COURT OF APPEAL OF YUKON

Citation: *R. v. Smarch*,
2015 YKCA 13

Date: 20150714
Docket: 14-YU747

Between:

Regina

Appellant

And

James William Smarch

Respondent

Corrected Judgment: The text of the judgment was corrected at page 16, para. [48], on August 4, 2015

Restriction on publication: A publication ban has been mandatorily imposed under s. 486.4 of the *Criminal Code* restricting the publication, broadcasting or transmission in any way of evidence that could identify a complainant or witness, referred to in this judgment by the initials M.B. This publication ban applies indefinitely unless otherwise ordered.

Before: The Honourable Madam Justice Bennett
The Honourable Madam Justice Garson
The Honourable Madam Justice Stromberg-Stein

On appeal from: An order of the Territorial Court of Yukon, dated October 23, 2014 (*R. v. Smarch*, 2014 YKTC 51, Whitehorse Docket 13-00085).

Counsel for the Appellant: N. Sinclair

Counsel for the Respondent: G. Coffin

Place and Date of Hearing: Vancouver, British Columbia
April 1, 2015

Place and Date of Judgment: Vancouver, British Columbia
July 14, 2015

Written Reasons by:
The Honourable Madam Justice Stromberg-Stein

Concurred in by:
The Honourable Madam Justice Bennett
The Honourable Madam Justice Garson

Summary:

Mr. Smarch was convicted of sexually assaulting M.B. and was designated a dangerous offender pursuant to s. 753 of the Criminal Code. The Crown sought a sentence of 4-5 years so Mr. Smarch would have the benefit of federal corrections programs. Based on the evidence of the forensic psychiatrist and the judge's own knowledge of available community programs, the judge concluded that there was a reasonable expectation that a custodial sentence of 16 months, less 14.5 months for pre-sentence custody, and a three-year probation period would adequately protect the public. The Crown argues the judge misapprehended the evidence of the forensic psychiatrist and erroneously relied on his personal knowledge of available community programs. The parties consented to a post-sentence report. Held: Appeal dismissed. While the judge erred in relying on his personal knowledge of programs available in the community, the evidence that was before him, and the post-sentence report, confirm that the determinate sentence he imposed was an appropriate sentence.

Reasons for Judgment of the Honourable Madam Justice Stromberg-Stein:

Background

[1] Mr. Smarch was convicted of sexually assaulting M.B., contrary to s. 271 of the *Criminal Code*, R.S.C. 1985, c. C-46. He also pleaded guilty to two breach offences, contrary to s. 145(3), for violating his curfew and for consuming alcohol. For the sexual assault offence, the judge designated Mr. Smarch a dangerous offender and sentenced him to a determinate sentence of 16 months, less 14.5 months credit for pre-sentence custody. For the breach offences, the trial judge sentenced Mr. Smarch to 1.5 months and one month, consecutive to each other and to the sexual assault sentence. The Crown had sought a sentence of four to five years so that Mr. Smarch would benefit from programs recommended by the forensic psychiatrist provided by Correctional Service of Canada (CSC).

[2] On appeal, the Crown argues that the judge should have imposed a sentence of at least two years or more with a 10-year long-term supervision order (LSO), pursuant to s. 753(4)(b) of the *Criminal Code*. The Crown submits the judge misapprehended the evidence of the forensic psychiatrist who evaluated Mr. Smarch, speculated as to the length of custody that could address his treatment

needs, and imposed a sentence that does not reflect the risk posed by Mr. Smarch and fails to adequately protect the public.

[3] For the reasons that follow, I would dismiss the appeal.

Circumstances of the Offence

[4] On May 2, 2013, a passerby on the Whitehorse riverfront noticed Mr. Smarch lying behind and pressed up against M.B.'s back in a "spooning" position. Mr. Smarch had his pants down and he was moving. M.B. was clothed and not moving. When the police attended, M.B.'s pants were down, exposing her backside. Mr. Smarch was highly intoxicated. M.B. was passed out and unresponsive. The judge concluded the evidence did not support a finding that intercourse had occurred but did support a finding of contact of a sexual nature with M.B., without her consent. The judge found "the actions of Mr. Smarch to have been those of a highly intoxicated individual who likely somewhat spontaneously and opportunistically engaged in sexual contact with the unresponsive M.B.": *R. v. Smarch*, 2013 YKTC 114 at para. 23.

