

Citation: *R. v. Abdullahi*, 2010 YKTC 76

Date: 20100225
Docket: 09-00237
Registry: Whitehorse

IN THE TERRITORIAL COURT OF YUKON

Before: His Honour Judge Cozens

REGINA

v.

MOHAMED MOHAMED ABDULLAHI

Publication of information that could disclose the identity of the complainant has been prohibited by court order pursuant to section 486.4 of the *Criminal Code*.

Appearances:
Bonnie Macdonald
André Roothman

Counsel for the Crown
Counsel for the Defence

REASONS FOR SENTENCING

[1] COZENS T.C.J. (Oral): Mohamed Abdullahi was convicted after trial on a charge that he committed a sexual assault on K.L., contrary to s. 271 of the *Criminal Code*.

[2] In brief, I found that Mr. Abdullahi, who was driving his marked taxi, picked up K.L. at the bottom of Two Mile Hill as she was walking home in the early morning hours of June 20, 2009. Shortly after picking her up, Mr. Abdullahi turned his taxi away from the direction of K.L.'s nearby residence. He grabbed her hand and put it on his upper thigh and groin area. She pulled her hand away but Mr. Abdullahi again grabbed it

and put it on his exposed penis. K.L. removed her hand and asked Mr. Abdullahi to drive her to her friend's residence in Porter Creek, which he did.

[3] The RCMP were contacted shortly afterwards and Mr. Abdullahi was subsequently arrested and charged.

Positions of Counsel

[4] Crown counsel characterized this offence, while serious, as being toward the "lower end of the scale of intrusion on the complainant's sexual integrity". Crown counsel is seeking a sentence of 90 days custody to be followed by nine months of probation and is opposed to the 90-day sentence being served conditionally in the community. She submits that the overriding principles in this case are denunciation and general and specific deterrence, all of which require a period of incarceration.

[5] Defence counsel submits that a conditional discharge would be an appropriate disposition. Crown counsel is, of course, opposed to a conditional discharge being ordered.

Aggravating Factors

Breach of Trust

[6] S. 718.2(a)(iii) of the *Criminal Code* sets out as an aggravating factor evidence that the offender, in committing the offence, abused a position of trust or authority in relation to the victim. Mr. Abdullahi was a taxi driver and K.L. his passenger. In order to operate a taxi in the City of Whitehorse owners and operators must comply with

certain requirements. People who travel in taxis place themselves, to some extent, in the care of the taxi driver and do so based upon an expectation that the driver meets certain criteria and will safely transport them to their destination. There is a responsibility placed on the taxi driver and a concomitant trust relationship created between the taxi driver and his or her passenger. In this case, Mr. Abdullahi breached that trust relationship in committing the offence. Section 718.2(a)(iii) contemplates a variety of trust relationships of varying degrees. Certainly the trust relationship in this case is not the same as that of a parent to a child, or even an employer to an employee that he or she directly supervises, but it remains a trust relationship nonetheless.

[7] I have considered that K.L. was 19 years old at the time of the offence, that she was upset and crying over circumstances in her personal life when Mr. Abdullahi picked her up, and that she had been drinking. While these place the sexual assault in context, I do not consider her to have been in the position of a vulnerable individual to the extent that she was particularly susceptible to being sexually assaulted in a way which would cause me to treat her personal circumstances as necessarily constituting an aggravating factor in considering the conduct of Mr. Abdullahi.

Mitigating Factors

[8] The sexual assault was brief and, as was conceded by Crown as stated above, towards the lower end of the scale of sexual assaults. There is a broad scope of conduct by an offender which can constitute the offence of sexual assault contrary to s. 271 of the *Code*. This can be seen in the range of sentences available, which can be from a discharge to a maximum sentence of ten years. The Crown has elected to

proceed by summary conviction in this case, which limits the maximum sentence to 18 months.

[9] There was no violence beyond that which is, of course, inherent in the sexual assault itself. In other words, no additional violence. K.L. was at all times, although confined in a moving taxi with no reasonable means of escape, on a public roadway and was not taken to a secluded location. Mr. Abdullahi took K.L. to her friend's residence as requested with no further inappropriate conduct.

