Citation: *R.* v. *C.D.S.*, 2010 YKTC 84

Date: 20100730
Docket: 09-00463
09-00463A
10-00308
Registry: Whitehorse

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

REGINA

v.

C.D.S.

Publication of information that could disclose the identity of the complainant or the accused has been prohibited by court order pursuant to sections 486.4 and 486.5 of the *Criminal Code.*

Appearances:
Jennifer Grandy — Counsel for the Crown
Gordon Coffin — Counsel for the Defence

REASONS FOR SENTENCING

[1] COZENS T.C.J. (Oral): C.S. has entered guilty pleas to four offences. Firstly, that he committed a sexual assault on A.S. ("A."), contrary to s. 271 of the *Criminal Code*, and that he committed a sexual assault on D.S. ("D."), contrary to s. 271 of the *Criminal Code*. The Informations allege that these offences took place between the 8th day of June 2005 and the 15th day of July 2009. This covers the period of time when Mr. S. was an adult. Crown has foregone any position with respect to anything that may have occurred before that and it is my understanding that the dates covered could have extended into the time that he was a youth as well.

[2] The circumstances of those offences are that the RCMP responded to concerns raised by Mr. S.'s mother regarding a sexual assault by Mr. S. against his sister, A. In the course of the investigation, it was learned that Mr. S. had had sexual intercourse with A. over a period of several years, with the last incident being about four months prior. Mr. S. admitted, when confronted by the police, to having had sexual intercourse approximately five times covering the period that he was a youth, and then into when he was an adult, with A.

[3] He also admitted responsibility for the sexual assault against his sister, D., which occurred on one occasion where he attempted to touch her breast and touched her between her legs. D. was about ten at that time.

[4] The second offence is an offence contrary to s. 145(5.1). Mr. S. was on an undertaking to a peace officer that required him not to attend at any bar or tavern or other commercial premises whose primary purpose is the sale of alcohol. On May the 9th, he was observed by his Bail Supervisor in a tavern in Whitehorse with a beer in his hand. He was confronted with this a couple of days later. He initially denied it but then subsequently admitted that he had been in the bar with the beer.

[5] Finally, he was arrested this week on an Information sworn on the 27th of July and has pled guilty to one of the charges on this Information, that between the 1st day of January 2010 and the 25th day of July 2010, he touched, for a sexual purpose, A.D., a person under the age of 16, directly with a part of his body, his penis. Ms. A.D. was 14 years of age. The circumstances, as I understand it, are that although Mr. S. says she initially told him she was 19 and then 16 and then 15 and ultimately he learned she

was 14, that after learning she was under the age of 16, he continued to have a sexual relationship with her. Somewhat aggravating is that when he initially spoke to his Bail Supervisor about this matter, she assisted him to the extent that she confirmed that A. was in fact 14, admonished him not to have any form of sexual relationship with her, and continued to take steps to try to give him direction not to do so. Mr. S. was very reluctant to admit the extent of his responsibility and involvement in a sexual relationship, but ultimately did so.

[6] Mr. S. has just turned 23.

[7] MR. COFFIN: Yes.

[8] THE COURT: He is a First Nations individual from the Tet'li Gwich'in First Nation.

[9] There was an initial pre-sentence report provided to the Court that had attached to it a Family Violence Prevention Unit treatment summary. Due to some of the issues raised in that report there was an adjournment of this matter and the Court has now received a psychological and risk assessment from Craig Dempsey, in addition to a further updated pre-sentence report. Mr. Dempsey's report is generally favourable towards the prognosis for future offending and for treatment of Mr. S. Mr. Dempsey notes that he presents as younger than his stated age. Mr. Dempsey indicates that some of the concerns with respect to any psychiatric impairment that Mr. S. may have been facing are most likely related to alcohol and drug abuse in conjunction with some of the history that he has, which appears to have included himself being subject to a sexual assault when he was about eight years old, by a babysitter. Mr. Dempsey says

there is little evidence during the interview to suggest that Mr. S. is currently experiencing psychiatric impairment. He states that Mr. S. meets the diagnostic criteria for non-exclusive pedophilia or incest. The criteria he notes were: an attraction to pre-pubescent children, 13 or younger, acting on these fantasies and being at least 16 years of age or having a five year age difference. His sisters were approximately ten and he was at least five years older than them at the time that these incidents first occurred.

