Citation: *R. v. M.D.*, 2021 YKTC 24

Date: 20210623
Docket: 18-00711
Registry: Whitehorse

IN THE TERRITORIAL COURT OF YUKON
Before Her Honour Judge Ruddy

REGINA

v.

M.D.

Publication of information that could identify the complainant is prohibited pursuant to s. 486.4 of the *Criminal Code*.

Appearances:
Amy Porteous — Counsel for the Crown
Jennifer Budgell — Counsel for the Defence

REASONS FOR SENTENCE

[1] RUDDY T.C.J. (Oral): M.D. stands charged with having committed a sexual assault on L.M. on July 19, 2016. The file has a somewhat convoluted history. The Information was sworn on January 16, 2019. Crown proceeded by indictment on February 5, 2019, and, on April 2, 2019, M.D. elected to proceed before a Supreme Court Judge with a jury. He requested a preliminary inquiry on May 21, 2019. The preliminary inquiry was conducted in Territorial Court over three separate days between June and November 2019. On April 26, 2021, M.D. re-elected, with the consent of the

Crown, to proceed in Territorial Court. On April 29, 2021, Crown re-elected, on consent, to proceed summarily, M.D. entered a guilty plea, and counsel filed an Agreed Statement of Facts. Submissions on sentence were heard on June 7, 2021.

Facts

[2] The facts are that M.D. and L.M. had been involved in a common law relationship of some duration. By the summer of 2016, the relationship had broken down, but the parties were still sharing a residence.

[3] On July 19, 2016, M.D. and L.M. spent the evening together, consuming alcohol. Following an argument, L.M. went to sleep alone in the bed the two still shared. She describes herself as having "passed out". When L.M. woke the following morning, she noted liquid between her legs. When she stood up, semen trickled downward.

[4] L.M. confronted M.D., believing she had been raped. M.D. told her that he "needed release".

[5] In 2018, L.M. again confronted M.D. about the incident, recording the conversation without his knowledge. At that time, M.D. stated that he had masturbated on L.M. while she was sleeping. This is the non-consensual sexual activity constituting the offence that M.D. has admitted to in these proceedings, and for which he is to be sentenced.

Positions on Sentence

[6] Neither counsel suggest that a custodial sentence is warranted on the facts before me. At issue, is whether M.D. should be granted a discharge.

[7] Crown acknowledges that the offence falls at the lower end of the spectrum, and does not warrant an overly punitive response. However, Crown argues that the violation of L.M.'s sexual integrity while she was sleeping is not a trivial offence. Counsel for the Crown takes the position that a conviction is necessary to meet the principles of deterrence and denunciation, and submits that the appropriate balance can be achieved with the imposition of a suspended sentence with a probationary term of 10 to 12 months.

[8] Defence counsel submits that the offence is out of character for M.D. who has lived an otherwise exemplary life. She argues that a conviction is not, therefore, necessary to deter M.D. She further argues that, based on the circumstances of this particular offence, a conditional discharge would be sufficient to deter others from committing similar offences.

Background

[9] M.D. comes before the Court with no prior criminal record. He will be 66 years old in September. He was born in Alberta where he was raised until moving to Trail, British Columbia, at the age of 16.

[10] Approximately 10 years ago, M.D. began travelling to the Yukon while working for a mining exploration company. He met L.M. and the two commenced a long-

distance relationship. M.D. moved to the Yukon eight years ago, and he and L.M. began living together. As noted, the relationship broke down some time before the offence date.

[11] M.D. has four adult daughters, and two grandchildren. Last December, he married his current spouse, gaining two stepsons, two stepdaughters, and one step-grandchild.

[12] Upon moving to the Yukon, M.D. ran his own business for some time before commencing work for the [redacted] First Nation. He is currently the Director of Infrastructure for [redacted], a position he has held for approximately one year. M.D. and his spouse hope to retire in the next four to five years.

[13] M.D. has provided a number of letters attesting to his character.

[14] [Redacted] Health Director, S.R.B., describes M.D. as "a person of high moral character" who "is compassionate for people and it is apparent that he places the needs of clients at the forefront; ensuring that all voices are heard…".

