IN THE SUPREME COURT OF THE YUKON TERRITORY

Citation: *R.* v. *Sam,* 2005 YKSC 02

Date: 20050107
Docket No.: S.C. No. 04-01526
Registry: Whitehorse

Between:

HER MAJESTY THE QUEEN

And

CHARLES MICHAEL SAM

Before: Mr. Justice R.S. Veale

Appearances:

Mr. John W. Phelps — For the Crown
Mr. Gordon R. Coffin — For the Defence

REASONS FOR JUDGMENT

INTRODUCTION

[1] A jury convicted Mr. Sam of sexual assault on a woman suffering from serious physical and mental impairments. Counsel for Mr. Sam, on instructions, submitted that a penitentiary term of two and one-half years was appropriate. The Crown submitted that an eighteen-month custodial sentence with three years probation under strict conditions was appropriate. As Mr. Sam has a significant history of failing to abide by conditions and completely rejects treatment, I sentenced him to three years in the penitentiary. Oral reasons were given at the sentencing (*R.* v. *Sam,* 2004 YKSC 81). These reasons deal

with issues arising out of the Pre-Sentence Report, the Psychological Report, the Victim Impact Statement and the penitentiary sentence rather than a shorter sentence with a three-year probation order.

THE FACTS

[2] The victim is a thirty-six-year-old First Nation woman. She suffers from fetal alcohol syndrome disorder, physical impairments, developmental delays, a speech impediment and a hearing impairment. She resides in a supported-living arrangement. She visits her seventy-seven-year-old mother on weekends. The sexual assault occurred while she was sleeping in her mother's bedroom.

[3] Mr. Sam is a forty-seven-year-old First Nation man. He was a friend of both the victim and her mother. He is a chronic alcoholic who admitted that the incidents in his lengthy criminal record occurred while he was drinking. He was drinking during the day and evening of the sexual assault.

[4] Mr. Sam stayed overnight at the invitation of the victim's mother. He slept on the couch and watched TV until 5 a.m. He entered the bedroom of the victim's mother. He lay down beside the victim and fondled her breasts under her blanket and over her nightgown. He fondled her vagina under her nightgown and underwear.

[5] When the victim woke up, she attempted to push him off. He persisted until the victim's mother woke up and told him to leave.

THE VICTIM IMPACT STATEMENT

[6] The Victim Impact Statement was prepared by Elaine Seier, a social worker from the Fetal Alcohol Syndrome Society. She manages a supported-living housing project

where the victim resides and has known the victim for close to six years. Ms. Seier also testified at trial. She was very helpful to the jury in explaining why and how the victim functions with her multiple physical and mental challenges.

[7] Defence counsel challenged the admissibility of the Victim Impact Statement as it was prepared by Ms. Seier and not the victim. I allowed the Victim Impact Statement, subject to some deletion. There is no doubt that the victim is not capable of making a Victim Impact Statement that adequately describes the impact of the sexual assault upon her. Section 722 (4)(b) of the *Criminal Code* describes the persons permitted to prepare a Victim Impact Statement as follows:

> **722(4)** For the purposes of this section and section 722.2, "victim", in relation to an offence,
>
> (a) means a person to whom harm was done or who suffered physical or emotional loss as a result of the commission of the offence; and
>
> (b) where the person described in paragraph (a) is dead, ill or otherwise incapable of making a statement referred to in subsection (1), includes the spouse or common-law partner or any relative of that person, anyone who has in law or fact the custody of that person or is responsible for the care or support of that person or any dependant of that person.

[8] Ms. Seier clearly comes within s. 722(4)(b) as she has been "responsible for the care or support of that person". This Court has previously ruled in favour of a liberal interpretation of who may give a Victim Impact Statement (*R.* v. *S.R.J.*, 2001 YKSC 542).

[9] Ms. Seier has drafted the Victim Impact Statement both from the victim's perspective and from her own professional perspective. This is, in reality, opinion

evidence. I am of the view that Victim Impact Statements can and should be accepted generously rather than restrictively. Nevertheless, the professional opinion of Ms. Seier should not be placed in a Victim Impact Statement. It should, rather, be presented separately as provided for in s. 722(3). I ordered that the opinion evidence be deleted.

