

Citation: *R. v. Johnston*, 2014 YKTC 60

Date: 20140922
Docket: 13-00831
Registry: Whitehorse

IN THE TERRITORIAL COURT OF YUKON
Before His Honour Judge Chisholm

REGINA

v.

ALLAN FREDERICK JOHNSTON

Publication of information that could disclose the identity of the complainant has been prohibited by court order pursuant to section 486.4 of the *Criminal Code*.

Appearances:
Jennifer Grandy
Gordon R. Coffin

Counsel for the Crown
Counsel for the Defence

REASONS FOR SENTENCING

[1] CHISHOLM T.C.J. (Oral): Mr. Allan Frederick Johnston has pleaded guilty to an offence contrary to s. 153(1)(a) of the *Criminal Code*, namely that he had illicit sexual intercourse with his foster daughter. The Information alleges the offence occurred between January 1, 1975 and December 31, 1976, in Bayside, New Brunswick.

According to an agreed Statement of Facts, the victim, J.L., was living with Mr. Johnston and his common-law partner at the time of the offence.

[2] J.L. had been living in another foster home where she alleged to authorities that she had suffered repeated sexual assaults by the foster father. When these complaints did not lead to her removal from that home, she ran away and was subsequently placed with Mr. Johnston and his spouse.

[3] J.L. lived with Mr. Johnston's family until she moved back with her mother in 1977. That year, she gave birth to a daughter. She was 16 years of age. She was sure that Mr. Johnston was the father, as he had sexually assaulted her and she had not had sexual intercourse with anyone else in the year prior to her daughter's birth.

[4] Mr. Johnston's guilty plea encompasses one incident of sexual assault.

[5] J.L. contacted the police in New Brunswick in 2012 in relation to this matter and a formal investigation was commenced. The police were not able to confirm her recollection that she had initially reported the offence in 1990 with no ensuing result.

[6] In the course of the 2012 investigation, the police sought a consensual DNA sample from Mr. Johnston who had been located in Whitehorse. Mr. Johnston told the police that he would only consent if another individual was required to provide a sample as well and that he thought J.L.'s allegations were about money. The police sought a warrant to obtain a sample of Mr. Johnston's DNA, which was executed in October of 2012. A further testing involving that sample confirmed that Mr. Johnston is the father of J.L.'s child born in 1977.

[7] It is clear from the Victim Impact Statement prepared by J.L. that she suffered as a result of this sexual assault. It affected her ability to trust men and it impacted her

mental health. To aggravate matters, she indicates that she encountered officials who did not believe her when she initially reported the sexual assault. She struggled financially as a single parent raising her child.

[8] The offence to which Mr. Johnston has pleaded guilty is no longer in the *Criminal Code*. At the time of the sexual assault, it was a straight indictable offence with a maximum penalty of two years in jail.

[9] Mr. Johnston is 65 years of age. He committed this offence at the age of 27 at which time he was married with two young children. He had one prior conviction for the offence of attempted robbery for which he was sentenced at the age of 20. He has not been convicted of any other offences since.

[10] A Pre-Sentence Report was prepared and filed with the Court.

[11] Mr. Johnston was adopted as a child but maintained contact with his biological mother, and even returned to live with her for a period of time. He describes his upbringing by his adoptive parents as positive.

[12] His adoptive parents adopted another child, Kathy Johnston, who is 13 years younger than Mr. Johnston. Despite the age difference, she and Mr. Johnston had a good relationship growing up and they still maintain some contact. According to Kathy Johnston, Mr. Johnston felt rejected by his birth family and this, in her view, has impacted him psychologically.

[13] Mr. Johnston has vocational level training and has a decent work history. He is presently unemployed. It appears that his last employment ended in October 2013. His abuse of alcohol negatively impacted upon this employment.

[14] Mr. Johnston has been in a relationship with Beverly Watts for 13 years. She has filed a letter of support for Mr. Johnston. Based on the information contained in the Pre-Sentence Report, however, it is clear that their relationship has been difficult at times. Mr. Johnston's overuse of alcohol has been disruptive and has led to dysfunction between them.

[15] Mr. Johnston has two adult children from a previous relationship with whom he does not maintain contact.

[16] From the information with which I have been provided, it is obvious that Mr. Johnston does not have a network of friends to whom he can turn for support. Ms. Watts is supportive but, as I say, there is a certain level of dysfunction in their relationship.

[17] The author of the Pre-Sentence Report describes Mr. Johnston as a poor historian. He is also someone who displays distorted ideations, such as his statement that his partner engages in sexual acts with her adult son.

[18] According to Mr. Johnston's younger sister, he has had to deal with depression at times.

[19] He has self-reported as suffering from severe asthma, diabetes, and acid reflux. He has indicated through the Pre-Sentence Report that he will require both bowel and eye surgery, although there has been no medical documentation filed to confirm this.

[20] Although Ms. Watts has filed a letter of support for Mr. Johnston, they have, as indicated, a recent history of a dysfunctional relationship marred by his alcohol abuse. She has indicated that in the last two and a half months, Mr. Johnston has finally taken some steps to deal with his significant alcohol dependence.