[15] A.C. notes him to be "respectful, honest and trustworthy" and "always willing to go outside his scope of work to help, often times staying outside hours of operation to ensure a job is finished".

[16] S.J. writes that M.D. is "an important, respected and valued member of the [redacted] Community".

[17] [Redacted] Implementation Manager, B.S., calls M.D. “a real good man of integrity, common sense, truth and respect”, based upon which he was invited to be adopted into the [redacted] Clan and given the traditional name “Yakei Kha” which translates into “good man”.

[18] M.D.’s supervisor, J.S., [redacted] Senior Director of Operations, indicates that M.D. “is steadfast, committed, reliable and trustworthy” and someone who “willingly volunteers and goes beyond expectations”.

Victim Impact

[19] These glowing descriptions of M.D.’s character contrast sharply with L.M.’s experience. She has provided a Victim Impact Statement detailing how the offence has affected her. She notes that she felt “completely violated by this sexual assault”. She had difficulty sleeping, required medication for anxiety, and, due to emotional and psychological distress, she was unable to work for a period of 14 months. L.M. continues to be fearful, noting a particular concern that M.D. may be angry following the court proceedings.

[20] The offence also affected L.M.’s sense of place in the small community of [redacted] where both she and M.D. continue to reside. She notes that she “stopped going to community events due to embarrassment and judgement from community members”. Similarly, L.M. indicates that she had to seek supports outside of the community referencing her experience with a counsellor who worked alongside M.D. making comments to her that “seemed like she was discouraging me from reporting the assault”.

[21] L.M. acknowledges that M.D. is taking responsibility for his actions, but notes: "It took me a long time to come forward and report that [M.D.] sexually assaulted me. In part it was because he acted like what he had done was not a big deal and that he had not done anything wrong. I hope that [M.D.] now understands that he had no right to do what he did and the long term impacts I have had to live with".

The Law

[22] As noted, the primary issue to be determined is whether the imposition of a discharge is appropriate. The test to be applied is set out in s. 730(1) of the *Criminal Code* which reads:

> Where an accused, other than an organization, pleads guilty to or is found guilty of an offence, other than an offence for which a minimum punishment is prescribed by law or an offence punishable by imprisonment for fourteen years or for life, the court before which the accused appears may, if it considers it to be in the best interests of the accused and not contrary to the public interest, instead of convicting the accused, by order direct that the accused be discharged absolutely or on the conditions prescribed in a probation order made under s. 731(2).

Best Interests of the Accused

[23] Turning to the best interests of the accused, in *R. v. Fallofield* (1973), 13 C.C.C. (2d) 450 (B.C.C.A.), the most frequently cited decision on discharges, the British Columbia Court of Appeal made the following comments, at para. 21, about this first branch of the test:

> …
>
> (5) Generally, the first condition would presuppose that the accused is a person of good character, without previous conviction, that it is not necessary to enter a conviction

> against him in order to deter him from future offences or to rehabilitate him, and that the entry of a conviction against him may have significant adverse repercussions.

[24] There is evidence before me, most notably the letters of support, from which to infer that M.D. is a person of good character. He has no prior criminal convictions, nor is there anything to suggest he is at risk to re-offend.

[25] With respect to deterrence, defence counsel argues that the impact of these proceedings has had sufficient deterrent effect on M.D. In considering the question of specific deterrence, I note that I do have questions about the extent to which M.D. truly appreciates the gravity of his actions and is remorseful. His responses to L.M. when confronted, as outlined in the Agreed Statement of Facts, certainly suggest that he did not view his behaviour as serious. In addition, while M.D. has entered a guilty plea, often noted to be an expression of remorse, his guilty plea came only after a lengthy preliminary inquiry in which L.M. was required to testify. Other than the guilty plea, there is no other expression of remorse before me.

[26] That being said, there is also little to suggest that a criminal conviction is necessary to deter M.D. from committing future offences. His lack of a criminal record indicates, to some extent, that this offence is out of character, and I accept that his behaviour was impulsive rather than predatory in nature. On balance, I accept his counsel's submission that the embarrassment of going through the criminal justice system and its consequent impact on his reputation in the community are sufficient to address the principle of specific deterrence.

