

CANADA / JUDGMENT

R. v. R.A.O.

2021 BCCA 384

COURT

British Columbia Court of Appeal

DECIDED

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2021 BCCA 384 R. v. R.A.O.

COURT OF APPEAL FOR BRITISH COLUMBIA

Citation:

R. v. R.A.O.,

2021 BCCA 384

Date: 20211006

Docket: CA46800

Between:

Regina

Respondent

And

R.A.O.

Appellant

Restriction on publication: A publication ban has been mandatorily imposed under s. 486.4(1) of the Criminal Code restricting the publication, broadcasting or transmission in any way of evidence that could identify a complainant or witness, referred to in this judgment by the initials J.E. and K.L. This publication ban applies indefinitely unless otherwise ordered.

Corrected Judgment: The text of the judgment was corrected at the style of cause, the citation, and paras. 1 and 7 on October 14, 2021.

Before:

The Honourable Chief Justice Bauman

The Honourable Madam Justice Fisher

The Honourable Mr. Justice Abrioux

On appeal from: An order of the Provincial Court of British Columbia, dated February 28, 2018 (sentence) (R. v. R.A.O., Chilliwack Docket 64692-3C).

Oral Reasons for Judgment

Counsel for the Appellant:

E. Purtzki

Counsel for the Respondent:

C.G. Baragar, Q.C.

Place and Date of Hearing:

Vancouver, British Columbia

October 6, 2021

Place and Date of Judgment:

Vancouver, British Columbia

October 6, 2021

Summary:

Appellant, a first time offender, pleaded guilty to sexual offences involving children and was sentenced to seven years' imprisonment, less time served, to be followed by a 10-year long-term supervision order. He appeals the long-term offender designation, contending that the sentencing judge failed to exercise his discretion in determining whether to impose a long-term supervision order despite having met the criteria in s. 753.1 of the Criminal Code, and further, that such an order was not warranted. Alternatively, he seeks to reduce the period of supervision to five years. Held: Appeal dismissed. In considering the sentencing judge's reasons in context, it is evident that he found it necessary to exercise his discretion in favour of designating the appellant a long-term offender in order to protect the public. Despite the appellant's lack of a prior criminal record, the evidence established that he posed a significant risk of future sexual offending that warranted long-term supervision. The 10-year maximum period of supervision was reasonable in the circumstances.

- [1] FISHER J.A.: The appellant seeks to set aside a 10-year long-term supervision order (LTSO) imposed after he pleaded guilty to five sexual offences involving children. He contends that the judge failed to exercise his discretion in determining whether to impose an LTSO, which had an impact on the sentence. Alternatively, he seeks to reduce the length of the LTSO to five years.
- [2] The offences were serious. They included sexual interference of the appellant's stepdaughters, J.E. (aged 6 years) and K.L. (aged 8 years), and making, distributing and possessing child pornography. The pornography offences arose in large part from photographs and videos taken by the appellant of the two children. The appellant was in a relationship with J.E.'s mother for 4 years. They had a son together, and J.E. referred to the appellant as "dad". After the relationship ended, the appellant lived with K.L.'s mother.
- [3] The circumstances of the offences were put before the court in detailed Admissions of Fact that set out how police located the pornography in the appellant's email account, some details of the contents of the videos and photographs, statements of witnesses (including the two complainants) and a warned statement from the appellant. The appellant admitted that he sexually abused J.E. for "no longer than a year", took pornographic videos of himself and J.E. that he posted on the internet, and took photos of K.L. and also touched her for a sexual purpose. The sexual abuse of J.E., which was particularly egregious, included acts of anal penetration and oral sex.
- [4] The appellant was 37 years old at the time of the offences and had no prior criminal record. He had a history of substance abuse that included the use of cocaine.

