

1991 CarswellOnt 1748
Ontario Court of Justice (General Division)

R. v. Clancy

1991 CarswellOnt 1748, 14 W.C.B. (2d) 55

Her Majesty The Queen and Brian George Clancy

O'Connell J.

Judgment: June 11, 1991
Docket: Toronto P2217/90

Proceedings: Affirmed [1992] O.J. No. 158 (Ont. C.A.)

Counsel: *M. Leshner*, for Crown.
D. Midanik, for Accused.

Subject: Criminal

Related Abridgment Classifications

For all relevant Canadian Abridgment Classifications refer to highest level of case via History.

Headnote

Criminal law --- Dangerous offenders — Grounds for preventative detention — Failure to control sexual impulses

The Court:

- 1 Mr. Clancy, on the 23rd of November last, you were found guilty by a court composed of a judge and jury that you did, on the 30th of April, 1990, at the Municipality of Metropolitan Toronto, commit a sexual assault on M. A., contrary to section 271 of the *Criminal Code*.
- 2 You were remanded on that date to January the 14th for the Crown to make application under section 753 of the *Criminal Code* or to proceed with sentence and you were remanded to that date and thereafter until May of this year when the application was brought by the Crown pursuant to the provisions of section 754 of the *Code*, with the consent of the Attorney General, for an order pursuant to section 753 to have you declared a dangerous offender, to impose upon you a sentence of detention in the penitentiary for an indeterminate period of time in lieu of any other sentence that may be imposed for the offence of sexual assault contrary to the *Criminal Code*.
- 3 At your hearing on this application, you called Dr. Ben-Aron, a psychiatrist. The Crown had called two psychiatrists, Dr. Bradford and Dr. Glancy.
- 4 You had previously been convicted of the following offences. They are set forth in Exhibit 1, your criminal record.
- 5 1979, at Ottawa, armed robbery, and break and enter with intent. You were given a sentence of 12 months on each charge concurrent, probation for 24 months.
- 6 In 1982 you were convicted of break, enter and commit an indictable offence, theft under two hundred dollars; break, enter and commit an offence under section 306. There is reference in that entry to three charges. You were sentenced to two years less a day, probation for 36 months, along with six months on each of the other charges concurrent.

7 In 1984 at Peterborough you were convicted of aggravated sexual assault, contrary to section 246.3(1) of the *Criminal Code*, and sentenced to a term of six years plus probation for three years, and prohibited from owning or possessing any firearms, ammunition or explosives for ten years. Now, I don't understand how you could be given probationary term on top of a six-year sentence, as I understand that is outside the law.

8 In any event, that is your record. You were released on parole; parole had been revoked on occasion; you were subsequently released, released on mandatory supervision on August 10th, 1989. That continued until February 5th, 1990, at which time you were simply released. During the term of your supervision you were subject to curfew and other restrictions including no consumption of alcohol, and you were to seek treatment. You had attended with Dr. Bray but infrequently. Reports are filed as Exhibits number 2, 3, 4, 5 and 6, relative to your behaviour, and they are from a psychologist, a psychiatrist, and a coordinator of assessment behaviour, Mr. Malcolm, who I believe is a psychologist.

9 There is a document filed as Exhibit number 5 which is entitled Final Psychology Report and that was prepared by Dr. Arunima Khanna. It is dated 1986-09-25. I find it necessary just for a moment to refer to that report. On page 3 under the heading Treatment, he states: Considerable time was spent in discussing victims' reactions to the trauma of sexual assault. You were very ashamed of your behaviour and were encouraged to use these feelings to abstain from alcohol and behave in a more socially responsible manner. The nuances of male-female sexual relationships were discussed including judging consent, attitudes to females, etc. You were made aware of your elevated testosterone level, that these high levels did not seem to be accompanied by uncontrollable sexual urges. The possible role of alcohol in losing control of sexual impulses was underscored. You were given other tests, a psychological assessment, psychometric assessment. Conclusions are as stated in that report and the concluding sentence is: Furthermore, you are a personable young man who has several strengths that will make your integration into society relatively easy. It is believed that all these factors make you a candidate for early release. It is recommended that you abstain from alcohol and that you pursue your release and work plans.

