COURT OF APPEAL OF YUKON

Citation: *R. v. Buyck*,
2018 YKCA 3

Date: 20180507
Docket: 15-YU775

Between:

Regina

Respondent

And

Roy Kenneth Buyck

Appellant

Before: The Honourable Chief Justice Bauman
The Honourable Mr. Justice Frankel
The Honourable Madam Justice Tulloch

Supplementary Reasons to *R. v. Buyck*, 2017 YKCA 8.

Counsel for the Appellant:	J. Cunningham
Counsel for the Respondent:	L. Gouaillier
Written Submissions Filed:	March 5 and 12, 2018
Place and Date of Judgment:	Whitehorse, Yukon May 7, 2018

Written Reasons by:
The Honourable Madam Justice Tulloch

Concurred in by:
The Honourable Chief Justice Bauman
The Honourable Mr. Justice Frankel

Summary:

Appeal by B. from a sentence of 18 months' imprisonment to be followed by one year's probation, imposed following a guilty plea on a charge of sexual assault. The victim was the daughter of a woman with whom B. had a relationship. The offence involved digital penetration. The sentencing judge dealt with the matter on the basis of facts B. declined to admit. Following the initial hearing of this appeal, this Court appointed a Territorial Court Judge as a special commissioner to hold an evidentiary hearing and report back on the facts relating to the commission of the offence. At that hearing the victim testified, but B. did not. The judge found the facts to be those on which the sentencing judge relied. While accepting that the original sentence imposed was within the appropriate range, B. sought to have the period of imprisonment reduced to 12 months, based on his continuing efforts at rehabilitation. Held: Appeal dismissed. The sentencing judge was aware of B.'s efforts at rehabilitation and the updated information would not have affected the result.

Reasons for Judgment of the Honourable Madam Justice Tulloch:

Introduction

[1] Mr. Buyck appeals the sentence imposed on his conviction following a guilty plea for sexual assault.

[2] After many adjournments involving numerous counsel, Mr. Buyck was sentenced to 18 months' jail plus one year's probation on February 5, 2016 by Judge Chisholm after the Crown read into the record a draft agreed statement of facts: 2016 YTSC 71. Those facts were not admitted by Mr. Buyck and the original appeal sought a new trial based on this fundamental error.

[3] This Court found that the sentencing judge erred in proceeding with the sentencing hearing without the underlying facts being admitted by Mr. Buyck or proven by the Crown. Leave to appeal was granted in the circumstances.

[4] Pursuant to s. 683(1)(e) of the *Criminal Code* and the reasoning in *R. v. Pahl*, 2016 BCCA 234, a judge of the Territorial Court, other than the sentencing judge, was appointed as a special commissioner to conduct a *Gardiner* hearing and report back to this Court all of the facts proven: 2017 YKCA 8.

Findings of fact pursuant to the *Gardiner* hearing

[5] The *Gardiner* hearing took place before Chief Judge Ruddy on October 11 and November 29, 2017. The Crown called the victim, J.H. Mr. Buyck did not testify. On January 9, 2018, Ruddy C.J. provided this Court with her findings of fact: 2018 YKTC 1. Those facts are essentially the same as the facts relied upon by the sentencing judge.

[6] Chief Judge Ruddy made the following findings of fact (at para. 11):

> 1. On an evening in August of 2013, J.H. encountered Mr. Buyck in Whitehorse, Yukon, and he invited her to drink with him and his cousin, Archie, in Mr. Buyck's room at the Yukon Inn.
> 2. J.H. had been drinking alcohol over the course of the day and was "buzzed" when she met Mr. Buyck although not yet intoxicated.
> 3. In the hotel room, the three individuals consumed a 26 ounce bottle of vodka, of which J.H. consumed half.
> 4. J.H. passed out in a chair as a result of the consumption of alcohol.
> 5. When J.H. woke, she was on the bed and her pants and underwear had been removed.
> 6. Mr. Buyck was "fingering" her, which is to say that he had his finger in her vagina.
> 7. J.H. "freaked out" and began looking for her pants and underwear. She could only find her pants, which she put on.
> 8. J.H. left the Yukon Inn and went to detox where she told staff what had happened.
> 9. J.H. went to the hospital where a sexual assault kit was done.

In addition, she was satisfied beyond a reasonable doubt that J.H. did not consent to sexual activity with Mr. Buyck. Indeed, she was satisfied that J.H.'s state of intoxication was such that she lacked the capacity to consent to sexual activity.

Reports submitted at initial sentencing hearing

[7] In addition to the findings of fact from Chief Judge Ruddy, I have carefully considered all of the material that was before the sentencing judge.