The proceedings below

- [5] The judge imposed a global sentence of 7 years, reduced from 9 years following application of the totality principle, with a net sentence of 3 years and 10 months after giving credit for time served. In addition to the deemed aggravating circumstances under s. 718.2 of the Criminal Code, the judge found as aggravating the fact that the offences were planned, occurred on multiple occasions over a lengthy period of time, and showed a callous disregard for the harm caused. He also found as mitigating circumstances the fact that the appellant had no prior criminal history, pleaded guilty, expressed remorse, and appeared to wish to address the issues that led to his conduct.
- [6] With respect to the Crown's application to have the appellant designated a long-term offender, the judge set out the requirements of s. 753.1 of the Code as applicable:
- (1) The court may, on application made under this Part following the filing of an assessment report under s. 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.
- (2) The court shall be satisfied that there is a substantial risk that the offender will reoffend if
- (a) the offender has been convicted of an offence under section 151 (sexual interference), subsection 163.1(2) (making child pornography), 163.1(3) (distribution, etc., of child pornography), 163.1(4) (possession of child pornography) or 163.1(4.1) (accessing child pornography) and
 - (b) the offender
 - (i) has shown a pattern of repetitive behaviour, of which the offence for which he or she has been convicted forms a part, that shows a likelihood of the offender's causing death or injury to other persons or inflicting severe psychological damage on other persons, or
 - (ii) by conduct in any sexual matter including that involved in the commission of the offence for which the offender has been convicted, has shown a likelihood of causing injury, pain or other evil to other persons in the future through similar offences.

[7] In assessing the risk and possibility of controlling the risk in the community, the judge considered a psychiatric assessment by Dr. Shabehram Lohrasbe. Dr. Lohrasbe diagnosed several areas of "psychiatric dysfunction", the most significant being pedophilia. He opined that the appellant's future risk will be a combination of his pedophilia as the primary motivation, facilitated by "an unstable emotions/adjustment disorder, substance abuse or personality dysfunction". He emphasized that this risk has many dimensions or facets, a very important feature being the severity facet:

In my opinion a very important feature of this case is the severity facet: [R.A.O.] engaged in grooming to the degree where he could progress to both fellatio and anal intercourse with a very young child. It is much more common for pedophiles to engage in superficial 'fondling' type offences with younger children, in particular those with whom they share an emotional bond. The psychological damage done to the victim by intrusive penetrative sexual acts is generally more severe than through superficial ones. These intrusive penetrative sexual acts inflicted on a child also reflect the severity of [R.A.O.]'s deviancy, and the severity of his disconnect from feeling of caring, empathy, and protectiveness of the child.

- [8] He expressed particular concern about the nature of one of the videos with J.E. that showed the appellant to be unaffected by J.E.'s obvious distress.
- [9] Dr. Lohrasbe explained that pedophilia is an established sexual preference for which there is no 'cure', but pedophiles do not necessarily act on their deviancy, and available treatment programs seek to improve self-awareness and self-control. He further explained that the effectiveness of these treatment programs is controversial and complex, but they are the best that is currently available.

[10] With respect to risk management, Dr. Lohrasbe stated that a detailed plan can only be prepared when the appellant is close to being released into the community. His view was that lengthy follow-up is essential:

A substantial amount of research and clinical experience tells us that any benefits from treatment need 'booster doses' in order to transfer to life in the community. The frequency and duration of such booster doses depends on a host of variables that are impossible to anticipate, and will need adjustment depending on his progress. As a general principle, the longer the follow up, the greater the possibility of effectively managing risk in the community.

[11] He concluded that the appellant poses a significant risk for further sexual offences but with appropriate treatment, there is a reasonable possibility that his risk could eventually be safely managed in the community.

[12] The judge accepted Dr. Lohrasbe's risk assessment and concluded as follows:

[108] I find the Crown has established all the necessary criteria set out in s. 753.1(1) and find [the appellant] to be a long-term offender.

[109] Given Dr. Lohrasbe's opinion that a lengthy period of follow up being crucial for ongoing risk reduction and risk management, I order that the period of supervision be for a period of 10 years.

