

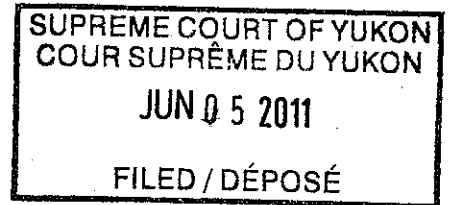
SUPREME COURT OF YUKON

Citation: *R. v. A.C.S.*, 2011 YKSC 46

Date: 20110505
Docket S.C. No.: 10-01517
Registry: Whitehorse

BETWEEN:

HER MAJESTY THE QUEEN



AND:

A.C.S.

Publication of information that could disclose the identity of the complainant or the accused has been prohibited by court order pursuant to section 486.5 of the *Criminal Code*.

Before: Mr. Justice L.F. Gower

Appearances:
David McWhinnie
Emily Hill

Counsel for the Crown
Counsel for the Defence

**REASONS FOR SENTENCING
DELIVERED FROM THE BENCH**

[1] GOWER J. (Oral): Mr. S. has today entered a plea of guilty to a charge of sexual assault on K.B., contrary to s. 271 of the *Criminal Code*, on May 28, 2010, in Whitehorse. Crown and defence have made a joint submission that the offender should be imprisoned for a term of two years less a day, subject to credit being given to him for his remand time to date, and that this period of imprisonment should be followed by three years of probation on certain terms, which I will come to.

[2] The facts have been read into the record but I will summarize them briefly. K.B. was four years old at the time of the offence, and was asleep in her bedroom on a double bed with her seven-year-old brother. Between 6:30 and 7:30 in the morning the brother woke up and saw the offender lying near his sister. He left the bedroom to seek the help of an older brother, who was 18 at the time. When he went to find his older brother, the offender got off the bed, put his pants on, and left through the front door of the house without his shoes on. As he was leaving, the offender passed by the older brother, who was able to identify him.

[3] Later that day, the four-year-old gave a statement to the police in which she said different things at different times. At one point, she said that the offender, or the "boy," as she described him, touched her private parts with his penis, but that it did not hurt. It was admitted at this sentencing that the offender removed the young girl's underwear and touched her genital area, and that the activity lasted for a few minutes. It was further admitted that he had no prior relationship with any of the people in the home, and had no lawful reason to be in the home.

[4] A medical assessment of the young girl indicated that there was no physical damage, redness, or tenderness in her genital area.

[5] The offender was arrested a few days later, on May 31, 2010. He was cooperative upon his arrest, and has been in custody at the Whitehorse Correctional Centre since then.

[6] The offender's personal circumstances are, to say the least, tragic. It was noted in a number of psychiatric assessments, done in 2006 and 2007, that he experienced a

chaotic early upbringing, with exposure to physical violence and an unreliable and transient lifestyle due to his mother's abuse of alcohol. When he was six years old, he was assaulted by his father, and although his father was charged with that offence, he committed suicide before that matter went to trial. At age nine, he was taken into care, and was shuttled back and forth from various foster homes. When he was age 11, he was made a permanent ward. For a few years, he did have some positive experiences with a couple of different families as a permanent ward, and did well in those supportive environments. But, eventually, he was charged with a sexual assault, which occurred in 2006, and was removed from the more recent of the two families and placed in what is referred to as the RYTS, which is -- do we know what that is?

[7] MS. HILL: What is stands for?

[8] THE COURT: The RYTS.

[9] MS. HILL: RYTS, it's a Residential Youth -- it's a group home run by Family and Children's Services.

[10] THE COURT: It's a group home. Okay.

[11] The offender was placed in a group home in Whitehorse, in February of 2006, and then has been in and out of custody over the ensuing years. He has a criminal record, which I will come to in a moment.

[12] The offender's mother died from cirrhosis of the liver in 2006. She also, as I have indicated, had an alcohol problem, which would it turn seem to have been the result of her prior chaotic upbringing, which is referred to in the various reports.

[13] The offender is a member of the Taltan and Little Salmon Carmacks First Nations, and I take his circumstances as a First Nations person into account on this sentencing, pursuant to s. 718.2(e) of the *Criminal Code*.

[14] Crown counsel referred to the offender's criminal record as "disturbing" for such a young man, and I agree. It includes the sexual assault conviction, which I spoke of, in 2006; an assault with a weapon, which was a stabbing to a young person's chest in 2007; an aggravated assault in 2007, involving smashing a shovel into someone's face; and numerous other convictions, the most recent being a breach of probation and breach of recognizance in November 2009.

[15] In the past, the offender indicated to various professionals that he did not follow his aboriginal culture, and seemingly had no interests in pursuing his cultural roots. However, his counsel now informs me that, in this most recent stretch of remand and before, he has taken and completed First Nations-related programs, including the White Bison Program in 2009, as well as the Gathering Power Program in December 2010, which he graduated from with honours. In addition, he has been attending the weekly prison fellowship meetings. So, I take it that the offender does have an interest now in perhaps exploring in greater detail some of his cultural roots.

