Citation: *R.* v. *Kodwat*, 2017 YKTC 26

Date: 20170512
Docket: 15-00616
Registry: Whitehorse

IN THE TERRITORIAL COURT OF YUKON
Before His Honour Judge Luther

REGINA

v.

JACKIE JAMES KODWAT

Appearances:
Noel Sinclair and Kevin MacGillivray — Counsel for the Crown
Vincent Larochelle — Counsel for the Defence

REASONS FOR JUDGMENT

[1] This court declared Jackie James Kodwat a dangerous offender on May 12, 2017. He was sentenced to six years imprisonment less a credit of 25.5 months for pre-sentence custody followed by a 10-year LTSO plus a few ancillary orders. Following are the written reasons for that decision.

[2] The details of the offender's four sexual offences are set out in the decisions of Judge Fabbro, [1989] Y.J. 121 (T.C.), Judge Lilles (2013 YKTC 38), and myself (2016 YKTC 58).

[3] All were major sexual assaults involving penetration. It is possible, although unlikely, that the 2011 sex crime involved digital penetration but that is also recognized

as a “serious and invasive form of sexual assault”, *R. v. Rosenthal*, 2015 YKCA 1, at para. 8.

[4] The Crown met the conditions required to bring this application. In its submission, the Crown felt that the offender should be declared dangerous under either s. 753(1)(a)(i), s. 753(1)(a)(ii), or s. 753(1)(b). The defence argued that Mr. Kodwat should be sentenced under the normal provisions of the *Code* without resort to these provisions and that he not be declared a dangerous offender.

[5] The Crown submitted that if declared a dangerous offender, Mr. Kodwat should be sentenced to 73.5 months’ imprisonment less the 25.5 months credit; that is four years on a going forth basis. This to be followed by a 10-year long-term supervision order (LTSO)(s. 753(4)(b). At the outset of this hearing, the Crown clearly stated that it was not seeking an indeterminate sentence (s. 753(4)(a)). The indeterminate sentence was effectively “off the table”.

[6] While I agree with the assessment of the Crown that the indeterminate sentence is not necessary, this was a borderline case. I am only satisfied that there is a reasonable expectation that a lesser measure will adequately protect the public against the commission by this offender of a serious personal injury offence if he serves a lengthy period of imprisonment, which would include the successful completion of meaningful programming, i.e. high intensity sex offender (HISO) programming, followed by significant maintenance programming and strict control of him by means of a 10-year LTSO.

[7] Defence counsel put forward the proposition that his client be sentenced to two years on a going forth basis, followed by three years of probation.

[8] During the course of the hearing, we heard evidence from Dr. Lohrasbe, an eminently qualified forensic psychiatrist with considerable experience in this very subject area. His thorough report, dated January 29, 2017, was entered as Exhibit 1.

[9] Furthermore, evidence was called from two officials from Correctional Services Canada Pacific Region: Kandace Goldstone, Regional Program Manager, and Ramtin Sadafi, Parole Officer Supervisor in Metro Vancouver. Sean Couch-Lacey, Probation Officer, authored the Pre-Sentence Report and testified about a local pilot program for sex offenders. The defence called Anthony Skookum to testify about his experience in the federal correctional system. See *R. v. Skookum*, 2016 YKTC 62.

[10] Ms. Goldstone, Mr. Sadafi, and Mr. Skookum appeared by video from British Columbia. Mr. Sean Couch-Lacey and Dr. Lohrasbe were in the courtroom.

[11] Defence filed four exhibits and the Crown, 13. These included victim impact statements from the victim and from both of the victim's parents. The parents appeared in court and read their statements. That process was helpful. In addition, Mark Stevens, an experienced *Gladue* report author, filed his report, which had been requested by the defence. It was not the subject of any argument and while less formal than his other reports that I have read, proved to be quite helpful. The Pre-Sentence Report was thorough and accurate.

[12] The offender's early years were frightful and appalling. They were rife with *Gladue* factors, probably as many and as severe as I have seen. His childhood was tragic. This is made abundantly clear in both the Pre-Sentence Report and the *Gladue* report. Very troubling was the sexual abuse foisted on him and how that early forced sexual knowledge so deeply affected him throughout his childhood, his first penitentiary stay, and beyond.

[13] Unfortunately, this offender is a lifelong criminal to this point, who has victimized many people. The lengthy criminal record includes youth dispositions from 1982 to 1987 and adult sentences from 1989 to 2013. There are no significant gaps.

