

Citation: *R. v. R.J.D.B.*, 2015 YKTC 16

Date: 20150303
Docket: 13-03540
Registry: Whitehorse

YOUTH JUSTICE COURT OF YUKON
Before His Honour Judge Chisholm

REGINA

v.

R.J.D.B.

Publication of identifying information is prohibited by sections 110(1) and 111(1) of the *Youth Criminal Justice Act*.

Appearances:

Leo Lane
Malcolm E.J. Campbell

Counsel for the Crown
Counsel for the Defence

REASONS FOR SENTENCING

[1] CHISHOLM, J (Oral): On October 31, 2014, R.B. was found guilty of sexual assault and touching a person under the age of 16 years for a sexual purpose after having been tried on a six-count Information. These offences occurred on March 17, 2011. The touching for a sexual purpose charge was conditionally stayed pursuant to the *Kienapple* principle.

[2] The sexual offence, for which R.B. has been found guilty, occurred in his bedroom with his niece, who was nine years of age at the time. R.B. asked her to have

sex. He laid on top of the victim, who was positioned on her stomach and whose pants were removed. He put his penis in her buttocks, but no penetration occurred.

[3] The Crown has submitted that an appropriate sentence in this case would be a period of probation of two years, while the defence argues for a much lesser period of probation.

[4] The *Youth Criminal Justice Act*, S.C. 2002, c.1 sets out a Declaration of Principle, which includes the following:

...(a) the youth criminal justice system is intended to protect the public by

- (i) holding young persons accountable through measures that are proportionate to the seriousness of the offence and the degree of responsibility of the young person,
- (ii) promoting the rehabilitation and reintegration of young persons who have committed offences, and
- (iii) supporting the prevention of crime by referring young persons to programs or agencies in the community to address the circumstances underlying their offending behaviour;

(b) the criminal justice system for young persons must be separate from that of adults, must be based on the principle of diminished moral blameworthiness or culpability and must emphasize the following:

- (i) rehabilitation and reintegration,
- (ii) fair and proportionate accountability that is consistent with the greater dependency of young persons and their reduced level of maturity,
- (iii) enhanced procedural protection to ensure that young persons are treated fairly and that their rights, including their right to privacy, are protected,

(iv) timely intervention that reinforces the link between the offending behaviour and its consequences, and

(v) the promptness and speed with which persons responsible for enforcing this Act must act, given young persons' perception of time;

(c) within the limits of fair and proportionate accountability, the measures taken against young persons who commit offences should

(i) reinforce respect for societal values,

(ii) encourage the repair of harm done to victims and the community,

(iii) be meaningful for the individual young person given his or her needs and level of development and, where appropriate, involve the parents, the extended family, the community and social or other agencies in the young person's rehabilitation and reintegration, and

(iv) respect gender, ethnic, cultural and linguistic differences and respond to the needs of aboriginal young persons and of young persons with special requirements; ...

[5] The Purpose and Principles of sentencing for youth are set out at section 38(1) of the *Act*.

The purpose of sentencing under section 42 (youth sentences) is to hold a young person accountable for an offence through the imposition of just sanctions that have meaningful consequences for the young person and that promote his or her rehabilitation and reintegration into society, thereby contributing to the long-term protection of the public.

(2) A youth justice court that imposes a youth sentence on a young person shall determine the sentence in accordance with the principles set out in section 3 and the following principles:

(a) the sentence must not result in a punishment that is greater than the punishment that would be appropriate for an adult who has been convicted of the same offence committed in similar circumstances;

(b) the sentence must be similar to the sentences imposed in the region on similar young persons found guilty of the same offence committed in similar circumstances;

(c) the sentence must be proportionate to the seriousness of the offence and the degree of responsibility of the young person for that offence;

(d) all available sanctions other than custody that are reasonable in the circumstances should be considered for all young persons, with particular attention to the circumstances of aboriginal young persons;

(e) subject to paragraph (c), the sentence must

(i) be the least restrictive sentence that is capable of achieving the purpose set out in subsection (1),

(ii) be the one that is most likely to rehabilitate the young person and reintegrate him or her into society, and

(iii) promote a sense of responsibility in the young person, and an acknowledgement of the harm done to victims and the community;

...

(3) In determining a youth sentence, the youth justice court shall take into account

(a) the degree of participation by the young person in the commission of the offence;

(b) the harm done to victims and whether it was intentional or reasonably foreseeable;

(c) any reparation made by the young person to the victim or the community;

- (d) the time spent in detention by the young person as a result of the offence;
- (e) the previous findings of guilt of the young person; and
- (f) any other aggravating and mitigating circumstances related to the young person or the offence that are relevant to the purpose and principles set out in this section. ...

