

SUPREME COURT OF YUKON

Citation: *R. v.J.J.*, 2012 YKSC 60

Date: 20120627
Docket S.C. No.: 10-01519
12-10002
Registry: Whitehorse

BETWEEN:

HER MAJESTY THE QUEEN

AND:

J.J.

Before: Mr. Justice R. Veale

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
Michael Reynolds

Counsel for the Crown
Counsel for the Defence

REASONS FOR SENTENCING DELIVERED FROM THE BENCH

[1] VEALE J. (Oral): Mr. J. has been charged with the summary conviction offence of committing a sexual assault on L.A.P., contrary to s. 271 of the *Criminal Code*, on August 18, 2010 at Watson Lake.

[2] Mr. J., as just indicated, has given a heartfelt apology for the terrible disruption this act has caused to the community of Liard First Nation, and certainly to the members of both his family, of course, and Ms. P.'s family in particular.

[3] There has been a guilty plea placed before the Court by Mr. J.. There is an Agreed Statement of Facts that has been read in as follows:

J.J. (the "Accused") admits each of the following facts without the necessity of the Crown calling evidence.

1. On August 18th, 2010, L.A.P. ("Ms. P.") returned to Watson Lake, Yukon after having attended the funeral of her grandfather. She was at her home. At approximately 10:30 in the evening she called her neighbour, C.O. ("Ms. O.").
2. Ms. O. was raised in part by Ms. P. The two remained very close, living just two houses away from one another. Ms. O.'s common-law partner is the Accused.
3. The Accused spoke with Ms. P. that evening. Ms. P. asked the Accused if he would drive her to buy cigarettes at the Petro Canada station (also known as Y-Tech locally) on Frank Trail. The Accused agreed and picked Ms. P. up at about 10.50 p.m. He was driving a blue Chevy truck. They drove together to the Petro Canada station where Ms. P. purchased cigarettes.
4. After the stop at the Petro Canada station, Ms. P. asked the Accused to return her to her home. Instead, the Accused drove around the Town of Watson Lake for about 10 minutes before heading back in the direction of her home.
5. The Accused drove past Ms. P.'s house to a gravel road. The road led to the pump house. Near the pump house, he stopped the vehicle, took his keys out and exited the driver's side door. He walked around the front of the vehicle to the passenger side, unfastening his pants while moving. Ms. P. attempted to lock the passenger door and discovered that there was no lock. She tried to keep the door closed by pulling on it but the Accused was able to get it open.
6. The Accused grabbed Ms. P.'s legs and swung her sideways in the seat. He pulled off Ms. P.'s pants. The Accused forced his penis into Ms. P.'s vagina against her clear and loud protests and attempts to push him away.
7. The Accused pulled his penis out of Ms. P.'s vagina and ejaculated.
8. There was a box of Kleenex in the truck. Ms. P. used the Kleenex to clean herself up and threw the Kleenex on the ground near the pump house. She wanted to run from the vehicle but she was frightened and shocked. Instead, she screamed at the Accused to take her home. The Accused drove Ms. P. to her house.

9. When Ms. P. returned to her house her son, C.W., was home. It was 11:30 p.m. She got into the shower and stayed there for a very long time. She realized that she had lost \$40 she was carrying in her shirt, somewhere in the Accused's truck.
10. She called the Accused and Ms. O. answered. Ms. P. told Ms. O. about the lost money but did not disclose the sexual assault. The Accused agreed to locate and return Ms. P.'s money, which he did shortly after their telephone conversation ended.
11. Neither Ms. P. nor the Accused had been drinking when this occurred.
12. After the sexual assault, the Accused called Ms. P. several times making sexually suggestive comments to her.
13. The incident was reported to the RCMP, on September 21st, 2010. She finally disclosed the incident to Ms. O. on September 20th, 2010. Ms. P. was concerned about disrupting Ms. O.'s family and did not want to report the incident immediately to RCMP. She also disclosed this incident to three of her close friends - N.H., L.A., and L.M. shortly after the sexual assault.
14. Ms. O., Ms. H. and Ms. A. all confirmed details of Ms. P.'s recollection of the incident. Ms. M. declined to provide a statement in relation to this matter.

