COURT OF APPEAL FOR BRITISH COLUMBIA

Citation: *R. v. J.W.R.,*
2010 BCCA 66

Date: 20100211
Docket: CA032981

Between:

Regina

Respondent

And

J.W.R.

Appellant

Restriction on publication: An order has been made in this case pursuant to s. 486(3) [now s. 486.4] of the *Criminal Code* that prohibits the disclosure of any information that could identify the complainants or witnesses.

Before: The Honourable Madam Justice Ryan
The Honourable Mr. Justice Donald
The Honourable Mr. Justice Groberman

On appeal from the Supreme Court of British Columbia, January 20, 2005 (*R. v. R.(J.W.)*, 2005 BCSC 75, No. 93060, Victoria Registry)

Counsel for the Appellant: D. Mayland McKimm, Q.C.

Counsel for the Respondent: Kenneth Madsen

Place and Date of Hearing: Vancouver, British Columbia
September 17, 2009

Place and Date of Judgment: Vancouver, British Columbia
February 11, 2010

Written Reasons by:
The Honourable Mr. Justice Groberman

Concurred in by:
The Honourable Madam Justice Ryan
The Honourable Mr. Justice Donald

Reasons for Judgment of the Honourable Mr. Justice Groberman:

[1] The appellant appeals from a finding that he is a long-term offender, and from the sentence imposed on him. He argues that, in light of social science evidence that the probability of recidivism for sexual offenders drops off with age, the trial judge erred in finding that there was a "likelihood" or "substantial risk" that he will cause harm in future as a result of re-offending.

[2] The appellant also contends that the trial judge erred in imposing on him a 10-year period of long-term supervision following the completion of his imprisonment, and in requiring that he comply with the provisions of the *Sex Offender Information Registration Act*, S.C. 2004, c. 10.

The Underlying Offences and Circumstances of the Appellant

[3] In a judgment indexed at 2003 BCSC 1694, the appellant was convicted on 13 counts involving the sexual and physical abuse of 6 children: 2 counts of common assault, 7 counts of indecent assault, 1 count of sexual assault, and 3 counts of rape. The victims of these various crimes were two of the appellant's daughters, two of his sons, one of his granddaughters, and a friend of one of his daughters. The convictions were upheld by this Court in a judgment indexed as 2007 BCCA 452. On the sentencing hearing, the trial judge heard evidence of additional incidents of sexual assault against the granddaughter, and of an incident of inappropriate sexual behaviour toward a 17-year old girl who was a client of his law practice.

[4] The details of the circumstances of the 13 convictions are set out in the reasons for judgment on conviction and summarized in the court's judgment on the conviction appeal. For the purposes of this appeal, an overview of the circumstances will suffice. In her reasons for judgment finding the appellant to be a long-term offender, the trial judge provided the following convenient synopsis:

> <u>Count 1: Sexual Assault – January 4, 1983 to December 31, 1988</u>
>
> [8] LB, now LAR, is the daughter of JWR's stepdaughter, DEG. In 1984, when LAR was about 7 or 8, JWR placed her hand on his erect penis and told her to move her hand up and down. In a second incident, JWR inserted

his finger in her vagina, causing a burning, tearing sensation. In a third incident, JWR placed LAR on a hide-a-bed couch, motioned her to place her hand on his penis, and then pulled up her nightie and touched her on the outside of her panties.

Count 2: Indecent Assault – July 1, 1976 to July 9, 1979

[9] JWR masturbated his son, JWR, Jr., several times in the summer of 1976 when his son was about 14 years of age.

Count 3: Indecent Assault – January 1, 1966 to July 14, 1971

[10] DEG is JWR's stepdaughter, whom he adopted in 1965. In about 1966, when DEG was about 8 years of age, JWR fondled her on the outside of her vagina; when DEG was between 8 and 10 years old, JWR inserted his finger in her vagina more than a dozen times; he forced her to kiss his penis; he forced her to lie on a bed without her pants on while JWR showed her genitalia to her brother and told him to insert his finger in her vagina; he fondled her under her pyjamas on a truck trip; and he attempted to rape her at a time when her mother was in hospital, telling her that it was "what good little girls do for their fathers."

