

**IN THE TERRITORIAL COURT OF YUKON**  
Before: His Honour Judge Lilles

REGINA

v.

KYLE GORDON HENRY DICK

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

Appearances:  
Kevin MacGillivray  
Kim Hawkins

Counsel for the Crown  
Counsel for the Defence

**REASONS FOR SENTENCING**

[1] LILLES T.C.J. (Oral): Mr. Dick is a 28-year-old aboriginal man who has entered a guilty plea to a charge of sexual assault on a female, A.S., contrary to s. 271 of the *Criminal Code*. This offence took place on June 15, 2012. At the time, A.S. was 16 years old and Mr. Dick was 27 years old.

[2] Counsel filed an Agreed Statement of Facts. I have made some minor changes to protect the identity of the complainant. The facts are as follows:

1. On June 14, 2012 in the City of Whitehorse, Yukon, during the day the complainant, A.S., was babysitting at ... Ms. Gwen Gage's residence.

2. That evening, the Accused, Mr. Kyle Dick, and Ms. G. Gage arrived at Ms. G. Gage's residence.
3. Mr. Dick brought a 26 ounce bottle of vodka.
4. Mr. Dick, A.S., and Ms. G. Gage drank the bottle of vodka.
5. Ms. Ocean Gage and Ms. Natasha Tom, arrived at the house, but there was no more drinking.
6. Ms. G. Gage went to sleep in a bedroom, and Ms. O. Gage and Ms. Tom went to another bedroom.
7. Mr. Dick was 27 years of age, and A.S. was 16 years of age...
8. Both A.S. and Mr. Dick fell asleep on couches in the living room early in the morning of June 15, 2012.
9. A.S. awoke to find Mr. Dick having sex with her; she felt his penis inside of her vagina.
10. A.S. did not consent to the sexual contact with Mr. Dick and asked Mr. Dick to stop and he did.
11. Mr. Dick pulled up A.S.'s pants which were at her ankles, and then he pulled up his pants while she looked the other way.
12. A.S. went to the bathroom and began to cry, and Ms. O. Gage heard her crying and attended to her asking what happened at which time A.S. explained that Mr. Dick took advantage of her.
13. A.S. and Ms. O. Gage asked to Mr. Dick to leave the residence and he did.
14. A.S. had a shower and changed her clothes and then reported the assault

to her mother.

15. A.S. received medical treatment on June 15, 2012, and complained of soreness in her vagina.

16. Mr. Dick was arrested on June 15, 2012 and released that day by an officer in charge on a promise to appear and an undertaking with conditions that he have no contact with A.S. and the other witnesses, that he abstain from the possession and consumption of alcohol, and that he not attend any bars.

[3] Now, Mr. Dick was on these conditions for almost one-and-a-half years without any breach charges being laid. There is another important fact that should be stated at the outset because it provides context to submissions made by both counsel. Mr. Dick does not have a criminal record. This charge, albeit a serious charge, I should say, a very serious charge, is his first criminal conviction.

[4] I have the benefit of a Pre-Sentence Report prepared by Colleen Geddes, and a *Gladue* Report prepared by Mark Stevens. Both counsel filed relevant cases for my consideration.

[5] The Crown's position, stated at the outset, is that an appropriate disposition on these facts is 16 months custody followed by 18 to 24 months of probation. If a Conditional Sentence is imposed the custodial portion could be longer, to a maximum of 18 months, but still followed with a Probation Order. The Crown also acknowledged that Mr. Dick "is living with a legacy of colonialism, including residential schools."

[6] Ms. Hawkins, on behalf of Mr. Dick, urged me to consider a Conditional Sentence

Order. A Conditional Sentence Order is not precluded on these facts as the Crown has elected to proceed summarily.

### **Mr. Dick's Background**

[7] Louise Stewart and Gordon Dick are Kyle Dick's parents. Gordon Dick left the relationship when he was eight months old. Although Gordon lives in Ross River, Mr. Dick does not currently have a relationship with his father.

[8] As a single mother, Louise Stewart worked to support the family. Mr. Dick ended up in daycare at an early age. When he was one year old, Louise Stewart moved to Surrey, British Columbia, where she worked for the *Langley Times*. While there she met Ralph Shaw and they had a son, Nicholas. Kyle was about six or seven, and that was the first time he had had a father figure in his life. The family moved to Carmacks, Yukon when Kyle was eight, in part because Louise wanted to be closer to her elderly parents. At age 13, they moved to Whitehorse where Louise took a job at the *Yukon News*. The relationship with Mr. Shaw lasted ten years.

