SUPREME COURT OF YUKON

Citation: *R. v. Anderson*, 2011 YKSC 06

Date: 20110128
S.C. No. 09-01506
Registry: Whitehorse

Between:

HER MAJESTY THE QUEEN

And

CHARLES LESLIE ANDERSON

Before: Mr. Justice R.S. Veale

Appearances:

Judy Bielefeld	Counsel for the Crown
Malcolm Campbell and Brook Land-Murphy	Counsel for Charles Leslie Anderson

REASONS FOR SENTENCING

INTRODUCTION

[1] Charles Anderson was convicted on July 16, 2010 of sexually assaulting the victim on April 30, 2008. The victim was incapacitated from alcohol and either blacked out or passed out during the assault: See *R. v. Anderson*, 2010 YKSC 32.

[2] The Crown has applied for a finding that Mr. Anderson is a long-term offender under s. 753.1(1) of the *Criminal Code.* The Court must be satisfied that:

(a) it is appropriate to impose a sentence of two years or more for the sexual assault offence;

(b) there is a substantial risk that the offender will reoffend; and

(c) there is a reasonable possibility of eventual control of the risk in the community.

[3] Counsel for Mr. Anderson agrees with the Crown that Mr. Anderson meets the test set out in s. 753.1(1) and should be found to be a long-term offender.

[4] However, there is no agreement on the sentence for the predicate offence of sexual assault or on the length of the long-term supervision. The Crown submits a range of five to seven years is appropriate for the sentence and the maximum of 10 years for long-term supervision.

[5] Defence counsel submits that the appropriate range for the sentence is 24 to 26 months and a long-term supervision of three years.

CIRCUMSTANCE OF THE SEXUAL ASSAULT

[6] The victim was 56 years old at the time of the assault and had been on a two-day drinking binge. In the late evening of April 29, 2008, she was with a group of friends at the bar in Carmacks. She was intoxicated but could not find someone to drive her home.

[7] Mr. Anderson was sober that evening and came into the bar when he dropped his daughter off there. The victim asked him for a ride home. The victim and Mr. Anderson were not strangers, they worked in the same office, and she was friends with his wife. The victim has known Mr. Anderson’s wife all her life and lived with her for a year when she was a child. The victim thought she could trust Mr. Anderson.

[8] Mr. Anderson picked up a case of 24 beers that the victim had purchased and drove her home.

[9] They drank together at her home and others joined them, including Mr. Anderson's daughter. When the small party broke up, Mr. Anderson left to drive his daughter home.

[10] Mr. Anderson returned to the victim's residence where she was alone and vulnerable. He had full sexual intercourse with her while she was highly intoxicated and passed out or blacked out. In my decision, cited above, I found that he was well aware of her excessive consumption of alcohol and her inability to consent.

VICTIM IMPACT

[11] The victim has suffered a great deal from the sexual assault upon her. She feels both ashamed and afraid. The sexual assault has affected her relationship with her partner. She pushes him away when he tries to hold her.

[12] She has taken counselling and missed work. She cannot trust anyone anymore.

[13] She is mad at herself and angry at Mr. Anderson. His wife was like a sister to her and the victim's family trusted Mr. Anderson.

CIRCUMSTANCES OF THE OFFENDER

[14] Mr. Anderson is 55 years old and, like the victim, of First Nation ancestry. His childhood was marred by his parents' alcoholism and family violence. Throughout his youth, he was placed with various relatives or in group homes.

[15] Mr. Anderson has a Grade 9 education and a good employment record. He has worked in a coal mine as a heavy equipment operator. He has also worked as a wood cutter and water and sewer truck operator. He has no difficulty obtaining seasonal employment.

[16] He is married to a supportive wife and they have three children who are now adults, some with children. He and his wife lived together for 12 years before marrying in 1984. Their relationship has been strained by alcohol abuse and financial problems.