[14] There are, on his record, numerous crimes of violence, property offences, and offences against the administration of justice. Specifically, in youth court and in adult criminal court, he has amassed 51 convictions, including 24 property offences, 11 against the administration of justice, two for driving, one for drugs, and 13 violent offences including four major sexual assaults described in the judgments referred to in paragraph 2 above.

[15] The main defence argument for why Mr. Kodwat should not be declared a dangerous offender under s. 753(1)(b) is that he controlled his sexual impulses from 1989 to 2012.

[16] It is true that there were no sexual assault convictions during that time frame. If the Crown had sought this designation for the third offence in 2013, at that time it would clearly have been an uphill struggle. However, given a 36-month sentence for that

particular offence, it is alarming and worrisome that within a relatively short period of time after serving that sentence, Mr. Kodwat would commit another sexual crime.

[17] Even more disturbing is the fact that Mr. Kodwat had stopped drinking for the last five years or so. The marijuana use was of little significance (2016 YKTC 58, para. 2). His judgment to deliberately violate the last two victims is disquieting and upsetting. In the predicate offence, the pre-meditation was limited to the short time after the victim presented herself to him in his room. It was an unusual situation where she just showed up. He did not seek her out. Nonetheless, over the relatively small period of time while he finished watching a movie, he decided to have sexual intercourse with a passed out teenage girl.

[18] This totally selfish criminal act was entirely for his own carnal gratification with absolutely no regard for the psychological or physical harm to the vulnerable young victim. It was done without compassion or remorse. Dr. Lohrasbe has significant doubts as to whether the offender can emotionally be aware of the harm done, even though intellectually he might see it. Part of this detachment is the denial of responsibility.

[19] Dr. Lohrasbe states at page 28 of his report:

> The relatively recent comments by his therapist in 2013 and 2014 suggest that Mr. Kodwat, all these years after first committing an act of serious sexual violence, still does not accept that he has to work at fundamental change. Since effectiveness of treatment interventions is heavily dependent on motivation, at this time one cannot rely on treatment to effectively reduce risk. It is not realistic to anticipate that therapy can instill guilt, remorse, or shame, or acceptance of moral and psychological responsibility in Mr. Kodwat.

[20] The diagnoses are spelled out in the report: Antisocial Personality Disorder (APD) and Substance Abuse Disorder. The latter was subject to intensive cross examination but Dr. Lohrasbe remained firm that Mr. Kodwat ought not to use marijuana, especially with the medications he is on, his past history, and the increased THC content of the drug.

[21] Dr. Lohrasbe states at page 20 of his report:

> I emphasize however that while there is no formal *diagnosis* of a sexual deviancy that can be applied to Mr. Kodwat at this time, there is an established pattern of sexually deviant *behaviour.* Counterintuitively, many sexual offenses (behaviours) are committed by people who are not sexually deviant. In such men, sexual violence can be driven by a number of interacting factors, including aggressive antisociality, anger, feelings of entitlement, etc. With Mr. Kodwat, his sexual violence is best regarded as a particularly malignant manifestation of his antisocial personality disorder.

[22] And further at page 29:

> With Mr. Kodwat it is possible that he can learn greater life skills through further programing [sic]. For instance, his view that marijuana use will not undermine his self-control is naïve.

[23] Mr. Larochelle emphasized that the offences from the late 1980's were not far removed from his childhood abuse. That is correct; however, the two latter offences were over 20 years removed and yet he still preyed on vulnerable victims.

[24] Of some considerable concern is this offender's lack of insight and progress with psychologist Cameron Grandy in 2013. There was a unique opportunity for treatment in 10 one-on-one sessions.

> Mr. Kodwat was referred to this writer for participation in the Whitehorse Correctional Centre sex offender risk management program (SORMP). This program was scheduled to run from October 1st, 2013 through December 5th, 2013. There were originally four referrals, however Mr.

> Kodwat participated in the group program with one other individual. After two sessions, the other participant was granted parole for outside treatment. Mr. Kodwat attended 10 subsequent sessions with his counsellor on a one on one basis. Mr. Kodwat was scheduled for release in early December, 2013. His treatment progress is outlined below.
>
> Mr. Kodwat was argumentative throughout the treatment sessions and would rarely discuss the assault. He said that he was innocent and that DNA had proved he was innocent but that he has a 'terrible lawyer'.

