Citation: *R.* v. *Johnson,* 2011 YKTC 11

Date: 20110228
Docket: 09-00116
Registry: Whitehorse

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

REGINA

v.

JUANITA DAWN JOHNSON

Appearances:

Jennifer Grandy — Counsel for the Crown
Ann Pollak — Counsel for the Defence

REASONS FOR SENTENCING

[1] COZENS T.C.J. (Oral): Juanita Johnson was convicted at trial with respect to a charge under s. 5(2) of the *Controlled Drugs and Substances Act*, 1996 c. 19. There was a *voir dire* held during the trial in which *Charter* arguments were raised. I ruled that there was no violation of the *Charter* rights of Ms. Johnson. At that point in time defence invited me to convict on the evidence that was before the Court in the *voir dire* and tendered into trial.

[2] Crown is suggesting that a sentence of ten to 12 months be imposed in this case. Defence counsel is not taking huge issue with the range but is seeking that the sentence be served conditionally in the community. Crown counsel has pointed to

some of the concerns generally, and the concerns particularly, in this case, with respect to the sentence that I will impose being served conditionally in the community.

[3] The facts of this case are that the RCMP obtained a cell phone belonging to an aunt of Ms. Johnson's. A phone call was made by an unidentified third person to this cell phone, seeking drugs, and, without going into great detail, subsequently the RCMP officers were informed by this third party that Ms. Johnson may be able to provide drugs. Contact was made between the RCMP officer and Ms. Johnson through the use of the cell phone text messaging system. Arrangements were made in short order to meet at a gas station in Whitehorse, and, when the RCMP attended there, they noted Ms. Johnson, arrested her, searched her, and found approximately four grams of uncookable cocaine. The cocaine they found on her was sufficient for the one transaction that she had agreed to make. Ms. Johnson would have been under the impression that she was arranging to meet her aunt to provide her aunt with the cocaine.

[4] Ms. Johnson has no prior criminal history. She is currently 26 years of age. She has not used drugs since she was 22. The Crown submits that this is for profit trafficking. Defence counsel takes some issue with that, indicating that she was providing her aunt with the drugs that her aunt needed. I note that this third party, who is unidentified, was able to have information that Ms. Johnson would likely be able to obtain or had cocaine for sale, and certainly she was able to get her hands on the cocaine pretty quickly to provide to who she believed to be Ms. Tsandaya.

[5] It is certainly a different case from a case where we have clear evidence, as in *R.*

v. *Naiker*, 2007 YKTC 58, that he was a street level trafficker. We are not dealing with cocaine noted to be packaged in ways that several transactions were set to be made, but clearly it was known to at least one other individual that Ms. Johnson was able to provide cocaine quickly, which she did. So we are not dealing with an addict trafficker. There is an element of profitability here.

[6] There is no question that in dealing with drug trafficking that the principles of denunciation and deterrence are paramount. There has been a considerable line of authorities in the Yukon that have dealt with the consideration of the principles of sentencing with respect to drug traffickers in our community. I refer to the comments of Faulkner J. in the case of *R.* v. *Holway*, 2003 YKTC 75, where he refers to *R.* v. *Curtis*, [1982] Y.J. No. 4, that spoke many years ago about this principle, saying that *Curtis:*

> *...*simply points out that northern communities are already struggling with disproportionately high rates of addiction, while scant resources are available to deal with the problem. The last thing we need is more drug traffickers. Courts in the North have quite properly held that they are entitled to take these local conditions into account and have consistently held that deterrent sentences are warranted and that, given our circumstances, the need to maintain a deterrent trumps other sentencing considerations in cases involving trafficking in hard drugs.

[7] The harmful effects of cocaine on individuals in the north are well noted, and not just on the user, but on the user's family and the user's children. Our courts are often seeing, in one way or another, young children significantly impacted, many times simply by parents incapable of properly raising them, many times as a result of the impact of drugs on those parents. There are many innocent victims of the drug trade in the Yukon.

[8] I do not propose to review the cases filed. They are informative and generally provide that ranges of sentences, depending on the particular circumstances of the offence and offender, go from six months to 12 months. Crown, quite fairly, pointed out that *Naiker,* at 14 months, would be at the higher end.

[9] The concerns that the Crown points to with respect to a conditional sentence in this case are the safety of the community, the risk of reoffending, and the gravity of the harm of reoffending. Cases where we are dealing with hard drugs, certainly conditional sentences, while not to be rare, are imposed with careful consideration, as they should be in all cases, but in light of the fact that deterrence and denunciation are very important to send a message to people that we do not want drugs trafficked in our communities.

