SUPREME COURT OF YUKON

Citation: *R.* v. *Carlick*, 2013 YKSC 83 Date: 20130726
Docket: S.C. No. 10-01510C
Registry: Whitehorse

BETWEEN:

HER MAJESTY THE QUEEN

AND:

CHRISTINA GLADYS CARLICK

Before: Mr. Justice C.S. Brooker

Appearances:
David McWhinnie Counsel for the Crown
Lynn MacDiarmid Counsel for the Defence

REASONS FOR SENTENCING
DELIVERED FROM THE BENCH

[1] BROOKER J. (Oral): Ms. Carlick is serving a life sentence for second degree murder. She was subpoenaed by the Crown to testify in the trial of Norma Larue on a charge of first degree murder. When called as the witness she refused to be sworn or affirmed and indicated that she would not testify. Previous to that she had advised the Court and counsel by letter that she did not want to testify.

[2] I ordered Ms. Carlick to testify. She was made aware of the consequences of a contempt citation and a prison sentence if she refused to testify in accordance with the order I had made that she should testify. She was afforded an opportunity and I

understand that she did consult with a lawyer, but she still refused to testify. I cited her for contempt in the face of the Court and she was returned to the cells to await sentencing. Today it is my duty to sentence Ms. Carlick.

[3] The Crown suggests the appropriate range in this case is two to three years, with a two-year sentence being the one that the Crown seeks. The defence, as I understood their position, did not take issue with the range, but says that the appropriate sentence in this particular case should be somewhere between 15 and 18 months.

[4] This is a difficult case for a number of reasons. A witness' refusal to testify is an extremely serious matter. It strikes at the very heart of our justice system. Rather than go on in my own words, I think it is important to note some of the comments that have been made in other cases by other judges when faced with a situation where a witness who has been called refuses to testify, despite being ordered to do so by the Court.

[5] In *R.* v. *B.T.*, [2013] N.S.J. No. 6, Provincial Court Judge Derrick said at para. 17:

> It is clear that contempt of court by refusing to testify is a very serious offence against the administration of justice. It strikes at the heart of the justice system: if witnesses can refuse to testify with impunity, the ability of the criminal justice system to function according to the rule of law will collapse. What can be prosecuted and what evidence can be considered by the court will be dictated by a code of the street that prohibits engagement with the authorities. …

At para. 19:

> The duty of a witness to testify in accordance with his or her subpoena is a duty owed, not only to the court, but also to society as a whole, "and is essential to the proper administration of justice." (citation omitted)

At para. 24:

> The message that the community needs to receive is that the penalty for refusing to testify under subpoena will be significant.

[6] In *R.* v. *Yegin*, [2009] O.J. No. 6051, a decision of Justice Roy of the Ontario Superior Court of Justice, says at para. 32, in part:

> … I cannot visualize a situation when the principles of deterrence set out in section 718(a) and (b) would be more important. A strong message has to be given to people like Mr. Yegin and other potential witnesses that it is not their choice when to testify and when not to testify. And, of course, if they refuse, that there will be serious consequences that will follow. …

The Ontario Court of Appeal had occasion to consider the Yegin case at *R.* v. *Yegin*, [2010] O.J. No. 1266, and in upholding the trial judge's three year sentence, said this at para. 2:

> The justice system depends on witnesses who testify as required. The justice system's response to those who prefer to remain aligned with their criminal cohorts rather than do their duty as citizens must be firm and direct - significant jail terms above and beyond whatever other period of incarceration the individual is, or might be, facing for his own participation in the relevant events must be imposed.

[7] Finally, in *R.* v. *Neuburger*, [1995] B.C.J. No. 2793, the British Columbia Court of Appeal said, at para. 9:

> In my view, the sentencing judge was justified in viewing general deterrence as the most important single factor in sentencing for contempt in the face of the court. I also concur with his view that the refusal of a witness to testify in a criminal proceeding undermines the ability of the courts to deal effectively with the administration of criminal justice. It is not the prerogative of witnesses to criminal events to decide whether or not they will testify. They are bound to testify if called upon to do so, for it is only in this way that those guilty

> of crimes can be brought to justice and the public be protected.