Sentencing Proceedings

[5] The Crown applied to have Mr. Smarch declared a dangerous offender pursuant to s. 753 of the *Criminal Code.* An assessment report was prepared by Dr. Shabreham Lohrasbe, a forensic psychiatrist (the Assessment).

[6] The Crown argued that by his conduct in sexual matters, Mr. Smarch had shown "a failure to control his sexual impulses and a likelihood of causing injury, pain or other evil to other persons through failure in the future to control his sexual impulses": *R. v. Smarch*, 2014 YKTC 51 at para. 7.

[7] In reviewing the circumstances of the case, the sentencing judge noted that Mr. Smarch is a youthful citizen of the Tr'ondek Hwech'in First Nation with a lengthy criminal record. He was 28 years old at the time of sentencing.

[8] In 2000, when Mr. Smarch was 14 years old, he pleaded guilty to one count of breaking and entering and committing an indictable offence (theft), and one count of breaking and entering with intent to commit an indictable offence. Both offences were committed in violation of a curfew. He was charged with breaking and entering and committing sexual assault, but that count was stayed. It was alleged that Mr. Smarch had touched the leg of a woman who was asleep in the house. The sentencing judge held that he could not find a sexual component to these offences.

[9] In 2003, Mr. Smarch pleaded guilty to two counts of breaking and entering and committing sexual assault. The complainants were known to him. In both instances, he undressed, got into the complainant’s bed, and began fondling her. The first complainant was his cousin. With respect to the second complainant, a friend, he put his fingers in her vagina and attempted to have intercourse. She escaped and he threatened to harm her if she told anyone about what had happened. He was 17 years old.

[10] In 2010, Mr. Smarch pleaded guilty to assault, contrary to s. 266 of the *Criminal Code*, and touching a person under the age of 16 for a sexual purpose, contrary to s. 151. He also pleaded guilty to breach of a recognizance to abstain from the consumption of alcohol, breach of an undertaking to have no contact with the complainant, and uttering threats. He had been in a nine-month relationship with the 15-year-old complainant and they had had intercourse on a number of occasions. At one point he punched her in the back of the head and then in the face. He was 22 and 23 years old at the time.

[11] In 2011 Mr. Smarch pleaded guilty to breach of a probation order to abstain from the consumption of alcohol.

[12] The sentencing judge reviewed the court registry files and discovered other convictions: in 2000 for possession of stolen property (a backpack containing beer and three gold nuggets); and in 2011 convictions for breach of a probation order to abstain from alcohol and for failing to attend court.

[13] The judge conducted a lengthy review of the Assessment, which included a detailed discussion of Mr. Smarch's personal circumstances and upbringing, addressed issues relating to Mr. Smarch's risk for future sexual violence, and recommended risk-management strategies.

[14] Mr. Smarch was raised by his mother and stepfather, along with four half-siblings. He may have been sexually abused as a child by his cousin. He did not complete high school. At one point he lived in a foster home with a relative. He claims he consumed alcohol regularly from ages 14 or 15, except for a period between 2003 and 2009, although there is inconsistent information from him and his probation officer. He has used marihuana regularly since age 24 and has occasionally used cocaine, including crack, and non-prescription painkillers.

[15] One cognitive assessment revealed definite but relatively mild cognitive deficits. A previous psychological assessment from 2000 indicated a diagnosis of Conduct Disorder and Substance Abuse. Another assessment, written by a Dr. Williams following the 2003 sexual offences, indicated a diagnosis of Conduct Disorder developing into an Antisocial Personality Disorder. Dr. Williams concluded that without intervention Mr. Smarch was at a high risk for sexual re-offence and there was a possibility of the offences escalating. A neuropsychological assessment from that same year indicated Mr. Smarch suffered from Attention Deficit Hyperactivity Disorder (ADHD), a mild intellectual handicap, and a learning disability (dyslexia).

[16] In the Assessment, Dr. Lohrasbe concluded it is highly likely that Mr. Smarch suffers from Fetal Alcohol Spectrum Disorder (FASD) and that this disorder promoted his sexual offending, the development of his antisocial personality, and his substance abuse. He noted that many people with that disorder "commit some kinds of inappropriate behaviour" and that "[a]s with many patients with FASD he lacks the capacity to maintain an awareness that his judgment, cognitive skills, and interpersonal skills are impaired, and that his sexual and social behaviours are inappropriate": at paras. 69 and 75. He also concluded that the symptoms of ADHD

are mild and it is not clear that medication is necessary; while Mr. Smarch does have Antisocial Personality Disorder, he is not especially psychopathic; and Substance Abuse/Dependence is an ongoing concern.

