

CANADA / JUDGMENT

R. v. Wormell

2005 BCCA 328

COURT

British Columbia Court of Appeal

DECIDED

13 June 2005

Source: bccourts.ca · Research copy typeset by Esheria. Not court-issued or certified.

2005 BCCA 328 R. v. Wormell

COURT OF APPEAL FOR BRITISH COLUMBIA

Citation:

R. v. Wormell,

2005 BCCA 328

Date: 20050613

Docket: CA028819

Between:

Regina

Respondent

And

William John Wormell

Appellant

AN ORDER HAS BEEN MADE IN THIS CASE PROHIBITING PUBLICATION OF ANY INFORMATION THAT COULD DISCLOSE THE IDENTITY OF THE COMPLAINANT OR WITNESS PURSUANT TO SECTION 486(3) OF THE CRIMINAL CODE

Before:

The Honourable Madam Justice Southin

The Honourable Madam Justice Ryan

The Honourable Mr. Justice Smith

T. J. Russell

Counsel for the Appellant

J. M. Gordon

Counsel for the Respondent (Crown)

Place and Date of Hearing:

Vancouver, British Columbia

18th May, 2005

Place and Date of Judgment:

Vancouver, British Columbia

13th June, 2005

Written Reasons by:

The Honourable Madam Justice Southin

Concurring Reasons by:

The Honourable Madam Justice Ryan (P. 21, para. 52)

Concurred in by:

The Honourable Mr. Justice Smith

Reasons for Judgment of the Honourable Madam Justice Southin:

- [1] This is an appeal from a judgment of the Honourable Madam Justice Baker pronounced the 27th July, 2001, declaring the appellant to be a dangerous offender. The appellant, who was born 22nd July, 1933, had been found guilty on the 21st January, 2000, of two counts of sexual assault, two counts of sexual touching, and two counts of inciting to sexually touch, committed against two children in late 1998.
- [2] His appeal from those convictions was dismissed by this Court on 4th November, 2003 (2003 BCCA 585).
- [3] I do not know why it has taken a further 18 months for this appeal to come on for hearing. The delays in this case do no credit to the administration of justice.

The Proceedings Below

- [4] The thrust of the Crown's case was that the appellant is an incurable pedophile who over a period from 1957 to 1998 committed sexual offences against 13 children.
- [5] The appellant was not prosecuted for the 1957 offence until March 1990 when the Crown laid an information containing seven counts, upon five of which he was convicted:

COUNT 1, William John WORMELL, a male person, between the 1st day of January, 1957 and the 31st day of December, 1958, at or near Victoria, in the Province of British Columbia, did indecently assault another male person, to wit, [B.W.], contrary to Section 148, 1953-54, C. 51 of the Criminal Code.

COUNT 2, William John WORMELL, between the 1st day of March, 1960 and the 1st day of September, 1960, at or near Powell River, did indecently assault a female person, to wit, [M.N.], contrary to Section 141(1), 1953-54, C. 51, of the Criminal Code.

COUNT 3, William John WORMELL, a male person, between the 1st day of January, 1971 and the 31st day of December, 1976, at or near Victoria, in the Province of British Columbia, did indecently assault another male person, to wit, [R.H.], contrary to Section 156, R.S.C. 1970 of the Criminal Code.

COUNT 4, William John WORMELL, between the 1st day of January, 1974 and the 31st day of December, 1979, at or near Victoria, in the Province of British Columbia, did commit an act of gross indecency with a female person, to wit, [L.A.], contrary to Section 157, R.S.C. 1970 of the Criminal Code.

* * *

COUNT 7, William John WORMELL, a male person, between the 1st day of January, 1979 and the 31st day of December, 1980, at or near Victoria, in the Province of British Columbia, did indecently assault another male person, to wit, [P.K.], contrary to Section 156, R.S.C. 1970 of the Criminal Code.

- [6] The appellant's first conviction for a sexual offence against a child was in 1974.
- [7] On the 1990 convictions, he was sentenced to two years less a day imprisonment and probation of three years.
- [8] The Crown opened its case by calling some of the appellant's victims.
- [9] Its principal evidence, however, was that of Dr. R. Lamba, who prepared the assessment required by s. 752.1(2) of the Criminal Code, and of Dr. S. Lohrasbe, a forensic psychiatrist.
- [10] Because the evidence was overwhelming that the appellant had "shown a failure to control his or her sexual impulses and a likelihood of causing injury, pain or other evil to other persons through failure in the future to control his or her sexual impulses", I refer only to evidence on the possibility of control in the community.
- [11] On that point, Dr. Lohrasbe testified, in part:

Q But in terms of, and I'm speaking about eventual control of the risk in the community, we spoke about this outside. As I understand it, you would agree that, on the basis of the past, which you've earlier said is the best predictor of the future, Mr. Wormell is, one can conclude that there is a reasonable possibility of his control and a reduction in the risk in the community because he responds to supervision.

