COURT OF APPEAL OF YUKON

Citation: *R. v. Lange*,
2019 YKCA 2

Date: 20190115
Docket: 15-YU771

Between:

Regina

Respondent

And

Mark Lewis Lange

Appellant

Before: The Honourable Chief Justice Bauman
The Honourable Madam Justice Cooper
The Honourable Mr. Justice Fitch

On appeal from: An order of the Territorial Court of Yukon,
dated November 27, 2015 (*R. v. Lange*, 2015 YKTC 43,
Whitehorse Docket No. 14-00138).

Counsel for the Appellant:	V. Larochelle
Counsel for the Respondent:	N. Sinclair
Place and Date of Hearing:	Whitehorse, Yukon May 11, 2018
Place and Date of Judgment:	Vancouver, British Columbia January 15, 2019

Written Reasons by:
The Honourable Madam Justice Cooper
The Honourable Mr. Justice Fitch

Concurred in by:
The Honourable Chief Justice Bauman

Summary:

The appellant appeals his dangerous offender designation or, alternatively, the imposition of an indeterminate sentence. He says the sentencing judge erred by not providing any or sufficient reasons for the designation and by failing to consider his treatment prospects at the designation stage of the proceedings. The Crown concedes the latter issue, but argues that the dangerous offender designation was the only reasonable outcome. Held: the appeal is allowed. The sentencing judge erred in principle by failing to consider treatment prospects at the designation stage. On the evidence in this case and in the absence of clear factual findings respecting the appellant's treatment prospects, the Court is unable to conclude that there is no reasonable possibility that a different result would have been reached absent the error. The matter is remitted for a new hearing.

Reasons for Judgment of the Honourable Madam Justice Cooper and the Honourable Mr. Justice Fitch:

INTRODUCTION

[1] Mr. Mark Lange appeals his dangerous offender designation or, alternatively, the imposition of an indeterminate sentence. For the reasons that follow, we are of the view that the appeal must be allowed, the dangerous offender designation set aside, and the matter remitted for a new hearing.

BACKGROUND

[2] In June of 2014, the appellant was charged with aggravated assault. He subsequently pleaded guilty to the included offence of assault causing bodily harm. The Crown brought an application to have him declared a dangerous offender pursuant to s. 753(1)(a)(i) and (ii) of the *Criminal Code*, R.S.C. 1985, c. C-46 [*Criminal Code*]. On November 27, 2015, the appellant was declared a dangerous offender and sentenced to an indeterminate sentence. The reasons for judgment are indexed as 2015 YKTC 43.

[3] For the purposes of the dangerous offender proceeding, the sentencing judge had information regarding the appellant's prior convictions, which consist of a mix of violent offences, property offences and offences for breaching court orders. To establish the requisite pattern, the Crown relied on the following convictions:

- 1990 (Youth Court): Assault with a weapon (s. 267(1)(a) of the *Criminal Code*) – 18 months' probation;

- 1998: Assault causing bodily harm (s. 267(1)(b) of the *Criminal Code*) – 6 months' imprisonment to be followed by 18 months' probation;

- 1998: Assault (s. 266 of the *Criminal Code*) – 60 days' imprisonment, consecutive to the sentence being served for assault causing bodily harm;

- 2006: Manslaughter (s. 236 of the *Criminal* Code) – 9 years and 4 months' imprisonment; and

- 2014: Uttering threats (s. 264.1(1)(a) of the *Criminal Code*) – 75 days' imprisonment, to be followed by 9 months' probation.

[4] The sentencing judge was provided with numerous documents from prior court proceedings, affidavits and evidence from corrections representatives and, as the appellant is Indigenous, a *Gladue* report. The sentencing judge also had two psychiatric assessments prepared by forensic psychiatrist Dr. Shabehram Lohrasbe – one from 2012 and one prepared for the purposes of the 2015 proceedings. The 2015 assessment addressed the prospects of successful treatment of the appellant.

[5] In his report, Dr. Lohrasbe stated that while it was possible that Attention Deficit Hyperactivity Disorder (ADHD), Fetal Alcohol Spectrum Disorder (FASD), and brain injury were present, the risks associated with medicating for any of these diagnoses outweighed any benefits that might be achieved.

[6] He determined that the appellant displayed anti-social attitudes, values, and behaviours but that he had responded well to programming in the past and that "[h]e can do better with appropriate guidance in the future."

