

Citation: *R. v. R.W.R.*, 2019 YKTC 33

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Registry: Whitehorse

Heard: Carcross

IN THE TERRITORIAL COURT OF YUKON

Before His Honour Judge Cozens

REGINA

v.

R.W.R.

Publication of information that could identify the complainant or a witness is prohibited pursuant to section 486.4 of the *Criminal Code*.

Appearances:

Noel Sinclair

Kelly Labine

Counsel for the Crown

Counsel for the Defence

REASONS FOR SENTENCE

[1] R.W.R. was convicted after trial of having committed offences contrary to ss. 271 and 266 of the *Criminal Code*. He has also entered guilty pleas to having committed offences contrary to ss. 145(5.1), 145(3), 430(1)(a), and 129(a) of the *Code*.

Circumstances of the Offences

Sections 271 and 266

[2] In my Reasons for Judgment, 2019 YKTC 6, I found that on April 12, 2017, the victim, T.H., was in the community to visit her three children who were residing with their father, R.W.R. T.H. and R.W.R. had been in an on-and-off again relationship. They had two children together, and T.H. had an older child that lived with R.W.R. as well.

[3] At the time, R.W.R. and T.H. were no longer in an intimate relationship.

[4] T.H. was staying at R.W.R.'s residence while in the community. That evening, T.H.'s sister and her boyfriend, as well as T.H. and R.W.R.'s youngest child, were also in the residence. R.W.R. and T.H. had been drinking alcohol.

[5] After leaving the residence for a while, T.H. returned and went to sleep on the floor beside the couch where R.W.R. was sleeping. T.H. awoke to find herself undressed and R.W.R. on top of her having sexual intercourse with her. T.H. "froze" and said or did nothing while R.W.R. was penetrating her vagina with his penis.

[6] R.W.R. ceased this act of intercourse, and he and T.H. began to talk, with this communication ending in an argument. R.W.R. became angry and told T.H. to leave the residence. She did not do so immediately as she had belongings in the residence which she attempted to retrieve.

[7] R.W.R., while still angry, followed T.H. throughout the residence, using force to try to restrain her and push her down the stairs and out of the residence. He followed her into the bathroom as part of his attempt to force her to leave. He tore T.H.'s shirt in

the process of trying to push her out of the residence, something that he was ultimately successful in accomplishing.

[8] At paras. 84-92, I provided my reasons for finding that T.H. did not consent to the sexual contact initiated by R.W.R. Further, at paras. 92-111, I provided my reasons for finding that there was no basis for R.W.R. to successfully rely on the defence of honest but mistaken belief in consent.

[9] With respect to the s. 266 offence, at paras. 113-118 I provided my reasons for convicting R.W.R. of this offence. While R.W.R. may have been justified in requesting T.H. to leave his residence, the physical force he used to do so was unlawful.

Section 145(5.1) x 2

[10] R.W.R. was released on an Undertaking to an Officer in Charge. One of the requirements was that he report when and as directed to do so by his Bail Supervisor. Between May 23 and June 15, 2017, R.W.R. failed to report to his Bail Supervisor, contrary to the directions he had received.

[11] Another term of the Undertaking to an Officer in Charge was that he abstain absolutely from the possession and consumption of alcohol. On July 2, 2017, R.W.R. was found passed out in a roadway in the community as a result of the consumption of alcohol.

[12] On July 21, 2017, R.W.R. was found in the community intoxicated and threatening to commit suicide. He was noted to have superficial cuts on his arms that did not require medical attention.

Section 145(3) x 2

[13] R.W.R. was released from custody on an Undertaking to a Judge or Justice. One of the terms of this Undertaking required him to not be under the influence of alcohol in a public place. On March 22, 2017, R.W.R. was located in the community of Whitehorse intoxicated by alcohol. A search of his backpack revealed a Smith and Wesson knife. He was barred by a term of the probation order from possessing a weapon. The Crown did not, however, attempt to establish that this knife constituted a weapon for the purpose of proving an offence had been committed.

[14] On August 13, 2018, R.W.R. was located in the community intoxicated by alcohol and in need of medical attention. At that time he was bound by a recognizance requiring him to abstain from the consumption of alcohol.

Section 430(1)(a)

[15] On August 25, 2018, R.W.R. was in a dispute with his girlfriend, P.H. He took a bag of her clothing out onto the porch of the residence they were sharing and lit it on fire, destroying some of her clothing and a backpack. The fire was extinguished by neighbours, one of whom suffered a burnt hand. R.W.R. was intoxicated at the time contrary to a term of the recognizance he was subject to. He admitted to having started the fire.