[10] Mr. Dempsey identifies a matter of further concern, being the relationship that Mr. S. was having with the 14-year-old girl, who, subsequent to Mr. Dempsey's report, is the same girl that Mr. S. has pled guilty to in respect of the s. 151 charge.

[11] Mr. Dempsey goes on to state that:

> Despite meeting the criteria for pedophilia, I am uncomfortable with this diagnosis without employing the use of an objective measure of sexual arousal such as a penile plethysmograph or an ABEL assessment. Mr. S. engaged in sexual offending against his sisters in part due to his early sexualisation (sexual abuse by a babysitter at age eight), the abuse of drugs and alcohol, and the dysfunction that existed in the family home. He does state that his primary sexual attraction is to same age females. Mr. S. is attending for treatment for his offending behaviour and prognosis is promising regarding his risk for re-offence. Typically incest offenders have the lowest rates of re-offence of all sexual offenders and Mr. S. is employing risk management strategies to further reduce his risk.

He also notes that Mr. S. met the diagnostic criteria for substance dependence.

[12] Mr. Dempsey assessed Mr. S. as a medium-low risk for reoffending in a sexual manner and placed his risk for sexual violence as being in the moderate risk range.

[13] He states that Mr. S.'s risk manageability is high, meaning that he would be an

excellent candidate for community supervision. He noted that Mr. S. was remarkably forthcoming during the interview. He appeared to be genuinely remorseful and somewhat insightful. He presented as a good candidate to participate and benefit from a sex offender treatment program, and he noted that Mr. S. had already engaged himself in treatment for sexual offending.

[14] The pre-sentence report itself raises concerns about the relationship with A.D., and again, this was prepared initially prior to these charges being laid. Mr. S.'s lack of forthrightness about this relationship raised further concerns. The Criminogenic Risk Assessment in the pre-sentence report places him at a 48 percent probability of reoffending, which puts him in the medium risk range.

[15] Care must be taken when considering what these reports say about reoffending because at the time that these reports were prepared, and the risk assessment was made, we were dealing with offending, primarily, it would appear, in the context of what the original offences were, which were the sexual assaults against his sister. I am well aware of the fact I have to be careful in looking at those risks when I consider the possibility of reoffending in a voluntarily, albeit non-consensual relationship, such as he has been having with A.D. He certainly has not been assessed with respect to risk in that, and that, in my mind, remains a considerable risk and a factor that Mr. S. will have to keep in mind.

[16] He has a substantial level of problems related to drinking and a moderate level of problems related to drugs.

[17] Mr. S. has certainly done a lot, once he faced up to these charges, to proactively

seek counselling, seek treatment, and move forward with respect to the offences against his sister. He was less proactive with respect to his relationship with A.D. and, as I indicated earlier, not completely straightforward and not taking advantage of the opportunities to stop this relationship when he was told it was clearly wrong. He knew that it was clearly wrong.

[18] Crown and defence are in agreement, essentially, that for the s. 271 offences, a conditional sentence is an appropriate sentence, the range being between 12 months, from defence point of view, at the low end, to 18 months from the Crown point of view, at the higher end, on the conditional sentence. The Crown proceeded by indictment on the s. 151 charge and there is a minimum sentence of 45 days. Crown is suggesting that four to six months would be the appropriate sentence for this offence.

[19] There has been a victim impact statement filed by A. that is really quite appropriate, in the sense that it is somewhat disoriented and confused, which would probably best sum up what a young girl of her age would have felt when all this was happening to her, and would still feel. Significant consequences were obviously suffered by A.S.

[20] Mr. S.'s mother, D.S., filed a letter and spoke in court and was very candid and direct, being in an extremely difficult situation. In this case, she clearly offers her support for her son in a manner that also reflects her appreciation of the devastating impact this has had on her daughter, A. in particular. I know less about the consequences on D., who suffered far fewer of the sexual assaults.

