Citation: *R. v. S.C.C.,* 2019 YKTC 61

Date: 20191002
Docket: 18-10006
Registry: Watson Lake
Heard: Whitehorse

IN THE TERRITORIAL COURT OF YUKON
Before His Honour Judge Schneider

REGINA

v.

S.C.C.

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Appearances:

Amy Porteous	Counsel for the Crown
Lynn MacDiarmid	Counsel for the Defence

REASONS FOR SENTENCE

[1] SCHNEIDER T.C.J. (Oral): On April 11, 2019, after a trial, S.C.C. was found guilty of one count of sexual assault. The Court was told that the only issue in dispute at trial was whether the sexual intercourse was consensual. Findings from the trial are set out in the next several paragraphs.

[2] One witness, the complainant D.D., was called by the Crown. D.D. described the events of May 1, 2018, beginning in the evening at approximately 8 p.m., as one which

involved considerable consumption of alcohol — coolers followed by rum — the playing of electronic games, listening to music, watching a movie, and then unwanted sexual contact.

[3] By way of background, S.C.C. and D.D. are related distant cousins. They have known each other all of their lives. They had "hung out" together on previous occasions. These times together had all involved the consumption of alcohol, games, movies, music, and ending with S.C.C. passing out and D.D. going home. Her family lives two doors away from S.C.C.

[4] On the night of May 1, there was no one at S.C.C.'s home, though he lives there with his mother and brother, as I understood it. According to D.D., S.C.C. was criticizing her that evening for not drinking fast enough, that she was not "Tahltan enough." As the two were watching a movie in his bedroom, D.D. began to feel uncomfortable as S.C.C. kept moving closer to her, putting his hands on her thigh, and moving his hands up toward her crotch. S.C.C. did not ask if that was okay. D.D. did nothing to suggest it was okay.

[5] D.D. indicated that ". . . we're cousins . . . he had a girlfriend . . . I did not like him that way . . . ." S.C.C. kept asking if she was mad at him. D.D. indicated she was "buzzed" at the time.

[6] S.C.C. then started to kiss her, grab at her, and got on top of her. She felt "overwhelmed." She said, "You have a girlfriend . . . I don't want to do this . . . ." Eventually, S.C.C. managed to get her pants off and began to have sexual intercourse

with D.D. She was telling him to stop. S.C.C. said they were “distant cousins” and that it was okay. Eventually, she was able to push him off.

[7] The two then shared stories of how they had each been sexually assaulted in the past, whereupon S.C.C. assured D.D. that she was safe with him. She did not leave at that point because she felt they had bonded after the first incident and their subsequent talk. She promised him that she would not “ditch him” as she had done on previous occasions once he had passed out. D.D. fell asleep. She awoke sometime later as S.C.C. was having vaginal intercourse with her, after pulling down her pants and entering her from behind.

[8] After the first event, D.D. had put on a pair of S.C.C.’s pyjama bottoms prior to falling asleep. She felt S.C.C. ejaculate on her back. S.C.C. then went to the bathroom to wash up and returned to the living room couch where he passed out.

[9] Once D.D. was sure that S.C.C. had passed out, she gathered her things and left. She ran home in hysterics, whereupon her father called the police.

[10] D.D.’s account of the event was clear, consistent, and coherent. She did not hesitate recounting the events and did not waiver in any way during cross-examination. Her account was logical, credible, and did not have gaps suggestive of confabulation.

[11] S.C.C. testified on his own behalf. He indicated that he had “hung out” with D.D. on as many as 25 occasions during the year prior to that event. His telling of the night’s events is quite different. After inviting D.D. over to his house, the two began drinking, were talking about relationships while playing cards in the kitchen, and then started to

watch a movie in the bedroom. They started kissing. Pretty soon their pants were off and they were having intercourse, but both suddenly stopped, as they both apparently had the same simultaneous epiphany that this was "wrong." He then went to the living room and fell asleep.

[12] S.C.C. is of the view that he then must have had a seizure due to his excessive alcohol consumption. He came to this conclusion because when he woke up, he did not know where he was and had no recollection of the night before: "my memory was wiped." The next thing S.C.C. knew, the police were at his house. He subsequently gave a video statement to the police, which was "inaccurate" because his memory was not fully restored. He failed to mention anything about a seizure to the police. S.C.C. says, on the one hand, he thought she was consenting, then "I would never do something like this" — that is, have sex with his cousin. He never discussed having sex with D.D., rather "D.D. never stopped me."

