SUPREME COURT OF YUKON

Citation: *R.* v. *Stewart*, 2012 YKSC 75

Date: 20120914
Docket: S.C. No. 11-01509
11-01510
Registry: Whitehorse

BETWEEN:

HER MAJESTY THE QUEEN

AND:

KENNETH NORMAN STEWART

Before: Mr. Justice R. Veale

Appearances:
Terri Nguyen — Counsel for the Crown
Malcolm Campbell — Counsel for the Defence

REASONS FOR SENTENCING
DELIVERED FROM THE BENCH

[1] VEALE J. (Oral): Kenneth Stewart has pled guilty to two counts of sexual assault. The first assault took place on August 21, 2010. He was arrested and released on November 16, 2010, on an undertaking to a Peace Officer. The second sexual assault took place on November 17, 2010, and it was committed on a 13-year-old girl shortly after his release on the undertaking.

[2] Mr. Stewart is a member of a Yukon First Nation and when the conviction on the two counts was entered on July 18, 2012, Mr. Stewart had been in pretrial custody since November 18, 2010. His counsel at that time wished to proceed to sentencing

immediately without the benefit of a Pre-Sentence Report and more particularly what is known as a *Gladue* Report, which I find to be a requirement that cannot be short-circuited in any way. I am going to quote from the recent decision of *R. v. Ipeelee,* 2012 SCC 13, at para. 60:

> …Counsel have a duty to bring that individualized information before the court in every case, unless the offender expressly waives his right to have it considered. In current practice, it appears that case-specific information is often brought before the court by way of a *Gladue* report, which is a form of pre-sentence report tailored to the specific circumstances of Aboriginal offenders. Bringing such information to the attention of the judge in a comprehensive and timely manner is helpful to all parties at a sentencing hearing for an Aboriginal offender, as it is indispensable to a judge in fulfilling his duties under s. 718.2(e) of the *Criminal Code*.

[3] As a result, I directed that a *Gladue* Report be prepared and adjourned the sentencing to September 12, 2012. That request apparently caused some difficulty because not all probation officers are trained to do the *Gladue* aspect, which is to address the Aboriginal person's background specifically to determine the role that systemic issues, past colonial practices or residential school may have played. For the Yukon this is a capacity and training issue that must be addressed immediately because it simply is not fair or just to have lengthy delays to prepare a *Gladue* Report which may benefit the First Nation person who is in pretrial custody. Counsel, of course, should be alive to this requirement and ensure well in advance of a sentencing hearing that a *Gladue* Report will be prepared.

[4] Having said that, although the Probation Officer who has prepared this report has candidly indicated that he did not receive *Gladue* training, I am satisfied that the Pre-

Sentence Report filed in this case has provided the necessary *Gladue* material in terms of the First Nation, the history of the residential school factor, and the particular circumstances of Mr. Stewart. This Pre-Sentence Report is a *Gladue* Report.

Agreed Statement of Facts

[5] Counsel have provided an agreed statement of facts which have been read into the record and admitted by Mr. Stewart, who is 33 years old. I will repeat the agreed statement of facts.

The incident of August 21, 2010:

1. On August 20, 2010, the [Victim], age nineteen, met up with some friends and relatives, and began consuming vodka at various locations in the town of Watson Lake, in the Yukon Territory.
2. Eventually the [Victim] ended up at the Campbell Block apartment building.
3. The [Victim] has difficulty with her memory as a result of excessive consumption of alcohol, but next recalled being at the corner of 9th Street and Finlayson Avenue where she met the Accused, and asked him to walk her home.
4. The [Victim] then blacked out again.
5. When the [Victim] came to, she was lying on her back and the Accused was on top of her. Her pants and underwear were down to her knees.
6. The [Victim] recalls crying and telling the Accused to stop what he was doing.

7. She felt something in her vagina, and then blacked out again.
8. Her encounter with the Accused took place in the early morning hours of August 21, 2010.
9. The [Victim] attended the Nursing Station where she described pain and discomfort from her tampon having been pushed up inside her. The examinations showed no other signs of physical trauma.
10. While at the Nursing Station, a Sexual Assault Kit was performed, but while the results found some male DNA, it was not enough to allow for matches to be made.
11. The Accused was arrested on November 16, 2010, and was released on an Undertaking to a Peace Officer that day.

