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or justice may make an order directing that any information that could identify the complainant or a witness shall not be published in any document or broadcast or transmitted in any way, in proceedings in respect of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, 171.1, 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 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).

(2) In proceedings in respect of the offences referred to in paragraph (1)(a) or (b), the presiding judge or justice shall

(a) at the first reasonable opportunity, inform any witness under the age of eighteen years and the complainant of the right to make an application for the order; and

(b) on application made by the complainant, the prosecutor or any such witness, make the order.

(3) In proceedings in respect of an offence under section 163.1, a judge or justice shall make an order directing that any information that could identify a witness who is under the age of eighteen years, or any person who is the subject of a representation, written material or a recording that constitutes child pornography within the meaning of that section, shall not be published in any document or broadcast or transmitted in any way.

(4) An order made under this section does not apply in respect of the disclosure of information in the course of the administration of justice when it is not the purpose of the disclosure to make the information known in the community. 2005, c. 32, s. 15, c. 43, s. 8;2010, c. 3, s. 5;2012, c. 1, s. 29.

486.6 (1) Every person who fails to comply with an order made under subsection 486.4(1), (2) or (3) or 486.5(1) or (2) is guilty of an offence punishable on summary conviction.

(2) For greater certainty, an order referred to in subsection (1) applies to prohibit, in relation to proceedings taken against any person who fails to comply with the order, the publication in any document or the broadcasting or transmission in any way of information that could identify a victim, witness or justice system participant whose identity is protected by the order. 2005, c. 32, s. 15.

COURT OF APPEAL FOR ONTARIO

CITATION: R. v. M.L., 2015 ONCA 487
DATE: 20150630
DOCKET: C55930

Cronk, Gillese and Huscroft JJ.A.

BETWEEN

Her Majesty the Queen

Respondent

and

M. L.

Appellant

Michael Davies, for the appellant

Roger Shallow, for the respondent

Heard: April 24, 2015

On appeal from the sentence imposed on May 18, 2011 by Justice Célynne S. Dorval of the Ontario Court of Justice.

Huscroft J.A.:

[1] The appellant appeals from the sentencing judge's decision declaring him a dangerous offender and sentencing him to an indeterminate term of imprisonment. The appellant conceded on the Crown's application that he meets the criteria required to be designated as a dangerous offender and his concession was accepted by the sentencing judge. The only issue was whether the appellant should be given an indeterminate sentence or a determinate

sentence followed by a long-term supervision order. The sentencing judge concluded there was no reasonable possibility of the eventual control of the appellant in the community and sentenced him to an indeterminate sentence.

BACKGROUND

[2] The appellant is a 36-year-old man with a lengthy record of sexual assault and assault dating back to 1993, when he was a young offender. His criminal record includes the following convictions (and corresponding sentences):

1993 – 2 counts of sexual assault (12 months' probation concurrent)

1993 – Assault (12 months' probation)

1997 – 2 counts of sexual assault (4 months' imprisonment and 2 years' probation concurrent)

1998 – Sexual assault (60 days' imprisonment and 20 days' pre-sentence custody)

1998 – Assault (suspended sentence and 12 months' probation)

2001 – Assault of peace officer (1 day imprisonment, 36 months' probation, and 4 months' pre-sentence custody)

2002 – Sexual assault (3 months' imprisonment), assault of peace officer (1 day imprisonment and 48 days' pre-sentence custody), and assault (3 months' imprisonment concurrent)

2005 – Sexual assault (2 years' less a day imprisonment, 3 years' probation, and 20 months' pre-sentence custody), unlawfully in dwelling house (2 years' less a day imprisonment, concurrent, and 3 years' probation), and uttering threats (2 years' less a day imprisonment, concurrent, and 3 years' probation).

[3] The appellant is deaf and communicates primarily through sign language.

