Citation: *R. v. Butler*, 2014 YKTC 67

Date: 20140909
Docket: 13-00195C
Registry: Whitehorse

IN THE TERRITORIAL COURT OF YUKON
Before Her Honour Chief Judge Ruddy

REGINA

v.

RANDY WADE BUTLER

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

Appearances:
Keith D. Parkkari — Counsel for the Crown
Gordon R. Coffin — Counsel for the Defence

REASONS FOR SENTENCE

[1] RUDDY C.J. (Oral): Randy Wade Butler is before for me for sentencing on an offence, contrary to s. 151 of the *Criminal Code*, committed on November 28, 2013, the charge commonly referred to as "sexual interference". The matter was originally set for trial but Mr. Butler changed his plea to guilty on one count of the four-count Information on the date of trial. A Pre-Sentence Report was requested and the matter adjourned before me for sentencing.

[2] The factual background to this offence dates back to June 2012. The complainant, O.K., and her cousin were returning to their grandmother's home after a

night of partying when they encountered Mr. Butler. He invited them to his apartment, where he offered them cocaine, with each of them consuming to varying degrees. Mr. Butler asked the girls if they were 16 or 17 yet. Ms. K. advised that she was 16 years old and her cousin was 17. In reality, she was only 14 years of age and her cousin was 15.

[3] Mr. Butler had apparently been acquainted with Ms. K. through family connections when she was nine years of age. He, nonetheless, appears to have accepted her assertion as to age at face value and made no further inquiries.

[4] For the purposes of these proceedings it is important to note that Mr. Butler is an adult, who is nine years older than Ms. K.

[5] Ms. K. advised the police that she and Mr. Butler had sex on two occasions on that first evening. She apparently told her cousin that she did not want to have sex again after the first time. She appears to have viewed the intercourse as consensual on the basis she did not say no or tell Mr. Butler to stop, a disturbing attitude which suggests that we have fallen woefully short in our efforts to send a clear message that silence alone cannot and should not ever be interpreted as consent. Rather, all parties share the burden of ensuring that they have clear consent from any prospective sexual partner before engaging in sexual activity.

[6] Ms. K.'s apparent belief that silence equals consent also underscores the very reason why someone under the age of 16 cannot in law consent to sexual activity with an adult. It is a law which recognizes the particular vulnerability of young persons who, from a developmental perspective, are ill-equipped to process and to understand the

myriad of complex emotions and implications associated with engaging in sexual activity and who consequently are at a higher risk of sexual victimization.

[7] In the months following June 2012, Mr. Butler and Ms. K. are said to have had sex “once in a while”.

[8] In April 2013, Ms. K.'s grandmother made a complaint to the RCMP, which led to an investigation and, ultimately, to charges being laid against Mr. Butler. With the charges and consequent disclosure, Mr. Butler was on clear notice that Ms. K. was underage and could not therefore legally consent to sexual activity with him. He was placed on a recognizance with conditions, including that he have no contact with Ms. K.

[9] That recognizance was in effect on November 28, 2013, when Mr. Butler, again, had sex with Ms. K. This incident forms the basis of the charge to which he has pleaded guilty. While the specific details of the sexual encounter were not provided, I am advised, and it is admitted by Mr. Butler, that the incident involved full intercourse.

[10] Ms. K. has declined to provide a Victim Impact Statement, though it is my hope that the conviction and sentence in this case will help her and other young girls in similar circumstances to understand that what happened in this case was a serious criminal offence.

[11] In terms of disposition, this is a case in which there is a fixed sentencing range. With the recent amendments to the *Code*, there is a mandatory minimum penalty of 90 days. With the Crown's re-election to proceed summarily, the maximum possible penalty is 18 months.

[12] Crown submits that a sentence of 14 to 15 months followed by a two-year term of probation would be appropriate. Three cases have been filed in support of this contention.

[13] In *R. v. Young*, 2010 CanLII 70370 (NL PC), Gorman J. of the Newfoundland and Labrador Provincial Court imposed a sentence of 14 months' imprisonment plus two years' probation with respect to so-called "consensual intercourse" between a 22-year-old adult male and a 13-year-old girl. The unemployed offender had a dysfunctional childhood and was described as having "low cognitive ability". While a youth record was alluded to, it was inadmissible per s. 119(2) of the *Youth Criminal Act*.