10 As I have indicated, there are other reports that relate to you from Corrections Canada. The Crown applies under this section of the *Criminal Code*, section 753(a) and (b), to have you declared a dangerous offender so that the court may thereupon impose a sentence of detention in a penitentiary for an indeterminate period in lieu of any other sentence that might be imposed for the offence for which the offender has been convicted. Section 753 says:

Where, on an application made under this Part following the conviction of a person for an offence but before the offender is sentenced therefor, it is established to the satisfaction of the court

(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 conduct in any sexual matter including that involved in the commission of offence for which he has been convicted, has shown a failure to control his sexual impulses and a likelihood of his causing injury, pain or other evil to other persons through failure in the future to control his sexual impulses, the court may find the offender to be a dangerous offender and thereupon impose a sentence of detention in a penitentiary

that is indeterminate. Section 752 refers to the offences as those relating to sexual assault.

11 On this hearing I heard evidence from two psychiatrists called on behalf of the Crown and one psychiatrist called on the accused's behalf, and other evidence relevant to the issue insofar as it relates to the nature of the offence.

12 At the time of the commission of this offence, you were some 30 years of age, probably closer to 31, and one of four children. Your history is related in the numerous reports filed to the evidence of Dr. Bradford.

13 Evidence was heard from Ms. H., who was the victim of one of the original offences involving a break and enter in the Ottawa area which related to the commission of an indictable offence. Evidence was read into the record with respect to the offence of 1984, to which you pleaded guilty. The evidence of the 1990 offence emanating from Ms. A. was referred to by counsel and agreed to as fact.

14 Dr. John MacDonald Bradford is a well-known psychiatrist. His c.v. is filed. He is highly qualified and associated with the Royal Ottawa Hospital. He wrote the report for the court at the time of sentencing in 1984 on the charge of aggravated sexual assault. You had been a patient under his care at that hospital from December 29th, 1983 to January 27th, 1984, where extensive evaluations of your sexuality had taken place along with psychiatric and other examinations including many tests, a mental status examination, a neuropsychological test, a sexual behaviour evaluation and physiological tests relating to sexual arousal under and without alcohol. That report is filed as Exhibit number 9 and contains the conclusions arrived at by Dr. Bradford relating to your medical history, dyslexia, etc., including evidence of minimal brain dysfunction. Tests revealed high levels of male hormone, testosterone. He concluded that you get into difficulties as they relate to sexual deviation when you are drinking. From all of the tests, his conclusion was that there was evidence of long-standing mild brain damage which handicapped your personality development, which contributed to the problem relating to sexual deviation.

15 He concluded you could be treated, with respect to the aspects of sexual drive, with respect to the consumption of alcohol. He said the alcohol issue was one that needed help and treatment. He testified he discussed those conclusions with you, and at the time he wrote the report in 1984, he was aware of your previous convictions and the circumstances surrounding those convictions. That at that time you showed remorse for the victim with respect to the 1984 conviction and that you made it clear to him that you wanted help and assistance and you did not wish to be in trouble with the law again.

16 In that report at page 4, Dr. Bradford states that you have a number of deficits and difficulties which can hinder both your overall personality functioning and also your sexual functioning. A tendency to sexually aggressive responses was noted by abnormal plasma testosterone levels and failure to suppress on penile tumescence testing to specific stimuli in that regard, and it was noted that this response was brought out by low levels of alcohol. Overall, you have major personality difficulties which are a contributing factor. In terms of treatment, he states it is clear that alcohol is an aggravating factor to your overall behavioural deficiencies, it is not just high levels of alcohol, and you must refrain from the consumption of alcohol at all times in the future if there is to be no recurrence of your abnormal sexual behaviour. The high levels of plasma testosterone and high sexual drive are contributing and aggravating factors which can be treated medically. With your specific informed consent, the administration of an antiandrogen preparation can reduce these levels and will give you a better control over your own sexuality and will contribute to a reduction in sexual aggressive responses.

17 He then says:

I would highly recommend, at the discretion of the court, that: Although it is likely that a custodial disposition is to be considered in this particular case, the problems outlined in the evaluation of his sexuality should be considered mitigating, and also provide a treatment/rehabilitation intervention option. However, I would not recommend any treatment until such time as he is eligible for parole. Any success of treatment at this time would then depend on his cooperation and intervention, and his ability to follow my medical advice.

He conducted other tests including phallometric testing, referred to by psychiatrists as a good clinical tool and by Dr. Glancy as being supportive of results from other tests; that test has a history and use in this type of problem. The tests were conducted without alcohol and with alcohol. Deviation was noted. And this condition that he noted, referred to as deviation or paraphilia, is referred to as a psychosexual disorder.