[27] Per *Fallofield*, this leaves the issue of whether the entry of a conviction may result in significant adverse repercussions for M.D.

[28] Defence counsel indicates that a criminal conviction may have adverse implications for M.D.'s employment, noting that while M.D.'s direct supervisor has provided a glowing letter of support, it will ultimately be up to [redacted] Chief and Council to decide whether a conviction would impact M.D.'s employment. In addition, defence counsel notes that M.D. and his spouse hope to travel upon retirement, and that a criminal conviction for this type of offence may well impede this goal.

[29] In *R. v. Shortt*, 2002 NWTSC 47, a decision of the Northwest Territories Supreme Court, Vertes J. made the following observations, at para. 32, regarding the standard to be applied in considering adverse repercussions flowing from a conviction:

> A review of the case law reveals that in many cases a discharge was granted where a conviction would result in an accused losing his or her employment, or becoming disqualified in a pursuit of his or her livelihood, or being faced with deportation or some other significant result. These are examples of highly specific repercussions unique to the specific accused. But, such specific adverse consequences are not a prerequisite. In my opinion, it is sufficient to show that the recording of a conviction will have a prejudicial impact on the accused that is disproportionate to the offence he or she has committed. This does not mean that the accused's employment must be endangered; but it does require evidence of negative consequences which go beyond those that are incurred by every person convicted of a crime (unless the particular offence is itself harmless, trivial, or otherwise inconsequential)...

[30] In my view, defence counsel's submission that entry of a criminal conviction may have an adverse impact on M.D.'s stated desire to travel upon retirement amounts to no more than negative consequences that may be incurred by every person convicted of a

crime. Given the nature of the offence, I am hard pressed to see such a consequence as disproportionate to the behaviour.

[31] The potential impacts for M.D.'s employment are more concerning. However, what, if any, consequences there may be are entirely speculative at this point. M.D. certainly has the support of his immediate supervisor, and there is no information before me regarding the First Nation's disciplinary policies that would enable me to assess the likelihood of adverse repercussions for M.D.'s employment should a conviction be entered. That being said, I do appreciate that M.D. is similarly not in a position to predict, with any degree of certainty, how his employment may be affected.

[32] Ultimately, I accept, albeit somewhat reluctantly, that while unclear at this point, it is not unreasonable to conclude that M.D.'s employment may be adversely affected with the imposition of a conviction for sexual assault.

[33] In the circumstances, I am satisfied that a discharge would be in M.D.'s best interests.

The Public Interest

[34] The more difficult issue to assess, however, is the second branch of the discharge test, whether a discharge would be contrary to the public interest.

[35] Counsel for M.D. has provided four cases in support of her argument that a discharge is appropriate.

[36] In *R. v. Reyes-Brogwardt*, 2010 BCSC 1594, a 2010 decision of the British Columbia Supreme Court, the offender participated in what the sentencing judge referred to as a prank gone wrong. The offender and three others spent the night drinking. When one member of the party passed out, one of the others pulled down his pants and underwear and directed the offender to mime oral sex for the purposes of taking photographs. In so doing, the offender touched the victim's bare buttocks with his fingers and tongue. The sentencing judge noted the highly unusual circumstances, and seemed persuaded by the fact the offender remained clothed throughout and his actions were not for sexual gratification.

[37] I would agree with the Crown that the highly unusual circumstances of the *Reyes-Brogwardt* case make it of limited value. In the case at bar, the behaviour was clearly for the purposes of sexual gratification and cannot be characterized as a mere prank when assessing moral culpability.

[38] In *R. v. Jayswal*, 2011 ONCJ 33, a 2011 decision of the Ontario Court of Justice, the facts include the offender kissing the victim on the cheek, hugging her, and grabbing her breast over her clothing. The imposition of a discharge, however, was a result of a joint submission and took note of a pending refugee status claim. Accordingly, the case is of limited value in assessing the appropriate disposition in this case.

