

**SUPREME COURT OF NOVA SCOTIA**

**Citation:** R.v. Waterfield, 2012 NSSC 449

**Date:** 20121224

**Docket:** CRH 348165

**Registry:** Halifax

**Between:**

Her Majesty the Queen

v.

James Albert Waterfield

**Editorial Notice:** Identifying information has been removed from this electronic version of the judgment.

**Judge:** The Honourable Justice Arthur J. LeBlanc

**Heard:** December 17, 2012

**Oral Decision:** December 19, 2012

**Written Decision:** December 24, 2012

**Counsel:** Catherine Cogswell and James Giacomantonio, for the Crown

Brad Sarson, for the Defendant

**By the Court:**

[1] James Albert Waterfield has entered pleas of guilty to three counts of a nine count indictment with the remaining six counts withdrawn by the Crown.

[2] He pled guilty to theft over \$5,000, aggravated assault and harassment. All charges pursuant to the *Criminal Code*. on October 24, 2011 that between 27 July and 30 July 2010 that he unlawfully committed the offence of theft over \$5,000 contrary to s.344 of the *Criminal Code*, and a sexual assault by wounding, maiming, and disfiguring or endangering the victim's life thereby committing aggravated sexual assault contrary to s.273(1) of the *Criminal Code* and also between 11 August 2010 and 16 August 2010, did harass the victim without lawful authority by repeatedly communicating directly or indirectly with her, thereby causing her to reasonably, in all circumstances, fear for her safety, contrary to s.264(2)(b) of the *Criminal Code*.

**Factual Background**

[3] The victim and the accused knew each other. They dated casually for four months. Mr. Waterfield was more serious than the victim as to their relationship.

She terminated the relationship. However, their relationship resumed. At some point the victim advised Mr. Waterfield that she wanted to terminate the relationship once again.

[4] The weekend before the circumstances giving rise to these charges, she advised Mr. Waterfield that she had been with her ex-boyfriend for the weekend. As a result of this Mr. Waterfield became infuriated. At that time he had told her that he would kill her ex-boyfriend and advised her that her life was over because he had hepatitis C and they had unprotected sex. Several days later, he called her telling her that he had made that up. On July 29<sup>th</sup> he called and wanted to come over and say goodbye. Despite her protestation, he insisted and showed up at her house. They had a couple of drinks outside her residence and around 9 p.m. they went the inside the residence in the living room area. They sat on the sofa for a few minutes and she thought that Mr. Waterfield was getting up to leave. He walked behind her and grabbed her by her hair. She told him that he was hurting her and he told her that he meant to, saying "I want to fucking hurt you." He dragged her by the hair all the way upstairs and at one point she felt as if her feet were off the ground. He took her to her bedroom. He stated that it was not up to her to decide when the relationship was over and called her names such as whore

and cunt. Over a period of time, he hogtied her and took articles out of her underwear drawer such as bras and scarves. She pleaded to let her go but rather he smacked her and punched her couple of times. He reminded her what it would be like to die because she had had a conversation with him in the past about her feeling so depressed that she wanted to die. He told her that she would have to first suffer. He punched her in the head a few times with her eyes swelling up and her nose broken with blood everywhere. She claimed that there was blood in her eyes while she was hogtied.

[5] He raped her and then he checked her closet and located a vibrator. He used it on her. She cried out in pain and when she did he went downstairs and located the two biggest carving knives from the kitchen and held them against her neck when he came back and told her that if she made one more noise it would be over for her. This appeared to go on forever for her. At one point she managed to get loose when he had gone downstairs but when he returned he retied her even tighter. He beat her again. He grabbed her arm towards her back and said that with one more move it would break. He continued to sexually assault her anally and vaginally. He pushed her face into the blanket and so she would not attempt to scream. He flipped her on her back and held a knife to her throat. He used the

knife to inflict knicks, claiming she would die from a 1000 cuts. He located prescription painkillers on her bed table and forced her to take a mouthful. He poured water in her mouth so that she would have to ingest them. As she was attempting to hide them in her mouth he discovered this and told her that he would kill her if she did not take them. He was giving her pills by the handful, up to 20 or 30 at a time.

[6] He located her Facebook account and wanted to know who B. was. When she claimed that the picture he located was not B. he beat her again. Eventually when he came back with another picture she admitted that that was indeed B.'s picture. He then proceeded to put his penis in her mouth and told her to suck it. He also had a knife to her throat and threatened to cut it if she bite his penis. He then again penetrated her vaginally and anally. He demanded and received her pin number for the her TD bank account. He withdrew \$400 from her account. He continued to rant and rave around the house calling her names.

