IN THE SUPREME COURT OF THE YUKON TERRITORY

Citation: *R. v. Desjarlais*, 2004 YKSC 13

Date: 20040122
Docket : S.C. 03-01503
Registry: Whitehorse

Between:

HER MAJESTY THE QUEEN

And:

JOSEPH GEORGE DESJARLAIS

Publication of information that could disclose the identity of the complainant or witness has been prohibited by Court Order pursuant to s. 486(3) of the *Criminal Code.*

Before: Mr. Justice L. Gower

Appearances:
Ludovic Gouaillier — For the Crown
Robert Dick — For the Defence

MEMORANDUM OF SENTENCE
DELIVERED FROM THE BENCH

[1] GOWER J. (Oral): Joseph George Desjarlais today plead guilty to the charge of sexual assault on G.M.S., which occurred on August 15, 2003 in Pelly Crossing. That guilty plea was entered after a preliminary inquiry in Pelly Crossing. However, the unusual circumstance here is that there were two witnesses expected to testify at the preliminary inquiry, one being the victim's aunt and the other the victim herself. I understand that the victim's aunt, who was a witness to part of the sexual assault, was the first to testify and was examined. However, prior to the victim

being required to give examination in chief, the accused consented to being committed to stand trial. That relieved the victim from having to testify at all at the preliminary inquiry and I take that as a significant mitigating factor, which I will come back to a little bit later.

[2] The facts in this case are that the victim was a young adult, the 26-year-old daughter of the accused's common-law partner at the time. I understand that the common-law partner had left her home in Pelly Crossing to go to Whitehorse and had instructed the victim to look after the house while she was gone. The accused ended up in the residence with the complainant in the afternoon. He had been drinking and was intoxicated and possibly consuming some marihuana. The accused offered some alcohol to the victim. She accepted. There was some conversation between them. The accused made some comments alluding to the fact that his common-law partner was apparently jealous of the victim and perhaps the two of them should take care of it by sleeping together right then and there and "getting it over with."

[3] The victim did not respond in any particular way to that suggestion. The accused then went further by asking the victim whether she would know what to do if she was choked, and he began to demonstrate a choke hold on the victim by grabbing her neck and choking her.

[4] Up to this point, the two had been in the living room of the home; however, the accused then took the victim into the bedroom. He threw her on the bed, continued choking her. He had one hand on her throat and periodically was using his other hand to cover her mouth, which impaired her breathing from time to time. He managed pull the victim's pants down to her ankles and then pulled his own pants down. He was trying to get himself erect; however, the victim was continuing to fight throughout all of this conduct.

[5] The victim is not certain, because of the circumstances of her struggle, whether penetration occurred and that cannot be proven beyond a reasonable doubt. In any event, it is denied by the accused, and he also denies causing any injury to the victim's vagina.

[6] At that point, the victim's aunt entered the residence. She had also been asked by the accused's common-law partner to keep an eye on the residence, and she walked into the house, heard someone trying to holler, followed the noise to the bedroom door, opened it, and saw the accused on top of the victim with both of their pants down. The accused promptly pulled up his pants and left the room, and, eventually, after being confronted by the aunt, left the home. The victim also pulled up her pants and was comforted by the aunt in the home.

[7] The accused was arrested later on that same day in Pelly Crossing and has been in custody to date.

[8] The victim was taken, by the R.C.M.P., to the nursing station in Pelly Crossing. She was very distraught and emotional. She had some bruising and scratch marks on her neck. She informed the authorities that she thought she was bleeding "down there," but refused to be further examined by the medical staff, and also refused to cooperate with the R.C.M.P. seizing her clothing.

[9] The victim subsequently explained, through the victim witness assistant, that the reason she was uncooperative with the medical staff in Pelly Crossing at the time was because it was a male nurse whom she was unfamiliar with and did not feel comfortable being examined by that individual at that time. There was no DNA evidence obtainable.

[10] The Crown and defence have largely agreed on the aggravating and mitigating

circumstances. The Crown says that the nature of the offence, the offence itself, is serious; it is very serious. Also that there was choking and violence beyond that inherent in the nature of a sexual assault. Also that the victim was the daughter of the accused's common-law partner at the time, and while not alleging that to be a clear-cut abuse of a position of trust, the Crown asks me to take that into account.