A Okay, again, I just want to make sure. Control, you mean, by others, not by himself? Yes. If we're agreed on that, yeah, I say that there -- because what his history tells us is that when he is supervised, as far as we know, he does not re-offend. That there's no reason to dispute that that would happen in the future, barring information that tilts it one way or the other.

Q Right. All right. So if you use the past as the best predictor of the future, my question to you or suggestion to you that Wormell will be a -- is a good candidate or is -- would establish reasonable possibility of eventual control in the community is a correct assumption that I've made on the basis of the past evidence.

A Again, if you're talking about control as in others controlling him through tight supervision, yes.

and:

Q And it appears, I'm going to suggest to you, that with a person like Mr. Wormell, a determinate prison sentence followed by a 10-year supervision order, and if necessary, the tools of 810.1, could keep eventual control on this person to minimize the risk to the community?

A It could, but you know, I'd have to say it could to a large number of offenders. That's possible. It depends on how everything falls into place.

Q What I'm saying is that there's a reasonable possibility of that eventual control?

A Yes.

[12] Dr. Lamba, as I read his evidence, was never asked directly whether there was a reasonable possibility of eventual control of the risk in the community, but the tenor of his evidence appears to be that there was not.

[13] The appellant called Dr. Robert Haymond, a registered psychologist, who said, in part, this:

A All pedophiles are at risk to reoffend. There is no cure. The -- if you want to be 100 percent, without a doubt, then keep all pedophiles in prison the rest of their lives. But if you look at this man and you look at the dynamic factors with Mr. Wormell, the --the knowledge that he's compliant; knowledge of his offender cycle; the knowledge that he's not a psychopath, in fact, very low on that score; the knowledge that he's getting older; the knowledge that he's actually sick, all of these are dynamic factors which indicate that in the community, particularly if regulated by a probation requirement, he will not reoffend.

Q He will not reoffend?

A That's what I said.

Q That is your clinical opinion, doctor?

A Yes.

Q You wouldn't want to qualify that, whatsoever, would you?

A I would say, "Of course, in life there are no guarantees."

Q But you don't feel that qualification is necessary, do you, doctor?

A Well, we're talking about human beings, so anybody could be a pedophile and we don't know it. We're talking about human beings. We're not talking about physics; we're talking about human beings. This is not a strict science. I am saying that he is exceedingly low. His risk to reoffend is and remains exceedingly low if put in place a treatment program and, secondly, probation requirements and, thirdly, some assistance with his sexual offending while he's out in the community, somebody he can talk with and someone he could monitor -- who can monitor him, and who is knowledgeable about this sort of thing, as Mr. Anthony was.

Q Do you feel comfortable in your professional capacity as a clinical psychologist, sir, making a comment like that, "He would not reoffend"?

A I want to say he would not -- his risk to reoffend is exceedingly low, that's the way we say it.

Q But that's not what you said?

A I said -- okay, let me change that. He -- his risk to reoffend is exceedingly low. As I said we're talking about human beings, there are no guarantees.

and, again:

A ... All we need to know about Mr. Wormell is that he is a pedophile, he's not curable, he needs to be monitored....

The Judgment Below

[14] At the beginning of her reasons, 2001 BCSC 1100, the learned judge said:

[2] On September 1, 2000, the Crown applied under Part XXIV of the Code to have Mr. Wormell designated a dangerous offender and detained for an indeterminate period. At the conclusion of submissions on September 29, I reserved judgment and set November 2, 2000 for delivery of my decision. On November 2, counsel for Mr. Wormell applied to adjourn sentencing on the ground that in October five justices of the British Columbia Court of Appeal had heard and reserved judgment on two dangerous offender appeals, and an intervention, described as *R. v. Edgar*, *R. v. Johnson*, and *R. v. Bush*. Counsel for Mr. Wormell asked the court to adjourn sentencing to await the outcome of the Court of Appeal's deliberations.

