

CANADA / JUDGMENT

R. v. Kavanagh

2025 BCCA 135

COURT

British Columbia Court of Appeal

DECIDED

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2025 BCCA 135 R. v. Kavanagh

COURT OF APPEAL FOR BRITISH COLUMBIA

Citation:

R. v. Kavanagh,

2025 BCCA 135

Date: 20250414

Docket: CA47217

Between:

Rex

Respondent

And

Charles Michael Kavanagh

Appellant

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Before:

The Honourable Madam Justice Fenlon

The Honourable Justice Dickson

The Honourable Madam Justice DeWitt-Van Oosten

On appeal from: An order of the Supreme Court of British Columbia, dated December 18, 2020 (sentence) (R. v. Kavanagh, 2020 BCSC 2070, Vancouver Docket 27368).

Oral Reasons for Judgment

Counsel for the Appellant:

T.J. Russell

Counsel for the Respondent:

J.R.W. Caldwell

Place and Date of Hearing:

Vancouver, British Columbia

April 8, 2025

Place and Date of Judgment:

Vancouver, British Columbia

April 14, 2025

Summary:

This is an appeal from an indeterminate sentence for sexual interference. The appellant was declared a dangerous offender and sentenced to an indeterminate sentence after the judge decided there is no "reasonable possibility" the appellant will make sufficient progress within a fixed sentence to control his risk in the community. The appellant says the judge erred in reaching that conclusion, including misapprehending parts of the evidentiary record. **HELD:** Appeal allowed, but only to the extent necessary to set aside victim surcharges imposed by the judge. The remainder of the sentence will remain intact. The appellant has not established an error of law or palpable and overriding error of fact that would otherwise allow for appellate intervention. Furthermore, based on the record as assessed and weighed by the judge, there were ample bases from which the judge could reasonably conclude in favour of an indeterminate sentence.

[1] DEWITT-VAN OOSTEN J.A.: This is an appeal from an indeterminate sentence.

[2] In 2018, the appellant, Charles Michael Kavanagh, was found guilty of four offences: sexual interference; two counts of drug trafficking; and breach of a recognizance that was intended to protect the public from his risk of sexual offending. He appealed the convictions, but was unsuccessful: 2022 BCCA 225.

- [3] The sexual offence occurred in July 2016 and involved a highly vulnerable and intoxicated 15-year-old male complainant. Among other challenges, the complainant was addicted to methamphetamine. The appellant befriended the complainant in violation of his recognizance, which prohibited contact with children. He "groomed" the complainant, gave him cannabis and methamphetamine, and allowed him to traffic drugs for him. The appellant lied to others about the relationship, telling the complainant's father, for example, that he was an "outreach worker": at para. 9.
- [4] This was the appellant's eighth conviction for a sexual offence. The first offence occurred in 1978, when the appellant was 20. By the time of the predicate offence, he was 57. The appellant's sixth and seventh offences occurred between 1998-2001 and involved prolonged sexual abuse of two complainants. He received a 10-year prison sentence for those offences. While incarcerated, the appellant completed sexual offender programming. He was said to have made significant strides. Program facilitators believed he understood what was necessary to avoid re-offending and was committed to doing so. The appellant understood that if he did not self-manage his risk and re-offended, he would likely face indeterminate prison. The predicate offence occurred less than three years after the appellant's release from custody.
- [5] The Crown applied to have the appellant declared a dangerous offender. The appellant agreed that he meets the criteria for a dangerous offender under s. 753(1) of the Criminal Code, R.S.C. 1985, c. C-46. He admitted the evidence adduced at the dangerous offender hearing proved a pattern of repetitive behaviour, including the predicate offence, that showed a failure to restrain his behaviour and a likelihood of inflicting severe psychological damage on other persons: Criminal Code, s. 753(1)(a)(i).
- [6] The Crown sought an indeterminate sentence for the sexual offence. The appellant asked the judge to impose a cumulative determinate sentence of 16 years' imprisonment, followed by 10 years of long-term supervision.
- [7] The judge declared the appellant a dangerous offender and imposed an indeterminate sentence.[1] Before doing so, she was obliged to "conduct a thorough inquiry that consider[ed] all the evidence presented during the hearing in order to decide the fittest sentence for the [appellant]": *R. v. Boutilier*, 2017 SCC 64 at para. 76. An indeterminate sentence would not be a fit sentence if the evidence established a "reasonable expectation" that a lesser sentence would adequately protect the public from the appellant committing another serious personal injury offence: *Boutilier* at para. 77, citing Criminal Code, s. 753(4.1).

