NOVA SCOTIA COURT OF APPEAL
Citation: ***R. v. Aylward***, 2009 NSCA 99

Date: 20091001
Docket: CAC 303189
Registry: Halifax

Between:

Mark Garnet Aylward

Appellant

v.

Her Majesty the Queen

Respondent

Restriction on publication: pursuant to s. 486(3) of the **Criminal Code**

Judges:	Bateman, Saunders and Oland, JJ.A.
Appeal Heard:	September 22, 2009, in Halifax, Nova Scotia
Held:	Leave to appeal granted and appeal allowed per reasons for judgment of Bateman, J.A.; Saunders and Oland, JJ.A. concurring.
Counsel:	Luke A. Craggs, for the appellant Mark Scott, for the respondent

Publishers of this case please take note that Section 486(3) of the **Criminal Code** applies and may require editing of this judgment or its heading before publication. The subsection provides:

> (3) **Order restricting publication** - Subject to subsection (4) where an accused is charged with
>
> > (a) an offence under section 151, 152, 153, 155, 159, 160, 170, 171, 172, 173, 210, 211, 212, 213, 271, 272, 273, 346 or 347,
> >
> > (b) an offence under section 144, 145, 149, 156, 245 or 246 of the **Criminal Code**, chapter C-34 of the of the Revised Statutes of Canada, 1970, as it read immediately before January 4, 1983, or
> >
> > (c) an offence under section 146, 151, 153, 155, 157, 166 or 167 of the **Criminal Code**, chapter C-34 of the Revised Statutes of Canada, 1970, as it read immediately before January 1, 1988,
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> the presiding judge or justice may make an order directing that the identity of the complainant or of a witness and any information that could disclose the identity of the complainant or witness shall not be published in any document or broadcast in any way.

Reasons for judgment:

[1] While on parole from a life sentence for second degree murder committed in 1987, Mark Garnet Aylward was charged with various offences arising out of a sexual assault with a weapon on the 13th of May, 2006. Upon being charged with this offence and having fled the jurisdiction, Mr. Aylward's parole was revoked and he was returned to custody to continue serving the life sentence on the murder conviction.

[2] On the 30th of November, 2007, following a lengthy plea negotiation between the Crown and defence, he pleaded guilty to sexual assault with a weapon (**Criminal Code of Canada**, R.S.C. 1985, c. C-46, s.272(2)(a)) and uttering threats (**Criminal Code**, s.264.1(1)(a)). Mr. Aylward had a prior conviction for sexually assaulting a thirteen year old male in 1988, while on bail awaiting trial on the murder charge.

[3] The victim of the current offences was fourteen years old at the time of the assault. An affidavit from the Crown who appeared at the sentencing has been tendered with the consent of the appellant. She deposes that the plea negotiation was motived to spare the young complainant the further anguish of testifying during the scheduled three week trial and taking into account the fact that there were triable identification issues. The two prior offences coupled with this sexual assault resulted in a joint recommendation that the appellant be designated a long-term offender and be subject to a determinate sentence of twelve years' incarceration. The Crown was satisfied that the public would be adequately protected by the recommended sentence, taking into account the fact that Mr. Aylward was serving a life sentence for murder. In order to perfect the long-term offender aspect of the recommendation the Crown made application to the sentencing judge for the long-term offender designation (**Criminal Code** s.753.1).

[4] The sentencing judge rejected the joint recommendation. He was not satisfied that there was a reasonable possibility of eventual control in the community which is a prerequisite for a long-term offender designation (**Criminal Code**, s.753.1(1)(c)). On his own motion, the sentencing judge found the appellant to be a dangerous offender and ordered an indeterminate period of incarceration. Mr. Aylward appeals. The reasons for sentence are reported as **R. v. Aylward**, 2008 NSPC 55.

[5] The appellant says that the judge erred in law by imposing a dangerous offender designation (**Criminal Code**, s.753) in the absence of an application for such.

