NOVA SCOTIA COURT OF APPEAL
Citation: *R. v. Bailey*, 2017 NSCA 48

Date: 20170606
Docket: CAC 427183
Registry: Halifax

Between:

Lloyd Eugene Bailey

Appellant

v.

Her Majesty the Queen

Respondent

Restriction on Publication: 486.4 of the Criminal Code of Canada, R.S.C. 1985, c. C-46

Judges:	Per Curiam (Saunders, Hamilton and Scanlan, JJ.A.)
Appeal Heard:	April 18 and 19, 2017, in Halifax, Nova Scotia
Subject:	Appeal of convictions on a number of sex related offences and appeal of designation as a dangerous offender, sentenced to indeterminate sentences.
Summary:	The appellant sexually assaulted a victim whom he had befriended and lured into a hotel room, ostensibly to engage in a modeling photo-shoot. As part of his scheme he administered an intoxicating substance to the victim. To assist him in carrying out the assault he placed a shoe lace around the victim's neck and choked her to the point that she was losing consciousness. The assault ended only when other patrons in the hotel heard screaming and summoned management to the room, allowing the victim an opportunity to escape. The appellant had assaulted other females in the past, one being only 12 years old at the time of the assault. Each one of

the victims were lured into a situation that provided the appellant an opportunity to be alone with the victims. In each case he applied a weapon or force to the neck area of the victim to subdue them.

Upon conviction, the Crown applied to have the appellant declared a Dangerous Offender pursuant to the provisions of the *Criminal Code*. Expert evidence was called and, that evidence, together with the evidence from two earlier victims, was sufficient to satisfy the trial judge that Mr. Bailey was a dangerous offender.

Mr. Bailey was sentenced as a dangerous offender to indeterminate sentences.

Issues:

(1) Was the similar fact evidence from the two earlier victims admissible?

(2) Was the appellant entitled to present fresh evidence on appeal related to accessing the contents of his cell phone?

(3) Miscellaneous items related to appeal on the merits.

(4) Did the sentencing judge err in declaring Mr. Bailey a dangerous offender and imposing indeterminate sentences?

Result:

(1) The trial judge did not err in admitting the similar fact evidence to show: *modus operandi,* rebut the defence of consent, and to be used in assessing the credibility of the complainant in the case being tried.

(2) There was no fresh evidence to be admitted on appeal. Mr. Bailey was asking the RCMP to “unlock” his cellphone. The RCMP do not have access to technology which would allow them to “unlock” the cellphone without destroying the data contained therein.

(3) There were approximately 14 miscellaneous arguments raised in the notice of appeal or during oral arguments. There was no merit to any of the miscellaneous grounds of appeal.

(4) The decision to declare the appellant a dangerous offender was clearly reasonable based on the evidence. There was an expert psychiatric report admitted as evidence. It referenced a pattern of sexual predation going back over 29 years. The report noted that in spite of his physical limitations, the appellant's level of violence continues to escalate, and his behaviour is not likely to be inhibited by normal standards of behavioural restraint. The judge did not err in considering the earlier offences against females, or the expert report. That evidence fully supports the judge's decision to declare the appellant a dangerous offender. The psychiatric report described the appellant's risk for reoffending outside of jail as being "enormous", saying the appellant's sexual sadism and psychopathy precluded a realistic scenario that he could be released to the community at an acceptable or manageable risk level. The indeterminate sentences are reasonable.

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Judges:	Saunders, Hamilton and Scanlan, JJ.A.
Appeal Heard:	April 18 and 19, 2017, in Halifax, Nova Scotia
Held:	**Application to admit fresh evidence denied; appeals against conviction, designation as a Dangerous Offender, and indeterminate sentences all dismissed, per curiam**
Counsel:	Appellant in person Mark Scott, Q.C., for the respondent

Order restricting publication sexual offences

486.4 (1) Subject to subsection (2), the presiding judge or justice may make an order directing that any information that could identify the complainant or a witness shall not be published in any document or broadcast or transmitted in any way, in proceedings in respect of

(a) any of the following offences:

(i) an offence under section 151, 152, 153, 153.1, 155, 159, 160, 162, 163.1, 170, 171, 172, 172.1, 172.2, 173, 210, 211, 212, 213, 271, 272, 273, 279.01, 279.011, 279.02, 279.03, 280, 281, 346 or 347,

(ii) an offence under section 144 (rape), 145 (attempt to commit rape), 149 (indecent assault on female), 156 (indecent assault on male) or 245 (common assault) or subsection 246(1) (assault with intent) of the *Criminal Code*, chapter C-34 of the Revised Statutes of Canada, 1970, as it read immediately before January 4, 1983, or

(iii) an offence under subsection 146(1) (sexual intercourse with a female under 14) or (2) (sexual intercourse with a female between 14 and 16) or section 151 (seduction of a female between 16 and 18), 153 (sexual intercourse with stepdaughter), 155 (buggery or bestiality), 157 (gross indecency), 166 (parent or guardian procuring defilement) or 167 (householder permitting defilement) of the *Criminal Code*, chapter C-34 of the Revised Statutes of Canada, 1970, as it read immediately before January 1, 1988; or

(b) two or more offences being dealt with in the same proceeding, at least one of which is an offence referred to in any of subparagraphs (a)(i) to (iii).

Reasons for judgment (per curiam):

[1] Mr. Bailey was arrested on December 4, 2008 and charged with numerous sexual offences which form the subject-matter of this appeal. His trial by jury was heard in the Nova Scotia Supreme Court between June 14-25, 2010, the Honourable Mr. Justice Glen G. McDougall, presiding. The appellant was represented by counsel, J. Brian Church, Q.C., at his trial.

[2] Before the Crown closed its case it moved to have certain extrinsic acts admitted as similar fact evidence. The Crown confined its application to two incidents involving different victims who were each assaulted at a time the appellant was confined to a wheelchair. The court granted the Crown's motion and the jury heard from those two witnesses.

[3] On June 25, 2010, the appellant was found guilty on all eight counts. The court then dealt with a single count Indictment that alleged a breach of a long-term supervision order. A guilty plea was entered. The Crown then sought a remand and psychiatric assessment to see whether they should apply to have the appellant declared a dangerous offender.

[4] Eventually, a dangerous offender hearing was convened before the trial judge, Justice McDougall. A large volume of documentation was entered regarding the appellant's history and personality make-up. The Crown called Dr. Hy Bloom as its expert. He was the only psychiatric expert to testify. Dr. Bloom detailed the appellant's psychiatric and sexological make-up and provided an opinion on the appellant's risk and manageability. In his comprehensive 65-page report (excluding appendices) Dr. Bloom said this about Mr. Bailey:

> …Lloyd E. Bailey is a 41 year old single longstanding violent and sexual recidivist who is currently facing a second Crown initiated proceeding to have him declared a DO.
>
> From my reading of ….(the) … 2002 Decision, Mr. Bailey dodged the bullet, as it were, at least in part because his physical limitations were thought of as a factor which could impede his capacity to reoffend. … Mr. Bailey has managed to reoffend in a highly contrived and markedly intrusive, dangerous and potentially lethal way, notwithstanding his physical limitations. …. He has, on multiple occasions, contrived and manipulated circumstances in which he could bring about a sexual assault of an unwilling victim, and use of weapons (even towards a

> 12 year old) and choking are frequent motifs. This is highly suggestive of sadistic gratification through these acts.
>
> In positing that Mr. Bailey is a sexual sadist, I have also considered the distinct prospect that he has on one or more occasions used some kind of substance to render a victim insensible and more vulnerable to a sexual assault. Sadists are gratified by this kind of control and power. The other interpretation (which is equally problematic) is that Mr. Bailey has, through his perverse ingenuity, figured out a way to make victims more accessible. … Taken together, the various risk recidivism tools used indicate that Mr. Bailey is at **markedly high risk** for a repeat sexual/violent offence against a female. ...the prospect for treatment and rehabilitation is bleak. … Put succinctly, his motivation is markedly poor. … As noted, Mr. Bailey's risk has not been contained by his physical limitations. The most recent (predicate) offences speak volumes to that. He is still a young man (at age 41). There is no clear evidence of physical deterioration to an extent where it could play an important role in impeding reoffence. …I would not be confident that Mr. Bailey could not or would not employ the same contrivances to access a victim, or that he has sufficient (sic) upper body strength to accomplish an assault.
>
> In the circumstances, I do not see any realistic recommendations emanating from the psychiatric/sexological realm that could reduce Mr. Bailey's risk to others. … (Emphasis in original)

Dr. Bloom concluded that the appellant was a high risk to re-offend and that there was no reasonable expectation that his risk could be adequately managed through lesser measures than an indeterminate sentence.

[5] Justice McDougall concluded that the Crown had satisfied its burden of proving beyond a reasonable doubt that Mr. Bailey should be declared a dangerous offender. During the course of that lengthy hearing the appellant twice dismissed his counsel, Mr. Church, choosing to represent himself.

[6] Mr. Bailey, also self-represented on this appeal, now appeals his conviction, as well as his dangerous offender designation and indeterminate sentences. Additionally, he seeks leave to introduce fresh evidence in support of his request for a new trial. He says the conviction is tainted because of Crown misconduct and the trial judge's decision to admit the similar fact evidence. He complains that there was insufficient disclosure.

[7] To accommodate the time zone difference between Nova Scotia and British Columbia where the appellant is currently incarcerated, his appeal was heard during two half day hearings, Tuesday, April 18 -Wednesday, April 19. He

"appeared" by video conference. Through that medium Mr. Bailey was able to question the two witnesses who testified as part of his fresh evidence application, and fully participate in making his submissions or, in responding to the Crown's submissions, as well as questions from the panel. Audio and visual contact was maintained with the use of video screens in the courtroom and in the appellant's cell during the proceedings.

[8] For the reasons that follow we are unanimously of the opinion that the appellant's appeals against both his conviction and his sentences should be dismissed.

[9] Considering the vast number of "issues" and "grounds" raised by Mr. Bailey during the course of this appeal, and because of the prolonged history of proceedings involving the appellant, a detailed review of the facts leading up to his conviction and sentence will be necessary.

[10] What follows is taken largely from the Crown's factum as well as portions of Justice McDougall's dangerous offender decision, which accurately summarize the background leading to Mr. Bailey's prosecution, conviction and sentencing.

Factual Background & Procedural History

[11] Mr. Bailey was born in October, 1969. In December, 2008, when the offences forming the subject-matter of this appeal occurred, the appellant was 39 years of age. In July, 1990, Mr. Bailey was severely injured in a motor vehicle accident leading to an eventual diagnosis of "C7-C8 quadriplegia", as a result of which he has been confined to a wheelchair, ever since.

[12] In the summer of 2008, shortly after serving an 8-year sentence for a different sexual assault, the appellant became acquainted with S.M. through his visits to a local pizza shop where S.M. was employed. S.M. was 19 years of age at the time. Mr. Bailey often visited this establishment as he knew the owner. During his visits they would have what S.M. described as casual conversations.

[13] S.M. left this job in the fall of 2008 and began a new job at a pizza shop in a local shopping mall. Through subsequent contact and conversations, Mr. Bailey was ultimately able to cajole S.M. into attending a "photo shoot" to model bathing suits at a hotel room in the city. They met for lunch where it would appear that during a brief interval when S.M. left the table to use the washroom, Mr. Bailey

added a stupefying drug to her beverage in the hope that she would become incapacitated when they were alone together later that afternoon.

