IN THE SUPREME COURT OF THE YUKON TERRITORY

Citation: *R.* v. *Peters*, 2005 YKSC 46 Date: 20050803
Docket: S.C. No.04-01547
Registry: Whitehorse

BETWEEN:

HER MAJESTY THE QUEEN

AND:

REUBEN AARON SHANE PETERS

Publication of information that could disclose the identity of the complainant or witness has been prohibited by Court Order pursuant to s. 486(3) of the *Criminal Code.*

Before: Mr. Justice L.F. Gower

Appearances:
John W. Phelps For the Crown
James Van Wart For the Defence

REASONS FOR SENTENCE

[1] GOWER J. (Oral): On October 31, 2004, Mr. Peters sexually assaulted B.G. On January 26, 2005, he waived his right to a preliminary inquiry and consented to a committal for trial in this court. On April 15, 2005, Mr. Peters pled guilty, a pre-sentence report was ordered and the sentencing hearing was adjourned until August 1, 2005.

[2] The facts are relatively straightforward. The victim, B.G., was 16 years old at the time of the offence. She and another female teenager friend were at the Takhini Trailer

Court in Whitehorse, where B.G.'s sister resided. B.G. and her friend were invited to the trailer where Mr. Peters lived with two male roommates aged 19 and 20. Mr. Peters was 24 years old at the time. One of Mr. Peters' roommates was the adult boyfriend of B.G.'s friend. Mr. Peters knew B.G. previously.

[3] B.G. had consumed a beer earlier in the evening. Upon entering Mr. Peters' trailer, B.G. and her friend were offered whiskey by Mr. Peters, which was consumed by all the members of the party until the early hours of the morning. B.G. became quite intoxicated and at one point attempted to go outside the trailer for some reason. When she got outside she fell down some stairs and received scratches and a bloody nose. Mr. Peters assisted B.G. in re-entering the trailer. He told her that she could sleep in his bed, where she laid down. Mr. Peters watched television for a time. B.G. drifted in and out of consciousness and at one point she asked Mr. Peters for some water, which he provided. Mr. Peters subsequently laid down with B.G. in his bed and ultimately had intercourse with her while she was blacked out. B.G. awoke in the bed and found that her pants and underpants had been removed. She grabbed some clothing from the room, fled the residence and told her mother. She attended at the Whitehorse General Hospital for medical examination. There was evidence that someone had had sexual intercourse with her in the previous hours, although she had no sexually related injuries.

[4] The police made attempts to arrest Mr. Peters during the day on October 31st, but were unsuccessful. However, the following day on November 1st, just after 10 o'clock in the morning, Mr. Peters turned himself in to the Whitehorse RCMP and

provided a fully-warned statement admitting to his involvement. He said that while he had initially used a condom, he pulled if off prior to ejaculating.

[5] Mr. Peters has a criminal record and, while it is not insignificant, it is unrelated and somewhat dated. He has five property-related convictions from 1995 to 2000. One failure to appear in 1999 and a drinking and driving conviction from 2001. He has never been previously sentenced to a jail term. He has been sentenced to probation for every conviction and has no convictions for breach of probation.

[6] The circumstances of the offender are as follows. Mr. Peters is now 25 years old. He was raised primarily in Whitehorse. His parents attended residential schools and were troubled from that experience. His father had a drinking problem and was very aggressive when intoxicated. His mother is a teacher and is nearing retirement. His parents separated about three years ago and he does not see his father very often. A few months ago he moved into the residence of his mother, where he also lives with his younger sister and her two children. His mother is a non-drinker and I understand that alcohol is not tolerated in the home. Mr. Peters has a large extended family. He is an aboriginal person and a member of the Little Salmon Carmacks First Nation.

[7] He attended FH Collins High School in Whitehorse, but dropped out at the grade 11 level. In 2000 he began upgrading in order to enter the Yukon Native Teachers' Education Program at Yukon College. He eventually completed that upgrading and was admitted to the Teachers' Education Program in September 2004.

He then withdrew from that program after being charged with this sexual assault offence. He told his teachers at the Yukon College about the charge and is under the belief that he would no longer be permitted to teach with a sexual assault conviction on his record.

[8] Mr. Peters has never been employed and is currently collecting social assistance. He has a number of friends, but has been isolating himself as a result of this charge and feels that he “can’t show his face around town”. He has dated a couple of young women in the past, but is not in a relationship at this time. He has no children.