[13] While S.C.C.'s memory was faulty upon awakening, he was sure his memory is accurate, that is, at the time of trial. When asked whether he ejaculated on D.D., he said, "No . . . don't know . . . maybe . . . ." He did not remember the event accurately when speaking with the police because he was "too ashamed . . . As far as I remember, I did not put my penis inside her . . . I was scared so I told the police I might've done it . . . ."

[14] The version of events related by S.C.C. was garbled, it was illogical, and essentially incapable of belief. As well, a version of S.C.C.'s testimony is inconsistent with the position taken by counsel at the outset of the trial that the only issue for the

Court's consideration was that of consent. I accepted the version of events as depicted by D.D. as credible and believable.

[15] Nevertheless, having made that finding, even on S.C.C.'s version of the events, there was nothing in what he related that could be taken to constitute consent on D.D.'s part. He took no steps to ascertain that she was consenting.

[16] On her version of the events, which I accepted, D.D. explicitly refused consent and repeatedly told him to stop.

[17] It is quite clear that, first, S.C.C. had sexual intercourse with D.D.; and second, it was without her consent. Accordingly, S.C.C. was found guilty.

[18] On August 14, 2019, S.C.C. was before the Court for the purpose of sentencing. A pre-sentence report was provided along with relevant case law and a victim impact statement. S.C.C. informed the author of the pre-sentence report that he does not agree with the findings of the Court and that he was wrongly convicted. He states that he is appealing the findings of the Court.

Circumstances of the Accused

[19] The accused, S.C.C., is a 32-year-old member of the Tahltan First Nation. He grew up in Good Hope Lake, B.C., as he is a member of the Tahltan First Nation of Telegraph, B.C. He moved to Watson Lake, Y.T. in either 1994 or 1995. Though his parents split, he has maintained a good relationship with both. He has two siblings with whom he also has positive relationships. He enjoyed a stable childhood and did not experience abuse. This was notwithstanding his mother attending residential school.

S.C.C.'s family has a history with the residential school system. S.C.C.'s mother did not share much about her experiences with S.C.C., who described his mother as "a good mother . . . always there for me."

[20] During high school, S.C.C. was diagnosed with epilepsy. While he has, in the past, consumed alcohol in significant quantities, he reports no current problems, though he has lost his driver's licence as a result of drinking and driving.

[21] He graduated from high school. Unfortunately, at present, there are no individuals he would identify as friends. He has been isolated since the time of the present offence. He has been employed sporadically since leaving school and is a seasonal worker with [indiscernible] Construction. At present, he is working. He is not presently in a relationship.

[22] S.C.C. is of the view that the Court made an error in convicting him of the present offence and therefore accepts no responsibility and expresses no remorse. He did not want to discuss the matter with the author of the pre-sentence report. Nevertheless, the author of the pre-sentence report reports that S.C.C. represents a low risk and requires a low level of supervision. S.C.C. has one previous unrelated conviction from 2015 for refusing to provide a breath sample. For present purposes, I do not treat this conviction as aggravating. It is, however, suggestive of possible difficulties with alcohol.

Positions of Counsel

[23] The Crown advocates for a sentence between 20 and 21 months followed by a period of probation. This is said to be in the "mid-range" for offences of the type before the Court. The Crown has asked that the Court consider the following:

- the accused has no record — and I would accept that, although there is technically the one driving entry;
- he is an Aboriginal offender;
- the offence encompasses two gross violations of the victim;
- the accused knew that the victim had previously been sexually assaulted;
- the second incident, in particular, constituted a breach of trust;
- the accused induced the victim to consume alcohol;
- the accused penetrated the victim while she was asleep; and
- at this juncture, there is no admission of guilt; S.C.C. expresses no remorse for the incident and indicated to the author of the pre-sentence report that he will be appealing the conviction, as the Court had not made the right decision.

[24] Counsel, on behalf of S.C.C., indicated that he has retreated into himself since the incident and has not since consumed any alcohol. Counsel noted the following in respect of S.C.C.:

- he is young (32 years of age);
- the incident was "out of character";
- he is unlikely to repeat this sort of behaviour;

– the incident was one where alcohol played a significant role;

– there have been no problems while he has been on judicial interim release; and

– S.C.C. is now working.

[25] Counsel, on behalf of S.C.C., indicated that the appropriate range of sentence is between 12 and 30 months, followed by a period of probation, but urges the lowest possible sentence.

[26] I have also been provided with case law, which has been of assistance.

