CANADA / JUDGMENT

R. v. Gain

2010 BCCA 498

COURT
British Columbia Court of Appeal

DECIDED
29 October 2010

Source: bccourts.ca · Research copy typeset by Esheria. Not court-issued or certified.

2010 BCCA 498 R. v. Gain

COURT OF APPEAL FOR BRITISH COLUMBIA

Citation:

R. v. Gain,

2010 BCCA 498

Date: 20101029

Docket: CA036843

Between:

Regina

Respondent

And

Michael Gain

Appellant

Restriction on publication: Publication ban pursuant to s. 486.4(2) C.C.C.

Before:

The Honourable Mr. Justice Donald

The Honourable Madam Justice Kirkpatrick

The Honourable Mr. Justice Groberman

On appeal from: Supreme Court of British Columbia, January 21, 2009

(R. v. Gain, Kamloops Docket No. 77530)

Oral Reasons for Judgment

Counsel for the Appellant:

J.J. Blazina (via telephone)

Counsel for the Respondent:

M.J. Brundrett

Place and Date of Hearing:

Vancouver, British Columbia

October 28, 2010

Place and Date of Judgment:

Vancouver, British Columbia

October 29, 2010

[1] KIRKPATRICK J.A.: On 9 June 2006, a jury convicted Michael Allen Gain of sexually assaulting A.S. at or near Kamloops on or about 5 August 2000, contrary to s. 271(1) of the Criminal Code of Canada. Following the conviction, the Crown applied for and obtained a psychological assessment order under s. 752.1 of the Criminal Code. Dr. Lindsey Alison Jack, a forensic psychologist, filed a dangerous offender assessment on 2 October 2006. The Crown subsequently obtained another assessment from Dr. Shabehram Lohrasbe, a forensic psychiatrist, whose report is dated 17 January 2007. The Crown then obtained the consent of the Attorney General, pursuant to s. 754 of the Criminal Code, and gave notice to Mr. Gain that it would be seeking to have him declared a dangerous offender and sentenced to an indeterminate period of incarceration under the provisions of Part 24 of the Criminal Code.

[2] The dangerous offender hearing commenced on 26 May 2008 and completed after some 23 days of evidence and submissions on 26 November 2008. At the conclusion of the Crown's case, Mr. Gain called evidence from a forensic psychologist, Dr. Allan Posthuma.

[3] On 21 January 2009, a judge of the Supreme Court declared Mr. Gain to be a dangerous offender and sentenced him to an indeterminate period of incarceration. Mr. Gain appeals from that sentence.

[4] The predicate offence, the sexual assault of A.S., occurred when A.S. had been out with friends in Kamloops. The evening ended at a popular bar where A.S. drank a lot of alcohol. The trial judge found that she ended up with the appellant in the back seat of a car at a lookout in Kamloops. The appellant covered her mouth and choked her with both hands around her neck to prevent her from screaming. He forced sexual intercourse and then took her underwear under further threat of an assault, after which he drove her to downtown Kamloops and dropped her off.

[5] The evidence of two other assaults also formed the basis of the dangerous offender hearing. At the time of the trial of the sexual assault on A.S., the appellant was serving a sentence for aggravated assault and unlawful confinement arising from an 8 June 2004 conviction in relation to an incident that occurred on 12 December 2003. A jury convicted the appellant on 8 June 2004 of aggravated assault and unlawful confinement but acquitted him of attempted murder and aggravated sexual assault. The sentencing judge in that case found that the appellant attacked J.M., a sex trade worker, after having consensual sexual intercourse with her.

[6] On appeal from his sentence from that offence, this Court stated:

6] The facts of this case are serious. The appellant was 26 years of age at the time he committed the offences. The victim was a 16 year old prostitute. The appellant picked her up on the street in Kamloops the morning of December 12, 2003 after agreeing to purchase sex. The appellant drove the victim to Mission Flats where they had intercourse. The appellant told the victim that he had no money and he had to go to a trailer to pick it up. Instead, he drove to a remote area on Greenstone Mountain. There the appellant began to strangle the victim with her seatbelt. The victim, struggling to get away, opened her door and fell to the ground. The appellant lifted her by the hair, and dragged her to the vehicle where he obtained a can of some ether-like substance. He pulled the victim's sweater over her head, pushed her into the snow and sprayed her with the substance. The victim passed out. While she was unconscious the appellant taped her eyes and bound her wrists and ankles behind her back with electrical tape. He drove off leaving her barefoot and barely clothed. The temperature was minus 5.5 degrees Celsius.

