COURT OF APPEAL OF YUKON

Citation: *R. v. J.J.P.*,
2020 YKCA 13

Date: 20200807
Dockets: 18-YU828; 18-YU829

Docket: 18-YU828

Between:

Regina

Appellant

And

J.J.P.

Respondent

- and -

Docket: 18-YU829

Between:

Regina

Respondent

And

J.J.P.

Appellant

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Before: The Honourable Madam Justice MacKenzie
The Honourable Mr. Justice Fitch
The Honourable Madam Justice Fisher

On appeal from: An order of the Supreme Court of Yukon, dated June 28, 2018 (*R. v. J.J.P.*, 2018 YKSC 30, Whitehorse Dockets 17-01513; 16-01514; 16-01514A; 16-01514B; 16-01513; 17-00700).

Counsel for the Crown (via videoconference): N. Sinclair

Counsel for J.J.P. (via videoconference): F. Mahon

Place and Date of Hearing: Vancouver, British Columbia
May 26, 2020

Place and Date of Judgment: Vancouver, British Columbia
August 7, 2020

Written Reasons by:
The Honourable Mr. Justice Fitch

Concurred in by:
The Honourable Madam Justice MacKenzie
The Honourable Madam Justice Fisher

Summary:

J.J.P. pleaded guilty to 24 counts including sexual interference, sexual assault, voyeurism, and making and possessing child pornography. The offences involved 13 pre-pubescent and pubescent female victims and took place over approximately seven years. The sentencing judge dismissed a Crown application to have J.J.P. designated a dangerous offender. Instead, he found J.J.P. to be a long-term offender and sentenced him to 16 years' imprisonment followed by a 10-year long-term supervision order.

The Crown appeals the dismissal of its dangerous offender application on grounds that the judge erred: in interpreting the threshold test at the designation stage; in assessing the weight to be given to the hearsay-based evidence of a psychiatrist; and by relying on J.J.P.'s "dock statement". Held: Appeal dismissed. The judge did not err in articulating or applying the test at the designation stage. The weight to be given to the psychiatrist's evidence was a factual determination. It does not involve a question of law. The judge did not err in considering the statement made by J.J.P. before sentence was imposed.

J.J.P. appeals his designation as a long-term offender on grounds that the judge erred: in his articulation of the standard of proof on whether he posed a substantial risk of reoffence; by not considering first whether a determinate sentence standing alone would adequately protect the public; by misapprehending the psychiatrist's evidence; and by imposing a demonstrably unfit sentence. Held: Appeal allowed in part, but only to address a mathematical error that was made in crediting J.J.P. for time served in pre-sentence custody. The judge did not err: in articulating the standard of proof governing a long-term offender designation—but even if he did, there is no reasonable possibility that the result would have been different had the error not been made; by failing to consider first whether a determinate sentence standing alone would afford adequate public protection; by misapprehending evidence and thereby committing reversible error; or by imposing a demonstrably unfit sentence.

Reasons for Judgment of the Honourable Mr. Justice Fitch:

I. Introduction

[1] The Crown appeals the dismissal of its application to have J.J.P. designated a dangerous offender (18-YU828). The Crown seeks an order allowing its appeal and declaring J.J.P. to be a dangerous offender. In addition, the Crown seeks the imposition of an indeterminate period of imprisonment. J.J.P. appeals his designation as a long-term offender (18-YU829). He seeks an order allowing his appeal and setting aside the long-term offender finding. In addition, J.J.P. seeks the

imposition of a determinate sentence that is substantially less than the 16-year period of incarceration imposed by the sentencing judge.

[2] For the reasons that follow, I would dismiss the Crown's appeal. I would allow J.J.P.'s appeal but only to correct a mathematical error that was made in crediting him for time spent in pre-sentence custody.

II. The Legislative Context

[3] The provisions of the *Criminal Code*, R.S.C. 1985, c. C-46 [*Code*] applicable to the sentencing proceedings below and to these appeals are as follows:

> **PART XXIV**
>
> **Dangerous Offenders and Long-term Offenders**
>
> …
>
> **Application for finding that an offender is a dangerous offender**
>
> **753 (1)** On application made under this Part after an assessment report is filed under subsection 752.1(2), the court shall find the offender to be a dangerous offender if it is satisfied
>
> **(a)** that the offence for which the offender has been convicted is a serious personal injury offence described in paragraph (a) of the definition of that expression in section 752 and the offender constitutes a threat to the life, safety or physical or mental well-being of other persons on the basis of evidence establishing
>
> **(i)** a pattern of repetitive behaviour by the offender, of which the offence for which he or she has been convicted forms a part, showing a failure to restrain his or her behaviour and a likelihood of causing death or injury to other persons, or inflicting severe psychological damage on other persons, through failure in the future to restrain his or her behaviour,
>
> **(ii)** a pattern of persistent aggressive behaviour by the offender, of which the offence for which he or she has been convicted forms a part, showing a substantial degree of indifference on the part of the offender respecting the reasonably foreseeable consequences to other persons of his or her behaviour, or
>
> …
>
> **(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.

…

Sentence for dangerous offender

(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.

…

If offender not found to be dangerous offender

(5) If the court does not find an offender to be a dangerous offender,

(a) the court may treat the application as an application to find the offender to be a long-term offender, section 753.1 applies to the application and the court may either find that the offender is a long-term offender or hold another hearing for that purpose; or

(b) the court may impose sentence for the offence for which the offender has been convicted.

…

Application for finding that an offender is a long-term offender

753.1 (1) 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.

Substantial risk

(2) The court shall be satisfied that there is a substantial risk that the offender will reoffend if

(a) the offender has been convicted of an offence under section 151 (sexual interference), 152 (invitation to sexual touching) or 153 (sexual exploitation), subsection 163.1(2) (making child pornography), 163.1(3) (distribution, etc., of child pornography), 163.1(4) (possession of child pornography) or 163.1(4.1) (accessing child pornography), section 170

(parent or guardian procuring sexual activity), 171 (householder permitting sexual activity), 171.1 (making sexually explicit material available to child), 172.1 (luring a child) or 172.2 (agreement or arrangement — sexual offence against child), subsection 173(2) (exposure) or section 271 (sexual assault), 272 (sexual assault with a weapon) 273 (aggravated sexual assault) or 279.011 (trafficking — person under 18 years) or subsection 279.02(2) (material benefit — trafficking of person under 18 years), 279.03(2) (withholding or destroying documents — trafficking of person under 18 years), 286.1(2) (obtaining sexual services for consideration from person under 18 years), 286.2(2) (material benefit from sexual services provided by person under 18 years) or 286.3(2) (procuring — person under 18 years), or has engaged in serious conduct of a sexual nature in the commission of another offence of which the offender has been convicted; and

(b) the offender

(i) has shown a pattern of repetitive behaviour, of which the offence for which he or she has been convicted forms a part, that shows a likelihood of the offender's causing death or injury to other persons or inflicting severe psychological damage on other persons, or

(ii) by conduct in any sexual matter including that involved in the commission of the offence for which the offender has been convicted, has shown a likelihood of causing injury, pain or other evil to other persons in the future through similar offences.

Sentence for long-term offender

(3) If the court finds an offender to be a long-term offender, it shall

(a) 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

(b) order that the offender be subject to long-term supervision for a period that does not exceed 10 years.

…

If offender not found to be long-term offender

(6) If the court does not find an offender to be a long-term offender, the court shall impose sentence for the offence for which the offender has been convicted.

…

Appeal — offender

759 **(1)** An offender who is found to be a dangerous offender or a long-term offender may appeal to the court of appeal from a decision made under this Part on any ground of law or fact or mixed law and fact.

…

Appeal — Attorney General

(2) The Attorney General may appeal to the court of appeal from a decision made under this Part on any ground of law.

Disposition of appeal

(3) The court of appeal may

(a) allow the appeal and

(i) find that an offender is or is not a dangerous offender or a long-term offender or impose a sentence that may be imposed or an order that may be made by the trial court under this Part, or

(ii) order a new hearing, with any directions that the court considers appropriate; or

(b) dismiss the appeal.

