Citation: *R. v. P.G.*, 2016 YKTC 67

Date: 20161202
Docket: 15-00289A
15-00289B
Registry: Whitehorse

IN THE TERRITORIAL COURT OF YUKON
Before His Honour Judge Chisholm

REGINA

v.

P.G.

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

Appearances:
Leo Lane — Counsel for the Crown
Jarrod Rutledge — Appearing for the Defence
(Articled Student, Agent for Vincent Larochelle)

REASONS FOR SENTENCE

[1] Chisholm J. (Oral): P.G. assaulted two young girls by touching them inappropriately in a bedroom in which they were staying on August 12, 2015. One of the girls, D.P., is the daughter of P.G.'s stepson. P.G. had been abusing D.P. in a similar fashion for a three-year period. The other girl, S.V., was spending the night with her friend when P.G. abused her.

[2] After trial, I convicted P.G. of two offences of sexual interference, contrary to s. 151 of the *Criminal Code*. Two additional counts of sexual assault which related to the same abuse were conditionally stayed. I acquitted P.G. of two other charges which did not relate to the aforementioned victims.

[3] The Crown proceeded by way of indictment on these charges.

[4] P.G. pleaded guilty to one offence, contrary to s. 145(3) of the *Criminal Code*, for having failed to reside as approved by his Bail Supervisor. By consent and pursuant to s. 725 of the *Code*, the Crown read in as an aggravating factor that P.G. had also failed to report to his Bail Supervisor as directed.

[5] P.G. was visiting his stepson on August 12, 2015. At the request of his stepson, P.G. went upstairs to check on D.P., her younger brother, and D.P.'s friend S.V. They were all awake in the early morning hours. Upon request, P.G. told the children, who were all in the same bed, a bedtime story.

[6] S.V., 11 years of age, awoke to P.G. touching her with his hands on her breasts, stomach, and vaginal area. He was touching her breasts and vaginal area over her clothing, but touched her directly on her exposed belly. S.V. remained silent during the touching, which lasted for approximately 30 seconds. When she noted him rubbing D.P.'s buttocks, she told him to get out of the room. She woke up D.P. before disclosing the incident to D.P.'s father.

[7] D.P., who was also 11 years of age at the time, had disclosed to S.V. earlier in the day that she was sad because her step-grandfather had been touching her

inappropriately. D.P. had been thinking of telling her parents about this prior to S.V.'s visit, as she had learned in school that it was wrong for people to touch young people in that way.

[8] The abusive conduct had started a number of years previously and consisted of P.G. touching her breasts, thighs, and vaginal area. The touching took place at times over her clothing and at times underneath her clothing. There was some discrepancy as to when the abuse began. D.P. believed it may have occurred for a period as long as five years. Both P.G. and D.P.'s father testified that P.G. reconnected with his stepson in 2012, at which time he became involved in D.P.'s life. Based on this, I find that the abuse of D.P. occurred over a three-year period.

[9] P.G. failed to report as directed by his Bail Supervisor between November 18 and 25, 2016. During this period of time, he also did not reside as directed. He had left the country and travelled to France. The police arrested him at the airport upon his return.

[10] I am advised that the Crown explained to the victims the purpose of a victim impact statement. After consideration, each declined to submit a statement.

[11] During the trial of this matter, S.V. described P.G.'s illegal conduct as causing her to have butterflies and feel ill. D.P. indicated that when S.V. had revealed to her how P.G. had been touching D.P.’s buttocks while she slept, D.P. felt angry and scared. She was scared because she realized she would finally have to tell her father what P.G. had been doing to her.

[12] I also take into consideration the potential psychological harm that ensues from offences of this nature. As stated in *R. v. Rosenthal*, 2015 YKCA 1:

> [6] ...In sentencing for sexual assault it is, however, proper to consider the likelihood of psychological harm to the victim*:* *R. v. McDonnell*, [1997] 1 S.C.R. 948. That likelihood is a reason that the principle of general deterrence is significant in sentencing for sexual assault …

[13] The Crown seeks a penitentiary sentence of three and one half years as well as a number of ancillary orders. The Crown argues that P.G.'s illegal conduct towards D.P. constituted a significant breach of trust, as she was in his care when he sexually abused her. The abuse was perpetrated in her home, where she should have always felt safe.

[14] The defence argues that a more appropriate sentence is one in the range of one to two years' imprisonment. The defence points to the fact that P.G. is 63 years of age and has never been in trouble with the law. He has a good record of employment and volunteer work. It is also argued that Yukon case law for this type of offence points to a lower range of sentence than suggested by the Crown.

