

Case Name:

R. v. T.

**Between
Her Majesty the Queen, and
H. M. T.**

[2003] O.J. No. 3739

59 W.C.B. (2d) 183

File No. 200396

Ontario Court of Justice
Oshawa, Ontario

Bellefontaine J.

Oral judgment: July 29, 2003.

(35 paras.)

Criminal law -- Recognizances and undertakings -- Recognizance to keep the peace -- Evidence and proof -- When granted.

Application by the Crown to place T. on a 12-month recognizance. The police feared that T. would commit a sexual offence on a person under the age of 14. T. committed 13 break and enters in 1987 and 1988. He would enter homes and sexually assault adolescent boys. He served three years in prison in the United States. He was then returned to Canada to plead to the Canadian portion of these charges. He was placed on probation for three years. During the probation he received intensive counselling for his sexual deviance. Despite six years of treatment he was caught peeping in a boy's window in September 1995. He received three years of probation but continued to reoffend. In June 1997 he received an additional three years of probation after he looked into a boy's window and videotaped him. The police decided to proceed with this application when the probation was concluded. T. was placed on a recognizance but breached it when he was found to have engaged in consensual sexual activities with teenage youths on public school property. T. was a homosexual hebephile. He had a sexual attraction to sexually maturing young adolescents. There was no treatment available to change his sexual preference. There was a 40 per cent chance that he would reoffend.

HELD: Application dismissed. The Crown failed to prove, on a balance of probabilities, that there was a serious and imminent danger that T. would reoffend. It was 60 per cent likely that T. would not reoffend. The offences that T. committed in 1995 and 1997 would not entitle the Crown to the recognizance. The court did not accept that T. would commit sexual assaults since he limited his activities to peeping and videotaping since 1988.

Statutes, Regulations and Rules Cited:

Criminal Code, s. 810, 810.1.

Counsel:

L. Yourkevich, for the Crown.
J. Scarfe, for H. T.

1 BELLEFONTAINE J. (orally):-- These are my reasons on the application brought pursuant to 810.1 of the Criminal Code by Detective Thomas Hart to have H. T. placed on a recognizance for 12 months based on the officer's fear that Mr. T. would commit one of the prohibited sexual offences on a person under the age of 14 years.

2 The issues before me are firstly, to determine the correct legal interpretation of the test to be applied as set out in *Regina v. Budreo*. Secondly to apply the test and determine whether Detective Hart's fears, which I view to be properly subjectively held, are in law, objectively reasonable. Finally to decide whether it is appropriate to exercise my discretion in favour or imposing the recognizance.

3 I have considered all of the evidence and all of the arguments in this matter. The fact that I do not mention any particular piece of the evidence or any particular argument raised is not a reflection of my not having considered it.

4 The evidence has shown that Mr. T. committed 13 break and enters in 1987 and 1988, where he entered homes and sexually assaulted or attempted to sexually assault, young adolescent boys by fondling their genitals. These crimes were the culmination of about three years of peeping activity, and resulted in him serving three years in a prison treatment program in the United States following which he was returned to Canada to plead to the Canadian portion of those charges for which he was placed on probation for three years. Through his probation he received further intensive in-patient and out-patient counselling for his sexual deviance. Notwithstanding over six years of treatment, he was caught in September of 1995 peaking in a boy's window and received a 30 day sentence for prowling at night, with a further three years probation and counselling terms.

5 During his subsequent counselling, he admitted to his counsellors to re-offending by peeping in windows while he was on the earlier probation order. He was involved in intensive counselling over the new period of probation. While still on this probation order, in 1997 he offended again, by peeping into boy's windows and videotaping one or more of them. These offences resulted in him receiving an 18 month sentence and three years probation on June 26th, 1997. He served his sentence at the Ontario Correctional Institute, where he was again involved in intensive counselling programs. Following completion of his three years of probation, police determined to proceed with this s. 810.1 recognizance. After several months occupied in efforts to locate Mr. T., he was arrested and placed on an undertaking in the spring of 1992. Although the charges were withdrawn, he was charged on June 26th of the year 2002, with breaching his recognizance for being with 17 and 18-year-old youths on public school property in the middle of the night, engaging in consensual activity that was suspicious of being a precursor to legal consensual sex with them.

6 The expert evidence is an agreement on the main areas. Mr. T. is a homosexual hebephile. He has a sexual attraction to sexually maturing young adolescents. His target range is in the 13 to 16 age bracket. At least some of his victims have been age 13, and fall within the top of the age range designed to be protected by this section.

