

Citation: *R. v. Josie*, 2017 YKTC 43

Date: 20170801
Docket: 16-00656
16-00656A
Registry: Whitehorse
Heard: Old Crow

IN THE TERRITORIAL COURT OF YUKON
Before His Honour Judge Cozens

REGINA

v.

LENA ANNE JOSIE

Appearances:
Amy Porteous
Cathy Rasmussen
(Agent for David J. Christie)

Counsel for the Crown
Counsel for the Defence

REASONS FOR SENTENCE

[1] COZENS T.C.J. (Oral): Lena Josie has entered a guilty plea to having committed an assault contrary to s. 266 of the *Criminal Code*.

[2] The circumstances are that on December 29, 2016, in Old Crow, Ms. Josie was in a grocery store with her adult daughter. She saw Crystal Linklater in the store and began to swear at her. After a brief period of time, Ms. Josie approached Ms. Linklater from the end of an aisle, grabbed her by the coat and punched her in the face, injuring her lower lip, although there was no lasting injury. She then told her that she was going

to be run out of town and that she should "get the fuck out of town". The manager intervened and the incident was over.

[3] By way of background to this incident, Ms. Josie asserts that she was angry at Ms. Linklater due to something that had happened about 10 years earlier in which she says that Ms. Linklater and some others were involved in beating her and her daughter up and no charges were laid. Obviously there has been no finding in that regard, but I am just explaining this by way of dealing with some of the issues raised in the Pre-Sentence Report ("PSR").

[4] A Victim Impact Statement has been filed by Ms. Linklater. Clearly, this took place in a public environment. She was quite embarrassed by it. Old Crow is a small community and she feels that in the community there are continuing impacts upon her from the supporters or members of Ms. Josie's family, although I will say that there is no actual evidence that there has been any action by anyone, Ms. Josie or any others, that necessarily confirms that as being true. That does not change the fact that Ms. Linklater has been impacted by this and she has that feeling.

[5] Ms. Josie has no prior criminal history.

[6] She is a 56-year-old member of the Vuntut Gwitchin First Nation.

[7] A PSR has been filed. Certainly, *Gladue* factors are present here. She has had trauma in her life in the drowning death of her mother, who Ms. Josie says generally provided her with a happy childhood, although certainly an environment in which she was a witness to abuse and substance abuse. Her death has a very traumatic impact

on her and I totally understand and accept that. There are also some other issues, including some issues with relation to a past that she has recently found out about that have caused some further stress for her.

[8] She has two adult children, the one that was with her and one that lives in the Northwest Territories. She has been involved in counselling. She is rated as being low with respect to requiring a level of supervision. She has a low criminal history risk rating. She has a medium level of criminogenic need.

[9] One of the issues that arises out of the PSR is that while Ms. Josie accepts responsibility for her actions, she still, to some extent, blames Ms. Linklater for what she says took place 10 years earlier and, to some extent, places that as provocation, although she is not seeking that it have any impact on the sentence.

[10] The Crown has certainly dealt with what appears to be some victim blaming on the part of Ms. Josie.

[11] I am not delving into the history. I know the bottom line is that what Ms. Josie did was wrong, regardless of what may have happened 10 years earlier. I accept that Ms. Josie understands that and I am not going to go any further. I do not consider the sort of conditional remorse that is here to be aggravating. I am not privy to everything that took place 10 years ago, but I do accept that Mr. Josie understands that it was wrong. She is sorry for what took place. And even while she may mitigate that somewhat, due to the history, I am satisfied it is not going to happen again and that she has accepted responsibility by her guilty plea.

[12] Crown is suggesting a suspended sentence and probation, citing the fact that this was vigilante justice to some extent over a very dated incident and that the remorse is not as good as it should be in order to justify a discharge. Defence counsel is seeking a discharge.

[13] I raise an issue that comes out of the PSR in that Ms. Josie, five years sober from alcohol, has indicated that she smokes marijuana daily. She has, through counselling, cut back from six joints a day to two. She does not view her usage as a problem, but by my understanding, it is ongoing usage.

[14] I raise the issue, as I am familiar with the decision that I recently issued in *R. v. Graham*, 2017 YKTC 29, in Haines Junction. In that case, Mr. Graham had entered a guilty plea to having committed an offence contrary to s. 4(1) of the *Controlled Drugs and Substances Act*, S.C. 1996, c. 19. He had been charged with possession for the purposes of trafficking and ended up pleading to simple possession of marijuana.

[15] The issue that arose there is Mr. Graham had indicated in the PSR that he was daily user of marijuana and that there was no indication that was going to change. As I said:

12 The problem that arose for me with respect to the discharge at the original sentencing date was that Mr. Graham, quite candidly and quite honestly, said that he used marijuana daily and that was not going to stop. I was confronted with the difficulty of imposing a conditional discharge with a probation order on someone who has candidly admitted he is going to be using illegal drugs every day to deal with the issues he had been dealing with . . .

— and he had some medical issues — and how that would reflect upon the public interest component of a discharge.