[14] During the course of stylizing the photo shoot by having S.M. adopt various "poses" for "the magazine", the appellant was able to coil a length of cord around S.M.'s neck and tie it to his wheelchair. After overcoming her resistance through attempted strangulation and threats to kill her, he then brutally sexually assaulted S.M. These attacks were interrupted by hotel management following reports from concerned patrons about loud noises and screams they heard coming from the room. S.M. managed to flee. Later police kicked down the door to the bathroom where Mr. Bailey had gone to hide.

[15] We will pick up the narrative by turning to that portion of Justice McDougall's decision on the dangerous offender application where he reviews the evidence relating to the jury's verdict in convicting the appellant:

> … Mr. Bailey asked S.M. if she wanted another job on the side. He told her that he and a friend have a scuba superstore in Orlando, Florida, and that they needed a model. He told her that because she was a friend of his, he would put the other applications for the modelling job aside. Mr. Bailey told her that the name of the company was Lloyd Bailey's Scuba and Water Sports. He provided her with his phone number and invited her to check out the business's web page on the internet.
>
> While S.M. had always been interested in being a model, she was nevertheless unsure of Mr. Bailey's proposal. However, she and her boyfriend Googled Lloyd Bailey's Scuba and Watersports, found the website, and felt satisfied that it represented a legitimate business. S.M. testified that she became excited at the possibility of this modelling job, and told her mother and friends about it.
>
> S.M. contacted Mr. Bailey and told him that she was interested in the modelling job. He told her that there would be an initial photo shoot for which she would be paid $1,000, and if they liked her pictures, she would be flown to Orlando, Florida where there would be additional photo shoots.
>
> Following this initial telephone conversation, S.M. and Mr. Bailey had three or four subsequent telephone conversations in which Mr. Bailey further explained the plans for the photo shoot. He told her that the photo shoot would take place on Thursday, December 4, 2008, at the Lord Nelson Hotel in Halifax, Nova Scotia. He told her there would be female photographers present to make her feel more comfortable. He said she would be modelling scuba gear and that she should bring bathing suits to wear. He told her that she would need to bring $100 as down payment on the hotel room and additionally that if she had any extra

extension cords for the lights she should bring them. Finally, Mr. Bailey told her that there would be some props used to help her as a new model hold certain poses. The props included rope and tape.

…

During these telephone calls, S.M. inquired with Mr. Bailey about having her boyfriend present at the photo shoot. Mr. Bailey said her boyfriend could drop her off and pick her up, but that he was not allowed at the photo shoot as the photographers did not like to have other people on the set.

On the morning of December 4, 2008, the boyfriend of S.M. along with two of her friends drove her down to the Lord Nelson Hotel. Her boyfriend gave her a rose as they approached the hotel. S.M. and her companions met Mr. Bailey at the entrance to the hotel. After a quick hello, S.M.'s companions left her with Mr. Bailey.

Mr. Bailey informed [S.M.] that they were going to go to lunch first at the Oasis Restaurant.

At lunch, Mr. Bailey explained that the Lord Nelson Hotel was double-booked and that they were first going to go to another photo shoot located at a different hotel before returning to the Lord Nelson Hotel to complete the originally planned photo shoot. He further explained that the photographers were still in flight and were slightly delayed in arriving. Mr. Bailey showed S.M. a copy of a modelling contract that he had on his phone, claiming that he had not yet had an opportunity to print it. During lunch, Mr. Bailey asked S.M. if she was interested in X-rated stuff. S.M. unequivocally stated that she was not.

S.M. had a BLT sandwich and a beer for lunch. She recalled needing to go to the bathroom part-way through the meal before returning and finishing it.

After finishing lunch, Mr. Bailey called a cab. Upon entering the cab, Mr. Bailey asked S.M. to go to the nearby Dollar Store in the Park Lane Mall as he felt that they may need an additional extension cord for the photograph equipment. S.M. took the money and purchased an extension cord. As she was walking back to the cab, she started feeling dizzy and sick. She noticed that her vision was starting to get fuzzy and that her body felt really heavy. She felt like she was going to be sick. She went into the bathroom at the mall. She was unsure why she was feeling ill, as she had been feeling normal before lunch.

S.M. returned to the cab where Mr. Bailey was waiting. The cab proceeded to drive to the Point Pleasant Lodge, a local hotel often utilized by out-of-town patients of the nearby hospital.

S.M. exited the cab and vomited near the side of the building. Upon entering the hotel, Mr. Bailey went to the front desk and paid $165 for the room. S.M. recalled how Mr. Bailey described her to the hotel employee as his health care

worker. This comment momentarily puzzled her. However, she did not dwell on it as she was focussed on and distracted by her ill health.

Mr. Bailey and S.M. proceeded to a hotel room within the Point Pleasant Lodge. She recalled expecting a party room, and was surprised to find that they had a normal hotel room. S.M. sat in a chair in the corner of the room. She still felt ill. She vomited again. Mr. Bailey told her that he felt bad about how she was feeling, gave her some water, and told her that this had not happened to any of the other models before. Despite her sickness, he said that they needed to start working. He told her that he was going to take some test photographs of her so that once the photographers arrived, they could quickly review the poses and select ones that looked best.

S.M. went to the bathroom and put her two-piece bathing suit on. She believed she vomited again in the bathroom.

After exiting the bathroom, Mr. Bailey began to take photographs of S.M. with a cellular phone. He had a piece of paper listing various poses which he was using to direct her. After taking some pictures of her in standing poses, Mr. Bailey directed her to sit in a chair in the corner of the room near the bed. He took out some tape and said that they were going to use it for a few poses. She held her arms out as directed, expecting that Mr. Bailey would only put a little bit of tape on. Mr. Bailey quickly kept wrapping the tape around her arms. S.M. began to panic. S.M. tried to get out of the chair. And when she did so, Mr. Bailey quickly put a noose made from a shoe lace over her head and tried to stuff a sock into her mouth. She resisted the sock despite his yelling at her to put it in her mouth.

S.M. attempted to escape from Mr. Bailey by running across the bed. Yet unbeknownst to her the shoe lace around her neck was tied to the wheelchair of Mr. Bailey. Her unsuccessful attempt at fleeing resulted in both Mr. Bailey and S.M. landing on the floor. Mr. Bailey began to tighten the ligature around S.M.'s neck saying that he was going to choke her to death. S.M. screamed until she felt she was going to pass out. She tried to kick at Lloyd Bailey. He kept choking her. She tried to work her arms free from the tape. Lloyd Bailey told her that he would kill her if she did not stop struggling. She managed to work her hands free to pry the ligature from around her neck to her mouth. She tried to chew through the ligature. As Mr. Bailey continued to tighten the rope, S.M. stopped struggling as she felt she would pass out. She did not want to pass out.

Mr. Bailey directed her to slide towards him. He demanded that she put her now-freed arms under her back. He pulled down her underwear and began to lick her vagina. He began to digitally penetrate her vagina. He then told her to pass him his bag as he said he had a toy in it. He retrieved a cucumber from the bag, removed its plastic wrapping, and began to put it inside of her. S.M. pleaded with him not to as it would hurt. Mr. Bailey ignored her pleas. S.M. testified that at this point: I just gave up. I didn't think there was any point in trying, and I just wanted to die.

Other guests in the hotel were disturbed by the noise from Mr. Bailey's room. They contacted the front desk. Soon after, Mr. Michael Manuel, the manager of the hotel, began to knock at the door of Mr. Bailey's room. Mr. Manuel had been notified that guests in the surrounding rooms reported hearing screaming.

Mr. Bailey responded to Mr. Manuel's knocking by stating that everything was okay and to go away. Mr. Manuel was undeterred. He stated that he wanted someone to present themselves at the door.

Mr. Bailey took the ligature off S.M.'s neck and told her to open the door. He threatened her by stating, "Don't do anything stupid or there's going to be a shoot out." S.M. opened the door and quickly ducked into the closet alcove thinking that if Mr. Bailey shot, he would not be able to hit her. She mouthed the words, "Help me. Let me out". Mr. Manuel upon seeing the scantily-clad S.M. and the lower extremities of Mr. Bailey who had been evidently upset from his wheelchair did not know what to make of what he saw. However, S.M. quickly fled past Mr. Manuel and ran down the hallway into the elevator. Mr. Manuel directed her to go into his office where she curled up like a ball under his desk.

Police were called to the hotel. The police cleared the nearby rooms and forcefully entered Mr. Bailey's room. Lloyd Bailey was found in the bathroom where he was arrested.

S.M. was taken to the hospital. She suffered innumerable spots of petechial hemorrhaging to her face as a result of the ligature that was repeatedly tightened around her neck. She suffered a cut which encircled the perimeter of her neck from the ligature. She suffered a cut to her mouth area. She suffered cuts to her arms in her struggle to remove the tape. She suffered scratches to her neck from her own efforts to remove the ligature. She suffered vaginal tears from the insertion of the cucumber.

Samples of Ms..M.'s blood and vomit revealed the presence of two powerful narcotic analgesics, hydromorphone and Oxycodone. S.M. testified that she had never knowingly taken such drugs. Found in the jacket pocket of Mr. Bailey, which was recovered from the hotel room at the Point Pleasant Lodge, was a vial containing beads of hydromorphone.

Mr. Chris Keddy, a toxicologist employed with the Royal Canadian Mounted Police, testified that the symptoms suffered by S.M. on December 4th, 2008 were consistent with the effects of hydromorphone and oxycodone. Additionally, Mr. Keddy testified that the onset of S.M.'s symptoms on December 4, 2008, was consistent with her being administered these drugs during the period of time in which she was at lunch. Taken together, the only possible conclusion from the jury's verdict and the testimony of various witnesses is that Mr. Bailey covertly slipped these drugs into either S.M.'s food or drink.

[16] We think it is necessary to describe the brutality of the attack against S.M. in such detail so as to provide context for the similar fact evidence the Crown sought to have admitted at the trial. That evidence, the purpose for which the Crown sought its introduction, and Justice McDougall's reasons for admitting it, as well as the directions he gave to the jury with respect to it, will all be addressed later in these reasons. At this point it is enough for us to simply refer to that evidence in general terms to better acquaint the reader with the principal issues to be considered later.

[17] The first "similar fact witness" called by the Crown was L.B. She had been employed as a care worker with an agency in the city. Mr. Bailey was one of her clients. She looked after his banking, grocery shopping, housecleaning, etc. One day in early February, 1999 she went to his apartment on Brunswick Street, in Halifax. Mr. Bailey complained of having "a really bad headache" and asked L.B. to place a blanket over his bedroom and living room windows to reduce the light. The appellant asked her to bring him his walker and help him stand up. She thought his request was "strange" because he had always been able to do such things by himself. But over his insistence she agreed. She attempted to help him up off the bed. During the course of her efforts he "fell" on top of her, placed his right hand over her mouth and nose, and his left elbow over her throat, and proceeded to squeeze so hard she felt like she was passing out. She kept screaming and kicking at him, and biting his hand. She eventually managed to escape after grabbing a hair brush and beating him in the face with it, but not before he grabbed her left leg, bit her knee, and pulled one of her earrings out with his teeth. He accused her of stealing from him. She denied it. She testified she thought he was going to rape her. Looking back on the incident she felt he had asked her to cover the windows so that no one would be able to see into his apartment and witness the attack.

