

Citation: *R. v. Hager*, 2011 YKTC 05

Date: 20110124
Docket: 09-00595
09-00595A
09-00595B
09-00595C
Registry: Whitehorse

IN THE TERRITORIAL COURT OF YUKON

Before: His Honour Judge Lilles

REGINA

v.

CHRISTOPHER BENJAMIN HAGER

Publication of information that could disclose the identity of the complainant or a witness has been prohibited by court order pursuant to section 486.4 of the *Criminal Code*.

Appearances:
Noel Sinclair
Gordon Coffin

Counsel for the Crown
Counsel for the Defence

REASONS FOR SENTENCING

[1] LILLES T.C.J. (Oral): Dealing then with the matter of Christopher Hager.

Mr. Hager is a 26-year-old young man who has entered a plea of guilty to a charge of sexual assault, contrary to s. 271 of the *Criminal Code*. This incident took place on June 2, 2009.

[2] In addition, he has entered guilty pleas to two counts of breach of recognizance which occurred on November 4, 2010, for consuming alcohol and failing to reside at the Yukon Adult Resource Center, as directed.

[3] The circumstances around three additional breaches were presented as aggravating factors. Counsel have put forward a joint submission as to sentence, namely, a sentence of a 12-month conditional sentence of imprisonment followed by probation, in relation to the s. 271 offence, and time served with respect to the breaches of recognizance.

[4] A conditional sentence of imprisonment is, as a practical matter, an unusual sentence for a charge of sexual assault, but the circumstances of this case are also somewhat unusual. Mr. Hager, the victim and two other individuals had been drinking in various locations around Whitehorse and eventually ended up by the side of the Yukon River, near the place of business known as the Kanoe People. Those other two individuals advised the police that the victim, a female aged 16 years, was coming on to Mr. Hager. She was being sexually demonstrative towards Mr. Hager. Both the victim and Mr. Hager were intoxicated. After the two individuals who had been drinking with Mr. Hager and the victim left, it is evident that Mr. Hager engaged in sexual contact with the victim. The victim herself had no recollection of what happened along the river that early morning, but around 3:00 a.m., Mr. Hager approached a Mr. Skookum, who was walking by along the road, for help to locate the victim. They found her lying in a ditch near the river, with her pants undone, unconscious. They carried her to a nearby wooden picnic platform.

[5] Mr. Skookum called the police, and Emergency Medical Services were also called. At the hospital, a sample of blood was taken from the victim that revealed an alcohol content of 380 milligrams percent. Mr. Hager denied sexual contact with the victim. Perhaps he, himself, did not remember what had happened. The two

independent witnesses told the police that Mr. Hager had earlier rejected the victim's advances because she was too drunk, but a DNA analysis of a vaginal swab from the victim established sexual contact by Mr. Hager with the victim.

[6] Mr. Hager's guilty plea is premised on the fact that he engaged in sexual contact with the victim while she was too intoxicated to give a valid consent. In addition to the circumstances of the offence, the accused's guilty plea is a significant mitigating circumstance. A key Crown witness is in Saskatchewan and is not conveniently available to return to Whitehorse. Also, the Crown has elected to proceed summarily. Mr. Hager has a limited adult record. I am satisfied that Mr. Hager is not precluded from receiving a conditional sentence of imprisonment pursuant to s. 742.1 of the *Criminal Code*.

[7] An appropriate sentence for the s. 145(3) charges would be two months custody on each, consecutive to each other. As he has served a total of six months custody already, I am imposing a sentence of one day deemed served on each count. The record should indicate the time served. With respect to the s. 271 charge, there will be a 12-month conditional sentence order on terms, essentially, as set out in the Pre-Sentence Report prepared by the Conditional Sentence Supervisor, Ms. Simon. Madam Clerk, I am not going to go over all of those terms; they are set out in the Pre-Sentence Report, a copy of which --

[8] THE CLERK: I have a copy.

[9] THE COURT: -- you have a copy there, with the following modification, and perhaps counsel can follow along. With respect to clause 5, clause 5

will be modified to read as follows: Abide by a curfew by remaining within your place of residence, except with the prior written permission of your Conditional Sentence Supervisor, for the purposes of employment, medical appointments, counselling, and treatment, and such other purposes that the Conditional Sentence Supervisor may determine in his or her discretion.

[10] After six months of this order, you are to remain in your residence between the hours of 8:00 p.m. and 7:00 a.m., subject to the same exceptions as stated above.

[11] I read through that fairly quickly. Counsel can live with that wording?

[12] MR. COFFIN: Yes. We'll see -- yes.

[13] MR. SINCLAIR: I'm not sure if you intended to make an allowance for some sort of daily, you know, fresh air or?

[14] THE COURT: Well, I am not doing it directly, but I say, "and such other purpose that the Conditional Sentence Supervisor may determine." So if it is clearly something that can be negotiated and worked out, that would be, in my view, axiomatic, that there would be an hour or two where he could do his shopping or whatever else he needs to do.

[15] MR. SINCLAIR: Okay. I will -- I'll make sure that I can convey that to Ms. Simon.