[17] Dr. Lohrasbe concluded there was “no clear information to suggest that a consistent sexual deviancy is present with Mr. Smarch” and that “[h]is sexual aggression appears to be opportunistic and an extension of his anti-social personality”: at para. 73.

[18] Applying the Risk for Sexual Violence Protocol, Dr. Lohrasbe found that Mr. Smarch’s history and personal characteristics satisfied 13 of 22 categories. He assessed him as being at a high risk for sexual re-offence in the foreseeable future but the seriousness of the risk was likely not at the severe end of the spectrum. He noted that the risk was higher for his intimate partners.

[19] Regarding treatability and risk management, Dr. Lohrasbe was of the opinion that since Mr. Smarch had not been through intensive, risk-related programs, all hope for change was not lost. He recommended a sexual offender program; a substance abuse program; an Aboriginal-focused violence program; and vocational and life-skills training. Dr. Lohrasbe recommended broad management strategies for Mr. Smarch’s reintegration into the community, including supervision, monitoring, treatment and planning. He commented that “[t]he longest period of parole would assist in managing his risk when he is back in the community”: at paras. 81 and 83.

[20] In addition to providing the Assessment, Dr. Lohrasbe testified at the sentencing proceeding. He said Mr. Smarch is not a sexual offender but an impulsive offender who commits sexual offences, and his offending is connected to his substance abuse. He felt Mr. Smarch required a lengthy period of services in the community and not a lengthy period of incarceration. He agreed that “a period of approximately three years of treatment in the Federal Penitentiary system could make sense”, and that on release, “the follow-up treatment should be for as long as possible”: at paras. 93, 95, and 96. He concluded Mr. Smarch could be manageable in the community and that his interest in treatment seemed genuine.

[21] Mr. Smarch testified at the sentencing proceeding about his substance abuse and the programs he had participated in while in custody. These included Substance Abuse Management; Relapse Prevention Program; For the Sake of the Children; and Alcoholics Anonymous. As well, several of his family members spoke in his support and urged leniency from the Court.

[22] The judge reviewed the relevant sentencing provisions and the case authorities interpreting them, including those specifically addressing Aboriginal offenders, and concluded Mr. Smarch met the test for a dangerous offender designation because he had shown a failure to control his sexual impulses and was at a high risk to re-offend. The judge held, having regard to s. 753(1) of the *Criminal Code*, that he was obligated to declare Mr. Smarch a dangerous offender but concluded he was "not amongst the most dangerous of offenders":

> [209] When I look at the relatively lower-end sexually offending behaviour of Mr. Smarch, excluding the one 2003 offence where there was a forcible attempt to have intercourse, the circumstances of his subsequent criminal offending in 2010 and 2013 and the time period between the 2003 offences and these acts, his otherwise not particularly significant criminal history, the assessment of him not being sexually deviant or psychopathic, and the absence of a number of risk factors for sexually offending; while I am required to find him to be a dangerous offender, he certainly is not amongst the most dangerous of offenders.

[23] The dangerous offender designation is not challenged on appeal.

[24] The judge next considered the appropriate sentence for Mr. Smarch, including the application of the *Gladue* factors relative to the dangerous offender designation. Both Crown counsel and defence counsel agreed that an indeterminate sentence was not appropriate and that Mr. Smarch should receive a determinate sentence. The judge commented that it was implicit they agreed "there is a reasonable expectation that a determinate sentence will adequately protect the public against the commission by Mr. Smarch of the [offence] of murder or a serious personal injury offence": at para. 210.

[25] The judge recalled Dr. Lohrasbe's opinion that "what Mr. Smarch needs is a lengthy period of services, not a lengthy period of incarceration. The focus should

not be on years in prison but on the structure available to Mr. Smarch over a lengthy period in the community": at para. 216. He rejected the Crown's submission for a period of incarceration of four to five years in order to allow for three years of treatment in the federal corrections system, finding that such a sentence would be disproportionate to the circumstances of the offence and the offender. He noted again it was significant that Mr. Smarch was diagnosed as not being sexually deviant or psychopathic; alcohol was the most notable risk factor in his offending behaviour; treatment was available to control this factor; and his offending was towards the lower end of the spectrum.