- [3] I granted the adjournment sought and four subsequent adjournments requested by counsel for Mr. Wormell, over the objections of the Crown. The decisions of the Court of Appeal are still under reserve. However, I am satisfied that any further delay in sentencing Mr. Wormell is not warranted and in the Reasons that follow, I have dealt with submissions on the law in a manner that assumes the decisions of the Court of Appeal will be favourable to the offender.
- [15] At paragraphs 75 to 103, the learned judge addressed the question of the appellant's risk of reoffending. On that point, she preferred the evidence of Drs. Lamba and Lohrasbe to that of Dr. Haymond. She then said:
- [104] I am convinced, beyond a reasonable doubt, that Mr. Wormell has shown a failure to control his sexual impulses in the past, and that there is a likelihood that he will cause injury, pain or other evil to other children through failure to control his sexual impulses in future.
- [16] At paragraph 132, the learned judge said:
- [132] Counsel for Mr. Wormell submits that Mr. Wormell could be adequately supervised in the community after a lengthy determinate period of incarceration. Counsel submits that the court should decline to find Mr. Wormell to be a dangerous offender and should instead find him to be a long term offender. Counsel submits that the court should impose a determinate sentence of no less than two years, followed by a period of supervision in the community for a period not exceeding ten years.
- [17] Having referred to some of the evidence, the learned judge then concluded:
- [154] Mr. Wormell has a strong need to engage in this particular form of deviant behavior. He has no other sexual outlets. Even when he was married, he assaulted children. His need for sexual gratification is so extreme that he has been willing to engage in very risky behaviour.
- [155] The Crown does not have to prove beyond a reasonable doubt that the accused will re-offend. I must be satisfied beyond a reasonable doubt that there is a "likelihood" that he will inflict harm. *R. v. Currie* (1997), 115 C.C.C. (3d) [205 at] 223.
- [156] I am satisfied, based on the evidence presently available, that there is no prospect that even at the end of a lengthy determinate sentence, the risk Mr. Wormell poses to the community could be adequately managed through supervision, even assuming that supervision would last for the rest of Mr. Wormell's life.
- [157] I do not believe that Mr. Wormell is motivated to try to control his behaviour. I believe that in a situation where Mr. Wormell could not "bide his time" until the end of a period of probation, he would find a means to circumvent supervision, if not detection. Mr. Wormell is not entitled to any more chances. Forty years of offending is enough. There must be no more victims. It would be unrealistic to expect that Corrections Canada could devote the resources that would be required to provide 24-hour supervision of Mr. Wormell in the

community for ten years or any other period. I am convinced that anything short of that will not provide the protection the public is entitled to receive. The evidence available to me at present does not cause me to believe that Mr. Wormell's dangerous behaviour can ever be adequately controlled in a non-custodial setting, even with close supervision.

[158] Accordingly, the Crown has proved, beyond a reasonable doubt, that Mr. Wormell is a dangerous offender and that I should not exercise any residual discretion I may have to find him to be a long term offender, or to sentence him to a determinate sentence. I order that he be incarcerated in a penitentiary for an indeterminate period.

Grounds of Appeal

[18] In this Court, the appellant argues that the learned judge ought to have found him to be a long-term offender, pursuant to ss. 753 and 753.1 of the Criminal Code. In the alternative, the appellant seeks an order for a new hearing.

[19] These are the grounds:

[1.] The learned trial judge erred by failing to require the Crown to prove beyond a reasonable doubt that it was not reasonably possible to control the risk posed by the Appellant through a long-term offender sentence.

[2.] The learned trial judge erred by failing to consider the availability of ongoing supervision under section 810.1 of the Criminal Code after the completion of a long-term offender sentence.

[3.] The learned trial judge erred in misapprehending evidence that was directly relevant to deciding whether the Appellant was a long-term offender or a dangerous offender.

Application to Adduce Fresh Evidence

[20] The appellant sought before us to adduce fresh evidence described in his factum thus:

56. The Appellant seeks to introduce as fresh evidence on this appeal the medical-legal opinion of Dr. Christie, dated August 9, 2004. In that opinion, Dr. Christie states that the Appellant's health has declined significantly over a short period of time since his designation as a dangerous offender. In her diagnosis, the Appellant suffers from cerebral small vessel disease with strokes, coronary artery disease with angina and possible early dementia. He is also limited in his ability to walk unaided, and requires the use of both a walker and a wheelchair. Dr. Christie concludes her opinion by stating that the Appellant's significant decline over a short period suggests a poor prognosis for the future.
57. The Appellant also seeks to introduce as fresh evidence the Affidavit of Jon A.C. Stewart, barrister and solicitor. Mr. Stewart represents the Appellant in a civil matter brought against him by the complainants in the predicate offences in the case at bar. The substance of the claim is for damages suffered by the children as a result of the Appellant's actions in the predicate offences. Mr. Stewart deposes that the Appellant has reached a settlement in the claim against him, before the matter proceeded to trial. The settlement is subject to the

approval of the Public Guardian and Trustee.

[21] For its part, the Crown sought, if the appellant were granted leave, to adduce in reply medical evidence that the appellant is not as ill as Dr. Christie avers.

[22] would grant both applications.

The Relevant Statutory Provisions

[23] By the Criminal Code:

718. Purpose

The fundamental purpose of sentencing is to contribute, along with crime prevention initiatives, to respect for the law and the maintenance of a just, peaceful and safe society by imposing just sanctions that have one or more of the following objectives:

- (a) to denounce unlawful conduct;
- (b) to deter the offender and other persons from committing offences;
- (c) to separate offenders from society, where necessary;
- (d) to assist in rehabilitating offenders;
- (e) to provide reparations for harm done to victims or to the community; and
- (f) to promote a sense of responsibility in offenders, and acknowledgment of the harm done to victims and to the community.

718.1 Fundamental principle

A sentence must be proportionate to the gravity of the offence and the degree of responsibility of the offender.

