SUPREME COURT OF NOVA SCOTIA

Citation: *R. v. Crowe*, 2013 NSSC 212

Date: 20130704
Docket: CRH 340325
Registry: Halifax

Between:

Her Majesty the Queen

v.

Robert Thomas Crowe

Restriction on publication: Section 486 *C.C.C.* (Sexual Assault)

Judge: The Honourable Justice M. Heather Robertson

Heard: June 17, 2013, in Halifax, Nova Scotia

Decision: July 4, 2013

Counsel: Eric Taylor and James Giacomantonio, for the Crown
J. Brian Church, Q.C., for Mr. Crowe

Robertson, J.:

The Application:

[2] Counsel for Robert Crowe has made application for a declaration that the Crown's current dangerous offender application ("DOA") should be declared a nullity, due to the delay in the completion of the dangerous offender assessment by the Crown appointed expert Dr. Hy Bloom, in contravention of the timelines set out in s. 752.1 of the *Criminal Code*. It should be first noted that Dr. Bloom's assessment report was filed within the statutory 120-day time period but his assessment of Mr. Crowe was commenced on the 89th day and completed on the 91st day of these timelines.

The proceedings against Mr. Crowe:

[3] Mr. Crowe was convicted on multiple offences on March 26, 2012. The Crown requested an assessment pursuant to s. 752.1 of the *Criminal Code*. The matter was adjourned to April 5, 2012.

[4] On that date an uncontested application for the assessment was granted and the matter set down for a hearing November 5-9 and 12-16, 2012. The Crown sought a return to the court on May 31, 2012 to provide for the contingency that they may have needed an additional 30 days for the filing of the report under s. 752.1(3). On that date Crown counsel Mr. Carver sought an adjournment to June 18, 2012, to provide a more meaningful update on the progress of the assessment.

[5] On June 18, 2012, Mr. Carver sought an additional 30 days for the filing of the expert's report under s. 752.1(3). The transcript of that appearance reveals that discussion occurred about Dr. Bloom's availability to come to Halifax to perform the assessment. Mr. Church, counsel for Mr. Crowe was present along with Mr. Crowe. The transcript reflects at p. 59 that Mr. Crowe agreed to be interviewed between July 3 and July 5, 2012. The court agreed to the 30-day extension. Dr. Bloom's report was filed with the court on August 2, 2012.

[6] The issue has now arisen that Mr. Crowe's assessment was not completed before the timelines specified in s. 752.1(3).

[7] On November 5, 2012, the date upon which the hearing was to commence, the matter was adjourned by consent. Mr. Church noted he had not filed a report of his own expert Dr. Bradford, but in any event did not believe he had the final report of Dr. Bloom to pass on to Dr. Bradford. Discussion ensued about the possibility of Dr. Bloom supplementing his filed report should he be given permission to meet with a few other critical witnesses. At that appearance, the transcript reveals that Mr. Church stated he may apply to "strike Dr. Bloom's report because of the failure to provide it … under the *Criminal Code*" and Mr. Carver stated that in his view the report satisfied the requirements of the *Criminal Code*.

[8] The matter was adjourned to February 4, 2013, when new dates were chosen to hear the application, September 30 to October 11, 2013, because Mr. Crowe had yet to obtain his expert's report. Mr. Crowe's expert Dr. John Bradford had suffered a heart attack earlier in the year, then due to weather events or conditions was unable to fly into Halifax on two scheduled occasions. On February 4, 2013, Mr. Church requested a date to hear a preliminary motion challenging the proceeding for failure to meet the required filing timelines.

[9] Mr. Church's brief, on behalf of Mr. Crowe, was filed on May 2, 2013 and brought a motion to have the dangerous offender proceedings declared a nullity. The Crown asked for more time to reply to what they viewed as a more extensive motion. The hearing of this motion was set for June 6, 2013 and then adjourned to accommodate Mr. Church to June 17, 2013.

