Citation: *R. v. T.J.H.*, 2022 YKTC 15

Date: 20220330
Docket: 20-00705
20-00706
Registry: Whitehorse

IN THE TERRITORIAL COURT OF YUKON
Before His Honour Judge Seidemann III

REGINA

v.

T.J.H.

Publication of information that could identify the complainant or a witness is prohibited pursuant to s. 486.4 of the *Criminal Code*.

Appearances:
Noel Sinclair — Counsel for the Crown
David C. Tarnow (by videoconference) — Counsel for the Defence

REASONS FOR SENTENCE

[1] SEIDEMANN III T.C.J. (Oral): T.J.H. has entered pleas of guilty to two charges of what are commonly referred to as sexual interference contrary to s. 151 of the *Criminal Code*. They were on two separate Informations because they are two separate and completely unrelated incidents. On the first occasion, the victim was a young girl of ten years old. The second occasion, the victim was a young girl of seven years old.

[2] The admissions of fact set out that T.J.H. was intoxicated by alcohol at the time of each of these offences. At the time of each of the offences, he was in the

residence — not of his own residence but the residence which was being occupied at that time by the victim and the family of the victim because he was known to, and a friend of, the family of the victims.

[3] T.J.H., through his counsel, has challenged the constitutional validity of the minimum sentence provisions contained in s. 151 of the *Criminal Code*, not because he suggests that the sentence that ought to be imposed upon T.J.H. is less than the minimum sentence which is provided by that provision, but because the presence of a minimum sentence precludes me from imposing a conditional sentence, that is, a sentence of incarceration but to be served in the community. That provision and its effect on whether or not a conditional sentence can be imposed in these circumstances has been considered by a number of other courts and, in particular, has been considered by other judges of the Territorial Court of Yukon. They have found that, at least in some circumstances, a conditional sentence would be appropriate and that, to the extent that the minimum sentence provision of s. 151 prevents the granting of a conditional sentence, that provision is invalid.

[4] I am prepared to accept the reasoning contained in those decisions and, for the purposes of this case, I am prepared to consider whether or not a conditional sentence is the appropriate sentence to impose upon T.J.H.

[5] One of the features which is common in those cases is a consideration that, in many cases when a conditional sentence is imposed, it is a sentence which is imposed for a longer period of time than would otherwise be imposed if a sentence of actual incarceration in an institution was imposed.

[6] I give, as an example, one of the cases to which I have been referred, *R. v. D.A.D.*, 2021 YKTC 20. The sentence which was imposed was a six-month sentence to be served conditionally but I think, if I am not mistaken, somewhere earlier, the indication was that an appropriate custodial sentence would be approximately four months.

[7] In any event, in this case, T.J.H., through his counsel, suggests that an appropriate sentence would be four months to be served as a conditional sentence order. If I were to say that this sentence must represent something somewhat longer than what would be served in a custodial sentence, then a custodial sentence would only be two or three months.

[8] The Crown, in this case, is seeking a custodial sentence of somewhere between a total of 19 to 22 months.

[DISCUSSIONS]

[9] In *D.A.D.*, the Crown sought a four-month custodial disposition, and *D.A.D.*, through his counsel, proposed nine months as a conditional sentence. Judge Cozens found that nine months of actual incarceration, based on the facts of this case, would be more than what was in the range, but he expresses explicitly that a conditional sentence can be longer than what would be served in a custodial institution.

[10] One of the particularly distinguishing factors of T.J.H.'s case, compared to all three of the recent cases in the Yukon to which I have been referred, is the age of the

victims. In this case, we have a victim who was seven years of age and a victim who was ten years of age. In these other cases, we had victims who were 14, 16 and 17.

[11] The *Criminal Code* in s. 718.01 says that:

> When a court imposes a sentence for an offence that involved the abuse of a person under the age of eighteen years, it shall give primary consideration to the objectives of denunciation and deterrence of such conduct.

[12] That is certainly a consideration for 14, 15, and 16-year-olds. It is even more a consideration, to my mind, the younger the victims become.

