COURT OF APPEAL FOR THE YUKON TERRITORY

Citation: ***R. v. Sharp***,
2004 YKCA 10

Date: 20040812
Docket: YU00509

Between:

Regina

Respondent

And

Thomas Paul Sharp

Appellant

THERE IS A BAN ON PUBLICATION PURSUANT TO SECTION 486(4.1) OF THE *CRIMINAL CODE*

Before: The Honourable Madam Justice Saunders
The Honourable Madam Justice Levine
The Honourable Mr. Justice Thackray

G.R. Coffin	Counsel for the Appellant
E.J. Horembala, Q.C. and J.W. Phelps	Counsel for the Respondent
Place and Date of Hearing:	Whitehorse, Yukon Territory May 26, 2004
Place and Date of Judgment:	Vancouver, British Columbia August 12, 2004

Written Reasons by:
The Honourable Madam Justice Saunders

Concurred in by:
The Honourable Madam Justice Levine
The Honourable Mr. Justice Thackray

Reasons for Judgment of the Honourable Madam Justice Saunders:

[1] Mr. Sharp appeals a decision under s. 753 of the ***Criminal Code*** designating him a dangerous offender. The dangerous offender hearing followed his conviction in November 2002 of one count of forcible seizure, one count of breach of recognizance, one count of sexual assault with a weapon, and one count of kidnapping. His conviction appeal on the counts of forcible seizure and breach of recognizance was dismissed on April 7, 2004. Those reasons for judgment may be found at 2004 YKCA 6. The reasons for judgment determining him to be a dangerous offender may be found at 2003 YKSC 54.

[2] The appeal centers on the conclusion of the learned sentencing judge that the Crown had proven beyond a reasonable doubt that there was no reasonable possibility of eventual control of Mr. Sharp's risk in the community. On behalf of Mr. Sharp it is submitted that the sentencing judge erred in failing to give adequate consideration to the possibility of "burn out", the prospects for treatment, both chemical and behavioural, and controlling conditions that could be placed on Mr. Sharp in a supervision order. He seeks an order substituting the dangerous offender designation with a long-term offender designation and appropriate sentence.

[3] A substantial body of evidence concerning Mr. Sharp was placed before the sentencing judge over the course of the ten-day sentencing hearing. The evidence encompassed the predicate offences, Mr. Sharp's prior criminal record in the United States of America and the Yukon Territory, his interaction with treatment counsellors on arriving in the Yukon, the various psychological assessments and treatment programs he has undergone, and expert opinion on Mr. Sharp's past behaviour and future prospects.

[4] Both the long-term offender and dangerous offender designations under the ***Code***, ss. 753 and 753.1 respectively, contemplate a substantial risk the offender will reoffend. However, the court must designate an offender a long-term offender where it is satisfied that "there is a reasonable possibility of eventual control of the risk in the community" (s. 753.1(1)(c)); that is, the difference between the two lies in the degree of intractability of the risk the offender poses to the community. As part of deciding an application that a person be designated a dangerous offender the court must canvass the possibility that the offender may eventually be controlled in the community. In ***R. v. Johnson***, [2003] 2 S.C.R. 357 the Supreme Court of Canada, in statements that set the framework for this appeal, held:

> [29] . . . The principles of sentencing thus dictate that a judge ought to impose an indeterminate sentence only in those instances in which there does not exist less restrictive means by which to protect the public adequately from the threat of harm, i.e., where a definite sentence or long-term offender designation are insufficient. The essential question to be determined, then, is whether the sentencing sanctions available pursuant to the long-term offender provisions are sufficient to reduce this threat to an acceptable level, despite the fact that the statutory criteria in s. 753(1) have been met.
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> [32] .. . If the public threat can be reduced to an acceptable level through either a determinate period of detention or a determinate period of detention followed by a long-term supervision order, a sentencing judge cannot properly declare an offender dangerous and sentence him or her to an indeterminate period of detention.
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> . . .
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> [44] As we have discussed, a sentencing judge should declare the offender dangerous and impose an indeterminate period of detention if, and only if, an indeterminate sentence is the least restrictive means by which to reduce the public threat posed by the offender to an acceptable level. . . .

[5] I turn then to the circumstances that were known to the sentencing judge. I will review them in some detail, as the appeal is based upon the contention that the sentencing judge did not give adequate consideration to the prospect of control in the community of the risk posed by Mr. Sharp.

[6] Mr. Sharp is now 41 years old. On April 24, 1986, he was convicted of attempted rape in connection with an assault on a

78 year old woman. For this offence, committed while he was on probation in California for another offence, he received an indeterminate sentence not to exceed ten years.

