SUPREME COURT OF YUKON

Citation: *R. v. D.B.S.*, 2018 YKSC 16

Date: 20180329
S.C. No. 16-01508
Registry: Whitehorse

BETWEEN

HER MAJESTY THE QUEEN

AND

D.B.S.

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

Before Mr. Justice R.S. Veale

Appearances:
Noel Sinclair — Counsel for the Crown
Lynn McDiarmid — Counsel for the defence

REASONS FOR JUDGMENT

INTRODUCTION

[1] D.B.S is before the Court for sentencing, following his conviction on two counts of sexual interference committed against his step-granddaughter, who is now 13 years old. My reasons for judgment following his trial can be found in *R. v. D.B.S.*, 2017 YKSC 56.

[2] Briefly, at the time of the offences, D.B.S. was married to the victim's grandmother. The two of them were raising the victim and her brother in their home. The children lived with D.B.S. and their grandmother between 2006 and 2016, when the police became aware of the sexual abuse. The Crown alleged a total of six specific instances over this time frame, and I convicted D.B.S. with respect to two of them.

Overall, the victim spoke to a pattern of conduct in which D.B.S. would touch her in the vaginal area, under her clothes and underwear, in his bedroom and while her grandmother was out of the home. The first of the specific instances that I found had been proven beyond a reasonable doubt took place when the complainant was six or seven and the second when she was nine or ten.

[3] The Crown proceeded by indictment. Given this election, at the time of the earlier offence, sexual interference was punishable by a minimum sentence of 45 days, and at the time of the later offence, the minimum sentence was (and still is) one year.

[4] D.B.S. has been in custody since the convictions were entered; a period of 5 ½ months. Crown and defence agree that this time should be credited at 1.5-to-1. The Crown submits that a fit sentence in these circumstances is 27 months, less remand credit. Defence counsel argues for 12-18 months custody, less remand credit, plus a three-year term of probation.

[5] In addition to the case law provided by counsel, I have the benefit of a *Gladue* report, as well as three Victim Impact Statements. The accused also filed a number of support letters from community members.

RELEVANT SENTENCING PRINCIPLES

[6] Pursuant to section 718.01 of the *Code*, in imposing a sentence for an offence that involved the abuse of a child, primary consideration must be given to the objectives of denunciation and deterrence. As well, there are a number of statutorily aggravating factors that exist in these circumstances, namely:

- section 718.2(a)(ii.1): evidence that the offender abused a person under the age of 18;

- section 718.2(a)(iii): evidence that the offender abused a position of trust or authority in relation to the victim;
- section 718.2(a)(iii.1): evidence that the offence had a significant impact on the victim, considering their age and other personal circumstances. This evidence was provided in the victim impact statements, which will be discussed in more detail below.

[7] These principles must be situated within the fundamental principle of sentencing that a sentence must be proportionate to the gravity of the offence and the degree of responsibility of the offender. As well, as D.B.S. is a First Nations person, under s. 718.2(e), the principles articulated in *R. v. Gladue,* [1999] 1 S.C.R. 688, and *R. v. Ipeelee,* 2012 SCC 13, must be considered.

[8] Counsel have provided a number of sentencing authorities. Generally speaking, there is no disagreement on the applicable principles, however the Crown relies on cases with sentences in the low penitentiary range, while defence relies on cases where the sentences imposed were one year or less.

[9] Both counsel agree that D.B.S. is caught by the mandatory minimum sentence of one year that came into effect in 2012.

EVIDENCE AT THE HEARING

Victim impact statements

[10] Three victim impact statements were filed. The victim's father and grandmother each read theirs in court, and the victim's was read by the Crown prosecutor. It is an understatement to say that their lives have been significantly impacted by the conduct of D.B.S.

[11] Both the victim and her father wrote of her three suicide attempts and how isolated she feels in the community to which both she and D.B.S. belong, and in which he has significant support. The victim spoke of being afraid and tired and affected by the labels (“slut”, “psychotic bitch”) that have been applied to her since she disclosed the abuse. She has tried to numb herself with drugs, pills and alcohol but she is profoundly unhappy. She wrote that she does not know how to be happy.

[12] The grandmother’s statement was not just about the impact that the conduct of D.B.S. has had on her granddaughter, but also about the impact it has had on her, as his ex-wife. Her life is “shattered in a million pieces” and her trust has been horribly betrayed. She has started to suffer from depression and has herself contemplated suicide. The break-up of the relationship also had financial implications and she is struggling to maintain her family.