[7] When she was laying on her side or on her back he would motion with the knife that he would kill her but was stabbing the mattress repeatedly.

[8] She thought she was going to die and he told her that if she called the cops he would kill her.

[9] Around 1:45 a.m. (some four and half hours later) he told her that someone had her daughter and if he didn't call by 2:15 they would shoot her. At about 2:15 he telephoned but did not speak to anyone and told her that he was going to let her live [for now] but he was going to kill B. in any event.

[10] She was pretending to sleep but he came back into the room and hit her again and then sodomized her one more time. She claims that she could not feel her hands or feet because she was bound so tight.

[11] Eventually he left and she managed to get free and she laid in her bed listening to the still silence. She managed to get up and looked outside the window and noticed that her vehicle was missing.

[12] She eventually called 911. She dressed in different clothing and then she was examined at the QEII Hospital.

[13] It was determined she had a broken nose, two black eyes, lacerations and bruises all over her body and although it was thought that she had fractured cheek bones and joints, that turned out not to be so. The hospital also observed tears in her anal area and they feared that she might go septic.

[14] She said that she was raped at least 10 times and was unsure whether it was with the sex toy or penis. She told him that she was in excruciating pain.

[15] He never previously had shown any aggression towards her until this evening and this was like a blitz attack, as she described it. He was eventually arrested and following his arrest, she noticed a couple of messages on her Facebook account indicating that he was taking things to a different level, suggesting that there was some premeditation and planning of this violence.

[16] Following a preliminary inquiry Mr. Waterfield was committed to stand trial in the Supreme Court, he changed his plea to that of guilty, as I indicated. As I indicated earlier, previous to his entering the plea, the Crown indicated its intention of seeking an order to either declaring Mr. Waterfield either a dangerous

offender or long-term offender. Following a significant delay, the sentencing hearing commenced on Monday, December 17<sup>th</sup>, 2012.

[17] The Crown and Mr. Waterfield have made a joint recommendations as to the length of sentence I should impose, the period of pre-sentence credit that I should grant Mr. Waterfield and the time frame of the long-term offender order. The Crown is also seeking ancillary orders as to the possession of firearms, a DNA order and a SOIRA order.

[18] Dealing first with the sentence that I should impose on Mr. Waterfield, I am guided by the principles and objectives of sentencing enumerated in the *Criminal Code*. They include denunciation, specific and general deterrence, separation from society and where appropriate, rehabilitation. I should impose a sentence that takes into account the circumstances of the offence and the circumstances of the offender. I should also take into account any aggravating and mitigating factors and in particular, offenses which involve violence against women, whether sexually motivated or not.

[19] The *Criminal Code* provides that an offence of aggravated assault carries up to which involves a wounding or endangering the life of the complainant is liable to life imprisonment. In the case of theft over \$5,000, the offender is liable to imprisonment for the maximum is 10 years as it is for harassment.

[20] In the matters before me, the primary and overwhelming objectives are denunciation and deterrence, both specific and general. The Court has an obligation and duty to denounce the conduct of Mr. Waterfield and to serve notice on him that society will not tolerate such conduct. In addition, the Court needs to send a signal that anyone involving himself in similar conduct will result in a severe and high-grade sentence. Such conduct is abhorrent and is absolutely unacceptable. I know that rehabilitation is, [although] one of the principles and objectives set out in s.718 of the *Criminal Code* but today that must take secondary importance. Therefore, rehabilitation is not a factor before me in the imposition of the sentence. Hopefully, rehabilitation will come when Mr. Waterfield engages in remedial programs that are offered to him.

[21] I am also mindful that s.718.2 provides that the sentence should be similar to sentences imposed in similar offences for similar offenders committed in similar

circumstances. I should also consider imposing a sentence whereby the offender would be not deprived of liberty if less restrictive sanctions may be appropriate in the circumstances and, furthermore, that all available sanctions other than imprisonment that are reasonable in the circumstances should be considered for all offenders, including, in particular aboriginal offenders. However, these last two factors are not present today.

[22] The only redeeming factor that I consider relevant is the fact that Mr. Waterfield decided to enter a plea of guilty to the two counts and one included offence of theft, thereby saving the complainant/victim from having to testify once again. Otherwise, all of the factors that I have mentioned are very much aggravating.

[23] As to the aggravated factors, the abject and profound violence involved in this is both mind-boggling event, is to say the least appalling. It is almost impossible to imagine how one human being can be so degrading of another, so purposefully wretched. Some of the aggravating factors:

- The use of knives and the forced consumption of prescribed medication is another aggravating factor.

