

TERRITORIAL COURT OF YUKON

Citation: *R. v. R.P.B.*, 2011 YKTC 12

Date: 20110309
T.C. No. 09-00687
Registry: Whitehorse

Between:

REGINA

And

R.P.B.

Before: Mr. Justice L.F. Gower

Appearances:

Judy Bielefeld
Edward J. Horembala, Q.C.

Counsel for the Crown
Counsel for the Defence

REASONS FOR JUDGMENT DELIVERED FROM THE BENCH

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*.

INTRODUCTION

[1] This is the sentencing of R.P.B. for the offence of sexual assault on the victim A.B. in Whitehorse on August 9, 2009, contrary to s. 271 of the *Criminal Code of Canada*. I am proceeding with this sentencing sitting as a Territorial Court judge. Crown and defence counsel have substantially agreed on a joint submission for the sentence. They propose that a term of 18 months imprisonment be imposed, to be followed by a period of

probation of two years, as well as the mandatory ancillary orders regarding a DNA sample from the offender, a firearms prohibition order for a period of 10 years, and an order under the *Sex Offender Registry Act* for a period of 10 years. The only point of disagreement is whether the jail term can be served conditionally under s. 742.1 of the *Criminal Code*. In that regard the Crown's opposition to a conditional sentence is based on the singular ground that such a sentence would endanger the safety of the community.

CHRONOLOGY OF EVENTS

[2] Before getting into the facts, it is significant to note the chronology of events in this case. First of all, the charge was not laid until December 9, 2009. The offender was arrested and released on a recognizance dated February 5, 2010. The preliminary inquiry was held on August 2, 2010, and I am informed by the Crown that the victim was a very reluctant witness and the committal to trial was only just barely attained.

[3] On January 13, 2011, the Crown re-elected to proceed summarily and the offender entered a guilty plea to the sexual assault.

[4] On January 23, 2011, the offender was noted to be slumped over the steering wheel of his vehicle, which was parked at or near an intersection on Range Road in Whitehorse, in an intoxicated condition. Because one of the conditions of his recognizance was to abstain from alcohol, he was arrested for a breach of recognizance and impaired driving. When a sample of his breath was demanded by the police, the offender refused saying "No fuck, I'm already fucked enough".

FACTS

[5] The facts are as follows. The offender and the victim are first cousins. The offender would have just turned 28 years old at the time of the offence. The victim was then 21 years old. On or about August 9, 2009, the offender and the victim had been drinking together and were both intoxicated. They jointly took a taxi to an apartment belonging to their aunt in Whitehorse. There is some confusion about whether they entered the apartment through the front door or whether it was by way of forced entry through one of the apartment windows. Defence counsel informs me that a fingerprint of the victim was found on one of the windowsills where the exterior window appeared to be dislodged. In any event, once inside the apartment, the victim fell asleep on the couch and awoke to find her jeans had been removed and the zipper had been broken. The offender was holding her down and having sexual intercourse with her. The victim was crying and repeatedly told the offender to stop, but he continued going "harder" (to use the victim's description), causing her pain. Eventually, the victim passed out.

[6] The victim has not completed a Victim Impact Statement.

THE OFFENDER

[7] The circumstances of the offender are that he is currently a 29-year-old aboriginal member of the Vuntut Gwitchin First Nation. He was born in Whitehorse, but raised in Old Crow with his parents. Unfortunately, his upbringing was dysfunctional at times, due to his parents struggling with alcoholism. He did however receive support from his paternal grandmother and aunt. The latter has stated that many of the family members suffered from a dysfunctional lifestyle because of their experience in residential school. The offender remained with his parents until he was nine years old. When they separated, he

and his brother moved with their mother to British Columbia for a period of time, then back to Alberta, and eventually back to the Yukon. To his credit, the offender graduated from high school in 2001 and began a steady work history shortly thereafter. He has been more or less consistently employed from then until now. In 2004, he obtained his class one truck driver's license, as well as a number of other industrial certificates for work in the Alberta oil fields. He was employed as an oilfield truck driver until December 2010, when he felt he needed to return to the Yukon to deal with this sexual assault charge. Because of the impaired driving charge arising January 23, 2011, the offender no longer has a driver's licence and will not be able to pursue that line of employment for some time. However, he has indicated to the probation officer who prepared the pre-sentence report that he has also given thought to studying carpentry or becoming a driver trainer in the future.