[21] The principles of sentencing set out in s. 718 of the *Criminal Code* clearly set out

that unlawful conduct needs to be denounced, and certainly sexual offending against young children and individuals under the legal age of consent needs to be denounced. There is a requirement that the sentence is able:

> (b) to deter the offender and other persons from committing offences;
>
> (c) to separate offenders from society, where necessary;
>
> (d) to assist in rehabilitating offenders;
>
> (e) to provide reparations for harm done to victims or to the community; and
>
> (f) to promote a sense of responsibility in offenders, and acknowledgment of the harm done to victims and to the community.

[22] A court that imposes a sentence has to take into consideration a number of factors, aggravating of which is the fact that the victim of the offence is under the age of 18 and that there is abuse of a position of trust or authority. Now an older brother, clearly, in the family relationship, is in a position of some trust and, clearly, an older person, when the age difference is such as it was in Mr. S.'s case and that of A.D., there is some degree of trust there too that they are responsible to act on. That type of trust was breached in both of these cases. That is an aggravating factor.

[23] 718.2:

> (d) Offenders should not be deprived of liberty if less restrictive sanctions may be appropriate in the circumstances; and
>
> (e) all available sanctions other than imprisonment that are reasonable in the circumstances should be considered for all offenders, with particular attention to the circumstances of aboriginal offenders.

[24] Mr. S. is clearly remorseful for his actions, most notably with respect to the impact this has had on his family and his sisters. He has been separated from his sisters for the better part of a year. He is living with his grandparents. His family has been torn apart to some extent and, as he candidly said, as a result of his actions. There has been a significant consequence suffered there. The brunt of the consequences falls widely upon the family.

[25] His acceptance of responsibility for the sexual contact with A.D. indicates, and I accept, that he is remorseful. The extent to which he understands the reason why that was a criminal offence is probably not as clear as it is with respect to the s. 271 offences, but I believe he understands now that this was wrong and that he cannot be in such a relationship in the future.

[26] He has spent time in custody since July 26th to today's date, which is the first time he has ever done that, and I accept, and it appears obvious to me, that this has had a significant impact on him, and every day he spends in custody will have a significant impact and a deterrent effect upon him.

[27] Mitigating factors include the youthful age of offenders, the extent to which they have shown insight into their problems, whether there is a genuine remorse demonstrated, whether the individual is willing to submit to treatment or counselling or has already started taking treatment and counselling in advance of sentencing, whether there were guilty pleas, and the extent to which the offender has already suffered for his crime and his family, his career and his community. These mitigating factors are all at play in this case.

[28] I am satisfied that specific deterrence does not require the imposition of a long period of custody. In this case, I am satisfied that, in all of the circumstances, a lengthy period of custody for the s. 151 offence is not necessary to meet the principles of justice in s. 718. There will be custody and this custody will have an impact upon Mr. S.'s life and his way of approaching his decisions in the future. One significant aspect is that the period of custody that he will be sentenced to will be followed by a conditional sentence of imprisonment of significant length, and, to some extent, that sentence will stand over him as a reminder that a wrong choice will put him back into custody again, and potentially for a long period of time.

[29] With respect to the s. 151 offence, although latest in time, it will be served first. I take into account that he has spent five days in custody and impose a further 55 days in custody. Although the issue of intermittency was discussed, an intermittent sentence will not be imposed because I accept the submissions of defence counsel that it may be, given the nature of the work employment that Mr. S. has, more difficult for him to attempt to go in and out of custody at this point in time than it would be to simply do his time and not have to go through the emotional adjustments of getting out and going back in again. That will impact the employment he had up to this point in time but, in the long run, that may well be better for him.

[30] I am not certain what the exact policies at Whitehorse Correctional Centre are but I would hope that, should Mr. S. be accepted into the Jackson Lake Treatment Centre and his performance at Whitehorse Correctional Centre otherwise be exemplary or in line with their expectations, he would at least be considered for temporary absences to attend that program should he still be in custody when the program

commences. As I have said, if he is accepted in to that program, I, of course, cannot tell them what to do but it certainly, in my opinion, would be a significantly positive step in his rehabilitation.