Gladue report

[13] Both Crown and defence observed that the *Gladue* report prepared for D.B.S. is perhaps unusually positive in terms of D.B.S.’ memories of his upbringing and his strong connection with his family and his culture. However, counsel for D.B.S. pointed out that he has nonetheless grown up within a First Nation that, like other Yukon First Nations, has been impacted by residential school and other legacies of colonialism, and invited me to take judicial notice of the broader intergenerational trauma that exists within his extended family and community. She also says that the report reflects D.B.S.’ personality, in that he is a person that will always focus on the positive in a situation. I should not assume, based on the narrative he provided to the report-writer, that he has

not experienced the unique circumstances that face Aboriginal offenders and that have led to their overrepresentation in the justice system.

[14] It is clear from the report that a number of D.B.S.' uncles on his mother's side attended residential school, as did his father. However, despite this, he describes his parents as happily married and his home life as relatively stable. His mother and his grandmother were fluent in their Indigenous language and were involved in teaching language and culture at the community school. While there was not a lot of money in the home, the kids were kept fed through his father's harvesting of animals, and the family spent significant time in the bush together. He does not remember any overt racism, even though the community was fairly segregated. Similarly, while he recalls that there was "lots of drinking" in the community, he says "a lot of the time we never saw it". The exception seems to be parties that coincided with his parents' payday, during which his parents would drink, sometimes using money that should have been spent on food. D.B.S. himself went through a period as a young man where he struggled with alcohol use, one time being found passed out in a ditch at 40 below zero. However, he has been sober for almost thirty years.

[15] D.B.S. has one son that grew up in Ontario with his mother, and with whom he has had only sporadic contact. He met the victim's grandmother in the late 1980s. She and D.B.S. settled in his home community in 1990 and both have lived and worked there since. The living arrangement continued until the allegations about these offences were made to the police.

[16] D.B.S. continues to deny sexually assaulting the victim. He refuses to participate in sex offender programing but is willing to engage in counselling around anger

management. As well, although he does not admit responsibility, his friends describe him as being “always in turmoil” as a result of the allegations and the tearing apart of his family. D.B.S. has a lot of community support, which the report writer says is unusual given the nature of the offences. He has been spending a lot of time out on the land, connecting with family and trying to work through his emotional issues.

Support letters

[17] Defence counsel submitted twelve letters filed in support of D.B.S. They are primarily from family members as well as people that he grew up with or has become friends with. All describe him as someone with a positive attitude, who has spent his life deeply engaged with his community and family, always ready to lend a hand and particularly involved in cultural initiatives and programs for youth.

ANALYSIS

[18] As mentioned, Crown and defence have each provided me with a number of authorities. While not all have facts comparable to the ones in this case, they do set out relevant sentencing considerations, in addition to applying the statutory factors set out above.

[19] The relevant factors set out in the caselaw include the frequency of the sexual contact, the presence or absence of threats, the nature of the sexual touching, the abuse of trust implicated in the relationship, the existence of any disorders that underlie the offender’s behaviour, any previous convictions of the offender, the offender’s behaviour after commission of offences and the impact of the offences on the particular victim (see *R. v. E.M.Q.,* 2015 BCSC 201, at para. 84).

[20] Some of these factors are captured as aggravating factors in specific *Criminal Code* provisions. In addition to these, the *Code* dictates that the primary sentencing considerations are necessarily denunciation and deterrence. However, that does not mean that these are the only sentencing objectives that need to be considered; restraint and rehabilitation nonetheless continue to be operative secondary concerns, and the sentence must ultimately be proportionate with regard to the gravity of the offence and the degree of responsibility of the offender (*R. v. Menicoche,* 2016 YKCA 7). *Gladue* factors must also be taken into account.

[21] Here, D.B.S. comes before the court as a first offender. While I acknowledge that previous good character is not a mitigating factor in the context of this type of offence (*R. v. R.S.H.*, 2005 BCSC 927), D.B.S.' lack of past experience with the justice system to some extent reduces the severity of the sanction necessary to meet the principle of specific deterrence and is also relevant to his rehabilitation. It does not affect the application of denunciation or general deterrence.

[22] As indicated in the *Gladue* report, D.B.S. does not accept responsibility for these offences and asserts that he did not commit them. This is not an aggravating factor; rather it is the absence of a mitigating one. Nonetheless, as identified by the *Gladue* report writer, it does impact on his prospects for rehabilitation.