[16] The other thing that is different now from the offender's past, at least from 2007, is that then he was seen by the professionals as having virtually no insight into his addiction problems and to his risk for serious crimes, including crimes of violence. That appears to have changed. His counsel informs me that she has had extensive discussions with him, and that he does have remorse and insight into the circumstances

of the current offence. She explained that alcohol was a major factor at that time, and that the offender has little recollection of the incident. She also explains that the offender is willing to attend and complete such further and other alcohol assessment and counselling as may be ordered by the Court, as well as any other related counselling for his sexual offending proclivities. So, that indicates to me that the offender is now maturing to the point where he understands he has some serious problems that need addressing, and that is a positive sign.

[17] It is also to his credit that he has been working, more or less on a full time basis in the laundry at Whitehorse Correctional Centre, and apparently enjoys being occupied in that manner. So, he is putting his remand time to good use; he is not just sitting around and wasting it.

[18] The issue of credit has arisen because the offender was put into custody after the change in legislation regarding the extent to which I can give credit for remand time. Defence counsel is asking for one and a half to one credit for each month that he has been in custody to date. Crown counsel does not oppose that, even though this case comes after the change in the legislation. Defence counsel explained to me that the offender has been in remand perhaps somewhat longer than ordinarily might have been the case because of the complexities of this particular case, and the fact that the Crown had a very young witness who said inconsistent things to the police when she was videotaped.

[19] The Crown did not have a particularly compelling case, and, of course, that had to be taken into account in coming up with the joint submission. There were a number of

pre-trial conferences held, and lengthy discussions between counsel, resulting in the appearance today. Defence counsel explains that none of that delay is to be laid at the feet of the offender, and I accept that submission.

[20] I also presume that the offender, as a remand prisoner, would not have had full access to all of the programs available to him at the jail, which he will have as a serving prisoner in general population. As an example of that, he apparently asked to see an alcohol counsellor when he was initially booked in, but for various bureaucratic reasons and some confusion, perhaps, that did not happen, has not happened to date, and his name was taken off the list.

[21] In all of the circumstances, I am prepared to credit the offender for one and a half months for each month which he has been in custody. That will leave a balance of about seven to seven and a half months of actual time to be served, to be followed by the three-year probation term. So, it is implicit in what I have just said that I am agreeing with the joint submission.

[22] The terms of the probation order will be as follows. Mr. S., the statutory terms under the *Criminal Code* will be that:

1. You will keep the peace and be of good behaviour;
2. You will appear before the Court when required to do so by the Court;
3. You will notify the Court, or your Probation Officer, in advance of any change of name or address, and promptly notify the Court or your Probation Officer of any change of employment or occupation;
4. You will remain within the Yukon Territory, unless you obtain written

permission from your Probation Officer or the Court;

5. You will report to a Probation Officer immediately upon your release from custody, and then when and in the manner directed by the Probation Officer.

[23] I did not hear anything about a reside clause, was that intentional?

[24] MR. MCWHINNIE: Because he has no particular place to go, he's going to have to report to his Probation Officer, and work that out.

[25] THE COURT: Should there be a reside clause in the order?

[26] MS. HILL: No.

[27] THE COURT: Okay. This is, perhaps, the most significant of all of these conditions, the offender:

6. You are to abstain absolutely from the possession or consumption of alcohol and controlled drugs and substances, except in accordance with a prescription given to you by a medical doctor or a qualified medical practitioner. You are to provide a sample of your breath or urine for the purposes of analysis upon demand by a Peace Officer who has reason to believe that you may have failed to comply with this condition;
7. You are to have no contact, directly or indirectly, with any of the persons named on the indictment;
8. You are to have no contact, directly or indirectly, with any children under the age of 18;

9. You are not to attend at the premises where the offence occurred;

I will not read that address into the record, but it is on the record.

10. You will take such alcohol and drug assessment, counselling, or programming as directed by your Probation Officer and, having given the Court your consent, attend and complete a residential treatment program, if directed by your Probation Officer;
11. You are to take such sex offender assessment, counselling, and programming as may be directed by your Probation Officer;
12. You are to take such other assessment, counselling, and programming as may be directed by your Probation Officer.

[28] In addition to the terms of your probation, there will be a firearms order prohibiting you from possessing any firearms, ammunition or explosives for a period of ten years under s. 109 of the *Criminal Code*.

[29] There will be an order under the DNA provisions of the *Criminal Code* that you provide a sample, for the purposes of analysis and registration.

[30] There was not any reference of the sex offender registry?

[31] MR. MCWHINNIE: There was no reference to it, My Lord.

[32] THE COURT: That was intentional?

[33] MR. MCWHINNIE: That was intentional.

[34] THE COURT: All right. Thank you. Anyway, for the reasons given by

counsel, which include the fact that it is a term of the probation that the offender not have any contact with anyone under the age of 18, it seems to me there is no need to make an order under s. 161 of the *Criminal Code*.

[35] Sorry, you have something to add?

[36] MS. HILL: Just with regard to the terms, and I may have just not heard. I think we had submitted that there should be a remain within the Yukon Territory; was that order made?