Count 4: Indecent Assault – July 15, 1971 to December 31, 1976

[11] JWR attempted sexual intercourse with DEG in 1971 when she refused to strip naked on a boating excursion to an isolated beach.

Count 5: Rape – January 1, 1970 to July 14, 1971

[12] JWR raped DEG from the time she was 13 years of age on more than 20 occasions.

Count 6: Rape – July 15, 1971 to December 31, 1976

[13] JWR raped DEG until she was 16 years of age. She could not estimate the number of times that JWR forced sexual intercourse on her.

Count 7: Sexual Intercourse with a female under age 14 not his wife – January 1, 1970 to January 4, 1972

[14] This count concerning sexual intercourse with DEG, a female person under the age of 14 years who was not JWR's wife, is subsumed in Counts 4, 5, and 6.

[It should be noted that a conditional stay was entered on this count on the basis of the principle set out in *R. v. Kienapple*, [1975] 1 S.C.R. 729)]

Count 8: Assault – June 1, 1965 to July 14, 1972

[15] JWR physically assaulted DEG with a leather strap, his hand, and an electrical cord.

Count 9: Indecent Assault – June 1, 1974 to September 30, 1975

[16] JWR fondled the breast of KJH, a childhood friend of JWR's stepdaughter, DMR.

Count 10: Indecent Assault – October 1, 1966 to July 14, 1971

[17] On her seventh birthday, JWR inserted his finger into the vagina of DMR. In another incident, JWR fondled her vaginal area and buttocks and

> later digitally penetrated her vagina while ostensibly helping her to change from her swimming clothes.
>
> Count 11: Indecent Assault – July 15, 1971 to December 31, 1976
>
> [18] When DMR was about 11, JWR came into the bathroom in which she and a friend, CEM, were bathing. He began feeling around in the bathtub and touched DMR's bottom. DMR and her friend both screamed and JWR ran out of the bathroom.
>
> [19] In another incident when DMR was about 10 years of age, JWR inserted his finger in her vagina, saw blood, and informed her brothers that "there was a new woman in the house."
>
> [20] In a further incident, JWR told her to hold his erect penis and attempted to undo her pants.
>
> [21] Another time, after catching DMR smoking, he digitally penetrated her vagina and pulled her nipples. On one or two occasions JWR went into DMR's bedroom after she had been out for the evening and either inserted his fingers in her vagina or opened her legs and looked at her.
>
> Count 12: Assault – June 1, 1965 to July 14, 1972
>
> [22] On the morning after JWR's indecent assault on DMR on her seventh birthday, DMR went to her parents' bedroom to tell her mother that she had noticed blood on her underpants. JWR told her to return to her room. He came into her bedroom and beat her with a bath brush.
>
> Count 14: Indecent Assault – July 15, 1971 to December 31, 1976
>
> [23] JWR performed oral sex on his son, DCCR, on at least one occasion. JWR asked his son on several occasions if he would like to touch his father's genitals.
>
> [Count 13 was stayed by the Crown, and the accused was acquitted on Count 15.]

[5] The evidence heard by the trial judge on the sentencing hearing included evidence of additional sexual assaults against LAR (the complainant in count 1). In the summer of 1988, when LAR was 11, she visited the appellant in California. On one occasion, he touched her breasts and labia, kissed her vaginal area, and then positioned her on his erect penis. He attempted intercourse, but found that he could not achieve penetration, as he was "too big for her".

[6] Subsequently, on the same trip, the appellant picked LAR up to give her a "piggy-back ride". While doing so, he placed his hands behind her buttocks, then moved them inside her underwear, digitally penetrating her vagina.

[7] The following summer, during another visit to California, LAR was swimming in a hotel pool when the appellant dove into the pool and grabbed her vaginal area and pulled her underwater. When LAR threatened to report the accused to her mother, the accused said he would hurt her if she did so.

