R. v. Nilaulak, 2000 NWTSC 23

Date: 2000 03 24
Docket: CR 03708

IN THE SUPREME COURT OF THE NORTHWEST TERRITORIES

IN THE MATTER OF ALEX NILAULAK, convicted at Rankin Inlet, in Nunavut Territory (in respect to a matter being tried in this court) on the 5th day of August, 1999 by Justice J.E. Richard, sitting with a jury, upon an Indictment alleging that he did, on or about the seventeenth day of October, 1998, at or near the Hamlet of Rankin Inlet in the Northwest Territories did commit the indictable offence of sexual assault, contrary to Section 271 of the Criminal Code;

AND IN THE MATTER OF an Application on behalf of the Attorney General of Canada, pursuant to section 753 of the Criminal Code of Canada to have ALEX NILAULAK declared a dangerous offender;

BETWEEN:

HER MAJESTY THE QUEEN

- and -

ALEX NILAULAK

Ruling on the constitutional validity of Part XXIV C.C., (Dangerous Offenders and Long-Term Offenders) specifically s.752 and s.753 C.C.

Application heard: March 2, 2000

Reasons filed: March 24, 2000

REASONS FOR JUDGMENT OF THE HONOURABLE JUSTICE J.E. RICHARD

Counsel for the Applicant: Thomas H. Boyd
Counsel and Agent of the Attorney General of Canada: Alan Regel

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REASONS FOR JUDGMENT

[1] The offender Alex Nilaulak has been convicted by a jury of the crime of sexual assault contrary to s.271 C.C. Following the offender's conviction, the Crown prosecutor invoked the provisions of Part XXIV of the Criminal Code (Dangerous Offenders and Long-Term Offenders). Specifically, the Crown prosecutor intends to ask the Court to find Alex Nilaulak to be a dangerous offender and sentence him to detention in a penitentiary for an indeterminate period.

[2] On the present application the offender seeks to challenge the constitutional validity of the provisions of Part XXIV, in particular s.752 and s.753. He says these provisions infringe his constitutional rights under s.7, s.11(d) and s.12 of the Charter and are therefore invalid.

[3] The jury convicted Mr. Nilaulak of the crime of sexual assault. The circumstances of that crime were, in summary, that Mr. Nilaulak entered a private dwelling house in the middle of the night, uninvited. The 24-year-old female complainant was sleeping in her bed. Her infant child was sleeping in the bed with her, and her own mother was sleeping in another bed in the same room. The complainant says she felt someone touching her in the vaginal area underneath her pants and panties, and she awakened to see the offender there in the bedroom. The offender subsequently left the bedroom and fled from the house.

[4] The offender has an extensive criminal record, including convictions for similar criminal behaviour. His record also includes more serious offences, in particular two convictions for rape or forcible sexual intercourse.

[5] It is central to the offender's complaint on the present application that his most recent offence of sexual assault (the predicate offence) is "less serious" than some of his earlier offences. He asserts that there is an unfairness in such a "less serious" matter triggering the dangerous offender sentencing provisions.

[6] Parliament has indeed provided that a conviction for sexual assault will open the gate to a Part XXIV dangerous offender hearing.

[7] The relevant provisions of Part XXIV, for purposes of the present application, are as follows:

> s.752 In this Part,
>
> . . .
>
> "serious personal injury offence" means
>
> (a) an indictable offence, other than high treason, treason, first degree murder or second degree murder, involving
>
> (i) the use or attempted use of violence against another person, or
>
> (ii) conduct endangering or likely to endanger the life or safety of another person or inflicting or likely to inflict severe psychological damage upon another person,
>
> and for which the offender may be sentenced to imprisonment for ten years or more, or

(b) an offence or attempt to commit an offence mentioned in section 271 (sexual assault), 272 (sexual assault with a weapon, threats to a third party or causing bodily harm) or 273 (aggravated sexual assault).

