Citation: *R. v. B.A.L.*, 2022 YKTC 11

Date: 20220324
Docket: 20-00585
Registry: Whitehorse

IN THE TERRITORIAL COURT OF YUKON
Before His Honour Judge Schneider

REGINA

v.

B.A.L.

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

Appearances:
Lauren Whyte — Counsel for the Crown
Jason D. Tarnow — Counsel for the Defence

REASONS FOR SENTENCE

[1] SCHNEIDER T.C.J. (Oral): B.A.L. has pled guilty to one count of sexual assault contrary to the provisions of s. 271 of the *Criminal Code of Canada* (the "*Code*"). The Crown had elected to proceed by way of indictment. He appears before the Court out of custody on judicial interim release.

Positions of the Parties

[2] B.A.L., by way of Application, seeks the following declarations:

a. That s. 742.1(f)(iii) of the *Criminal Code of Canada* violates s. 7 of the *Canadian Charter of Rights and Freedoms* [the *Charter*] and is not saved by s. 1 of the *Charter*, and therefore it ought not bind the Court in imposing sentence upon the Applicant;

b. That s. 742.1(f)(iii) of the *Criminal Code* violates s. 15(1) of the *Charter* and is not saved by s. 1 of the *Charter*, and therefore it ought not bind the Court in imposing sentence upon the Applicant.

[3] Specifically, B.A.L. argues that, were it not for the statutory impediments created by s. 742.1(f)(iii) of the *Code,* he would be a candidate for a conditional sentence. He argues that a conditional sentence, subject to terms, of two years, less one day, followed by a two-year period of probation would be appropriate in all of the circumstances.

[4] The Crown argues that a fit sentence, in all of the circumstances, is a jail sentence of 18 months followed by a two-year period of probation. Therefore, the Crown argues, whether or not s. 742.1(f)(iii) binds the Court is moot.

Agreed Statement of Facts

[5] The following statement was admitted as accurate by [B.A.L.]:

1. On September 19, 2020, [S.B.] [(“S.”)] and her sister, [B.B]. [(“B.”)], went out to the Kluane Park Inn (“KPI”) in Haines Junction, Yukon with a few friends. [B.] was the designated driver for the evening.

2. While at the KPI, [S.] and [B.] saw [B.A.L.] [(“L.”)] with a few of his friends. [L.] was known to [S.] and [B.] as a family friend and the father of their cousin’s child.

3. At one point in the evening, [S.] and [L.] were talking. [S.] felt uncomfortable and texted her sister for help. [S.] later told [B.] that [L.] was saying things like “I’m going to take care of you”. [S.] thought [L.] was hitting on her.

4. Around 11:30 pm, [B.] and [S.] left the KPI. After driving around for awhile, [B.] dropped [S.] off at their mother's house in Haines Junction. [B.] set up a bed on an upstairs living room couch for [S.] and then left again to return to the KPI.

5. [S.] got changed into pajamas and spoke with her ex-boyfriend, [R. H.] [("H.")], on the phone. She eventually fell asleep on the couch.

6. Meanwhile, at the KPI, [B.] offered [L.] a ride home but he had nowhere to go. He was supposed to go back to Burwash Landing with the friends he arrived with, but they left without him.

7. [B.] knew of a residence at which she thought [L.] could stay. [B.] proceeded to drive him there but upon arrival, [L.] wouldn't get out of the vehicle.

8. [B.] felt bad for [L.] because it was dark and cold, so she drove him to her mother's house and set him up in her room in the basement. She gave him a blanket and told him there were children upstairs and not to go up there. [B.] left the house again.

9. [S.] was still asleep on the upstairs couch. She thought that she felt her ex-boyfriend in her dreams. She soon realized there was someone physically inside her and she fully woke up.

10. [L.] was engaged in non-consensual penetrative vaginal intercourse with [S.].

11. At first [S.] felt frozen but then said, "Get off of me." She called [H.] crying and told him that someone was touching her and it was not him. [H.] called [S.]'s mother, waking her up, and told her that something was taking place on the couch. [H.] also called [B.] and told her what was happening.

12. [S.]'s mother walked down the hallway and saw [L.] jump up from the couch, wearing only his boxers. The accused covered himself with a shirt and passed [S.]'s mother on his way back down to the basement. [S.] told her mother that "he was on top of me, I woke up to him on top of me, I thought it was [R.]."

13. Meanwhile, [B.] called friends to go over and get [L.] out of the house. Three of her friends went in the house and removed [L.].