[7] On January 5, 1991 Mr. Sharp was released on parole on condition that he enter and complete a treatment program for sexual offenders. The January 1991 report of Dr. Humbert, a psychologist, referred to him "as posing a significant risk to the community". Dr. Humbert observed:

> While Mr. Sharp appears eager to dismiss the sexual nature of his current offense, the fact is that he violently attacked an elderly woman in her own bedroom and that his attack was specifically and maliciously sexual in form.

[8] Within three months of his release his parole was revoked. He was held for about seven weeks and then released. Within two months a recommendation was made to revoke his parole, but by then he had absconded. Nine months later, in March 1992 (while he was still on parole), Mr. Sharp was arrested in the state of Washington and charged with two counts of child molestation in the first degree. The children were 7 and 11 years old. After a trial Mr. Sharp was found guilty and sentenced to a prison term of 126 months on each count. While serving that sentence he signed a letter in which he said he took full responsibility for the crimes of

child molestation. In his testimony in these proceedings, however, he said he had acknowledged the crimes and had "played the game" in order to enter the sexual offender treatment program only because his counsellor threatened that if he did not take the program "he would probably be civilly committed".

[9] Mr. Sharp served his entire sentence for child molestation. Shortly before his release he denied aspects of those offences and, in those proceedings, he again denied the offences. The Treatment Summary prepared in connection with his imprisonment in Washington State indicated that Mr. Sharp said he did not plan to attend any therapeutic setting when released. The author assessed Mr. Sharp's risk in these terms:

> It is difficult to determine Mr. T.P.S.'s risk to reoffend. He has not been in the community more than 10 months prior to reoffending. It was difficult, at times, for Mr. T.P.S. to follow rules and show up for group consistently through out treatment. It was difficult for Mr. T.P.S. to demonstrate consistent changes in his attitudes toward authority figures. The concern for Mr. T.P.S. would be when he is released and begins having relationship problems both with authority figures as well as interpersonal relations. In the past this would be a high-risk situation for him when he begins developing resentment and the "pay back" mentality that caused him to offend in the past. The SOTP treatment team believes that given the actuarial and dynamic factors his risk to reoffend is relatively high. With particular risk factors present such as alcohol

> use Mr. T.P.S.'s risk could increase significantly. There are concerns surrounding his release plans and not having the support when he gets to Canada. Specifically a lack of follow up services and ongoing support with supervision that he would have access to in the US, which will be discussed further in the next section.
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> [Emphasis added.]

[10] Shortly after his release in May 2001, Mr. Sharp moved to Whitehorse, Yukon Territory. On June 13, 2001, he met with a Probation Officer and Sexual Offender Treatment Program Counsellor, who outlined the Sexual Offender Risk Management Program. The Program included a support group. He agreed to participate, but failed to appear for a scheduled interview after his name and photograph were made public. On July 9, he attended a meeting with the Sexual Offender Risk Management team, and indicated he did not wish to participate in treatment or risk management counselling. The next day, June 10, 2001, he advised an officer of the Sexual Offender Risk Management Program that he posed no risk to women in the community.

[11] On July 25, 2001, Mr. Sharp committed the offences of sexual assault with a weapon and kidnapping but his identity as the offender went undetected until January 2002. These two offences occurred when Mr. Sharp approached a young woman at about 10:30 p.m. and, using a knife to threaten her, forced

her to go with him towards a wooded area, where he then sexually assaulted her.

[12] On November 5, 2001, Mr. Sharp attempted to pull a female towards some bushes. He failed as she fought back.

[13] The sentencing judge found as follows:

> [71] I find the following facts from Mr. T.P.S.'s statements and evidence:
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> 1. He has had an abusive childhood. He has been physically and mentally neglected and sexually abused as a child.
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> 2. He participated in the Twin Rivers sex offender treatment program to avoid "civil commitment". He became angry when they would not deal with his childhood issues and thereafter he lied and "played the game".
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> 3. He has previously stated that he doesn't believe the U.S. reports and assessments are of any value.
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> 4. He has stated that his risk to re-offend is nil and that he didn't want to participate in treatment after release from prison in Washington.
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> 5. He did indicate a willingness to be involved in the Yukon sexual offender treatment program, but refused to do so after the unauthorized notification.
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> 6. He now admits that he needs lengthy sexual offender treatment that includes dealing with his childhood issues and treatment that he feels best suits him. If he does not get the treatment he wants, his conflict with authority, revenge and pay-back attitude will continue.

