

Citation: *R. v. Smarch*, 2005 YKTC 08

Date: 20050120
Docket: 03-00322
Registry: Whitehorse
Heard: Teslin

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

REGINA

v.

JACK WILLIAM SMARCH

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*.

Appearances:
John Phelps
Gordon Coffin

Appearing for Crown
Appearing for Defence

REASONS FOR SENTENCING

[1] LILLES C.J.T.C. (Oral): I am dealing today with Mr. Smarch, who is a forty-year-old member of the Teslin Tginlit First Nation. He was found guilty of sexual assault contrary to s. 271 of the *Criminal Code* after a trial conducted in Teslin on July 8, 2004. Briefly, the circumstances of the offence were as follows:

[2] The complainant and two female friends were drinking at her home on August 24, 2003. During the evening, Mr. Smarch dropped in, and he sat with the three women

talking and socializing. The complainant's common-law partner and a Teslin elder were also present later in the evening. The two female friends left early in the morning, around two o'clock. The complainant retired to her bedroom, her common-law partner retired to another bedroom, and the Teslin elder went to sleep on a couch in the living room. Mr. Smarch retired to another couch.

[3] The complainant closed the door to her bedroom and went to bed fully clothed. She woke up to find Mr. Smarch on top of her with his hand and weight on her shoulder. She yelled at him and he left the room. She pulled up her pants and panties which were drawn down to her knees.

[4] When she went into the living room, Mr. Smarch was laying on the floor on some cushions from the couch pretending to sleep. When she woke up the other adults in the house, Mr. Smarch ran out the back door.

Criminal Record

[5] Mr. Smarch has a lengthy criminal record going back to 1981 consisting of 15 prior criminal convictions. They were largely property offences until 1988, but at age 24, he incurred his first assault charge. He has four assault convictions and an assault causing bodily harm conviction in 1992. In 1992, he was also convicted of sexual assault, for which he received a penitentiary term of four years imprisonment.

His Family Situation:

[6] Both of Mr. Smarch's parents were heavy drinkers. I understood that his father died in 1985. His mother stopped drinking in 1979 and is 82 years of age. Mr. Smarch

witnessed a lot of violence in the home when he was young. Mr. Smarch continues to live at his mother's home. He has not lived away from her home in a meaningful relationship with a partner. His mother, Florence, who spoke on his behalf today in court, is very protective and defensive of Mr. Smarch. She also indicated today that she relies on him to assist around the house because of her age and her own physical incapacity. Mr. Smarch helps her out by cutting wood and other tasks.

Education and Employment

[7] Mr. Smarch has a grade 10 education. He works seasonally and collects EI or social assistance when not at work. He has held a variety of jobs, mostly as a labourer. He has had work in Fort Nelson for the past several years.

Alcohol and Drug Issues

[8] Mr. Smarch grew up in a home where alcohol abuse was prevalent. He started drinking at age 16. Most of his criminal convictions were related to alcohol abuse. On occasion, he drinks until he blacks out. He has attended several residential treatment programs in the past, but his sobriety thereafter has been short-lived. No doubt the fact that most of his family members abused alcohol made it difficult for him to maintain sobriety for any length of time.

[9] Mr. Smarch is known in the community as someone who gets violent when under the influence of alcohol. Doug Smarch, a clan leader for Teslin, addressed the court. When Mr. Smarch is sober, it is his view that he would not harm anyone. When

interviewed for his pre-sentence report, he stated that he had been sober now for a number of months.

Remorse

[10] Although Mr. Smarch pled not guilty and was found guilty after trial, he told his probation officer that he felt badly about what he did and recognized that he put the complainant through a bad experience by having to testify in court. It is unfortunate, in my opinion, that he did not come to this realization prior to entering his plea. He could have spared her the ordeal of a trial.

Risk Assessment

[11] Using the LSI-R assessment tool, Mr. Smarch was assessed in the moderate risk category for re-offending generally. His risk factors include alcohol and drugs. The Static-99 assessment tool placed Mr. Smarch as a high risk to re-offend sexually.