Further Admissions Relevant to Sentencing

15. The Accused admits his criminal record as provided at Tab 1.
16. Ms. P. has Stage 4 pancreatic cancer and until recently, has been delaying treatment for that condition until this matter was dealt with.
17. The trial of this matter was delayed twice - once in September and again in February - as a result of deaths in the Accused's family and Ms. P.'s family. The delays have been stressful for Ms. P., however, that stress has been balanced with her ability to focus on grieving important members of her family and community.
18. The separation of Ms. P.'s family from Ms. O.'s family has also been a significant source of ongoing stress for Ms. P. and her children.
19. The Crown acknowledges significant mitigation in the Accused's plea of guilty in that it reduces the serious levels of stress for Ms. P. The Crown further acknowledges that the Accused's acceptance of responsibility is key to rebuilding a future relationship between the O. and P. families.

[4] They indicate quite clearly a very serious offence that, under most circumstances, would result in a long period of incarceration in jail for Mr. J., but there are some exceptional circumstances in the case that I am going to deal with at this time.

[5] First, however, I am going to just deal with the aggravating circumstances because I think they have to be set out in the court record. Number one, Ms. P. was calling Mr. J. for a ride into town. Second, Mr. J. is a trusted family member, I would say, because they lived two doors from each other and Mr. J.'s common-law is a woman that was raised by Ms. P. and she treats her, in effect, as a daughter. That raises, of course, the spectre of family violence and sexual family violence. Third, the assault took place in a remote location that Mr. J. had driven to despite the protests and attempts to fend him off by Ms. P. Four, the conduct became particularly egregious because Mr. J. did not appreciate the nature of the acts and participated in some comments of a sexual nature after the event to Ms. P., and those are particularly aggravating and one of the terms in the joint sentence position that counsel have taken will be directed to that issue.

[6] The Crown attorney has indicated the exceptional nature of this incident and the events that have followed. There was a trial date set for September 28 to 30, 2011, and it did not proceed by consent because of the death of Mr. J.'s father in the Liard First Nation community. This Court understands the importance of those events, not only for the individuals involved, but for the entire Liard First Nation community. Secondly, Ms. P. has been advised that she is a stage four pancreatic cancer victim, and that is an extremely serious medical condition and she has put off treatment because of the stress of this outstanding matter. It was set again for trial on March 5, 6, and 7 of 2012 in Watson Lake. However, at that time, in addition to the pancreatic cancer, Ms. P.'s

common-law husband died suddenly and, of course, the matter had to be adjourned once again.

[7] There were additional factors; two children of Ms. P. had been charged with a hate crime in the community, which was ultimately not proceeded with. Ms. P. herself was unfortunately charged with impaired driving and that has been dealt with, but all of these events have been extremely emotional and difficult for Ms. P., and that leads us to the joint sentence submission, which has been made today.

[8] However, I would like to deal with a few matters with respect to, firstly, the Victim Impact Statement made by Ms. P. It was a very emotional statement that she read out in court, and I should indicate that she only came in for the purpose of reading that statement and left immediately afterwards. Unfortunately, she was not here to hear Mr. J.'s apology to her, which, in my view, was definitely heartfelt on his behalf.

[9] It is difficult for me to summarize the Victim Impact Statement that was read out by Ms. P., but this event has had a very profound impact on her in terms of the emotional abuse; the psychological overlay that is always involved in sexual violence; the loss of self-esteem; her isolation in the community, her loss of her best friend, the common-law partner of Mr. J., and the loss of relationship with the children of Mr. J.; the difficulties that obviously arose in the relationships in her own family and how her children have obviously taken this matter very emotionally themselves. It is a wonder that there has not been an outbreak of violence on their part as a result of the incident, but Ms. P. has to be commended for ensuring that that has not taken place. Ms. P., to her credit, and although she bears no guilt for this event, has undergone treatment

herself and she clearly has come out of that a stronger woman. She is now employed by Liard First Nation, and she has indicated that she is going to assist other women who find themselves in the same situation.

[10] She said one thing about breaking the cycle of residential school abuse, and that is a very profound statement because, in spite of the fact that Lower Post Residential School may have closed some 40 years ago, the traumatic events that individuals, and in this case, Mr. J., have suffered as a result of that blight on Canada's history, is something that is ongoing in the community of Liard First Nation and in probably every Aboriginal community in Canada. It is something that is going to take place in this country as long as individuals who went through residential school are not able to take hold of their lives and start to conduct themselves in an acceptable manner.