[25] Despite previous incarcerations, other interventions by the criminal justice system, and being off alcohol, this offender made a calculated and deliberate decision to sexually violate a 17-year-old vulnerable girl. Indeed, all of his four sexual victims were vulnerable. The temptation in the predicate offence was real and high. He had time to take steps to avoid the temptation, but did not. With a relatively clear mind, he yielded to the temptation.

[26] The offender's answer for the future was simply that he must not let any young women into his house and thereby avoid that temptation. Thus, while sober and alone, he would not commit further sexual crimes. That, of course, is easier said than done. While I am optimistic that he may continue his sobriety, I am very doubtful that he will be able to stay away from vulnerable women, even though he should be successful in keeping them out of his residence.

[27] Regrettably, vulnerable victims abound in the north, probably more so than elsewhere. A review of the jurisprudence from this jurisdiction reveals the sad truth.

[28] The following cases, by no means exhaustive, point to the prevalence of these sorts of crimes and thus by extension, the availability of passed out victims.

R. v. Sam (1998), 110 B.C.A.C. 115 (Yukon C.A.)
R. v. Snowshoe, 2001 YKTC 41
R. v. James, 2001 YKTC 29
R. v. Netro, 2003 YKTC 80
R. v. R.F.L., 2003 YKTC 100
R. v. Peters, 2005 YKSC 46
R. v. Clark, 2010 YKTC 61
R. v. Joe, 2010 YKTC 134
R. v. R.P.B., 2011 YKTC 12
R. v. Kenneth Roy Buyck, 2016 YKTC 71
R. v. Menicoche, 2016 YKCA 7

[29] Any hope that this trend will seriously reverse in the near future is unrealistic. Furthermore, what is also unrealistic is that this offender will confine himself to his own residence. It is probable and highly likely that he will find himself in a situation where vulnerable victims are present. There are several social scenarios which could easily put him in a position where other people are drinking to excess and passing out. Mr. Kodwat cannot be trusted now nor in the foreseeable future to control his sexual urges.

[30] Dr. Lohrasbe did state with some confidence that by the time men are in their 60s, they are, for the most part, not committing these crimes. Statistically it is very, very low. Mr. Kodwat is likely on a downward slope and on course to burnout.

[31] As offenders get older, their energy and thrill seeking levels go way down. Furthermore, Dr. Lohrasbe indicated that older people hang out with older people. It would appear that Mr. Kodwat has been transformed from an out-of-control thrill seeking young man into a middle-aged somewhat depressed man, quite prepared to take advantage of vulnerable female victims. The crimes of the late 1980s have changed to what we saw in the third and fourth sexual offences. The “predatory aggressive sexual assaults” (Dr. Janke 1989) are now more opportunistic calculated ones. What is

common to all of his four sexual offences are vulnerable female victims. Simply put, potential victims must be protected regardless of where Mr. Kodwat is at developmentally.

[32] With his background and not being under the influence of alcohol, Mr. Kodwat committed two major sexual assaults at ages 40 and 45. There is no basis to believe that, unchecked by deprivation of liberty, these uncontrollable sexual impulses will no longer exist any time soon. Mr. Kodwat will not be 60 until December of 2030.

[33] Dr. Lohrasbe talked about these proceedings being a wake-up call to the offender and I am sure they have been. That, in itself, is not nearly enough to motivate him to fully and seriously participate in programming and not to commit any further sexual crimes. Indeed, in his summary, Dr. Lohrasbe was clear that “Mr. Kodwat poses a high risk for further acts of sexual violence”.

[34] I am satisfied that this offender, by his conduct, has shown a failure to control his sexual impulses. There is a likelihood of him causing injury, pain, or other evil to other persons through failure in the future to control his sexual impulses (s. 753(1)(b)).

[35] It is unnecessary to fully consider the application of s. 753 (1)(a)(i) and s. 753 (1)(a)(ii) because of the certainty of my conclusion above; however, should I be mistaken in that conclusion, a thorough analysis of the circumstances surrounding the other violent offences that were presented to the Court would lead to a similar finding under those two sub-paragraphs as well.

[36] I agree with the law as stated by Cozens, T.C.J. in *R. v. Smarch*, 2014 YKTC 51. The "low threshold" in paragraph 201 was not subject to any criticism by the appeal court (2015 YKCA 13), although the Court of Appeal noted that the designation of dangerous offender was not challenged on appeal. It would seem to me that if they found the "low threshold" legal description inaccurate or wrong, they would have at least commented on it, especially as they had set out the trial judge's reasons following their own review of Dr. Lohrasbe's evidence.