III. Background

1. The Offences

[4] Over a period of approximately seven years commencing in 2008, J.J.P. sexually abused 13 pre-pubescent and pubescent girls in Yukon, Ontario and British Columbia. The offences were calculated and brazen. The conduct was grossly invasive. J.J.P. video-recorded and took still photographs memorializing his sexual abuse of the victims. That his conduct persisted without detection for so many years is attributable to the flagrant abuse by J.J.P. of his position of trust and authority, and the determination and stealth with which he pursued his deviant predilection. The conduct only came to light in 2015 when one of the victims disclosed to a school guidance counsellor what had happened to her and J.J.P.'s son discovered a cache of child pornography on his father's computer.

[5] J.J.P. entered pleas of guilty and was convicted on 24 counts including 19 Yukon-based offences, one Ontario-based offence, and four British Columbia-based offences. In total, J.J.P. pleaded guilty to: nine counts of sexual interference contrary to s. 151; two counts of sexual assault contrary to s. 271; three counts of voyeurism contrary to s. 162(1)(a); nine counts of making child pornography contrary to s. 163.1(2); and one count of possessing child pornography contrary to s. 163.1(4) of the *Code*.

[6] The conduct underlying the guilty pleas was the subject of lengthy and detailed agreed statements of facts. I will not reproduce the agreed statements of facts in these reasons. The following summary will suffice.

[7] J.J.P.'s 11 Yukon victims were female friends of his daughter, all of whom had been invited into J.J.P.'s home for sleepovers. J.J.P. knew when he committed the offences that all of the victims were under 14 years of age. The sexual touching occurred after the victims went to bed. It often occurred in the presence of J.J.P.'s daughter who was asleep in the same room, unaware of what was occurring. Nine of the victims were subjected to sexual abuse by J.J.P. The conduct included breast and genital touching (both manually and with the use of a vibrator), digital vaginal penetration, digital anal penetration, and penile and attempted penile anal penetration involving use of a lubricant. Two of the Yukon victims were not sexually touched but were sexually violated when J.J.P. surreptitiously video-recorded them as they changed clothes, bathed or showered. In total, 58 video recordings and 644 still images were taken by J.J.P. documenting his abuse of these 11 children. One video depicts a victim holding open her labia when directed to do so by J.J.P. She can be heard sobbing during the video. J.J.P. masturbated in the presence of this victim (and others) and ejaculated onto her bare buttocks. On another occasion, J.J.P. filmed himself applying his tongue to the genitals of one of the victims. Five of the 11 victims reported having some recollection of being sexually assaulted by J.J.P.

[8] The Ontario victim was sexually assaulted by J.J.P. while attending a family gathering. This victim was 11 years of age at the time of the offence. While she was swimming in a lake with J.J.P., he touched her vaginal area on top of her bathing suit. When she tried to swim away, J.J.P. grabbed her by the right ankle to restrain her and pull her back through the water towards him. She resisted and was able to kick herself free from J.J.P.'s grasp. She immediately reported the incident to her mother.

[9] J.J.P.'s British Columbia-based offences involved one of the Yukon victims and a 13th complainant. These offences occurred after J.J.P. moved with his family from Yukon to Delta, British Columbia. The offence involving the Yukon victim occurred when she visited J.J.P.'s family in Delta. J.J.P. pulled down her pyjama bottoms and digitally penetrated her vagina in the bedroom she was sharing with J.J.P.'s daughter, who was asleep at the time of the offence. The victim remembered seeing "a flash" as J.J.P. continued to touch her vagina and "bottom". She was 10 years old at the time of this offence. She told the police she was "freaked out" by J.J.P.'s conduct but said it had happened to her before when he lived in Yukon. The 13th victim, who was 14 or 15 years of age at the relevant time, was "massaged" by J.J.P. during a sleepover with J.J.P.'s daughter. She told her mother that J.J.P. was "creepy" and that she did not want to return to his residence. J.J.P. contacted her after this visit. They exchanged 151 text messages between March and August, 2014. On one occasion, J.J.P. and his daughter came to her residence and invited her for a sleepover. She declined the invitation and made excuses thereafter not to go to J.J.P.'s residence. This victim appears in still photographs and in a video depicting her showering in J.J.P.'s residence. A small camera had been surreptitiously installed by J.J.P. in the back of the shower and positioned to capture the genitals and upper half of the victim's body.

[10] The still photographs and videos J.J.P. created documenting his abusive conduct formed part of a larger collection of child pornography found on his computer and other storage devices discovered in his residence. The children depicted in the larger collection appear to be between six and 13 years of age. Some of the videos depict both physical and sexual abuse. At least one depicts an act of sexual sadism involving a child. These videos were possessed, but not created, by J.J.P.

[11] The sentencing judge summarized the offences committed by J.J.P. in these terms:

> [134] I have reviewed the Agreed Statements of Fact and reviewed the photographs and videos of the offences. In addition to the shocking nature and staggering number of the sexual offences on these young girls, I am struck by the elaborate and meticulous staging and exhibition of these deplorable acts. J.J.P.'s conduct was not opportunistic or random but rather incredibly well-organized and planned criminal activity in the pursuit of his predatory and devastating ends. He had, in effect, created a personal library of film and video of the most intrusive sexual acts on his young and vulnerable female victims for his personal gratification.

[12] The harm J.J.P. caused to the victims and their families is incalculable. In victim impact statements provided to the sentencing judge, the victims and their families attempted to express the lasting harm caused by J.J.P.'s predatory acts. Unsurprisingly, some of the victims have spent years in therapy attempting to deal with the emotional trauma caused by J.J.P.'s conduct. From the perspective of many of the victims' parents, J.J.P. betrayed their trust. As one mother put it, "we … are just sick with remorse for not having protected our child. Our family and our daughter have been damaged and will never be the same." The sentiment was echoed in different ways by many other parents, some of whom accused J.J.P. of wearing the mantle of a deeply religious man as a means of engendering their trust and evading detection. Indeed, the harms caused by sexual violence of the sort perpetrated in this case were recently discussed by the Supreme Court of Canada in *R. v. Friesen*, 2020 SCC 9 at paras. 50–86. Predictably, many of the actual harms discussed in *Friesen* are present in the case at bar.

[13] J.J.P. did not testify on the sentencing hearing but addressed the court pursuant to s. 726 of the *Code* before sentence was imposed. He apologized to the victims, to their families, and to his own family for the harm he caused. He accepted responsibility for his actions, asked for forgiveness, and pledged to follow "the requirements and conditions [imposed on sentencing], knowing they are meant to aid me on my road to once again be a kind, empathetic and productive citizen."

2. The Offender

[14] J.J.P. was 48 years of age when sentence was imposed in 2018. He is now 50. He had no previous criminal record. He agreed to participate in a pre-hearing

assessment ordered by the sentencing judge pursuant to s. 752.1 of the *Code*. That assessment was undertaken by Dr. Shabehram Lohrasbe, a forensic psychiatrist.

[15] Dr. Lohrasbe diagnosed J.J.P. as having a pedophilic disorder and a voyeuristic disorder. He described J.J.P.'s pedophilic disorder as "intense and established." There is no cure for pedophilia. Dr. Lohrasbe said that the intensity of the disorder pointed to the need for caution in making assumptions as to the effectiveness of treatment and the manageability of J.J.P. in the community. He emphasized, however, that while pedophilia is a lifelong disorder, it is not synonymous with sexual offending and does not necessarily mean that an individual so diagnosed will commit sexual offences in the future.

[16] Dr. Lohrasbe noted that J.J.P. appeared to be highly motivated to understand his offences and the steps he needed to take to avoid the risk of reoffence. Applying the Risk for Sexual Violence Protocol (RSVP), he concluded that J.J.P. was rated as being "highly manageable upon his release into the community." He said motivation is the single most important element in treatability and that it appeared to be "abundantly present" in this case. He concluded that J.J.P. has a genuine and deep-seated desire to change who he is and ensure he does not reoffend. He noted that J.J.P. has no cognitive deficits or personality disorder that might interfere with treatment.