- The hog tying of the victim to the point where she had no feelings in her legs and limbs.
- The physical attack leaving her with a broken nose, cuts and two black eyes.
- The threats to take the life of her former boyfriend and her daughter.
- The vicious and numerous sexual assaults both vaginally and anally with his penis and a sex toy and the resulting injuries.
- The threats to her life that if she called the police that he would kill her.
- The length of time this terror took place.
- Stealing her vehicle and withdrawing of money from her account.
- His lengthy criminal record which is before the Court starting back into 1982 and continuing until 1996 and then resuming again in 2003 through 2005. In all, he has been involved with criminal activities well over 25 years. For example, he had convictions in 1982, 1984, 1988, 1989, 1990, 1991, 1993, 1994, 1995, 1996, 2003, 2005 and a 2011. Included in these are three assaults with a weapon two assaults causing bodily harm, uttering threats, criminal harassment, robbery and possession of a weapon, a discussion of the police officer and theft.

[24] Although he did not express remorse before me, he did communicate this sentiment to Dr. Brunet during the course of the risk assessment interview. In my sentence, it is not an aggravating factor or the lack of it is not a mitigating factor. Therefore, I place no weight on what he told Dr. Brunet.

[25] The victim, who is not present today has filed a victim impact statement. She writes that the because of the attack on her, she now is without trust in any human being. She suffers from PTSD with frequent nightmares of the event, disruptive sleep, night sweats, panic attacks, paranoia and requires prescription medication treatment. Since July 2010 she is dealing continually with stressful events such as multiple blood tests over a six-month period to check for HIV and hepatitis infection on account of Mr. Waterfield had informed her that he had been infected.

[26] Her relationship with her daughter has suffered enormously and she no longer wants her daughter to be alone on account of fear for her safety. Her relationship with her mother has completely dissolved as she refuses to give her access to her thoughts or information. She no longer has any contact with her father because she cannot share with him what she went through.

[27] She does not go out alone after dark. She has adjusted her working hours during the winter months so she can walk to work and return to her vehicle prior to it being dark. She has given up going to the gym, working over time and walking after dark.

[28] She has been attending counselling but this has not resolved her anxiety and stress. She feels ashamed and guilty for this horrific event. She said that she cannot imagine putting herself in the position of having a meaningful relationship any time in the future.

[29] Her work has suffered as a result. She is less popular at work. She keeps to herself. She is unable to put herself back to her responsibilities. She does not want to travel away for work as she does not want to be living in hotels.

[30] Her career has taken a hit. She is not seeking any promotional opportunities because she is simply at a stage in her life where she is simply existing. She is, in addition, suffering financially because she has had to incur security measures such as alarms, alarm systems and additional cell phones.

[31] It is obvious that she has suffered psychologically and still suffers from this terrible nightmare appears to have continued for long beyond two years.

[32] As mentioned earlier, by virtue of s. 718.2, I am directed to consider imposing a sentence similar to sentences imposed on similar offenders for similar offences committed in similar circumstances.

[33] Although no two cases are identical, it is necessary to consider sentences that are within the range to determine their commonality, if any, so that there can be some degree of uniformity.

[34] I have reviewed all of the cases submitted by counsel and I have reviewed additional cases of my own. I wish refer to some of the cases only to show a cross-section of what courts in Nova Scotia and in other jurisdictions have been imposing by way of sentencing.

[35] *R. v. Hachey* - aggravated sexual assault - aggravating factors included violent criminal record, re-offending while on parole, invasion of private residence, extremely violent and depraved attack, disregard for the victims life, victim's pain and suffering and loss of neurological function, impact on her family. Mitigating factors included remorse, guilt to be, provisioned of blood samples, and a willingness to be treated -- 20 years.

[36] *R. v. Phillips* rape trial - aggravating factors, premeditation, stark horror and brutality, armed with a knife, 16 previous convictions, including one for rape, for which he was on parole when he committed the predicate offence, death threats, and cutting of hand and no mitigating factors -- 20 years.

[37] *R. v. Shrubsall* - aggravated sexual assault and choking -trial, unprovoked and brutal assault, extreme degree of violence including choking, horrible physical and emotional injuries, lengthy criminal record, with many instances of violence against women, general dangerousness of offender and no mitigating factors -- 15 years.

[38] *R. v. Wheeler* - aggravated sexual assault and choking - trial, history of convictions for attacking woman, attacking the victim in her home, brutalized, beaten, sexually assaulted, threaten, repeatedly choked, confined for six hours. No mitigating factors -- 15 years.