14. [S.] was taken to the local health center around 2:20 a.m. and the RCMP were called. [S.] then attended the Whitehorse General Hospital for a sex assault examination kit.

15. The RCMP located [L.] around 4:30 a.m. in Haines Junction. He was arrested, provided his *Charter* rights, and was transported back to the RCMP detachment, where penile swabs were taken and a phone call to a lawyer was facilitated.

16. [L.]'s' penile swabs and a known sample from [S.] were sent to the RCMP Forensic Laboratory. DNA matching [S.B.]'s profile was identified on swabs taken from [L.]'s penile shaft.

Victim Impact Statements

[6] Victim Impact Statements were provided by S.B., B.B. and S.B.'s mother. It is uncontested that the actions of B.A.L. had a devastating effect upon S.B. and her family. S.B. no longer feels safe in her home. She feels anxious and unsafe in an environment that previously provided comfort and sanctuary. She no longer trusts people as she once did. The psychological impact of this event has had a profound effect upon her personal life as well as upon her employment. The family no longer feels safe. They continue to relive the trauma of the event. S.B.'s mother stated that her daughter has not been the same since that night. She stated: "B.A.L. not only raped her physically but raped my family of the time we spend together at home." In considering carefully the Victim Impact Statements filed, I am also mindful of the observations made by the Supreme Court of Canada in *R. v. Goldfinch*, 2019 SCC 38, at para. 37:

> …Throughout their lives, survivors [of sexual assault] may experience a constellation of physical and psychological symptoms including: high rates of depression; anxiety, sleep, panic and eating disorders; substance dependence; self-harm and suicidal behaviour. …

[7] A great deal of case law and other material has been provided for the Court's consideration. A repetitive observation is that sexual assaults and, in particular, sexual

assaults upon sleeping or unconscious victims, are "…all too common in this jurisdiction" (see, for example: *R. v. Netro*, 2003 YKTC 80).

Gladue Report

[8] The *Gladue* Report indicates that B.A.L. is 29 years of age and a member of the Wiikwemkoong First Nation. He grew up in Bay Mills, Michigan, and Sault Ste. Marie, Ontario. His parents separated when he was young but both continued to keep B.A.L. as their main focus and took turns parenting him. He has lived in Canada and the United States. He has finished high school and went on to attend the University of Ottawa where he is in his fourth year. The report is very comprehensive and notes that B.A.L. was, himself, the victim of sexual abuse as a child. The impact of this and the residual impact of residential schools upon him and his family is described in detail. As well, B.A.L.'s mother died unexpectedly last year. He has had his share of challenges. Nevertheless, B.A.L. has been deeply involved with his cultural heritage and has eclectic interests and a generally pro-social history. He has no criminal record. He has one 7-year-old daughter from a common law relationship that has now ended though B.A.L. remains very involved in his daughter's life. He has had difficulties with alcohol though he is, at present, abstinent. B.A.L. is involved with counselling to assist him in moving forward. He appears to have insight into the impact his actions have had upon S.B. and her family. The *Gladue* Report is, on the balance, very positive.

Yukon Counselling & Psychotherapy Services

[9] B.A.L. remains engaged in counselling which began in November 2020. He is described as:

- Very active in his Ojibwe culture;

- Aware of his own unresolved trauma and the barriers it presents;

- Committed to sobriety;

- Interested in intensive treatment; and

- Remorseful with respect to the matter that brings him before the Court.

Expression of Remorse

[10] B.A.L. appears to have insight into the damage that he has caused S.B. and her family. He appears to be sincerely motivated to take corrective measures and appears to be truly remorseful for his actions.

Letters of Support

[11] It does not appear to be controversial that B.A.L. is of otherwise good character. He has strong ties to both his family and his culture. He has led a pro-social life to date. He has pursued both educational and employment opportunities. By all accounts, the matter that brings him before the Court is an aberration and out of keeping with what one would have expected from B.A.L.

Vigilantism

[12] Subsequent to the events of the present matter, B.A.L. was attacked in his residence while asleep with his child and child's mother by S.B.'s ex-boyfriend. The perpetrator broke into the home and violently assaulted B.A.L. The perpetrator was

apprehended and B.A.L. has testified at a preliminary inquiry. I accept that being the victim of vigilantism is a fact that may be considered when determining the appropriate sentence (see, for example: *R. v. Suter*, 2018 SCC 34).

Mitigating and Aggravating Factors Cited by B.A.L.

