Citation: *R.* v. *G.J.W.,* 2012 YKTC 54

Date: 20120615
Docket: 11-00186C
Registry: Whitehorse

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

REGINA

v.

G.J.W.

Publication of information that could disclose the identity of the complainant or witness has been prohibited by court order pursuant to sections 486.4 and 486.5 of the *Criminal Code.*

Publication of information that could disclose the identity of the accused has been prohibited by court order pursuant to section 486.5(2) of the *Criminal Code.*

Appearances:
Kevin MacGillivray — Counsel for the Crown
Bibhas Vase — Counsel for the Defence

REASONS FOR SENTENCING

[1] The accused, G.J.W., pled guilty to the following charge:

[2] On or between the 1st day of September, 2010 and the 11th day of June, 2011, at or near Teslin and Whitehorse in the Yukon Territory, being in a position of trust or authority towards M., a young person, did for a sexual purpose touch directly the body of M., a young person, with a part of his body to wit: his hands and penis, contrary to Section 153(1.1) of the *Criminal Code.*

[3] The accused was born in May, 1968. His niece, M., was born in June, 1994 and throughout the offence timeframe was 16 years of age.

[4] Following a Gardiner hearing (*R.* v. *Gardiner,* [1982] 2 S.C.R. 368), and pursuant to s. 724 3(e) of the *Criminal Code,* I ruled that in February, 2011, the accused at a remote cabin during the course of a long snowmobiling trip with his niece had sexual intercourse with her.

[5] The accused tried, without success, to persuade her that it was okay. M. was very concerned that an uncle should not be doing this to his niece. She tried to push him off. She told him to stop, which he eventually did. Afterwards, she saw the condom on the floor. While they had discussed going on the trip together, there was no talk about going to the cabin and having sex.

[6] The victim had had a boyfriend before but this was her first experience of sexual intercourse. She and her uncle, the accused, had, in the past, held hands and kissed. After the crime, she sat outside the cabin feeling sick to her stomach, “gross and disgusted”.

[7] The defence called no evidence, but his counsel, through cross-examination, raised doubts as to the nature of the relationship with his niece after this crime until June, 2011. While I accepted M. ’s testimony as to what occurred at the cabin, I found her testimony to be somewhat unreliable for the period after the offence. Her personal feelings of guilt and shame continue to this day. That, plus her emotional confusion, caused her to be evasive, vague and on some points, untruthful as to the events after the offence.

[8] In her Victim Impact Statement, the mother of M. wrote how this crime “has torn my family apart”. Her own considerable stress caused sleeplessness, weight loss and medical leave from her job. She also wrote about the hurt caused to her father (M’s grandfather), and how he took this to the grave.

[9] M., in her Victim Impact Statement, displayed her anger towards the offender and how she felt “angry, upset, sad, stressed”. At times she doesn’t know who she can trust, especially men, other than her father, brother and cousins. She is concerned about her reputation. It has affected her physically, too. She will have to go to counselling.

[10] The offender’s mother, S.W. wrote a letter of support for her son, outlining the “strained conflict and hurtful position being G.J.W.’s mother and M.’s grandmother. I have been stuck in the middle which put a lot of stress on me, mentally, physically and emotionally. My health and family structure have deteriorated for the worst”. Her moving letter asked that her son be released from jail on a time served basis. This request I am unwilling to grant.

[11] G.J.W. is a member of the Teslin Tlingit First Nation. Both the Gladue Report and the P.S.R. set out the troubled upbringing and the many challenges which faced him: family violence, foster homes, substance abuse. In addition, G.J.W. was sexually abused at the age of twelve by a man with whom his mother was in a relationship. Also, he was sexually abused by two older female cousins. The P.S.R. recounted “he didn’t feel violated by these incidents (female cousins) but felt very violated when he was molested by his mother’s boyfriend.”

[12] Despite the many negative influences and eight criminal convictions, G.J.W. has a clean record after October 2000 until the present offence and has been regularly employed with good construction jobs. He enjoys an excellent reputation as a dependable, hard worker. He is appropriately confident that he will readily obtain employment when his sentence concludes.

[13] G.J.W. and his wife were married for twelve of their twenty-two year relationship. Due to this offence, coupled with several affairs in the past, his wife has commenced divorce proceedings.

[14] The offender was convicted of sexual interference in 1999 and sexual assault in 2000. The Crown reviewed these records and advised that these two offences involved the nine year old daughter of a friend and a thirteen year old niece. In both instances, which involved fondling, he received conditional sentence orders.

