
CANADA / JUDGMENT

R. v. Jerome

2019 BCSC 1353

COURT

Supreme Court of British Columbia

DECIDED

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2019 BCSC 1353 R. v. Jerome

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

R. v. Jerome,

2019 BCSC 1353

Date: 20190530

Docket: 27779

Registry: Vancouver

Regina

v.

Sean Michael Jerome

Restriction on publication: Pursuant to s. 486.4(1) C.C.C.

Before: The Honourable Madam Justice Ker

Oral Ruling on Admissible Information to be Provided to Author of Assessment Report

Counsel for the Crown:

D.P. Montrichard

Counsel for the Accused:

B.R. Anderson

Place and Date of Hearing:

Vancouver, B.C.

May 13, 2019

Place and Date of Judgment:

Vancouver, B.C.

May 30, 2019

Introduction

- [1] THE COURT: These Reasons for Judgment were delivered as oral reasons. They have since been edited for distribution.
- [2] This is a ruling on a defence application seeking to prohibit the Crown from disclosing certain information to a court-appointed risk assessor. The information pertains to charges against Sean Michael Jerome that were stayed by the Crown mid-trial in January 2019. Pursuant to s. 753.01(1) of the Criminal Code [the "Code"], the Crown is applying to have Mr. Jerome subjected to a remand risk assessment to determine whether to apply for an indeterminate sentence in this case. The Crown intends to provide various reports, statements, and other materials in its disclosure package to the court-appointed assessor. These materials pertain to allegations of assault and sexual assault by Mr. Jerome upon his former common law spouse between October 19 and December 26, 2017 (the "disputed materials"). These charges were stayed by the Crown mid-trial after determining that the evidence could no longer meet the substantial likelihood of conviction branch of the Crown charge approval standard.
- [3] Mr. Jerome has entered a guilty plea to one count of breaching a condition of his long-term supervision order. Due to his dangerous offender designation in July 2011, the provisions of s. 753.01 of Part XXIV of the Code are engaged. To place this application in context, it is important to know what provisions of the Code underlie the proceedings:

753.01 (1) If an offender who is found to be a dangerous offender is later convicted of a serious personal injury offence or an offence under subsection 753.3(1), on application by the prosecutor, 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 subsection (4).

- (2) The person to whom the offender is remanded shall file a report of the assessment with the court not later than 30 days after the end of the assessment period and make copies of it available to the prosecutor and counsel for the offender.
- (3) On application by the prosecutor, the court may extend the period within which the report must be filed by a maximum of 30 days if the court is satisfied that there are reasonable grounds to do so.

- (4) After the report is filed, the prosecutor may apply for a sentence of detention in a penitentiary for an indeterminate period, or for an order that the offender be subject to a new period of long-term supervision in addition to any other sentence that may be imposed for the offence.
 - (5) If the application is for a sentence of detention in a penitentiary for an indeterminate period, the court shall impose that sentence unless it is satisfied by the evidence adduced during the hearing of the application that there is a reasonable expectation that a sentence for the offence for which the offender has been convicted -- with or without a new period of long-term supervision -- will adequately protect the public against the commission by the offender of murder or a serious personal injury offence.
 - (6) If the application is for a new period of long-term supervision, the court shall order that the offender be subject to a new period of long-term supervision in addition to a sentence for the offence for which they have been convicted unless it is satisfied by the evidence adduced during the hearing of the application that there is a reasonable expectation that the sentence alone will adequately protect the public against the commission by the offender of murder or a serious personal injury offence.
- [4] As defence counsel asserts, the Crown is obliged to prove beyond a reasonable doubt any disputed aggravating circumstances, such as unproven charges, that it intends to rely upon at the sentencing hearing. In this case, the defence argues that the Crown has already determined that these charges could not be proven beyond a reasonable doubt and that, accordingly, providing the disputed materials to the assessor would be:
- 1. Prejudicial to the offender;
 - 2. A waste of the expert's time in reviewing the materials; and
 - 3. A consideration that will significantly undermine the weight that can be attached to the expert's report (because the assessor's opinion would be based, at least partially, on unproven facts).
- [5] In response, the Crown argues that by restricting the information provided to the assessor, the court would, in effect, be inappropriately directing the assessor as to how to perform his or her assessment. The Crown further asserts that assessors routinely receive information about allegations of unproven criminal conduct and that they know how to govern themselves in the treatment of this information.
- [6] Furthermore, to the extent that the opinion relies upon the unproven charges or assumes that the charges are proven, that is an issue that goes to the weight of the expert's opinion.