[10] The remaining content of the Victim Impact Statement indicated that the victim undoubtedly suffered from the emotional impact of the sexual assault and was visibly distressed each time she had to give her evidence to the police, at the preliminary hearing and at the jury trial. She would sweat, shake and feel sick to her stomach. The victim was also painfully aware of her speech impediment, hearing impairment, the way she “walks funny” and how this would be perceived.

[11] Testifying before a jury of strangers and Mr. Sam was a very stressful experience for the victim. It is unfortunate that the victim was unable to articulate the entire impact of the sexual assault. In the future, the Crown may wish to consider presenting opinion evidence separately from the Victim Impact Statement.

THE OFFENDER

[12] Mr. Sam is a descendant of a strong Yukon First Nation family. However, his father has denied that he is his son, despite a remarkably similar appearance. His mother has also rejected him. Both his parents attended residential school and they had poor parenting skills. This has left Mr. Sam as a lonely and bitter alcoholic who indicated he did not wish to change his alcoholic lifestyle. He drinks alcohol whenever he has the finances to do so and would drink a twenty-six ounce bottle of alcohol everyday if he could.

[13] Mr. Sam attended the Carcross Indian Residential School for three years. In many sentencing hearings, this is often all that is known. However, counsel for Mr. Sam called Mr. Ernewein as a witness. Mr. Ernewein is lawyer representing Mr. Sam in a residential school civil claim against the federal government. He is also a friend of Mr. Sam and his extended family. He testified that Mr. Sam was physically and mentally abused at the school. As well, he was sexually assaulted three times a week during his three years there. Mr. Ernewein advised that Mr. Sam is embittered by the fact that he has been convicted for his sexual assault but that his two white predators at the residential school have not been. These facts go a long way to explain Mr. Sam's conduct and his unfortunate resistance to any form of treatment or counselling. He clearly needs treatment or counselling for his alcoholism, his sexual assaults on vulnerable victims and his own victimization at the residential school.

[14] When Mr. Sam left the residential school, he was raised in an abusive alcoholic setting until he ran away to live on the streets of Whitehorse before he was incarcerated in a young offenders' facility.

[15] Mr. Ernewein advised that Mr. Sam has, on at least two occasions, attempted to commit suicide.

[16] Mr. Ernewein advised that when Mr. Sam is not drinking, he is an affable, likeable person who enjoys being in the bush. However, as a result of the physical beatings and sexual assaults suffered at the residential school, he completely mistrusts authority and white society in general. Mr. Ernewein was adamant that probation would not work for Mr. Sam and it would be breached. At the same time, he expressed the view that Mr. Sam can stop drinking and could be amenable to treatment in the future. However,

he has not taken any treatment, although it was offered, from the federal government or the Committee on Abuse in Residential School Society, a Whitehorse-based aboriginal group focusing on the treatment of survivors of residential schools through counselling.

[17] Mr. Sam has an extensive criminal record that began in 1975 and involves twenty-eight offences including auto theft, impaired driving, fire setting, assaults, uttering threats and obstructing a peace officer. There is a previous sexual assault conviction in 1998 followed by four failures to comply with undertakings or probation orders. On the sexual assault charge, he was sentenced to five months followed by two years probation. The sexual assault was on an unconscious victim.

[18] Although Mr. Sam is adamant in rejecting counselling, he did apologize to the victim when he addressed the court. I indicated, at the time, this is a positive step in a long process of treatment and rehabilitation.

THE PRE-SENTENCE REPORT AND PSYCHOLOGICAL REPORT

[19] The Pre-Sentence Report covers Mr. Sam’s previous probation supervision for sexual assault and his negative attitude and unwillingness to address his behaviour. The probation officer did not mention Mr. Sam’s residential school experience although it was addressed briefly in an attached Psychological Report, which discussed Mr. Sam’s risk for violent and sexual re-offending. The Psychological Report was prepared by a psychologist who has an M. Sc. in Forensic and Legal Psychology. He is currently seeking his licence from the Alberta College of Psychologists. While I have no quarrel with the manner in which the Psychological Report was prepared, it should have contained a written explanation of the educational background of the psychologist and

the role of his supervisor. It is usually advisable for the supervisor to sign the report as well.