[8] The offender admits that he has experienced problems with alcohol abuse since he was a teenager. He scored a "moderate" level of risk on a risk assessment instrument used by the probation officer. His problems with alcohol began when he was 14 or 15 years old, consisting of charges of break enter and theft, underage drinking and possession of marijuana, for which he received probation. As an adult, he was further found guilty of assault with a weapon in 2006, but received a conditional discharge plus probation for nine months. That charge was also alcohol-related. Thus, all of the offender's experiences with the criminal justice system to date have been due to his alcohol misuse and abuse.

[9] The offender was also administered a drug abuse risk assessment instrument, but scored "low" on that.

[10] Finally, his level of risk for re-offending generally was also assessed and he scored in the “moderate range”, with potential risk factors including substance abuse.

[11] The offender is currently single. The only significant relationship that he has had thus far is one with A.B., since 1999. The couple have a two-year-old son, and although they are separated, they share a residence with the offender’s brother. The offender acknowledges that the relationship with A.B. has been "ruined" by his alcohol consumption and the commission of the sexual assault, although they are still on speaking terms and co-parent their son.

[12] The offender acknowledges that he has an alcohol problem and admits that he does not want to consume alcohol anymore. He states that he is ready to begin addressing his substance abuse issues and to take whatever counselling, programming or treatment is recommended, including attendance at Alcoholics Anonymous meetings. He has not previously received any addiction focused counselling or treatment.

[13] The offender has expressed to the probation officer significant remorse and shame for the sexual assault and wishes that he could “take it all back”. He has taken full responsibility for what occurred and is willing to do whatever it takes to address his unresolved issues, as well as his offending behaviours. He is aware that the victim is going through a very difficult time as result of the sexual assault and has stated a desire to apologize to her in person. According to the probation officer, he has expressed what appears to be “genuine shame, disgust and remorse for his actions towards his victim and the impact his actions and choices have had on his family”. He stated that he cannot believe how he could have done something like that and believes that he will never commit a sexual assault again.

[14] Letters of reference were filed by the offender's paternal aunt, S.K. and his younger brother, R.B.

AGGRAVATING AND MITIGATING CIRCUMSTANCES

[15] The aggravating circumstances are as follows. This is a situation involving full penetration and intercourse for more than just a momentary duration of time. The offender took advantage of the victim while she was asleep and vulnerable. He also refused to stop the intercourse and when the victim told him to do so. He caused some physical pain to the victim. Finally, the offender breached the terms of his recognizance by being found impaired on January 23, 2011.

[16] Crown counsel invited me to find that there was an element of breach of trust here because the offender and the victim are related, because the offender was slightly older than she, and because the victim had attended at the aunt's apartment thinking that it would be a safe haven for her for the evening. However, I am not satisfied that the relationship between the parties, their respective ages, and/or the circumstances under which the offender and the victim entered the apartment establish beyond a reasonable doubt that there has been a breach of trust.

[17] The mitigating circumstances are significant. The offender chose to enter a guilty plea following the preliminary inquiry, where the Crown only just obtained a committal for trial because of problems with the victim's evidence. Therefore, the offender has spared the victim from having to testify again, in circumstances where there may well have been a possibility of an acquittal. Besides taking full responsibility for his actions, the offender is genuinely remorseful and appears to have some empathy for the trauma he has caused to the victim.

[18] Further, notwithstanding his rather dysfunctional upbringing, the offender has demonstrated quite a remarkable ability to succeed by completing his high school education and managing to maintain a steady and responsible work record.