[17] Dr. Lohrasbe's optimism about managing J.J.P.'s risk in the community was expressed in these terms in his report:

> [J.J.P.] grasps the principle that full cooperation and participation in his rehabilitation will assist not just to prevent further victims but also his ability to reside in the community. He sees 'the system' and its resources as being 'on the same side' as himself. He is not antisocial or antiauthority in temperament or belief. Hence there are ample reasons to be optimistic about risk management.
>
> Moreover, regarding risk for contact offending, the pattern of his offending narrows down the pool of likely victims to those who come within his orbit of power and control, with no indications of him expanding the circle of potential victims to strangers. Hence there is a very concrete focus for risk management; prevention of opportunity.

> The prospects for risk management for non-contact (child pornography/internet) offending is far less certain. …
>
> In my experience, it is virtually impossible to fully monitor a motivated offender's access to the internet.

[18] Dr. Lohrasbe summarized his opinion on risk assessment, treatability and manageability of risk in the community at the end of his report:

> i. If [J.J.P.] had not been apprehended, it is likely that he would have continued with both contact and internet offending. Left alone and without sustained intervention, he was at high risk to reoffend.
>
> ii. The legal consequences of his conviction are by themselves likely to have a salutary effect on risk. In addition, ageing is likely to reduce risk.
>
> iii. It is anticipated that he will be offered a full-dress sex offender treatment program once sentenced. He is likely to benefit from such a program, and it is reasonable to anticipate that his risk will be reduced to levels that are manageable in the community.
>
> iv. At that point, he will fall within a statistical subgroup of sex offenders who [are] at low risk to recidivate with another sexual offence.
>
> v. It is anticipated that he will be [a] good candidate for risk management in the community.
>
> vi. Even if future risk assessments confirm the above expectation that his risk will then be low, a lengthy period of supervision in the community is recommended, given the potential for lifelong persistence of pedophilic urges and fantasies. Legally mandated supervision brings with it resources that may not otherwise be available to him when back in the community.

[19] Dr. Lohrasbe was the only witness called to give opinion evidence on sentencing. He testified that while some of his opinion turned on his assessment of J.J.P.'s credibility and sincerity, "[t]he bulk of the risk assessment [was] anchored in the known facts." He did not believe that J.J.P. was being manipulative or deceitful in the assessment interview, but acknowledged there is no way he could "dismiss the possibility of the wool being pulled over my eyes." He said J.J.P. expressed stark remorse and shame during the interview.

[20] Dr. Lohrasbe emphasized that treatment does not cure pedophilia. Rather, treatment would focus on strengthening J.J.P.'s awareness of the harm he has done to others, and on teaching him techniques to deal with his deviant sexual thoughts and urges to guard against the disorder being manifested in his future conduct.

[21] Dr. Lohrasbe acknowledged that any risk assessment involves "a certain amount of crystal ball gazing" and that much would depend on whether J.J.P. maintained his motivation for treatment following the imposition of sentence, and whether he benefited from treatment. Dr. Lohrasbe said that even with the best techniques available to assess risk, "what we're left with is a kind of black hole of entirely unpredictable contingencies, some dependent on the offender and his efforts [and] some out of his control and dependent simply on life events." He testified he had no reason to anticipate that J.J.P.'s motivation for treatment would fail.

[22] In addressing the correlation between aging and the risk of J.J.P. committing future acts of sexual violence, Dr. Lohrasbe said this:

> The more advanced the age, the more likely [there will be a decrease in risk], but the trajectory is steadily downwards. … With sexual violence, it's not quite as steep and there is more of a lingering tail of offenders who continue to offend. And the die-off is in advanced age. We're talking seventies and eighties. So between 48 and 70, it's more like a gradual decline as against a sudden die-off.

[23] Dr. Lohrasbe testified that, quite apart from achieving the sentencing goals of deterrence and denunciation, "if I had my way as a psychiatrist, I would have him under supervision for the rest of his life if it came to his therapeutic needs only."

[24] Dr. Lohrasbe also testified that if a long-term supervision order came into effect when J.J.P. was over 60 years of age, he would then be at a very low risk to reoffend.

[25] In cross-examination by J.J.P.'s trial counsel (not counsel on appeal), Dr. Lohrasbe said this about J.J.P.'s treatment prospects:

> Q Now, I want to talk to you about treatment. You have no reason to believe that [J.J.P.] won't buy into treatment?
>
> A No.
>
> Q You have no reason to believe he won't remain motivated?
>
> A No.
>
> Q No reason to believe that this whole — you know, that for the past three years he's been putting on an elaborate façade, pretending that he's motivated and wants help?

A Correct.

Q And you have no reason to believe that the treatment offered in correctional services here in Canada won't be successful for [J.J.P.]?

A Correct.

Q Now, we talked about based on your psychiatric opinion what is the proper way to deal with [J.J.P.'s] risk. And I think, based on our discussions, is it fair to say that from a psychiatric point of view, given [J.J.P.'s] risks, you don't think that indefinite incarceration is even relevant at all?

A No. And again, I don't want to tread into territory that I don't belong. I'm again referring purely from a treatment and rehabilitation point of view. Nothing to do with other aspects of sentencing.

I think there's a consensus in my profession that lengthy periods of incarceration for all but, you know, the highly psychopathic offenders is often counterproductive, that you want to hit a sweet spot where there's enough time to do all the programming that is reasonable to try and deliver. Sometimes, you know, more than once. And the key is then the duration and intensity of the follow-up.

In the past, the mistake my entire field made was we would deliver intensive programming, and then they would — the resources weren't there for the follow-up. And that was — the failures were interpreted as the failure of treatment, and really, it was the failure of follow-up.

But in recent years, there's been a steady shift of resources being shifted into the community. And like I said, any serious offender, and where — whether sexual or not, from my perspective as a treating psychiatrist, the longer the better, and indefinite follow-up would be ideal.

…

Q Okay. Now, just going back one question before that one, we talked about, you know, indefinite incarceration and you gave me an elaborate answer. But would you agree that from a psychiatric point of view based on your understanding of [J.J.P.'s] risk — and just that part, the risk — indefinite incarceration makes no sense?

A I agree.

Q No sense at all?

A Agreed.

[26] Dr. Lohrasbe confirmed his opinion that J.J.P. is a good candidate for risk management in the community and that it was reasonable to anticipate, with the benefit of treatment he would receive while incarcerated, that his risk to the community upon release would be reduced to a manageable level.

3. Reasons for Sentence (2018 YKSC 30)

[27] The sentencing judge concluded that J.J.P. has an incurable, lifelong and intense pedophilic disorder. He found the offences to be meticulously planned. He found that J.J.P. was able to deceive his family and community by maintaining a public veneer of a devoutly religious and trustworthy person. He acknowledged that J.J.P. admitted his guilt and became remorseful and desirous of treatment only after he realized the police were in possession of his collection of child pornography—a collection that included the depiction of some of his victims. The judge accepted Dr. Lohrasbe's evidence that J.J.P. "is not intractable from a treatment perspective but his intense pedophilia is not curable."

[28] Although the Crown's application that J.J.P. be designated a dangerous offender appears to have been premised on s. 753(1)(a)(i) and (ii) as well as s. 753(1)(b), the judge addressed the application primarily through the lens of s. 753(1)(b). The Crown does not suggest on appeal that he erred by doing so.

[29] Section 753(1)(b) provides that an offender shall be designated as dangerous if the Crown proves beyond a reasonable doubt that the offender, by his or her conduct in any sexual matter, has shown a failure to control his or her sexual impulses and a likelihood that he or she will cause injury, pain or other evil to other persons through failure in the future to control his or her sexual impulses.