- [7] At this preliminary stage, the Crown seeks to provide all relevant information it has in terms of Mr. Jerome and his conduct with intimate partners. The Crown intends to include a cover letter to the assessment authority, here the Forensic Psychiatric Services Commission (FPSC), making it clear that while the disputed information was the subject of a criminal trial, it was not proven to the criminal standard.
- [8] Finally, the Crown argues that the relief sought by the defence in this case would have the effect of providing the assessor with a misleading picture about the offender. This is largely because the timeframe particularly germane to the offender's circumstances would be removed from the assessor's consideration. As this is a preliminary risk assessment and protection of the public is the overarching concern, all relevant information concerning the offender and his circumstances ought to be provided to the assessor.

Background

Recent Convictions

- [9] On March 15, 2019, Mr. Jerome appeared before Associate Chief Justice Holmes and entered a guilty plea to one count of breaching his long-term supervision order contrary to s. 753.3(1) of the Code. The offence occurred between December 23, 2017 and January 6, 2018. By his guilty plea, Mr. Jerome admitted that he had failed to comply with a term of his long-term supervision order that required him to immediately report all intimate, sexual, non-sexual relationships and friendships with females, and any changes within those relationships to his parole officer. The underlying basis for this charge, as I understand it, was Mr. Jerome's failure to advise his parole officer that his common law relationship with J.H. had ended and that he was involved with another female intimate partner.
- [10] Mr. Jerome was arrested on the charge before the court on January 5, 2018. He was also charged with a number of offences including assault and sexual assault of J.H., which were alleged to have occurred between October 19 and December 26, 2017. Mr. Jerome has been in custody on these matters since his arrest on January 5, 2018.

Criminal History

- [11] Mr. Jerome has a lengthy criminal record starting in 1984 when he was 18 years old. He has convictions for sexual assault in 1989 for which he received a two-and-a-half-year sentence. There was an approximately nine-year gap in his record, and then in December 2000 and April 2001, he was placed on peace bonds in relation to two different women with whom he had relationships. In the spring of 2005, he became involved in a common law relationship with a woman named C.T. Between August 2005 and December 2008, Mr. Jerome had a number of charges related to domestic assault upon C.T.

- [12] In January 2010, Mr. Jerome was found guilty of two counts of criminal harassment, three counts of failing to comply with conditions of probation, one count of threatening death, and one count of threatening an animal. These charges related to C.T. Following Mr. Jerome's conviction on these offences, the Crown applied to have him declared a dangerous offender following the receipt of a court-ordered dangerous offender assessment report made pursuant to s. 752.1 of the Code.