[14] Two experts provided reports: Dr. Singh, who performed the court ordered assessment, and Dr. Lohrasbe, a Crown witness. Dr. Singh interviewed Mr. Sharp; Dr. Lohrasbe did not. The sentencing judge thoroughly canvassed their reports and evidence in the following passages of his reasons.:

> [75] Dr. Singh found Mr. T.P.S. to be reasonably articulate and able to understand the system. However, he concluded that: "It is also reasonably evident that Mr. T.P.S. is unable to demonstrate remorse in relation to serious misdemeanours. His anti-social behaviour has shown little foresight and is not associated with guilt because he seems to have a keen capacity for rationalizing and for blaming his behaviour on others." Dr. Singh used the term "serious misdemeanours" to refer to Mr. T.P.S.'s criminal history.
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> [76] Dr. Singh stated that Mr. T.P.S.'s criminal profile "paints a picture of a man who obviously has serious sexual deviancy."
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> [77] Dr. Singh agreed with the Twin Rivers treatment summary dated April 2, 2001 that Mr. T.P.S.'s risk to commit a new sexual offence based on actuarial assessment is relatively moderate to high. From his perspective, the best indicator for future violence is past behaviour. Dr. Singh concluded the following:
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> 1. Incarceration has had no deterrent effect to reduce Mr. T.P.S.'s sexual deviancy.
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> 2. He has not learned from treatment and is not someone to be trusted in the community.
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> 3. His history indicates a consistent pattern of disregard and disrespect for the opposite gender and an inability to refrain from sexual offending.

4. Mr. T.P.S. demonstrates "a poor development of conscience, lack of concern for the effects of his behaviour on others, indifference to suffering, failure to profit from experience, inability to comprehend how easily people can be hurt not only physically but also mentally."

5. He concludes that "Mr. T.P.S.'s anti-social personality, and his aggressive and hostile sexual deviancy, is likely to continue and his paraphilic [sic] behaviour raises serious concern for the safety of others around him."

[78] Dr. Singh resisted suggestions that Mr. T.P.S. was at a high or extreme risk of reoffending. He did say that he posed a significant risk and a substantial risk. But he would not say that he was at a high risk, which he interpreted to mean he would re-offend at "a graver level."

. . .

[80] Dr. Singh stated that treatment could not occur in the community. He was not optimistic about treatment in custody being successful, with either behavioural or chemical interventions. He stated that treatment often does not show any effect. Sexual offenders like Mr. T.P.S. have to undergo treatment programs several times and even then it may be difficult to say he would be ready for return to the community under structured conditions. Dr. Singh did not say successful treatment of Mr. T.P.S. is impossible, but rather quite difficult as it did not work in the past.

[81] Dr. Singh stated treatment interventions depend significantly on the person's honesty, sincerity and willingness to change. He described these qualities as "rare commodities" in a person who has a sexual deviancy problem.

[82] He indicated that chemical treatments may dissipate sexual fantasies in six months or be completely ineffective. From his point of view, the

anti-libidinal drugs are not a panacea or cure, but must be accompanied by counselling and psychotherapy. He pointed out that the anti-libidinal drugs may have side effects and a person may simply refuse to taken them when in the community.

[83] Dr. Singh was questioned about the "burn-out theory". He described it as the blunting of the aggressive propensity of an individual when they reach their fifties. He did not make any-specific statement about the theory as it related to Mr. T.P.S.

[84] Dr. Lohrasbe is a forensic psychiatrist who has worked on a sessional basis at the Forensic Psychiatric Institute in Port Coquitlam, B.C. . . .

[85] Mr. T.P.S. did not wish to be interviewed by Dr. Lohrasbe, who is a Crown witness. Dr. Lohrasbe was of the view that because of the extensive documentation available, including repeated mental health assessments, and Dr. Singh's report of May 12, 2003, he was able to offer opinions on risk assessment.

[86] I have not admitted Dr. Lohrasbe's opinion on page 23 of his August 6, 2003 report regarding whether Mr. T.P.S. should be a dangerous offender.

[87] However, I found Dr. Lohrasbe's risk assessment for future sexual violence to be useful. . . .

[89] Dr. Lohrasbe summarized as follows:

> An application of the SVR-20 to Mr. T.P.S. therefore demonstrates that 13 risk factors are clearly present, and 7 are neither clearly present nor clearly absent. A striking finding is that not a single risk factor is clearly absent with Mr. T.P.S. Such a risk factor "profile" indicates that the risk he poses for sexual violence in the foreseeable future is high.

. . .