[14] In *R. v. Craig*, 2013 BCSC 2098, Bracken J. of the B.C. Supreme Court imposed a sentence of 15 months' imprisonment plus two years' probation in relation to a similar incident also involving a 22-year-old male and a 13-year-old girl. The offender was described as "low functioning" with a history of anxiety and depression. He was fully employed at the time of sentencing and had expressed remorse for his actions. There was a limited and unrelated criminal record.

[15] In *R. v. Louie*, 2014 BCSC 552, Fitch J. of the B.C. Supreme Court imposed a sentence of 18 months' imprisonment plus three years' probation in relation to three instances of sexual intercourse between a 32-year-old Aboriginal male and a 14-year-old girl. The offender had a dysfunctional childhood and a long-standing alcohol problem for which he had engaged in programming. He also had a recent prior conviction for sexual assault against a 17-year-old.

[16] Defence submits that a sentence of three to six months would be appropriate. While no cases were filed by the defence, counsel points to the extensive summary of applicable case law included in the *Young* decision, noting that several cases relied on by the defence in that case involved sentences in the two to six month range, including several conditional sentences, although it is conceded that, pursuant to subsequent amendments to the *Criminal Code*, a conditional sentence is no longer an available sentencing option.

[17] Two of the cases referred to in *Young*, *R. v. C.R.C.* 2004 NLSCTD 106, and *R. v. W.H.*, 2010 NLTD 62, are clearly distinguishable on the basis of the facts. Each involved offences of sexual touching rather than intercourse and are therefore, while still serious offences, objectively less serious than the conduct complained of in this case.

[18] Two other cases, *R. v. R.H.W.*, (1999) 176 Nfld. & P.E.I.R. 70 (Nfld. S.C.); and *R. v. McIvor*, (1992) 78 Man.R. (2d) 207 (C.A.), involved sentences of four months; the former to be served conditionally and the latter, straight jail. However, the actual decisions themselves are very short and offer little in the way of guidance. I would also note that both are older decisions from the 1990s, predating many of the amendments to the *Criminal Code* intended to reflect the change in social norms in relation to the seriousness with which we, as a society, view adults taking sexual advantage of vulnerable young teens and children.

[19] In my view, these decisions have little application to the case at bar. This is not to say that a sentence at the lower end of the range would never be appropriate for similar offences where significant mitigating factors are present. It is simply to say that

the absence of same in this case would militate against a sentence at the lower end of the range, in my view.

[20] Mr. Butler comes before the Court with a prior criminal record, which includes three convictions for offences of violence, including spousal assault; assault causing bodily harm in 2012; and a related conviction for sexual interference, though it should be noted that this conviction dates back to 2004 when Mr. Butler, himself, was a youth.

[21] Progress reports with respect to his attendance in the sex offender treatment program do not appear to have been positive, indicating that he was suspended from the program on two occasions for failing to attend and for being under the influence. In addition, the report suggests that Mr. Butler engaged in victim blaming, asserting that the victim in the offence, was highly instrumental in initiating his sexual involvement with her.

[22] Additional convictions on his record include impaired driving related convictions and convictions for failing to comply with court orders. He has been sentenced to only limited periods in custody and also appears to have successfully complied with conditional sentence orders in the past.

[23] On a positive note, Mr. Butler does have the support of his family. His spouse, Ms. Leiske, with whom he shares two young children, has provided a letter of support, noting her reliance on him to provide for their young family.

[24] Mr. Butler speaks in positive terms of his relationship with Ms. Leiske. She was the victim in his 2012 conviction for spousal assault. Mr. Butler did successfully

complete the Domestic Violence Treatment Option Program ("DVTO") and appears to have derived some benefit from it, though it is notable that in discussing the incident and his experience in DVTO, he advised his Probation Officer that Ms. Leiske assaulted him first and he responded by hitting her.

[25] Mr. Butler's uncle has also provided a letter of support, confirming that Mr. Butler has full-time employment with his uncle's contracting company. His uncle notes his own history of struggles with alcoholism and his willingness to assist Mr. Butler by introducing him to AA.

[26] I have had the benefit of a detailed Pre-Sentence Report with an attached sex offender risk needs assessment. Neither can be described as particularly favourable. Of particular concern in processing the information provided in the reports, several Probation Officers who have had involvement with Mr. Butler raise serious questions about his truthfulness and note that he appears to be willing only to provide information of a positive nature about his circumstances.