Previous Victimization

[12] During a psychological assessment in 1992, Mr. Smarch disclosed that when he was about 14 years old, he was sexually assaulted by an older male cousin. Mr. Smarch attributes his withdrawal from and failure to relate to people to this abuse. He said he was shy, and that it was difficult for him to ask women to dance. He relied on “booze” to make him more brave. The psychologist concluded that this abuse appears to have had a big impact on Mr. Smarch and that he needs to deal with it in counselling. Although this report is somewhat dated, I am not aware that he has dealt with these issues in counselling or otherwise.

Principles of Sentencing

[13] The relevant purposes and principles of sentencing in this case include the following:

1. To denounce this kind of conduct. Mr. Smarch attempted to take advantage of an intoxicated woman who was sleeping in her bed. The sentence imposed must denounce and deter this kind of behaviour.
2. The sentence must deter Mr. Smarch from committing similar offences. He already has one conviction for sexual assault. This is his second. The sentence should send a clear message to Mr. Smarch that this community will not tolerate this kind of behaviour from him or from others.
3. This sentence must also assist in rehabilitating Mr. Smarch. Doug Smarch, the clan leader, spoke very eloquently during this proceeding, indicating that jail by itself does not solve such problems. Doug Smarch emphasized the need of treatment and programming regardless of this court's disposition. Doug Smarch also emphasized that Mr. Smarch should be given an opportunity outside of jail to make his own decisions, with supervision.

Mr. Smarch has a number of issues to address including his own victimization, substance abuse and his sexually offending behaviour. I regret to say that he has not been motivated to deal with these issues through programming on his own. The sentence should place him in a

structured environment where relevant programming is available to him.

As Mr. Sutton, the probation officer, indicated, it will still be up to Mr.

Smarch to be motivated to take advantage of that programming.

4. I am satisfied that until Mr. Smarch has had an opportunity to participate in this programming and to get along on his healing path, he must be separated from society for society's protection.
5. When Mr. Smarch returns to his community, he needs to be under supervision for a lengthy period of time. During that time, he should be required to continue counselling and programming to deal with all of his issues.
6. Finally, this sentence should recognize that Mr. Smarch, as an aboriginal offender who has had a difficult childhood, should receive a sentence that reflects this past. As a repeat sexual offender, however, protection of the public must be given priority.

[14] I also take into consideration the following facts:

1. Mr. Smarch pled not guilty and was found guilty after trial. He is, therefore, not entitled to the reduction in sentence due to the mitigating factor of an early guilty plea.
2. We all heard today from the complainant, who was here in court. I think it was very apparent listening to her and observing her that this offence continues to have a significant impact on her. I encourage her to receive

counselling from others, support from others, from those who have an appreciation of what she has gone through. I think that will benefit her.

[15] I want to read into the record, however, for Mr. Smarch's benefit, what she had to say in her victim impact statement. I think it is important for all of us to understand, particularly those of us who are males, that sexual victimization can have totally unappreciated consequences on a woman. Here is what she said:

For the first few months, I couldn't sleep. I was having nightmares. I couldn't eat -- just enough to keep me going. This caused me to move two weeks after, back to Whitehorse, and before I left, I had to keep my doors locked because I didn't feel safe. When I went to bed, I put a butter knife in the bedroom door to help lock it. I wouldn't go out by myself other than to go to work. My bosses took me to and from work most of the time.

For a few months after I moved to Whitehorse, I couldn't walk by myself around town. My family members and friends were always with me. When I was there in Teslin, I trusted everybody, and after, I had to make sure my house was empty and safe before I went to bed.

With my change in location, I had part time work for a short period so there was a lot of time to remember and think about what happened. Sometimes these thoughts took over and I had many really rough days. This situation broke [E.] and I up. It cost me my relationship.