[20] I do not fault the probation officer and the psychologist for not providing a complete Gladue report (*R.* v. *Gladue*, [1999] 1 S.C.R. 688) which would have resulted in more extensive reporting on Mr. Sam's residential school background. I accept that Mr. Sam would not be very forthcoming in his interviews with the probation officer and the psychologist. He is no doubt an extremely difficult and uncooperative subject when dealing with authority figures. Fortunately, the defence provided extensive evidence on Mr. Sam's residential school experience.

[21] The psychologist confirmed that Mr. Sam did not want treatment and would be unlikely to engage in community treatment and supervision. He stated that Mr. Sam requires a structured environment in order to stay sober and engage in treatment. However, he opined that his successful treatment prognosis was not good, as Mr. Sam "demonstrated no empathy for his victim and revealed little concern regarding the seriousness of his current conviction". He recommended stringent long-term external controls including a prohibition against possession or consumption of alcohol and drugs. He acknowledged that it was unlikely that Mr. Sam would abide by the suggested conditions but stated that there was no other responsible recommendation.

[22] I interject at this point to say that the use of the word "treatment" in these reports is in the counselling sense. It is not an issue of invasive medical treatment which requires the consent of the offender as stated in s. 732.1(3)(g) of the *Criminal Code*. See *R.* v. *Harris*, 2001 BCPC 97.

[23] The probation officer found that Mr. Sam was not a suitable candidate for rehabilitation because he denied committing the sexual assault and was “pissed off” at being found guilty. Mr. Sam stated that alcohol and sex offender treatment was “bullshit”. He apparently continued to drink alcohol during the Sex Offender Risk Management Program for his previous sexual assault conviction. The probation officer stated that Mr. Sam would only “try” to abide by conditions of probation. Paradoxically, the probation officer considered Mr. Sam suitable for three years of probation with tight conditions. The probation officer also stated that when released, Mr. Sam will continue to put the community at risk. The recommended probation conditions included abstaining from all intoxicants with weekly reporting to the police and the Sex Offender Risk Management Program.

DEFENCE COUNSEL SUBMISSIONS

[24] Defence counsel had four main issues:

a) He objected to the fact that the Victim Impact Statement was attached to the Pre-Sentence Report. I agreed and ordered that the Victim Impact Statement should not be included in the Pre-Sentence Report. It is an independent document that comes before the court pursuant to s. 722 of the *Criminal Code*. As it may be the subject of objections at the sentencing hearing, it is problematic to incorporate it into the Pre-Sentence Report. I appreciate that the probation officer was most likely providing it as her source for victim concerns rather than putting the victim through another stressful interview session. However, it was appropriate to include Ms. Seier as the source of information which

would properly leave the Victim Impact Statement as an independent document.

b) The Psychological Report is quite comprehensive but unfortunately contained a significant error in the description of the current offence. It described the victim as having been raped vaginally, orally and anally. There was no evidence of this and the Crown accepted responsibility for not providing the psychologist with the evidence from the trial. It is a dangerous practice to rely upon the RCMP file in the preparation of psychological reports, as it often has allegations that are not supported by the evidence at trial. There were several other minor factual errors that did not affect the risk assessment opinion in the Psychological Report. I ordered that the current offence section of the Psychological Report be deleted.

c) Defence counsel objected to any weight being given to the risk assessment opinion because of the psychologist's error on the facts of the current offence. The psychologist testified and his supervisor did not. He stated that the risk assessment instruments that he used did not categorize whether the sexual assault was low density (sexual touching) or high density (anal, vaginal and oral intercourse). His purpose was not to determine the impact of the sexual assault on the victim but rather to provide an opinion on the risk of Mr. Sam committing another sexual assault. Thus, from his point of view the error was irrelevant, and his opinion on risk assessment remained valid.

