SUPREME COURT OF YUKON

Citation: *R. v. L.A.J.*, 2018 YKSC 2

Date: 20180116
S.C. No. 17-AP004
Registry: Whitehorse

BETWEEN

HER MAJESTY THE QUEEN

RESPONDENT

AND

L.A.J.

APPELLANT

Before Mr. Justice R.S. Veale

Appearances:
Amy Porteous — Counsel for the Respondent
Vincent Larochelle — Counsel for the Appellant

REASONS FOR JUDGMENT

INTRODUCTION

[1] Ms. J. pled guilty to an assault contrary to s. 266 of the *Criminal Code* before a judge of the Territorial Court. The Crown submitted that a suspended sentence with probation was the appropriate sentence. The defence advocated for a conditional discharge.

[2] The sentencing judge convicted Ms. J. and imposed a suspended sentence, resulting in a criminal record. He focussed on Ms. J.'s admission in the Pre-Sentence Report that she smoked marijuana daily and would continue to do so. He found that it would be contrary to the public interest to give a conditional discharge to an offender

who says she will continue to possess marijuana, despite the fact that it is currently illegal to do so.

[3] Ms. J. appeals her conviction and the issue is whether a conditional discharge, in the circumstances of Ms. J., is contrary to the public interest.

THE FACTS

[4] Ms. J. is a 57-year-old citizen of the Vuntut Gwich'in First Nation, which is based in Old Crow. Old Crow is a small First Nation village in northern Yukon. There is no road access. There are approximately 221 residents.

[5] On December 29, 2016, Ms. J. was in the Old Crow grocery store with her adult daughter. Ms. J. began to swear at the complainant and, after a brief period of time, grabbed her by the coat and punched her in the face, injuring her lower lip. Ms. J. then said she would run the complainant out of town and that she should "get the fuck out of town". The store manager intervened and the incident ended.

The Victim Impact Statement

[6] Although there is no lasting physical injury, the complainant has been affected by the assault, which was in a very public place in a small community.

[7] She states that there are continuing impacts upon her from the supporters or members of Ms. J.'s family. There was no finding of fact in that regard but I accept that it is an impact felt by the complainant.

The Pre-Sentence Report

[8] The Pre-Sentence Report is the source of most of the information about Ms. J. considered in the sentencing hearing. Ms. J. has one previous discharge in 1988.

[9] Ms. J. was 56 at the time of this incident and has always resided in Old Crow. She was raised by her mother, who was essentially a single parent. She has had little contact with her biological father. She had a stepfather and remembers some contact with him, but he froze to death when she was a young child.

[10] Ms. J. described her relationship with her mother as positive but there was drinking, abuse and spousal violence in the home from a young age. Her mother struggled with alcohol until the age of 50 when she stopped drinking. Her mother had 11 children but not all were raised by her. Ms. J. recalls spending a lot of weekends with her grandparents while her mother drank. Her mother died tragically after a fall through the ice in 2000 and losing her has been difficult. She has recently started to come to terms with the violence and abuse she experienced as a child and this has been a source of considerable stress.

[11] Ms. J. is unemployed and has had some challenges maintaining employment. She is currently a single parent with two daughters.

[12] Ms. J. has had an alcohol problem but reports that she has been sober for five years. Alcohol was not a factor in the incident with the complainant.

[13] The probation officer reported the following information that is the issue before the Court:

> Ms [J.] reports to smoking marijuana on a daily basis to "calm [herself] down". Ms [J.] advised that since seeing [her counsellor] more regularly (since February of 2017) she has gone from "smoking six (6) joints a day down to two (2) joints a day". Ms [J.] stated that this usage is "not that much", does not consider it to be a problem, and does not wish to stop at this time.

[14] Ms. J. justified her assault by describing in some detail a past event which occurred some 10 years earlier, where she alleges that she was beaten up by a group that included the complainant. She was injured but no criminal charges resulted. This is her justification for assaulting the complainant.

