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T-2-CR-2003000501
T-2-CR-2003000648

IN THE TERRITORIAL COURT OF THE NORTHWEST TERRITORIES

IN THE MATTER OF:

HER MAJESTY THE QUEEN

- and -

V.J.O.

REASONS FOR JUDGMENT
of the
HONOURABLE JUDGE Bernadette Schmaltz

Heard at:	Yellowknife, Northwest Territories June 20 and 22, 2006
Counsel for the Crown:	D. Mahoney
Counsel for the Defendant:	P. Taylor

(Charged under ss. 271 x 2; 145(2)(b); 145(3) *Criminal Code*)

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[1] V.O. has plead guilty to and been convicted of two counts of sexual assault. The victims were his granddaughter, J., who was 10 years old at the time, and another 6 year old girl, A., both from Wrigley. He has also entered guilty pleas to failing to attend court and breach of undertaking.

[2] From January to June 2001, V.O. was living with his daughter in Wrigley; his daughter is J.'s mother, and he is J.'s grandfather. J. was 10 years old at this time. During this period, one night when J. was getting ready for bed, Mr. O. came into her bedroom to tuck her in, he sat on her bed and when he kissed her goodnight he put his tongue in her mouth for approximately 5 seconds. When he took it out, he asked J.: "Did that feel good?". On another occasion, when J. was watching TV on the couch, Mr. O. put his hand between her legs and moving his hand up tried to put his finger inside her vagina. On yet another occasion during the time that Mr. O. was staying at her house, J. was sleeping in her bed; she

woke up and her grandfather was sitting on her bed and was rubbing her bum over top of her shorts. He left her bedroom when J. woke up.

[3] The second count of sexual assault occurred in October 2002. A. was six years old at the time, and V.O was at her home. V.O. asked A. to sit on his lap, and she did. He then put his hand between her legs, and began rubbing her vaginal area, over her clothes. She got off his lap when he did this to her. Those are the facts of the second charge.

[4] On August 12, 2003, these matters were set for preliminary inquiry in Fort Simpson. The matters were being heard in Fort Simpson as Wrigley being a very small remote community, the Territorial Court does not usually sit there, and matters from Wrigley are heard in Fort Simpson. The witnesses were brought from Wrigley to Fort Simpson to testify at the preliminary inquiry. V.O. failed to appear in court that day, the preliminary inquiry did not proceed, and a warrant was issued for V.O.'s arrest.

[5] On February 8, 2003, V.O. was released on an undertaking before a justice with a condition that he was to report to the RCMP every Monday and Friday, in person or by phone. On Friday, August 15, 2003, V.O. failed to report to the RCMP.

[6] On March 25, 2006, V.O. was arrested in Manitoba, and has been in custody since that time. On April 6, 2006, V.O. re-elected to have these matters dealt with in Territorial Court, and entered guilty pleas. The matters were adjourned to June 20, 2006, for facts and sentencing.

[7] The most aggravating factor in the circumstances of these offences – and I will first deal with the sexual assaults, is the breach of trust involved. J. was repeatedly sexually assaulted, exploited, by her grandfather. This was someone she should have been able to look to for love, protection, security, who she

should have been able to place her complete trust in, and that trust was breached in a most despicable way by V.O.

[8] Section 718.2(a)(ii) of the *Criminal Code* states that when an offender in committing an offence abuses his spouse, common-law partner, or child, that shall be deemed to be an aggravating circumstance. Parliament has thereby recognized that abuse of family members is a serious problem, and courts have to recognize, have to send a message, that the community will not tolerate family abuse. I recognize that J. was V.O.'s granddaughter, not his daughter, but I see little difference in a father or grandfather abusing a child. It is a terrible, and a very sad breach of the trust that young children have so completely and unconditionally in adults who are close to them, whether they be parents, grandparents or other important adults in a child's life.

[9] The sexual assault on A. is also a breach of trust; it was not in the facts that there was a family relationship between V.O. and A., though defence counsel seemed to be under an impression that there was a relationship. But V.O. was known to 6 year old A., he was in her home, she trusted him enough to sit on his lap. I also note that these offences occurred in Wrigley, a very small, traditional community. I expect that 6 year old A., knowing V.O., he being her friend's grandfather (from her Victim Impact Statement), would have trusted V.O., she would not have expected to come to harm from this friend in her home. He was not a stranger, she was at home, and she should have been safe.

