Citation: *R.* v. *W.J.J.*, 2013 YKTC 58

Date: 20130425
Docket: 12-10010
Registry: Watson Lake
Heard: Whitehorse

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

REGINA

v.

W.J.J.

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

Appearances:
Terri Nguyen — Counsel for the Crown
Robert Dick — Counsel for the Defence

REASONS FOR SENTENCING

[1] WYANT T.C.J. (Oral): Sadly, it sounds cold for me to say, but it is what it is, and as human beings we have to pick ourselves up and then deal with what it is that has brought us to a place. For you, I do not attempt to minimize that the things that you have to face are huge issues, Mr. J., but I am of the belief that, particularly after listening to you and listening to the fact that you are an intelligent man, that you can, if you want to, deal with it. Sometimes people commit criminal offences that they are so ashamed of,it actually scares them straight. I do not know if you know what I mean by that, but they are actually so horrified by what they have done that instead of going back and drowning themselves in liquor and alcohol, they actually say, “I cannot believe I

would have ever done that; I was so drunk that I actually did that," which is what you are telling me. But you have not gotten to that stage yet. I am not holding that against you, but frankly, if you are so horrified and ashamed by what you did, it would seem to me you would want to do anything in your power to avoid doing that again, right? And drowning your sorrows and getting drunk, as you did a couple of days ago, that does not cause the problems to go away. Running away to British Columbia or Ontario, or even hiding yourself in work, does not cause it to go away. Do you understand what I mean?

[2] There are a lot of factors that are in your favour, Mr. J., and I am going to list them, not exclusively, but I think the lawyers have touched on them. I accept your early guilty plea. I accept the fact that this guilty plea was unequivocal; you did not set it down for trial; you never intended to contest this; you saved this young girl the pain of coming to court and talking in open court about what happened to her. I accept the fact that you are completely remorseful and ashamed for what occurred, not only by your guilty plea, but in everything you have done since and the fact that you have expressed it today. I accept the fact that you were on bail for a long period of time; that you stayed out of trouble, and that is an unequivocal thing to me. It is not for me to speculate, well, maybe he just did not get caught; it is not. You stayed out of trouble. Good for you. That meant that you were able - and I appreciate a lot of that you were injured - but you were able to stay out of trouble. That demonstrates to me something positive, and it is almost a year now since the offence took place.

[3] I recognize that there are significant *Gladue*, [1999] 1 S.C.R. 688, and *Ipeelee*, 2012 SCC 13, factors, and without going through them, obviously the Court, in every

circumstance, has to look for the least restrictive sentence, and particularly having regard to both the systemic and personal situations of Aboriginal offenders, and I recognize that as well. As I said, I recognize that you are a good worker and that you have supported your family. I recognize all of those factors that speak on your behalf.

[4] There are a lot of factors that do not, though, and you know what they are but I am going to go through them. One of them is your criminal record. Now, you are not to be re-sentenced on your record. You have done your time or you have paid your fines, or whatever the situation is, but your record does disentitle you to leniency. When you look at your record, it has gone on for the past almost 30 years, starting in 1984, so we are approaching 30 years of a record. I think your lawyer said you were now 46 years of age, so from the time you were 16 years of age, pretty much up until this point in time, you have been involved on a host of occasions, so many occasions, of criminal offences, including: offences of assault, although not related to this type of assault but nonetheless assault; and a lot of breaches of court orders in the past. I think you would agree with me, probably all, if not most, of those offences were committed because of alcohol. So you have your record, you have the fact that it is a significant factor.

[5] Another factor that is very aggravating is the fact that I am dealing with a 13-year-old complainant. Although counsel did not say it, it is important for me to refer to s. 718.2 of the *Criminal Code* because, without getting too legal, s. 718 talks about the principles of sentencing: deterrence, denunciation, rehabilitation. Section 718.2 of the *Criminal Code* talks about the fact that one of the other factors to be taken into account:

> (a) a sentence should be increased or reduced to account for any relevant aggravating or mitigating circumstances relating to the

> offence or the offender, and, without limiting the generality of the foregoing,
> …
> (ii.1) evidence that the offender, in committing the offence, abused a person under the age of eighteen years,

That is an aggravating feature, that this young girl was thirteen years of age at the time. Not just under 18, significantly under 18 years of age.

