Citation: *R. v. Menicoche*, 2015 YKTC 34

Date: 20150929
Docket: 14-00004
14-00004B
14-00004A
Registry: Whitehorse

IN THE TERRITORIAL COURT OF YUKON
Before His Honour Judge Luther

REGINA

v.

SKYLER JERRY PHILIP MENICOCHE

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:
Susan E. Bogle — Counsel for the Crown
Gordon R. Coffin — Counsel for the Defence

REASONS FOR SENTENCING

[1] LUTHER J. (Oral): The accused pled guilty in July of this year to a sexual assault on M.F. The offence occurred sometime between 4 a.m. and 8 a.m. on October 6, 2013.

[2] M.F. was 15 years old at the time and the offender was a few days shy of his 27th birthday. At no time did M.F. discuss her age with the offender in a responsible way. It might be said that the offender was reckless, in terms of determining her age. M.F. slightly knew the offender, through Facebook, for a few months.

[3] The offender invited M.F. and some of her friends to a party and to drink alcohol at his place. This was short-lived as the offender's mother told the group to leave. After driving around Whitehorse with a friend and cousin, M.F. responded to a text message from the offender to have some more drinks with him. So between 3 and 4 a.m., she arrived and continued to consume alcoholic beverages and watch television with the offender, his brother, and his mother.

[4] Within an hour, the mother went to bed. M.F. felt awkward not really knowing these people that well. However, they kept drinking vodka. Becoming extremely tired, M.F. found a bedroom in which to sleep. The brother talked to her for a bit and then the offender came in and lay down beside her on the bed. She faced the wall; he faced her back. They talked briefly. The offender then made some advances to her, holding and kissing her. She told him to stop, which he did. Fully clothed, she fell asleep, passing out.

[5] I now quote from paras. 7 and 8 of the Agreed Statement of Facts:

> 7. The next thing M.F. remembered is that her pants were down and the accused had his penis in her rectum and he was not wearing a condom. She became completely awake as soon as he anally penetrated her, elbowed him away and the accused immediately withdrew and apologized to her. There was no ejaculation. M.F. began to cry and he again said he was sorry and left the room.
>
> 8. M.F. called her cousin and friend to come pick her up and they arrived to find her crying and upset. She told them she had been raped but did not go into any detail. She hid at her friend's house for the next week and her mother was unable to find her. During this time she messaged the accused and told him to watch his back and that she would charge him. He

> apologized again and asked her what he could do for her to forgive him and not charge him. She asked for money and for the next few months, the accused e-transferred her a total of $1680 in 5 separate payments. The last payment was made on Dec 13, 2013 when the accused's mother found out what was going on.

[6] The leading case on sentencing involving non-consensual sexual intercourse with a victim who was sleeping or unconscious is *R. v. Rosenthal,* 2015 YKCA 1, a very recent case from the Yukon Court of Appeal decided earlier this year, which accepts the scholarly, comprehensive, and detailed analysis by Mr. Justice Gower in *R. v. White*, 2008 YKSC 34. The range of sentence in this type of case is roughly 12 to 30 months imprisonment.

[7] The Crown seeks a high territorial sentence of 21 to 23 months. The defence argues for a shorter period of incarceration along the lines of *Rosenthal*, perhaps in the range of 12 to 14 months.

[8] The offender is about to turn 29 in the next few days. From the Northwest Territories originally, he is a member of the Pehdzeh Ki First Nation.

[9] His adult criminal record consists of only one assault, s. 266, and a failure to appear, s. 145(5), for which he was sentenced to 60 and 15 days, plus probation for one year and a mandatory prohibition order under s. 109. These occurred in Edmonton and were remotely associated with an Oilers' playoff victory back in 2006 or 2007. The offender did well on probation.

[10] The offender, for the most part, felt safe growing up in Fort Simpson, as he was surrounded by a great host of family on his mother's side. Tragically, he was without his father from the age of six onwards, as he had drowned in a boating accident while under the influence of alcohol. This has had an ongoing impact on the offender.

[11] As to schooling, there was a lot of turmoil between the offender and his mother. Mr. Menicoche, although quite intelligent, did not graduate from high school.

[12] His work record includes: supervisor at a fast food restaurant; drywall mudder, babysitter, construction and mine worker. None of the jobs lasted more than a year and a half.

[13] Now in his second relationship, Mr. Menicoche is the father of a boy who is 22 months old. This year, he took time off from his mining job to spend time with his family before going to jail.

[14] The offender is sorry for his criminal wrongdoing and reiterated to the author of the Pre-Sentence Report that:

> ..."everything is wrong about it because it makes people feel unsafe around me ..."

[15] At page 20 of the Pre-Sentence Report, it was determined that:

> ...the composite assessment places Skyler in the MODERATE-HIGH priority category for supervision and intervention in comparison to other sexual offenders assessed using these measures.

[16] There are numerous *Gladue* factors present, including alcohol abuse, strained family relationships over time, Residential School attendances by previous generations, early death involving substance abuse, pronounced emotional abuse, ongoing and severe violence in the home.