[27] Counsel, on behalf of the Crown, provided me with the decision in *R. v. White*, 2008 YKSC 34, which is factually quite similar to the present matter in a number of respects. In that case, after a night out drinking with friends, the victim and the accused went to the accused's room and resumed drinking. She had disclosed to the accused that she had been previously sexually assault. She eventually went to sleep in the accused's bed. She told the accused that she wanted to sleep on her own side of the bed and was given assurances by the accused that she need not worry. She had gone to sleep with her clothes on but woke up to find her pants and underwear pulled down with the accused trying to force sexual intercourse. The accused persisted as the victim was saying, "No" and "I don't want to" three or four times.

[28] The similarities between *White* and the matter before the Court are as follows:

– the accused were both First Nations;

– the accused had both been abused as youth;

- neither accused accepted responsibility for the offence and both were appealing their verdicts;
- the matters could be said to constitute a breach of trust on two bases: (i) the victims were asleep at the time of the assault; and (ii) the accused had both given their victims the assurance that they could be trusted; and
- the acts were committed by the accused while victims were in vulnerable states after they had been drinking and had fallen asleep.

[29] A key difference between the two cases is that in the *White* matter, the accused attempted sexual intercourse but did not succeed. In the present matter, the accused had penetrated the victim on two occasions.

[30] The Court in *White* conducted a comprehensive review of the relevant case law, which was very helpful in the present matter. The cases considered by that Court revealed a range of between 12 months' (in the form of a conditional sentence) to four and one-half years' incarceration. On the basis of Yukon decisions, the Court in *White* found that the range for non-consensual intercourse with a sleeping or unconscious victim is roughly from one year, at the low end, to penitentiary time in the vicinity of 30 months, at the higher end — and that the range is not inflexible.

[31] At the end of the analysis, the Court in *White* imposed a sentence of 26 months' incarceration less credit for time in pre-trial custody for a total of 24 months.

[32] Where, within a range, an accused will be placed is a function of the seriousness of the offence, the impact upon the victim, and the antecedents and circumstances of the accused.

[33] Counsel for S.C.C. provided the cases of *R. v. Menicoche*, 2016 YKCA 7, and *R. v. R.J.N.*, 2016 YKTC 55.

[34] In *Menicoche*, a case involving anal intercourse with a sleeping victim, the Court of Appeal found that the sentencing judge had given inadequate weight to the accused's prospects for rehabilitation and failed to give adequate consideration to the *Gladue* principles. The victim in this case was 15 years of age. The Court noted that in such cases, primary consideration must be given to deterrence and denunciation, and because the victim was under the age of 16 years, the minimum penalty is imprisonment for one year. The Court varied the sentence from the 23 months originally imposed to 17 months. The accused had entered a guilty plea and had "positive prospects of rehabilitation."

[35] In *R. v. R.J.N.*,2016 YKTC 55, a case involving non-consensual sexual intercourse, the accused was seen as having "overwhelmingly positive" potential for rehabilitation. He had the full support of his family and First Nation. He was insightful and clearly committed to making a positive change in his life. He had pleaded guilty at a very early stage in the proceedings. He fully admitted responsibility and was extremely remorseful. The sentencing court, after considering the cases of *R. v. Proulx*, 2000 SCC 5, *R. v. Gladue*, [1999] 1 SCR 688, and *R. v. Ipeelee*, 2012 SCC 13, imposed a conditional sentence for a duration of 18 months followed by a period of probation for three years, along with a number of ancillary orders.

Analysis

[36] In the present matter, counsel on behalf of the Crown submits the sentence in the mid-range between 20 to 21 months plus a period of probation would be appropriate. Counsel argue that the offence is actually made up of two gross violations, that is, vaginal penetrations. Counsel submits — and I accept — that it is aggravating that the accused knew the victim had been sexually assaulted in the past, induced the victim to drink, had promised her that she would be safe, and violated her, and that he assaulted her while she was asleep.

[37] Counsel, on behalf of S.C.C., noted that he had considerable family support in the court room. Counsel indicated that letters of support would be forthcoming. Counsel indicated that S.C.C. had not been drinking since the offence, and that he has retreated into himself. She indicated that the incident was one that was largely the product of excessive alcohol, and that it was not likely the sort of behaviour that would be repeated. The offence was not one that involved any gratuitous or instrumental violence. The offence could be described as one of opportunism.

[38] The author of the pre-sentence report describes S.C.C. as having done well on judicial interim release. Further, it was observed that S.C.C. is relatively young with a minor unrelated record. The Court was informed that S.C.C. is now working. The fact that the accused does not accept responsibility for the sexual assaults and is, therefore, not remorseful is not to be taken as an aggravating factor. S.C.C. was entitled to his trial, and he is entitled to his appeal. In S.C.C.'s case, unlike that of *R.J.N.*, there is not an "overwhelmingly positive" potential for rehabilitation. Obviously from the accused's

perspective, rehabilitation is not a factor, in that he takes the position that there was no misbehaviour.