[30] The sentencing judge made these critical findings of fact:

> [194] I have concluded from the evidence of Dr. Lohrasbe that <u>J.J.P. is not intractable or untreatable</u> as that term is defined in *Boutilier*. Based on the opinion of Dr. Lohrasbe about J.J.P.'s current appreciation of his offending and his willingness to participate in treatment, <u>I cannot find beyond a reasonable doubt that J.J.P. is unable to surmount his sexual offending against children</u>. Having said that, I understand the concern of the victims and their families that no amount of apology and rehabilitation will ever make J.J.P. a suitable person to return to the community. Although he is undoubtedly at a high risk to re-offend if untreated, Dr. Lohrasbe is clear that he is a good candidate for treatment and risk management in the community. While the Crown and victims would argue that there is no certainty that he will not reoffend, that is not the test for designation for a sexual offender as a dangerous offender. <u>The Crown has failed to prove beyond a reasonable</u>

> doubt a high risk of harmful recidivism and the intractability of his conduct, in the context of the expert evidence about his treatment prospects.
>
> …
>
> [196] … [T]he only evidence before me specifically on future treatment prospects is that [of] Dr. Lohrasbe, J.J.P.'s two police interviews and the apology of J.J.P. at the end of the sentence submissions. Dr. Lohrasbe concluded quite clearly that J.J.P. is not intractable with respect to treatment but in fact is a good case for treatment and management in the community. J.J.P. presents an unusual case in the sense that he has no criminal record and no previous history of compliance or not with treatment.
>
> [197] The expert evidence of Dr. Lohrasbe, the person with psychiatric expertise who has interviewed J.J.P., is that pedophiles can be treated and managed in the community and that J.J.P. is a good candidate because he is genuinely remorseful, has accepted legal and moral responsibility and feels awful for the damage he has done to the young victims and their families.
>
> [198] The Crown has made a great effort to demonstrate that there are no guarantees in the predictive behaviour business. The Crown has established that the pedophilia of J.J.P. is intense and incurable but it has failed to prove beyond a reasonable doubt that J.J.P. is intractable from a treatment perspective. That is the standard set by the Supreme Court of Canada. It is a high standard, and particularly in the circumstances of a first offender, is a difficult burden to meet.
>
> [Emphasis added.]

[31] In the result, the judge dismissed the Crown's application to have J.J.P. designated a dangerous offender and sentenced to an indeterminate period of imprisonment.

[32] Pursuant to s. 753(5)(a), if a judge dismisses an application by the Crown to have an offender designated as a dangerous offender, the application may be treated instead as an application to designate the offender a long-term offender, in which case s. 753.1 applies.

[33] Applying the provisions of s. 753.1(1), the judge found that this was clearly a case in which it would be appropriate to impose a sentence of two years or more as required by subsection (1)(a). The judge was also satisfied that the second and third requirements of s. 753.1(1)(b) and (c) were also met—that there is a substantial risk that J.J.P. will reoffend and a reasonable possibility of eventual control of that risk in the community. With respect to the second and third criteria, the judge said this:

> [207] To be satisfied that s. 753.1[(1)](b) has been met, I must find that there is a substantial risk that the offender J.J.P. would reoffend. Section 753.1(2)(b)(ii) requires a finding that J.J.P. "has shown a likelihood of causing injury, pain or other evil to other persons in the future through similar offences." This section does not require a consideration of the Crown proving beyond a reasonable doubt that J.J.P. is intractable with respect to future treatment or management in the community, as required in a dangerous offender application. See *R. v. Wormell*, cited above. The wording "satisfied" in s. 753.1(2) does not require the Crown to satisfy a burden of proof beyond a reasonable doubt but, rather, that the sentencing judge must be satisfied, having regard to the whole of the evidence, that the public threat could be reduced to an acceptable level through either a long term supervision order or a determinate sentence. See *R. v.* [*D.*] *(F.E.)* (2007), 84 O.R. (3d) 721 (Ont. C.A.). I am satisfied from Dr. Lohrasbe's evidence that without treatment there is a substantial risk that J.J.P. will reoffend.
>
> [208] With respect to a finding in s. 753.1[(1)](c) that there is a reasonable possibility of eventual control of risk in the community the court must be satisfied that the containment or management of risk is reasonably possible rather than the eradication of risk.
>
> [209] To be satisfied that J.J.P. can meet the requirement of reasonable possibility of eventual control of his risk in the community, I must be satisfied that he can meet the requirement within the time frame of the long-term supervision order which follows J.J.P.'s determinate sentence. See *R. v. B (D.V.)* (2010), 254 CCC (3d) 221 [(Ont. C.A.)].
>
> [210] I am satisfied that Dr. Lohrasbe clearly anticipated that J.J.P. would be a good candidate for risk management in the community following "a lengthy period of supervision in the community." In my view, Dr. Lohrasbe was implicitly recommending the maximum 10-year supervision. Dr. Lohrasbe's statement that J.J.P. is a lifelong pedophile does not detract from his conclusion that J.J.P. would be a good candidate for risk management after treatment.
>
> [211] I conclude that J.J.P. should be a long-term offender, and that his sentence should include the maximum 10-year period of community supervision under a long-term supervision order, which begins when J.J.P. finishes serving his sentence on terms to be set by the Parole Board.
>
> [Emphasis added.]

[34] Having found J.J.P. to be a long-term offender, the judge considered what a fit determinate sentence would be. He described the offences as "among the worst imaginable," noting that they spanned a period of seven years, involved a large number of children, were highly invasive, and caused "untold damage to the children that [were] abused, as well as to their families." The judge observed that the offences reflected predatory behaviour and a gross abuse of trust. The judge took note of the statutorily recognized aggravating factors present in this case: the

offences involved the abuse of victims under the age of 18 years (s. 718.2(a)(ii.1)); in committing the offences, J.J.P. abused a position of trust or authority in relation to the victims (s. 718.2(a)(iii)); and the offences had a significant impact on the victims, considering their age (s. 718.2(a)(iii.1)). He agreed that J.J.P. should receive some credit for his early guilty plea and acceptance of responsibility, but concluded that deterrence and denunciation were the paramount sentencing objectives.

[35] Subject to the totality principle, the judge decided that consecutive sentences should be imposed on each of the nine sexual interference counts that involved a different victim. On four of those counts, the judge imposed four-year terms of imprisonment. On one of those counts, the judge imposed a two-year term of imprisonment. Consecutive periods of imprisonment of 22, 16, 10 and three months' imprisonment were imposed on the remaining four counts. On the two counts of voyeurism from Yukon, the judge would have imposed two-month terms of imprisonment, concurrent to one another but consecutive to the sentences imposed on the sexual interference counts. On the eight Yukon counts of making child pornography, the judge was inclined to impose sentences of two years' imprisonment, concurrent to one another but consecutive to the sentences imposed for sexual interference and voyeurism. On the sexual assault count from Ontario, the judge would have imposed a consecutive sentence of three months' imprisonment. With respect to the offences committed in British Columbia, the judge was inclined to impose a two-year sentence for making child pornography, to be served concurrently with the sentences imposed for the same offence arising out of J.J.P.'s behaviour in Yukon. On the single count of voyeurism committed in British Columbia, the judge would have imposed a consecutive sentence of four months' imprisonment. On the single count of possessing child pornography in British Columbia, the judge would have imposed a one-year consecutive sentence. Finally, on the single count of sexual assault committed in British Columbia (involving one of the same victims from Yukon), the judge would have imposed an 18-month concurrent sentence. Without applying the totality principle, the judge determined that a 26-year period of imprisonment was warranted.

[36] The Crown and defence agreed that application of the totality principle should result in a significant reduction in penalty. The Crown submitted that the totality principle should reduce the global sentence to a period of imprisonment of 14–16 years. The defence submitted that a global sentence of 7–9 years would be appropriate.

[37] Applying the totality principle, the judge considered that a fit determinate sentence would be 16 years' imprisonment followed by a 10-year long-term supervision order. To give effect to his ruling on totality, the judge ordered that the four-year sentences imposed on the four most serious sexual interference counts be served consecutively, and that all of the remaining counts be served concurrently.

[38] J.J.P. was given credit for 866 days served in pre-sentence custody at a ratio of 1.5 to 1 (1.5 days credited for every day spent in pre-sentence custody). He was thus credited for having served the equivalent of 1,299 days.

