

Citation: *R. v. Clark*, 2010 YKTC 61

Date: 20100608
Docket: 07-00242N
07-00242O
07-00242P
09-00410
Registry: Whitehorse

IN THE TERRITORIAL COURT OF YUKON

Before: His Honour Judge Faulkner

REGINA

v.

JOHNNY JAMES CLARK

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

Appearances:
Bonnie Macdonald
Kimberly Hawkins

Counsel for the Crown
Counsel for the Defence

REASONS FOR SENTENCING

[1] FAULKNER T.C.J. (Oral): Johnny James Clark was convicted after trial on a charge of sexual assault.

[2] The defendant and the victim L.S. were at the apartment of another man, R.D. After an evening of drinking, R.D. went to bed leaving the accused and L.S. in the living room. Later Mr. D. awoke to find the accused engaged in sexual intercourse with L.S., who was passed out or unconscious.

[3] Mr. Clark, though only being in his early 30's, has 48 prior criminal convictions. About the best that can be said for him is that none of them are for sexual assault.

[4] Unfortunately, sexual assaults of this kind, which involve taking advantage of comatose victims, are very prevalent in this jurisdiction. That being the case, coupled with, of course, the reprehensible features of such offences, means that the sentence of the Court must seek to both denounce and deter such conduct.

[5] Having regard to the recent decision of Mr. Justice Gower in *R. v. White*, 2008 YKSC 34, read together with the earlier decision of the Yukon Court of Appeal in *R. v. G.C.S.*, [1998] Y.J. No. 77, I am satisfied that the range of sentence for this offence would fall within the 12 to 30 month range.

[6] In this case, given that the accused did succeed in having sexual intercourse with his victim, given that he did not accept responsibility, given that he has a horrendous prior criminal record, and given that, according to the pre-sentence report, he is at serious risk to re-offend; Mr. Clark, I think, must inevitably find himself toward the upper end of this range. In fact, the Crown sought a sentence of 30 months, although less credit for time served, which is substantial.

[7] Really, the only questions before me in sentencing in this case are what account should be made of the fact that Mr. Clark is an Aboriginal offender and, particularly, what account should be made of the fact that he is an offender who is afflicted with the effects of pre-natal exposure to alcohol. Unfortunately, at the end of the day, there is really no satisfactory answer to such questions, since taking account of the circumstances of the offender in mitigation runs headlong into the equally pressing need

to denounce and deter conduct of this kind, and to provide safety and protection for the public from those who are at high risk to re-offend. The best that the Court can do is to balance and weigh those factors, and I would be the last to pretend that it is a perfect or precise process.

[8] Of the cases to which I was referred, those which really bore most similarity to the present case were the *White* case, to which I have already referred, and the recent decision of Judge Cozens of this Court in *R. v. Quash*, 2009 YKTC 54. Looking at those cases, I think I have to say that I would be hard pressed to find a substantial enough difference between the circumstances of this case and those to warrant a sentence at the very top end of the range, as is contended for by the Crown. *Quash*, in particular, was a FASD offender, whose offence was somewhat similar. It must also be noted that Mr. Quash did have a prior record for sexual assault, but, on the other hand, he had a much less extensive criminal record and had the benefit of a guilty plea. Effectively, Mr. Quash received a sentence of 24 months. Mr. White received a sentence of 26 months.

[9] Having regard to the particular circumstances of this offender and this offence, Mr. Clark is sentenced to a period of imprisonment of 26 months. I allow credit for time served of 14 months, leaving a remanet of one year yet to be served.

[10] He also entered a plea of guilty to a breach of an undertaking charge. That undertaking involved the consumption of alcohol, I think the day after his release. With respect to that matter, the sentence should be 30 days consecutive, but again, less credit for the remainder of the time served of 15 days.

[11] Following his release from imprisonment, he will be subject to a probation order for a period of three years. I will return to the terms of that.

[12] The victim fine surcharge will be waived.

[13] There will also be an order prohibiting from having in his possession any firearms, ammunition, explosive substances or any other items more compendiously described in s. 109 of the *Criminal Code* for a period of ten years following his release from imprisonment.

[14] He will comply with the provisions of the *Sex Offender Information Registration Act* for a period of 20 years. He will provide samples of bodily substances for the purpose of DNA analysis and banking.

[15] The terms of the probation order will be the statutory terms and in addition thereto the following terms:

1. You are not to drink or do drugs;
2. You are not allowed to go to any bar or liquor store or off sales;
3. You cannot speak with L.S. or go to her house or anywhere where she is;
4. You must try to find and maintain employment;
5. You must meet with FASSY and the FASSY worker when you are told to;

[15] The remaining counts?

[16] MS. MACDONALD: Your Honour, before the Crown stays those, I wonder if there might be a condition that he report to a Probation Officer and reside as directed by a Probation Officer? There will be no one to tell him to speak to FASSY.

[17] THE COURT: That is right. It is not a statutory term, is it?

[18] MS. MACDONALD: Yes.

[19] THE COURT: All right.

6. Report to a Probation Officer upon your release from jail and thereafter as in the manner directed;

7. You will reside where directed by the Probation Officer.

[20] MS. MACDONALD: With respect to any counts where there has been no finding of guilt, the Crown enters a stay of proceedings.

[21] THE COURT: Thank you.

FAULKNER T.C.J.