[26] The judge noted the paucity of evidence of available treatment options in the community; however, he relied on his knowledge and experience to conclude there were sufficient resources in Yukon to provide Mr. Smarch with the treatment and monitoring he needs to allow for a reasonable expectation that he will not re-offend violently. Although the judge was uncertain about the intensity of community programs relative to the programs provided by CSC, he found that his uncertainty did not require him to impose a penitentiary sentence.

[27] The judge considered the relevant principles of sentencing, including that for Aboriginal offenders particular attention should be paid to whether a sanction other than imprisonment is appropriate. He found that factors enumerated in *R. v. Gladue*, [1999] 1 S.C.R. 688, including a dysfunctional background, grounded in the harmful, systemic discrimination against Aboriginal peoples. In Mr. Smarch's case, these factors accounted for his FASD and substance abuse.

[28] The judge concluded that for a sanction other than imprisonment to be reasonable, it would need to include sufficient access to treatment and programming, as well as monitoring, to address substance abuse, and sexual and violent offending. He found Mr. Smarch appeared motivated and had the ability to learn skills to reduce risk, although the depth of his insight was limited. He had been sober since his arrest on August 25, 2013, and had participated in programs in custody primarily with respect to sexual offending and substance abuse. He found

that a period of incarceration was necessary for the sexual assault but rejected the appropriateness of a sentence of two years or more imprisonment followed by a long-term supervision order of up to 10 years, pursuant to s. 753(4)(b) of the *Criminal Code*. He held that such a sentence would be contrary to the principles and purposes of sentencing and to Dr. Lohrasbe's opinion. The judge therefore sentenced Mr. Smarch to a determinate sentence of 16 months' custody, less 14.5 months credit for pre-sentence custody. In doing so, he commented as follows at paras. 242–244:

> [242] As such, it appears that the maximum credit for time served in custody which I am able to consider in sentencing Mr. Smarch is 449.5 days (14.78 months). At the time of Mr. Smarch's sentencing hearing on May 29, 2014 based upon *R. v. Chambers*, 2013 YKTC 77 he would have been entitled to 1.5 credit for the entirety of his time in custody which at that time would have resulted in 439.5 days. As of today's date, he would have been entitled to 661.5 days (21.78 months).
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> [243] If I were to sentence Mr. Smarch for the minimum sentence of two years in order to be able to make a long-term supervision order, this would mean that for the index offence he would be required to remain in custody for an additional 280.5 days or 9.22 months less any remission he would be granted.
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> [244] In my opinion this is an excessive period of actual custody and is not required in the circumstances. Such a sentence would, in fact, be contrary to the purposes, objectives and principles of sentencing. As Dr. Lohrasbe stated, from a treatment and risk management perspective, it is not a lengthy period of custody that Mr. Smarch needs, it is a lengthy period of treatment. Mr. Smarch has already spent a lengthy period of time in custody during which he has taken programming. While I find that he will require an additional period of time in order to provide opportunity for him to further stabilize and for plans to be made for his treatment, programming and monitoring in the community, it is not that much time. I believe that a shorter period of incarceration, in the range of four months would be appropriate, for adequate preparations to be made for his release into the community.

[29] In addition to the effective four month sentence for sexual assault, the judge imposed 1.5 months for breach of curfew and one month for breach by consuming alcohol, to be served consecutively and consecutive to the sexual assault sentence. He also imposed a three-year period of probation, including conditions that Mr. Smarch:

1. Not have contact with M.B. unless approved by his probation officer and consented to by M.B., and not at all if he is under the influence of alcohol;

2. Abide by a curfew condition;
3. Not possess or consume controlled drugs or alcohol;
4. Not attend any premises where the primary purpose is the sale of alcohol;
5. Participate in assessment and counselling programs, as directed by his probation officer, in relation to his violence, substance-abuse, and sexual offending issues;
6. Participate in educational or life-skills programming, as directed by his probation officer;
7. Make reasonable efforts to find and maintain suitable employment; and
8. Abide by any further no-contact conditions imposed by his probation officer.

[30] The sentencing judge imposed mandatory DNA and *Sex Offender Information Registration Act* orders, and a 10-year weapons prohibition. He waived the Victim Surcharges.

[31] Mr. Smarch was released from custody on January 15, 2015.

Post-Sentence Report

[32] On February 26, 2015, the parties consented to a Post-Sentence Report (PSR) addressing Mr. Smarch's activities with his peer group and treatment since sentencing. Authority to order and consider a PSR flows from ss. 683 and 687 of the *Criminal Code*: *R. v. Takhar*, 2007 BCCA 423 at para. 10. The report was prepared by Sean Couch-Lacey, a Probation Officer.