[18] The second "similar fact witness" was B.M. She was 25 years of age at the time she testified, and 12 at the time of the incident she described as having occurred in December 1997. The appellant was a friend of B.M.'s mother. He asked the mother if B.M. could babysit overnight for some friends of his in Lower Sackville. He picked her up at her home. They dropped off two other passengers and then went back to the appellant's house. Under threat, the appellant told B.M. not to tell her mother where she was, and to reassure her mother that all was well by calling her on the phone. The appellant fed B.M. ice cream that "tasted funny" and then told her to sleep in his bed while he slept on the couch. B.M. awakened

during the night to the appellant touching her breasts and genitalia. She slapped him and resisted. She went to the bathroom and returned where she said the appellant continued to molest her. She said she would sleep on the couch at which time the appellant grabbed her and held scissors to her neck and threatened to shove the scissors down her throat. She bit his hand and banged his head against a door. She later told her mother, the police were informed, and charges laid. Mr. Bailey was convicted of sexual assault, sexual touching, uttering death threats, and unlawful possession of a weapon to commit an offence, and sentenced to a term of imprisonment of eight years. His appeal was dismissed by a decision of this Court, 2001 NSCA 146. In the original prosecution of the case, there was no evidence supporting proof that the appellant had administered a stupefying substance, although B.M. thought it had been put in her ice cream, saying that after taking one or two spoonful's of the ice cream, she did not remember anything more until she awakened to feel the appellant groping her breasts and her vagina under her nightie.

[19] The Crown sought to have testimony concerning these two incidents admitted in order to:

- refute any suggestion of coincidence;
- show similarities in offences committed by the appellant while confined to a wheelchair, in particular that these were not random females but rather females with whom he had enjoyed some form of a relationship;
- establish that the appellant used a ruse or trick to be physically isolated with both females; and that he then overcame their resistance, despite his own physical limitations, by choking them or threatening them with weapons held to their throats.

[20] After considering counsels' submissions, McDougall, J. agreed to admit the evidence of L.B. and B.M. for three purposes stipulated by the Crown: first, to show a *modus operandi* or system used by the appellant in attacking his victims; second, to rebut the defence of consent should Mr. Bailey advance it; and third, to use in assessing the credibility of the complainant, S.M., in the case being tried.

[21] Justice McDougall then gave the jury mid-trial instructions with respect to the proper and improper use of such evidence, and did so again in his final charge.

Issues

[22] The host of issues and complaints raised by Mr. Bailey can be most conveniently addressed if grouped under four headings which we will consider in the following order:

(i) Fresh Evidence – cell phone;

(ii) Admissibility of Similar Fact Evidence;

(iii) Miscellaneous – Appeal on the Merits;

(iv) Sentencing – declaring Mr. Bailey a dangerous offender and imposing indeterminate sentences.

[23] We turn now to our analysis of these issues.

Standard of Review

[24] The variety of alleged errors listed by Mr. Bailey in his written and oral submissions do not easily translate into a one-time statement of the standard of appellate review that is engaged. We prefer to explain the applicable standard when addressing each of the four headings we assigned to the appellant's litany of complaints.

(i) Fresh Evidence – Cell Phone

Standard of Review

[25] The standard of review for a consideration of fresh evidence is as referred in in *R. v. West*, 2010 NSCA 16, ¶1, 28-29:

> [28] Section 683(1) of the *Criminal Code* permits the Court of Appeal, "where it considers it in the interests of justice", to allow the introduction of fresh evidence. In *R. v. Wolkins*, 2005 NSCA 2, Cromwell J.A. (as he then was) reviewed the applicable principles:
>
> > [57] Both the SCAC and this Court have a wide discretion to admit new evidence on appeal where it is in the interests of justice*: Criminal Code*, s. 683(1). Case law has structured the exercise of this discretion in the various contexts in which new evidence may be advanced.

[58] Fresh evidence tends to be of two main types: first, evidence directed to an issue decided at trial; and second, evidence directed to other matters that go to the regularity of the process or to a request for an original remedy in the appellate court. The legal rules differ somewhat according to the type of fresh evidence to be adduced. Mr. Wolkins advances evidence of both types.

[59] Fresh evidence on appeal which is directed to issues decided at trial generally must meet the so-called Palmer test. A key component of that test requires that the proposed fresh evidence could not have been available with due diligence at trial: *R. v. Palmer*, [1980] 1 S.C.R. 759 at 775. This rule makes it clear that the place for the parties to present their evidence is the trial. If evidence that with due diligence could have been called at trial were admitted routinely on appeal, finality would be lost and there would be less incentive on the parties to put forward their best case at trial. The rule requiring due diligence at trial is therefore important because it helps to ensure finality and order, two features which are essential to the integrity of the criminal process*: R. v. G.D.B.*, [2000] 1 S.C.R. 520 at para. 19. In that paragraph of *G.D.B.*, the Supreme Court adopted these words of Doherty, J.A. in *R. v. M.(P.S.)* (1992), 77 C.C.C. (3d) 402 at 411:

> While the failure to exercise due diligence is not determinative, it cannot be ignored in deciding whether to admit "fresh" evidence. The interests of justice referred to in s. 683 of the *Criminal Code* encompass not only an accused's interest in having his or her guilt determined upon all of the available evidence, but also the integrity of the criminal process. Finality and order are essential to that integrity. The criminal justice system is arranged so that the trial will provide the opportunity to the parties to present their respective cases and the appeal will provide the opportunity to challenge the correctness of what happened at the trial. Section 683(1)(d) of the *Code* recognizes that the appellate function can be expanded in exceptional cases, but it cannot be that the appellate process should be used routinely to augment the trial record. Were it otherwise, the finality of the trial process would be lost and cases would be retried on appeal whenever more evidence was secured by a party prior to the hearing of the appeal. For this reason, the exceptional nature of the admission of "fresh" evidence on appeal has been stressed: *McMartin v. The Queen, supra*, at p. 148.
>
> The due diligence criterion is designed to preserve the integrity of the process and it must be accorded due weight in assessing the admissibility of "fresh" evidence on appeal.

> In my view, these considerations are equally relevant in the context of an appeal from sentence. Accordingly, due diligence in producing fresh evidence is a factor that must be taken into account in an appeal from sentence, on the same basis as the other three criteria set out in *Palmer*.
>
> [60] But finality and order, important as they are, must give way in the interests of justice. Accordingly, the due diligence criteria is not applied inflexibly and yields where its application might lead to a miscarriage of justice: *R. v. G.D.B., supra* at paras. 17 - 21; *R. v. Lévesque, supra* at para. 15. The due diligence requirement is one factor to be considered in the "totality of circumstances": *G.D.B.* at para. 19. In considering whether the due diligence requirement has been met, the appellate court should determine the reason why the evidence was not available or was not used: *G.D.B.* at para. 20. The absence of an explanation or the fact that the failure to call the evidence was a deliberate tactical choice will weigh against its admission: *R. v. Warsing*, [1998] 3 S.C.R. 579 at para. 51.
>
> [61] The other category of fresh evidence concerns evidence directed to the validity of the trial process itself or to obtaining an original remedy in the appellate court. In these sorts of cases, the *Palmer* test cannot be applied and the admissibility of the evidence depends on the nature of the issue raised. For example, where it is alleged on appeal that there has been a failure of disclosure by the Crown, the focus is on whether the new evidence shows that the failure may have compromised trial fairness: see *R. v. Taillefer*; *R. v. Duguay*, [2003] 3 S.C.R. 307 at paras. 73 - 77. Where the appellant seeks an original remedy on appeal, such as a stay based on abuse of process, the evidence must be credible and sufficient, if uncontradicted, to justify the appellate court making the order sought: see e.g. *United States of America v. Shulman*, [2001] 1 S.C.R. 616 at paras. 43 - 46. Where the appellant alleges that his trial counsel was incompetent, the fresh evidence will be received where it shows that counsel's conduct fell below the standard of reasonable professional judgment and a miscarriage of justice resulted: see *R. v. G.D.B.*, supra.

To the same effect: *R. v. Assoun*, 2006 NSCA 47 at ¶ 297, leave to appeal ref'd [2006] S.C.C.A. No. 233; *R. v. Jones*, 2006 NSCA 136, at ¶ 14.

Analysis

[26] Mr. Bailey applied for leave to admit fresh evidence in this Court in relation to a cellphone which he argues contains photo images that are relevant to his original trial and this appeal. During the original trial, Mr. Bailey had asked that the RCMP access his cellphone to view the photo images stored on the phone. He said those photos are relevant to the issue of consent. He provided the RCMP with

four different passwords, none of which unlocked the device. The RCMP, specifically Blair MacLellan, a Senior Forensic Analyst, has been involved in this case with the RCMP since 2009. In 2009 he was initially provided with the cellphone. Mr. MacLellan used a number of different types of software in an attempt to access the device. He indicated he was not able to open the cellphone.

[27] In 2010, Mr. MacLellan was qualified by the trial judge to testify as an expert in cellphones and computers. His evidence was to the effect that even with the software that the RCMP had in 2010, they were not able to access the device without a valid password.

[28] Since that time, Mr. Bailey has urged the RCMP to continue to attempt to access the device. Mr. MacLellan testified that software which allows the RCMP to access cellphones continues to be updated. He indicated that recently he again tried to access the device. The technology and software that the RCMP had available in Halifax did not meet with any further success than it did during the original attempt in 2010. He is still not able to access the photos, if any, stored on the cellphone.

[29] Mr. Bailey suggested that commercial service providers advertise they can unlock devices for a fee of $50.00. Mr. MacLellan testified that there is a difference between unlocking a device and retrieving the data stored within it. He indicated that to his knowledge the unlocking of the device by the telecom providers would not allow access to the data or information stored within that device. If a commercial service provider were to unlock the device it would destroy any data, including photographs stored on the cellphone. So far Mr. MacLellan is aware there is currently no technology available to the RCMP which would be able to unlock the device without destroying the data.

[30] Because the RCMP are not able to unlock Mr. Bailey’s cellphone, there is no new evidence from the cellphone to be considered.

[31] We dismiss the application for leave to admit fresh evidence.

(ii) Admissibility of Similar Fact Evidence

Standard of Review

[32] There are two different standards of review applicable to the issue of similar fact evidence: one applies to the admission of similar fact evidence and the other applies to the instructions to the jury.

[33] As to the admission of similar fact evidence, as pointed out in *R. v. Fletcher*, 2013 ABCA 74:

> [7] The requirements of the test for the admission of similar fact evidence is a question of law for which the standard of review is correctness*; R. v. Tessier*, 2002 SCC 6; *R. v. Ward*, [1979] 2 SCR 30; 44 CCC (2d) 498 and *R. v. Moreau*, (1986) 15 OAC 81; 26 CCC (3d) 359 (Ont CA). The assessment of the probative value of the proposed similar fact evidence and the weighing of it against potential prejudice is a question of discretion that is entitled to deference; *R. v. B(CR)* [1990] 1 SCR 717 at 733 e-f; *R. v. Arp*, [1998] 3 S.C.R. 339 at 368; *R. v. Handy* 2002 SCC 56 at para 157. …

[34] For use of the similar fact evidence and instructions to the jury as to how to deal with similar fact evidence see *R. v. Araya*, 2015 SCC 11. The Court urges an appellate court to examine any alleged error in the context of the entire charge and the trial as a whole noting that in accordance with *R. v. Jaw*, 2009 SCC 42, trial judges are to be afforded some flexibility in crafting the language of jury instructions.