[17] Returning to the crime, pulling down the victim's pants and inserting his penis into her rectum is a serious invasive sexual assault. In my opinion, the crime here is more serious than that in *Rosenthal*, which involved putting a finger into the victim's vagina.

[18] Penile penetration without a condom involves the risk of a sexual disease.Also, in terms of psychological harm, it is my opinion that it is more likely that a victim of sexual assault will struggle more and for a longer time knowing that he or she has been violated by a criminal's sexual organ rather than his finger. The victim has already suffered enormously, as was clearly set out in the Victim Impact Statement. She talked about a downward spiral of depression and hatred. Themes of suicide, alcohol, poor school performance, anxiety attacks, fear, social media pressure and shame, nervously awaiting justice, all these were present in her report. In her despair, she wrote, "I will never forget what happened, which means a lifetime of hurt."

[19] The victim's mother was also greatly affected, writing of her physical, emotional, psychological, and financial harm. Both were clearly and highly upset with social media and with the length of time it took for this case to conclude.

[20] The process was started when the Information was sworn on April 2, 2014. The guilty plea was entered on July 6, 2015. There were some issues dealing with the offender's representation in court, as well as other systemic delays.

[21] The late guilty plea is but a minor mitigating factor on sentence, given that the victim had to be prepared on this and at least one other occasion to testify. Any mitigating factors in this case clearly take a backseat to the aggravating factors, which include: participating in getting a teenage girl drunk; the age difference of about 12 years; self-gratification with no regard to the harm to be caused to a young, impressionable girl.

[22] The purposes of sentencing are set out in s. 718. In 718.01, an objective is stated by Parliament:

> 718.01 When a court imposes a sentence for an offence that involved the abuse of a person under the age of eighteen years, it shall give primary consideration to the objectives of denunciation and deterrence of such conduct.

[23] Nothing has been shown to me in this case or, indeed, in any previous cases since I have been presiding in this jurisdiction since 1988 to suggest that the frequency of major sexual offences involving violating a sleeping or unconscious victim has been reduced over the years. Thus, denunciation and deterrence and separating offenders from society remain the primary purposes of sentencing, probably even more so.

[24] I would draw counsel's attention to a very recent case from a Newfoundland Provincial Court decision from Judge Gorman, *R. v. I.L.*, [2015] N.J. No. 305. That was a more horrendous case than what I am dealing with here today and the sentence was considerably longer.

[25] Judge Gorman took the time to cite a case, *R. v. Clifford* [2014] EWCA Crim 2245, at paragraph 19:

> ...the Court of Appeal for England and Wales noted that sexual offending "will by its very nature cause harm at the time the offence is committed, but it is well recognised that for many victims significant harm persists for a considerable period afterwards."

[26] The Newfoundland Court of Appeal in *R. v. Cluney*, 2013 NLCA 46 indicated that:

> [16] The principle of proportionality applies to sentencing for all criminal offences... The appropriate range of sentence is related to the gravity of the offence and the moral blameworthiness of the offender. …

[27] Closer to here, in *R. v. B.*, 2014 BCPC 94, the British Columbia Court of Appeal held as a result of s. 718.01 of the *Criminal Code*, the sentencing principles of restraint and rehabilitation of the offender, while still operative, are given secondary status.

[28] And in another recent case from the B.C. Court of Appeal, *R. v. Allen*, 2012 BCCA 377 at paragraph 51:

> Thus, the discretion of the sentencing judge in applying all of the factors set out in Part XXIII of the *Code* has been circumscribed by these provisions. …

[29] The B.C. Court of Appeal also indicated in *Allen* at paragraph 60:

> Parliament has made it very clear that the protection of children is a basic value of Canadian society which the courts must defend. ...

[30] I would now like to talk about what the Ontario Court of Appeal has described as the "inflationary floor". Judge Gorman at para. 42 of his decision in *R. v. I.L.* said:

> This effect is often referred to as an increase in the "inflationary floor". The effect of an increase in the inflationary floor was explained by the Ontario Court of Appeal in *R. v. Delchev*, 2014 ONCA 448 in the following manner (at paragraph 19):
>
> > The effect of the inflationary floor is that because the "best offender" must receive the minimum sentence, which may be a higher sentence higher than the one that would have been given without the minimum, the sentences for more culpable offenders are increased as well, so that the whole range increases.

[31] The inflationary floor, in my view, is a very real consideration in a case of this nature involving alcohol and a 15-year-old girl with an offender 12 years her senior.

[32] Mr. Menicoche is a member of a First Nation in the Northwest Territories and, of course, the Court must pay attention to s. 718.2(e) of the *Criminal Code*. This particular provision has been discussed recently in the courts of appeal of Nunavut, NWT, and Yukon in the cases of *R. v. Ipeelie,* 2015 NUCA 3 at paragraph 21, a decision from the Nunavut Court of Appeal; *R. v. Sikyea*, 2015 NWTCA 6 at paragraph 15; and a passing reference in the case of *R. v. Smarch*, 2015 YKCA 18 at paragraph 27.

