

CANADA / JUDGMENT

R. v. Nome

2001 BCSC 1575

COURT

Supreme Court of British Columbia

DECIDED

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IN THE SUPREME COURT OF BRITISH COLUMBIA

REASONS FOR SENTENCE

MR. JUSTICE A.M. STEWART

MARCH 2, 2001

HER MAJESTY THE QUEEN

AGAINST

TIMOTHY MITCHEL NOME

Counsel for the Crown L. Bernard, A. Saettler

Counsel for the Accused M. Nathanson

BAN ON DISCLOSURE

s. 486(3) C.C.C.

- [1] THE COURT: (Oral) The Crown made a submission as to how I ought to deal with the offender, Nome. Counsel for the offender adopted the position advanced by Crown counsel and made further submissions in an attempt to have me do what the Crown urges me to do. Crown counsel does not like the term "joint submission." That term was first used by counsel

for the offender. I say that with knowledge of how the submissions as to what I ought to do with Nome became common ground, as above, there is much to be said for using the term "joint submission" to summarize what is afoot. So I will.

- [2] What is before me now is, in effect, a joint submission that I should be convinced beyond a reasonable doubt of all of the necessary under s. 753.1(1)(a), (b), (c), and in the result, having thus found the offender, Nome, to be a long-term offender, go on to sentence him on his conviction by the jury on Count 3 for sexual assault in accord with the provisions of s. 753.1(3). I pause to note here what is simply a fact. It is a fact that no application under 753(1), that Nome be found to be a dangerous offender, was placed before me by the Crown.
- [3] Counsel before me are also on common ground on things which are actually a subset, or subsets, of what is noted above, including the application of the decision of the Supreme Court of Canada in *R. v. Wust* in April 2000, to the facially minimum punishment of two years to be imposed under 753.1(3)(a) and the setting of the length of supervision under 753.1(3) at ten years. There is a further declension - to use that word incorrectly, but in a way that gets at what I am about - in that both counsel suggest that the net result under 753.1(3)(a) could be as insignificant as a sentence of one day and a brief period of probation in the circumstances of the case at bar.
- [4] To put things briefly, there certainly is no doubt that I ought to be and am convinced beyond a reasonable doubt of the necessary under 753.1(1)(a) and (b).
- [5] It is 753.1(1)(c) that is the problem.
- [6] Section 753.1(1) reads as follows:

The court may, on application made under this Part following the filing of an assessment report under subsection 752.1(2), find an offender to be a long-term offender if it is satisfied that

- (a) it would be appropriate to impose a sentence of imprisonment of two years or more for the offence for which the offender has been convicted;
- (b) there is a substantial risk that the offender will reoffend; and
- (c) there is a reasonable possibility of eventual control of the risk in the community.

- [7] I focus, as above, on (c).
- [8] Counsel emphasize the little of which I must be convinced beyond a reasonable doubt under (c).
- [9] They are right. Parliament says I must be convinced on the criminal standard of proof - proof beyond a reasonable doubt, the highest standard of proof known to the law - of next to nothing.

- [10] Only by keeping that fundamental point embedded in the legislation by Parliament front and centre as I have considered this matter, have I arrived at the conclusion that I should find as the Crown and the offender, through his counsel, urge me to find; that is to say that there is proof beyond a reasonable doubt of the little that is demanded by 753.1(1)(c).
- [11] The gossamer wings in the material placed before me that taken together are enough - barely enough - for the purpose of 753.1(1)(c) include the following:
- (a) The net result of Dr. Ogloff's report (Exhibit S3, tab B1) and of his testimony before me is that experience shows that even psychopaths such as Nome who have a history of violent offences and sexual offences may not commit further offences, albeit one would bet the mortgage money that they will.
 - (b) Time - time, time, - once a psychopath, always a psychopath; that will not change. But for reasons not entirely understood, some, not all, psychopaths who have committed offences in the past reach an age where they no longer enter the criminal justice system. The material before me in this particular case does not get at what passage of time we are talking about in any or sufficient particularity for me to do other than say that Mr. Nome is so young - but 26 now - that I am proceeding on the basis that this bit of gossamer wing, as I have referred to it above, is almost non-existent.
 - (c) I pay no attention to the protestations of Nome about his desires, wishes, hopes, and - he says - realization that the time has come to change his ways. He is a psychopath. Manipulation is not just any psychopath's stock in trade, it is a drumbeat throughout the material in S3, material which deals with Nome and his history in particular. But Nome's actions while in prison in connection with things flowing from or connected with his being an aboriginal, combined with the fact, according to the evidence placed before me, that those who must set the terms of the supervision demanded by 753.1(3)(b) can - if they choose to - dip into an array of settings and programs open to aboriginals, opens a way for Nome's intelligence - for as with most psychopaths he is intelligent - to lead him to conclude that for his own good - not for the good of others, for he never will care about anyone but himself - it would be best to "internalize," as Dr. Ogloff put it, what he has been told over and over about avoiding triggers that result in violent or unlawful sexual conduct by him.
- [12] I emphasize that I am only at this point: I have found beyond a reasonable doubt that each of 753.1(1)(a), (b), (c) has been established beyond a reasonable doubt. And when one looks at (c) the observation must be, "And that is all, and barely."
- [13] It is in this context, having found Nome to be a long-term offender, that I move to sentence him under 753.1(3)(a).