[9] Louise was raised primarily in Carmacks but did attend residential school at Yukon Hall in Whitehorse for two years. While many students of Yukon Hall have reported abuse, Louise reports that she had no problems. She also describes her childhood with her parents as "a really great childhood." She also reports that she liked school and did reasonably well academically. Her education enabled her to get jobs in British Columbia and Whitehorse in order to support her family. She was not as successful in her relationships. She had a short-term relationship with Gordon Dick, Kyle's father, and, as I mentioned, that was followed by a ten-year relationship with Mr.

Shaw. She currently is married to Tom Stewart.

[10] Mr. Dick graduated from Grade 12 when he was 18 years old, but does not think he has grade 12 skills. The PSR indicates he graduated from a “modified program.” He acknowledged that he was “on the slow side” and that they “just pushed me through.” Mr. Dick denies experiencing any abuse while a child. He said there was drinking in the home occasionally. His mother stopped drinking altogether four years ago. Discipline usually meant more chores or removal of his electronics and was not physical in nature. Overall, Mr. Dick states he had a happy childhood.

### **Alcohol and Drug Problems**

[11] Mr. Dick started experimenting with alcohol during a visit with his father and cousins in Ross River when he was about 15 years old. When his mother heard about his drinking she made him return home to Whitehorse. Nevertheless he continued drinking and hanging around with friends who drank. As a youth, he was detained by the police at least once and spent the night in the drunk tank. When he graduated from high school he got a variety of jobs but they did not last long, and I infer that was in part due to his drinking.

### **Family and Marital Situation**

[12] Mr. Dick was recently married to Cassandra Warville. They met in elementary school and moved in together six years ago. They have three children, aged six, three and one. Mr. Dick also has a stepson, Draven, who is eight years old.

[13] Alcohol is also a problem for Ms. Warville. She too has been drinking since she

was in her teens. She stopped drinking when she first became pregnant with Draven but started drinking again last year, she says because of the stress of parenting.

Mr. Dick says they both drank excessively during the time period around the assault.

[14] The excessive drinking resulted in an intervention by Family and Children's Services. Initially, it was in the form of supervision and intensive parenting supports, but because their drinking continued, the children were eventually apprehended in January 2013. Family and Children's Services indicate that after many months of programming, Mr. Dick and Ms. Warville were unable to make a change in their parenting.

### **Personal and Cognitive Issues**

[15] There are a number of clear indications that Mr. Dick has some cognitive/developmental issues. While he graduated from Grade 12, it was a modified program. When he went back to college to try upgrading he was unable to stay in the program. By his own admission, he sees himself as slow. His sporadic work history is consistent with alcohol abuse, as well as cognitive limitations. Family and Children's Services identified deficits in problem-solving skills and minimum insight into issues surrounding the apprehension of the children, attributable to both parents.

[16] Mr. Benoit, Mr. Dick's alcohol and drug counsellor, also notes that he appears to have some cognitive limitations.

### **Criminogenic Risk Assessments**

[17] Mr. Dick was assessed as a low risk for sexual violent reoffending. He was also assessed as requiring a medium level of supervision. His major risk factors are his

alcohol abuse, stress resulting from Family and Children's Services involvement with his children, and his relationship with his wife. He typically drinks to relieve stress. He is currently sober and attending counselling sessions with Mr. Benoit, his alcohol counsellor. He also has a job, and his mother, Louise, reports that this has had a dramatic impact on his self-esteem.

[18] The Pre-Sentence Report concludes that Mr. Dick is suitable for community supervision. As mentioned, he is at a low risk to reoffend, but he faces significant life challenges, as it appears that he has difficulty with cognition. A detailed functional assessment would identify weaknesses and areas of strength that could be built upon. While he has some very important family supports now, he is likely to need professional supports and interventions over the long term if he is to maintain his employment. If his employer is not aware of his limitations, a breakdown of that relationship is likely. He is likely to react by quitting his job and resorting to alcohol to deal with the stress.

[19] A detailed functional assessment will also help to define his future relationship with his family. His children are currently in care. Understanding his strengths and weaknesses may assist in providing specific supports that would allow Kyle and Cassandra to play a meaningful role in the lives of their children.