Section 129(a)

[16] On October 8, 2018, the RCMP were in the process of arresting R.W.R. for being intoxicated contrary to the terms of his recognizance, following a complaint having been made. R.W.R. resisted the attempt to arrest him by grabbing Cst. Muise and engaging in a physical struggle with him.

Positions of Counsel

[17] Crown counsel submits that a sentence of two years less one day with a one-year of probation to follow should be imposed for the s. 271 offence. Custodial sentences in the range of 90 days should be imposed for the remaining offences, although these custodial sentences should be made concurrent based upon the principle of totality.

[18] Counsel for R.W.R. submits that he should receive a probationary disposition for the s. 271 offence and consecutive conditional sentences for the remaining offences.

[19] I note that R.W.R. has no time in custody on remand for which he would be entitled to receive credit against any custodial sentence that is imposed.

Victim Impact

[20] T.H. did not provide a victim impact statement, despite having initially indicated a desire to do so, and having been provided the opportunity.

[21] There are a variety of reasons why a victim of a sexual assault may not provide a victim impact statement. The sexual assault and assault are offences of violence that

were committed by R.W.R. against T.H. in the context of a relationship between estranged parents, hence constituting a breach of trust. Having observed T.H. testify at trial, I am satisfied that these offences have had a significant impact upon her.

[22] P.H. also did not file a victim impact statement. I have no information as to the impact the s. 430 offence had upon her. Again, this offence occurred in a breach of trust situation and I would be surprised if the burning of her personal items did not have some negative impact upon her.

Circumstances of R.W.R.

[23] The circumstances and background of R.W.R. are set out in a **Gladue** Report (*R. v. Gladue*, [1991] 1 S.C.R. 688) and a Pre-Sentence Report (“PSR”).

[24] R.W.R. is a 38-year-old member of his First Nation.

[25] R.W.R.’s only previous criminal conviction was for a s. 253(1)(b) offence in 2017.

[26] His mother was removed at the age of three from her family home and she was raised in foster homes. She also briefly attended the Choutla Residential School. She was a victim of abuse throughout her childhood.

[27] His father physically abused his mother. She finally left him after she was hospitalized for her injuries after being assaulted by him. R.W.R. and his brother were placed into foster care until she was discharged from the hospital.

[28] After that incident, R.W.R. did not see his father again until R.W.R. was 13 years old. He has no relationship with his father, stating that his father was “an asshole” who always questioned the legitimacy of R.W.R. being his biological child.

[29] As a child, R.W.R. was also a victim of sexual abuse committed by a family member.

[30] R.W.R. lived in both Whitehorse and his community while growing up. He was the victim of school bullying in Whitehorse and, in the course of one such incident, sustained a severe concussion that resulted in him being hospitalized for a week. He was involved in many fights while at school.

[31] R.W.R. dropped out of school in Grade 11.

[32] From the age of five to 13, R.W.R.’s mother was in a relationship with G.M., who was a positive father figure in R.W.R.’s life. R.W.R. still maintains a positive relationship with G.M.

[33] After dropping out of school, R.W.R. was employed on-and-off for 20 years with the same company. He is currently unemployed and receiving social assistance. He lost his last job due to his drinking. R.W.R. has obtained certain vocational certificates that are beneficial to and/or required for employment.

[34] During the prior 20-year-period of employment, R.W.R. began to drink heavily after a relationship ended.

[35] R.W.R. began drinking originally at the age of 16 and, other than a five-year-period from approximately the age of 22 to 27, he has struggled with alcohol abuse since. He scores as having a severe level of problems related to alcohol abuse, and acknowledges that he is an alcoholic. R.W.R. stated that if he was sober he would not have a criminal record or be facing sentencing for the current offences.

[36] R.W.R. regained some control over his drinking prior to beginning the relationship with T.H., who was five months pregnant with R.W.R.'s stepdaughter when they met. This relationship was positive for several years, and continued through the birth of R.W.R.'s stepdaughter, and his and T.H.'s first child together.

[37] However, when T.H. became pregnant with their youngest child, R.W.R. began to drink heavily again. After this child was born, T.H. began to drink heavily. Their relationship deteriorated and both continued to abuse alcohol. They experienced a two-month period of sobriety after attending a two-week treatment program, however began to drink again after that.

