

SUPREME COURT OF NOVA SCOTIA

Citation: *R. v. Lilly*, 2022 NSSC 345

Date: 20221212

Docket: CRH 498473

Registry: Halifax

Between:

His Majesty the King

v.

Jacob Matthew Lilly

DANGEROUS OFFENDER (STAGE 1) DECISION

Judge: The Honourable Justice Jamie Campbell

Heard: November 23, 2022, in Halifax, Nova Scotia

Counsel: Rick Woodburn and Scott Morrison, for the Crown
Ian Hutchison, for the Defence

By the Court (Orally):

[1] Jacob Lilly has just turned 25 years old. He was incarcerated when he was 16 and has spent a considerable amount of time since then in jail, as a youth and as a young adult. He has been in jail since August 2019.

[2] Mr. Lilly was found guilty of aggravated assault as a result of his participation in an incident that happened while he was an inmate at the Central Nova Scotia Correctional Facility on December 2, 2019.

[3] The Crown has given notice of the intention to seek to have him declared a dangerous offender or a long-term offender. The first part of that process is to make an application for an assessment under s. 752.1(1) of the *Criminal Code*. That assessment, if granted, is used in the second stage of the process in determining whether the person should be designated as a dangerous or long-term offender. Section 752.1(1) provides that an assessment order shall be made when an offender has been convicted of a serious personal injury offence and the court is of the opinion that there are reasonable grounds to believe that the offender might be found to be a dangerous offender or long-term offender.

[4] The conviction for aggravated assault qualifies as a conviction for a serious injury offence. The issue is then whether there are reasonable grounds to believe that Mr. Lilly might be found to be a dangerous offender or a long-term offender. If so, he would be remanded for a period not exceeding 60 days for the purpose of having an assessment completed.

Reasonable Grounds

[5] This is potentially a first step. If the process were to go on to the second stage it would involve a substantial amount of evidence and an assessment report prepared by a psychologist. Evidence would be led about incidents in which Mr. Lilly is alleged to have been involved. This step does not involve the same requirements for evidence as the second step. This is a first stage application to determine if there are reasonable grounds.

[6] It is by no means intended to be a perfunctory step. Mr. Lilly's rights are involved. While he has no obligation to participate in an assessment that might be ordered, the granting of an order for assessment places him closer to the potential of being designated a dangerous or long-term offender. Each step in that process is serious.

Dangerous Offender or Long-term Offender

[7] At this stage the determination is whether there are reasonable grounds as to whether Mr. Lilly might be found to be either a dangerous offender or a long-term offender. Section 753(1) of the *Criminal Code* provides that a court shall find a person who has been convicted of a serious personal injury offence to be a dangerous offender if the person constitutes a threat to the life, safety, or physical or mental well-being of other persons on the basis of establishing one of three things. One of those involves offences of a brutal nature. That has not been argued here.

[8] There are two other ways in which that threat to life, safety, or mental or physical well-being of others can be established. One is by showing a pattern of repetitive behaviour of which the predicate offence forms a part. The pattern must show a failure by the offender to restrain their behaviour in the past and a likelihood of death, injury, or severe psychological trauma to others through their failure to restrain their behaviour in the future. There are both prospective and retrospective elements.

[9] The other way is to show a pattern of aggressive behaviour of which the predicate offence is a part. The pattern must show a substantial degree of indifference on the part of the offender about the reasonably foreseeable consequences of their behaviour.

[10] There is no requirement that the offences in either case be the equivalent of “similar fact” cases. A variety of crimes can still constitute a pattern. There need only be either similarities in the kind of offences or similarities in terms of result, in terms of the degree of violence or aggression. A pattern of behaviour in the past is not enough. There must be evidence that the behaviour will continue. There must be evidence of harmful recidivism and intractability of the violent pattern of conduct.

[11] The focus is not entirely retrospective.