[20] The Pre-Sentence Report notes that Kyle will require long-term intervention and support in most areas of his life if it is determined that he has a cognitive disability:

...The first priority would be a functional assessment and develop a team of supports that will assist him in managing his life more successfully. A lengthy term of supervision is necessary. Mr. Dick will require assistance throughout his life, and if he can utilize community supervision and see it as

a support rather than a punishment he has the opportunity to recognize and utilize supports in the future far past his term of probation. ...

I have reproduced that paragraph because, in my opinion, it is very important and provides clear indication to Kyle of the direction that he should pursue.

### **The Law: Principles of Sentencing**

[21] Section 718 of the *Criminal Code* sets out the fundamental purpose of sentencing, which is to contribute to respect for the law and the maintenance of a just, peaceful and safe society. On the facts of this case, the most relevant objectives in sentencing Mr. Dick are denunciation, deterrence, rehabilitation and promoting a sense of responsibility and acknowledgement of the harm done.

[22] In addition, a sentence must be proportionate to the gravity of the offence and the degree of responsibility of the offender. In *R. v. Harper*, 2009 YKTC 18, I noted at para. 43 that:

The role of specific deterrence ... decreases in proportion to the severity of the offender's cognitive deficits.

[23] Although in this case I do not have a formal evaluation of Mr. Dick's cognitive deficits, there is substantial agreement among all the professionals who have been working with Mr. Dick that he does suffer from some significant deficits in cognition. Clearly, this is a mitigating factor.

[24] A number of aggravating factors, as defined in s. 718.2, are present in this case. The victim in this case was only 16 years old. She was passed out from consuming alcohol. She was a vulnerable victim. Although I did not receive a Victim Impact

Statement from her, I am prepared to take judicial notice of the profound effects on a woman's well-being which can result from a sexual assault. In *R. v. G.W.S.*, 2004 YKTC 5, para. 20, I stated:

...[T]ypical feelings of humiliation, degradation, guilt, shame, embarrassment, fear, and self-blame can result from the unwanted invasion of intimate privacy and the loss of control associated with sexual victimization. ...

[25] Because Mr. Dick is an aboriginal offender, s. 718.2(e) of the *Criminal Code*, which provides as follows, must be given particular attention:

All available sanctions other than imprisonment that are reasonable in the circumstances should be considered for all offenders, with particular attention to the circumstances of aboriginal offenders.

[26] Section 718.2(e) was interpreted by the Supreme Court of Canada in *R. v. Gladue*, [1999] 1 S.C.R. 688. The purpose of this section is to respond to the problem of over-incarceration and particularly to the more acute problem of the disproportionate incarceration of aboriginal peoples. The section highlights the importance of the principle of restorative justice, alongside more traditional sentencing principles when sentencing an aboriginal person. It requires that penal sanctions be a last resort in cases where no other individual or combined sanctions are appropriate.

[27] The Supreme Court refined the approach to be taken under s. 718.2(e) in *R. v. Wells*, 2000 SCC 10. This was a case involving a sexual assault on an unconscious woman by an aboriginal male. The Court stated at para. 40:

[T]he Court in no way intended to suggest that as a general rule, the greatest weight is to be given to principles of restorative justice, and less weight accorded to goals such as

denunciation and deterrence. Indeed, such a general rule would contradict the individual or case-by-case nature of the sentencing process which proceeds on the basis of inquiring whether, given the particular facts of the offence, the offender, the victim, and the community, the sentence is fit in the circumstances.

[28] Section 718.2(b) states that sentences “should be similar to [those] imposed on similar offenders for similar offences committed in similar circumstances. “

[29] In *R. v. White*, 2008 YKSC 34, Mr. Justice Gower reviewed 14 Yukon sexual assault cases which involved an offender having non-consensual intercourse with a sleeping or unconscious victim. In six of those cases, jail terms of 12 months plus probation were imposed. In two cases, there were 14 month jail terms plus probation, and another two cases involved 16 month jail terms plus probation. Three involved jail terms of two years less a day. In two cases, penitentiary sentences were imposed, one for two years and another for 30 months.

[30] In the result, the range of sentences was noted to be between 12 and 30 months incarceration, but because sentencing is inherently subjective and an individual process, ranges are merely guidelines. There are no mandatory minimum and maximum sentences. A range does not preclude a lesser or greater sentence as the circumstances warrant.

