Citation: *R.* v. *C.J.D.*, 2012 YKTC 17

Date: 20120126
Docket: 11-00047
Registry: Whitehorse

IN THE TERRITORIAL COURT OF YUKON
Before: His Honour Judge Lilles

REGINA

v.

C.J.D.

Publication of information that could disclose the identity of the complainant has been prohibited by court order pursuant to section 486.5 of the *Criminal Code*.

Appearances:

Lee Kirkpatrick	Counsel for the Territorial Crown
Jennie Cunningham	Counsel for the Defence

REASONS FOR SENTENCING

[1] LILLES T.C.J. (Oral via teleconference): We are dealing, then, with the case of C.J.D. Mr. D. is a 26-year-old man who has pled guilty to a charge of assault on A.M., contrary to s. 266 of the *Criminal Code.* At the time, A. was two and a half years old. Mr. D. lives with S.M., A.'s mother. Although D. and M. are not married, Mr. D. serves as A.'s stepfather. In fact, in everyday matters, A. considers Mr. D. to be his father.

[2] The assault occurred on the evening of Thursday, March 24, 2011, when S.M. was out of the home. A. had been crying and would not stop. Mr. D. admitted that on three separate occasions he went upstairs and spanked A. in an attempt to stop his crying. On one occasion, he held A. by his face using his two hands and lifted him up

off the bed and dropped him back onto the bed. On at least one of these occasions, he put his hand over A.'s mouth, but not covering his nose, in an attempt to stop A.'s crying.

[3] S.M. returned home about 10:00 p.m., and did not notice anything abnormal until the next morning when she took A. to the toilet. She was extremely upset and stayed home with A. Friday.

[4] When she returned A. to daycare the following week, the bruising on A.'s face and buttocks were noticed. Family and Children's Services were contacted. Mr. D. was immediately and fully cooperative with Family and Children's Services and the police. He fully disclosed what he had done. He accepted full responsibility for what had happened.

[5] A. was examined by Dr. Sally MacDonald at the hospital on March 31st. She observed three faint linear bruises on A.'s face, two on the left side and one on the right. These would be consistent with bruising caused by Mr. D.'s fingers. The photographs filed as an exhibit showed a very slight discoloration. The buttocks did not show any signs of bruising. This examination took place one week after the assault.

[6] The Pre-Sentence Report indicates Mr. D. grew up in a traditional, supportive, middle-class family. After graduating from high school, Mr. D. obtained two trade certificates: in sheet metal and refrigeration. Except for one year, he worked in the family business, [business named], where he is now the sales and service manager.

[7] Mr. D. has a four-year-old child, E., from an earlier relationship. He shares custody with E.'s mother. His relationship with A.'s mother, S.M., began over a year

ago. According to her, it is a good relationship. She describes Mr. D. as being very good with children. He has been a father figure to A. She states that this incident is totally out of character. Nevertheless, she considers what happened to be a very serious matter. The following is an extract from the letter S.M. filed with the court:

> I am writing you this letter today to clarify to you just what kind of person C.D. really is. He is a caring, respectful, hard working, loving man that would do anything for his family. C. loves his kids very much, as he considers and treats A. like his own. Since the incident C. has done everything in his power to make things right again and become a good person like he always has been. He has seen a psychologist since the incident and is still seeing her to this day. We are also seeing a psychologist for couple's therapy so we can learn to communicate effectively and be on the same page when it comes to everyday life and parenting, which is really helping with the reduction of stress. He has done everything that Family and Children Services has asked him to do, and more. He has asked to work with a Family Support Worker and has met with her to discuss parenting and developmental stages in a child's life. C. has also decided to make a life change by not drinking and working out daily. I have noticed a huge improvement in his stress level, his mood, and the way he handles himself. He is a lot more patient and understanding. He now understands the kids' developmental stages and instead of getting frustrated with their behaviours, he sits down with them and really listens to what is wrong and talks it out with them.
>
> C. tells the kids 10 times a day how much he loves them and is constantly [showering] them with hugs, kisses, cuddles and spending every extra second that he has with them, playing, cooking, reading, teaching etc. A. asks where C. is everyday and is so excited to see him after day care. A.'s favourite game is when C. sits on the floor and A. runs, gives him a huge hug and tries to knock him over. They can play that for hours and A. just laughs and laughs.

Ms. M. and her parents do not trivialize what happened. Nevertheless, Ms. M. states:

> We all care about A. very much and if I had the slightest inkling or did not trust that C. would never harm A. again, I would not be with C. and would not continue to have C. in A.'s life whatsoever. C. is a good person and acted atrociously and out of character on the day I will never forget.

