Citation: *R. v. C.B.*, 2004 YKYC 2

Date: 20040423
Docket: T.C. 03-03531
Registry: Whitehorse

IN THE YOUTH JUSTICE COURT OF YUKON
Before: His Honour Judge Barnett

IN THE MATTER OF THE *YOUTH CRIMINAL JUSTICE ACT*, S.C. 2002, c.1

Regina

v.

C.B.

Publication of identifying information is prohibited by s. 110(1) of the *Youth Criminal Justice Act*.

Appearances:
Ludovic Gouaillier — Counsel for Crown
Elaine B. Cairns — Counsel for Defence

REASONS FOR SENTENCING

[1] BARNETT T.C.J. (Oral): C., this case approaches one where I might wish to take it away and think about it for a week or 10 days and keep you on the hook, as it were, before giving a decision; but I think that that would not be the fairest way to deal with you, yourself, and while it might read a little more coherently if anybody was later interested in reading my decision, it would not change the bottom line result.

[2] At my request, the Court Clerk told you earlier this afternoon that there are certain rules that judges have to follow when they sentence people, particularly when they

sentence young persons; and in the eyes of the law, you are a young person. The Court Clerk told you that one of the things that Judge Barnett wanted was to know that you had sat down and read that Presentence Report. Now, I appreciate fully that I can read that more easily than you can, but you have a copy of it, and you have done your best, I am told, to go through it, and I accept that. I know that Ms. Cairns has discussed your situation with you. That is one rule that the judge has to follow. There are a whole lot of rules that judges have to follow when they deal with young persons in court these days. Some of them are very significant in a case such as yours.

[3] The *Youth Criminal Justice Act* says that when a youth is to be sentenced, the principal purpose is to hold that person accountable and to impose a sentence which is a meaningful consequence, one that has, as an alternate goal perhaps you might say, the rehabilitation and reintegration of the young person, that's you, and the words in the Act are "into society, thereby contributing to the long-term protection of the public". The Act goes on to say "that the sentence must not result in punishment that is greater than the punishment that would be appropriate for an adult who has been convicted of the same offence in similar circumstances." Well, Mr. Kingshott got a penitentiary sentence. He was your buddy. Arson, the maximum that an adult can get for that is 14 years.

[4] Another principle that the judge has to keep in mind is that the sentence has to be similar to other sentences imposed in the community for other young persons who have done similar wrongs. Well, yesterday Crown counsel reminded us of this case, Judge Stuart's, six years ago, where a young person got two years closed custody for arson.

[5] Another principle that a judge has to keep in mind is the degree of participation by the young person in the commission of the offence. You and Mr. Kingshott did this together. You wanted Ms. Trudeau and Mr. Sigmond to believe that he was the leader and you were the follower; but that, I think, is not consistent with what you have told other persons, and my own assessment is that you were just totally involved in this. You and he did this together.

[6] Another thing that the judge has to keep in mind is the harm done to the victims, not just your grandmother but also to D.T. and whether it was intentional or reasonably foreseeable. Well, you guys sure intended to burn the house down, and you were very successful.

[7] Crown counsel says that the sentence in this case should include a period of custody. Many years ago in Canada, many persons who were judges under the *Juvenile Delinquents Act* used to deal very harshly with people your age, people of your background. I don't know that just because I read books. I know that because when I was a young lawyer, I dealt with a lot of kids your age and did my best to keep them out of gaol, not youth gaol but real gaol.

[8] Under the *Youth Criminal Justice Act*, a judge can only send a young person into a custodial situation if certain very tight standards are met. The Act says that "a Youth Justice Court shall not commit a young person to custody unless," and there are some exceptions. One is that the young person has committed a violent offence, and another is in exceptional cases where there are aggravated circumstances, such that the imposition of a noncustodial sentence would be inconsistent with the purpose of the Act.

Crown Counsel says that this is the sort of case where not only is it "legal for the judge to impose a custodial sentence but that it is required," and he referred me yesterday to a case from the Alberta Court of Appeal, decided just on the 2nd of March this year, *R. v. C.D.* I have read that case, and I think that it does, indeed, support Crown Counsel's submission.