[35] At the end of the day, the question to be asked on appeal is whether the trial judge's instructions to the jury were correct in law and properly explained how the law applied in the context of the case before the jury. On appeal, a case does not turn on whether a particular format or sequence was used. That is a matter within the discretion of the trial judge and it is reviewed through the lens of the particular circumstances of each case. Model charges are helpful but they must be tailored to include the facts of each case. We will return to what the trial judge had to say on the issue of similar fact evidence later in this decision.

[36] Mr. Bailey argues that the trial judge erred in admitting similar fact evidence at his original trial. As we have already explained, the trial Crown sought to have the evidence of two individuals placed before the jury, arguing their evidence was

relevant to the issues of: establishing the appellant's *modus operandi*; rebutting the defence of consent; and assessing the credibility of the complainant.

[37] The Crown said the evidence was not to show that Mr. Bailey was a person of bad character, but rather to reveal a pattern of behaviour Mr. Bailey used to get his victims alone. In each case, the women were known to Mr. Bailey. He overcame his physical limitations using threats and intimidation along with either strangulation, or the use of a weapon pointed at the victims' neck. We see this pattern of behavior considered again as it related to the "dangerous offender application".

[38] When the Crown applied for the admission of similar fact evidence, defence counsel had already indicated that Mr. Bailey intended to testify. Defence counsel advised that the issue for trial was going to be whether the physical activities between Mr. Bailey and the complainant were consensual. He argued that the prejudicial effect of the evidence outweighed the probative value of any similar fact evidence. Defence counsel expressed concern that the jury may well seek to punish Mr. Bailey for his past, or convict him based on bad character.

[39] In spite of Mr. Bailey's objections, the trial judge was satisfied the probative value of the evidence outweighed the prejudicial effect, saying:

> The Crown seeks to offer evidence of similar acts or similar facts - it seems to be used interchangeably - committed by Mr. Bailey against two other individuals. These incidents occurred in 1997 and 1999. The earlier incident resulted in a conviction for sexual assault and uttering threats. The latter ended in a conviction for assault.
>
> A voir dire was held to determine whether the similar-act evidence should be admitted at trial. The Crown seeks to have the evidence admitted to assist the jury in deciding the case against Mr. Bailey. It's intended to be used in relation to:
>
> - the *modus operandi* or system used by Mr. Bailey in attacking his victims;
> - two, to rebut the defence of consent which Mr. Bailey is expected to advance; and
> - for use in assessing the credibility of the complainant who in this case is [S.M.]
>
> Similar-act evidence by its very nature is potentially prejudicial to an accused person. In order to be admissible, the evidence must be probative to an issue at trial. The probative value of the evidence must outweigh its prejudicial

effect. Ultimately, it is this balancing process that determines whether the evidence goes in and for what purpose or purposes it may be used.

The Crown and Defence counsel were able to agree on a Statement of Facts, thereby alleviating the necessity of calling *viva voce* evidence. This helped to expedite the matter, and allowed the Court to focus on the real issue which is to consider and assess the proposed similar-fact evidence both for its probative value and it's prejudicial effect.

I will begin with a brief overview of the law. The general principles of evidence of similar acts are discussed in **Watts Manual of Criminal Evidence**, Thompson Carswell 2006. In commentary, Justice David Watt who is now with the Ontario Court of Appeal wrote this at paragraph 34.01 on page 463, and I quote:

> "The rules governing the exceptional admissibility of evidence of similar acts have migrated from the traditional pigeonhole to the more recent principled approach. The change is similar to what has taken place in connection with hearsay exceptions.
>
> The admissibility of evidence of similar acts is determined by (1) the relevance of the evidence to an issue in the case otherwise then by demonstrating the propensity of the defendant to commit crimes or other disreputable or repugnant acts; (2) the probative value of the evidence; (3) the prejudicial effect of the evidence; and (4) a balancing of the probative value against the prejudicial effect of the evidence."

Justice Watt goes on to state that, and I quote again:

> "Similar-act evidence may be relevant, for example, to rebut a defence otherwise open to the defendant to establish intent, to prove a motive for the offence, to support the credibility of the victim, or to provide background circumstances in which the offence is alleged to have occurred."

In terms of the probative value of the proposed similar-fact evidence, Justice Watt wrote this. Again I quote:

> "The principle driver of probative value is the connectedness of the evidence of similar acts to the offence as charged. There is no absolute prohibition against propensity reasoning in determining probative value, only an insistence that propensity evidence relate to some other issue beyond general disposition or character.
>
> The degree of similarity required depends on the issues in the case, the purpose for which the evidence is tendered, and the rest of the evidence in the case. Similarity does not require a strong peculiarity or unusual characteristics underlying the events to be compared."

Justice Watt suggests that an important element in the determination of probative value is the prospect of collusion amongst the witnesses. In the case that is before this Court, there is virtually no such cause for concern. Both of the proposed similar-fact witnesses had already testified in Court presumably under oath or affirmation or on a promise to tell the truth before they had an opportunity to meet.

[S.M.], the complainant in the case now before this Court has never even met the other two witnesses and likely has no knowledge of them or the incidents in which they were involved. If there was evidence of collusion amounting to no more than an opportunity to collude, the issue of collusion would be best left with the jury in any event. However, as I have previously said, there is no evidence of collusion to be concerned with in this case.

In respect to the prejudicial effect, evidence of similar acts involves both moral and reasoning prejudice. It is not the risk of conviction *per se*, but rather the risk of an unfocused trial and wrongful conviction.

The concern is that the jury would infer guilt from general disposition or propensity, the so-called forbidden chain of reasoning. If the evidence of similar acts is admitted, the jury would have to be instructed on the use to which they could put the evidence, and specifically what they could not use it for.

Moral prejudice has to do with the potential for an inference of guilt based on bad character. Reasoning prejudice has to do with juror confusion due to the other incidents and distraction from their task of deciding the charges on which the accused is currently arraigned.

Although presumptively inadmissible, evidence of similar acts may be admitted if the Prosecution shows on a balance of probabilities that the probative value of the evidence on an issue for which it is tendered outweighs its prejudicial effect.

Counsel have referred me to a number of decided cases, many from the Supreme Court of Canada, and others from various Appellate Courts across the country. In one such case cited as **R. v. B.C.R.**, [1990] 1 S.C.R. 717, Supreme Court of Canada, McLachlin, J., now Chief Justice McLachlin, discussed the history and parameters of the similar-fact rule, and quoted from the seminal case of **Makin v. Attorney General for New South Wales** at paragraphs 9 and 10 on page 6 of the Quicklaw version. I quote:

> "Viewed thus, the so-called similar-fact rule was in reality an exception narrowly defined to the general rule excluding evidence of prior misconduct or propensity.
>
> This approach is embodied in the oft-quoted passage from **Makin v. Attorney General for New South Wales**, [1894] A.C. 57 at page 65. Lord Herschel, L.C., first enunciated the general principle of exclusion (the first limb of the rule)."

And this is a quote within a quote:

> "It is undoubtedly not competent for the Prosecution to adduce evidence tending to show that the accused has been guilty of criminal acts other than those covered by the indictment for the purpose of leading to the conclusion that the accused is a person likely from his criminal conduct or character to have committed the offence for which he is being tried."

He then stated the exception, the second limb of the rule at page 65, again a quote within a quote:

> "On the other hand, the mere fact that the evidence adduced tends to show the commission of other crimes does not render it inadmissible if it be relevant to an issue before the jury, and it may be so relevant if it bears upon the question whether the acts alleged to constitute the crime charged in the indictment were designed or accidental, or to rebut a defence which would otherwise be open to the accused."

Chief Justice McLachlin went on to state at paragraphs 11 and 12, and again I quote:

> "From the point of view of underlying principle, the **Makin** rule may be seen as essentially concerned with probative value. On the one hand, it recognized the grave prejudice that evidence of previous wrongdoing or propensity might work. Such evidence often does not possess great logical or probative force. Yet at the same time it has great potential for harm, raising the danger that the jury may convict not because they are satisfied that the Crown has proved beyond a reasonable doubt that the accused committed the offence with which he stands charged but because the accused is a bad or suspicious person.
>
> On the other hand, the **Makin** rule acknowledged the common-sense proposition that in some cases, the probative value of the evidence might justify its reception.
>
> As a rule of application, the analysis in **Makin** typically involved two steps. Courts first ask whether the proposed evidence went beyond mere propensity. If the hurdle was met, they went on to determine whether the evidence fell within one of the accepted exclusionary categories. In practice, the two steps often merge since evidence falling within the established categories of exception to the general exclusionary rule usually went beyond mere propensity."

And that's the end of the quote.

The decision in **R. v. B.C.R**. has been repeatedly recognized by the Supreme Court of Canada as the governing authority. And reference can be made to **R. v. Handy**, [2002] 2 S.E.R., page 908, Supreme Court of Canada decision at

> paragraph 53. There are numerous other cases on topic. I will not refer to them all.
>
> …

[40] From this we know the trial judge was aware that the burden lay with the prosecution to show on a balance of probabilities that the probative value of the evidence, on an issue for which it was tendered, must outweigh its prejudicial effect. He correctly recited the law as it applies to this case. The trial judge was cognizant of the differences between the earlier cases and the case before him. He referenced the ages of the victims and the complainant. He also referenced the similarities of earlier cases including the appellant. The similarities included Mr. Bailey managing to isolate the victims so as to be alone with them after gaining their trust. Each case was based on a scenario involving a ruse. Once the appellant was alone with the victims he attacked them. In each attack he attempted to overcome any resistance by the victim by going for an area of the neck or throat and threatened to kill them if they continued to resist.

[41] We are satisfied that the judge did not err in his identification of the issues, nor did he fail to properly apply the law related to the admission of similar fact evidence.

[42] Because Mr. Bailey is self-represented on this appeal, we wish to go on to note that the trial judge also properly instructed the jury as regards the use that it could make of the evidence. He warned the jury against using the evidence to punish Mr. Bailey for anything he might have done previously. He also instructed that they could not use the evidence to conclude that Mr. Bailey was the 'type of person' who would commit the offence for which he was charged. In his charge to the jury, the trial judge pointed out any dissimilarities between the previous cases and the case before the jury.

[43] We are satisfied that in admitting the similar fact evidence the judge applied the proper principles. Further, his mid-trial instructions and his charge to the jury were also appropriate.

(iii) **Miscellaneous - Appeal on the Merits**

[44] In his factum, but especially during his oral argument, Mr. Bailey identified at least 14 "errors" which he said constituted "Charter of Rights … Human & Civil … Rights Violations", or otherwise prejudiced his right to a fair trial, and led to his

convictions and dangerous offender designation, all of which he asks us to set aside.

[45] Because some of Mr. Bailey's points were raised in his oral argument and not in his factum, or vice versa, we propose to address them (individually or in combination) using the same characterization the panel adopted at the hearing to best articulate and make sense of the appellant's submissions.

[46] In doing so, we expect that our reasoning will be very brief and expressed summarily, largely because we accept Mr. Scott's submissions on behalf of the Crown as being a correct and complete response to the appellant's allegations.

[47] As far as the applicable standard of appellate review is concerned, that of course will depend upon how one characterizes the "question" being considered.

[48] The standard of appellate review applicable to (i) Fresh Evidence – Cell Phone and (ii) Admissibility of Similar Fact Evidence have already been explained. The proper standard applied to a sentencing appeal following a dangerous offender designation will be reviewed when that issue is considered later in these reasons.