[8] The information filed with the Court strongly suggests that stress and alcohol

were operating factors of this offence. C. himself stated that alcohol was a factor, as it resulted in poor judgment on his part. He has not consumed alcohol since the incident on March 24, 2011.

[9] Mr. D. has been on bail conditions since the incident and has complied fully. He has done everything recommended by Family and Children's Services, including living apart from S. and A. for the first five months and not having any contact with A. for three months. He has been seeing a psychologist monthly, and now Mr. D. and Ms. M. are attending couples counselling. Mr. D. has been back in the family home since August, and was then also allowed unsupervised access to A. The family support worker worked with the family for three months and was withdrawn on December 1, 2011.

[10] Letters of support were filed by Mr. D.'s parents and by S.M.'s parents. They underscored the seriousness of the offence, but also acknowledged that the actions were out of character and were triggered by a combination of alcohol and stress. Mr. D., S.M. and A. have extended family support in Whitehorse.

[11] The Pre-Sentence Report concludes as follows:

> Overall, C. has a high number of positive factors which will contribute to him getting past this incident and continuing on with a healthy life. These include his excellent employment history, his education, a high number of healthy and supportive family/friends, secure housing and financial stability.

[12] The assault took place on March 24, 2011. As mentioned earlier, Mr. D. cooperated fully with the police and Family and Children's Services. He has complied fully with the recommendations made by Family and Children's Services, including a period of separation from S. and no contact with A. He immediately engaged in

counselling with a psychologist, Marilyn Smith, which counselling continues today. Ms. Smith concludes her letter to the Court by stating:

> Blended families have special needs that can tax the best of relationships and I feel that both partners have been making an excellent effort at making it work. They have both made time to learn new skills and be patient with each other through a challenging time.

[13] It is obvious to me that the assault, as serious and regrettable as it was, resulted in a process of shame, remorse, self-awareness, learning and maturity. That, in turn, has resulted in positive changes in Mr. D. These changes are evident in his statement to the Court, which I will reproduce in its entirety.

> My name is C.J.D. I was charged with assault of A.M. at the end of March. This incident in my life has really hurt me, my family and especially A. I am very ashamed about what happened and I am making sure nothing like this will ever happen again.
>
> Right after that day I stopped drinking completely. Before I was arrested and told not to. I have found other ways to relieve stress like working out daily and talking to psychologist about other ways to deal with stress and how to not become frustrated. My psychologist is Marilyn Smith and I have been seeing her every four weeks since early April. I have also worked closely with children and family services and proved to them that I am a good person and a good father; they believe that too and have given me full unsupervised access to A. I am also working with a family support worker to learn different parenting strategies and will continue to until they and S. and I feel we are on the right track of great parents. I believe that this has helped me in way more aspects of my life and I am very happy with how I have grown from this incident. I love A. just as much as my own daughter E. who is four years old. They are just like brother and sister now and A. and I have a very good relationship. I think of him as my own son and he thinks of me as his dad. I want to be his father figure in his life so he can look up to me and grow into a great man that I know he will be. One of my favourite parts of the day is when I read him a book before bed and tuck him in and he says he loves me.
>
> I feel very bad about this whole thing and regret it so much but am happy that I have been able to learn all that I have to be a better person. I know that nothing like this will ever happen again and have a safety plan so if I ever do get frustrated when I am alone with the children that I can call

> people to come and help me. This has made my family stronger and my love for them all grow more than I thought it could. I am going to continue working with all the people that have been helping my family to learn as much as I can so I grow into an even better father for A. and E.

[14] The Crown and defence appear to be in agreement on the facts, but differ significantly on their recommendations as to sentence. Mr. D. asked the Court to consider a conditional discharge. The Crown recommends a 90-day conditional sentence of imprisonment followed by one year of probation.

[15] The cases filed by the Crown can all be distinguished on the facts. Some of the differences include:

- a number of charges and more serious charges;
- occurrences on more than one occasion;
- not guilty plea, a trial and a finding of guilt;
- more serious physical injuries such as broken bones;
- long-term psychological impact on child victim;
- absence of counselling, treatment and similar initiatives taken by the offender prior to the sentencing;
- no indication of support in the community; and
- did not involve family working together to continue family relationship.