[9] There is the *Westwood* case Judge Blake decided in Prince George. That is the one where I told your lawyer and the Crown lawyer yesterday that I knew something about that case. I do not find much guidance from that case; but there is one more case, and that is the decision of the Prince Edward Island Court of Appeal in the case of *R. v. J.J.C.*, decided on the 20th of October last year. When I read the *C.D.* case from Alberta and the *J.J.C.* case from P.E.I., I am satisfied that the circumstances that were involved here can properly be described as circumstances involving a violent offence. In the Prince Edward Island case, there is some similarity. He had spent a night inflicting considerable damage to residential property, causing a disturbance on another night and a breach of an Undertaking. It would be very gentle to say that you spent the night inflicting considerable damage at your grandmother's place. In the Prince Edward Island case, the Court of Appeal, three judges, said that the circumstances there did not amount to violence. The victim said that it was scary to get a telephone call from the RCMP early in the morning and that they dreaded going to see the damage done to a car; but the Prince Edward Island Court of Appeal said that "You can't manufacture violence out of these circumstances." But here when you guys torched your grandmother's house with that propane tank, you were worried right there at the scene that there might be an explosion. Well, you had a damned good reason to be worried

that there might be an explosion right there at the scene, in which case you would not be here. Neither would your friends.

[10] The members of the volunteer fire department at Marsh Lake got called out. That was a dangerous callout for them. And your grandmother was clearly traumatized by what was done. I do not have any hesitation in saying that this was a violent offence. If, however, wiser judges than me happen to think that that is a wrong conclusion, then I would say that the circumstances here, both what happened that night and the information contained in the reports, this is an exceptional case; but the bottom line is that in my opinion, the gate has been opened, and this is a case where a judge can properly consider that a custodial disposition is proper. That does not mean that the judge should immediately jump to that conclusion. One of the rules is that a judge has to consider whether there is anything that he or she can properly do, short of imposing a custodial sentence that would meet the needs of society and the young person.

[11] Mr. Sigmond says in his report, and it is a very helpful report, I am looking at pg. 18, Mr. Sigmond says:

> The Court should consider an open custodial disposition for as long a period of time as is possible, given the nature of the current charges.

Then he recommends maximum probation, too.

[12] Ms. Trudeau, who wrote a similarly very helpful Presentence Report, recommends a period of time in open custody. Both Mr. Sigmond and Ms. Trudeau give extensive reasons for their recommendations.

[13] Well, a maximum period of time in custody, I believe, is two years. This is not a case, in my opinion, looking at it as a judge, not as a psychologist, this is not a case where a maximum period of custody could be justified. I think you had one minor scrape with the law before, which resulted in diversion; but worried as persons might be about what the future holds, this simply is not a case where maximum time in custody would be fair or necessary and certainly not appropriate in my opinion.

[14] However, having said that, I am going to go on and say that I think at the end of the day a custodial sentence is necessary. I read Ms. Trudeau's report and Mr. Sigmond's report carefully. They are very long. They are very detailed. I am not going to go through them in any detail, and I am not going to recount the admitted circumstances of what happened that night; but I do know, C., that within a few months, in December of this year, you will be 18. I do note that your mother was in court yesterday. She is here today. I noted what was said in the reports about your childhood. You are an aboriginal youth. I am well aware of the decision of the Supreme Court of Canada in the *Gladue* case, and that is not to be overlooked today. I know that you had a difficult childhood. Your mother and your father separated when you were an infant. Those were tough years for your mother. After your father departed from the scene, she formed a relationship with R.G. You endured some abusive discipline; and when you were eight years old, the social workers took you away; and the outcome of that, as I understand it, was that it was agreed that you should go to your grandmother's home, and your mother signed custody or guardianship or both over to your grandmother, and you lived with your grandmother, I believe, from the time you were eight until you were about 16. I understand that there was a lot of conflict between you

and her partner, D.T. I understand that you have very hostile feelings towards him, but it does not appear that he was an abusive caregiver. My reading of these reports tells me that your feelings about your grandmother are very conflicted, but I think it is pretty clear that you feel that D.T. deserved what happened and that it wasn't really your fault that it happened. Well, I certainly cannot share those sentiments if they really are your sentiments, C. I was pretty surprised about some of the things I heard in the courtroom yesterday afternoon, and it leads me to the conclusion, no matter what I heard, that if you can go back to live with your mother at some time, if, that some time is not now. Both Ms. Trudeau and Mr. Sigmond say that your circumstances are such that a very great deal of structure is required.

