

CANADA / JUDGMENT

R. v. Tremblay

2021 BCCA 26

COURT

British Columbia Court of Appeal

DECIDED

21 January 2021

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2021 BCCA 26 R. v. Tremblay

COURT OF APPEAL FOR BRITISH COLUMBIA

Citation:

R. v. Tremblay,

2021 BCCA 26

Date: 20210121

Docket: CA43507

Between:

Regina

Respondent

And

Martin Daniel Tremblay

Appellant

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Before:

The Honourable Madam Justice MacKenzie

The Honourable Mr. Justice Goepel

The Honourable Mr. Justice Abrioux

On appeal from: An order of the Supreme Court of British Columbia, dated
December 1, 2015 (R. v. Tremblay, 2015 BCSC 2263, Vancouver Docket 25982).

Counsel for the Appellant
(via videoconference):

E. Purtzki

Counsel for the Respondent
(via videoconference):

M.A. Street

Place and Date of Hearing:
Vancouver, British Columbia
December 2, 2020

Place and Date of Judgment:
Vancouver, British Columbia
January 21, 2021

Written Reasons by:

The Honourable Mr. Justice Abrioux

Concurred in by:

The Honourable Madam Justice MacKenzie

The Honourable Mr. Justice Goepel

Summary:

In 2013, the appellant was convicted of two counts of criminal negligence causing death. The Crown subsequently initiated dangerous offender proceedings, which resulted in the appellant being designated as a dangerous offender. The appellant was sentenced to an indeterminate term of imprisonment. He appeals his sentence on the ground that the judge erred in failing to properly consider the management of his risk at the penalty phase of the assessment. He seeks to adduce fresh evidence in support of the appeal. Held: Appeal dismissed. The judge fully considered the appellant's risk assessment and treatment prospects and his findings were reasonable. The application to adduce fresh evidence is dismissed.

Reasons for Judgment of the Honourable Mr. Justice Abrioux:

Introduction

- [1] On February 22, 2013, the appellant was convicted of two counts of criminal negligence causing death and two counts of failing to provide the necessities of life. The trial judge conditionally stayed the latter convictions pursuant to *R. v. Kienapple*, [1975] 1 S.C.R. 729, and also convicted Mr. Tremblay of one count of attempting to obstruct justice by encouraging his daughter's grandmother to lie to the police and accept responsibility for the deaths.
- [2] The Crown subsequently initiated dangerous offender proceedings under s. 753(1)(a) of the Criminal Code, R.S.C. 1985, c. C-46 [Code]. Dr. Kulwant Riar performed a psychiatric assessment of Mr. Tremblay pursuant to s. 752.1 of the Code, which did not include an interview since the appellant refused to meet with him. The report is dated September 23, 2013. The dangerous offender proceedings began on January 19, 2015, at which time the appellant was 49 years old (the "Hearing").
- [3] The judge designated Mr. Tremblay as a dangerous offender and sentenced him to an indeterminate term of imprisonment.
- [4] The appellant did not challenge his designation as a dangerous offender at the Hearing, nor is that an issue in this Court. Rather, he seeks to replace the indeterminate sentence with a fixed term of 20 years to be followed by a 10-year long-term supervision order (LTSO).
- [5] The appellant also seeks to have admitted as fresh evidence on this appeal three reports completed by the Correctional Service of Canada ("CSC") concerning his performance in the high intensity offender program between 2017 and 2018.
- [6] For the reasons that follow, I would dismiss both the application to adduce fresh evidence and the appeal.

The Predicate Offences

- [7] The offences which lead to the appellant's dangerous offender designation and indeterminate sentence consisted of two counts of criminal negligence causing death (the "Predicate Offences").
- [8] In his reasons for sentence which are indexed as 2015 BCSC 2263 (the "Reasons") the judge succinctly summarized the pertinent facts:
- [1] On February 22, 2013, I convicted Martin Tremblay of two counts of criminal negligence causing death arising from events that occurred on March 1 and 2, 2010: *R. v. Tremblay*, 2013 BCSC 816. The two deceased, Kayla Lalonde and Martha Jackson, both died of methadone and alcohol toxicity. Ms. Lalonde was 16 years old at the time of her death and Ms. Jackson was a year older. Mr. Tremblay was in his mid-40s. He was a drug dealer and offered his home to at-risk youth, primarily female First Nations teenagers, for the purpose of partying. He was well known to Ms. Lalonde who referred to him as her "street dad". He provided gifts,

alcohol, drugs, and a cell phone to her. She, in turn, invited her friends to his residence where he gave them free alcohol and drugs. During the incident which resulted in the convictions, Mr. Tremblay gave the girls, and one of their friends, alcohol and powdered methadone which they snorted. Neither had used methadone before and they quickly passed out. Mr. Tremblay was fully aware of the girls' weakened condition, but took no steps to obtain appropriate assistance for them. Indeed, I concluded, on the basis of video evidence, that he touched the girls for a sexual purpose after they passed out. Ms. Lalonde died on a sidewalk in Burnaby where Mr. Tremblay had left her body. Ms. Jackson died in his residence. I found that Mr. Tremblay showed a wanton and reckless disregard for the lives and safety of the two girls and found him guilty of criminal negligence causing death. I also found him guilty of one count of obstruction of justice.

