2007 CarswellOnt 5597, 75 W.C.B. (2d) 62

R. v. L. (R.F.)
HER MAJESTY THE QUEEN and R.F.L.
Ontario Superior Court of Justice
M.G.J. Quigley J.
Heard: June 21-22, 2007
Judgment: August 24, 2007
Docket: M2586/05

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Counsel: Monica MacKenzie for Crown

L. Talbot for Offender

Subject: Criminal

Criminal law --- Dangerous offenders — General.

**Cases considered by *M.G.J. Quigley J.*:**

*R. v. Drummond* (1982), 67 C.C.C. (2d) 498, 1982 CarswellOnt 1257 (Ont. C.A.) — referred to

*R. v. Hall* (2004), 2004 CarswellOnt 1460, (sub nom. *R. v. M.B.H.)* 186 C.C.C. (3d) 62, 185 O.A.C. 319, 70 O.R. (3d) 257 (Ont. C.A.) — considered

*R. v. Torres* (2007), 2007 CarswellOnt 2141 (Ont. S.C.J.) — referred to

*R. v. Y. (J.)* (1996), 1996 CarswellSask 52, 104 C.C.C. (3d) 512, 141 Sask. R. 132, 114 W.A.C. 132 (Sask. C.A.) — considered

**Statutes considered:**

*Criminal Code*, R.S.C. 1985, c. C-46

Generally — referred to

s. 151 — referred to

s. 152 — referred to

s. 271 — referred to

s. 752 "serious personal injury offence" — referred to

s. 752 "serious personal injury offence" (a) — considered

s. 752 "serious personal injury offence" (b) — referred to

s. 752.1 [en. 1997, c. 17, s. 4] — referred to

s. 752.1(1) [en. 1997, c. 17, s. 4] — considered

s. 753 — considered

s. 753(1) — considered

s. 753(1)(b) — referred to

s. 753.1 [en. 1997, c. 17, s. 4] — referred to

s. 753.1(2)(a) [en. 1997, c. 17, s. 4] — referred to

***M.G.J. Quigley J.*:**

1. On June 21, 2006, R. F. L. was found guilty by a jury of three counts of having sexually assaulted his daughter, B. Le. L., between October 1, 1996 and April 30, 1997, when she was 11 years of age, contrary to sections 271, 151 and 152 of the *Criminal Code of Canada*. At the time of his conviction, Mr. L. was incarcerated in a federal penitentiary, having violated conditions of the parole that he was granted after serving 18 years of a life sentence for seconddegree murder. Rather than immediately proceeding to a sentencing hearing on the predicate offences, however, the Crown advised that it intended to consider bringing an application to have Mr. L. declared a dangerous offender under s. 753 of the *Code*. On June 22, 2007, at the conclusion of the hearing of this application, I advised Mr. L. and counsel that the standard established in s. 752.1(1) of the *Code* for an assessment had been met by the Crown and Mr. L. was remanded at that time for assessment. I indicated that formal reasons for my ruling would follow.

2. Under s. 753(1) of the *Code*, the Court may, on an application made following the filing of an assessment report prepared under subsection 752.1(1), find an offender to be a dangerous offender. It may do so if it is satisfied on the basis of certain evidence that the offence for which the offender has been convicted is a serious personal injury offence described in paragraph (a)of s. 752, and that the offender constitutes a threat to the life, safety, or physical or mental well-being of other persons. The evidence presented must establish a pattern of repetitive behaviour by the offender, of which the offence for which he has been convicted forms a part, or a repetitive pattern of inability to control his sexual impulses, showing a failure to restrain his behaviour and the likelihood of causing death or

injury to other persons, or inflicting severe psychological damage on other persons, through failure in the future to restrain his behaviour.

