

Case Name:

R. v. J.I.

**Between
Her Majesty the Queen, and
J.I.**

[2006] O.J. No. 3742

2006 ONCJ 356

Information No. 05-5620

Ontario Court of Justice
Hamilton, Ontario

A. Zuraw J.

April 6, 2006.

(37 paras.)

Sentencing -- Offences against person and reputation -- Duties tending to preservation of life -- Failure to provide necessaries of life -- Particular sanctions -- Conditional sentence -- Sentencing considerations -- Submissions -- Joint submissions -- Sentencing of JI for failure to provide the necessaries of life -- JI, who was HIV positive, pled guilty to failing to provide the necessaries of life for not availing herself of treatments to safeguard her child from being infected with HIV during birth -- Court accepted joint recommendation of a six-month conditional sentence to be served in the community with three years' probation -- JI was ordered to attend medical treatment, obey the instructions of Children's Aid, and seek training and employment.

Sentencing of JI for failure to provide the necessaries of life. JI was charged with and pled guilty to failing to provide the necessaries of life to her newborn child. JI was infected with HIV. She had given birth to one child already with all of the appropriate precautions in place. That child remained free of the HIV virus. JI had been provided with extensive neo natal counseling during her subsequent pregnancy but had bypassed all available treatments and failed to inform medical staff during the delivery of her HIV positive status. She insisted on breastfeeding the newborn child, ESN, knowing that this would increase the risk of transmission. ESN was found to be HIV positive.

The Catholic Children's Aid Society was granted wardship of her children.

HELD: Court accepted a joint submission of a six-month sentence to be served conditionally in the community followed by three years' probation. Recent history indicated that JI had accepted more responsibility for her condition and that her viral load had dropped. This made criminal sanctions inappropriate for potential failures to disclose her status to those she might put at risk of infection. She was ordered to attend medical appointments, seek employment and training, and to stay away from her children except as instructed by Children's Aid.

Statutes, Regulations and Rules Cited:

Criminal Code, s. 215(5)(a)(ii)

Charge: Fail to Provide Necessities of Life - S. 215(2)(a)(ii)

Counsel:

K. Shea, Counsel on behalf of the Crown

L. Fedak, Counsel on behalf of J.I.

REASONS FOR SENTENCE

1 A. ZURAW J.:-- Ms. J.I., you have pleaded guilty before me to a charge of failing, between September 4, 2004, and September 7, 2004, to provide the necessities of life to your newborn child. In effect, you were HIV positive, knew you should take certain steps to safeguard your child and did not - all of which is outlined in the agreed statement of facts, filed as exhibit number 1 in these proceedings.

2 Your new country Canada, took great steps to assist you and your children to be born healthy and to remain that way. Notwithstanding repeated significant attempts by the staff at McMaster University Medical Centre to ensure the health of this, your newborn child, you acted in a way to defeat those attempts. As a result, your son E.N. is now in the world HIV positive with all the ramifications that that entails.

3 The Crown has proceeded summarily and seeks the maximum sentence on a summary conviction and submits that as you are no longer a danger to the community, that you should be permitted to serve it conditionally in the community.

4 I am advised that since this matter arose, you have been acting in a responsible fashion, taking all the care and following all the steps that you have been required to do by the public health authorities and by the Children's Aid Society and that you have taken steps to ensure that you are a person in the community who will be assisting the community and, curiously, in the health field.

5 The only concern that I have with the sentence was whether or not there ought to be some criminal sanction should you fail to disclose to others that you have an issue that could cause them to become HIV positive. I am told that in view of the history since this came to light and in view of the testing results that show that you are basically not showing any viral load at this time, and in view of the fact that there were already orders outstanding from the Ministry of Health, there is no need to make such an order part of this sentence.

6 Accordingly, I accept the joint submission and you are sentenced to six months, which you may serve conditionally in the community, to be followed by three years probation. The terms of the conditional sentence order will be as follows:

7 You will keep the peace and be of good behaviour. You will appear before the Court when required to do so by the Court. You will report forthwith, in person, to a supervisor and thereafter as required by the supervisor and in such manner directed by the supervisor.

8 You will remain within the Province of Ontario unless you have prior written permission from the supervisor or from the Court. You will reside at a place approved by your supervisor. You will notify the supervisor in advance of any change of name or address, employment or occupation.

9 You will abstain from association, communication or any contact directly or indirectly with E.N. and V.I. except as permitted and under the supervision of the Hamilton Catholic Children's Aid Society and as permitted by the said Society or pursuant to any Family Court order.

10 You are not to be within 100 metres of any address known to be the residence of E.N. and V.I. except as permitted by the Hamilton Catholic Children's Aid Society or any Family Court order and comply with any present or future Family Court orders with respect to those two children.

11 You will provide for the support or care of your children, as directed by the Hamilton Catholic Children's Aid Society or any present or future Family Court orders.

12 You will attend and actively participate in good faith in such rehabilitative programs, assessment, treatment or counselling as recommended by your supervisor and show proof of attendance and completion to the supervisor in writing when requested to do so.

13 You will attend all appointments as scheduled by your physician at the Special Immunology Services Clinic at McMaster University Medical Centre. You will continue to take all medications as recommended by your attending physician.

14 You will seek and maintain employment or attend school for upgrading as arranged and approved by your supervisor.

15 That will be followed by three years probation on these terms:

16 You will keep the peace and be of good behaviour. You will appear before the Court when required to do so by the Court. Report forthwith in person to a probation officer and thereafter as required by the probation officer and in the manner directed by the probation officer.

17 You will remain within the Province of Ontario unless you have written permission from the court or the supervising probation officer. You will reside at an address as approved in advance by the probation officer. You will notify the probation officer in advance of any change of name or address or any change in employment or occupation.

18 You will abstain absolutely from any contact or communication directly or indirectly with the two children named except under the supervision of the Hamilton Catholic Children's Aid Society and as permitted by the Hamilton Catholic Children's Aid Society or pursuant to any Family Court order.

19 You are not to be within 100 metres of any address known to be the residence of the two named children except as permitted by the Hamilton Catholic Children's Aid Society or any Family Court order.

20 You will comply with any present or future Family Court orders relating to the two named children. You will provide for the support or care of the two named children as directed by the Hamilton Catholic Children's Aid Society or any present or future Family Court orders.

21 You will attend and actively participate in good faith in such rehabilitative programs, assessment, treatment, counselling as recommended by the Probation Officer and show proof of attendance and completion to the probation officer in writing when requested to do so.

22 You will attend all appointments as scheduled by your physician at the Special Immunology Services Clinic at McMaster University Medical Centre. You will continue to take all medications as recommended by your attending physician.

23 You will seek and maintain employment or attend school for upgrading as arranged and approved by your probation officer.

24 Do you understand the terms of the conditional sentence order?

25 J.I.: Yes.

26 HIS HONOUR: Can you live with those terms?

27 J.I.: Yes.

28 HIS HONOUR: Do you understand the terms of the probation order?

29 J.I.: Yes, I do.

30 HIS HONOUR: Can you live with those terms?

31 J.I.: Yes.

32 HIS HONOUR: All right, I will waive the surcharge. Good luck, ma'am.

33 MS. FEDAK: Thank you, Your Honour.

34 MS. SHEA: Thank you, Your Honour. Your Honour, the remaining counts on that information could please be withdrawn at the request of the Crown and I believe the other information has already been withdrawn. There was a former information.

35 COURT CLERK: I just had the one.

36 MS. SHEA: All right, thank you. Thank you very much, Your Honour.

37 HIS HONOUR: Thank you.

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