COURT OF APPEAL FOR THE YUKON TERRITORY

Citation: ***R. v. Boya***,
YKCA 15

Date: 20061023
Docket: YU0557

Between:

Regina

Respondent

And

Clarence Donald Boya

Appellant

Before: The Honourable Madam Justice Prowse
The Honourable Mr. Justice Mackenzie
The Honourable Mr. Justice Low

Oral Reasons for Judgment

K.D. Pakkari — Counsel for the Appellant

M.W. Cozens — Counsel for the Respondent

Place and Date: Vancouver, British Columbia
23 October 2006

[1] **PROWSE, J.A.**: On December 7, 2005, following a trial, Mr. Boya was convicted of two counts of sexual assault relating to events which occurred on July 30, 2005, in Watson Lake in the Yukon. In addition, Mr. Boya pleaded guilty to one count of common assault which occurred on February 15, 2005.

[2] On February 17, 2006, Mr. Boya was sentenced to 21 months on each count of sexual assault, to be served concurrently, and one month consecutive for the common assault. He was given eight months credit for time spent in custody pending trial and sentencing with the result that, as of the date of sentencing, he had 14 months left to serve. He was also placed on two years probation subject to terms.

[3] Mr. Boya is seeking leave to appeal sentence and, if leave is granted, is seeking to have his sentence reduced.

[4] Mr. Boya was released on bail pending appeal on June 23, 2006, after serving 4 months and 7 days of his custodial sentence. Since then, he has been residing at the Yukon Adult Resource Centre located in Whitehorse and operated by the Salvation Army. The Court has been presented with a post-sentence report relating to his progress since that time.

[5] By way of brief background, the two sexual assaults occurred at the home of Mr. Boya's sister and her partner. A number of other people were also staying there, including the two complainants. During the night, Mr. Boya, who was extremely intoxicated, sexually assaulted his 14-year-old niece, who was also extremely intoxicated, by climbing on to the couch where she was sleeping and pulling down

her pants. At that time, he was interrupted by his sister's partner, who pulled him off and berated him.

[6] Later that same evening, Mr. Boya sexually assaulted the second victim, who awoke to find Mr. Boya on her bed fondling her breasts.

[7] The earlier common assault was perpetrated on a man who had allowed Mr. Boya to stay at his home, but then asked him to leave because he was drinking alcohol. A scuffle ensued and the male was pulled to the floor and received some bruises and scratches. No exception was taken to the sentence with respect to that count.

[8] At the sentencing hearing, the Crown sought a sentence of 18-24 months imprisonment and Mr. Boya's counsel suggested a sentence of between 13-14 months.

[9] The sentencing judge stated that the mitigating factors in the case were Mr. Boya's difficult family history, including being sexually abused by an uncle, his addiction to alcohol, and the fact that the sexual assaults were brief and did not result in intercourse. In that regard, he observed that "Mr. Boya's discovery prevented matters from proceeding further than they did."

[10] The sentencing judge also referred to the aggravating factors at para. 7 of his judgment:

> The catalogue of aggravating factors is somewhat longer. Firstly, Mr. Boya has a very extensive criminal record, and that record includes 12 prior assault convictions and numerous process offences. However, it must be noted that none of the assault convictions are for

> sexual assault. Secondly, it is an aggravating factor that Mr. Boya was on probation when these offences were committed. Third, there is the obvious aggravating factor that there were two separate sexual assaults on the one night. Fourth, it is equally obvious that Mr. Boya was not dissuaded from the second assault by his discovery in the midst of the first. Fifth, one of the victims was only 14 years of age and was a relative of the offender. Sixth, both victims were incapacitated, one by alcohol consumption and the other by serious illness.

[11] The sentencing judge noted that this type of offence was "all too common in this Territory" and that there was a need for denunciation and deterrence. He noted that he had been referred to various authorities by the parties, including ***R. v. Gladue***, [1999] 1 S.C.R. 688. He made particular reference to the decision of the Yukon Territory Court of Appeal in ***R. v. G.C.S.***, [1998] Y.J. No. 77 (QL), in finding that the range of sentence suggested by the Crown was appropriate, particularly given the fact that there were two sexual offences in this case.