[49] In this section where we deal with (iii) Miscellaneous – Appeal on the Merits, the standard we apply will of course depend upon whether Mr. Bailey's complaint raises a question of law, or a question of fact, or mixed fact and law, or relates to the judge's instructions to the jury, or arises from a ruling that engaged the trial judge's exercise of discretion.

[50] In the analysis that follows, questions of law will be reviewed on a standard of correctness. Questions of fact or inferences drawn from facts will be reviewed on a standard of palpable and overriding error. Questions of mixed law and fact will be reviewed on a standard of palpable and overriding error, unless there is an extractable legal question which will then be assessed on a standard of correctness. Rulings involving the exercise of discretion will engage a deferential standard of review. Anything that involves the judge's dialogue with the jury will be reviewed in accordance with the special rules that apply in such circumstances.

[51] These then are the principles we will apply during the analysis that follows.

1. Documentation disclosed to the jury which it should never have seen

[52] Mr. Bailey's complaint is misguided. During the course of the appeal hearing it became obvious to everyone that the appellant had operated under a significant misapprehension of the evidence. He had erroneously assumed that the 38 bound volumes forming the voluminous "Appeal Book" had all been presented to and made available to the jury during its deliberations. The point of his objection was that old school records, his criminal record as a youth, hospital reports and notes prepared by health care professionals which had nothing to do with this trial on the charges involving S.M. should never have been disclosed to the jury.

[53] The short answer is that they were not.

[54] Volumes 1, 2, 3, 4 and 9 represent the record of evidence that was presented at his trial. This is the only evidence to which the jury was ever referred. Volumes 5, 6, 7, 8 and 10 to 38 represent the record introduced during the lengthy Dangerous Offender hearing over which Justice McDougall presided, alone.

[55] We are satisfied the jury saw what was properly admitted, and was never compromised by documentation it ought not to have seen.

2. Vial never tested for fingerprints

[56] Among the belongings seized from Mr. Bailey at the time of his arrest was his jacket in which a vial was found. Testifying in his own defence, Mr. Bailey told the jury that in the weeks leading up to the meeting in the hotel room, he had given drugs to S.M. to "get high" or sell. He told the jury that when they met for lunch at the hotel restaurant before going to the "photo shoot" he had handed a vial of pills to S.M. which she took into the bathroom, returning later to the table where she gave the vial back to the appellant. He told the jury that he presumed she had gone into the washroom and taken the pills "to get high". He denied putting any kind of drug into her drink while she was absent.

[57] Mr. Bailey's complaint at trial was that the Crown's experts ought to have been able to lift S.M.'s fingerprints off the vial, thus "corroborating" his version of events.

[58] It is obvious to us that several factors undermine the appellant's argument. First, all of this was before the jury. Mr. Bailey testified in his own defence. It is obvious that the jury disbelieved Mr. Bailey or otherwise were not left with a reasonable doubt about his guilt.

[59] Second, two police officers testified about this issue. Detective Constable Luther, on cross-examination, confirmed that after the vial was found they were asked to fingerprint it. He said:

> That was completed and determined to be negative. …

[60] Detective Constable Praught testified that when he seized and searched the jacket he "missed this vial" and it was only discovered when the jacket was examined again in March 2010. He explained to the jury that the vial was sent to Ottawa for analysis of what may have been inside the vial but that he tested it for fingerprints. He said during cross-examination:

> …When I examined the vial for fingerprints … there was no fingerprints developed. There was no smudge marks developed. There was no traces of any movement of any fingerprint that would have moved. Sometimes we see swipes and wipes … when we try to develop articles for fingerprints … There was none of that developed at all. … the white vial, I coated it with black fingerprint powder and there was no sign of smudges, there was no sign of ridge detail … there was no sign of anything on the vial. … I can't explained why there was no fingerprints on it. Lots of times it depends on the individual. If you're not sweating and if you have dry skin, you can touch things all day long and not leave a fingerprint.

[61] In concluding his questioning on this point, we see this exchange between the appellant's lawyer and the officer:

> Q. All right. So it's possible that two people could have touched that vial and no fingerprints could be shown?
>
> A. That's correct.

[62] Finally, this alleged "failing" figured prominently in defence counsel's closing address to the jury. The defence theory, strongly urged upon the jury, was that S.M. consented, and reviewed a contract, agreeing to go with Mr. Bailey to a hotel room to make X-rated movies. That she agreed to be taped by the appellant and willingly used the cucumber to masturbate and position herself explicitly for S.

and M. photos. Defence counsel mocked the police for the things they "missed" in their investigation. Mr. Church compared their efforts to the old TV comedy show, Laugh-In. During his closing address, Mr. Church said this:

> …you'll notice through the evidence of Cst. Praught …the things that they didn't do is that they didn't do their searching of all their goods that they recovered from the hotel room. They didn't discover all the evidence until some time later, and that's the vile (sic) of the drugs, if you'll remember, that they didn't find until 2010. Now this incident happened on December 4th, 2008. And you'll remember the evidence … about how …they met each other… the Crown maintains … and it's a theory, their theory, that these drugs were either put on the food or put in her drink. Now what does Mr. Bailey say? Yeah, I gave it … I gave her the drugs. I handed them to her. And it was Oxycontin … why did he give her those drugs? Because that was the agreement that they had made.
>
> They were going to do S&M photos… Home-made movies… Had a contract. Had a series of poses … This was an agreement that we were going to do these X-rated movies … She consented to going in that room with Mr. Bailey. …
>
> The Crown insists that Mr. Bailey administered the stupefying drugs. Up until April of 2010 they didn't even know that the drugs were in their evidence. Mr. Bailey acknowledges that he gave them to her. ….
>
> … this cucumber, was voluntarily inserted by [S.M.].
>
> …There's no DNA from Mr. Bailey on the cucumber. There's no fingerprints on the cucumber of Mr. Bailey's. If there were fingerprints on there, we'd have heard about it. … The Defence maintains that … this is a consensual act … Wasn't seized. It's sort of like … (the) TV show called Laugh-In. From the '70s… this is the valid evidence that arrived in March 2010. A year and a half later showing the drugs. …

[63] From all of this it is obvious that Mr. Bailey's answer to the charges, and defence counsel's attack on the "failings" and "shortcomings" of the police investigation were front and center before the jury. Obviously none of this raised a reasonable doubt in the minds of the jurors in convicting him, as charged.

3. Strip searched when a student in school in 1984

[64] Mr. Bailey's complaint is two-fold. First, he says the documentation concerning this incident should never have been seen by the jury. As noted earlier, it never was. Second, he says he was "strip searched" in the presence of others after being accused of theft at the school he was attending.

[65] Assuming, without deciding, that there is any merit to the substance of the appellant's complaint, the opportunity to object expired decades ago. We have no jurisdiction to look into the matter now, more than 30 years later. If the circumstances surrounding the 1984 "theft" from the school were problematic at the time, it has nothing whatsoever to do with Mr. Bailey's convictions in this case.

[66] Finally, it is important to note lead counsels' long connection to this offender and his crimes. The record discloses that Mr. Brian Church, Q.C. has represented the appellant, in one circumstance or another, since approximately 2000. Counsel on this appeal, Mr. Mark Scott, Q.C., has maintained carriage of the matter since 1997. Mr. Church represented the appellant at the first Dangerous Offender hearing in 2002. These records (which Mr. Bailey now challenges) were all part and parcel of that Dangerous Offender proceeding. There was no objection made as to their admissibility, nor any *Charter* arguments advanced with respect to them. During the second Dangerous Offender hearing in 2014, after firing Mr. Church twice, Mr. Bailey did make a submission in his closing argument regarding his youth record, but there was no substantive objection to these materials when that evidence was being introduced. In fact, Mr. Bailey, at one point, was invited to swear to an affidavit and be subject to cross-examination if he wished, but he declined.

[67] Mr. Bailey's complaint is without merit.

4. Jury given access to his school records in 1984

[68] We have already explained that none of the impugned documentation was ever seen by the jury.

5. Dr. Bloom's opinion is discredited because the appellant refused to be interviewed and he failed to communicate with Mr. Bailey's collateral sources

[69] In his opinion, Dr. Bloom described in detail the massive record he had been given to review before rendering his opinion. Dr. Bloom was never challenged on the "failure" to communicate with any of Mr. Bailey's collateral sources. He would not necessarily have known these collateral sources in the event that Mr. Bailey refused to be interviewed. Suggesting, now, that any "failure" on the part

of Dr. Bloom to approach and interview any of these collateral sources would have had any kind of impact upon his expert opinion, is sheer speculation.

[70] In his report, Dr. Bloom recognized the fact that Mr. Bailey had refused to be interviewed. Dr. Bloom said in part:

> The documentary information in Mr. Bailey's case is markedly voluminous. You had, in fact, sent me 12 binders, as well as a number of additional documents forwarded under separate cover. …
>
> Because I did not carry out a clinical interview of Mr. Bailey, I do not have any first hand background information. All the information regarding Mr. Bailey's personal and family, relational, sexual, physical and mental health, educational and work histories, etc. that I considered relevant to the task at hand have been excerpted from previous reports, particularly that of Dr. Philip Klassen (April 30, 2002). Apart from having reviewed a similar fund of documents that I had available to me (although not indexed in the same way), Dr.Klassen had the benefit of meeting with Mr. Bailey for about 9 hours….
>
> … Mr. Bailey's reluctance to undergo a detailed sexological assessment, particularly phallometric testing, and his reluctance to disclose sexual ideation/fantasies that, at a minimum, can be inferred from his past offending history, have impeded the diagnostic process. That being said, however, one must respect Mr. Bailey's history for what it discloses. He has, on multiple occasions, contrived and manipulated circumstances in which he could bring about a sexual assault of an unwilling victim, and use of weapons (even towards a 12 year old) and choking are frequent motifs. This is highly suggestive of sadistic gratification through these acts. …

[71] In our view, there is nothing to suggest that the strength of Dr. Bloom's opinion was diminished by any "failure" to interview Mr. Bailey or his collateral sources. That opinion was certainly persuasive in satisfying Justice McDougall that the Crown had met its burden in having the appellant designated as a Dangerous Offender.

6. Dr. Bloom's opinion is discredited because he should not have had access to Mr. Bailey's school records

[72] Even if there were some kind of viable legal challenge to whatever occurred in 1984, we reject the inference Mr. Bailey asks us to draw that such would have had any bearing upon Dr. Bloom's assessment of future risk and manageability. In fact, if there had been any basis for an objection, it ought to have been made before Dr. Bloom testified and further, Dr. Bloom could, of course, have been questioned

about whether any excision of that bit of information would have affected his opinion.

7. The appellant's "*Charter* rights were violated" when he was mistreated by the police during his arrest and incarceration on these charges in 2008

[73] On this point, the appellant's argument covers a variety of "misdeeds" including complaints that he was treated roughly and rudely by the arresting officers, denied or at least delayed access to a catheter so that he could void, and denied or at least delayed a chance to contact his lawyer, presumably, Mr. Church.

[74] We see no merit to any of the appellant's complaints. He himself testified that he didn't "fall for" any of the police conduct, did rely upon his right to silence, and did eventually speak to his lawyer, Mr. Church, who told him not to say anything at all to the police. When questioned during the fresh evidence application portion of the appeal, Mr. Church testified to never having been asked by Mr. Bailey to advance any kind of *Charter* argument concerning anything that arose when in the custody of the police, or at any other time. Clearly, had there been any basis to seek a remedy under the *Charter*, that ought to have been raised as a pre-trial motion when Mr. Bailey was represented by his long-time defence counsel.