[15] The probation officer reported:

> Ms [J.] said she would not be agreeable to writing an apology letter because [the complainant] never apologized to her. In contrast to this, Ms [J.] told the writer that she was going to stand up at court and say "I'm sorry I was wrong". The writer questioned Ms [J.] with regard to the discrepancy between what she told the writer and what she was planning on telling the court, to which Ms [J.] stated that she "would not say [she's] sorry" but that she knows she was wrong.

[16] After the Pre-Sentence Report was prepared and following further counselling, counsel for Ms. J. filed the following apology letter.

> I wish to apologize to the court and to the complainant for my actions and attitude that has brought me before the court. I have been attending counseling since the incident and it helps me to focus on myself. I have also been volunteering with the elders and working. I am very sorry I have come before the court and I will not do it again. I am embarrassed by being here. I hope that the complainant will accept my apology as I take full responsibility for my actions that have brought me here today.

[17] The counsellor confirmed in a letter to the court:

> … [she] has done well in our sessions and I have no reservations concerning her honesty and or her effort during our time together. She states that our sessions have been helpful to her and we plan on continuing to meet regularly to discuss past history and the anxiety present now.
>
> …

[18] Since being charged, Ms. J. has also acted as a volunteer to assist two elders in Old Crow.

THE TRIAL JUDGMENT

[19] The trial judge gave oral Reasons for Sentence in Old Crow. He addressed the concern arising out of the Pre-Sentence Report that while Ms. J. accepts responsibility for her actions, she still blames the complainant for what took place 10 years ago. Nevertheless, he accepted the assertions in her letter that she knew it was wrong and that she is sorry.

[20] Although it was not raised by either Crown or defence, the trial judge raised the issue of marijuana use by Ms. J. He acknowledged that it had been reduced from six joints a day to two joints a day through counselling. He gave counsel an opportunity to respond.

[21] He stated the following at para. 14 of his Reasons for Sentence:

> [14] I raise the issue, as I am familiar with the decision that I recently issued in R. v. Graham, 2017 YKTC 29, in Haines Junction. In that case, Mr. Graham had entered a guilty plea to having committed an offence contrary to s. 4(1) of the Controlled Drugs and Substances Act, S.C. 1996, c. 19. He had been charged with possession for the purposes of trafficking and ended up pleading to simple possession of marijuana.

[22] Mr. Graham also indicated in his Pre-Sentence Report that he was a daily user of marijuana and would not stop.

[23] At para. 15 of his Reasons for Sentence, the trial judge quoted from the *Graham* case which set out his view of the public interest component of a discharge for Mr. Graham:

> 12 The problem that arose for me with respect to the discharge at the original sentencing date was that Mr. Graham, quite candidly and quite honestly, said that he used marijuana daily and that was not going to stop. I was confronted with the difficulty of imposing a conditional discharge with a probation order on someone who has

> candidly admitted he is going to be using illegal drugs every day to deal with the issues he had been dealing with . . .
>
> 13 In order to use illegal drugs, one has to buy these drugs from somewhere. Since there is nowhere that can sell them legally except to a person with a medical marijuana exemption, it meant Mr. Graham had to be buying from someone who was trafficking illegally, and he himself becomes part of the trafficking transaction. That, of course, facilitates illegal trafficking on a bigger scale. The people trafficking the marijuana that he is purchasing may be doing more — I do not know — and nothing turns on that, but the bottom line is that the public interest remains clear, that the trafficking of illegal drugs in the Yukon can have a very negative impact on the larger community.
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> 14 The countervailing point is, of course, the Liberal government's indication at that time [of the original sentencing] that it was going to legalize marijuana [at some point in the future,] and the fact that they have moved forward towards doing that. And at some date in the future there is a very good likelihood, given the majority government, that marijuana use and purchase will be legal in certain prescribed amounts and under certain rules and regulations.