* * *

753. (1) Application for finding that an offender is a dangerous offender

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

* * *

- (b) that the offence for which the offender has been convicted is a serious personal injury offence described in paragraph (b) of the definition of that expression in section 752 and the offender, by his or her conduct in any sexual matter including that involved in the commission of the offence for which he or she has been convicted, has shown a failure to control his or her sexual impulses and a likelihood of causing injury, pain or other evil to other persons through failure in the future to control his or her sexual impulses.

* * *

753.1 (1) Application for finding that an offender is a long-term offender

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.

* * *

753.2 (1) Long-term supervision

Subject to subsection (2), an offender who is required to be supervised by an order made under paragraph 753.1(3)(b) shall be supervised in accordance with the Corrections and Conditional Release Act when the offender has finished serving

- (a) the sentence for the offence for which the offender has been convicted; and
- (b) all other sentences for offences for which the offender is convicted and for which sentence of a term of imprisonment is imposed on the offender, either before or after the conviction for the offence referred to in paragraph (a).

[24] I have included s. 718 and s. 718.1 because of this passage in the judgment of the Supreme Court of Canada in *R. v. Johnson*, [2003] 2 S.C.R. 357, 2003 SCC 46 ¶ 28:

Like all discretion exercised in the sentencing context, a judge's discretion whether to declare an offender dangerous must be guided by the relevant principles of sentencing contained in ss. 718 to 718.2 of the Criminal Code. As mentioned above, these include the fundamental principle of proportionality contained in s. 718.1....

[25] By the Corrections and Conditional Release Act, S.C. 1992, c. 20:

2.1 A person who is required to be supervised by a long-term supervision order is deemed to be an offender for the purposes of this Part, and sections 3, 4, 23 to 27, 55 and 56, subsections 57(2) and 66(3), sections 68, 69, 76, 77 and 79 to 82, paragraph 87(b) and sections 90 and 91 apply, with such modifications as the circumstances require, to the person and to the long-term supervision of that person.

* * *

23. (1) When a person is sentenced, committed or transferred to penitentiary, the Service shall take all reasonable steps to obtain, as soon as is practicable,

* * *

- (c) any reasons and recommendations relating to the sentencing or committal that are given or made by
- (i) the court that convicts, sentences or commits the person, and
- (ii) any court that hears an appeal from the conviction, sentence or committal;

* * *

134.1 (1) Conditions for long-term supervision

Subject to subsection (4), every offender who is required to be supervised by a long-term supervision order is subject to the conditions prescribed by subsection 161(1) of the Corrections and Conditional Release Regulations, with such modifications as the circumstances require.

(2) Conditions set by Board

The Board may establish conditions for the long-term supervision of the offender that it considers reasonable and necessary in order to protect society and to facilitate the successful reintegration into society of the offender.

(3) Duration of conditions

A condition imposed under subsection (2) is valid for the period that the Board specifies.

(4) Relief from conditions

The Board may, in accordance with the regulations, at any time during the long-term supervision of an offender,

- (a) in respect of conditions referred to in subsection (1), relieve the offender from compliance with any such condition or vary the application to the offender of any such condition; or
- (b) in respect of conditions imposed under subsection (2), remove or vary any such condition.

[26] By the Corrections and Conditional Release Regulations, SOR 92/620 -

161. (1) For the purposes of subsection 133(2) of the Act, every offender who is released on parole or statutory release is subject to the following conditions, namely, that the offender

- (a) on release, travel directly to the offender's place of residence, as set out in the release certificate respecting the offender, and report to the offender's parole supervisor immediately and thereafter as instructed by the parole supervisor;
- (b) remain at all times in Canada within the territorial boundaries fixed by the parole supervisor;
- (c) obey the law and keep the peace;
- (d) inform the parole supervisor immediately on arrest or on being questioned by the police;

- (e) at all times carry the release certificate and the identity card provided by the releasing authority and produce them on request for identification to any peace officer or parole supervisor;
- (f) report to the police if and as instructed by the parole supervisor;
- (g) advise the parole supervisor of the offender's address of residence on release and thereafter report immediately
- (i) any change in the offender's address of residence,
- (ii) any change in the offender's normal occupation, including employment, vocational or educational training and volunteer work,
- (iii) any change in the domestic or financial situation of the offender and, on request of the parole supervisor, any change that the offender has knowledge of in the family situation of the offender, and
- (iv) any change that may reasonably be expected to affect the offender's ability to comply with the conditions of parole or statutory release;
- (h) not own, possess or have the control of any weapon, as defined in section 2 of the Criminal Code, except as authorized by the parole supervisor; and
- (i) in respect of an offender released on day parole, on completion of the day parole, return to the penitentiary from which the offender was released on the date and at the time provided for in the release certificate.

