Citation: *R.* v. *R.L.*, 2011 YKTC 10 Date: 20101001
Docket: 10-00182
Registry: Whitehorse

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

REGINA

v.

R.L.

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

Appearances:
Terri Nguyen Counsel for the Crown
Gordon Coffin Counsel for the Defence

REASONS FOR SENTENCING

[1] SCHMIDT T.C.J. (Oral): The accused is before the Court charged with one count between the 1st day of June 2007, and the 31st day of July 2008, at Whitehorse, of sexual assault on B.L., contrary to s. 271 of the *Criminal Code*.

[2] The assault consisted of him crawling into bed one night where his child had already gone to sleep after he returned home, and during the course of the night, snuggled up to her and simulated sexual intercourse over her clothed body. That happened on two other occasions. On all three occasions, the accused was high on cocaine. The disclosure occurred sometime later in Ontario and the accused admitted his guilt.

[3] There is no question, from reading the cases that have gone before, that the Court must concern itself primarily with deterrence and denunciation in cases such as this. While other sentencing principles come into play, they should not overshadow denunciation and deterrence. That appears to be the way the law has developed, quite rightly.

[4] The cases on these points all differ in their facts, and some are said to be more serious because of the facts, and some are said to be less serious because of the facts. It should always be borne in mind that what occurred may not completely disclose the seriousness of the offence, because it also matters what effect the offence will have on a young child. Something that we put on a scale as less serious may actually be very damaging to some children and not as damaging to other children. So I think it is a little bit of a difficult horse to ride in setting up a sentencing spectrum based on the *actus reus* of the events that actually occurred. We must take all of these cases seriously, is the long and the short of it, and we must keep those principles of deterrent sentencing in mind, because all adults should be deterred from this kind of conduct. It does not necessarily matter the actual sexual events that occurred when it comes to the amount of damage that a child might suffer.

[5] In this case, there are some aggravating facts: The child was young; this was her father, and her father was in a place of particular trust to her because of the family dynamics. There were three incidents, and it was simulated sexual intercourse, which is a step beyond touching her genital parts over her clothing. It was a situation where the young girl was far from her usual home and entrusted to her father. As I have said before, it is an aggravating fact that we do not know the damage to a child. It may not

appear that there is damage at the time, and then it may come up at a later time, according to the psychological evidence that we receive in these types of cases. This is not evident in this particular case as there is no psychological report available.

[6] There are some mitigating factors: The guilty plea is said to be a mitigating factor. In many cases I think it is overstated. Guilty pleas come about for a variety of practical reasons, not necessarily from remorse. In this case, however, we do have a better indication of remorse. He has taken full responsibility that, in his statement of facts, appear to go beyond what the girl was willing to disclose. He says those are the true facts regardless of the girl minimizing the facts, and that must be an indication of remorse, in my view. There is also a mitigation in that he is working at rehabilitation, has been clear of drugs since March of 2008, and he is looking into other forms of counselling and appears to have the welfare of his children at the heart of all his efforts.

[7] There was no request for a conditional sentence. I do not think that a conditional sentence is not available, but also should be used very carefully in cases of sexual assault of young children because of the view the public might take, and this has been noted in a number of cases that were handed up. The public might not be adequately deterred if they see the accused going back into his home where the events in fact occurred. It would not appear to the public, even though that might be a hardship on the accused that that is much of a hardship suffered for this kind of serious offence. I think that a conditional sentence would not normally be ordered and it is not asked for in this case.

[8] The parties are somewhat apart on the sentencing, but not drastically. The

Crown is seeking an 18 month sentence, and the defence is seeking a six month sentence. They are also somewhat apart with respect to credit for time served. He has been in custody for this offence since June the 11th, and today is October 1st. So that is 113 days. The Crown says his custodial time should be credited at one for one. The accused is hoping for one and a half to one because he has been away from his family. The Crown says that is of no particular import, because he would not be allowed to have contact with his family in any event, under these circumstances and was not, according to the Court, in Ontario, where he was first picked up on these charges.

[9] For the reasons stated about the seriousness of this offence, and having regard to the mitigating factors and in the hope that this family can come back together in a proper forum, in time, with the proper treatment of all parties, the Court is content with a sentence of 12 months, with four months given (which is just over one for one) for time served. There are eight months left to serve in this sentence.

[10] It will be followed by a term of probation of three years. The terms are:

1. To keep the peace and be of good behaviour;
2. Report to the Probation Officer any change of address or name or employment or occupation;
3. Report to a Probation Officer immediately upon his release from custody, and that immediately to be within five days;
4. He is to reside as approved by the Probation Officer and not change his residence without the prior written permission of the Probation Officer;
5. He is to abstain from the possession or consumption of controlled drugs and substances except in accordance with a prescription given to you by a

qualified medical practitioner;

6. To provide a sample of his urine for the purpose of analysis upon demand of a Peace Officer who has reason to believe that he has failed to comply with this condition;
7. He is to take such drug assessment, counselling or programming as directed by a Probation Officer;
8. He is to take psychological assessment, counselling, and programming as directed by the Probation Officer;
9. He is to take such other assessment, counselling, and programming as directed by the Probation Officer;

I am not going to make an order for no contact and not attend. I am going to leave that to the Family Courts, given the letters that have been filed with the Court from the children. I think that can adequately be worked out in Family Court.

10. You are to provide your Probation Officer with consents to release information with regard to your participation in any programming, counselling, employment or education activity that you have been directed to do pursuant to this probation order.

[11] If we leave the no contact to the Family Court, that court can hear from the children, their caregivers and psychologists, and make a determination based on more information than I have before me today.

[12] MS. NGUYEN: Yes, sir, just to be clear, the order in Ontario is an order of the Criminal Court and applies everywhere. I don't want Mr. L. thinking he can have any contact.

[13] THE COURT: Yes.

[14] MS. NGUYEN: He can't.

[15] THE COURT: Any orders in Ontario that are still outstanding, of course, have to be obeyed, regardless of what I have said today. Okay.

[16] MS. NGUYEN: Sir, DNA and SOIRA?

[17] THE COURT: Yes, there will be DNA taken from you at the jail, and I am making an order that you are directed to attend for registration in the Sex Offender Registry for ten years.

[18] All right, have I dealt with all of the issues?

[19] MS. NGUYEN: As far as the Crown's concerned, yes.

[20] MR. COFFIN: Yes, sir.

[21] THE COURT: Okay. Thank you.

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SCHMIDT T.C.J.