[8] On the sentencing hearing, the trial judge also heard evidence of an incident involving a 17-year old girl whom the appellant was representing in a personal injury action. The girl had attended at his office in the company of her father. The appellant arranged for the girl to subsequently attend at his office alone, and when she arrived, instead of meeting with her in his office, he took her to his sailboat. On the boat he insisted that she drink an alcoholic drink, and then tried to engage her in lewd conversation, including a threatening suggestion that he might have sexual intercourse with her. Eventually, the girl convinced the accused to take her back to his office, where a friend picked her up.

[9] At the time of the sentencing hearing, the accused was 64 years old. His most recent known sexual offence had occurred 16 years earlier. He continued to deny all of the allegations against him.

[10] The trial was the accused's second on these charges. His convictions on his first trial were overturned by the Supreme Court of Canada, 2001 SCC 65, [2001] 3 S.C.R. 7, 277 N.R. 49. This resulted in a lengthy period of custody prior to the disposition – a total of approximately 5 ½ years.

[11] The trial judge found the appellant to be a long-term offender under s. 753.1 of the *Criminal Code*. She imposed a sentence of three years on count 1, to be followed by ten years' supervision in the community. On the other counts, she imposed a combination of concurrent and consecutive sentences, with the total period of incarceration on all counts coming to 5 years after taking into account double credit for pre-trial time in custody.

[12] The appellant appeals only the finding that he is a long-term offender, the long-term supervision order of ten years, and the requirement that he register pursuant to the *Sex Offender Registration Act*.

Statutory Provisions

[13] The appellant was sentenced under Part XXIV of the *Criminal Code*, R.S.C. 1985, c. C-46. The following are the statutory provisions relevant to this appeal:

> 753.1 (1) The court may … find an offender to be a long-term offender if it is satisfied that
>
> (a) it would be appropriate to impose a sentence of imprisonment of two years or more for the offence for which the offender has been convicted;
>
> (b) there is a substantial risk that the offender will reoffend; and
>
> (c) there is a reasonable possibility of eventual control of the risk in the community.
>
> (2) The court shall be satisfied that there is a substantial risk that the offender will reoffend if
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> (a) the offender has been convicted of an offence under … section 271 (sexual assault) ... and
>
> (b) the offender
>
> (i) has shown a pattern of repetitive behaviour, of which the offence for which he or she has been convicted forms a part, that shows a likelihood of the offender's causing death or injury to other persons or inflicting severe psychological damage on other persons, or
>
> (ii) by conduct in any sexual matter including that involved in the commission of the offence for which the offender has been convicted, has shown a likelihood of causing injury, pain or other evil to other persons in the future through similar offences.
>
> (3) ... [I]f the court finds an offender to be a long-term offender, it shall
>
> (a) impose a sentence for the offence for which the offender has been convicted, which sentence must be a minimum punishment of imprisonment for a term of two years; and
>
> (b) order the offender to be supervised in the community, for a period not exceeding 10 years ....
>
> …
>
> 753.2 (3) An offender who is required to be supervised … may apply to a superior court of criminal jurisdiction for an order reducing the period of long-

> term supervision or terminating it on the ground that the offender no longer presents a substantial risk of reoffending and thereby being a danger to the community. The onus of proving that ground is on the applicant.

[14] The issue with respect to the long-term offender designation is whether the trial judge erred in finding that there was a substantial risk that the appellant would re-offend, as required by s. 753.1(1)(b). In making that finding, the trial judge relied on s. 753.1(2)(b)(ii); she was of the view that the accused's past conduct was indicative of a likelihood that he would commit further similar offences. The appellant says that the trial judge's finding was unreasonable and unsupported by the evidence.

The Finding of a Likelihood that the Appellant will Re-offend

[15] On the issue of whether there was a substantial risk that the appellant would re-offend, the trial judge heard expert evidence from three psychiatrists: Dr. Robert Miller was appointed by the court to assess the appellant; Dr. Shabehram Lohrasbe was called by the Crown; and Dr. Elisabeth Zoffman was called by the appellant. The appellant also called a forensic psychologist, Dr. Terry Nicholaichuk.

