

Citation: *R. v. B.E.M.*, 2011 YKTC 85

Date: 20111205
Docket: 10-00677
Registry: Whitehorse

IN THE TERRITORIAL COURT OF YUKON

Before: Her Honour Judge Ruddy

REGINA

v.

B.E.M.

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:
Ludovic Gouaillier
David Christie

Counsel for the Crown
Counsel for the Defence

REASONS FOR SENTENCING

[1] RUDDY T.C.J. (Oral): B.M. is before me for sentencing with respect to a single count of sexual assault to which he has entered a plea of guilty. The offence itself occurred on December 18, 2010. The matter was originally set down for trial, but in September of this year Mr. M. changed his plea.

[2] There was a Pre-Sentence Report that was ordered. That Pre-Sentence Report has been not without issues. When canvassed with respect to his attitudes with respect to the offence and willingness to make amends, Mr. M. was very clear in the Pre-Sentence Report that he was not fully accepting responsibility. He went so far as to suggest that he had not committed the offence but was only entering the plea to avoid

the possibility of penitentiary time should he be convicted. It is my understanding there had been an agreement between counsel for the Crown to re-elect to proceed summarily, which would limit his liability to a maximum of 18 months in prison.

[3] Since those initial meetings with the Probation Officer, Mr. M. had some discussions with his counsel. He contacted the Probation Officer again with an indication that no, in fact, he did commit the offence. His explanation to Mr. Butt, the Probation Officer, suggested that his rationale, at least at that time, for having denied the offence, was that he was confused and the writer had tried to trick him.

[4] He has had some additional discussions with counsel. He is before me today. He has now signed an Agreed Statement of Facts with respect to what has happened. His counsel assures me that they have spent significant time reviewing the facts and discussing his recollection of the events and what he is prepared to admit to today. Following those discussions, he did sign the Agreed Statement of Facts. I also questioned him today on what occurred on the night and he was able to articulate for me facts which amount to a sexual assault and are consistent with the Agreed Statement of Facts.

[5] His explanation before me today was that his initial denials relate to his shame and embarrassment with respect to both the nature of the act that was committed and also the fact that the victim in this case was his cousin. After discussions with both counsel and Mr. M., I was satisfied that I could accept the plea in all of the circumstances and we have proceeded to sentencing today.

[6] The Agreed Statement of Facts, essentially, alleges a single incident of non-

consensual anal intercourse. Ms. M., the victim, Mr. M.'s cousin, had been at his home along with another individual; all were consuming alcohol. She went to one of the bedrooms in the residence and fell asleep fully clothed, only to wake to find Mr. M. engaged in having anal intercourse with her without her consent. There was a DNA sample taken, which identified Mr. M.

[7] MR. GOUAILLIER: It was inconclusive in relation to tying --

[8] MR. CHRISTIE: Yes.

[9] THE COURT: Sorry.

[10] MR. GOUAILLIER: Yeah, sorry, perhaps that's not clear, but it was inconclusive in terms of tying him to the offence.

[11] THE COURT: Okay, I am sorry. No, no, I misread that. Thank you very much.

[12] MR. GOUAILLIER: That was also a reason why we came to an agreement on disposition.

[13] THE COURT: I am sorry. I read it quickly this morning, because I did just receive it this morning, but I see now that it is the complainant's DNA that was identified, not his. Thank you very much. So there was inconclusive DNA. In any event, he is admitting to the act before me today.

[14] He comes before the Court with a prior record. On the positive side, there have been no criminal convictions since 1996. On the very negative side, however, of the

equation, his last conviction in 1996 was an indecent assault on the same victim of the offence that is before me today, something which I find extremely concerning.

[15] I have been provided information with respect to Mr. M.'s background and circumstances. He is now 47 years of age, a member of the Kwanlin Dun First Nation. His family history appears to have been characterized by a fair amount of abuse of alcohol and also a number of deaths in his family, including two brothers who committed suicide and his wife who died as a result of liver complications. All three had significant issues with abusing alcohol. It appears that Mr. M. himself has a lengthy history of abusing alcohol. In addition, he does have significant literacy and educational deficits, as described by his counsel, but does have at least a recent employment history of working for the Kwanlin Dun First Nation Fire Smart Program over the last three seasons. He does have one positive support in his cousin B.S., who appears to be a sober individual who was present earlier today but apparently unable to remain.

[16] With respect to disposition in this case, counsel are agreed with respect to the length of sentence, but the primary issue is whether or not it is appropriate for Mr. M. to be entitled to serve his sentence conditionally within the community. As I indicated earlier, 18 months is the maximum sentence that I could impose, and counsel are agreed that it is appropriate in this particular case. I will say I agree. Given the circumstances of the offence, we are talking about a full intercourse offence, and given the fact that there is a prior related offence on the same complainant, I have absolutely no difficulty in determining that the maximum is appropriate in this particular case. Counsel are then jointly agreed that a probationary term is appropriate. I also agree in the circumstances that it is entirely appropriate for Mr. M. to be subject to a lengthy term

of community supervision to ensure that there is access to services for him, hopefully to address his underlying issues, but also so that there is supervision to ensure that there are no further incidents of this kind.