[7] When the victim regained consciousness she managed to remove the tape. She walked barefoot through snow and bush, over a small cliff and across an ice-covered creek to a roadway. A passing motorist stopped and took her into the vehicle. She was badly frost-bitten, swollen and bleeding. She still suffers from a loss of sensation and movement in her toes and hand.

[7] In addition to the 2000 sexual assault on A.S. and the 2003 aggravated assault and unlawful confinement of J.M., the judge accepted evidence from J.W., the sister of the appellant's former common law spouse. She testified at the dangerous offender hearing that between May and September 2000, while sleeping at the home of her sister and the appellant, she awoke to find the appellant kneeling beside her with his fingers inserted in her vagina.

[8] The judge had a considerable body of evidence before him.

[9] There was a pre-sentence report prepared following the appellant's conviction for aggravated assault of J.M. The probation officer who prepared the report, Lisa Johnston, supervised approximately 80 sex offenders per year. She stated that since the appellant did not admit any wrongdoing, it was hard to know what programs would be available for him. Further, she said it would be difficult for him to participate in any programming so long as he maintained his innocence. Indeed, the treatment program provider will not accept a person into treatment unless the offender accepts responsibility for the offence or admits

deviant sexual behaviour.

[10] Christopher Hans, a community parole officer, prepared a preliminary assessment report on the appellant after he was sentenced for the aggravated assault and unlawful confinement of J.M. The appellant told him that he was the victim of an unprovoked attack by a prostitute, felt he was the victim, and said he acted in self-defence. Mr. Hans did not consider him remorseful.

[11] Similarly, William Soon, a parole officer with Correctional Service of Canada, conducted an assessment of the appellant upon his entry into federal prison in 2005. In his interview, the appellant indicated that he was "wrongfully convicted". Mr. Soon reported that the appellant could not effectively be assisted if he was not prepared to admit his offence or deal with his pattern of behaviour. He suggested that an appropriate treatment program for the appellant would be the high intensity family violence program and obtained the permission of the facilitator for the appellant to participate. The appellant was not referred to sex offender counselling because at that time he had not been convicted of a sexual offence.

[12] A psychologist with Correctional Service of Canada, Shirley Friesen, prepared a report on the appellant in May 2005. He again minimized his role in the aggravated assault offence and focused on his own feelings of being victimized. Ms. Friesen considered that clinical intervention was important in his case, concluding that "without treatment, the probability for sexual recidivism, violence against women, will be at least moderate".

[13] The appellant's institutional parole officer, Tara Tomasi, reviewed the appellant's correctional plan and made changes to refer him to three core programs, the moderate intensity sex offender program, cognitive skills, and anger and emotions. Ms. Tomasi met with the appellant, who refused to discuss anything with respect to the offence and told her that he would refuse to participate in any of the programs she referred him to, particularly the sex offender program. The appellant consistently advised Ms. Tomasi that he had not changed his mind with respect to the programs she indicated were available to him, notwithstanding the concern she expressed to the appellant that he was a possible candidate for detention up to warrant expiry, based upon his offence and his lack of program participation. Ms. Tomasi indicated that over time the appellant modulated his rejection of participating in programs, indicating that "he would see" if they were offered to him.

[14] Dr. Jack, the forensic psychologist who prepared the court-ordered dangerous offender assessment, was not optimistic about treatment for the appellant because he was not motivated to change and was unwilling to disclose his difficulties with sexual offending.

[15] Dr. Lohrasbe, the forensic psychiatrist called by the Crown at the dangerous offender hearing, prepared an assessment report without the benefit of interviewing the appellant. Although Dr. Lohrasbe did not consider the appellant's denial of his offences as unusual, the duration of the denial was of concern, not because it precluded treatment, but because offenders can become entrenched in their denials and it becomes more troublesome to break through the denial. So long as the denial was maintained, Dr. Lohrasbe considered

that one could not understand what drives the sexual offender's behaviour sufficient to be satisfied that the offender has gained insight "solid enough" to be managed in the community.

