NOVA SCOTIA COURT OF APPEAL
Citation: *R. v. A.H.,* 2018 NSCA 47

Date: 20180606
Docket: CAC 465864
Registry: Halifax

Between:

Her Majesty the Queen

Appellant

v.

A.H.

Respondent

Restriction on Publication: s. 486.4 of the *Criminal Code*

Judge:	The Honourable Chief Justice J. Michael MacDonald
Appeal Heard:	April 12, 2018, in Halifax, Nova Scotia
Subject:	Criminal Law; dangerous offender application, request to extend remand time to complete assessment
Summary:	A court cannot impose a dangerous (or long-term) offender designation without an expert assessment. This is achieved by remanding the offender to the appropriate psychiatric facility for a period not to exceed 60 days. In this matter, a remand was ordered but the 60-day time limit passed without the assessment being completed. The Crown appeals the sentencing judge's refusal to extend that deadline.
Issue:	Did the judge commit reversible error by denying the Crown's request to extend the remand time in order to complete the assessment?
Result:	Appeal dismissed. There was no need to interfere with the judge's discretionary decision to deny the extension.

This information sheet does not form part of the court's judgment. Quotes must be from the judgment, not this cover sheet. The full court judgment consists of 13 pages.

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Judges:	MacDonald, C.J.N.S.; Beveridge and Bourgeois, JJ.A.
Appeal Heard:	April 12, 2018, in Halifax, Nova Scotia
Held:	Appeal dismissed, per reasons for judgment of MacDonald, C.J.N.S.; Beveridge and Bourgeois, JJ.A. concurring
Counsel:	Mark Heerema, for the appellant Robert J. Currie and B. Matthew MacMillan (articled clerk), for the respondent

Order restricting publication *B* 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or justice may make an order directing that any information that could identify the complainant or a witness shall not be published in any document or broadcast or transmitted in any way, in proceedings in respect of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:

Overview

[1] A court cannot impose a dangerous (or long-term) offender designation without an expert assessment. This is achieved by remanding the offender to the appropriate psychiatric facility for a period not to exceed 60 days. In this matter, a remand was ordered but the 60-day time limit passed without the assessment being completed. The Crown appeals the sentencing judge's refusal to extend that deadline.

BACKGROUND

[2] In November of 2016, Justice Jamie S. Campbell of the Nova Scotia Supreme Court convicted the respondent A.H. of serious sexual and physical offences against his intimate partner. The Court ordered a pre-sentence report, which revealed something very concerning to the Crown. Back in 2012, a forensic sexual behaviour assessment had been prepared relative to a previous sexual assault conviction involving A.H.'s then girlfriend. The report had been eerily prophetic:

> At this point in time, [A.H.]'s prognosis is considered poor due to his lack of insight, lack of motivation to attend programming, presence of numerous cognitive distortions about sexuality, violence and women, and lack of responsivity to external supervision.

[3] This newly revealed information prompted the Crown to seek a dangerous offender designation for the 2016 offences. Accordingly, it asked the Court to remand A.H. so that the required assessment could be completed. This process is set out in the Criminal Code:

> Application for remand for assessment
>
> 752.1 (1) On application by the prosecutor, if the court is of the opinion that there are reasonable grounds to believe that an offender who is convicted of a serious personal injury offence or an offence referred to in paragraph 753.1(2)(a) might be found to be a dangerous offender under section 753 or a long-term offender under section 753.1, the court shall, by order in writing, before sentence is imposed, remand the offender, for a period not exceeding 60 days, to the custody of a person designated by the court who can perform an assessment or have an

> assessment performed by experts for use as evidence in an application under section 753 or 753.1.
>
> Report
>
> (2) The person to whom the offender is remanded shall file a report of the assessment with the court not later than 30 days after the end of the assessment period and make copies of it available to the prosecutor and counsel for the offender.

A.H. did not oppose the request.

