Citation: *R.* v. *McGinty*, 2010 YKTC 29

Date: 20100302
Docket: 09-00630
Registry: Whitehorse
Heard: Pelly Crossing

IN THE TERRITORIAL COURT OF YUKON
Before: His Honour Judge Cozens

REGINA

v.

DESMOND MCGINTY

Publication of information that could disclose the identity of the complainant has been prohibited by court order pursuant to section 486.4 of the *Criminal Code*.

Appearances:
Bonnie Macdonald — Counsel for the Crown
Malcolm Campbell — Counsel for the Defence

REASONS FOR SENTENCING

[1] COZENS T.C.J. (Oral): Desmond McGinty has entered a guilty plea to a charge that he committed a sexual assault on C.J., contrary to s. 271 of the *Criminal Code.* The offence date is February 8, 2009. The Information, in fact, was not sworn until October 13, 2009.

[2] I recognize that the guilty plea is on the day of trial. It was arranged the day before trial and, on the submissions before me, clearly should be given some credit, because this is a case that the complainant would have found extremely difficult to have testified in.

[3] The circumstances of the offence are that on February 8, 2009, Mr. McGinty was having sexual intercourse with a passed out and highly intoxicated C.J. Obviously, this is a case that consent was not possible and there is no allegation that it was consensual in any event.

[4] There is a joint recommendation before the Court for a sentence of nine months, with a deduction of three months credit for time served, followed by a period of probation of two years.

[5] As Crown has finely put before the Court, this is at the very low end of the range, and I would say perhaps outside of the low end of the range for a case of sexual assault of this nature. I am familiar with the cases of *R.* v. *G.C.S.*, [1998] Y.J. No. 77, and *R.* v. *White*, [2008] Y.J. No. 126, that have canvassed the range of sentences for sexual assaults of this type in the Yukon, and it often goes from 16 months and up.

[6] Every case needs to be looked at separately and there were factors in this case that I was made aware of, that Crown has put forward to explain some of the problems with the Crown's case. I say problems not in the sense that the Crown was not prepared to prosecute the case; they were, and obviously the Crown felt that they had a reasonable prospect of conviction. However, this is a case that was going to be extremely difficult on the complainant and, although willing to come to trial and to testify to what she recollected, which was not a lot, she would have found it extremely difficult and is highly relieved by the fact that she does not have to come to court and testify. As well, she is supportive of the position of Crown counsel; not that that is always determinative, but there are other factors that go to perhaps some difficulties with

respect to the voluntariness of some of the information that Mr. McGinty provided to the RCMP that would have been highly litigated. This may have included *Charter* issues and not just voluntariness.

[7] There is another factor in looking at this, is that Mr. McGinty has been in custody since last August on other charges. In addition to the three months credit he gets for these charges, and when looking at an appropriate sentence for an individual such as Mr. McGinty, who is 24 years of age, a member of the Selkirk First Nation, with some cognitive difficulties, his youth was spent in group homes with a very troubled background, there is a cumulative aspect to time in custody that needs to be taken into account. Even though he has spent that other time in custody, most of it is not related to this. There is still a cumulative impact that when you are looking at the principles of sentencing, including the principles of sentencing 718 (2)(d) and (e), it is important to keep in mind.

[8] So I will make it plain, that this sentence in this case does nothing with respect to the range of sentencing set out in the *G.C.S.* and *White* cases. This is an extraordinary set of circumstances, in some degree, that will allow the Court to impose a sentence that is less than what would normally be imposed in the circumstances.

[9] The sentence will be nine months, less credit for three months time served, leaving a balance of six months in custody.

[10] There will be a probation order for two years. The terms will be:

1. To keep the peace and be of good behaviour;
2. Appear before the Court when required to do so by the Court;

3. Notify the Court or Probation Officer in advance of any change of name or address and promptly notify the Court or Probation Officer of any change of employment or occupation;
4. Report to a Probation Officer immediately upon your release from custody and thereafter when and in the manner directed by the Probation Officer;
5. Reside as approved by your Probation Officer and do not change that residence without the prior written permission of your Probation Officer;
6. Take such assessment, counselling and programming as directed by your Probation Officer.

[11] I had not mentioned this before but in imposing this sentence I have taken into account the counselling opportunities that Mr. McGinty has taken or accessed while in custody, including the Gathering Power and White Bison program. I feel that, in the circumstances, there may be some assessments and counselling during this period of time that might assist Mr. McGinty in avoiding finding himself in a similar situation or other situations of difficulty.

[12] In looking at his criminal record, which was filed, which is made up of unrelated offences and primarily mischief and breach allegations, and the submissions that I have heard with respect to perhaps dealing with some cognitive issues, I believe that whatever help he can be given through this probation order will be a benefit to his future.

7. He is to have no contact directly or indirectly or communication in any way with C.J.;

8. He is to not attend at or on the premises of C.J.'s residence, school, or work place.

The order, I assume, will have the full name of the complainant on it, in the normal course, not the initials, but as there is a publication ban, I used her initials in this case in giving the oral reasons for judgment.

[13] There will be an order under s. 490.012 requiring Mr. McGinty to comply with the *Sex Offender Information Registration Act*. As the Crown proceeded indictably, this order will be for the mandatory minimum of 20 years.

[14] This is a primary designated offence. There will be an order that he provide a sample of his DNA.

[15] This is also an offence that requires a mandatory 10 year firearms prohibition. The fact that he is currently on one does not change the mandatory nature of the law I must enforce today.

[16] The victim fine surcharge will be waived. Is there anything from either counsel?

[17] MR. CAMPBELL: No, Your Honour.

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COZENS T.C.J.