Citation: *R.* v. *Silas*, 2012 YKTC 53

Date: 20120522
Docket: 09-00173
09-00173A
09-00429A
09-00429B
09-00176
12-00155
Registry: Whitehorse

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

REGINA

v.

DAVID JOHNNY JUNIOR SILAS

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:

Keith Parkkari — Counsel for the Crown
André Roothman — Counsel for the Defence

REASONS FOR SENTENCING

[1] LUTHER T.C.J. (Oral): Earlier today David Johnny Silas pled guilty to a number of charges. The Crown and defence presented me with a joint submission.

[2] This offender is now almost 28 years of age, but at the time of the commission of the sexual offences he was 23. During the period between October and December of 2008, he became sexually interested in two 13-year-old girls, friends of his young sister. He pleaded guilty to a s. 151 charge on M., which involved kissing, feeling her breasts,

and rubbing her vagina with no digital penetration. There were three somewhat similar incidents.

[3] Also, the offender pled guilty to a s. 271 charge on E., which started with kissing, touching and later, upon being persuaded to go to his room in the basement, she was subjected to vaginal intercourse, oral sex, and then vaginal and anal intercourse. The girl was afraid he would hurt her if she did not oblige. Physically, E. suffered bleeding and was sore for a couple of days. E. filed a brief victim statement wherein she felt scared, guilty, and alienated. She has come to realize that what happened was not her fault. There was no alcohol involved in the first offence, but the offender was intoxicated for the second. Neither victim had consumed alcohol.

[4] This offender is a Northern Tutchone man with close ties to his family and his people. He is blessed with insightful, responsible, and supportive parents, who took the time to visit him in jail as much as they could, to attend court, and to write a very loving, thoughtful, and meaningful letter of support for their son. I read from the second last paragraph on page 2:

> We want the Court to know that we love and care for our son and we want the very best for him. We are prepared to take whatever measures the Court feels is necessary to assist David in being a useful member of society. He has a large, extended family in this community who also support him and who he can depend on in future should that be required. We are a large, well established family in this community. In First Nations communities and families, it is our culture to support family members when required with help and kindness.

[5] David Silas has been gainfully employed on a full-time basis with Capstone Mining, but was let go because of these charges and being in custody. He will likely be able to resume his work upon being released from the Whitehorse Correctional Centre

at the conclusion of his sentence. He has no previous criminal record other than an impaired conviction in 2008.

[6] Mitigating factors include the cooperation with the police, the pleas of guilty, and the very short record. In addition, he has a very supportive family and community. I am satisfied that he will be able to turn things around. Also of note, he made good use of his time in pre-trial custody.

[7] It seems to me that there are, in all likelihood, continuing psychological consequences to the victims, particularly E. I will read an excerpt from a case called *R.* v. *Sean Elliot Young*, 2010 CanLII 70370 (NLPC), a decision from the Newfoundland Provincial Court dated November 29th of that year. At page 42 of that decision:

> Finally, I have considered that any sentence imposed here must send a clear message to adults: sexual relations with children are completely unacceptable and will result in lengthy periods of incarceration being imposed. Adults must understand that if they have sexual intercourse with a child, arguing that the child consented or initiated the sexual contact will be of little assistance to them when sentence is imposed. As Ms. Simms pointed out, it is the adult who must accept responsibility for ensuring that sexual intercourse with a child does not occur, not the other way around. Similarly, the Scottish Law Commission in its *Report on Rape and Other Sexual Offences* (December, 2009), noted at page 70, that what "the law is seeking to prevent is the exploitation of the child's vulnerability to give consent without fully appreciating what is involved. The second aim of the law is to make a symbolic statement about child protection. The Home Office Review Group noted that one of the key issues to emerge from its consultation was 'the need for the law to establish beyond any doubt that adults should not have sex with children.'"

[8] The principles of sentencing are set out in the *Criminal Code*. Under s. 718 of the *Criminal Code*, the purpose is to:

> (a) to denounce unlawful conduct;
> (b) to deter the offender and other persons from committing offences; …

Clearly, these are very important in cases of this nature. We must never lose sight of the prospects of rehabilitation and reformation, and I do believe that there is a substantial likelihood that this young man will be rehabilitated and will be able to turn his life around. Also, I think it is important in this case to promote a sense of responsibility in offenders and acknowledgment of the harm done to the victims and to the community.

[9] Also of note under s. 718.2:

> A court that imposes a sentence shall also take into consideration the following principles: …
>
> (ii.1) evidence that the offender, in committing the offence, abused a person under the age of eighteen years, …

[10] While we are dealing with a First Nations young man, there is no evidence of the type of background problems that we see in *R.* v. *Gladue*, [1999] S.C.J. No. 19, *R.* v. *Ipeelee*, [2012] S.C.J. 13, *R.* v. *Ladue,* 2011 B.C.C.A. 101, and many other cases.