[39] In *R. v. T.J.H.*, 2012 BCPC 115, a 2012 decision of the British Columbia Provincial Court, the offender made persistent advances to the fiancé of a friend and touched her genitals over the clothing. The sentencing judge did impose a discharge, but, in so doing, noted unique challenges the offender was facing. Those challenges

are not described, making it extremely difficult to determine how similar or different the case may be from that of M.D.

[40] It is notable that none of these three cases involved spousal relationships, and the latter two lack the element of taking advantage of a sleeping or unconscious victim. All three cases are also somewhat dated, and may not reflect the attitudinal and legislative changes that have occurred in more recent years in relation to the seriousness with which the justice system views the offence of sexual assault.

[41] Finally, in *R. v. J.L.B.,* 2017 BCPC 24, a 2017 decision of the British Columbia Provincial Court, the offender touched an employee on the buttocks and thighs, and kissed her without her consent. The case is a more recent one, and does involve a breach of trust; however, the case lacks the aggravating factor of taking advantage of a sleeping or unconscious victim, and contains significant mitigating factors that are not present in M.D.'s case, including the fact the offender's immigration status was at risk, and that he attended and completed sex offender treatment at his own expense.

[42] Ultimately, and as is not unusual, none of the decisions is directly on point. Nor are any of the decisions overwhelmingly persuasive in assessing whether a discharge would be contrary to the public interest in this case.

[43] The public interest branch of the discharge test is often equated with the need for general deterrence. While deterrence is clearly an element to consider in assessing the public interest, the case law is clear that implicit in the public interest is consideration of public confidence in the administration of justice. In *Shortt*, Vertes J. stated at para. 34:

> …Most of the case law identifies the "public interest" with the need for general deterrence. Yet, in my opinion, there is a further aspect to the public interest…that being the need to maintain the public's confidence in the justice system. From this perspective the knowledge that certain type of criminal behaviour will be sanctioned by way of a criminal record not only acts as a deterrent to others but also vindicates public respect for the administration of justice.

[44] In *R. v. MacKenzie*, 2013 YKSC 64, the Yukon Supreme Court overturned a Territorial Court decision imposing a discharge in a case of spousal assault. In considering whether the sentencing judge erred in assessing the public interest branch of the test, Veale J. adopted the reasoning in *Shortt* in finding that the public interest "includes the need to maintain the public's confidence in the system of justice." In addition, at para. 44 of the decision, Justice Veale adopted the factors set out in the Newfoundland Court of Appeal decision in *R. v. Elsharawy* (1997), 156 Nfld. & P.E.I.R. 297 (Nfld. S.C. (T.D.)), to be considered in determining whether general deterrence of others is necessary:

1. the gravity of the offence;
2. the prevalence of the offence in the community;
3. public attitudes towards the offence; and
4. public confidence in the effective enforcement of the criminal law.

[45] Turning first to the gravity of the offence, much of defence counsel's argument that a discharge would not be contrary to the public interest is based on her view that the offence falls at the low end of the spectrum. She cites the lack of physical contact or penetration in submitting that the conduct falls at the lower end of moral blameworthiness.

[46] I have a great deal of difficulty with this position. While it is perhaps arguable that a lack of penile or digital penetration may well make the offence objectively less serious, the lack of physical contact, in my view, does not. To suggest that ejaculating semen on someone without their knowledge or consent is somehow less serious than touching someone for a sexual purpose without their knowledge or consent makes absolutely no sense. The behaviour is no less a violation of someone's sexual integrity than a touching offence. Indeed, in some ways it is perhaps more serious as the notion of discharging bodily fluids onto someone without their consent is, quite frankly, repugnant.

[47] Furthermore, there are a number of aggravating factors in this case that increase the gravity of the offence. Firstly, the offence involved the abuse of an intimate partner, or former intimate partner, a statutorily aggravating factor pursuant to s. 718.2(a)(ii) given the breach of trust or betrayal inherent in abusing one's partner. Secondly, the offence happened in the victim's own home, in her own bed, a place she was entitled to feel safe from harm. Thirdly, the offence was committed against a victim who was sleeping or unconscious, and, therefore, particularly vulnerable. Finally, the offence had a significant negative impact on the L.M. as set out in her Victim Impact Statement, also a statutorily aggravating factor pursuant to s. 718.2(a)(iii.1). While there appear to have been those in the community who have minimized the offence, such as the local counsellor L.M. met with, I have absolutely no difficulty understanding why this experience has been so disturbing and traumatic for L.M.