[15] I have considered the purposes and principles of sentencing as enunciated in the *Criminal Code*. In cases involving the abuse of children, s. 718.01 of the *Code* establishes that denunciation and deterrence are the primary sentencing objectives.

[16] Pursuant to s. 718.2, other pertinent principles include:

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

[17] The following are included in the enumerated aggravating factors:

> (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,

[18] I also remain cognizant as set out in 718.2(b) that:

> a sentence should be similar to sentences imposed on similar offenders for similar offences committed in similar circumstances;

[19] I must not lose sight of the fact that the sentence must be proportionate to the gravity of the offence and the degree of responsibility of the offender.

[20] Of course, sentencing is a highly individualized process which reflects the circumstances of the offence and of the offender. (see *R. v. Ipeelee*, 2012 SCC 13 and *R. v. C.A.M.*, [1996] 1 S.C.R. 500) Sentencing is a "profoundly contextual process" wherein the judge has a broad discretion. (see *R. v. L.M.*, 2008 SCC 31)

[21] P.G. has no prior criminal history. He has demonstrated a good work history. The defence filed a letter of reference from the former chief executive officer of a First Nations corporation who dealt with P.G. in his capacity as a union representative for a Yukon mining company in the 1990s. The two later became friends. The letter speaks to the professionalism P.G. displayed in his work, as well as describing him as a dedicated father who was involved in the community.

[22] P.G. and his ex-spouse raised two children and, as I understand it, he was, at times, the primary caregiver due to medical issues of his ex-spouse. The two children, now adults, indicate that they were provided a good upbringing by their father.

[23] The offences for which P.G. has been found guilty are very serious for a number of reasons. He abused his position of trust in abusing D.P. for a lengthy period of time. As indicated, this occurred in her own home. On the one occasion he abused S.V. during her sleepover, he used his position as D.P.'s step-grandfather to enable him access to S.V. The final aggravating factor is the over 50-year age difference between him and each of the victims.

[24] P.G. does not receive the benefit of taking responsibility for his actions by having pleaded guilty to these offences, nor for having expressed remorse for the abuse he inflicted on these two girls. This is, of course, not an aggravating factor; it is only the absence of a mitigating factor.

[25] I find that the predominant sentencing objectives in all of these circumstances must be the denunciation of the accused and others, as well as denunciation of the offences. The rehabilitation of P.G. plays a lesser role.

[26] As with any criminal offence, the sentences which courts have imposed for crimes of this nature are quite varied. Counsel referred me to many cases involving the sexual abuse of children. I will refer to a number of them.

[27] In *R. v. R.T.A.*, 2015 YKTC 24, the offender entered a guilty plea to an offence of sexual interference with his five-year-old daughter. The Crown had proceeded by

indictment. The offence comprised a number of incidents over an eight-month period. These included placing his hand on the victim's vagina and licking her clitoris, rubbing her vagina and buttocks, rubbing his penis on her vagina and hand, and masturbating himself to ejaculation while touching her vagina. The offender was a 26-year-old Aboriginal man who had a difficult upbringing. He was remorseful for his crime. The Court imposed a sentence of 12 months' imprisonment, followed by a three-year probation order.

[28] In *R. v. R.R.*, 2016 ONSC 3684, the Court imposed a sentence after trial of 18 months' imprisonment, followed by two years of probation for sexually assaulting his girlfriend's young daughter. The offence involved numerous incidents of abuse over a 10-month period in 2004, which included placing the victim on top of him and rubbing his penis against her vagina. The offender was 64 years of age with a criminal record, including a conditional sentence for sexual offences which post-dated the matter for which he was being sentenced.

[29] In *R. v. P.D.W.*, 2015 BCSC 660, the Court convicted the offender for s. 151 and s. 152 offences in relation to a 14-year-old girl. The offender sent sexually explicit text messages to the young victim, a friend of his stepdaughter, prior to committing an act of oral sex as well as digital penetration. The victim was intoxicated and staying at his home for a sleepover. The offender had no previous record. He owned and operated his own woodworking business and financially supported his family. A psychological report concluded the offender, who minimized the seriousness of the offences, was at moderate risk for sexual reoffending. The victim struggled with depression and drug addiction. The Court sentenced him to concurrent 15-month sentences of

imprisonment, followed by a two-year probation order. The offences predated the 2012 amendments to the *Code* which increased the mandatory minimum sentences for offences of this nature. At the time of the offences, the mandatory minimum sentence was 45 days, as opposed to the one-year jail term which is now in effect.

[30] In *R. v. T.D.*, [1995] Y.J. No. 159 (S.C.), the offender was found guilty after trial for having touched the victim with his hands and penis and for having inflicted cunnilingus on her while she slept or feigned sleep. He had committed five separate acts in an 18-month period. The offender was 34 years of age with no prior criminal history. He had an excellent work and community services record. Mr. Justice Maddison imposed a sentence of two years and three months' imprisonment, taking into account seven months of pre-trial remand.