8. The Crown's toxicology report is incomplete and unreliable

[75] In his factum, the appellant suggests that there was a toxicological report that would show that the hydromorphone drug could have been administered as much as four days prior to the offence. The appellant suggests that this information was suppressed by the Crown. A number of points serve to reject the appellant's allegation.

[76] We begin by pointing out that this does not arise in a toxicological "report" per se but rather is referred to in a letter sent from the Crown to defence counsel dated June 3, 2009, prior to the preliminary inquiry into this matter, as part of Crown disclosure. In that letter the Crown Attorney lists a series of bullet points describing his conversation with Mr. Keddy, the toxicologist. One of the bullet points describes Mr. Keddy as saying:

> …that the very earliest they (the drugs) could have been consumed was 4 days prior.

[77] Mr. Bailey's complaint, on appeal, is that this "information" ought to have been put to his jury so that they might have then been persuaded that the complainant had taken the drugs four days before she ever met with the appellant. Mr. Bailey's complaint ignores several factors. First, his lawyer, Brian Church, Q.C., was well aware of the information since it was contained in a letter the Crown sent to him as part of its disclosure obligations. Second, it is obvious that when that disclosure was provided in 2009, the blood and urine reports were not complete.

[78] It is clear from a review of the toxicological reports and the evidence of Mr. Keddy that the 2009 disclosure letter was sent before the blood and urine samples were analyzed.

[79] Mr. Keddy testified that the whole of the evidence, including the hypothetical of S.M. being surreptitiously slipped the drugs at the pub, were consistent with her description of the effects of the drugs found. That is, the analyses of the vomit, the blood and the urine were consistent with the Crown theory that the appellant slipped the hydromorphone into either the food or beer of S.M. at the pub, that the alcohol assisted in speeding up the effects of the drug, and that she became nauseated, which was a common side effect. When asked, based on all of the information, whether the hydromorphone could have been ingested 24 hours before the sample was taken, Mr. Keddy said it would be an outside stretch because of what was found in the blood. In his opinion, it would have been taken much sooner.

[80] To conclude on this point, nothing was suppressed. Nothing in this evidence would support the inference the appellant now asks us to draw, namely, that S.M. could have ingested the drugs days before they met on December 4, 2008.

9. The appellant was prejudiced because some court records identify him as having a variety of aliases, or erroneously refer to a "different Mr. Bailey with a different date of birth"

[81] This complaint can be rejected summarily. First, the impugned material was provided at Mr. Bailey's Dangerous Offender hearing, not his trial. Second, the reference to a different individual was cleared up by the Crown at the Dangerous

Offender hearing, who advised the Court that it was only the cover page of a faxed letter that had, in fact, borne someone else's name, but that everything else in the documents related to the appellant and not other individuals or aliases. Further, while there may have been one page from Mr. Bailey's remand records that listed a wrong date of birth, the Crown and, more importantly, Justice McDougall were satisfied that but for these two exceptions, the rest of the voluminous record was accurate. There is nothing to suggest that Dr. Bloom's opinion was in any way impacted by these insignificant, inaccurate references.

10. He was prejudiced in the eyes of the jury when the Crown Attorney accused him of "tailoring" his evidence during cross-examination

[82] Here the appellant lifts a single word from almost 300 pages of the transcript of his cross-examination, and says his questioner, Crown Attorney Paul Carver, Q.C. prejudiced his fair trial rights by accusing him of "tailoring" his evidence in the presence of the jury.

[83] Mr. Carver did no such thing. Mid way through the cross-examination we see this exchange:

> Q. Yeah, except that you …
>
> A. … only 18.
>
> Q. …didn't mention that it was based on looking at the photograph. Did you attempt to tailor your evidence to what you saw on the photograph?
>
> A. How was I going to tailor my evidence? I am telling you basically the way that it happened. …

This exchange related to the length of shoelaces found at the scene which the Crown alleged had been tied together and used as a cord which the appellant managed to loop around S.M.'s neck and tether her to his wheelchair as he tried to stuff a sock in her mouth. Obviously Mr. Carver's point in raising these questions related to the appellant's earlier denials that he had used the shoelaces in that fashion, insisting that they were not long enough to serve that purpose. Mr. Carver sought to challenge that "explanation" by reminding Mr. Bailey that the length of the laces shown in the photographs as found at the scene were "more than long enough to do so" and that the appellant was now endeavouring to adjust his

testimony, in other words, "tailor his evidence" based on what he had just seen (and been confronted with) in the photographs.

[84] There was nothing improper in the line of questioning undertaken by the Crown Attorney.

11. Despite the trial judge's instructions on the law, the jurors were prejudiced against Mr. Bailey because of the similar fact evidence

[85] We have already considered the trial judge's decision to admit the similar fact evidence, and his directions to the jury with respect to it.

[86] The particular point to which this complaint relates concerns Mr. Bailey's submission on appeal that no matter what the trial judge told the jury, the members of the jury were not "legally trained" and so would be unable to "do the things a judge could" when applying that evidence properly and avoiding its misuse.

[87] Were the appellant's hypothesis to be true, there would never be <u>any</u> case where similar fact evidence could be admitted. That is not the law.

[88] We have already explained why, in our view, the trial judge properly applied the law in admitting the evidence, and gave proper mid-trial and final instructions to the jury as to its application.

[89] Nothing more need be said on this point.

12. The Crown's "misconduct" in referring to Mr. Bailey or his defence pejoratively

[90] This allegation of bias against him on the part of the two Crown attorneys is based on a brief conversation between those attorneys and the appellant's lawyer, Mr. Church at the start of the day, June 15, 2010, which was picked up on the recording devices <u>before</u> Justice McDougall entered the courtroom and court was "opened". After being provided with CDs of the proceeding, the appellant "discovered" the comments that had been recorded on the CDs. A subsequently prepared transcript shows that in the moments before "Court opened – 09:36:22" these comments were made:

> …**<u>MR. CHURCH</u>:** Right. Most of the stuff it is what it is, right? The photos.

> **MR. (CARVER):** Yeah. … (inaudible) (The vial/) The missing gun. Got to have a little humour in here, you know. … (inaudible)
>
> **FEMALE**: What?
>
> **MALE** We'll have to trade … (inaudible)
>
> **MR. CARVER:** I would have thought offering this dude a banana was about the last thing you'd want to do.
>
> **MR. HEEREMA:** Yeah.
>
> ...(inaudible)
>
> **MR. CARVER:** Alternatively it looks like the defence is run by a bunch of monkeys.
>
> **MR. HEEREMA:** So, yeah, I want to talk to you about my (mirror?) project.
>
> (Court opened – 09:36:22)

[91] Mr. Bailey took exception to those words, said it reflected racism on the part of the Crown and as an African Nova Scotian he found it especially offensive. He asked his lawyer, Mr. Church, to bring a formal motion before McDougall, J. to have Crown counsel removed. All of the evidence and submissions of counsel on this issue are contained in the Supplemental Appeal Book filed by the Crown. During the course of argument Mr. Bailey interrupted Mr. Church and said this:

> **MR. BAILEY:** When you use "monkey" towards a black person in any offence, they take it as an offence.
>
> **MR. CHURCH:** Yes.
>
> **MR. BAILEY:** You pretty much might as well call the person the N-word. … It should not have happened.

[92] Obviously this was a serious matter. It was treated as such by Crown counsel, defence counsel, and the judge. Like most things, context is important. After considering the transcript of the brief, recorded comments between the Crown Attorneys and Mr. Church that morning, it was obvious that a normal exchange of greetings ensued following which Mr. Church (munching on a banana) offered one to his client, all of this within reach and earshot of the Crown Attorneys. In part we see this exchange:

> **MR. CHURCH:** Do you want a banana, Lloyd.
>
> **MR. BAILEY:** Maybe later on.
>
> **MR. CHURCH:** I got two bananas here, started (eating them for lunch?)

MR. BAILEY: I'll take one later.

MALE: Best food in the city, isn't it?

MALE: Vegetables.

MR. BAILEY: That's … Yeah, that's what they say. Potassium.

MR. (CHURCH)?: (Sorry?) Mark, you made the paper today.

Mr. HEEREMA: Yeah.

MR. CARVER: I don't know why I didn't make the paper.

MR. CHURCH: What?

MR. CARVER: I don't know why I didn't make the paper.

MR. CHURCH: I don't know why you didn't either. …

[93] Justice McDougall looked at the circumstances very carefully and obviously took the opportunity to listen several times to the playback of the conversations and reflect upon the submissions. While in no way diminishing the seriousness of the allegation, McDougall, J. said:

> …And I listened to the playback … several times. I can discern from listening to the banter that was being exchanged between Crown and Defence counsel that morning, that Defence counsel when he arrived, he was kind enough to offer to his client, Mr. Bailey, one of two bananas that he had brought to the courtroom with him, a kind gesture, I might add. …it was all what I'd describe as banter. It was a good-natured discourse between different people and quite upbeat. And something that was intended, I think, to lighten the moment and to inject a little bit of levity, I guess, into the proceedings which is not uncommon. … I guess my role as a trial judge is to ensure fairness, to ensure that there's an even playing field, to ensure that a person who is charged with an offence is given full opportunity to make full answer and defence … quite frankly I have not witnessed … or overheard anything that I think could be construed in any way as being racially motivated or discriminatory or insensitive to your particular situation. And if I had, certainly I would have raised it and made sure that it would not happen again. …

[94] Mr. Carver acknowledged making the comment, explained the circumstances, and offered an apology to both Mr. Bailey and to Mr. Church. He said in part:

> **MR. CARVER:** …My Lord, we obviously had the opportunity to listen to this recording this morning here in Court. This was the first time the Crown was made aware of this particular issue. Weren't able to discern anything.

> But having the opportunity to use Your Lordship's perhaps better equipment or better sound system off your computer, I've had the chance to listen to it. And I believe that I hear myself saying the words, "Alternatively it looks like the Defence is run by a bunch of …" And in the context of what was occurring, I suspect that the next word, as Mr. Bailey has suggested, is monkeys. And I would attribute that comment to myself, and I would acknowledge that it appears that's a comment that I made.
>
> What I would ask the Court to consider is the context in which this all occurs. These are the few minutes before we are starting the second day of a long jury trial on which certainly was day two of the Crown's case. Beginning to present the real heart of it with Ms. [M.] preparing to testify, and completing evidence with respect to an exhibit witness.
>
> And in those few minutes that Mr. Church enters the room and you hear in those six minutes, there is some alternatively casual banter mixed with issues related to the day. And prior to this comment, one of the comments that Mr. Church made was about thinking, and I said … or he said it's dangerous to think, and I said, yes, I try and avoid it myself.
>
> I was making a joke in a self-deprecating manner with respect to myself, and it's just the sort of casual conversation you may have before you enter into a much more serious vein for the rest of the day. There was the conversation between Mr. Church and Mr. Bailey with respect to the bananas. They, as I recall, remained on the table, the Defence counsel table. And just shortly before Court opened, I noted that, I observed that. That's not something I've ever seen before in Court, certainly not in a jury trial where you're always conscious of how you physically appear, how your case appears, what is the jury going to … how they're going to assess you. So it struck me as a curious thing, and I made a joke to my colleague, "It appears that the Defence is run by a bunch of …" and I believe I said "monkeys."
>
> It's more a reference to the physical presentation of the courtroom with the Defence counsel with two bananas sitting on it. It was not in any way meant to cast a racial aspersion or make a racial comment, epithet, none of that whatsoever, but simply the way in which the courtroom was physically presented at that precise moment. It was made off-the-cuff without thinking. I certainly acknowledge, as Your Lordship had, that you can say things without intending to be insensitive or to offence, but that can nevertheless happen. And to the extent that that has happened in this particular case, I sincerely offer my heartfelt apology to Mr. Bailey as well.