[4] At trial in 2009, the appellant pleaded guilty to the predicate offences (one count of sexual assault and one count of breach of probation). The appellant exposed himself to the complainant in the laundry room of the apartment building where they both lived. He grabbed her crotch area and tried to hold her arms. The complainant pushed the appellant off and he left the laundry room. Shortly afterwards, the appellant knocked on the door to the complainant's apartment and pushed a note under her door. In the note he apologized and asked her to have sex with him. He returned to the complainant's apartment a few minutes later asking that she not get him in trouble. He slid a second note under her door again asking her to have sex.

[5] The matter was adjourned for assessment and associated matters and the Crown brought a dangerous offender application in 2011.

TREATMENT HISTORY

[6] The appellant has a lengthy history of involvement with mental health professionals. He has been treated for various sexual and behavioural disorders, in one form or another, since at least 1994. His clinical history includes the following assessments:

- 1997 – Dr. Dickey noted the appellant's unwillingness to take medication, his impulsivity and lack of appreciation of the consequences of his behaviour. The appellant's refusal to take medication was also noted by

Dr. Dickey in 1998. In Dr. Dickey's opinion, the appellant posed a significant risk for aggressive behaviour both sexual and otherwise.

- 1997 – Dr. Sloman noted the appellant's unwillingness to take medication on a regular basis and his impulsivity, in addition to his low frustration tolerance and distrust of others.

- 2001 – Dr. Ward reported some success in treating the appellant with antipsychotic drugs. She considered that the appellant's hypersexuality and psychosis were consistent with bipolar or schizoaffective disorder but did not make a definite diagnosis. She confirmed that he suffered from paraphilic disorder and polysubstance abuse.

- 2002 – Dr. Fedoroff provided an opinion on the use of antiandrogens and nonphamaracological measures. Dr. Fedoroff reported that the appellant would be willing to try antiandrogen drugs so long as the effects were reversible. He recommended increasing the appellant's antipsychotic drug and adding an antiandrogen drug if the appellant's sexual behaviour were not controlled.

- 2004 – Dr. Ward again assessed the appellant after he was charged with sexual assault. The appellant admitted that he was not taking his oral medication and that his sex drive decreased after he received intramuscular injections. Dr. Ward noted the appellant was difficult to treat

because his psychotic symptoms interfered with his treatment and he did not fit the criteria for schizophrenia or bipolar disorder. His treatment was further complicated by his deafness and communications difficulties.

- 2005 – Dr. Fedoroff conducted a sexual behaviours assessment. The appellant expressed a desire to resume treatment with Dr. Ward and a willingness to take medication to reduce his sex drive. Dr. Fedoroff recommended antiandrogen medication.

- 2005 – Dr. Ward recommended a treatment plan for the appellant that included intramuscular forms of antipsychotic and antiandrogen medication, along with various forms of counselling and community support, to be continued throughout the community supervision portion of his sentence. Dr. Ward expressed the view that the appellant's risk of reoffending would be reduced to a low level with full participation in the program she recommended and that he could be managed in the community.

- 2005 – Dr. Hector assessed the appellant while he was incarcerated at the St. Lawrence Valley Correctional and Treatment Centre. He expressed the view that the appellant responded well to medication in an institutional setting but was at high risk of recidivism and that compliance could not be assured when the appellant returned to the community.

- 2006 – Dr. Grey assessed the appellant while he was living at a supervised home. The appellant informed him that he did not want to take medication and wanted to solve his problems on his own.

EXPERT EVIDENCE AT DANGEROUS OFFENDER HEARING

[7] The appellant was assessed by two psychiatrists, Dr. Pallandi and Dr. Gojer, for the purposes of the dangerous offender hearing. Both testified on the appellant's long term risk and treatability. In addition, Dr. Ward reported to the Court on the question of criminal responsibility. The appellant admitted to Dr. Ward that he had stopped taking his medication in 2008. Dr. Ward noted that the appellant continued to show poor insight into his need to take medication unless he is incarcerated.

