R. v. A.S.

Collection: Decisions of the Court of Appeal
Date: 2023-04-28
Neutral citation: 2023 ONCA 290
Docket numbers: C68684
Judges: Fairburn, J. Michal; Lauwers, Peter D.; Miller, Bradley

WARNING

The President of the panel hearing this appeal directs that the following should be attached to the file:

An order restricting publication in this proceeding under ss. 486.4(1), (2), (2.1), (2.2), (3) or (4) or 486.6(1) or (2) of the *Criminal Code* shall continue. These sections of *the Criminal Code* provide:

> 486.4(1) Subject to subsection (2), the presiding judge or justice may make an order directing that any information that could identify the victim or a witness shall not be published in any document or broadcast or transmitted in any way, in proceedings in respect of
>
> (a) any of the following offences;
>
> (i) an offence under section 151, 152, 153, 153.1, 155, 160, 162, 163.1, 170, 171, 171.1, 172, 172.1, 172.2, 173, 213, 271, 272, 273, 279.01, 279.011, 279.02, 279.03, 280, 281, 286.1, 286.2, 286.3, 346 or 347, or
>
> (ii) any offence under this Act, as it read from time to time before the day on which this subparagraph comes into force, if the conduct alleged would be an offence referred to in subparagraph (i) if it occurred on or after that day; or
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> (b) two or more offences being dealt with in the same proceeding, at least one of which is an offence referred to in paragraph (a).

(2) In proceedings in respect of the offences referred to in paragraph (1)(a) or (b), the presiding judge or justice shall

(a) at the first reasonable opportunity, inform any witness under the age of eighteen years and the victim of the right to make an application for the order; and

(b) on application made by the victim, the prosecutor or any such witness, make the order.

(2.1) Subject to subsection (2.2), in proceedings in respect of an offence other than an offence referred to in subsection (1), if the
victim is under the age of 18 years, the presiding judge or justice
may make an order directing that any information that could identify the victim shall not be published in any document or broadcast or transmitted in any way.

(2.2) In proceedings in respect of an offence other than an offence referred to in subsection (1), if the victim is under the age of 18 years, the presiding judge or justice shall

(a) as soon as feasible, inform the victim of their right to make an application for the order; and

(b) on application of the victim or the prosecutor, make the order.

(3) In proceedings in respect of an offence under section 163.1, a judge or justice shall make an order directing that any information that could identify a witness who is under the age of eighteen years, or any person who is the subject of a representation, written material or a recording that constitutes child pornography within the meaning of that section, shall not be published in any document or broadcast or transmitted in any way.

(4) An order made under this section does not apply in respect of the disclosure of information in the course of the administration of justice when it is not the purpose of the disclosure to make the information known in the community.

486.6(1) Every person who fails to comply with an order made under any of subsections 486.4(1) to (3) or subsection 486.5(1) or (2) is guilty of an offence punishable on summary conviction.

(2) For greater certainty, an order referred to in subsection (1) applies to prohibit, in relation to proceedings taken against any
person who fails to comply with the order, the publication in any document or the broadcasting or transmission in any way of information that could identify a victim, witness or justice system participant whose identity is protected by the order.

COURT OF APPEAL FOR ONTARIO

CITATION: R. v. A.S., 20
DA
DOC

Fairburn A.C.J.O., Lauwers and Miller JJ.A.

BETWEEN

His Majesty the King

and

A.S.

Andrew Furgiuele and Kamran Sajid, for the appellant

Lisa Joyal, for the respondent

Heard: April 21, 2023

On appeal from the dangerous offender designation and indeterminate sentenc
Justice R. Cameron B. Watson of the Ontario Court of Justice on November 22, 2

REASONS FOR DECISION

FACTS

[1] On January 25, 2017, the appellant pled guilty to sexual assault, pornography (two counts), telecommunicating agreement to commit specific crir with another believed to be under the age of 14 years (three counts), dis pornography (two counts), possession of child pornography (two counts), sexua

of a young person under the age of 18 years and procuring that person. The vic
minor children.

[2] The Crown brought an application under s. 753 of the *Criminal Cod* appellant declared a dangerous offender and to have an indeterminate sente The Crown submitted that the appellant committed a serious personal injury of showed a pattern of repetitive behaviour, of which the offences for which she v form a part, showing a failure to restrain her behaviour and a likelihood of c injury or severe psychological damage on other persons, through failure in restrain her behaviour (s. 753(1)(a)(i)), and/or (b) showed a failure to contr impulses and a likelihood of causing injury, pain or other evil to other persons t in the future to control her sexual impulses (s. 753(1)(b)). The Crown further s the totality of the evidence indicated that there was no reasonable expectation punishment, other than an indeterminate sentence, would adequately protect th defence asked that the appellant be designated as a long-term offender, in determinate sentence of 8-10 years (taking into account the time already sp followed by a long-term supervision order, the length of which would be left to th the sentencing judge, to a maximum of 10 years.