[9] The probation officer who prepared the pre-sentence report described Mr. Peters as intelligent, polite and friendly, but with a demonstrated immaturity. On the other hand, the author acknowledged that his assessment of Mr. Peters’ immaturity may be based on Mr. Peters’ sense of humour and his joking personality.

[10] The pre-sentence report also describes Mr. Peters as a young man with “minimal motivation”. As an example, Mr. Peters often had insufficient money to take a taxi to attend the adult probation office for meetings to prepare the pre-sentence report. He would often times be unable to find alternative transportation to attend those meetings for a week or more. This assessment of Mr. Peters’ lack of motivation is also corroborated by the fact that he has never been employed, even though he is intelligent, capable and able-bodied. It is further corroborated by the fact that Mr. Peters does not

involve himself in any leisure or recreational activities, other than spending occasional weekends at his family's fish camp in the Carmacks area.

[11] Mr. Peters acknowledges that he began to use alcohol when he was 11 years old, but says that he never drank to excess until he started to attend Yukon College. He then began daily use of alcohol and was also smoking marijuana upwards of four times per week. He admitted drinking at the time of the offence. The pre-sentence report notes that alcohol and/or drugs played an influential role in the offence and recommends that Mr. Peters undergo further assessments to determine if there are any further alcohol or drug needs that require attention. The pre-sentence report further suggests requiring Mr. Peters to abstain from alcohol and drugs as part of the sentence for this offence. Mr. Peters claims to have remained sober since the offence. He also says that he moved into his sober mother's home in order to have the benefit of her support in his recovery. However, while he was apparently aware of the option of obtaining a drug and alcohol assessment prior to sentencing, he has no explanation for not doing so.

[12] A criminogenic risk-assessment was performed on Mr. Peters. The "Static-99" instrument placed Mr. Peters in the "medium – low" risk category relative to other male sex offenders. The probation officer believes that this score fairly represents Mr. Peters' risk at this time.

[13] The aggravating circumstances in this case are as follows:

1. Mr. Peters knew B.G. prior to committing this offence. No doubt that played a role in B.G.'s acceptance of Mr. Peters' invitation to come to

his trailer to drink. That in turn provided Mr. Peters with the opportunity to commit the offence. In this sense, Mr. Peters abused his position of trust toward B.G. That is an aggravating circumstance that I must take into account pursuant to s. 718.2(a)(iii) of the *Criminal Code*.

2. The victim was only 16 years old, while Mr. Peters was 24 years old. That is a significant age gap for persons in that age range. Defence counsel sought to minimize this factor by arguing that Mr. Peters is somewhat immature for his age and that he also had roommates at the time who were 19 and 20 years old respectively. While that may be true, Mr. Peters was old enough and intelligent enough that he should have know better than to take advantage of a relatively young teenage girl.

3. Mr. Peters encouraged B.G. to consume the alcohol he provided, to the point where she became severely intoxicated and was apparently “falling down drunk”. Her state of intoxication would have been obvious to Mr. Peters, as he assisted her in re-entering the trailer from outside.

4. Mr. Peters consciously removed his condom and continued to have unprotected sex with the victim to the point of ejaculation.

5. Apart from pleading guilty to this offence, which I do credit Mr. Peters with and will discuss shortly, he has done little or nothing about dealing with his alcohol and drug issues or his potential need for sex offender treatment. There is no apparent explanation for this other than the assessment that he is minimally motivated. His lack of motivation to

begin assessment and treatment prior to sentencing means that I have little information about his level of risk beyond the criminogenic risk assessment referred to in the pre-sentence report.

[14] The mitigating circumstances are as follows:

1. Mr. Peters waived his right to a preliminary inquiry and entered his guilty plea fairly soon thereafter. He has thus spared the young victim from the need to testify. I give him significant credit for taking that responsibility.
2. It is particularly noteworthy that Mr. Peters turned himself in to the RCMP the day after the offence and provided a fully-warned statement. Clearly, he admits responsibility for the offence. He told the probation officer that he could not have lived with the guilt of having committed a sexual assault. He knew it was wrong at the time and acknowledged that he made a very poor decision.
3. While there is no specific reference in the pre-sentence report to Mr. Peters' remorse, nor is there any evidence of an attempt to apologize to the victim, I am prepared to infer from his expression of regret and shame that he does in fact feel remorseful.
4. This offence appears to be out of character for Mr. Peters, as he has no prior related offences.
5. Mr. Peters is still a relatively young man and has never been previously incarcerated.
6. The risk assessment places him in the "low to medium" risk category.