[8] Dr. Pallandi agreed with Dr. Ward that the appellant has a psychotic disorder not otherwise specified and that he has difficulty controlling his impulses, planning, and using language. He described the appellant as having a "courtship disorder" and suffering from an antisocial personality disorder. He expressed the opinion that the various treatments required by the appellant could only be provided in a secure setting in order to ensure that they are provided concurrently.

[9] Dr. Gojer expressed the view that the appellant has a schizoaffective disorder that causes him to lose touch with reality. He agreed that this could also

be diagnosed as a psychotic disorder not otherwise specified and that the treatment for both conditions was the same. He agreed that the appellant also likely suffers from Fetal Alcohol Syndrome, polysubstance abuse, sexually deviant behaviour, and has severe social skills deficits.

[10] Both Dr. Pallandi and Dr. Gojer expressed the view that the appellant poses a high risk of reoffending. Dr. Pallandi described the appellant as being at a “high or even very high” risk of recidivism with respect to sexual offences, noting a progression in the intrusiveness of the appellant’s conduct towards women of all ages who may come into contact with him. He was not optimistic about controlling the risk posed by the appellant. Dr. Gojer described the appellant as being at a “high risk” to reoffend, but expressed the view that there is a reasonable possibility of controlling the risk presented by the appellant following treatment in a corrections institute, if the appellant is supervised and receives the recommended treatments concurrently. He added that the risk increased if one component of the treatment was missing.

THE SENTENCING JUDGE’S REASONS FOR DECISION

[11] The sentencing judge rejected the Crown’s position that the appellant bore the burden of establishing manageability in the community. She noted that the overall objective of the dangerous offender legislation is the prevention of future offences and the protection of the public. As a result, the sentencing judge

stated, at para. 107, that there must be “more than an expression of hope” concerning a reasonable possibility of eventually controlling the offender’s risk in the community. There must be evidence of treatability indicating that the offender can be treated within a definite period of time. She understood the “reasonable possibility” concept as requiring a “degree of realism”.

[12] The sentencing judge noted the requirement of an evidentiary basis for contingencies in a proposed treatment plan, as well as the need to make a finding concerning the appellant’s present and future willingness to take his medication. She stated, at para. 112, that “eventual control” of the risk posed by the appellant requires a determination “that the risk posed by the offender will be controlled not only during the supervision order, but also at the conclusion of that order, when the offender is no longer supervised.” Citing this court’s decision in *R. v. D.V.B.*, 2010 ONCA 291, 100 O.R. (3d) 736, at para. 57, she noted that “all that is required is that there be a reasonable possibility that such control can be achieved”.

[13] The sentencing judge found that Dr. Pallandi and Dr. Gojer identified numerous risk factors including the appellant’s psychotic and sexual deviant disorders; his inability to control his impulses; his substance abuse issues; his unwillingness to comply with medication; his isolation as a result of his deafness; and his deafness. She found that the appellant requires an extensive and varied package of treatment, which she summarized as follows, at para. 116:

- Sex offending counselling to deal with: childhood abuse, self-esteem, consensual behaviour, respect towards women, and management of sexual impulses;
- Psychological treatment while in custody to deal with: cognitive development, life skills, socialization development, empathy development, impulsivity control tools, independent living skills, and anger management;
- Intramuscular anti-psychotic and anti-androgen medication;
- Residence in a supervised all-male setting upon release;
- No access to pornography;
- No access to drugs and alcohol;
- Supervision by males; and
- Supervision by staff with training as to signs of relapse.

[14] The sentencing judge noted, at para. 116, Dr. Gojer's opinion that the appellant requires one-on-one counselling for the first 7-10 years.

