

**IN THE SUPREME COURT OF THE YUKON TERRITORY**

BETWEEN:

HER MAJESTY THE QUEEN

AND:

JOHN DALE JOHNSON

ELIZABETH BELLEROSE

For the Crown

BRIAN BERESH

For the Defence

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**MEMORANDUM OF SENTENCE  
DELIVERED FROM THE BENCH**

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[1] VEALE J. (Oral): John Dale Johnson has been convicted of sexually assaulting a female person on June 27, 2000. The Crown seeks a term of incarceration of two to two and one-half years. The defence submits that a conditional sentence of 18 months is appropriate.

**CIRCUMSTANCES OF THE OFFENCE**

[2] Late in the evening, Barbara McLeod had been drinking and was intoxicated on Wood Street when she saw a red and gray truck pull up. She said Mr. Johnson waved her over. She asked for a ride to Riverdale and he said, "Jump in." She said

that he drove to Third Avenue and went along Third Avenue until he drove down to Second Avenue. Mr. Johnson asked her when was the last time she gave a blow job to a man or men. She became nervous and thought she would jump out at a stoplight, but the traffic lights were green.

[3] He drove across the Riverdale bridge and turned left onto the Hospital Road. She said to Mr. Johnson that she thought he was supposed to be driving her home. He turned left onto Long Lake Road and asked her when was the last time she had sex with a man. She said, "Last night." She said he got angry during this exchange and drove past some houses and started to speed. He drove to a secluded area past the power line poles and parked the truck. She took a sip of her beer and looked out the passenger window.

[4] The next thing she saw was Mr. Johnson with his pants down and penis erect on her side of the truck. He put her hand on his penis, hit her with an open hand, and forced her head down on his penis. She said he wanted her to give him a blow job. She said he slapped her on the left forehead until she put his penis all the way into her mouth. She said she didn't want to do it, but he forced her and slapped her until she did it right. She said she did it four times during the incident. She testified that between the second and third time she was sick and left the truck to urinate. She said he squatted in front of her to watch her urinate and tried to stick his penis in her mouth. He asked her if she wanted to do it outside or inside the truck. She said he asked her if she liked it in her mouth or the other way. She said she was afraid of being raped so she said, "We might as well finish this way." She got back into the

truck and drank some beer. He was in the same position and she was forced to give him a third and fourth blow job. He asked her if she liked it and when she didn't answer, he slapped her.

[5] I am satisfied beyond a reasonable doubt that these are the facts of this offence.

### **VICTIM IMPACT**

[6] The victim says that she was recovering from a previous head injury at the time of the incident. As a result of being slapped on the head in this sexual assault, she has had headaches and loss of memory.

[7] She has experienced nightmares and loss of sleep. She has feared for the safety of her daughter and sent her out of the territory. The victim no longer feels safe walking downtown in the day or night. She has suffered emotionally and been physically sick from the sexual assault.

### **THE OFFENDER**

[8] John Dale Johnson is a 51-year-old male Caucasian. He has lived in the Whitehorse area since he was 21 years old. He has no related criminal convictions. He was released on his own recognizance on June 27, 2000. Upon conviction on November 3, 2001, he was placed on more severe conditions amounting to house arrest on November 6, 2001 and remains on those conditions to this date.

[9] The delay in sentencing has occurred because I ordered a psychological assessment. However, Mr. Johnson obtained new counsel after conviction. Mr. Johnson did not participate in the psychological assessment as he intends to appeal his conviction and wishes to exercise his right to remain silent.

[10] Mr. Johnson lives with his spouse of 11 years. He completed a grade 12 education and has a number of post-secondary courses and training. His employment history has been steady up until 2000 when the mining industry went into a slump.

[11] He stopped drinking since 1983. He has used marijuana and cocaine, but has been drug-free, although he has had relapses in 2000 and 2001. There is no evidence that drugs or alcohol were factors in this sexual assault. He has filed 16 letters of good character, indicating that he has a support network. He has been supported throughout the court procedures by his spouse, both in the social and financial sense.

[12] He suffered a stroke in May of 2001, but it has not affected his functioning from my observation. No medical evidence was filed.

[13] On the Static 99 test, administered by the probation officer, he scored in the low range, meaning that he is a low risk to re-offend.

**AGGRAVATING FACTORS**

[14] The aggravating factors of the sexual assault are that he forced oral sex four times on the victim during a period of confinement. He slapped her several times with an open hand to force compliance. His victim has been severely traumatized.