[12] Section 752.1(1) of the *Criminal Code* says that the court must grant an assessment when there are reasonable grounds to believe that the person might be found to be a dangerous offender or a long-term offender under Section 753.1. The long-term offender designation may be imposed when it would be appropriate to impose a sentence of two years or more for the offence for which the person has been convicted, when there is a substantial risk that the person will reoffend and

there is a reasonable possibility of eventual control of the risk in the community. It is a less onerous penalty but still an exception finding. But, to grant an assessment order it is not necessary that the judge be satisfied that there are reasonable grounds to believe that the person might be designated as a dangerous offender. It is enough that there be reasonable grounds to believe that the person might be designated as a long-term offender.

Evidence on the Application

[13] Mr. Lilly was in jail on remand as of August 2019. He was found not guilty with respect to the underlying offence. But while on remand he committed other offences.

[14] Mr. Lilly was found guilty of intimidation of a witness. On March 31, 2021, before the trial dealing with the assault on Stephen Anderson he yelled at one of the correctional officers, words to the effect that he should “stop snitching”. The words were uttered in an attempt to prevent the officer from testifying. He was sentenced to 25 months for that offence.

[15] On July 10, 2020, Mr. Lilly was involved in an incident in which a correctional officer was assaulted. The officers had responded to North 3 Range at the Central Nova Scotia Correctional Facility. Mr. Lilly refused to lock up and shoved the officer with two hands. He was sentenced to 75 days.

[16] Mr. Lilly was convicted for the assault on Stephen Anderson which happened on December 2, 2019. He was not an incidental participant. Mr. Lilly was involved in the planning for the assault, bringing people together to plan the assault and in preventing the correctional officers from intervening to stop the assault.

[17] In December 2018, when he was incarcerated at the Atlantic Institution in Renous, New Brunswick, Mr. Lilly was one of a group of inmates who attacked another inmate. That person was stabbed several times and was punched and kicked. Mr. Lilly could be seen on video kicking the victim in the neck and head several times while he was down. The victim was transported to hospital for treatment. Mr. Lilly pleaded guilty to assault causing bodily harm and was sentenced to 2 years. That sentence is under appeal.

[18] On June 3, 2016, Mr. Lilly entered a home and demanded drugs and money. He and another person assaulted the victim in the home for more than an hour. The

victim was hospitalized. Mr. Lilly was sentenced to 30 months for assault causing bodily harm and robbery.

[19] In July 2016 he was caught driving while impaired by alcohol. That resulted in a vehicle accident in which there was significant damage to the car driven by Mr. Lilly and another car. He was sentenced to 30 days and was prohibited from driving.

[20] On July 23, 2015, Mr. Lilly was apprehended and charged with possession of 11 grams of marijuana. He got a \$200 fine for that.

[21] Before that Mr. Lilly was a young person and his convictions are all from Youth Justice Court. While they are still part of his record, they must be considered through the lens of the foundational principles of the Youth Criminal Justice System. The moral blameworthiness of a young person must be considered in light of their lack of maturity and reduced executive functioning. Once a person “ages out” of that system they should not be retrospectively held to an adult standard. The Youth Court record is relevant but must be considered for what it is.

[22] On June 26, 2014, Mr. Lilly was involved in an incident in which a group of people set out to rob a drug dealer. Mr. Lilly conceived the plan, and the group met the dealer under the pretense of buying drugs from him. When he arrived Mr. Lilly pointed a revolver at him and forced him to enter the car. The dealer had nothing to give the group, so they took him to Mr. Lilly’s mother’s house where they tortured him. He was whipped with phone cords and forced to play Russian roulette with a revolver placed in his mouth. He was convicted of aggravated assault, unlawful confinement, robbery, possession of a firearm, and possession of a weapon.

[23] On January 10, 2014, Mr. Lilly was found in possession of bear spray. He was sentenced to 9 months probation.

[24] On February 13, 2013, Mr. Lilly pointed a pellet gun at another person when he was leaning out the window of a home. He was sentenced to community service for assault with a weapon and possession of a weapon for a dangerous purpose.