[19] In addition, although his criminal record is generally dated and unrelated, it appears that the offender successfully complied with probationary terms imposed both as a youth and as an adult. With respect to the current recognizance on the sexual assault offence, imposed February 5, 2010, with the exception of the one admitted breach on January 23, 2011, there were no other occasions of non-compliance.

[20] The offender also seems highly motivated to remain clean and sober, and to obtain counselling for any underlying issues which might have prompted him to commit this sexual assault.

LAW

[21] The well-known leading case on conditional sentences is *R. v. Proulx*, 2000 SCC 5. In that case, a unanimous Supreme Court, at para. 46, set out the four criteria that courts must consider before deciding to impose a conditional sentence:

“This provision lists four criteria that a court must consider before deciding to impose a conditional sentence:

- (1) the offender must be convicted of an offence that is not punishable by a minimum term of imprisonment;
- (2) the court must impose a term of imprisonment of less than two years;
- (3) the safety of the community would not be endangered by the offender serving the sentence in the community; and
- (4) a conditional sentence would be consistent with the fundamental purpose and principles of sentencing set out in ss. 718 to 718.2.”

[22] The first three criteria are prerequisites to a conditional sentence and, in particular, the criterion of safety of the community should be viewed as “a condition precedent” to the assessment of whether a conditional sentence would be fit and proper (see para. 65).

At para. 69 of *Proulx*, the Supreme Court stated:

“In my opinion, to assess the danger to the community posed by the offender while serving his or her sentence in the community, two factors must be taken into account: (1) the risk of the offender re-offending; and (2) the gravity of the damage that could ensue in the event of re-offence. If the judge finds that there is a real risk of re-offence, incarceration should be imposed. Of course, there is always some risk that an offender may re-offend. If the judge thinks this risk is minimal, the gravity of the damage that could follow were the offender to re-offend should also be taken into consideration. In certain cases, the minimal risk of re-offending will be offset by the possibility of a great prejudice, thereby precluding a conditional sentence.”

[23] I assume here that the reference to the gravity of the damage that could ensue is with respect to the potential for the offender recommitting the substantive offence, which in this case is the sexual assault, as opposed to, for example, another unrelated offence arising from alcohol abuse.

[24] The offender's breach of his recognizance on January 23, 2011, is clearly relevant to my assessment of the level of risk of endangering the safety of the community.

However, as the Supreme Court noted at para. 71 of *Proulx*, the risk that a particular offender poses to the community must be assessed in each case, on its own facts.

[25] I would again interject here to observe that it would be unlikely that a court would ever be satisfied that the level of risk has been completely eliminated. Rather, even in cases where the offender might pose some risk to the community, a court is still free to consider the imposition of conditions which might reduce that risk to a minimal one. As the Supreme Court said at para. 72 of *Proulx*:

“The risk of re-offence should also be assessed in light of the conditions attached to the sentence. Where an offender might pose some risk of endangering the safety of the community, it is possible that this risk be reduced to a minimal one by the imposition of appropriate conditions to the sentence...”

[26] I will return to the issue of appropriate conditions shortly, but I want to just touch briefly on the case law discussed by defence counsel. Defence counsel's concern here seems to arise from a comment made by Faulkner J. of this Court in *R. v. James*, 2001 YKTC 29. At para. 7 of that case, Faulkner J. acknowledged that the Supreme Court's decision in *Proulx* did not preclude the imposition of a conditional sentence for any offence which does not attract a minimum jail sentence. However, while he did not disagree with *Proulx*, he felt that it would be “an exceptional disposition in cases of this kind, having regard to the prevalence of this crime and the paramount need to deter it as best the Court can”. The type of sexual assaults he was referring to involve full intercourse with unconscious victims.