[38] R.W.R. is currently in a relationship with T.H.'s sister, P.H., who is the victim of the s. 430 offence, although he is currently on no-contact conditions in respect of her.

[39] The three children are being raised by R.W.R.'s mother, as neither R.W.R. nor T.H. are able to provide a safe environment for them. R.W.R.'s mother has been sober for many years and is a safe and stable caregiver for the children and a support for R.W.R. She supports him not only by caring for the children, and being there for him, but by also holding him accountable for his drinking. That said, she also deflects

responsibility away from R.W.R. and towards T.H. for the circumstances resulting in the ss. 271 and 266 convictions.

[40] R.W.R. states that he is avoiding hanging out with his prior peer group associations as he is tired of the drinking and alcoholic lifestyle. He states that he spends most of his time at home or with his children. R.W.R. was required to move out of his mother's home in July 2019 due to concerns expressed by Family and Children Services. He is staying in a cabin owned by his maternal aunt. R.W.R. is noted to be a good parent when he is with the children, and sober.

[41] The writer of the PSR noted that R.W.R. "displayed overt negative feelings and ill will toward T.H. and made many negative statements about her". That said, R.W.R. acknowledged that T.H. is a good parent for the most part.

[42] R.W.R. was further noted as "victim blaming" for the sexual assault and attempting to justify or excuse his actions. He expressed that he felt betrayed by T.H. and that she was motivated to bring these charges against him because of his romantic involvement with T.H.'s sister.

[43] In this regard, I note that R.W.R. was originally only charged with a s. 266 offence in respect of the April 12, 2017 offences. He had agreed to plead guilty to the s. 266 offence. When the matter came before the court for sentencing in November 2017, it was adjourned until February 2018 to allow for the preparation of a victim impact statement. It was during this time that T.H. disclosed the sexual assault, following which the February 2018 sentencing date was adjourned, and the information including both the ss. 271 and 266 charges was sworn on March 3, 2018.

[44] In 2013, R.W.R. completed spousal violence programming through the Domestic Violence Treatment Option Court, including the Respectful Relationship Program.

[45] R.W.R. has never participated in any mental health assessments. He disclosed a three-year-period of self-harming that stopped in 2018, although he stated that he has not experienced suicidal thoughts. He was involved in counseling for a six-month period in 2017 and is prepared to continue with counseling with the same counselor in the future. He has also been attending counselling in the community through the Mental Wellness and Substance Use Service (“MWSUS”) and will continue to do so. Through MWSUS he has completed the necessary requirements to apply for residential treatment.

[46] R.W.R. scores as being at a low risk level for re-offending sexually. I note that Crown counsel questions the accuracy of this assessment, given that it relies on static and not dynamic factors. I understand that in the present transitional environment, most PSR writers are not trained and authorized to use anything other than a static risk assessment, although that situation is being rectified.

[47] While I understand Crown counsel’s concern regarding the utilization of risk assessments based on static factors, I am not aware of any factors that would point towards R.W.R. being at risk for future sexual re-offending. In saying this, I am considering his age, his lack of history with any indicators of sexual deviance or predation, and the circumstances of this offence. I am not prepared to disregard the low-risk assessment in the absence of a clear and compelling reason to do so.

[48] This said, if R.W.R. does not resolve his alcohol abuse issue, his drinking will quite possibly place him in situations where his apparent lack of understanding of sexual boundaries, as exemplified in the circumstances of the s. 271 offence, and his lack of insight into his behaviour, will quite possibly place him and other women, at risk.

[49] With respect to the Spousal Assault Risk Assessment, R.W.R. scores as requiring a moderate level of intervention or effort in order to address his risk factors and prevent further violence within an intimate relationship.

[50] On the Criminogenic Risk Assessment, which is a combined assessment of R.W.R.'s criminal history related risk and criminogenic needs, R.W.R. is considered as requiring a medium level of supervision. It notes that while he has a low criminal history risk rating, he has a high level of criminogenic need.

Analysis

[51] The most serious of the offences for which R.W.R. is being sentenced is the s. 271 offence.

[52] The aggravating factor in this offence is that it occurred in the context of a spousal relationship, notwithstanding that the parties were not in an intimate relationship at the time. When T.H. lay down to sleep on the floor beside where R.W.R. was passed out on the couch, she should have been able to feel safe. In fact, she was not safe and the ensuing breach of trust is a statutorily aggravating factor.