[4] Having "reasonable grounds to believe" that A.H. met these criteria, the judge remanded him for 60 days to the East Coast Forensic Hospital. Until then, he had been released on conditions pending sentence.

[5] When A.H. entered the Hospital, things got complicated. The Hospital psychiatrists refused to comply with the order. This problem will be discussed in more detail later. In any event, the 60 days came and went before the assessment was done. This prompted the Crown to ask the sentencing judge for an extension. Otherwise, the dangerous offender application would be doomed.

[6] The Crown's request triggered two considerations: (a) whether the Court even had jurisdiction to grant an extension; and (b) if so, should it be granted in these circumstances.

[7] In his June 2017 decision under appeal, the judge ruled that, while he had jurisdiction to do so, he declined to grant the extension in this case.

[8] Before us, the Crown asserts that this refusal reflects errors in principle that must be corrected. Because A.H. has not challenged the jurisdictional ruling, I will assume, without deciding, that the judge had jurisdiction to grant the extension, had he been so inclined.

ISSUES

[9] Here are the Crown's grounds of appeal:

> 1. In refusing to grant the extension for remand on, a completion of the s. 752.1 assessment, the Learned Trial Judge erred in principle by relying on a premature prognostication about the ultimate outcome of the assessment or future hearing;

> 2. In refusing to grant the extension of time for remand on, and completion of the s.752.1 assessment, the Learned Trial Judge erred in principle by relying on an erroneous interpretation of the prerequisites to a Dangerous Offender (or Long Term Offender) designation;
>
> 3. In relying on the same opinion or information as above, the Learned Trial Judge failed to consider the prospect of, and prerequisites for, a Long Term Offender designation;
>
> 4. In refusing to grant the extension for remand on, and completion of the s.752.1 assessment, the Learned Trial Judge erred in principle in concluding prejudice to the offender, in part, by concluding that there were no grounds to revoke the offender's bail following conviction and, in part, by ignoring that any remand issues could be addressed when considering the inevitable carceral sentence.
>
> 5. In refusing to grant the extension for remand on, and completion of the s.752.1 assessment, the Learned Trial Judge caused an injustice to the Crown, who was not responsible for any delays, by preventing the completion of the s.752.1 assessment and preventing the Crown from considering whether to apply for a Dangerous Offender or Long Term Offender designation, or to seek a traditional sentence, as the circumstances required;

[10] As a preliminary point, A.H. seeks to have the appeal dismissed, asserting that these grounds fail to raise a question of law. He explains in his factum:

> 27. Justice Campbell's decision was clearly on a question of mixed law and fact, since it involved applying his discretion under s. 752.1(1) to the facts surrounding the procedure under which [A.H.] had been remanded. Given the restriction of Crown appeals of findings under s. 752.1(1) to questions of law alone, this appeal is outside the permissible scope, and should be dismissed by this Court on that basis.

[11] I disagree with this assertion. Instead, as I will explain, three legal issues emerge for our consideration.

[12] The first issue is distilled from the first three grounds of appeal. Here, the Crown essentially asserts that the psychiatrists, in refusing to complete the assessment, were operating under a seriously flawed interpretation of the dangerous (long-term) offender regime. Yet, instead of calling them to task for failing to comply with his order, the judge "acquiesced" in this flawed and misguided approach. The Crown, in its factum, explains:

> 9. In providing reasons for their refusal, the ECFH relied upon a flawed understanding of the relevant law. They opined that a designation was not likely given that: (1) [A.H.] was untreated; (2) that he is not the "worst of the worst" and (3)(a) that the 2012 Report already provided a static risk assessment and was, (b) in effect, unnecessary.
>
> 10. Justice Campbell acquiesced in this misinformed failure by the ECFH. Rather than noting their mistakes, he was taken in by them, and consequently fell into error by refusing the Crown's application to extend the assessment.

[13] The second issue is reflected in Ground #4. It suggests that the judge erred in law by overlooking a material fact; namely that any additional hospital remand time could be accounted for in the ultimate sentence.