The Appellant's Background

Family and Social History

- [9] The appellant was born on August 18, 1965 in Jonquière, Québec. His father, who died when Mr. Tremblay was 12 years old, was physically abusive. It would appear that the appellant neither graduated from high school nor had gainful employment for any extended period of time.
- [10] Mr. Tremblay has had several long-term relationships, including one short-lived marriage. He has a daughter.
- [11] While there are inconsistencies in his reporting to professionals who have assessed him over the years, it would appear from the record that Mr. Tremblay began using street drugs extensively after his father's passing, beginning with marijuana and cocaine. At age 16, he started using heroin. At age 21, he experimented with a variety of substances, including crystal methamphetamine, mescaline and acid. The appellant attended an addiction treatment center in Québec in 1985, but relapsed within one year. Following a car accident in 2001, he began abusing Tylenol-3s, Percocets, and benzodiazepines. According to his self report, Mr. Tremblay has generally abstained from consuming alcohol since 2000 or 2002.
- [12] In 2003 the appellant self-reported being sexually assaulted by two men when he was approximately 14 years old. He also reported being sexually abused on other occasions during his teenage years.

Criminal History

- [13] Mr. Tremblay's extensive criminal history to the time of the Predicate Offences was summarized by the sentencing judge as follows:
- [130] Mr. Tremblay has been convicted of a wide variety of offences including property offences, armed robbery, obstruction of justice, failure to appear, and various narcotic-related offences. The following table summarizes his offence history:

Conviction Date

Offence

Sentence

October 24, 1984 Montreal, Quebec

Theft under \$200

Suspended sentence and 18 months probation

December 4, 1992 Longueuil, Quebec

Failure to Appear

\$50 fine and costs and surcharge \$5 (in default 15 days)

December 8, 1992 Longueuil, Quebec

(1) Attempt Break and Enter with Intent

(2) Possession of Break in Instruments

(1) Fine and costs \$400 and surcharge \$40 (in default 3 months) and 2 years probation

(2) \$100 fine and surcharge \$10 (in default 15 days) and 2 years probation

December 14, 1992 Edmundston, NB

(1) Theft Over \$1000

(2) Possession of Property Obtained by Crime over \$1000

(3) Possession of Narcotic

(1-2) 4 months on each consecutive

(3) 21 days consecutive

May 5, 1993 Edmundston, NB

(1) Armed Robbery

(2) Attempt Break and Enter with Intent

(1) 2 years concurrent with sentence serving

(2) 60 days consecutive

March 30, 1994 Montreal, Quebec

Obstruction

\$125 fine (in default 5 days)

October 28, 1994 Montreal, Quebec

Assault

1 month consecutive to sentence serving

January 29, 1996 Montreal, Quebec

Fail to Comply with Recognizance

Fine and Costs \$250 (in default 2 months) and 2 years probation

February 20, 1996 Montreal, Quebec

(1) Possession of Narcotic

(2) Fail to Comply with Recognizance

(1-2) 15 days on each charge and 2 years probation

April 11, 1996 Montreal, Quebec

Possession of Narcotic

(four charges)

(1) Fine and costs \$100 (in default 5 days) and 2 years probation

(2) \$400 fine (in default 20 days concurrent) and 2 years probation

(3) \$200 fine (in default 10 days concurrent) and 2 years probation

(4) \$100 fine (in default 5 days concurrent) and 2 years probation

December 11, 1996 Port Alberni, BC

Break and Enter and Theft

3 months and 1 year probation

December 4, 2003 Vancouver, BC

Sexual Assault (five charges)

3 years and 6 months and 18 months probation

November 19, 2004 Vancouver, BC

Possession of Narcotic

(2 charges)

1 day each concurrent

December 8, 2010 Vancouver, BC

Failing to Appear

1 day (credit for 2 days served)

February 15, 2011 Vancouver, BC

- (1) Trafficking in a Controlled Substance
- (2) Trafficking in a Controlled Substance
- (3) Possession for the Purpose of Trafficking

11 months plus credit for 23 days time served, mandatory 10 year firearms prohibition

- [14] The appellant did not begin offending sexually until 2001, when he was in his late 30s. From that time, several incidents, in addition to the Predicate Offences, are indicative of a specific modus operandi of offending against vulnerable adolescent women.
- [15] In 2003, Mr. Tremblay was convicted of five charges of sexual assault, committed between 2001 and 2002. All five complainants were Indigenous women between the ages of 13 and 19. In each case, Mr. Tremblay provided the complainants with free alcohol and drugs and filmed himself sexually assaulting them when they became incapacitated.
- [16] At the Hearing, the Crown also established that the appellant committed sexual offences against three other adolescent women between 2005 and 2007, being two sexual assaults and obtaining sexual services from a minor (the "Uncharged Offences"). Two of the three complainants in these incidents were Indigenous, and all three were adolescent women aged around 15 to 19 whom Mr. Tremblay had at various times provided with free alcohol and drugs. The sexual assaults occurred while the complainants were incapacitated. The judge further concluded that Mr. Tremblay had provided alcohol and drugs to a fourth complainant, also an adolescent Indigenous woman, and accepted her evidence that she had witnessed Mr. Tremblay doing the same for other adolescent Indigenous women. The Crown laid charges in respect of these offences in 2011 but directed a stay of proceedings in 2015 following several adjournments.