[15] In addition, G.J.W. fathered a child with a seventeen year old girl who was the daughter of his sister-in-law. This sexual intercourse, which resulted in fathering his now 13 year old daughter, took place in the same timeframe of the two sexual offence convictions. The grandmother of G.J.W.'s 13 year old daughter stated that G.J.W. groomed her own teenaged daughter in much the same way he groomed M.

[16] The community has made it abundantly clear that it does not want this offender back. There is no community support for G.J.W. whatsoever. His mother and very few other family members do support him.

[17] In the P.S.R., the author received valuable insight from Kareen Keenan, Director of Justice, Teslin Tlingit Council.

> … Ms Keenan repeated that the [sic] Mr W. is not welcome back in the community. She explained to the writer that he has shamed and betrayed his community as well as the Dakhlawedi Clan of which he is a member. She also added that he has shamed her as woman of the Dakhlawedi Clan. Ms Keenan explained that in Tlingit First Nation tradition that because M. is Mr W.'s niece she is also considered to be his daughter.

[18] It seems to me that G.J.W.'s sexual abuse as a child has had more effect on him than he himself realizes, including that perpetrated by his older female cousins.

[19] G.J.W. does not present in the typical Gladue manner in that he has a commendable work history, good income, meaningful opportunities and has quite successfully battled substance abuse issues, for at least five years. Furthermore, he has responded well to counselling and programming and has a good work record with the Whitehorse Correctional Centre.

[20] The Crown sought a sentence of three to four years imprisonment while the Defence put forward a proposal of time served. G.J.W. has been in pre-trial custody for a long time and is eligible for 278 days credit.

[21] Both counsel submitted numerous cases for me to consider including, *R.* v. *R.W.D.* [2004] O.J. No. 5776, *R.* v. *P.B.B.* [2007] O.J. No. 4013, *R.* v. *W.G.G.* , 2003 BCPC 0345, *R.* v. *Paterson* [2010] O.J. No. 5108, *R.* v. *J.B.S.*, 2009 ABCA 347, *R.* v. *Torres*, 2012 ABQB 4, *R.* v. *Ashley-Pryce*, 2004 BCCA 531, and *R.* v. *Power*, 2010 BCCA 21. All of the cases submitted were helpful to varying degrees.

[22] Throughout this decision, I will pay particular attention to *R.* v. *White*, 2008 YKSC 34. Gower J. thoroughly analysed the relevant jurisprudence from this Territory in a comprehensive judgment exceeding 36 pages.

[23] The aggravating factors are clear and include the position of trust, prior record of sexual offences, significant premeditation, serious nature of the crime and that he did not stop immediately when told “no” by the victim, consequences to the victim, their family and the community, and that the offender’s risk assessment of reoffending is high.

[24] For his own sexual gratification, G.J.W. was shown to be opportunistic and calculating in his approaches to young females. Of course, I am only passing sentence for the offence relating to M. She was groomed by the offender. In the P.S.R. he admitted as much. The pattern of spending time, texting, holding hands, kissing and finding time to spend alone was part of cultivating what he referred to as “an affair”.

[25] The Ontario Court of Appeal in *R.* v. *A.G.* [2004] O.J. 4563 at paragraphs 11 and 17 discuss the concept of grooming.

> **11** Counsel for the appellant makes two submissions on this issue. First, he says that grooming is a recent phenomenon which did not exist thirty years ago. He contends that it is unfair to take a recent concept and apply it to these dated events. Second, relying upon a definition of grooming from Childnet International, he contends that the conduct of the appellant as described by the complainant did not amount to grooming. There is no merit to these submissions. The term "grooming" is merely a description of conduct where the perpetrator attempts to prepare the child victim for increasingly more intrusive sexual abuse. It is not a new concept; it is simply a compendious description of a course of conduct. The appellant's conduct towards the complainant easily fits within the notion of grooming. He befriended the lonely and isolated complainant. He began with less intrusive conduct such as kissing and when

> he saw that she would not complain he resorted to increasingly more serious abuse.
>
> …
>
> **17** In my view, it was open to the trial judge to find that there was a pattern of behaviour and conduct that could properly be described as grooming, which was an aggravating factor the trial judge could take into account. The trial judge could not, of course, sentence the appellant for the uncharged incidents, many of which could have been separately prosecuted as assaults or indecent assaults. The grooming aspect of the conduct was relevant because that conduct showed an element of planning and premeditation that made the offences more serious….

[26] In mitigation, G.J.W. has behaved very well in the W.C.C. and his time has been productive, both in terms of work and programming. As stated above, he is aboriginal but does not fit totally into the Gladue model. His plea of guilty is only slightly mitigating as the victim was required to testify at the sentence hearing at some length.