7 There is no treatment available to change Mr. T.'s sexual preference. The avoidance of further criminal activity focuses on managing Mr. T.'s risk to children by different coping mechanisms. These include individual and group counselling sessions, maintaining a circle of support with other hebephiles who are successfully abstaining and maintaining a stress free life, as well as identifying and avoiding triggers that may tempt him and maintain meaningful adult homosexual relationships.

8 Both Dr. Wilson for the Crown and Dr. D'Mello for the defence agree that Mr. T. is rated a high risk to re-offend using the most accurate assessment tool available. Dr. Wilson articulates this as the test being 75 to 80 percent accurate in predicting a 35 to 40 percent likelihood of Mr. T. re-offending in the next two or three years.

9 The assessment test known as the STAT 99 is based on fixed and limited objective factors. Clinical judgments can be used to reinforce or modify a risk calculation up or down, based on subjective factors that the test does not assess.

10 Dr. D'Mello and the other defence witnesses have testified and support a number of positive factors in Mr. T.'s life that would suggest his risk is reduced below that predicted by the STAT 99. In particular, since his last offences and the incarceration flowing from that, he has moved to Toronto from the smaller northern communities where he traditionally

lived and had to hide his homosexuality. Here he has been forming appropriate adult relationships; is maintaining counselling and has a strong support group.

11 On the negative front, extensive past counselling efforts have not only failed, but he was involved in ongoing uncharged offences while undergoing counselling, and was able to deceive the people around him who felt he was doing well over these time periods.

12 Further, in June of 2002, he suffered a significant lapse in judgment by ignoring his risk triggers and consensually engaging in a hoped for sexual liaison with two youths close in age range to those in his target range. Considering both the positive and the negative subjective factors, which I view to balance each other out, I am prepared to decide the case based on the STAT 99 assessment that he has a 35 to 40 percent chance of resuming his past behaviours over the next two to three years.

13 In doing so, I have not adjusted the likelihood of re-offending up or down to accommodate or adjust the three year re-offence period to the one year maximum of the bond. In my opinion, particularly in light of the imminent danger requirement set out in *Regina v. Budreo*, the proper recidivism rate over the one year period of the bond is the risk factor to consider. As the time distribution of re-offending over the three years and in particular over this first year, is not before me in evidence. I will not speculate on it and adjust the re-offence rate to a one year timeframe.

14 Applying these facts to the law, a preliminary question arises as to the test to be applied in determining whether Mr. T.'s risk level rises to the point a recognizance can be imposed on him. The most often quoted test is that of Justice Then's in *Regina v. Budreo* reported at 104 C.C.C. (3d), page 245, where he indicates after significant review of the authorities that the correct standard is on a balance of probabilities. Standing by itself, this wording of the test leaves open the question whether it is simply the underlying facts that are relied on to justify the fear that must be proven on a balance of probabilities or whether the same or some different tests applies to assessing whether the likelihood of a defendant committing a future act must be high enough to be more probable than not.

15 Is a fear unreasonable simply because it is more likely that further offences will not be committed? Justice Then goes on to address this question. In the context of determining whether the fear is reasonable, Justice Then states:

It is clear that the use of the word "fear" in a legislative context does not put the judicial process at the mercy of unsubstantiated paranoia but requires an allegation to be objectively provable. Judges should take care before exercising their preventative jurisdiction. Both sections 810 and 810.1 speak of a reasonably grounded fear that the defendant "will" commit an offence. To my mind, as a matter of legislative construction, this takes the appropriate threshold a notch above a simple demonstration that the defendant is more likely than not to commit an offence. A reasonably grounded fear of serious and imminent danger must be proved on a balance of probabilities. The court under s. 810.1 must, therefore, scrutinize carefully the evidence put before it.

16 Having read a number of cases, including those included in *Regina v. Budreo*, I consider myself bound by this interpretation. The Court of Appeal in *Regina v. Budreo* implicitly approves this test by referring to Justice Then's lengthy and well reasoned decision, and stating later that they are in substantial agreement with his reasons. As well, this test is in accordance with the majority on this issue, in the Supreme Court of Canada decision in *Regina v. Parks*, [1992] 2 S.C.R. 871, who rejected the proposition that an individual who was an extremely low risk to re-offend, could be placed on a preventative bond due to the extremely serious harm, in that case a murder, that could be committed should he re-offend. Justice Sopinka states "the law requires a proven factual foundation which raises a probable ground to suspect a future misbehaviour."

17 This test as well has been applied by other respected provincial courts, see for example Justice Fairgreaves decision in *Regina v. Harding*, [1998] O.J. No. 2499. In my view, the test requires both that the underlying facts be established on a balance of probabilities and secondly, that the harm feared be more likely than not to occur.