[10] In this case, the pre-sentence report that was prepared was not done by a local bail supervisor or probation officer, but was done recently in Alberta, where Ms. Johnson had been living since October. It is not as comprehensive as our pre-sentence reports tend to be. It does not include risk assessments. I view it as generally positive with respect to family support, and Ms. Johnson not being in a high risk area of reoffending, while recognizing there is no actual risk assessment. I am careful in the weight that I put on the risk of reoffending that I view from the report.

[11] Ms. Johnson is a member of the Kwanlin Dun First Nation. There is little doubt that the members of her extended family have struggled with fallout of, perhaps, to some extent, the residential school system. There is not much in the way of information in this regard. It is to be noted that Ms. Johnson’s mother, who does not, as I

understand it, live in Whitehorse, appears to be one of the few in the large family circle that did not abuse drugs or alcohol. Ms. Johnson herself did spend the years from 18 to 21 struggling with addiction and abuse of substances.

[12] Ms. Johnson currently has an 11-month-old daughter. She is expecting another child in August. Her partner is employed with his father's Chilkoot steel company in Whitehorse, which I understand, has been here for a while. The job in Alberta did not work out as planned, which is why they have just moved back here. They are currently living in a basement suite rented from a friend in Whitehorse, with an intention, in approximately three months, to move to a single family dwelling in Whitehorse and pay rent.

[13] One of the concerns with respect to a risk of reoffending is whether an individual has the means to earn enough money to make a living. In this case, I have no reason to believe the relationship is not stable, and no reason to doubt that Mr. Jensen has a job. I do not see that Ms. Johnson has a need or poses a significant risk of continuing to traffic in drugs in order to get by financially. There is another source of income.

[14] When finding a fit and just sentence, all circumstances need to be taken into account and it is not at all unusual for first offenders to find themselves in real jail, doing real time, separated from society, from their family, from the life they knew, because the crime warrants it, and drug trafficking is one of those crimes where that is not at all unusual. There is a principle of restraint that runs in s. 718.2, as well as in s. 718, that speaks to the necessity or the separation of offenders from society where it is necessary to do so. It also speaks to the principle that all other sanctions other than

imprisonment should be used, if the circumstances warrant it. Particular attention needs to be paid to the incarceration of offenders, with particular concern to the status of First Nation offenders. Sometimes we are dealing with comprehensive reports that can draw a distinct link between an individual's First Nation status and their offending. Other times, the link is less tenuous, or there is not a link, and in this case, there is not a lot of information, so we do not have a clear, strong link that would lead to Ms. Johnson's First Nation status being a significantly contributing factor to the offence that she has been convicted of committing on this date.

[15] Section 742.1 stipulates that a conditional sentence can be imposed if the Court is satisfied that the service of the sentence in the community would not endanger the safety of the community, and that it is consistent with the fundamental purpose and principles of sentencing. Ms. Johnson has been on an undertaking given to a peace officer from April 7, 2009, until February 16, 2010. It was fairly minimal, requiring her to attend at the RCMP, not possess cell phones or other communication devices or be in motor vehicles where they are present, and not to possess or consume non-prescription drugs. This was changed to an undertaking to a judge or justice on February 16, 2010, to simply require her, in addition, to keep the peace and be of good behaviour and to report to the Court and to change the reporting from the RCMP to a bail supervisor. There has been no indication that there has been any concerns that she has been complying with these conditions.

[16] I believe, from what she said to the Court, that Ms. Johnson is scared of being separated from her child, scared for herself and scared for her child. It is not a determinative factor by any means, because offenders that go to jail will be separated

from their children, but it can be a factor in a person realizing the extent to which the consequences of their actions may harm other people. I believe Ms. Johnson is aware of that, that every day and at every opportunity a person needs to make the right choice, and regardless of what it might be like here in court looking at the possibility of leaving this courtroom and going directly into a jail cell, and what it will be like in a different environment, Ms. Johnson will need to continue to make the right choices.

[17] While I do not have an abundance of information before me, I am satisfied that the service of this sentence in the community would not endanger the safety of the community and would be consistent with the fundamental principles and purposes of sentencing. If Ms. Johnson chooses to reoffend, and I do not see that there is a risk of that happening, but if she does, there will be significant consequences, and that can happen quickly. I believe that the principles of sentencing, besides deterrence and denunciation, such as rehabilitation in this case, which I believe is perhaps to be viewed in the context of reorientation, in that Ms. Johnson's life appears not to have been oriented towards criminal activity before and does not appear to have been oriented to criminal activity since, will continue without her being involved in any criminal activity.