[10] Mr. Abdullahi took this case to trial and continues to deny having committed the offence of sexual assault. I say this only to point out that as such, I do not have the mitigating factors of a guilty plea or an expression of remorse. That said, these factors are not in any way aggravating. Mr. Abdullahi was entitled, as is any person charged with a criminal offence, to take the allegation against him to trial and to maintain his position even after being convicted. However, the consequence is simply that any mitigation that would arise from a guilty plea and/or an expression of remorse is not available in this case.

Circumstances of Mr. Abdullahi

[11] Mr. Abdullahi is 49 years of age. He comes before the Court with no criminal record. A pre-sentence report was prepared. This pre-sentence report is generally very favourable in its portrayal of Mr. Abdullahi.

[12] As a child he and his family became refugees from his Ethiopian birthplace and moved to Somalia. His family provided him a fairly stable environment to grow up in,

notwithstanding some of the civil unrest in his countries of residence. He possesses a university degree in public administration, which was obtained in Saudi Arabia. He emigrated to Canada approximately 19 years ago at the age of 30, and he became a Canadian citizen approximately three years later.

[13] Mr. Abdullahi is currently married with a one-year-old child. His wife and child reside in Yemen. He provides financial support for them and he hopes to sponsor them to come and live in Canada. He has a 24-year-old daughter from an earlier marriage who resides in Edmonton. His daughter provided information to the author of the pre-sentence report. She is aware that her father has been convicted of the charge of sexual assault and is supportive of him.

[14] Mr. Abdullahi does not consume alcohol or take illicit drugs. He has a very supportive community of friends in Whitehorse, several of whom have been present in Court to demonstrate their support and whom have provided letters of support for my consideration in sentencing. The Criminogenic Risk Assessment Mr. Abdullahi was administered in the preparation of the pre-sentence report classifies his risk of reoffending as being in the very low range with a nine percent possibility of reoffending, which the author of the pre-sentence report describes as being the lowest level of risk to reoffend. I note that this percentage is much lower than that generally seen in pre-sentence reports prepared for the sentencing of offenders in the Yukon. The author of the pre-sentence report is supportive of a community disposition for Mr. Abdullahi.

[15] Mr. Abdullahi has incurred negative consequences as a result of his conviction. He has lost his ability to be employed as a taxi driver in Whitehorse and thus his major

source of income, although he has been able to provide dispatch services. Whitehorse is a relatively small community when compared to some of the larger southern cities and the notoriety associated with this conviction are more attachable to Mr. Abdullahi as an identifiable individual, in part due to his status as a member of a visible minority. An unfortunate side effect of Mr. Abdullahi's conviction has been to cast suspicion on other cab drivers who are also members of a visible minority.

Law and Analysis

[16] The principles of sentencing are set out in s. 718, which reads:

The fundamental purpose of sentencing is to contribute, along with crime prevention initiatives, to respect for the law and the maintenance of a just, peaceful and safe society by imposing just sanctions that have one or more of the following objectives:

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

[17] Section 718.1 goes on to say that:

A sentence must be proportionate to the gravity of the offence and the degree of responsibility of the offender.

[18] There are other sentencing principles set out in s. 718.2, which requires that a Court consider whether:

- (a) a sentence should be increased or reduced to account for any relevant aggravating or mitigating circumstances relating to the offence or the offender...

These include the aforementioned point regarding evidence that the offender, in committing the offence, abused a position of trust or authority in relation to the victim.

It also stipulates that:

- (d) an offender should not be deprived of liberty, if less restrictive sanctions may be appropriate in the circumstances, and
- (e) all available sanctions other than imprisonment that are reasonable in the circumstances should be considered for all offenders,...