**MITIGATING FACTORS**

[15] Mr. Johnson does not have any related record so he comes before the court as a first offender. He has met and complied with his bail conditions post charge and conviction. He has a good work record, family support and has cooperated with the police.

**DISCUSSION**

[16] The defence submits that this is an appropriate case for a conditional sentence. To do so, three conditions must be satisfied:

1. That the appropriate sentence of imprisonment is less than two years;
2. That the safety of the community would not be endangered;
3. That serving the sentence conditionally would be consistent with the fundamental purposes and principles of sentencing as set out in s. 718 to 718.2 of the *Criminal Code*, RS 1985, c. C-46.

[17] Crown counsel submits that a range of two to two-and-one-half years is

appropriate. This is a change from a previous suggestion by the Crown that she was not seeking penitentiary time. The defence suggests one to two years is appropriate.

I am of the view that this is a very serious sexual offence and that 22 months would be the appropriate time of imprisonment.

[18] It appears that the safety of the community is not endangered, as this has been an isolated incident and Mr. Johnson has complied with his bail conditions.

[19] However, I have difficulty with the third condition, which requires that a conditional sentence would be consistent with the fundamental purpose and principles of sentencing set out in s. 718 to 718.2 of the *Criminal Code*. In *R. v. Wells*, [2000] 1 S.C.R. 207, Iacobucci J. stated at paragraph 40:

However, the scope of s. 718.2(e), as it applies to all offenders, restricts the adoption of alternatives to incarceration to those sanctions that are “reasonable in the circumstances”. Again, as was expressly stated in *Gladue*, the 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.

[20] Because the offender is exercising his right to silence, I am unable to address the restorative and rehabilitative aspects of sentencing in any depth. However, I am of the view that denunciation and deterrence would not be met by a conditional sentence in these circumstances. In this case, Mr. Johnson took advantage of a

vulnerable woman who was intoxicated and requesting a ride home. The offence involved violence, aspects of confinement and repeated sexual assaults. It was a brutal offence and must be answered by adequate deterrence and denunciation.

[21] Taking all these factors into consideration, I sentence you to 22 months of imprisonment. I have taken into consideration your post conviction bail restrictions.

[22] When your sentence is completed you will be subject to a probation order of two years on the following conditions. One, to keep the peace and be of good behaviour and appear before the Court when required to do so by the Court. Two, to 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. Three, to remain within the jurisdiction of the Court, unless written permission to go outside that jurisdiction is obtained from the Court or the probation officer. Four, to abstain absolutely from the possession, consumption or purchase of alcohol and non-prescribed drugs, and to submit to a breathalyzer, urinalysis, and bodily fluids or blood test upon demand by a peace officer or probation officer who has reason to believe that you have failed to comply with this condition. Five, that you have no contact, directly or indirectly, with Barbara McLeod or her children. Six, that you not attend within 100 metres of the residence of Barbara McLeod, located at 3 Donjek Road in the city of Whitehorse. Seven, that you make reasonable efforts to find and maintain suitable employment and provide the probation officer with all necessary details concerning your efforts.

[23] Pursuant to s. 109(1)(a) of the *Criminal Code*, I order that Mr. Johnson be prohibited from possessing any firearm, crossbow, restricted weapon, ammunition and explosive substance for 10 years and any prohibited firearm, restricted firearm, prohibited weapon, prohibited device or prohibited ammunition for life.

[24] I further order that pursuant to s. 487.051, that a number of samples of bodily substance that are reasonably required for forensic DNA analysis be taken from John Dale Johnson. I have signed the order in Form 5.03 on the file.

[25] There shall be a victim surcharge payable in the amount of \$100. Anything further, counsel?

[26] MR. BERESH: Nothing. Thank you.

[27] THE CLERK: My Lord, the time to pay the surcharge is?

[28] THE COURT: I did not indicate a time.

[29] MR. BERESH: No time requested.

[30] THE COURT: Forthwith.

[31] MR. BERESH: Forthwith. Default should be fixed, though.

[32] THE CLERK: Normally, the default is fixed at the time it goes into default.

[33] THE COURT: Well, just to make it clear, counsel has requested a default period. I will put in, in default 10 days.

[34] MR. BERESH: Sounds excessive.

[35] THE COURT: Well, sorry. Make a submission on it; I didn't allow you to do that.

[36] MR. BERESH: Five days.

[37] THE COURT: Five days.

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VEALE J.