[39] It is common ground that the judge made a mathematical error in calculating the number of days J.J.P. had served in pre-sentence custody. He had, in fact, served 1,233 days in pre-sentence custody when sentence was imposed. He should have been credited for having served the equivalent of 1,850 days in pre-sentence custody.

IV. The Crown's Appeal

[40] The Crown advances three grounds in support of its appeal from the dismissal of the dangerous offender application. The three grounds of appeal are all said to establish errors of law. As framed in the Crown's factum, the grounds of appeal are as follows:

> a) The sentencing judge erred in law by interpreting the statutory dangerous offender designation threshold to require proof of the offender's untreatability, or, in effect, proof of an offender's "therapeutic hopelessness";

b) The sentencing judge erred in principle by failing to properly instruct himself on the weight to attribute to the hearsay-based opinion evidence of Dr. Lohrasbe; and

c) The sentencing judge erred in principle by relying on J.J.P.'s "dock statement" made pursuant to s. 726 of the *Code* as evidence indicative of his remorse and treatability.

[41] The Crown's right of appeal from the dismissal of a dangerous offender application is restricted to questions of law: s. 759(2). A more expansive right of appeal is granted to an offender who has been declared a dangerous or long-term offender. An offender's appeal may be based on any ground of law or fact or mixed law and fact: s. 759(1). The asymmetrical rights of appeal as between the offender and the Attorney General conferred under s. 759 mirror the expansive right of appeal given to a convicted person by s. 675 and the limited right of appeal given to the Attorney General appealing from an acquittal under s. 676: see *R. v. Natomagan*, 2012 SKCA 46 at paras. 49–52.

[42] The Crown made two arguments on appeal in an effort to enlarge the jurisdiction of the Court to entertain its grounds of appeal. In my view, neither can prevail.

[43] First, the Crown argued that appellate courts must apply the standard of "reasonableness" in reviewing whether an offender meets the criteria for designation as a dangerous offender. The Crown submits that while deference is owed to the factual findings of the sentencing judge, appellate review of a dangerous offender designation is "somewhat more robust" than the scope of review on a regular sentence appeal. In support of this submission, the Crown relies on *R. v. Currie*, [1997] 2 S.C.R. 260 at paras. 17, 32–35, and *R. v. Sipos*, 2014 SCC 47 at paras. 23, 25–26.

[44] The standard of review to which the Crown makes reference applies to appeals <u>by an offender</u> from a finding that he or she meets the criteria for a dangerous offender designation. Robust review for reasonableness is not the

standard of review that applies on an appeal by the Crown pursuant to s. 759(2). So long as the legal analysis is untainted by error in law, a finding that an offender does or does not meet the criteria for designation as a dangerous offender is a finding of fact which cannot be appealed by the Crown. To succeed on this appeal, it is incumbent on the Crown to demonstrate that the judge erred in law, either in his interpretation of the requirements of s. 753(1) or in some other material way.

[45] Second, the Crown argued, by analogy to *Hill v. The Queen*, [1977] 1 S.C.R. 827, and *R. v. R.A.J.*, 2010 BCCA 304 at para. 12, that this Court has jurisdiction to increase a sentence in response to an appeal filed by an offender—even when the Crown has not cross appealed—if the Crown has provided notice of its intention to seek an increased penalty. In essence, the Crown submits that J.J.P.'s appeal opens the door to a more robust consideration of the reasonableness of the factual findings made by the sentencing judge. I do not intend to decide in this case whether the principle established in *Hill*, which is applicable in regular sentence appeals, applies equally to an appeal filed by an offender under s. 759(1). Even assuming that the principle does apply in this context, it cannot operate to enlarge the statutory jurisdiction of this Court to entertain a Crown appeal from the dismissal of an application made pursuant to Part XXIV (Dangerous Offenders and Long-term Offenders) of the *Code*. By virtue of s. 759(2), the authority of an appellate court to intervene on a Crown appeal from the dismissal of an application that an offender be declared as a dangerous or long-term offender is restricted to questions of law, whether or not the offender puts the sentence in issue.

[46] Against this background, I am of the view that the second ground of appeal does not raise a question of law. The same can likely be said of the third ground of appeal. In any event, I am of the view that neither of these grounds of appeal has any merit and I propose dealing with them briefly at the outset.

1. The Weight Given to Dr. Lohrasbe's Opinion

[47] The essence of the Crown's position on this point is that an expert opinion is not evidence of the facts upon which it is based, and the foundation for much of

Dr. Lohrasbe's opinion came from J.J.P.'s self-report. As J.J.P. did not testify at the sentencing hearing, the Crown submits that the "facts" relied on by Dr. Lohrasbe—including J.J.P.'s remorse and his motivation to avoid future sexual offending—were not established. The Crown says that the judge erred by giving "undue weight" to Dr. Lohrasbe's opinion evidence.

[48] The Crown did not challenge the admissibility of Dr. Lohrasbe's evidence in the sentencing court and does not challenge the admissibility of that evidence on appeal. On well-established authority it was not open to the Crown to argue that Dr. Lohrasbe's evidence was inadmissible. In *Wilband v. The Queen* (1966), [1967] S.C.R. 14 at 21, Justice Fauteux, writing for the Court, noted that while the value of a psychiatrist's opinion may be affected by the extent to which it rests on second-hand source material, that goes to the weight the opinion should be given, not to its admissibility.

[49] There are a number of conceptual problems with this ground of appeal, not the least of which is that it does not raise a question of law. The weight to be given to Dr. Lohrasbe's evidence was a factual determination that fell within the province of the sentencing judge.

[50] Further, Dr. Lohrasbe's opinion did not depend on self-serving hearsay statements made by J.J.P. during the forensic assessment. His opinion was based on: the agreed statements of facts respecting the circumstances of the offences; police interviews of J.J.P. and the victims; other witness statements; the observations he made of J.J.P. during the assessment interview; and the conclusions he drew from those observations on risk-relevant factors, including the credibility of J.J.P.'s expression of remorse and the genuineness of his stated motivation to engage in treatment. Dr. Lohrasbe concluded that the sources of information available to him were adequate to prepare the risk assessment report. He confirmed in cross-examination that "[t]he bulk of [his] risk assessment is anchored in the known facts."

[51] At the end of the day, this Court has no jurisdiction to entertain a Crown appeal from the dismissal of a dangerous offender application that does not raise a question of law. In my view, this ground of appeal does not raise a question of law.

2. Relying on J.J.P.'s "Dock Statement" as Evidence of Remorse

[52] To put this issue in context, Crown counsel invited the judge to follow the requirements of s. 726 of the *Code* and ask J.J.P. if he had anything to say before sentence was imposed. It was not suggested in the court below, and has not been suggested on appeal, that the requirements of s. 726 (found in Part XXIII – Sentencing) do not extend to dangerous offender proceedings (commenced under Part XXIV) or that a judge presiding over a dangerous offender application has no jurisdiction to hear from an offender in an unsworn statement of the type contemplated by s. 726. The practice of permitting an offender to address the court before the imposition of sentence is one that is commonly observed in dangerous and long-term offender proceedings and I know of no authority suggesting that it should not be followed in this context. Doing so is consistent with the established proposition that dangerous offender proceedings are sentencing proceedings in which generally applicable sentencing principles, guidelines and practices apply: *R. v. Steele*, 2014 SCC 61 at para. 40; *R. v. Jones*, [1994] 2 S.C.R. 229 at 279–80; *R. v. Lyons*, [1987] 2 S.C.R. 309 at 350.

[53] Pursuant to this well-established practice, J.J.P. was asked by the judge if he wished to say anything before sentence was imposed. J.J.P. said that he accepted responsibility for his conduct, apologized for his behaviour and sought forgiveness. J.J.P. did not contest any of the agreed facts upon which the guilty pleas were based. For his part, Crown counsel did not object to the judge considering J.J.P.'s statement as evidence of remorse, suggest that this was a disputed fact the judge could not resolve on the evidence already adduced on the application, or argue that J.J.P. was obliged to establish his remorse on a balance of probabilities pursuant to s. 724(3)(d).