[27] From a reading of these sections, it is clear that neither under the Criminal Code nor under the Corrections and Conditional Release Act does the court hearing a dangerous offender application have any power to determine the terms of a long-term supervision order. That is not unreasonable because if, for instance, a judge sentences an offender to a long term of imprisonment, he or she is not in a position to know what the offender will be like in his attitudes and so on when he is released from custody.

[28] Nonetheless, the court can make recommendations which one would expect will be given by the National Parole Board such weight as seems appropriate when it comes to fixing the terms of long-term supervision if such is ordered.

The Nature of this Appeal

[29] By s. 759 of the Criminal Code:

759. (1) Appeal - dangerous offender

An offender who is found to be a dangerous offender under this Part may appeal to the court of appeal against that finding on any ground of law or fact or mixed law and fact.

* * *

(3) Disposition of appeal

On an appeal against a finding that an offender is a dangerous offender, the court of appeal may

(a) allow the appeal and

(i) find that the offender is not a dangerous offender, find that the offender is a long-term offender, impose a minimum sentence of imprisonment for two years, for the offence for which the offender has been convicted, and order the offender to be supervised in the community, for a period that does not, subject to subsection 753.1(5), exceed ten years, in accordance with section 753.2 and the Corrections and Conditional Release Act,

(ii) find that the offender is not a dangerous offender and impose sentence for the offence for which the offender has been convicted, or

(iii) order a new hearing; or

(b) dismiss the appeal.

[30] Thus, on an appeal from a dangerous offender designation, this Court's jurisdiction is not limited by the words of the statute as it is on a conviction appeal where it is limited by the words of s. 686(1)(a) of the Criminal Code. It is so, however, that the grounds put forward in this case are grounds which would attract a limited appellate jurisdiction in the form of s. 686(1)(a).

The First Ground of Appeal - The learned trial judge erred by failing to require the Crown to prove beyond a reasonable doubt that it was not reasonably possible to control the risk posed by the Appellant through a long-term offender sentence.

[31] I appreciate that in judgments of this Court delivered before *R. v. Johnson*, the Court has said "that the Crown was required to prove beyond a reasonable doubt that there was no 'reasonable possibility' of eventual community control in order to establish that the offender was a dangerous offender and not a long-term offender" (*R. v. B.R.B.*, 2002 BCCA 420 ¶ 13). In my opinion, however, there is nothing in the Supreme Court of Canada judgment in *R. v. Johnson* to support the proposition that such a burden lies upon the Crown.

[32] The task of the Court from beginning to end is to ask itself, "Am I satisfied that there is a reasonable possibility of eventual control of the risk in the community?" If the judge concludes that he or she is not so satisfied then the judge cannot designate the offender a long-term offender.

[33] In my opinion, it is not right to approach this with burden of proof at the back of one's mind. Burden of proof, whether it is proof beyond a reasonable doubt or on a balance of probabilities, directs itself to determining past events.

[34] While on a dangerous offender application the Crown must prove beyond a reasonable doubt past conduct of the accused which it says is relevant, there can be no burden of proof in the classic sense in the assessment of the future.

[35] That being so, I would not give effect to this ground.

The Second Ground of Appeal - The learned trial judge erred by failing to consider the availability of ongoing supervision under section 810.1 of the Criminal Code after the completion of a long-term offender sentence.

[36] By s. 810.1 of the Criminal Code:

810.1 (1) Where fear of sexual offence

Any person who fears on reasonable grounds that another person will commit an offence under section 151, 152, 155 or 159, subsection 160(2) or (3), section 163.1, 170, 171 or 172.1, subsection 173(2) or section 271, 272 or 273, in respect of one or more persons who are under the age of fourteen years, may lay an information before a provincial court judge, whether or not the person or persons in respect of whom it is feared that the offence will be committed are named.

(2) Appearances

A provincial court judge who receives an information under subsection (1) may cause the parties to appear before a provincial court judge.

(3) Adjudication

The provincial court judge before whom the parties appear may, if satisfied by the evidence adduced that the informant has reasonable grounds for the fear, order the defendant to enter into a recognizance and, for a period fixed by the provincial court judge of not more than twelve months, comply with the conditions fixed by the provincial court judge, including a condition prohibiting the defendant from

- (a) engaging in any activity that involves contact with persons under the age of fourteen years, including using a computer system within the meaning of subsection 342.1(2) for the purpose of communicating with a person under the age of fourteen years; and
- (b) attending a public park or public swimming area where persons under the age of fourteen years are present or can reasonably be expected to be present, or a daycare centre, schoolground, playground or community centre.

(3.1) Refusal to enter into recognizance

The provincial court judge may commit the defendant to prison for a term not exceeding twelve months if the defendant fails or refuses to enter into the recognizance.

(4) Judge may vary recognizance

A provincial court judge may, on application of the informant or the defendant, vary the conditions fixed in the recognizance.

(5) Other provisions to apply

Subsections 810(4) and (5) apply, with such modifications as the circumstances require, to recognizances made under this section.