On appeal

[13] The appellant's right of appeal is grounded in s. 759 of the Code, which permits a person found to be either a dangerous or long-term offender to appeal a decision on any ground of law or fact or mixed law and fact. Appellate review in this context is concerned with legal errors and whether the designation was reasonable: *R. v. Currie*, [1997] 2 S.C.R. 260 at para. 33; *R. v. Sipos*, 2014 SCC 47 at para. 23. It has been held that appellate review of a dangerous or long-term offender designation is somewhat more robust than "regular" appellate review of a sentence, but the appellate court must still give deference to the sentencing judge's findings of fact and credibility. Thus, the standard of review for errors of law is correctness and for errors of fact, reasonableness: *Sipos* at para. 26: see also *R. v. Malakpour*, 2018 BCCA 254 at para. 47.

[14] The appellant raises three grounds of appeal: (1) the judge erred in law in failing to exercise discretion under s. 753.1(1) of the Code not to impose an LTSO; (2) an LTSO was not warranted; and (3) alternatively, the length of the LTSO should be reduced.

1. Failure to exercise discretion

- [15] The appellant submits that the judge erred in law in failing to exercise his discretion to decline to impose an LTSO even if the statutory criteria were met, and instead approached the question as though the imposition of an LTSO was mandatory once those criteria were met. He also submits that this error had an impact on the sentence and this court should set aside the supervision order.
- [16] The Crown submits that the judge's reasons for sentence do not support the appellant's contention, but rather reveal that the judge recognized his discretion as to whether an LTO designation should be imposed.
- [17] There is no dispute that the decision to designate an offender as a long-term offender is a discretionary one. As this court noted in *R. v. C.R.G.*, 2019 BCCA 463, when the requirements in s. 753.1 are met, that designation may (not must) be made: see at paras. 19, 21. While the judge's reasons do not expressly recognize this discretion, when considering his reasons in context, it is evident that he found it necessary to exercise his discretion in favour of designating the appellant a long-term offender in order to protect the public interest. His finding that the appellant had shown "a likelihood of causing injury, pain or other evil to other persons in the future through similar offences" was well supported by the circumstances of the offences and Dr. Lohrasbe's risk assessment, all of which he reviewed in some detail. Moreover, the appellant did not take serious issue with the designation at the sentencing hearing. The transcript shows that defence counsel advised the court that the appellant recognized his future risk, expected that a long-term supervision order was going to be put into place and was willing to accept it. While this latter point is by no means determinative, it does provide further context in assessing the judge's reasons.
- [18] I would not therefore accede to this ground of appeal.
2. An LTSO should not be imposed
- [19] The appellant submits that an LTSO was not warranted in this case for several reasons: (a) he was a first-time offender; (b) he had not previously taken programming to address his risk of sexual offending; (c) according to Dr. Lohrasbe, he was willing to take available programming and would benefit from it; and (d) he was to be subject to stringent conditions under s. 161(1) of the Code once released from custody.
- [20] The question here is whether the long-term offender designation is reasonable, and in my view, it is. It reflects the objectives of an LTSO to protect the public from offenders who pose an ongoing risk of re-offence, and to facilitate their rehabilitation: see *R. v. Steele*, 2014 SCC 61 at para. 30; *C.R.G.* at paras. 14-15; *R. v. L.M.*, 2008 SCC 31 at para. 42; *R. v. Janssen*, 2015 ABCA 92 at para. 15.
- [21] I accept that the appellant's status as a first time offender is an important factor to be considered in exercising the discretion to designate him as a long-term offender. While it is not, and should not be common to make the designation for such offenders, the absence of a prior criminal record is not conclusive: *C.R.G.* at para. 21. Where an offender has a lifelong

condition, such as pedophilia, and may continue to pose a continuing risk at the end of his sentence, an LTSO may be necessary to control the risk. This was the case in C.R.G. and, in my view, is also the case here.