[13] Aggravating factors include:

- The situational context of the assault, being in the childhood home of the victim;
- The victim was asleep at the time of the offence;
- The act involved penile contact; and
- The lasting effects on the victim, as described in her Victim Impact Statement.

[14] Mitigating factors include:

- The Applicant entered a guilty plea;
- The Applicant before the Court is a first-time offender;
- The Applicant's performance on bail;
- The Applicant's Indigenous heritage which he is deeply connected to;
- The Applicant has experienced inter-generational trauma as a result of residential school experienced by elders in his family;

- The Applicant has insight into the harm caused by his offending behaviour and the harm caused to the victim;

- The Applicant has a stable work history and is pursuing a university degree;

- The Applicant has engaged in extensive counselling and culturally relevant programing while on bail;

- The Applicant has strong family support;

- The Applicant is a single father with joint custody of his 7-year-old daughter; and

- The Applicant's genuine expression of remorse.

[15] The Crown does not take issue with the aggravating and mitigating factors relied upon by B.A.L.

Fit Sentence

[16] B.A.L. argues that the three key pre-requisites for a conditional sentence have been met:

1. The Crown is seeking a sentence of 18 months in jail;

2. Serving a sentence in the community would not endanger the safety of the community; and

3. Serving a sentence in the community is consistent with the fundamental purpose and principles of sentencing.

[17] B.A.L. argues that, but for the provisions of s. 742.1(f)(iii) of the *Code*, a conditional sentence would be a fit sentence; hence, the above *Charter* Applications.

[18] The Crown argues that a fit sentence, in all of the circumstances of B.A.L.'s case, must include 18 months of incarceration. Therefore, the Applications made by B.A.L. are moot. The Crown does not dispute the veracity of any of the background information provided in support of B.A.L.

Case Law

[19] Any fit set sentence must be arrived at through the lens of s. 718.2(e) which requires that:

> …
>
> > …
> >
> > (e) all available sanctions, other than imprisonment, that are reasonable in the circumstances and consistent with the harm done to victims or to the community should be considered for all offenders, with particular attention to the circumstances of Aboriginal offenders. [emphasis added]

[20] There is ample evidence to support the contention that B.A.L. has suffered both directly and indirectly as a result of his Indigenous status and consequent disadvantaged familial/social circumstances which are, unfortunately, systemic and endemic.

[21] The provisions of s. 718.2(e) must be read alongside the provisions of s. 718.04 which provide that;

> 718.04 When a court imposes a sentence for an offence that involved the abuse of a person who is vulnerable because of personal circumstances – including because the person is Aboriginal and female – the court shall give primary consideration to the objectives of denunciation and deterrence of the conduct that forms the basis of the offence. [emphases added]

[22] At the time of the offence S.B. was, objectively, in a vulnerable state. She was asleep. She is Indigenous and female.

Range of Sentence in the Yukon

[23] In the case of *R v. White,* 2008 YKSC 34, the Court considered the principles of sentencing as related to serious sexual assaults upon "passed out" or unconscious victims who have been subjected to non-consensual sexual intercourse. The facts before the Court in *White* were reasonably similar to those presently before this Court. After an exhaustive review of the sentencing case law, the Court indicated:

> 85 …the current range in the Yukon for non-consensual sexual intercourse with a sleeping or unconscious victim, which is admittedly a very broad description of a type of sexual assault, with some exceptions, is roughly from one year, at the lower end, to penitentiary time in the vicinity of 30 months, at the higher end.

[24] On the facts of *White*, the Court found that the paramount principles of denunciation and deterrence called out for a penitentiary sentence. Therefore, no consideration was given to a conditional sentence.

[25] Generally, conditional sentences are reserved for less serious offences and non-dangerous offenders. Courts in the Yukon continue to recognize the range as set out in *White* (see, for example: *R. v. Charlie*, 2021 YKTC 48; *R. v. Charlie*, 2021 YKTC 54; *R. v. Rosenthal*, 2015 YKCA 1; *R. v. Johnson*, 2014 YKTC 46; *R. v. R.W.R.*, 2019 YKTC 33).

[26] I am mindful that, as indicated in *R v. Nasogaluak*, 2010 SCC 6, sentencing judges should pay heed to sentencing ranges though departures from an established range may be made so long as they are in accordance with the principles and objectives of sentencing. This principle of parity is also captured within the statutory provisions of s. 718.2(b). In the present case, I have not been directed to factors that should cause the Court to depart from the established range in the Yukon, as the Court similarly found in *Rosenthal*.

Conditional Sentence?