[15] The sentencing judge found that although anti-psychotic medication assists the appellant in dealing with his psychosis, it does not deal with all of his sexual offending and impulsive behaviours, at para. 117. Moreover, she concluded that Selective Serotonin Reuptake Inhibitors ("SSRIs") were ineffective to curb the appellant's sexual behaviour and were not injectable in any event, at

para. 118. The sentencing judge noted, at paras. 119-20, the appellant's long history of non-compliance with medication, not only because of its side effects but also because of his "total lack of insight in his mental illness and his sexual deviance disorder". She found that the appellant would only comply with the requirement to take medication "if he is constantly supervised to do so and feels forced to do so. Deterrence has had little effect on [him] in the past… I find that [he] would not consistently take anti-psychotic and anti-androgen medication willingly after the maximum period of supervision under [a Long Term Offender ("LTO") designation]", at para 123.

[16] Concerning psychological treatment, the sentencing judge found no evidence that the various counselling programs the appellant requires could be offered concurrently in the community by male-only counsellors on a one-on-one basis.

[17] The sentencing judge concluded, at para. 127:

> My findings that he will continue to resist to take medication and that the concurrent counseling he requires cannot be provided in the community, lead me to the conclusion that there is no reasonable possibility of eventual control over the risk he poses.

ISSUES

[18] The appellant raises three grounds of appeal. First, the appellant submits that the sentencing judge's decision to impose an indeterminate sentence was

unreasonable. Second, the appellant says the sentencing judge misapprehended the evidence concerning his compliance with medication. Third, the appellant submits that the sentencing judge failed to consider the state's obligation to provide him with sign language interpretation as required by the Supreme Court's decision in *Eldridge v. British Columbia (Attorney General)*, [1997] 3 S.C.R. 624.

[19] I address each ground below.

ANALYSIS

Issue One: Was the sentencing judge's decision to impose an indeterminate sentence unreasonable?

[20] The sentencing judge conducted a detailed review of the evidence and her findings are to be accorded deference: *R. v. I.M.C.*, 2014 ONCA 312, 120 O.R. (3d) 1, at para. 70; *R. v. Ramgadoo*, 2012 ONCA 921, 300 O.A.C. 149, at para. 42. The question is whether her decision is unreasonable.

[21] The appellant argues that he need not demonstrate either that he can be cured of the underlying causes of his criminality or that the risk to the community he poses can be reduced to zero. He submits that the sentencing judge had to be satisfied only that there was a "reasonable possibility" that a penitentiary sentence followed by a ten-year supervision order would reduce his risk of reoffending to an acceptable level.

[22] I note that the “reasonable possibility” standard was used at the dangerous offender hearing by agreement of the parties. The *Criminal Code*, R.S.C. 1985, c. C-46 was amended in 2008 and as a result, under s. 753(4)(b) or (c), a sentence of detention in a penitentiary for an indeterminate period is now required unless there is a “reasonable expectation” that a lesser measure “will adequately protect the public”.

[23] This court has not determined whether there is any meaningful distinction between the reasonable possibility and reasonable expectation standards. However, several courts have held that the “reasonable expectation” standard is more exacting than the former “reasonable possibility” threshold: see *R. v. Osborne*, 2014 MBCA 73, 306 Man. R. (2d) 276, at paras. 72-73, and the cases cited therein.

[24] The difference between the standards was not argued in this case and it is not necessary to determine the matter for purposes of this appeal. The appellant did not argue that he had been disadvantaged by application of the reasonable possibility standard and there is no reason to assume that he was in fact disadvantaged. On the contrary, it is arguable that the reasonable expectation standard is *more difficult* to meet than the reasonable possibility standard. To the extent that this is so, I agree with the Crown’s submission that the application of the reasonable possibility standard inured to the benefit of the appellant.

[25] The sentencing judge summarized Dr. Gojer's opinion regarding the eventual control of the appellant's risk, as follows, at para. 86:

> Dr. Gojer stated that he believed that if [the appellant] received treatment in the penitentiary and all of his recommendations were put in place upon release, it would be theoretically possible that control would be achieved within 10 years.

[26] She also stated, at para 127:

> [I]f all [Dr. Gojer's] recommendations were put in place it would be theoretically possible to achieve control of the risk posed by [the appellant] within 10 years.