[15] In Mr. Sigmond's report, I made special note of things that he says on pgs. 16, 17 and 18, and I am aware, C., that you have got some other serious charges outstanding and not resolved. I suppose that I just need to remind everybody, including myself, that those charges play no part in this matter. The only presumption that I am entitled to make and do make concerning those charges is that you are innocent. I am not assuming anything else concerning those charges.

[16] I had thought that while the maximum period of custody would not be right, that perhaps nine months might be appropriate, I do not find any guidance at all in this case in Judge Blake's decision in the *Westwood* case where he thought that 45 days would be right. That would not, in my considered opinion, be an adequate response here. On thinking more and on reading my letter, C., I changed what I was thinking. I really was thinking in terms of nine months. Six months will be appropriate; and when I say "six months," that does take into account the fact that your freedom has been somewhat

restricted, considerably restricted, since the little escapade when you took off and went to Ross River. It takes it into account to the degree that I think is right and fair and necessary. Six months is the bottom line.

[17] That brings me along to another rule that I have to go through with you, C., because I am ordering that there be a six month custody and supervision order. I have to read this to you, so you will bear with me, please. You are ordered to serve four months in custody, to be followed by two months to be served under supervision in the community, subject to conditions; and if you breach any of the conditions while you are under supervision in the community, you may be brought back into custody and required to serve the rest of the second period in custody, as well. You should also be aware that under other provisions of the *Youth Criminal Justice Act*, a court could require you to serve the second period in custody, as well. The periods in custody and under supervision in the community may be changed if you are or become subject to another sentence.

[18] There will be an Order under s. 42(2)(l) of the Act that there be an intensive support and supervision program.

[19] Finally, C., this is all to be accompanied by a period of one year probation. In case I did not make it abundantly clear already, the custody applies only to the arson charge. The probation order applies both to the arson charge, the willful damage charge and the breach charges. It covers all of those charges, not the *Motor Vehicles Act* matter.

[20] Looking at conditions of probation, C., there are some things that a judge must order: That you keep the peace and be of good behaviour, that you appear before the Court when you are required to do so. There will be a condition in the terms of the Act, and I am looking at s. 55(2)(a), that you are to report to and be supervised by the provincial director or a person designated by the provincial director. There will be a condition that you are to remain within the Yukon Territory while you are on probation. There will be a condition that you are to reside at a place that the provincial director may specify. There will be a condition in this Order, C., that you are not to consume or possess any alcohol in any form under any circumstances; and similarly, that you are not to possess or consume any drugs that were not prescribed for you by a medical doctor or cannot be purchased in a drugstore without a prescription unless those drugs were prescribed for you by a medical doctor; and if any peace officer or any youth worker wishes you to submit to a breathalyzer or urinalysis testing so that he or she can learn whether you have been complying with or not complying with this condition, you have to blow or you have to pee. That is all there is to it. He or she does not have to have any reason. They can just tap you on the shoulder and say, “Come with me.”

[21] There will be a condition, C., that you are to make your very best efforts to either get yourself involved in an educational program approved by the youth worker who is supervising this order; or alternatively, to get a job that the youth worker approves. Mr. Sigmond and Ms. Trudeau both say that you have got to do more to occupy your time. Sports would be part of it, but I am not ordering that you get involved in sports. You obviously like that.

[22] I am inclined to think that there should be an Order that while you are on probation, you pay your grandmother $200 a month, which I believe you can afford to do whether you get a job or not. That will not go very far towards compensating her for the loss, but I think it will be meaningful. I think you indicated, C., that you can do that.

[23] There should be a curfew here. Both Ms. Trudeau and Mr. Sigmond I believe recommend that; and the curfew should be, C., that you are to be in your home, in your residence, continuously every day of the week from 9:00 p.m. until 7:00 a.m. unless you have received written authority from your youth worker to be elsewhere during those hours, and your youth worker is authorized to give you that written authority only if he or she has good reason to think that it is appropriate, but she can do that if it seems to be the right and sensible thing to do.

[24] I do not see any need to tell you not to have anything more to do with Donald Kingshott, because he is not going to be around for a long time.

[25] Unless there are other conditions of probation that you wish to suggest, I think those are it.

[26] MR. GOUAILLIER: No, not in terms of conditions, but I'm not quite clear, and I'm not sure that Mr. Shaw is clear on the intensive supporting and supervision program. What he is telling me is that it is usually used in this jurisdiction as an alternative for custody. An Order is made and conditions are specified, and then, these conditions are supervised by probation. In this case, simply making an Order wouldn't provide much guidance.