Provisions of the *Criminal Code*:

[10] The timelines set out under s. 752.1 C.C. include a 60-day remand for assessment, an additional 30 days for the report to be filed, and the possibility of a 30-day extension of that filing deadline:

> 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.
>
> (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.
>
> (3) On application by the prosecutor, the court may extend the period within which the report must be filed by a maximum of 30 days if the court is satisfied that there are reasonable grounds to do so.

The timelines in this proceeding:

[11] The Crown submits the relevant dates for determining whether the assessment report was filed on time are April 5, 2012, the remand date for assessment under s. 752.1 and August 2, 2012, the date of filing Dr. Bloom's report. By the Crown's count the math is as follows.

> 25 days in April (April 6 to April 30)
>
> 31 days in May
>
> 30 days in June
>
> 31 days in July
>
> 2 days in August
>
> Total: 119 days

[12] The interview between Mr. Crowe and Dr. Bloom took place between July 3 and 5 (days 89 to 91).

Mr Crowe's affidavit and evidence:

[13] In this proceeding Mr. Crowe has been represented throughout by Mr. Church. Mr. Crowe also filed an affidavit with the court and requested personally

that he should be allowed to be heard on the motion. The court agreed to hear from Mr. Crowe. He testified to the content of his affidavit that set out the timelines of these events that are not in dispute. Mr. Crowe agreed he signed consent forms relating to the disclosure of his health and educational records and returned these to the Crown by fax on May 23 and June 6, 2012. Mr. Crowe acknowledged that he agreed to see Dr. Bloom on the dates' July 3-5, 2012, "on the advice of my lawyer." Mr. Crowe agreed he understood the process of the Part XXIV application. He testified that he was aware of the timelines involved. He agreed that he understood the Crown's psychiatric expert would have 90 days, that could be extended to 120 days to file a report assessing him to determine if he met the criteria for dangerous offender.   He testified that he did not meet with Dr. Bloom before June 4, inside the 60-day remand timeline. He testified that he was now put to his prejudice, as he did not yet have a final report of Dr. Bloom, so could not finalize his own expert's report and he was waiting for sentencing. He testified that he could not now on remand receive any treatment for his sexual issues as he had been deemed too high a risk for treatment in the Province's sexual treatment community program. He testified he wanted to be sentenced for the offences so he could get treatment and move on in his life. Mr. Crowe was less forthright as he testified to the issue of allowing Dr. Bloom to interview collateral witnesses, his mother, his current boyfriend Deckland and a previous friend Chris; (see Dr. Bloom's report at page 3). He would only agree that there was one witness, a former girlfriend, that he refused to allow Dr. Bloom to interview as their relationship had ended poorly.

Argument and Law:

[14] It is the Crown's position that although there was a delay in Dr. Bloom interviewing Mr. Crowe, the assessment report was filed within the statutory time period and that this ought to be determinative of the application. They also say the wording in s. 752.1(1) says the assessment must be "performed" not "completed" as Mr. Crowe suggests in his brief and that it appears from the language of the section that the 60 days relate to the length of the remand for the purpose of the assessment.

[15] The Crown also argues that the delay in the assessment was in part due to a delay in acquiring all the documents necessary for Dr. Bloom's review (by Mr

Crowe's written consent faxed back to the Crown on May 23 and June 6, 2012) and Mr. Crowe's agreement to be interviewed secured on June 14, 2012.