18 I should note that there are a number of potential components to determining whether a fear is reasonable. Most significant will be the likelihood of the feared event happening. Additionally, the nature and seriousness of the anticipated harm that may be suffered if the event occurs, in my view, should as well be an appropriate factor to evaluate.

19 I do not view the Supreme Court of Canada decision in *Regina v. Parks* to be inconsistent with that proposition. Indeed, without considering all relevant factors, including the seriousness of the potential harm, I do not see how the reasonableness of the applicant's fears can be evaluated.

20 In light of this test, the Crown evidence does not, in this case, meet the threshold. Dr. Wilson's evidence of there being a 35 to 40 percent likelihood of recurrence means the event is 60 or 65 percent more likely not to happen.

21 Further, other issues in the evidence also detract from the strength of the Crown's case. The relevant risks for me to evaluate in determining the reasonableness of Detective Hart's fears, is limited to the risk of Mr. T.'s committing the offences listed in the section which are primarily assaultive in nature. Mr. T.'s 1995 and 1997 offences of prowling on people's property at night and videotaping the teenagers, do not fall within the listed offences.

22 Although not articulated, implicit in Dr. Wilson's evidence was that this type of behaviour would be a type of re-offending contemplated by the STAT 99, accordingly the risk of assaultive behaviour that can legally support the fears, is somewhat below what Dr. Wilson has articulated.

23 Acknowledging the obvious concern that his peeping activity may turn out to be a precursor to further sexual assaults, the reality has to be acknowledged that on the limited occasions that we are aware of since 1988, he has restrained himself to peeping and videotaping. As heinous as these activities may be, they fall short of the seriousness of the listed offences I am restricted to considering for the purposes of the application.

24 Obviously, the nature and extent of the harm associated with the commission of the listed sexual assaults I would rate as very high. The long term psychological and emotion harm to children and youths who have been sexually abused has become a serious societal problem. The damage can be more devastating to many individuals in the long term than major bodily harm.

25 I appreciate that Detective Hart has considerable justification for his fears. There is a real risk of Mr. T. re-offending in some fashion or another. However, the evidence does not support it being more likely than not that Mr. T. will commit one of the listed offences, or that he represents a serious and imminent danger as required by Regina v. Budreo.

26 Although it is not necessary, I can indicate I would have been inclined to exercise my discretion and not impose a recognizance on Mr. T., even if the legal threshold was lower and had been met by the lower but not insignificant risk that the Crown's evidence supports.

27 The enumerated offences which I could issue such a bond for, were last committed by Mr. T. in 1987 and 1988, now 15 years ago and seem unlikely to reoccur over the next year in light of his move to Toronto and the adult relationships he has been developing.

28 Further, Mr. T.'s sexual interests are predominantly in children older than the 13-year-olds and under that the section is designed to protect.

29 Also, his modus operandi is to illegally prowl on people's properties at night to watch youths masturbate. At its extreme, back in 1987 and 1988, to later enter the home when they are sleeping to masturbate or fondle them. He has never been known to frequent schools or playgrounds, or such places that I am permitted to include in the bond.

30 In light of his personal history, a recognizance as requested would be illusory in terms of its meaningful protection to the public. These are obviously places that he ought to stay away from, to avoid triggering any thoughts that may have him go on to later relapse. Indeed, commencing to loiter about places that children under 14 frequent, may be sufficient in their own, in light of his background to justify the imposition of a bond.

31 By way of protecting the public, the criminal law that binds him at all times in the future is not only adequate but more relevant to controlling his personal behaviours and a more punitive tool to address future crime by him.

32 Break and enter carries a sentence of life imprisonment; unlawfully in a dwelling house ten years, and prowling at night the same six month sentence as the penalty for breaching his bond. These are adequate tools to protect the community given his personal predilections and entail no risk of Mr. T. being arrested for technical breaches of a broadly worded recognizance which might well not relate to the protective interest the bond was intended for.

33 Finally, I should note that some of the terms most urged upon me could not be granted in any event. Specifically, a curfew, a term he report regularly to police, and finally a term he not associate with other convicted sex offenders; fall outside the scope of the terms permitted by the section.

34 In this regard, I am bound by the decision of our Court of Appeal in Regina v. Budreo, 46 O.R. (3d) 481, stating the word including, referring to the types of conditions that could be imposed, is used to limit the scope of the term "conditions" to those conditions similar to the specified examples. They go on later to state:

The section does not authorize a court to impose broader restrictions on a person's liberty, than activities, areas and places where children are likely to be found.

35 Accordingly, the application for a section 810 recognizance is dismissed.

qp/s/qw/qlgkw/qlhcs/qltl

drs/e/qlaab/qlsdd/qljal