[10] We all have a duty to care for and protect children. A child's safety is the responsibility of every adult in the community. I find the intentional hurting or abuse of a child a particularly disturbing crime. Besides the abuse of trust involved when the child is related or known to an offender, there is also a breach of the duty we all have to children, there is a breach of the authority that all adults inherently have over small children. A child is a particularly vulnerable victim.

[11] A young child will usually blindly trust an adult, though this may be changing. Sadly, we can't as a society, as a community, trust as much as perhaps we used to. Nowadays, we have to teach our children to be wary of strangers. Crimes where children are the victims harm us all. These crimes make us all trust each other less. And this is especially so when they are committed by someone who we should have been able to entrust the care of a child to – such as a grandfather.

[12] Defence counsel submits that if all the community were present and could see and hear the progress made by this offender, the community would not be concerned about specific deterrence. I have difficulty with that submission. I have no details of the rehabilitation that V.O. has apparently achieved. I pressed defence counsel on this and she chose to have the accused speak to this. Perhaps Mr. O. is better able to talk about the traditional healing or counseling he has undergone, I am sure he understands it better. But no details, not when counseling or healing was undertaken, what the objectives were, whether there is follow-up, or how effectiveness was determined or monitored, none of this information could be supplied by counsel. One of Mr. O.'s resumes that were filed on his behalf refers to his experience in providing healing workshops based on the Medicine Wheel, with the use of the Pipe, Sweat Lodge Stories and Traditional Medicine; this was from 1996 to 1999. This predated all the offences that Mr. O. is before the court for today. With respect to healing, which in my mind is not the same as rehabilitation, Mr. O. said "the things I have done for myself are numerous. Well, they're not numerous, but I guess maybe there are a lot of people that are helping me." It is fortunate that Mr. O. has supportive people in his life. I accept that he has been involved in traditional healing while he was in Manitoba over the last 2 to 3 years; I also note that he was involved in traditional healing workshops from 1996 – 1999. Healing and rehabilitation while sometimes associated, again, are not the same thing.

[13] As an aside, I believe that counsel have a duty to their clients to assist them in every way possible and to provide a foundation for the conclusions that counsel ask the court to draw. It may well be that an accused person will want to speak on his own behalf and perhaps even expound on comments made by his or her counsel. But to not provide an explanation or a basis, or reasons for a position advanced by counsel, to my mind indicates that counsel has blindly accepted a position that her or his client has advised of, and has not taken the steps to substantiate the information, and provide the court with an informed submission. Either that, or there is no information to substantiate the position.

[14] Mr. O. has a lengthy criminal record dating form 1969 to 2001, with 16 convictions for criminal offences. There are 2 gaps in his record, one being 12 years from 1970 to 1982, and 8 years from 1991 to 1999. There are 5 prior offences of violence on his record, all between 1987 and 2001. In June 2001, Mr. O. was convicted of assault causing bodily harm, and sentenced to a global sentence of 14 months in jail, (1 year for the assault causing). I realize that this conviction occurred after the sexual assault on his granddaughter J. When Mr. O. was sentenced in June 2001, he was also placed on probation for one year following his jail sentence. So when Mr. O. sexually assaulted A., he would have been on probation and recently released from jail. In November 1990, Mr. O. was convicted of 2 counts of sexual assault, and sentenced to a total of 6 months, and 2 years probation. I am told that the victim of these sexual assaults was a young person.

[15] Mr. O. has many issues in his life, and I take that into account. He attended residential school and suffered abuse there; he also says that he suffered abuse in his own home and from his relatives when he was a child. There comes a time when it is difficult to continue to see a person as a victim, and this is when he repeatedly makes victims of others.

[16] The question of rehabilitation is always something that must be kept in mind in any sentencing, and I do take that into account in this case. But there also comes a point when rehabilitation is a secondary concern. Mr. O. has been placed on probation 6 times; Mr. O.'s counsel has filed a letter dated January 23, 2006, indicating that Mr. O. was involved in therapy for "two specific periods of time from the spring of 1996 to the late summer of 1999." This would have predated both of the offences that Mr. O. is before the court for today. The letter refers to alcohol and drug abuse, sexual abuse, depression, a tendency to run, so I assume the therapy attempted to address these issues. Shortly after this therapy, Mr. O. commenced the sexual abuse of his granddaughter; shortly after that he was given a lengthy sentence for an offence of violence; and shortly after being released from that jail sentence, and while on probation, he committed a sexual assault on another little girl. The time has come when the main sentencing consideration and goal has to be protection of the public. It appears that the only way to protect the public is to separate Mr. O. from the community. In considering his record and history, and the opportunities that have been placed before him to change his behaviour, to rehabilitate himself, I can only find that he is incorrigible.