[16] In any event, they argue that Mr. Crowe through counsel consented to the extension of time for the assessment at his June 18, 2012 appearance, agreeing the dates of July 3 to July 5 were convenient for Dr. Bloom and Mr. Crowe. The transcript at p. 60 reveals this exchange:

> MR. CARVER: Yes, My Lady. This is an application under 752.1(3) to extend the time for filing the report of the expert on the assessment for the application for the dangerous offender. The Court is required to have reasonable grounds in order to make such an extension. Crown is here to advise Your Ladyship that ... and speaking with my friend, Mr. Church, I understand Mr. Crowe has agreed to be interviewed by Dr. Bloom. Dr. Bloom will be in the city the week of July the 3rd to the 5th, I believe, and hopes to do the interview at that time.
>
> Also, we've ... I know that consent forms have been signed with respect to health records. We're just not quite sure where they are. They seem to have been misplaced somewhere in transit, so we just need to clarify that, which means that health records are going to be obtained, but they haven't been sent to Dr. Bloom as yet. And, as well ...
>
> THE COURT: You don't have much time.
>
> MR. CARVER: Well, we'll ... I'm not expecting them to be particularly extensive records, but we do want ...
>
> THE COURT: Right.
>
> MR. CARVER: ... to have them in his hands. And, as well, I was just informed last week that the Department of Justice has now agreed that records from the Correctional Centre can be sent to the Crown office without the necessity of a FOIPOP application or a subpoena. So I'm ...
>
> THE COURT: Okay.
>
> MR. CARVER: ... in the process of collecting those, as well.
>
> THE COURT: And you'll have them all collected for July 3rd to 5th.

MR. CARVER: Yes. Yes, we'll have them all to Dr. Bloom in relatively short order.

THE COURT: All right. So, certainly, I find that there are reasonable grounds for ... to grant the extension and it's really a matter of consent, in any event. Mr. Church?

MR. CHURCH: Yes, I agree.

THE COURT: Yeah. Agreed.

MR. CHURCH: Yes.

THE COURT: So that's where we are and we ... and Mr. Crowe will, therefore, be available for Dr. Bloom and then everybody will be in receipt of a report sometime in the early fall. And then I guess the next remand date is the application date itself?

MR. CARVER: Yes. That's ...

THE COURT: In November.

MR. CARVER: Yes. If we could have a dual remand until that time frame, Dr. Bloom will make arrangements, I expect, with the Correctional Centre to have him moved over to the East Coast Forensic for purposes of conducting the interview. That's how I understand ...

THE COURT: Okay.

MR. CARVER: ... it generally works.

THE COURT: Yeah.

MR. CARVER: The facility at the East Coast ...

THE COURT: So a dual remand to the Correctional Centre and the East Coast Forensic Centre.

MR. CARVER: Yes.

THE COURT: All right.

[17] The Crown submits that Mr. Crowe's consent to the extension should be interpreted as *de facto* waiver of any delay based on the date of the interview with Dr. Bloom.

[18] The Crown argues that by its nature an assessment under Part XXIV of the *Criminal Code* may involve large volumes of records and background materials, some of which may not be available or arrive after the assessment period, thereby requiring subsequent comment by the expert, if the court is to have the benefit of the best available evidence. They also note that unforeseen events like the availability of the court-appointed psychiatrist or his or her unexpected illness may also be factors outside the control of process. In any event, they suggest the court can use evidence that does not form part of the assessment regime under s. 752.1 in the sentencing proceeding and the court's residual authority under s. 723(3) would allow the court to require further production of any evidence that would assist the court in determining the appropriate sentence.

The Bloom Report:

[19] Dr. Bloom's report was filed on August 2, 2012. At p. 2 of the report he outlines the documents he reviewed in his "preliminary report" of Mr. Crowe. These include health records, education records, and Correctional Service of Canada documents.

[20] Dr. Bloom provided the opinion that Mr. Crowe met the criteria in s. 753(1)(a)(I) and (ii) of the *Criminal Code* and may be a hebephiliac with sadistic inclinations. He posited that Mr. Crowe's future risk may be managed utilizing the long-term offender provisions. Dr. Bloom specifically articulates at p. 2 of his report that the database used was limited because he had not been able to interview Mr. Crowe's past intimate partners nor did he then have the psychological/sexological report authored by Dr. Angela Connors. Following that review he undertook filing a more fulsome report. His affidavit filed with the court details the difficulty in gaining permission from Mr. Crowe to interview collateral witnesses.