18 In a report previously filed in 1979, his diagnosis was minimum brain dysfunction with no full-blown antisocial personality disorder and with no indication of psychosexual disorder or paraphilia. In a report filed in 1982 he came to the same conclusions, that there were no typical features of a serious antisocial personality disorder and there was no need for psychiatric treatment, although you may have some antisocial personality disorders.

19 In preparing his 1984 report, Dr. Bradford reviewed all the previous information relating to behaviour, conduct, including history relative to education, home life, etc. And he related no evidence of major personality disorder or no evidence of any serious sexual deviation, which had been referred to in the previous reports and which was not included in the 1984 report.

20 In the 1984 report, the basis of this application, tests were further and more extensive. That report included a report prepared by you, who would have needed help to complete and read it. An associated doctor concluded there was no diagnosis that you had paraphilia. It appears that the 1984 report did not mention the previous reports prepared relative to personality disorder and psychosexual deviation. It likewise appears that there is a difference between Dr. Bradford and the hospital reports as to whether there was a totally psychosexual disorder in nature arising from the tests. The tests concluded, according to Bradford, that when you were drinking you became involved with the law, as alcohol was relevant to the issue of your tolerance. There was no firm evidence as I discern the reports and the evidence of Dr. Bradford that you suffered from any antisocial personality disorder, and the diagnoses in that regard is borderline at best, according to Dr. Bradford. He went on to state that not everyone convicted of three offences is a dangerous offender, and your record is one of the least serious that he has seen in this type of application, considering the number of offences as against the type of application involved with many more; that your conduct, insofar as violence is used to effect that purpose, may relate to the question or issue of sexual sadism. This concept he states is carried forward in the 1990 offence which involved violence to a degree, notwithstanding that there is no correlation between high levels of sexual violence and elevated levels of testosterone.

21 Dr. Glancy based his opinion upon the summaries he received from the Crown, on your report and the report of Dr. Bradford, and the transcript of the evidence of Ms. A. relating to the 1990 conviction. He did not interview you, and he said he was faced with an ethical dilemma, to talk about somebody he had not interviewed. He said his opinion was based upon a hypothetical person presented to him by the Crown. On the evidence, he concludes that this person, that is you, suffered from paraphilia based on the record and the evidence and Dr. Bradford's report and testimony. Paraphilia means rape proneness, a variant of sexual sadism. That you suffered from minimal or slight brain damage, and you have antisocial personality traits. He concludes that, unlike other specialists who conclude otherwise, that you show a failure of empathy, that you show no remorse and a failure to learn from experience. He concludes that, unlike other specialists who conclude otherwise, that the minimal brain damage may affect the ability to restrain your impulses and that it may make you more sensitive to the disinhibiting effects of alcohol and may be a contributing factor to the sexual problem, if you suffer one. A high serum testosterone is known to be associated, he stated, with sexual deviation. He testified that sadism may be a contributing factor as it relates to offences committed.

22 Some of these factors he concludes are borderline, and he qualifies his opinion by the word "may". He dealt with the issue of phallometric testing and the value of it and said it was not a predictable tool but it was a tool that was used in this type of testing. The concept of a finding of high testosterone is associated, he said, with aggressive sexual tendencies, this concept or conclusion being contentious in the research field notwithstanding his opinion.

23 In relying on Dr. Bradford's report, he was not aware of Dr. Bradford's previous reports of 1979 or 1982. His diagnosis was -- this is Glancy's -- evidence of mild sexual sadism, some evidence of antisocial values and attitudes, some evidence of mild brain damage which may not be relevant, and some evidence that alcohol was the cause of your problems. He based that opinion on the three incidents referred to in the record, and he admitted that he may have been biased by knowing of other matters or allegations not proven before a court.

24 He concluded that you did not have an antisocial personality disorder but there was evidence of some antisocial values, and that the tests, including the phallometric testing, showed a mild form of sexual sadism. He likewise concluded that if the information shown on the charts prepared by the nursing staff were correct, Dr. Bradford's diagnosis of paraphilia was in doubt, but that the phallometric test supports the diagnosis notwithstanding that such tests are not a hundred per cent reliable or valid. He made such conclusions not knowing the basis of those tests nor the stimuli used and his diagnosis was based on the hypothesis the hypothetical person had mild paraphilia.