Dangerous Offender Hearing

- [13] A lengthy dangerous offender hearing was conducted in the Ontario Court of Justice in 2011. On July 5, 2011, Justice Pringle found Mr. Jerome to be a dangerous offender, but concluded that there was a reasonable possibility of controlling his risk in the community pursuant to a long-term supervision order. Justice Pringle heard submissions on the appropriate length of incarceration and length of long-term supervision. A determinate sentence of three years' imprisonment followed by a four-year long-term supervision order was imposed on July 8, 2011. One of the terms of the long-term supervision order was that Mr. Jerome was to disclose any intimate partner relationship to his parole officer.
- [14] In comprehensive reasons finding Mr. Jerome to be a dangerous offender, Justice Pringle outlined Mr. Jerome's criminal history, the circumstances of the predicate offence, and also made findings in respect of a previously uncharged offence. Insofar as the predicate offence for the dangerous offender designation is concerned, Justice Pringle stated:
- [2] On January 11, 2010, I found Mr. Jerome guilty of two counts of criminal harassment, three counts of failing to comply with conditions of his probation, one count of threatening death and one count of threatening an animal. The offences took place between January 30, 2009 and March 30, 2009, and related to his common law partner, [C.T.], and her daughter [K.T.], who was 23 years old at the time.
- [3] The offences involved calling and emailing [C.T.], threatening her family and also threatening to kill her dogs and burn down her house. There were over 500 calls alone, and numerous threatening emails. One email was entitled "my new toy", and included a picture of a gun. Mr. Jerome sent repeated text messages to [K.T.] [that] referred to revenge, murder and payback. Both women testified at trial that they were extremely fearful and disturbed, and I found that they had good reason to be afraid.
- [4] These offences took place at a time when Mr. Jerome was subject to two probation orders that prohibited him from having contact with [C.T.], and the offences began immediately upon his release for a prior jail sentence imposed for threatening [C.T.] when he said he would "wake her up so she could decide which side of her head she wanted the bullet to go through".
- [5] The offences also took place in the context of repeated incidents of actual or threatened violence against [C.T.] and [K.T.] over a 3 ½ year period. From August 2005 until his final arrest in March 2009, Mr. Jerome was found guilty of eight separate incidents in relation to

[C.T.], and around this time he was also convicted of a number of alcohol related offences. Between 2000 and 2009, he was placed on eight different probation orders and two peace bonds, most of which included conditions to take counselling for alcohol and/or spousal abuse. However, Mr. Jerome was never able to complete any counselling or treatment, and he continued to re-offend.

- [15] In the course of the reasons on the dangerous offender hearing, Justice Pringle found that the Crown had proven to the requisite standard that Mr. Jerome had also sexually assaulted his former common law partner, C.T., in the summer of 2008, a previously unreported incident. In the summer of 2008, Mr. Jerome and C.T. were not living together, but she was still in contact with him and knew there was a warrant out for his arrest. As Justice Pringle noted:
- [64] One evening, she agreed to pick him up at work so that he could turn himself in to the police. After first taking him to the Beer Store, they spent some time talking and drinking together. When she began to pressure him to finish his beer so she could take him to the station, Mr. Jerome got angry with her and said, "Bitch, if I am going to go to jail, then I'm going to have something to remember". Despite [C.T.'s] protests and screams, he then pushed her to the ground in the rain and the mud and had intercourse with her against her will. He did not turn himself in to the police at that time.
- [16] Justice Pringle also referred to a subsequent assault Mr. Jerome committed on C.T. in August 2008 and a chilling threatening offence from December 2008 wherein Mr. Jerome contacted C.T. seeking her to provide a letter so he could resume contact with her. When she refused, he threatened her by saying he would "wake her up so she could decide which side of her head she wanted the bullet to go through," and also that he would go to her daughter's home and "take care of business." Mr. Jerome was convicted of the August 2008 assault and pleaded guilty to the December 17, 2008 threatening offence. Both sentences were short day-long sentences with probation to follow in light of the pretrial custody served on each matter.
- [17] Justice Pringle summarized the predicate offence for which Mr. Jerome was designated a dangerous offender in the following manner:
- [67] The index offences of which I found Mr. Jerome guilty occurred between January 30 and March 30, 2009, and began immediately upon his release from custody on his previous sentence for threatening [C.T.]. At that time, he was subject to two probation orders that prohibited him from having contact with her. However, I found that Mr. Jerome was calling and emailing [C.T.], threatening her family and also threatening to kill her dogs and burn down her house. There were over 500 telephone calls alone. He also put an ad on Craig's list that included her phone number suggesting that she was a cougar looking for fun, and he sent her an email with a picture of a gun. At the same time, he was texting [K.T.] and referring to revenge, murder and payback.