[17] This is not Mr. Anderson's first offence. He has a relatively short criminal record, however it notably includes three prior convictions for sexual assault. In 1991, he was convicted of two counts of sexual assault in relation to over-the-clothes touching of a 10-year-old girl. There is also a 2009 conviction for sexual assault. I am advised that this offence was also committed against a 10-year-old girl, and it involved under-the-clothes vaginal touching.

[18] Mr. Anderson and his wife separated in 1990 when he was charged and later convicted of his first sexual assault. They have been separated during his recent incarceration but his wife appears to be supporting him and they will likely live together on his release.

[19] Mr. Anderson has a history of alcohol abuse. His wife reported to Bill Stewart, a registered psychologist to whom Mr. Anderson self-referred while in custody in 2008, that Mr. Anderson abstained between 1984 and 1993 which gave their relationship more stability. Bill Stewart indicated in his report of September 2008 that Mr. Anderson requested counselling to address his alcohol abuse and his sexually abusive behaviour. Bill Stewart could not assist him because his contracting agency, the Northern Tutchone Council which includes Mr. Anderson's First Nation, will not engage in treatment until any criminal charges have been resolved. Mr. Anderson apparently did not seek counselling or treatment while he was in custody for the 1991 offence.

[20] Mr. Anderson was a model prisoner in pre-trial custody. He acquired a number of trade certificates and completed the Gathering Power Workshop and the White Bison Program. He made inquiries about substance abuse treatment although no formal assessments were done. His case manager considered that he had a sincere interest in participating in future assessments and programming.

[21] Mr. Anderson's plan when released from custody is to return to his community, reside with his wife and seek employment. He has a car to permit him to access programming in Whitehorse.

[22] Craig Dempsey, the supervisor of Offender Services for Yukon Government, indicated that Mr. Anderson could take a new Yukon treatment program for moderate to high risk sexual assault offenders that is modelled upon the Good Lives program offered in the federal penitentiary. The Yukon program is still being developed but will be available for offenders in and out of custody in March 2011. Craig Dempsey indicated that the program requires 25 – 50 three-hour sessions and takes a motivated client 18 months to complete. There is also a two-year relapse prevention program available.

[23] Mr. Anderson also presents himself as having Fetal Alcohol Spectrum Disorder. He first indicated this concern in cross-examination at trial after he gave a lengthy and factually complex version of events. Bill Stewart stated that Mr. Anderson reported "that his mother likely consumed alcohol during her pregnancy with him." Bill Stewart indicated that Mr. Anderson exhibited some of the growth impairment and facial anomalies associated with FASD and that Mr. Anderson was being referred for a full assessment with the FASD team working with the Fetal Alcohol Syndrome Society of Yukon. There has been no assessment to date.

[24] While Bill Stewart did not testify, Dr. Lohrasbe testified as a qualified expert in psychiatry to give opinion evidence about the risk of Mr. Anderson's sexual reoffending. His report was prepared pursuant to a court order under s. 752.1 for an assessment to be used for a dangerous or long-term offender application. Dr. Lohrasbe prepared a written psychiatric assessment of 23 pages in length and testified by telephone for approximately three hours. Dr. Lohrasbe testified in an open and forthright manner and I have accepted his evidence completely.

[25] Regarding the FASD concern, Dr. Lohrasbe stated:

> Mr. Stewart has suggested it in his report of September 2008 that Mr. Anderson's cognitive difficulties may reflect some of the common consequences of Fetal Alcohol Spectrum Disorder (FASD), a concern also raised by Elizabeth Anderson. While that possibility cannot be dismissed, definitive information about his mother's alcohol consumption is lacking, as it often is. Additionally he does not have obvious facial stigmata associated with FASD. He does however have some of the cognitive deficits and impulsivity seen in FASD, but such 'symptoms' are seen in a wide range of neuro-developmental syndromes. Whatever the origins of his cognitive deficits (which will require clarification and attention during the course of treatment and rehabilitation), Mr. Anderson has much to learn about sexuality and sexual offences, and information provided to him will have to be customized so that it can be absorbed and retained.

