Citation: *R.* v. *J.D.*, 2011 YKYC 2

Date: 20110623
Docket: Y.C. 09-03547
Registry: Whitehorse

IN THE YOUTH JUSTICE COURT OF YUKON
Before: His Honour Judge Faulkner

REGINA

v.

J.D.

Publication of identifying information is prohibited by s. 110(1) and 111(1) of the *Youth Criminal Justice Act*.

Appearances:
David McWhinnie — Counsel for the Crown
Gordon Coffin — Counsel for the Defence
Fia Jampolsky

REASONS FOR SENTENCING

[1] At the outset, let me say that my reasons for sentence may seem rather brief and contain only a rather cursory examination of the applicable law -- considering that the young person stands convicted of manslaughter -- but the brevity of my reasons does not mean that I have not anxiously considered the matter or that I have failed to consider the provisions of the *Youth Criminal Justice Act* (the "*Act*") bearing on sentence or to consider the precedents or the other extensive materials filed by both the Crown and defence herein.

[2] For various reasons, the proceedings in this case have become quite protracted. Further delay for the preparation of extensive written reasons would not be in the best

interests of anyone and would run counter to the clear intention of the *Youth Criminal Justice Act* that proceedings under the *Act* be concluded with dispatch. Despite my just-stated intention to be brief, I will not be *that* brief, for the road to today has been anything but straight and some explanation of the journey is essential.

[3] J.D. was convicted after trial in the stabbing death of P.S. It should be noted that, although there was a trial, J.D. did offer a plea to manslaughter at the outset of the trial. She was 16 at the time of the killing and is today almost 18. She has no prior record.

[4] Having described the events leading to the death of P.S. in my Reasons for Judgment (2011 YKYC 1), they need not be reviewed extensively here. In short, J.D. attacked P.S. with a knife and inflicted 12 stab wounds, one of which proved fatal. The deceased, who had once been J.D.'s mother's boyfriend, still resided with J.D, her mother and her brother. Mr. S.'s presence in the home was much resented by J.D., who saw P.S. as unpleasant, lazy and a drag on the family's limited finances. There is no evidence whatever that would begin to explain why this general dislike of the deceased morphed into a murderous attack. Mr. S. made no advance toward J.D. and offered no provocation beyond his presence in the home.

[5] Clearly, the offence meets the definition in the *Act* of a serious violent offence. Although the Crown could have sought an adult sentence, it frankly conceded that it could not meet the onus of showing that a youth sentence would be inadequate. In

consequence, J.D. is to be sentenced under the provisions of the *Youth Criminal Justice Act.*

[6] The principles of sentencing under the *Youth Criminal Justice Act* are now well-settled and are derived primarily from the purpose and principles of sentencing set out in s. 38 of the *Act*. When sentencing youth, great weight is to be placed upon rehabilitation. To that extent, sentencing is said to be "offender-centric". At the same time (particularly in the case of serious violent offences), emphasis must also be placed on the imposition of "just sanctions that have meaningful consequences for the young person". In the end, neither rehabilitation nor the imposition of consequences can trump the other. The sentence must strike a balance between two often times contradictory objectives.

[7] The young person having been convicted of manslaughter, s. 42(2)(o) provides that the maximum sentence the court can impose is a custodial disposition of three years with the portion of actual custody and conditional supervision in the court's discretion.

[8] Purportedly applying the same provisions of the *Act* just discussed, the Crown and the defence produced two markedly different sentencing submissions. The Crown seeks a custodial sentence at the maximum allowed, less some credit for time served, with the suggestion that the portions of actual custody and conditional supervision be divided more or less equally. For its part, the defence contended that a proper

application of the *Youth Criminal Justice Act* should result in the imposition of a probation order.

[9] To arrive at a proper disposition, it will be helpful to begin with a consideration of what J.D. has done and her attitude concerning those deeds. At the end of the day, although I was not satisfied that the Crown had proved the specific intent for murder, it was clear that J.D. had attacked her victim with the infliction of substantial harm in mind. In shorthand form, what occurred here could best be described as a "near murder". Afterward, she made no attempt to assist P.S., but fled. Considering that she has taken the life of another, J.D. displays a troubling lack of remorse or regret for her actions. Even after making due allowance for the self-centeredness of youth, the court has to be concerned that she remains almost totally focused on the effect of all this upon her.

[10] The additional troubling factor running through this whole case is the lack of explanation for J.D.'s resort to lethal force. Dr. Janke, the psychiatrist who prepared a pre-sentence assessment of J.D. said:

> Given that Ms. D. up to this point in time has not been able to fully explain how she reached a state where her reaction to relatively minor social transgressions by P.S. was lethal violence, it is not possible to state that the risk for future acting out is low. In fact, I would state that it is difficult to provide any meaningful assessment at this point.

