

Citation: *R. v. R.A.*, 2010 YKTC 101

Date: 20100917
Docket: 09-00462
Registry: Whitehorse

IN THE TERRITORIAL COURT OF YUKON

Before: Her Honour Chief Judge Ruddy

REGINA

v.

R.A.

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

Appearances:

Jennifer Grandy
Robert Dick

Counsel for the Crown
Counsel for the Defence

REASONS FOR SENTENCING

[1] RUDDY C.J.T.C. (Oral): R.A. is before me having entered a plea of guilty to a single count of sexual assault. It is an historical offence of sexual touching on one of his daughters. Mr. A. has been in a relationship with D.S. for an extended period of time and the couple share four children. He is now before the Court having entered a plea of guilty with respect to sexually assaulting one of those daughters, D.

[2] The offences came to light in July of 2009 when the mother made a complaint to Family and Children's Services, advising that her two daughters may have been

sexually assaulted by their brother. There was a subsequent investigation involving both Family and Children's Services and the RCMP. Through the course of that investigation, D. provided a statement advising that when she was ten years of age, her father would come into her room when she was asleep, lay down on the bed beside her, and would touch her in the vaginal area with his fingers. She describes it as being on her bare skin, which I take to be under the clothing, and was aware of him making grunting noises at the time. On each occasion she would close her legs and turn towards the wall, pretending still to be asleep in an attempt to get him to leave her alone, which he would eventually do. There were multiple occasions over the period of approximately a week.

[3] In addition to these nighttime visits, there were a number of instances during the daytime when Mr. A. would lay on the couch with D., put his hands down her pants, and would touch and squeeze her bum area and would proclaim, "This is my bum," to which she would respond, "No, it is not." Ultimately and fortunately, D. reported the incidents to her mother and it was at that point in time that the incidents stopped. I believe D. is now 19 years of age.

[4] Mr. A. was arrested on July 18, 2009, with respect to these matters. They were then subsequently set for trial in May of this year, so some significant time later, and ultimately there was a guilty plea proffered by Mr. A. with respect to the sexual assault on D. on that date of trial.

[5] Mr. A. comes before the Court with a prior criminal record. The record is relatively dated. It does include some offences of violence, although there do not

appear to be any sexual offences on the record. There have been no convictions since 1993. There is also a Pre-Sentence Report which outlines Mr. A.'s background and circumstances. His childhood is one which appeared to have been somewhat chaotic, although he appears to have had a very strong, supportive influence in his grandfather, who spent a significant period of time teaching him his First Nations traditions and culture. It is my understanding the particular First Nation which Mr. A. belongs to is the Tellit Gwitchin First Nation in the Fort MacPherson/Inuvik area.

[6] Mr. A., to his credit, does have a fairly stable employment history. He has been in the position he is in now, or with the employer that he is with now, that being the Yukon Government, for an extended period of time and has worked his way into a supervisory position.

[7] The positions of counsel before me, essentially, amount to a joint recommendation for a nine month conditional sentence to be followed by a period of probation, although there is a dispute as to the appropriate length of that probation order with defence suggesting that 12 months is sufficient in the circumstances of this case, given the fact that the girls are now almost adults and that there has been no recurrence of the activity since D. was ten years of age.

[8] Crown is suggesting that a lengthier period of probation, in the two to three year range, is appropriate, given the need to manage any risk that Mr. A. may present, not just to the girls, but to other children and the need for him to be involved in sex offender treatment to manage that risk.

[9] In terms of assessing the joint recommendation, Crown has provided three cases which indicate, as is not always surprising, that there is a range of responses to cases of this nature. The cases which have been filed go from a low of a suspended sentence, although I would note in that case, it appears there was significant work done by the offender and by the family and community in terms of addressing the issues which had brought that individual into conflict with the law. There is a mid-range sentence of 90 days plus a probationary term, which again, is a situation involving an offender who had taken a significant degree of responsibility for his actions and had engaged in some treatment and programming.

[10] Finally, there is also a case before me with an eight-month custodial term. All of the cases are factually similar to the case that is before me today, including the fact that there has been some degree of acceptance of responsibility by virtue of Mr. A.'s guilty plea. The Crown quite fairly points out that the plea, while late in the day, does relieve a fairly significant burden from the girls in having to come forward and testify, which would not in any way be easy, given the familial relationship and the nature of the charges. I do accept that Mr. A. is entitled to credit for that.

[11] On the aggravating side, however, this is a situation involving a sexual assault of a father on a daughter, which is a breach of trust situation; a young daughter at that, being only ten years of age. There were multiple incidents that did extend over, albeit, a fairly brief period of time, but they did extend over a period of time.