[6] For the reasons which follow, I would find that the sentencing judge did not err in declining to impose a long-term offender designation in circumstances where he was not satisfied that the statutory requirement of a reasonable possibility of control of the offender within the community had been met (**R. v. Peters**, 2008 BCCA 446 at para. 42). However, in the absence of an application for dangerous offender status, the judge was limited by s.753.1(6) to imposing a determinate sentence for the offences of which the offender was convicted. Consequently, I would find that the judge erred in finding Mr. Aylward to be a dangerous offender.

[7] The judge relied upon the decision of the Supreme Court of Canada in **R. v. Johnson**, 2003 SCC 46, [2003] 2 S.C.R. 357 as his authority to make the dangerous offender designation. He said:

> [44] If, on the other hand, the Court does not find him to be a long term offender, here, it does not think that it can sentence him for the offences for which he has been convicted, as contemplated by s. 753.1(6). This is so as, based on Dr. Neilson's clinical assessment of his risks, it is the Court's opinion that his dangerousness still presents a clear and continuing threat to the community. Equally significant, as pronounced by Iacobucci and Arbour JJ. , in **R. v. Johnson**, [2003] 2 S.C.R. 357 at para. 39:
>
> > ...Parliament did not intend that (sic) the dangerous offender provisions and the long term offender provisions to be considered in isolation of one another. On a dangerous offender application, a sentencing judge may consider the possibility that a long term offender designation is appropriate.
>
> [45] As a result, in considering the scope of what can be ordered and the operation of the same principles, as pronounced in **Johnson**, *supra*, in this Court's opinion, the converse would also be applicable. Thus, on a long term offender application, the Court may consider the possibility that a dangerous offender designation is appropriate if it is satisfied that there is no reasonable possibility of control of the risk in the community, notwithstanding that the application was advanced for a long term offender designation. Furthermore, to release an offender into the community while, in sexual matters, he remains unable to

> control his sexual impulses and with the likelihood that he would cause injury, pain and other evil to other persons, serves neither the interest of the offender nor those of the community.
>
> (Emphasis added)

[8] With respect, this is not an accurate interpretation of **R. v. Johnson**, **supra**. The dangerous offender provision of the **Code** states in part:

> 753. (1) The court may, on application made under this Part following the filing of an assessment report under subsection 752.1(2), find the offender to be a dangerous offender if it is satisfied . . .

[9] The issue in **Johnson** was whether a judge, when asked to make a dangerous offender designation, can only resort to the long-term offender provisions pursuant to s.753(5) if he concludes that the offender does not meet the dangerous offender conditions. Iacobucci and Arbour, JJ., writing for the Court, opined that a sentencing judge retains a discretion to decline to declare an offender dangerous although the statutory criteria for that designation are satisfied (para. 16). This is so because the determination must be guided by the relevant sentencing principles contained in ss. 718 to 718.2 of the **Code**. Section 718.2 (d) and (e) require that a judge consider the possibility that a less restrictive sanction would suffice to achieve the sentencing objectives (para. 28). Consequently, before imposing a dangerous offender designation the sentencing judge must consider whether the sentencing sanctions available pursuant to the long-term offender provisions are sufficient to reduce the threat to the community to an acceptable level, despite the fact that the statutory criteria in s.753(1) have been met (para. 29).

[10] With respect to the contrary conclusion of the sentencing judge here, **Johnson** does not stand for the proposition that a judge who is considering an application for long-term offender status can, instead, impose the more serious dangerous offender designation, in the absence of an application for such and proper notice to the offender (s.754(1)(b)).

[11] The consent of the Attorney General is a prerequisite to the court hearing an application for either a dangerous or a long-term offender designation (s.754). The Crown here had applied to the Attorney General only for consent to make a dangerous offender application. Consent was granted. Notwithstanding the fact that the Attorney General had consented to the Crown seeking dangerous offender

status, the application placed before the sentencing judge requested only a long-term offender designation.