[17] The Crown has suggested, having taken into account that Mr. O. has been detained on these charges for approximately 3 months, that a sentence of a further 11 to 14 months would be appropriate. Defence submits that a sentence at the lower end of the Crown submission would be appropriate, and that Mr. O. should be given 6 months credit for his pre-trial custody, resulting in a sentence in the range of a further 5 months for these offences.

[18] Two cases have been provided by the Crown in support of the position of the Crown in this case. One of the cases is *R*. v. *T.A*., [1992] N.W.T.J. No. 185, a decision of Richard, J. from our Supreme Court. That case involved a 72 year old unilingual Chipewayan man, with no criminal record, who had sexually assaulted his three granddaughters over a nine-month period. A joint submission

of a suspended sentence had been submitted to the Court in that case. Richard, J. found that a suspended sentence could not adequately address the primary sentencing objectives of deterrence and denunciation. The accused was sentenced to 4 months on each charge, concurrent. I do not find that that case sets a starting point of four months for this type of offence. Richard, J. found a sentence of four months an appropriate sentence in that case. There are distinguishing factors in that case which are not present in this case: the accused there was 72 years old, with no prior record, and enjoyed a good reputation in the community; the accused had a problem with alcohol at the time of the offences that was a factor in the commission of the offences. It is noteworthy that Richard, J. placed significant emphasis on the fact that the accused had no prior record, and certainly no record for sexual assault or similar offences. Richard, J. specifically commented: "And Mr. A should realize that if [he] ever again commits a crime like this, he'll be going to jail for a much longer time." This is not the first time Mr. O. has been before the courts, and not his first conviction for sexual assault, but his third and fourth convictions for sexual assault.

[19] In the case of *R*. v. *J.K*., [1998] N.W.T.J. No. 98, the facts were more aggravating than the case at bar, as reflected by the global sentence of 10 years imposed in that case. That case involved the accused engaging several times in sexual intercourse with his granddaughter and thereby being convicted for incest; there was also sexual intercourse with one of the other victims; further there was fondling of some of the victims; and attempted digital penetration of one of the victims. On four of the seven counts, involving "touching" as described by Schuler, J., sentences of 1 year concurrent were imposed. Mr. K. had an unrelated criminal record, and did not have any convictions for approximately 6 to 7 years before the commission of these offences. However whereas the circumstances of the offences in *J.K*. may be vastly different than the circumstances before me today, I do agree with the general comments made by Schuler, J. regarding the sexual abuse of children. In reference to the Victim

Impact Statements filed, and the testimony of the mothers of the victims, Schuler, J. stated:

> The responsibility for all of this emotional trauma lies on J.K., and while he may not have foreseen all of the harm that could result from his actions, the trauma of child sexual abuse is well documented and well publicized in our society and I do not believe that anyone living in our society can plead ignorance of it.
> …
> One of the terrible consequences of this type of offence committed by a person like J.K. is that it makes it harder for us as a society, as a community, to trust those that we would normally trust with children. … The sexual abuse of children, in my view, does society in general a great harm in making us all less inclined to trust.

[20] Victim Impact Statements have also been filed by the young victims in this case. Both victims have indicated that they do not want their Victim Impact Statements read out loud in Court, but I do take into account the serious and lasting effects that this kind of abuse can have on young children, the psychological harm that is inflicted. I find it very sad when a young girl, far too young to legally drink, states in her Victim Impact Statement: "I think I drink because of what happened." And what will be the fallout of that? When an adult takes advantage of a child, the trust that the child places in adults is lost. And we know now that when young people are abused sexually, there are very serious and long-lasting psychological consequences of that abuse, even if they are not harmed physically. We know that young people who are abused sexually have psychological and emotional problems that can last them for the rest of their lives.

[21] Mr. O. had to realize the harm he was subjecting these young girls to. And yet he stated at this hearing that he wishes that these two young girls will not have to go through what he has gone through. He has been carrying his abuse and the effects of it for many, many years. Why would Mr. O. think that these young girls would not have to go through what he went through? He knows the harm caused, he knows from first hand experience, and yet he chose to sexually

molest these two little girls. I find his wish is an empty wish – he knows it will never come true.