[14] The third issue is reflected in Ground #5. It suggests that the judge erred in law by seriously misapprehending the facts; namely by purportedly blaming the Crown for the Hospital's failure to complete the assessment.

[15] In my forthcoming analysis I will, therefore, consider the following:

> Did the judge err in law by:
>
> a) adopting the psychiatrists' flawed approach to the dangerous/long-term offender regime;
>
> b) not realizing that the ultimate prison sentence could be reduced to account for any additional hospital remand time; and
>
> c) unjustifiably blaming the Crown for the assessment failure?

ANALYSIS

Did the Judge adopt the Hospital's flawed approach to the dangerous (long-term) offender regime?

[16] Here, the Crown identifies three fundamental problems with the approach taken by the psychiatrists, which it says the Judge should not have "endorsed":

> 49. Succinctly stated, the Appellant argues that Justice Campbell failed to understand the applicable tests and relevant factors under both s. 753 and 753.1 by endorsing the legally misinformed position of the ECFH. This misunderstanding led Justice Campbell to erroneously pre-judge the Crown's Application.

> 50. Specifically, the Appellant points to the following sources of error:
>
> (1) The misunderstood significance of [A.H.] being untreated,
>
> (2) The misunderstood significance of [A.H.] not being the "worst of the worst"; and
>
> (3) The misunderstood significance and utility of the 2012 Report.

[17] Respectfully, I would dismiss this ground of appeal for the following reasons.

[18] First of all, this appeal must be placed in perspective. It is not about whether the psychiatrists misunderstood the law when refusing to complete the assessment. Nor is it about whether they were offside in refusing to comply with a judge's order. Instead, it is about whether the judge erred in law when exercising his discretion to deny the extension.

[19] In exercising this discretion, any heed paid to the psychiatrists was, in my view, minimal and represented only one of many competing factors the judge had to balance. In this regard, the judge is entitled to deference. See *R. v. R.E.W.*, 2011 NSCA 18 at ¶ 33. Furthermore, at no time did the judge ever "endorse" the psychiatrists' legal views.

[20] For example, consider the alleged misunderstanding regarding A.H. being untreated. The Crown elaborates in its factum:

> **<u>The Misunderstood Significance of [A.H.] being Untreated</u>**
>
> 51. Drs. Brunet and Theriault expressed opinions that [A.H.]'s untreated status was effectively incompatible with a dangerous offender designation. Justice Campbell, who referred extensively to these emails, concluded as follows:
>
> > He has not been treated at all. There would be a substantial hurdle to overcome in an application for a dangerous offender status.
>
> [A.B., Tab 3, page 28]
>
> 52. Justice Campbell re-iterated the perceived import of untried programming in his sentencing decision when he held:
>
> > He's now more mature. But the 2012 report remains relevant in this sense: [A.H.] has not received treatment for his sexual issues. <u>That lack of treatment is part of why there were reservations expressed about the dangerous offender application. While the assessment notes that he presented then a high risk, and that assessment was based, largely, on static factors, he has never received treatment for the concerns that have been identified</u>.

> [A.B., Tab 3, page 41]
>
> 53. The law holds that untried programming is not determinative, contrary to the misconceptions of Drs. Theriault, Brunet and Justice Campbell.

[21] Yet, here is the full passage from which the Crown's first impugned excerpt is taken. Notice the many factors the judge had to consider:

> The granting of an extension of time is, however, a matter for the exercise of judicial discretion. The time limits are not extended as of right. That involves a review of the circumstances of the case, bearing in mind the interests at stake. On one side, there's a concern that a court be fully informed when dealing with sentencing. Having the information from such an assessment may be critical in assessing the risk to public safety.
>
> A dangerous offender is a serious matter and should not be rendered a nullity in a summary way. The concern for full inquiry may often outweigh the prejudice that would arise from having the report filed a few days or even a few weeks late. The prejudice to the offender is more clearly an issue when it involves requiring a person to be remanded for an additional period of time. Here, that concern has been expressed.
>
> [A.H.] is being remanded pending that assessment and his sentencing is delayed. He would, otherwise, be at large on his undertaking pending that sentencing. He has lost the presumption of innocence but, were it not for this remand, he would be at large on his under[taking] subject to an application to revoke bail. That prejudice is moderated somewhat by the likelihood that he faces a period of incarceration on sentencing and credit can be given for time spent on remand having that assessment done. That, however, is not an entirely straightforward exchange. If he were sentenced to a term of imprisonment in the Federal system, he would have been able to start the process required for participation in treatment programs. Instead, he has been detained, pending an assessment that so far is yet to take place.
>
> I'm mindful here, as well, of the concerns expressed to counsel by both Dr. Brunet and Dr. Theriault. [A.H.]'s risk assessment, based on static factors, suggests that he's a high risk to reoffend violently. His conviction would not change that assessment in a substantial way. He has not been treated at all. There would be a substantial hurdle to overcome in an application for a dangerous offender status. That is not to pre-judge the application, but in the exercise of judicial discretion, that is a circumstance that cannot be ignored. The delay in this case may not be blamed on the Crown, but it cannot at all be blamed on [A.H.]. He's not shown any indication of a refusal to cooperate. He hasn't even been asked yet. He's just been in Burnside, essentially, doing time. The disagreement between the Crown and the East Coast Forensic Hospital is not his fault.

> While I'm satisfied that I have jurisdiction to make an order extending the time period for an assessment, I'm not satisfied that this is an appropriate case for me to exercise that jurisdiction by granting the order. The prejudice to [A.H.] involved in the further delay of the sentencing and his being held at the East Coast, at Burnside for a further period for assessment, when that assessment may be of marginal utility, outweighs the potential benefit of having such a report.
>
> As Justice Ouellette observed in *Gow*, the failure of the dangerous offender in no way deprives the Crown of the opportunity to put forward meaningful and serious consequences that could be imposed on an offender. The 2012 assessment suggests that [A.H.] requires a serious course of treatment. That does not require a dangerous offender application and a further remand and report preparation period that comes with it. For the same reasons, it would not be appropriate to order a new remand and simply start the process over again.

[22] Note as well that at no time does the judge conclude that the lack of treatment would be "determinative" of a dangerous offender application, as the Crown accuses. Far from it. The judge simply said he was "mindful" and could not "ignore" the psychiatrists' observations. He expressly noted that he was not pre-judging the prospective dangerous offender application.

[23] Furthermore, the Crown's reference to the judge's sentencing decision is completely out of context. The judge was simply making an observation when passing sentence. This has no possible relevance to his decision under appeal.

[24] The Crown's second attempt to align the judge with the psychiatrists' alleged legal errors—that this designation is reserved for the "worst of the worst"—is even more of a stretch. It alleges in its factum:

> **The Misunderstood Significance of [A.H.] not Being the "Worst of the Worst"**
>
> 62. A dangerous or long-term offender designation made pursuant to s. 753 or 753.1 is not reserved for the "worst of the worst". Offenders who have proved violent in the past and have been shown to be violent in the future may properly fall within the purview of these designations. Their degree of violence in the past, need not meet the objective label of "worst" - that is an impossible standard. Neither the statutory provisions require such a label, nor must the safety of society wait for such a label where the provisions are otherwise satisfied:
>
> > 6 Contrary to the appellant's submission, a dangerous offender designation is not restricted to offenders who commit the gravest of crimes. There is no requirement under the *Criminal Code* that the serious personal injury offence required to trigger a dangerous offender application meet a specified threshold of seriousness. As this court