[11] Though youth are considered less culpable than adults, given their lack of maturity and judgment, in my view meaningful consequences in the circumstances of

this case necessarily involve a custodial disposition – the lack of any prior record and the need for rehabilitation notwithstanding:

> If it were otherwise, sentencing would be weighted almost exclusively in favour of what is in the best interests of the accused; denunciation would be muted; the importance of life devalued; proportionality would be ignored. The reforms in this area attempted by the YCJA would be effectively negated: *R. v. D.L.* (No. 3), 2005 ONCJ 386.

[12] Still, as I began by saying, consequences cannot trump rehabilitation. Youth are considered less formed and more amenable to change. The sentence must also be designed to foster that change.

[13] It was at this point in a remarkable case that a second remarkable consideration entered the picture.

[14] After J.D. had been in custody for five months, Mr. G. and his wife, Ms. S. stepped forward, offering to take J.D. into their home and to care for her should she be released. This offer was clearly remarkable. J.D. is not in any way related to Mr. G. or his wife. Mr. G. was then a guidance counsellor at J.D.'s school and knew J.D., but only to the extent he would have known many of the students. Ms. S. had never even met J.D.

[15] It goes without saying that the number of families who, in similar circumstances, would have offered to take a teenager charged with murder into their homes is vanishingly small. That Mr. G. and Ms. S. were prepared to make such a commitment is about as fine an illustration of the generosity of the human spirit as can be imagined.

Just as astonishing is that Mr. G. and Ms. S. continued to care for J.D. for a period of 18 months *and* did so without a penny's contribution from J.D.'s parents or the state.

[16] Equally astonishing is how J.D. has blossomed since coming to live with Mr. G. and Ms. S.. J.D. had been going nowhere – an indifferent student whose primary interest was in alcohol and drugs. Her prospects were, not to put too fine a point on it, dim. Now, she has graduated Grade 12 with honours grades, has an acceptance to the University of Alberta in hand, and was nominated for valedictorian of her graduating class. Meanwhile, she has been working steadily at a part-time job and has glowing reports from her employer. Throughout, J.D.'s observance of her release conditions (not inaccurately described by Mr. Coffin as being analogous to an adult conditional sentence) has been flawless.

[17] To say the turnaround has been remarkable is to risk understatement. Although the book telling the full tale of this crime may be as yet unfinished, a chapter on redemption has surely been added.

[18] Much is due to Mr. G. and Ms. S., but much is also due to J.D. herself. She, after all, has had to do the work.

[19] It is abundantly clear that the opportunity for J.D. to live with Mr. G. and Ms. S. has been heaven-sent and equally clear that it is in everyone's interest that the arrangement should continue.

[20] Unfortunately, such is not to be. Mr. G. has lost his Whitehorse job and will be moving to Edmonton. Despite this, Mr. G. and Ms. S. would have been prepared to have J.D. live with them in Edmonton. Given that J.D. has hopes of attending the University of Alberta, such an offer was as fortuitous as it was generous. However, Mr. G. and his wife are now living on a much-reduced income and are unable to continue to care for J.D. without any financial assistance, particularly since they have children of their own to educate.

[21] In the discussion that follows, I relate information conveyed to me by J.D.'s Youth Worker (and author of the pre-sentence report) Rob Marshall. In making the comments I do, I want to make it clear that I attribute no fault whatever to Mr. Marshall. He does not set the policy and the decisions have not been his to make. Neither do I want to be accused of shooting the messenger.

[22] One would be forgiven for thinking that providing some monetary support to Mr. G. and Ms. S. would be a no-brainer, however, I was advised that, for various reasons involving program parameters and eligibility tests, J.D.'s situation did not fit in any of the Department of Health and Social Services pigeon holes – the Department's broad mandate in the areas of social welfare, child protection and youth justice notwithstanding. Despite protracted discussions between Mr. G. and the Department, no financial assistance has been forthcoming in all of the 18 months – only the not terribly helpful suggestion that Mr. G. and Ms. S. should pursue J.D.'s parents for money.

[23] However, when the matter of sentence was first before the court, the Youth Worker advised that there was a possibility that the Mr. G./Ms. S. residence could be designated as an open custody facility. This would allow the court to impose a custodial sentence with appropriate controls over J.D. while still allowing her to reside with Mr. G. and Ms. S. – *and* at the same time allow them to be financially compensated.

[24] The court had been thrown a life line, but it was quickly yanked back.