3. A serious personal injury offence, as described in paragraph (a) of s. 752, is an indictable offence, other than treason or murder, which involves either the use or the attempted use of violence against another person or conduct endangering or likely to endanger the life or safety of another person or inflicting or likely to inflict severe psychological damage upon another person, for which the offender could be sentenced to 10 years or more. Serious personal injury offence is also defined to include an offence or an attempt to commit an offence described in s. 271 of the *Code*, thus embracing the predicate sexual assault offences for which the offender was convicted. In the Saskatchewan Court of Appeal decision in *R. v. Y. (J.)* (1996), 104 C.C.C. (3d) 512 (Sask. C.A.), the Court held that sexual assault may constitute a "serious personal injury offence" under either of the two paragraphs of the definition in s. 752 of the *Code*.

4. It is generally open to the Crown in circumstances where these provisions apply to seek to have an offender classified as either a long-term offender or a dangerous offender, with the differing consequences that flow from each of those designations. The offences referred to in paragraph 753.1(2)(a) relating to long-term offenders include the crimes of sexual assault, sexual interference, and invitation to sexual touching, the same offences of which Mr. L. was convicted with respect to his daughter, B. Le. L..

5. Before either a dangerous offender application or long-term offender application can be brought, however, it is necessary for the Court to order at stage one in the process that the offender be remanded for a period to the custody of a person that the Court directs, who can perform an assessment or who can have an assessment performed by experts. The results of that assessment are to be used as evidence in any application subsequently brought for a dangerous offender designation or long-term offender designation with respect to the offender under either s. 753, were s. 753.1 of the *Code*. Accordingly, before a dangerous offender application can proceed in the case of Mr. L., and insofar as he is ineligible for long-term offender designation by reason of being an offender who has previously been sentenced to life imprisonment, an assessment must be ordered, but that assessment may only be ordered where "the court is of the opinion that there are reasonable grounds to believe that the offender might be found to be a dangerous offender under s. 753..."

6. In the present case, it is evident from the nature of the offences for which Mr. L. was convicted, and it was admitted by defence counsel, that those offences do constitute serious personal injury offences in respect of which he could be determined by the Court to be a dangerous offender and accordingly incarcerated indefinitely in accordance with the provisions of the *Code*.

7. As is evident from the provisions of the *Code* relating to dangerous offender designations, which I have repeated above, Mr. L. may be found to be a dangerous offender on the basis of evidence establishing a number of elements. These include a pattern of repetitive behaviour, which in this case is evident from the extensive criminal record and parole revocation of Mr. L.. From the age of 17, Mr. L. spent only very short periods of time without committing offences or misdeeds against other people. His long record of criminal offences commenced in 1965 when he was 17 years of age and was reflected in his criminal record provided by the RCMP identification services which was before the Court on this hearing. He was also convicted of subsequent weapons and robbery offences in 1971 and 1973.

8. Mr. L. was arrested on a charge of second degree murder in September 1976 and in 1977 was convicted by a jury, but on appeal that conviction was overturned and he was retried. He was again convicted by a jury in 1980 and sentenced to 10 years. The Crown appealed that sentence. In Reasons for Judgment that outlined in horrific detail the circumstances relating to the murder of the victim, Associate Chief Justice McKinnon, presiding and speaking for a distinguished criminal law panel that included Martin and Dubin JJ.A., increased Mr. L.'s sentence to life imprisonment with a minimum of 18 years to be served before he could apply for parole: *R. v. Drummond* (1982), 67 C.C.C. (2d) 498 (Ont. C.A.).

9. Mr L. was granted parole in December 1994. He moved to Acton, Ontario, and while there, on parole and living with his wife, he committed the predicate sexual assault offences against B. Le. L., for which he was found guilty by a jury in a trial over which I presided. He was further convicted of driving while impaired in 1997. His parole was suspended on at least two occasions, and on June 27, 2000, his parole was revoked by the National Parole Board and he was recommitted to serve his life sentence in federal penitentiary as a parole violator. It is evident from the report prepared at that time that Mr. L. was considered a poor risk for being permitted to remain in the community because of his disregard for release conditions imposed upon him, his lack of insight into his own personal problems, his documented history of substance abuse, and past ineffectiveness of increased community interventions. His parole was revoked on the basis that he was a poor parole risk and the fact that he could only be safely managed within the corrections system while incarcerated.