[48] In terms of the prevalence of the offence in the community, in the *MacKenzie* decision, Veale J. speaks at length about the prevalence of domestic violence in the

Yukon, noting that it remains "exceptionally high" (see paras. 46-48). Moreover, numerous cases in the Yukon have referenced the disturbing frequency of sexual assaults on sleeping or unconscious victims. In *R. v. Rosenthal*, 2015 YKCA 1, the Yukon Court of Appeal held that a suspended sentence was not appropriate for an offence of digital penetration on a sleeping victim when considered in light of the prevalence of such offences, noting at para. 12:

> 12 A suspended sentence is a significant departure from the range identified in *R. v. White*, which is not made appropriate by the respondent's lack of a prior criminal record. A suspended sentence does not serve the principles of denunciation and deterrence, which are especially important given the prevalence in Yukon of sexual assaults on sleeping or unconscious victims: *R. v. White* at para. 51.
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> 13 In *R. v. Netro*, 2003 YKTC 80, the prevalence of sexual assault on sleeping victims in Yukon was one of the factors which led the judge to reject a conditional sentence and impose a 12-month custodial sentence:
>
> > [22] The difficulty in considering a conditional sentence in this case arises from the circumstances not of the offender but of the offence. … [T]he crime must be viewed in its community context. Sexual assault on unconscious and helpless victims is … rampant in this jurisdiction and throughout the North.

[49] With respect to public attitudes, it is undeniable that attitudes toward sexual assault are rapidly changing, with increasing intolerance for sexually abusive behaviour of all kinds and a growing recognition that such behaviour is deserving of sanction. Public confidence in the effective enforcement of the criminal law does require consideration of appropriate and meaningful sanctions for such behaviour to ensure effective denunciation and deterrence.

[50] As noted by Vertes J. in *Shortt* at para. 34:

> …The question to ask here is would the ordinary, reasonable, fair-minded member of society, informed about the circumstances of the case and the relevant principles of sentencing, believe that the recording of a conviction is required to maintain public confidence in the administration of justice. …

[51] Recognizing the prevalence of both domestic violence and sexual assaults on sleeping or unconscious victims in the Yukon, and considering the particular aggravating factors of the offence committed by M.D., I am satisfied that a conviction is required to maintain public confidence in the administration of justice. Accordingly, I conclude that a discharge would be contrary to the public interest.

[52] With respect to the appropriate disposition, I did consider whether a conditional sentence order or short term of incarceration would be warranted in all of the circumstances of the offence, but in light of M.D.'s positive antecedents, I am content to adopt the submission of the Crown with respect to the appropriate sentence. Accordingly, I would suspend the passing of sentence and place M.D. on probation for a period of 12 months. The terms and conditions will be 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 L.M., except with the prior written permission of your Probation Officer

and with the consent of L.M. or except through counsel for the purposes of resolving division of property;

5. Do not go to any known place of residence, employment or education of L.M., except with the prior written permission of your Probation Officer and with the consent of L.M.;

6. Report to a Probation Officer within two working days and thereafter, when and in the manner directed by the Probation Officer; and

7. 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: spousal violence, sexual offending 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.

[53] Given the nature of the offence, there are a number of mandatory ancillary orders I must impose. As this is a primary designated offence, I make an order requiring M.D. to provide such samples of his blood as are necessary for DNA testing and banking. He will also be required to comply with the provisions of the *Sex Offender Information Registration Act*, S.C. 2004, c.10, for a period of 10 years. Thirdly, I impose the mandatory victim surcharge in the amount of $100. Time to pay will be one month.

[54] Lastly, I am required to consider whether a firearms prohibition should be imposed under s. 110. I note the Crown is not seeking a prohibition nor is there anything before me to suggest that such an order is necessary. Accordingly, I would decline to impose the discretionary firearms prohibition.

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RUDDY T.C.J.