[23] In terms of the offences themselves, the incidents that led to convictions took place over a three- or four- year period. The conduct of D.B.S. towards his granddaughter was persistent. However, I also take into account the submission of defence counsel that the touching suffered by her was not at the extreme end of the spectrum. While the touching was under the clothes, there was no penetration, and no

indication that the nature of the touching escalated over the course of time. As well, unlike in some of the cases filed, D.B.S did not force his victim to fondle him or use his penis in the contact.

[24] I do not say this to minimize the awfulness of the offences or the profound harm that they have done to his victim. It is evident that D.B.S.' conduct has had a devastating impact on the victim. While the physical acts were not, objectively speaking, the most serious sexual acts that could have been perpetrated, the breach of trust inherent in his conduct is significantly aggravating. D.B.S. was not only step-grandfather to the victim; he was effectively one of her two primary caregivers from the time she was an infant. This dependent relationship as well makes his comments to her about being taken away from her grandmother should she tell anyone about the touching, more threatening than what it might otherwise appear to be on its face.

[25] There is also *Gladue* to consider. While D.B.S.' upbringing may have instilled him with cultural values and a connection to his family and the land, the report makes it clear that his community did not escape the impacts of colonialism that sentencing judges are directed to look at as part of the relevant systemic and background context. Indeed, as the *Gladue* report pointed out, the complainant and her family are also victims of the same practices, and have themselves faced the social and economic deprivations that *Gladue* and *Ipeelee* are concerned with. To the extent that different procedures and sanctions may be appropriate to meet the objectives of sentencing in the context of D.B.S., they should be considered.

[26] Defence counsel has provided a number of cases in which courts have imposed sentences of one year or less for convictions involving the repeated sexual touching of a

single victim without oral sex or penile penetration. I note that these cases all pre-date the 2012 amendments to the *Criminal Code* that increased the minimum sentence for a s. 151 offence to one year on an indictable election and 90 days on a summary election. In this respect, I bear in mind Crown counsel's reliance on *R. v. Lloyd,* 2014 BCCA 224, for the proposition that, when Parliament dramatically increases a mandatory minimum sentence, it indicates an intention that the relevant offence is to be viewed more seriously.

[27] For its part, the Crown has referred to a number of cases in which penitentiary terms were imposed on offenders convicted of sexually assaulting children, although in many of those cases the conduct included oral sex or forced intercourse, and *Gladue* was not a relevant consideration.

[28] What is clear on a review of the caselaw, is that a wide range of sentences have been imposed for convictions of this nature. In my view, however, the more persuasive cases before me are the ones decided by Yukon courts and ones that bear significant similarity on the facts to the case before me. I appreciate that many of the other cases filed provide valuable statements of principle and a framework of relevant considerations in which discretion can be exercised, but in terms of proportionality, they provide less guidance.

[29] Although Yukon does not subscribe to the starting point approach to sentencing, the decision in *R. v. Rosenthal,* 2015 YKCA 1, is useful as a frame of reference in this jurisdiction. In *Rosenthal,* the Court of Appeal overturned a suspended sentence to impose a 14-month custodial term on a youthful first offender who had digitally penetrated a sleeping victim. Notably, the Court in *Rosenthal* did not have to consider

the application of *Gladue* factors. However, the case nevertheless sets an appellate benchmark against which to assess other sentences for proportionality.

[30] Obviously, none of the cases provided in the books of authorities have identical facts or offenders, but one Yukon case that does have some similarity in terms of the facts is *R. v. P.G.*, 2016 YKTC 67, a decision by Chisholm J. that was filed by the Crown. There, the 63-year-old accused had engaged in persistent sexual touching of his 11-year-old step-granddaughter over a three-year period. The touching was of the victim's breasts, thighs and vaginal area, and took place over and under her clothing. He was charged after he was reported for touching the breasts and vaginal area of a friend of the granddaughter's during a sleepover. Following a trial on those charges, P.G. was sentenced to 27 months' imprisonment with respect to the offences against the granddaughter, and 12 months' concurrent for the offence against the friend. Similar to the accused in this case, P.G. had no criminal history and a good work history. The differences between the P.G. case and this case include the fact that D.B.S. stood in more of a parental role than did P.G. Also, there was no application of *Gladue* principles in P.G.

