assessing Mr. Ferguson's future dangerousness to society.

[33] Considering the purpose of the legislation, the role of the assessor and the report itself, I am not prepared to make the direction sought by the Crown. In my view, such a direction would go beyond what is set out in the Criminal Code and to do so would interfere with the expert who, to use Mr. Justice Ehrcke's words, "should be given the opportunity to rely upon her professional expertise and judgment in deciding the best way to carry out her functions under s. 752.1": Mavros, para. 17.

- [34] While it might be said that Dr. Jack's opinions could be articulated with more precision, I am unable to conclude that her opinions are deficient in such a way so as to render them insufficient to meet the purpose for which the assessment was ordered. Dr. Jack does express opinions regarding Mr. Ferguson's risks and potential for risk management. To direct Dr. Jack, an expert witness, as to how she must express those opinions would be, in these circumstances, inappropriate.
- [35] For the same reasons, I decline to order a second assessment. I do note that nothing in the Criminal Code precludes the preparation of a second assessment: *R. v. Howdle*, 2004 SKCA 39, at para. 15. However, given the complex and labour intensive nature of these assessments, the delay a second assessment would cause to the proceedings and its potential effect on the liberty of the offender, it is my view that strong grounds would have to exist to justify the ordering of a second assessment. Those grounds do not exist here. I view this as a situation where Dr. Jack perhaps lacks some clarity in her form of expression, a clarity that is found in the opinions of some of her colleagues perhaps, but she does express opinions on the issues that may provide assistance to the court in its ultimate determination.
- [36] For these reasons, the Crown's application for directions or a second assessment order is dismissed.

S.A. Donegan J."

DONEGAN J.

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