[11] The defence, on that point, says the victim sometimes lived in Pelly Crossing and sometimes in Whitehorse and was not particularly reliant on her mother for care and, therefore, disputes that this was a situation aggravated by a breach of trust and I accept that submission.

[12] The Crown, lastly, pointed in aggravation to the fact that there was, as I understand the submission, a risk that if the victim's aunt had not intervened, that something more serious would have ensued.

[13] The defence, quite properly, asks that I not sentence the accused for something which might have happened but only that which did happen and that I take into account that had the aunt not intervened, we do not know if there might have been other intervening events such as the impossibility of the accused getting an erection, or something in the conduct between the parties which might have caused the accused to stop what he was doing.

[14] Most significantly, the Crown says that the criminal record of the accused is aggravating, and I agree. I have counted some 12 previous convictions for violence, four weapons offences. From those, there are two sexual assaults, one in 1984 was particularly serious as it was a sexual assault with a weapon for which the accused received a seven-year sentence. A more recent sexual assault, in 1992, was disposed of by a two-month sentence, and I agree with defence counsel that I must conclude that that was a relatively minor matter, particularly as the accused, by that

point, already had a previous related record for sexual assault. Also among the 12 prior related convictions, there is one assault causing bodily harm; there are two common assaults, and the rest are generally weapons related offences.

[15] In mitigation, I recognize that the more recent record of the accused is relatively minor, that the more serious offences are quite dated, going back to the mid 1990s. I take into account the submission of defence counsel that the last conviction on the record, from May of 2002, was apparently as a result of the accused turning himself into the authorities so that he could deal with that matter before moving to the Yukon, and I will come back to that in dealing with the circumstances of the accused.

[16] Counsel also say that it is mitigating that the accused entered his guilty plea, and, moreover, his attitude towards the victim and the proceeding is reflected not only by his guilty plea today but also by his conduct at the preliminary inquiry, which I mentioned. It is particularly important in this case because the Crown tells me that the victim was quite fragile and was traumatized by this offence, that she was apparently reluctant to testify at the time of the preliminary inquiry because she had been receiving significant pressure from some individuals in the community not to testify, individuals who are apparently supportive of the accused. I understand that that pressure continued right up until the eve of trial. So there was that difficulty.

[17] There was also the difficulty that the victim apparently has some cognitive issues, which would have made it even more difficult for her to testify, perhaps, and perhaps more difficult for the Crown to make out its case.

[18] So, in those circumstances, I have to give the accused significant credit for his guilty plea and his apparent acceptance of responsibility.

[19] Lastly, in mitigation, is the fact that this was not an act of fully completed sexual

intercourse.

[20] I have taken into account the case law that has been filed by the Crown, which generally ranges from one to two years, in cases of sexual assault without overt violence; usually unconscious victims and offenders with relatively minor records. That moves upwards to more serious penalties of five to six years and even seven years, in cases where offenders have proceeded to trial, they have not received the mitigation of a guilty plea, there have been long criminal records, there has been aggravation within the offences of sexual assault themselves, and so on. But I am satisfied that the joint submission sought by both counsel in this case, of 30 months, is appropriate and within the range.

[21] The accused has been in remand since August 15, 2003, which is approximately five months and seven days. After giving him double credit for that remand time, combining with the 30 months, which has been submitted would be the equivalent of a sentence of just under three and a half years, which I find to be appropriate in the circumstances.

[22] For the record, those circumstances, of course, include the circumstances of the accused, who is 49 years of age, born in Lac La Biche, Alberta. He is a member of the Metis nation. He has general skills as a labourer and construction worker. As I indicated earlier, he met the victim's mother in Alberta in 2002 at a point in his life when he was trying to turn himself around and get himself straightened out. It was as a result of that decision that he went to the authorities and dealt with his last matter in Alberta, which is reflected as his last conviction on his criminal record. He then moved to Pelly Crossing in the Yukon, in that same month, in May of 2002, and was able to obtain employment in that community as a janitor with a local store and also hauling wood. I am informed that he was able to stay out of trouble there and

was able to avoid drinking altogether. I assume, from the submission that I heard, that he was able to avoid any other type of substance abuse and was generally clean and sober.

[23] Things seemed to be going well for him in the community until the day of the offence. On that day the accused was informed that his father passed away, and in dealing with that grief, the accused was able to obtain alcohol and began drinking. That was the context of how he became intoxicated and came into the company of the victim.