- [14] And now, in my view, everything is against my doing as the Crown suggests, that is to say, sentencing Nome to one day in prison with a probation order directed at keeping tabs on him until the procedure under 753.2 can take effect, or, in the alternative, sentencing him to a period of imprisonment that will keep him in custody for 90 days or so, so the preliminaries necessary under 753.2 can be taken care of. I could not be further away from accepting the Crown's submission.
- [15] As the judge who sat with the jury, I set the facts for the purposes of sentencing Nome under 753.1(3)(a) on Count 3 on the indictment, sexual assault, as follows. I say that accepting, as I must, as proved, all facts essential to the jury's verdict of guilty on Count 3, I find as the trier of fact beyond a reasonable doubt that the circumstances under which the offence alleged against Nome in Count 3 was committed were those described in her evidence by M.T. I take my statement of the thrust of her evidence, which becomes my statement of the circumstances of the offence, from what, according to my notes, I told the jury during my instructions to them at the end of the case. And I now quote what my notes indicate I said to the jury:

M.T. told you that in the accused's bedroom in his house at Pender Harbour, British Columbia, on the night of July 24/25, 1999, what occurred included the following. The accused grabbed her by the arm and pushed her against the wall. He told her not to worry about the missing money or that it was no big deal. He put his face on hers. She turned her head and said that she did not want to kiss him. The accused shoved her onto the bed. She said, "Go away. Stop it. We don't have the money." The accused had a hand on the bed and leaned towards her and said he was going to check inside her and see if she had the money. She was crying. The accused started pulling her pants down. She said, "Stop it," and, "Don't rape me." She was crying. He kept pulling her pants down. He tried to kiss her. He pulled her underwear down after he had pulled her pants down. He put his fingers on her bare leg, grabbing her inner thigh, and brushed his fingers against her vagina. At that point A.V. walked into the room.

- [16] Nome's criminal record, marked Exhibit S1, taken, as it must be, after Nome's denial of various things stated on the face of the record remains appalling. It speaks for itself. It includes four previous convictions for sexual offences. The first two were committed when he was a youth of 13. Both included violence and one included a violent attack on a woman who was, in effect, his guard. The last two sexual assault convictions noted above occurred when Nome was 18 years of age. Two young girls were his victims.
- [17] Nome is an individual about whom it is useful to note, amongst other things, the following.
- [18] When the Court of Appeal on October 2, 1995, dismissed Nome's appeal from sentence on the sexual assault convictions in connection with the offences he committed on the two young girls noted above, that is to say when he was 18, the Court of Appeal, according to the summary that the Crown has given me, said the following:

Taking into account the circumstances of the offences, the background of the appellant and the evaluations prepared for the purpose of sentencing, the court is not persuaded that the trial judge erred in principle or that it could be said the total sentence imposed was inordinately long. There was nothing to suggest that the sentences appealed from, including the order that they be served consecutively, were unfit. The court is, however, concerned that such a long sentence was imposed for what amounted to the appellant's first adult offence. For that reason and in the hope that the imposition of the sentences might have had sufficient shock value to give the appellant the inspiration and desire to change his ways the court ordered a post-sentence report. It does not appear that the imposition of the sentences appealed from has had any beneficial effect on the appellant. In fact, if anything, it would appear that he presents a greater risk of reoffending and thus a greater threat to society today than when he was first sentenced.