[26] Dr. Lohrasbe was of the opinion that Mr. Anderson did not have a severe cognitive impairment but that he did lack insight and had some cognitive disabilities in terms of general knowledge, dates and quantifications, and memory for remote events, some of which may be a function of defensiveness. Because of Mr. Anderson's defensiveness in sexual matters, Dr. Lohrasbe was unable to say whether Mr.

Anderson's three prior sexual offences involving children reflect an underlying pedophilia.

[27] I conclude that Mr. Anderson has no formal diagnosis of FASD but rather has cognitive disabilities that do not amount to a severe cognitive impairment.

[28] Referring to Mr. Anderson's lack of knowledge, insight and judgment, Dr. Lohrasbe concludes with his risk assessment:

> Beyond those deficits however at this point there is little we know of the relative roles of issues such as deviancy, impulsivity, and predation in his sexual violence. In such circumstances, it is my view that a conservative approach to risk assessment is necessary; there is simply too much that remains unknown. Given the diversity of these offences (adult and child victims), and the lengthy period of time over which the offences have occurred (18 years), my working assumption is that, whatever the combination of risk factors, they are not transient and situational but entrenched and internal. Hence he is at high risk for future sexual violence, but the specific nature of that violence is difficult to anticipate, and much will depend on the availability of a victim. (my emphasis)

[29] After applying the RSVP (Risk for Sexual Violence Protocol), Dr. Lohrasbe opined:

> In summary therefore, based on the three convictions for sexual violence and a current clinical examination, my opinion is that there is a high likelihood that Mr. Anderson will commit further acts of sexual violence in the foreseeable future. Children are at obvious risk, as are incapacitated or otherwise vulnerable adult females. This risk can be lowered and managed if external restrictions are placed on him, and if there has not been significant internal change as a result of interventions focussed on his sex offending. (my emphasis)

[30] Dr. Lohrasbe stressed in his oral evidence that the treatment and management of sex offenders is not a question of a cure, but rather management to minimize the risk to children and vulnerable adults.

SENTENCE DISPOSITION

[31] There is a large gap in the submissions on the appropriate range of sentence based upon the characterization of the predicate offence. The Crown seeks a sentence of 5 – 7 years and the defence submits 24 – 26 months, or time served, is appropriate.

[32] Both counsel and the court are in agreement that Mr. Anderson has served approximately 22 months of pre-trial custody. He should receive a credit of 1.5 times as he has been a model prisoner, and the new “truth in sentencing” amendments do not apply. As a result he shall be credited with 33 months of pre-trial custody.

[33] The defence submits that the *R. v. G.C.S.,* [1998] Y.J. No. 77, remains good authority. The Yukon Court of Appeal in *G.C.S*. referred to “the accepted range” of sentence for a passed out victim without additional physical violence was 12 months to 2 years less a day. In *R. v. G.C.S.*, after a rather cursory discussion, a sentence of 2 years less a day on a guilty plea for a sexual assault conviction was reduced to 16 months. G.C.S. was 18 years old, and the complainant was 16 years old and passed out from excessive drinking when he forced sexual intercourse upon her, before being stopped by her uncle. The Court of Appeal took into consideration the guilty plea, the young age of the offender and his expression of some remorse and his potential for rehabilitation.

[34] In an extensive review of the range of past sentences in *R. v. White,* 2008 YKSC 34, Gower J., at para. 44, referred to the fact that the *R. v. G.C.S.* range of 1 to 2 years applied:

> ... for cases of sexual assault without overt violence, usually involving unconscious victims and offenders with relatively minor records. However, I also noted that the range moved upwards to more serious penalties of five to six years and

> even seven years, in cases where offenders had proceeded to trial and had not received the mitigation of a guilty plea, where they had significant criminal records and where there were other aggravating circumstances.

