R. v. Smith, 2003 YKTC 70

Date: 20030902
Docket No.: T.C. 02-00626, 02-00626A
Registry: Whitehorse
Heard: Carcross

IN THE TERRITORIAL COURT OF YUKON
(Before His Honour Chief Judge Lilles)

REGINA

v.

RICKY SMITH

David McWhinnie — Appearing for Crown

Elaine Cairns — Appearing for Defence

REASONS FOR SENTENCING

---

[1] LILLES C.J.T.C. (Oral): Mr. Ricky Smith is a 33-year-old First Nations man before the court having been found guilty of a charge contrary to s. 271 of the *Criminal Code*: sexual assault on J.A., a female person. This assault occurred on December 27, 2002. Mr. Smith pled not guilty to that charge and was found guilty after trial.

[2] Mr. Smith has also pled guilty today to a charge of breaching a condition of his

recognizance, namely, purchasing alcohol, contrary s. 145(3) of the *Criminal Code* of Canada.

[3] The facts, as they relate to the substantive offence, are set out in my trial decision dated June 27th of this year. I will summarize those facts briefly. The complainant and her common-law husband were at a party in Tagish. They went to bed intoxicated. The common-law husband woke up in the middle of the night and the accused, Mr. Smith, was on top of the complainant in the bed, next to the common-law husband, having sex with the complainant. The common-law husband threw Mr. Smith out of the bedroom. The complainant was passed out at the time and did not wake up. She knew nothing of the assault until told by her common-law husband in the morning.

[4] As Mr. McWhinnie, the Crown, has noted, this kind of offence occurs far too frequently in the Yukon Territory. I suspect it is a common offence in northern and remote communities where alcohol abuse is common.

[5] Mr. Smith comes to the court clearly with a serious alcohol problem. This is demonstrated by four impaired driving convictions on his criminal record since 1990. Mr. Smith acknowledges that alcohol has been a problem for him from a very early age and that it continues to be a problem for him. He has indicated through counsel today that it is a matter that he wishes to address and understands that he needs to address.

[6] As is not uncommon with individuals with alcohol problems, Mr. Smith grew up in an alcoholic home. He witnessed family violence and was subject to physical discipline himself. He was also intoxicated at the time of the offence and he has

indicated, through counsel, that he does not remember what actually happened in relation to the offence.

[7] His criminal record indicates a limited history of failing to abide by court orders.

[8] Mr. Smith has a limited formal education, having completed a grade ten equivalency. In the past, he has obtained several certificates and clearly has some skills and I understand from the pre-sentence report, that one of those certificates may relate to heavy-duty equipment operation. He has worked off and on as a labourer.

[9] As counsel indicated, the reports suggest that he is a good worker when sober, but the emphasis must be on "when sober."

[10] Mr. Smith has indicated that he has, in the past, been able to maintain sobriety for extended periods of time, five months in one case, six months in another.

[11] Mr. Smith has had two previous relationships. There are four children from that relationship and, as discussed with counsel, there are significant outstanding maintenance arrears. He is not parenting these children at the current time and has limited contact with them.

[12] Mr. Smith has participated in some programming related to his criminal history. He has completed the Domestic Violence Treatment Program, after failing to do so on the first occasion, and that, I believe, resulted in a breach charge. He participated in a family residential alcohol treatment program in Alberta some time ago, but did

not complete that program. I am advised that he completed a 21-day Whitehorse residential treatment program more recently and I understood counsel to indicate that he is interested in participating in a similar program in the future.

[13] As I mentioned in my discussion with counsel, the risk of future offending for Mr. Smith will be real and probably significant so long as he continues to abuse alcohol. Looking at his record, and looking at the matter that brings him before the court here today, I think he has figured that out for himself.

[14] I should note that Mr. Smith has spent a short time in custody on this charge prior to his release. Mr. McWhinnie advised that Mr. Smith was in custody for 11 days. Since his release, he has done quite well. I would not say very well, but in all of the circumstances, it appears on balance that he has done quite well. There is one breach, with which I am dealing today, which indicates a problem. That breach involved his presence in a liquor store purchasing and possessing alcohol. That breach also relates directly to the underlying issue for Mr. Smith, and that is his alcoholism.

[15] I want to make it very clear that, in my view, this kind of offence is a very serious offence. In my view, it also involves a high degree of emotional violence. It may not be physical violence, in the sense of someone being beaten up or rendered unconscious with some form of weapon, but, as has been alluded to earlier today, this kind of victimization invariably has a profound long-lasting negative impact on the victim. Although there is no victim impact statement before me today, I am prepared to take judicial notice of that fact.