> [91] Dr. Lohrasbe did offer a risk assessment based upon Mr. T.P.S.'s known sexual offences. He found the role of anger and revenge to be a striking feature as a motivator of his sexual violence. He stated that Mr. T.P.S. "has persistently displayed a sense of entitlement" usually found in adolescents or young adults. . . .
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> [93] Dr. Lohrasbe found nothing to suggest that Mr. T.P.S. was a good candidate for risk management strategies in the foreseeable future.
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> [94] As to chemical treatment, Dr. Lohrasbe said that anti-libidinal drugs are most useful in a small number of men who have a high sexual desire and may be brain damaged or mentally handicapped. But it was his opinion that sexual drive is a small component of sexual offending. These drugs also have serious side effects on the heart and liver and cause breast enlargement and testicle shrinkage, side effects that usually result in patients refusing to take them.
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> [97] Dr. Lohrasbe was of the opinion that Mr. T.P.S.'s prospects of successful treatment are poor and likely to fail. However, he stated if treatment succeeded, it would reduce his risk to re-offend. . . . .
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> [99] Dr. Lohrasbe was also asked if the concept of burn-out applied in this case. He described the concept as being both complex and controversial as it arose in the context of violence in general, not sexual violence. With respect to sexual violence, he said he could elaborate on theories, but "we really don't know" and it is a hard concept to apply in a specific case. He did not apply it to Mr. T.P.S.

[15] There is no disagreement with the principles articulated by the sentencing judge. However, it is said on behalf of Mr. Sharp that the sentencing judge did not consider adequately the possibility that Mr. Sharp’s risk of reoffending could be

reduced to an acceptable level in the community through “burn out”, chemical and behavioural treatment, and restrictions imposed on him under a long-term supervision order.

[16] Where there is no error of law, the task of this Court on an appeal from a dangerous offender designation is to determine whether the designation was reasonable: ***R. v. Currie***, [1997] 2 S.C.R. 260, 115 C.C.C. (3d) 205 at paras. 32-35. Because the determination that Mr. Sharp is a dangerous offender is essentially a finding of fact based on the sentencing judge's assessment of the evidence, including his assessment of the credibility of the witnesses called at the hearing, the designation is entitled to considerable deference: ***R. v. Currie*** at paras. 17, 33.

[17] In this case the sentencing judge has given lengthy reasons for judgment and reviewed the evidence in detail. On my review of the evidence, he did not ignore evidence on any aspect of control, and fairly summarized the evidence that was before him. He stated his conclusion on the possibility of eventual control of the risk Mr. Sharp poses to the community at paras. 141 and 142 of his reasons:

> [141] Finally, it is significant that Dr. Singh was of the view that treatment, although not impossible, would be difficult as it had failed in the past. Dr. Lohrasbe's analysis found nothing to suggest that Mr. T.P.S. was a good candidate for risk strategies

> in the future. He stated that Mr. T.P.S.'s treatment prospects were poor and likely to fail.
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> [142] In my view, the factors favouring the reasonable possibility of eventual control of Mr. T.P.S.'s risk in the community are highly speculative. I am persuaded by the experts and Mr. T.P.S.'s own evidence that his sexual assaults arise from a very deep-seated anti-social behaviour that will be difficult to treat. There is no evidence from the experts to suggest that treatment for a finite period of time would reduce his risk to an acceptable level. As a result, I am not satisfied that there is a reasonable possibility of eventual control of Mr. T.P.S.'s substantial risk in the community. I do not find Mr. T.P.S. to be a long-term offender.

[18] I cannot find that those conclusions are unsupported by, or are based on any misapprehension of, the evidence.

[19] With respect to “burn out” the sentencing judge accurately summarized the evidence on this issue and stated its significance at paras. 83 and 99 of his reasons.

[20] The sentencing judge reviewed the evidence on the issue of chemical or behavioural treatment at paras. 80, 81, 82, 93, 94 and 97. Again, those paragraphs accurately summarize the evidence on this issue.

[21] The third possible means of controlling the risk posed by Mr. Sharp would be to place conditions on his release into the community. Again, the evidence received fair treatment: see paras. 80, 81 and 93 of the sentencing judge’s reasons.

[22] But, it is said on behalf of Mr. Sharp, that in his testimony Mr. Sharp expressed willingness to engage in behavioural treatment to explore the underlying anger that he says stems from his childhood. However, the sentencing judge reviewed the testimony of Mr. Sharp and concluded that it did not indicate, given the other evidence before him, the reasonable possibility of "eventual control of Mr. Sharp's risk to the community". That conclusion is amply supported by the evidence.

[23] Mr. Sharp's submissions in effect ask this Court to reweigh the evidence and to reach different conclusions on the controllability of his risk. That is not the task of this Court; rather, absent an error of law, our task is, as earlier indicated, to determine whether the designation is reasonable.

[24] The sentencing judge in this case reached a conclusion based on the evidence before him. While one may hope that Mr. Sharp will eventually find a way to control his risk of reoffending so that he has a viable application for release from prison, at this time and on the information known to the court, there is no basis to interfere with his designation as a dangerous offender.

[25] For these reasons, I would dismiss the appeal.

“The Honourable Madam Justice Saunders”

I AGREE:

“The Honourable Madam Justice Levine”

I AGREE:

“The Honourable Mr. Justice Thackray”