[11] Of importance is the fact that he has spent 13 months in custody. This will only be credited on a one-to-one basis, because he was detained in custody. In their joint submission, the Crown and defence recommended a sentence totalling 29 months, less the 13 months in pre-trial custody, for a total of 16 months. On the face of it, given the serious nature of the charge under s. 271, this does seem somewhat on the low side. However, given the fact that we are dealing with experienced counsel here, and given the substantial likelihood that this young man will be able to turn his life around, I can

accept the joint submission, and it will be achieved as follows: On the s. 151 charge, a sentence of three months; on the s. 271 charge, 18 months consecutive; s. 253(1)(b), one month consecutive; s. 145(5.1) from the same date, one month concurrent; from June the 3rd, s. 145(5.1), one month consecutive; from April 28, 2010 on the s. 145(2)(a) charge, one month consecutive; July 9, 2010, three months consecutive; April 29, 2011, the s. 145(3), two months consecutive.

[12] After the sexual charges were laid, his life started spiralling out of control, with more drinking of alcohol, breaching his undertaking, impaired driving, failing to attend court, and so on.

[13] The sentences were properly crafted on a consecutive basis, other than the s. 145(5.1) from May 7, 2009, because there were separate crimes committed on different days. The aggregate of 29 months reflects, perhaps generously, the totality principle. In other words, the sentences may well have been longer sentences if there were fewer of them, but given the fact that there were that many offences, taking a look at the whole picture, the 29 months seems appropriate. Thus, I am accepting the joint submission.

[14] As to the *Sex Offender Information Registry Act,* S.C. 2004, c. 10, the Court imposes an order under s. 490.012(1) of the *Criminal Code*, commencing today, and it will run for 20 years, and this will be on the s. 271 charge. Also, there will be a DNA order as a primary designated offence on the s. 271 charge.

[15] The Court will impose a period of probation for three years on the s. 271 charge, and the conditions will be the statutory ones:

1. To keep the peace and be of good behaviour;
2. Appear before the Court when required to do so;
3. Notify the Probation Officer in advance of any change of name, address, and promptly notify the Probation Officer of any change of employment or occupation;
4. Remain within the Yukon Territory unless you obtain the written permission from the Probation Officer or the Court;
5. Report to the Probation Officer immediately upon your release from custody, and thereafter when, and in the manner directed by the Probation Officer.

Those conditions will be in effect for three years. The other conditions will start with the phrase, "For the first two years," and that will include:

6. Abstain absolutely from the possession or consumption of alcohol;
7. Not attend any bar, tavern, off-sales, or other commercial premises whose primary purpose is the sale of alcohol;
8. Take such alcohol and drug assessment, counselling, or programming as directed by your Probation Officer;
9. Having given the Court your consent, attend and complete a residential treatment program as directed by the Probation Officer;
10. Take such psychological assessment, counselling, and programming as directed by your Probation Officer;
11. Take such other assessment, counselling, and programming as directed by your Probation Officer;

12. Participate in such educational life skills programming as directed by your Probation Officer;

13. Make reasonable efforts to find and maintain suitable employment and provide your Probation Officer with all necessary details concerning your efforts; and

14. Provide your Probation Officer with consents 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 probation order.

All of those are for the first two years. Getting back to the conditions that are in effect for three years, it also would include the no contact, and specifically:

15. Have no contact directly or indirectly or communication in any way with E. and M.

[16] In addition, there will be, on the s. 271 charge, a s. 109 weapons prohibition order for ten years. Given the length of the sentence, I am going to waive the imposition of a victim surcharge.

[17] So David Johnny Silas, would you stand, please. Today, you are sentenced to a total period of 29 months, less the 13 months that you have been in custody, for a total of 16 months. While the sentence is probably on the light side, considering the severity of the sexual assault, I do feel that justice has been served here today. I think that what has happened to you over the last 13 months in custody has caused you to give some very serious thought as to the future direction of your life.

[18] I also think it has caused you to think long and hard about the strong support that you have received from your family, particularly your parents, coming to visit you, coming to court here today, writing what I would call a beautiful letter, and I do not want you to let them down anymore. Your parents are very important to you, I am sure, and please do not do that.

[19] Keep working hard while you are inside the institution and then when you are released, I am optimistic that you will be able to continue working in the mining industry, getting paid well, and you can make a very good life for yourself, but these sorts of crimes that you have committed here in the past, you absolutely have to turn away from them, you understand that, do you not?

[20] THE ACCUSED: I understand.

[21] THE COURT: Very well. Are there any questions here for the Crown?

[22] MR. PARKKARI: On the probation order, I didn't catch whether there was a residence clause. It would be the fourth clause on the form there.

[23] THE COURT: Yes. If I did not read that then, I will read it now:

16. Reside as approved by your Probation Officer.

That one will be in effect for two years; that will be one of the two year conditions. The only three year conditions are the statutory, the jurisdiction, the reporting, and the no contact. All the rest will run for the two years. Was there anything else for the Crown?

[24] MR. PARKKARI: No.

[25] THE COURT: For the defence?

[26] MR. ROOTHMAN: Nothing from me, Your Honour.

[27] THE COURT: Very well, and Mr. Silas, do you have any questions at all?

[28] THE ACCUSED: No.

[29] THE COURT: Under s. 259 of the *Criminal Code* with regard to the impaired charge, there will be a driving prohibition. Did the Crown speak to that?

[30] MR. PARKKARI: Yes, it asked for two years, that being the minimum penalty.

[31] THE COURT: That is granted.

[32] MR. PARKKARI: Assuming there is nothing else dealing with sentence, a stay of proceedings on all the remaining charges that have not been spoken to.

[33] THE COURT: Okay.

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LUTHER T.C.J.