[8] These materials include two separate pre-sentence reports together with a very comprehensive *Gladue* Report.

[9] In the reports, Mr. Buyck clearly admits to being in a position of trust towards J.H. He had been her late mother's boyfriend for some time and on page six of the most recent pre-sentence report, he describes J.H. as his step-daughter.

[10] At the time of sentencing, it is clear that Mr. Buyck was participating in counselling. Further at the time, he was caring for his ailing sister. He was also working part-time with his First Nations community and hoped to gain full time employment. There was considerable information about his hope to maintain his sobriety and his dream to become an addiction counsellor himself in the future.

Argument

[11] Mr. Buyck accepts that the sentence imposed in February 2016 was within the appropriate range on the facts that were proven. However, he asks this Court to reduce the sentence to 12 months, based on the following information contained in his recent affidavit:

- Mr. Buyck has been on bail pending appeal for 20 months since July 11, 2016.
- His rehabilitative efforts for the last 20 months were of course unknown to the sentencing judge at the time of the original hearing.
- Since April 2017, Mr. Buyck has been employed full-time by his First Nation.
- He advises that he has been meeting with a counsellor in Whitehorse and he attends a Men's Group every Wednesday.
- He is on the path to full-time employment and sobriety.
- He is caring for his sister who has been diagnosed with terminal cancer and he visits her and spends a day or two with her every two months.

[12] Mr. Buyck urges this Court to consider what would be a fit sentence now considering these changes.

Analysis

[13] Does this additional information meet the test for admission as fresh evidence? In my view it does not.

[14] In *R. v. Lévesque*, [2000] 2 S.C.R. 487, the Supreme Court of Canada adopted in the context of a sentence appeal, the requirements for the introduction of fresh evidence set out by Justice McIntyre in *Palmer v. The Queen*, [1981] 1 S.C.R. 759:

1. The evidence should generally not be admitted if, by due diligence, it could have been adduced at trial.
2. The evidence must be relevant in the sense that it bears upon a decisive or potentially decisive issue in the trial.
3. The evidence must be credible in the sense that it is reasonably capable of belief, and
4. It must be such that if believed it could reasonably, when taken with the other evidence adduced at trial, be expected to have affected the result.

The evidence being tendered meets the first and third criteria but not the second or fourth.

[15] Further, it is information that simply expands on what was already known at the time of sentencing. The sentencing judge knew that Mr. Buyck was participating in counselling. It was known that Mr. Buyck was caring for an ailing sister and it was well known that he was hoping to go down the path to sobriety and full-time employment.

[16] The only thing that has changed is that Mr. Buyck has now been successful in securing full-time employment.

[17] Although it is submitted that a “lengthy jail sentence” poses a significant risk to Mr. Buyck’s stability, I am unable to find anything specific in his affidavit to support such a position.

[18] At the time of sentencing Mr. Buyck was attending counselling, at that time he was assisting his sister and at that time he was employed (albeit part-time) by his First Nation community.

[19] The *Gardiner* hearing, although necessary in the circumstances, did not change any of the relevant facts that were before the sentencing judge on the date of sentencing.

[20] The one thing that did change is that Mr. Buyck lost the benefit of one very substantial mitigating factor which is usually associated with a guilty plea. He lost the effect of sparing the victim from the ordeal of having to testify in court, which she had to do on two occasions.

[21] In the Supreme Court of Canada case of *R.* v. *Shropshire*, [1995] 4 S.C.R. 227, Justice Iacobucci confirmed that considerable deference is to be shown by this Court with respect to sentence appeals. At para. 46, he said as follows:

> An appellate court should not be given free reign to modify a sentencing order simply because it feels that a different order ought to have been made. The formulation of a sentencing order is a profoundly subjective process; the trial judge has the advantage of having seen and heard all of the witnesses whereas the appellate court can only base itself upon a written record. A variation in the sentence should only be made if the court of appeal is convinced it is not fit. That is to say, that it has found the sentence to be clearly unreasonable.

[22] The sentence imposed in this case is well within the appropriate range for this particular offender on these particular facts.

[23] This is a case where deterrence and denunciation were, as the sentencing judge indicated, of primary importance given his description of this offence as “a serious and invasive sexual assault”.

[24] The sentencing judge adequately and appropriately considered Mr. Buyck’s background and his rehabilitative efforts.

[25] All of the principles of sentencing were applied appropriately, and I am of the view that the additional information supplied would not have affected the overall result.

[26] The sentence imposed in this case is a fit and appropriate one.

[27] Accordingly, I would dismiss this appeal.

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The Honourable Madam Justice Tulloch

I AGREE:

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The Honourable Chief Justice Bauman

I AGREE:

_____
The Honourable Mr. Justice Frankel