Citation: *R. v. C.A.,* 2016 YKTC 43

Date: 20160913
Docket: 15-00016A
Registry: Whitehorse

IN THE TERRITORIAL COURT OF YUKON
Before Her Honour Chief Judge Ruddy

REGINA

v.

C.A.

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

Appearances:
Ludovic Gouaillier — Counsel for the Crown
Jennifer A. Cunningham — Counsel for the Defence

REASONS FOR SENTENCE

[1] C.A. has entered a guilty plea to an offence of sexual assault. The facts and the procedural evolution of this case are highly unusual when considered within the context of sexual assault cases normally seen within the criminal justice system, and, for that reason, this has been a difficult case to reconcile.

[2] The families of both C.A. and the victim, J.E., had been long-term friends and members of the same church. The conduct complained of, and to which C.A. has admitted by virtue of his guilty plea, occurred in March and April of 2013. At that time, C.A. was 21 years old; J.E. was 17. C.A. was sharing an apartment with J.E.'s older

brother. J.E.'s family had moved out of territory; however, J.E. had returned to Whitehorse for a visit and was staying with his brother and C.A., in their two-bedroom residence. Due to his brother's early work schedule, and the fact that both C.A. and J.E. were night owls, J.E. would sleep either on the living room couch, or on the floor or bed in C.A.'s room.

[3] The two would often work out together, and would later massage each other in C.A.'s room. One of the incidents upon which the charge is based involved C.A. moving his hands too low on J.E.'s back during a massage. In addition, the two would frequently watch movies late at night in C.A.'s room. On two or three of these occasions, C.A. touched J.E. with his hand on the hip and inner thigh area, both over and under J.E.'s clothing.

[4] J.E. was clearly uncomfortable with this behaviour. It was ultimately disclosed to his girlfriend and family members and a decision was made to speak to the pastor of their church. Informal steps appear to have been taken by the church. C.A. was confronted by the pastor and an elder, and later by J.E.'s parents. J.E. was ultimately encouraged by family and the church pastor to make a formal complaint to the RCMP.

[5] An information was laid on June 2, 2015. Crown proceeded by indictment, clearly as a result of the fact that, once the charges were laid, they were well beyond the six month limitation period to proceed summarily. C.A. elected to proceed before the Supreme Court of Yukon with a jury trial.

[6] The matter came before me for a preliminary inquiry in January of 2016. At the completion of the preliminary inquiry, I was asked by counsel to reserve on the question

of committal to allow for further discussions with respect to a potential resolution; following which the Crown, on consent, re-elected to proceed summarily and C.A. entered a guilty plea before me on August 26, 2016.

[7] C.A. comes before the court with no prior criminal record. He is now 24 years of age and comes from a close and supportive family. His mother and two of his siblings have provided letters of support that describe a kind and caring young man with a strong work ethic who provides considerable support to his family, in particular to two of his siblings living with disabilities. His good qualities are confirmed by a glowing letter of support from his current employer. By all accounts, this offence is entirely out of character.

[8] At the time of these incidents, C.A. was experiencing considerable confusion with respect to his sexual identity, confusion he was attempting to navigate within what defence counsel described as an intensely homophobic environment, as the church in question considers homosexuality to be a sin. Consequently, C.A. has struggled with issues of self-esteem and feelings of shame and anxiety.

[9] As a result of the allegations which bring him before the court, C.A. felt he had no choice but to leave the church, which had provided the basis of his social circle. He went further in deciding to leave the Yukon to move to Ontario where the majority of his family now resides. In doing so, he had to leave a full-time position of employment in which he had gained considerable responsibility. He now works two part-time jobs to support himself.

[10] To his credit, he has accessed counselling, is in a healthy, committed relationship and is active in the local gay community. He has a particular interest in helping others who are experiencing similar struggles in relation to their sexual identity.

[11] I am advised through his counsel, and accept that he is extremely remorseful for his actions, and deeply regrets the impact they have had on J.E.; and there is no doubt that his actions have had a negative impact on J.E. While he declined to provide a formal Victim Impact Statement, in his testimony, J.E. described the actions of C.A. as making him feel small and unable to protect himself.

[12] The question now to be decided is the appropriate disposition based on the circumstances of this offence and this offender, and the impact of this offence on J.E.

[13] Defence argues that an absolute discharge is appropriate in all of the circumstances. Crown agrees that a discharge would not be contrary to the public interest, but argues that a conditional discharge with a probationary term of 18 months is appropriate, with conditions focused on rehabilitation, and providing J.E. with the comfort of a no contact order.