[21] Overall, Mr. Johnston has not demonstrated a significant support network.

[22] The crime committed by Mr. Johnston is a very serious one. He breached his position of trust with respect to his adolescent victim. Although it is not evident that Mr. Johnston was aware of the previous abuse J.L. had suffered, her vulnerable status as a foster child heightens his degree of responsibility. It is also significantly aggravating that she became pregnant as a result of the sexual assault he afflicted upon her. J.L. raised the child without any assistance from Mr. Johnston.

[23] It is clear from information he provided to the author of the Pre-Sentence Report that he was aware, from being interviewed by the police in 1977 in relation to this matter, that he might possibly be the father of J.L.'s child. He stated that he lived in fear for the next 10 years, yet he did nothing to attempt to resolve the question of whether he was the father. He did nothing to assist J.L.

[24] Mr. Johnston has taken responsibility for the offence by way of his guilty plea and should receive credit for having done so. He also stated in court that he is remorseful

for what occurred. Yet, in the interviews with the author of the Pre-Sentence Report, he continuously displayed a tendency to victim blame. He appears to have little insight into the trauma and harm he caused J.L.

[25] I have considered the principles of sentencing set out in the *Criminal Code*, as well as the circumstances of this offence and this offender in coming to a decision as to a proper sentence. I have decided that a sentence in the lower range submitted by counsel is appropriate and have settled on a sentence of 16 months' incarceration.

[26] The difficult question in this matter is whether the jail sentence imposed might be served conditionally. The Crown has acknowledged that Mr. Johnston is eligible for a conditional sentence based on the wording of s. 742.1. In other words, the offence for which he has pleaded guilty is not captured in the language of the section limiting the offences to which conditional sentence orders are applicable.

[27] I have reviewed a number of cases where this issue has been considered: *R. v. Ralph*, 2014 BCSC 467; *R. v. Caesar*, 2014 YKTC 6; *R. v. Yusuf*, 2011 BCSC 626; *R. v. H.S.*, 2014 ONCA 323; *R. v. T.B.L.(2003)*, 173 O.A.C. 159; and *R. v. Klasges*, 2010 ONSC 3419.

[28] In the *R. v. H.S.* decision, the Court of Appeal overturned the sentencing judge's decision to grant a conditional sentence order in an historical sexual assault case involving a foster child. In that matter, the offender pleaded guilty to two offences, one of which is a similar offence to that to which Mr. Johnston has pleaded guilty.

[29] In that case, the victim was 15 years of age at the time of the offence and the offender sexually assaulted her on a number of occasions, leading to her becoming pregnant.

[30] Although the facts of *H.S.* were more serious than in the matter before me, it is worthwhile nonetheless to consider some of the principles to which the Court referred. At para. 41, the importance of protecting children from "seducers and predators through sentences that emphasize the principles of denunciation and deterrence" is noted. The Court refers to the decision in *R. v. D.D.*(2002), 58 O.R. (3d) 788 (C.A.) in this regard.

[31] In terms of the lapse of time since this offence, it is true that Mr. Johnston has not committed other offences. This, in my view, is a mitigating circumstance. However, this fact does not override the relevant sentencing principles.

[32] In order to impose a conditional sentence, I must be satisfied that the service of the sentence in the community would not endanger the safety of the community and would be consistent with the fundamental purpose and principles of sentencing set out in ss. 718 to 718.2. I am of the view that allowing Mr. Johnston to serve the sentence in the community would not endanger it. However, I do not believe that his serving of the sentence in the community would be consistent with the purpose and principles of sentencing.

[33] Mr. Johnston abused his position of trust in sexually assaulting this teenager who became pregnant as a result of the assault. It is a serious crime and Mr. Johnston's degree of responsibility is high. The consequences of the sexual assault were

significant. His level of remorse appears low. In all the circumstances, this is not an appropriate case in which to grant a conditional sentence.

[34] The defence argues that Mr. Johnston should not be subject to registration in the Sexual Offender Registry based on the fact that the legislation post-dated his offence. The defence has not challenged the constitutionality of the provision, but argues that it is not applicable to him.

[35] In my view, having considered ss. 490.011(c) and (d) and s. 490.012, Parliament intended to make these provisions retrospective in nature.

[36] The Saskatchewan Court of Appeal in *R. v. Whiting*, 2013 SKCA 127, has held that the legislation is retrospective. In the face of constitutional challenges, a number of courts of appeal have found that the obligation to register does not constitute additional punishment -- *R. v. Cross*, 2006 NSCA 30 and *R. v. Youngpine*, 2009 ABCA 89 -- nor does it contravene an offender's s. 7 *Charter* rights -- *R. v. Dyck*, 2008 ONCA 309; *R. v. S.S.C.*, 2008 BCCA 262; and *R. v. Morin*, 2009 QCCA 187.

[37] Although an argument may be made on a case-by-case basis for an exemption, this is not a case where one has been made out.

[38] There will be a SOIRA order for a period of 10 years.

[39] Mr. Johnston is also subject to a DNA order. He must provide samples of his bodily substances for DNA analysis and recording.

[40] Any applicable victim fine surcharge is waived.

CHISHOLM T.C.J.