Citation: *R. v. Lennie*, 2018 YKTC 53

Date: 20180405
Docket: 17-00517
Registry: Whitehorse

IN THE TERRITORIAL COURT OF YUKON
Before His Honour Judge Cozens

REGINA

v.

PETER JAMES LENNIE

Publication, broadcast or transmission of any information that could identify the complainant or a witness is prohibited pursuant to section 486.4 of the *Criminal Code*.

Appearances:
Kevin W. MacGillivray — Counsel for the Crown
Lynn MacDiarmid — Counsel for the Defence

REASONS FOR SENTENCE

[1] COZENS T.C.J. (Oral): Peter Lennie has entered a guilty plea to having committed the offence of sexual assault contrary to s. 271 of the *Criminal Code* on the day of trial. He entered the guilty plea to the count as re-elected to a summary election by the Crown. The offence date is for November 5, 2017. The guilty plea was entered on February 20, 2018.

[2] Mr. Lennie was in custody, but he was not in custody on this file on its own, but also in connection with file 16-00618, a four-count Information also alleging an offence under s. 271 and s. 151 of the *Criminal Code*, in addition to breach charges under

s. 145(5.1) of the *Criminal Code*. That matter proceeded to trial and he was convicted of the s. 271 offence. The s. 151 offence was stayed as per *R. v. Kienapple*, [1975] 1 S.C.R. 729 — at least that is what the notes show — and he was sentenced by Judge Faulkner to six months' custody with consecutive sentences of 15 days on the breach charges, which was time served, as I understand it. He now has a total of 27 days to be credited towards the current offence.

[3] The circumstances of the sexual assault are set out in an Agreed Statement of Facts that was filed in this matter. I will not go through it, but the 17-year-old victim had been drinking with Mr. Lennie and some others. She was from Inuvik and attending in Whitehorse. Two of those drinking went to sleep in a bedroom and Mr. Lennie and the victim, L.K., slept on separate couches. She awoke to find herself fully clothed and Mr. Lennie fully clothed, but he was touching her buttocks over her clothes and rubbing his penis on her leg. She pushed him off her and the assault stopped, and he apologized afterwards before going back to sleep.

[4] Mr. Lennie, through counsel, had indicated that he had little to no recollection of what took place, but ultimately ended up with the guilty plea on the day of trial. The victim and her mother travelled down from Inuvik for the trial day but were not required to testify.

[5] That said, obviously, until they attended that morning, the victim would have anticipated having to testify, so it is not quite the same as an early guilty plea where the victim does not have to at least prepare themselves emotionally and mentally for a trial that would have had to have taken place, to some extent here, but nonetheless, it is still

a guilty plea. There is a big difference between preparing to testify and actually testifying and being examined.

[6] Mr. Lennie is 29 years old, of Aboriginal heritage. At the time of this offence, he had no prior criminal record. He now has a criminal record for the s. 271 and s 145(5.1) offences, with the s. 151 being *Kienapple*'d, as a result of the sexual assault offence that took place on November 12, 2016. He was on bail in relation to that offence at the time he committed this offence.

[7] While Mr. Lennie has no prior criminal record for the purpose of putting that as an aggravating factor, clearly the fact that he was on bail awaiting a trial on a sexual assault — which of a somewhat similar nature to the one here, a finding that he had touched the babysitter's vaginal area over her clothes — is an aggravating factor. Again, as I understand, alcohol was a significant factor in these offences.

[8] The victim in the previous case was 12 years old, as I understand it, 13 at the time she testified. It was after trial.

[9] The submission before me is somewhat unusual. Crown counsel is suggesting a period of five months' custody is appropriate, noting the familial connection, the non-statutory but still practical trust relationship between Mr. Lennie and the victim in this case, noting the fact he was on bail at the time that this happened and taking into account, certainly, the mitigating factors of the guilty plea, that the five months falls within an appropriate range of disposition.

[10] In the event a conditional sentence were to be imposed, counsel suggests it could be a longer period of time. Crown is not opposed to the imposition of a conditional sentence, neither, however, is Crown supporting it because there are certainly some unknowns in this case as there is not a risk assessment and the plan is perhaps not as complete as some of the plans we have seen with respect to moving forward, a cautious but certainly understandable approach by the Crown and one that I think complies with what the expectations are before the imposition of a conditional sentence.

[11] Defence counsel's position is sort of twofold. On the one hand, counsel agrees that a period of custody in three to six-month range would be appropriate, but that it would be served conditionally in the community. However, counsel has a concern about the fact that, under s. 490.012 and s. 490.013 of the *Criminal Code*, the *SOIRA* order that would be imposed would be a lifetime order — as this would be a second conviction for one of the categorized offences — whereas a discharge, not being a conviction, would therefore not trigger the mandatory lifetime *SOIRA* order. I note that the lifetime *SOIRA* order is reviewable after 20 years and, of course, in the event that there is a pardon sooner, that also would have an impact on the length of the *SOIRA* order.