The sentencing judge added that the Court could not deal with theoretical possibilities when the protection of the public is at stake.

[27] The appellant takes issue with the sentencing judge's characterization of Dr. Gojer's opinion. Specifically, the appellant states that Dr. Gojer did not express the view that reasonable control of his risk in the community was only "theoretically possible".

[28] A review of Dr. Gojer's opinion and testimony confirms that he did not use the term "theoretically possible". The transcript records the following testimony:

> **Examination-in-chief**
>
> Q: And can you tell the Court what your opinion is with respect to the reasonable possibility of managing [the appellant] in the community?
>
> A: … In terms of reasonable possibility, again, these are difficult concepts as a psychiatrist to even comment on.

All I can say is that I know that his major mental illness which has a connection with his sexual offending can be treated. It's possible that the antipsychotic drugs will contain him. Superimposed on that we have the use of antiandrogens which has never been tried on him. There is a reasonable likelihood that the use of antiandrogens will contain [the appellant].

…

If you ask me: how do I add up all these treatments? Would that mean there's a reasonable possibility of eventual control? There are two components to the reasonable possibility of eventual control. I believe that these treatments will work under the supervision of a parole officer, but the second component is a more difficult question to answer for you. That question is: what would happen to [the appellant] after the long-term offender designation is over? Now, that's a very difficult question for me as a psychiatrist to answer. I cannot make a prediction. In fact, I am not making any predictions. I'm using my clinical knowledge to tell you, the Court, how this individual can be managed.

… I still believe that when I take into consideration the treatments, the likelihood of him maturing over a 10-year period, slowing down in terms of impulsivity, slowing down in terms of the antisocial behaviours that we've talked about, combining with the social network that can be created over a 10-year period, that is why in my report I wrote there is a reasonable possibility of eventual control. (pp. 833-8)

Cross-examination

Q: Are you prepared to say there is an ascertainable time period when he will no longer require those things and he can then live in a community on his own and not pose a danger to the public?

A: I'm saying that from a clinical perspective, given that these other parameters are available, like the *Mental Health Act*, I believe that within a 10-year period if he

> received a period of time incarcerated and received that counselling, that clinically it's possible.

[29] It is clear that although Dr. Gojer expressed the opinion there was a reasonable possibility of eventual control of the appellant's risk in the community, he described this as a reasonable possibility at a "clinical" level rather than a theoretical possibility.

[30] In my view, however, the difference in terminology is insignificant. Neither Dr. Pallandi nor Dr. Gojer could predict whether the high to very high degree of risk posed by the appellant could be controlled in the community. It was for the sentencing judge to determine whether there was a reasonable possibility of eventual control and she did not find that there was such a possibility.

[31] The sentencing judge's conclusion is supported by Dr. Pallandi's assessment of the appellant's prospects, which was more pessimistic than Dr. Gojer's. Having regard to the evidence as a whole, it was open to the sentencing judge to regard Dr. Gojer's evidence as somewhat speculative in light of the complex combination of factors involved in treating the appellant. Her use of the term "theoretically possible" can be understood in this context.

[32] The sentencing judge found that although the appellant responds positively to medication, he has a long history of non-compliance based not only on the side effects of the medication but his lack of insight into his mental illness and sexual deviance disorder. The sentencing judge found, further, there was no

evidence that counselling would change the appellant's insight: he would comply "only if he is constantly supervised to do so and feels forced to do so", and that he would not consistently take medication willingly after the maximum period of supervision under an LTO designation. She also found that the concurrent and varied treatment the appellant requires on all of the issues was available only in custody.

[33] These findings are amply supported by the record. Accordingly, in my view, the sentencing judge's decision to sentence the appellant to an indefinite term of imprisonment is not unreasonable.

Issue Two: Did the sentencing judge misapprehend the evidence concerning the appellant's medication compliance?