The incident of November 17, 2010:

12. On November 17, 2010, the [Victim], age 13, left school and went to the home of [a person] in Watson Lake, in the Yukon Territory.
13. A number of people were present at that residence and were drinking, including the [Victim] and the Accused.
14. The [Victim] was intoxicated, but remembers dancing.
15. Another person at the residence [...] observed the Accused and the [Victim] “making out”.
16. [He] told the Accused that the [Victim] was fifteen and that he should leave her alone, and then told the Accused to leave.
17. The Accused and the [Victim] left the residence together.

18. The [Victim] remembers going to the Tags Convenience Store, but then blacked out.

19. When the [Victim] came to, she was standing in a bathroom stall at the Watson Lake Recreation Centre with the Accused holding her against the stall wall. The Accused told the [Victim] not to tell anyone what had just happened.

20. The [Victim] attended the hospital.

21. The [Victim] does not remember anything that happened in the bathroom stall, but her jacket was pulled to the side and the zipper to her pants was down.

22. A Sexual Assault Kit was done on the [Victim] at the hospital.

23. The [Victim]'s DNA was found on the Accused's underwear. No male DNA was detected from the vaginal and rectal swabs taken from the [Victim]. No signs of physical trauma were observed during the examination.

24. On November 18, 2010, the Accused was arrested and confessed to having consumed alcohol throughout the evening.

25. The Accused has been in custody since November 18, 2010.

Victim Impact Statement

[6] The 13-year-old [Victim] has provided a written Victim Impact Statement which was read out by Crown counsel at the sentencing hearing. As I will indicate later, Mr. Stewart, although he has pled guilty, remains in considerable denial about his responsibility for the sexual assaults and the impact his sexually assaultive behaviour

has had on his [Victim]s. I will read the 13-year-old [Victim]'s statement as it relates to her emotional injuries:

> Since the assault I have not been the same person. I used to be outgoing and happy and trusting. Now I hardly go out, don't trust anyone and I am angry all the time. I feel guilt and shame for the things I shouldn't because Kenny Stewart stole my self-esteem and self-worth the day he raped me. I am coping with what he did to me all the time. It has affected all my relationships, my schooling, my personal life, and my social life. I need counseling and even that is hard for me to do. I hate that I have to try to learn to live with what he did to me - I am too young to deal with this kind of stuff. Even going to the doctor for checkups and my pap test has turned to be a painful, emotional thing for me.
>
> I still have nightmares. I can't find safety from my memories, all of a sudden the assault just fills my head. I get sad and depressed and really scared. I find I drink to [sic] much now. I have tried to comit [sic] suicide 2 times since he assaulted me. It makes me, me [sic] not care about life as much anymore because I am not myself in my own life. Everything is different.
>
> I am too young to have to figure this all out. I am sad and depressed and I just hurt all the time.

Kenneth Stewart

[7] Kenneth Stewart is 33 years old. He is single now but has two children ages 13 and 11. The children were raised essentially by his mother, as well as their own mother, who now has custody of them in another First Nation community. Mr. Stewart has a Grade 11 education and has provided a resume. It indicates that he has taken a number of training courses since he left high school, to assist him in the construction and mining trades. He also has a work history but at the time of these offences was on social assistance. He is confident in his work skills and work ethic and says he can work anywhere in the world. He also does not have a fixed residential address and couch surfs, all of which suggests that his alcohol addiction plays a greater negative role in his

life than he is prepared to admit.

[8] Both his parents went to residential school and have suffered from that experience. Their parents drank when they were removed from their families. His parents also drank, and there is no question that this has affected their ability to raise Kenneth Stewart, leaving him in a situation where he had to leave home for short periods of time because of drinking and violence. Both his parents lost their culture and Mr. Stewart is in a similar situation. Although he was fortunate in not having to attend residential school, he clearly suffers from the intergenerational effects. In spite of this background, his parents have worked together as carpenters and are proud to have built their own home.

[9] Kenneth Stewart frankly admits that he is conceited and there is no doubt that he has a high opinion of himself and what he can accomplish. Unfortunately, this also leads to a certain amount of social isolation and a tendency to hold things in and not talk about things.