[37] THE COURT: I did.

[38] MS. HILL: Thank you. The prohibition against contact with individuals under 18, I think it was the intention of my friend and I that there could be an exception, unless he had the prior written permission of his Bail Supervisor. There may be circumstances, I believe there may be -- he may have siblings under 18 or individuals who the Bail Supervisor could give permission.

[39] THE COURT: Thank you for reminding me of that. That will be part of the order.

[40] MS. HILL: Thank you. And finally, with regard to the abstention, the term requiring him to give a breath sample, my friend and I, I don't think we're asking for that term, and pursuant to *R. v. Shoker*, [2006] S.C.J. No. 44, this not being a conditional sentence order, I would suggest that it shouldn't be part of a probation order.

[41] THE COURT: Very well. I will remove that provision from the

abstention condition in the probation order.

[42] THE CLERK: Your Honour, on the no contact, was that any names in the agreed statement of facts or the indictment?

[43] THE COURT: Sorry, I meant to say the agreed statement of facts.

[44] THE CLERK: Okay. And the victim fine surcharge?

[45] MR. MCWHINNIE: It likely should be waived, My Lord. He's had no income for an extended period of time, and is not likely to for a period of time.

[46] THE COURT: So ordered.

[47] THE CLERK: And the remaining counts?

[48] MR. MCWHINNIE: Stayed.

[49] THE COURT: Now, Mr. S., I am not quite done. You and I are going to have a little conversation. I have given you credit because what your counsel has said about your new-found insight into your problems, and your willingness to deal with those problems. I sincerely hope that that is the case, because as of 2007 you were a bomb waiting to go off, because you have had no insight and no willingness to recognize that there was a real problem that needed addressing, not only with the alcohol and the anger, but on the issues that you now claim to have understood that you need to address.

[50] What was said in one of the reports in 2007 is that, if you are only able to give lip service to the fact that you want to change your life, it is likely that you will revert to your

old pattern of behaviour, and continue to place yourself and the community at risk. That continues to be the case today.

[51] I give you full credit for the guilty plea that you have entered. You have saved a young girl from the trauma of cross-examination, and you have entered your guilty plea despite knowing that there was a shot that you might have succeeded at trial.

[52] You should be very grateful that you have had two experienced and competent counsel here who have been able to work together in a cooperative fashion to come up with the recommended sentence, because I found it acceptable, and that is the sentence that will be passed. But, you need to take full advantage of that sentence, and part of that is going to start today when you go back to the jail. What I want you to do, and I am not making this an order, but I am going to make this suggestion to you: You talked about wanting to see an alcohol counsellor, and that did not happen, and there was some confusion back and forth. I want you to start that process again; and I want you to continue to be a squeaky wheel until you get an alcohol counsellor. I also want you to think about going to the Alcoholics Anonymous meetings that are available at the jail. I think they used to be there weekly, although I do not know if they still are, but they are something that you should think about attending.

[53] There may well be other issues that you need to address that are below the surface, but do not use those as an excuse not to get a hold of your alcohol problem, because that is a good place to start. One of the reasons that I am strongly suggesting this to you, sir, is that when you walk out that door, as your counsel says, you have no family and you have no supports. The Alcoholics Anonymous community will be there

for you. There will be daily meetings, there will be people you can call, you can get a sponsor, and you will have the support of at least that community. That will help you a lot in terms of being able to stay clean and sober, so that you can get a job, so you can have a productive life, an enjoyable life, and a healthy life, one that is not going to involve this kind of stuff happening at 6:00 or 7:00 in the morning, blind-drunk in the bed of a four-year-old girl. Okay. That cannot happen again, because if it does, sir, you are going to be looking at some major jail time, a lot longer than what you got today.

[54] So, I want you to take full advantage of what is available to you in the jail in terms of at least starting down that path, and the Probation Officer can help you with all of the other issues. But, you can start that today, you can make a choice today about how you are going to spend the rest of your life, whether you are going to drink or not drink. All right. So, I wish you well, and all the best of luck.

[55] Anything else, counsel?

[56] MR. MCWHINNIE: Nothing more.

[57] MS. HILL: No, Your Honour.

[58] THE CLERK: Your Honour, what was the exact time of the pre-sentence -- the time spent in his pre-sentence custody?

[59] MS. HILL: My calculation was that he spent 340 days in custody to date, which is 11 -- just over 11 months.

[60] THE COURT: So that is multiplied by 1.5.

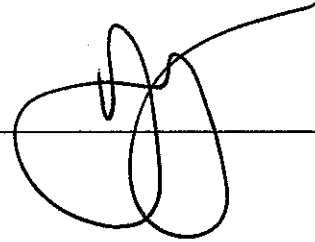
[61] MS. HILL: Yes.

[62] THE COURT: Is that satisfactory for you, Mr. Clerk?

[63] THE CLERK: Thank you, Your Honour.

[64] THE COURT: Okay. Thank you, counsel.

GOWER J.

A handwritten signature in black ink, consisting of several overlapping loops and a long horizontal stroke extending to the right, positioned above a horizontal line.