10. Under the statutory provisions, the repetitive behaviour in question must show a failure on the part of the offender to restrain his or her behaviour. I agree with the Crown's argument that the fact that Mr. L. from the age of 17 went for only very short periods of time without committing further offences or misdeeds leading to parole revocation, indicates clearly that he has failed to restrain his behaviour. The only time he has ever been able to restrain his behaviour, and even that is not constant, was while he was incarcerated in an institution. Essentially, since his first conviction in 1965, more than 42 years ago, Mr. L. has spent very few years

living outside of Canadian penal institutions, and when he has been in the community, he has been repeatedly shown to re-offend.

11. On this application only one witness gave evidence, namely, Dr. Peter I. Collins, whose expertise as a forensic psychiatrist was accepted by the defence. Dr. Collins is an Associate Professor in the Department of Psychiatry at the University of Toronto and a forensic psychiatrist in the Law and Mental Health Program at the Centre for Addiction and Mental Health in Toronto. Dr. Collins thoroughly reviewed Mr. L.'s prior history. He noted a prior but inconclusive assessment had been made of Mr. L. in 1991. Nevertheless, those earlier assessments had diagnosed Mr L. as having an antisocial personality disorder. While acknowledging that he could not provide a diagnosis of Mr. L. on the basis of the material that he had reviewed, nevertheless Dr. Collins felt it was reasonable to conclude, and he gave his opinion, that Mr. L. falls within the scope of individuals who have been remanded for psychiatric assessment under section 752.1 of the *Code*. In his opinion, a full independent psychiatric assessment is required to determine from a psychiatric perspective whether Mr. L. is a candidate for either a dangerous offender or long term offender designation. In reaching this conclusion, Dr. Collins stated:

> A past history of behaviour is the most reliable predictor of future behaviour. From a risk perspective, Mr. L. could be at high risk to re-offend due to his history of previous violence, young age at the time of his first violent act, history of relationship instability, substance abuse, personality disorder and prior supervision failure. His criminal versatility, disregard for authority, and history of sexual deviant acting out also potentially places him at risk.

12. On cross-examination, defence counsel suggested that the passage of years since the earlier assessment of Dr. Marshall, combined with the passage of 10 years since the commission of the predicate offences in this matter, could suggest that at 60 years of age there is materially reduced risk associated with Mr. L. owing merely to the passage of time. Dr. Collins countered, however, that it was only generally when he was in the community that Mr. L. has re-offended. While it is true that Mr. L. has in many ways been a model prisoner, and has demonstrated good behaviour while incarcerated, the passage of time does not address his propensity for criminality because that criminal behaviour only takes place when he is in the community. Moreover, Dr. Collins confirmed that Mr. L.'s "versatile criminality", embracing offences of armed robbery, fraud, murder and sexual assault against a minor, constitutes a serious risk enhancing factor. In his view, there is a real concern about Mr. L.'s predilection for sexual deviance that would need to be ruled out if he were to ever be considered for parole again, and that was why a further assessment is needed.

13. Repetitive behaviour of the type displayed over 42 years by Mr. L., which he has been unable to restrain, must necessarily raise the likelihood that he could cause

death or injury to other persons or inflict severe psychological damage on other persons. It appears evident that Mr. L.'s failure to restrain his sexual impulses, and as well as his aggression, if it were to continue, could be likely to cause at a minimum severe psychological damage to other persons, of the traumatic kind caused to B. Le. L., if not death or injury. The alternative ground potentially applicable to Mr. L. is that of a failure to control his sexual impulses and a likelihood of causing injury, pain or other evil to other persons through failure in the future to control his sexual impulses. There can be no question looking at Mr. L.'s past, reflected as it relates to his conviction for second-degree murder in the reported decision of Associate Chief Justice MacKinnon in June 1982, that the elemental environment within which the second-degree murder offence took place unquestionably involved the inability of Mr. L. to control his sexual impulses, notwithstanding his denial that there was any sexual aspect to that crime at all. He has shown a failure to control his sexual impulses both in the murder for which he was previously convicted, and in the predicate offences of having sexually assaulted his 11-year-old daughter.