[33] The Crown relies on this report to address the community programs and treatment options available to Mr. Smarch. Mr. Smarch objects to the report insofar as it takes issue with a finding of the trial judge about the availability of programs in the community to address Mr. Smarch's risk. It is unclear why this evidence was not before the sentencing judge in the first instance. Given the nature of this appeal, which requires this Court to consider the correctness of a sentence for a designated dangerous offender, I am inclined to view the PSR as being of some assistance.

[34] Mr. Couch-Lacey reports that while in custody serving his sentence, Mr. Smarch was cautioned on two occasions by corrections staff for repeatedly exposing his genitals to female corrections officers. Mr. Smarch said he did so out of anger and frustration, including sexual frustration. Mr. Couch-Lacey expressed significant concern about this behaviour for sexual deviancy on an assessment with the STABLE 2007 Risk/Needs Instrument.

[35] Since his release from custody on February 15, 2015, Mr. Smarch has attended Offender Supervision and Services (OSS) twice per week to visit with a counsellor in the Sexual Offender program and once per week to work with Mr. Couch-Lacey. Mr. Smarch has regularly attended the Sex Offender treatment programming at OSS, and is in the monitoring and risk-assessment phase of that program. Mr. Smarch has, at least once, asserted his innocence for the sexual assault of M.B.

[36] OSS offers spousal and family violence programming, which Mr. Smarch attended prior to the current offence. The OSS does not offer violence programming tailored to Aboriginal persons but does offer a Violence Prevention Program that has an Aboriginal component. It does not offer life-skills training as a core program, but does offer such programming bi-annually. A Substance Abuse Management program is also available. This is in addition to inpatient treatment available in Kwanlin Dun. For vocational training there is a Challenge program, which provides training, support, and employment for persons with cognitive delays.

[37] Mr. Smarch lives with his grandmother and father in the community of Kwanlin Dun, and spends significant time with his family, helping around the house, and helping to care for his grandmother. He draws support from his father, uncle, grandmother, and siblings to abstain from alcohol. He attends church every Sunday and attends AA meetings with his uncle. He reports that he refrains from associating with anyone outside his family in an effort to avoid being around people consuming alcohol and the violence in his community.

[38] As of March 12, 2015, Mr. Smarch had not found employment but indicated he was planning to apply to work with Challenge or Career Industries where he had worked in the past. He was also pursuing an option relating to the care of his father.

[39] The PSR lists the results of several self-report questionnaires administered in furtherance of treatment, which indicate significant problems related to alcohol and drug abuse, and lend support to Mr. Smarch's lack of awareness of problem areas in his life. Mr. Couch-Lacey found this concerning, given Mr. Smarch's ongoing substance abuse treatment, but noted that it could be attributable to his "deficits in memory, insight, and his ability to comprehend written and verbal information." He noted that other professionals working with Mr. Smarch had noticed these deficits.

[40] Mr. Couch-Lacey administered a Complex Needs Screen to determine case management strategies. Mr. Smarch passed the threshold for referral for a Functional Assessment. He was to be re-evaluated at some point in mid-May 2015, presumably in furtherance of this assessment.

[41] Mr. Couch-Lacey noted several programming issues and concerns. OSS programming is designed for those functioning at a minimum of a grade 7 level, whereas Mr. Smarch's reading and writing levels are at a grade 4 and 3 level, respectively. Further, Mr. Smarch's difficulties with attention and verbal instruction, and his cognitive issues, impair his ability to properly engage with program content and assessments. Mr. Couch-Lacey concludes that OSS programming is not suitable for Mr. Smarch, as the programming cannot be modified to address Mr. Smarch's unique needs and does not match the programming suggested by Dr. Lohrasbe. Mr. Couch-Lacey indicates there are several CSC programs that are available in-custody, including programs tailored to Aboriginal individuals.