- [8] The appellant says the evidence at the dangerous offender hearing did precisely that, and in reaching a different conclusion, the judge applied a flawed reasoning process. He says that on a proper analysis of future risk, the availability of supervisory control, and the appellant's capacity for self-management in the community, a determinate sentence followed by long-term supervision would adequately protect the public without unreasonably depriving the appellant of his liberty.

Appellate Review

- [9] The standard of review in the dangerous offender context is well-established. As succinctly stated in *R. v. Sohal*, 2023 BCCA 256:
- [98] Appellate review of a dangerous or long-term offender designation is "somewhat more robust" than a "regular" review of a sentence. However, some deference is still owed to the sentencing judge. Errors of law are reviewed on a standard of correctness while errors of fact are reviewed on a standard of reasonableness: *Boutilier* at para. 81; *R. v. R.A.O.*, 2021 BCCA 384 at para. 13.
- [99] A dangerous offender designation and findings essential to the designation, including the assessment of the offender's future risk and amenability to treatment, are questions of fact. Absent a material error in law, such findings are entitled to deference and will only be overturned if they are unreasonable: *Boutilier* at paras. 81, 85-88; *R. v. T.L.P.*, 2021 BCCA 36 at para. 71.
- [10] When applying this standard, we must review the judge's reasons functionally and contextually. We must not "finely parse the reasons in a search for error": *R. v. G.F.*, 2021 SCC 20 at para. 69 [G.F.], internal references omitted. Instead, we "must assess whether the reasons, read in context and as a whole, in light of the live issues at trial, explain what the judge decided and why [she] decided that way in a manner that permits effective appellate review": *G.F.* at para. 69. We must also keep in mind that judges are not obliged when crafting reasons to show they appreciated and considered every aspect of the record: *R. v. R.E.M.*, 2008 SCC 51 at paras. 19-20, 45; *R. v. Bragg*, 2015 BCCA 498 at paras. 54, 59.

Sentencing Reasons

- [11] The sentencing reasons are indexed at 2020 BCSC 2070.
- [12] The judge began her analysis by instructing herself on the legal framework that governs dangerous offender proceedings: at paras. 4-13. (See also paras. 150-155.)
- [13] She then reviewed the appellant's background, including his criminal history and the circumstances surrounding his prior sexual offences: at paras. 14-106. She next turned to the facts of the predicate offence, finding that during his relationship with the complainant, the appellant "manipulated everyone" who was trying to provide the complainant with assistance: at para. 111. This behaviour was "similar to his usual pattern" as a sexual offender: at para. 107.