[16] In *R.* v. *MacDonald* [2009] M.J. No. 96, Manitoba Court of Appeal, Chief Justice Scott identified three categories of child abuse as a useful guide to sentencing:

> (1) cases involving the application of force with the expectation of causing injury or indifference to it;
> (2) cases involving the application of force where a parent was immature and unskilled and acting out of emotional upset, frustration or temper and did not fully appreciate the serious injuries which might result; and
> (3) cases involving diminished responsibility through mental disorder where the abnormal mental condition of the accused requires the treatment of the offender to be given priority over the principles of general and individual deterrence.
>
> This analysis provides a useful guide, but its application cannot, of course,

> displace the sentencing principles by which judges are bound, including that which requires a sentence to take into account the gravity of the offence.

[17] I disagree with Crown counsel's submission that this case falls within category one. In my view, the assault against A. is best described as category two, as an assault by an unskilled parent acting out of frustration. The information filed with the Court demonstrates that Mr. D.'s actions resulted from lack of parenting skills and frustration, and that he did not intend to cause injury. In any event, the injuries were of a minor nature, consisting of bruising only. His immediate remorse, acceptance of responsibility and full engagement in counselling has been part of a maturing and learning process for Mr. D. This is evident from his statement to the Court.

[18] Section 718 of the *Criminal Code* sets out the purpose of sentencing. In assault charges, the objectives that are normally emphasized are denunciation, specific and general deterrence, and rehabilitation.

[19] Section 718.01 requires the Court to give primary consideration to the objectives of denunciation and deterrence in cases involving the abuse of a person under the age of 18.

[20] Section 718.2(iii) requires the Court to consider the abuse of trust or authority in relation to the victim as an aggravating factor in sentencing. These directives recognize the vulnerability of children, especially young children, and the position of trust that parents occupy towards their children.

[21] Notwithstanding the foregoing aggravating factors, the sentencing judge is also directed as follows by s. 718.2:

(d) an offender should not be deprived of liberty, if less restrictive sanctions may be appropriate in the circumstances; and

Section 718.2:

(e) All available sanctions other than imprisonment that are reasonable in the circumstances should be considered for all offenders, with particular attention to the circumstances of aboriginal offenders.

[22] It is important to note that while Parliament has directed that primary consideration be given to the principles of denunciation and deterrence in assaults on children, it has not precluded the use of conditional discharges or other community-based dispositions. The full range of sentencing options are available. Sentencing requires a careful balancing of the various objectives and principles established by Parliament.

[23] On the facts of this case, including the nature and seriousness of the offence, the circumstances of the offender, the acceptance of responsibility by Mr. D., and the steps taken by him in counselling and programming, I have concluded that a period of imprisonment, whether conditional or actual, is not necessary to meet the statutory requirements of s. 718 of the *Criminal Code*. The issue is whether a conditional discharge with a term of probation attached is sufficient or whether a conviction must be entered in order to satisfy the objectives of sentencing, with particular attention to denunciation and deterrence.

[24] The leading case on the application of the discharge provisions is the British of Columbia Court of Appeal decision in *R.* v. *Fallofield*, [1973] 13 C.C.C. (2d) 450. This case has been adopted and applied on numerous occasions in the Yukon Territory. A

conditional discharge contemplates the commission of an offence for which the maximum punishment is less than 14 years imprisonment. It is not limited to a technical or trivial violation of the law. The following are several quotes from the *Fallofield* decision:

- Of the two conditions precedent to the exercise of the jurisdiction, the first is that the Court must consider that it is in the best interests of the accused that he should be discharged either absolutely or upon condition. If it not in the best interests of the accused, that, of course, is the end of the matter. If it is decided that it is in the best interests of the accused, then that brings the next consideration into operation.

- Generally, the first condition would presuppose that the accused is a person of good character, without previous conviction, that it is not necessary to enter a conviction against him in order to deter him from future offences or … to rehabilitate him, and that the entry of a conviction against him may have significant adverse repercussions.

- The second condition precedent is that the Court must consider that a grant of discharge is not contrary to the public interest.

- In the context of the second condition the public interest in the deterrence of others, while it must be given due weight, does not preclude the judicious use of the discharge provisions.

[25] In this case, as in most cases, a discharge would be in the best interests of the accused. He has no criminal record. There is ample evidence that he is a person of good character and that this offence is inconsistent with his normal behaviour. Mr. D.'s early acceptance of responsibility, his remorse, his participation in counselling and his willingness to work with Family and Children's Services satisfy me that specific deterrence need not be addressed in this sentencing. His work in government buildings may require a security clearance that may be adversely affected by registering a conviction. His family often travels to Alaska for holidays and recreation. I am prepared to take judicial notice of the fact that a criminal record may create problems for Mr. D.

and his family crossing into the United States. I am satisfied that granting of a discharge would be in Mr. D.'s best interests.