752.1(1) Where the offender is convicted of a serious personal injury offence or an offence referred to in paragraph 753.1(2)(a) and, before sentence is imposed on the offender, on application by the prosecution, the court is of the opinion that there are reasonable grounds to believe that the offender might be found to be a dangerous offender under section 753 or a long-term offender under section 753.1, the court may, by order in writing, remand the offender, for a period not exceeding sixty days, to the custody of the person that the court directs and who can perform an assessment, or can have an assessment performed by experts. The assessment is to be used as evidence in an application under section 753 or 753.1.

. . .

753.(1) The court may, on application made under this Part following the filing of an assessment report under subsection 752.1(2), find the offender to be a dangerous offender if it is satisfied

(a) that the offence for which the offender has been convicted is a serious personal injury offence described in paragraph (a) of the definition of that expression in section 752 and the offender constitutes a threat to the life, safety or physical or mental well-being of other persons on the basis of evidence establishing

(i) a pattern of repetitive behaviour by the offender, of which the offence for which he or she has been convicted forms a part, showing a failure to restrain his or her behaviour and a likelihood of causing death or injury to other persons, or inflicting severe psychological damage on other persons, through failure in the future to restrain his or her behaviour,

(ii) a pattern of persistent aggressive behaviour by the offender, of which the offence for which he or she has been convicted forms a part, showing a substantial degree of indifference on the part of the offender respecting the reasonably foreseeable consequences to other persons of his or her behaviour, or

(iii) any behaviour by the offender, associated with the offence for which he or she has been convicted, that is of such a brutal nature as to compel the

> conclusion that the offender's behaviour in the future is unlikely to be inhibited by normal standards of behavioural restraint; or
>
> (b) that the offence for which the offender has been convicted is a serious personal injury offence described in paragraph (b) of the definition of that expression in section 752 and the offender, by his or her conduct in any sexual matter including that involved in the commission of the offence for which he or she has been convicted, has shown a failure to control his or her sexual impulses and a likelihood of causing injury, pain or other evil to other persons through failure in the future to control his or her sexual impulses.
>
> . . .
>
> (4) If the court finds an offender to be a dangerous offender, it shall impose a sentence of detention in a penitentiary for an indeterminate period.
>
> . . .
>
> (5) If the court does not find an offender to be a dangerous offender,
>
> (a) the court may treat the application as an application to find the offender to be a long-term offender, section 753.1 applies to the application and the court may either find that the offender is a long-term offender or hold another hearing for that purpose; or
>
> (b) the court may impose sentence for the offence for which the offender has been convicted.

[8] The foregoing provisions and the rest of Part XXIV constitute the latest legislative scheme adopted by Parliament for the designation of certain offenders as "dangerous offenders" and for sentencing such persons to a penitentiary for an indefinite period. Different legislative versions have existed in Canada since 1947. Historically, the purpose of this legislation has been, and is, to protect the public. In its present form, the legislation is specifically targeted at a very small group of highly dangerous criminals whom Parliament intends be designated as dangerous offenders, as stated recently in *R. v. Neve*, 1999.ca.ab.206.

[9] The 1983 version of the dangerous offender legislative regime (which for present purposes was substantially the same as the present version) withstood a constitutional challenge before the Supreme Court of Canada in *R. v. Lyons* (1987), 37 C.C.C. (3d) 1. In that decision it was held, *inter alia*, that:

(1) the imposition of indeterminate, preventive detention as authorized by the subject legislation does not result in a deprivation of liberty that is not in accordance with the principles of fundamental justice as guaranteed by s.7 of the Charter of Rights,

(2) the imposition of indeterminate, preventive detention authorized by the legislation meets high standards of rationality and proportionality and does not constitute cruel and unusual punishment under s.12 of the Charter, and

(3) assuming the procedural requirements of the legislation are complied with, it cannot be said that the legislation violates s.9 of the Charter by authorizing arbitrary detention or imprisonment.

[10] As I am bound by the *Lyons* decision, the within challenge by Mr. Nilaulak must necessarily fail, in my view.