[Emphasis in original]

- [18] It is apparent from Justice Pringle's reasons finding Mr. Jerome to be a dangerous offender that Mr. Jerome has significant issues with alcohol. On the day of his arrest for the predicate offence, he threatened to commit suicide and advised a police officer he was going to do so. He consumed a large amount of alcohol and, when he met the arresting officer at an agreed-upon location, was found swaying on his feet with a beer in hand and standing beside a nearly empty prescription pill bottle that he advised the officer he had consumed.
- [19] Justice Pringle summarized a portion of Mr. Jerome's background as disclosed by the documentary evidence adduced on the dangerous offender hearing as follows:
- [70] In summary, during the years 2005 to 2009 there were eight proven incidents of actual or threatened violence against [C.T.], three of which included her daughter [K.T.]. During this period, Mr. Jerome also had recurring drinking and driving offences and his alcohol abuse was an obvious underlying problem in all of these convictions. Between 2000 and 2009, he was placed on eight separate probation orders and two peace bonds, most of which included conditions to take counselling for alcohol and/or spousal abuse. From the time of his re-engagement with the criminal justice system in 2000 until the time of his most recent arrest, he was unable to complete any counselling or treatment program.

The Disputed Materials and the Stay of Charges

- [20] I have included the detailed reference to Mr. Jerome's background history. In my view, it is of significance. It provides a necessary measure of context to the current proceedings and informs the assessment of the current application made by the defence. As Mr. Jerome was previously found to be a dangerous offender and was bound by a long-term supervision order, which he breached, an order for a remand assessment is mandatory in these circumstances.
- [21] The information that the defence seeks to have withheld from the assessor relates to separate charges against Mr. Jerome that form the basis of a six-count information filed in Provincial Court and on which Mr. Jerome was arrested on January 5, 2018. The charges covered by the information were all in relation to J.H. They included:
- Assault, December 23, 2017;
 - Uttering threats, December 26, 2017;
 - Assault with a weapon, October 19, 2017;
 - Assault causing bodily harm, October 19, 2017;
 - Choking with intent to commit an indictable offence on October 19, 2017; and
 - Sexual assault on November 21, 2017.

- [22] Mr. Jerome had a preliminary hearing on these charges on September 18 and 19, 2018, and was ordered to stand trial. The Crown filed an indictment in this court, Indictment 27695, that largely mirrored the charges contained in the Provincial Court information (save for the fact that the indictment did not include the charge of choking with intent).
- [23] Mr. Jerome's trial on that indictment was heard by Matthews J. between January 14 and 17, 2019. The complainant testified for three days and was subjected to a vigorous cross-examination. Her cross-examination concluded on January 16, 2019. The next morning, the Crown sought the court's indulgence to stand down briefly so that he could confer with others about the state of the prosecution in light of the complainant's evidence in cross-examination.
- [24] When the trial resumed later that morning on January 17, 2019, Crown counsel advised the court that (1) in light of the evidence adduced and in particular the cross-examination from the day before; and (2) bearing in mind that credibility was of central importance in the case; and (3) contemplating the test enumerated by the Supreme Court of Canada in *R. v. W. (D.)*, the Crown had determined there was no longer a substantial likelihood of conviction and therefore directed a stay of proceedings on the indictment.

Analysis

- [25] The defence relies on three points to support his argument that the disputed information ought not to be forwarded to the assessor. First, he asserts that the prejudicial effect of it outweighs its probative value, particularly for the reasons that prompted the Crown to stay the charges. Second, he says it will be a waste of the expert's time in reviewing the materials because they are unreliable. Third, he submits that any consideration of the unproven materials by the expert will significantly undermine the weight that can be attached to the report.
- [26] Starting with defence counsel's first point, I understood the contention of prejudice to be the unfairness of having been denied an acquittal and an adverse credibility finding with respect to the complainant, as well as having the defence strategy revealed at trial only to have to re-advance it at the sentencing hearing on these charges. This latter point blends with the defence's second point that the disputed information ought to be excluded from the assessor's consideration because it will be a waste of the assessor's time and will result in an unfair proceeding in relation to both the assessment and the sentencing hearing.
- [27] The defence relies upon the Supreme Court of Canada decision in *R. v. Harrer*, [1995] 3 S.C.R. 562 to support his argument. There, Mr. Justice La Forest, writing for the majority, opined that if the impugned evidence in that case, a statement by the accused while in American immigration detention, had been obtained in a manner that rendered the trial unfair, then the trial judge would have a duty to properly exercise their discretion, regardless of whether a Charter breach had been established, to exclude evidence that would result in an unfair trial. La Forest J. concluded his opinion by stating:

- [24] The effect of s. 11(d), then, is to transform this high duty of the judge at common law to a constitutional imperative. As I noted in *Thomson Newspapers*, at p. 563, judges must, as guardians of the Constitution, exercise this discretion where necessary to give effect to the Charter's guarantee of a fair trial. In a word, there is no need to resort to s. 24(2), or s. 24(1) for that matter. In such circumstances, the evidence is excluded to conform to the constitutional mandate guaranteeing a fair trial, i.e., to prevent a trial from being unfair at the outset.
- [28] The third point advanced by the defence is that it is inherently unfair and would bring the administration of justice into disrepute for the Crown to direct a stay of proceedings on serious charges (because they can no longer meet the charge approval standard), but then later permit the Crown to forward materials forming the basis of those charges to a court assessor for consideration in the remand assessment process.
- [29] To this end, the defence relies upon the decisions in *R. v. Cole* (1998), 126 C.C.C. (3d) 159 (N.S.S.C.), and *R. v. Nixon*, 2011 SCC 34, to argue that the Crown is engaged in a tactical decision in the case at bar (as opposed to a core prosecution decision reviewable only for abuse of process) that is reviewable by the court. And, as such the evidence the Crown will seek to tender on the sentencing hearing ought to be excluded. As I understood the defence argument on this point, they intend to challenge the admissibility of Ms. H.'s evidence at the sentencing hearing insofar as it relates to the substance of the stayed charges, and so the court-appointed expert ought not to be considering the disputed information at the preliminary remand assessment phase under s. 753.01 of the Code. The overall thrust of the defence argument reduces to a claim of unfairness being visited on the offender by the Crown reversing its position in respect of the substantive charges.
- [30] In the case at bar, the defence submissions as to prejudice and fairness and admissibility of the disputed information are more in the nature of a pre-emptive strike seeking to preclude the court-appointed assessor from considering what may well be relevant information insofar as the risk assessment process is concerned.
- [31] It must be remembered that the offender is no longer facing a trial. Rather, he is at the preliminary stage of a sentencing proceeding. By virtue of his status as a designated dangerous offender and the fact that he has admitted breaching a term of his long-term supervision order, a term meant to inform and protect women engaged in intimate relationships with him, his fair trial rights are attenuated. While an offender awaiting sentence is entitled to a fair hearing, he is not entitled to the most favourable procedures that could possibly be imagined: see *R. v. Lyons*, [1987] 2 S.C.R. 309 at 362.
- [32] The protection of society is the paramount goal when sentencing a dangerous offender who has breached a condition of his long-term supervision order. Indeed, as the Supreme Court of Canada confirmed in *R. v. Johnson*, 2003 SCC 46 at para. 19, the primary purpose of the dangerous offender regime is the protection of the public. Provisions that inform the sentencing of this case are also found within Part XXIV of the Code. These principles, as well

as the general principles of sentencing found in s. 718 through 718.2 of the Code, will inform the determination of the appropriate sentence to impose at the conclusion of the eventual sentencing hearing in this case.