[39] *R. v. Kelly* - aggravated sexual assault and the aggravated factors were confined for two hours, gratuitous violence and threats, contemptuous disregard

for others, prior convictions for similar serious offenses, severe injuries to the victim including permanent reduction of vision - mitigating factor guilty plea – 14 years.

[40] *R. v. Challis* - aggravated sexual assault - trial, aggravating factors bound hands and gagged mouth, threats, armed with a knife, premeditated assault, characterized by terror, trauma, and indecency. No mitigating factors -- 14 years.

[41] *R. v. McNamara* - aggravated sexual assault - trial - aggravating factors - extensive criminal record, but none for sexual offenses, victim suffered moderate injuries. No mitigating factors -- 12 years.

[42] *R. v. DAP* - aggravated sexual assault - aggravating factors, by judge and jury, confined for seven hours, repeatedly beaten and assaulted, threats, armed with a knife, extensive injuries, unprovoked acts of cruelty and domination. Mitigating factor was that he was an aboriginal offender -- 8 years.

[43] *R. v. JJC* - aggravated sexual assault - trial - aggravating factors - vicious, relentless, methodical attacks, six hours, punched her repeatedly, hit her with a

baseball bat, armed with knives, burning with lit cigarette, cut her hair, forced anal, oral and vaginal sex, extensive criminal record. Mitigating factors - was that he was a youth - 7 years and 4 months.

[44] *R. v. JRB* - aggravated sexual assault - aggravating factors, premeditation, confinement with rope, degrading odyssey of physical, emotional and sexual abuse, choking, threats, forced ingestion of sleeping pills. Mitigating factors guilty plea, remorse, Crown recommended seven years "at the very low end of proper range of seven -- 10 years.

[45] *R. v. Parker* - aggravated sexual assault and sexual assault with a weapon -- trial -- aggravating factors life-threatening injuries, premeditation, victim five months pregnant, subdued by use of a weapon, tied down and gagged, threatened with a straight razor, extremely violent, brutal and degrading. No mitigating factors -- 7 years.

[46] As a result of this review, I am satisfied that the joint submissions made by experienced Crown counsel and by experienced defence counsel is reasonable in the circumstances because it falls within the acceptable range of sentencing, albeit

at the low end of the range. I will set the range between which would be between 10 and 14 years. Certainly, if a trial had been held and Mr. Waterfield had been found guilty, a 13 to 14 year sentence would have been appropriate.

[47] In this instance, I do not believe that the joint recommendation of 10 years is contrary to the public interest, or unreasonable, or brings the administration of justice into disrepute.

[48] Therefore, I sentence Mr. Waterfield to a period of 10 years imprisonment in a federal penitentiary on the count of aggravated assault, and two years on the count of theft over \$5000 to be served concurrent to the 10 year term and two years on the count of harassment to be served concurrent to the 10 year term.

[49] Mr. Waterfield has been in custody since August 3<sup>rd</sup>, 2010. He entered a plea of guilty to charges on October 24<sup>th</sup>, 2011.

[50] In accordance with the provisions of s.719(3) of the *Criminal Code*, the joint recommendation is that for the period from August 3<sup>rd</sup>, 2010 to October 24<sup>th</sup>, 2011 I should accord credit on a one to one basis namely one day for each day

spent in custody. From the date Mr. Waterfield pled guilty, the joint recommendation is that he be granted one and one half day for each day in custody, or in other words a 1.5 to 1 in accordance with s. 719(3)(1) for a total, in the aggregate of 36 months. Counsel have agreed that this would be a credit of three years or 36 months. I accept this joint recommendation.

[51] However, it is necessary for me to provide the reasons to support an increase to the ratio from 1:1 to 1.5:1.

[52] It is evident that in the case of *R. v. Carvery*, 2012 NSCA 107, the sentencing judge granted a higher credit on the basis of the loss of opportunity to earn remission time and the Crown appealed that decision. The decision was confirmed by the Nova Scotia Court of Appeal under the penmanship of Justice Beveridge.

[53] In this instance, when Mr. Waterfield entered a plea of guilty, but for the decision of the Crown to seek an Order declaring him a dangerous offender or a long term offender, Mr. Waterfield would have been eligible to be sentenced immediately.

[54] Considerable amount of time was taken in marshalling the necessary risk assessment and given the fact that there was a mixup on the availability of the Crown's expert witness to testify at the sentencing hearing, the sentencing hearing had to be adjourned until this week. There are additional factors, particulars of these delays may be found in the Court record. I will not necessarily list them all today. Furthermore, I am also taking my own counsel that doing such a long period of the time in a local facility prevents the accused from accessing assessment and treatment. In addition, I am also considering the fact that the longer Mr. Waterfield spent in custody he was losing the opportunity to earn remission time. Although this last aspect may be more speculative as I am unaware whether he will earn any remission time on his sentence.