- [14] At sentencing, the appellant did not contest the factual findings surrounding the predicate offence. He admitted that he "groomed [the complainant] over an extended period of time". He also acknowledged that he did so while subject to restrictions on contact with children: at para. 137.
- [15] Based on the appellant's history, the judge found:
- [144] a clear pattern to Mr. Kavanagh's sexual offending. Since 1978 he has been convicted of sexually assaulting nine young boys ranging in age between 12 and 16 years. All of the boys were vulnerable which made them perfect victims. He started his sexual offending by using force and fear. As he became more sophisticated he progressed to targeting particularly vulnerable boys, luring them into spending time with him and grooming them over an extensive period of time. He provided them with alcohol and drugs and preyed upon their addictions, loneliness and in most cases isolation from their families. In each case he threatened the boys, overtly or subtly. He concealed what he was doing from others, often with lies. He then sexually assaulted the boys. Some hundreds of times, others less; [the complainant], once.
- [145] It is an understatement to say that all of Mr. Kavanagh's victims have suffered severe psychological damage.
- [146] Mr. Kavanagh has repeated this pattern of aggressive behaviour unrestrained by counselling, community supports and various forms of supervision. He has shown himself to be a master manipulator, fixated on his goal of having sex with the boys, completely indifferent to the devastation he was causing the boys and their families.
- [Emphasis added.]
- [16] The judge noted the appellant was assessed by a forensic psychiatrist in 2009/2010 and described as an "entrenched, prolific homosexual hebephile" who "maintains a high level of psychological defences", "minimizes and justifies his offending", and has a "poor record for complying with community supervision": at para. 94. At the time of the dangerous offender hearing, the appellant continued to present a high risk to reoffend sexually, with an "entrenched sexual attraction towards pre-pubescent and early year teenage males": at paras. 147, 169, 177. The judge found there is "no doubt" the appellant "poses a high risk of harmful recidivism and that his conduct is intractable": at para. 148.
- [17] After reaching this conclusion, the judge turned to the question of a fit sentence. As noted, the appellant sought a cumulative 16 years' imprisonment, followed by 10 years' supervision (the Crown's alternate position). He submitted that if he served the entirety of the prison term (which is what happened with his previous incarceration), he would be 78 when released. Because of his age, he would naturally present less of a public risk. Aging would reduce the intensity of his deviance: at para. 160. Upon release, long-term supervision could then adequately manage his risk in the community through a restrictive order that, among other things: prohibits him from consuming intoxicants and having contact with children;

requires that he reside at a community-based correctional centre or a residential facility under contract to correctional authorities; and precludes him from leaving that facility unless accompanied by another adult: at para. 161. The appellant also indicated a willingness to undergo electronic monitoring when first released into the community and to take testosterone-reducing drugs: at para. 163.

[18] The judge did not consider this form of sentence adequate. In her view:

[189] [The appellant] has demonstrated a persistent pattern of targeting vulnerable young boys. He engages in a patient grooming process which involves inserting himself into every aspect of the boy's life. He uses drugs, coercion and threats to gain "cooperation" for sex. He makes the boys dependant on him; he is their lifeline to a limitless drug supply. He manipulates people that care about the young boys into believing that he is helping them when he is doing the opposite.

[190] He is a very dangerous man. He has shattered the lives of many young boys. He either has no sincere insight into the damage he has caused or he does not care. I am not sure which. But it does not matter. What matters is that he has destroyed the young male targets of his sexual attraction over and over again. This pattern has spanned over 4 decades. As stated by Drs. Lamba and Riar, Mr. Kavanagh is an entrenched, prolific homosexual hebephile.

[191] He has been in and out of counselling since he was 10/11 years of age. He has "successfully" completed [a cognitive behavioural program] designed to teach him how to change his behaviour. He has been offered sexual offender counselling. Repeatedly. The threat of longer periods of incarceration did not deter him. Nor did the knowledge that he would be facing a dangerous offender hearing if he reoffended.

[192] He is incorrigible. Again and again he has told doctors and courts that he is sorry, that he understands his offending cycle, that he is aware of his risk factors and that he is motivated to change. At this hearing, Mr. Kavanagh claims to have "renewed" insight into his offending, claims "renewed" remorse for his victims and says that he wants to change so he does not hurt anyone else. While I have no doubt that he is sincere in those expressions right now as he awaits sentence, this court cannot have any confidence that these "renewed" insights will have any lasting effect on his behaviour. Mr. Kavanagh has said the same things before at his sentencings and on assessments for release. His words have been repeatedly proved to be hollow with devastating consequences.

See also para. 198 of the reasons for sentence.