[16] THE COURT: Make sure she understands that. Clause 5 will also have the following terminology: At all times, when not in your residence, you will carry

the written permission from your Conditional Sentence Supervisor on your person, and make it available for inspection to any Peace Officer upon demand. Clause 5 currently also includes the standard knock and talk term, and that term should remain part of paragraph 5. Madam Clerk, I have this written down in case you had trouble following me, so do not panic.

[17] THE CLERK: Yes.

[18] THE COURT: The rest of the conditional sentence order, as set out in the Pre-Sentence Report, will remain as drafted by the Supervisor, except for paragraphs 17, 18, and 19, which will be deleted.

[19] This conditional sentence order will be followed by nine months probation on the following terms. Madam Clerk, these are taken directly from the form and, again, I can hand you a copy of my form, so do not panic about following along. The statutory terms will apply:

1. Keep the peace and be of good behaviour;
2. Appear before the Court when required to do so, and notify the Probation Officer in advance of any change of name or address, and promptly notify the Probation Officer of any change of employment or occupation;
4. Remain within the Yukon Territory unless you obtain written permission from your Probation Officer or the Court;
5. Report to a Probation Officer within two working days of the completion of your conditional sentence, and thereafter when and in the manner directed by the Probation Officer;

6. Reside as approved by your Probation Officer, and not change that residence without the prior written permission of your Probation Officer;
7. Abstain absolutely from the possession and consumption of alcohol;
8. Not attend any bar, tavern, off-sales, or other commercial premises whose primary purpose is the sale of alcohol;
9. Take such alcohol, counselling, or programming as directed by your Probation Officer;
10. Take such other assessment, counselling, and programming as directed by your Probation Officer, including sex offender treatment;

[20] That is in there in the event that the programming does not get completed within the time period of the conditional sentence order.

11. Have no contact, directly or indirectly, or communicate in any way with S.G., except with the prior written permission of your Probation Officer in consultation with Victim Services;
12. Make reasonable efforts to find and maintain suitable employment, and provide your Probation Officer with all the necessary details concerning your efforts;
13. Provide your Probation Officer with consents to release information with regard to your participation in any programming, counselling, employment, or educational activities that you have been directed to do pursuant to this probation order.

[21] Does the Crown have anything in addition that you would suggest? Would

defence counsel -- anything that is going to create a problem for your client?

[22] MR. COFFIN: Hopefully not.

[23] THE COURT: Hopefully not. Well, it might. But if it does, it is his own doing.

[24] There was an application for a DNA order, Mr. Coffin. Do you have a position on that?

[25] MR. COFFIN: It's not clear, but the copy of the criminal record, if I could just find that --

[26] THE COURT: I am assuming they already have his DNA because, somehow, they made a match.

[27] MR. COFFIN: Yes.

[28] THE COURT: But again --

[29] MR. SINCLAIR: A warrant was executed. Oh, maybe he came back with the -- they can't use the data bank. I mean, there are limitations, but yeah, they have it.

[30] THE COURT: I will make the order, and if they feel that they have to do whatever they do to get another sample, it is a pretty innocuous proceeding --

[31] MR. SINCLAIR: It's a pinprick.

[32] THE COURT: -- but I suspect they probably will not need it.

[33] MR. COFFIN: Yes. And the only thing that I was referring to is the record -- the copy of the record that has been provided to me has at its top "DNA on known offender data bank," and so I --

[34] THE COURT: Oh, I see.

[35] MR. COFFIN: -- inferred from that.

[36] THE COURT: Right, probably have it.

[37] MR. COFFIN: He's already in it, but.

[38] THE COURT: Yes, you are probably right.

[39] MR. SINCLAIR: I'll just leave it.

[40] THE COURT: If they have it, they will not need the sample.

[41] MR. SINCLAIR: Right. The order's made, and they'll look into that.

[42] THE COURT: Yes, exactly. The victim fine surcharge will be waived, as requested by Mr. Coffin. Anything else with respect to this matter?

[43] MR. COFFIN: No, I don't believe so.

[44] MR. SINCLAIR: No, sir.

[45] THE COURT: What discussion did you have with Ms. Simon about your release today and your residence today?

[46] THE ACCUSED: I have to stay with a friend until tomorrow morning. I

have to see her at nine o'clock a.m. in the morning to see if I could reside at the ARC.

[47] THE COURT: Okay.

[48] THE ACCUSED: The Adult Resource Center, and then I have to reside there for about three months.

[49] THE COURT: All right. Again --

[50] THE CLERK: Remaining Information?

[51] THE COURT: The remaining Informations?

[52] MR. SINCLAIR: Stay of proceedings.

[53] THE COURT: Thank you. And again, Mr. Hager, this order is tough, but it depends on you to control yourself and to enforce the order. We have talked earlier about the fact that even a minor breach will end up -- what will happen, you will end up in custody again. Here is a chance to try to set things right for yourself, not for anybody else, for yourself. So I hope you take advantage of this opportunity and do the very best you can. I mentioned earlier about working closely with Ms. Simon, or whoever other Conditional Sentence Supervisor you have. It is really important that you work hard at keeping her or him happy and informed of all the good things you are doing, because that person has a lot of discretion; they can do a lot of things for you if they think that you are trying hard. So try hard, okay?

LILLES T.C.J.