[12] Where this case differs significantly, in my view, from some of those which have been filed relates to the degree to which Mr. A. has actually taken responsibility for the

offences. He does admit the facts. He has admitted those facts before me today. However, I do have a Pre-Sentence Report which indicates that he has vacillated from admitting the facts, to denying the facts, to admitting that something might have happened while he was asleep, to now being before me today and indicating that he is admitting the facts. It is clear to me that there is a significant amount of concern about the degree to which he fully accepts responsibility for his behaviour. I also have concerns about the fact that Mr. A.'s focus, as a result of the incidents which bring him before the Court, appears primarily to be on himself and the impact that these proceedings have had on him. As his counsel pointed out, he has had difficulty admitting what has happened and that it is a difficult thing to admit. However, it is a significantly more difficult thing for your daughter to have experienced, sir. And when you stood up to speak to me today, the first thing to come out of your mouth was, "I never thought this could happen to me." This is not about what happened to you. This is about what you have done to your child.

[13] When I consider that, I will tell you, if I could not fairly say that the joint recommendation before me is within the range, I think I would be hard pressed in these circumstances, given the fact that you appear to really be struggling to admit your own behaviour and to recognize the impact that it has had on your daughter and your family, and will continue to have, I would be hard pressed to order that you be placed on a conditional sentence instead of regular jail today. But I do accept it is within the range. I do accept, as the Crown has pointed out, that you have at least saved your daughter the further stress of having to testify with respect to this incident.

[14] So for that reason, I am prepared to adopt the joint submission as it relates to the nine-month conditional sentence. Where there is dispute, that being the length of probation order, I appreciate, as Mr. Dick has pointed out, that these are historical offences, and that there is no information before me suggesting a repetition. I am not satisfied, however, that there is necessarily a lesser risk to the public simply by virtue of the fact that the girls are now almost adults. Mr. A., in his life, is going to be exposed to other children. I suspect that at some point in the not too distant future he may well be looking at grandchildren. There are likely going to be other instances in his life where he will be around children. That being said, I am strongly of the view that there is the need for Mr. A. to undergo significant counselling and programming as it relates to sexual offending, such that we avoid the possibility of there being a repetition with respect to the incident that has brought him before the Court.

[15] In terms of the length required for that, I am satisfied the probationary term needs to be longer, and the reason I am of the view it needs to be longer is exactly because Mr. A. is struggling significantly to admit to himself and to this Court the extent of his behaviour and to take full responsibility for it. That being said, it is going to take him longer in the programming than it might someone who has fully reached that recognition and already begun to engage in the programming and treatment that is necessary for their rehabilitation. Because Mr. A. is late in the day to the admission at all and is tending to minimize his behaviour, I am of the view that it is going to take longer. I am also of the view that, should he begin to engage in the programming, should he begin to work on the issues he needs to work on, starting with a full admission of what he has done and a full recognition of what this has done to his daughter, there is always the

possibility for him to return, partway through the probation, to determine whether or not it ought to be terminated early, which in my view would largely be a decision which would be driven by the assessments of the treatment providers. By that, I am saying, if he gets well into this and the treatment providers say, "We have done all we can do for him, and he has done well and the risk is virtually eliminated," the option is there for him to come back. But I am not satisfied that a shorter probationary term is going to be sufficient in the circumstances that are here before me today.

[16] I am going to make it a three-year probationary term to ensure that there is the fullest opportunity for him to undergo programming and that, in the meantime, there is supervision of his activities and of the programming that he undergoes to make sure that he is following through.

[17] Beginning first with the terms and conditions of the conditional sentence, as noted, that will be for a nine-month term. The terms and conditions of the conditional sentence order will be as follows. Mr. A., they will include the statutory terms. Those are terms I am required to include in each and every conditional sentence order. They are:

1. That you keep the peace and be of good behaviour;
2. That you appear before the Court when required to do so by the Court;
3. That you report to a Supervisor within two working days and thereafter when required by the Supervisor and in the manner directed by the Supervisor;

You are probably going to want to head over there as quickly as you can, quite frankly, because you are going to have to work your schedule around it.

4. You are to remain within the Yukon Territory unless you have written permission from your Supervisor, and notify the Supervisor in advance of any change of name or address, and promptly notify the Supervisor of any change of employment or occupation;
5. You are to reside as approved by your Supervisor and not change that residence without the prior written permission of your Supervisor;

I want them to know where you are at all times. They are going to need to do that to manage the next condition, which is:

6. That at all times, you are to remain within your place of residence except with the prior written permission of your Supervisor except for the purposes of employment, including travel directly to and directly from your employment. You must present yourself at the door or answer the telephone during reasonable hours for curfew checks. Failure to do so will be a presumptive breach of this condition;
7. You will be required to take such assessment, counselling, and programming as directed by your Conditional Sentence Supervisor including, but not limited to, sex offender assessment, counselling, and treatment;
8. You are to have no contact, directly or indirectly, or communication in any way with D.S. unless you have the prior written permission of your

Conditional Sentence Supervisor in consultation with Victim Services, D.S., and A.S.;

9. You are also not to attend at the residence of D.S. without the prior written permission of your Conditional Sentence Supervisor in consultation with Victim Services, D.S. and A.S.;
10. You are to provide your Conditional Sentence Supervisor with consents to release information with regard to your participation in any programming or counselling that you have been directed to do pursuant to this order.