> recognized in *R. v. Hall* (2004), 70 O.R. (3d) 257, 186 C.C.C. (3d) 62 (Ont. C.A.), a "worst offender/worst offence" characterization is not a precondition to the imposition of an indeterminate sentence under s. 753.1 of the *Criminal Code*. To the contrary, a dangerous offender designation and an indeterminate sentence are properly imposed in cases where, as here, the offender meets the statutory criteria for such a designation and his or her future risk cannot be controlled through a determinate sentence or the imposition of a long-term supervision order.
>
> [*R. v. Solano*, 2014 CarswellOnt 2751 (C.A.) at para. 6]
>
> [See also, *R. v. Currie*, 1997 CarswellOnt 1487 (SCC) at paras. 24 and 26]
>
> 63. In her email, Dr. Brunet suggested that [A.H.] must be the "worst of the worst":
>
> Dr. Theriault's comments were directed at that perspective, that being that presumably DO designation is meant for the 'worst of the worst' essentially irredeemable offenders
>
> [S.A.B., Tab 1, p. 11]
>
> 64. "Worst of the worst" is not statutorily required. Justice Campbell's failure to correct this assertion, considering his reliance on the ECFH, is concerning.

[25] Here the Crown no longer alleges that the judge "endorsed" the psychiatrists flawed premise. It simply suggests that the judge should have corrected it. Again, this appeal is not about whether the psychiatrists erred in law. This submission has no merit.

[26] Let me turn to the Crown's third attempt to align the judge with the psychiatric opinions. Here is the Crown's written submission:

> 70. Dr. Theriault opined in his email to Ms. McKinney, that a s. 752.1 report would only "rework existing information" or "offer no new insights." It would appear Justice Campbell agreed, holding that a report would be of "marginal utility".

[27] The reference to "marginal utility" comes from the passage I have cited above. First of all, the judge did not say the prospective report "would" be of marginal utility, as the Crown accuses. Instead, he conjectured that it "may" be of marginal utility. Furthermore, as the full passage reveals, this consideration was one of many the judge had to balance when considering the extension request. It reveals no error in principle. This submission has no merit.

[28] I would dismiss this aspect of the appeal.

Did the judge not realize that the ultimate prison sentence could be reduced to account for any additional hospital remand time?

[29] Here are the Crown's written submissions on this issue:

> 73. Justice Campbell found that the prejudice to [A.H.] outweighed the benefits of a further s. 752.1 assessment order.
>
> 74. The prejudice that Justice Campbell identified was not that he would be necessarily incarcerated and detained during this assessment, given the "likelihood that he faces a period of incarceration" (A.B., Tab 3, p. 28), but rather, that during this time he would not have been able to "start the process required for participation in treatment programs". [A.B., Tab 3, p. 28]
>
> 75. This 'prejudice' is difficult to understand.
>
> 76. Firstly, lack of access to programming is an acknowledged basis for enhanced pre-credit towards a sentence of imprisonment.
>
> [R. v. Summers, 2014 SCC 26 at para. 2]
>
> 77. Secondly, in light of the inevitable carceral sentence that was imposed, all that was at issue was the timing of when [A.H.] would have treatment made available to him. Put somewhat differently, if a further assessment was ordered, it would not have resulted in a denial of treatment opportunities for [A.H.].
>
> 78. Thirdly, an updated s. 752.1 report was destined to highlight the exact type of treatment that [A.H.] may need, based on an updated clinical assessment of him.

[30] Again, context is important. The judge identified and addressed all these issues. Here again is the relevant excerpt:

> [A.H.] is being remanded pending that assessment and his sentencing is delayed. He would, otherwise, be at large on his undertaking pending that sentencing. He has lost the presumption of innocence but, were it not for this remand, he would be at large on his under[taking] subject to an application to revoke bail. That prejudice is moderated somewhat by the likelihood that he faces a period of incarceration on sentencing and credit can be given for time spent on remand having that assessment done. That, however, is not an entirely straightforward exchange. If he were sentenced to a term of imprisonment in the Federal system, he would have been able to start the process required for participation in treatment programs. Instead, he has been detained, pending an assessment that so far is yet to take place.