- [33] Significantly, the purpose of a long-term supervision order itself is twofold: to protect the public and to rehabilitate offenders and reintegrate them into the community. (See *R. v. Ipeelee*, 2012 SCC 13 at para. 50.)
- [34] The severity of a given breach ultimately depends on all of the circumstances including the nature of the condition breached, how the condition is tied to managing the particular offender's risk of re-offence, and the circumstances of the breach: *Ipeelee* at para. 52. In *Ipeelee*, Justice LeBel added:
- [55] It is the sentencing judge's duty to determine, within this open range of sentencing options, which sentence will be proportionate to both the gravity of the offence and the degree of responsibility of the offender. The severity of a particular breach of an LTSO will depend, in large part, on the circumstances of the breach, the nature of the condition breached, and the role that condition plays in managing the offender's risk of reoffence in the community. This requires a contextual analysis. As Smith J.A. states in *R. v. Deacon*, 2004 BCCA 78, 193 B.C.A.C. 228, at para. 51, "the gravity of an offence under s. 753.3 must be measured with reference not only to the conduct that gave rise to the offence, but also with regard to what it portends in light of the offender's entire history of criminal conduct". Breach of an LTSO is not subject to a distinct sentencing regime or system. In any given case, the best guides for determining a fit sentence are the well-established principles and objectives of sentencing set out in the Criminal Code.
- [35] As protection of the public is the paramount consideration in these circumstances, the assessor must be provided with all relevant information informing the offender's conduct so that he or she can prepare a proper and fully informed risk assessment pursuant to s. 753.01. Excluding the disputed information from the assessor's consideration would require that the assessment be conducted in a vacuum without the background context that led to the breach of the long-term supervision order. It would also deprive the assessor of more recent information about the offender's interactions prior to his arrest and would leave the assessor with a distorted picture of the offender's overall behaviour and circumstances in the more recent time period.
- [36] It cannot be forgotten that providing the assessor with the disputed information in the assessment package is merely a first step in the overall sentencing process engaged by s. 753.01. Other protections for the offender remain engaged at the final stage of the proceedings, the sentencing hearing. Notably, where the Crown relies on evidence of past unproven conduct, it must prove the facts surrounding that conduct beyond a reasonable doubt: see *R. v. Ziegler*, 2012 BCCA 353 at para. 10; *R. v. Cragg*, 2018 BCPC 134 at para. 37.

- [37] Of course, if an expert assessor's opinion is based on assumptions that are either unreliable or inaccurate or based on unproven evidence, the quality and reliability of the opinion may be negatively impacted: see *R. v. Pike*, 2010 BCCA 401, and Cragg at para. 205. As Associate Chief Judge Gillespie (as she then was) so adroitly noted in Cragg, the matter of what the psychiatrist bases their opinion on goes to weight, not to admissibility or receivability of the opinion:
- [205] The British Columbia Court of Appeal in *R. v. Pike*, 2010 BCCA 401 reminded judges that while psychiatrists play a very significant role in dangerous offenders hearings, it was imperative that judges not forget that they are the ones responsible for making the requisite findings of fact, as the psychiatrists make assumptions based on facts that may or may not be found by trial judges.
- [61] Psychiatric evidence plays a vital role in dangerous offender proceedings, furnishing the sentencing 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: *Neve*, at para. 182.
- [63] It remains, however, the undivided responsibility of the sentencing judge to make all requisite findings of fact, including those regarding the alleged conduct upon which a psychiatrist bases his or her opinion. A psychiatric opinion is not evidence of the facts upon which it is based. If the court is not independently satisfied as to the truth of those facts on the basis of evidence presented at the hearing, then the value of the ultimate opinion is correspondingly diminished: *R. v. Knight* (1975), 27 C.C.C. (2d) 343 at 354, 356 (Ont. H.C.J.). As explained by the Supreme Court of Canada in *Wilband*:

The value of a psychiatrist's opinion may be affected to the extent to which it may rest on second-hand source material; but that goes to the weight and not to the receivability in evidence of the opinion, which opinion is no evidence of the truth of the information but evidence of the opinion formed on the basis of that information. [Emphasis in original.]

- [64] In *Neve*, the Alberta Court of Appeal listed the following non-exhaustive list of considerations to assess the value of psychiatric evidence (at para. 189):
1. the qualifications and practice of the psychiatrist;
 2. the opportunity the psychiatrist had to assess the person, including: length of personal contact, place of contact, role with ongoing treatment, and involvement with the institution in which the person is a patient or prisoner;
 3. the unique features of the doctor-patient relationship, such as hostility or fear by the patient (or the psychiatrist) arising from the personalities, the circumstances of the contact, and the role of the psychiatrist;
 4. specifically and precisely what documents the psychiatrist had available and reviewed, for example, from earlier court proceedings, institutional records, other medical consultations, or treatment;

5. the nature and scope of consultations (this could include: personal contact with third parties, information from other health care professionals, prison authorities, police, lawyers, family);
6. specifically and precisely what the psychiatrist relies on in coming to an opinion; and
7. the strengths and weaknesses of the information and material that is relied on.