[27] THE COURT: I suppose there are cases where somebody goes into Canadian Tire and walks out of there with some things they did not pay for, they get put on probation and nobody pays much attention to it. Intensive supervision, I believe that I have said what the Act requires; and if it turns out to be just intensive supervision of a Probation Order, sobeit. I have not, of course, said that I am ordering open custody or secure custody or closed custody, because I believe that under the new legislation, that is a decision that is the responsibility of the Director to make; but the very clear suggestions, both by Ms. Trudeau and Mr. Sigmond are for open custody, and I would expect them to pay attention to those, but it isn't my Order to make.

[28] MS. CAIRNS: Yes, it is.

[29] MR. GOUAILLIER: Yes, in this jurisdiction, it is, Your Honour, and I'm sorry, I thought I had mentioned it in my submissions.

[30] THE COURT: Well, if it is, then I would say open.

[31] MR. GOUAILLIER: Under s. 88, yes.

[32] THE COURT: If you tell me it is, that is fine. We don't need to debate it, then, because it is clear to me that is what is needed.

[33] MR. GOUAILLIER: That's fine. Nothing to add in terms of conditions, Your Honour. I just wonder if Your Honour was going to address the DNA and firearm issues.

[34] THE COURT: I am talking about the Probation Order right now.

[35] MR. GOUAILLIER: That's fine, I have nothing to add in terms of conditions.

[36] THE COURT: Thank you.

[37] MS. CAIRNS: Your Honour, just perhaps for my clarification, the intensive supervision and support Order runs alongside the Probation Order.

[38] THE COURT: Yes.

[39] MS. CAIRNS: So, it's essentially just saying it's a Probation Order with that model.

[40] THE COURT: Yes.

[41] MS. CAIRNS: Okay, I understand.

[42] THE COURT: C., in my opinion, these circumstances were sufficiently aggravated and serious so that a judge, including a judge dealing with a youth and including a judge dealing with a youth who has no previous record; but when I consider what happened and when I read those reports, I am persuaded that this is a case where it would be wrong not to order DNA testing or not to make a DNA Order, and I do make that Order.

[43] And there will be an Order that copies of the Presentence Report and Mr. Sigmond's report be released to the correctional authorities.

[44] This is not a case where I must order a firearms prohibition.

[45] MR. GOUAILLIER: No, it would be under s. 810, and it would be a discretionary prohibition for up to 10 years.

[46] THE COURT: I think in those circumstances, I will add to the Probation Order a final condition, and that is the condition, looking at the Act, s. 55(2)(ii), C., you are not to own, possess or have the control of any weapon, ammunition, prohibited ammunition, prohibited device or explosive substance. In other words, no guns.

[47] MS. CAIRNS: And that's attached to the Probation Order as a condition of that year.

[48] THE COURT: That's attached to the Probation Order. It is not a separate Prohibition Order.

[49] MS. CAIRNS: Thank you.

[50] THE COURT: So, C., it has taken a little while to get through this. I told you that the new legislation really does require that the judge jump through some hoops. You are going to have some restrictions for some little time to come. Mr. Sigmond is worried. I am concerned, but I hope, C., that you are not going to find yourself back before people like me any time in the near future or at all.

[51] Unless there is something more that I need to be told.

[52] MS. CAIRNS: Was Your Honour not imposing a fine for the *Motor Vehicles Act*?

[53] THE COURT: I do have to do that, don't I? On the *Motor Vehicles Act* offence, I think it is more important, quite frankly, that if C. has any money left over that it gets directed N.B.'s way, rather than the YTG way. There should be a fine of $100 to be paid within two months. Thank you for reminding me.

[54] The victim fine surcharge is totally irrelevant in a case like this, and there will be no victim fine surcharge.

[55] MR. GOUAILLIER: So, unless there is anything left, Your Honour, that my friend can think of, Crown will direct a stay of proceedings on all other outstanding matters. Actually, no, I should take great care, as we did adjourn some matters yesterday.

[56] THE COURT: Well, there was another Information that was adjourned to another date.

[57] MR. GOUAILLIER: Yes.

[58] THE COURT: That Information is no longer before me.

[59] MR. GOUAILLIER: That is correct.

[60] THE COURT: Thank you.

BARNETT T.C.J.