[13] I have had read before me Victim Impact Statements which detail the significant impact felt upon the families of these victims. The Victim Impact Statements are in each case from the mother of the victim and each of them refer to the circumstances of the small community in which T.J.H. and these victims all reside.

[14] I have the benefit of a very thorough *Gladue* Report which details many of the circumstances of the background of T.J.H. and how his heredity and upbringing have been impacted by the residential school system and details how it has very specifically impacted the living conditions that T.J.H. was raised in and in which he, to some extent, still resides.

[15] The sentence which is proposed by T.J.H.'s counsel is not even close to the ballpark for what is appropriate for these offences. A very real sexual assault against seven- and ten-year-old girls.

[16] The range of sentence proposed by the Crown may be higher than I might otherwise have imposed, but it is certainly somewhere in the ballpark.

[17] If I were to consider a conditional sentence order, I would, in accordance with normal practices, have to go do something greater than that. I would be looking at a conditional sentence order — that is, a sentence to be served in the community — certainly approaching two years at least. With respect to T.J.H.'s circumstances and his living conditions, I consider that to be entirely unrealistic. It is just not practical.

[18] T.J.H. has taken a number of steps since the commission of these offences to improve himself and to rehabilitate himself. I accept that those are honest and sincere efforts, and that they have had very real results. He has attended the Wilp Si'Satxw facility and has, he says, reduced his drinking significantly — not entirely, but in a very genuine and significant way. He has been dealing with the mental health counsellor. His counsellor indicates that he would have perhaps preferred some greater degree of involvement, but that does not minimize what T.J.H. has done.

[19] T.J.H., in court today, extended an apology which, as I watched him, I have no reason to doubt the sincerity of. For this type of offence, it is not something that occurs every time, I have to say. There are a number of people who commit this type of offence who do not acknowledge the wrongness of their behaviour. I am satisfied entirely that T.J.H. does not attempt to minimize that. He acknowledges that he did something, that it was wrong, and that it was harmful.

[20] I have to say, I do not know the traditions of the Selkirk First Nation, but I know that many First Nations do have traditions and ceremonies where you can make that

kind of an apology to your community, and if that is an option that is available to you, in the long run, T.J.H., it is one that I commend to you because, as you have heard from the Victim Impact Statements that were read today, there is a concern in the community about you. The best way to allay that concern is to acknowledge it publicly, to say, "Yes, I know you are concerned. I know you have a reason because I did do something wrong. You guys all know about it and I am not going to do it again." That is the only way to really clear the air in your community because right now, your community does not trust you.

[21] Having said that, I am not satisfied that imposing a conditional sentence is either practical, in your living circumstances, or that it would send the right message of deterrence and denunciation for these types of offences.

[22] As I say, there is a significant difference between offences involving a 16- or 17-year-old and offences involving a seven-year-old. The community sees that as different and they, in my view, would not see a conditional sentence as imposing the kind of denunciation that the law requires.

[23] In the Victim Impact Statements, the victim's mother says she sees the system as protecting your rights, not the victim's rights. If you were allowed to serve your sentence in the community, I think that would reinforce that belief in her and in the community. The community must see that we, as a society, take this behaviour seriously.

[24] I am not satisfied that, in this case, a conditional sentence would be appropriate. I am going to impose for the first offence, which is Information 20-00705, a sentence of eight months to be served in a custodial setting.

[25] On Information 20-00706, I am going to impose a sentence of 10 months consecutive because they are totally separate offences.

[26] In addition, you will be placed on probation for a period of three years following your release from custody.

[27] The conditions of your probation will be that you will:

1. Keep the peace and be of good behaviour;
2. Appear before the court when required to do so by the court;
3. Notify your Probation Officer in advance of any change of name or address, and promptly of any change of employment or occupation;
4. Report to your Probation Officer within one week after your release from custody, and thereafter, when and in the manner directed by the Probation Officer;
5. Attend and actively participate in all assessment and counselling programs as directed by your Probation Officer for:

   alcohol abuse; and

   psychological issues.