[31] Following the period of custody, there will be a sentence of 14 days concurrent custody on the s. 145(5.1) offence. This is his first such offence.

[32] With respect to the s. 271 offences, there will be concurrent sentences. I note that although the factual circumstances are different, neither counsel suggested that the sentences conditionally be imposed in differing degrees. So as such, I will make them concurrent for reasons of simplicity. The conditional sentence will be 16 months. The terms of the conditional sentence will be:

1. To keep the peace and be of good behaviour;
2. To appear before the Court when required to do so by the Court;
3. Report to a Supervisor immediately upon your release from custody 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, address; and promptly notify the Court or 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 for the purposes of employment, including travel directly to and directly from your employment; and except for the purpose of attendance at assessment, counselling and programming, and including travel to and from such assessment, counselling and programming; and except for attendance for educational purposes, including travel to and from such programs --

I will add this other aspect to it:

-- or, when deemed appropriate, except with the prior written permission of your Supervisor.

This is a bit of a catch-all for circumstances not contemplated, not to be commonly used, and that is one reason why I specified the major reasons that you would be allowed to be out. There may be other circumstances I have not contemplated that are important enough that your Supervisor can give you permission for. You will have to ask in advance and get written permission.

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 to not attend any bar, tavern, off-sales or other commercial premises whose primary purpose is the sale of alcohol;
10. You are to take such alcohol and drug assessment, counselling, or programming as directed by your Supervisor and complete a residential

treatment program as directed by your Supervisor;

11. You are to take such psychological assessment, counselling and programming as directed by your Supervisor;

12. You are to take such other assessment, counselling and programming as directed by your Supervisor;

13. You are to have no contact directly or indirectly or communication in any way with A., D. or A.D., except with the prior written permission of the Supervisor in consultation with Victim Services, Family and Children Services --

Is there a reason why the RCMP is on this one? We do not generally include that outside of the communities.

[33] MS. GRANDY: I don't think that's necessary.

[34] THE COURT: I will leave the RCMP off that.

14. Do not attend at the residence, place of employment, or place of education of A., D. or A.D., except with the prior written permission of your Supervisor in consultation with Victim Services and Family and Children Services;

15. You are prohibited from the possession, purchase or viewing of pornographic materials;

16. You are to provide your Supervisor 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 conditional sentence order;

17. You are to attend for a review of this conditional sentence order at 9:30 a.m. Friday, November 12th.

At that point in time, we will see how you are doing and whether there should be any changes made in your conditional sentence order at that time.

[35] Are there any other terms on the conditional sentence order that either counsel have any questions about or that they think should be added?

[36] MS. GRANDY: Just with respect to an issue that's come up lately, where individuals are exercising permissions. I might suggest that, if it's included, that he be required to carry any letters of permission on his person when he's exercising exceptions. That may save him and the police some time and aggravation.

[37] THE COURT: Mr. Coffin, you made a submission on that issue the other day, did you not, about if they do not have -- was it on a conditional sentence order you said that about the permission, carrying it with them. You had a concern about a client the other day that that might pose a difficulty, and I am trying to remember if it is on the exact same issue or not.

[38] MR. COFFIN: No, I think there was -- that suggestion was that --

[39] THE COURT: I could short circuit it. Do you have any concerns about that term, in respect to this client and these circumstances?

[40] MR. COFFIN: I don't, although I guess while I appreciate that it can solve the problem and it's a real good idea to carry it, making it a breachable offence, making it a criminal offence not to carry it, I guess that was kind of the context of my concern on the other situation. It's --

[41] THE COURT: Yes. I mean in this case, it would not make it a criminal offence but it would certainly make it a breachable circumstance on the conditional sentence order, right?

[42] MR. COFFIN: Yes, and subject to collapse if he doesn't have it. That does raise concern for me. I think it's a good idea for him to carry it, that makes perfect sense, but subject to a collapse of his conditional sentence?