They then dismissed the appeal. The sentences they were dealing with were described in the note that I have been given by the Crown as two consecutive sentences of two years imprisonment, in other words four years.

- [19] So Nome did his time. And he did every minute of it. He was held in custody right to the end, right to his warrant expiry date. He was released from custody on either November 17th or November 18th, 1998. The materials I have been given, which are voluminous, refer to both dates, but it is one or the other, November 17th or November 18th, 1998.
- [20] The offence referred to in Count 3 on the indictment, sexual assault, was committed on July 25, 1999 - call it nine months after Nome was released - and it is worthy of note that Nome was then, on July 25, 1999, on probation. He had been placed on probation in January 1999 according to Exhibit S1, and that resulted - according to what Nome says and the Crown has not disputed it - from an offence committed before he was released from prison on November 17 or 18, 1998. But the point is that Nome was on probation when he committed the sexual assault for which I am now to sentence him under 753.1(3)(a).
- [21] The report of Dr. Ogloff and all other reports that are before me make it clear that now - right now - Nome is a psychopath who is extremely likely, absent prison bars, to commit crimes of violence and/or sexual assaults. And as for sexual assault, it is most likely his victims will be girls, girls whose ages straddle the age of consent.
- [22] Nome has no solid history of being gainfully employed. The best he has done is what occurred when he worked for a landscaper after November 1988, and up to and including July 1999. So it is a fact he was working before and during the time he committed the offence in Count 3. It is obvious that whatever one might hope for by way of the limiting effect of someone being interested in work on their proclivity to commit crime, it did not work in Nome's case.

- [23] It is my view that the day after Nome committed the offence of which he has been found guilty on Count 3, and now, he was and is a clear and present danger to any community other than the population of a medium or maximum security prison. And in limiting it that way I have taken into account the fact that all outrages alleged against him in prison were denied by Nome and none of them was proved by the Crown.
- [24] Because of the Court of Appeal's recent decision in *R. v. Dennis* (2001), B.C.C.A. 30, January 25, 2001, I make it clear that I have considered the relevant provisions in Code, Part XXIII, including but not limited to: ss. 718, 718.1, 718.2 and, more particularly, 718.2(e), and the decision of the Supreme Court of Canada in *R. v. Gladue*, [1999] 1 S.C.R. 688, and the fact that Nome is an aboriginal.
- [25] It is my decision that had I been sentencing Nome on July 26, 1999, on Count 3, sexual assault, I would have sentenced him to seven years in prison. That is the appropriate starting point. The Crown urges me to give Nome 19 times two or 38 months credit for 19 months dead time. I will.
- [26] I sentence Nome on Count 3 under 753.1(3)(a) to 46 months in prison.
- [27] Under 753.1(3)(b) I order that Nome be supervised in the community for ten years.
- [28] What will confront the relevant authorities when the terms of his supervision must be set cannot be said. I therefore make no recommendations.
- [29] Under s. 760 of the Code I order that the report of Dr. Ogloff and a transcript of his testimony be forwarded to CSC. Also must go a transcript of the proceedings at trial. And so under 760 there will be a copy of the report of Dr. Ogloff; there will be a transcript of the testimony given by Dr. Ogloff; there will be a transcript of these reasons for sentence, and a transcript of the trial of Nome forwarded to Correctional Service of Canada for their information. The court has no way of seeing that that is done other than to ask that the Crown supervise the obtaining and sending off of those documents.
- [30] Last but not least I turn to Count 4. Count 4 is a count of possessing a weapon for a purpose dangerous to the public peace. The facts for the purpose of Count 4 and the sentencing thereon I set as being that Nome on the night in question feigned the loss of some money and, having cast the cat amongst the pigeons, produced a knife and, amongst other things, used it to intimidate the two girls in question by, amongst other things, cutting some strings that held some blinds. Psychopaths thrive on chaos; it is their meat and drink. It is my conclusion that Nome knew there was no so-called missing money; he merely set a train of events in motion for his own amusement. That train of events eventually included the commission by him of the offence in Count 4, the weapons offence, and the offence in Count 3, sexual assault. In connection with Count 4, I sentence Nome to 14 months imprisonment to be served concurrently with the sentence I imposed moments ago on Count 3.

"A.M. Stewart, J."

The Honourable Mr. Justice A.M. Stewart

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