Paragraph 10:

> It follows that there must be an effective sanction imposed on those who refuse to testify, particularly where, as here, the charge is one of murder. …

[8] The range of sentences for this type of contempt seem to vary. I do not intend to go through all the cases, but in order to give you some idea of what I have considered, I note in *R.* v. *B.T, supra,* the sentence for a young offender was two years for refusing to testify. In *R.* v. *Yegin, supra,* it was three years. There was another *R.* v. *Yegin* case, *R.* v. *Yegin,* [2010] O.J. No. 2083, again in the Ontario Superior Court, where the offender was given four years. In the *R.* v. *Neuburger, supra,* it was 15 months. A case that I referred to in my decision on permitting Ms. Carlick's statements to be placed in evidence after she refused to testify, *R.* v. *Stevens, Worme*, *and Campeau*, [2013] A.J. No. 658, was a joint submission and the sentence imposed under the joint submission was 15 months of imprisonment for contempt for refusing to be sworn or testify against a co-accused.

[9] I agree with the Crown counsel that, from a practical standpoint at least, five years is the maximum possible sentence for this type of an offence. It would appear, generally speaking, that the range would be somewhere between 15 months to four years, depending on the nature of the offence being tried, the offender's age, and prior record.

[10] I have reviewed and considered the *Gladue* Report as well as the Pre-Sentence Report, both of which are clearly dated, but which were submitted by defence counsel. I

have also considered the explanation provided by Ms. Carlick through her counsel. I pause here, to observe that Ms. Carlick's expressed reason for refusing to testify, as stated this morning through her counsel, is not very persuasive. Basically, it was her personal choice based upon her assessment of how she thought testifying would affect her emotionally and how she viewed the necessity of her testimony to secure a conviction against Mr. Larue. Courts cannot permit a witness, in these circumstances, to make such a determination and thereby usurp the function of the Court to determine whether Ms. Carlick should be excused from testifying.

[11] I have also considered the additional time and expenses incurred as a result of Ms. Carlick's refusal to testify as set out in the affidavits filed by the Crown, but that is a very, very minor point for consideration as Crown counsel fairly pointed out. Ensuring fair trials is an expensive proposition and one which society incurs to ensure that justice prevails.

[12] Clearly, in this case, deterrence is the primary consideration. A specific deterrence to Ms. Carlick should she, for some reason, be called in the future to give evidence in this case, and secondly, and importantly, general deterrence so that any other person who may consider refusing to testify will know, without a doubt, that they will risk a significant penalty.

[13] This Court's task is made more difficult in that the law does not permit me to make my sentence consecutive to the life sentence that Ms. Carlick is presently serving. In that regard, see *R.* v. *Cadeddu,* [1980] O.J. No. 1566, a decision of the Ontario Court of Appeal which was approved by the British Columbia Court of Appeal in *R.* v.

Camphaug, [1986] B.C.J No. 202. Nor do I have the jurisdiction to formally add my sentence to extend Ms. Carlick's parole eligibility date. I can and will, however, make the Court's views on this known to the parole authorities by virtue of these reasons.

[14] In all of the circumstances of this case, including that this was a trial for first degree murder, that Ms. Carlick was the only eye-witness, that she has a significant criminal record, including convictions for both manslaughter as well as second degree murder, that she is an Aboriginal person and therefore entitled to the benefit of the principals set out in *Gladue*, and the fact that she has been in remand since her contempt, I believe the appropriate sentence in order to send the message both to her and to the public generally, is a sentence of two years imprisonment concurrent to the life sentence she is presently serving.

[15] It is this Court's express hope that the parole authorities will take into consideration this conviction and this sentence when Ms. Carlick first comes up to be considered for parole. If there is not to be any effect from this conviction and sentence on her ultimate eligibility for parole, it means that she and anyone in similar circumstances can basically flout court orders to testify and, consequently the rule of law, with absolute impunity. That is my decision.

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BROOKER J.