Was Dr. Bloom's report complete and is this fatal to the application?

[21] The Crown argues that notwithstanding the timelines specified in the *Code* nothing prevents Dr. Bloom from subsequently responding to new information. They argue that the language of the section contemplates that an assessment be "performed" (s. 752.1(1)) and a report "filed" (s. 752.1(2) and (3)).

> 752.1(1) …[T]he Court shall, by order in writing, before sentence is imposed, <u>remand the offender for a period not exceeding 60 days</u>, to the custody of a person designated by the Court who can <u>perform an assessment or have an assessment performed</u> by experts for use as evidence in an application under section 753 or 753.1. [Emphasis added]

[22] They rely on *R. v. Jones*, [1994] 2 S.C.R. 229 at paras. 123 and 124 and say that a seminal statement on the importance of dangerous offender applications and the kind of evidence that must be considered was made by Gonthier, J. on behalf of the majority,

> 123 I repeat that once the party reaches the dangerous offender proceeding, he has already been found guilty of the offence. Where there is a serious risk that the offender will re-offend, Parliament has seen fit to provide for an indeterminate sentence for offenders who pose a danger to the public. Section 753 seeks to protect society against offenders who constitute "a threat to the life, safety or physical or mental well-being of other persons". As La Forest J. noted at pp. 328-29 of Lyons:
>
> > It must be remembered that the appellant was not picked up off the street because of his past criminality (for which he has already been punished), or because of fears or suspicions about his criminal proclivities, and then subjected to a procedure in order to determine whether society would be better off if he were incarcerated indefinitely. Rather he was arrested and prosecuted for a very serious violent crime and subjected to a procedure aimed at determining the appropriate penalty that should be inflicted upon him in the circumstances.
> >
> > . . .
> >
> > It is thus important to recognize the precise nature of the penological objectives embodied in Part XXI. It is clear that the indeterminate detention is intended to serve both punitive and preventive purposes. Both are legitimate aims of the criminal sanction. Indeed, when society incarcerates a robber for, say, ten years, it is clear that its goal is both to punish the person and prevent the recurrence of such conduct during that

> period. Preventive detention in the context of Part XXI, however, 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.

As with all sentencing, both the public interest in safety and the general sentencing interest of developing the most appropriate penalty for the particular offender dictate the greatest possible range of information on which to make an accurate evaluation of the danger posed by the offender.

124 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. If there is, the dangerous offender sentencing allows the justice system to more precisely tailor the actual time served by the offender to the threat that he poses to society. The overriding aim is not the punishment of the offender but the prevention of future violence through the imposition of an indeterminate sentence. An indeterminate sentence is not an unlimited sentence. If, in the case at hand, the psychiatrists testifying on behalf of the accused are correct in their assessment that Mr. Jones will be fit to be released in ten years, then he will be liberated at that time. The offender faces incarceration only for the period of time that he poses a serious risk to the safety of society. In the interim, it is hoped that he will receive treatment that will assist him in controlling his conduct. To release a dangerous offender while he remains unable to control his actions serves neither the interests of the offender nor those of society. [Emphasis Added]

[23] The Crown says there is nothing in the section that prohibits an amendment to the expert's report and that following *Jones*, *supra,* it is critical the court have all the relevant and updated information available to it for review at the DOA hearing.

[24] Defence counsel argues that the assessment was not completed within the required 60-day remand period and further that the report of Dr. Bloom is not a final report as by his own words he describes it as "preliminary" pending his opportunity to review the Connor's report and conduct an interview of past partners of Mr. Crowe. They say the report should be struck, the DOA proceeding ended and that the court should proceed with sentencing Mr. Crowe on the offences for which he was found guilty.