[43] THE COURT: It certainly makes good sense. I am not going to include that term because the terms of the conditional sentence are specifically targeted at the requirements to allow the sentence to be served in the community. Carrying it on his person absolutely should be done. Whether I want to set him up for the potential for him to be in breach because he does not happen to have it because he changed pants, it is going to put him in the awkward situation, if he does not have it and the police are not able to find it; that they are going to bring you down to the RCMP detachment, in all likelihood, and you are going to be held to see whether you should be subject to a breach hearing, and then, if you say, "It's in my other pants, " and you get it the next day, you may have spent a night in custody. So it makes a lot of sense, and telling the RCMP you have permission when you are not carrying it with you, do not be surprised if they do not accept your explanation right away and you end up in custody. They are

only doing what they probably should do in the circumstances. So you can forestall all that by carrying your permission with you at all times, but I am not going to order that you do it as part of the conditional sentence order.

[44] MS. GRANDY: The only other aspect that I would just -- I think there may be some benefit just to clarify, just for Mr. S.'s benefit, not to change the language, but just to make it absolutely clear that the no contact condition includes things like text messages, emails, Facebook, MySpace, whatever kind of contact, whether it's in person or whether it's electronic. It's a bigger -- a bigger scope now than it used to be and just to make it clear that all those things are included.

[45] THE COURT: Not as part of the actual term but --

[46] MS. GRANDY: No, no, just to explain that that's exactly what we're talking about here.

[47] THE COURT: Contact and communication directly or indirectly can be a little bit unclear at times, so we will make it clear: It means you cannot wave at them, see them and make gestures towards them, you cannot send them a text, you cannot use Facebook, you cannot use Twitter or whatever else may be out there for computer communication, you cannot ask a friend through any other means to send a message to them, to say hi to them, to do any of that. Nothing. If you are walking down an aisle in the store and they are in the same aisle, move to another aisle, right? It does not mean that you cannot be in the same store. You cannot be in a situation where you are in some way or another sending a message of any form or asking someone else to. You just have to avoid every situation where it could even be thought

that that takes place. It is a small town; things happen and, in your case, because you have had a relationship with A.D., and from what I understand, she is likely going to try or quite possibly going to be trying to contact you, and I am not saying this in any negative way in respect of her; it is just the way it is. You cannot even tell her not to contact you, if you can avoid that. You cannot text her and say, “You’ve been trying to get a hold of me, don’t do that." You cannot do that. You cannot respond to her emails if she sends you any. If she smiles and says hi, you cannot say hi back, right? Hopefully someone will communicate that to her, not you, right?

[48] THE ACCUSED: Yep.

[49] THE COURT: You understand what no contact and communication means. I mean you can with permission, and that may be something that you get at some point in time, but you need the permission first, not afterwards, because the response to a conditional sentence breach allegation is not like probation, not that you have been on it before. You get arrested first and then they talk later. With probation breaches or recognizance or undertakings, which you have been on, they do not always arrest you right away and bring you into custody. A conditional sentence breach, if someone says you have done something, you will be brought into custody and you could serve the rest of your sentence in custody, and that is a long time. That is clear, right?

[50] THE ACCUSED: Yes.

[51] THE COURT: All right. Now this order is going to be followed by a period of probation and I am going to make the probation two years. It is a long period

of supervision. Three is a very long period and while there may be good reason that it could be three, in this case I am going to make it two because you are going to be under a significantly long period of supervision right now. The terms of the probation order will be as follows. I will read the statutory terms out, which are different, which are:

1. Keep the peace and be of good behaviour;
2. Appear before the Court when required to do so by the Court;
3. Notify the Court or Probation Officer in advance of any change of name or address and promptly notify the Court or Probation Officer of any change of employment or occupation;
4. Report to a Probation Officer immediately upon completion of your conditional sentence and thereafter when and in the manner directed by the Probation Officer;

[52] All the other terms will be identical to the terms on the conditional sentence order except there will be no house arrest term or curfew. So even if the conditional sentence gets changed at some point to a curfew, once you have completed that and are on probation, there will not be a curfew or any requirement that you stay in your residence. You will still have to reside where you have been directed to reside.