[16] I am going to deal with the formal sentence in the first instance, and then

come back and address the question of whether or not a conditional sentence of imprisonment would be the appropriate way for him to serve his jail term.

[17] In all of the circumstances, I am satisfied that a period of imprisonment for a period of 12 months, for the s. 271 offence*,* would be appropriate. With respect to the breach charge, there will be a further one-month custody order, consecutive. The custody will be followed by period of probation of two years.

[18] I think Mr. Hyde, in his pre-sentence report, has highlighted the important terms of that probation order. It would include the statutory conditions. In addition:

1) Mr. Smith is to report to a probation officer immediately upon the termination of his custodial sentence and thereafter as and when directed by the probation officer.

2) He is to reside at such place as is approved in advance by the probation officer and the sexual offender risk management team and abide by the rules of that residence.

3) He is to abstain absolutely from the possession, purchase and consumption of alcohol and non-prescription drugs, and submit to a breathalyzer or urinalysis upon demand of any peace officer, or probation officer, or the risk management team, who has a reasonable suspicion to believe that he has failed to comply with this condition.

4) For the first 90 days of this probation, he is to abide by a curfew by remaining within his residence between the hours of 10:00 p.m. and 7:00 a.m. unless he

has the written permission from the risk management team or from his probation officer. During this curfew period, he will answer the door or answer the telephone during reasonable hours for the purpose of curfew checks. Failing to do so will be a presumptive breach of this term of his probation order.

5) He is not to attend any licensed bar or tavern.

6) He is to have no contact directly or indirectly with the complainant, J.A., or her common-law spouse, H.S.

7) He is to attend and participate in such assessment, counselling and treatment as directed by the risk management team including but not limited to sex offender treatment and alcohol and drug treatment. He is to attend and participate in such other assessment, counselling and treatment as directed by the risk management team.

8) He is to use reasonable efforts to seek and maintain employment and/or upgrade his educational qualifications.

[19] Now with respect to that probation order, which I earlier described as onerous, is there anything that the Crown finds problematic? Essentially, I followed, with some minor modifications, the outline set out by Mr. Hyde in his report.

[20] MR.MCWHINNIE: Nothing on that subject, sir.

[21] THE COURT: I mentioned earlier that, in my view, the

substantive offence is a very, very serious offence. The purpose of sentencing, in these kinds of cases, is to denounce this kind of conduct. We need to send a clear message to the community that sexual offending behavior will not be tolerated. Hopefully, it will also send the message that alcohol abuse, alcohol and drug abuse, is a significant risk factor in relation to these kinds of offences.

[22] Section 718.2*,* referred to by counsel, sets out some other considerations. They include proportionality, or similarity with respect to other offenders and other similar offences. Counsel have directed my attention to that issue.

> (c) where consecutive sentences are imposed, the combined sentence should not be unduly long or harsh;...

To look to and to use less restrictive sanctions when appropriate, and:

> (e) 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.

[23] Again, defence counsel has referred to this subsection of the *Code*. Ms. Cairns has referred to the decision in *R. v. Gladue*, [1999] 1 S.C.R. 688, which has underscored that same point.

[24] The published cases indicate that judges have wrestled with the so-called special treatment for aboriginal offenders and I continue to do so. Living in this Territory, I am cognizant of the history of aboriginal people in the Yukon Territory and, in particular, I am sensitive to and have some appreciation of the negative impact that the mission schools had on First Nations individuals.

[25] There have been a number of cases that have attempted to wrestle with this issue and they make several points. One is that the more serious the offence, the less the difference between any disposition a non-aboriginal offender might receive as compared to an aboriginal offender.

[26] In *R. v. Wells*, [2000] 1 S.C.R. 207, the Supreme Court of Canada states:

> ...the more violent and serious the offence, the more likely as a practical matter that the appropriate sentence will not differ as between aboriginal and non aboriginal offenders.

[27] Now, I am not alluding to that principle because, in my view, it does not come into play in this particular case. I mentioned earlier that this is a very serious offence. It does not involve physical violence but did involve emotional and psychological violence. On the facts of this case I do not find that the accused should receive a sentence substantially different from what a non-aboriginal offender would receive.

[28] The issue, then, is whether or not a conditional sentence would be appropriate in the circumstances.

[29] I think Ms. Cairns, for Mr. Smith, has pointed out the difficulty in asserting that there was a lack of remorse in this particular case. What I can say is that there was a plea of not guilty and that the process involved a full trial with the complainant having to testify, with all of the trauma associated with that.