[26] In a case such as this, where the assault is against a young child, the more difficult issue to be decided is whether granting of a discharge is contrary to the public interest. Parliament chose not to define the phrase "public interest". As a result, the circumstances of the case under consideration and decisions in other cases will be instructive. A helpful analysis of "public interest" factors can be found in the decision of *R.* v. *Triplett*, [2008] A.J. No. 958.

[27] While general deterrence should be weighed in addressing the public interest, it is only one factor to be considered. The public interest encompasses a wider perspective than a need to deter others. Moreover, general deterrence is less of a factor in offences that are not premeditated and arise out of frustration and immaturity, as in this case. General deterrence is more important in circumstances where the offending behaviour is premeditated or planned.

[28] The public interest includes an interest in acceptance of responsibility, an early guilty plea, and remorse by the offender. In appropriate cases, it includes a reparation or restitution to victims. In part, this relates to saving the State the expense and time associated with a trial. The public interest is also served when victims are spared the anxiety and sometimes trauma of awaiting trial and testifying. The public interest is also served when an accused takes the opportunity to learn from his out-of-character error in judgment and to develop skills and knowledge that will help ensure that a similar incident will not occur in the future.

[29] Mr. D. has been diligent in seeking out psychological counselling and, more recently, couples counselling. He has worked closely with Family and Children's Services, including a support worker. It is evident that Family and Children's Services are satisfied with the progress Mr. D. has made during the past ten months. The support worker has been withdrawn and unsupervised access to A. has been granted to Mr. D.

[30] The seriousness of the offence is a factor to be considered. The more serious the offence, the less likely would be the use of a discharge. An assault against a vulnerable infant by a parent or person in authority is obviously more serious. These are aggravating factors, and s. 718.01 of the *Code* requires the Court to give primary consideration to the objectives of denunciation and deterrence. Further, this was not one incident involving an impulsive slap. During the evening, there were three incidents involving spanking and, in one instance, grabbing A. by the face. There was no indication how close in time these incidents occurred. Mr. D. was charged with one assault. I am satisfied that Mr. D.'s actions should be considered as one event.

[31] Although every assault against a child is serious, in the range of assaults against children that are prosecuted pursuant to the *Criminal Code*, the facts of this case clearly fall in the low range. There was some bruising, but after a week no bruises were observed by Dr. MacDonald on A.'s buttocks. The finger marks on the side of A.'s face were barely noticeable, as in the photographs. In other words, the bruising was transient.

[32] The nature and circumstances of some offences demand that they be part of the

public record so that the public would be aware of the commission of the offence by the accused. Sexual assaults, crimes of dishonesty and offences which demonstrate a violent disposition fall into that category. On the other hand, if every case of excessive force by a parent by way of slap or spanking resulting from frustration or immaturity were charged and prosecuted criminally, our courts would do little else. That is not to condone such actions, but rather to recognize that parenting skills are often, unfortunately, "learned on the job." Moreover, the Supreme Court of Canada has recently found it necessary to establish guidelines for the use of force in disciplining children, indicating that there was a lack of consensus until recently and that changes have been taking place in our society with regard to the discipline of children (see *Canadian Foundation for Children, Youth and the Law* v. *Canada* (*Attorney General*), 2004 SCC 4, [2004] 1 S.C.R. 76.)

[33] "Public interest" is not synonymous with general deterrence. It encompasses wider considerations than the need to deter others, nor is it equated to or decided by expressions of public concern (see *R.* v. *Triplett*, *supra*, paragraph 36). Individuals who have committed assaults on children have, in the past, received a discharge as an appropriate sentence.

[34] The "public interest" also recognizes that emphasizing denunciation and deterrence in certain kinds of offences can produce unintended and possibly harmful consequences. For example, prosecuting domestic violence cases aggressively, with primary emphasis on denunciation and deterrence is believed to contribute to underreporting, recanting by witnesses and stays of proceedings in domestic violence cases. The introduction of the Domestic Violence Treatment Option Court in the Yukon

that provides a rehabilitative, court-supervised alternative to formal prosecution, sometimes resulting in discharges as the disposition, has significantly increased reporting by victims and encouraged treatment and rehabilitation by offenders (see the Domestic Violence Treatment Option, DVTO, Whitehorse, Yukon, Final Evaluation Report, October 2005).

[35] For similar economic and social reasons, family-based child assaults are probably also underreported. In appropriate circumstances, a non-punitive disposition that recognizes remorse and emphasizes rehabilitation will encourage disclosure and treatment and reduce reoffending.