[24] In *Graham,* the trial judge adjourned the sentencing for four months to permit Mr. Graham to obtain a medical marijuana exemption or "some indication" that his daily usage was not going to continue.

[25] Mr. Graham appeared four months later and his counsel said he had just applied for the medical marijuana exemption. That did not satisfy the trial judge who declined to impose a conditional discharge and sentenced Mr. Graham to a fine of $300.

[26] In the Reasons for Sentence of Ms. J., the trial judge stated:

> [21] And as I said in the Graham sentencing and discussions with counsel, it puts the RCMP in a somewhat difficult situation, because right now the law is that it is still illegal. And the RCMP, while they may use discretion in deciding whether they are or are not going to deal with marijuana possession charges at this point in time, are still under a

> clear legal obligation to investigate and charge where appropriate.
>
> [22] I still have that problem that a discharge for someone who says that they are going to continue on a daily basis, which will facilitate trafficking or cultivation for possession for the use of marijuana simply is contrary to the public interest. I am not saying that people who do that should necessarily be charged. That is an entirely different issue, and I am sure the RCMP prioritize what they do, but I think that it sends the wrong message.
>
> [23] As such, for the same reasons as in the Graham case, notwithstanding the distinctions, I do not think I can impose a discharge. I think it is contrary to the public interest, and that again recognizes the public interest in Ms. [J.] not having a criminal record.
>
> [24] In the balancing of them all, I am afraid I feel I must come down on this side. The remorse issue and the issue of the vigilante justice would not in themselves have precluded me from granting a discharge, but when I throw in the marijuana issue, it is a bigger issue for me. I do not find the distinction is enough that I could explain what I said in Graham and do something different here.

[27] He suspended the passing of sentence and ordered eight conditions of probation, for a period of six months, the details of which are not in issue. There is no condition prohibiting the possession of non-prescription drugs or alcohol.

[28] He concluded with the following:

> [26] I have noted the letters that have been provided that are positive in support of Ms. [J.], and her involvement in counselling. I accept her apology that she has provided to the Court and note the work that she has been doing with the Elders in her community. In my opinion, she is a contributing member of her community and will continue to be. So this incident is one I do not expect to be repeated.

THE CROWN AND DEFENCE SUBMISSIONS

[29] At the sentencing hearing, the Crown focussed upon the lack of credible remorse. The Crown, on being advised of the judge's view on discharges while continuing to smoke marijuana, found it "interesting" and that it made sense, but it was the remorse issue that was her primary concern.

[30] Defence counsel submitted that Ms. J. took counselling after the Pre-Sentence Report, volunteered with the Elders and learned coping mechanisms and better strategies from the counselling. He distinguished *Graham* as case where the offender was saying that he would continue to do what he was being sentenced for.

[31] At the appeal hearing, the Crown submitted that the sentencing judge committed no error and did not fail to consider a relevant factor. She submitted that the sentence was fit for a mature, once-discharged offender who committed an act of violence. It combined both general deterrence for a brazen public assault for which she refused to accept full responsibility and candidly admitting that she would not comply with current marijuana laws. She submitted that granting the discharge would cause the public to lose confidence in the administration of justice.

[32] Counsel for the appellant notes that the trial judge stated he would have granted a conditional discharge were it not for the fact that Ms. J. said she smoked marijuana on a daily basis. He argues that the result of this decision is that anyone dealing with a drug addiction cannot get a conditional discharge as they are facilitating the trafficking of drugs. He submits that the decision will discourage offenders from making a full and frank disclosure for their pre-sentence reports, which will hinder probation officers from recommending counselling to deal with drug addiction.

[33] Counsel for Ms. J. also submits that there is no connection between Ms. J.'s consumption of marijuana and the offence.