[16] As might be expected, there were some differences in the views of the various experts who testified. They emphasized different aspects of the appellant's history and provided somewhat different assessments of the appellant's likelihood of re-offending. However, the experts were generally in agreement on the factors that affect the appellant's likelihood of committing further crimes. As well, while they expressed the likelihood of risk somewhat differently from one another, their assessments shared a great deal of common ground.

[17] Dr. Miller was qualified as an expert in forensic psychiatry and the dynamics of child physical and sexual abuse and in the diagnosis, treatment and rehabilitation of sexual offenders. He did not have the opportunity to interview the appellant prior to his first report, but did conduct a "guided professional interview" before writing his second report. He used a number of actuarial risk-assessment tools in reaching his conclusions, including tools known as the "PCL" (Psychopathy Checklist), the "SVR-

20" (Sexual Violence Risk) and the "Static-99". Each of these tools attempts to assess the risk that a sexual offender will re-offend.

[18] Dr. Miller pointed out that the appellant's sexual offences were not confined to a clearly defined group of victims – the victims were of both sexes, and, although most were members of his family, there were victims who were not family members. He considered the appellant to be a pedophile, but noted that the appellant's sexual interests were not exclusively directed at children. He considered the number and variety of offences to be a matter of concern, as was the use of violence in the commission of some offences. He also noted that the appellant's continued denial of the offences made treatment more difficult. On the other hand, he accepted that the length of time that had elapsed since the last offence was a positive factor, making it less probable that the appellant would re-offend.

[19] He noted certain limitations in the actuarial methods that he used. In respect of one test, for example, he stated:

> [T]his data should be treated with caution. I would suggest that it may be unusual for an offender to be convicted of as many offenses as [JWR], dating back over many years, at a first trial. [JWR's] case, therefore, may not be comparable to many of the 206 offenders on which the actuarial prediction is based.

[20] He acknowledged that part of the problem with a statistical approach to risk assessment is that the statistics do not necessarily differentiate between those convicted of single offences and those convicted of multiple offences.

[21] Dr. Miller concluded that the appellant represents a "moderate" risk to re-offend – a risk he defined as meaning that there was a 20-30% chance that a person would re-offend over a five-year period. While he agreed that the risk of re-offending might decrease with age, he said that he was unable to state "when or if" that would occur.

[22] Dr. Lohrasbe was qualified as an expert in the dynamics of child sexual and physical abuse, risk assessment and the diagnosis, treatment, and rehabilitation of sexual offenders. He did not have an opportunity to interview the appellant, and,

unlike Dr. Miller and Dr. Zoffman, he did not use formal actuarial tools in his risk assessment. He stated that he was uncomfortable with the use of such tools, because they consolidate data of numerous individuals with different characteristics.

[23] Dr. Lohrasbe also diagnosed the appellant as a pedophile. Like Dr. Miller, he found it noteworthy that the appellant's victims were, for the most part, family members, but also included persons outside of the family. He considered the fact that the appellant had used "intimidation, threat, force and control" in the course of the various assaults to be an "ominous feature" of the offences, and said:

> Many possibilities arise when trying to understand such a pattern. He may have a limited ability to empathize with others. He may have very strong deviant sexual urges, that override concerns for the wellbeing of his victims. He may enjoy the infliction of humiliation or pain i.e., he may be sadistic. He may be so emotionally unstable that angry impulses are carried out without restraint.

[24] Dr. Lohrasbe's prognosis was not an optimistic one:

> [I]t is important to note that pedophilia is not known to spontaneously disappear. Like any sexual behaviour it tends to persist in an [individual's] life, particularly when well established. Patterns of sexual arousal and gratification are not easily extinguished. In a man with a well-established pattern, the best that can be hoped for is self-control. There is no cure. The potential to reoffend will always be there.

[25] Dr. Lohrasbe was aware that the appellant had not offended for a lengthy period, but did not attach much weight to that fact, given that it is not uncommon to see long gaps in a sexual offender's pattern of offences. Four factors were particularly important to his assessment:

- the appellant's victims were of both sexes;
- the appellant used a variety of approaches to his victims, including seduction, threats and physical force;
- the appellant employed violence against his own children;
- the offences spanned a long period of time, and continued over more than one generation of the family.