[16] After Dr. Lohrasbe prepared his initial report, the appellant agreed to be interviewed by him. The interview did not change Dr. Lohrasbe's opinion that the "uncertainties related to his violent offences remains unsettled".

[17] Dr. Posthuma, a forensic psychologist called by the defence, was tendered as an expert in clinical and forensic psychology. The judge had no hesitation that Dr. Posthuma would be able to provide evidence pertaining to the dangerous offender proceeding. However, the judge reserved his indisputable right to accord Dr. Posthuma's evidence the weight he considered appropriate, noting some gaps in Dr. Posthuma's academic background and the reports he has provided with regard to dangerous offender matters.

[18] Dr. Posthuma interviewed the appellant and considered him a low risk for reoffending in a sexually or physically violent manner.

[19] There was also before the judge the recent National Parole Board decision of August 2008 referred to by the judge at para. 74 of his reasons:

It is the psychologist's opinion that at the present time, you pose an undue risk to the community under any form of conditional release. It is believed that until you participate in programs, become open and honest in discussions regarding the index offences and fully participate in psychological and psychiatric evaluations, that your risk cannot be adequately assessed or managed in a community setting.

You are assessed as having entrenched negative attitudes towards women, lack the ability to control your emotions or violent sexual impulses and show a callous disregard for others in achieving your own goals and gratification.

It is the belief of the Correctional Service of Canada that no programs are available in the community that would reduce your risk to re-offend. It is further believed that even with the enhanced structure and control of a Community Residential Facility (CRF) that you would remain an undue risk to the community. You have not participated in any programming to address your risk factors and are considered an untreated violent sexual offender.

[20] In comprehensive reasons delivered orally, the judge reviewed in detail the predicate and other offences and the evidence tendered at the dangerous offender hearing. The judge noted:

[49] The difficulty posed by Mr. Gain is that he is an enigma as reflected in the various reports prepared by psychologists, psychiatrists, staff employed by Corrections Services of Canada, which I will refer to simply as Corrections Canada, the police, and the probation officers who have dealt with him within the correctional facilities or whose expertise has been engaged to determine and learn more about Mr. Gain, how his behaviour might be

moderated to reduce the risk he poses in the community and how best he might be supervised and controlled within the community.

...

[55] Mr. Gain's disavowal of responsibility for the offences continues and a serious ramification is that, as he considers himself not responsible for the offences, there is no need for him to take the programs for offenders to address sexual and familial violence which are offered in the institutions in which he has been incarcerated. He has been incarcerated since his 2004 conviction on the 2003 offences and Mr. Justice Wong sentenced him in March 2005. The Court of Appeal on August 15, 2005, dismissed his appeal against sentence.

[56] In the period from his convictions on the December 2003 offences to the present, Mr. Gain has not participated in any programs for offenders involved in sexual assault or family violence which were viewed by Corrections Canada staff as programs from which he might benefit and lead to a modification of his behaviour including his attitude towards women. Mr. Gain declined to participate in the sexual offender program after the 2003 convictions because he said his conviction was being appealed, although in fact it was only his sentence which was under appeal. Mr. Gain also took the position that his 2003 convictions did not involve sexual assault only, and I emphasize "only," involved aggravated assault and unlawful confinement and, therefore, he need not attend a program for sexual assault offenders ignoring in doing so the whole sexual context which led to those convictions. However, even after his 2006 conviction for the sexual assault of A.S., Mr. Gain has avoided taking programs for sexual assault offenders. In April 2008, he declined to participate in a family violence treatment program and, although waitlisted to participate in a sexual offender treatment program as of April 2008, he has yet to take such a program.