[24] Since he has been detained, I am informed that he has been participating in the AA program at the Whitehorse Correctional Centre and has also completed a three-week course entitled "Commitment to Change."

[25] Now, I am also told that Mr. Desjarlais is continuing his relationship with the victim's mother, that he does have some support in the community and may well return there upon his release.

[26] I was recently informed by the Crown that the victim is of a different opinion about the extent to which Mr. Desjarlais has support in the community. Also, the R.C.M.P. do not necessarily agree that he is a very popular individual in that community. The victim has some concerns about Mr. Desjarlais returning to Pelly Crossing upon his release and fears perhaps for herself and her younger sisters.

[27] I will say to you, Ms. S., that with the sentence that I am about to impose, I cannot by law add any probationary conditions. It is a sentence in excess of two years imprisonment. As a result, when Mr. Desjarlais is released, if he receives early parole, then he will be under mandatory supervision and there will be certain conditions that will attach to that. But once he is finished his parole and he is fully

released, there is nothing that this court can do, in terms of exercising further control over him, unless, of course, he gets into additional trouble with the law. So if he chooses to reside in Pelly Crossing, then he, apparently, is free to do that.

[28] Having said that, Mr. Desjarlais, I am now talking to you, sir. You have what might be considered a horrific criminal record. It is certainly very, very lengthy. It goes back to 1971 and counsel have pointed out there have been only very few times in your life when you have been able to get through an entire year without some form of criminal conviction. I am assuming that a large part of this has to do with alcohol and substance abuse. I acknowledge that, in the last few years, particularly, things have been tapering off in terms of your criminal activity and in terms of the seriousness of the kinds of things that you have been involved with. I also am encouraged to hear about your plan with your common-law, which originated in Alberta, to turn yourself around. I expect that by this time in your life, being 49 years of age, you are pretty sick and tired of going back and forth to jail.

[29] I am also encouraged to hear that you are doing something constructive while you are in jail. You will have an opportunity, if you are transferred to a penitentiary down south, to take advantage of more programs than are available here in Whitehorse. In particular, Alcoholics Anonymous, I expect, will be available to you, I hope on a daily basis, and I would very much encourage you to take advantage of that program and to continue with that program after you are released, because it is something you will be able to take with you wherever you go. If you return to Pelly, if you return to Whitehorse, wherever you go, there are always going to be AA groups that you can look to for support, and you are going to need that support, because you can see what has happened in this circumstance. You are going along fine, something happens, you slip, you drink, and you are back in the can. It is as easy as that, and you know that will happen again, if you drink again. So, Mr. Desjarlais, I am

encouraging you to do whatever you can to continue to turn yourself around in that regard.

[30] I am also -- I have not seen your DNA order, counsel.

[31] MR. GOUAILLIER: Yes, My Lord, I will just get Mr. Dick to sign it.

[32] So to sum up, Mr. Desjarlais, I sentence you to be imprisoned for a further period of 30 months. I also impose an order, as tendered by the Crown, pursuant to s. 487.04 of the *Criminal Code of Canada*, requiring you to submit samples for DNA analysis and recording.

[33] Now, counsel, are there any submissions on a firearms order, which is mandatory under s. 109?

[34] MR. GOUAILLIER: I believe we are agreeing. If we are not, at least it's the Crown's position that, My Lord, you are quite correct in your reading of the section and the lifetime prohibition should apply, seems clear from subsection (3) and (4). Mr. Desjarlais, having been convicted previously of a similar offence, the lifetime prohibition will kick in.

[35] THE COURT: Of an indictable offence.

[36] MR. GOUAILLIER: Yes.

[37] THE COURT: Mr. Dick.

[38] MR. DICK: Take no position on that issue and I will advise Mr. Desjarlais of his ability to apply under the sustenance provisions under the *Code*.

[39] THE COURT: Very well. I am also prohibiting you, Mr. Desjarlais, from possessing any firearms, ammunitions or explosives, et cetera, pursuant to the

provisions of s. 109 of the *Criminal Code*, and pursuant to subsection (3) of that section, I am required, by law, to make that a lifetime prohibition.

[40] In the circumstances, although I have not heard from counsel, because you are going to be sentenced to a penitentiary, I am going to waive the victim of crime surcharge. Is there anything else, counsel?

[41] MR. GOUAILLIER: No, I believe that covers it, My Lord.

(Sentencing concluded)

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GOWER J.