[31] There are a number of additional mitigating factors in this case. When the complainant woke up and told Mr. Dick to stop, he did. He accepted responsibility and entered a guilty plea, sparing the victim the ordeal of testifying and reliving the event. He has finally obtained employment, which has had a significant positive impact on his

self-esteem. He is now attending alcohol counselling on a regular basis. I have already mentioned that, at age 27, this is his first criminal conviction. I am satisfied that this assault was not premeditated. Mr. Dick has now been on conditions for almost a year and a half since his arrest, with no reported breaches.

[32] In all of the circumstances I find that a sentence of 16 months incarceration, followed by 18 months of probation would be a fit sentence.

[33] Mr. Dick's counsel has asked me to consider a conditional sentence based on the circumstances of this case. As I mentioned earlier, the Crown has elected to proceed summarily and thus a conditional sentence is not precluded.

[34] I am guided in part by the decision of the Supreme Court of Canada in *R. v. Proulx*, 2000 SCC 5. In that case, the Court confirmed that conditional sentences were introduced by Parliament to reduce the reliance on incarceration and to increase restorative justice principles in sentencing. I note that s. 718.1 of the *Criminal Code* requires a sentence to be proportionate to both the gravity of the offence and the degree of responsibility of the offender. This objective directs me to consider his cognitive deficits as a mitigating factor. Mr. Dick is a first-time offender. He is seeking professional assistance for his alcoholism. He has accepted responsibility for his actions. He has close family supports, and I see many of them here in court today.

[35] I am satisfied that serving his sentence in the community would not endanger the safety of the community and would be consistent with the purposes and principles of sentencing set out in s. 718 and s. 718.2 of the *Criminal Code*. By imposing a conditional sentence I am in no way intending to minimize the seriousness of this

offence, or its impact on his victim. While some consider a conditional sentence to be more lenient than an actual prison sentence, the conditions imposed will be both numerous and restrictive, but also rehabilitative. A wilful breach would probably result in significant jail time. The courts have consistently held that a conditional sentence has both denunciatory and deterrent aspects.

[36] I am now prepared to deal with the terms of the Conditional Sentence and the Probation Order. I know counsel want to participate in that process. What I am going to propose is that I run through the terms, and then ask counsel to react to them and comment and make suggestions on alterations. I am also using the file insert sheets that the court normally provides. So if you want to follow along, you will be able to do that.

[AFTER REVIEWING THE PROPOSED TERMS WITH COUNSEL, THE FOLLOWING ORDERS WERE MADE]

[37] So with respect to the 16 months Conditional Sentence of imprisonment, the statutory terms will apply.

1. Keep the peace and be of good behaviour and appear before the court when required to do so by the court;
2. Report to a Supervisor today and thereafter when required by the Supervisor and in the manner directed by the Supervisor;
3. Remain within the Yukon Territory unless you have written permission from your Supervisor;
4. Notify the Supervisor in advance of any change of name or address, and

promptly notify the Supervisor of any change of employment or occupation;

5. Reside at..., telephone..., or such other place as approved by your Supervisor, and not change that address without the prior written permission of your Supervisor;
6. For the first six months you are to abide by a curfew by remaining within your place of residence between the hours of 5:00 p.m. and 6:00 a.m. daily. For the remaining ten months, the curfew will be between the hours of 8:00 p.m. and 6:00 a.m., except with the written permission of your Supervisor, except in the actual presence of your mother, Louise Stewart, or another responsible adult approved by in advance by your Supervisor. 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;
7. You are to abstain absolutely from the possession or consumption of alcohol. You are to provide a sample of your breath 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;
8. You are not to attend any bar, tavern, off-sales or other commercial premises whose primary purpose is the sale of alcohol;
9. You are to take such alcohol assessment, counselling or programming as may be directed by your Supervisor;
10. You are to take such other assessment, including functional assessment,

- and counselling and programming as directed by your Supervisor;
11. You are to have no contact, directly or indirectly, or communicate in any way with the complainant, A.S.;
  12. Perform 50 hours of community service as directed by your Supervisor, provided any hours spent in counselling may, in the discretion of the Supervisor, count as community service hours;
  13. You are to make reasonable efforts to maintain and find suitable employment, and provide your Supervisor with all necessary details concerning your efforts;
  14. You are to provide your Supervisor with consents to release information with regard to your participation in any programming, counselling, employment or educational activities that you have been directed to do pursuant to this Conditional Sentence Order;
  15. You are to meet with the Social Worker or the Family Support Worker if they say you need to;
  16. You have to meet with a counsellor to talk about your relationship with Ms. Warville and learn healthy ways to deal with problems;
  17. You cannot hang out with any people that are drinking.