[19] The conditional discharge option is set out in s. 730(1) of the *Code* and reads as follows:

Where an accused, other than an organization, pleads guilty to or is found guilty of an offence, other than an offence for which a minimum punishment is prescribed by law or an offence punishable by imprisonment for fourteen years or for life, the court before which the accused appears may, if it considers it to be in the best interests of the accused and not contrary to the public interest, instead of convicting the accused, by order direct that the accused be discharged absolutely or on the conditions prescribed in a probation order...

[20] The conditional discharge option was analyzed by Justice Vertes in the case of *R. v. Shortt*, 2002 NWTSC 47, which was an appeal of a lower court decision heard in the Northwest Territories Supreme Court. This, of course, was not a case that related to a sexual assault but to a domestic assault and, to some extent, dealt with the breach of trust situation that arises in the context of a domestic relationship. That is, of course,

not the same as the case here. In para. 20 of the *Shortt* case, Justice Vertes discussed the principles of s. 718 and noted that s. 718 of the *Code* states that:

The purpose of sentencing... is to contribute to a just, peaceful and safe society by the imposition of sanctions that have, among others, the objectives of denunciation, deterrence, rehabilitation, reparation to victims, and the promotion of a sense of responsibility in offenders,

and considers further the application of s. 718.1 and 718.2(e). He then goes on to elaborate on the principle of restraint and the judicious use of the discharge option in paras. 22 and 23, stating that:

The principle of restraint animates the discharge option in the overall sentencing regime. ...Its objective was always to enable courts to relieve against both the fact and stigma of a criminal conviction.

Referring to an article by Professor Manson, he quotes him, where he stated:

It is easy to understand the rationale for a discharge in the abstract. Situations will arise, especially for young (first) offenders, where the life-long stigma and potential adverse consequences of a conviction are not warranted by the conduct in question. However, other cases move beyond the abstract and present real and immediate consequences which will flow directly from a criminal conviction,

and noting a point made by Clayton Ruby in his book on sentencing:

Implicit in the provision of this alternative disposition is a recognition by Parliament that a criminal conviction as such may be a form of punishment and that punishment is neither appropriate, nor necessary, in some instances. On occasion, very harsh effects upon an accused person's life can result from the acquisition of a criminal record and this legislation is one way of relieving this consequence in appropriate cases.

Justice Vertes goes on to state that:

All this convinces me that the fundamental aim of the discharge option is the avoidance of a criminal record. As a general proposition, discharges are granted in circumstances where the nature of the offence, and the age, character and circumstances of the offender, are such that the recording of a criminal record would be disproportionate and unjust in relation to the offence.

He goes on to review case law, stating that:

24. Numerous cases have interpreted the criteria set out in s. 730(1) of the Code....They generally agree that the first condition, that a discharge would be in the best interests of the accused, pre-supposes that the accused is a person of good character without previous convictions, that it is not necessary to deter the accused from further offences or to rehabilitate him, and that the entry of a conviction may have significant adverse repercussions. The second condition, that the grant of a discharge not be contrary to the public interest, addresses the public interest in the deterrence of others. The cases also note that, while a need for general deterrence is normally inconsistent with the grant of a discharge, it does not preclude the judicious use of the discharge option. This option, however, should not be applied routinely to any particular offence (nor is it precluded from use in respect of any offence other than an offence for which a minimum punishment is prescribed by law or an offence punishable by imprisonment for 14 years or for life.) Finally, the discharge option should not be resorted to as an alternative to probation or a suspended sentence.

25. The cases also emphasize that the power to grant a discharge should be used sparingly. This was the view expressed in *MacFarlane* (supra) at para. 13:

It is to be borne in mind that one of the strongest deterrents to criminal activity, particularly in the case of those who have no records, is the fear of the acquisition of a criminal record.

26. The MacFarlane judgment also noted that offences involving violence are generally not amenable to the granting of a discharge....This is not meant to create an offence-specific presumption that takes a certain type of offence out of consideration for a discharge (something much criticized by the Supreme Court of Canada in the context of conditional sentences in R. v. Proulx, [2000] 1 S.C.R. 61); it is simply a recognition that a greater emphasis on the need for general deterrence will usually mean that a discharge is contrary to the public interest.