[26] Based on his clinical experience, Dr. Lohrasbe considered the appellant to be at a high risk of committing further sexual offences. His risk assessment, however, differed from those of the other professionals, in that he compared the appellant not to others convicted of sexual offences, but to the general population as a whole.

[27] Dr. Zoffman was qualified to give expert evidence in the area of psychiatry, and, in particular, the diagnosis, treatment and rehabilitation of sexual offenders. She was able to conduct the most complete assessment of the appellant, having interviewed him, as well as certain persons described as "collaterals". Like Dr. Miller, she used a number of evaluations to gauge the degree to which the accused was dangerous.

[28] Dr. Zoffman agreed that the appellant is properly categorized as sexually deviant, and agreed that, as such, he could not be "cured" but only managed. She also agreed that his failure to acknowledge his offences was problematic – it limited the types of treatment that could be offered, and made it impossible to assess the factors that motivated the appellant to offend.

[29] In terms of the risk of re-offending, Dr. Zoffman noted several aspects of the appellant's life were indicative of a low risk: his lack of any history of general criminal behaviour; the absence of any history of substance abuse; his capacity to form relationships and maintain friendships and to engage in and remain in work; and the absence of emotional dysregulation in most contexts. On the other hand, troubling factors included the lack of any explanation for the offending behaviour and the thinking that led to it.

[30] For Dr. Zoffman, the appellant's age was one of the most important factors in evaluating the risk that he would re-offend. She provided evidence from the social science literature indicating that recidivism of sexual offenders drops by 50% after age 50 and to almost zero after age 60. Nonetheless, Dr. Zoffman concluded that the accused fell into the "low-moderate" risk category. She said:

> The numbers that we have from recidivism studies place that risk at somewhere between 4 percent to as high as 25 percent, or 4 out of 100 will

> recidivate, or 25 out of 100 will recidivate. Those are the outside barriers of the recidivism statistics.
>
> The problem with applying it, I can say JWR belongs in that class, but that's where it stops. Without more time and observation and opportunity, I cannot be any more precise about how likely he is to be that one in 25 or one in 5 persons who reoffends.

[31] Dr. Zoffman stated that she had assessed the appellant as an "incest-type" offender, and that recidivism is relatively low for that type of offender after he is caught. She agreed that the evidence at the sentencing hearing suggested that the appellant was a pedophile who did not confine himself to "incest-type" offences. Such a categorization, she said, increased her assessment of risk somewhat. Depending on the method of risk assessment, it increased the likelihood of recidivism from a range of 4 to 25% to a range of 12 to 25% or from a risk of about 12% to a risk of 18-20%. She was of the view that all of these assessments fall within the "low-moderate" range.

[32] Despite her generally optimistic assessment of the appellant, Dr. Zoffman considered it essential that the appellant be released into the community with a "prolonged supervision order" and with restrictions on his access to children.

[33] Dr. Terry Nicholaichuk, a psychologist, also testified. He was tendered as an expert in forensic psychology and in the diagnosis and treatment of sexual offenders and the assessment of risk. He categorized the appellant as an "incest-type offender" in his report, and said that such offenders generally have low rates of recidivism. Several factors contributed to his view that the appellant's likelihood of committing another offence is low: the length of time since the appellant's last offence, his age, his lack of a criminal history, and the fact that he appeared to have healthy, pro-social support.

[34] In cross-examination, Dr. Nicholaichuk agreed that the accused meets the criteria for a pedophile, and that he is arguably not just an "incest-type offender". He also agreed that while the risk of recidivism declines dramatically after offenders reach the age of 50, he could not say whether that was true in the appellant's case.

[35] Dr. Nicholaichuk provided the most optimistic assessment of the appellant, finding him to be at low risk of re-offending.

[36] The trial judge, after reviewing the evidence, indicated that she was satisfied that there was a likelihood that the appellant would cause injury, pain or other evil to other persons in the future through similar offences. While she acknowledged that the appellant's age might be a factor reducing the risk, she noted that the underlying cause of the appellant's behaviour could not be assessed, as he continued to deny the offences. This factor greatly complicated risk assessment. While she was satisfied that there was a reasonable possibility of controlling the appellant in the community, she considered that a long-term supervision order for the maximum period allowed under the statute should be imposed.

