

IN THE SUPREME COURT OF THE YUKON TERRITORY

Citation: *R. v. Sam*, 2004 YKSC 81

Date: 20041117
Docket: S.C. No. 04-01526
Registry: Whitehorse

Between:

HER MAJESTY THE QUEEN

And:

CHARLES MICHAEL SAM

Publication of information that could disclose the identity of the complainant has been prohibited by court order pursuant to section 486(3) of the *Criminal Code*.

Before: Mr. Justice R.S. Veale

Appearances:
John W. Phelps
Gordon R. Coffin

For the Crown
For the Defence

MEMORANDUM OF SENTENCE DELIVERED FROM THE BENCH

[1] VEALE J. (Oral):

INTRODUCTION

[2] This is a sentencing hearing for Charles Michael Sam, a 47-year-old Yukon First Nation man. He was convicted at a jury trial of sexually assaulting a Yukon First Nation woman who has been diagnosed as having Fetal Alcohol Syndrome, physical impairments, developmental delays, a speech impediment and a hearing impairment.

[3] There are a number of special features about Mr. Sam's background, and the evidence at this sentencing hearing, and thus I wish to reserve my right to give further written reasons.

FACTS

[4] The facts are that the victim was visiting her mother for the weekend. She normally resides in a supportive residence. Mr. Sam is the son of a friend of the victim's mother. The victim's mother is 72 years old. The victim's mother and her friend apparently went to residential school as children.

[5] Mr. Sam was drinking that day and night. He is an admitted alcoholic who does not wish treatment. He was invited to stay over at the residence of the victim. In the early morning, Mr. Sam entered the bedroom where the victim slept with her mother. He lay on the bed beside her. She had a blanket over her. He touched her breasts over her nightgown and touched her vagina under her nightgown and underwear. He also kissed her.

[6] The victim woke up and tried to push Mr. Sam away but he persisted until her mother woke up and told him to leave, which he did.

[7] There are a number of aggravating circumstances:

1. Mr. Sam is a friend of the victim and her mother and was invited to stay over so there are clear elements of a breach of trust.
2. The victim is very vulnerable.
3. Mr. Sam has a very long record, dating back to 1975 and continuing through to 2001.

[8] Of special relevance is the fact that he was convicted of a sexual assault in 1998 in similar circumstances of a vulnerable victim. On that occasion, he was sentenced to five months incarceration and two years probation. After that, and during the probation, he had two convictions for breach of probation, including an offence of obstructing a peace officer. This clearly indicates that Mr. Sam does not do well on probation, primarily because of his alcoholism. He also has nine process offences for breaches of probation or recognizances.

[9] Although it is not a mitigating factor, it is significant that Mr. Sam went to the Carcross Residential School for three years. The lawyer representing him in a civil action against the Crown, testified that the allegations are that he was sexually assaulted three times a week over the period of three years. This allegation is apparently not contested by the Crown in the court action, following written interrogatories and discovery.

[10] Both the pre-sentence report and the psychological report indicate that Mr. Sam is not a good candidate for treatment for his sexually assaultive behaviour, his alcoholism or his residential school experience. In fact, he is quite resistant to treatment which is very disturbing to me. Mr. Sam has said "I just want to do my time and be left alone." He shows no remorse until today when he apologized in court for his conduct. In all likelihood, on his release without treatment, he will continue to drink and continue his predatory sexually assaultive behaviour. This is very disturbing to Yukon citizens, and particularly to Mr. Sam's victims.

POSITION OF COUNSEL ON SENTENCE

[11] In an unusual twist, the defence seeks a penitentiary term of 30 months while the Crown seeks 18 months of incarceration at the Whitehorse Correctional Institute, followed by three years of probation. The Crown submits this will result in greater control over Mr. Sam and treatment orders that could be imposed.

[12] I have some doubt about the usefulness of treatment in that the evidence suggests that he is quite negative and resistant to treatment. Mr. Sam has not availed himself of treatment offered in the residential school litigation and treatment which is always available through a local group called "CAIRS" which stands for the Committee on Abuse in Residential School Society. This is a grassroots group run by aboriginal people for aboriginal people.

[12] The defence submits that imposing a strict curfew and treatment terms in a probation order will only result in Mr. Sam coming before the court again and again as he has in the past.

[13] I should also indicate that a conditional sentence has not been proposed and it would not be appropriate for the safety of the community.

[14] In my view, a sentence of less than two years is also not appropriate. It is Mr. Sam's second offence on a vulnerable victim, with no indication that he understands and takes responsibility for his sexually assaultive behaviour, notwithstanding his apology today which was a first positive step in a long process.

[15] The Yukon, despite its excellent rehabilitation programs on sexual assault, still has a sexual assault rate considerably higher than the national average, at least three times greater. I say this not to diminish the value of such programs but to indicate that

denunciation, deterrence and separation are important sentencing principles in this case. While it is also important to assist in the rehabilitation of offenders, the present attitude of Mr. Sam makes that objective somewhat unrealistic.

[16] I am also aware of s. 718.2(e) of the *Criminal Code* which requires that all available sanctions other than imprisonment should be considered with particular attention to aboriginal offenders. However, in my view, imprisonment is appropriate in the circumstances of this case, particularly when the evidence indicates that the offender will likely breach conditions imposed which will be of particular concern to vulnerable aboriginal women.

SENTENCE

[17] Would you please stand, Mr. Sam?

[18] I am going to impose a sentence of imprisonment for a term of three years which includes time served since your conviction. There will be no victim fine surcharge.

[19] I have signed the order for the forensic DNA sampling. There will be a mandatory ten-year firearms prohibition.

[20] Mr. Sam, I want to say to you, Sir, that you have taken a big step today in the courtroom by apologizing to your victim. I also want to say that I recognize that you have been a victim of sexual assault in the past but I also want to say that now is the time for you to break that cycle of you having been abused in the past and now becoming an abuser of vulnerable women today. You have to break that cycle, Sir, and only you can do it. You will have an opportunity in the federal penitentiary to change your life for the better. I recognize that you are a part of a great Yukon First Nation

family. It is never too late to take charge and control of your life and become a person that your grandfather would be proud of.

[21] Is there anything arising, counsel?

[22] MR. COFFIN: My Lord, just for clarification, the three years you said to include

[23] THE COURT: I was trying to be clear on that.

[24] MR. COFFIN: --- on top of or reduce by ---

[23] THE COURT: The three years will be reduced by time served since conviction.

[24] MR. COFFIN: Thank you.

[25] THE COURT: To be clear.

[26] MR. COFFIN: That is clear, thank you.

[27] THE COURT: Anything else?

[28] MR. COFFIN: No.

[29] MR. PHELPS: Being three months?

[30] THE COURT: No, the actual time served.

[31] MR. PHELPS: The actual time served. Thank you.

[32] THE COURT: Thank you.

VEALE J.