[57] The defence submits that the reasons behind Mr. Gain's failure to attend programming while incarcerated cannot be attributed to him, citing some discrepancies in the manner in which Corrections Canada staff determined what programs he ought to take. While I appreciate that there was some confusion originally as to what programs Mr. Gain was qualified and ought to take, I am not convinced that this confusion is responsible for Mr. Gain not having participated in any programs to date. Of note is the evidence from Corrections Canada staff about the efforts made by most offenders to enrol in programs as their statutory release date approaches to ensure that they are released on that date. In Mr. Gain's case, there is little or no evidence to suggest that he has made any effort to participate in programs to address his previous anti-social conduct involving sex and violence.

[58] I referred earlier to Mr. Gain being an enigma, in part because of his failure to become involved in the programs which Corrections Canada believe would be of assistance in reducing the risk his behaviour poses for the community, but also by his reluctance until very recently to participate in psychological and psychiatric assessments for the court.

[21] The judge's ultimate conclusion is encapsulated in para. 80:

[80] I am unable to conclude on the basis of all the evidence before me with respect to Mr. Gain that there is a reasonable possibility of eventual control of the risk that he poses for the community. He is at this time much the same as he was before when he was initially incarcerated. He denies the offences, he will not accept responsibility for the offences, he blames the complainants, he has no empathy or remorse for the victims whom he has assaulted, and I am satisfied that he has deliberately avoided the programs available and necessary to assist him in addressing his behaviour.

[22] On appeal, the appellant contends that the judge misapprehended the evidence concerning the appellant's opportunities to participate in programs to address the risk of reoffending; erred in law by placing the burden of proof on the appellant to disprove the Crown's allegations of aggravating circumstances; and erred in rejecting the evidence of Dr. Posthuma due to his lack of qualifications after having already found him qualified to give opinion evidence.

[23] I will first address the third alleged error concerning Dr. Posthuma. The judge found Dr. Posthuma's report to be "singularly unhelpful given his lack of recent experience, the narrow basis upon which he assessed Mr. Gain's explanation for the offences upon which he has been found guilty, and the grounds upon which Dr. Posthuma reached his conclusions." The appellant contends that once Dr. Posthuma was qualified to give evidence as an expert, the judge should not have rejected his opinion on the basis that, in counsel's words, "he ought never to have qualified Dr. Posthuma as an expert witness in the first place".

[24] In my opinion, there is no merit in this ground of appeal. At the time the judge accepted Dr. Posthuma as an expert witness qualified to give evidence at the hearing, Dr. Posthuma had not testified and his report had not been subjected to cross-examination. The judge was entitled to weigh the factors he considered, including the expert's qualifications, when determining the value of the expert opinion: R. v. Lavallee, [1990] 1 S.C.R. 847 at 900. It was a question of the weight to be accorded to Dr. Posthuma's opinion, not its admissibility.

[25] Furthermore, the judge was evidently troubled by Dr. Posthuma's testimony, noting among other things that Dr. Posthuma accepted the appellant's continuing exculpatory description of the offences, which the judge found contrary to the evidence upon which the juries convicted the appellant; did not press the appellant with respect to the facts found by the judge in the aggravated assault and unlawful confinement conviction; and attributed the appellant's inability to tell him about the 2000 and 2003 offences to "hysterical amnesia".

[26] The appellant's first ground of appeal is that the judge misapprehended the evidence concerning the appellant's opportunity to participate in treatment.

[27] As I have noted, at para. 80 of the judge's reasons he concluded that the appellant had "deliberately avoided the programs available and necessary to assist him in addressing his behaviour." In support of his submission, the appellant points to the evidence of Ms. Tomasi that, prior to December 2007, he had not been offered the opportunity to participate in any programs. The appellant thus submits that he cannot be faulted for not taking programs that

were never offered. However, the appellant was offered, in January 2008, a moderate intensity sex offender program but was not enrolled because he was attending court for the dangerous offender proceeding. In April 2008, the appellant refused the family violence prevention program and was wait-listed for the sex offender treatment program. In my opinion, the judge perhaps overstated the matter when he said that the appellant had deliberately avoided taking treatment programs. Nevertheless, there was ample evidence that the appellant adamantly denied the offences, blamed his victims for his predicament, and demonstrated, at the least, reluctance to take the programs. In this sense, the avoidance of treatment is demonstrative of his overall attitude.