[55] In addition, Crown counsel and Mr. Sarson, on behalf of Mr. Waterfield, have jointly recommended that I make a finding that Mr. Waterfield be determined to be a long-term offender and that the order provide that he be placed on such a supervisory order for a period of 10 years following the completion of his sentence.

[56] I have reviewed the relevant provisions of the *Criminal Code* dealing with long-term offenders and their application and it is evident that the threshold requirements have been met such as the proper filing of the Notice of Application, the filing of the consent of the Attorney General and the imposition of a sentence for longer than two years.

[57] S.753.1 of the *Criminal Code* provides as follows:

753.1(1) The court may, on application made under this Part following the filing of an assessment report under subsection 752.1(2), 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 offense 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 community.

753.1(2) The court shall be satisfied that there was a substantial risk that the offender will reoffend if

- (a) the offender has been convicted of an offense under section 151 (sexual interference), 152 (invitation to sexual touching) or 153 (sexual exploitation), subsection 163.1(2) (making child pornography), subsection 163.1(3) (distribution, etc., of child pornography), subsection 163.1(4) (possession of child pornography), subsection 163.1(4.1) (accessing child pornography), section 172.1 (luring a child), subsection 173(2) (exposure) or section 271 (sexual assault), 272 (sexual assault with a weapon) or 273 (aggravated sexual assault), or has engaged in serious conduct of a sexual nature in the commission of another offence of which the offender has been convicted; and

(b) the offender

(i) has shown the 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.

[58] As I have indicated the first requirement in order to invoke the provisions is that the sentence of the Court in this case, on Mr. Waterfield, be greater than two years. I have indeed done so, I have sentenced him to a period of 10 years and, therefore, that threshold has been met.

[59] Some have opined that it is necessary to make a finding that there the elements in s.753.1(2) must be satisfied in order to find that there is a substantial risk to reoffend, but our own Court of Appeal ruled otherwise in *R. v. McLean*. In that case, the judge had restricted her analysis to s.753.1(2) and found that the predicate offence was nonsexual, and declined to designate the offender as a long-term offender. On appeal, the position was summarized to the Court of Appeal by the Crown:

It is the Crown's submission that s. 753.1(2) is simply a deeming provision, meaning that the Court must find that the offender presents substantial risk to reoffend if the criteria in section 753.1(2) are met. However, even if the offender and the nature of the offense of need to court earlier of the deeming provision, the court may find him to be a long-term offender under section 753.1(1).

[60] The Court of Appeal sided with the Crown's position on this point. This is so despite the findings in case of *R v. LM* decided by the Supreme Court of Canada which held that "in assessing the substantial risk to them, the judge must determine that the elements under section 753.1 (2) are satisfied." This is largely qualified by the fact that Judge LeBel recognized that some long-term offenders are not sex offenders.

[61] The position adopted by the Court of Appeal is also supported by the test for dangerous offender designation. In the case of *R. v. Johnson*, and stated:

...that in virtually every instance which an offender is declared dangerous, it would have been appropriate to impose a sentence of imprisonment of two or more years in respect of the predicate offence that there will be substantial risk that the offender will reoffend.

[62] The last requirement is that there must be a reasonable possibility of eventual control of the risk in the community.

[63] Obviously, the burden remains on the Crown to show the various criteria of the provision in both the *Criminal Code* and in the order sought are met.

[64] In assessing this I have the evidence of Dr. Aileen Brunet, the Clinical Director and a psychiatrist at the East Coast Forensic Hospital in Dartmouth, Nova Scotia.

[65] Dr. Brunet was qualified to give expert psychiatric opinion evidence in the area of psychiatry, including, but not limited to, the practice of forensic psychiatry, the diagnosis, assessment, and treatment of mental disorders, the diagnosis and the classification of violent and sexual offenders, the assessment of risk for future violence or recidivism for violent and sexual offenders, the treatment for violent and/or sexual offenders.

[66] Dr. Brunet issued two reports that are exhibits of this Court relative to Mr. Waterfield. However, before addressing these, I wish to refer to some of her evidence.

[67] Dr. Brunet opined that Mr. Waterfield was a high risk of future recidivism but was in a medium range of sexual recidivism. It was more of a risk of violent offence than sexual offenses and meets the designation of a long-term offender with eventual control in the community. She noted that he had been, for the previous 12 years immediately preceding the commission of these offences offence free except there had been one incident in 2005 and she believes that with proper control and supervision he can manage his violent type of conduct.