[54] In his reasons for sentence, the judge noted that the evidence relevant to treatment prospects came from Dr. Lohrasbe, J.J.P.'s police interviews, "and the apology of J.J.P. at the end of the sentenc[ing] submissions." This is the only reference the judge made in his reasons to J.J.P.'s "dock statement".

[55] I think it is beyond dispute that a judge can consider a statement made by an offender under s. 726 before sentence is passed. Were it otherwise, the provision would serve no useful purpose. An offender's acknowledgement of harm and expression of remorse are factors relevant to the achievement of the sentencing objectives identified by Parliament in Part XXIII of the *Code*.

[56] The Crown seems to suggest on appeal that J.J.P.'s expression of remorse and stated willingness to accept the assistance he will be given to control his disorder was a disputed fact that could only be established by J.J.P. taking the stand. The practical implications of the Crown's position for sentencing proceedings are clear—protracted proceedings would be required to establish whether an offender was sincere in apologizing for their conduct, including in a case of this kind where the sentencing judge had expert evidence before him that the offender was sincerely remorseful for his behaviour.

[57] In support of this proposition, the Crown relies on *R. v. Nur*, 2011 ONSC 4874, and *R. v. Pahl*, 2016 BCCA 234. In my view, both cases are factually distinguishable and neither is of assistance to the Crown on this appeal.

[58] In *Nur*, the offender attempted to use his "dock statement" to advance a mitigating explanation for his criminal conduct. The sentencing judge concluded that the statement was an improper attempt to circumvent the normal rules relating to proof of disputed aggravating and mitigating circumstances and gave no weight to the explanation. This determination was not disturbed on appeal (2013 ONCA 677, affirmed 2015 SCC 15).

[59] In *Pahl*, this Court held that the offender could not put a disputed, mitigating explanation for his offending behaviour "in evidence" through the submissions of his counsel.

[60] In *Nur* and *Pahl*, the offenders sought to have an untested, mitigating, and disputed explanation for their conduct put into evidence. J.J.P. did nothing of the sort in this case. He simply apologized for admitted conduct. I see no parallel between this case and the authorities relied on by the Crown. In my view, it was open to the sentencing judge to place as much or as little weight on J.J.P.'s expression of remorse as he considered appropriate. I see no error in principle here and nothing that played any consequential role in the determination of the sentence. I would not accede to this ground of appeal.

3. Error in Articulating and Applying the Test for a Dangerous Offender Designation

[61] This alleged error lies at the core of the Crown's appeal. As Crown counsel conceded in oral argument, this ground of appeal turns on the judge's use of two words in summarizing what *R. v. Boutilier*, 2017 SCC 64, decided must be established beyond a reasonable doubt before an offender can be designated a dangerous offender. For convenience, the impugned language is reproduced and emphasized in the passage that follows:

> [194] I have concluded from the evidence of Dr. Lohrasbe that J.J.P. is not intractable <u>or untreatable</u> as that term is defined in *Boutilier*.
>
> [Emphasis added.]

[62] The Crown argues it is not required to prove that an offender is "untreatable" or "therapeutically hopeless" to obtain a dangerous offender designation. The Crown submits that by requiring proof beyond a reasonable doubt that J.J.P. is untreatable, the judge erred in law by establishing a more rigorous test at the designation stage than was contemplated in *Boutilier*. The Crown submits that the legislation as a whole cannot reasonably be interpreted as requiring proof of untreatability or therapeutic hopelessness before an offender can be designated as a dangerous offender. On this point, the Crown argues that if such proof were required at the

designation stage, Parliament would not have allowed for the possibility that an offender so designated could receive only a determinate sentence at the penalty stage.

[63] As the scope of *Boutilier* lies at the heart of the Crown's appeal, I turn next to consider what the Crown must prove at the designation stage of a dangerous offender application.

[64] *Boutilier* establishes that an offender cannot be designated as a dangerous offender unless the sentencing judge concludes that he or she is a future "threat" having conducted a prospective assessment of risk: at para. 23. Thus, it is clear from *Boutilier* that sentencing judges must consider an offender's treatment prospects at the designation stage and do so on applications premised on s. 753(1)(a) <u>and</u> s. 753(1)(b): *Boutilier* at paras. 36, 38; *R. v. Skookum*, 2018 YKCA 2 at para. 57.

[65] In order to obtain a dangerous offender designation in this case, the Crown was required to prove beyond a reasonable doubt: (1) that J.J.P. had been convicted of a "serious personal injury offence" as defined in s. 752; and (2) that J.J.P., by his conduct in any sexual matter, including that involved in the commission of the offences for which he had been convicted, demonstrated a failure to control his sexual impulses and the likelihood of causing injury, pain or other evil to other persons through failure in the future to control his sexual impulses. In addition, the Crown was required to prove beyond a reasonable doubt a high likelihood: (3) of harmful recidivism; and (4) that the established pattern of behaviour is intractable (*Boutilier* at footnote 1 and paras. 26, 35–36, 46).

[66] In *Boutilier*, Justice Côté, writing for the majority, explained that "'intractable' conduct" means "behaviour that the offender is unable to surmount": at para. 27. It is significant for the purposes of this appeal that the analysis focuses on the <u>intractability of conduct</u>, not on the intractability of a diagnosed psychiatric disorder. I agree with the submission made by counsel for J.J.P. on appeal that the requirement of intractability ensures that only a very small group of offenders will

meet the criteria for designation. In this way, the requirement of intractability is linked with the constitutionality of the legislative scheme: *Boutilier* at para. 46.

[67] I see no error in law in the judge's articulation of the test governing the designation stage of the Crown's dangerous offender application. In my view, the judge was using the words "untreatable" and "intractable" as synonyms. He was not suggesting that the Crown must prove beyond a reasonable doubt "therapeutic hopelessness." Indeed, I note that this phrase is entirely of the Crown's making—it was not used by the sentencing judge anywhere in his reasons.

[68] The finding of the sentencing judge that J.J.P.'s conduct was not intractable is a finding of fact from which the Crown has no right of appeal. There was an evidentiary basis upon which the judge could come to this conclusion. Dr. Lohrasbe was clear that while J.J.P. has a lifelong, incurable disorder, his <u>conduct</u> is not intractable.

[69] Finally, the Crown's underlying argument—that reading in a requirement of intractability at the designation stage is incompatible with the legislative scheme and with the exercise of discretion to impose a determinate sentence at the penalty stage—is a submission based on *R. v. Szostak*, 2014 ONCA 15 at paras. 53–55, leave to appeal ref'd [2014] S.C.C.A. No. 300. This statutory interpretation argument was made in *Boutilier* and explicitly rejected: see paras. 29–31. It is not open to the Crown to recycle that argument before this Court.

[70] As I am not persuaded that the judge made an error in law in dismissing the Crown's application to have J.J.P. designated a dangerous offender, there is no basis upon which an indeterminate sentence could be imposed.

4. Conclusion on the Crown Appeal

[71] For the foregoing reasons, I would dismiss the Crown's appeal.

V. J.J.P.'s Appeal

[72] J.J.P. appeals from the finding that he is a long-term offender and from the 16-year determinate sentence imposed by the judge. In support of his appeal, J.J.P. advances four grounds of appeal. He asserts that the sentencing judge:

1. Erred in law in his articulation and application of the standard of proof applicable to the criteria governing a long-term offender designation;
2. Erred in principle by designating him a long-term offender before first determining whether a determinate sentence would afford adequate protection to the public;
3. Misapprehended Dr. Lohrasbe's evidence concerning the risk-reducing impact of aging—a misapprehension said to be material to both the type and length of sentence imposed; and
4. Erred by imposing a global sentence that is demonstrably unfit.

1. Alleged Error in the Standard of Proof

[73] Section 753.1(1) sets out the three criteria that must be met before a long-term offender designation can be made: (1) it would be appropriate to impose a sentence of imprisonment of two years or more; (2) there is a substantial risk that the offender will reoffend; and (3) there is a reasonable possibility of eventual control of the risk in the community. Pursuant to s. 753.1(3), if the court finds an offender to be a long-term offender, it shall impose a sentence of not less than two years' imprisonment and order that the offender be made the subject of a long-term supervision order that does not exceed 10 years. If the court does not find the offender to be a long-term offender, the court must impose sentence for the offences for which the offender has been convicted: s. 753.1(6).