[6] Counsel did not argue this, and I want to be very clear in the way I phrase this because you have not pled guilty to the other offence of s. 151; that is not a factor for me to take into account. But had there been a conviction under s. 151, which is the sexual interference offence, because there is a mandatory minimum penalty there, we would not even be talking about the possibility of a Conditional Sentence. Parliament has said when those types of offences occur, deterrence and denunciation are important. I want to be careful, though, that is not a factor that I take into account. It is only an observation that I take into account, because I cannot take into account an offence for which there has been no plea or finding of guilt.

[7] I want to talk for a minute about what actually happened on that day. I appreciated, Mr. Dick, what you had said about comparing this to other offences, and I think the Crown also made mention of this. Certainly, in the two cases that are filed, we had situations where there was sexual assault without consent, with penile penetration in both of those cases. In this particular case, we do not have any penetration: digital, penile penetration, or anything of that nature. Of course, and I think rightfully so, Mr. Dick, as defence counsel, you point the Court to the fact of the presence or absence of certain facts that can be aggravating, and certainly, I think properly so, you did that. But

I think that the Crown makes a good point, and without putting words in the Crown's mouth, I think what the Crown is reminding the Court is that the Court should not necessarily parse out what did or did not happen or facts that are present or are not present in each particular offence. Yes, there is no penetration; yes, this was an offence that occurred over a relatively short period of time, I can find. So maybe those are mitigating factors in some respect, in relation to other offences, but we are dealing with a sexual offence against an incredibly vulnerable individual.

[8] Courts have said time and again that we need to protect those who are incapable of protecting themselves, and children are in a position where - and certainly in this particular case - they are incapable of protecting themselves. Let us transport ourselves back for a moment to this particular home when this occurred. Here is a young 13-year-old girl, incredibly vulnerable, who is dropped off by her mother to reconnect with an estranged biological father, who she does not know, who takes her to visit you, Mr. J. She does not know you; she does not know, perhaps that you are intoxicated to the point that you cannot even remember this. Let us put ourselves in the position of a 13-year-old girl in this house with two grown men, in a strange house, with people that she does not know, who is then grabbed by an individual, who then fondles her as he puts her on his lap, feels her up, for lack of a better term, and tries to put his hands down her pants. I cannot imagine, Mr. J., how frightened and terrified this young girl was in the position that she was in on that particular occasion, and how helpless and lonely she must have felt in the presence of these two grown, big men. And then when it breaks for a short period of time, it comes back, and what happens is: you do it again. You put her on your lap, you bend her over, you put your hand down her pants. Sure, there is no digital

penetration. Yes, there is no penile penetration, but, Mr. J., on the scale of aggravating features, that is a horrifying and despicable set of circumstances.

[9] I think we have to be really careful as lawyers, and I know it is all of our job to parse out aggravating and mitigating circumstances and to try to sanitize it later when it comes to court, but there is no easy way of sanitizing this. Sure, there are some things that are not present that are present in other cases, but when it all comes down to it, Mr. J., when it all comes down to it, I see a helpless young girl in the presence of these two guys, wondering what is going to happen to her next and how terrified she must have been, and how wrong that is, Mr. J., that any individual should have that happen to them. You above all people, Mr. J., you above all people, with all of those things that happened to you when you were young, that scarred you, that changed you, that brought you to this place, should have known better. When you look at Exhibit S.2, when you look at the Victim Impact Statement, it is sad but unsurprising to see that now we have this 13-year-old daughter who her mother reports went from being a "beautiful outgoing girl with an infectious smile and personality, to a girl that felt very sad and hurt and angry. My daughter turned these emotions into self-harm upon herself."