[27] The Court must also consider how the provisions of s. 718.2(e) interact with those of s. 742.1. In *Netro*, the Court rejected a conditional sentence given the prevalence of sexual assaults being perpetrated upon sleeping women in the Yukon. The focus was offence-specific.

> 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, if my dockets are any indication, rampant in this jurisdiction and throughout the North.

[28] While it is true, as set out in *R. v. Proulx*, 2000 SCC 5, that a conditional sentence is, by definition, a sentence of imprisonment and may adequately address the principles of denunciation and deterrence, it is also true that the circumstances of an offence, as it becomes more serious, may call for a term of imprisonment rather than a conditional sentence regardless of the circumstances of the accused.

[29] In B.A.L.'s case, as in *R. v. Wells*, 2000 SCC 10, the question is, being mindful of the admonition that all available sanctions other than imprisonment that are reasonable in the circumstances should be considered, whether a non-custodial sentence is reasonable in the present circumstances where the paramount sentencing objectives are denunciation and deterrence.

[30] The analysis set out in *Proulx* proceeded as set out below. In determining the "mootness question", I will proceed with the analysis assuming that there is no statutory impediment (ie. s. 742.1(f)(iii))[1]:

1. Have a suspended sentence and probation and a penitentiary term of imprisonment both been excluded? if so,

2. Have the statutory prerequisites of s. 742.1 been satisfied?

    i) the absence of a statutory minimum sentence?

    ii) a sentence of imprisonment of less than two years?

[1] See: *R. v. Lloyd*, 2016 SCC 13, *R. v. Bear*, 2021 SKQB 26. There is no point in considering a constitutional challenge to limiting legislation until it is decided that it might impact upon the determination of the most appropriate sentence.

iii) the safety of the community would not be endangered by the offender serving the sentence in the community?

- The risk of the offender re-offending?, and
- The gravity of the damage that could result from re-offending?

[31] With respect to the above criteria, I am of the view that B.A.L. meets the threshold requirements. Specifically:

- Neither a suspended sentence nor a penitentiary term of imprisonment would constitute a best fit sentence;
- The offence does not mandate a statutory minimum sentence;
- The Crown is advocating a term of imprisonment of 18 months (which appears to be within the appropriate range); and
- Serving the sentence in the community would not endanger the community. B.A.L. has no criminal record and is doing well with community supervision while on judicial interim release. There is, objectively, a low risk of recidivism.

[32] The second stage of the analysis requires the Court to determine whether the imposition of a conditional sentence would be consistent with the fundamental purpose and principles of sentencing set out in ss. 718 to 718.2.

[33] When determining a fit sentence, I must balance the punitive factors of denunciation and deterrence with those of rehabilitation. I must consider B.A.L.'s background and current circumstances. I must consider the *Gladue* factors as well as all of the other relevant provisions contained in Part XXIII of the *Code*. I have considered and I am mindful of the detailed content of the filed *Gladue* Report. The Report contains helpful supports, resources, and recommendations which will help in creating a positive trajectory into the future. I accept the validity of the cited aggravating and mitigating factors. It would appear as though, as set out in *Proulx*, rehabilitative and restorative justice principles could be captured within the ambit of a conditional sentence for B.A.L.

[34] However, the Court in *Proulx* pointed out that "…there may be certain circumstances in which the need for denunciation [or deterrence] is so pressing that incarceration will be the only suitable way in which to express society's condemnation of the offender's conduct" (at para. 106). Therefore, depending upon the severity of the offence, the principles of denunciation and deterrence may not be adequately addressed within the ambit of a conditional sentence regardless of the offender's very positive prognosis.

[35] This is so where, as set out is s. 718.2(e), no sanction, other than incarceration, is appropriate in all of the circumstances. An appropriate sentence must take into account the needs of the victim(s), the accused, and the community. It is recognized that most traditional Aboriginal approaches to sentencing place an emphasis upon restorative objectives for both the offender and the community (which includes immediate victims). Nevertheless, alternatives to incarceration must be "reasonable in the circumstances" whether or not the offender is of Indigenous heritage. The Court in

R. v. Gladue, [1999] 1 S.C.R. 688, did not say that in all cases when sentencing Aboriginal offenders the greatest weight should be placed on the principle of restorative justice and less to denunciation, deterrence, and separating the offender from society. The provisions of s. 718.2(e) call for a modified lens or methodology applied to the sentencing process rather than, necessarily, a different result. The Court indicated that generally, as a practical matter, as the seriousness of the offence increases so does the paramountcy of denunciation and deterrence.