[36] The public interest also includes the impact of the sentence on the fabric of the family. Both Mr. D. and S.M. have worked hard to keep the family together by engaging in counselling and working with helping agencies. This is not a case where the parties have separated and gone their separate ways. The public interest demands that a discharge not be precluded as a sentence in such circumstances, in part as an incentive to engage in rehabilitative programming. This is not to suggest that a discharge would be generally available in all cases involving assaults on children. Nevertheless, in a narrow range of circumstances, a discharge will be the appropriate sentence.

[37] It is incorrect to assume that a charge that results in a discharge does not provide deterrence. In *R.* v. *Lawry*, Alberta Court of Appeal, April 26, 1991, the Court stated:

> the judge must weigh and balance all of the relevant factors, and decide whether the discharge sought would be contrary to the public interest. The Court also recognizes there is not always the imposition of a criminal record which has the general and specific deterrent effect. The much

> greater deterrence is in having to participate in the judicial process. In many cases it is the concern of having friends, relatives and spouses learn of the conviction. It is the fear of the public notoriety which provides the real deterrent. The imposition of a criminal record adds nothing in terms of deterrence.

[38] I am not prepared to go as far as stating that the entering of a conviction adds nothing in terms of deterrence, but often, its contribution to deterrence is minor compared to the impact of the other factors referred to in the *Lawry* decision. In *R.* v. *Moore*, [2005] Y.J. No, 14, Yukon Territorial Court cited approvingly in *R.* v. *Malcolm*, 2011 YKTC 25, this Court stated:

> The question to ask here is would the ordinary, reasonable, fair-minded member of society, informed about the circumstances of the case and the relevant principles of sentencing, believe that the recording of a conviction is required to maintain public confidence in the administration of justice.

Later in the *Moore* case, this Court stated:

> … the court should examine carefully what it purports to achieve in the name of general deterrence when sentencing an accused and should be open to consider alternative dispositions to achieve the same ends.
>
> It would be wrong to suggest that a discharge with appropriate conditions could not have a general deterrent effect …

[39] I would add that as a matter of law and common sense, first offenders are entitled to favourable treatment at sentencing.

[40] Granting of a discharge is a matter of discretion. Discharges of any type should be used sparingly and for offences of violence, as in this case, should only be given in exceptional circumstances. Most of the factors reviewed in the circumstances of this case support a discharge, but some do not. They must be weighed and balanced against each other. Some of the factors that support a discharge are the lack of pre-

meditation, remorse, lack of maturity of the accused, presence of frustration on the part of the accused, early acceptance of responsibility, adherence to strict bail conditions for a period of ten months, seeking and participating in both individual and couples counselling, and working closely with Family and Children's Services. In addition, Mr. D. has no prior criminal record and the entering of a conviction could impact on his work opportunities. Moreover, both Mr. D. and his partner are determined to stay together and be a family with their children.

[41] Those that support the entering of a conviction include the statutory requirement to consider deterrence and denunciation, and an assault against a vulnerable infant.

[42] I have come to the conclusion that a conditional discharge is the appropriate disposition in this case. Mr. D. will be placed on probation for a period of 12 months on the following conditions:

1. Keep the peace and be of good behaviour;
2. Appear before the Court when required to do so by the Court;
3. Notify the Court or the Probation Officer in advance of any change of name or address, and promptly notify the Probation Officer of any change of employment or occupation;
4. Report to a Probation Officer within two working days and thereafter when, and in the manner directed by the Probation Officer;
5. Abstain absolutely from the possession or consumption of alcohol;
6. Not attend any bar, tavern, off-sales or other commercial premises whose primary purpose is the sale of alcohol;

7. Take such alcohol assessment, counselling or programming as directed by your Probation Officer;
8. Take such other assessment, counselling and programming, including parenting and couples counselling, as directed by your Probation Officer;
9. Provide your Probation Officer with the consent to release information with regard to your participation in any programming, counselling, employment or educational activities that you have been directed to do pursuant to this order.

[43] Mr. D., I should advise you as follows: If you are found to be in willful breach of these conditions, the Crown can apply to revoke this discharge and to enter a conviction. The Court may then impose any sentence that it could have imposed, instead of the discharge that I have imposed today.

[44] In addition, there will be a victim fine surcharge of $50, 14 days to pay.

[45] Based on the Crown counsel's submissions, I decline to make a DNA order or a firearms order. Both are discretionary in the circumstances.

[46] Counsel, are there any other issues that need to be addressed in the probation order that I have not addressed? Can I hear from Madam Crown first?

[47] MS. KIRKPATRICK: Nothing, thank you.

[48] THE COURT: Defence counsel, anything in that order that would create a difficulty for Mr. D.?

[49] MS. CUNNINGHAM: No, nothing, thank you.

LILLES T.C.J.