Issues on appeal

[42] The Crown argues a fit sentence, at the very least, would be two years or more with a 10-year LSO pursuant to s. 753(4)(b) of the *Criminal Code*. The Crown appeals the sentence on four grounds:

1. The judge misapprehended the forensic psychiatric evidence suggesting Mr. Smarch required three years of high-intensity, in-custody programming available through CSC;

2. The judge erred by speculating that four months' custody could address the treatment needs of Mr. Smarch;

3. The judge erred by imposing a sentence inconsistent with his finding that Mr. Smarch is a high-risk, dangerous offender who requires treatment in the community for as long as possible; and

4. The sentence imposed fails to adequately protect the public.

Position of the Parties

The Crown

[43] The Crown submits there was a lack of evidence to support the judge's conclusion that suitable, high-intensity treatment programs were available in Yukon, either in or out of custody, or that a satisfactory risk-management treatment and programming plan could be developed by Yukon corrections authorities for Mr. Smarch. Without such an evidentiary basis, the Crown submits the judge's finding that there was a reasonable expectation that a short period of incarceration and three years' probation would be sufficient to protect the public amounted to speculation and an error of law. The Crown argues that the sentence does not protect the public, which is the primary sentencing objective for dangerous offenders, and it is therefore demonstrably unfit. The Crown notes that Dr. Lohrasbe, considered Mr. Smarch would be "a challenging candidate for treatment" who requires "as wide a range of intensive programs as possible" and the longest possible period of community supervision, and identified Mr. Smarch's compliance problems with past treatment efforts as a risk factor.

Mr. Smarch

[44] Mr. Smarch submits that underlying this appeal is whether it is appropriate to send a designated dangerous Aboriginal offender to a federal prison on a disproportionate sentence, thus removing him from his family and community, in order to access more intensive programs than may be available in his community. He submits the sentencing judge neither erred in law in the sentence he imposed nor misapprehended the evidence of Dr. Lohrasbe. Mr. Smarch asserts that the sentence is not demonstrably unfit and adequately protects the public. He argues Dr. Lohrasbe's evidence was not that three years of high-intensity, in-custody treatment was required but simply identified what treatment would be beneficial. In any event, the judge was not obligated to accept Dr. Lohrasbe's suggestions. The judge had evidence of Mr. Smarch's treatment programs while in custody, as well as his own personal knowledge of available programs in the community. His conclusion that four months' incarceration was an adequate sentence was therefore not speculative. The judge weighed a number of factors in determining a fit sentence, including that the offending behaviour was on the less serious end of the spectrum; Mr. Smarch's other criminal history was not particularly significant; he was not considered sexually deviant or psychopathic; many risks for sexual re-offence were absent; the *Gladue* factors were applicable; the most notable risk factor was alcohol abuse; and Mr. Smarch had already spent significant time in custody and had participated in a number of programs.

Legal Principles Governing Dangerous Offender Sentencing

[45] Where a judge has declared an individual to be a dangerous offender pursuant to s. 753(1) of the *Criminal Code*, ss. 753(4) and (4.1), govern the sentence to be imposed. Those provisions provide:

> (4) If the court finds an offender to be a dangerous offender, it shall
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> (a) impose a sentence of detention in a penitentiary for an indeterminate period;
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> (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
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> (c) impose a sentence for the offence for which the offender has been convicted.
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> (4.1) The court shall impose a sentence of detention in a penitentiary for an indeterminate period unless it is satisfied by the evidence adduced during the hearing of the application that there is a reasonable expectation that a lesser measure under paragraph (4)(b) or (c) will adequately protect the public against the commission by the offender of murder or a serious personal injury offence.

[46] There is no dispute that the primary purpose of sentencing in the dangerous offender context is the protection of the public: *R. v. Johnson*, 2003 SCC 46 at para. 19. In *Johnson*, the Court confirmed, however, that dangerous offender proceedings, as part of the sentencing process, “must be guided by the fundamental purpose and principles of sentencing contained in ss. 718 to 718.2” of the *Criminal Code*: *Johnson* at para. 23. The Court further cited *Lyons*, [1987] 2 S.C.R. 309 at 329, for the proposition that preventive detention “simply represents a judgment that the relative importance of the objectives of rehabilitation, deterrence and retribution are greatly attenuated in the circumstances of the individual case, and that of prevention, correspondingly increased”: *Johnson* at para 23.

[47] A sentencing judge must also consider “the possibility that a less restrictive sanction would attain the same sentencing objectives that a more restrictive sanction seeks to attain”: *Johnson* at para. 28. With respect to the principle of proportionality in dangerous offender sentencing, in *R. v. Armstrong*, 2014 BCCA 174, this Court held, “a proportionate sentence is one that not only balances the nature of the offence and the circumstances of the offender, but also gives considerable weight to the protection of the public”: *Armstrong* at para. 72. Similarly, the principles surrounding the sentencing of Aboriginal offenders, set out by the Supreme Court of Canada in *R. v. Gladue*, [1999] 1 S.C.R. 688, apply in the context of dangerous offender sentencing, though their application may be more limited: see *R. v. Ominayak*, 2012 ABCA 337 at para. 41; and *R. v. Standingwater*, 2013 SKCA 78 at para. 49; *contra R. v. Shanoss*, 2013 BCSC 2335 at para. 165.