[22] And he is responsible for the harm done, for the lasting effects. I am sure that Mr. O.'s actions will affect these young girls for the rest of their lives. But hopefully, with the support and love of their families, they will be able to move on from this and put it behind them, but the sexual abuse of a child can have devastating effects on the child for the rest of her, or his, life.

[23] Besides the cases filed by counsel, I have reviewed many cases dealing with sexual abuse of children from this jurisdiction; unfortunately there are many, many cases[1]. Sentencing cases, while helpful, are also limited in the assistance that they can offer – each case is different, and each offender is different.

[24] The most important sentencing objectives in this case are deterrence and denunciation. A sentence has to recognize the harm done to the victim, and also has to promote a sense of responsibility in the offender.

[25] The court's role is to impose sentences that are meaningful and that will achieve the objectives of sentencing. The sentence that is imposed by the court must be one that will be seen by members of the community as severe enough that it will discourage not only Mr. O., but perhaps more importantly, other men, young or old, from abusing or taking advantage of young children to satisfy their own selfish sexual appetites, and also express the community's condemnation of this type of behaviour.

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[1] See *R*. v. *Casaway*, [2002] N.W.T.J. No. 53 (S.C.); *R*. v. *D.H*., [2005] N.W.T.J. No. 10 (S.C.); *R*. v. *A.J.E*., [2001] N.W.T.J. No. 16 (S.C.); *R*. v. *L.W*., [2002] N.W.T.J. No. 14 (C.A.); *R*. v. *G.W*., [2000] N.W.T.J. No. 48 (S.C.); *R*. v. *Codzi*, [1996] N.W.T.J. No. 11 (C.A.); *R*. v. *P.J*., [1983] N.W.T.J. No. 5 (C.A.); *R.* v. *Beyonnie*, [1988] N.W.T.J. No. 138 (C.A.); *R.* v. *Green*, [1993] N.W.T.J. No. 138 (C.A.); *R.* v. *R.K*., [2001] N.W.T.J. No. 23 (S.C.)

[26] Section 718 of the *Criminal Code* states that the fundamental purpose of sentencing is to contribute to respect for the law and the maintenance of a just, peaceful and safe society by imposing just sanctions, or sentences, that will:

a) denounce unlawful conduct;
b) deter offenders and other persons from committing offences;
c) if necessary, separate offenders from society;
d) assist in rehabilitating offenders;
e) provide reparations for harm done to victims or to the community; and
f) promote a sense of responsibility in offenders, and acknowledgment of the harm done to victims and to the community.

[27] A sentence must be proportional to the gravity of the offence and the degree of responsibility of the offender. The gravity of sexual abuse of a child has to be recognized – and when the offender is an adult in the position of trust and authority over the child, the degree of responsibility of the offender is the utmost.

[28] Other sentencing principles are set out in s. 718.2. I mentioned earlier that that section recognizes that the abuse of one's child shall be deemed an aggravating circumstance.

[29] Section 718.2(d) says an offender should not be deprived of liberty, if less restrictive sanctions may be appropriate in the circumstances; s. 718.1(e) states 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.

[30] I do take into account that Mr. O. is an aboriginal offender, and there were many sad and unfortunate circumstances in his life that may have contributed to him being before the court today. But I also take into account that Mr. O. has chosen to continue the cycle of abuse, he has become the abuser. He knows the effects, and he knew the effects when he chose to inflict this abuse on these little girls. Six times he has been placed on probation; he has been given the

opportunities to seek rehabilitation. Now, the community, the public, and especially the children, have to be protected.

[31] Children who cannot protect themselves will be protected vigorously by the law and the courts. Children should be loved, respected, fostered, and raised to be good people. Adults are in positions of power over children, over young people. They are in positions of control. So when an adult takes advantage sexually of a young person, that is an exercise of power, and it is an abuse of power. Children and young persons need to be supported, they need to be guided.

[32] The courts cannot minimize, cannot downplay any situation where an adult abuses a child sexually. Everybody in the community has to realize that this is the type of conduct that no society will condone, and every society will condemn.