[35] Gower J., at para. 85, suggested with many caveats that, in his view,

> ... the current range in the Yukon for non-consensual sexual intercourse with a sleeping or unconscious victim, which is admittedly a very broad description of a type of sexual assault, with some exceptions, is roughly from one year, at the lower end, to penitentiary time in the vicinity of 30 months, at the higher end.

[36] However, he added the important caveat at para. 87:

> ... I am not suggesting this range is conclusive. Greater or lesser sentences will be justified where circumstances warrant. This range is only suggested as a shorthand way of describing what the courts in Yukon have done in previous cases where the offence and the offender were similar to those in the case at bar.

[37] I do not have any difficulty with a discussion of past ranges particularly with the exceptions and caveats indicated by Gower J. But ranges should not become rigid guidelines that require extensive intellectual exercises to justify remaining within or moving outside of a range. Sentencing requires an individualized approach that challenges any suggestion that ‘one size fits all’. The best description of the crafting of a sentence is set out in *R. v. C.A.M.*, [1996] 1 S.C.R. 500, at para. 92:

> ... It has been repeatedly stressed that there is no such thing as a uniform sentence for a particular crime. [Citations omitted]. Sentencing is an inherently individualized process, and the search for a single appropriate sentence for a similar offender and a similar crime will frequently be a fruitless exercise of academic abstraction. As well, sentences for a particular offence should be expected to vary to some degree across various communities and regions in this country, as the "just and appropriate" mix of accepted sentencing goals will depend on the needs and current

> conditions of and in the particular community where the crime occurred. ...

[38] This quote was more recently endorsed by the Supreme Court of Canada in *R. v. Gladue*, [1999] 1 S.C.R. 688, at para. 76. The *Gladue* decision is the definitive judgment on the search for a fit sentence for an aboriginal offender in recognizing that the circumstances of aboriginal offenders are markedly different from those of other offenders.

[39] Nevertheless, the Supreme Court of Canada in *Gladue*, reaffirmed "the inherently individualized process" in stating at para. 78:

> In describing the effect of s. 718.2(e) in this way, we do not mean to suggest that, as a general practice, aboriginal offenders must always be sentenced in a manner which gives greatest weight to the principles of restorative justice, and less weight to goals such as deterrence, denunciation, and separation. It is unreasonable to assume that aboriginal peoples themselves do not believe in the importance of these latter goals, and even if they do not, that such goals must not predominate in appropriate cases. Clearly there are some serious offences and some offenders for which and for whom separation, denunciation, and deterrence are fundamentally relevant.

[40] There are a number of aggravating circumstances in this case. Mr. Anderson has a sexual assault record that begins in 1991. His conduct is not improving over time. His choice of victims is also diverse, ranging from 10 year-old children to a 56 year-old woman, all of whom can be described as extremely vulnerable. This is his fourth conviction for sexual assault. While the 1991 offences were for touching the vagina of a 10 year-old over clothing, the 2006 offence was for touching the vagina of a 10 year-old under her clothing. There is no apparent diminishing sexual aggression with age with this offender. The 2008 offence was full sexual intercourse to ejaculation on an

incapacitated woman. It was a planned and calculated sexual assault upon a woman he has been friends with for almost 40 years. Although not amounting to a breach of trust in the classic sense, it was a betrayal of trust to a woman who sought his assistance in getting a drive home. Dr. Lohrasbe states that Mr. Anderson has a high risk for future acts of sexual violence. He remains an untreated sexual offender whose risk factors are "not transient and situational but entrenched and internal".

[41] There are mitigating factors but they do not include a guilty plea which is common to those who are sentenced in the range referred to. Mr. Anderson has had a difficult family background. Nevertheless, he has a good record of employment. He has had a long marriage and has a supportive wife. He is desirous of having treatment for his alcohol abuse and sexual abuse. In a written statement, he said this:

> In sentencing me, I only ask that you include the assistance I need because a simple jail sentence without the help I need to address my problems will not benefit me.