Psychiatric/Psychological History

- [17] Mr. Tremblay was assessed by four psychiatric and psychological professionals between 2003 and 2005. He was assessed again in 2012.
- [18] In February 2003, forensic psychiatrist Dr. Douglas McKibbin diagnosed him with alcohol, benzodiazepine and opioid abuse in remission in a controlled environment; cannabis and cocaine abuse in sustained full remission; possible substance-induced mood disorder and substance-induced psychotic disorder; possible malingering; and probable antisocial personality traits. That November, psychiatrist Dr. Ronald LaTorre diagnosed him with polysubstance abuse in sustained full remission; opioid dependence in remission in a controlled environment; anxiolytic abuse (historical diagnosis); and adjustment reaction with mixed disturbance of emotions and conduct (historical diagnosis).

- [19] In April 2005, psychologist Dr. Gary Saulnier of the outpatient clinic at the Forensic Psychiatric Services Commission met with Mr. Tremblay to assess his suitability for a sex offender group therapy program and concluded that it was unnecessary since Mr. Tremblay had recently completed a similar program in custody. He observed that Mr. Tremblay was "quite resistant" to participating in the informal sex offender maintenance program offered through probation. In May 2005, Dr. Todd Tomita of the same clinic assessed Mr. Tremblay and formed the impression that he did not suffer from any major mental illnesses. He scheduled Mr. Tremblay for further testing to assess his sexual deviance, which Mr. Tremblay failed to attend. Mr. Tremblay agreed to further testing at a subsequent meeting in July 2005 but again failed to attend.
- [20] Mr. Tremblay was assessed again in June and July 2012 while in custody for the Predicate Offences. Forensic psychiatrist Dr. Witold Widajewicz diagnosed him with polysubstance abuse in remission in a controlled environment; substance-induced mood disorder with dissociative symptoms; possible drug-induced psychotic disorder in remission; and mixed antisocial, borderline and narcissistic personality disorder.
- [21] Two risk assessments were undertaken over this time period. In November 2003, Dr. LaTorre conducted a risk assessment using the Static 99, an actuarial instrument designed to help predict sexual and violent recidivism for sexual offenders. He concluded that Mr. Tremblay fell within a group of sexual offenders who "on a balance of probabilities are less likely, rather than more likely, to sexually reoffend" up to 15 years following release. In June 2011, psychologist Arthur Linbald conducted a second risk assessment using the same method. He placed Mr. Tremblay in the moderate-to-high risk category. His assessment did not include the Uncharged Offences or the Predicate Offences.

Corrections, Community Supervision and Treatment History

- [22] Mr. Tremblay's treatment history has been checkered, both in custody and while under community supervision.
- [23] Mr. Tremblay expressed a willingness to undergo treatment at least as early as May 1993 while in custody, and had completed phase one of an institutional substance abuse program and a "self-knowledge, self-expression, and self-acceptance" course before his statutory release in August 1994. However, he reoffended in September 1994 following his release and his parole was subsequently revoked. He was again released in May 1995 but reoffended within three months of the expiry of his sentence in August 1995. Mr. Tremblay did not participate in any extended treatment programs while in custody prior to his May 1995 release.

- [24] Mr. Tremblay completed the 16-week Sexual Offender Treatment Program ("SOTP") prior to his release from Ford Mountain Institution in October 2004. Following his release, he was supervised by community corrections for 18 months as a high-risk offender, during which time he participated in the informal sexual offender maintenance program in appointments with his probation officer. His commission of the Uncharged Offences overlapped with this probationary period, which ended in April 2006.

Evidence at the Hearing Regarding Psychological and Psychiatric Assessments and Treatment History

Dr. Riar's Opinion

- [25] Dr. Riar was of the view that the appellant possessed strong characteristics of an anti-social personality disorder. While the appellant did not have a deviant sexual disorder, Dr. Riar found that he possessed psychopathic personality traits. He was also of the opinion that the appellant had polysubstance abuse disorder which was in remission: Reasons at para. 142. Overall, Dr. Riar was of the opinion that Mr. Tremblay posed a high risk for sexual offending.
- [26] When it came to treating the appellant's risk for sexual offending, Dr. Riar was generally pessimistic. He found that any treatment had to be focussed on the appellant's personality disorder, and to a lesser extent, his substance abuse issues. Dr. Riar testified that the biggest challenge in treating offenders with personality disorders, like the appellant, was that they tended not to be motivated to change and could not be expected to engage with the programming. Dr. Riar stated that underlying personality disorders were difficult to treat in any event and could only be managed: Reasons at para. 146. He was also of the view that risk-relevant programming for the appellant would be available within the prison system. However, based on the appellant's long-standing personality disorder, his related sexual behaviours, and his lack of insight, it was "very likely that he [would] not seriously motivate himself to participate with an open mind, and benefit from these treatments". Moreover, even if the appellant were to engage in such treatment--which Dr. Riar expressed some doubt--there was "no guarantee" that the appellant would benefit from it.
- [27] At the Hearing, Dr. Riar was asked whether the appellant's risk for sexual offending would reduce as he aged--the so-called concept of "aging out". He agreed with the general concept that a person's risk did reduce with age, however, he questioned whether that applied to the appellant because his sexual offending began later in his life and, if anything, appeared to have increased as he aged: Reasons at para. 150.
- [28] However, Dr. Riar agreed that the appellant's sexual offending had a specific modus operandi in that he used money and drugs to lure victims into a private residence where he would commit sexual offences. He stated that the appellant's ability to traffic in drugs would reduce with age, which might in turn reduce his ability to offend in the specific way he had since it would limit his access to funds.