Analysis – Declaration that the Appellant is a Long-Term Offender

[37] The question of whether an offender is likely to re-offend is one of fact. In order to succeed on this appeal, therefore, the appellant must show that the trial judge's conclusions were unsupportable on the evidence. In my view, there was evidence before the trial judge upon which she could reasonably have reached the conclusions that she did.

[38] While s. 753.1(2)(b) emphasizes the offender's past conduct in the assessment of whether there is a substantial risk of recidivism, the jurisprudence indicates that a nuanced approach must be taken. Where, despite the offender's history, there are factors that minimize the likelihood of future offences, a court must not find the offender to be a long-term offender on the basis of his history alone: *R. v. Bakker*, 1999 BCCA 84, 133 C.C.C. (3d) 75 (sub nom. *R. v. M.O.B.)*. The trial judge, therefore, was obliged to consider whether factors such as the appellant's age made recidivism unlikely.

[39] In this case, the trial judge reviewed the evidence of the experts in some detail. While some of the evidence indicated that sexual offenders tend to stop offending when they reach the age that the appellant has reached, the evidence was of a general nature, and the experts agreed that its applicability to the appellant was

not clear. The appellant had a lengthy and varied history of offending. The experts agreed that it is impossible to cure pedophilia, and that the best outcome that can be hoped for is control. The appellant continued to deny his crimes, and there were, therefore, limits on the types of treatment that he could be given.

[40] The task imposed on the court by the long-term offender legislation is a formidable one. The court is greatly assisted in this task by expert evidence. Statistics with respect to recidivism can be of great assistance. In the end, however, the judge must consider the offender's background and history, and the quality of the existing social science evidence in making her decision. As the respondent puts it in its factum:

> The assessment of a likelihood that an offender will reoffend is a complex task that may not lend itself to precise articulation. The nature and limits of psychiatric evidence will not always provide a dispositive answer, and must be approached realistically and in conjunction with all the evidence when assessing whether the legal burden of proof has been met.
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> ...
>
> Thus, while medical evidence will be significant in a dangerous offender proceeding, finding a likelihood of reoffence is a legal finding, not a medical diagnosis. Ultimately, it is the trial judge who makes the finding, based not just on the medical evidence, but on the evidence in relation to all the elements required pursuant to s. 753. ... [I]t is not psychiatric or psychological conditions alone, or treatment of those conditions, that define dangerousness, or likelihood of reoffending. It is a combination of factors, including the predicate offence(s); criminal offending history; other background and behavioural characteristics; the offender's attitudes; resources available in custody and the community; reasonably foreseeable risks should there be future offending; and the assessment(s) that are considered.

[41] The trial judge was faced with a particularly difficult task in determining whether the appellant was likely to re-offend in this case. But for his age, there would be little question but that he qualified as a long-term offender. The evidence of the psychiatrists and psychologist indicated, however, that it is unusual for sex offenders to be convicted for offences that occur after they reach the appellant's age. None of the experts, however, was able to say whether the generalization is applicable to the appellant. That should not be seen as surprising – the psychiatric and psychological evidence that was presented was tendered in order to help the

trial judge to assess the danger posed by the appellant, not to definitively predict recidivism (see, in this respect, the discussion of psychiatric evidence in *R. v. Lyons*, [1987] 2 S.C.R. 309 at 365-367, 44 D.L.R. (4th) 193). In the end, the assessment was one for the trial judge to make, after considering all of the evidence, including the psychiatric and psychological assessments.

[42] The trial judge followed the law as established by cases such as *R. v. Currie*, [1997] 2 S.C.R. 260, 115 C.C.C. (3d) 205, and *R. v. Johnson*, 2003 SCC 46, [2003] 2 S.C.R. 357, 177 C.C.C. (3d) 97, in reaching the conclusions that she did. I am not persuaded that she erred in any way in coming to the conclusion that the appellant is a long-term offender.