[31] In *R. v. Gilmore*, 2015 YKTC 49, the 56-year-old offender pleaded guilty to three counts of sexually abusing children. The offences ranged from digital penetration of one victim; touching the vagina and breasts of another victim, both inside and outside her pyjamas while his penis touched her buttocks over her pyjama bottoms; touching the vaginal area of another victim outside of her clothing; and touching the thigh area of a fourth victim while she was wearing shorts. The offences occurred on and off over a period of just under two years. Mr. Gilmore had a significant criminal record, although no prior offences of this nature. He was on a conditional sentence when he committed some of the offences. He was sentenced to a global sentence of 44 months' imprisonment.

[32] In *R. v. Wesley*, 2014 BCCA 321, the British Columbia Court of Appeal upheld a five-year penitentiary term for a 27-year-old offender who had sexually assaulted a young girl for a period of four months in 2011. He committed three incidents of abuse which included having the naked child sexually touching him, the offender touching her with a sexual object, and fondling. The offender was not a mere acquaintance of the victim, as he was in a relationship with the victim's aunt. The facts reveal the assaults were not impulsive. The offender had three prior assault convictions and a 2010 conviction for aggravated assault. He pleaded guilty to the sexual assault and expressed remorse.

[33] The British Columbia Court of Appeal upheld a five-year penitentiary term in *R. v. R.E.L.*, 2010 BCCA 493. The offender sexually abused his stepdaughter between the ages of 6 and 12. The offender commenced the abuse by fondling her genitals. After the victim was eight, the offender had her perform oral sex. At times, he digitally penetrated her. In the bathtub, he would have her sit on his penis; he would ejaculate. He once tried to stick his penis in her vagina. He pleaded guilty to the offence of sexual assault and expressed remorse. He had no prior criminal history. He had sought counselling and wished to continue with treatment.

[34] These cases display a wide range of circumstances in sentencing. Some have characteristics similar to the case at bar, others less so. Some are instructive, although each case must be decided on its specific facts and the circumstances of the offender.

[35] I am mindful of the fact that the British Columbia Court of Appeal has recently reiterated in *R. v. R.J.B.*, 2016 BCCA 428, that:

> 35 ...a sexual assault's seriousness is not dictated by the existence (or non-existence) of penetration …

[36] In the matter before me, I find P.G.'s moral culpability to be high. He abused his step-granddaughter, D.P., over a three-year period when she was between eight and 11 years of age. The last occasion reveals that he was willing to abuse her even when her father was home. The illegal conduct only ended when a disclosure was made. His abuse of S.V. is of a much lesser scale, although he did take advantage of her friendship with his step-granddaughter which led to her being a guest in the home he often frequented.

[37] Having considered all of the circumstances of the offences and of P.G., in my view, an appropriate sentence for the offence committed on D.P. is one of 27 months' imprisonment.

[38] For the offence against S.V., I sentence him to the mandatory minimum sentence of one year in jail to be served concurrently.

[39] I sentence him to a sentence of 15 days jail to be served consecutively for the s. 145 offence.

[40] He has served 71 days in custody and will receive credit for the equivalent of 107 days of pre-sentence remand, leaving 23 months and 28 days' imprisonment to be served.

[41] I also make the following ancillary orders:

- A 10-year firearms prohibition, pursuant to s. 109 of the *Criminal Code*.

- An order under s. 487.051 of the *Criminal Code* for the provision of samples of DNA for analysis and recording. As the sexual interference convictions are primary designated offences, the order is mandatory.

- P.G. shall comply with the *Sex Offender Information Registration Act*. The offence of sexual interference is a designated offence under s. 490.011(1) of the *Criminal Code*, and I therefore make the order under s. 490.013(3). Since P.G. has been convicted of multiple offences, the order is for life.

- Pursuant to s. 161, I order that, for a period of 10 years, P.G. be prohibited from attending a public park or public swimming area, where persons under the age of 16 years are present or can reasonably be expected to be present, or a daycare centre, school ground, playground, or community centre.

- He is also prohibited for that period of time from seeking, obtaining, or continuing any employment, whether or not the employment is remunerated or being a volunteer in a capacity that involves being in the position of trust or authority towards persons under the age of 16 years.

- Finally, he is prohibited for the same period of time from having any contact, including communication by any means, with a person who is under the age of 16 years unless he does so under the supervision of a person whom the Court considers appropriate.

[42] The victim surcharges total $500. I order that that amount be payable forthwith.

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CHISHOLM T.C.J.