[68] She reached the conclusion, following a series of interviews with Mr. Waterfield, covering several hours, and she also had discussions with his sister and a former partner. She considers his a baseline risk and determined, if there was a need, to adjust the level of risk.

[69] She considered his history and also relied on a series of testing tools. These were done prior to the interview and she was prepared to either adjust - decrease or increase the risk following the interview. She also did an extensive file review of the various clinical assessments conducted over the past number of years.

[70] There were several psychiatric assessments previously conducted

she noted, but none of these revealed any diagnosis of a mental health disorder. She confirmed that he had been previously diagnosed with an antisocial personality disorder and a substance abuse disorder. The latter is a large part of the cause of his violent criminality while his antisocial personality results in a pattern of disregard for rights of others, and this goes back to his childhood. It also exhibits itself in a general lack of remorse and deceitfulness.

[71] She believes that correctional services have programs to address some of the features of antisocial disorder.

[72] She opined that the offences before the Court is an outlier in the sense that he caused much more damage but she noted that Mr. Waterfield claims he did not remember what happened and remembers being at to the complainant's home. She found that to be difficult to reconcile however. He reported that he felt betrayed, lied to and deliberately used.

[73] She noted that there were some missing pieces. She also described that Mr. Waterfield's previous knowledge of violent events have a significant impact and his involvement in this instance was much more protracted than previous events.

[74] She said as well that the manifestations resulting in the violence visited upon the victim here was manifestations of violence, but not for sexual gratification, but she could be wrong on this point. She thought that his intention was to hurt rather than for the purpose of seeking sexual gratification.

[75] She agreed that she had some concerns as an assessor because she places a great deal of emphasis on what Mr. Waterfield told her was caused these events.

[76] In order to come to a proper conclusion, she had to understand the context and dynamics and the needs to understand what was going on in his life.

[77] She claimed that Mr. Waterfield felt bad as to what had happened and he described as a "terrible thing", she recognized that he pled guilty to avoid a trial. That's where she said that he expressed some remorse and regret about his conduct in the results. She did not put a great deal of weight on his expression of remorse because it does not enter in her assessment of the risk of recidivism.

[78] She confirmed that the nature of this offence is quite different although it indicates that he has a potential for violence of this nature, it is not an indicator of his future conduct. Her opinion would have been different if there had been previous violent conduct of a sexual nature against women.

[79] Dr. Brunet determined that Mr. Waterfield, had been previously diagnosed with an antisocial personality disorder and a substance use disorder. In her report, she gave the definition to these two disorders.

[80] In coming to her conclusion in dealing with opinion that she rendered to the Court, she relied on a number of instruments, namely five of them and she did the following tests: She utilized the following instruments and scored Mr. Waterfield's risk of violent recidivism and these are noted in her initial report:

1. Psychopathy checklist revised, second edition;
2. HCR - 20;
3. Violent risk appraisal guide (VRAG);
4. Sexual offense risk appraisal guide (SORAG); and
5. Static 2002R.

[81] According to Dr. Brunet, she determined that based on the PCL -R, Mr. Waterfield scored at or above the 70th percentile on the two factors composing the test; namely, factor one indicates the extent to which an individual demonstrates the interpersonal and affective traits associated with psychopathic tendencies, that being selfish, callous and remorseless use of others and factor two represents the extent to which an individual demonstrates the behavioural traits associated with psychopathy of a chronically unstable, antisocial and socially deviant lifestyle. She indicated that item scores as fully present on this instrument were cunning/manipulative, lack of remorse or guilt, callous/lack of empathy, poor behavioural controls, promiscuous sexual behaviour, early behavioural problems, many short-term marital relationships, revocation of conditional release and criminal versatility.

[82] On the Violent Risk Appraisal Guide (VRAG), Mr. Waterfield's score placed him in the sixth category. Similarly scoring individuals in the sample construction recidivated facilitated violently at a rate of 44% over a seven-year period of risk and 58% over a 10 year period. Dr. Brunet indicated that in addition to indicating a probability of violent recidivism, this instrument also related the rapidity of violent re-offense; therefore higher scores are more likely to reoffend

quickly and also the degree of violence. Even with treatment of Mr. Waterfield, it will not lead to a reduction of the VRAG Score.

