

Citation: *R. v. Rosenthal*, 2014 YKTC 41

Date: 20140814  
Docket: 13-00471  
Registry: Whitehorse

**TERRITORIAL COURT OF YUKON**  
Before His Honour Judge Schmidt

REGINA

v.

ASHTON REED ROSENTHAL

**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:

David Jardine

Melissa D. Atkinson

Counsel for the Crown

Counsel for the Defence

**REASONS FOR SENTENCING**

[1] SCHMIDT T.C.J. (Oral): The accused was found guilty after trial of sexual assault. Circumstances were described in the oral judgment. The sentencing was adjourned for a pre-sentence report.

[2] To briefly review the circumstances, the accused and two friends were looking forward to a night of playing music and using the hot tub in one of their parents' homes. They phoned several people to join them. The complainant was the only person to come. She lived in the immediate neighbourhood.

[3] While playing and listening to music, she took off her clothes, except for a bra and panties, and began to dance. The three young men followed suit. This went on for some time and later in the evening, the complainant produced some marihuana. In addition, there was a considerable amount of drinking of alcohol by all who were there.

[4] At some point, they all stripped off their remaining clothes and got into the hot tub, where they stayed for a long time. The accused phoned his girlfriend to join them but after a lengthy conversation she declined. Later, they put some clothes back on and continued playing music.

[5] The complainant asked if she could stay over and sleep in the bed the accused normally used, with the accused. She went to bed and then came out later and pulled the accused aside to talk. Neither she nor the accused remember that conversation; this event was reported by another participant. She returned to the bed and the accused continued to play music and then made hot dogs and took one on a plate to the complainant. She declined and he got into bed with her. Sometime later, she awoke and her panties had been pulled down and the accused had a finger in her vagina. She moved over and he removed his hand. She said she was not interested in sex and got up and dressed and went home.

[6] A day or two later, she spoke to the police. The accused was subsequently charged with sexual assault.

[7] The Crown is seeking a term of imprisonment of 14 to 18 months, emphasizing the principles of general deterrence and denunciation. They argue that women are taken advantage of in their sleep or drunken state far too often in the Yukon and that the

Yukon Supreme Court in a case of *R. v. White*, 2008 YKSC 34 set a range of one year to 30 months.

[8] With respect, the Crown is misreading the decision in *R. v. White*. The judge clearly disagrees with a starting point approach to sentencing. At para. 87, the judge says of his comments about a one year to 30 month range:

... This range is only suggested as a shorthand way of describing what the courts in Yukon have done in previous cases where the offence and the offender were similar to those in the case at bar.

[9] The judge in *White* also quoted, with approval, Lamer C.J.C. in *R. v. Proulx*, 2000 SCC 5 (para. 81 in *White*):

... In my view, the risks posed by starting points, in the form of offence-specific presumptions in favour of incarceration, outweigh their benefits. ...

...

... By creating offence-specific starting points, there is a risk that these starting points will evolve into *de facto* minimum sentences of imprisonment. ...

[10] The Court questioned the Crown on his range submission and he agreed that the courts neither in the Yukon nor elsewhere have attempted to exceed their jurisdiction and establish a minimum sentence for sexual assault.

[11] In all sentencing, the Court must consider the circumstances of the offence and the offender and impose similar sentences for similar offenders committed in similar circumstances, pursuant to s. 718.2(b) of the *Criminal Code*.

[12] I will review all of the cases counsel referred me to.

***R. v. White, supra***

[13] The victim went for a night of drinking with the accused. They retired to his dorm room where she fell asleep after she had confirmed with him that she would be safe. She was fully dressed. She awoke to find the accused on top of her, her pants and underwear removed, with the accused trying to put his penis in her vagina. She said no three or four times and he kept trying to put his penis into her vagina. He was a much bigger person than she was. He stopped trying to force her after 10 minutes. When he stopped, he fell asleep, and she fled.

[14] The accused was a cocaine addict and alcoholic. He had 10 previous criminal offences, including aggravated assault. He denied responsibility for the offence and maintained, prior to sentencing, that he would appeal. He was assessed to be at a high risk of reoffending. He received a custodial sentence of 26 months.

***R. v. G.W.S., 2004 YKTC 5***

[15] The accused was convicted of offences on June 7, 2003, and June 22, 2003.

[16] On June 7th, he was at a drinking party. A 16-year-old was at the party but did not drink. She went to sleep on the couch after the party was over and awoke to find the accused fondling her vagina over her clothing. He tried to take her pants off but she resisted successfully and he finally left. He later came back and put his hand on her thigh and she resisted again.

[17] On June 23rd, the second charge, he stayed for a night at his 44-year-old cousin's place and went to sleep on a sofa after she had fed him. She went to her bed and went to sleep without taking her clothes off. She awoke to find her clothes removed and the accused fingering her vagina and anus. He had his hands on her throat to restrain her. He had his pants off. She struggled, finally kicking him in the testicles and he left.