[27] Mr. Butler describes a relatively uneventful childhood with supportive parents, who he says spoiled him. This would appear to be contradicted by his mother's reference to the way in which his father's alcohol use impacted his treatment of the children, particularly Mr. Butler. It is further contradicted by the fact that Family and Children Services received some 16 reports in relation to the family over a period of several years.

[28] In terms of education, prior Pre-Sentence Reports describe a pattern of aggression at school, followed by Mr. Butler dropping out in Grade 10. To his credit, he did obtain his GED through Yukon College.

[29] In terms of employment, Mr. Butler notes he has held numerous jobs and asserts that he has never been fired, only leaving a position to go to a better one. File records contradict this assertion, noting that he was fired from one of his earliest jobs for failing to show up to work.

[30] Mr. Butler admits to a problem with substance abuse dating back to his teens and notes that he attends AA once per week. He maintains that he was highly under the influence at the time of this offence and was generally acting irresponsibly as a result of pressures he was experiencing in his life, including the birth of his first child.

[31] He and his mother also describe a head injury Mr. Butler suffered in a motor vehicle accident and raise questions about the impact of the injury on his behaviour in this instance. Mr. Butler was unwilling to sign consents to release information to allow for further information to be obtained with respect to the injury. He is certainly entitled to take this position. However, this places me in the position of being unable to determine whether the impact of the injury offers any insight into his behaviour and potential for rehabilitation. I would also note that reports suggest that similar problems with impulsivity were exhibited by Mr. Butler before the accident as well as after.

[32] An overall assessment of the two reports suggests that rehabilitative prospects in this particular instance are limited. While Mr. Butler advised me that he is more than willing to attend programming, as he puts it, "if it is necessary", the reports suggest that

Mr. Butler is resistant to programming and has little insight into the issues which continue to bring him into conflict with the law.

[33] Furthermore, Mr. Butler exhibits a distressing tendency to blame the victims of his offences for his behaviour. He has done so in relation to his three prior convictions for violent offences. The same is true in this instance. While he says he recognizes the seriousness of the offence and he wants his guilty plea to show for something, he also advised the Probation Officer that he felt he was lured into the situation by Ms. K, who would always text and call him.

[34] Considering both the circumstances of this offence and of this offender, the challenge for me is to determine where the appropriate sentence in this case falls within the established range. In reaching my determination, I am mindful of the principles of sentencing of which denunciation and deterrence are clearly the dominant applicable principles. Having noted the minimal rehabilitative prospects, the principle of rehabilitation has limited application.

[35] This is a case in which the aggravating factors clearly outweigh the mitigating ones. I have had particular regard to the following aggravating factors:

- Mr. Butler was given clear notice prior to this incident that Ms. K. was under the age of 16 and could not legally consent to sexual activity;

- Mr. Butler was on a recognizance with a condition that he have no contact with Ms. K. at the time of the offence;

- Mr. Butler has a prior related conviction, although I do note that the conviction is dated and occurred when Mr. Butler was only 15 years of age; and

- Mr. Butler exhibits little real remorse and displays a clear tendency to blame his victims for his actions.

[36] The mitigating factors of note include:

- Mr. Butler's relatively young age;

- The fact that he has entered a guilty plea, while not until the date of trial, his plea is mitigating to the extent that Ms. K. was not required to testify; and

- The Pre-Sentence Report references an earlier Pre-Sentence Report in which Mr. Butler was noted to be the victim of a very similar offence at the hands of a 24-year-old adult female when he was only 14 years old, an incident which precedes both this and his prior related conviction. While he exhibits little insight into his own behaviour, this incident does offer at least some explanation as to why this kind of behaviour might be normalized in Mr. Butler's mind.

[37] This leaves the question of how I ought to view Ms. K.'s role in the incidents. Defence counsel suggests that her apparent consent is a relevant factor for consideration in mitigation, as this case does not include the elements of forced trickery or grooming behaviour one might otherwise expect to see in these types of cases.

[38] Crown points to para. 84 in the *Young* case in which Gorman J. takes the position that it is inappropriate to consider the willingness of the victim to participate in offences of this nature, noting that:

> …In this country, we have come to accept that children are incapable of providing consent to sexual activity with adults and we must not lose sight of this nor characterize such offences as anything else but what they are: the sexual abuse of a child. …

[39] In my view, consent simply cannot be considered as mitigating in cases of this nature. At best, it can be considered a distinguishing factor signifying the absence of aggravating features, such as the use of force or violence, but it is not itself a mitigating factor. A child simply cannot consent to sexual activity with an adult, a fact Mr. Butler was placed on clear notice of well before this incident occurred.