[6] The *Act* also deals with the Court's ability to impose custody on a youth, and without going into detail, it is clear that custody may be imposed where the young person has committed a violent offence. The meaning of the term "violent offence" in section 39(1)(a) of the *Act* has been considered by the Supreme Court of Canada in the decision of *R. v. C.D.*; *R. v. C.D.K.*, 2005 SCC 78. The Court accepted a harm-based definition that focused, at least in part, on the bodily harm caused or attempted by a young person. The Court found that this harm would include psychological harm.

[7] In my view, psychological harm can be presumed in a case such as this. In any event, such harm is clearly present with respect to the young victim in this matter. From the information I have received, she has been traumatized by this serious offence. She is mistrustful of boys. She blames herself, and she is engaging in self-harm. She is justifiably scared and angry.

[8] Custody is an available disposition in this case; however, as indicated, the Crown is not seeking a term of custody for this individual in these circumstances.

[9] I have the benefit of a pre-sentence report and a section 34 psychological report prepared for the purposes of this sentencing. R.B. is 19 years of age. He has a grade 12 education, although it is reported that he struggled at times in school.

[10] I am informed that he has an employment history, although he is presently unemployed.

[11] R.B. still denies that this offence occurred. Both he and his mother have a strange conviction that the victim was prompted to lay these charges by her parents. He does not believe he requires counselling, although he does indicate he would attend counselling if ordered.

[12] I should add that, as indicated by the author of the psychological report, it is not unusual to have individuals convicted of this type of offence who are not willing to take responsibility.

[13] R.B. comes before the Court with no prior criminal record. He does not receive the benefit of having pleaded guilty to this offence.

[14] The offender was 15, approaching 16, at the time of the offence. He sexually exploited a child of nine years. He invaded her bodily integrity, and the consequences have been devastating. He is assessed as a moderate to low risk to reoffend.

[15] The author of the psychological assessment is of the view that R.B. has limited insight and test results suggest elevated levels of defensiveness.

[16] In terms of the causality of the offence, the author states:

...R.'s offence would appear to have ensued predominantly from the factors of availability, opportunity, immaturity and selfishness: the victim was readily available to R. with whom he seemingly had unsupervised contact and a power imbalance that provided him with the opportunity to gratify his sexual needs, he is somewhat immature and lacking in insight, and despite his amiability he is quite self-focused. His offence should not be attributed merely to an absence of legitimate sexual outlets or, despite R.'s immaturity, childlike sexually exploratory behaviour.

[17] Some time has passed since this offence occurred, so although R.B. is being sentenced as a youth today, he is of legal age. He is over the age of 19.

[18] I balance the principles of sentencing for youth, the circumstances of this offence and the circumstances of the offender and, in my view, the appropriate sentence is that suggested by the Crown. I would be remiss in imposing a term of shorter duration.

[19] R.B. will be subject to a two-year probation order. It will be intensive in nature. Although no formal intensive support and supervision program exists in Whitehorse, I am informed that Youth Probation is in a position to work with and monitor R.B. very closely.

[20] The terms of the order:

1. You are to keep the peace and be of good behaviour;
2. You are to appear before the court when required to do so by the court;
3. You are to report to a Youth Probation Officer within two working days, and thereafter, when and in the manner directed by your Youth Probation Officer;

4. You are to reside as approved by your Youth Probation Officer and not change that residence without the prior written permission of your Youth Probation Officer;
5. For the first nine months of this order, you shall abide by a curfew by being inside your residence or on your property between 10:00 p.m. and 6:00 a.m. daily, except with the prior written permission of your Youth Probation Officer. You must answer the door or the telephone for curfew checks. Failure to do so during reasonable hours will be a presumptive breach of this condition;
6. You are to attend and actively participate in all assessment and counselling programs as directed by your Youth Probation Officer and complete them to the satisfaction of your Youth Probation Officer for the following issues: sexual offending and any other issues identified by your Youth Probation Officer, and provide consents to release information to your Youth Probation Officer regarding your participation in any program you have been directed to do pursuant to this order;
7. You are to have no contact, directly or indirectly, or communication in any way with the victim in this matter. You will also have no contact, directly or indirectly, or communication in any way with female persons under the age of 15 years unless you are in the immediate presence of a responsible, sober adult approved in writing in advance by your Youth Probation Officer;

[21] From the evidence that I heard at the trial, in my view, the offender's mother is not likely to fall into this category, but I will leave the discretion with respect to that with the Youth Probation Officer.

8. You are to remain 50 metres away from any known place of residence, employment, or education of the victim;
9. You are to perform 75 hours of community service as directed by your Youth Probation Officer, or such other person as your Youth Probation Officer may designate. This community service is to be completed at a rate of no less than five hours a month until it is completed in full;
10. You are to participate in such educational or life skills programming as directed by your Youth Probation Officer and provide the officer with consents to release information in relation to your participation in any programs you have been directed to do pursuant to this order;
11. You are to make reasonable efforts to find and maintain suitable employment and provide your Youth Probation Officer with all necessary details concerning your efforts.

[22] You are to provide a sample of your DNA for the purposes of analysis and recording.

CHISHOLM T.C.J.