[18] The accused had an extensive record, including 10 assaults. The accused was given a 14-month custodial sentence.

***R. v. Lepine*, 2013 NWTSC 19**

[19] The complainant and the accused were at a house party. At 7 a.m., the complainant fell asleep in one of the bedrooms. She may have passed out from alcohol consumption. Another male person was sleeping beside her. She awoke to find the accused with his finger in her vagina. She protested, started kicking and waking up the other male, and the accused left.

[20] At trial, he gave alibi evidence that he was at home sleeping with his wife at the time. The accused had 22 adult convictions. The convictions were for offences that were serious, including a number of assaults, including assaults with weapon. The accused received a custodial sentence of three years.

***R. v. A.A.F.*, 2014 BCPC 46**

[21] The complainant was having a drinking party in her hotel room. The accused was also staying in the hotel and was drinking heavily. He was invited to the party. The

party broke up and people left. The accused returned to the complainant's room sometime later where the complainant was sleeping. She woke up to find the accused in her room rubbing her back and arms, putting a hand down her shirt, and forcing her hand between his legs. She told him to leave and he did.

[22] The accused had a threatening conviction in 1968 and an assault conviction in 1993. This was in 2014. He received a suspended sentence and two years' probation.

***R. v. Aftergood, (January 26, 2012), Victoria 145042 (B.C.S.C.)***

[23] The accused and the complainant were taking part in partying at the university dorms. They were 18 years old. After much carousing, the complainant returned to her room and fell asleep. The accused later entered her room and sexually assaulted her in her sleep by digital penetration of her vagina and by attempting penetration with his penis. The complainant awoke and he continued his assault until she sat up and scared him off.

[24] The accused did not have a criminal record. He had good performance on bail for three years prior to sentence after trial. He received a three-year suspended sentence with probation.

***R. v. Ingrey, 2003 SKQB 300***

[25] Here, a police officer, with no record, digitally penetrated a sleeping friend. He received a suspended sentence of 12 months, which was reduced to a conditional discharge on appeal.

***R. v. T.J.H., 2012 BCPC 115***

[26] In this case, an accused with what are described as unique challenges touched a female outside her clothing on the genitals. They knew each other and the incident had significant effect on the victim.

[27] He did not have a record and received a conditional discharge.

[28] The present case has some similarities in offender but is dissimilar in circumstances.

[29] In the present case, the Pre-Sentence Report describes the accused as a 26-year-old with no criminal record and good work history. He suffered a brain injury as an infant which has some effects not dissimilar to FASD. He has done well in school and hopes to attend university.

[30] He comes from a family that separated when he was five. He had difficulties with his stepfather, who administered corporal punishment bordering on abuse. He went back and forth living in Calgary for some grades with his father and returning to the Yukon for some grades with his mother.

[31] Since high school, he has worked in Calgary and Whitehorse. His father died and the accused's grieving was complicated by his perception of his mother's harsh attitude towards his father's memory. He has been estranged from his mother since.

[32] The accused has had times when he hung about in bars with a drinking crowd and has drunk to excess, and perhaps problematically. He also has a stable group of

friends who have good jobs and no criminal convictions. He does not appear to hang out with negative influences any longer.

[33] A Risk/Needs Assessment was done in conjunction with the Pre-Sentence Report. There are 13 risk/needs items tested. Areas of concern, according to the results of this assessment, of the accused were:

1. Capacity for relationship stability;
2. Impulsive acts;
3. Poor problem-solving skills; and
4. Negative emotionality.

[34] There were no concerns for the purpose of risk assessment in the areas of:

1. Emotional identification with children;
2. Hostility towards women;
3. General social rejection;
4. Lack of concern for others;
5. Sex drive, sex preoccupation;
6. Sex as coping;
7. Deviant sexual preference; and

8. Cooperation with supervision.

[35] On the ACUTE-2007, an assessment of ACUTE risk factors which are reported to be associated with general and sexual offence recidivism, he falls in the low priority category for supervision and intervention.

[36] To counter this assessment of low risk for recidivism, the fact that the accused has no record and that he is seen to be of good character by people who know him, as evidenced by the letters filed by the defence counsel, the Crown says that the accused has not demonstrated remorse. The Crown supports this contention by pointing to the fact that the accused did not plead guilty and to the statement by one of his friends that they did not think the circumstances should make him guilty of sexual assault. The accused repeated those observations to the report writer and speculated as to the victim's motives.