[10] So what have we done; what is the result of all of this, Mr. J.? The result is that we now have this young, vulnerable, beautiful, outgoing girl with an infectious smile and personality, who has now been abused, who has now got her own demons to deal with. We have all failed her in this circumstance, Mr. J. We have all failed her. Yes, you were not in a position of trust, which is an aggravating feature, but it is not lost on me that you were an adult in the company of someone who was trusted with her wellbeing. So we do not account for future trauma that might occur because we all hope, and I am

sure you hope, Mr. J., that this young girl does recover, is able to deal with what occurred to her, and can live a life that is positive and productive. But you know as well as I do, and particularly if you look at the Victim Impact Statement, there is every possibility that this young girl now may struggle for a long time, if not a lifetime, as a result of what occurred. She did not deserve that. So, yes, we can talk about aggravating and mitigating features, but frankly, the position that you put this young girl in is, as I have indicated, despicable and almost, quite frankly, without adjective. As the Crown said, it was not just the one time, where she resisted, but then the second time as well. So I cannot, quite frankly, imagine that horror.

[11] When we look at the fundamental principles of sentencing we talk about deterrence and denunciation, and we talk about rehabilitation. Those are all significant factors, and I do not doubt, Mr. J., that you are not only remorseful, but, in many respects, that we can fashion something that would deter you. However, we have to send a message to other people, quite frankly, we have to send a message to other people that if you are going to engage in this type of behaviour and this type of trauma to someone who is vulnerable, that the Courts must send a message of deterrence and denunciation. I agree with the lawyers that a sentence of imprisonment is called for, for all of the factors that I have indicated: your prior record, the fact that this was a sexual assault on a 13-year-old, and all of the other factors I have alluded to. I appreciate the fact that both counsel agree with that.

[12] The question becomes: is it served in jail or is it served conditionally in the community, and to come to this conclusion that it is served conditionally in the community I have to find that it fits the fundamental principles of sentencing and all of the other

prerequisites in s. 742 of the *Criminal Code*. That is what I have to find, and frankly, in this particular case, I do not find that a conditional sentence of imprisonment would fit the fundamental principles of s. 718, and I find, as a fact, for a couple of reasons. One, I do not believe that to order this sentence to be served conditionally in the community would give an appropriate voice to the principles of general deterrence and denunciation.

[13] I say this very carefully because I recognize that general deterrence, denunciation, and specific deterrence, can find a voice in Conditional Sentence orders. It is not a situation where they cannot. They can. The Supreme Court of Canada and many Courts of Appeal have said that. But in this particular case, given all of the aggravating circumstances, it is my belief that the principles of general deterrence and denunciation would not find an appropriate voice in a Conditional Sentence Order.

[14] I also find, quite frankly, that notwithstanding the fact that you are remorseful, that you have entered a guilty plea, and significantly, that you were on that Bail Order for a long period of time, I still do not find in this particular case that to order a sentence to be served in the community would not endanger the safety of the community. I only have to look at this man's prior criminal record, which is repetitive, which includes offences of violence, which includes repetitive offences of breaches of court orders, and then marry them, sadly, with these latest two breaches, to conclude, that, in fact, a sentence of imprisonment in the community would endanger the safety of the community. So I find that not only would a Conditional Sentence endanger the safety of the community in this particular case, I also find that it would not be consistent with the fundamental purpose of the principles as set out in ss. 718 to 718.2, and I particularly refer to the principles of general deterrence and denunciation.

[15] I say that recognizing, Mr. J., as I have said, all of those factors - and there are several - that speak on your behalf. But in my view, a sentence of imprisonment not to be served conditionally in the community is the appropriate sentence to send a message to you, as a reminder, and equally importantly, if not more importantly, to others that this type of behaviour, and behaviour on a vulnerable individual, will not be tolerated and should never be tolerated by the Courts or by our society at all.