[3] The sentencing judge designated the appellant as a dangerous offender an indeterminate sentence.

[4] The appellant raises two arguments on appeal:

1. The sentencing judge committed a "*Boutilier* error" by failing to consider t future treatability at the designation stage.
2. The sentencing judge erred in law by failing to consider a less restricti option.

ANALYSIS

[5] We do not accept that the sentencing judge failed to follow *R. v. Boutilier*, 2 [2017] 2 S.C.R. 936. He cited it many times and was deeply familiar with its requ

[6] In the designation section of his reasons, the sentencing judge set out proposition of law that the appellant invokes: "In order for an offender to be dangerous offender a court must conclude, after a prospective assessment of future treatment prospects, that the offender is a future threat." citing paras. 43-4

[7] The sentencing judge addressed both treatability and intractability in the c of his reasoning in the designation section:

> This Court concludes that [the appellant] is a future threat upo consideration of a prospective assessment of the risk she pose This Court has taken into account what will be required with respe to future treatment prospects of [the appellant] based on the totali of the evidence in this case. This Court is satisfied on the totality the evidence that [the appellant] possesses a high likelihood recidivism and that her conduct is intractable.
>
> There is nothing that this Court can find in the treatment prospects [the appellant] which are compelling enough for this Court t conclude that [the appellant] does not present a high likelihood [o harmful recidivism or that her behaviour is not intractable.

[8] The appellant's submission that the sentencing judge did not give sufficien criterion of intractability is not supported by the reasons. Indeed, this criteric substantial portion of the reasoning. The question of the appellant's treatability his reasoning. The sentencing judge complied with s. 753 of the *Code* and with did not fail to consider the appellant's future treatability at the designation stage.

[9] The appellant's particular argument is that the sentencing judge failed to weight to the appellant's treatability as explained by the forensic psychiatris

opinion in whole or in part. This too is completely within the sentencing judge's *Levac v. James*, 2023 ONCA 73, at para. 82. Third, the sentencing judge did ac the forensic psychiatrist's testimony, and also explained why he rejected the which the appellant relies.

[10] The forensic psychiatrist diagnosed the appellant as having borderlir disorder, pedophilic disorder, non-exclusive type, limited to incest, and subs disorders. Two of these, her pedophilia and her borderline personality disorder, a incurable and can only be managed.

[11] The sentencing judge quoted several parts of the forensic psychiatrist's manageability:

> In summary, based on the risk assessment noted above, it is m opinion that [the appellant] is low-moderate risk for violent (an sexual) recidivism. In this case, despite [the appellant] bein assessed as a low-moderate risk, the severity, and potential severit of the offending behaviour may influence the decisions regarding th ongoing need for monitoring and supervision
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> …
>
> [T]he question as to whether [the appellant] could be managed in th community ultimately lies with the Court … In my opinion, if [th appellant] is placed in the community, the following structures an conditions should be considered:
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> …
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> (c) [The appellant] should undergo substance use programming bot in the institution and in the community. She should remain abstiner from alcohol and street drug use in perpetuity.
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> …
>
> (f) [The appellant] should be subject to intensive case managemer and supervision upon any eventual release into the communit There should be clear communication with [the appellant] about th

> her access to chatlines, social media or electronic devices should b monitored.
>
> g) [The appellant] should not have unaccompanied access t children under the age of 16 in the community in perpetuity.

[12] The sentencing judge rejected the forensic psychiatrist's evidence that was only a low to moderate risk for violent (and sexual) recidivism. He based tl factors that he extracted from the psychiatrist's evidence, including: that th pedophilia "is not limited to just incest and that she may be interested in c children", which was borne out by the evidence; that the evaluation seemed inc the "intensive risk management plan"; that her borderline personality disorder severe; that her cognitive distortions are "deeply ingrained, and longstandi persisted notwithstanding the medication and therapy" in the carceral institu intensification of the appellant's offending over time.