[11] Mr. J., of course, is an individual who is a victim of residential school sexual and physical abuse, and that goes a long ways to explaining the situation he finds himself in today. On the other hand, Mr. J. has gone through the independent assessment process under the Residential School Settlement Agreement with the Government of Canada and he has been compensated. I think he is aware of the fact that it is time now to put those horrible events behind him and become a model citizen, not only for his family, but for the community, and become a leader in terms of assuring that the kind of abuse that he suffered is not perpetrated on other members of the community, whether it be neighbours or his own children. These matters, unfortunately, continue to arise again and again and they are particularly difficult for Aboriginal communities to deal with. But we have a situation where both the victim and the convicted person in this

case have developed a great deal of awareness of what has taken place, and I think both have committed themselves to ensure that these events will never occur again.

[12] I should indicate that the court record, in addition to the Agreed Statement of Facts, has an excellent Pre-Sentence Report on Mr. J., which is, in effect, *Gladue*-oriented, in addition to an excellent *Gladue* Report prepared, as requested by the Court. Those two documents indicate both the personal history that Mr. J. has gone through and the history of the Liard First Nation and Watson Lake as a community as it was impacted by the Lower Post Residential School and the construction of the Alaska Highway, all of which have had very negative influences that the community is going to be dealing with for some time in the future.

[13] I am going to accept the joint sentencing position that has been put forward by counsel. In short, it is for a 24-month Conditional Sentence Order, followed by a 36-month Probation Order. I should indicate that the Conditional Sentence Order is house arrest for a period of 24 months.

[14] It also includes an order for the provision of bodily substances required for the purposes of DNA analysis and an order that Mr. J. be registered under the *Sex Offender Information Registration Act*, S.C. 2004, c. 10.

[15] So the Conditional Sentence Order will be for 24 months under the following terms and conditions:

1. To keep the peace and be of good behaviour;
2. To appear before this Court when required to do so;

3. Mr. J. must report immediately to a Conditional Sentence Supervisor in Whitehorse, and thereafter to the Conditional Sentence Supervisor in Watson Lake, and will report to the Conditional Sentence Supervisor when he requires, and in the manner that the Conditional Sentence Supervisor requires;
4. Mr. J. must remain within the Yukon, unless he has the written permission to go outside the Yukon that has been obtained either from the Court or from his Conditional Sentence Supervisor;
5. Mr. J. must notify the Court or his Conditional Sentence Supervisor in advance of any change of name or address, and promptly notify the Court or the Conditional Sentence Supervisor of any change of employment or occupation.

As an aside, I can indicate now that you should indicate to the Conditional Sentence Supervisor, Mr. J., today or tomorrow, when you meet with him, that you do have new employment conditions at the hotel.

6. You will be under house arrest, which means that you have to remain at your home 24 hours a day, except for purposes of employment, education, counselling, and those permissions will be granted in writing from the Conditional Sentence Supervisor and you must carry that writing with you at all times. There will also be two hours per week that you can leave your home to attend to personal needs, shopping, whatever you need to do, but that also must be according to written conditions from your Conditional Sentence Supervisor;

7. You have to attend and complete counselling and programming as directed by the Conditional Sentence Supervisor, and I strongly recommend that you continue to work with Bill Stewart in that regard;
 8. You are to have no contact directly or indirectly in any way with L.A.P., except as permitted in writing by your Conditional Sentence Supervisor, who must consult first with Victim Services and Child and Family Services, and of course it must be with the consent of L.A.P.;
 9. You are not to attend within 25 metres of the residence or work place of L.A.P., except as permitted in writing by your Conditional Sentence Supervisor, in consultation with Victim Services and Child and Family Services;
 10. You must abstain absolutely from the consumption or possession of alcohol and narcotics, except as may be prescribed by a medical practitioner;
 11. You are not to attend at any bar, tavern, off-sales or any other place where the primary purpose is the sale of alcohol;
- [CONSULTATION WITH COUNSEL]
12. You are to refrain from discussing either the complainant or the incident that occurred on August 18, 2010, with any person, with the exception of discussions that may take place in the context of counselling or treatment.

