

WARNING

The President of the panel hearing this appeal directs that the following should be attached to the file:

An order restricting publication in this proceeding under ss. 486.4(1), (2), (3) or (4) or 486.6(1) or (2) of the *Criminal Code* shall continue. These sections of the *Criminal Code* provide:

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or justice may make an order directing that any information that could identify the complainant or a witness shall not be published in any document or broadcast or transmitted in any way, in proceedings in respect of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, 173, 210, 211, 212, 213, 271, 272, 273, 279.01, 279.02, 279.03, 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 step-daughter), 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).

CITATION: R. v. D.A.M., 2011 ONCA 717

DATE: 20111115

DOCKET: C51274

COURT OF APPEAL FOR ONTARIO

Laskin, Cronk and Blair JJ.A.

BETWEEN

Her Majesty the Queen

Respondent

and

D. A. M.

Appellant

Christopher D. Hicks and Theodore Sarantis, for the appellant

Frank Au, for the respondent

Heard and released orally: November 3, 2011

On appeal from the sentence imposed on July 15, 2009 by Justice David M. Stone of the Ontario Court of Justice, with reasons reported at 2009 ONCJ 362 (CanLII).

ENDORSEMENT

[1] After approximately a 15-day hearing before the sentencing judge, the appellant was declared to be a dangerous offender and sentenced to an indeterminate sentence in the penitentiary. He appeals from the sentence imposed.

[2] In his factum, the appellant attacked his designation as a dangerous offender on multiple fronts, arguing that he should have been found to be a long-term offender. However, during oral argument, his challenge to the sentence imposed focussed primarily on two alleged errors by the sentencing judge:

- 1) misapprehension of the evidence regarding the appellant's willingness to take Lupron, an anti-androgen drug, as a treatment modality for helping to control the risk to the public to be posed by the appellant on release to the community; and
- 2) the impermissible admission of expert reply psychiatric evidence tendered by the Crown and the improper use of this evidence by the sentencing judge.

[3] In our view, these grounds of appeal cannot succeed.

[4] The sentencing judge concluded that, given the appellant's admitted lengthy pattern of deceitfulness and manipulation of his victims, caregivers and parole supervisors, there was serious reason to doubt whether he would take Lupron as a condition of his eventual release into the community. This finding was open to the sentencing judge on the evidence.

[5] In particular, the record amply supports the sentencing judge's finding that, "When his parole ran out, so did his use of Lupron, and no reasonable effort was made by him in the next several years to do anything with Lupron but enhance his image with his supervisors." Similarly, there is an evidentiary foundation for the sentencing judge's finding that the appellant falsely claimed to be pursuing Lupron treatment.

[6] In its case-in-chief, the Crown led opinion evidence from a forensic psychiatrist and a psychologist, both of whom offered opinions as to the possible containment of the appellant's risk of sexually re-offending in the community. In their view, the appellant was at very high risk for sexually violent recidivism, on both clinical and actuarial testing measures. Dr. Woodside, for example, described the appellant as posing roughly triple the degree of risk posed by the average sex offender.

[7] The defence expert agreed with this high risk assessment but expressed a more optimistic view of the chances of managing the appellant's risk in the community at tolerable levels by the employment of a multi-faceted treatment and supervision plan, including the on-going administration of Lupron injections.

[8] The sentencing judge considered all the expert evidence and, as he was entitled to do, rejected the defence expert's opinion on the prospects of managing the appellant's risk in the community. He concluded, for example, that this expert's view of the appellant's potential reconditioning and possible discontinued use of Lupron was unrealistic. This conclusion is reasonably supported by this record.

[9] Taken as a whole, the appellant's complaints regarding his designation as a dangerous offender are focused on the sentencing judge's assessment of the evidence and related factual findings, both of which are squarely within the sentencing judge's domain and attract considerable deference from this court. In effect, the appellant seeks to have

this court revisit the sentencing judge's key factual findings, although they are grounded in the evidence. That is not the function of this court.

[10] The other main ground of appeal concerns the admission of expert psychiatric reply evidence regarding the significance (or lack thereof) of phallometric testing of the appellant. The appellant argues that this evidence was inadmissible and that the sentencing judge improperly relied on it in concluding that there was no reasonable possibility of eventual control of the appellant's risk in the community.

[11] We disagree. The impugned evidence and a will-say statement of the reply expert's proposed testimony were admitted on consent. In these circumstances, there can be no sustainable objection to the admission of the evidence. Nor do we accept that the sentencing judge misused this evidence.

[12] Accordingly, the appeal from sentence is dismissed.

"John Laskin J.A."

"E.A. Cronk J.A."

"R.A. Blair J.A."