13 In order to use illegal drugs, one has to buy these drugs from somewhere. Since there is nowhere that can sell them legally except to a person with a medical marijuana exemption, it meant Mr. Graham had to be buying from someone who was trafficking illegally, and he himself becomes part of the trafficking transaction. That, of course, facilitates illegal trafficking on a bigger scale. The people trafficking the marijuana that he is purchasing may be doing more — I do not know — and nothing turns on that, but the bottom line is that the public interest remains clear, that the trafficking of illegal drugs in the Yukon can have a very negative impact on the larger community.

14 The countervailing point is, of course, the Liberal government's indication at that time [of the original sentencing] that it was going to legalize marijuana [at some point in the future,] and the fact that they have moved forward towards doing that. And at some date in the future there is a very good likelihood, given the majority government, that marijuana use and purchase will be legal in certain prescribed amounts and under certain rules and regulations.

[16] In that case, I adjourned it for four months so that he could come back with a medical marijuana exemption or some indication that his daily usage was not going to continue.

[17] On the date of sentencing, it was apparent to me that nothing had really been done in that regard. On that day, his counsel said, "Well, just today he has applied", which was about, as I said, four months after the adjournment had been granted to allow him the opportunity to satisfy my concern about the public interest component.

[18] I denied him the discharge and I recognized the public interest is greatly served in having an individual like Mr. Graham, an Aboriginal person of good character with no criminal record, given every opportunity to avoid incarceration and involvement in the legal system.

24 But the problem is that the public interest is greatly involved when we are considering the trafficking of illegal drugs, marijuana or otherwise. The fact that this government may end up legalizing marijuana does not necessarily mean trafficking is going to stop. People may not like the quality of the marijuana; they may not like the quantities they are allowed to purchase it in. I do not know. But there is no guarantee that illegal trafficking is going to stop. ...

[19] I then went on to say:

25 Primarily for the reason that I believe the public interest is not served by granting a discharge to a person, even a person with all the positives of Mr. Graham, an Aboriginal person, when he still continues to facilitate the illegal trafficking of drugs, I do not find that the public interest component of the discharge can be met.

[20] This case is different in the sense that in that case Mr. Graham was saying that every day he was going to continue doing what he had just been sentenced for doing. That is different. It does not, however, still negate the public interest component, the negative impacts on the public interest of having a person saying every day they are going to do something that facilitates the trafficking of illegal drugs. It is a bit of a quandary.

[21] And as I said in the *Graham* sentencing and discussions with counsel, it puts the RCMP in a somewhat difficult situation, because right now the law is that it is still illegal.

And the RCMP, while they may use discretion in deciding whether they are or are not going to deal with marijuana possession charges at this point in time, are still under a clear legal obligation to investigate and charge where appropriate.

[22] I still have that problem that a discharge for someone who says that they are going to continue on a daily basis, which will facilitate trafficking or cultivation for possession for the use of marijuana simply is contrary to the public interest. I am not saying that people who do that should necessarily be charged. That is an entirely different issue, and I am sure the RCMP prioritize what they do, but I think that it sends the wrong message.

[23] As such, for the same reasons as in the *Graham* case, notwithstanding the distinctions, I do not think I can impose a discharge. I think it is contrary to the public interest, and that again recognizes the public interest in Ms. Josie not having a criminal record.

[24] In the balancing of them all, I am afraid I feel I must come down on this side. The remorse issue and the issue of the vigilante justice would not in themselves have precluded me from granting a discharge, but when I throw in the marijuana issue, it is a bigger issue for me. I do not find the distinction is enough that I could explain what I said in *Graham* and do something different here.

[25] So, I will suspend the passing of sentence. It will be a probation order for the period of six months.

1. You will keep the peace and be of good behaviour;
2. You will appear before the court when required to do so by the court;
3. You will notify the Probation Officer in advance of any change of name or address and promptly of any change in employment or occupation;
4. You will have no contact directly or indirectly or communication in any way with Crystal Linklater, except with the prior written permission of your Probation Officer and with the consent of Crystal Linklater in consultation with Victim Services;
5. You will not go to any known place of residence, employment, or education of Crystal Linklater except with the prior written permission of your Probation Officer and with the consent of Crystal Linklater in consultation with Victim Services;
6. You will report to a Probation Officer immediately and thereafter when in the manner directed by the Probation Officer;
7. You will attend and actively participate in all assessment and counselling programs as directed by your Probation Officer and complete them to the satisfaction of your Probation Officer for any issues identified by your Probation Officer, and provide consents to release of information to your Probation Officer regarding your participation in any programming you have been directed to pursuant to this condition;

8. You will perform 10 hours of community service as directed by your Probation Officer or such other person as your Probation Officer may designate. Any hours spent in programming may be applied to your community service at the discretion of your Probation Officer.

[26] I have noted the letters that have been provided that are positive in support of Ms. Josie, and her involvement in counselling. I accept her apology that she has provided to the Court and note the work that she has been doing with the Elders in her community. In my opinion, she is a contributing member of her community and will continue to be. So this incident is one I do not expect to be repeated.

[27] I am not going to impose any firearms prohibition and I am not going to impose a DNA order.

[28] There is a fine surcharge of \$100 and two months' time to pay.

COZENS T.C.J.