[37] Dealing first with the accused's requests for a trial, the Court does not find that his not-guilty plea contradicts his post-trial admissions of remorse and concern for the complainant. In this case, both the complainant and the accused suffered gaps in memory regarding the events of the evening and regarding specifically the events leading up to the offence. The accused remembers touching the complainant but not what led up to it. It was correct for him to ask her version of the events to be tested in a court. Once that was done, he made no attempts to contradict her direct testimony and did not give evidence.

[38] While some of the accused's contemporaries have apparently felt that the charges against him are unfair, given the events of the evening, the Court is satisfied

that the conviction sends the message to the non-predatory audience, which is that consent cannot be read into behaviour that is not intended to be sexual or inviting sexual response.

[39] The Supreme Court of Canada in 2011 again made it clear -- this case was referred to in the judgment -- that consent must be contemporaneous (*R. v. J.A.*, 2011 SCC 28). That message will continue to be sent by lower courts, as in this case. It is a conviction that will denounce actions like this and deter the average person, such as the youthful contemporaries of the accused.

[40] The accused is neither a predator nor a violent offender, as was the case in the cases discussed where the outcomes were a prison sentence.

[41] The Court is satisfied that the accused is remorseful to a point that he is amenable and eager to seek treatment in whatever form dictated by the Court to prevent any recurrence of wrongful criminal acts. He advises the Court that he is determined to work harder to overcome or mitigate the effects of his brain injury which may have well caused the four risk factors identified, those being capacity for relationship stability, impulse control, problem-solving skills, and negative emotionality. The Court is not sure what negative emotionality is but I am sure counsellors will deal with it.

[42] Because sexual assault sentencing is a continuum with no minimum, it is helpful to set out some mitigating and aggravating factors to determine where on the continuum of sentencing this case lies.

[43] The aggravating factors in this case are:

1. He sexually assaulted the complainant in circumstances where she was unable to provide consent or prevent the assaultive behaviour; and
2. He penetrated her vagina digitally, a serious invasive assault.

[44] The mitigating factors are:

1. He has no criminal record;
2. He is at a low risk to reoffend;
3. He expresses remorse, which is accepted as genuine by the Court;
4. He has abstained from alcohol for the entire bail period and complied with all of the bail terms, and has shown an interest in understanding the terms so as not to breach them in the future; and
5. He discontinued his actions immediately upon being told to do so.

[45] Given these factors, the Court finds that the case falls in circumstances of the offender and offence more in the range of cases of *R. v. A.A.F.*, *R. v. Aftergood*, *R. v. Ingrey*, and offender similarities *R. v. T.J.H.* In all those cases, suspended sentences were given.

[46] The offender's profiles and antecedents in the circumstances in *R. v. White* and *R. v. Lepine* were aggravated with increased elements of risk and predatory behaviour,

which no doubt placed them on the continuum at a place where jail was warranted to deter any like-minded or foolish predatory persons.

[47] The Court is satisfied that the fact that conviction and a sentence, which also accommodates a rehabilitative component, as well as a significant curb on the offender's freedom, will have an adequate denunciatory and deterrent function and will speak to the wider population and serve as a reminder of the need to scrupulously respect each person's sanctity of person.

[48] As this case aligns more accurately with the reviewed cases where a suspended sentence was granted, the Court finds that a suspended sentence with a two-year term of probation is appropriate.

[49] The terms of the probation are:

1. You will be required to keep the peace and be of good behaviour.
2. You are to appear before the Court when required to do so by the Court.
3. You are to notify the Court or Probation Officer in advance of any change of name or address, and promptly notify the Probation Officer in advance of any change of employment or occupation.
4. You are to remain within the Yukon Territory unless you obtain written permission from your Probation Officer or the Court.
5. You are to report to the Probation Officer by 4 p.m. today and thereafter as and when required by the Probation Officer.

6. You are to abstain absolutely from the possession or consumption of alcohol and/or controlled drugs or substances that have not been prescribed for you by a qualified medical practitioner. You are to provide a sample of your breath for the purpose of analysis upon demand by a Peace Officer who has reason to believe that you may have failed to comply with this condition.
7. You are to attend and actively participate in all assessments and counselling programs as directed by your Probation Officer and complete them to the satisfaction of your Probation Officer for the issues of alcohol abuse and as mentioned in the Pre-Sentence Report, respectful relationships.
8. You are to provide consents to release information to your Probation Officer regarding your participation in any program you have been directed to do pursuant to this order.

[50] The Crown asks for a DNA order, which I will make.

9. Within two weeks, you must attend at the RCMP or other place for the purpose of giving up a sample of your DNA.

[51] I believe the SOIRA order is mandatory for a period of 20 years.

[52] I do not believe a firearms order is mandatory and I will not make it.

[53] Anything further?

[DISCUSSION WITH COUNSEL]

[54] THE COURT: There is to be no contact directly or indirectly with JH.

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SCHMIDT T.C.J.