[83] In the HCR-20, Mr. Waterfield scored a 14 out of 20, obtaining a fully present score of 4:1 ems (previous violence, substance use problems, personality disorder and prior supervision of failure) she noted partially present for five (young age at first violent incident, relationship instability, employment problems, psychopathy, early maladjustment) and absent from one (major mental illness). They had two clinical items fully present (negative attitudes and unresponsive to treatment), two partially present (lack of insight, impulsivity) and one absent (active symptoms of major mental illness). On the entirety of this test, Mr. Waterfield scored 7 out of 10. She noted however that from the perspective of the risk management items on the HCR-20, Mr. Waterfield's history indicates that he usually has personal support available to him and that his plans are generally feasible but there is some moderate likelihood that he would face stress and exposure to destabilizers and it also demonstrates some noncompliance with remedial attempts.

[84] On the SORAG instrument, Mr. Waterfield scored in the 88th percentile. This places him in the seventh category of risk. Similarly, scoring individuals in the construction sample recidivated violently at a rate of 585% over the seven-year period of risk and 80% over a 10 year period of risk.

[85] On the Static-2002R, Dr. Brunet amended her report to reflect that Mr. Waterfield's score from 3 on her previous score of 7 to 4 to place him in a moderate-high risk category whereas 4 is a low-moderate and she indicated that these terms are in reference to the other sex offenders scored with the instrument rather than a broad definition. The predicted recidivism rate for someone like Mr. Waterfield having a score of 4 is 3.6%. She noted that the sexual offense recidivism rate for sex offenders with the same score as Mr. Waterfield would be expected to be approximately 1.38 times higher than the recidivism rate of the typical sexual offender (defined as medium score of 3).

[86] In her initial report, Dr. Brunet noted that Mr. Waterfield's past history of violence results in his overall risk of violent recidivism in the long term being high. She noted that meant violent recidivism refers to a new charge or probation for any type of violence and given that the most common form of violence by far

is simple assault we cannot presume that the high risk rating equally necessary to a high risk of Mr. Waterfield engaging in violence to the extent of causing serious injury or even death. She noted however that Mr. Waterfield had a history of assaults with police that were not documented as causing harm and three criminal assaults over 20 years and did not cause any physical injury. She added that Mr. Waterfield's overall risk of sexual recidivism is significantly less than his risk of future violence recidivism and in her opinion falls in the moderate range.

[87] To her, the suggestion that the criminal lifestyle factors that underpin the risk of recidivism for Mr. Waterfield are much more likely to drive his behaviour in the direction of interpersonal violence rather than a future sexual offense.

[88] She underlined that her report was to address Mr. Waterfield's history of violent offending and whether there was a substantial risk that he will reoffend and whether there is a reasonable chance of eventual control of any risk in the community setting.

[89] She closed her report by stating that with reference to Mr. Waterfield's risk of reoffending, the risk assessment conducted indicates that Mr. Waterfield does

pose a substantial risk of offending violently in the future. This is underpinned by his personality style, a tendency to be overly reactive in the direction of anger, attitudes that endorse violence as a dispute resolution strategy and a callous disregard for authority and the rights of others. However, it is also very clear that Mr. Waterfield's violence, at least his known criminal violence, is very much related to substance abuse and acute intoxication. Being in a state of intoxication makes him vulnerable to reacting in an aggressive and excessive manner because of the well-known disinhibiting effects of substance such as alcohol, drugs benzodiazepines and cocaine. In the absence of substance abuse by Mr. Waterfield, he has demonstrated the capacity to conduct himself in a relatively pro-social and nonviolent manner.

[90] In her supplementary report, she confirmed her earlier findings and added that in her opinion there was a reasonable possibility of eventual control of Mr. Waterfield's risk in the community even though there is a substantial risk of his violent reoffending. Her opinion is based in part because she considers assault that are a higher risk rating equally, that they vary from common assault to assault causing serious injury, even death, while the offences before the Court are an

anomalous and an exceptional event in Mr. Waterfield's criminal career and violent history.

[91] This, by far, is the most violent incident he had been involved in that caused the most victim harm physically and presumably psychologically. She added that fundamentally it was a violent offence rather than a sexual offence and that the motivation behind the offence was presumably the desire to cause harm rather than a desire to obtain sexual gratification. She indicated that she was uncertain about his motivation because to a great extent this remains within the knowledge of Mr. Waterfield. She added that this was a concern to her from an intervention and risk management perspective but does not significantly change her opinion regarding the possibility of eventual control in the community.

[92] She also noted that the absence of a history of repeated, severe, escalating violence, the clear link between almost all of his past violence and the antipathy towards the police and intoxication and to sustain periods totaling 11 years without violence supports, in her opinion, that Mr. Waterfield's risk of future violence can be eventually managed in the community. As Mr. Waterfield ages

his risk of violence will decrease to a certain extent as well his impulsivity which has already shown signs of abatement over time.

[93] She added that Mr. Waterfield's overall risk of sexual recidivism is significantly less than his risk of future violent recidivism because in her opinion the sexual recidivism falls in the moderate range.