1. The best interests of the accused

[21] With respect to the first part of the test, I find that a conditional discharge would be in Mr. Abdullahi's best interests. He currently has no criminal record. He travels outside of Canada and a criminal record for this offence could make such travel difficult. He is currently attempting to sponsor his wife and child to come to Canada and a criminal conviction for sexual assault will, in all likelihood, make this a much more difficult, if not ultimately impossible, process.

[22] I consider the circumstances of Mr. Abdullahi's such that a criminal conviction would have, and quoting from para. 32 of *Shortt*, "...negative consequences which go beyond those that are incurred by every person convicted of a crime..."

2. The public interest

[23] A discharge must not be contrary to the public interest. The public interest goes beyond the principle of general deterrence and speaks to the need to maintain the public's confidence in the justice system. As Justice Vertes put it in para. 34 of the *Shortt* decision:

From this perspective the knowledge that certain type of criminal behaviour will be sanctioned by way of a criminal record not only acts as a deterrent to others but also vindicates public respect for the administration of justice. The question to ask here is would the ordinary, reasonable, fair-minded member of society, informed about the circumstances of the case and the relevant principles of sentencing, believe that the recording of a conviction is required to maintain public confidence in the administration of justice.

Given the offence that Mr. Abdullahi has been convicted of and the circumstances in which the offence occurred, in considering both the aggravating and mitigating factors, as well as the personal circumstances of Mr. Abdullahi, I find that the granting of a discharge would be an unfit disposition and would undermine the public's confidence in the administration of justice. The need for denunciation of the conduct and general deterrence require that there be a criminal conviction for the commission of this offence. The actual and/or potential negative impact upon Mr. Abdullahi, including that associated with travel and his ability to become a sponsor for his wife and child, do not override the public interest in a conviction being imposed for this offence. This does not mean that I consider the negative impacts, actual and potential, to be of no significance; they simply cannot displace the public interest on the facts of this case.

3. Fit sentence

[24] I find that a jail sentence is warranted and I agree with Crown counsel that a period of 90 days is appropriate. I must now consider the appropriateness of a conditional sentence. The conditional sentence option is set out in s. 742.1 of the *Code* which states that:

If a person is convicted of an offence, other than a serious personal injury offence as defined in section 752, a terrorism offence or a criminal organization offence prosecuted by way of indictment for which the maximum term of imprisonment is ten years or more or an offence punishable by a minimum term of imprisonment, and the court imposes a sentence of imprisonment of less than two years and is satisfied that the service of the sentence in the community would not endanger the safety of the community and would be consistent with the fundamental purpose and principles of sentencing set out in sections 718 to 718.2, the court may, for the purpose of supervising the offender's behaviour in the community, order that the offender serve the sentence in the community, subject to the offender's compliance with the conditions imposed under section 742.3.

[25] The law makes it clear that the principles of denunciation and general deterrence can be met by the imposition of a conditional sentence. It is true that the more violent an offence, and sexual assault by its very nature is a violent offence, the less likely it is that a conditional sentence will be appropriate. As stated in the case of *R. v. R.A.R.*, [2000] 1 S.C.R. 163, which cited from *R. v. Proulx*, [2000] 1 S.C.R. 61:

Where punitive objectives such as denunciation and deterrence are particularly pressing, such as cases in which there are aggravating circumstances, incarceration will generally be the preferable sanction. This may be so notwithstanding the fact that restorative goals might be achieved by a conditional sentence.

[26] In *R.A.R.* the court substituted a period of incarceration in overturning the decision of a lower court to impose a conditional sentence on the basis that the offender had abused his position of authority as an employer combined with the demeaning and violent nature of the sexual assault and two further assaults. The objectives of denunciation and deterrence were considered to be particularly pressing. I note that the facts in *R.A.R.* were more aggravated than in the case before me.