[25] In addition to those criminal charges, Mr. Lilly has been placed on 45 disciplinary levels since he was incarcerated in August 2019. Those range from possession of contraband, intimidation, assaulting staff, assaulting other inmates, and fighting, to detrimental behaviour and unauthorized movement. While there has been no third-party adjudication of those matters, the disciplinary reports

provide some details that are based on observation from video surveillance. Mr. Lilly has been involved with assaults of inmates that have required that they be sent to hospital for treatment. These assaults and their nature suggest that the assault on Stephen Anderson was not a one off. Once again however, while the disciplinary record is relevant, it is not the same as a criminal record. The same process is not followed.

[26] Mr. Lilly's counsel, Mr. Hutchison says that any pattern of violent behaviour that there was, has come to an end. He says that Jacob Lilly has turned the page. He has stopped committing violent offences and he has complied with Correctional Services rules. His record does show a change in behaviour.

[27] A letter was received from Laura Langille, MSW, RSW, a social worker at the Central Nova Scotia Correctional Centre. She has known Mr. Lilly for about three years, has worked with him and provided ongoing support to him. Mr. Lilly and Ms. Langille have been meeting regularly for counselling sessions. She says that Mr. Lilly has shown significant insight into how his upbringing and social circumstances have contributed to his experience of incarceration. He has shown an ability to be critically reflective when working individually as well as participating in a group setting.

[28] Earlier this year Mr. Lilly participated in the Dialectic Behavior Therapy for Anger program that aims to provide participants with prosocial coping skills. Those include emotional regulation, distress tolerance, mindfulness, and interpersonal effectiveness. Ms. Langille says that Mr. Lilly was a "pivotal" member of the group with his honesty and empathy. He was engaged, respectful and collaborative. "Mr. Lilly has demonstrated the ability to garner insight and critically reflect on his upbringing and how his formative years have shaped his worldview and the impact this has had on the trajectory of his life."

[29] Mr. Lilly and Ms. Langille are now working on *Building Resilience-A Workbook for Men*. Mr. Lilly has told her that he wants to continue with more intensive programming. Ms. Langille says that Mr. Lilly has enhanced his ability to cope with difficult emotions and situations as well as develop more pro-social coping strategies.

[30] Ms. Langille's letter is a ray of hope. It may be that Jake Lilly has matured to the point where he can make choices that will change the trajectory of his life.

Reasonable Grounds in Mr. Lilly's case

[31] The purpose of this application is to determine whether an assessment should be ordered on the basis that there are reasonable grounds to believe that Mr. Lilly might be found to be either a dangerous offender or a long-term offender. It is not to prejudge any further stages of the process.

[32] Mr. Lilly is a young man. He is only 25 years old. For legal purposes he has been an adult for 6 years. During that time, he has been involved in serious violent offences and spent a significant amount of time in jail. He has been incarcerated since August 2019. While he has been in jail, he has racked up a substantial list of internal disciplinary offences which are not administrative in nature. There is some reason to believe that control of Mr. Lilly's behaviour in a custodial environment is a challenge.

[33] It might be said that if a person's behaviour cannot be controlled in a custodial setting, there is even less chance that it can be controlled outside that setting. It is also true however that life in a custodial environment places stresses on a person that would not be present on the outside. A prison is an artificial environment in which people are housed together in close quarters. Many of them have issues with self control and they are separated from families and other resources that might provide a modicum of stability. Mr. Lilly's criminal record must be considered in light of his age and his living circumstances.

[34] The length of a person's criminal record is not determinative of the issues on an application of this kind. What is significant is the nature of the record. There appears to be a pattern in Mr. Lilly's violent behaviour. He has been involved in incidents in which a group of people gang up on another for the purpose of committing an assault. That has happened within prison and on the outside.

[35] A reasonable belief is one that is based on facts and evidence. The facts contained in Mr. Lilly's criminal record along with the evidence of his violent behaviour while incarcerated, permit the belief, based on reasonable grounds, that he might be found to be a dangerous offender or a long-term offender. It is not a reasonable belief that he will be found to be either a dangerous offender or long-term offender but only that he might be.

[36] Ms. Langille's letter indicates that there has been a change in Mr. Lilly. It has not been sustained for so long that it can be said that there are not reasonable grounds to believe that he might be designated as a long-term or dangerous offender.

[37] The assessment will be ordered.

Campbell, J.