[12] I am going to deal with that argument first. I would tend to agree that for these sexual offences, being on the lower end of the spectrum, perhaps a lifetime *SOIRA* order seems a little bit disproportionate even with the review mechanisms.

[13] That said, I do not have a *Charter* argument before me to challenge the applicability of that legislation to this individual. The section itself has not been found to be a *Charter* violation on its own, and any s. 12 violation would have to be in the particular circumstances of this case. I am not saying such an argument would have been successful, but that is an argument that could perhaps have been made.

[14] My concern in this case would be to impose what I consider to be a sentence outside of the range, a conditional discharge, simply for the purpose of avoiding the lifetime *SOIRA* order. That order is not, in my opinion, particularly intrusive, although it is clearly intrusive. It requires yearly contact, compliance with changes of address, compliance with changes of employment, and cannot be said to have no impact, but in my opinion, any impact by a lifetime order that is reviewable at 20 years and even earlier if a pardon is obtained is not the same as the impact that, in my opinion, imposing a discharge would have in the circumstances of this offence and this offender.

[15] I think that it is more important to give credence to the principles of sentencing in this case in relation to this offence than it would be to impose a discharge solely for the purposes of circumventing the somewhat perhaps extreme aspect of a lifetime *SOIRA* registration requirement. On the facts of this case, a discharge would not be an appropriate sentence. Were it standing alone without the prior conviction prior to the date of the sentencing, there could perhaps have been an argument made, but the criteria set out in the *Criminal Code* and in *R. v. Fallofield*, 1973 CarswellBC 184 (C.A.), would not allow me to impose a discharge in this case without creating an artificial sentence.

[16] The *SOIRA* order, as I said, is one that simply is not going to have such a prejudicial effect that it would outweigh the need to properly apply s. 718 through s. 718.2 of the *Criminal Code*, including not only denunciation and deterrence, which are, of course, primary factors in this case, but also rehabilitation. There are certain aspects with respect to the imposition of a conviction that can actually work in the areas of specific deterrence and to bring home to individuals the need to change their ways. In my opinion, a discharge is not appropriate.

[17] I am satisfied that a period of custody is appropriate. What is the appropriate length of that custody and how should that be served?

[18] With respect to victim impact, I have Victim Impact Statements from L.K. and from her mother. They were present by video link from Inuvik, although were unable to remain while the disposition was handed out.

[19] This offence has had a significant impact, in part because of the relationship and the way that they had viewed Mr. Lennie prior to this as, in their eyes, somewhat of a hero for the assistance he provided to their family in locating a deceased member of the family.

[20] As is often the case where there is a sexual assault committed between individuals who know each other and are either close friends or part of the family, there is an underlying trust relationship that brings the impact of the assault home in a way different than it might be if it was a stranger. I am not saying it is always going to be more or less, but it will have a differential impact and I accept that the victims in this

case, in particular L.K., have been harmed emotionally and psychologically in a way that may, by some, not myself, be associated with even a more intrusive sexual assault.

[21] It made it clear, this is a serious sexual assault not just because of the actual physical act that took place but aggravated by the relationship between the parties. And while there is a scale between the nature of sexual assaults, and this sexual assault, as the one based on the wording of Judge Faulkner on the previous one, the lower end of the spectrum is still the serious end of the spectrum.

[22] The circumstances of Mr. Lennie are set out in a *Gladue* Report. I have read the report. I am not going to go through it in any particular detail.

[23] This is a young man who has tremendous potential. He has had tremendous familial support; good familial support. His parents have travelled down from Inuvik and, from what I can see, have done a very good job of providing Mr. Lennie with an understanding of his culture, of being on the land, of what the expectations are for him and what he is capable of.

[24] His life is, however, also marked with some of the circumstances associated with being an Aboriginal individual and certainly his struggles with alcohol are connected to that. Again, I am not going to go through the report in length here.

[25] Mr. Lennie also suffered from a very serious snowmobile accident when he was 12 years of age that had a significant impact on his health for a while, as he incurred a fairly significant head injury. The extent to which that injury may have impacted on his life, we do not know, but it certainly does not seem to have been something that would

present Mr. Lennie now as someone who does not have the capability of continuing to live a pro-social lifestyle.

[26] I have support letters that were filed. As I can see, one is from his aunt, Cheryl Wright, one is from Lillian Wright, who is his grandmother, one is from Ruth Wright, who is a cousin of his, and the other one is from George Adam, who has known him since he was a child. All of these letters indicate and, in my opinion, based on what I have seen in the *Gladue* Report, quite properly and accurately, that Mr. Lennie is a young man with potential.