[12] In **R v. McLeod**, 1999 BCCA 347, McLeod had entered a guilty plea on the understanding that the Crown would seek long-term offender status rather than dangerous offender status. The long-term offender application was made. However, the consent granted by the Attorney General was to seek dangerous offender status. The Attorney General had specifically declined to consent to a long-term offender application. The trial judge heard the long-term offender application and made that designation. On appeal, the Court determined that the requirement for the Attorney General's consent was one of jurisdiction. The Attorney General having consented only to an application for dangerous offender status (para. 36), the court was without jurisdiction to proceed as if consent had been granted to seek long-term offender status.

[13] Section 753(5) of the **Code** permits consideration of long-term offender status, where dangerous offender status is sought:

> (5) If the court does not find an offender to be a dangerous offender,
>
> > (a) the court may treat the application as an application to find the offender to be a long-term offender, section 753.1 applies to the application and the court may either find that the offender is a long-term offender or hold another hearing for that purpose; or
> >
> > (b) the court may impose sentence for the offence for which the offender has been convicted.

[14] Prowse, J.A., writing for the Court in **MacLeod**, held that s.753(5) had no application to a case (at para. 38) where the application was for long-term offender status. The provision permitting default to long-term offender status applies only where a dangerous offender application is made pursuant to s.753 and not where the initial application is for a long-term offender designation under s. 753.1.

[15] I would find that the decisions in **Johnson**, **supra**, and **McLeod, supra** are not in conflict. As I discuss above, the issue in **Johnson** was the court's jurisdiction to consider a "lesser but included" disposition, pursuant to s.735(5), in the face of a dangerous offender application. In **Johnson**, the Court stated:

> 38 . . . The sole purpose of s. 753(5) is to ensure that the Crown need not bring one application for a declaration that an offender is a dangerous offender and then, should that first application fail, a separate application seeking a declaration that an offender is a long-term offender. Section 753(5) thus increases the efficiency of the court system and preserves judicial resources by providing for a substantial degree of procedural integration between the two designations. . . .

[16] The decision in **McLeod**, **supra**, addresses the Court's jurisdiction based upon the Attorney General's consent. Section 754(1) provides:

> 754. (1) With the exception of an application for remand for assessment, the court may not hear an application made under this Part unless
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> > (a) the Attorney General of the province in which the offender was tried has, either before or after the making of the application, consented to the application;
> >
> > (b) at least seven days notice has been given to the offender by the prosecutor, following the making of the application, outlining the basis on which it is intended to found the application; and
> >
> > (c) a copy of the notice has been filed with the clerk of the court or the provincial court judge, as the case may be.
>
> . . .
>
> (Emphasis added)

[17] If the Attorney General consents only to a long-term offender application, the Crown cannot bring a dangerous offender application. If the Attorney General consents only to a dangerous offender application, the Crown may not instead advance a long-term offender application, although through the operation of s.753(5) the Court may consider the lesser long-term offender designation. Where the Attorney General consents to a dangerous offender application, as was the case here, the court cannot proceed as if consent were given for an long-term offender application.

[18] Here, the Crown should have initially sought consent from the Attorney General to bring both applications or, once having reached a plea agreement,

should have sought consent for the long-term offender application. On appeal, the Crown concedes that the wrong procedure was followed.

[19] Thus I would conclude that not only did the judge err by treating the long-term offender application as including an application for dangerous offender status, the Court was without jurisdiction to consider the long-term offender application in the absence of the Attorney General's consent.

[20] On appeal counsel agree that the proper disposition by this Court would be the imposition of the determinate sentence of twelve years which was a part of the plea negotiation. In view of the fact that Mr. Aylward is currently serving a life term in relation to the prior murder conviction, I would find that it is appropriate to accept the joint recommendation of appellate counsel.

[21] I would grant leave, allow the appeal, set aside the dangerous offender designation and order that Mr. Aylward serve a sentence of 12 years for these offences.

Bateman, J.A.

Concurred in:

Saunders, J.A.

Oland, J.A.