Discussion

Parties' positions

- [19] The appellant says the indeterminate sentence reflects a flawed reasoning process. He asks that we set the sentence aside and substitute a fixed cumulative penitentiary term, with long term supervision. Alternatively, he asks that we order a new dangerous offender hearing.
- [20] The appellant's factum identifies and develops numerous alleged errors of law or material errors in principle. I consider it appropriate to group and frame those errors this way:
- a) The judge failed to consider, appreciate, or give meaningful effect to mitigating evidence that weighed in the appellant's favour, including evidence of remorse, insight, past rehabilitative efforts and responsiveness to programming, periods of restraint and non-offending, and reductions to risk inherent to aging.
 - b) The judge misapprehended parts of the evidence, resulting in unreasonable or unsupported inferences relevant to assessing the appellant's future risk and manageability in the community.
 - c) The judge failed to conduct a thorough evidentiary inquiry as mandated in dangerous offender proceedings, and instead, allowed the fact of the appellant's recidivism for sexual offending against children to overwhelm the analysis.
- [21] The Crown says the judge committed no errors, the conclusions reached on future risk and manageability were open to her on the evidence, and in asking this Court to interfere, the appellant is simply asking that we re-visit and re-weigh the record and substitute our own view of an appropriate disposition. The Crown reminds the Court that a determination as to future risk and manageability is a question of fact: *R. v. Awasis*, 2020 BCCA 23 at para. 74, citing *R. v. R.M.*, 2007 ONCA 872 at para. 53, leave to appeal ref'd, [2008] S.C.C.A. No. 91; *Sohal* at para. 99.

Analysis

- [22] This was a lengthy dangerous offender hearing involving extensive evidence about the appellant's personal and criminal antecedents, the therapeutic and other programming interventions that have been tried in the past, the appellant's response to those interventions--both positive and negative, and assessments of his psychological and psychiatric challenges, his personality profile, his character, and his risk. This is not an exhaustive list.
- [23] The judge summarized much (but not all of this evidence) in her reasons for judgment. Her actual analysis of the evidence is at times cursory and couched in conclusory terms, and the reasons do not lay out everything she considered when assessing the record, applying the relevant legal framework, or reaching her final conclusion.

- [24] The appellant says this Court should infer from the reasons that the judge did not approach the evidence with the level of rigor expected of a dangerous offender hearing. Instead, she tended to draw one-sided inferences, failed to appreciate evidentiary nuances, and gave the appellant no real credit for past efforts to identify and avoid his risk factors or his current commitment to improvement. The appellant says an indeterminate sentence should be treated as a last resort and he is not the "worst of the worst". He contends that the record offered a principled path to a lengthy determinate sentence with long-term supervision and the judge's reasons reflect no real consideration (or appreciation) of that potential. He says there was "evidence before the court that the [appellant could] be safely released into the community" (R. v. Smarch, 2015 YKCA 13 at para. 48), and the judge gave that evidence inadequate effect.
- [25] Given the nature of the proceeding and the severity of the potential consequences, it would have been preferable for the judge on material issues to explain her analysis of the evidence in greater depth and to show why evidence that weighed in the appellant's favour did not sufficiently alleviate her concerns about future risk to warrant something less than an indeterminate sentence. However, as noted, reasons for judgment are reviewed through a functional and contextual lens, and I am satisfied that on a fair reading of these reasons, considered as a whole, the judge was alive to evidence the appellant says supported his position.
- [26] The judge understood that during his previous 10-year sentence, the appellant "reportedly did very well" in sex offender programming, was able to identify his risk factors, and formulate a risk management plan: at para. 173. She understood program facilitators had assessed him as having benefitted from the intervention: at para. 173. (See also paras. 82-83, 86-87.) The judge appreciated that some treatments have not yet been tried with the appellant, such as medication to "reduce his sex drive or deviancy": at paras. 175, 178.
- [27] The judge accepted that the "risk of recidivism may decrease with advancing age": at paras. 176, 178. She also appreciated that since being incarcerated for the predicate offence in 2017, the appellant has "worked hard on addressing his issues", including programming: at para. 193. The judge explicitly disabused herself of forensic evidence adduced by the Crown that she considered unreliable: at para. 166.
- [28] What the judge did not do in her assessment of the evidence, is assign the amount of weight to potentially mitigating evidence that the appellant wanted. Nor did she interpret the evidence the same way. The appellant alleges the judge misapprehended parts of the record, but as I read her reasons, the alleged misapprehensions were either not material to the judge's overall analysis, or in fact, not misapprehensions at all. Rather, the judge simply construed the evidence differently.
- [29] I accept that some of her descriptions or references to the evidence are ambiguous; however, G.F. instructs us that where ambiguities are open to "multiple interpretations", we must prefer the interpretation that is consistent with the presumption of correct