[53] There needs to be one more clause added on the conditional sentence and the probation, I do not believe that I made an employment clause on that; correct? I intended to do that:

> To make reasonable efforts to find and maintain suitable employment and provide your Probation Officer with all necessary details concerning your efforts.

[54] In clause 9, which is unrelated to the employment clause, was included the attend the Family Violence Prevention Unit to be assessed. I am satisfied that is caught in the other clauses so I am not going to include that. So that is going to be part of the conditional sentence order and the probation order. If you end up at Yukon College, that is fine. You are not going to be directed to go work when you are there, I would expect.

[55] There will be the mandatory s. 109 order that attaches to the s. 151 offence, and that is an order that prohibits you from possessing any firearm, crossbow, prohibited weapon, restricted weapon, prohibited device, ammunition, prohibited ammunition and explosive substance, and this will be for the mandatory period of ten years. Do you understand that?

[56] THE ACCUSED: Yes.

[57] THE COURT: There will be an order under s. 487.051, that you provide a sample of your DNA. That also is a primary designated offence.

[58] There will also be -- I had not asked you this, Mr. Coffin. We never dealt with this. The Crown has sought the s. 490.012 order; correct, that he comply with the *Sex Offender Information Registration Act*, S.C. 2004, c. 10, and that would be for a period of 20 years. It is a mandatory order in this case unless I am satisfied that the order

would impact on Mr. S.'s privacy and liberty and would be grossly disproportionate to the public interest and protecting society through the effective investigation of crimes of a sexual nature. I know that your client is young and I am not certain whether you had a submission on that, and I am not saying I am inviting one because I am predisposed to anything; it is simply a matter that in the normal course I would have asked you, during your submissions, if you had any concerns about that order being made.

[59] MR. COFFIN: Frankly I've never seen or been able to really contemplate an argument that these are -- that it is likely to successfully argue that they'll be excessive in the circumstances or would infringe, would violate the privacy rights, or whatever the phrasing is.

[60] THE COURT: "The grossly disproportionate to the interests sought."

[61] MR. COFFIN: So no, I have nothing to say about that.

[62] THE COURT: Certainly there are some red flags raised in the report that provide a basis for the potential for ongoing concern, particularly if Mr. S. does not continue his treatment and make the appropriate efforts to deal with his substance abuse, and as such, I am going to make the order under s. 490.012. The order will be for a period of 20 years because the maximum term of imprisonment on the s. 151 offence is ten years. It begins on today's date. I will let you know that an application for termination of the order can be made after ten years on a 20 year order. There are requirements under the *Act* for reporting and information being provided about where you live, that you will learn about. The nature of this information is very private and protected and is only for investigative purposes by police forces. So it is not a publically

disclosable issue. Just so you understand that.

[63] THE ACCUSED: Okay.

[64] THE COURT: So that order will go.

[65] I am going to waive the victim fine surcharges. Is there anything else before I leave this?

[66] MS. GRANDY: I just want to make sure that, because we're dealing with a number of, essentially, different sentences, because I heard Your Honour say, or at least I thought I heard Your Honour say, that the s. 271s are concurrent to each other, but I didn't hear Your Honour say that they would be consecutive to the 151?

[67] THE COURT: They are, after the term of imprisonment and yes, they are consecutive to the term of imprisonment that he is serving on the 151.

[68] MS. GRANDY: Thank you.

[69] THE COURT: I felt it was important to deal with this today and not, in the circumstances, wait longer; not that it would have changed the critical parts of my decision but I might have been able to make it a little clearer had I taken a little more time to actually write it down.

[70] MS. GRANDY: If the remaining counts could be marked as withdrawn, please.

[71] THE COURT: All right.

[72] Mr. S., at times, early on, this may look a little difficult. If you do what you are supposed to do, it will actually be a lot easier, and it will get easier and time will pass and you will get on. You are getting on with your life now. You will get better and better as you continue. All right?

[73] THE ACCUSED: I understand that.

[74] THE COURT: I wish you the best.

_____

COZENS T.C.J.