[94] In general, the two broad domains more strongly associated with sexual recidivism are sexual deviancy and lifestyle instability or criminality. The criminal lifestyle characteristic (e.g., history of the rule violation, substance abuse) are also those more strongly related to violent and general (any) recidivism among sexual offenders, and general offenders and offenders with mental disorder.

[95] She noted as well that the risk factors that contribute to Mr. Waterfield's sexual recidivism risk are very much the same as those that contribute to his violent risk: these are risk factors that capture anti-sociality, poor behavioural controls and criminality. Risk factors that capture sexual deviance are absent in Mr. Waterfield's case.

[96] To her, the suggestion that criminal lifestyle factors that risk of violence will decrease to a certain extent as his impulsivity which have already shown signs of abatement over time.

[97] She claimed that the factors that most need to be addressed in managing the risk of future violence are those that have been addressed in the past in which as shown that can generally manage and maintain Mr. Waterfield. And he has to be controlling his misuse of substances, managing his temper, and having pro-social relationships in a reasonably structured, productive routine. However, the relevance of the nature of the index offence; ie: this offence that I am dealing with today as to Mr. Waterfield's future risk of violence and its likelihood of being controlled in the community is unclear given the relatively atypical nature of this offence for him. She added that one might wish to speculate that this offence is indicative of an acute elevation in his risk of violence that would be sustained or a change in the nature of the type of violence he might perpetrate in the future; this is likely unsupportable in the context of his lengthy history. She added that his baseline or floor level risk of violence is not elevated by this offence. However, this offence does highlight some potential dynamic risk factors that are to be further explored with him, addressed through therapeutic interventions and

monitored in the future. This offence seems to have been triggered by Mr. Waterfield feeling betrayed, rejected and misused by the victim and may have been motivated by raising the desire for vengeance.

[98] In his history, Mr. Waterfield has engaged in behaviour, also apparently motivated by a desire for revenge, when he made a threatening telephone call to a former girlfriend who he felt had betrayed him, although not romantically. She also pointed out that the sustained nature of the assaults on the victim in this offence, his lack of desistance and his clear intentions to terrorize her are concerning and potentially ominous. Additionally, this offence occurred in the context during which Mr. Waterfield was otherwise functioning quite well and can be regarded as unpredictable, giving rise to concerns about how to both target treatment interventions and how to monitor this risk in the future.

[99] Dr. Brunet recommended that Mr. Waterfield ought to engage in individual therapy directed at exploring the antecedents to and precipitants of the offence. Additionally, a review of anger management skills and strategies for remaining substance free would be worthwhile as well as other programming targeted specifically for violent offenders. Upon his release, there should be a structured,

productive lifestyle for him as this would be important to him. It may be however a problem for Mr. Waterfield to obtain employment depending on when he is released. In any event, the community supervision is to be directed towards, among other things, surveillance for substance use and close monitoring of his romantic relationships.

[100] Given what Dr. Brunet has reported and opined, the issue is whether the Court accepts the joint recommendation of counsel to declare Mr. Waterfield to be a long-term offender and an order for a 10-year period.

[101] The Supreme Court of Canada, in the decision of *R. v. Johnson*, ruled that in exercising judicial discretion, the dominant objective is protection of the public and therefore any of these orders must be geared to that end. Therefore, at para. 29, the court stated that the primary or dominant purpose of preventive detention is:

...to protect the public when the past conduct of the criminal demonstrates a propensity for crimes of violence against the person, and there is a real and present danger to life or limb.

and that:

...the essential question to be determined, then is whether the sentencing sanctions available pursuant to the long-term offender provisions are sufficient to reduce

this threat to acceptable level, despite the fact that the statutory criteria section 753(1) have been met.

[102] In this instance, I am relying on the expert and professional advice of Dr. Brunet and I am satisfied that the conditions set out in s.753.1(1) have been met. I believe that Mr. Waterfield presents a substantial risk that he will reoffend but there is a reasonable possibility of eventual control of that risk in the community.

[103] Accordingly, I accept the recommendation of counsel that Mr. Waterfield be declared a long-term offender and I am placing him on 10-year supervision following the completion of his sentence.

[104] In addition, I am granting a lifetime ban under s.109 of the *Criminal Code* and a lifetime Order under the SOIRA legislation.

[105] I am also granting a DNA Order which will be held in abeyance until it is determined whether it is necessary or whether there is already one available to the authorities.

[106] Finally, at the request of counsel for Mr. Waterfield, I am waiving the Victim Surcharge Fee.

LeBlanc, J.