application: at para. 79, citing *R. v. C.L.Y.*, 2008 SCC 2 at paras. 10-12. The judge was also entitled to accept all, some, or none of the evidence. She was not obliged to adopt the appellant's assessment of the evidence, including evidence that arguably weighed in his favour. She was also entitled to assess the strength of potentially mitigating evidence and its overall impact in the context of the record as a whole, including other evidence with countervailing impact.

- [30] Establishing a misapprehension of evidence is a high bar. That is the primary allegation made on appeal. To succeed on this ground, an appellant must show that the judge made an actual mistake about the substance of evidence, failed to consider evidence relevant to a material issue, or failed to give proper effect to evidence. Moreover, any such error, if established, must be shown to have played a central role in the judge's reasoning process: *R. v. Morrissey* (1995), 97 C.C.C. 193 at 218, 221, 1995 CanLII 3498 (Ont. C.A.); *R. v. Lohrer*, 2004 SCC 80 at para. 1. The misapprehension must be plainly identifiable, not based on a different view or interpretation of evidence: *R. v. Osinde*, 2021 BCCA 124 at paras. 17-20. In my view, the misapprehensions and "mischaracterizations" alleged by the appellant predominantly fall into the latter category.
- [31] Ultimately, the judge determined that the evidence in the dangerous offender hearing did not provide a sufficient basis from which to conclude there is "a reasonable possibility that [the appellant] will make sufficient progress within a fixed sentence to take advantage of the supervision mechanisms provided on his release in order to control his risk in the community": at para. 196. I cannot say this conclusion (which applied a lower standard than the one required under s. 753(4.1) and inured to the appellant's benefit), is unreasonable. Nor can I say it is the product of a less than thorough inquiry.
- [32] Having reviewed the portions of the record directed to our attention by counsel, I am satisfied there was ample bases for the judge to reach the conclusions that she did, including that the appellant's plan for long-term supervision following a determinate prison sentence would place him in "virtually" (substantially) the same position he was in when he began "grooming" the complainant in this case: at para. 200. When he befriended the complainant, the appellant was subject to a recognizance that mandated he report to a probation officer; reside in an approved residence; participate in risk assessments, counselling, and programming as directed; abstain from alcohol or non-prescription substances (a significant risk factor for him); have no contact, direct or indirect, with anyone under the age of 16 years except for commercial transactions in a store; and stay away from defined places where children can reasonably be expected to be present. This level of control, supervision, and engagement with community-based resources was not sufficient to sustainably manage the appellant's risk even though he had previously successfully completed sexual offender programming and understood the likely consequences of further offending. The judge was understandably troubled by this evidence in light of the appellant's demonstrated recidivism and the devastating harm caused by his offending. She cannot be faulted for finding that the fact he was subject to fairly intensive supervision when he began

grooming the most recent complainant was logically informative of the question before her. Indeed, it was highly relevant.