[18] The sentence that I am going to impose is going to be a sentence of ten months to be served conditionally in the community on the following terms:

1. Keep the peace and be of good behaviour;
2. Appear before the Court when required to do so by the Court;
3. Report to a Supervisor immediately and thereafter when required by the Supervisor and in the manner directed by the Supervisor;

4. Remain within the Yukon Territory unless you have written permission from your Supervisor or the Court;
5. Notify the Supervisor or the Court in advance of any change of name or address, and promptly notify the Court or the Supervisor of any change of employment or occupation;
6. Reside as approved by your Supervisor and not change that residence without the prior written permission of your Supervisor;
7. At all times you are to remain within your place of residence except with the prior written permission of your Supervisor. You must present yourself at the door or answer the telephone during reasonable hours to ensure that you are complying with this condition. Failure to do so will be a presumptive breach of this condition;

[19] Certainly, as your counsel pointed out, conditional sentences can be difficult. You do not have a choice when you are in jail as to where you are going to be. People on conditional sentences have a choice in the sense they can try not to comply with the term that requires them to stay in their residence. They can walk out, but the consequences are significant. So this is difficult, but there are permission exceptions. I am not going to limit them to anything specific, and they are not generally granted lightly. There needs to be a legitimate reason, but also, in this jurisdiction, it has been my experience that supervisors are sensitive to the needs of individuals, whether it is counselling, employment, or education, to allow them the permissions they need to ensure that the sentence is not unduly harsh, given what is hopefully to be the redirection of a person's life.

8. You are to abstain absolutely from the possession or consumption of alcohol and controlled drugs or substances, except in accordance with a prescription given to you by a qualified medical practitioner;
9. You are not to attend any bar, tavern, off-sales or other commercial premises whose primary purpose is the sale of alcohol;

[20] It is somewhat unusual. I am not certain whether there is any need for any programming or counselling clauses in this case. Ms. Grandy, do you see any need for that in this case?

[21] MS. GRANDY: Well, there's not exactly enough information to really make that determination. A general clause, I mean, would at least leave the rehabilitative benefit option open.

[22] THE COURT: Right. You are quite correct, we do not have a lot of information in this report. I am going to include a clause:

10. Take such assessment, counselling and programming as directed by your Supervisor;

There will be community service. I appreciate that the community service can be more difficult when you have a young child, but there may be viable options there. I am going to order:

11. That you perform 50 hours of community service as directed by your Supervisor or such other person as your Supervisor may designate. This community service is to be completed by the end of the eighth month of

this order. At the discretion of the Supervisor, any hours spent in programming or counselling may be counted as community service hours;

There certainly might be the availability of some programs that involve you and your child assisting other mothers; I do not know.

12. That you participate in such educational or life skills programming as directed by your Supervisor;
13. That you provide your Supervisor with consents to release information with regard to your participation in any programming, counselling or educational activities that you have been directed to do pursuant to this conditional sentence order.

Are there any of those terms or any additional terms that counsel wish to address?

[23] MS. GRANDY: The only thing I would suggest, Your Honour, is to add to the house arrest condition that if she is exercising permission, that she carry a copy of that on her person. It would have the benefit of avoiding unnecessary detention if she does have permission, but the RCMP aren't aware of the exception, so then she would be able to, essentially, go on her way because she would have that permission on her person.

[24] THE COURT: I have had counsel before me on that very issue talk about the propriety of making, whether you carry it or did not carry it, a breachable condition. I have heard different submissions on that and I have done both, depending on the circumstances. Do you have anything?

[25] MS. POLLAK: My advice to Ms. Johnson, I don't say this as a waiver entirely of my privilege, but I have already discussed with Ms. Johnson the importance that if she is out of the house, she must have that with her. Whether it ought to be a condition of the order, it certainly is in her interest to have it with her for exactly the reason that my friend has suggested, and I expect she will and it need not be part of the order.

[26] THE COURT: I think the last time this argument was before me I strongly recommended that it be carried, but I acceded to defence counsel's submissions in that case that I should not necessarily make it a term in the sense that it is going to put her in risk of having the entire conditional sentence collapsed, which is always the risk. It is presumptive, really. It does not always, or in this jurisdiction, even necessarily happens that a sentence is collapsed completely, but I am just, because I have not really discussed this with my other judges. Ms. Grandy, you have raised this with the other judges on other occasions. Generally, what has been your experience?