[37] Both the Pre-Sentence Report and the psychiatric report are unequivocal that this offender is at high risk to re-offend. In the Probation Officer's words, "Mr. Kodwat scored as having a **HIGH** level of criminogenic need and a **HIGH** level of criminal-history related risk. Combined consideration of the levels of the client's criminogenic needs and criminal-history related risk indicates that a **HIGH** level of supervision and intervention would be appropriate for Mr. Kodwat." (page 20). Furthermore, at page 21, "well above average risk for being charged or convicted of another sexual offence" (page 21).

[38] On Page 27 of his report, Dr. Lohrasbe summarizes the application of the Risk for Sexual Violence Protocol, or RSVP as follows:

> *1. The overall likelihood of future sexual violence is high.*
>
> 2. The *nature* of that risk (of greatest concern and the focus of this assessment) is of sexual violence against a female.
>
> 3. The severity of victim harm is high, as his violence has repeatedly included penetrative sexual acts.

> 4. The *frequency* is low, given that he has committed four acts of sexual violence over three decades.
>
> 4. The *context* is of access to a vulnerable female.
>
> 5. The *imminence* is closely related to both the above context (opportunistic), with Mr. Kodwat being disinhibited.an additional potential factor promoting imminence. [sic]

[39] The Court of Appeal in *Smarch* noted "that Mr. Smarch's history and personal characteristics satisfied 13 of 22 categories" in the Risk for Sexual Violence Protocol. For Mr. Kodwat, there were 17 of 22.

[40] Even though much was made of the "wake-up call", the cessation of alcohol, and his age, I am fully satisfied that this offender should be designated as dangerous pursuant to s. 753(1)(b).

[41] As to the relation between s. 753 and s. 718, the law is clear and has been stated in many cases, including *R. v. Paxton,* 2013 ABQB. 750 at paras. 31-35 and *R. v. Osborne,* 2014 MBCA 73 at paras. 44-49.

[42] While *Gladue* principles were not of concern on the designation stage, they will be taken into account in the determination of what must be done under s. 753(4). As stated above, the indeterminate sentence was "off the table". In terms of imposing a proper sentence, my mind is turned towards the *Gladue* factors in the life of this offender; however, given his lengthy record, past unsuccessful interventions, and the predicate offence, I will be, and must be, giving emphasis to protection of the public, in particular within the confines of legal soundness, doing the utmost in preventing Mr.

Kodwat from victimizing persons in the future. No more women, vulnerable or otherwise, should ever be assaulted by him again.

[43] The proposed sentence by the defence is totally inadequate. Imposing the lowest federal sentence of two years plus probation for three years might result in his receiving the high intensity sex offender programming in full, especially if Corrections Services Canada gave him top priority. But the purpose here is not to get Mr. Kodwat back on the streets as soon as possible. He has committed a fourth major sexual assault on a vulnerable female and this crime needs to be denounced wholeheartedly. This offender and others so inclined must be deterred.

[44] In addition to these and other purposes set out in s. 718, account is taken of s. 718.1, s. 718.2 (a)(ii.1), s. 718.2 (a)(iii.1), s. 718 (b) and, of course, s. 718.2 (e). These provisions are important, but the fundamental principle is that the protection of the public must prevail (*R. v. Osborne).* To impose inordinately low or overly lenient sentences on dangerous sexual offenders is to fail to offer adequate protection to victims. Indeed, it would be creating unnecessary scenarios where vulnerable people will be victimized and forced to live lives of untold psychological and perhaps other harm.

[45] *Rosenthal* confirmed that psychological harm results from sexual crimes. If not convinced, all one has to do is carefully read the victim impact statements and listen closely to those statements as they were read aloud by the parents of the victim. As to the application of s. 718.2 (a)(ii.1) and (iii.1) to the victim and her parents, it is obvious.

[46] While Correctional Services Canada has improved its efficiency in delivering programming (exhibits 15 and 16), there is no assurance that this offender would complete the high offender sex offender program in the relatively short time frame of a two-year sentence. Even if he did, I am not satisfied at all that the public would be protected. He would still be in his 40s upon release and only subject to probation which does not have the leverage and control of a possible longer parole period (based on a sentence of four years rather than two) followed by a ten-year LTSO. The parole officers would have more capacity to act on a parole violation (proof on a balance of probabilities) than a probation breach or LTSO breach (beyond a reasonable doubt). LTSO breaches are rare according to Dr. Lohrasbe.