[25] I was next advised that the designation could not be made until a home study had been completed. What would be left to study is difficult to say, considering that J.D. has been in said home for 18 months, all the while closely monitored by Youth Justice. Miracles have been worked therein. In the result, the proceedings had to be further adjourned to await the completion of a home study. Still, there appeared hope that sense would ultimately prevail and the right thing would be done.

[26] When the proceedings reconvened, my disappointment could not have been more complete. I was advised that the home study had not been done because Youth Justice Officials in Alberta had determined in their infinite wisdom that they would not accept an arrangement with Yukon that would allow J.D. to serve an Open Custody sentence with Mr. G. and Ms. S. as open custody caregivers. It was made clear that Alberta would call the shots on placement – most likely in a group home.

[27] For its part, Yukon seems unwilling or unable to come up with any other plan (or even a suggestion) as to how it could facilitate J.D. remaining with Mr. G. and Ms. S.

[28] This news was delivered to me at 1:05 p.m. Monday June 20, 2011 – court was to have convened at 1:00 on that day. Counsel presented new options of an open custody placement in a youth facility (either here or in Alberta) or probation terms that would see J.D. reside with an aunt in Ontario. I required time to consider this turn of events and reluctantly adjourned to Thursday, as I was unavailable Tuesday and Wednesday. I was then told that Mr. G. and Ms. S. were unwilling to care for J.D. without assistance for even three additional days. Obviously they had had enough. Who can blame them? J.D. was remanded in custody.

[29] Sometimes in judging, as in life, there are no good choices: the best you can do is to pick the least of the bad. Today is one of those times. We have been robbed of the best solution. Once again bureaucracy has done battle with humanity, and humanity has got decidedly the worst of it.

[30] The remaining options are all more or less unpalatable.

[31] In this case, probation is not a realistic outcome because J.D. has committed a terrible crime. A life has been lost and there must be consequences. Probation is simply an inadequate response although, even so, I admit that I would have been tempted to embrace it if J.D. would have been able to continue living in the Mr. G./Ms. S. household and attend the University of Alberta, but such is not to be. Rather, the proposal I received last Monday was to send her to live with an aunt in Ontario. This was hardly satisfactory as I knew nothing of the aunt, her character, or her circumstances of life.

[32] Today I received some additional information concerning J.D.'s aunt by way of an updated Pre-Sentence Report. However, even assuming there is now some substance to the present plan, the bottom line is that a probation order would not satisfy all the requirements of a fit sentence. As stated previously, meaningful consequences in a case such as this necessarily involve a custodial disposition.

[33] At the same time, I fully recognize that imposing a custodial sentence also has a downside. J.D. will miss her chance to attend the University of Alberta this fall. She will be admitted to the Young Offender's Facility to spend her days fraternizing with exactly the people she should be avoiding like the plague. The opportunity to turn this girl's life around and make of her a contributing and non-violent member of society may be irrevocably lost.

[34] At the end of the day, one has to choose. Balancing rehabilitation and consequences as best I can and with due regard for the severity of the crime she has committed, I sentence J.D. to three years custody and supervision.

[35] Taking into account the time already spent in custody and the substantial period on strict release conditions, I fix the period of custody at 12 months, the remainder to be served under conditional supervision. Had J.D. not served time in custody and on strict release conditions, I would have fixed the period of custody at two years.

[36] Keeping in mind the provisions of s. 83(2)(a), and J.D.'s impressive performance while on release conditions, the custodial portion of the sentence will be served in open

custody. I hope against hope that something better than the Young Offender's Facility can be found. I hope against hope that the period of custody will do no worse than delay J.D.'s plans to further her rehabilitation and her education.

[37] The terms of the conditional supervision order will be the statutory terms enumerated in s. 105(2) of the *Youth Criminal Justice Act* together with the following optional terms as provided for in s. 105(3) of the *Act*: subsections (b), (c) (d) and (e).

[38] In addition, I impose the following terms:

1. Complete a psychological assessment if so directed by the Youth Worker.
2. Take such other assessment, counselling and programming as the youth worker directs.
3. Abstain from the possession of alcohol or controlled drugs or substances except in accordance with a medical prescription.
4. Obey a curfew between 10:00 P.M. and 6:00 A.M. daily. You must be in your residence during these hours except with the prior permission of the youth worker.

[39] There will also be an order whereby the young person will provide samples of bodily substances for the purpose of DNA analysis and banking.

[40] Finally, there will be an order whereby J.D. will be prohibited from possessing any firearms, ammunition, explosives or other items described in s. 109 of the *Criminal Code* for a period of five years following the completion of the custodial portion of her sentence.

[41] In my view, the tragedy of Mr. S.'s death has been compounded by the failure to seize the unique opportunity which Mr. G. and Ms. S. presented. I depart from this case a sadder, but not a wiser, man.

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FAULKNER T.C.J.