- [22] I do not accept the appellant's submission that the evidence of the risk factors in this case are markedly different from those in C.R.G. Although the offender in C.R.G. had expressed some homicidal fantasies during a police interview, the sentencing judge noted that they did not reflect his actions, nor had it been established that they were true. The underlying concern was the offender's paraphilia of sexual sadism and pedophilic disorder that were likely to be lifelong unless his risk was well managed through treatment and self-management strategies. The psychiatric assessment concluded that there was a reasonable likelihood that the offender could be treated in such a way as to make his risk more manageable while in the community.
- [23] Here, the evidence shows that the underlying concerns regarding the appellant's risk are no less serious, especially in light of the severity facet emphasized by Dr. Lohrasbe.
- [24] It is important to note that a sentence and a supervision order have different goals: the principal objective of a prison sentence is punishment, while the objectives of a supervision order are to prevent future criminal conduct and protect the public: L.M. at para. 46; C.R.G. at para. 38. Thus, the rationales for treating the absence of a criminal record as a mitigating factor in sentencing (an indication of otherwise good character or no benefit of the corrective effect of a previous conviction: see R. v. R.M., 2019 BCCA 409 at paras. 20-21) are not directly applicable here, other than to consider that the appellant has not yet received any institutional treatment.
- [25] This fact, that the appellant has not yet taken programming, and according to Dr. Lohrasbe is willing to do so and would benefit from it, does not assist in the analysis. Nor does the suggestion that the appellant will have "more than sufficient time" to complete programming given the length of his sentence. Dr. Lohrasbe was clear in his assessment that there was no cure for the appellant's pedophilic disorder, and the effectiveness of the currently available treatment programs is controversial and complex. He was also clear in stating that the specific content of the appellant's risk management plan could only be prepared when he is close to being released into the community, and recommending a lengthy period of follow-up. This evidence reflects the speculative nature of an assessment of future risk, which must be made at the time of sentencing: see Janssen at para. 18.
- [26] Similarly, the fact that the appellant will be subject to a prohibition from having contact with persons under the age of 16 under s. 161(1) of the Code does not assist. While such an order also aims to provide a measure of protection for the public, it provides no supervision and does not advance the offender's rehabilitation.

[27] Therefore, I see no basis on which to set aside the LTSO.

3. The length of the LTSO should be reduced

- [28] In the alternative, the appellant submits that the LTSO should be reduced from a period of 10 years to 5 years. He says the 10-year period is excessive as it is longer than necessary to protect the public from the risk he poses. He relies on R. v. S.W.P., 2020 BCCA 373, where this court reduced a 10-year LTSO to 5 years.
- [29] I agree with the comment of Justice Newbury in S.W.P. (at para. 60) that the 10-year maximum LTSO is not a "default" position. Every case must be assessed on the basis of its particular facts. However, I would not interfere with the length of the LTSO here, as the circumstances of the offences and the appellant are markedly different from those in S.W.P.
- [30] In S.W.P., the offender broke into a home, exposed himself and masturbated. He was 16 years old at the time of the offence, had cognitive difficulties and was of Aboriginal heritage. He also had a criminal record that included two assaults and two other indecent acts involving exhibitionism and attempts to touch women. He was assessed as a high risk of repetition of exposing and non-consensual sexual touching, but the future course of his psychiatric development was difficult to predict. The assessing psychiatrist opined that he needed a "lengthy period under legal supervision" for "as long as possible" to achieve stability. However, given the uncertainty of the appellant's future prognosis as well as his personal circumstances, this court concluded that a 10-year period was not justified.
- [31] In this case, the 10-year period of supervision reflects the nature and severity of the appellant's offences, the harm to the victims, the appellant's significant risk to reoffend sexually, and Dr. Lohrasbe's opinion - accepted by the judge - that a lengthy period of follow-up was necessary to manage the risk in the community. In these circumstances, the imposition of the maximum 10-year period of supervision was reasonable.
- [32] For all of these reasons, I would dismiss the appeal.
- [33] BAUMAN C.J.B.C.: I agree.
- [34] ABROUX J.A.: I. agree.
- [35] BAUMAN C.J.B.C.: The appeal is dismissed.

"The Honourable Madam Justice Fisher"

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