[33] I cannot ignore the fact that we are dealing with the sexual abuse of two children, and the prevalence of this offence in this jurisdiction. Sexual assault is always a serious crime, but a sexual assault committed on a child is particularly disturbing. In the north, the number of crimes of violence in general, and sexual assaults in particular is notorious. The sexual abuse of children is a serious social problem in the Northwest Territories today and this is true in virtually every community in the Northwest Territories.

[34] I consider the aggravating circumstances, the circumstances in which this crime was committed, particularly the fact that one of the victims was Mr. O.'s granddaughter, and the abuse of her was repeated; the other victim was very young, being just 6 years old; Mr. O. was in a position of trust being the grandfather of one of the victims, but also he was known to the other victim, she too would have trusted him. Both young girls should have been able to trust him,

to look to him for protection and security. Mr. O. breached this trust in a terrible way.

[35] There is one very significant mitigating factor in this case. Mr. O. has pleaded guilty; he has accepted responsibility for these offences. This is not an early guilty plea, but by the guilty plea, the young victims were spared having to testify about what happened to them. In this type of case, I find that even a late guilty plea has to be given significant credit. The victims hopefully will now have one less stress in their lives.

[36] I also take into account that Mr. O. has been in custody for approximately 3 months. However, I also consider how Mr. O. ended up in custody – he was not initially detained on this charge, but did not show up for his preliminary inquiry, and left the jurisdiction. His counsel says this was because he simply could not face the situation and therefore he left the jurisdiction and went to The Pas, Manitoba. This is certainly in contrast to what Mr. O. says. Mr. O. quite adamantly said he did *not* run away from appearing in court, but that "it was for convenience" that he did not appear. I take it he meant that it was inconvenient for him to appear. He was working in Yellowknife at the time, and then had a chance to go down to Edmonton, so he went down there. He did not report to the RCMP after that because if he had reported then he would have to tell them where he was. Consequently Mr. O. was on the lam for approximately 2.5 years before he was arrested in Winnipeg. He says he wanted to deal with this. I have difficulty with that; he certainly could have dealt with it earlier, nothing was preventing him from dealing with it, all it would have taken was a phone call. He says he was glad when they "finally" found him. In any event, whatever the reason for Mr. O. not dealing with this matter in a more timely manner, or not appearing in court, this is not a situation where he was detained in custody from his arrest, but he was detained in custody because he failed to comply with the conditions of his release (see: *R*. v. *Casaway*, [2002] N.W.T.J. No. 53, (S.C.), para. 8). I do recognize however that there is no statutory remission applied to

pre-sentence detention, and I do take that into account. I would give Mr. O. 4 to 5 months' credit for his pre-trial custody.

[37] With respect to the failure to attend court, I find it aggravating that it was his preliminary inquiry that Mr. O failed to appear for; witnesses had been transported to Fort Simpson; I am sure that much stress was caused to the young witnesses in having to prepare to testify, only to have the matter put off.

[38] In arriving at an appropriate sentence in this case, I have attempt to weigh and balance all the factors that must be taken into account.

[39] Having considered all of the circumstances of these offences, and this offender. And giving Mr. O. a great deal of credit for his guilty plea, for finally accepting responsibility for these offences, and accepting that he is remorseful for what he did to these little girls the following sentences will be imposed:

- for the offence of sexually assaulting J. between January 1, 2001, and June 26, 2001, 1 year imprisonment;
- for the offence of sexually assaulting A. in October, 2002, 6 months imprisonment, concurrent. I would find that that sentence should be consecutive, but considering both totality, and the remand time, I am making the sentence concurrent. However, the sentence imposed reflects the seriousness of the offence.
- For failing to attend court on August 12, 2003, 2 months imprisonment, consecutive;
- For failing to comply with your undertaking on August 15, 2003, 1 month imprisonment, concurrent.

[40] On release from jail, Mr. O. will be placed on probation for a period of 3 years. Besides the statutory conditions, the only other condition will be that he have no contact, direct or indirect, with A. or J. without further order of this court.

[41] There will also be the mandatory firearms prohibition for a period of 10 years, and Mr. O. will also be required to comply with the provisions of the *Sex Offender Information Registration Act* for a period of 20 years. There will be no order that a sample of Mr. O.'s DNA be taken to be submitted to the DNA Data bank, such an order having previously been made. The victim of crime surcharge is waived on the ground of hardship.

Bernadette Schmaltz
J.T.C.

Dated this 22nd day of June, 2006, at
the City of Yellowknife, in the Northwest
Territories.

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