[95] After taking into account all of these circumstances and the submissions made by counsel as well as Mr. Bailey, McDougall, J. accepted the explanation of Crown counsel. In his ruling he said it was within his discretion to remove Crown

counsel but accepted that in these circumstances there was no intent to cast an aspersion or express a racist comment. While acknowledging that it was an unfortunate choice of words, he was ultimately:

> ….not inclined to even seriously consider asking Crown counsel to fall on their sword and remove themselves as counsel of record. …

[96] We are not persuaded there is any reason to not defer to the trial judge's exercise of discretion. Obviously, McDougall, J. was acutely aware of the context following both a full trial and a significant history of proceedings in getting the Dangerous Offender hearing under way. The record clearly indicates that counsel for the Crown tried to assist the appellant in a variety of ways, both before and after this motion was made, and particularly when he was self-represented.

[97] We see nothing here to support a conclusion that Mr. Bailey's trial was rendered unfair by virtue of Mr. Carver's co-prosecution of the case. Accordingly, that complaint is dismissed.

13. The testimony (both at trial and on the fresh evidence application) of the Crown's forensic computer expert was not worthy of belief

[98] This allegation can be dismissed summarily. Mr. Blair MacLellan is a Senior Forensic Analyst with the Royal Canadian Mounted Police. He testified at the appellant's trial. His qualifications as an expert were not challenged by the appellant's defence counsel.

[99] Any challenge to the weight to be attached to his opinion arose during the course of his direct and cross-examination in the presence of the jury. That was a matter that lay exclusively within the jury's authority, as the trier of fact.

[100] Nothing arose during Mr. MacLellan's questioning in the fresh evidence application portion of this appeal which causes us to doubt his competence or credibility.

14. The "inconsistent" results following the Dangerous Offender hearings in 2002,and 2014

[101] This too can be dismissed summarily. The history and circumstances, together with the medical opinions considered by Justice Wright in the Dangerous

Offender hearing he conducted in 2002, differed chronologically and substantively from the record considered by Justice McDougall during the Dangerous Offender hearing he conducted in 2014. To state the obvious: between those two hearings Mr. Bailey had served an 8-year prison term for a terrible sexual assault upon a 12 year old girl, and shortly after his release contrived an intricate ruse in luring S.M. to a hotel room in the city where he subjected her to an unimaginable sadistic, sexual attack.

[102] For this and countless other reasons, the respective records before the Courts in 2002, and 2014, are distinguishable and there is nothing "inconsistent" in the fact that the sentencing decisions and outcomes were different.

(iv) Sentencing – declaring Mr. Bailey a dangerous offender and imposing indeterminate sentences

[103] The judge's June 20, 2014 oral reasons describe the dangerous offender application that took four years to complete. He attributes most of the delay to the appellant:

> It has taken a considerable amount of time to arrive at this juncture. The majority of the delays are attributable to [the appellant's] decision to discharge his trial counsel not only once but twice, and to repudiate and renege on the agreement made on his behalf by his counsel which could have streamlined proceedings considerably.
>
> Further delays were the result of [the appellant's] inability to either retain alternate counsel or to maintain representation once it had been arranged. It should be noted that the Crown was in a position to set dates for the hearing of the application to determine dangerous-offender status as early as October 22nd, 2010, just a little less than four months post-conviction. Other than this and the delay to allow the Court time to prepare a decision, all other delays were caused by the Defence.

[104] He refers to agreements made by the parties to admit the voluminous documents without calling witnesses and makes it clear that eventually there was agreement on their admission:

> . . . Counsel agreed that certain evidence could be admitted without the requirement to call witnesses to prove it.
>
> …

> . . . The reduction in the number of days required was due to the agreements reached by Crown and Defence counsel regarding the admissibility of evidence without the need to call witnesses.
>
> …
>
> [The appellant] advised the Court that he was dismissing his lawyer, and that any agreements made by his former counsel were withdrawn. This meant that the evidence the Crown wished to rely on would have to be presented to the Court and proved by way of witness testimony.
>
> …
>
> > On Wednesday afternoon, December 12, 2012, after the Court had indicated that it was considering the appointment of an *amicus curiae*, [the appellant's] former counsel, Mr. Brian Church, Q.C., was once again retained by [the appellant] to represent him.
> >
> > Mr. Church was given time to discuss with his client the possibility of reinstating the previous agreements that would allow for the introduction of previous Court transcripts, Correctional Service Canada record, and all medical and psychological and psychiatric records and reports pertaining to [the appellant]. When the matter reconvened, Mr. Church advised the Court that all these transcripts and records would be entered without the need to call any other witnesses. The Court made it clear to [the appellant] that even if he should once again decide to discharge his counsel, he was not going to be allowed to renege on his agreement.

[105] The judge refers to the expert report and testimony of Dr. Hy Bloom, the psychiatrist permitted to testify and give opinion evidence as:

> > A psychiatrist able to provide opinion evidence in the area of psychiatry including but not limited to the practice of forensic psychiatry, the diagnosis, assessment and treatment of mental disorders; the diagnosis and classification of violent and/or sexual offenders; the assessment of risk for future violence or recidivism for violent and/or sexual offenders; the treatment for violent and/or sexual offenders; and the nature and degree of psychological harm caused by violent and/or sexual offenders to their victims.

His was the only report and testimony of this nature.

[106] The judge reviews the law on dangerous offenders and indeterminate sentences, finds all conditions precedent to proceeding with a dangerous offender application have been met and considers the 2002 reasons of Justice R. W. Wright

(*R. v. L.E.B.*, 2002 NSSC 156) given following the first Crown application to have the appellant declared a dangerous offender. Justice Wright's decision was made before the 2008 amendments to the dangerous offender provisions of the *Code*, when a judge had discretion on whether to designate an offender a dangerous offender even where the requirements of s. 753(1) were met. Justice Wright found the appellant was a long-term offender and not a dangerous offender.

[107] In his reasons, Justice McDougall reviews the circumstances of the appellant's predicate offences and considers the appellant's criminal history, including his offences as a young offender between the ages of 15 and 17. He notes a number of common elements among the offences that involved attacks on women: the appellant knew all of his victims and they knew him; he isolated the victims by means of a ruse before attacking them; the appellant used violence and threats to gain their compliance and all victims were attacked at the neck. The degree of escalating violence in his multiple sexual assaults on unsuspecting women is disturbing.

[108] The judge refers to Dr. Bloom's report and finds the appellant was a dangerous offender:

> The pattern of behaviour began a little over 29 years ago when [the appellant] was 15 years of age. Since then, he has continued to commit attacks on females despite the intervention by the Courts and increasing periods of incarceration. Clearly, this demonstrates a pattern of repetitive behaviour as well as a pattern of persistent aggressive behaviour.
>
> Furthermore as was exhibited in the latest attack on Ms. M., the level of violence employed by the offender keeps escalating and is of such a brutal nature both physically and emotionally that one can only conclude that his behaviour in the future is unlikely to be inhibited by normal standards of behavioural restraint.
>
> [The appellant] has had the opportunity to be assessed and to receive treatment. He has, in the past, agreed to take pharmacological sex-drive-reduction treatment, but later reneged on this undertaking, stating in so many words that he only said it to avoid a dangerous-offender designation.
>
> He has also demonstrated that the normal aging process and his physical limitations that cause him to rely on the use of a wheelchair to assist his mobility have done little to impede his predatory behaviour against women. Indeed, it seems that the latter is less of a hindrance and more of a prop to gain an advantage when setting up his trap to snare another victim.

As Dr. Hy Bloom stated in his assessment report, and I quote:

> As noted, [the appellant's] risk has not been contained by his physical limitations. The most recent predicate offences speak volumes to that. He is still a young man at age 41. (he's older now) There is no clear evidence of physical deterioration to an extent where it could play an important role in impeding re-offence. It appears to me that [the appellant's] physical limitations did not so much affect his ability to plan and execute physically and psychologically injurious sexual actions against unsuspecting females. His physical limitations did, however, confer some benefit on his victims, as they were able to better resist him and escape.
>
> I would not be confident that [the appellant] could not or would not employ the same contrivances to access a victim or that he has sufficient upper-body strength to accomplish an assault.

Dr. Bloom also offered his assessment of [the appellant] after considering the entirety of his history. On page 64 of his report he stated, and I quote again from Dr. Bloom's report:

> [The appellant's] life pursuits have very much centered on gratifying or serving his every need or wish. This invariably involved the exploitation or abuse of others to his benefit and to their detriment.
>
> The predicate offences, in fact, are a testament to the triumph of the pursuit of his potentially sadistic gratification of sexual and other needs over the well being of the victim, the legal and moral edicts of society, any self-awareness and motivation for change, the presumptively deterrent value of the risk of a severe custodial sentence (which [the appellant] has already faced), and even his own physical limitations.
> …
>
> There is in the end nothing to displace the historically - and clinically-based view that [the appellant] will continue to pursue any workable opportunity to gratify his sexual impulses and need for power and control over others. The likelihood is considerable that he will continue to prey on anyone who is actually weaker or whom he perceives to be weaker and exploitable as has evidently

> occurred, notwithstanding the course of physical decline and limitation.
>
> In this regard, individuals with highly problematic personality pathology and who fit the criteria for the construct of psychopath are actually quite gifted at getting their needs met in circumstances in which they have need to adapt to or manipulate.

In respect to management, supervision, and risk-reduction recommendations, Dr. Bloom had this say, and I quote again:

> As suggested above, I am compelled by a review of [the appellant's] history up until 2002, considered together with his history since then including the predicate offences, to conclude that the prospect for treatment and rehabilitation is bleak. [The appellant] has a more than 20-year history of substantial denial of responsibility for the core element of his sexual-offence history and aggression towards females. Disavowal of any sexual problems or issues with females, and reluctance to accede to sexological assessments, investigations, and interventions which potentially could have years ago positively impacted on his dangerousness. Put succinctly, his motivation is markedly poor.
>
> All of this suggests a rather malignant prognostic picture. [The appellant] has skirted around the issue of psycho-pharmacological intervention–i.e. sex-drive-reducing medication. I would not, based on this history, have any confidence in [the appellant's] claim were he to make it that he will take medication of this kind. To his credit, he has seemingly admitted in the past that he only entertained a discussion about this intervention to be seen as motivated with the potential that this would avert the worst possible penal outcome.
>
> …

I am not ceding my responsibility to decide whether the offender meets one or more of the definitions of dangerous offender as set out in Section 753(1)(a)(i), (ii) and (iii), or paragraph (b) of that section.

But unlike the last time [the appellant] was subject of a dangerous-offender hearing, there is no one suggesting that he could be properly and adequately supervised under any type of release program.

Nor has [the appellant] agreed to take any form of anti-androgen medication. Perhaps I should have said [the appellant] has not tried to once again mislead the Court into believing he will take such sex-drive-reduction medication.