[53] Although urged to do so by the Crown, I will not consider the subsequent offences committed by R.W.R. to be an aggravating factor for the purpose of

determining an appropriate sentence for the s. 271 offence. While I agree that these offences show an inability on the part of R.W.R. to restrain his behaviour generally, as I will be imposing a sentence for each of these offences, I decline to also increase the sentence for the s. 271 offence as a result.

[54] What these subsequent offences do show is that R.W.R. did not take the steps he could have after being before the Court on the ss. 271 and 266 charges, to present the Court with a plan and steps already taken towards a substance-free and pro-social lifestyle. While I do not consider this to be an aggravating factor, I do recognize that R.W.R. cannot present any such accomplishments as a mitigating factor to the Court, as indicative of a track record of positive change well underway.

[55] I agree with Crown counsel that the only mitigating factors with respect to the ss. 271 and 266 offences are the personal circumstances of R.W.R. set out in the **Gladue** Report and PSR. With respect to the remaining matters, however, the guilty pleas are also mitigating factors.

[56] As R.W.R. took the s. 271 matter to trial, he is denied the mitigation available through a guilty plea and acceptance of responsibility. This is not, of course, an aggravating factor. R.W.R. was entitled to take the matter to trial and should not fear any repercussions for having done so, insofar as his decision to plead not guilty would be held against him in such a way as to increase his sentence through being considered as an aggravating factor.

[57] That said, when there is an acceptance of responsibility and guilty plea, the victim is spared the stress and ordeal of testifying. Acceptance of responsibility through

a guilty plea can be a significant factor when considering the issue of future risk and the sentencing principle of rehabilitation.

[58] I accept that R.W.R. is sorry that this incident happened. While he may lack insight as to his sexual offending behaviour in this case, and still casts some blame and anger at T.H., I am prepared to accept that he is, in general, sorry for what happened. This includes him being sorry for the impact of the ss. 271 and 266 offences against T.H.

[59] R.W.R. provided the Court an apology letter directed at T. H. It reads:

Dear T.H.,

For the past 3 odd years, I've been sorry this situation has happened. I am hoping you know that I would never intentionally do something like this to you. I take responsibility for my part in what happened. I never meant for you to get hurt. With rehabilitation and time I am hoping to get my life back together. I hope you can forgive me one day.

[60] I also consider the text messages R.W.R. sent to T.H. the day after the incident.

[61] These were filed as an exhibit at trial, and read as follows:

I'm sorry. I'm an asshole. I'm sorry. I don't deserve you or your forgiveness. I understand why you wanted to be with someone else because I'm worthless. I got so mad because I wanted you all to myself for the rest of my life and I'm sorry. I'm an alcoholic.

[62] While these text messages were not factors in my decision to convict R.W.R., and I did not and do not consider them as being an admission of responsibility by R.W.R. for having committed a sexual assault against T.H., I nonetheless accept them as evidence that R.W.R. immediately regretted his overall actions towards T.H. that

evening and morning, and that he was apologizing to her for them. I find R.W.R.'s letter of apology to be consistent with these initial expressions of remorse for his behaviour.

[63] I will make one further comment. In the present case, I found that R.W.R. engaged in sexual contact with T.H., and that she was not consenting to this sexual contact. R.W.R. had an obligation to ensure that T.H. was consenting to the sexual contact before initiating it. To the extent that R.W.R. failed to ensure that T.H. was consenting, and erroneously assumed that her failure to say "No" was an indication of consent, he was therefore criminally reckless in his actions and committed the offence of sexual assault.

[64] I did not, in any way, place a responsibility on T.H. to have resisted the sexual contact, or to say "No" to it occurring. The responsibility was on R.W.R. to ensure that he had T.H.'s consent, it was not on T.H. to let R.W.R. know that he did not.

[65] There was also no evidentiary basis for R.W.R. to honestly but mistakenly believe that T.H. was consenting to the sexual contact. There were no efforts made by R.W.R. to ensure that he had T.H.'s consent before he initiated sexual contact, and there was nothing in T.H.'s conduct that could have led R.W.R. to honestly, but mistakenly, believe that he had her consent.

[66] These circumstances differ, however, from those in which an offender deliberately embarks on a course of conduct with a clear premeditated plan from the outset to not only have sexual contact with the victim, but to do so in a manner that could only be considered to be a deliberate and predatory sexual assault. Both circumstances are sexual assaults and both are serious criminal offences. But they are

different and, in holding R.W.R. accountable for his actions through the sentence to be imposed, his moral culpability and blameworthiness must be assessed having regard to the circumstances of the offense which he has committed.