Evidence of Federal Programming and Supervision

- [29] Representatives from the Correctional Service of Canada and the Parole Board of Canada testified at the Hearing as to the available programs and forms of supervision.
- [30] Jody Flarbour, an employee of the correctional service, testified as to the types of programs available for federally sentenced offenders. She explained that the federal system offered programming through what was known as the Integrated Correctional Programming Model ("ICPM"). All of the programs were voluntary and approximately 18% of offenders chose not to take part in any programming and were thus considered untreated. Ms. Harbour testified that the ICPM program was specialized for different types of offending, for example sex offending, and at different intensities. Programs were not offered to low-risk offenders. The ICPM program model was only recently introduced by the correctional service and the initial research from the service established "promising" results from the program and that it was shown to have improved offenders' skills, motivation and attitude.
- [31] Patrick Storey, a representative of the Parole Board, testified as to the conditions imposed by long-term supervision orders ("LTSOs"). He explained that certain conditions of LTSOs arose by operation of law, with others imposed by the Parole Board which were specific to the offender's needs, risk and crime cycle. Mr. Storey testified that one of the conditions that could be imposed was a condition to reside at a half-way house if it was relevant to managing an offender's risk.

Positions of the Parties at the Hearing

- [32] Defence counsel conceded that the appellant met the criteria to be designated as a dangerous offender under s. 753(1)(a) in that the Crown had established that the appellant had a "pattern of repetitive behaviour". That pattern was made out due to the highly specific modus operandi the appellant employed in his offending as exhibited in the 2001-2002 sexual assaults, the Uncharged Offences, and in the Predicate Offences themselves.
- [33] The defence position was that a 15-20-year sentence followed by a 10-year LTSO should be imposed, rather than an indeterminate sentence. Counsel submitted such a sentence would adequately manage the appellant's risk. This was because the appellant's sexual offending was characterized by a very specific modus operandi and that the enhanced supervision mechanisms within the LTSO would be particularly effective in reducing his risk and opportunities for sexual reoffending. Defence counsel further submitted that because drug dealing was a critical component of the appellant's offence cycle, it was likely that the appellant's ability to traffic in drugs would diminish with age: Reasons at para. 124.
- [34] The Crown's position was that an indeterminate sentence should be imposed. The Crown argued that, based primarily on Dr. Riar's opinion, the appellant would likely not engage in any programming and that he lacked any insight into his sexual offending. The Crown also submitted that the appellant's risk could not be managed as past periods of probation had proved ineffective at addressing any of his offending patterns of behaviour. In particular, the

Crown highlighted the Uncharged Offences committed while Mr. Tremblay was subject to an 18-month probation order.

The Reasons for Sentencing

- [35] The trial judge was satisfied that the appellant met the designation criteria under s. 753(1)(a) of the Code by virtue of a very specific pattern of offending against vulnerable adolescent women.
- [36] He concluded that the Predicate Offences were part of a 10-year pattern of identifying and "groom[ing] ... vulnerable teenage girls" through the provision of drugs and alcohol and a place in which to consume those substances "with a view to sexually assaulting them" once they had been rendered "defenceless". He held that this pattern "clearly demonstrate[d] [the appellant's] failure to restrain his behaviour" and that there was "no evidence which could support a suggestion that he was able to restrain his behaviour": Reasons at para. 96.
- [37] He next identified the sentencing options and noted that he needed to determine whether the evidence was "sufficient to establish a confident belief, for good and sufficient reasons, that a determinate sentence followed by an LTSO is capable of reducing to an acceptable level the threat [the appellant] poses". He noted that this assessment "necessarily raises the question of whether [the appellant's] risk can be reduced or minimized through treatment": Reasons at paras. 112-113.
- [38] After examining the evidence, giving "particular consideration to [the appellant's] risk assessment and treatment prospects" and "carefully [considering] the lesser measures proposed", the judge found there was "no evidence to suggest, let alone provide a basis for a confident belief, that [the appellant], might benefit from treatment for his antisocial personality disorder which might ameliorate his sexual offending": Reasons at paras. 127, 139 and 162. He also found that the "age-out" (or "aging-out" argument "[offered] nothing for the court to rely on with respect to [the appellant's] treatability": Reasons at para. 163. The judge was ultimately not satisfied that any measure other than an indeterminate sentence would adequately protect the public. He also sentenced the appellant to a concurrent sentence of two years for obstruction: Reasons at paras. 127, 167 and 170.