[40] That being said, having considered all of the information before me, I find there is little to distinguish the facts of this case from those in the *Young* and *Craig* cases. Noting the aggravating factors referred to earlier, I am satisfied that a sentence of 15 months is appropriate in all of the circumstances. Mr. Butler is entitled to credit at 1.5:1 for the time he has spent in remand, which I calculate at 25 days. Accordingly, the remaining sentence to be served will be 14 months plus five days.

[41] At all times while in custody, Mr. Butler will be subject to an order pursuant to s. 743.21 that he have no contact with Ms. K, her cousin, and/or her grandmother. For the purposes of preparing the order, the full names are set out in the Pre-Sentence Report.

[42] The custodial term will be followed by a term of probation for a period of two years on the following terms and conditions, Mr. Butler, that you:

1. Keep the peace and be of good behaviour;

2. Appear before the court when required to do so by the court;

3. Notify your Probation Officer in advance of any change of name or address, and promptly notify your Probation Officer of any change of employment or occupation;

4. Report to your Probation Officer immediately upon your release from custody and thereafter, when and in the manner directed by your Probation Officer;

5. Remain in the Yukon Territory unless you have the prior written permission of your Probation Officer;

6. Abstain absolutely from the possession or consumption of alcohol and/or controlled drugs or substances except in accordance with a prescription given to you by a qualified medical practitioner;

7. Not attend any bar, tavern, off sales, or other commercial premises whose primary purpose is the sale of alcohol;

8. Have no contact directly or indirectly or communication in any way with Ms. K., her grandmother, and/or her cousin;

9. Not attend at or within 50 metres of any known residence of Ms. K, her grandmother, and/or her cousin;

10. Reside as approved, abide by the rules of the residence, and not change your residence without the prior written permission of your Probation Officer;

11. Attend and actively participate in all assessment and counselling programs as directed by your Probation Officer, and complete them to the satisfaction of your Probation Officer, for the following issues:

    alcohol abuse,

    substance abuse,

    sex offender programming,

    and provide consents to release information to your Probation Officer regarding your participation in any program you have been directed to do pursuant to this condition;

12. Participate in such educational or life skills programming as directed by your Probation Officer and provide your Probation Officer with consents to release information in relation to your participation in any programs you have been directed to do pursuant to this undertaking.

[43] Crown has sought several ancillary orders. Defence has not raised any objection with respect to the application of several of the orders, many of which are mandatory in

nature, nor would there appear to be anything in the circumstances of this case to suggest that they ought not apply.

[44] Accordingly, as this is a primary designated offence, there will be an order that Mr. Butler provide such samples of his blood as are necessary for DNA testing and banking.

[45] Mr. Butler will also be required to comply with the provisions of the *Sex Offender Information Registration Act,* S.C. 2004, c. 10, for a period of 10 years.

[46] Crown has also sought two discretionary orders, the first being a firearms prohibition under s. 110. In the circumstances, I am not persuaded that this order is necessary or appropriate. There is nothing in the facts of this offence or in Mr. Butler's history to suggest that there are any concerns in this regard.

[47] The second discretionary order is a prohibition pursuant to s. 161 of the *Criminal Code*, a prohibition which is entirely warranted, in my view, based on both this offence and Mr. Butler's prior related conviction. Accordingly, there will be an order prohibiting Mr. Butler from attending any public park, school ground, daycare centre, public swimming pool, playground, skating rink, community centre, or recreational centre where persons under the age of 16 years are present or might reasonably be expected to be present. Mr. Butler is also prohibited from seeking, obtaining, or continuing any employment, whether or not the employment is remunerated, or being a volunteer in a capacity that involves being in a position of trust or authority towards persons under the age of 16 years. This order will be for a period of five years.

[48] I should note in relation to the conditions for the probation order, given the lengthy custodial term, I expressly declined to include the curfew that was suggested.

[49] The additional condition that I did not include is the no contact with persons under 16, as I opted to apply the s. 161 prohibition instead.

[50] Regarding the victim fine surcharge, as the election is summary, it will be $100 payable forthwith.

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RUDDY C.J.T.C.