[36] As the Court said in *R. v. L.P.,* 2020 QCCA 1239, at paras. 122 and 123:

> 122 …*Gladue* and *Ipeelee* do not suggest that, "as a general practice, aboriginal offenders must always be sentenced in a manner which gives greatest weight to the principles of restorative justice, and less weight to goals such as deterrence, denunciation, and separation".
>
> 123 There are some serious offences and some offenders for which and for whom the aforementioned goals of deterrence, denunciation, and separation remain fundamentally relevant. In cases of sexual violence against Indigenous women, the *Gladue* factors affecting the offender have to be weighed against the necessity to give appropriate consideration to the historical and systemic circumstances of Indigenous women victims of sexual violence in the domestic context, the whole to meaningfully achieve the fundamental purposes of sentencing and the protection of the public.

[37] Though the case pre-dates *Code* amendments (s. 742.1(f)(iii), which have excluded sexual assaults), B.A.L.'s case resonates well with the analysis applied in *Netro*, (discussed above). It is the circumstances of the offence, being both serious and violent, that present the greatest difficulty in finding a conditional sentence to be one that is appropriate. The Court found as follows at paras. 22 to 24:

> 22 The difficulty in considering a conditional sentence in this case arises from the circumstances not of the offender but of the offence. The crime was a serious one involving violation of the victim in his own home by a

> trusted friend and guest. Moreover, the crime must be viewed in its community context. Sexual assault on unconscious and helpless victims is, if my dockets are any indication, rampant in this jurisdiction and throughout the North.
>
> 23 In such circumstances, and although as I have indicated, Mr. Netro would be an excellent candidate for a conditional sentence, I am of the view that such a sentence would be an inadequate response to the crime for which he stands convicted.
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> 24 Indeed, the situation here is strikingly similar to that in R. v. Wells, [2000] 1 S.C.R. 207, wherein the Supreme Court of Canada upheld a trial judge's decision to reject a conditional sentence for an aboriginal offender convicted of sexual assault primarily because, in the trial judge's view, the necessary elements of deterrence and denunciation would be lacking. That, in my view, is the result that must obtain in this case as well.

[38] A fit sentence must be proportionate to the offence and the degree of responsibility of the offender (s. 718.1). The gravamen of the index offence must result in a proportionate sentence in order to maintain the public's confidence in the administration of justice. While B.A.L., in the abstract, might be considered a good candidate for a conditional sentence, in my view it is the offence which would make this an inappropriate sentence even if it were presently a lawful option. It is my view that the principles of denunciation and deterrence cannot be adequately addressed in relation to the factual circumstances of this particular offence. B.A.L. has pled guilty to sexual assault involving penile vaginal penetration of a sleeping Indigenous female victim in her residence where he was a guest. The facts are egregious and, as materials filed and case law provided indicate, this sort of offence is occurring in this jurisdiction all too frequently. A conditional sentence would therefore not accord with the fundamental purpose and principles of sentencing.

[39] Given that I have found that a conditional sentence would be inappropriate in B.A.L.'s case it is unnecessary to consider the *Charter* arguments.

Conclusion

[40] In B.A.L.'s case, I am of the view that a period of incarceration for 15 months is required as part of the fit sentence. It is within the accepted range in the Yukon Territory. I am of the view that the principles of deterrence and denunciation are adequately addressed with this component of the sentence. However, it is important to include a component that will assist B.A.L. with respect to his rehabilitation. In that regard, I am of the view that a period of probation would be of assistance.

[41] Therefore, the period of incarceration will be followed by two years of probation. The terms of which will include:

1. Keep the peace and be of good behaviour;

2. Report to a Probation Officer within 72 hours of your release from custody and thereafter as required;

3. Attend for counselling, assessment, programs and or treatment as required by your Probation Officer;

4. Do not possess or consume alcohol or non-prescribed drugs;

5. Have no communication directly or indirectly with S.B. or any member of her family;

6. Do not go within 250 meters of any place you know S.B. to reside, work, go to school, worship, or frequent; and

7. Do not possess any weapon as defined by the *Criminal Code of Canada* unless for the immediate preparation of food, for the purposes of employment, or for culturally-related purposes (i.e. knives for carving drumsticks).

[42] There will also be a mandatory DNA Order, a 5-year firearms prohibition with exception (s.113) for the purpose of hunting, a 20-year *SOIRA* Order, and victim surcharge.

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SCHNEIDER T.C.J.