[Emphasis in original.]

- [38] Even before the final sentencing stage of the proceedings, in any case that engages the provisions of s. 753.3 and 753.01(4), the prosecutor must forward the s. 753.01 assessment report along with their recommendation to the Regional Crown Counsel director or representative deputy for a decision as to whether an application for an indeterminate sentence should be made: see B.C. Prosecution Service Crown Counsel Policy Manual, Dangerous Offender and Long-Term Offender Applications Policy (DAN 1), effective March 1, 2018.
- [39] If the Crown decides to apply for an indeterminate sentence for the breach pursuant to s. 753.01(4) of the Code, the court must impose such a sentence unless satisfied by the evidence adduced during the hearing that a new period of long-term supervision will adequately protect the public: s. 753.01(5) of the Code. Thus, while the protection of the public is paramount, a number of procedural safeguards remain in place to ensure oversight, review, and transparency in the process such that the offender's fair trial rights and liberty interests are protected.
- [40] Although not directly on point, the decision of Mr. Justice Betton in *R. v. Boisvert* (6 July 2012), Vernon 45210, is of assistance in determining the issue raised in this application. The Crown relies upon this decision as authority for the proposition that it is inappropriate for the court to direct the forensic assessor as to how to perform and conduct their s. 753.01 remand assessments.
- [41] In *Boisvert*, an assessment report had been obtained that relied on criminal allegations that had either been investigated but not charged, or had resulted in charges where there were acquittals. Upon receipt of the assessment report, Crown and defence counsel jointly applied for a second assessment report with a direction to the FPSC not to consider the information pertaining to the unproven charges. Justice Betton made the order requested by counsel.
- [42] Upon receipt of that second order for another report, with the direction not to consider the information about the uncharged allegations and allegations resulting in acquittals, counsel for FPSC raised concerns about the nature of the order. The matter was brought back before Justice Betton and the Crown withdrew its support for the need for the second assessment report and indicated that it was content to proceed with the first report. Defence counsel maintained his objection arguing that it was inappropriate for such information to form part of the foundation for the opinion. Justice Betton determined that the ordering of the second

report with the constraint imposed upon the assessors not to consider the information in dispute in that case was inappropriate and accordingly withdrew the previously made order.

- [43] Betton J. relied upon the decision in *R. v. Rindero*, 2004 BCSC 735. In that case, the defence sought a direction that FPSC not assign the same psychiatrist to conduct a s. 752.1 assessment upon the rehearing of a dangerous offender application (the application involving the earlier psychiatrist had been successfully appealed at the Court of Appeal).
- [44] In *Rindero*, Mr. Justice Taylor had occasion to discuss the purpose and role of an expert in the context of these assessments. In that case, the court was asked to place restrictions upon the FPSC in its selection of an expert to prepare the assessment. In the course of determining that the court had no jurisdiction to make an order prohibiting the 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.
- [45] Mr. Justice Taylor concluded there was no basis in law for the court to make any orders limiting the manner in which the FPSC appoints experts. At paras. 41 and 44, he noted:
- [41] As with any witness, Dr. Lohrasbe, if he does the assessment, may be challenged on premises upon which the assessment is predicated and the process by which he followed to achieve that assessment. If that process of challenge reveals a biased or closed mind, then that is something that may well detract from the opinion being given the full weight that an otherwise dispassionate assessment might be accorded.

...

- [44] In my view, there is no basis in law for this court to make any orders limiting the manner in which the Commission appoints experts either for an original hearing or for a rehearing. Such experts are witnesses not triers of fact even though the report they prepare is a result of a court order under s. 752.1.
- [46] Justice Betton relied upon these passages from *Rindero* to withdraw the order he made in the *Boisvert* case. Madam Justice Donegan relied upon them in *R. v. Ferguson*, 2014 BCSC 2556 at paras. 19 and 20, in rejecting the Crown's application for an order directing the assessing forensic psychologist to clarify her opinion or, alternatively, for an order for a second s. 752.1 assessment report.