[47] Dr. Lohrasbe opined that it is possible that the completion of the High Intensity Sexual Offender program, coupled with adequate follow-up maintenance, might be enough in terms of his rehabilitation, but recognized properly that there were other principles and considerations at stake. Most certainly these are protection of the public in the future, plus s. 718, etc.

[48] Defense counsel maintained that a 10-year LTSO would be harsh. In no way can I accept that submission. Any harshness from by the imposition of a 10-year LTSO pales in comparison with the brutal harshness of devastating memories and psychological harm callously imposed on the four female victims. The evidence revealed that 10-year orders are common and, furthermore, that they are flexible with regard to conditions depending on the offender. This four-time sexual offender must be effectively lawfully controlled as long as is justified and in my opinion, certainly until he is in his early 60s.

[49] As to the effect of ageing and treatment, Dr. Lohrasbe stated at p. 30, para 2:

> With Mr. Kodwat, problems with personality and character have been a both a [sic] formidable obstacle to treatment as well as an unapproachable target of treatment, and may remain so **indefinitely.** It is unrealistic to expect him to change his personality and character **at this stage in his life** as it is one realm of therapy that requires very high levels of motivation. (my emphasis)

[50] One might be forgiven for questioning the sincerity of his stated desire to go to a federal penitentiary for treatment, given that the "writing is on the wall". Nonetheless, I am hopeful that at his age now, he will be more sensible and committed to programming.

[51] The program outlined by Sean Couch-Lacey is a pilot territorial program for sex offenders. Designed for low to moderate risk needs, it would appear outside the high intensity that this offender needs. Page 26 of the Pre-Sentence Report at paragraph 2 points to him as being high and very high in the risk category. The first iteration of this program will conclude by the end of July 2017. There is no certainty that the program will continue.

[52] Sean Couch-Lacey, a strong proponent and advocate of the program admitted that he was unable to say whether Mr. Kodwat's needs would be met. This program has yet to be tested or evaluated.

[53] I would reiterate my comments in *R. v. Skookum*, 2016 YKTC 62, paragraphs 12 to 15.

[54] Furthermore, from that decision I commented on the extensive reasons of Gower J. in *R. v. White*, 2008 YKSC 34 and noted in paragraph 27 of *Skookum* the importance of paragraph 44 from *White* which stated that, for repeat offenders, the range of sentence could go to seven years. The *Criminal Code* provides for a maximum of 10 years in this case.

[55] Mr. Kodwat, by his heinous criminal act, i.e. fourth sexual assault involving penetration, has subjected himself to the top of the range, if not a little beyond. The *Gladue* factors outlined in great detail in the reports, the *Gladue* report, the Pre-Sentence Report, Dr. Lohrasbe, etc. are awful, and sexually as bad as I have seen. Nonetheless, they are primarily decades old and a great number of all sorts of convictions and attempted interventions have taken place in that intervening time frame. Feeling empathy for what Mr. Kodwat went through back then in his earlier years is a natural human compassionate response. Judicially though, the most I can do for Mr. Kodwat is to reduce an otherwise seven year sentence to one of six years imprisonment.

[56] In the end, the court imposes a sentence of six years imprisonment less the 25.5 months credit for pre-sentence custody. That will be followed by a 10-year LTSO.

[57] In addition, there will be a DNA order, pursuant to s. 487.051, a firearms prohibition for 10 years pursuant to s. 109, a victim surcharge of $200.00 under s. 737, payable forthwith, and a lifetime SOIRA order pursuant to s. 490.012(3).

[58] A s. 760 order is hereby issued requiring that a copy of all reports given by psychiatrists, psychologists, criminologists, and other experts on the court file pertaining

to Jackie James Kodwat and any observations of the court with respect to the reasons for the Dangerous Offender designation, together with a transcript of the trial of the offender, the exhibits filed, and a transcript or CDs of the sentence hearing, be forwarded to the Correctional Service of Canada for information and case management purposes.

[59] In conclusion, I would like to thank all counsel for their dedication, hard work, and thoughtful submissions. These types of cases are always challenging.

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Luther T.C.J.