[11] In his written brief, Mr. Nilaulak makes three arguments:

i) that by automatically including sexual assault in the definition of "serious personal injury offence" in s.752, Parliament has interfered with the independence of the Court (i.e., precluded the Court from judicially determining whether a particular sexual assault offence is a serious personal injury offence) and thereby deprived the offender of a fair hearing before an independent tribunal as guaranteed by s.11(d) of the Charter.

ii) that Parliament further compromised the independence of the Court by requiring the Court to conduct a "pattern analysis" following conviction for s.753(1)(a) predicate offences (i.e., violent, non-sexual offences), yet the Court is not required to conduct, or precluded from conducting, a similar analysis following conviction for s.753(1)(b) predicate offences (sexual assaults).

iii) that to place this offender Mr. Nilaulak at risk of indeterminate incarceration for a relatively "less serious" sexual assault is an outrage to decency and is so excessive and grossly disproportionate as to constitute a violation of his s.12 Charter right not to be subjected to cruel and unusual treatment or punishment.

[12] The first and second grounds curiously rely on the Court's independence as foundation for the argument. It is clear that the offender has a constitutional right to a fair hearing of the Part XXIV dangerous offender application by an independent and impartial Court. How can it be said that that right is infringed by Parliament exercising its legislative power to enact penal laws of general application, in particular, for the designation of certain criminals as dangerous offenders and of the provision for indefinite incarceration for such persons? The applicant cites no authority for the novel proposition that Parliament, in enacting substantive criminal law, can unlawfully impinge on the independence and impartiality of a tribunal.

[13] As the applicant's core complaint is the "automatic" characterization of sexual assault as a "serious personal injury offence" without any judicial examination of the particular circumstances of the predicate sexual assault, these grounds of argument are more correctly founded in the alleged arbitrary nature of that characterization. The applicant is clearly asserting that it is unfair that a sexual assault, be it ever so minor or trivial, can trigger a dangerous offender application whereas the other category of predicate offence requires a judicial examination of its particular circumstances. (Here, the applicant points to the *Neve* decision, where the Alberta Court of Appeal confirmed that, with respect to s.753(1)(a) predicate offences, the Court must make a determination in each case that the violence or endangerment to life was objectively serious, before the offence qualifies as a "serious personal injury offence".)

[14] The short response to these grounds of argument is that Parliament and the Courts consider sexual assault to be inherently serious. See the maximum penalties provided for convictions under s.271, s.272 and s.273, and see *R v. McGraw* (1991), 66 C.C.C. (3d) 517, (S.C.C.); and *R. v. Currie* (1997), 115 C.C.C.(3d) 205 (S.C.C.).

[15] It must also be remembered that a sexual assault conviction merely opens the door to a dangerous offender proceeding, at the prosecutor's discretion. There are many subsequent procedural and substantive hurdles over which the Crown prosecutor must pass before the offender is exposed to the sanction of indefinite incarceration.

[16] The argument that a mere sexual assault conviction exposes an offender to arbitrary imprisonment under s.9 of the Charter was answered in *Lyons, supra*. The Supreme Court of Canada cited with approval the earlier remarks of Ewaschuk J. in *Re Moore and The Queen* (1984), 10 C.C.C.(3d) 306 that "the legislative criteria for finding a person a dangerous offender are perhaps the most detailed and demanding in the Criminal Code". The Court went on to state that the criteria in Part XXIV "are anything but arbitrary in relation to the objectives sought to be attained; they are clearly designed to segregate a small group of highly dangerous criminals posing threats to the physical or mental well-being of their victims."

[17] I agree that the specificity of the statutory requirements of Part XXIV ensures their application on a rational basis.

[18] The second argument in the applicant's brief, summarized above, emanates from the *Neve* decision; however, with respect, arises from a misreading of that decision. The Alberta Court of Appeal in *Neve* provided a comprehensive analysis of the statutory framework for dangerous offender proceedings. For purposes of addressing the applicant's second argument (i.e. that no "pattern analysis" is required of the Court when the predicate offence is sexual assault), I shall only refer, however, to two of the statements in *Neve*. It should be remembered that in *Neve* the predicate offence was robbery, and thus the application proceeded under paragraph (a) of the s.752 definition of "serious personal injury offence", and under s.753(1)(a) of the application process. *Inter alia*, the Court stated:

(1) As a threshold requirement when the predicate offence is under s.752(a), the Court must determine whether the violence or endangerment to life was objectively serious. There is no such threshold requirement when the predicate offence is a sexual assault under s.752(b).