[7] Alcohol was identified as a factor in the appellant's criminality. He had periods of sobriety, including an extended period of seven years. A stronger commitment to sobriety would require "support and supervision, but again it is doable." Dr. Lohrasbe

concluded that, should certain preconditions be met, the appellant could be safely supervised in the community.

[8] The sentencing judge reviewed the evidence. He outlined the nature and circumstances of the predicate offence and the prior offences. He discussed the background and personal circumstances of the appellant. He reviewed the treatment which the appellant had undergone over the years and made reference to some of the conclusions in the 2015 psychiatric assessment. The sentencing judge concluded:

> [47] Based on the analysis of the criminal record and the facts of the predicate offence, the psychiatric assessment report, the other reports and the *viva voce* testimony, the Court has no hesitation whatsoever in declaring Mr. Lange a dangerous offender under subsections 753(1)(a)(i) and 753(1)(a)(ii) of the *Code*.

[9] Having found Mr. Lange to be a dangerous offender, the sentencing judge proceeded to consider whether there was a reasonable expectation that a sentence other than an indeterminate one would adequately protect the public. He decided that it would not.

ISSUES

[10] The issues on this appeal are:

1. Did the sentencing judge err in not providing sufficient reasons?
2. Did the sentencing judge err in not considering prospects for treatment at the designation stage of the proceedings?
3. Did the sentencing judge err in failing to consider whether the predicate offence was part of a broader pattern of violent behaviour?
4. Is the indeterminate sentence demonstrably unfit?

APPLICABLE LAW

[11] The relevant provisions of the *Criminal Code* provide:

> **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
> >
> > **(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; or
>
> …
>
> **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.
>
> **Sentence of indeterminate detention**
>
> **(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.

ANALYSIS

[12] The sentencing judge did not have the benefit of the Supreme Court of Canada's decision in *R. v. Boutilier*, 2017 SCC 64, which confirmed that s. 753(1) of the *Criminal Code* – the designation stage of the dangerous offender proceedings –

requires the court to consider an offender's future treatment prospects. The failure to do so constitutes error in principle.

[13] The Crown concedes that the sentencing judge erred by failing to consider treatment prospects at the designation stage. The Crown argues, however, that based on the evidence, the only reasonable result was the dangerous offender designation. The Crown urges the Court to dismiss the appeal.

[14] Having found that the sentencing judge erred, the Court can dismiss the appeal if there is no reasonable possibility that the verdict would have been any different had the error of law not been made: *R. v. Johnson*, 2003 SCC 46 at para. 49. In this case, it is not possible for the Court to determine what the verdict would have been if the judge had not erred because he failed to give sufficient reasons for his decision. Thus, the second ground of appeal is inextricably connected with the first.

[15] There was evidence before the sentencing judge regarding the appellant's treatment prospects in the form of Dr. Lohrasbe's assessment report. Dr. Lohrasbe's conclusions on the subject of treatability were as follows:

> To summarize treatability: Mr. Lange has engaged with and benefited from programs in the past. While his relapse into substance abuse and his violence are of obvious concern, it does not follow that further treatment interventions are worthless. It is a lamentable fact that such relapses occur with some frequency ('old habits die hard'). In my opinion, given his strengths but acknowledging the long road he has ahead of him, it is still reasonable to hypothesize that with further treatment interventions, and further growth on his part, his risk could be reduced to levels that can be managed in the community in the foreseeable future. Such interventions should not be focused on what he *has* (as much as such would be his preference), but on who he *is*, what he *does*, and the way he approaches and responds to what he *encounters* in the future.
>
> …
>
> …To safely supervise an offender such as Mr. Lange in the community, there has to be a strong alliance between him and his supervisors. Such an alliance is based on Mr. Lange moving toward openness, honesty, disclosiveness, and behavioural cooperation. If he continues to harbour hostility toward representatives 'of the system', and mistrusts the individuals charged with his monitoring and supervision in the community, risk management will be problematic…
>
> He is very cognisant of the fact that current sentencing proceedings mean that he has 'run out of chances', and that any further acts of significant violence may result in a lengthy incarceration. His 'jailhouse fatigue' and his knowledge