[28] One of the things I meant to say, and I will say this now, sir — and I am not finished with probation — I acknowledge that you have made great steps with respect to your alcohol problem. The number of people who can do that on their own are miniscule. You took the right process when you went to Wilp Si'Satxw and you got that process started. But in order to deal with that in any way that is going to truly be permanent, you are going to have to acknowledge and deal with those issues in your background, things about which you bear no blame. I mean, the abuse that you suffered is not your fault, just like what has happened to these poor girls is not their fault. What happened to you is not your fault, sir, but it is part of your background. If you are going to have a productive, happy life, you are going to have to deal with these issues and deal with them in a way that finally puts them behind you. You can only do that with help.

[29] I am going to come back to your probation terms because I am not quite done, but I am going to make another comment, sir, about the Pre-Sentence Report. It says you want to be a plumber and a pipefitter. While you are in custody, you are likely to have an opportunity, if you want to apply yourself, to finishing getting your high school education, because that is going to be a precondition to getting your training for those kinds of things. Those are jobs that, in our society, are going to be in constant demand. I would encourage you to get trained for those kinds of jobs because, if you do, there is always a job available for you. If you are interested in doing that, that is a way you and your girlfriend can enjoy a very productive life, but you have to take those steps.

[30] For the period of your probation, you are to:

6. Not attend any public park, school ground, daycare centre, public swimming pool, playground, skating rink, community centre, or recreational centre where persons under the age 12 years are present or might reasonably be expected to be present, except with the prior written permission of your Probation Officer or except in the actual presence of another responsible adult approved in advance by your Probation Officer.

[31] When you get out, sir, if you want to engage in activities that are going to happen at a public centre like that, if there is a good reason for you to be going there, you can talk to your Probation Officer and say, “I want to go there.” Maybe it is a place where they are offering night courses or something like that. You can get permission ahead of time; it is not a problem. This condition is for the duration of your probation.

[32] The Crown is requesting that I make a further order prohibiting you under those kinds of conditions for quite a long time. I have considered whether that was necessary, sir, and I am required by this section to consider whether I should make an order under s. 161 of the *Criminal Code*. I am satisfied that the provisions that I have included in the probation order for the duration of the probation order are sufficient and I am not going to make any order beyond that time.

[33] I am not going to make not drinking or not taking drugs part of your probation order, sir. I encourage you to abstain, but I am not going to criminalize it if you have a drink once a month. I encourage you to not do that because you have demonstrated that you have a problem. You have attempted to deal with that and it is what gets you

into trouble. However, I am not to criminalize that simple fact for you, sir, so I am not going to include that as a condition on your probation order.

[34] I am going to make the order pursuant to s. 487.051 authorizing the taking of samples from you for the purpose of DNA analysis. They will take a DNA sample from you, sir, which will go into the records just like fingerprints.

[35] Because of the nature of this offence, I am required and do make the order requiring you to comply with the provisions of the *Sex Offender Information Registration Act*, S.C. 2004, c. 10, for a period of 10 years.

[36] If a weapons prohibition is something that I must consider and not mandatory, then I have considered and I would not make the weapon prohibition order because there is no suggestion that they were in any way involved or threatened or things like that in this case.

[37] I do want to make one comment. It does not change anything I have said, but for purposes of whether or not this decision is in any way ever appealed, I do want to say that, with respect to the one Information, the seven-year-old, that I considered that this was, in fact, a case where, to some extent, you were in a position of trust, you were in a position of authority when you caused the young girl to leave her friends and did the behaviour that you did with her. I have considered that to be an aggravating feature in considering the sentences that I would impose.

[38] On the probation order, you will:

7. Have no contact directly or indirectly or communication in any way with either S.J., H.A.M., O.B., or any member of their immediate family; and

8. Not go to any known place of residence of either S.J., H.A.M., O.B., or any member of their immediate family.

[DISCUSSIONS]

[39] I will issue the warrant for his arrest. T.J.H., I would say you should surrender yourself to the RCMP by 4:00 p.m. today. The Court can communicate that I have said that you should surrender by 4:00 p.m. I would expect that they will give you that time to attend on your own. If you fail to do that, they will come looking for you, sir.

[40] THE CLERK: The remaining counts?

[41] MR. SINCLAIR: Stay of proceedings.

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SEIDEMANN III T.C.J.