[34] The appellant argues that although the sentencing judge was correct to be sceptical about his future compliance with medication, a long term supervision order would provide oversight for the taking of medication and force compliance, and a failure to comply would result in re-incarceration. He also argues that the sentencing judge made findings concerning his impulsiveness and difficulty with abstract concepts that were not supported by the evidence, and that she failed to consider the potential improvement to his condition that 10-15 years of therapy prior to termination of the supervision order would yield.

[35] There is no disagreement that the appellant requires anti-psychotic and sex drive-reducing medication for the rest of his life. Nor is there any disagreement that the appellant has repeatedly failed to take this medication in the past. The sentencing judge accepted Dr. Pallandi and Dr. Gojer's evidence that the appellant has little insight into his mental illness and sexual deviance disorder and found that there was no evidence that counselling would improve his insight. Her conclusion on medication is set out in this passage at para. 123:

> When he is facing sentencing and is being assessed, he says he will consent to medication to lower his sex drive but does not comply when it is prescribed. He even told Dr. Pallandi during his assessment that he would consent to take the medication until he was better. [The appellant] will only comply if he is constantly supervised to do so and feels forced to do so. Deterrence has had little effect on [the appellant] in the past. The possibility of imprisonment for breach of an LTO order would have little effect on a person who acts impulsively and who has difficulty with abstract concepts. He had been "warned" about the inevitability of dangerous offender proceedings by his probation officer and psychiatrist, yet re-offended. Even if breach charges did weigh sufficiently on his mind to convince him to take medication, I find that [the appellant] would not consistently take anti-psychotic and anti-androgen medication willingly after the maximum period of supervision under LTO.

[36] In my view, the sentencing judge did not misapprehend the evidence. Her finding that the appellant would not consistently take his medication willingly is supported on the evidence that was before her. Moreover, as the Crown submitted, even if the requirement to take medication were a mandatory part of a

supervision order, the appellant's motivation/willingness to take the medication would remain relevant, as he could refuse to cooperate in taking it.

[37] Finally, contrary to the appellant's submission, the sentencing judge's comments regarding the appellant's impulsivity and difficulty with abstract cognitive functioning are well grounded in the record of the appellant's clinical course and treatment.

[38] I would reject this ground of appeal.

Issue Three: Did the sentencing judge fail to consider the state's obligation to provide sign language interpretation to the appellant as required by the Supreme Court's decision in *Eldridge*?

[39] The appellant argues that the sentencing judge erred in finding there was no evidence that male-only counselling could be offered in the community or that sign-language interpretation for such counselling was available, and that these findings were based on a misapprehension of the evidence of Dr. Gojer and a failure to consider the decision of the Supreme Court of Canada in *Eldridge* concerning the state's obligation under the *Canadian Charter of Rights and Freedoms* to provide sign language interpretation.

[40] In my view, there is no merit to this ground of appeal.

[41] Read in context, the sentencing judge found it unreasonable to expect that the concurrent counselling the appellant requires could be provided by male-only

counsellors on a one-to-one basis in the community. The sentencing judge accepted the testimony from both Dr. Pallandi and Dr. Gojer that the appellant requires concurrent treatment for his various conditions and agreed with Dr. Pallandi that the array of concurrent treatment he requires could be achieved only in custody.

[42] I am satisfied that the sentencing judge did not rule out a long-term supervision order on the basis that sign language interpretation was not funded in the community. Sign language interpretation is a component of the treatment the appellant requires and there is no dispute concerning the state's *Charter* obligations to the appellant in this case. The Crown accepts "the necessity and requirement of sign-language interpretation in the provision of medical and other treatments to offenders that are subject to state supervision", regardless of the nature of the sentence imposed.

DISPOSITION

[43] Accordingly, I would dismiss the appeal.

Released: June 30, 2015 "EEG"

"Grant Huscroft J.A."
"I agree E.A. Cronk J.A."
"I agree E.E. Gillese J.A."