[39] Counsel has filed 30 letters in support from friends and family who described S.C.C. as a hard-working, responsible, respectful person who is not a drinker and not prone to violence of any sort. They say that the matter, in respect of which S.C.C. has been convicted, is entirely out of character.

[40] The filed victim impact statement indicates that the victim has, since the time of the incident, suffered from anxiety, has been socially withdrawn, has had suicidal ideation, has not been able to work, and she finds it difficult to talk to people. Further, the victim indicates that she is afraid of S.C.C. He lives only two doors away. It is clear to me and uncontested that the assault perpetrated upon D.D. was psychologically impactful.

[41] While the accused is, at 32 years of age, young, I am mindful that he has virtually no criminal antecedents. By all accounts, he is a well-liked and contributing member of society, both within his First Nation and in general. I was impressed by the tremendous number of letters of support which were provided to the Court. This number is significant when contextualized. He comes from a relatively small community. I take all of this to indicate that S.C.C. is otherwise a person of previously good character. He demonstrates no proclivity for violence. As well, he has demonstrated, while on judicial interim release, that he will abide by court orders and presents no difficulties in the community. He has remained sober since the time of the offence. I am mindful that any

period of incarceration will be damaging to the employment and interpersonal relationships S.C.C. is presently maintaining.

[42] Counsel, on behalf of S.C.C., has asked the Court to consider a sentence of 12 months with a longer period of probation.

[43] Counsel, on behalf of the Crown, as indicated earlier, has suggested a sentence of 20 months.

[44] I am of the view that, in all of the circumstances, appreciating there are no fixed boundaries, S.C.C. should be placed toward the lower end. The behaviour resulting in the matter before the Court is atypical for S.C.C. It was opportunistic. His probability of reoffending is low. I can infer from S.C.C.'s pre-sentence report that he is a person of otherwise good character.

[45] Nevertheless, the objectives of denunciation and deterrence must be addressed. The antecedents, in the present circumstances of S.C.C., have been canvassed. Accordingly, S.C.C. will be sentenced to a period of incarceration of 12 months. This will be followed by a period of probation of three years with the following terms and conditions:

1. Keep the peace and be of good behaviour.
2. Appear before the court when required to do so by the court.
3. Notify your probation officer in advance of any change of name or address, and promptly notify your probation officer of any change of employment or occupation.

4. Have no contact directly or indirectly or communication in any way with D.D.

5. Do not go to any known place of residence, employment or education of D.D.

6. 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:

   - substance abuse
   - spousal relationship violence
   - sexual offending

   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.

[46] In addition, there are several ancillary orders I am required by law to impose.

[47] First, there will be an order requiring you to provide such samples of your blood as are necessary for DNA testing and banking.

[48] Second, you will comply with the provisions of the *Sex Offender Information Registration Act* for a period of 20 years.

[49] Third, you will be prohibited from having any firearm, ammunition, or explosive substance in your possession for a period of 10 years, except for subsistence hunting. Now, this matter was canvassed in passing on the last occasion, counsel. I do not

know whether that wording is sufficient to cover off the exception or not. I happily defer to you in assisting with that matter.

[50] Lastly, the victim surcharge.

[DISCUSSIONS]

[51] The victim surcharge will be waived.

[DISCUSSIONS]

[52] THE COURT: And have the ancillary orders been covered fully, Madam Crown? Is there anything that I have missed?

[53] MS. PORTEOUS: I don’t think so, Your Honour. The only thing — with respect to the firearms prohibition, I’m not sure that Your Honour can specifically make the exemption for subsistence hunting. If I understand correctly, it has to be more of a blanket ban. But, certainly, a reference to s. 113 could be made, which then I think authorizes the Chief Firearms Officer or the Registrar to issue a limited permit if, upon an application by S.C.C., they consider it warranted.

[54] THE COURT: So, this exception would not be part of my order but rather upon his application.

[55] MS. PORTEOUS: I think so, yes, though I think your order should be clear that — if Your Honour is all right with it, which clearly you are — that it is worth including so that the firearms officer is aware of that.

[56] MS. MacDIARMID: Subject to an application pursuant to s. 113.

[57] THE COURT: All right. I will maybe modify it somewhat. I will indicate that you will be prohibited from having any firearm, ammunition, or explosive substance in your possession for a period of 10 years, except for subsistence hunting, at the discretion of the Chief Firearms Officer or Registrar.

[DISCUSSIONS]

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SCHNEIDER T.C.J.