[25] Mr. Crowe relies on the decision in *R v. Gow*, 2010 ABQB 564 which ruled that the 60-day time frame for assessment mandated under s. 752.1, if violated should result in the proceedings being declared a nullity. Indeed the facts of *Gow* are that no report was filed or assessment completed within the time frames set out in the section. Specifically, *Gow* interpreted whether the timelines set out under that section of the *Criminal Code* are substantive/mandatory or procedural/discretionary. Defence counsel distinguished those earlier cases where timelines were deemed to be "procedural" and "directory" rather than substantive and mandatory, because they were decided before the 2008 amendments to Part XXIV. Mr. Church acknowledged *R v. Acoby*, [2009] O.J. No. 197 (Ont. Sup. Ct.), a case where the court granted an extension for a late filing report noting "the failure to comply with the timelines in the present case was not the result of the Crown or Dr. Woodside simply ignoring their obligations." Mr. Church also acknowledged *R. v. Vanderwal*, 2010 ONSC 265 (Ont. Sup. Ct.) which decided whether there were sufficient grounds to order an assessment but recognized the timelines as procedural not mandatory.

[26] The Crown argues that *Gow* stands alone. The court in *Gow* rejected the reasoning of the Saskatchewan Court of Appeal in *R. v. Howdle*, 2004 SKCA 39 on the basis that it was decided before the 2008 amendments to the section.

[27] *Howdle* ruled that the time limits under s. 752.1 are procedural as opposed to substantive. In *Howdle,* the facts were identical to this case in that the assessment was not completed in the 60-day remand period. *Howdle*, in paras. 14 and 15 adopted the *Jones* reasoning with respect to the court requiring best evidence.

[28] *Howdle* has been subsequently followed by the Quebec Court of Appeal in *R. c. Gladu*, 2012 QCCA 2091, a unanimous decision of the court that found at paras. 4 and 5 (translated):

> 4 It is well established that the time prescribed for the assessment and preparation of the report is procedural rather than substantive. The amendments made to section 752.1 of the Criminal Code in 2008 did not transform the nature of the prescribed time, but merely framed the conditions respecting the extension as it relates to the preparation of the assessment report.

> 5 Failure to comply with the time period prescribed does not automatically invalidate the assessment report. Rather, it is up to the party who believes that damage has resulted, to demonstrate it. [Emphasis Added]

[29] The Crown has also relied on a line of cases that stress the public policy issues at stake override procedural claims on the matter of timelines, in the absence of resulting prejudice. In *R v. Pike*, 2002 NFCA 40 the report was filed four days past the then 15-day time deadline. In *R. v. Vincent (W.T.V.)*, [2003] O.J. No. 2272, the report was filed four months after the conclusion of the assessment because the assessing physician had suffered a stroke. The Crown also relied on an unreported case *R. v. Ian Michael Cheeseman* (Ruling May 22, 2002, released September 13, 2002) where the report was filed outside the 15-day timeline. The expert faxed to the court an interim report in the form of a letter indicating, among other things, that he was awaiting written reports from other members of his assessment team. Even this interim report, however, was sent a day past the 15-day period. Justice Dorval noted at para. 4 that the late filed report satisfied s. 752.1(2) stating:

> The second paragraph of the section provides direction to the assessor; it requires that a report be filed within 15 days "after the end of the assessment period". This requirement was meant to provide assurance that the process of conveying of evidence is expeditious. This requirement is indeed imperative but does not establish a prerequisite to the admissibility of the results of the assessment. Such interpretation would render the intent of the legislature in s. 752.1(1) subservient to compliance with a procedural requirement outside the power of either party to the hearing. Had the legislature intended such an interpretation, the language of the section would clearly set out the time limitation as a condition precedent to admissibility of evidence. [Emphasis added]

[30] Lastly in the event that the court does find the timelines under s. 751.2 have been violated the Crown urges the court to take the position it can continue utilizing the expert evidence of Dr. Bloom, relying on *R. v. Mitchell*, 2002 BCCA 48. In that case, in light of a stale psychiatric report the court invited the Crown to make a new s. 752.1 application and conduct a second psychiatric assessment. The report had been filed under Part XXIV, where a predicate offence dated prior to the 1997 amendments creating the long term offender regime. The Court of Appeal allowed the use of the new assessment observing at para. 28, notwithstanding some evidence of prejudice to the offender.

