

IN THE TERRITORIAL COURT OF YUKON
(Before His Honour Chief Judge Lilles)

REGINA

v.

JOHN WALTER SAM

David McWhinnie

Appearing for Crown

John Laluk

Appearing for Defence

REASONS FOR JUDGMENT

[1] LILLES C.J.T.C. (Oral): This then is the matter of John Walter Sam and an application for remand for assessment pursuant to s. 752.1 of the *Criminal Code*. Mr. Sam has entered a guilty plea to an offence contrary to s. 151(a) of the *Criminal Code*, with respect to which the Crown has elected to proceed by way of indictment. The Crown indicated that it is considering an application for a finding that Mr. Sam is a long-term offender. The Crown has made application for an assessment, pursuant to s. 752.1.

[2] The Crown's position is that the assessment referred to is mandatory and it must be both ordered and considered by the court. Section 753.1 is referred to as authority for this position. That section reads in part:

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.

And so the section continues.

[3] The defence position is that s. 753.1 only requires the filing of the assessment with the court if, and only if, an assessment order is made pursuant to s. 752.1. That section is entitled "Application for Remand for Assessment / Report." It states in part:

Where an offender is convicted of a serious personal injury offence or an offence referred in paragraph 753.1(2)(a) and, ...the court is of the opinion that there are reasonable grounds to believe that the offender might be found to be a dangerous offender or a long-term offender under s. 753.1, the court may, by order in writing, remand the offender, for a period not exceeding sixty days, to the custody of the person that the court directs and who can perform an assessment....

And of course that assessment can be used in evidence in this proceeding. The use of the word "may" suggests that when the Crown makes an assessment application pursuant to s. 752.1 the ordering of the report is discretionary.

[4] I have reviewed the decisions of *R. v. McArthur*, [1997] O.J. 5146, (Sup. Ct.Jus) (QL), and *R. v. J.G.T.*, [2000] A.J. 152 (Alta. Q.B.) (QL). Although both of these cases are dangerous offender applications, s. 752.1 applies to both dangerous and long-term offender applications. The wording of s. 753(1), dealing with the procedure for finding a person to be a dangerous offender, is similar to that of s. 753.1 as it relates to the assessment procedures.

[5] In *J.G.T.*, *supra*, it was held that before an application for assessment may be granted, the court must be satisfied that there are reasonable grounds to believe that the offender might be found to be a long-term offender. In other words, there must be some evidence of each of the criteria enumerated in s. 753.1(1) and (2).

[6] The defence acknowledges that these thresholds have been met in the case of Mr. Sam so that it is unnecessary for me to review the evidence placed before me by the Crown in the extensive materials filed with the Court.

[7] I mentioned earlier, in discussions with the Crown and the defence, that I found the reasoning in *McArthur, supra*, to be attractive. I still do. In that case, LaForme J. found that a remand for assessment under s. 752.1 is not mandatory before a dangerous offender application is made. By extrapolation this means that a remand for assessment is also not necessary before an application for a long-term offender application. He stated:

As noted above, the Crown intends to pursue a Dangerous Offender application and thus seeks to have the court order the offender remanded in accordance with s. 752.1 for assessment. The Crown submits that the requirements of s. 753 make it mandatory that an assessment must be obtained under s. 752.1 in order to proceed with a Dangerous Offender application. In other words, the Crown takes the position that if this court does not order a remand for assessment under s. 752.1 then it is foreclosed from seeking to have the offender declared a Dangerous Offender under s. 753. In summary, the Crown's position is; if the Crown fails, for whatever reason, to obtain a court order for remand, the matter is at an end and the offender can only be sentenced in the traditional fashion.

Continuing the quote later on in the case,

It is difficult for me to imagine that Parliament, regardless of the imperfections one might be able to point to in the language of the legislation, could possibly have intended that such an extraordinary potential result could be expressly governed by what, in my view, amounts to a summary proceeding. A proceeding which, again in my view, has as its sole purpose the gathering of one singular, albeit potentially very important and helpful, piece of evidence to be considered by a judge in his or

her subsequent determination of whether or not to impose such an extraordinary sentence.

And later on in the decision the case says,

I do not believe, nor do I find, that such was Parliament's intention. Rather, it seems to me that the intention of Parliament was to provide a mechanism for placing before the hearing judge a further piece of relevant information or evidence for consideration, if he or she deems it necessary. It is clear, at least to me, that s. 752.1 provides discretionary power to a judge to determine, in circumstances where an offender might be found to be dangerous offender, whether any useful purpose can be served by ordering an offender remanded for assessment, not that the judge must regardless of the circumstances.

[8] In this particular case, the judge remanded the offender for the assessment, although it was discretionary. He felt it necessary as the last assessments completed were five to six years old.

[9] I find defence counsel's submission and the reasoning in *McArthur, supra*, persuasive and compelling. A remand for assessment is not mandatory before a long-term offender application can be made. It is a matter of discretion to be exercised judicially, taking into account the serious nature of a long-term offender application as it relates to the serious consequences to the accused. The *Code* requires the Court to consider the likelihood of the offender committing serious offences in the future. A full appreciation of the offender's past conduct and current psychological makeup will be essential in this determination. Hence, the importance of current and complete evaluations or assessments.

[10] This case is exceptional in that the Crown has filed with the court a binder of reports, both psychological, progress and pre-sentence, going back almost 25 years. By my count there are at least five psychological or psychiatric assessments or

reports on file in addition to several pre-sentence reports, progress reports and other reports from various correctional institutions. The last psychological or psychiatric assessment in the Crown's file is dated July 1999. In addition, counsel have located a more recent psychological assessment dated June or July 16th, 2001, an assessment conducted by Dr. Karl Williams.

[11] Defence counsel has also advised me that should a further assessment be ordered by this court, Mr. Sam would not or is highly unlikely to participate in it. In these circumstances, it is my view that little can be gained by exercising my discretion at this time to order a further assessment. For these reasons, I decline the Crown's application.

LILLES C.J.T.C.