The Legal Framework

- [39] The dangerous offender statutory regime following *R. v. Boutilier*, 2017 SCC 64 was succinctly summarized by Justice Fisher in *R. v. Awasis*, 2020 BCCA 23, leave to appeal ref'd, [2020] S.C.C.A. No. 225:
- [70] Integral to the designation stage is an assessment of future risk. As the Supreme Court of Canada confirmed in *Boutilier*, an offender cannot be designated as dangerous unless he is shown to present a high likelihood of harmful recidivism and that his violent conduct is intractable. Accordingly, a judge must conduct a prospective assessment of dangerousness--which necessarily involves the consideration of future treatment prospects--before

designating an offender as dangerous: Boutilier at paras. 45-46. This requirement applies with equal force to designations under both s. 753(1)(a) and (b): R. v. Skookum, 2018 YKCA 2 at para. 57.

Sentencing

[71] Once an offender is designated a dangerous offender, the proceedings move to the sentencing stage. The relevant provisions are ss. 753(4) and (4.1):

753 (4) If the court finds an offender to be a dangerous offender, it shall

- (a) impose a sentence of detention in a penitentiary for an indeterminate period;
- (b) impose a sentence for the offence for which the offender has been convicted - which must be a minimum punishment of imprisonment for a term of two years - and order that the offender be subject to long-term supervision for a period that does not exceed 10 years; or
- (c) impose a sentence for the offence for which the offender has been convicted.

(4.1) The court shall impose a sentence of detention in a penitentiary for an indeterminate period unless it is satisfied by the evidence adduced during the hearing of the application that there is a reasonable expectation that the lesser measure under paragraph 4(b) or (c) will adequately protect the public against the commission by the offender of murder or a serious personal injury offence.

[72] Section 753(4.1) does not impose an onus, a rebuttable presumption, or mandatory sentencing. Rather, indeterminate detention is one sentencing option among others available under s. 753(4), limited to "habitual criminals who pose a tremendous risk to public safety": Boutilier at paras. 34, 58, 71 and 77. To properly exercise discretion under s. 753(4), the judge must impose the least intrusive sentence required to reduce the public threat posed by the offender to an acceptable level: Boutilier at paras. 60 and 70. In doing so, the judge must conduct an individualized assessment of all relevant circumstances, and consider the sentencing objectives and principles set out in ss. 753(4), (4.1) and 718-718.2, which include those developed for Indigenous offenders: Boutilier at paras. 53, 63 and 71; [R. v. Malakpour, 2018 BCCA 254] at para. 37; R. v. Shanoss, 2019 BCCA 249 at para. 30 [Shanoss BCCA].

[73] At this stage, prospective evidence of treatability is highly relevant. Evidence of treatability must be more than "speculative hope" and must indicate that the offender can be treated within an ascertainable period of time: R. v. Little, 2007 ONCA 548 at para. 42, leave to appeal ref'd, [2008] S.C.C.A. No. 39. In the current scheme, the judge must be satisfied that there is a reasonable expectation that the offender's risk can be managed to an acceptable level in the community so as to protect the public. "Reasonable expectation" refers to a belief that risk will be managed to an acceptable level, as opposed to the mere possibility: R. v. D.J.S., 2015 BCCA 111 at para. 30.

[Italics emphasis in original; underline emphasis added.]

Standard of Review

[40] This was also summarized in *Awasis*:

[74] An offender who is found to be a dangerous offender has the right to appeal his designation and sentence "on any ground of law or fact or mixed law and fact": s. 759(1) of the Criminal Code; *R. v. Bragg*, 2015 BCCA 498 at para. 21. Absent any material error of law, a dangerous offender designation is a question of fact and an appellate court is to determine whether the designation was reasonable: *Boutilier* at para. 85. Similarly, a determination as to risk and manageability in the community is a question of fact to which deference is owed: *Boutilier* at paras. 86-88; *R. v. R.M.*, 2007 ONCA 872 at para. 53, leave to appeal ref'd, [2008] S.C.C.A. No. 91.

[75] The standard of review was summarized by this court in *Malakpour*:

[47] Appellate review in this context is concerned with legal errors and whether the dangerous offender designation was reasonable: *R. v. Currie*, [1997] 2 S.C.R. 260 at para. 33; *R. v. Sipos*, 2014 SCC 47 at para. 23; *Boutilier* at para. 85. Appellate review of a dangerous 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; *Boutilier* at para. 81; *Bragg* at para. 22; *R. v. Walsh*, 2017 BCCA 195 at para. 23.

See also *R. v. Garnot*, 2019 BCCA 404 at para. 47.

Grounds of Appeal

[41] As framed by the appellant there are two issues on appeal:

- the judge erred in failing to properly consider the management of the appellant's risk at the penalty phase of the Hearing; and
- the fresh evidence ought to be admitted as relevant to whether an indeterminate sentence ought to be imposed.

Did the Judge Err in Failing to Properly Consider the Management of the Appellant's Risk at the Penalty Phase of the Hearing?