[10] There are two additional concerns arising out of the Pre-Sentence Report. Mr. Stewart acknowledges that he has an alcohol problem and in my view anyone who drinks to blackout level has a serious alcohol problem that interferes with family and work and needs to be addressed. Mr. Stewart says his alcohol problem only hurts him. That is a very serious misunderstanding of the impact that excessive alcohol consumption has had on his former spouse, his children, his parents, and the two [Victim]s of his sexual assault.

[11] Your substance abuse, Mr. Stewart, affects everyone; however, you are the only person that can do something about it. Unfortunately, although you took the substance abuse management program while in custody, the facilitator made two remarks:

1. That you defended your drinking, saying that you enjoyed it too much to stop.
2. The facilitator does not believe the program will have much effect on you until you are ready to face your drinking on a more serious level.

The problem is your drinking, and if you do not do something about it, you are going to be back in court sooner than later.

[12] The second issue that concerns me is that you do not respect women. You have said, as a reason for stopping drinking, that women are evil and you cannot trust them. You even go as far as saying your [Victim]s have problems and they are not your type. The reality, Mr. Stewart, is that you have committed the criminal offences of sexual assault and women cannot trust you. That is why we are here today. The real tragedy is that you have spent 22 months in jail and you are still a committed alcoholic and an untreated sexual offender with very little self-understanding of who you are and how your conduct damages others and your community.

[13] Having said that, Mr. Stewart, you have the capacity to be a good dad and be a positive force in your community, but it is going to take a lot of work and a lot of personal commitment.

[14] There are a number of aggravating factors in these offences:

1. The sexual assault of November 17, 2010, involves a 13-year-old girl.
2. The November 17 sexual assault was committed while Mr. Stewart was released on an undertaking for the August 21, 2010 offence.
3. You were told that the victim was underage and to leave her alone.
4. The August 21 victim had asked you to take her home.
5. The victim on August 21, 2010, had a tampon painfully pushed up inside her as a result of your sexual assault.

[15] In mitigation, you have pled guilty and avoided the necessity of either [Victim] testifying and that is to your credit, and, secondly, you have no criminal record. However, the Court must consider, pursuant to s. 718.01, that the principles of denunciation and deterrence are given primary consideration as the November 17 offence involves a person under 18 years of age. At the same time, pursuant to s. 718.2(e) the court must consider all available sanctions other than imprisonment with particular attention to your Aboriginal heritage. In this regard it is worth repeating the meaning of s. 718.2(e) as recently stated in *R.* v. *Ipeelee, supra,* at para. 60:

> Courts have, at times, been hesitant to take judicial notice of the systemic and background factors affecting Aboriginal people in Canadian society . . . . To be clear, courts must take judicial notice of such matters as the history of colonialism, displacement, and residential schools and how that history continues to translate into lower educational attainment, lower incomes, higher unemployment, higher rates of substance abuse and suicide, and of course higher levels of incarceration for Aboriginal peoples. These matters, on their own, do not necessarily justify a different sentence for Aboriginal offenders. Rather, they provide the necessary *context* for understanding and evaluating the case-specific information presented by counsel. (emphases already added)

[16] Both counsel in this case have agreed that Mr. Stewart is entitled to a credit of 1.5 times his pretrial incarceration of 22 months, so that his time served is the same as though he was serving after conviction. In my view, Mr. Stewart's Aboriginal circumstances justify this. So he is credited with 33 months of time served.

[17] The Crown submits that the sentence for Mr. Stewart should be four years, less a credit for the 33 months, to reflect the appropriate denunciation and deterrence. This would require Mr. Stewart to serve a further 15 months. The Crown also acknowledges that defence counsel in their submission is within the range based on the *Gladue* factors mentioned above. The Crown also submits that a two to three-year period of probation be put in place to ensure protection of the community and treatment for Mr. Stewart.

[18] The defence position is that the time served of 33 months is the appropriate period of incarceration, followed by a two-year period of probation, reflecting the fact that you have been incarcerated for a lengthy period of pretrial time. This would also give weight to the guilty plea and the lack of criminal record and your difficult upbringing.

[19] As stated by Gower J. in *R.* v. *White*, 2008 YKSC 34 at para. 87, the discussion of the range of sentences for sexual assaults is "a shorthand way of describing what the courts in Yukon have done in the [past]" but recognizing that greater or lesser sentences will be justified where the context and circumstances warrant.