[27] G.J.W. chose to address the Court and I am pleased that he did. Prior to that, there was some real concern as to whether he had any remorse. In a sincere manner, G.J.W. expressed his apologies for what he had done to the victim and their family. I think it took him a long while to realize the seriousness of his actions. When it finally had sunk in to him, he spoke and I believed him.

[28] Before returning to *White*, I want to make it abundantly clear that s. 153 is not a less serious offence than s. 271. The maximum punishments, by indictment or summarily are the same for both charges. The Crown argued that with the minimum punishments under s. 153 and the unavailability of a conditional sentence, that it is now a more serious offence than s. 271. Tempting as that analysis might be, I do not agree.

Sections 153 and 271 are on equal footing, especially in relation to more serious criminal behaviour.

[29] The patterns or range of sentence for s. 271 are applicable to s. 153. The B.C.C.A. referenced this point in *Power* at paragraph 9.

> [9] A couple of times in her reasons, the judge referred to the offence the applicant committed as a sexual assault when she ought to have said sexual exploitation, but her having done so is of no particular consequence now. She was not confused about the charge. The sentence imposed cannot be said to be inconsistent with what has been imposed for the offence of sexual exploitation: *R.* v *Ashley-Pryce*, 2004 BCCA 531.

[30] Clearly what is important is the nature of the criminal sexual behaviour, not whether it was s. 271 or s. 153.

[31] And now, returning to *White*, the offender was a 39 year old First Nations male who forcibly attempted intercourse for ten minutes with an asleep female college student. The victim woke up and told him “no” and “I don’t want to” three or four times.

[32] At paragraph 7, Gower J. described her physical injury:

> During the sexual assault, the victim felt pain in her vaginal area. She was later observed to have an abrasion in her perineal area, about one quarter inch in diameter, where the skin had been broken.

[33] The offender had ten prior convictions but none were sexual. He was sentenced to 26 months less time in custody on remand, for a total of 24 months.

[34] For purposes of sentencing G.J.W., I refer to the following portions of Gower J. in *White.*

> [44] At para. 20, I, like the Yukon Court of Appeal in *G.C.S.,* observed that the case law which had been filed by the Crown generally ranged from one to two years, for cases of sexual assault without overt violence, usually involving unconscious victims and offenders with relatively minor records. However, I also noted that the range moved upwards to more serious penalties of five to six years and even seven years, in cases where offenders had proceeded to trial and had not received the mitigation of a guilty plea, where they had significant criminal records and where there were other aggravating circumstances.
>
> …
>
> [85] Having said that, and based upon a relatively thorough review of the authorities, I would suggest, with great respect, that the time has come to assess whether the range of sentences for non-consensual sexual intercourse in the Yukon continues to be that set out in *R.* v. *G.C.S*. First of all, that case is now ten years old. Second, the case was limited to an examination of only eight sentencing authorities. A significant number of cases since *G.C.S.* have exceeded the upper end of that range of two years less a day. In reassessing this range, I wish to emphasize that I have only had regard to the jurisprudence in the Yukon, albeit with some insight provided from the N.W.T. and southern appellate courts. Further, I see my role here as involving a review and observation of what I understand the range to be – not to "set" a new range of sentence. With those caveats, it is my view that the current range in the Yukon for non-consensual sexual intercourse with a sleeping or unconscious victim, which is admittedly a very broad description of a type of sexual assault, with some exceptions, is roughly from one year, at the lower end, to penitentiary time in the vicinity of 30 months, at the higher end.
>
> …
>
> [87] Further, as noted in *Bernier*, I am not suggesting this range is conclusive. Greater or lesser sentences will be justified where circumstances warrant. This range is only suggested as a shorthand way of describing what the courts in Yukon have done in previous cases where the offence and the offender were similar to those in the case at bar.

[35] The victim in *White* and M. were both very vulnerable. As all cases must be determined on their own facts, there is no point in trying to establish categories of vulnerability. The asleep or passed out victim is well covered in *White* and children as victims is outlined meaningfully in *Torres* in paragraphs 21, 22 and 23.

> [21] Children are vulnerable to exploitation and abuse and as such "society has recognized the legitimate need to safeguard all children

[. . .]from exploitative conduct"; *R. v. Hewlett (J.J.),* 2002 ABCA 179, 312 A.R. 165 at para. 24.

[22] In the context of sexual exploitation offences, the Alberta Court of Appeal has rejected arguments "minimizing the seriousness of the offence" where the complainant "consented" or was a willing participant in the activity: *R. v. J.B.S.*, 2009 ABCA 347 (CanLII), 2009 ABCA 347, 464 A.R. 353 at para. 4; see also *R. v. Pritchard*, 2005 ABCA 240 (CanLII), 2005 ABCA 240, 371 A.R. 27 at para. 7.