THE LAW OF CONDITIONAL DISCHARGES

[34] Section 730(1) of the *Criminal Code* sets out the test to determine whether a conditional discharge is appropriate:

> 730 (1) Where an accused, other than an organization, pleads guilty to or is found guilty of an offence, other than an offence for which a minimum punishment is prescribed by law or an offence punishable by imprisonment for fourteen years or for life, the court before which the accused appears may, **if it considers it to be in the best interests of the accused and not contrary to the public interest**, instead of convicting the accused, by order direct that the accused be discharged absolutely or on the conditions prescribed in a probation order made under subsection 731(2). (my emphasis)

[35] Section 730(3) states that where the offender has been discharged, the person is deemed not to have committed the offence and therefore has no criminal record.

[36] There is a further section of the *Criminal Code* which applies to Aboriginal offenders:

> 718.2(e) all available sanctions, other than imprisonment, that are reasonable in the circumstances and consistent with the harm done to victims or to the community should be considered for all offenders, with particular attention to the circumstances of Aboriginal offenders.

[37] The case law on conditional discharges has been addressed in two decisions of this Court: *R. v. MacKenzie*, 2013 YKSC 64 ("*MacKenzie*") and *R. v. Martin*, 2017 YKSC 61 ("*Martin*"). These decisions review the case law from *R. v. Fallofield* (1973), 13 C.C.C. (2d) 450 (B.C.C.A.)*; R. v. B.J.M*. (1976), 3 Alta. L.R. (2d) 341; *R. v. Shortt*, 2002 NWTSC 47 and *R. v. Samson*, 2015 YKCA 7.

[38] Addressing the first part of the test, that the court considers the conditional discharge to be in the best interests of the accused, this is generally met if the accused is a person of good character, without a criminal record, so that it is not necessary to enter a conviction to deter future offences and recognizing that the entry of a conviction may have significant adverse repercussions. It is not necessary to identify specific results like the loss of employment but only that the entry of a conviction may have significant repercussions that create a genuine concern.

[39] The second part of the test for a discharge, whether it would be contrary to the public interest to grant the discharge, focusses on whether there is a need for general deterrence of others in the community and the need to maintain the public's confidence in the administration of justice. The courts consider the following:

1. the gravity of the offence;
2. the prevalence of the offence in the community;
3. public attitudes towards the offence; and
4. public confidence in the effective enforcement of the criminal law.

[40] In both *Shortt* and *MacKenzie*, the trial judges imposed suspended sentences where the offences involved spousal or domestic violence, which they found requires both denunciation and deterrence.

ANALYSIS

[41] An appeal court may intervene to vary a sentence if the court below has committed an error in principle, failed to consider a relevant factor, overemphasized appropriate factors or imposed a sentence that is demonstrably unfit. In *R. v. Lacasse,*

2015 SCC 64, the Court clarified that the above principles only justify intervention where the error had an impact on the sentence imposed.

[42] As stated in *R. v. Ipelee,* 2012 SCC 3, at para. 38, sentencing judges, despite the constraints of parity, must have sufficient manoeuvrability to tailor sentences to the circumstances of the particular offence and the particular offender. LeBel J. specifically addressed parity at paras. 78 and 79:

> 78 The interaction between ss. 718.2(e) and 718.2(b) - the parity principle - merits specific attention. Section 718.2(b) states that "a sentence should be similar to sentences imposed on similar offenders for similar offences committed in similar circumstances". Similarity, however, is sometimes an elusory concept. As Professor Brodeur describes ("On the Sentencing of Aboriginal Offenders: A Reaction to Stenning and Roberts" (2002), 65 Sask. L. Rev. 45, at p. 49):
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> > "... high unemployment" has a different meaning in the context of an Aboriginal reservation where there are simply no job opportunities and in an urban context where the White majority exclude Blacks from segments of the labour-market; "substance abuse" is not the same when it refers to young men smoking crack cocaine and to kids committing suicide by sniffing gasoline; "loneliness" is not experienced in a similar way in bush reservations and urban ghettoes.
>
> 79 In practice, similarity is a matter of degree. No two offenders will come before the courts with the same background and experiences, having committed the same crime in the exact same circumstances. Section 718.2(b) simply requires that any disparity between sanctions for different offenders be justified. To the extent that Gladue will lead to different sanctions for Aboriginal offenders, those sanctions will be justified based on their unique circumstances - circumstances which are rationally related to the sentencing process. Courts must ensure that a formalistic approach to parity in sentencing does not undermine the remedial purpose of s. 718.2(e). …