[20] The comment of Madam Justice Southin in *R.* v. *Bernier,* 2003 BCCA 134, 177 C.C.C. (3d) 137, at para. 42 is also appropriate:

> A "range" does not preclude on grounds of deterrence or denunciation or the gravity of the particular offence a sentence

> different from that “range”. Nor does a “range” preclude a lesser sentence if some special circumstances warrant such a course. … The “range” is not conclusive.

The range suggested in *R.* v. *White,* cited above, was from one year at the lower end to penitentiary time of 30 months at the higher end.

[21] I repeat that the tragedy in this case is that Mr. Stewart has been born into a lifestyle of serious alcohol addiction, drinking to the point of blacking out, with a mindset that it only affects him. Nothing could be further from the truth as these [Victim]s can attest to the lifetime of psychological damage that Mr. Stewart has caused. Even more tragic is the fact that Mr. Stewart has absolutely no self-awareness of the damage he has done to these women.

[22] The factors that must be balanced in this case are on the one hand the guilty plea and the fact that he has no criminal record, and the intergenerational effects from residential school. On the other hand, there are two separate offences with the November 17, 2010 offence against a 13-year-old girl, who has clearly been traumatized by it. Further, it was committed while Mr. Stewart was on release after committing the first offence on August 21, 2010.

[23] In my view, the appropriate sentence is 15 months on the August 21, 2010 sexual assault, and 23 months on the offence of November 17, 2010. I will give him the credit for 33 months pretrial time served, which leaves a sentence of five months to be served.

[24] As I indicated, Mr. Stewart remains an untreated sexual offender and I order a period of three years of probation following his release. The Crown and defence had differing views on the necessity for a curfew and whether he should be required to remain in the jurisdiction. This probation order will be a significant burden on Mr. Stewart and I do not find a curfew to be appropriate; however, I am of the view that he remain in the jurisdiction as the treatment services for substance abuse and sexual offenders are available in the Yukon. He may seek the written permission of the Probation Officer should the Probation Officer be satisfied that a change in jurisdiction is appropriate.

[25] Terms of the probation order are as follows:

1. That you keep the peace and be of good behaviour; appear before the Court when required to do so by the Court; that you 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;
2. That you remain within the Yukon Territory unless you obtain written permission from your Probation Officer or the Court;
3. That you report to a Probation Officer immediately upon your release from custody;
4. That you reside as approved by your Probation Officer and not change that residence without the prior written permission of your Probation Officer;
5. That you abstain absolutely from the possession or consumption of alcohol and controlled drugs or substances, except in accordance with a

prescription given to you by a qualified medical practioner; and that you provide a sample of your breath and urine for the purposes of analysis upon demand by a Peace Officer who has reason to believe that you may have failed to comply with this condition;

6. That you not attend any bar, tavern, off-sales, or other commercial premises whose primary purpose is the sale of alcohol;
7. That you take such alcohol assessment and sexual offender risk assessment counselling or programming as directed by your Probation Officer, and I note that you have given the Court your consent to attend and complete a residential treatment program as directed by your Probation Officer;
8. That you have no contact, directly or indirectly, or communication in any way with the Victims. and that you not attend at their residence, school, or place of employment;
9. That you make reasonable efforts to find and maintain suitable employment and provide your Probation Officer with all necessary details concerning your efforts;
10. That you provide your Probation Officer with consent to release information with regard to your participation in any programming, counselling, or educational activities that you have been directed to do so pursuant to this probation order.

[26] I also order that you provide a DNA sample pursuant to s. 487.051 of the *Criminal Code*; and that you comply with the *Sex Offender Information Registration Act*,

S.C. 2004, c. 10, pursuant to ss. 490.12 and .13 for a period ending 10 years from the date of this order, which is September 14, 2012.

[27] Are there any further matters arising? I should indicate to you that there are some outstanding counts which I do not think have been dealt with.

[28] MS. NGUYEN: Those will be stayed.

[29] THE COURT: Thank you.

[30] MS. NGUYEN: Sir, just to be clear the 15 month and 23 month sentences are obviously consecutive to one another?

[31] THE COURT: Yes.

[32] MS. NGUYEN: The remand credit should apply to the August offence first?

[33] THE COURT: Yes.

[34] Ms. Nguyen: Thank you. And the probation order will apply to both offences?

[35] THE COURT: Yes.

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VEALE J.