The probation officer, using the Level of Service Inventory – Revised tool, which is a measure of general recidivism, placed Mr. Sam in the high-risk category. Using the Psychopathy Checklist Revised, 2nd Edition, the Violence Risk Appraisal Guide (VRAG), the STATIC 99 risk assessment and the SVR – 20, the psychologist rated Mr. Sam as a moderate to high risk for re-offending violently and sexually. I am satisfied that the risk assessment remains valid.

d) Defence counsel had a further objection to the Psychological Report. The psychologist found that Mr. Sam was “peculiarly preoccupied“ with the theft of land from Yukon First Nation people. The psychologist did not find any evidence of psychosis or any major mental illness, although he suggested that Mr. Sam’s claim was “potentially evidence of a persecutory belief system or thought process”. Along similar lines, the probation officer concluded that Mr. Sam continues to blame society for his lot in life and consistently focuses on racial biases as to why he is where he is today.

In my view, it is not unusual to hear a Yukon First Nation person state that their traditional land was “stolen” and I would find it surprising that such a view would be indicative of a mental illness rather than a political statement.

However, it is unfortunately also indicative of Mr. Sam’s attitude that he does not want to change his behaviour and take control of his life.

> Mr. Sam is caught in a cycle where he was abused and now he has adopted a destructive behaviour that entraps him as well as his victims.

[25] Mr. Sam's counsel indicated that Mr. Sam lives in a small community outside Whitehorse where he can pursue his own lifestyle. He objects to probation as he cannot remain at his home and comply with the restrictive conditions that would be imposed. However, the most telling submission is that Mr. Sam is unwilling to comply with probation conditions and counselling. The result will be another series of probation breaches that occurred on his previous conviction for sexual assault.

ANALYSIS

[26] It is somewhat unusual for defence counsel to seek a penitentiary term while the Crown submits that an eighteen-month custodial sentence with three years probation is appropriate.

[27] However, I have some difficulty accepting the Crown's submission. Mr. Sam is an untreated sexual offender without any motivation to take treatment and change his behaviour.

[28] Further, he will not abide by conditions against drinking although he admits that his drinking is associated with all his criminal behaviour. He remains a significant risk to the community. In my view, it is fruitless to have a period of incarceration with a long period of probation that leaves the community at risk and does not result in meaningful rehabilitation.

[29] It should be stated that the sentencing practice in Yukon courts is to keep the offender in custody for a term that does not exceed two years less a day followed by

lengthy probation with counselling in the hope that behavioural change will take place. At the very least, it may permit some monitoring and risk reduction. This serves both the safety of the community and the rehabilitation of the offender. As stated in *R.* v. *Taylor* (1997), 122 C.C.C. (3d) 376, (Sask C.A.) at paragraph 30, “the innate character of a probation order is such that it seeks to influence the future behaviour of the offender”. In *R.* v. *Proulx*, 2000 SCC 5, the Court quoted paragraph 30 of *R.* v. *Taylor* and indicated that a probation order is “a rehabilitative sentencing tool”.

[30] However, Mr. Sam does not want treatment, does not do well on community supervision and has instructed his counsel to seek a penitentiary term. In my view, when the goal of rehabilitation is completely obstructed by the attitude of the offender, it is not appropriate to subject the community and vulnerable women in particular to an offender with a moderate to high risk for re-offending violently and sexually.

[31] In addition, a probation order will inevitably bring Mr. Sam back to court for breaches of conditions that he cannot or will not meet. In some cases, the Court will simply delete the conditions of a probation order likely to be breached, as in *R.* v. *T.A.,* 2003 BCCA 218. I conclude that the proposed probation order would be doomed to fail both in protecting society and in rehabilitating the offender. It cannot be resurrected by deleting conditions that go to the fundamental purpose of the proposed probation order.

[32] A penitentiary term has the advantage of meeting the sentencing goals of separation, denunciation and deterrence. It also offers a structured environment to stay sober and, if Mr. Sam sees fit, to engage in treatment and programming directed at his residential school abuse and his own sexual assault behaviour.

[33] I conclude that a sentence of three years incarceration in penitentiary, less time served since conviction, is a fit and proper sentence for Mr. Sam.

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Veale J.