[27] In considering the appropriateness of a conditional sentence, I consider the Crown decision in this case to proceed by summary conviction, a decision which was appropriate on these facts, the circumstances of the sexual assault and the length of the sentence recommended. In assessing the extent and degree of the violence, I also consider the positive pre-sentence report and the noted extremely low risk of re-offending that Mr. Abdullahi has been found to pose when I look at the risk to the safety of the public. I am satisfied that the imposition of a conditional sentence, which allows Mr. Abdullahi to serve his sentence in the community, will not endanger the safety of the community and is in accord with the fundamental purpose and principles of sentencing.

[28] There will be a three month conditional sentence order. The terms of the order will be the statutory terms:

1. Keep the peace and be of good behaviour;
2. Appear before the Court when required to do so by the Court;
3. Report to a Supervisor immediately and thereafter when required by the Supervisor and in the manner directed by the Supervisor;
4. Remain within the Yukon Territory unless you have written permission from your Supervisor or the Court;
5. Notify the Supervisor or the Court in advance of any change of name or address and promptly notify the Court or Supervisor of any change of employment or occupation;
6. Reside as approved by your Supervisor and not change that residence without the prior written permission of your Supervisor;

7. At all times you are to remain within your place of residence except for the purposes of employment, education, counselling and attendance at a place of worship as permitted in writing in advance by the Conditional Sentence Supervisor, or on other occasions as are permitted in writing in advance by the Conditional Sentence Supervisor. You shall carry a copy of this permission with you at all times when you are outside of your residence for any purpose;
8. You must present yourself at the door or answer the telephone during reasonable hours for curfew checks. Failure to do so will be a presumptive breach of this condition;
9. You are to 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 practitioner;
10. You are not to attend any bar, tavern, off-sales or other commercial premises whose primary purpose is the sale of alcohol;
11. You are to take such assessment, counselling and programming as directed by your Supervisor;
12. You are to have no contact, directly or indirectly, or communication in any way with K.L.
13. You are to provide your Supervisor with consents to release information with regard to your participation in any programming or counselling that you have been directed to do pursuant to this conditional sentence order;
14. You are not to operate a taxi within the City of Whitehorse.

[29] The conditional sentence order will be followed by a probation order. The probation order will be for nine months. The statutory terms will be:

1. Keep the peace and be of good behaviour;
2. Appear before the Court when required to do so by the Court;
3. Notify the Court or Probation Officer in advance of any change of name or address and promptly notify the Court or Probation Officer of any change of employment or occupation;
4. Report to a Probation Officer immediately upon completion of your conditional sentence and thereafter when and in the manner directed by the Probation Officer;
5. Reside as approved by your Probation Officer and not change that residence without the prior written permission of your Probation Officer;
6. Take such assessment, counselling and programming as directed by your Probation Officer;
7. Have no contact, directly or indirectly, or communication in any way with K.L.;
8. Provide your Probation Officer with consents to release information with regard to your participation in any programming or counselling that you have been directed to do pursuant to this probation order.

[30] There will be a *Sex Offender Information Registry Act* order under s. 490.012. The order shall be for ten years. Defence counsel's opposition to the imposition of this order was almost entirely based upon his submission that such an order would subvert

the benefit of a discharge, were I to have imposed one. While there may have been merit to that argument, as I have declined to accept the submission for a discharge, I consider the basis for the objection to no longer exist. The *SOIRA* order is not particularly onerous and the use to which the information is made available is very limited. I find that Mr. Abdullahi does not meet the necessary criteria for an exception under s. 490.012(4). The order does not have a grossly disproportionate effect upon Mr. Abdullahi in comparison to the public interest in protecting society through the effective investigation of crimes of a sexual nature.

[31] There will be an order that Mr. Abdullahi provide a sample of his DNA as this is a primary designated offence.

[32] I decline to make a s. 110 firearms order.

[33] As I understand from the pre-sentence report, he is working to some extent. There will be a victim fine surcharge of \$50. Time to pay?

[34] MR. ROOTHMAN: Thirty days.

[35] THE COURT: Thirty days time to pay. Anything from either counsel?

[36] MR. ROOTHMAN: Nothing from me.

[37] MS. MACDONALD: No.