7. Mr. Peters has complied with the terms of his undertaking since his arrest about 10 months ago, including a condition not to consume alcohol.

[15] Counsel provided me with a number of case authorities relevant to this sentencing:

- *R.* v. *G.C.S.*, [1998] Y.J. No. 77 (C.A.)
- *R.* v. *James*, [2001] Y.J. No. 89 (Terr. Ct.)
- *R.* v. *Smith*, [2003] Y. J. No. 116 (Terr. Ct)
- *R.* v. *Stewart*, [2003] Y.J. No. 71 (Terr. Ct)
- *R.* v. *Tom*, [2003] Y.J. No. 169 (S.C.)
- *R.* v. *A.S.,* [1997] Y.J. No. 197 (S.C.)
- *R.* v. *Carl David Blanchard*, (unreported) June 16, 1997, Y.T.C.

[16] There is no victim impact statement before the Court. Nevertheless, I have no doubt that the victim was traumatized by this offence and will suffer adverse effects for some time to come. In *R.* v. *Smith*, cited above, Lilles, C.J.T.C., as he then was, commented about the impact of this type of offence at paragraph 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."

[17] Further, Veale J. of this court in *R.* v. *Tom*, 2003 YKSC 67, made similar remarks at paragraph 25:

> "I am also mindful of the fact that sexual assaults have their greatest impact at the emotional or psychological level, in the sense that a violation of this woman's personal integrity has taken place. It will clearly have an impact upon her for

> the rest of her life. Sexual assault obviously has a profound impact on a woman's health and well-being …"

[18] The Yukon Court of Appeal in *G.C.S*., cited above, effectively found that the range for this type of offence was between 12 months and 2 years less one day, plus a period of probation. The facts in *G.C.S*. were similar to those of Mr. Peters' case. The offender was approximately 18 years old and the victim was 16. The victim had been drinking alcohol to excess and was passed out or deeply asleep when the offender entered her bedroom in her grand-mother's house. The offender had been drinking heavily and forced sexual intercourse upon the victim, until he was interrupted by other family members. He had a troubled upbringing, dropped out of school in grade eight and had no substantial work history. It is my understanding that the offender was aboriginal, although the case report does not specifically mention that fact. On the other hand, the offender had a criminal record which included a related assault conviction. He was also on probation at the time of the offence and had only recently been released from jail.

[19] What is curious about the *G.C.S.* decision is that the Court of Appeal distinguished that case from the case of *R.* v. *Atlin*, [1986] Y.J. No. 18 (YTCA), where the offender received a sentence of 2 years less one day, plus probation. The Court essentially said that the circumstances in *Atlin* were of greater severity than those in *G.C.S*. However, after acknowledging that *G.C.S.* had spent four and a half months in pre-sentence custody, the Court of Appeal imposed a sentence of 16 months imprisonment, plus two years probation. Thus, if the ordinary credit of two-for-one was

notionally given to *G.C.S*. for his pre-sentence custody, the sentence would effectively have been one of 25 months in jail, which would exceed the sentence in *Atlin*.

[20] Crown counsel asks for a true jail sentence of 18 to 24 months, plus probation for two to three years in order to allow for sufficient time for Mr. Peters to complete a sex offender treatment program, which is expected to last at least 18 months.

[21] Defence counsel asks for a conditional sentence of 12 to 18 months, plus probation for approximately 24 months.

[22] Clearly the circumstances of the sexual assault in this case were serious. Other courts would characterize this as a “major sexual assault”. Mr. Peters enticed the victim into his home and plied her with alcohol to the point where she blacked out. Apart from complying with the terms of his release, he has done little since the offence to begin the process of his rehabilitation or to apologize to the victim.

[23] On the other hand, Mr. Peters did take immediate responsibility for having committed the offence. He seems to feel shame and some remorse. He has likely been deterred by the simple fact of being charged and the impact that he seems to feel this will have upon his aspiration to be a teacher.

[24] However, and I am directing these comments to Mr. Peters, I would strongly encourage you, to obtain further advice on that point. You may not be forever prevented

from teaching if you complete your sentence in a satisfactory manner and are ultimately rated as low risk. You also have the option of applying in due course for a pardon for this offence. Given the fact that you have apparently put so much time and energy into upgrading to the point where you became eligible to enter the teaching program, it would be a terrible shame for you to throw that away on the basis of a possible misunderstanding about whether you will or will not ever be able to teach. I would therefore urge you to obtain an objective second or third opinion before giving up on that career path. You may yet have an opportunity to contribute to your community and to the youth of the Yukon.