[42] However, Dr. Lohrasbe says that he has much to learn about sexuality and sex offences. I note at trial that he referred to the 1991 convictions as "that was just touching at the time." There is a clear willingness for treatment but no remorse, taking responsibility for, or understanding of the consequences of his sexual assaults.

[43] I must, however, take into account Mr. Anderson's diminished cognitive ability which may be attributable to FASD, although undiagnosed. His cognitive ability must be placed in the context described by Dr. Lohrasbe at page 3 of his report:

> Mr. Anderson emphasized throughout both interviews that people called him dumb because "*I can't think, I can't remember".* Clinically, his intellectual capacity appears to [be] below average, but he did not come across as severely limited in intellect. He can be concrete and lacks introspectiveness and 'psychological mindedness', but

> nevertheless has reasonably good social skills. He was able to communicate appropriately with me, correctional staff, and other inmates without undue difficulty. His self-deprecatory comments came across as related more to his needy and dependent personality rather than an accurate appraisal of his deficits.
>
> Despite what seemed like undue emphasis on his limited intellect and his memory problems, some problems with memory did in fact become apparent. Mr. Anderson struggles especially hard with his recall of dates, sequences, and events in the remote past. These problems with memory contrasted with Mr. Anderson's insistence that he can recall many specific events that are related to his charges and convictions of sexual assault, and his claims of severe memory problems contrasts with his self-assured dismissal of some allegations against him.

[44] There is a question about how the 2006 sexual offence should be considered in sentencing Mr. Anderson for this offence. Can this conviction be treated as an aggravating factor when the conviction was not pronounced until 2009 and this offence was committed? In my view, this fact might have some significance if we were dealing with a situation of imposing greater punishment for a second conviction. However, in these circumstances, the previous 2006 sexual assault can properly be treated as an aggravating factor. See *R. v. Andrade*, 2010 NBCA 62, at para. 20.

[45] In considering the purposes and principles of sentencing set out in s. 718 of the *Criminal Code*, the objectives of separation or the protection of society loom large as well as the denunciation and deterrence aspect. At the same time, Mr. Anderson's cognitive deficits and desire for treatment must be taken into account. While I have considerable sympathy for his background and upbringing, in my view the predominant factor must be the protection of the public.

[46] I conclude that a sentence of four years is a fit and proper sentence. I strongly recommend that Mr. Anderson should go through a comprehensive sex offender treatment program, as he appears to be motivated to take one.

LONG-TERM OFFENDER AND SUPERVISION

[47] I am satisfied that Mr. Anderson is a long-term offender. I have sentenced him to a term of two years or more and I accept the evidence of Dr. Lohrasbe to establish that there is a substantial risk that he will reoffend. Counsel for Mr. Anderson have conceded that s. 753.1 (1) and (2) apply and that he should be found to be a long-term offender. Dr. Lohrasbe is in agreement that Mr. Anderson has a reasonable possibility of control in the community.

[48] The Supreme Court of Canada has provided guidance in *R. v. L.M.*, 2008 SCC 31, at paras. 44 and 46, on the relationship between the sentence given to a long-term offender and the period of community supervision. The period of community supervision cannot be any longer than necessary to obviate the risk that the offender will reoffend (and thus to protect the public). The Court said at para. 46:

> ... The principal objective of a prison sentence is punishment, although the sentence must be determined in accordance with the principles set out in the *Criminal Code*. On the other hand, the objectives of and rationale for the supervision of an offender in the community are to ensure that the offender does not reoffend and to protect the public during a period of supervised reintegration into society. ...

[49] In its submission that a three-year supervision order is adequate, Mr. Anderson's counsel relies on the following five factors:

1. Mr. Anderson's considerable motivation to receive treatment;

2. The efforts he has made towards obtaining substance abuse and other treatment since 2008;

3. the fact that he has not received any sort of comprehensive sexual offender treatment program;

4. the fact that he has been sober since July 2008; and

5. his age of 58 substantially lowers his risk to reoffend sexually.