[27] To some extent, what he is being sentenced for today, and what Judge Faulkner sentenced him for recently, were offences that did not seem to be consistent with the life he has led up until now. We do not know what is going on and we do understand that he has two young children, and his own personal family life has been in somewhat of a bit of a turmoil, but that does not provide me with what I would consider to be much of a context for a sexual offending of this nature even on the lower end as it is.

[28] There are certainly some inquiries that need to be made into why Mr. Lennie committed these offences and whether there is more underlying it than simply the consumption of alcohol and making bad choices while he was drunk. That is what the orders that are attached to the sentence will deal with.

[29] In my opinion — and noting the concerns of the Crown that are concerns certainly raised in the context of what the expectation is in s. 742 — while there is some uncertainty, based on the history of Mr. Lennie and what I see here now, I am satisfied that the sentence for the s. 271 offence is a sentence that he can serve conditionally in

the community on appropriate terms. It will be longer, as per the Crown's submission, and the sentence will be as follows.

[30] With respect to the 27 days he has in custody, I am aware that he served it. I am not crediting it to anything. The fact that, at the time he committed this offence, he was breaching his recognizance that required him to abstain from alcohol that was read in pursuant to s. 725 of the *Criminal Code* does not, of course, attract a sentence on its own, nor would I necessarily have imposed a sentence of 27 days' custody on that were it to be something I was sentencing him for, but I am aware that that breach was a contributing factor to the sexual assault that was committed, so I am not giving him any credit for the 18 days' custody. There will be a further six months' custody to be served conditionally in the community.

[31] The terms of that sentence will be that you:

1. Keep the peace and be of good behaviour;

2. Appear before the court when required to do so by the court;

3. Report to your Supervisor immediately upon your release from custody, and thereafter, when required by your Supervisor and in the manner directed by your Supervisor;

4. Remain within the Yukon unless you have written permission from your Supervisor;

5. Notify your Supervisor in advance of any change of name or address, and promptly of any change of employment or occupation;

[32] These are the statutory terms. These are the terms that are required to be put on any order.

[33] I recognize that Mr. Lennie's plan is to return to Inuvik. This order will not stop that from taking place. He simply needs to get permission. I would expect that that is a permission that he is likely to get, given that his strongest support is his parents and that is where they will be living — and the *Gladue* Report sets out some of those circumstances.

6. Have no contact directly or indirectly with L.K. and M.R. except with the prior written permission of your Supervisor and with the consent of L.K. and M.R. This will be in consultation with Victim Services as well and, for the duration of the conditional sentence order, it will be solely for the purposes of participation in victim-offender reconciliation with the consent of L.K. and M.R. I do not anticipate any other contact within the first six months of this order. To be clear, that is going to be driven by the victim and her mother in this case;

7. Not go to any known place of residence, employment or education of the same two victims, L.K. and M.R. Just so we are clear, I include M.R. as a victim because this is the mother of this young lady and I have no problem including her in this;

8. Reside as approved by your Supervisor, abide by the rules of the residence, and not change that residence without the prior written permission of your Supervisor;

[34] Because of the uncertainty with respect to any factors, I am going to make this a clear house arrest throughout, but certainly counsel can bring it forward in the event that there has been enough information to justify change to a curfew at some point in this. So, I am not intending to preclude a curfew.

9. Remain inside your residence or on your property at all times except with the prior written permission of your Supervisor except for the purposes of employment, including travel directly to and directly from your place of employment, or except in the direct company of Billie and Hans Lennie or another responsible adult approved in writing in advance by your Supervisor. You must answer the door or the telephone to ensure you are in compliance with this condition. Failure to do so during reasonable hours will be a presumptive breach of this condition;

10. Not possess or consume alcohol and/or controlled drugs or substances that have not been prescribed for you by a medical doctor. You will provide a sample of your breath or urine for the purpose of analysis upon demand by a peace officer who has reason to believe that you may have failed to comply with this condition;

11. Not attend any premises whose primary purpose is the sale of alcohol, including any liquor store, off sales, bar, pub, tavern, lounge or nightclub;

12. Attend and actively participate in all assessment and counselling programs as directed by your Supervisor and complete them to the satisfaction of your Supervisor for the following issue:

alcohol abuse,

sexual offending,

and any other issues identified by your supervisor,

and provide consents to release information to your Supervisor regarding your participation in any program you have been directed to do pursuant to this condition; and

13. Make reasonable efforts to find and maintain suitable employment and provide your Supervisor with all necessary details concerning your efforts.

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COZENS T.C.J.