

CANADA / JUDGMENT

R. v. M.A.G.

2003 BCCA 582

COURT

British Columbia Court of Appeal

DECIDED

28 October 2003

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2003 BCCA 582 R. v. M.A.G. COURT OF APPEAL FOR BRITISH COLUMBIA Citation: R. v. M.A.G., 2003 BCCA 582 Date: 20031028 Docket: CA029574 Between: Regina Respondent And M.A.G. Appellant There is a publication ban pursuant to s. 486(3) of the Criminal Code directing that the identity of a complainant or a witness and any information that could disclose the identity of the complainant or witness shall not be published in any document or broadcast in any way. Before: The Honourable Madam Justice Ryan The Honourable Madam Justice Saunders The Honourable Mr. Justice Oppal Oral Reasons for Judgment G.D. McKinnon, Q.C. Counsel for the Appellant J. Duncan Counsel for the (Crown) Respondent Place and Date: Vancouver, British Columbia October 28, 2003

- [1] OPPAL, J.A.: On June 26, 1998, the appellant was declared to be a dangerous offender and received an indeterminate sentence. The sentencing took place prior to 1 August 1997 when Part XXIV of the Criminal Code was amended. In this appeal it is alleged that the sentencing judge erred in his interpretation of s. 753(5) of the Code in that he failed to consider the new long term offender provisions in declaring the appellant to be a dangerous offender. The order was made prior to the decisions of this Court and the Supreme Court of Canada in R. v. Johnson (2001), 158 C.C.C. (3d) 155, 2003 SCC 46 and R. v. Edgar (2001), 158 C.C.C. (3d) 212 [2003] S.C.C. 47.
- [2] In his Reasons for Judgment the sentencing judge made the following comments at para. 12:
- [12] The defence asks that the Court find the accused to be a long-term offender in lieu of an indeterminate sentence. In effect the defence says that it can agree to a greater penalty (prison for two or more years, plus community supervision for up to ten years) than would be imposed following a finding that the accused is not a dangerous offender, or finding that he is with a rejection of the indeterminate sentencing option.
- [3] At para. 14 the sentencing judge went on to state:

- [14] I might be attracted to the defence argument if I were to find that the accused is not a dangerous offender. However, the evidence is overwhelming that he is a dangerous offender. Under the new s. 753(5), the Court can treat the Crown's dangerous offender application as a long-term offender application under s. 753.1, only if it does not find the accused to be a dangerous offender. Since I find the accused to be a dangerous offender, the option of finding him a long-term offender does not arise. [emphasis added]
- [4] Counsel for the appellant, Mr. McKinnon has argued that in that passage the learned sentencing judge made a reversible error. The Crown does not disagree. The Crown's position is that the curative provision of the Code, s. 759(3)(b) ought to be applied and that the appeal in the circumstances ought to be dismissed.
- [5] In Johnson and Edgar, supra, the Supreme Court of Canada dealt with the issue as to whether the curative provision ought to be applied. The court stated that the curative provision ought to be applied only in the rarest of cases. The court made the following comments at paras. 50 and 51: 50 Where the error of law consists of the sentencing judge's failure to consider the availability of the long-term offender provisions, it is in only the rarest of circumstances, if any, that there will be no reasonable possibility that the sentencing judge would have imposed a different sentence but for the error. The criteria set out in the long-term offender provisions are substantially different from the criteria set out in the dangerous offender provisions. Therefore, the evidence and arguments that are relevant under the long-term offender application are not precisely the same as the evidence and arguments that are relevant under the dangerous offender application. Absent a thorough inquiry into the suitability of the long-term offender provisions at the sentencing hearing, it will be difficult, if not impossible, for an appellate court to be satisfied that the sentencing options available pursuant to the long-term offender provisions would have been incapable of reducing the threat of harm to an acceptable level. 51 In the case presently before the Court, the record discloses insufficient evidence to conclude that there is no reasonable possibility that the respondent would have been declared a long-term offender if the sentencing judge had considered the long-term offender provisions when determining whether to declare him dangerous. In the absence of a full inquiry into the suitability of the long-term offender provisions, it would be improper to reinstate the sentencing judge's finding that the respondent is properly classified as a dangerous offender.
- [6] I think that reasoning is applicable to the case at bar. Accordingly, I would allow the appeal and remit the matter back to the sentencing judge for a re-hearing.
- [7] RYAN, J.A.: I agree.
- [8] SAUNDERS, J.A.: I agree.
- [9] RYAN, J.A.: The appeal is allowed, the declaration that the appellant is a dangerous offender set aside and a new hearing is ordered. "The Honourable Mr. Justice Oppal" CORRECTION: December 22/03: The last sentence in para. [1]: The order was made prior to the decisions of this Court and the Supreme Court of Canada in R. v. Johnson (2001), 158 C.C.C. (3d) 155 and

R. v. Edgar (2001), 158 C.C.C. (3d) 212 [2003] S.C.C. 46 should be: The order was made prior to the decisions of this Court and the Supreme Court of Canada in R. v. Johnson (2001), 158 C.C.C. (3d) 155, 2003 SCC 46 and R. v. Edgar (2001), 158 C.C.C. (3d) 212, 2003 SCC 47. APRIL 28, 2008 THIS JUDGMENT HAS BEEN ANONYMIZED.

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