[67] The sentence imposed on R.W.R. must be in accord with similar sentences imposed for similar offences committed by similar offenders.

[68] The appropriate range of sentence for a s. 271 offence of this kind is set out in **R. v. White**, 2008 YKSC 34 . The range is stated to be from 12 to 30 months. I have reviewed **White** and the other case law submitted by counsel. I am satisfied that the circumstances of the s. 271 offence here fall within the range established in **White**.

[69] There are both aggravating and mitigating factors present here. The breach of trust is a significant aggravating factor.

[70] Balanced against this are the **Gladue** factors that are at play. R.W.R. clearly continues to suffer from the negative debilitating impacts of the systemic governmental discrimination against Indigenous peoples in Canada, as seen not only within the residential school system, but also in other governmental policies and laws. This must be taken into account in sentencing R.W.R.

[71] While denunciation and deterrence are important sentencing principles, rehabilitation and restraint are also important. The fundamental principle of proportionality must recognize and take into account the **Gladue** factors.

[72] R.W.R. comes before the Court for sentencing as a troubled 38-year-old Indigenous man with a limited criminal history but a significant alcohol abuse problem. This problem has contributed to the offences for which he is now being sentenced.

[73] He has made some tentative steps towards changing his lifestyle, but has made little progress along this pathway, as his drinking has limited his ability to do so. There is nonetheless a realistic hope for R.W.R. with respect to his rehabilitative prospects, yet still a ways to travel on the pathway of rehabilitation.

[74] I do not have before me the kind of information I would require with respect to R.W.R.'s rehabilitative efforts and success to date that would allow me to craft an exceptional sentence outside of the normal range. In saying this, I am aware of the Court of Appeal of Yukon's statement in *R. v. Charlie*, 2015 YKCA 3, that a range is simply that, a range, and sentences can be imposed that are greater and lesser than the normal range depending on the circumstances. In order to impose such a sentence, however, there must be circumstances particular to the case to allow such a sentence to be imposed on a principled basis. I do not have such circumstances here.

[75] The sentences to be imposed, taking into account the purpose and principles of sentencing, the aggravating and mitigating factors, and totality, are as follows:

- for the s. 271 offence: 20 months custody;
- for the s. 266 offence: 60 days custody concurrent;
- for the s. 145(3) offences: 20 days custody on each concurrent;
- for the s. 145(5.1) offence: 20 days custody concurrent;
- for the s. 430(1)(a) offence: 30 days custody concurrent; and

- for the s. 129(a) offence: 30 days custody concurrent.

[76] A 12-month probation order will be attached to the ss. 271, 266 and 430(1)(a) offences. The terms of this probation order are as follows:

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 T.H., except with the prior written permission of your Probation Officer and with the consent of T.H. in consultation with Victim Services and except through a third party approved in advance by your Probation Officer for the purposes of arranging access to your children;
5. Do not go to any known place of residence of T.H. without the prior written permission of your Probation Officer and with the consent of T.H. in consultation with Victim Services;
6. Have no contact directly or indirectly or communication in any way with P.H., except with the prior written permission of your Probation Officer and with the consent of P.H.;
7. Report to a Probation Officer immediately upon your release from custody and thereafter, when and in the manner directed by your Probation Officer;

8. Attend and actively participate in all assessment and counselling programs as directed by your Probation Officer for the following issues: alcohol abuse, spousal violence, anger management, and any other issues identified by your Probation Officer, 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;
9. Perform 30 hours of community service as directed by your Probation Officer or such other person as your Probation Officer may designate. This community service is to be completed no later than 30 days before the end of this order;
10. Make reasonable efforts to find and maintain suitable employment and provide your Probation Officer with all necessary details concerning your efforts.

[77] As the Crown has proceeded by Indictment on the s. 271 charge, there will be a mandatory firearms prohibition order for 10 years in accordance with s. 109 of the *Code*.

[78] There will be an order, as a result of the s. 271 conviction, pursuant to s. 490.012 and, in accordance with s. 490.013, this order will be for a period of 20 years.

[79] There will be an order, with respect to the s. 271 offence only, pursuant to s. 487.051, for a sample of DNA to be provided.

COZENS T.C.J.