The Imposition of a 10-Year Period of Community Supervision

[43] The next question is whether the trial judge erred in imposing the maximum period of community supervision permitted by the statute – ten years. In assessing this question, it is important to recognize that the supervision period is not intended to be “penal” in the sense of being designed to achieve goals of deterrence or denunciation. The fixed sentence imposed on the offender is the means by which penal objectives are met: *R. v. L.M.*, 2008 SCC 31, [2008] S.C.R. 163 at para. 40, 231 C.C.C. (3d) 310. Rather, the supervision period is intended to accomplish the goal of preventing future crimes.

[44] The trial judge considered that the appellant remained a danger to society as a result of his pedophilia, notwithstanding his age. She evidently considered that community supervision for a lengthy period was necessary to prevent a recurrence of the appellant’s destructive behaviour, particularly in light of the limited treatment that is available for offenders who do not acknowledge their offences.

[45] In the circumstances, I cannot say that the trial judge erred in the imposition of the maximum period of community supervision. This was not a case in which specific treatment was envisioned, nor was it one in which the evidence suggested that a particular period of supervision would suffice to reduce the risk posed by the appellant. The appellant’s history of offending was long and varied, and apart from

the hope that his advancing age would diminish his urge or ability to offend, there was little to suggest that the danger posed by the appellant would disappear. The trial judge considered that a lengthy period of supervision was necessary to protect the community. That was a conclusion open to her on the evidence.

[46] On this appeal, the appellant sought to tender evidence of his progress since he was sentenced. In my view, it would not be appropriate for this Court to consider that evidence on this appeal. The question for this Court is whether the sentence imposed was an appropriate one, not whether subsequent progress justifies a modification of the community supervision provisions of it. The long-term offender regime contemplates, in s. 753.2(3), an application to the Supreme Court by the offender where he can demonstrate that he no longer poses a danger to the community. In my view, that is the preferable forum for the appellant's new evidence to be canvassed. The trial court's procedures are better suited to the evaluation of the new evidence, and the *Criminal Code* provisions specifically provide for decisions of this nature being made in that court. If the appellant wishes to pursue his arguments that his progress makes the long-term community supervision order unnecessary, he should do so by way of an application under s. 753.2.

Registration under the *Sex Offender Information Registration Act*

[47] Section 490.012 of the *Criminal Code* generally makes an order for compliance with the provisions of the *Sex Offender Information Registration Act*, S.C. 2004, c. 10, mandatory in a case such as that of the appellant. The relevant *Code* provisions read as follows when the accused was sentenced:

> 490.012 (1) A court shall, on application of the prosecutor, make an order in Form 52 requiring a person to comply with the *Sex Offender Information Registration Act* ... as soon as possible after it imposes a sentence on the person for [certain offences, including offences for which the appellant was convicted].
>
> ...
>
> (4) The court is not required to make an order under this section if it is satisfied that the person has established that, if the order were made, the impact on them, including on their privacy or liberty, would be grossly disproportionate to the public interest in protecting society through the effective investigation of crimes of a sexual nature, to be achieved by the

> registration of information relating to sex offenders under *Sex Offender Information Registration Act*.
>
> (5) The court shall give reasons for its decision.

[48] Final submissions on the appellant's sentencing hearing were heard on December 16, 2004, only one day after the *Sex Offender Information Registration Act* (which enacted s. 490.012 of the *Criminal Code*) was brought into force.

[49] In the course of his submissions on sentence, defence counsel simply acknowledged that an order under s. 490.012 would form part of the disposition. Crown counsel commenced his submissions with a suggestion that certain ancillary orders be made at the outset – in particular, a firearms prohibition order, an order for the provision of a DNA sample, and an order requiring compliance with the *Sex Offender Information Registration Act* – so that they were not forgotten later on. The following exchange then took place between the court and defence counsel:

> THE COURT: Do you have any objections, Mr. Myers, to me making those orders now so that they don't fall between the cracks?
>
> MR. MYERS [for the accused]: No, I don't, except I just wanted to say that while we address the issue of the order coming – the Order in Council coming into force, subsequent to his conviction, we are conceding jurisdiction to impose the order, too, because we obviously acknowledge that this would form at some point a part of his supervision.