Positions of the Parties on Appeal

[42] The appellant accepts that, post *Boutilier*, evidence of treatability remains a relevant consideration at the penalty phase but argues that the judge failed to properly consider the management of the risk. His position in this Court, as set out in his factum is:

52. In this case, the judge's analysis of whether to impose an indeterminate sentence at the penalty phase was almost exclusively devoted to his finding that there was no evidence that the appellant could be treated. This is evident from the following portions of the judge's reasons at the penalty phase:
- (1) In deciding whether to impose an indeterminate sentence, the judge found that evidence of treatability was significant, as a matter of law, by stating "Courts of appeal in Ontario and this province have emphasized the importance of treatability to the consideration of the reduction of risk to an acceptable level" [Reasons at para. 164]).
 - (2) In addressing the defence position regarding the appellant risk diminishing due to his "aging out", the judge found "[t]he difficulty with the defence position is that it offers nothing for the court to rely on with respect to Mr. Tremblay's treatability" [Reasons at para. 163];
 - (3) The judge found that it would be an error for him to rely on the "possibility of Mr. Tremblay "aging out" of his risk such that supervision mechanisms could control what remains of it" at the expense of considering the appellant's ability to make sufficient strides in treatment during his determinate sentence [Reasons at para. 167];
 - (4) The judge found "there is no likelihood that he will benefit from treatment" and found that the appellant "poses a high risk of re-offending sexually" that "his pattern of offending is deeply ingrained" and that he had not "benefited from treatment received in the past and is not well motivated to pursue treatment to control his criminal behaviour" [Reasons at paras. 168 and 169]; and
 - (5) The judge found that an indeterminate sentence ought to be imposed because of the appellant's "personality profile, lack of morality and accountability, persistent pattern of offending, and nonexistent treatment prospects" [Reasons at para. 170].
- [43] Mr. Tremblay argues that the "sole" reference in the Reasons to the management of his risk was the finding at para. 169 that:

While his libido and general energy may decrease as he ages, there is no way for this court to assess if or when his diminished libido and energy will reach a level that would allow safe management within the community. The difficulty with this approach is evident from Mr. Tremblay's history of offending: while committing the Uncharged Criminal Behaviour offences, he was easily able to pursue his chosen criminal lifestyle while avoiding detection from supervisors and police. (Emphasis added in factum.)

- [44] The appellant then submits that the judge failed to properly consider the evidence concerning the management of his risk, specifically:

- the combined effect of the appellant's very specific offence cycle and the process of him "aging out" in respect of (non-sexual) criminal behaviour which provided a gateway into the sexual offending; and

· the ability of the LTSO--as distinct from a standard probation order--to monitor and supervise the appellant's specific type of offence cycle.

[45] According to Mr. Tremblay, these two factors established a realistic prospect that the appellant--although presenting a high and intractable risk of reoffending--could be managed in the community following a long determinate sentence with a period of supervision under an LTSO.

[46] The Crown's position is that although the judge employed the word "treatability" several times in his reasons, this did not mean he "almost exclusively" relied on the appellant's prospective treatability in reaching his decision on sentence.

[47] It further argues that when the Reasons are considered in their entirety, it is evident that the judge was well aware that he was required to consider all of the available evidence in rendering an appropriate disposition and that he gave particular consideration to the appellant's risk assessment and treatment prospects.

Discussion

[48] In my view no reviewable error was committed by the judge.

[49] The Reasons as a whole indicate that the judge paid careful consideration to the appellant's risk assessment and treatment prospects, taking the following factors into account in his analysis:

- the appellant's background and criminal record;
- the appellant's inconsistent expressions of remorse and lack of morality and accountability;
- the appellant's corrections history and previous performance under and after community supervision;
- the fact the appellant continued to offend after Ms. Lalonde and Ms. Jackson died;
- Dr. Riar's diagnosis; and
- the available evidence on "aging-out".

[50] I also do not accept the appellant's submission which, in my view, attempts to artificially delineate "management of risk" from "treatability" in the context of the second stage of a dangerous offender hearing.

[51] While the appellant is correct that the judge used the term "treatability" several times in his decision, it bears repeating that at the penalty stage:

prospective evidence of treatability is highly relevant. Evidence of treatability must be more than "speculative hope" and must indicate that the offender can be treated within an ascertainable period of time.

[Awasis at para. 73.]