[31] Another Yukon case, also decided by Chisholm J. is *R. v. Gilmore*, 2015 YKTC 49. In that case the offender entered guilty pleas with respect to the sexual touching of four children, ranging in age from seven to ten. Mr. Gilmore was a family friend of the parents of all of his victims. The global sentence was 44 months, but on the two most serious sets of facts, Mr. Gilmore received 24 months' imprisonment for digitally penetrating one of his victims and 20 months for touching another victim in her vaginal area over and under her clothing. These sentences ran consecutively, and two further

12-month sentences for slightly less aggravated offences were also imposed and ran concurrently. Again, as with *P.G.*, *Gilmore* can be distinguished because the offender was less in a position of trust and because there were no *Gladue* factors.

[32] Other cases with similarities to the facts here were decided in British Columbia. In *R. v. F.A.B.,* 2012 BCPC 362, the Court considered the appropriate sentence for an offender who had sexually abused his step-grandchild over a three-year-period, while the child was between the ages of 6 and 9. The offender would touch the child in her chest and vaginal areas and kiss her vagina. Although F.A.B. had pleaded guilty, it was after a preliminary inquiry in which his victim had testified. F.A.B. was an Aboriginal offender, who had lost connection with his home community and had personally attended residential school. In imposing sentence, the judge considered that rehabilitation was a significant, if secondary component of a fit sentence. The sentence imposed was six months followed by 12 months' probation.

[33] *R. v. M.D.S.*, 2014 BCPC 56, also has some comparable facts. In that case, the offender was in an intimate relationship with the mother of his two victims, who were 9 and 12 at the time he was found to have touched their genital areas over their clothes. As is the case with D.B.S., at the time of sentencing, M.D.S. maintained a denial that he had committed the offences. This made it difficult for the sentencing judge to consider any therapeutic or restorative alternatives, despite the acknowledged application of *Gladue* and the existence of culturally relevant options for offenders who had accepted responsibility for their conduct. In the result a 12-month sentence with two years' probation was imposed.

[34] These sentences are significantly lower than what was imposed by Chisholm J. in *P.G.* To the extent that they also were decided before the mandatory minimum sentence increased to one year, I find them less compelling. However, unlike the case with *P.G.,* they consider the circumstances of an Aboriginal offender.

[35] I have concluded that a fit and proportionate sentence in this case is a global one of two years, which I will impose on each count to run concurrently, less credit for time served on remand. This is lower than the sentence imposed in *P.G.* but not outside of the range set out in *Rosenthal, P.G.* and *Gilmore.* I find that a two-year-sentence adequately meets the primary sentencing objectives of denunciation and specific and general deterrence. It reflects the gross betrayal of trust inherent in this offence and the devastating consequences that D.B.S.' conduct has had on his victim. As well, this sentence acknowledges the application of *Gladue* principles.

[36] Although the *Gladue* report filed on behalf of D.B.S. does not describe circumstances as tragic as some of those reflected the cases filed, as a First Nations offender, he is nonetheless entitled to the consideration required by 718.2(e). This means that rehabilitation, although secondary to denunciation and deterrence, should still be given significant weight. While D.B.S. has not accepted responsibility for his offending, he has indicated a willingness to participate in counselling to address his identified anger issues and also has support of his community in participating in traditional on-the-land programming that will hopefully allow him to come to terms with the trauma he has inflicted on his family and particularly on his granddaughter.

[37] I decline to impose a term of probation. D.B.S.' conduct while on bail and within the jail has been exemplary, and he is motivated to pursue counselling and traditional

healing once he has finished serving his sentence. The only term of probation that could potentially be useful is a term preventing contact with the victim and her family, but that can also be accomplished through the terms of an order under s. 161.

[38] In the result, I sentence D.B.S. to two years less time spent in pre-sentence custody. He has been in custody since October 13, 2017, for a total of 163 days. He is entitled to credit at a rate of 1.5:1 for a total of 245 days credit. Accordingly, the effective sentence is 485 days.

[39] I also impose the following ancillary orders:

- A 10-year firearms prohibition, pursuant to s. 109 of the *Criminal Code* with an exemption for sustenance hunting and trapping purposes*;*
- An order under s. 487.051 of the *Criminal Code* for the provision of samples of DNA for analysis and recording;
- D.B.S. shall comply with the *Sex Offender Information Registration Act.* Since he has been convicted of two counts of sexual interference, pursuant to s. 490.013(2.1) this order is for life;
- Pursuant to s. 161, I order that for a period of five years, D.B.S. be prohibited from being within 500 metres of any dwelling house where the victim ordinarily resides;
- Pursuant to s. 743.21, I order that D.B.S. have no communication directly or indirectly with the victim during his custody.

[40] The victim surcharges total $400. I order that that amount be payable forthwith.

_____

VEALE J.