SUPREME COURT OF YUKON

Citation: *R v Nehass*, 2016 YKSC 5

Date: 20160126
S.C. No. 12-01503
Registry: Whitehorse

Between:

HER MAJESTY THE QUEEN

And

MICHAEL DAVID ARCHIE NEHASS

Before Mr. Justice C.S. Brooker

Appearances:

H.N. Kaur — Counsel for the Crown
Sarah Rauch — Counsel for the Defence

REASONS FOR DECISION

INTRODUCTION

[1] This is an Application by the Crown pursuant to s. 752.1(1) of the *Criminal Code of Canada* for an Order of Assessment.

[2] Section 752.1(1) reads:

> On application by the prosecutor, if the court is of the opinion that there are reasonable grounds to believe that an offender who is convicted of a serious personal injury offence or an offence referred to in paragraph 753.1(2)(a) might be found to be a dangerous offender under section 753 or a long-term offender under section 753.1, the court shall, by order in writing, before sentence is imposed, remand the offender, for a period not exceeding 60 days, to the custody of a person designated by the court who can perform an assessment or have an assessment performed by experts for use as evidence in an application under section 753 or 753.1.

[3] The section refers to the Court deciding that the offender might be found to be a dangerous offender under s. 753 or a long-term offender under s. 753.1.

[4] In May of 2015 the offender was found guilty by a jury of three counts, including forcible confinement and assault with a weapon. Prior to the Court sentencing the offender for these crimes, the Crown brought the present application.

[5] The offender, who is now represented by counsel, has brought a *Charter* application. In it, he seeks as one of his remedies, a judicial stay of all proceedings under this Indictment.

[6] At the commencement of this application, Ms. Rauch, the offender's counsel, sought an adjournment. She wished to have the Crown provide additional information and proof of facts surrounding the offender's record. As I understood her argument, she also wanted to argue the constitutional *Charter* issues in advance of this application.

[7] I declined the request for an adjournment and also indicated that this application should be heard before the offender's lengthy *Charter* application.

[8] In my opinion, an application under s. 752.1(1) is intended to be a summary procedural step. Its purpose is to obtain expert evidence to assist the Crown in deciding whether or not to proceed with either a dangerous offender application or a long-term offender application. According to the authorities, the threshold is low. For example, "Is the prospect of the offender being found to be a dangerous or long-term offender within the realm of possibility or beyond it?" See *R v Fulton*, 2006 SKCA 115 at para. 21.

[9] In my view, therefore, engaging in a lengthy and drawn out evidentiary investigation would be counterproductive, adding unnecessary expense and delay to a summary procedure. Since the application is a procedural step as part of the sentencing process in this case, affidavits containing hearsay evidence are acceptable. See *R. v. Jones* [1994] 2 S.C.R. 229 at para.127.

[10] The Crown argues that the offender might be found to be a dangerous offender under s. 753(1.1) or s. 753(1)(a)(i) or s. 753(a)(ii). Alternatively, he might be found to be a long-term offender under S. 753.1(1)(b)(i).

[11] The offender, relying on *R v. Hill* 2012 ONSC 5050, argues that rebuttable presumption that places an onus on the offender in s. 753(1.1) offends the *Charter*. Further, the presumption does not apply because the offender was not in fact sentenced by Judge Ruddy to more than two years – rather it was two years less a day – and in any event, relying on *R v Pike*, 2010 BCCA 401, the Crown has not proven on even the low threshold test, that the offender might be found to be a dangerous or long-term offender.

SECTION 753(1.1) PRESUMPTION

[12] Section 753(1.1) states:

> If the court is satisfied that the offence for which the offender is convicted is a primary designated offence for which it would be appropriate to impose a sentence of imprisonment of two years or more and that the offender was convicted previously at least twice of a primary designated offence and was sentenced to at least two years imprisonment for each of those convictions, the conditions in paragraph (1)(a) or (b), as the case may be, are presumed to have been met unless the contrary is proved on a balance of probabilities.

[13] Here, Mr. Nehass according to his record, which is exhibited in these proceedings, was convicted in December, 2003 of aggravated assault for which he was sentenced to 33 months imprisonment. Aggravated assault is specified a "primary designated offence" under s. 752 of the *Criminal Code*.