[50] As indicated earlier, I have relied upon the evidence of Dr. Lohrasbe. He has 26 years of practice and has assessed over 6,000 people, of whom one-third are sexual offenders. He indicates that most of his work is at the serious end of offences.

[51] His opinion on the appropriate period of supervision is that it should be lengthy or for the longest period possible. He summarizes his opinion as follows:

> To summarize, there is a high likelihood of a future sexual offence if Mr. Anderson is given access to potential victims, barring targeted interventions, which are typically delivered during the course of a comprehensive sex offender treatment program. His treatability is unknown, given the dearth of reliable knowledge regarding the factors that contributed to his offending. However, given the fact that he has never been through any comprehensive sex offender treatment program, the possibility that such programming may reduce the risk to the point where he can be safely managed within the community in the foreseeable future cannot be dismissed. A very lengthy period of supervision in the community, post-treatment, is highly recommended.

[52] Dr. Lohrasbe stated in evidence that he was optimistic about the potential for management of Mr. Anderson's risk in the community but pessimistic about his capacity to benefit from treatment. As stated above, his treatability is simply unknown.

[53] Dr. Lohrasbe explained his pessimism about Mr. Anderson's prospects for treatment as follows:

> Mr. Anderson has acknowledged, although in a superficial manner, only the two ‘touching’ incidents with two separate children, some 16 years apart. He denies the sexual assault on the adult victim. He denies sexually inappropriate thoughts, feelings, fantasies, or plans. His denials are hurried and dismissive and to me came across as highly defensive. Given these facts, and considering his lack of insight, his ignorance about sexual violence, and his limited capacity to learn, it is hard to avoid being pessimistic about his prospects for treatment.
>
> Despite that pessimism, I cannot anticipate how he will respond to treatment. Mr. Anderson emphasized that he would be willing to attend any sex offender treatment program mandated by the Court, as well as any other programs. He has never been in the kind of comprehensive treatment program that addresses these very factors (denial, minimization, lack of insight, ignorance, among others). He needs basic sex education and awareness of power differentials between adults and children. He needs an alcohol treatment program, and he needs a tight structure and supervision when he is released.

[54] I accept Dr. Lohrasbe’s opinion in response to the optimistic factors submitted by defence counsel. I conclude that the period of supervision should be 10 years.

[55] Although it is the National Parole Board that will determine the conditions of his supervision, I endorse the recommendations of Dr. Lohrasbe as follows:

1. that Mr. Anderson go through a comprehensive sex offender treatment program;
2. that Mr. Anderson be given an alcohol treatment program;
3. that Mr. Anderson have a First Nations culture and spiritual component to his rehabilitation; and
4. that in the period of supervision there should be a prohibition regarding contact with children and a prohibition from consumption of alcohol.

SUMMARY

[56] Please stand Mr. Anderson. I find you to be a long-term offender and sentence you to a term of four years, less the pre-trial custody credit of 33 months, which results in a further period of 15 months incarceration. You shall be subject to long-term supervision for a period of 10 years.

[57] Pursuant to s. 109 of the *Criminal Code*, there will be a mandatory firearms prohibition for a period of 10 years.

[58] I order the provision of samples for DNA analysis pursuant to s. 487.051 of the *Criminal Code.*

[59] There shall be an order under s. 490.012(1) of the *Criminal Code* in Form 52 requiring Mr. Anderson to comply with the *Sex Offender Information Registration Act* for the period of 20 years pursuant to s. 490.013(2)(b).

[60] I should also advise you, Mr. Anderson, that s. 753.2(3) provides for an application to reduce the period of long-term supervision or terminating it on the ground that you no longer present a substantial risk of reoffending. Section 753.3(1) provides that it is an indictable offence to breach a long-term supervision order, and a conviction can lead to a sentence of imprisonment not exceeding 10 years.

VEALE J.