[74] Satisfaction of the first criteria is not in issue on this appeal. J.J.P. concedes that the judge properly concluded that it would be appropriate to impose a sentence substantially longer than two years' imprisonment. J.J.P. also concedes there is no burden on the Crown to prove beyond a reasonable doubt the third criterion (a

reasonable possibility of eventual control of the risk in the community). I agree with J.J.P.'s position on both of these issues: see *R. v. Wormell*, 2005 BCCA 328 per Southin J.A. at paras. 32–34 and per Ryan J.A. at paras. 60–63, leave to appeal ref'd (2006), [2005] S.C.C.A. No. 371; *R. v. F.E.D.*, 2007 ONCA 246 at paras. 51–55, leave to appeal ref'd (2008), [2007] S.C.C.A. No. 568.

[75] J.J.P. submits that the Crown is required to prove the second criterion—that he poses a substantial risk of reoffending—beyond a reasonable doubt. Again, I agree with J.J.P.'s position on this issue: see *R. v. L.M.*, 2008 SCC 31 at para. 40; *R. v. C.R.G.*, 2019 BCCA 463 at para. 18; *F.E.D.* at para. 52.

[76] J.J.P. argues that the judge erred by concluding that the Crown was not required to establish beyond a reasonable doubt that he poses a substantial risk to reoffend. In support of this argument, J.J.P. relies on para. 207 of the reasons for sentence which, for convenience, I will reproduce in full again with the impugned passage underlined:

> [207] To be satisfied that s. 753.1[(1)](b) has been met, I must find that there is a substantial risk that the offender J.J.P. would reoffend. Section 753.1(2)(b)(ii) requires a finding that J.J.P. "has shown a likelihood of causing injury, pain or other evil to other persons in the future through similar offences." This section does not require a consideration of the Crown proving beyond a reasonable doubt that J.J.P. is intractable with respect to future treatment or management in the community, as required in a dangerous offender application. See *R. v. Wormell*, cited above. <u>The wording "satisfied" in s. 753.1(2) does not require the Crown to satisfy a burden of proof beyond a reasonable doubt but, rather, that the sentencing judge must be satisfied, having regard to the whole of the evidence, that the public threat could be reduced to an acceptable level through either a long term supervision order or a determinate sentence.</u> See *R. v.* [*D.*] *(F.E.)* (2007), 84 O.R. (3d) 721 (Ont. C.A.) I am satisfied from Dr. Lohrasbe's evidence that without treatment there is a substantial risk that J.J.P. will reoffend.
>
> [Emphasis added.]

[77] The judge did not express himself in this passage as clearly as he might have wished. Among other things, the discussion appears to mix the criteria for a long-term offender designation set out in s. 753.1(1), with the manner in which one of those criteria (a substantial risk of reoffence) may be established—through resort to the presumption set out in s. 753.1(2).

[78] Discerning the meaning of the second half of the impugned paragraph gives rise to interpretive challenges. At least two possibilities present themselves. The first is that the judge, in referencing *F.E.D.* and *Wormell*, mistakenly applied the burden of proof that applies to the third criterion to the second criterion, thereby concluding that the Crown need not prove beyond a reasonable doubt that there is a substantial risk the offender will reoffend. This is the meaning J.J.P. urges this Court to ascribe to the paragraph as doing so would give rise to a clear error in principle.

[79] The second meaning that might be derived from the impugned paragraph is that the judge was addressing the presumption created by s. 753.1(2). Section 753.1(2) provides that the court shall be satisfied there is a substantial risk that the offender will reoffend if the requirements of that subsection are met. This provision gives rise to a conclusive presumption of a "substantial risk" in defined circumstances: *R. v. McLeod*, 1999 BCCA 347 at paras. 26–27; *R. v. Weasel*, 2003 SKCA 131 at para. 56; *D.D. c. R.*, 2006 QCCA 1323 at para. 31. Where those circumstances have not been shown to be present, the issue of "substantial risk" remains to be determined without the benefit of the presumption, on a standard of proof beyond a reasonable doubt.

[80] Where, however, the circumstances set out in s. 753.1(2) are present, the Crown may benefit from the presumption that the "substantial risk" criterion is made out. In the impugned passage, the judge may be referring to the fact that substantial risk need not be proven beyond a reasonable doubt *per se* if the underlying components of s. 753.1(2)(a) and (b)(i) or (b)(ii) are established.

[81] I need not definitively resolve this issue. Even accepting that the paragraph reflects error in principle, I am not persuaded there is a reasonable possibility that the judge would not have found J.J.P. to be a long-term offender but for the error. In *R. v. Johnson*, 2003 SCC 46 at paras. 48–50, the Court accepted the proposition that an appellate court has the power to dismiss an appeal from a finding that an offender is a dangerous or long-term offender on grounds that an identified error of law did not result in a substantial wrong or miscarriage of justice (see also *Sipos* at

paras. 24, 35). The power must only be exercised in rare circumstances.
The test mirrors, in some respects, the operation of the curative proviso set out in s. 686(1)(b)(iii). It asks whether there is any reasonable possibility that the result would have been different had the error in law not been made.

[82] On the evidence in this case, and given the acceptance of Dr. Lohrasbe's opinion, I am satisfied there is no reasonable possibility that the judge would have concluded the Crown had failed to prove beyond a reasonable doubt there is substantial risk J.J.P. will reoffend. Accordingly, this is one of the rare cases in which it is appropriate to exercise the power identified in *Johnson* to dismiss this ground of appeal.

2. Failing to Consider Whether a Determinate Sentence Would Afford Adequate Protection to the Public

[83] The sentencing judge structured his reasons for sentence in the following order: he dismissed the Crown's dangerous offender application; pursuant to s. 753(5)(a), he treated the application as an application for a long-term offender designation; he found that J.J.P. met the criteria for designation as a long-term offender; he imposed a 10-year period of long-term supervision; finally, he imposed a 16-year determinate sentence.

[84] J.J.P. submits that the judge erred in principle by finding him to be a long-term offender without first considering whether the lesser measure of a determinate sentence—standing alone, without a long-term supervision order—would adequately protect the public from the risk of future harm. The essence of J.J.P.'s complaint, as I understand it, is that the judge ought to have first considered whether the least onerous sentencing option (a determinate sentence) would afford adequate protection to the public before imposing a harsher penalty (a long-term offender designation which entails both a determinate sentence and a long-term supervision order). J.J.P. submits that support for his position may be found in *Johnson* at para. 32, and *L.M.* at para. 49 (see also *Boutilier* at para. 70).

[85] I do not propose addressing this ground of appeal in any detail. It raises significant issues that were not well developed in the written submissions of the parties or in oral argument. Further, it is raised by an offender who plainly constitutes a long-term risk to public safety. As noted earlier, J.J.P. has an incurable disorder characterized by deviant sexual urges towards children. Dr. Lohrasbe concluded that even if J.J.P. is at a low risk of reoffending when he is released from the penitentiary, a lengthy period of supervision in the community is advisable given the potential for lifelong persistence of pedophilic urges and fantasies. As Dr. Lohrasbe also pointed out, mandated supervision brings with it resources that may not otherwise be available to J.J.P. when he is back in the community.

[86] Given the nature of the offences committed by J.J.P. and the opinion evidence of Dr. Lohrasbe—which was not contradicted by any other evidence called on the sentencing hearing—there is no reasonable possibility that the judge would not have found J.J.P. to be a long-term offender had the judge structured his reasons in the way in which J.J.P. says was required. Put another way, there is no reasonable possibility that the judge would have found that a determinate sentence, standing alone, would provide adequate protection to the public. It follows that I would not accede to this ground of appeal.

[87] In dismissing J.J.P.'s second ground of appeal on this footing, I do not wish to be taken as endorsing J.J.P.'s position on this point. Without deciding the issue, I would make the following observations.