[13] The sentencing judge quoted the forensic psychiatrist's evidence about t of the appellant's case given multiple diagnoses:

> Q. And how is treatment complicated by the presence of these thre specific disorders?
>
> A. Well, I think treatment can become complicated given the fact tha she suffers from multiple disorders, that each disorder in and of itse confers a particular treatment and management plan and so th complexity of that management plan would be increased. I woul also note that the diagnosis of a pedophilic disorder is atypical i females and so the management and monitoring of that disorde would require a level of understanding and knowledge that may b different from the norm. So, I think that these are some complicatin factors.

[14] Finally, the sentencing judge noted the evidence that the actuarial risk ass for female pedophiles were limited, given the small number of females di pedophilic disorders, which the forensic psychiatrist acknowledged "do not have

[15] It is evident that the sentencing judge engaged deeply with the psychiatric rejection of the evaluation that the appellant was only at a low to moderate risk fo sexual) recidivism was carefully explained and was rooted in the evidence.

[16] The sentencing judge is also said to have erred by not expressly mentioni opinion offered by a psychologist. This doctor was not called as a witness in the Yet, the substance of her report was included in the 78-page assessment repo the psychiatrist who did testify in the proceedings. The sentencing judge's rejecting the psychiatrist's ultimate opinion on the issue of risk are equally app psychologist's written report.

[17] The appellant also argues that the sentencing judge erred in his ap evidence of an employee of Corrections Services Canada at the designation reasoning. In particular, the appellant says that this evidence was important to co point in the reasoning because available programming can directly inform th future dangerousness.

[18] We see no error in the sentencing judge's approach. He directly enga evidence and summarized it, albeit in the sentencing portion of his reasons. T are clear that there is nothing in the Corrections Services employee's eviden support a different finding at the designation stage. It was general evidence abou treatment programs available for individuals such as the appellant while in the those individuals choose to participate in that programing. It was entirely disco the appellant's own ability to be treated while incarcerated or managed in the co trial judge came to factual conclusions about the appellant that were inconsis ability to engage with that programming. Those factual conclusions were availa the record.

public", citing *R. v. D.V.B.*, 2010 ONCA 291, at paras. 58 and 81. H "[c]onsiderations surrounding protection of the public necessarily involv assessment of risk and a future assessment of risk, at a time when a conventi or when a determinate sentence paired with the imposition of a long-term sup will expire." This approach is eminently sensible.

[20] The sentencing judge concluded that:

> In the case before me, after careful consideration of the totality of th evidence, there is no evidence before me which allows me t determine that [the appellant] can be rehabilitated within determinate period of time. Hope and optimism are insufficient fo the imposition of anything less than an indeterminate sentence.
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> Until [the appellant] gets the help she needs, which depends upo her commitment and engagement in a meaningful way whic requires her to make substantial efforts while incarcerated to addres and attempt to deal with the issues that she has which underline he diagnoses she must remain segregated from society.

[21] The sentencing judge added:

> On the record before me there is no evidence that [the appellan could be meaningfully treated within a definite period of time and tha the resources required to implement the necessary supervisio conditions for eventual control in the community are available. Th restrictive provisions necessary to control the risk of re-offending b [the appellant] coupled with the need to protect the public would a present and in future essentially replicate 'jail-like' conditions in th community. Courts have found under those circumstances tha indeterminate sentences are warranted.
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> …
>
> [The appellant] represents a continuing and ongoing danger to th public. The only way to protect the public in the instant case is t ensure that [the appellant] is incarcerated for the rest of her life o until such a time that [the appellant] receives proper treatment an the correctional authorities deem a supervised release or other form of release are possible. [Citations omitted]

and be prohibited from unsupervised access to children under 16 in perp requirements led the sentencing judge to the observation that perpetual limits achieved by a supervision order because, at its conclusion, the appellant would community unsupervised. He noted, "[a] court should not impose a determir followed by a long-term supervision order if it is not satisfied the offender can community unsupervised at the expiry of that supervision order."

[23] The sentencing judge noted that the appellant "presents a lifelong risk t managed within [a] determinate sentence and a 10-year long-term supervisi added, based on the evidence of an expert, that the supervision available for after release "is not sufficient to protect the public from ongoing harm". He conclu

> There is no evidence, beyond mere hope/optimism, that at present c in the future [the appellant] can be adequately treated, supervised c monitored so as to ensure public safety. Community supervision i not sufficient to contain [the appellant's] ongoing risk.

[24] Thus, the argument that the sentencing judge failed to consider a lesser no merit. There is nothing that persuades us that the sentencing judge's exercis in sentencing rested on a wrong principle or that he made a palpable and over fact in imposing an indeterminate sentence. Appellate deference is due.

[25] The appeal is dismissed.

"Fairl
"P.
"B.