[23] The majority of the Court in *R. v. Revet*, 2010 SKCA 71 (CanLII), 2010 SKCA 71, 350 Sask.R. 292 at paras. 9, 12 and 14 addresses this issue as follows:

> The next ground of appeal relates to the fact that the victim was 14 years of age at the time of the offence. Under s. 150.1(1) of the *Criminal Code*, when a person is charged with an offence under s. 271 of the *Criminal Code* in respect of a complainant under the age of 16 years, it is not a defence that the complainant consented to the activity that forms the subject matter of the charge. Accordingly consent was not an issue with respect to the conviction. However, the appellant argues that although consent is not a defence to the charge, consent should still be considered a mitigating factor with respect to sentence. He further contends that the sentencing judge wrongly failed to do so.
> [. . .]
>
> There is certainly a difference between an assault against a child that involves force, violence, intimidation, or trickery and an assault against a child where the child actually consents to the activity or simply does not resist it. That being said, the whole purpose of the legislation is to protect children, who are not sufficiently mature to appreciate all of the consequences of sexual activities. We agree that a child's willing participation is not, *per se*, a mitigating factor in the imposition of a sentence for sexual assault upon that child. It means nothing more than an absence of aggravating factors such as the use of force, violence, intimidation or trickery.
> [. . .]
>
> [. . .]The purpose of the legislation is to protect children, something readily understandable by the general public. To allow a claim for reduced responsibility on the basis of ignorance of the law, in the case of a 39 year old man having sex with a 14 year old girl, would be contrary to that purpose.

[36] The following sections of the *Criminal Code* set out the principles:

> **718.** The fundamental purpose of sentencing is to contribute, along with crime prevention initiatives, to respect for the law and the maintenance of a just, peaceful and safe society by imposing just sanctions that have one or more of the following objectives:
>
> (*a*) to denounce unlawful conduct;
>
> (*b*) to deter the offender and other persons from committing offences;
>
> (*c*) to separate offenders from society, where necessary;
>
> (*d*) to assist in rehabilitating offenders;
>
> (*e*) to provide reparations for harm done to victims or to the community; and
>
> (*f*) to promote a sense of responsibility in offenders, and acknowledgment of the harm done to victims and to the community. 1995, C. 22, S. 6.
>
> **718.01** When a court imposes a sentence for an offence that involved the abuse of a person under the age of eighteen years, it shall give primary consideration to the objectives of denunciation and deterrence of such conduct. 2005, C. 32, S. 24.
>
> **718.1** A sentence must be proportionate to the gravity of the offence and the degree of responsibility of the offender. 1995, C. 22, S. 6.
>
> **718.2** A court that imposes a sentence shall also take into consideration the following principles:
>
> > (*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,
> >
> > …
> >
> > (iii) evidence that the offender, in committing the offence, abused a position of trust or authority in relation to the victim,

> …
>
> (*e*) all available sanctions other than imprisonment that are reasonable in the circumstances should be considered for all offenders, with particular attention to the circumstances of aboriginal offenders. 1995, C. 22, S. 6; 1997, C. 23, S. 17; 2000, C. 12, S. 95*(c)*; 2001, c. 41, s. 20; 2005, c. 32, s. 25.

[37] Given the aggravating factors listed above, and considering *White* at paragraph 87, I conclude that a greater sentence is clearly justified.

[38] While the Crown recommended a federal sentence of imprisonment for a number of reasons, including better programming for sex offenders, I do not agree. G.J.W. has finally come to realize how wrong his criminal actions were. He functions well in the W.C.C. and does have important, albeit very limited family support which would not be readily available if he were in B.C. or Alberta.

[39] Taking into consideration all of the above, G.J.W. is hereby sentenced as follows:

a) imprisonment for 32 months less remand credit of 278 days for a net amount of 693 days or just under 23 months;

b) s. 109 prohibition order for life;

c) s. 490.01 S.O.I.R.A. for life;

d) s. 487.04 DNA order;

e) s. 737 (3) victim surcharge waived;

f) s. 743.21 order, no communication with M. during custodial period;

g) s. 731 (1)(b) probation for two years with the following conditions:

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

2. Advise the probation officer of all changes of address, employment or family circumstances.

3. Do not leave the Yukon Territory without the written permission of your probation officer.

4. Report to a probation officer as required.

5. Reside as directed by your probation officer.

6. Have no contact directly or indirectly or communication in any way with M.

7. Not enter the community of Teslin, Yukon, without the prior written permission of your probation officer.

8. Make reasonable efforts to find and maintain suitable employment.

9. Not be in the immediate company of any female person under the age of 18 years unless in the company of a responsible adult as approved by the probation officer.

_____

LUTHER T.C.J.