[37] I appreciate that in *R. v. Goodwin* (2002), 168 C.C.C. (3d) 14, 2002 BCCA 513, my colleague, Donald J.A., concurred in by my colleague, Rowles J.A., said of this section, in paragraph 5:

This section came into force at the same time as the long-term offender provisions in 1997. In my opinion, it should be seen as a companion provision one that can operate as a follow-up measure when the term of community supervision expires and should be employed that way in this case.

[38] I note that no mention of the section was made in *R. v. Johnson*.

[39] In the circumstances of this case, I am of the opinion that the learned judge's conclusions on the dangerousness of the appellant make it, for present purposes, of only peripheral relevance.

The Third Ground of Appeal - The learned trial judge erred in misapprehending evidence that was directly relevant to deciding whether the Appellant was a long-term offender or a dangerous offender.

[40] On this head, the appellant argues that the learned trial judge erred in this passage:

[98] The evidence does not support this opinion. [The learned judge was referring to Dr. Haymond's opinion that the appellant is compliant with and respects authority.] I have already referred to the comments of Mr. Forhan and Mr. Anthony regarding Mr. Wormell's superficial compliance with supervision. Mr. Wormell has lied to the police in the past. He has typically denied guilt, to the extent of continuing to deny guilt even after pleading guilty. He appeared to have no compunction about lying under oath at the trial of his most recent offences. This history of lying to police officers, probation officers, judges and juries does not indicate to me that Mr. Wormell respects authority.

[Emphasis of counsel.]

[41] But a close reading of this and connected passages of the learned judge's reasons shows that she was here addressing the concluding words of s. 753(1)(b), "has shown a failure, etc. etc."

[42] As to my mind those words have essentially the same meaning as the words in s. 753.1, "there is a substantial risk that the offender will reoffend", and as the focus of oral argument on this appeal was not on the learned judge's conclusion of the risk of reoffending but on her alleged failure to come to grips with the issue of s. 753.1(1)(c), I consider this ground of appeal now to be of no relevance.

The Issue at the Heart of this Appeal

- [43] In my opinion, the real issue here is whether, because the learned trial judge did not expressly approach the task before her in the manner prescribed by the Supreme Court of Canada almost two years later in *R. v. Johnson*, this Court should order a new hearing so that either Baker J. or another judge may go through ss. 753 and 753.1 step by step, having due regard in the process to s. 718 and, if appropriate, s. 718.1.
- [44] On the facts of this case, in my opinion, to order a new hearing for such a purpose would be elevating form over substance.
- [45] On his record of convictions, the appellant meets the criteria of s. 753. He is someone who needs to be separated from society as he appears not to have acknowledged the harm which he has done over many years to victims.
- [46] Although she did not expressly refer to s. 718, the learned judge addressed the purposes of s. 718, especially sub-clauses (b) and (c), when she said "Forty years of offending is enough. There must be no more victims."
- [47] For me, the only troubling aspect of the learned judge's reasons is her not addressing expressly, when she was considering what she called her "residual discretion", the evidence of Dr. Lohrasbe quoted by me in paragraph 11 *supra*. It could be said that by paragraph 157 she implicitly rejected that evidence.
- [48] But as Dr. Lohrasbe was not asked what he meant by "tight supervision" and as no evidence was adduced from which one could conclude that the National Parole Board could or would provide whatever level of supervision Dr. Lohrasbe had in mind, I am not prepared to conclude that the learned judge's ultimate conclusion was in error.
- [49] In so concluding, I have taken into account that by s. 761(1) of the Criminal Code, the appellant, who has been in custody under a sentence of detention for an indeterminate period since 27th July, 2001, will be eligible for a parole hearing in approximately three years. The National Parole Board, at that time, can, and one trusts will, look more closely at the possibilities of supervision in the community for this man who will then be 75 years old.
- [50] For these reasons, I would dismiss the appeal.
- [51] Since writing these reasons, I have had the privilege of reading in draft the reasons of my colleague, Ryan J.A. I agree with those reasons.

"The Honourable Madam Justice Southin"

Reasons for Judgment of the Honourable Madam Justice Ryan:

- [52] I agree with Madam Justice Southin that this appeal ought to be dismissed. I wish to add to her comments (see para. 31) as to why the first ground of appeal should be dismissed.