There is also a suggestion of an order that he provide for the support or care of his dependents. Is that something that has been discussed?

[18] MS. GRANDY: No, I don't think that's --

[19] MR. DICK: That hasn't been an issue.

[20] MS. GRANDY: No.

[21] MR. DICK: He always has.

[22] THE COURT: He has been. Okay. I would have some questions in my mind about my authority to order that in any event, so I am not going to include it, and the letter which I have received from D.S. does indicate that he has, in fact, been meeting his financial obligations. Any concerns about the conditions for the conditional sentence order?

[23] MS. GRANDY: No. Just to be clear that the no contact order includes both D. and A.S.

[24] THE COURT: A.S. I believe I did say both.

[25] MR. DICK: Yes.

[26] MS. GRANDY: Thank you.

[27] THE COURT: The intention of this conditional sentence order is to be punitive. That is why you are restricted to your residence. You are going to need to sit down and talk to your Conditional Sentence Supervisor as quickly as possible about how you work around your work schedule and any other exceptions that you need, because you need to get them in writing first. You need to understand that if you breach any of those terms and conditions, you will find yourself back in jail, and there is the possibility that you will serve the remainder of the sentence in jail. So the conditional sentence is supposed to be punitive.

[28] The probation term, while I am making it a lengthy one, because I am concerned that you have a bit of a road ahead of you in terms of really coming to terms with what has happened, is really intended to be more supportive in nature in terms of getting you into the counselling and programming that you need. The terms and conditions of the probation order will be:

1. That you keep the peace and be of good behaviour;
2. Appear before the Court when required to do so by the Court;
3. Notify your Probation Officer in advance of any change of name or

address, and promptly notify the Probation Officer of any change of employment or occupation;

There will not be residency or curfew clauses, because this will be primarily about your programming and of course managing contact, so there will be a condition requiring that:

4. You take such assessment, counselling and programming as directed by your Probation Officer including, but not limited to, sex offender assessment, counselling, and treatment;
5. You have no contact, directly or indirectly, or communication in any way with D.S., except with the prior written permission of your Probation Officer in consultation with Victim Services, D.S. and A.S.;
6. You not attend at the residence of D.S. without the prior written permission of your Probation Officer in consultation with Victim Services, D.S. and A.S.;
7. You provide your Probation Officer with consents to release information with regard to your participation in any programming or counselling that you have been directed to do pursuant to this probation order.

So it is primarily to manage the ongoing contact and to ensure that you follow through on the programming. As I said, if you get in there and you work hard, and you start to come to terms with what you have done and the impact that it has had, you are going to be assessed as you go along by the treatment personnel, and it opens the door for you to come back to seek to terminate it if the treatment people are satisfied that you have

done all you need to do. But as I have said, based on what is before me today, I am of the view that it is going to take some time, given where you are at right now, for you to get to that point and that is why the order is as long as it is.

[29] There will also be some orders that I am required to make by law because of the nature of the offence that is before me. The first of those is a firearms prohibition. Pursuant to s. 109, you will be prohibited from having in your possession any firearm, ammunition or explosive substance for a period of ten years.

[30] You will also be required, as this is a primary designated offence, to provide such samples of your blood as are necessary for DNA testing and banking.

[31] Again, because of the nature of the offence, you will be required to comply with the provisions of the *Sex Offender Information Registration Act* for a period of 20 years from today's date.

[32] The victim fine surcharges? He is working at the moment, is that right?

[33] MR. DICK: That's correct.

[34] THE COURT: They will be – I think it is an indictable election. That makes it \$100. There will be a victim fine surcharge of \$100. How long does he need to pay that?

[35] MR. DICK: Fourteen days, Your Honour.

[36] THE COURT: Okay. We will make it one month time to pay in the event that anything comes up. Do remember that if you are looking to be outside of

your home to come and pay that, you will need to get the written permission of your Conditional Sentence Supervisor to do that.

[37] MS. GRANDY: If the other counts can be marked as withdrawn, please.

[38] THE COURT: Okay. They will be so marked. Is there anything further or concerns about any of the conditions? No? Thank you.

RUDDY C.J.T.C.