[31] The judge did not ignore the ability to set off hospital remand time against A.H.'s inevitable prison sentence. Instead he addressed it head on. He simply said

that it was not "a straightforward exchange", noting that the treatment A.H. needed would have been delayed to his prejudice, had the extension request been granted. That was a fair observation and something the judge was entitled to consider, when balancing the pros and cons of granting the extension.

[32] There is no merit to this aspect of the appeal.

Did the judge unjustifiably blame the Crown for the assessment failure?

[33] Here are the Crown's written submissions on this issue:

> 79. The Court seemed to foist upon the Crown the misguided failure of the ECFH to abide by the judicial order:
>
> > The delay in this case may not be blamed on the Crown, but it cannot at all be blamed on [A.H.]. He's not shown any indication of a refusal to cooperate. He hasn't even been asked yet. He's just been in Burnside, essentially, doing time. <u>The disagreement between the Crown and the East Coast Forensic Hospital is not his fault</u>.
> >
> > [A.B., Tab 3, p. 29] [Emphasis added by the Appellant]
>
> 80. With respect, characterization of the circumstances as a "disagreement" between the Crown and the ECFH is inappropriate.
>
> 81. First, labelling what occurred as a "disagreement" presumes that a Court order is an elective matter up for debate.
>
> 82. Second, characterizing the fault for the delay as a "disagreement" between the Crown and the ECFH, suggests the Crown was somehow complicit in the failure of the ECFH to respond to a Court order.
>
> 83. Recall, that when the initial s. 752.1 order was issued by the Court, the Crown met its burden to show that there were "reasonable grounds to believe" that [A.H.] "might" be a dangerous or long-term offender. The ECFH was wrong to balk at an order of the Court. It is neither the job nor role of the ECFH to question and/or refuse to abide by a Court order for their own "philosophical perspectives on the nature and purpose of a DO designation". [S.A.B., Tab 1, p. 11]
>
> 84. The ECFH have illustrated exactly why it is inappropriate for them to question a Court order: they clearly misunderstood the *legal* considerations that are germane to a legal finding. Unfortunately, Justice Campbell was drawn into their error.
>
> 85. The Crown expressed its concern to the ECFH in a timely manner. The Crown brought the matter to the attention of the Court before the expiration of the

> initial 60-day period. There is no suggestion that the Crown is complicit in the failure of the ECFH to abide by a Court order.
>
> 86. The Crown attempted to be part of the solution, but was treated as part of the problem.
>
> 87. There were valid grounds for an assessment initially, and those grounds remain.

[34] Again, this appeal is not about whether the psychiatrists were offside in failing to complete the assessment. By referring to the situation between the Crown and the Hospital as a "disagreement", the judge was not casting blame on the Crown. Nor did he "treat [the Crown] as part of the problem". Nor did he "foist upon the Crown the misguided failure of the [Hospital] to abide by a judicial order". By the impugned passage, the judge was simply saying that wherever the fault may lay, it did not lie at A.H.'s feet. In fact earlier in his decision, the judge acknowledged that the problem was not caused by the Crown. He noted this when referring to a similar case:

> Mr. Pink, for the Defence, argues that the reasoning of the Alberta Court of Queen's Bench in *Gow* should be applied. In that case, Justice Ouellette was dealing with a dangerous offender application brought with respect to Neil Gow. Mr. Gow was remanded for 60 days and the assessment was ordered. The assessment wasn't completed within the 60-day time period. In fact, the expert hadn't even begun the assessment at that point, when the 60 days had run out. The prosecutor in that case, as here, did everything required to have the assessment done; it just wasn't done. The Court, in *Gow*, had to decide whether the extension of time should be granted to allow for the completion of the assessment and the eventual filing of the report.
>
> [Emphasis added]

[35] There is no merit to this aspect of the appeal.

DISPOSITION

[36] I would dismiss the appeal.

MacDonald, C.J.N.S.

Concurred in:

Beveridge, J.A.

Bourgeois, J.A.