[27] It important to note that *James* is distinguishable from the case at bar for number of reasons. Firstly, the offender there only entered his guilty plea partway through the trial, once certain probative DNA evidence was admitted. He also had a significant criminal record and a pre-sentence report which was described as “not a positive one”. Further, at para. 8 of the case, Faulkner J. noted that because the offender had breached the terms of his release while awaiting his trial for the sexual assault, he was not a suitable candidate for a conditional sentence in any event, even if he was inclined to impose one in all the other circumstances of the case. Thus, I tend to agree with defence counsel's submission that Faulkner J.'s comments about conditional sentences being

“exceptional” for that type of sexual assault were really secondary and more akin to *obiter dicta*.

[28] Defence counsel went on to take me through a number of authorities where conditional sentences have been imposed for serious sexual assaults. However, I did not understand the Crown to oppose the imposition of a conditional sentence because this is a serious sexual assault, but rather because there is a question of whether doing so would potentially endanger the community. In other words, I did not understand her to submit that this is not “an exceptional case” and therefore a conditional sentence should not be considered.

[29] The cases referred to by defence counsel include *R. v. D.K.J.*, 1999 YTSC 18 and *R. v. Sidney*, 2008 YKTC 62. Defence counsel also made reference to two other unreported decisions from the Territorial Court, *R. v. R.A.* and *R. v. McLeod*, which, although distinguishable on their facts, also involved conditional sentences for sexual offences. All this was in support of the proposition that, while conditional sentences for serious sexual offences are not common, defence counsel says they are “not rare” either. Again, I did not hear the Crown argue against that proposition.

[30] Similarly, the Crown does not submit, in this case, that a conditional sentence would be inconsistent with the fundamental purpose and principles of sentencing set out in sections 718-718.2 of the *Criminal Code*.

CONCLUSION

[31] In conclusion, I am satisfied that the proposed sentence of 18 months imprisonment is appropriate, but that the level of risk which the offender poses to the safety of the community can be minimized by the imposition of appropriate conditions,

many of which will focus on his need to address his alcohol abuse. The conditions which I will impose begin with the compulsory ones set out in s. 742.3(1) of the *Code*. The others are drawn largely from those recommended in the pre-sentence report, with some slight variations. I note that the offender has expressly agreed to all of the conditions recommended by the probation officer. Mr. B., for the next 18 months, you must abide by the following orders:

1. Keep the peace and be of good behaviour;
2. Appear before the Court when required to do so by the Court;
3. Report to a sentence supervisor within two working days, and then as and when required by the supervisor, and in the manner directed by the supervisor.
4. Remain within the Yukon Territory, unless you have prior written permission from the supervisor or the Court.
5. Notify the supervisor in advance of any change of name or address, and promptly notify the supervisor of any change of employment or occupation.
6. Reside as directed by your supervisor, abide by the rules of the residence, and not change your residence without the prior written permission of your supervisor.
7. Remain inside your residence (this means house arrest), unless you have the prior written permission of your supervisor for any of the following purposes:
 - a) To meet with your supervisor at a pre-arranged appointment;
 - b) For medical treatment for yourself or your immediate family;

- c) To shop for groceries and items required for daily living for no more than two hours, once a week;
 - d) For the purposes of your employment, between the times indicated in writing by your supervisor, as specified by your supervisor, including looking for such employment;
 - e) To meet with any person or group approved in advance by your supervisor for assessment, counselling and programming, including attendance at Alcoholics Anonymous meetings, providing your sentencing supervisor has specified in writing the place, time and duration of such meetings; and
 - f) During such other times and for such other purposes as may be approved in writing by your supervisor.
8. While within your residence, you must present yourself at the door and answer the telephone during reasonable hours for checks on your compliance with your house arrest. Failure to do so will be considered to be a breach of this condition.
9. Abstain absolutely from the possession or consumption of alcohol and controlled drugs or substances, except in accordance with a prescription given to you by a qualified medical practitioner. You must provide a sample of your breath or urine 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.