14. I acknowledge here that my role on this application is to serve a gatekeeper function. It is important that the Court carefully undertake the review mandated by section 752.1 in order that every offender for whom the Crown seeks to have an assessment undertaken is not simply subjected to the personally intrusive aspects of an assessment on a whim of risk of reoffending, or the most remote possibility of meeting the tests that underlie dangerous and long term offender designations. It is true that most offenders have a right to simply be sentenced for the crime of which they have been convicted: see *R. v. Torres*, [2007] O.J. No. 1402 (Ont. S.C.J.). Because of the fact that Mr. L. is serving a sentence of life imprisonment, he is only capable of being found to be a dangerous offender. The long term offender designation, with its lesser consequences, can never apply to him because of his lifer status.

15. Nevertheless, the Crown correctly observes that the test on this stage one hearing is not one of probability that Mr. L. will re-offend, or the probability that he will be unable to restrain his sexual impulses, or the probability that the other concerns articulated by Parliament in the language of section 753 of the *Code* apply to him. Rather, the test is merely one of there being reasonable grounds to believe that there is a reasonable possibility that Mr. L. might be found to be a dangerous offender under section 753. Dr. Collins has ably testified to Mr. L.'s past versatile criminality, and Mr. L.'s own criminal record speaks bluntly to the repetitive pattern of his criminal behaviour.

16. In *R. v. Hall* (2004), 186 C.C.C. (3d) 62 (Ont. C.A.), the Ontario Court of Appeal concluded that sexual assault is a serious personal injury offence under section 752(b) and under section 753(1)(b), but it cautioned that there is no requirement that the facts surrounding the sexual assault that is the predicate offence in this matter clear any threshold of seriousness in order to engage the dangerous offender legislation. To determine whether the accused is a dangerous offender

would simply require that I consider whether the totality of Mr. L.'s conduct in sexual matters showed a failure to restrain his sexual impulses and thereby satisfy the requirements of section 753(1)(b).

17. Mr. L.'s failure in the past to restrain his sexual impulses, as well as the evident aggression inherent in the crimes for which he has been convicted, if it were to continue, could be likely to cause severe psychological damage to other persons, if not death or injury. Moreover, Mr. L. has shown a blatant failure to control his sexual impulses in both the predicate offence and in the prior murder conviction. Given that it was only shortly after he was released on full parole that he started sexually abusing his daughter, after he started living in Acton with his daughter and wife, there may well be a likelihood that he may continue in future to fail to control his sexual impulses and force himself on children or unwilling adult partners. Were this likelihood to arise, it is evident based on his prior history that pain or other evil could result.

18. The simple basis upon which this Court can require that Mr. L. be remanded for expert assessment under section 752.1(1) is if there are reasonable grounds to believe that Mr. L. might be found to be a dangerous offender under section 753 of the *Code*. Without making any finding of probability, and recognizing that the test is one of real possibility, there is no doubt in this case, with the prior history of this offender, that there is a real possibility that Mr. L. might be found to be a dangerous offender. It is for these reasons that the assessment has been ordered on the terms reflected in my endorsement and the order for in-custody assessment signed by me following the completion of the hearing on June 22, 2007.

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**KEYCITE**

**R. v. L. (R.F.), 2007 CarswellOnt 5597, 75 W.C.B. (2d) 62, [2007] O.J. No. 3394 (Ont. S.C.J.,Aug 24, 2007)**

**History**

**Direct History**

=> 1 **R. v. L. (R.F.),** 2007 CarswellOnt 5597, 75 W.C.B. (2d) 62, [2007] O.J. No. 3394 (Ont. S.C.J. Aug 24, 2007) **(Judicially considered 2 times)**