[16] I do make mention, and I have read and referred to the two cases that Mr. Dick provided, and I appreciated them being provided. I do note, of course, as Mr. Dick properly pointed out, that we were dealing with sexual offences which had features that are aggravating that are not present here; that they were sexual assaults against the consent of the individual. There are certainly factors that are more aggravating to some extent, as Mr. Dick pointed out, but there are certainly factors that are missing. One of them is, as both counsel pointed out, in *R.* v. *R.P.B.*, [2011] Y.J. No. 12, that was a joint recommendation. Secondly, in *R.* v. *V.J.S.*, 2008 YKTC 62, there was an individual who had a record that was of some date, and many other factors, including the exigencies of the evidence, for lack of a better term, in that particular case. So there are certainly cases that I believe that I can distinguish. I make this sentence of imprisonment in full knowledge of the facts in the Pre-Sentence Report and the background of this individual as an Aboriginal person.

[17] The sentence I intend to impose is as follows. On the charge of sexual assault, there will be a sentence of 12 months' imprisonment. With respect to the breach charges, I am in agreement that the two charges ought to be served concurrently with each other. I am not in agreement with the Crown that they should be served

concurrently with the sexual assault, and the reason I say that is I think I can take the two charges to be essentially a spree of offences occurring because of his failing to appear, and that consecutive periods on each are not warranted. But they are separate offences to the sexual assault, and, in my view, given that they are separate offences, they deserve a sentence on their own. I do, however, take into account the principle of totality and the fact that, given the fact that I have imposed a sentence of 12 months, that a sentence of a much longer period of time on the breaches, although ordinarily called for given his prior record, is not called for in this particular case. So, certainly, totality is a factor. There will be a sentence on each of 30 days to run concurrent with each other but consecutive to the previously imposed 12 months. So the total sentence of imprisonment is one of 13 months: 12 months on the sexual assault, 30 days each concurrent on the breaches but consecutive to each other.

[18] That sentence will be followed by probation, and the probation will be concurrent, Madam Clerk, on all of the charges. I think a sentence of two years' probation is fit and appropriate. I certainly heard the Crown with its representation that three years would be significant and appropriate, but I think Mr. Dick is right in this particular case. I have sentenced Mr. J. to a period of imprisonment, he needs some help, it is going to be there, it is either going to be successful or not in two years, and one can only hope that it is. So I think when you consider all of the circumstances, a period of probation for two years is appropriate. I am going to mirror, essentially, what the Crown has requested and what is suggested in the Pre-Sentence Report.

[19] After Mr. J.'s sentence of imprisonment, he will be on probation for two years. The conditions are:

1. Keep the peace and be of good behaviour and to appear before the Court when required to do so by the Court;

Do you understand that, Mr. J.? Keeping the peace and being of good behaviour means exactly that. You must stay out of trouble; you cannot break laws, court orders; you cannot cause a public disturbance. Do you understand? And you appear before the Court when and if required.

2. You are to report to your Probation Officer within two working days of your release from custody, and to report thereafter when and in the manner as directed by your Probation Officer;
3. You are to remain within the Yukon Territory unless you obtain written permission from your Probation Officer or the Court;

   [CLARIFICATION OF CONDITION 3]

4. You are to notify the Court or your Probation Officer in advance of any change of name or address and promptly notify the Court or the Probation Officer of any change of employment or occupation;
5. You are to attend, participate, and complete all programming, counselling or treatment as directed by your Probation Officer;

I take it that the Crown is not asking that I specify but rather delegate to Probation Services the nature of any treatment or programming that might be required?

[20] MS. NGUYEN: In the circumstances, yes.

[21] THE COURT: All right. I will do that in the circumstances.