[43] The trial judge correctly identified Ms. J.'s Aboriginal circumstances, or *Gladue* factors, based on the drinking, abuse and spousal violence in her home as a child, its impact on her and the tragic death of her mother. He was satisfied that her remorse for the offence was genuine and she accepted responsibility by her letter and that specific deterrence was not necessary. He concluded that the first part of the discharge test in s. 730(1) had been met and that a discharge was in her best interest.

[44] However, in my view, the trial judge erred when he applied his decision in *R. v. Graham* to conclude that it would be contrary to the public interest to grant a conditional discharge to this offender because she disclosed that she smokes marijuana daily to calm herself down. This is particularly so given his acknowledgement that she had reduced her usage from six joints a day to two as a result of her counselling for this offence. The denial of a conditional discharge in *Graham* may have been appropriate for that particular offence and offender, but it is not appropriate for Ms. J.

[45] This is not a case where the trial judge has failed to apply s. 718.2(e) of the *Criminal Code* and consider Ms. J.'s special circumstances. Rather, it is a case where what may have been an appropriate consideration in the *Graham* case has been given far too much weight in Ms. J.'s circumstances.

[46] In my view the fit sentence for Ms. J. must take the following differences from the *Graham* case into consideration:

1. Mr. Graham was charged and pled guilty to a drug offence of possession of marijuana, reduced from a charge of trafficking. He had two 8.2-gram bags of marijuana, $350 and a cellphone. Ms. J.'s offence of common

assault has no connection to the illegal drug industry and the trial judge's concern about the negative impact it may have on her community.

2. Ms. J.'s disclosure of marijuana smoking was made to her counsellor and probation officer. It was not a defiant act which may be an appropriate characterization of Mr. Graham's statement to the court that he was not going to stop smoking marijuana, the precise offence before the court. In spite of that, Mr. Graham was offered the opportunity of legalizing his marijuana use with a four-month adjournment, which he did not utilize to address the judge's clear statement that a discharge was contrary to the public interest in a drug possession case.

3. With respect to the sentencing judge's concern about illegal drug trafficking, it is simply not appropriate to lay that legitimate community concern on Ms. J., who is not before the court on a drug charge. It may indeed present a quandary to the RCMP in Old Crow pending the passage of federal legislation permitting possession of marijuana in small quantities, but that has little to do with the offence of common assault and whether Ms. J. should be conditionally discharged.

[47] The sentencing judge, although alive to the different circumstances of Mr. Graham and Ms. J., failed to distinguish them. In my view, Ms. J.'s case is distinguishable as there was no illegal drug activity in her offence and her disclosure of marijuana smoking was appropriate for her counselling and pre-sentence report and not a disclosure for which she should be penalized in her sentencing. I am of the view that it is not in the public interest that the personal possession and use of marijuana should

result in imposing a criminal record on a 56-year-old First Nation woman who has taken counselling, apologized, and taken responsibility for her offence

[48] Finally, in my view, the “not contrary to the public interest” factor in a conditional discharges refer to whether there is a need for general deterrence and the need to maintain public confidence in the administration of justice. That deterrence relates to the offence of common assault and not Ms. J.’s marijuana smoking. I find that a discharge in these circumstances would not affect the public’s confidence in the administration of justice.

CONCLUSION

[49] I conclude that the trial judge’s decision to suspend the passing of sentence, thereby giving Ms. J. a criminal record, resulted in an unfit sentence. I therefore allow the appeal and grant a conditional discharge on the same terms as the sentencing judge imposed.

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VEALE J.