[14] The test for a discharge, conditional or absolute, is two-fold: I must be satisfied that a discharge would be in C.A.'s best interests, and that it would not be contrary to the public interest.

[15] With respect to the first branch of the test, the B.C. Court of Appeal in *R. v. Fallofield*, (1973) 13 C.C.C. (2d) 450 noted:

> Generally, the first condition would presuppose that the accused is a person of good character, without previous conviction, that it is not necessary to enter a conviction against him in order to deter him from future offences or to rehabilitate him, and that the entry of a conviction against him may have significant adverse repercussions. (paragraph 21)

[16] I have little difficulty in concluding that a discharge would be in C.A.'s best interests. I am satisfied that he is of otherwise good character, and that a conviction is not necessary to deter him from future offences. I also conclude that the imposition of a criminal record for an offence of this nature would have negative repercussions for C.A. in terms of future career and educational opportunities, repercussions which would be entirely disproportionate, in my view, to the circumstances of this case.

[17] With respect to the public interest, the question is whether the imposition of a conviction is necessary to deter others from committing similar offences. Admittedly, from a denunciation and general deterrence standpoint, it would be highly unusual to impose a discharge for a sexual offence; however, this case can only be described as highly unusual when viewed through the lens of sexual offences normally seen in criminal courts. As the Crown has conceded, the facts that form the basis of the sexual assault charge in this case fall at the lowest level of intrusiveness; so much so that the Crown has agreed that the imposition of a *SOIRA* order, an order which is imposed in relation to the majority of sexual offence convictions, is neither necessary nor appropriate in this case.

[18] Indeed, when I consider the public interest in the context of the facts of this case, I have questions about the appropriateness of a matter of this nature being resolved in the criminal courts at all.

[19] In so saying, I want to make it clear that it is not my intention to minimize the impact that these events have had on J.E. These incidents were clearly distressing for him. His feelings are valid and must be respected. There is no doubt the behaviour complained of was inappropriate, and deserving of sanction, but that sanction must be proportionate to the gravity of the offence committed, when viewed objectively. In this case, a sanction that would include the imposition of a criminal record would not be proportionate. Nor would it be necessary to satisfy the public interest in denouncing and deterring such conduct. As such, I have little difficulty in concluding that a discharge would not be contrary to the public interest.

[20] In deciding between an absolute and conditional discharge, the question is whether conditions are necessary to satisfy the relevant principles of sentencing, including rehabilitation, protection of the public, and deterrence.

[21] Dealing first with rehabilitation, I am advised that C.A. has, on his own initiative, sought out counselling. He clearly has not required the impetus of a court order to take appropriate steps to address his conduct. Furthermore, there is absolutely nothing before me to suggest that he is at risk to reoffend. Accordingly, there would appear to be little utility in imposing conditions from a rehabilitative perspective.

[22] With respect to protection of the public, more specifically J.E., I would note that C.A. has indicated through his counsel that he respects J.E.'s desire to have no contact with him. The fact that he has been subject to an undertaking since July of 2015, requiring him to have no contact with J.E., and has not violated that condition, satisfies me that he will indeed respect J.E.'s desire to have no contact. The fact that C.A.

resides in a different province from J.E. further satisfies me that there is little risk of contact even without the imposition of conditions.

[23] Finally, in assessing the question of deterrence, as already noted, I am satisfied that there is no need to impose a sentence that would specifically deter C.A. from committing further offences.

[24] With respect to general deterrence, one must recognize that there are elements of the criminal process which can serve as an effective deterrent to others beyond the imposition of a criminal record and sentence. For example, these proceedings have had an undeniable impact on C.A., including the loss of his social circle, and the financial impacts of leaving his employment, moving out of the territory and funding his defence. From a more general perspective, one must recognize that there is a significant stigma attached to a criminal charge and public acceptance of responsibility, particularly in relation to an offence such as this. These can, and do, serve as a deterrent to others, and are sufficient, in my view, to meet the principle of general deterrence in this case.

[25] In all of the circumstances, I am satisfied that an absolute discharge is the appropriate disposition. I agree with counsel that an order under the *Sex Offender Information Registration Act,* S.C. 2004, c.10 would not be appropriate, and I would decline to make such an order. As defence takes no issue with the imposition of the mandatory DNA order, I order that C.A. provide such samples of his blood as are necessary for DNA testing and banking. I must consider the imposition of a firearms prohibition, but conclude that there is nothing to suggest such an order would be

necessary or appropriate on these facts. I am, however, required by law to impose a Victim Surcharge. With the summary election, the surcharge will be $100 with time to pay 30 days.

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RUDDY C.J.T.C.