[25] I also conclude that Mr. Peters has suffered some denunciation within his own social circle, at least in his own mind, as he apparently feels uncomfortable about associating with former friends because of his shame over having committed this offence.

[26] I note that Mr. Peters has never been to jail before. The impact of the slam of iron doors closing upon someone who is unfamiliar with that environment is often noted to be much more significant than to a seasoned criminal.

[27] On balance, I sentence Mr. Peters to a jail term of 14 months, to be followed by a period of probation of two years.

[28] I now come to the real issue in this sentencing, and that is whether Mr. Peters should be allowed to serve this jail sentence conditionally in the community. Mr. Peters is eligible for a conditional sentence as the term of imprisonment which I have imposed is less than two years. However, I must also be satisfied pursuant to s. 742.1(b) of the *Criminal Code* that serving the sentence in the community would not endanger the safety of the community and would be consistent with the fundamental purpose and principles of sentencing set out in ss. 718 to 718.2.

[29] *R.* v. *Proulx*, 2000 SCC 5, clearly states that no category of offence is presumptively excluded from consideration for a conditional sentence. However, it is my understanding that it has been historically rare that a conditional sentence has been imposed for a major sexual assault. In all of the cases filed by Crown and defence counsel, only one, *A.S*., resulted in a conditional sentence. That was a unique case in that the offender was completely deaf. He was 48 years old with a limited education. He also had the support of a community support worker and Alcohol and Drug Services, who were prepared to assist him with alcohol treatment. He had no previous record of sexual assault. While the offender denied the sexual assault, he acknowledged his alcohol problem and the Court concluded that this was fundamental to his recovery and level of risk in the community. Interestingly, Maddison J. said at paragraph 9:

> "It is no longer the law that certain crimes require incarceration. The numerous conditional sentences recently imposed for much more serious sexual transgressions than the present case are testimony to that."

However, no cases were specifically noted by Maddison J. in support of that proposition.

[30] On the other hand, in *R.* v. *James*, Faulkner T.C.J., said at paragraph 7:

> "… I do not disagree with *Proulx*, even if, as a Territorial Court Judge, I was entitled to disagree with the Supreme Court of Canada, but sitting where I am and faced with the prevalence of this particular crime, I think I am bound to say that a conditional sentence would be, in my view, an exceptional disposition in cases of this kind, having regard to the prevalence of this crime and the paramount need to deter it as best the Court can."

[31] I acknowledge that I am required to consider all available sanctions other than imprisonment for Mr. Peters, as he is an aboriginal offender. On the other hand, I must impose a sentence which is similar to sentences imposed on similar offenders for similar offences committed in similar circumstances.

[32] This is a difficult case. On the one hand, with the exception of a failure to appear in 1999, Mr. Peters has a demonstrated ability to comply with court orders. The risk assessment which was done, puts him in the low to medium risk category. He has admitted full responsibility for the offence and apparently feels shamed by it.

[33] On the other hand, defence counsel has provided me with only a single example of a previous case where a conditional sentence has been imposed for this type of offence. Thus, the weight of the precedent authorities support a true jail term.

[34] However, what troubles me more than anything else is Mr. Peters' apparent lack of motivation to do much of anything with his life since being charged. He is intelligent, capable and able-bodied. It is beyond me why he has neither sought nor obtained

employment, at all, either prior to 2000, or while he was pursuing upgrading, or in the 10 months since his arrest. I take it to be a truism that obtaining employment can often add to one's sense of self-worth and self-esteem, which would in turn assist Mr. Peters in his recovery and rehabilitation. On the other hand, doing nothing begets nothing. Were I to impose a conditional sentence in this case, in the event that Mr. Peters is unsuccessful in obtaining employment, I expect that he would continue to sit around his mother's house, doing essentially nothing but the occasional chore, which would not have any true punitive effect.