[30] I have encountered this kind of a case in the past, where an individual has said, "I do not remember what took place." "I was too intoxicated." In some instances, before trial, those same individuals have said, "but I accept what that other

individuals asserted. I do not remember it, but I am not in a position to call that person a liar, so that is why I am pleading guilty."

[31] Or, in other situations, once they have seen the evidence, or heard the evidence, have said, "I do not remember it but I now hear these facts and I accept that I did something that was very wrong." Mr. Smith has not done so.

[32] Mr. Smith is before the court here today having accepted the sentence that I have imposed, and he has accepted the fact that I found him guilty. He has not yet demonstrated real remorse.

[33] Mr. Smith comes before the court with a record of previous breaches of court orders and it is of concern to me that a previous conditional sentence was breached and collapsed. In fact, there are two breaches of that conditional sentence, the second one resulted in the collapse. There is also a breach of probation, an order in relation to attending the Spousal Abuse Program. This does not speak strongly in favour of a conditional sentence for this serious offence.

[34] I have now mentioned his alcohol abuse, or his alcoholic condition, a number of times. It is a continuing risk factor, a significant continuing risk factor, and I have heard today, through his counsel, that he is proposing to address that issue, that he has heard that there is a program in September that he could take advantage of, perhaps, if he is not too late.

[35] My concern is this: Since March, what has he done to actually address these problems? What has he done in relation to dealing with his alcohol and risk factors? He is now at the time of sentencing saying, "I would like to do", "I think I should do",

and sets out some of these very general plans; nothing specific, nothing concrete.

[36] These plans, in my view, are good but they fall far short of persuading me that he has the motivation and the ability to follow through on that programming, programming that he desperately needs if he is going to wrestle his alcoholism to the ground and to keep it under control.

[37] In all of these circumstances, including the seriousness of the offence, his past performance with respect to compliance, his previous breach of a conditional sentence, I am not satisfied that the community would not be endangered if he were to serve this sentence in the community and for that reason, I decline to make a conditional sentence order on the facts of this case.

[38] Ms. Cairns, I have not heard from you on the DNA application. Is there anything there?

[39] MS. CAIRNS: Nothing.

[40] THE COURT: That application will be granted.

[41] With respect to the firearms? Now is it s. 110?

[42] MR. MCWHINNIE: 109, Sir.

[43] THE COURT: 109, is the section that, I am actually thinking of the application to amend or for relief.

[44] MR. MCWHINNIE: 113 application*?*

[45] THE COURT: Yes, that is the one.

[46] MR. MCWHINNIE: Because this is one of those rare cases where the court retains jurisdiction afterwards, I would be suggesting you make the mandatory ten year order. There is no reason to go above ten years and over time, if Mr. Smith wants to bring it back, and has a basis, the court has the opportunity, under s. 113*,* to correct or vary the order or provide relief.

[47] THE COURT: That is the reason I raised it, to draw Mr. Smith's attention to the fact that, unlike the previous situation, when it was very difficult, without a constitutional argument, to terminate such an order, that is not the case now.

[48] What would he like to do with that? Does he rely on hunting for subsistence?

[49] MS. CAIRNS: He does hunt for food. He doesn’t rely on hunting for his employment at this point.

[50] THE COURT: Right, as many First Nations people do.

[51] My view would be this, and I am happy to have counsel make notes of my comments, and that is, my view would be, that the ten-year order should go at this time, but that either myself or any future court should consider an application to terminate the order, at a future date, in a very favourable way provided he has successfully completed some significant programming and has demonstrated an

ability to maintain sobriety for an extended period of time.

[52] Certainly, if the application were brought to me, in due course, I would consider that application in a very favourable light.

[53] MS. CAIRNS: Thank you.

[54] THE COURT: So I think, in those circumstances, the ten-year order will go. If you have any firearms, ammunition or explosive substances, any crossbows in your possession; you will have 48 hours upon your release from the Whitehorse Correctional Centre to dispose of such firearms, ammunition, explosive substances or crossbows.

[55] Victim fine surcharges will be waived.

[56] MS. CAIRNS: With respect to the period of time he has spent in custody, that was 11 days, has Your Honour given him credit for that? With my calculations, that would be 22 days and perhaps it would go towards the, either the s. 145 charge, which you have given him a 30-day sentence, or perhaps the one 12-month sentence. I'm not sure whether Your Honour has calculated that already or not?

[57] THE COURT: Well, I did not specifically direct my mind to it. There should be some credit for that.

[58] Madam Clerk, if you could go back to that sentence and for the consecutive breach sentence to reduce that to 14 days and to indicate that I have taken into

account 11 days pretrial custody in relation to that charge.

[59] Counsel, thank you for your assistance.

_____

LILLES C.J.T.C.