> that he will have no more chances may be strong motivators for treatment and for compliance with supervision. He is mindful that he had been given the opportunity to redeem himself and has failed. He is aware that time is running out for him to put his talents [as an artist] at the forefront of his identity. Such awareness is likely to assist in motivation for renewed efforts to examine and shift his attitudes. If he engages in the treatment programs that will be offered to him and learns that he benefits through cooperation and compliance, he may gradually come to see that 'the system' shares with him the goal of keeping him out of jails and prisons. It is then that the combination of aging, maturity, 'burnout', and close monitoring of his commitment to abstinence may be sufficient for safe risk management in the community.
>
> [Emphasis in original]

[16] The assessment report concluded with a summary, which stated:

> At present and in the foreseeable future:
>
> A. Mr. Lange will pose a high risk for violence.
>
> B. Further engagement in therapeutic programs available within the penitentiary system are likely to be of assistance in reducing risk. The goal would be to get him to the point where managing his risk in the community can reasonably be envisioned.
>
> C. Before risk management in the community can be contemplated, Mr. Lange will need to have a track record of cooperation, honesty, and disclosure.
>
> D. To manage his risk in the community, his supervisors would need to have a high level of confidence that Mr. Lange is genuine and steadfast in his commitment to total abstinence from alcohol and all intoxicants.
>
> E. Such preconditions to safe management in the community, while challenging, are not outside the realm of reasonable possibility.
>
> F. When Mr. Lange is released into the community, the lengthier the period of parole, the greater the chances of preventing further violence, through a combination of monitoring, supervision, therapy, and victim safety planning.

[17] Dr. Lohrasbe's report was supplemented by his testimony given during the hearing.

[18] In cross-examination of Dr. Lohrasbe, defence counsel highlighted factors that had the potential to positively impact the appellant's prospects for successful treatment. These included the motivation for change provided by the court proceedings; further engagement in programming while incarcerated; the appellant's intellectual curiosity and understanding that he is becoming institutionalized, which speak to his insight; the gains he made while previously incarcerated; his age; his

acceptance of responsibility; and the benefits of a supportive transitional period upon release.

[19] Dr. Lohrasbe's cross-examination concluded with the following exchange:

> Q And so would it be your opinion that, if, given all of these positive features and assuming for argument['s] sake, his acceptance of treatment and programming and engagement that is it your opinion that there would be a reasonable expectation he could be managed in the community?
>
> A Yes.
>
> [Emphasis added.]

[20] Thus, Dr. Lohrasbe's conclusion was that successful treatment was a "reasonable possibility", or that there was a "reasonable expectation" of successful treatment, if the appellant committed himself to a treatment program; established a track record of cooperation, honesty, and disclosure; and was committed to total abstinence from alcohol and all intoxicants. Given this evidence, it was incumbent upon the sentencing judge to make factual findings regarding the appellant's ability to achieve the preconditions and be successfully treated. Depending on how the sentencing judge assessed the evidence, a finding that the Crown had not discharged its onus for the appellant to be designated a dangerous offender was a reasonably possible outcome.

[21] Regrettably, although the sentencing judge reviewed Dr. Lohrasbe's evidence, he did not make findings of fact in relation to it. It is not possible to determine from the reasons for sentence what he considered to be the likelihood of the appellant achieving the pre-conditions to successful treatment, nor is it possible to determine, if those pre-conditions were met, what he considered to be the likelihood of successful treatment.

[22] In this respect, the case at bar differs from *R. v. Wesley*, 2018 ONCA 636 at para. 17, and *R. v. Malakpour*, 2018 BCCA 254 at paras. 95–98. In each of these cases, the sentencing judge made findings of fact that the appellate court was able to assess in the context of the applicable law and determine that the result would not

have been different had the sentencing judge properly considered treatability at the designation stage. We do not have the benefit of such findings.

DISPOSITION

[23] The sentencing judge erred in principle by failing to consider treatment prospects at the designation stage. Given the evidence in this case, it cannot be said there is no reasonable possibility of a different result had the error not been made. In the absence of clear factual findings on this critical issue, it is our view that the Court is not in a position to affirm the dangerous offender finding nor is it in a position to substitute for the dangerous offender finding a finding that the appellant is a long-term offender. Unfortunately, a new hearing before a different judge is required and we would make that order under s. 759(3)(a)(ii) of the *Criminal Code*.

[24] Given the findings on the first two grounds of appeal it is unnecessary to consider the remaining grounds.

"The Honourable Madam Justice Cooper"

"The Honourable Mr. Justice Fitch"

I AGREE:

"The Honourable Chief Justice Bauman"