10. You must not attend at any bar, tavern, off sales or other commercial premises whose primary purpose is the sale of alcohol.
11. You must take such alcohol and/or drug assessment, counselling or programming as directed by your supervisor; and attend and complete a residential treatment program as directed by your supervisor.
12. For the first 90 days of this order, you must attend Alcoholics Anonymous meetings not less than five times each week, and for the balance of the term of this order you must attend such meetings not less than three times each week, unless you have the prior written permission of your supervisor. You must also use your best efforts to obtain an Alcoholics Anonymous sponsor who is willing to communicate with your supervisor to ensure that you are complying with this condition.
13. You are to report to the Offender Services Unit to be assessed and, attend and complete the Sex Offender Treatment Program, as directed by your supervisor.
14. Take such psychological assessment, counselling and programming as directed by your supervisor.
15. Take such other assessment, counselling and programming as directed by your supervisor.
16. No contact directly or indirectly or communication in any way with A.B., except with the prior written permission of your supervisor and in consultation with Victim Services and Offender Services.

17. Not attend at or within 20 meters of the residence, place of employment or place of education of A.B., except with the prior written permission of your supervisor and in consultation with Victim Services and Offender Services.
18. Make reasonable efforts to find and maintain suitable employment and provide your supervisor with all necessary details concerning your efforts.
19. Provide your supervisor with consents to release information with regard to your participation in any programming, counselling, employment or education activities that you have been directed to do so pursuant to this Order.
20. You are prohibited from the possession, purchase or viewing of pornographic material.
21. You are to carry a copy of this order on your person at all times when you are outside your residence.

[32] Following the completion of your conditional sentence you will be subject to a period of probation for two years. The conditions of your probation will be as follows:

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. You must remain within Yukon Territory, unless you obtain the prior written permission of your probation officer.

5. You must report to a probation officer immediately upon completion of your conditional sentence, and then when and in the manner directed by the probation officer.
6. Abstain absolutely from the possession or consumption of alcohol and controlled drugs or substances, except in accordance with a prescription given to you by a qualified medical practitioner. You must provide a sample of your breath or urine 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
7. You must take such alcohol and/or drug assessment, counselling or programming as directed by your supervisor; and attend and complete a residential treatment program as directed by your supervisor.
8. No contact directly or indirectly or communication in any way with A.B., except with the prior written permission of your supervisor and in consultation with Victim Services and Offender Services.
9. Not attend at or within 20 meters of the residence, place of employment or place of education of A.B., except with the prior written permission of your supervisor and in consultation with Victim Services and Offender Services.

[33] I will also make the mandatory ancillary orders I indicated at the outset of these reasons regarding the provision of a DNA sample from the offender under s. 487.051 of the *Criminal Code*, the firearms prohibition under s. 110 of the *Code* for 10 years, and the *Sex Offender Registry Act* order under s. 490.013(2)(a) of the *Code* for a period of 10 years.

[34] Pursuant to s. 737(2)(b)(i) of the *Code* there will also be a \$50 victim surcharge.

[35] Mr. B., you indicated to the probation officer that this sexual assault has been “a big life changer” for you and that you hope things will get better if you can receive the help you need to address your issues. It seems abundantly clear to me that the biggest demon in your life right now is your tendency towards alcohol abuse. However, it is not for me to say whether you are an alcoholic or whether you are addicted to alcohol. Only you can say that. But given your criminal history, given what happened on August 9, 2009, and as recently as January 23 of this year, I would hope that you can see the writing on the wall. In addition to any other formal alcohol treatment and counselling that your supervisor may direct, I strongly believe that your active involvement in the Alcoholics Anonymous 12-step program will be an ongoing source of benefit to you. It costs nothing, there are meetings seven days a week in Whitehorse, and you can phone another member of the program for support at any time of the day or night. The only pre-condition is a genuine desire to stop drinking, which I believe you have. The program can change your life for the better. That is why I have made it mandatory for you to attend AA meetings and placed such an emphasis on that. If you do so, I am satisfied that your level of risk towards the safety of the community will be minimized. If you do not, you will be arrested, thrown in jail, and may well spend the rest of your conditional sentence behind bars.

[36] I wish you the best of luck.

Gower J.