[22] You said to me in our conversation that you can abstain from alcohol. Is that right? I am ordering then that:

6. You are to abstain absolutely from the possession or consumption of alcohol and/or controlled drugs or substances except in accordance with a prescription given to you by a qualified medical practitioner;
7. You are to have no contact directly or indirectly or communicate in any way with T.B. or D.B.;

[CLARIFICATION OF CONDITION 7]

8. You are not to attend at any residence where either T.B. or D.B. are residing;

I appreciate the comments that Mr. Dick said, that they are somewhere else, but nonetheless, I think the Crown is right that those protective conditions are appropriate in this case.

[DISCUSSION RE CONDITIONS REQUESTED BY CROWN]

[23] THE COURT: All right, then. I think that is appropriate:

9. You are not to attend any bar, tavern, off-sales or other commercial premise where the primary purpose is the sale of alcohol;

I am going to leave it at that, subject to any comment from you, Mr. Dick, as to any of the conditions I have made or any of the others that you think I should make.

[24] MR. DICK: No. I would just like to make a comment that in a Pre-Sentence Report, the list of conditions were conditions under a Conditional Sentence, which is different.

[25] THE COURT: Exactly.

[26] MR. DICK: Right.

[27] THE COURT: Quite frankly, I am of the view that the conditions in this Probation Order need to be relatively clear and straightforward in order to provide for his rehabilitation without necessarily being onerous or not understandable by Mr. J. I hope what I have crafted is enough to give him the opportunity to access the resources of Probation Services and to hopefully deal with the many legion of issues that he has.

[28] THE COURT: I am waiving the Victim Fine Surcharge.

[29] MS. NGUYEN: Sir, a DNA and a Sex Offender Registry Order are also mandatory in the circumstances.

[30] THE COURT: Yes. But before I do that, I want to ask Mr. J., do you have any questions about the sentence that I have imposed at this point in time? Do you understand the sentence?

[31] THE ACCUSED: Yes. I'm just wondering about my job and --

[32] THE COURT: Well, in terms of your employment, Mr. J., I have not made this a Conditional Sentence Order, as you have heard. So you are sentenced to a term of imprisonment, subject to any early release provisions that the jail has, but that

is not a factor that I take into account, nor something that I have any jurisdiction about. The job is something that you will have to deal with with your employer, and hopefully will be available to you upon your release. You understand that on your release there is that Probation Order, Mr. J., as I have found that you are an individual who has the potential. You need to get the help that you desperately need, not only to keep yourself employed, but out of jail, to support your family, and to ensure, most importantly, that an offence such as this or any other offence does not occur again. Do you understand that?

[33] Now, pursuant to -- and the Crown had proceeded summarily on this matter, which is a factor I take into account. You are asking for a DNA Order. This is, I believe, a primary designated DNA offence?

[34] MS. NGUYEN: Yes, it is.

[35] THE COURT: So I am making an order for the collection of DNA and that can be done institutionally. I take it that is the procedure here?

[36] MS. NGUYEN: Yes.

[37] THE COURT: Yes. And you are asking for an order as well under?

[38] MS. NGUYEN: Under the *Sex Offender Information Registry Act,* S.C. 2004, c. 10.

[DISCUSSION RE LENGTH OF *SOIRA* ORDER]

[39] THE COURT: Under s. 490.013(2), I am making a 10-year *SOIRA* Order, because it is being proceeded summarily.

[40] MS. NGUYEN: Yes, thank you. That leaves count 2 on the two count Information, which is withdrawn.

[41] THE COURT: Count 2 is withdrawn.

[42] MS. NGUYEN: Yes, thank you.

[43] THE COURT: And I do not believe there are other ancillary orders.

[44] MS. NGUYEN: No.

[45] THE COURT: Just so that you know, Mr. J., there is an order that you will be under the Sex Offender Registry for 10 years, and while in jail, the authorities will come and take a sample of your DNA to be kept on the National DNA Registration Databank. It is basically the modern day fingerprint.

[46] All right. Thank you, I appreciate both counsel making themselves available.

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WYANT T.C.J.