25 Dr. Ben-Aron, your appointed psychiatrist, based his opinion on the evidence of Ms. Austin, the records, the facts relating to the 1982, 1984 and 1979 convictions, and Dr. Bradford's report including reference to hospital records and the records of the Correctional Services of Canada, and from what he heard of the examination and cross-examination of Dr. Glancy and Dr. Bradford. Dr. Ben-Aron said he was unable to come to a definite diagnosis, as Dr. Glancy did, of mild paraphilia. Ben-Aron could only say it was a possibility. He stated that sexual sadism is a specific psychiatric problem, and to make such a diagnosis

the patient would have to be under his care. He was not aware of a simple correlation between high testosterone levels as it relates to human sexual behaviour, and that because of the variation of stimuli and the use of phallometric testing, he said its usefulness is questionable, in such tests.

26 He was of the view that your pattern of behaviour with respect to sexual offences exhibited one condition and that was non-consensual sexual assaults with no graduation in terms of violence. He said the three acts together did not allow a pattern; based on knowledge he gleaned from the information on hand, he could not say that this conduct would result in failure of you to control your impulses and result in the likelihood of your failure to control such impulses in the future.

27 He concluded that you would have to be motivated to receive help and to have treatment before it could become effective.

28 The Crown in his submission admits that the onus is on the Crown to prove beyond a reasonable doubt the matters at issue, and that proof emanates in essence from the two psychiatrists that the law imposes must be involved in such proceedings. That evidence, the Crown submits, is crucial to the issue of whether in the future there is a likelihood that you will be unable to fail to control your impulses, notwithstanding your relationships.

29 The defence submits that the onus upon the Crown is not met on the basis of the psychiatric evidence and your previous criminal history, as Dr. Bradford referred to the more remorse you exhibited previously, your wish to seek treatment, and of his efforts to help you make arrangements after your release from the 1984 conviction. And Dr. Ben-Aron could not come to a conclusion that dealt with the matter other than to discuss possibilities. The defence submits that Dr. Glancy's diagnosis of mild paraphilia is based on a hypothesis, admitting bias by him, because of matters that have not been proven.

30 The defence submits that Dr. Bradford in his previous reports contains findings totally inconsistent with the report of 1984, that his conclusions with respect to the phallometric testing were different totally from those notes made by the nurses at the time of those reports, in that they say that Mr. Clancy, the person being tested, did not react. The defence submits that it is inconceivable that both nurses both made mistakes of the same nature, notwithstanding the evidence of Dr. Bradford, and that the failure of Dr. Bradford to refer to the previous reports taints the validity of the 1984 report, and that as the report of Dr. Bradford was the basis of the Crown's case, that each offence contained an element of violence, that there was an element of intoxication involved, the only common thread to all offences was of a non-consensual nature.

31 The defence submits, considering Exhibits 2, 4 and 5 filed, the Crown has not satisfied the onus cast upon it.

32 It is from the evidence of Dr. Bradford, Dr. Glancy and Dr. Ben-Aron that the issue of whether Mr. Clancy is likely in future to show a similar failure must be determined.

33 I am not satisfied on that evidence that you have not show remorse. I am not satisfied on that evidence that you show aggression as described. I am not satisfied on that evidence that you are an alcoholic but that your consumption of alcohol seriously impairs your ability to control yourself. I am not satisfied on that evidence you will cause injuries to persons in the future and you cannot control such impulses if you are properly treated.

34 I am likewise not satisfied, considering the offence referred to, save and except for the 1984 aggravated sexual assault, which was of a more violent nature, that you will cause injury or pain in failing to control your conduct in the future, subject to the condition as to alcohol consumption and treatment.

35 In conclusion, the requirements to find that you are a dangerous offender within the meaning of the section of the *Code* in my view has not been proven.

36 I have considered all the evidence, read each report, and I find that you have not been proven to be a dangerous offender within the definition considering the psychiatric evidence of Dr. Bradford. His opinion I do not hesitate to accept, save and except for the fact that he did not refer to the previous reports in which you had no problems of any nature whatsoever. It appears that in committing all offences, as he states, that you were under the influence of alcohol and this contributes to the loosening of your inhibitions and to a failure to control yourself under certain circumstance.

37 The psychiatric evidence is relevant to the final issue of whether there is a likelihood of you causing injury to other persons from failure in the future to control your sexual impulses. The degree of evidence required to allow me to make such a finding is not before me and I am not satisfied from the opinions expressed and cannot conclude that such would be the result.

38 Accordingly, I find on the application that you are not a dangerous offender and I endorse the indictment accordingly.

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