(2) There is a second threshold when the Court moves from the definition section (s.752) to the application section (s.753). In *Neve*, the Alberta Court of Appeal used the terms pattern analysis and threat analysis -- pattern analysis referring to past behaviour, threat analysis referring to likelihood of future behaviour.

[19] The Court in *Neve* was addressing a case under s.753(1)(a) but the Court did <u>not</u> say that the pattern analysis applied <u>only</u> to paragraph (a) of s.753(1). A careful reading of paragraph (b) clearly indicates that a similar pattern analysis and threat analysis are required for applications initiated by sexual assault predicate offences as well.

[20] Thus there is no merit in the submission that *Neve* holds that no pattern analysis is required when the predicate offence is a sexual assault under s.752(b), as suggested in the applicant's brief.

[21] Finally, I turn to the applicant's third argument, that indefinite incarceration is grossly disproportionate to the 'less serious' sexual assault he committed and thus violates his constitutional right not to be subjected to cruel and unusual punishment.

[22] Success on this ground is precluded by the decisions of the Supreme Court of Canada in *Lyons* and *Currie*. This Court is bound by those decisions.

[23] As stated in *Lyons*, before an offender such as Alex Nilaulak can be found to be a dangerous offender it must be established to the satisfaction of the Court that the offence for which the accused has been convicted is not an isolated occurrence, but part of a pattern of behaviour which has involved a failure to control his sexual impulses. As well, it must be established beyond reasonable doubt that the pattern of behaviour is very likely to continue and to result in injury, pain or other evil to other persons through failure in the future to control his sexual impulses. Further, La Forest J. speaking for the majority in *Lyons* was of the view that the parole process itself (the periodic review by the National Parole Board mandated by Part XXIV) was sufficient to save this legislation from being successfully challenged under s.12 of the Charter.

[24] In *Currie*, the offender's predicate offence, like that of Mr. Nilaulak's, was "less serious" than some of his earlier sexual offences. In *Currie*, it was noted that, given the nature and structure of s.753(1)(b), the Court need not focus on the level of seriousness of the predicate offence. Indeed, it is open to the trial judge to ignore the nature of the predicate offence (though that would be unlikely). The Court stated:

> Parliament has thus created a standard of preventive detention that measures an accused's present condition according to past behaviour and patterns of conduct. Under this statutory arrangement, dangerous offenders who have committed "serious personal injury offences" can be properly sentenced without having to wait for them to strike out in a particularly egregious way. For example, suppose a known sexual deviate has been convicted of repeated offences for stalking and sexually assaulting young girls in playgrounds. He operates by offering them candy, touching their private parts, and if the children seem to comply or submit to his criminal advances, by taking them away where he violently sexually assaults them. Now suppose that individual is at large in society and caught by a parent at a playground after having offered a child candy and improperly touching her. In this example, like the present case, the predicate offence is objectively

> less serious than a violent and invasive rape, but the trial judge need not justify the dangerous offender designation and an indeterminate sentence as a just desert for the isolated act of sexual touching. On the theory of s.753(b), the offender has committed an inherently "serious personal injury offence". On a dangerous offender application, a trial judge is then entitled to consider his "conduct in any sexual matter" to determine if he presents a future danger to society. Otherwise, we would be saying that an offender's present condition is defined by the precise degree of seriousness of the predicate offences. That is equivalent to assuming that a dangerous individual will always act out, or be caught for that matter, at the upper limits of his dangerous capabilities.

[25] For the foregoing reasons, I find there is no merit in the applicant's submissions. The application is denied.

J.E. Richard,
J.S.C.

Dated at Yellowknife, NT, this
24th day of March 2000

Counsel for the Applicant: Thomas H. Boyd
Counsel and Agent of the Attorney General of Canada: Alan Regel

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