- [52] And as was noted by the judge and in Boutilier, "[m]any aspects of clinical evaluations provide evidence going to both the assessment of the offender's future risk and the sentence necessary to manage this risk": Boutilier at para. 44.
- [53] The appellant's submissions in this Court mirror those in the court below. In my view they were fully considered by the judge as the following extracts from the Reasons demonstrate:
- [122] The defence submits that the evidence before the court establishes that a lesser measure, namely a determinate sentence of 15 to 20 years followed by a ten-year LTSO will adequately protect the public against [the appellant] committing a serious personal injury offence in the future. The defence notes that with credit for pretrial custody, this would mean that [the appellant] would serve 10 to 15 years of the determinate sentence and would be released from the LTSO at the age of 65 to 70.
- [124] The defence's primary submission is that [the appellant] has a very specific offence cycle. His cycle starts with trafficking in drugs. Once he is engaged in trafficking, he has access to drugs and money. He is then able to attract young vulnerable females. ...
- [125] The defence also stresses that [the appellant's] offence cycle, in particular, the drug trafficking, requires significant energy. As [the appellant] ages, the amount of energy he has to direct towards his offence cycle will diminish. Further, it is very likely that [the appellant] is in the normative population which means his libido will decrease with age. As his libido diminishes, there will be a corresponding reduction in the risk that he will offend sexually.
- [126] When the particulars of the offence cycle are considered, along with Mr. Tremblay's declining energy and libido, the defence says that his risk of re-offending can be controlled through a LTSO. This is because the supervision imposed under a LTSO is more intensive than standard parole supervision. Under a LTSO the National Parole Board has discretion to impose strict conditions. The conditions in Mr. Tremblay's case would likely include a residency condition requiring him to reside in a halfway house. This would prevent him from having access to a private residence, a key component required for his offence cycle. Further, under a LTSO a condition could be imposed which would require Mr. Tremblay to attend ongoing psychiatric counselling. This is the ongoing treatment required for Mr. Tremblay's personality disorder, according to Dr. Riar. In summary, the defence says that Mr. Tremblay's risk of re-offending would be adequately controlled under a LTSO once he has served a lengthy determinate sentence for the two counts of criminal negligence causing death.

Analysis

- [127] I have given particular consideration to Mr. Tremblay's risk assessment and treatment prospects. I have also carefully considered the lesser measures proposed by the defence and have concluded that a determinate sentence with a LTSO would not provide adequate protection to the public.
- [139] Mr. Tremblay's history of convictions after 2000 and his involvement with corrections, including attempted treatment and supervision, is telling. He did not benefit from the SOTP at Ford Mountain. He did not change his behaviour after being convicted and incarcerated. He continued to pursue the same lifestyle, and did so in a clandestine way, while under supervision. Even after the death of the two girls he did not alter his lifestyle and continued to traffic in drugs

Aging of Sexual Offenders

- [149] Dr. Riar agreed that for a substantial majority of men, sexual vigour decreases with age which reduces the risk of re-offending. However, he notes that there are outliers; 75-year-old men who want to have sex every day and 40-year-olds who are not interested in sex. He is unable to offer an opinion as to where Mr. Tremblay falls on the continuum. However, he noted that even when sexual vigour is diminished, sexual interest remains. This means that an older man who is a sexual offender may offend less, but when he does re-offend, it will be in the same way.
- [150] Dr. Riar also agreed that individuals with antisocial personality disorders show a reduced incidence of antisocial activity as they age. However, he was of the view that Mr. Tremblay has not shown signs of "getting wiser" as he ages. Indeed, Mr. Tremblay appears to be moving in the other direction; his sexual offending started later in his criminal career and has increased over time.

Risk Assessment

- [161] As I have indicated, I accept Dr. Riar's assessment of risk, taking into account the conclusions I have drawn about the Uncharged Criminal Behaviour. In other words, Mr. Tremblay has a moderately high to high risk of re-offending sexually. There is little or no chance that treatment will provide any benefit to him.

A Lesser Measure will not Adequately Protect the Public

- [162] The defence argument really hinges on two assertions: that Mr. Tremblay's risk can be managed by conditions imposed under a LTSO; and that this is possible because he will age out of his sexual offending risk. The defence did not argue that there is treatment available for Mr. Tremblay which will reduce his risk of offending within the time period of a determinate sentence. The reason the defence has not made this argument is that there is no evidence before the court on which I could conclude that this is so. There is no evidence

to suggest, let alone provide a basis for a confident belief, that Mr. Tremblay might benefit from treatment for his antisocial personality disorder which might ameliorate his sexual offending.

[163] The defence relies on the "age out" argument because of the lack of evidence about treatment. In other words, the defence says I should accept that the risk of re-offending will be reduced to an acceptable level on the basis of a likely reduction in Mr. Tremblay's libido and in his energy to offend generally. The difficulty with the defence position is that it offers nothing for the court to rely on with respect to Mr. Tremblay's treatability.

[168] In summary, Mr. Tremblay poses a high risk of re-offending sexually. His pattern of offending is deeply ingrained. He has not benefited from treatment received in the past and is not well motivated to pursue treatment to control his criminal behaviour. As Dr. Riar noted at page 7 of his report:

He has significant psychopathic traits, where he is self-centred, manipulative, grandiose, has a lack of insight, etc. Mr. Tremblay has an indifferent attitude towards the impact of his difficulties on others, and in general he lacks morality, responsibility, and accountability to self.

[169] There is no likelihood that he will benefit from treatment. While his libido and general energy may decrease as he ages, there is no way for this court to assess if or when his diminished libido and energy will reach a level that would allow safe management within the community. The difficulty with this approach is evident from Mr. Tremblay's history of offending: while committing the Uncharged Criminal Behaviour offences, he was easily able to pursue his chosen criminal lifestyle while avoiding detection from supervisors and police.