[35] Similarly, and even more significantly, I am concerned that Mr. Peters has taken no steps to undergo any type of an assessment of his risk for either substance abuse or sexual offence treatment. I assume that he would have known about the value of doing so through his discussions with defence counsel. Clearly, he is not saying that he was unaware of those options, but for some unexplained reason, he failed to pursue them. Thus, arguably , he is at the same risk level as he was at the time that he committed the offence. In other words, he remains an untreated potential substance abuser and sexual offender. In my view, there is an evidentiary burden on an offender who seeks a conditional sentence to do more than simply enter a guilty plea and abide by the terms of his release. While the risk assessment undertaken in the pre-sentence report is of some assistance, it does not relieve me of my lingering concern that Mr. Peters remains an untreated sexual offender. Apart from the pre-sentence report, there has been no additional evidence provided by Mr. Peters or his counsel to assist me in my evaluation of the risk factor. Therefore, I am unable to conclude Mr. Peters would not endanger the

safety of the community if he were allowed to serve this jail sentence conditionally. Furthermore, if he did re-offend by committing another sexual assault, then the gravity of the damage would be considerable. In *Proulx*, Lamer C.J., speaking for the Supreme Court of Canada, said at paragraph 69:

> "In my opinion, to assess the danger to the community posed by the offender while serving his or her sentence in the community, two factors must be taken into account: (1) the risk of the offender re-offending; and (2) the gravity of the damage that could ensue in the event of re-offence. If the judge finds that there is a real risk of re-offence, incarceration should be imposed. Of course, there is always some risk that an offender may re-offend. If the judge thinks this risk is minimal, the gravity of the damage that could follow were the offender to re-offend should also be taken into consideration. In certain cases, the minimal risk of re-offending will be offset by the possibility of a great prejudice, thereby precluding a conditional sentence."

Furthermore, *Proulx* suggested, at paragraph 70, that in assessing the risk of re-offending, the sentencing judge should take into account such factors as:

- the nature and circumstances of the offence;
- the offender's profile, occupation and lifestyle; and
- the offender's conduct following the commission of the offence.

[36] I am also unable to conclude that it would be consistent with the fundamental purpose and principles of sentencing to impose a conditional jail term. In particular, I find that Mr. Peters has fallen short in terms of demonstrating his sense of responsibility as an offender in rehabilitating himself. While he certainly started off on the right track by turning himself in to the police and entering his guilty plea, he has done little else.

That ultimately is what tips the balance against him and leads me to conclude that a conditional sentence would be inappropriate in this case.

[37] Mr. Peters, after you are released from jail, you will be on a probation order for two years. The terms of your probation will be as follows:

1. You will keep the peace and be of good behaviour.
2. You will appear before the court when required to do so by the Court.
3. You will notify the Court or the probation officer in advance of any change in name or address, and promptly notify the Court or the probation officer of any change of employment or occupation.
4. You will report to a probation officer immediately and thereafter as and when directed, and in the manner directed.
5. You will abstain absolutely from the possession, purchase and consumption of alcohol and non-prescription drugs and submit to a breath or urine analysis upon demand of any peace officer or probation officer who has reason to believe that you have failed to comply with this condition.
6. You will reside as approved by your probation officer.
7. You will have no contact directly or indirectly with B.G.
8. You will attend and participate in such assessment, counselling and treatment as directed by the probation officer including, but not limited to, sex offender treatment and alcohol and drug treatment.
9. You will attend for such assessment, treatment and counselling as may be directed by the probation officer.

10. You will seek and maintain employment and/or make reasonable efforts to pursue education.
11. You will not knowingly be in the company of intoxicated female persons.
12. You will be subject to a curfew to remain in your residence between the hours of 11 p.m. and 7 a.m., except with the permission of a probation officer.

[38] In addition, you will be subject to a DNA order pursuant to s. 487.051 of the *Criminal Code*. You will be subject to a sex offender registration order pursuant to s. 490.012 of the *Criminal Code*. And finally, you will be prohibited from possessing any firearms, ammunition or explosives for a period of 10 years pursuant to s. 109 of the *Criminal Code*.

[39] Counsel, have I omitted anything?

[40] MR. PHELPS: No, My Lord. With respect to clause nine of the probation order, should it read, as directed by the probation officer? Just as a technicality, I suppose.

[41] THE COURT: Yes.

[42] MR. PHELPS: And would a victim fine surcharge apply to this matter?

[43] THE COURT: Given Mr. Peters lack of employment, I am going to waive the victim fine surcharge. Anything from the defence?

[44] MR. VAN WART: Nothing.

[45] THE COURT: Mr. Peters, do you have any questions?

[46] THE ACCUSED: Yes, just one question. This last year I haven't been just sitting down at home. I have been taking care of my niece and nephew, so, that is quite a responsibility and not just sitting around doing nothing. I just wanted to throw that in to clear that part. I know that doesn't make a difference, but it's still a big responsibility taking care of an infant.

[47] THE COURT: I agree and I am glad that you pointed that out to me. I was not aware of that and so, I apologize if I made a reference to the contrary, but it would not change my decision in the end. Thank you.

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GOWER J.