- [53] The appellant says that the learned trial judge erred by failing to require the Crown to prove beyond a reasonable doubt that it was not reasonably possible to control the risk posed by the appellant through a long-term offender sentence.
- [54] Madam Justice Southin has concluded that there is nothing in the Supreme Court of Canada judgment in *R. v. Johnson*, [2003] 2 S.C.R. 357, 2003 SCC 46, aff'g (2001), 158 C.C.C. (3d) 155, 2001 BCCA 456, to support the proposition that such a burden lies upon the Crown. I agree.
- [55] Much of the same issue was considered in July of last year by a division of this Court in *R. v. Brown* (2004), 188 C.C.C. (3d) 56, 2004 BCCA 416. Having determined that the appeal could be resolved without resort to the burden of proof, the court declined to rule on the point. In my view the present appeal requires the court to deal with it.
- [56] In *R. v. B.R.B.* (2002), 174 B.C.A.C. 243, 2002 BCCA 420, this Court, following its earlier decision in *Johnson*, said this, at para. 13:

The determination of the reasonable possibility of eventual control of the risk in the community is a question of future possibilities rather than past fact. As Lamer C.J.C pointed out in *R. v. Currie*, [1997] 2 S.C.R. 260, such a determination does not require proof beyond a reasonable doubt that the offender will offend in the future because such a standard would be impossible to meet. In *Currie*, the issue was the "likelihood" that the offender would cause harm in the future under s. 753(b) (now s. 753(1)(b)) of the Code and the court held that it was the likelihood that must be proved beyond a reasonable doubt. Similarly here, I think that the Crown was required to prove beyond a reasonable doubt that there was no "reasonable possibility" of eventual community control in order to establish that the offender was a dangerous offender and not a long-term offender.

[Underlining mine.]

- [57] This conclusion followed from this Court's holding in *Johnson*, supra, that if an offender could be cured, or could eventually be controlled in the community within the framework of a long-term offender sentence, then the offender could not be said to meet the criteria of a dangerous offender, but ought to be designated as a long-term offender instead.
- [58] The Supreme Court of Canada did not adopt this line of reasoning when the *Johnson* case made its way to that court. The central issue litigated in the case in the Supreme Court of Canada was whether a trial judge retained a discretion not to declare an offender a dangerous offender once the dangerous offender criteria had been met. This Court had held that there was no such discretion. In effect the Supreme Court of Canada overruled this Court's decision in *Johnson* on that issue. Justices Iacobucci and Arbour, for the court, said this, at paras. 28-32:

Like all discretion exercised in the sentencing context, a judge's discretion whether to declare an offender dangerous must be guided by the relevant principles of sentencing contained in ss. 718 to 718.2 of the Criminal Code. As mentioned above, these include the fundamental principle of proportionality contained in s. 718.1 and, most relevant to the central issue in the present appeal, the principle of restraint enunciated in paras. (d) and (e) of s. 718.2, ...

The joint effect of these principles is that a sentencing judge must consider the possibility that a less restrictive sanction would attain the same sentencing objectives that a more restrictive sanction seeks to attain.

In this case, the sentencing objective in question is public protection: see for example Lyons, [[1987] 2 S.C.R. 309], at p. 329, and Hatchwell v. The Queen, [1976] 1 S.C.R. 39, in which Dickson J. (as he then was) wrote, at p. 43, that the dominant purpose of preventive detention is "to protect the public when the past conduct of the criminal demonstrates a propensity for crimes of violence against the person, and there is a real and present danger to life or limb". Absent such a danger, there is no basis on which to sentence an offender otherwise than in accordance with the ordinary principles of sentencing. The principles of sentencing thus dictate that a judge ought to impose an indeterminate sentence only in those instances in which there does not exist less restrictive means by which to protect the public adequately from the threat of harm, i.e., where a definite sentence or long-term offender designation are insufficient. The essential question to be determined, then, is whether the sentencing sanctions available pursuant to the long-term offender provisions are sufficient to reduce this threat to an acceptable level, despite the fact that the statutory criteria in s. 753(1) have been met.

In order for the sentencing sanctions available pursuant to the long-term offender provisions to reduce the threat associated with an offender who satisfies the dangerous offender criteria to an acceptable level, it must be possible for the same offender to satisfy both the dangerous offender criteria and the long-term offender criteria. To repeat, the three criteria that must be established on a long-term offender application are: (i) it must be appropriate to impose a sentence of imprisonment of two or more years in respect of the predicate offence; (ii) there must be a substantial risk that the offender will reoffend; and (iii) there must be a reasonable possibility of eventual control of the risk in the community. On a dangerous offender application, the sentencing judge must be satisfied that the offender constitutes a threat to the life, safety or physical or mental well-being of other persons, on the basis of a pattern of repetitive or persistent aggressive behaviour, brutal behaviour, or sexual misconduct described in s. 753(1)(a) and (b).

Almost every offender who satisfies the dangerous offender criteria will satisfy the first two criteria in the long-term offender provisions. In virtually every instance in which an offender is declared dangerous, it would have been appropriate to impose a sentence of imprisonment of two or more years in respect of the predicate offence and there will be a substantial risk that the offender will reoffend. In a certain percentage of those cases there will also be a reasonable possibility of eventual control of the risk in the community. In those instances in which the offender currently constitutes a threat to the life, safety or physical or mental well-being of other

persons yet there is a reasonable possibility of eventual control of the risk in the community, an offender will satisfy the criteria in both the dangerous offender and long-term offender provisions.