[17] In addition to the Pre-Sentence Report with respect to Mr. M.'s circumstances, I have been provided a victim impact statement from Ms. M. It is a handwritten victim impact statement, essentially transcribed by a victim services worker on December 2nd of this year at the Whitehorse General Hospital. It is a difficult document to read, in which Ms. M. speaks at length about the impacts of this incident on her. It is evident that she is having a great deal of difficulty coming to terms with what has happened, to the point of actually feeling suicidal and checking herself into the hospital. So I am satisfied, based on what I have read, that there was a significant, negative impact on the particular victim in this case; I believe one could characterize it as quite devastating for her in all of the circumstances.

[18] As I indicated, the primary issue for me to decide is whether a conditional sentence is appropriate. There are a number of prerequisites which must be addressed. The first of those is that the sentence is not one which would exceed the limit of two years less a day. In this particular case, we are talking about an 18 month sentence, so that prerequisite is met. In addition, I need to be satisfied that the imposition of a conditional sentence would not endanger the safety of the community. With respect to this particular issue, as Mr. M.'s counsel has pointed out, he has been on strict conditions since December of last year and that there have been no breaches with respect to those conditions. He does not have a lengthy history. There is one prior breach of a recognizance in 1996, but there does not seem to be a significant history of

breaching. This would suggest, at least, that his behaviour could be managed within the community and that community safety could be addressed to some extent by the imposition of a conditional sentence, but that is not the end of the question to be determined today. I must also be satisfied that the principles of sentencing can be addressed by the imposition of a conditional sentence. There is a fair amount of case law with respect to conditional sentences and the impact they have in terms of addressing the principles of sentencing.

[19] In this particular case, in my view, the relevant principles of sentencing to be considered are, number one, denunciation; number two, deterrence; and number 3, rehabilitation. There is case law from the Supreme Court of Canada which speaks to the fact that, depending on what the dominant sentencing principles are, a conditional sentence can, in effect, be used to meet those principles. They speak, for instance, about the fact that where the primary sentencing principle to be addressed is rehabilitation, it is more likely that a conditional sentence is appropriate. On the other hand, where denunciation and deterrence are the primary objectives, it is less likely that a conditional sentence is appropriate. Where there are combined objectives, both rehabilitation and denunciation and deterrence, a conditional sentence can be used to address both.

[20] In this particular case, I am satisfied that denunciation and deterrence are the primary sentencing principles to be addressed. Rehabilitation is an issue but it is not, in my view, a primary issue in this particular sentencing. The reason for that is that it is evident that Mr. M. has significant issues with fully accepting responsibility for his behaviour, extending even to the point of victim blaming, which is seen in the Pre-

Sentence Report. That is a concern to me in determining whether or not there is a real likelihood of rehabilitative objectives being met through the imposition of a conditional sentence. The second reason that I feel that rehabilitation ought not to be a primary focus for this disposition is that Mr. M. seems somewhat equivocal about what, if any, help he does need. There is an indication in the Pre-Sentence Report, for instance, that he does not feel that counselling would assist him in addressing his alcohol issue. I am advised that he has had discussions with his cousin B.S. about the fact that he does need counselling, and I am hopeful that he is coming to that realization. However, I would note, and this is a fairly significant factor for me, and probably the most important factor, in determining whether or not rehabilitation ought to be the focus of this particular sentence, and that is the fact that absolutely no steps have been taken by Mr. M. in almost a year to address any of his issues.

[21] So at the end of the day, I am satisfied that denunciation and deterrence are the primary sentencing principles to be addressed through this sentence. I am not satisfied that a conditional sentence would appropriately address those principles. Accordingly, I am going to impose an 18-month custodial term on Mr. M. with respect to the offence that is before me.

[22] That will be followed by a term of three years probation. The terms and conditions of that order will be that Mr. M.:

1. Keep the peace and be of good behaviour;
2. Appear before the Court when required to do so by the Court;
3. Notify the 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. Remain within the Yukon Territory unless he obtains written permission from his Probation Officer;
 5. Report to a Probation Officer immediately upon completion of his custodial sentence, and thereafter when and in the manner directed by the Probation Officer;
 6. Have no contact, directly or indirectly, or communication in any way with N.M.;
 7. Not attend the residence or place of employment of N.M.;
 8. Abstain absolutely from the possession or consumption of alcohol and/or controlled drugs or substances, except with in accordance with a prescription given by a qualified medical practitioner;
 9. Not attend any bar, tavern, off-sales or other business whose primary purpose is the sale of alcohol;
 10. Take such assessment, counselling, and programming as directed by the Probation Officer;
 11. Provide the Probation Officer with consent to release information with regard to his participation in any programming, counselling, employment or educational activities that he has been directed to do pursuant to this probation order.

[23] In addition to the sentence that is imposed today there are a number of mandatory orders which I am required by law to impose in terms of the nature of the offence. The first of those is that, Mr. M., you are hereby required to comply with the

provisions of the *Sex Offender Information Registration Act*, SC 2004, c. 10, for a period of ten years. As this is a primary designated offence, you are also required to provide such samples of your blood as are necessary for DNA testing and banking. Do you understand both of those orders?

[24] THE ACCUSED: Yes.

[25] THE COURT: You can speak to your counsel further about the details of what that will look like in practice. He is not employed at the moment?

[26] MR. CHRISTIE: No, that just ended recently.

[27] THE COURT: Do you have any submissions on the victim fine surcharge?

[28] MR. GOUAILLIER: He'll be in custody for a period of time, so.

[29] THE COURT: I will waive it in his financial circumstances. The remaining count?

[30] MR. GOUAILLIER: There will be a stay of proceedings.

[31] THE COURT: Thank you.

RUDDY T.C.J.