- [33] More importantly, in assessing future risk and manageability in the community, the judge received evidence from Dr. Kulwant Riar, a forensic psychiatrist. After reviewing the appellant's background, interviewing the appellant, and conducting his own risk assessment, Dr. Riar produced a report that said if the appellant is released into the community after a fixed term, the risk he presents to children will be so high that effectively managing him will require "hand-on-shoulder" supervision for the first two to three years of his release. In other words, "around the clock" management. Dr. Riar also opined that:

As far as his risk in eight to ten years, he is sixty-one years old at present and will be seventy-one in ten years. As his age advances old age will likely bring physical degradation in every aspect of bodily functions, including mobility, behaviour, as well as emotions and cognition. There will be lack of vigor and desire to pursue fun-loving or gratifying activities. There will be lack of libido and behaviours associated with it, but his sexual interests will stay the same. If he gets the opportunity, the likelihood of him pursuing it remains high, even with advancing age.

he is showing motivation to change and he was able to say everything that is needed for him to stay free of offending in the future. It is a step in the right direction, but it is not enough to just let him be in the community without the above mentioned management and interventions. It is very difficult to say whether he would make the change or even if he makes the change, if he would be able to sustain it out in the community where there are a lot of other stressors of life and other competing interests my belief is that some individuals can do it; whether he can do it or not, I cannot predict, but looking at his track record, it does not bode for a good outcome.

[Emphasis added.]

- [34] Dr. Riar was asked when testifying whether the appellant "presents as somebody for whom there is a reasonable prospect of managing his risk in the community". He was prepared to acknowledge that such was the case--but only "theoretically". Dr. Riar went on to say that he has seen "very, very bad people turn around". He could not say the appellant "is the one who is going to turn around". Instead, if released, the only effective way to manage his risk would be to have "somebody on him all the time".
- [35] The evidence before the judge was that this level of community supervision is not available for a federal offender subject to a long-term supervision order. As made clear by this Court in *R. v. Trevor*, 2010 BCCA 331, a judge "can hardly be 'satisfied' there is a reasonable [expectation] of controlling [the offender's] risk in the absence of evidence that the means to do so are in fact available": at para. 35.
- [36] At the hearing of the appeal, the appellant's counsel made thorough and able submissions on his behalf.

- [37] However, I am not persuaded the judge committed an error of law or palpable and overriding error of fact that would properly allow this Court to interfere with her assessment of future risk and manageability in the community, even applying a "somewhat more robust" standard of review: Sohal at para. 98.
- [38] I am also satisfied that in the circumstances of this case, based on the record as assessed and weighed by the judge, there were ample bases from which she could reasonably conclude there is no reasonable expectation that something less than an indeterminate sentence will adequately protect the public against further sexual offending: Criminal Code, s. 753(4.1).
- [39] There is one aspect of the appeal I would accede to, namely, the appellant's challenge to the cumulative \$600 victim surcharges imposed by the judge. On appeal, the Crown has conceded there was no jurisdiction to make that order. The relevant Criminal Code provisions in place when the appellant committed the predicate offence were declared unconstitutional in *R. v. Boudreault*, 2018 SCC 58. Parliament's revised version, enacted in 2019, should not have been applied to him.

Disposition

- [40] Accordingly, I would grant leave to appeal where necessary and allow the appeal but only to the extent of setting aside the cumulative victim surcharges of \$600. I would dismiss the remaining grounds of appeal, leaving all other aspects of the cumulative sentence intact, including the indeterminate sentence imposed for sexual interference.
- [41] FENLON J.A.: I agree.
- [42] DICKSON J.A.: I agree.
- [43] FENLON J.A.: Leave to appeal is granted. The appeal is allowed to the limited extent of setting aside the victim surcharges.

"The Honourable Madam Justice DeWitt-Van Oosten"

- [1] Sexual interference was count 1 on the Indictment. The judge imposed concurrent sentences of six years' imprisonment for each of the drug offences, and a further concurrent two years' imprisonment for breach of the recognizance. The latter sentences are not under appeal.

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