[16] Her victim impact statement deals with the specific impact of this offence on her, but we should also appreciate that there is a general impact on all victims of sexual assault. The offence of sexual assault can have significant and adverse consequences to victims. In the case of *R. v. G.W.S.*, [2004] Y.J. No. 5, which was cited by the Crown, this court quoted from the Ontario Women's Directorate Report, entitled "Sexual Assault Impact on Health." Let me quote a few sentences from that report:

Sexual assault can have profound effects on women's health and well-being. It can result in physical injuries as well as psychological and emotional trauma. Women who have a history of being abused are at high risk of developing lifetime mental health problems. The effects of sexual assault on women's health and well-being can be just as serious as physical injuries. Nine of 10 incidents of violence against women have an emotional affect on [them]. The most commonly reported effects are anger, fear and becoming more cautious and less trusting. The emotional and psychological effects of sexual assault can also include depression, confusion, sleep disturbances, including nightmares, erratic mood swings, eating disorders, anxiety and flashbacks.

[17] In this particular case, there was no vaginal penetration. In the *R. v. G.W.S.*, *supra*, case that I just cited, the court stated at paragraph 20:

Earlier cases often considered lack of the penile penetration or even incomplete intercourse as a mitigating factor. In my opinion, these factors have been given too much weight. The typical feelings of humiliation, degradation, guilt, shame, embarrassment, fear, and self-blame can result from the unwanted invasion of intimate privacy and the loss of control associated with sexual victimization. That invasion occurs even in the absence of sexual intercourse. It would be wrong to suggest that digital penetration is significantly different from penile penetration, from the perspective of the victim. Touching a vulnerable or sleeping victim in the [genital area] can generate strong feelings of victimization.

[18] In my view, a conditional sentence of imprisonment is not appropriate in this case because of protection of the public concerns. In particular, I note the criminal record which includes breaches of court orders. I note the long history of criminal offending and the fact that there was a previous sexual offence. Alcohol has been a factor in most of the previous offences and he has a serious, long-standing untreated substance

abuse problem. In addition, the seriousness of the offence also speaks against a conditional sentence.

[19] In my view, an appropriate sentence in this case is a period of incarceration of two years, to be served in a penitentiary. This will be followed by three years probation.

[20] The terms of that probation order will be largely as recommended by the pre-sentence report. The statutory terms will apply.

1. Mr. Smarch will report within 72 hours of his release to a probation officer and thereafter as and when directed.
2. For the first three months of this probation order, he is to abide by curfew by remaining within his residence between the hours of 9:00 p.m. and 6:00 a.m. unless he has the prior permission of his probation officer.
3. During reasonable hours of this curfew, he must answer the door or telephone in order to allow the police or his probation officer to check on his curfew.
4. He is not to be alone in the presence of females if under the influence of mood altering substances including alcohol.
5. He is to abstain absolutely from the possession and use of alcohol and non-prescription drugs. Should a peace officer have reasonable suspicion to believe that he is in breach of this provision, the peace officer may

demand a breath or bodily fluid sample and he shall comply with such demand.

6. He is to participate in such alcohol and drug assessment, counselling and programming as and when directed by his probation officer.
7. He is to attend the sex offenders' program at the Family Violence Prevention Unit for assessment and attend for counselling and programming as directed.

[21] Mr. Phelps, is there anything else that should go into that probation order? Should there be a no contact order with respect to the complainant? I am asking whether I should include a no contact order in this probation order. Normally, C., that would read, "You are to have no contact directly or indirectly with the complainant, C.C." That will be part of that probation order.

[22] Mr. Sutton, anything else that should be there?

[23] MR. SUTTON: I was thinking just -- reading some of the material, that possibly general counselling conditions --

[24] THE COURT: I think it's a good idea. There's some psychological, historical issues that may need to be addressed. There will be another general counselling term, Madam Clerk: Take such other assessment, counselling and programming as may be directed.

[25] MR. PHELPS: That's the only concern that I had as well, Your Honour. With respect to the clause, "not to be alone in the presence of females if under the influence of any mood altering substances," the wording seemed a little bit awkward to me. I'm assuming it's the females who are under the influence and, perhaps, just by adding "a female who is under the influence" --

[26] THE COURT: No, my intention was the accused not to be under -- but I am open to re-visit that. I read that as having impact on him, but I understand where you are coming from. You are suggesting that since Mr. Smarch is to abstain from the use of alcohol and non-prescription drugs, he is covered. So, perhaps, the intention was, in fact, to apply to females. So perhaps -- let me go back to that. Not to be alone in the presence of any females who are under the influence of any mood altering substances including alcohol. In other words, he goes to visit someone and there are some women there who are consuming alcohol, he has to leave.