[27] MS. GRANDY: It is definitely an issue that's come up in other courts, and it is a condition that has been put on when I've requested it. It's an issue that's come up through, as well, through probation and the RCMP making comments to our office, and we've discussed it as an office as well. So it's definitely an issue that's come up of late and that's sort of our response to it, for the reasons that I suggested, and I haven't before had difficulty on either side, quite frankly, in having it put in, because, as I say, it has, you know, an obvious benefit.

[28] THE COURT: There is no question about the benefits. I think everyone agrees that it would be foolish to be outside without it, because all you are doing is setting yourself up to spend a night in jail or until someone can prove that you actually had the permission, so I expect this issue is going to be looked at a little more closely in future. I think, in this case, this is not the kind of case where we are dealing with employment or situations where you are going to end up with a less highly detailed circumscribed set of permissions. I think it is going to be pretty easy to carry it with you. I am going to put it on.

> 14. If you have written permission to be outside of your residence, you must carry that permission with you at all times.

It is for your own good, in the end.

[29] MS. POLLAK: Sorry, and there was -- that was actually one of the questions I had. And the other one was about a medical emergency exception. It stands to reason that the medical emergency would be good enough reason to be out of the house, but I have actually recently had it come up where somebody on the way to the hospital ended up going into custody instead. And in particular, given Ms. Johnson's current state, I would ask that the Court consider adding that as an exception. Medical emergency for herself or her child.

[30] THE COURT: You know, I will do it for clarity, because at least it gives an individual that may be concerned about a breach, a reason to look at a situation, but you are quite correct, that it is a defence in law in any event.

[31] MS. POLLAK: It was actually a situation where a person ended up

having to have his second heart attack in jail while he was on his way to the hospital for the first heart attack.

[32] THE COURT: I will add a separate clause to the house arrest rather than trying to redo it.

> 15. You are allowed to be outside of your residence for medical emergencies for yourself or your child, including travel directly to and directly from a physician or hospital.

That makes it pretty limited. It is pretty direct.

[33] MS. POLLAK: Thank you, Your Honour. Sometimes it's best not to leave the discretion.

[34] THE COURT: All right. I am going to add another clause with respect to the cell phone issue. I am not going to prohibit you from having a cell phone, but there will be a term:

> 16. That you are to provide your Supervisor, upon request, your cell phone records, with --

I do not want to invade her privacy too much in this regard, but.

[35] MS. POLLAK: Your Honour, it is actually a condition that I had discussed with Ms. Johnson prior and she said she had no objection to disclosing the phone numbers or the bill that would have the phone numbers on it, if that's what Your Honour was --

[36] THE COURT: Well, I was wondering to the extent I should require her to divulge information related to whose numbers the individuals are, but I think I will leave it at that: provide cell phone records upon request.

[37] I am not going to impose probation in this case. There has been a substantial period of time under fairly minimal supervision. This is not a case where it appears that ongoing counselling and programming are going to be necessary to provide every opportunity for rehabilitation. Ms. Johnson is going to be busy, and I believe in this case the resources that we have would be better put supervising other individuals. If Ms. Johnson continues on the law-abiding journey she appears to be on now, at the end of this conditional sentence order she will be free to make the choices in her life that are best for her and her family without the need of supervision from Probation Services.

[38] There is going to be a mandatory s. 109 firearms order for a period of ten years. That is automatic with this conviction. That prohibits you from possessing any firearm, cross-bow, prohibited weapon, restricted weapon, prohibited device, ammunition, prohibited ammunition and explosive substance.

[39] There will also be a forfeiture order under s. 16 of the *CDSA* with respect to the cell phone that was involved in this case and, of course the drugs, by law, and the drug packaging materials that were seized.

[40] Victim fine surcharge: Part of the presumption here to some extent is that this is a family that is not going to be in dire financial circumstances, but.

[41] MS. POLLAK: That’s true. Mr. Jensen is fully employed.

[42] THE COURT: However, it is ordering him to make the payment, I suppose. Crown?

[43] THE ACCUSED: Did I just get a fine?

[44] THE COURT: No, do not worry about it.

[45] THE ACCUSED: Oh, sorry.

[46] THE COURT: I am going to waive it. Community service will be more meaningful in this case.

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COZENS T.C.J.