[48] In determining whether there is a reasonable expectation that a lesser measure will adequately protect the public, there has to be evidence before the court that the dangerous offender can be safely released into the community. In *R. v. Bitternose*, 2013 ABCA 220 at paras. 30–37, the Court held that the mere hope of the existence of community programs is insufficient to address the reasonable expectation of protection of the public. There must be evidence of the existence of community resources that will provide the requisite level of supervision outside of custody to provide adequate protection of the public. Further, in *R. v. Trevor*, 2010 BCCA 331 at para. 35, the Court held that a judge cannot assume that the necessary resources are available to properly supervise an offender on an LSO in order to provide a reasonable possibility of control in the community of the risk of re-offending (*Trevor* was decided under the previous regime, which required a "reasonable possibility" of control of risk). Similarly, as recently held by the Court in the context of proceedings under the current dangerous offender provisions, "it is well established that it is an error of law to make a finding of fact for which there is no evidence": *R. v. D.J.S.*, 2015 BCCA 111 at para. 31, citing *R. v. J.M.H.*, 2011 SCC 45 at para. 25.

Standard of Review

[49] Section 759(3) of the *Criminal Code*, which applies to appeals under Part XXIV of the *Code* (Dangerous Offenders and Long-Term Offenders), provides that this Court may impose any order that may be made by a trial court under Part XXIV, order a new hearing, or dismiss an appeal.

[50] The Crown may appeal a decision made under Part XXIV only on a "ground of law": *Criminal Code*, s. 759(2). Since the Crown challenges the sentencing judge's conclusion under s. 753(4.1) that there was no evidence supporting a reasonable expectation that a sentence under s. 753(4)(c) would adequately protect the public against the commission by Mr. Smarch of murder or a serious personal injury offence, as opposed to a sentence under s. 753(4)(b), the Crown must demonstrate that in so doing, the judge erred in law. As the Supreme Court of

Canada held in *Housen v. Nikolaisen*, 2002 SCC 33 at para. 36, (cited recently by this Court in the dangerous offender context in *D.J.S.* at para. 28) errors of law can arise from questions of mixed fact and law where they are "readily extricable".

[51] Even if the Crown is able to demonstrate an error of law, it must still satisfy this Court that the error amounts to reversible error. I draw this conclusion from the Supreme Court of Canada's holding in *Johnson* at paras. 48–50, decided in relation to the previous dangerous and long-term offender regime, where it imported the reversible error standard in the curative proviso in s. 686(1)(b)(iii) of the *Code* to appeals by offenders against dangerous offender designations. The Court said in *Johnson:*

> [49] It is a reasonable assumption, in our view, that Parliament would not have intended that any error of law in the course of a dangerous offender application would necessitate a new hearing. As Prowse J.A. correctly concluded in the companion case, *R. v. Mitchell* (2002), 161 C.C.C. (3d) 508, 2002 BCCA 48, at para. 63:
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>> . . . it would defy common sense to presume that Parliament intended to preclude the court of appeal from dismissing an appeal where a sentencing judge makes a trivial or immaterial error in the course of dangerous or long-term offender proceedings. While the court of appeal is given the power to order a new hearing, it is not bound to do so simply because the appellant is able to point to an error on the part of the sentencing judge. Rather, the court must assess the nature and effect of the error to determine whether it justifies the substitution of a different sentence, a new hearing or a dismissal of the appeal.
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> [Emphasis added.]

[52] Appellate courts have, in various ways, applied reversible error standards to Crown appeals relating to determinations made under the dangerous and long-term offender provisions; however, Crown appeals from determinations made under s. 753(4.1) raise specific considerations. As observed by the Alberta Court of Appeal in *Bitternose* at para. 36, a Crown appeal regarding a determination under s. 753(4.1) differs from a Crown appeal of an acquittal because "the statutory test … expressly calls for evidence founding a reasonable expectation of adequate public protection. The offender does not succeed merely because of some chance of protection, nor some evidence, nor a reasonable doubt. The Crown need not

disprove such protection beyond a reasonable doubt." After finding that the judge had erred in imposing a determinate sentence on a dangerous offender despite a lack of evidence establishing the existence of facilities that could supervise the offender, the Court concluded that "the error was far from harmless; it was operative": *Bitternose* at para. 40.