[88] First, there are important structural differences between the dangerous and long-term offender provisions of the *Code* that need to be taken into account. If an offender is shown to meet the criteria for designation as a dangerous offender, the designation must follow. Discretion, guided by the language of s. 753(4.1) of the *Code*, only arises at the penalty stage where the judge has the three options enumerated in s. 753(4). I note that in *R. v. Lawrence*, 2019 BCCA 291, application to extend time to apply for leave ref'd (2020), [2019] S.C.C.A. No. 491, this Court rejected the proposition that *Boutilier* requires strict adherence to a formulaic

approach in sentencing an individual found to be a dangerous offender. What is required in the sentencing of a dangerous offender is that judges consider the efficacy of less onerous sentencing options: at paras. 82–83.

[89] In contrast, in the long-term offender regime, discretion arises at the designation stage but not the penalty stage: ss. 753(5), 753.1(1) and (3). In the case at bar, once the judge designated J.J.P. a long-term offender, he was required pursuant to s. 753.1(3) to impose a long-term supervision order along with a period of incarceration of a minimum of two years.

[90] Second, I do not wish to be taken as endorsing the proposition advanced by J.J.P. that *L.M.* requires sentencing judges to determine whether a determinate sentence affords adequate public protection before finding an offender to be a long-term offender. The issue raises complex questions that were not fully explored on this appeal. It is best left to be resolved another day where resolution of the issue is necessary to the proper disposition of an appeal.

3. Misapprehension of Evidence Concerning the Risk-Reducing Impact of Aging

[91] Adjusting the determinate sentence to take into account the error made respecting the number of days J.J.P. had served in pre-sentence custody when sentence was imposed, it is my understanding that he will be 61 years of age at his warrant expiry date. At that point, he will be subject to the 10-year period of long-term supervision.

[92] J.J.P. submits, correctly in my view, that resolution of the long-term offender application hinged on whether the Crown proved beyond a reasonable doubt that there was a substantial risk he would reoffend.

[93] J.J.P. submits that the judge misapprehended Dr. Lohrasbe's evidence: (1) on the risk-reducing impact of aging; and (2) on whether long-term supervision was required in this case for public protection purposes. I see no merit in either of these arguments.

[94] On the risk-reducing impact of aging, J.J.P. emphasizes one portion of Dr. Lohrasbe's evidence in which he acknowledged that if J.J.P. followed his treatment plan and benefited from it, he would be at a very low risk for reoffence at the age of 60. The evidence is consistent with Dr. Lohrasbe's observation in his report that, as a general rule, the kind of risk J.J.P. poses to the community "is likely to decline with age." Dr. Lohrasbe's evidence on this point was, however, more textured than J.J.P.'s submission suggests. In cross-examination by Crown counsel, Dr. Lohrasbe said that while risk gradually declines with age, "the die-off is in advanced age. We're talking seventies and eighties." He also agreed with a statement contained in the fifth edition of the American Psychiatric Association's *Diagnostic and Statistical Manual of Mental Disorders* (DSM-V) that a "pedophilic disorder may fluctuate, increase or decrease with age."

[95] The judge concluded that J.J.P. has a lifelong, incurable, but treatable disorder. He acknowledged Dr. Lohrasbe's evidence that "ageing is likely to reduce risk."

[96] The standard an appellant must meet to obtain relief on misapprehension of evidence grounds is high: *R. v. Lohrer*, 2004 SCC 80 at para. 2; *R. v. Webber*, 2019 BCCA 208 at para. 27. The error must be plainly identified. It must also be material in the sense that it formed a central element of the judge's reasoning process that led to the impugned result.

[97] In my view, J.J.P. has not identified any misapprehension of evidence on the part of the sentencing judge related to the impact of aging on the risk of reoffence. The judge was clearly cognizant of this evidence. He concluded, nonetheless, that J.J.P. posed a substantial risk of reoffence. There is ample evidence to support this conclusion. I see no basis upon which this Court could properly interfere with what amounts to a finding of fact on this issue.

[98] J.J.P. also argues that the judge misapprehended Dr. Lohrasbe's evidence on the need for a long-term supervision order in this case. As noted earlier, Dr. Lohrasbe testified that, "if I had my way as a psychiatrist, I would have him under

supervision for the rest of his life if it came to his therapeutic needs only." The judge accurately summarized Dr. Lohrasbe's evidence on this point.

[99] J.J.P. asserts that the judge misunderstood this evidence. He submits that in addressing the need for long-term supervision, Dr. Lohrasbe was speaking only to J.J.P.'s therapeutic needs, not to the need for long-term supervision to guard against the risk of reoffence. I do not agree. Dr. Lohrasbe explained that he framed the above-quoted evidence as he did to avoid speaking to issues that might intrude on the province of the sentencing judge. Reading Dr. Lohrasbe's evidence as a whole leaves me with no doubt that his opinion assumed long-term community supervision would be imposed, not just because of the incurable nature of pedophilic disorder, but also because of the irreparable harm that would be occasioned if J.J.P. acted in the future on his deviant thoughts. Further, it seems obvious to me that J.J.P. requires long-term supervision "from a therapeutic perspective" not solely as a means of self-improvement, but also as a protective measure against the risk of reoffence. In my view, this was implicit in Dr. Lohrasbe's evidence, as was his view that J.J.P. should be subject to a 10-year period of long-term supervision.

[100] I see no misapprehension of the evidence on this point, let alone one that was material to the outcome. It follows that I would not give effect to this ground of appeal.

4. Fitness of the Sentence

[101] The standard of review on an appeal challenging the length of a determinate sentence is deferential. Absent an error in principle shown to have a material impact on the sentence, an appellate court may not vary the sentence unless it is shown to be demonstrably unfit: *R. v. M. (C.A.)*, [1996] 1 S.C.R. 500 at para. 90; *R. v. Lacasse*, 2015 SCC 64 at para. 11; *Friesen* at para. 26; *R. v. Agin*, 2018 BCCA 133 at paras. 52, 56–57.

[102] J.J.P. submits that a global sentence of 16 years' imprisonment is demonstrably unfit. He does not assert error in principle in the reasons for sentence.

[103] Applying the deferential standard of review applicable to this ground of appeal, I see no basis upon which this Court could properly interfere with the sentence imposed. J.J.P.'s moral culpability is extremely high. His conduct was grossly invasive of the personal autonomy, sexual integrity and dignity of the victims. It was meticulously planned. It was repeated over a period of approximately seven years. It involved 13 victims and caused actual and irreparable harm to the victims and their families. It constituted a gross breach of trust. J.J.P. was found to constitute a substantial risk to reoffend.

[104] Against this background, the sentence had to reflect J.J.P.'s moral culpability and give expression to societal denunciation of behaviour that violates one of the most important of our shared communal values—the protection of children from sexual exploitation. The sentence also had to convey in the clearest terms a message of general deterrence. As specific deterrence was also an important sentencing objective in this case, protection of the public from the risk of reoffence was also an important consideration.

[105] The judge took these factors into account. He heavily discounted the sentence that would otherwise have been imposed to respect the totality principle.

[106] In my view, the sentence imposed in this case has not been shown to be demonstrably unfit. As recently noted in *Friesen* at para. 114, "double-digit penitentiary terms should be neither unusual nor reserved for rare or exceptional circumstances." Even so, this is an unusual case. The constellation of aggravating features required the imposition of a sentence in the range imposed by the judge.

5. Conclusion on J.J.P.'s Appeal

[107] Apart from rectifying the judge's mathematical error to give J.J.P. proper credit for the time he served in pre-sentence custody, I would dismiss J.J.P.'s appeal.

VI. Disposition

[108] I would dismiss the Crown's appeal. I would allow J.J.P.'s appeal, but only to the limited extent of crediting him with 1,850 days for pre-sentence custody, rather than the 1,299 days for which the judge gave him credit. In the result, J.J.P. will be credited for having served an additional 551 days in custody.

"The Honourable Mr. Justice Fitch"

I AGREE:

"The Honourable Madam Justice MacKenzie"

I AGREE:

"The Honourable Madam Justice Fisher"