[50] The trial judge then proceeded to make the order, without giving reasons. Argument on the sentencing hearing continued, and the matter of sentence was adjourned to January 20, 2005, for judgment. In the course of her reasons for sentence given on that date, the trial judge said:

> [142] Lastly, I must address the Crown's application, granted by me on December 16, 2004, that JWR comply with the *Sex Offender Information Registration Act*, S.C. 2004, c. 10. The Act came into force on December 15, 2004.
>
> [143] Since the granting of the order, I have reviewed in more detail the requirements of granting the order under s. 490.012 of the *Criminal Code*. In doing so, I am satisfied that the impact of the order made is not grossly disproportionate to the public interest in protecting society. Clearly, all available means to ensure that JWR does not re-offend, or if he does re-offend, that he will be detected, are in the public interest.

[51] The manner in which the order was made on December 16, 2004, was irregular. Section 490.012(1) contemplates an order being made only after a sentence has been imposed. There is a practical consideration at play here: the timing of the offender's obligation to register under the *Sex Offender Information Registration Act* depends on whether or not a custodial sentence has been imposed, so an enforceable order cannot be made until the sentence has been determined. Technically, therefore, the trial judge fell into error in making the order on December 16, 2004, prior to sentencing the appellant.

[52] The trial judge also fell into error in failing to give reasons for her order at the time that it was made. The reasons given on January 20, 2005, are not particularly helpful in this regard. The Supreme Court of Canada has indicated, in *R. v. Teskey*, 2007 SCC 25, [2007] 2 S.C.R. 267, that reasons developed after the making of an order are problematic:

> [18] Reasons rendered long after a verdict, particularly where it is apparent that they were entirely crafted after the announcement of the verdict, may cause a reasonable person to apprehend that the trial judge may not have reviewed and considered the evidence with an open mind as he or she is duty-bound to do but, rather, that the judge has engaged in result-driven reasoning. In other words, having already announced the verdict, particularly a verdict of guilt, a question arises whether the post-decision review and analysis of the evidence was done, even subconsciously, with the view of defending the verdict rather than arriving at it.

[53] While the reasons given in this case were not delivered "long after" the order was made, they indicate, on their face, that the judge only addressed her mind to some of the issues of the propriety of the order after it had been made. In my view, this Court should not consider the January 2005 reasons in determining the propriety of the December 2004 order.

[54] All this said, the trial judge's error was a purely technical one. Section 490.012 of the *Criminal Code* required the judge to make the order unless the accused could bring himself within the exemption set out in s. 490.012(4). This Court has considered that exemption in *R. v. B.T.Y.*, 2006 BCCA 331, 210 C.C.C. (3d) 484, *R. v. S.S.C.*, 2008 BCCA 262, 234 C.C.C. (3d) 365, and *R. v. May*, 2009

BCCA 161, 243 C.C.C. (3d) 413, and has concluded that it is a very narrow one. In *May*, the Court summarized the heavy onus faced by an offender who relies on s. 490.012(4):

> [16] ... [A]n offender who claims an exemption from a mandatory registration scheme has the onus to bring evidence that would establish on a balance of probabilities that "the public interest is clearly and substantially outweighed by the individual's privacy and security interests…" [Citation omitted.]

[55] The appellant in this case made no effort to meet that onus. Indeed, at trial he acknowledged that the order should be made. In the circumstances, the failure of the trial judge to give reasons is a purely technical error, and one which can be corrected on this appeal.

[56] In my view, the trial judge had no choice but to make an order under s. 490.012 of the *Criminal Code*. The section requires an order to be made unless the order will have an unusually negative impact on the offender. In this case, the appellant did not suggest that there was any such impact. Accordingly, the strong presumption in favour of the granting of an order was not rebutted. The appeal against the order should be dismissed.

Conclusion

[57] In the result, I would dismiss the appeal.

"The Honourable Mr. Justice Groberman"

I agree:

"The Honourable Madam Justice Ryan"

I agree:

"The Honourable Mr. Justice Donald"