[53] Thus, I conclude that this Court must assess the nature and effect of any error to determine whether it justifies the substitution of a different sentence, a new hearing or a dismissal of the appeal, and give consideration to whether the error was operative or merely harmless.

Discussion

[54] I agree with the Crown that the foundation for the sentence in this case, at least in part, was based on an absence of evidence, which is an error in law. There was no evidence before the judge regarding programs that could adequately supervise Mr. Smarch in the community; rather, the judge based his conclusion that such programs were available on his own knowledge and experience. This is not enough. But that does not end the inquiry in this case, given the evidence now before this Court.

[55] The Crown submits that Mr. Smarch spends a good deal of time unsupervised. It says that no intensive individualized program has been designed for him and that such programs would be available through federal corrections. As the Crown recognizes, the difficulty is that Mr. Smarch functions at a low level and has unique needs but is considered a high risk to re-offend. As such, he poses a risk to the community to commit a serious personal injury offence. Thus, the Crown asserts, he should be given a disproportionate sentence – that is, penitentiary time.

[56] Counsel for Mr. Smarch points out that the sentencing judge balanced the principles of sentencing while recognizing that protection of the public was the primary consideration. In reaching the result he did, the judge did not err in his balancing because of three factors: Mr. Smarch was not sexually deviant or

psychopathic; the relative seriousness of the offence was at the lower end and it was an offence of opportunity and not premeditation; and Mr. Smarch was treatable and manageable in the community, with the main focus being on his substance abuse issues.

[57] On the basis of the evidence that was before the trial judge, and the evidence now before this Court, I am satisfied that any error by the judge was harmless and that neither a longer sentence nor a new hearing is justified. The evidence supports a reasonable expectation that the sentence imposed will adequately protect the public. Firstly and most importantly, the sentencing judge recognized that Mr. Smarch had been in custody for a substantial time before he was sentenced and had already had the advantage of several programs at Whitehorse Correctional Centre, a territorial correctional facility. He concluded Mr. Smarch did not need more time in custody than the sentence imposed in order to adequately protect the public, and that more time would be disproportionate for this offender and this offence. I agree.

[58] In so concluding, the judge properly considered the *Gladue* principles, which are applicable to Mr. Smarch, who is the product of a dysfunctional background grounded in the harmful, systemic discrimination against Aboriginal peoples.

[59] Secondly, the PSR indicates that there are programs available in Mr. Smarch's community that can focus on the concerns raised by Dr. Lohrasbe, albeit perhaps not to the same degree of intensity as CSC programs. In particular, I note that there is evidence that Mr. Smarch has been attending AA meetings, and that a Substance Abuse Management program and an inpatient substance abuse program are available, all of which target the key factor cited by Dr. Lohrasbe as his primary concern for risk of re-offence. While I acknowledge that Mr. Couch-Lacey's evidence is that the Substance Abuse Management program cannot be modified to completely match Dr. Lohrasbe's treatment recommendations, I am confident that he can work to ensure that adequate accommodations are made. In my view, it would be wholly inappropriate to sentence Mr. Smarch to a minimum of two years'

incarceration and return him to prison solely to access federal programs. As his counsel points out, this would take Mr. Smarch, an Aboriginal man with cognitive and substance abuse issues, from his community and his family – a family that has served as a significant support for him following his release from custody. I note that the evidence before this Court indicates that Mr. Smarch has had success in abstaining from alcohol since his release.

[60] In my view, the judge did not misapprehend the forensic psychiatric evidence. Dr. Lohrasbe's evidence was not that Mr. Smarch required three years of high-intensity, in-custody programming available through CSC; rather, he identified what programming could assist to address the risk Mr. Smarch posed, which the judge pinpointed as programming that would address his substance abuse. Such programs are available in his community. I find the judge did not err by concluding that four months' additional custody, followed by three years of community supervision, could address the treatment needs of Mr. Smarch. I conclude that the judge imposed a sentence that adequately protects the public and is consistent with his finding that Mr. Smarch is a high-risk, dangerous offender who requires treatment in the community.

Conclusion

[61] I would dismiss the appeal.

"The Honourable Madam Justice Stromberg-Stein"

I Agree:

"The Honourable Madam Justice Bennett"

I Agree:

"The Honourable Madam Justice Garson"