And based on Dr. Bloom's diagnosis of [the appellant's] mental pathology and Mr. Peter Wickwire's testimony regarding offender supervision after release,

> and factoring in [the appellant's] extensive criminal history and his documented behaviour while incarcerated, I cannot foresee any kind of plan of supervision that could effectively control his behaviour and which would adequately protect the public from the likelihood of his re-offending and causing serious personal injury or perhaps even death to another hapless victim.
>
> I am satisfied on the totality of the evidence that [the appellant] meets each of the four definitions of dangerous offender found in Section 753(1)(a)(i), (ii), (iii), and paragraph (b).
>
> I am further satisfied that there is no reasonable expectation that a lesser measure will adequately protect the public against the commission by the offender of murder or a serious personal-injury offence.

[109] The judge then sentenced the appellant to indeterminate sentences for seven of the nine offences.

[110] The appellant appeals both his designation as a dangerous offender and his indeterminate sentences.

Issues

[111] The three issues to be determined with respect to the dangerous offender designation and indeterminate sentences are:

1. Did the judge err by admitting and considering documents relating to the appellant's convictions as a young offender?
2. Was the dangerous offender designation unreasonable?
3. Was the indeterminate sentence unreasonable?

Standard of Review

[112] In *R. v. Sawyer*, 2015 ONCA 602, the Court sets out the appropriate standard to be applied in appeals from dangerous offender and indeterminate sentence decisions:

> [26] Appellate review of a dangerous offender designation "is concerned with legal errors and whether the dangerous offender designation was reasonable": *R. v. Sipos*, 2014 SCC 47, [2014] 2 S.C.R. 423 (S.C.C.), at para. 23. While deference is owed to the factual and credibility findings of the sentencing judge, appellate review of a dangerous offender designation is more robust than on a "regular"

sentence appeal: *Sipos*, at paras. 25-26; *R. v. Currie*, [1997] 2 S.C.R. 260 (S.C.C.), at para. 33.

[27] Prior to the 2008 amendments to Part XXIV of the *Criminal Code*, the designation of an offender as dangerous would necessarily have resulted in the imposition of an indeterminate sentence. Now, the court has some discretion as to the sentence imposed, as discussed below. Whether this change results in a different standard of review for the dangerous offender designation as opposed to the sentence imposed has not been addressed in the jurisprudence and for the purposes of this appeal, it is not necessary for us to decide this issue.

[28] In my view, nothing turns on the standard of review here and, in any event, the standard of review for the imposition of an indeterminate sentence is likely the same as the standard of review for a dangerous offender designation. Section 759(1) grants an offender who is found to be a dangerous offender or a long-term offender a right of appeal "from a decision made under this Part on any ground of law or fact or mixed law and fact." The decision to impose an indeterminate sentence is made under "this Part" — Part XXIV — of the *Criminal Code*. In *Currie*, the Supreme Court interpreted an earlier version of this provision which also granted a right of appeal "on any ground of law or fact or mixed law and fact" and said the following at para. 33:

> [T]he role of an appellate court is to determine if the dangerous offender designation was reasonable.... I do not find the "manifestly wrong" or "demonstrably unfit" general sentencing standards ... to be applicable to this situation. However, it is equally true that s. 759 cannot be interpreted as calling for the equivalent of a trial de novo on the dangerous offender application. Some deference to the findings of a trial judge is warranted. After all, credibility should be assessed and findings of fact should be made by the trier of fact.

[29] In my view, as the right of appeal is identically worded, the Supreme Court's interpretation of the scope of appellate review in *Currie* applies equally to the imposition of an indeterminate sentence. Courts can review the imposition of an indeterminate sentence for legal error and reasonableness, but should defer to the factual and credibility findings of the trier of fact.

[113] We agree. The standard of review on an appeal from a dangerous offender designation and indeterminate sentence requires us to give deference to the judge of first instance on factual and credibility findings and to otherwise consider whether the designation and indeterminate sentences are reasonable. On questions

of law, such as the first issue raised in this appeal, the standard of review is correctness.

Analysis

Did the judge err by admitting and considering documents relating to the appellant's convictions as a young offender?

[114] The appellant argues the judge erred by admitting and considering, in connection with his dangerous offender application and indeterminate sentences, the documents relating to his convictions as a young offender.

[115] The Crown admits it did not make application to a Youth Court for release of the appellant's youth records in connection with this dangerous offender proceeding. It says it did not do so because (1) it successfully made such an application at the time of the appellant's 2002 dangerous offender application before Justice Wright, where those records were admitted by consent and formed part of the record of that proceeding that was before Justice McDougall and (2) the appellant agreed to the admission of these records at this dangerous offender proceeding, first through his counsel and, subsequently, as a condition of the judge permitting his counsel to withdraw for the second time.

[116] The Crown says without these agreements it would have applied for the release of his youth records for this dangerous offender application.

[117] The Crown also points out, relying on *R. v. Smith*, 2003 BCCA 661, that (1) when an application is made, such youth records are generally released "in the interests of justice" where the Crown intends to use them in a dangerous offender application and (2) failure to make an application, where consent would have been granted had it been made, has been viewed as a harmless error.

[118] In *R. v. Jones*, [1994] 2 SCR 229, at p. 290, the Court states:

> In the case of dangerous offender proceedings, it is all the more important that the court be given access to the widest possible range of information in order to determine whether there is a serious risk to public safety. . . .

[119] We are satisfied the judge did not err in admitting and considering the appellant's youth criminal records. The appellant agreed to their admission, and

had he not, the Crown would have made the required application, which would likely have been granted.

[120] We dismiss this ground of appeal.

Was the dangerous offender designation unreasonable?

[121] Under the dangerous offender provisions of the *Code* that govern this appeal, if all preconditions are met, a judge **must** find an offender to be a dangerous offender under s. 753(1) if 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
>
> (b) that the offence for which the offender has been convicted is a serious personal injury offence described in paragraph (b) of the definition of that expression in section 752 and the offender, by his or her conduct in any sexual matter including that involved in the commission of the offence for which he or she has been convicted, has shown a failure to control his or her sexual impulses and a likelihood of causing injury, pain or other evil to other persons through failure in the future to control his or her sexual impulses.

[122] A judge has no discretion with respect to the designation of a dangerous offender if the Crown proves beyond reasonable doubt these statutory prerequisites.

[123] The judge's reasons, set out in part in paragraph 108 above, make it clear he considered the evidence in light of the provisions of s. 753(1). He finds a pattern of repetitive behavior and a pattern of persistent aggressive behavior by the appellant as referred to in s. 753(1)(i) and (ii) respectively. He finds the brutality of the attacks compelled the conclusion that the appellant's behavior in the future was unlikely to be inhibited by normal standards of behavioral constraint as referred to in s. 753(1)(iii). He finds neither the appellant's age or physical restraints impeded his behavior. He refers to Dr. Bloom's evidence that there is nothing indicating the appellant can control his sexual impulses in the future, as referred to in s. 753(1)(b).

[124] The predicate offences involved a 19-year-old woman the appellant knew, whom he lured to a hotel room on the promise of modelling bathing suits in a photo shoot. He drugged and threatened her, taped her hands and told her to put a sock in her mouth to gag herself. He choked her by tightening a noose, made of shoelaces, around her neck so hard that it caused innumerable spots of petechial hemorrhaging to her face and a cut around her neck. The appellant licked her vagina and penetrated her with his finger(s) and a cucumber.

[125] The appellant had three convictions as an adult prior to the predicate offences, where he attacked women, between the ages of 12 and 31, whom he knew and who knew him. The last two took place when Mr. Bailey was confined to a wheelchair. All three involved choking his victims, using a ruse to isolate his victims and using threats and violence to gain their compliance. One involved multiple rapes, the binding of the victim's hands and feet and using a sock as a gag. Another involved the appellant fondling the breasts and vagina of the 12-year-old victim.

[126] Measuring the circumstances of the appellant's offences referred to above against the criteria set out in s. 753(1) for determining whether someone is a dangerous offender satisfies us that the designation of the appellant as a dangerous offender was reasonable.

[127] We would dismiss this ground of appeal.

Were the indeterminate sentences unreasonable?

[128] Once a dangerous offender designation has been made, an indeterminate sentence is presumed (s. 753(4)) unless the Court is satisfied of a reasonable expectation that a lesser measure will adequately protect the public:

> 753(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.

[129] The court in *R. v. Bragg*, 2015 BCCA 498 sets out the governing principles for sentencing a dangerous offender:

> [26] The principles governing the sentencing of a dangerous offender include the following, as summarized in *R. v. Smarch*, 2015 YKCA 13:
>
> > [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 CanLII 25 (SCC), [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. ...
> >
> > [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. …
>
> [27] As to the provisions of s. 753(4.1) of the *Criminal Code*, the Crown bears no burden in the assessment of future manageability: *R. v. Wormell*, 2005 BCCA 328, at paras. 31-32.
>
> [28] In *Wormell*, Southin J.A. also explained, using the language of the former provision:
>
> > [32] The task of the Court from beginning to end is to ask itself, "Am I satisfied that there is a *reasonable* possibility [now a reasonable expectation] of eventual control of the risk in the community?" If the judge concludes that he or she is not so satisfied then the judge cannot designate the offender a long-term offender. [Southin J.'s emphasis]
>
> There must be evidence that the risk posed could be controlled once a long-term supervision order expires.

[130] Ultimately, the judge has to be satisfied that the nature and severity of the risk can be adequately contained in the community by treatment, external controls, some other means, or combination of mechanisms; *Sawyer*, at para. 37.

[131] In sentencing the appellant to indeterminate sentences, the judge took Dr. Bloom's opinions into account. His was the only psychiatric report admitted. He was the only psychiatric expert to testify. His 65 page report detailed the appellant's psychiatric and sexological makeup and concluded that the appellant was a high risk to reoffend and that there was no reasonable expectation that his risk could be adequately managed through lesser measures than an indeterminate sentence.

[132] Dr. Bloom classified the appellant's risk for reoffending outside of jail as "enormous". He indicated the appellant's dependence on a wheelchair did nothing to lessen that risk, as evidenced by the fact he had offended three times since he began using a wheelchair. He said the appellant's age was not an answer either, due to the appellant's paraphilia, misogyny and psychopathy. Dr. Bloom saw the appellant's sexual sadism and psychopathy as precluding a realistic scenario that the appellant could be released to the community at an acceptable or manageable risk.

[133] There was no evidence to the contrary.

[134] The judge's conclusion that he was not satisfied on the whole of the evidence as to the reasonable expectation required by s. 753(4.1) was clearly open to him. His conclusion that there was no reasonable expectation the appellant could be managed in the community was reasonable given the extent and nature of his criminal record, the nature of the predicate offences, Dr. Bloom's opinion as to his high risk of reoffending, the inability to control his risk factors in the community and the unlikelihood he would use anti-libido medication.

[135] We are satisfied the indeterminate sentences are reasonable.

[136] We dismiss this ground of appeal.

Conclusion

[137] We decline to admit the appellant's so-called "fresh evidence". The trial judge did not err in admitting the similar fact evidence introduced at Mr. Bailey's trial. The judge's instructions to the jury with respect to the proper use of that evidence were correct. We are not persuaded by any of the myriad of miscellaneous complaints leveled by the appellant as providing any basis for overturning the verdicts and ordering a new trial. We see no legal error in the manner in which the judge conducted the Dangerous Offender hearing. We find his decision to designate Mr. Bailey as a dangerous offender and sentence him to indeterminate sentences as being perfectly reasonable.

[138] For all of these reasons we dismiss Mr. Bailey's appeals against both conviction and sentence.

Saunders, J.A.

Hamilton, J.A.

Scanlan, J.A.