In those instances where both the dangerous and long-term offender provisions are satisfied, it may be that the sentencing sanctions available under the long-term offender provisions are capable of reducing the threat to the life, safety or physical or mental well-being of other persons to an acceptable level. Under s. 753.1(3), long-term offenders are sentenced to a definite term of imprisonment followed by a long-term community supervision order of a maximum of ten years in accordance with the Corrections and Conditional Release Act. Supervision conditions under s. 134.1(2) of the Act may include those that are "reasonable and necessary in order to protect society". The very purpose of a long-term supervision order, then, is to protect society from the threat that the offender currently poses -- and to do so without resort to the blunt instrument of indeterminate detention. If the public threat can be reduced to an acceptable level through either a determinate period of detention or a determinate period of detention followed by a long-term supervision order, a sentencing judge cannot properly declare an offender dangerous and sentence him or her to an indeterminate period of detention.

[Underlining mine.]

[59] The justices went on to discuss the effect of the court's earlier decision in *R. v. Carleton*, [1983] 2 S.C.R. 58, 6 C.C.C. (3d) 480, aff'g (1981), 32 A.R. 181, 69 C.C.C. (2d) 1 (C.A.), and whether s. 753(5) of the Criminal Code precluded a consideration of the long-term offender provisions until after he or she has not found the offender to be a dangerous offender. They concluded their analysis with this, at para. 40:

For the above reasons, the British Columbia Court of Appeal was correct to conclude that a sentencing judge must take into account the long-term offender provisions prior to declaring an offender dangerous and imposing an indeterminate sentence. If a sentencing judge is satisfied that the sentencing options available under the long-term offender provisions are sufficient to reduce the threat to the life, safety or physical or mental well-being of other persons to an acceptable level, the sentencing judge cannot properly declare an offender dangerous and thereupon impose an indeterminate sentence, even if all of the statutory criteria have been satisfied.

[Emphasis added.]

[60] It is clear from these passages that the Supreme Court of Canada did not accept the reasoning of this Court that a person could only be declared a dangerous offender if the Crown could prove beyond a reasonable doubt that the offender was not a long-term offender. The court accepted that there will be offenders who satisfy both criteria and left it to the discretion of the sentencing judge to determine whether a person who fits the criteria of a dangerous offender should be designated a long-term offender instead. The Supreme Court of Canada held that if the sentencing judge is satisfied that the options available under the long-term offender provisions are sufficient to reduce the risk that the offender poses to

an acceptable level, then the sentencing judge cannot properly declare the offender to be dangerous.

- [61] Thus if the Crown proves that the offender meets the statutory criteria of a dangerous offender, then, before making the designation, the sentencing judge must turn to the criteria in s. 753.1(1)(c) which requires only that the court be satisfied that there is a reasonable possibility of eventual control of the risk in the community. Nowhere in the Johnson decision do the Supreme Court justices state that the Crown must prove beyond a reasonable doubt that there is no reasonable possibility that the offender will eventually be manageable in the community. In my view they do not say that because it would be inconsistent with their reasoning.
- [62] It follows that I agree with Madam Justice Southin when she says that it is not right to approach s. 753.1(1) with the burden of proof at the back of one's mind. Such an approach was found not to be right in *R. v. Proulx*, [2000] 1 S.C.R. 61, 2000 SCC 5, when the court dealt with the language of the conditional sentence provisions of the Criminal Code. Section 742.1 of the Code permits a sentencing judge to impose a conditional sentence if, among other things, the court "is satisfied that serving the sentence would not endanger the safety of the community". (Emphasis added.) With respect to that language Lamer C.J.C. said this, at paras. 120-21:

The wording used in s. 742.1 does not attribute to either party the onus of establishing that the offender should or should not receive a conditional sentence. To inform his or her decision about the appropriate sentence, the judge can take into consideration all the evidence, no matter who adduces it. . . .

In matters of sentencing, while each party is expected to establish elements in support of its position as to the appropriate sentence that should be imposed, the ultimate decision as to what constitutes the best disposition is left to the discretion of the sentencing judge.

- [63] A consistent approach should be taken with respect to the use of the same language in a statute. The reasoning in *Proulx* applies equally to s. 753.1(1) of the Code.
- [64] I agree with my colleague that this ground of appeal should be dismissed. I agree with her reasons with respect to the remaining grounds.
- [65] I would dismiss the appeal.

"The Honourable Madam Justice Ryan"

I Agree:

"The Honourable Mr. Justice Smith"

Source & reproduction note

Judgment wording, source notices and original paragraph numbers are retained. Esheria supplies the layout and this PDF's page numbers; these are not the source pagination. This is a research copy, not an official or certified court document. Check quotations, citations and publication restrictions against the original source before relying on it.

ORIGINAL SOURCE <https://www.bccourts.ca/jdb-txt/ca/05/03/2005bccca0328.htm>

CASE PAGE <https://chat.esheria.ai/case-law/canada/r-v-wormell-2005>

Prepared on 29 October 2026 · Esheria