[27] MR. PHELPS: Yes, that would be --

[28] THE COURT: Seems to me that that would be a good term.

[29] MR. PHELPS: There is the issue of an order pursuant to s. 109 and an order pursuant to s. 486, as well.

[30] THE COURT: The DNA order? Has there been a DNA order made, do you know?

[31] MR. PHELPS: I don't know that.

[32] MR. COFFIN: I'm not aware of one having been made.

[33] THE COURT: Mr.Coffin, I am prepared to hear you, but I probably won't listen because I am convinced the DNA order is most appropriate in this case. It will go in the usual form. Madam Clerk, are we at the point where we prepare those?

[34] THE CLERK: Yes. We just need to know whether it's a primary designated or secondary designated offence.

[35] THE COURT: I believe it is a secondary, isn't it?

[36] MR. SUTTON: I'd have to double check, Your Honour; I thought it was a primary.

[37] MR. COFFIN: I thought it was a primary.

[38] THE COURT: Just double check.

[39] I should indicate two things. Madam Clerk, if you could include in the order that -- incarceration order, endorse the warrant of committal with my strong recommendation that Mr. Smarch be given priority with respect to the aboriginal sex offender treatment program or equivalent program available in the penitentiary system.

[40] MR. COFFIN: I take it, Your Honour, you're not inclined to make a recommendation that Mr. Smarch serve his sentence here?

[41] THE COURT: No, I think there's an opportunity to access programs in the penitentiary system and I am also satisfied that if Mr. Smarch is

motivated, he will be able to access those programs. When he comes back, he will have a period of three years' probation where he will be able to take advantage of the program that is available in the Territory.

[42] MR. COFFIN: My friend has pointed out that pursuant to s. 487.04 this is a primary designated offence.

[43] THE COURT: Thank you.

[44] MR. COFFIN: With respect to firearm prohibition --

[45] THE COURT: I am not inclined to make that order at the current time.

[46] MR. COFFIN: I have no submissions to make, I simply raise it.

[47] THE COURT: There is no firearm or weapon involved in this particular charge. I note that Mr. Smarch is an aboriginal individual. I am assuming that when he finishes this program, that he will be healthy and should have an opportunity to take advantage of his culture, hunting and fishing.

[48] THE CLERK: Victim fine surcharge?

[49] THE COURT: Will be waived in the circumstances. Anything further from anyone?

[50] UNIDENTIFIED SPEAKER: (Inaudible).

[51] THE COURT: It seems to me that the general term of “participate in programming” probably covers that and I think that the extent that the justice committee and the community will want to be involved with him and will welcome him will depend very much on Mr. Smarch and what programming he has completed and how he presents himself when he comes back into this community.

[52] MR. PHELPS: Your Honour, I will require just a moment to find it, but there is now the sex offender registry program. There should be an order made that Mr. Smarch register pursuant to the program.

[53] THE COURT: Mr. Coffin? The exemption under that legislation is very, very narrow.

[54] MR. COFFIN: Yes. I have no submissions, Your Honour.

[55] THE COURT: That order will go.

[56] MR. PHELPS: I understand that the court takes care of that formality, as well.

[57] THE COURT: I believe so. Yes.

[58] Again, I want to thank the clan leaders and I want to thank everyone who was here today and participated in today’s court. I mentioned earlier that there were a number of people before the court today who have shown wonderful progress. I am going to leave here today very encouraged by the work they’ve been doing in the community with the support people who are here in the community. Even with respect

to Mr. Jackie Smarch, I am not discouraged. I think there is an opportunity here for Jackie to address his issues and come back and work in the community and work with the community. So I am even looking at this disposition as a positive one and I have a lot of hope. I wish Mr. Smarch all the best.

LILLES C.J.T.C.