[38] Now, just before I hear from counsel, Kyle, what I have read out here is not a Probation Order. It sounds like a Probation Order but it is actually a custodial order which requires you to live in the community under these strict terms. If there is a wilful breach, unlike a Probation Order, you will be immediately arrested. You will be put in

jail and you face the prospect of serving the balance of this conditional sentence, which is 16 months, in custody.

[39] So the Probation Order very much follows the Conditional Sentence and the statutory terms will apply:

1. Keep the peace and be of good behaviour; appear before the Court when required to do so by the Court;
2. Notify your Probation Officer in advance of any change of name or address and promptly notify the Probation Officer of any changes of employment or occupation;
3. You are to remain within the Yukon Territory unless you have written permission from your Probation Officer or the Court;
4. You are to 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. You are to reside as approved by your Probation Officer and not change that residence without the prior permission of your Probation Officer;
6. You are to abstain absolutely from the possession or consumption of alcohol;
7. You are to take such alcohol assessment, counselling or programming as directed by your Probation Officer;
8. You are to take such other assessment, counselling and programming, including a functional assessment, as directed by your Probation Officer;

9. You are to have no contact directly or indirectly, or communication in any way with the complainant A.S.;
10. You are to make reasonable efforts to find and maintain suitable employment and provide your Probation Officer with all necessary details concerning your efforts;
11. You are to provide your Probation Officer with consents to release information with regard to your participation in any programming, counselling, employment or educational activities that you have been directed to do pursuant to this Probation Order.

[DISCUSSION RE FORMAL ORDERS AND GUIDELINES]

[40] THE COURT: Victim Fine Surcharge.

[41] MR. MACGILLIVRAY: There are three outstanding -- freestanding orders. One is a DNA order. It's a primary offence. The second is a discretionary firearms order. The Court is required to consider it but not necessarily required to render it. And then there's the Victim Fine Surcharge, and my sense is that -- I understand Mr. Dick has just recently taken employment. Nonetheless, I think the Victim Fine Surcharge is something that should be applied. I have no submission on the gun -- weapon prohibition.

[42] THE COURT: DNA.

[DISCUSSION RE CORRECTIONS MADE TO AGREED STATEMENT OF FACTS]

[43] MR. MACGILLIVRAY: So all that's left is the DNA order and the weapons prohibition.

[44] THE COURT: DNA order, Ms. Hawkins.

[45] MS. HAWKINS: No issue.

[46] THE COURT: Order will go. Firearms order, discretionary order? I should say, my starting point with respect to the firearms order, noting all of the mitigating factors that have been identified, and the fact this offence had nothing to do with weapons, I am not inclined to go in that direction.

[47] MS. HAWKINS: Your Honour, my understanding of Mr. Dick's situation, I don't understand him to be a regular hunter, but I think that, on balance, and the opportunities that may come to him sort of culturally versus the benefit of having a firearms prohibition in the circumstance.

[48] THE COURT: Does he own any firearms?

[49] THE ACCUSED: No.

[50] THE COURT: I am prepared not to make that order in the circumstances. He does not own any firearms. Secondly, no weapon of any kind used or threatened in this particular fact situation, and I have already referred to the fact that this is his first criminal conviction. I am satisfied that a firearms order need not be made at this time.

[51] MS. HAWKINS: But with respect to the Victim Fine Surcharge, the matter is one that obviously predates by quite a long period the recent changes to the *Criminal Code* with respect to Victim Fine Surcharges. He has spent a large amount of that time unemployed. He has recently become employed but it is part-time employment.

[52] THE COURT: I am aware of the family situation economically. If there was a hundred dollars I would rather it be spent on the children and the family rather than paying it into court. That will be waived.

[53] MS. HAWKINS: Thank you.

[54] THE COURT: Anything further?

[55] MR. MACGILLIVRAY: No, there is nothing further for the Crown.

[56] THE COURT: Thank you, Mr. MacGillivray. Ms. Hawkins, anything from you?

[57] MS. HAWKINS: Nothing, Your Honour.

[58] THE COURT: Thank you, counsel. This took a lot of time. I appreciate the work that you put into it, thank you.

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LILLES T.C.J.