[33] The Court notes the obvious that in both *Sikyea* and *Ipeelie* the offences were much worse and the offender had a far worse background.

[34] I do not disagree with defence counsel when he stated that his client has "more than a glimmer of hope in becoming a productive member of society." This would

clearly be a different situation than what the courts of appeal in the NWT and Nunavut saw in those two cases that I made reference to.

[35] I disagree with defence counsel that a sentence in the range of 12 to 14 months' imprisonment adequately addresses the serious and deliberate nature of the crime with the resulting prolonged consequences to the victim and her mother. The offender was highly involved in providing alcohol to the victim, who no doubt was a willing drinker insofar as her youth allowed her to rationally absorb all that she was doing.

[36] For a major sexual assault involving penile penetration on a sleeping teenager in these circumstances, the range of sentence might well be expanded in the upper level to as high as four years. Far be it from me to state that this is the new range. Rather, it is merely an observation that the range could be increased in a fact situation such as this.

[37] Given the record of this offender, with no prior offences of a sexual nature and his realistic prospects of making a good life for himself, and considering the presence of the *Gladue* factors, I am fixing the sentence at a high territorial one, as opposed to a federal sentence, in the range of three to three and half years. Mr. Menicoche is hereby sentenced to 23 months' imprisonment less the credit of a few days for which I remanded him into custody pending sentence.

[38] The Victim Surcharge is set at the statutory minimum of $200. Actually, this provision -- it just dawned on me that the amendment to the *Criminal Code* took place after the offence so the Court is going to waive the Victim Surcharge.

[39] There will be an order under s. 487.051 of the *Criminal Code* requiring the offender to provide bodily substance for DNA analysis.

[40] Furthermore, there will be an order requiring the offender to be listed with the Sex Offender Registry for a period of 20 years.

[41] In addition, there will be an order under s 109(2)(a) prohibiting the offender from possessing any firearms, ammunition, and explosives for life.

[42] Finally, there will be an order prohibiting the offender from having any contact directly or indirectly with the victim while serving his prison sentence.

[43] I have considered s. 161 of the *Criminal Code*. The only concern I have in that regard will be addressed via a probation order. Thus, there will be no s. 161 order here.

[44] The probation order will be in effect for two years and will contain the following provisions:

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, of any change in employment or occupation;

4. Have no contact directly or indirectly or communication in any way with the victim, M.F., and her mother;

5. Remain 100 meters away from any known place of residence, employment or place of education of the victim;

6. Remain within the Yukon unless you obtain the written permission from your Probation Officer or the Court;

7. Report to your Probation Officer within two working days of your release from custody;

8. For the first four months of this order, you are not to possess or consume alcohol and/or controlled drugs or substances that have not been prescribed for you by a medical doctor. Also, for the first four months, you are not to attend any premises whose primary purpose is the sale of alcohol including any liquor store, off sales, bar, pub, tavern, lounge or nightclub;

9. Attend and actively participate in all assessment and counselling programs as directed by your Probation Officer, and complete them to the satisfaction of your Probation Officer, for the following issues: alcohol abuse, sexual treatment; and provide consents to release information to your Probation Officer regarding your participation in any program you have been directed to do pursuant to this condition;

10. If recommended by the Probation Officer, attend residential treatment for alcohol abuse.

[45] Now, I believe that may address all the issues that were brought to my attention.

[46] Let us just straighten away the number of day's credit that he gets. Mr. Menicoche was remanded into custody on the 21st of September 2015. Today, being the 29th day of September -- so that would be eight days times 1.5 -- I will give him 12 days of credit.

[47] And for the Crown, are there any questions or concerns?

[48] MS. BOGLE: No, Your Honour. There was just the issue of the breach.

[DISCUSSION WITH COUNSEL]

[49] THE COURT: I disagree with counsel that it should be concurrent. This is a separate offence. It is not part of a single criminal enterprise. It occurred on May 9, 2015. The original offence was from, say, early October of 2013. The Court will, taking into account the totality principal, impose a sentence of 14 days and it will be consecutive. This one will attract a Victim Surcharge of $100 and it will be paid forthwith.

[50] THE CLERK: Remaining counts?

[51] MS. BOGLE: The Crown will enter a stay of proceedings on the outstanding counts.

[52] THE COURT: Mr. Menicoche, please stand.

[53] The Court has sentenced you to 23 months and 14 days, mostly for the sexual offence.

[54] You have a young child now. You do have somewhat of a sporadic work record but it seems that you have a good job in the mine. They obviously feel that you are of some value to them. I have kept you here in the Yukon rather than sending you south to a federal penitentiary. Do your very best with the programs that are offered. When you are released, work hard at your job and work hard at staying sober. You are going to have to stay sober for four months anyway. Regardless of what temptation might come to you in the future involving self-gratification of a sexual nature, you are just going to have to absolutely refrain from doing that. It is not going to do you any good and it is going to do the victim a lot worse.

[55] You can go with the officer.

_____

LUTHER T.C.J.