[28] The undeniable fact is that although the appellant has said he was "willing to participate" in any programs to which he was referred, he has never done so. Without treatment and an acknowledgment of his offences, the weight of the evidence is that the appellant is an untreated violent sexual offender who cannot be controlled in the community.

[29] In this respect, the remarks of this Court in R. v. R.R.M., 2009 BCCA 578 at para. 27, are apposite:

... The appellant displays little insight into the nature of his offence or its impact on the victim. While he states that he is prepared to receive counselling, he does not appear to have taken any concrete steps to receive treatment for his offending. In my view, he will need the additional time remaining in his federal sentence to complete the sex offender program before he is released into the community. His current lack of treatment continues to place his stepdaughters and the public at risk.

[30] In my opinion, the judge did not misapprehend the evidence and properly concluded that there was no reasonable possibility that the appellant's risk could eventually be controlled in the community within the limits of a long-term offender sentence. The appellant's continued denials of the offences and the blaming of his victims are sure indicators that the appellant is not readily treatable and could not be controlled in the future.

[31] I would dismiss this ground of appeal.

[32] Lastly, the appellant contends that the judge placed on the appellant the burden of disproving that the appellant has deliberately avoided or refused to participate in a sexual offender program. As an allegation of past conduct constituting a relevant aggravating factor at sentencing, the appellant argues that the burden was on the Crown to prove the circumstances beyond a reasonable doubt.

[33] The appellant's argument focuses on that para. 57 of the judge's reasons reproduced earlier, in which the judge stated that he was not convinced that the confusion surrounding the availability of programs was responsible for the appellant not participating in programs.

[34] The appellant thus argues that the judge placed the burden of disproving the allegation that it was his fault for not having participated in a suitable sexual offender program.

[35] The appellant's argument rests on the supposition that his failure to engage in treatment was treated as an aggravating factor in the process that attracted an onus of proof beyond a reasonable doubt.

[36] I am not persuaded that the judge erred as suggested by the appellant. The words used by the judge do not support the appellant's contention and amount to an invitation for us to closely parse the reasons for error.

[37] The main issue in the hearing was whether, having found the appellant to be a dangerous offender, there was a reasonable possibility of eventual community control over the appellant. The appellant's willingness to participate in programs was but one aspect of the inquiry.

[38] The judge's task was described in R. v. Wormell, 2005 BCCA 328, paras. 32-33:

[32] The task of the Court from beginning to end is to ask itself, "Am I satisfied that there is a reasonable possibility of eventual control of the risk in the community?" If the judge concludes that he or she is not so satisfied then the judge cannot designate the offender a long-term offender.

[33] In my opinion, it is not right to approach this with burden of proof at the back of one's mind. Burden of proof, whether it is proof beyond a reasonable doubt or on a balance of probabilities, directs itself to determining past events.

[39] In my opinion, the judge properly focused on whether the appellant could be successfully treated such that the long-term offender sanctions would be sufficient to reduce his threat to an acceptable level. The entire focus was on the appellant's future manageability. The judge had to decide, based on the appellant's then current circumstances, whether he could be controlled in the future. The judge was clearly troubled by the fact that the appellant made no effort to address his conduct but that does not, in my opinion, mean that he improperly placed the burden of proof on the appellant.

[40] I am not persuaded that the judge misapprehended the evidence, reversed the onus of proof or otherwise erred in arriving at the designation of the appellant as a dangerous offender deserving of an indeterminate sentence.

[41] It follows that I would dismiss the appeal.

[42] DONALD J.A.: I agree.

[43] GROBERMAN J.A.: I agree.

[44] DONALD J.A.: The appeal is dismissed.

"The Honourable Madam Justice Kirkpatrick"

Source & reproduction note

Judgment wording, source notices and original paragraph numbers are retained. Esheria supplies the layout and this PDF's page numbers; these are not the source pagination. This is a research copy, not an official or certified court document. Check quotations, citations and publication restrictions against the original source before relying on it.

ORIGINAL SOURCE https://www.bccourts.ca/jdb-txt/CA/10/04/2010BCCA0498.htm

CASE PAGE https://chat.esheria.ai/case-law/canada/r-v-gain-2010

Prepared on 30 October 2026 · Esheria