- [47] Both the decisions in *Boisvert* and *Ferguson* demonstrate that there is a distinction between the role of the appointed expert (in preparing the assessment report) and the role of the sentencing judge (in receiving and relying upon such a report).
- [48] The purpose of a s. 753.01 assessment report is identical to the purpose of a s. 752.1 report. The s. 753.01 Code regime is designed to deal with dangerous offenders who receive determinate sentences coupled with long-term supervision orders but subsequently breach those long-term supervision orders. By virtue of s. 753.01(4) and (5) of the Code, the default sentence for the offender will be an indeterminate sentence unless there is a reasonable expectation that a lesser sentence will adequately protect the public.
- [49] In order to assist in making such a determination, the first step is the preparation of an assessment report pursuant to s. 753.01(1) of the Code. As I noted, s. 753.01 assessment reports serve an identical purpose to those reports obtained pursuant to s. 752.1 of the Code. To that end, the observations of Mr. Justice Fitch, as he then was, in *R. v. McDonald*, 2014 BCSC 2131, where he dealt with an application to extend the time for filing a s. 752.1 report, are informative. In summarizing the purpose of s. 752.1, he wrote:
- [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. The timelines set out in s. 752.1 include a 60-day remand for assessment, an additional 30 days for the report to be filed, and the possibility of a 30-day extension of that filing deadline:

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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.

- (2) The person to whom the offender is remanded shall file a report of the assessment with the court not later than 30 days after the end of the assessment period and make copies of it available to the prosecutor and counsel for the offender.
- (3) On application by the prosecutor, the court may extend the period within which the report must be filed by a maximum of 30 days if the court is satisfied that there are reasonable grounds to do so.

- [50] At paras. 18 to 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.
- [51] The observations of Fitch J. as to the purpose of s. 752.1 reports is equally apposite for s. 753.01 reports, and I adopt his observations in that respect. As Betton J. concluded in *Boisvert* at para. 8, the court must rely upon experts to formulate their opinions in accordance with established clinical practices and procedures employing recognized and accepted forensic assessment tools.
- [52] In *Boisvert* at para. 8, Betton J. concluded it was inappropriate for the court to direct qualified professionals as to what kind of collateral information they should or should not be referring to. For the same reasons, I reach a similar conclusion with respect to the present application which, in my view, is simply a variation upon the *Boisvert* scenario, albeit at one step earlier in the proceeding.
- [53] I conclude it is not for the court in this case to direct the Crown as to what collateral information should be provided to the assessment authorities. The assessor should be given the opportunity to consider the widest possible array of information about the offender and the circumstances that gave rise to the breach of the long-term supervision order condition. They can rely upon their professional expertise and judgment in deciding what collateral information to rely upon.

- [54] At the sentencing hearing, it is open to both the defence and the Crown to introduce whatever evidence they determine is appropriate for the purposes of informing what type of sentence should be imposed, including other expert opinions. Moreover, a challenge to the reliability and weight to be attached to the opinion can be undertaken through cross-examination of the author of the assessment report. In the end, it is for the court to determine the weight to be given to the report and the expert's opinion. Where the report and opinion are based on unreliable or unproven collateral information, the opinion will be given less weight: see Cragg at para. 205.
- [55] While the Crown bears a risk in forwarding the disputed information to the expert, particularly if the assessor relies upon it, in my view, the risk can be ameliorated to some extent by the Crown advising the assessment authority by means of a cover letter about the disputed information contained in the disclosure package. By this, I mean the Crown, as was indicated during argument on this application, should advise the assessment authority that the disputed information was the subject of a criminal trial, but that the allegation was not proven to the criminal standard.

Conclusion

- [56] Having considered the submissions and authorities provided to me on this application and bearing in mind that the primary purpose of this legislative scheme is the protection of the public, I conclude that the disputed information should be forwarded to the assessment authority to be considered by the forensic expert tasked with preparing the s. 753.01 assessment report.
- [57] Accordingly, the defence application to prohibit the Crown from providing the court-appointed expert with any information in respect of the charges on Indictment 27695 is dismissed.

"Ker J."

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