[12] On appeal, counsel for Mr. Boya takes issue with two findings of the sentencing judge. The first is the sentencing judge's statement that Mr. Boya pulled down the victim's pants and underpants and was lying on top of her. In that regard, there is no evidence as to whether the victim was wearing underpants, but in my view it was certainly a reasonable inference from the facts that Mr. Boya pulled her pants down to her ankles and that he must have been lying on top of her, or in extremely intimate proximity to her, since she was lying on her back on a couch.

[13] Mr. Boya's counsel also takes exception to the trial judge's comment that Mr. Boya was interrupted in the assaults before he could do anything more. This is a simple statement of fact since there is no indication that Mr. Boya had ceased his assaultive behaviour at the time he was interrupted. Nor am I persuaded that the

sentencing judge sentenced Mr. Boya for anything other than the sexual assaults he actually committed. With respect, I do not find the objections of counsel in this regard to be meritorious, or to be significant factors in relation to the question of whether the sentence was fit.

[14] Counsel for Mr. Boya's primary submission is that the sentence imposed is out of the range of similar sentences for similarly situated offenders. In that regard, he has referred to other cases from the Yukon in which sentences in the range of 12 months were imposed for arguably similar offences. He also notes that the ***R. v. G.C.S.*** decision referred to by the sentencing judge involved sexual intercourse without the complainant's consent, for which the individual was sentenced to imprisonment for two years less a day (reduced on appeal to 16 months imprisonment). In short, he submits that the circumstances there were more serious and the sentence shorter.

[15] The Crown, on the other hand, distinguishes the authorities relied on by Mr. Boya as involving either more mitigating factors or fewer aggravating factors. He emphasizes the same aggravating factors which were referred to by the sentencing judge as making this sentence fit.

[16] This Court can only interfere with the sentence imposed by a sentencing judge if it is satisfied that the sentence imposed was demonstrably unfit or, in a case like this, if the sentence was a substantial and marked departure from sentences customarily imposed for similar offenders committing similar crimes. See in that regard, ***R. v. Shropshire,*** [1995] 4 S.C.R. 227 and ***R. v. C.A.M.***, [1996] 1 S.C.R. 500. The Court must also bear in mind that the range of sentence is only one of

several factors which must be taken into account, both in sentencing an offender and in determining whether the sentence is fit. (In that regard, I refer to the decision of this Court in ***R. v. Bernier*** (2003), 179 B.C.A.C. 218, 2003 BCCA 134.)

[17] In this case, I would be more inclined to the view that this sentence was unfit if there had been only one sexual assault. Here, there were two, both on vulnerable victims, one of whom was 14 years of age and intoxicated and a relative of Mr. Boya, the other of whom was ill. Mr. Boya was reprimanded by his sister's partner after the first assault, but that did not deter him from seeking sexual gratification elsewhere. While his record indicates that his offending is alcohol-related, it is apparent that he has been unable to get his alcohol problem under control. His criminal record is extensive and continuous since 1985, and involves many assaults.

[18] The post-sentence report provided to the court indicates that Mr. Boya is a personable individual with a good work ethic and the ability to function well when he is sober. Since being released on bail he has regularly attended AA and sex offender counselling. He is making progress. He has managed to stay sober for approximately four months which, with his history of alcohol abuse, is a long time. It appears that he will not have great difficulty finding employment as a labourer when his sentence is complete.

[19] On the other hand, the pre-sentence report which was before the sentencing judge indicated that Mr. Boya was at a moderate to high risk of re-offending. His re-offending is directly related to his ability to remain abstinent. In my opinion, four months of sobriety in the life of a man who has had an alcohol problem for over two

decades is not enough to cast doubt on the original sentence imposed if it was fit at the time it was imposed. In my opinion, it was. Although it appears from the cases to which we have been referred that it may have been at the high end of the range for sexual assaults which did not involve intercourse, this is offset to a considerable degree by the fact of two assaults and the other aggravating features which were canvassed to by the sentencing judge in the passage from his reasons to which I have earlier referred.

[20] In the result, I would grant leave to appeal, but dismiss the appeal.

[21] **MACKENZIE, J.A.**: I agree.

[22] **LOW, J.A.**: I agree.

[23] **PROWSE, J.A.**: Leave to appeal is granted; the appeal is dismissed.

(discussion with counsel)

[24] **PROWSE, J.A.**: For greater clarity, there will be a direction of this Court that Mr. Boya be returned to Whitehorse Correctional Centre forthwith to serve the remainder of his sentence.

"The Honourable Madam Justice Prowse"