[16] So you can talk to your counsellor, but I want to make it clear that if you speak to any individual in the community about these matters, it will be treated as a breach of

your Conditional Sentence Order, and you may be brought back to court and sentenced to jail for the balance of your Conditional Sentence Order. Do you understand that, Mr. J.?

[17] THE ACCUSED: Yes.

[18] THE COURT: There will be a 36-month Probation Order to follow the completion of the Conditional Sentence Order with the following terms:

1. To keep the peace and be of good behaviour;
2. To appear before the Court when required to do so;
3. To report to a Probation Officer within two working days of the end of the Conditional Sentence Order, and thereafter as required by your Probation Officer and in the manner indicated by your Probation Officer;
4. Notify the Court or 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 must attend and complete any counselling and programming as directed by the Probation Officer;
6. You shall have no contact direct or indirect in any manner with L.A.P., except as permitted in writing by the Probation Officer in consultation with Victim Services and Child and Family Services, and of course, the consent of Ms. P.;

7. You are not to attend within 25 metres of the residence or the place of employment of L.A.P. except as permitted in writing by the Probation Officer in consultation with Victim Services and Child and Family Services.

[19] Any other comments with respect to conditions?

[20] MS. NGUYEN: The refrain from speaking about --

[21] THE COURT: Yes, and I will repeat the condition that:

8. Mr. J. shall refrain from discussing the complainant or the incident that occurred on August 18, 2010, with any person, with the exception of discussions in the context of counselling or treatment.

[DISCUSSION BETWEEN COUNSEL]

[22] MS. NGUYEN: Sir, I don't believe my friend and I have any other suggestions to make with respect to the conditions on the two orders.

[23] THE COURT: You did offer up an additional condition that would go in both orders, that Mr. J. not associate with any individuals involved in the criminal justice system, as directed by the Probation Officer or the Conditional Sentence Officer.

[24] MR. REYNOLDS: Yes, and that was in relation to the concerns within the Risk Assessment about, I guess, a pro-criminal social group.

[25] THE COURT: Right. But we will put them in as terms of both.

[26] MR. REYNOLDS: Certainly. Yes, and I put that to the Court if the Court had concerns about that. With Mr. J. working and being on house arrest for the next two years, I'm highly doubtful he'll have any contact with those individuals in any event, but I'll leave that to the Court.

[27] THE COURT: So there will be an order that Mr. J. provide bodily substances that are reasonably required for the purpose of forensic DNA analysis pursuant to s. 487.05(1) of the *Criminal Code*. There will also be an order pursuant to s. 490.012 of the *Criminal Code* for the registration of Mr. J. with the *Sex Offender Information Registration Act, supra*, which shall be for a term of ten years.

[28] MS. NGUYEN: Thank you, sir. I believe that only leaves the matter of the victim fine surcharge. It's \$50, given that the Crown has proceeded summarily.

[29] THE COURT: There will be a victim fine surcharge in the amount of \$50.

[30] Mr. J., this has not been a pleasant year and a half to two years for you since this event, but you now are in the wonderful position of making some great amends in your community, becoming a leader in your community, teaching others to put the past behind them, to ensure that Liard First Nation is a safe place for women and not a place that abuse takes place of any person: man, woman, or child.

[31] The Clerk is going to prepare two documents, I believe; there may be several documents prepared. She is going to read through the conditions in each case so that you will have heard them now and you will have gone through them with your lawyer

and you will hear them again from her, and then you will be signing those documents.

Do you understand?

[32] THE ACCUSED: Yes.

[33] THE COURT: Thank you very much, counsel. It has been a difficult case to deal with, but I think you have handled it extremely well, and I appreciate the work that you have done in the matter, and please convey to both the author of the *Gladue* Report and the Pre-Sentence Report my thanks for the very thorough nature of both reports. Thank you.

[34] MS. NGUYEN: We will do that, sir. Sir, the matter on the Indictment is stayed and so that Mr. J. isn't confused, until he signs the CSO, he's actually in custody. So I don't know if Madam Clerk would like to call somebody up from cells or we can hand over custody to the sheriff.

[35] THE COURT: I think we can handle it with the sheriff in the rear, there. Thank you.

VEALE J.