[14] In June 2010 Mr. Nehass was again convicted of aggravated assault. The dispute is, however, whether his sentence was two years less a day (as set out in the original CPIC record) or three years jail (as stated in the corrected supplementary criminal record).

[15] At the hearing at this application the Crown produced the oral reasons from the sentencing of Mr. Nehass by Judge Ruddy in June of 2010. Also, at the insistence of Mr. Nehass, the actual recording of Judge Ruddy's passing of sentence was played and marked as an exhibit. From the recording, as well as the transcribed Reasons, it is clear that the sentence passed by Judge Ruddy for this crime was three years in jail. However, she then gave Mr. Nehass credit of one year for pre-trial custody with the result that the time remaining to be served was two years. She then reduced it by one day so that he could serve his remaining time in a territorial facility.

[16] She said in her Reasons at para. 12:

> I conclude that Mr. Nehass' sentence should be reduced by credit for 12 months in pre-trial custody.

[17] And at para. 23:

> At the end of the day, I simply cannot reduce what I believe would otherwise be an appropriate sentence of four years to that suggested by defence counsel. However, I am satisfied that there is sufficient justification to reduce the sentence to one of three years,

> which, after credit for time spent in pre-trial custody, would allow Mr. Nehass to remain within the Yukon.

[18] Although Judge Ruddy said at para. 25: “Accordingly, there will be a sentence of two years less a day for aggravated assault ...”, that was simply the net time remaining to be served after giving credit for pre-trial custody.

[19] The actual sentence imposed on Mr. Nehass for that offence was three years imprisonment. Not only is this consistent with what was written and spoken at the time of sentencing, it is consistent with sentencing principles – Mr. Nehass had already, on a previous conviction for aggravated assault, been sentenced to 33 months.

[20] Interestingly, in *R v Hill, supra*, the Court had occasion to consider whether a sentence imposed of two years less a day after giving credit for pre-trial custody, was equivalent to a sentence of two years 11 months for the purposes of considering s. 753(1.1). The Court held that it was.

[21] Ms. Rauch refers to *Hill* to support her proposition that the s. 753(1.1) presumption infringes s. 7 of the *Charter* and cannot be saved by s. 1 of the *Charter*. Whether or not *Hill* would be followed in this jurisdiction remains to be seen. I need not decide that at this point; it might; it might not; for the purposes of this application it is an open question. The question I must decide is whether or not the presumption might be applied so that the offender might be found to be a dangerous or long-term offender.

[22] I find here that the test is satisfied here under s.753(1.1) and I would therefore grant the Crown application for an assessment on that basis.

IGNORING THE PRESUMPTION

[23] Even ignoring the presumption under s.753(1.1), the evidence in this case persuades me that Mr. Nehass might be found to be a dangerous offender or a long-term offender under s.753(1)(a) or s. 753.1

[24] Section 753(1)(a) states:

> 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
> > >
> > > (iii) any behaviour by the offender, associated with the offence for which he or she has been convicted, that is of such a brutal nature as to compel the conclusion that the offender's behaviour in the future is unlikely to be inhibited by normal standards of behavioural restraint; ...

[25] Section 753.1(1) states:

> 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.

[26] The jury found Mr. Nehass guilty of assault with a weapon and also unlawful confinement. Both these offences fall within the definition of "serious personal injury offence" as defined in s.752(a).

[27] I agree with the Crown's submissions that, having regard to the facts in this case as well as the criminal record of the accused and the affidavit evidence of Jean Plenderleith, Mr. Nehass might be found to be a dangerous offender under s.753(1)(a)(i) or (ii).

[28] Similarly, having regard to the aforesaid evidence, a court might conclude that there may be a reasonable possibility of eventual control of the offender's risk in the community and therefrom it might find that Mr. Nehass meets the necessary criteria to be declared a long-term offender pursuant to s.753.1(1)(b)(i).

CONCLUSION

[29] In the final analysis, the Crown has, on the evidence before me, met the low threshold required under s.752.1(1) in order to have this Court order an assessment under s.752.1 and I do so order.

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BROOKER J.