[170] In light of Mr. Tremblay's personality profile, lack of morality and accountability, persistent pattern of offending, and nonexistent treatment prospects, I am satisfied that there is no reasonable expectation that something other than an indeterminate sentence will adequately protect the public. Accordingly, I declare Mr. Tremblay to be a dangerous offender pursuant to s. 753(1)(a)(i) and sentence him to an indeterminate sentence of incarceration.

[Emphasis added.]

[54] These excerpts, in my opinion, preclude any argument that the judge failed to properly consider the combined effect of the appellant's modus operandi and the age-related reduction in risk associated with his drug trafficking when assessing management of the risk in the community.

- [55] I would also accept the Crown's submission that the judge's findings as to the manageability of the appellant's risk were reasonable. There was no evidence before him upon which he could base a confident belief that Mr. Tremblay's risk negatively correlated with age and would therefore become manageable in the community during, or by the completion of, a determinate sentence.
- [56] The conditions available on LTSO orders were outlined by defence counsel in his submissions to the judge: Reasons at para. 126. Although the judge did not expressly consider whether they would be appropriate in his Reasons, it would appear that was because he did not accept the "age out" premise upon which the LTSO submission was based. As such, no error in principle was committed: *R. v. Lawrence*, 2019 BCCA 291 at paras. 82-84, leave to appeal ref'd, [2019] S.C.C.A. No. 491.
- [57] I would not accede to this ground of appeal.

Application to Admit Fresh Evidence

- [58] In support of his appeal the appellant applies to adduce fresh evidence in the form of three program reports generated by Scott McEachern, an employee of the CSC, after the appellant was sentenced: (i) Program Completion Report dated July 21, 2017, relating to the appellant's completion of the ICPM -- Sex Offender Primer Program; (ii) Program Completion Report dated March 8, 2018, relating to the appellant's completion of the ICPM -- High Intensity Sexual Offender Program; and, (iii) Program Completion Report dated September 27, 2018, relating to the appellant's completion of the ICPM -- High Intensity Sexual Offender Maintenance Program.
- [59] Mr. Tremblay's position is that five years have passed since he was sentenced. The three program reports document the skills that he has developed as a result of his participation in the programs and how they relate to his various "risk factors" for sexual offending.
- [60] Mr. Tremblay submits that the fresh evidence demonstrates his ability to materially reduce his risk of reoffending through his participation in risk-relevant treatment measures. He notes that Dr. Riar had expressed considerable doubt and skepticism about the appellant's motivation to engage in treatment related to the personality issues that contributed to his risk of sexual offending, let alone his ability to benefit from any such treatment. The judge, furthermore, had found that the appellant's treatment prospects were simply "non-existent": Reasons at para. 170.
- [61] Mr. Tremblay points to the fact that after completing the core program in 2018, he was found to have taken responsibility, developed insight into his offending, and, as a result, was found to have made progress in addressing his various risk factors, including the underlying personality traits which contributed to his offending.
- [62] The Crown opposes the application on the basis that admission of this evidence is neither linked to the alleged legal error made by the judge nor the reasonableness of the sentence.

- [63] This Court may admit fresh evidence on a dangerous offender appeal when it is in the interests of justice to do so, pursuant to ss. 759(7) and 683(1) of the Code, and the framework set out in *Palmer v. The Queen*, [1980] 1 S.C.R. 759; *R. v. Lévesque*, 2000 SCC 47 at paras. 16-22. Evidence about the offender's rehabilitative efforts and the development of, or change in, his or her future prospects many years after sentencing is generally the province of correctional authorities and "will only exceptionally" meet the test: *R. v. Sipos*, 2014 SCC 47, at para. 43; and *R. v. Radcliffe*, 2017 ONCA 176 at para. 60, leave to appeal ref'd, [2017] S.C.C.A. No. 274.
- [64] In *Sipos*, Cromwell J. held that the admission of fresh evidence in dangerous offender appeals "has potentially a larger role to play" than in other contexts: at para. 44. He also explained that a court of appeal ought to apply the governing criteria in a flexible and context-specific manner having regard to two competing interests: (1) a desire to have current information about an offender; and (2) the principle of finality: at para. 30.
- [65] While Mr. Tremblay has apparently made considerable progress in addressing his risk factors and underlying personality factors, I would not admit this evidence.
- [66] That is because there is not, for the reasons I have outlined, a legal error that was committed by the judge in this case. Accordingly, there is no basis for this Court to consider the sentence afresh.
- [67] In my view, unlike certain of the authorities on which he relies such as *R. v. Araya*, 2015 ONCA 854 where the passage of time militated in favor of the Court having the benefit of updated information regarding the offender, what the appellant seeks to do by bringing this application is to use an alleged error "to trigger a complete assessment of the current appropriateness of the sentencing judge's decision" which is not permissible: *Sipos* at paras. 39-40.
- [68] For these reasons, I would not admit the fresh evidence.

Disposition

[69] I would dismiss the appeal.

"The Honourable Mr. Justice Abrioux"

I AGREE:

"The Honourable Madam Justice MacKenzie"

I AGREE:

"The Honourable Mr. Justice Goepel"

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Prepared on 29 October 2026 · Esheria