> … [T]he sentencing provisions of the Code appear to contemplate that the court may request additional evidence for the purpose of sentencing beyond that already provided by counsel where the court considers such information to be essential in determining a fit sentence. In most instances, such a request will not be necessary because counsel will have provided all of the information necessary to enable the court to do its job. There may be instances, nonetheless, where the court is satisfied that further information is necessary in order to determine a fit sentence. That is what occurred here, both because of the length of the sentencing proceedings, and the fact that they were carried out over an extended period.

[31] The Crown suggests that the court can on its own motion order the preparation of a report and opinion to aid the court in a determination under Part XXIV.

Conclusion:

[32] Mr. Crowe has been found guilty of serious sexual offences. In the sentencing process it is imperative that the court avail itself of the best evidence to determine the appropriate penalty for the offences committed. Part XXIV was legislated in light of important public policy issues that included not only the sentencing principals of rehabilitation, deterrence and retribution, but addressed the need for protection of the public in circumstances where the offender may pose an on-going risk.

[33] In my view. the timelines set out in s. 752.1 are procedural, there to ensure an expeditious collection of evidence for the sentencing proceeding. It was intended that assessments should be completed in a timely manner and the expert be given a reasonable time after the actual assessment to complete a report for the court. The 60-day period recognizes the necessity to remand the offender to a forensic unit for examination by the expert, as distinct from general remand time pending sentencing.

[34] It is generally recognized that the assessment not only involves an interview of the offender but the examination of possibly large volumes of records relating to the offender's earlier life, (health and education records, as well as department of corrections records etc.) and also the opportunity to interview collateral witnesses who can provide further information relating to the offenders' social and psychological makeup. The timeline of 120 days, by the grant of an extension,

allows the expert time to complete a report as mandated but does not preclude the necessity of supplemental evidence being gathered or further comment by the expert. It is often the case that the collection of personal records takes time to locate and acquire, often beyond the control of the Crown or the expert. Collateral witnesses may not be readily available but are important to the evaluation. There will always be circumstances that require a report to be supplemented after the initial filing, if the court is to be provided with a comprehensive opinion based on the best evidence. There may be circumstances where the filing of the report is delayed unavoidably, for reasons such as illness, or travel delay or other mishap. This requires some latitude being afforded by the court. The timelines were set down to ensure the offender does not languish in custody but were not established as a prerequisite to admissibility of the expert report.

[35] In this case, Dr. Bloom filed his report within the required 120 days. That is determinative of compliance with s. 752.1. Further, it is very clear that Mr. Crowe agreed to be interviewed by Dr Bloom between July 3 and 5, 2012. He understood the timelines involved in Part XXIV and consented to the interview. This consent amounts to a waiver of any delay in the assessment. His position has not been prejudiced by the receipt of Dr. Bloom's report. Indeed, some delay in the interview of collateral witnesses may be attributed to Mr. Crowe. Dr. Bloom was prepared to supplement his report after these interviews and it would be appropriate for the court to receive this supplemental opinion evidence. Section 752.1 does not preclude this from happening and the court by its own motion under s. 723(3) can require this.

[36] In the result, Mr. Crowe's application is denied. Dr. Bloom's report is admissible and meets the statutory requirements of s. 752.1. If possible the dates for hearing this DOA application will be retained, September 30, 2013 to October 11, 2013. Mr. Crowe is urged to make final arrangements with Dr. Bradford for preparation of his own expert report. Mr. Crowe shall remain on remand to the September 30, 2013 hearing date.

Justice M. Heather Robertson